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S. HRG. 111–324

"WHAT WENT WRONG: TORTURE AND THE OFFICE OF LEGAL COUNSEL IN THE BUSH ADMINISTRATION"

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

MAY 13, 2009

Serial No. J–111–22

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WHAT WENT WRONG: TORTURE AND THE OFFICE OF LEGAL COUNSEL IN THE BUSH ADMINISTRATION

WEDNESDAY, MAY 13, 2009

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 10 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Sheldon Whitehouse, Chairman of the Subcommittee, presiding.

Present: Senators Whitehouse, Leahy, Feinstein, Feingold, Durbin, Cardin, Kaufman, Graham, and Coburn.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Chairman WHITEHOUSE. Good morning. The hearing will come to order. I will make some brief opening remarks. The distinguished Acting Ranking Member will make some remarks. The distinguished Chairman will make some remarks. Chairman Feinstein will make some remarks. And if anybody else wishes to make some remarks, I would like to try to get opening remarks closed before the 10:30 vote begins, and then we will come back and go to the witnesses. I thank everyone for being here.

Winston Churchill said, "In wartime, truth is so precious that she should always be attended by a bodyguard of lies." The truth of our country's descent into torture is not precious. It is noxious; it is sordid. But it has also been attended by a bodyguard of lies. This hearing is designed to begin a process that will expose some of those lies, that will prepare us to struggle with that sordid truth, and that will examine the battlements of legal authority erected to defend that truth and its bodyguard of lies.

The lies are legion.

President Bush told us "America does not torture" while authorizing conduct that America has prosecuted—both as crime and war crime—as torture.

Vice President Cheney agreed in an interview that waterboarding was like "a dunk in the water," when it was used as a torture technique by tyrannical regimes from the Spanish Inquisition to Cambodia's Killing Fields.

John Yoo told Esquire Magazine that waterboarding was only done "three times," when public reports now indicate that two de-

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tainees were waterboarded 83 and 183 times. About Khalid Sheik Mohammad, reportedly waterboarded 183 times, a former CIA official had told ABC News, "KSM lasted the longest under waterboarding, about a minute and a half, but once he broke it never had to be used again." That, too, was a lie.

We were told that waterboarding was determined to be legal, but were not told how badly the law was ignored, bastardized, and manipulated by the Department of Justice's Office of Legal Counsel, nor were we told how furiously Government and military lawyers rejected the defective OLC opinions—but were ignored.

We were told we could not second guess the brave CIA officers who did this, and now we hear that the program was led by private contractors with a profit motive and no real interrogation experience.

Former CIA Director Hayden and former Attorney General Mukasey told a particularly meretricious lie: that the Army Field Manual restrains abuse by naive young soldiers but is not needed by the experienced experts at the CIA.

The Army Field Manual is a code of honor, as reflected by General Petraeus' May 10, 2007, letter to the troops, which I ask unanimous consent to have admitted as an exhibit to this hearing. Without objection.

Moreover, military and FBI interrogators such as Matthew Alexander, Steve Kleinman, and Ali Soufan are the true professionals. We know now that the "experienced interrogators" referenced by Hayden and Mukasey had little to no experience. In fact, the CIA cobbled its program together from techniques used by the SERE program, designed to prepare captured U.S. military personnel for interrogation by tyrant regimes who torture to generate propaganda. To the proud, experienced, and successful interrogators of the military and the FBI, I believe Judge Mukasey and General Hayden owe an apology.

Finally, we were told that torturing detainees was justified by American lives saved—saved as a result of actionable intelligence produced on the waterboard. That is far from clear. Nothing I have seen convinces me this was the case. FBI Director Mueller has said he is unaware of any evidence that waterboarding produced actionable information. The example of Zubaydah providing critical intelligence on Khalid Sheikh Mohammed and Jose Padilla, often given, is false, as the information was obtained before waterboarding was even authorized.

And there has been no accounting of wild goose chases our national security personnel may have been sent on by false statements made by torture victims just to end the agony; no accounting of intelligence lost if other sources held back from dealing with us after our descent to what Vice President Cheney called "the dark side"; no accounting of the harm to our national standing or our international goodwill; no accounting of the benefit to our enemies' standing and goodwill—particularly as measured in militant recruitment or fundraising; and no accounting of the impact this program has on information sharing with foreign governments, whose laws prohibit the type of treatment and detention policies the administration had enacted.

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I could relate other lies, a near avalanche of falsehood, on the subject of torture and what we have been told about interrogation techniques, but I suffer a disability: I am a legislator. Legislators have no authority to declassify. Our Senate procedure for declassification is so cumbersome that it has never been used. All of the "declassifiers" in Government are executive branch officials. And the Bush administration knew this. So they spouted their rhetoric, again much of it outright false and much of it misleading; and though many of us in Congress knew it to be false, we could not reply. It is intensely frustrating.

We have been told you should not criminalize conduct by prosecuting it. You criminalize conduct by making it a crime under the law of the land at the time the crime was committed. Prosecution does not criminalize anything; prosecution vindicates the law in place at the time, based on the facts that are admissible as evidence.

We have been told you should not prosecute people who followed lawful orders or relied on proper legal authorities or in good faith offered their best legal advice. But those are the questions, aren't they, and not the answers?

This is the first of what I hope will be a series of hearings looking into these questions. I hope we will soon be provided the Department of Justice Office of Professional Responsibility's report on its investigation of the Office of Legal Counsel and hold more thorough hearings in the wake of that.

Let me conclude by saying what a very sad day it is for America and for the Department of Justice that there should be such a thing as an OPR investigation into the United States Department of Justice Office of Legal Counsel and how loathsome it is what a few men did to bring this upon that office.

I would like to thank Chairman Leahy for allowing me to hold this hearing. No one has worked harder and cares more about this issue than he does. I also want to acknowledge the tireless work of Senator Feinstein, my Chairman on the Intelligence Committee, who is leading its detailed investigation into the Bush administration's interrogation and detention program. I applaud her for her efforts to get to the bottom of this shameful period of our country's history.

Today, we will hear from a distinguished panel of witnesses who will help us shed light on this topic. I thank them for their appearance this morning. I remind them all about unauthorized disclosure of classified information. I want to make a particular note about our last witness, Ali Soufan. Mr. Soufan interviewed al Qaeda terrorists and went undercover against al Qaeda. Threats against him have been documented. We ask the press to respect the security procedures we have in place and avoid photographing his face.

Senator Graham, any statement you would like to give?

STATEMENT OF HON. LINDSEY GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator GRAHAM. Thank you, Mr. Chairman. Well, I really do not know what to say or how to begin other than the difference between the nobility of the law and a political stunt may be soon evident one way or the other, and I do not know whether this is actu-

ally pursuing the nobility of the law or a political stunt. We will let the American people decide. But I do not question the Chairman's motivation. He is a very fine man, and I think he is rightly disturbed by some of the decisions that were made in the past, and so have I been.

But I guess if we are going to talk about evil, we need to talk about it more than just the last administration's policy decisions about trying to protect the Nation or to put in context what we are facing and who we are fighting—people who really could care less about any law anywhere. And would we have this hearing if we were attacked this afternoon? Do you want to have a bunch more hearings about what happened in the past? If one of our national treasures were attacked tomorrow, would we have more hearings? Or would we focus on repairing the damage and staying ahead of the enemy?

If we are going to find out who did what when, we need to find out who was told about it and when they were told about it. And if we are going to really find out what happened, it seems to me we would want to know what worked and what did not. So I am calling today for any memos that show information that was gathered from any enhanced interrogation technique, that that be made available to the Committee so we can look and see what worked. That is only fair.

And you have got to remember we are talking about this now many years after 9/11, and the people that we are judging woke up one morning, like the rest of America, and said, "Oh, my God. What is coming next?"

It is not really fair to sit here in the quiet peace of the moment and put ourselves in such a holier-than-thou position, because you do not have to make that decision. They did. And I have been a criminal lawyer, defense and prosecutor, for most of my adult life. I think I know the difference between a policy debate where I may disagree with the conclusion and a crime. The idea that you would read your political opponents into your crime makes no sense. The idea that you would seek advice from all corners of the Government in formulating policy and to call that a crime is dangerous.

What happened on September 11, 2001, was unprecedented. It was the most vicious attack on our homeland by a foreign entity in the history of the Nation. Mr. Chairman, here is what I think happened.

The Nation was rattled. The administration went on the offensive, and they looked at some statutes on the book as a way I would not have looked at it. They were very aggressive. They were going to make sure this did not happen again, and they tried to come up with interrogation techniques, evaluating the law in a way that I disagree with their evaluation. But there is no one iota of doubt in my mind that they were trying to protect the Nation.

But they made mistakes. They saw the law many times as a nicety that we could not afford, so they took a very aggressive interpretation of what the law would allow, and that came back to bite us. It always does. But that is not a crime.

What we have to understand as a Nation is that the fact that we embrace the rule of law is a strength and not a weakness. The fact that we will give our enemy a trial and they will not makes

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us better. The fact that our judgments are rendered based on evidence reviewed by an independent judiciary is a strength. Their kangaroo courts are not the model for the world. So I have tried over these many years to speak up in a way that I think is best for the Nation.

As to the Army Field Manual, I think I have a pretty good understanding of it. I know why it exists. To say that is the only way you can interrogate someone within the law is not right. There should be interrogation techniques not on the Internet for our national security. And let us bring the CIA Director into this hearing. He has already testified if we caught a high-value target tomorrow, he would go to the President and ask for interrogation techniques not in the Army Field Manual to defend this Nation, but they would be lawful. Is he a criminal because he would do that? No. I think this administration's policy, at least through the CIA Director's sworn testimony, is that they would reserve unto themselves the ability to brief the Commander-in-Chief about a high-value target, and they would suggest techniques to the Commander-in-Chief that were lawful that are not included in the Army Field Manual.

So this idea that someone said the Army Field Manual is the only way you can lawfully interrogate somebody I completely disagree with. And to those who suggest it may not be the best tool available to the country, I totally agree with.

Now, I do not know what Nancy Pelosi knew and when she knew it, and I really do not think she is a criminal if she was told about waterboarding and did nothing. But I think it is important to understand that Members of Congress allegedly were briefed about these interrogation techniques, and, again, it goes back to the idea of what was the administration trying to do. If you are trying to commit a crime, it seems to me that would be the last thing you would want to do. If you had in your mind and your heart that you are going to disregard the law and you are going to come up with interrogation techniques that you know to be illegal, you would not go around telling people on the other side of the aisle about it. You would not be getting legal advice. And the point of the matter is that they chose to ignore some pretty good legal advice. But is that a crime?

So as we go forward, there is a purpose to everything. There is a reason people do what they do, and it will soon become evident, I think, over time the reason for these hearings. There is a lot going on in this world today, at home and abroad. And I wonder where this fits into the average American's hierarchy of needs right now.

I have been on the Armed Services Committee where we did a very thorough investigation of these interrogation techniques and how they came about. The Levin report is a good one. It is there to be read. I will take a back seat to no one about my love for the law and the desire for my Nation to be a noble Nation. The moral high ground in this war is the high ground. It is not a location. The enemy we are fighting, Mr. Chairman, does not have a capital to conquer or a Navy to sink or an Air Force to shoot down. It is an ideological struggle, and the decisions made in the past have had two sides. We did get some good information that made us safer, but we also hurt ourselves. We damaged our reputation, and we

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did some things that I think were not going to make us safer in the long run if we kept doing them.

So I am ready to go forward. Waterboarding has never been an appropriate technique for me, and if there are any military members listening out there today, you will be prosecuted if you waterboard a detainee in your charge. Under the Uniform Code of Military Justice, it would be a violation. As to other agencies, please understand that in 2001, 2002, and 2003, the Geneva Convention did not apply to the war on terror—only in 2006. The war crimes statute that existed in 2001 was a joke. It codified the Common Article 3 standard which nobody could adhere to because it is so vague in terms of the notice it would give to someone to comply.

We have today I think the best war crimes statute on the books of any nation in the world that would outlaw a grave breach of the Geneva Convention. We passed that in a bipartisan fashion. We have policies now, the Detainee Treatment Act, the McCain amendment, and other policies that give our people who are fighting this war the guidance they need to make sure they understand what is in bounds and what is not. And we have a new President.

Now, I would conclude with this: President Obama, in my opinion, has made some very sound decisions regarding Afghanistan and Iraq. I had a meeting yesterday with the administration about what to do with Gitmo detainees, how we can deal with these detainees in a way that adheres to our values and protects our Nation. I want to be on record as saying that I think the administration has taken a very responsible view of Afghanistan, Iraq, and Guantanamo Bay. And it is my belief that they may ask for another continuance regarding military commission trials so that the Congress and the administration can sit down and work out what to do with these detainees as we move forward. If that request is made, I will applaud it.

I do appreciate what the President is trying to do to repair our image and to create rules for the road as we go forward. But as we look back—I will conclude with this: As we harshly judge those who had to make decisions we do not have to make, please remember this: that what we do in looking back may determine how we move forward, and let us not unnecessarily impede the ability of this country to defend itself against an enemy who is, as I speak, thinking and plotting their way back into America.

Chairman WHITEHOUSE. Thank you, Senator Graham.

Chairman Leahy and then Chairman Feinstein.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Well, thank you, Chairman Whitehouse.

This is one of the most important hearings the Senate Judiciary Committee will hold this year. I have listened to my friend from South Carolina. I have listened to each of his several conclusions that he made during his opening statement. I also heard him speak of the nobility of the law. I would just urge Senators not to raise straw men and try to predetermine this hearing. Let us listen to the witnesses who are going to be testifying rather than raising hypotheses and facts really not in the record.

I applaud Chairman Whitehouse for doing this. His own background as Attorney General and as a U.S. Attorney makes him eminently suited. I think it is one of the most important hearings we will have in the Judiciary Committee because it raises the question of how we got to a place where the Department of Justice's Office of Legal Counsel, an office that basically sets the standards for the whole Federal Government, came to write predetermined and premeditated legal opinions that allowed President Bush to authorize the torture of those in American custody and control—opinions that had to ignore our own laws, our own international agreements, and our own precedents as a Nation. From General George Washington's example during the Revolutionary War through the Civil War, the World Wars, Korea, and Vietnam, it was America that provided the model of a Nation that would not engage in such practices. It was America that led the world in the recognition of human dignity and human rights. And I think that the elite legal office at the Justice Department responsible for guiding the executive branch, and with the power to issue binding interpretations of law, so misused its authority is one of the fundamental breakdowns in the rule of law that dominated during the past 8 years.

The recent release of four more Office of Legal Counsel memos, written by two former heads of the OLC, Jay Bybee and Steven Bradbury, demonstrate in excruciating detail the methods authorized and used on people in American custody. We will hear all about those. Shackling naked people from the ceiling, keeping them inside a small box with an insect, beating them repeatedly, and waterboarding—these are actions that we have rightly protested when they have been used against Americans by other countries.

The purported legal justifications for the policies are disturbing. Some of the opinions use an ends-justify-the-means type of circular reasoning, saying that even though we would object if anybody ever did this to an America, it is OK for Americans to do that because we are Americans. It is not reasoning that stands up. Some seek to defend the use of these techniques by relying on hypertechnical interpretations that disregard the prohibitions in our laws. All seem posited on the idea that the President is somehow above the law or can override the law. Well, the rule of law in the United States means that no one is above the law—none of us as Senators, nobody in this room, and not the President of the United States.

So Senator Whitehouse deserves applause for having this hearing and for own his commitment to the rule of law and to getting to the truth. I would like to go forward in a nonpartisan commission, as I have said before, but that is going to require support from both sides of the aisle, one that could get to all the truth of what happened.

Two weeks ago, I invited Judge Jay Bybee to testify before the Senate Judiciary Committee. I did so after reading accounts in the Washington Post suggesting that he had expressed regrets regarding his work at the OLC. And then, in comments he sent a couple days later to the New York Times, he turned around and defended the same legal opinions—incidentally, legal opinions that have now been withdrawn. I invited him to come forward to tell the truth, the complete truth, before the Committee. Which Jay Bybee do we rely upon—the one who is in the press 1 day or the one who is in

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the press the next day? I ask, Mr. Chairman, if I could include in the record a copy of that letter to him.

Chairman WHITEHOUSE. Without objection.

Chairman LEAHY. Now, he has declined through his lawyers to testify before the Committee, I assume that he has no exonerating information to provide. I wish he would testify before us to help complete the record, and opining on why he refused, it is appropriate in this case because he has not done anything but maintain silence about it. He made a number of statements that certainly give his side. I would like to hear it all. He has talked to friends and employees, he has communicated to the press, and he has communicated through his lawyers to the Justice Department regarding the Office of Professional Responsibility's review of his actions while he was a Government employee in the Office of Legal Counsel. Apparently, the only people he will not explain his actions to are the people who granted him a lifetime appointment to the Federal bench—the American people through their elected representatives in the Senate.

So how we approach the mistakes of the past and whether we choose to learn from them is going to shape our way forward. Accountability can help restore our reputation around the world. But we have to restore the trust of the American public in our Government. I am a proud American. I think all Vermonters are. I am proud of the history of this country. I am proud of the times when our country has upheld the rule of law. I am also proud of the fact that the United States of America, when it has made mistakes, has not been afraid to admit those mistakes and learn from them and pledge not to make the same mistakes again. That is why we have this hearing, and that is why the American people deserve to know what mistakes were made and what we intend to do about it.

So, Senator Whitehouse, I applaud you for holding this hearing. I think it is one of the most important hearings the Senate Judiciary Committee will hold this year.

Chairman WHITEHOUSE. Thank you, Chairman.

The distinguished Chairman of the Senate Intelligence Committee and a member of the Judiciary Committee, Senator Feinstein.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I would echo the Chairman's words. Thank you for your leadership for holding this hearing.

Last month, the Obama administration released four memoranda from the Office of Legal Counsel, and questions have circulated ever since.

Now, it is well within the Judiciary Committee's jurisdiction to review these opinions and make findings as to whether the Committee does feel they fall within existing law as well as international treaties and conventions to which the United States is a signatory and, therefore, bound.

I listened very carefully to what Senator Graham said. I do not agree. I agree that the prior administration made the judgment that they did not apply, but that judgment was repudiated in Su-

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preme Court decisions. And as I read them, the finding was that those conventions do, in fact, apply. But as was the case with the program for warrantless surveillance, access to these legal opinions was severely restricted for years.

It has been publicly reported that the Office of Professional Responsibility may soon recommend to the Attorney General that the authors of these legal opinions face certain sanctions. However, the specifics of the OPR report have not been released.

While the Department of Justice can and should review the performance of its employees, the Judiciary Committee does have the responsibility of independent oversight of the Department of Justice and how it interprets the Constitution and the law, just as the Intelligence Committee, which I chair, has the oversight jurisdiction of the 16 intelligence agencies.

As members know, the Intelligence Committee is exercising its oversight responsibilities. We are conducting a major review of the CIA detention and interrogation program. This will include a detailed review of the conditions of detention experienced by high-value detainees at black sites, more than two dozen; how interrogation techniques were applied, by whom, in what combination, over what period of time; what information was produced as a result of these interrogations; and whether such information could have been obtained through other means; an evaluation of whether, in fact, the CIA detention and interrogation program complied with or exceeded the OLC opinions and other policy guidance; and whether the Intelligence Committee was accurately briefed about the detention and interrogation program and given a full explanation of what was happening at certain sites around the world. I believe this particular point is very important considering our review responsibilities. All of the facts will then be placed before the Committee, and the Committee will then work its will.

Now, to do this right is a major undertaking. It involves months of review. It involves going through millions of unredacted papers, documents, cables, and e- mails and a substantial number of personal interviews. The work will necessarily be classified in order to get the full scope of what has happened, and the work will be done fairly and professionally and in a strong bipartisan manner. And I want to stress that.

Yesterday, I had a brief meeting with Mr. Soufan, who is going to shortly be before this Committee. He will be asked at the right time when we have the facts to come before the Intelligence Committee.

Now, we have six crossover members that sit on this Committee and on Intelligence, including Senators Whitehouse, Feingold, Wyden, Hatch, Coburn, and myself. So I am convinced that between the Intelligence Committee's review and study and the Judiciary Committee's oversight of DOJ and these opinions, we will be able to provide a substantial body of knowledge and work within which judgments and assessments can be made.

I very much hope that this will be the case. I think to make this an explosive issue without carefully laying out all of the facts, conditions, cables, directives, and the whole situation will be a big, big mistake.

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So I want to thank you, Mr. Chairman, and I certainly welcome your hearing, and the Intelligence Committee will welcome whatever evidence it might provide for our deliberations as well. So thank you.

Chairman WHITEHOUSE. Thank you, Madam Chair. And as somebody who has seen firsthand your work on the Intelligence Committee, I am very proud of it and look forward to supporting you in that effort.

Senator FEINSTEIN. Thank you very much. I appreciate that.

Chairman WHITEHOUSE. Senator Feingold, do you wish to make a brief opening statement?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Very brief, Mr. Chairman. We want to get on to the hearing. But this hearing is such an important step in shedding light on one of the worst abuses of the past administration. Let me be clear: This so- called enhanced interrogation program was illegal, it was contrary to our national values, and it undermined our national security.

Like Chairman Whitehouse and Chairman Feinstein, I am a member of the Intelligence Committee, and I can tell you that nothing I have seen, including the two documents to which former Vice President Cheney has repeatedly referred, indicates that the torture techniques authorized by the last administration were necessary or that they were the best way to get information out of detainees. So, clearly, the former Vice President is misleading the American people when he says otherwise.

Mr. Chairman, I support further declassifications, including the rest of the Justice Department memos and letters on this program, the Inspector General report, and the work of the Intelligence Committee, provided their release would not jeopardize national security. And I have also sought the declassification of my own correspondence which I sent to then-CIA Director Hayden detailing my clear opposition to the program.

While the revelations of the past month are uncomfortable for some, they are absolutely essential if our country is to return to the rule of law. I am pleased that the members of the Judiciary Committee and the Intelligence Committee are moving forward to determine exactly what happened, and I continue to believe that an independent commission of inquiry, as Chairman Leahy has proposed, is needed so that we can fully understand and come to terms with this dark chapter in our recent history.

Thank you, Mr. Chairman.

Chairman WHITEHOUSE. Thank you, Senator Feingold. And just to chime in on that point, I think it is clear that I also agree that the time will come when it, frankly, becomes inevitable that a nonpartisan, authoritative commission should take a look at the work of Senator Feinstein's investigations, the OPR opinions, what the Judiciary Committee does under the leadership of Chairman Leahy, and other factors, and draw it all together so that the American people can make the appropriate conclusions.

Our first witness is David Luban. Professor Luban is a leading expert on legal ethics. He has written numerous articles and books

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on the subject, including "Legal Ethics," a leading textbook on the subject, and "Legal Ethics and Human Dignity," which collects selected essays he has written on legal ethics during the last 20 years. He is the University Professor of Law at Georgetown University Law Center, where he has taught since he joined the faculty of Georgetown University Law Center in 1997. He has previously taught at the University of Maryland and Yale and Kent State universities. He hold a Ph.D. from Yale University and a B.A. from the University of Chicago.

Professor Luban's recent research interests have included the legal ethics implications of U.S. torture policy and the powers granted to the President by the Constitution. As a result, he is particularly well suited to evaluate the OLC memos and explain the ethical issues that they raise.

Professor Luban.

STATEMENT OF DAVID LUBAN, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, HYATTSVILLE, MARYLAND

Mr. LUBAN. Thank you, Mr. Chairman.

Chairman Whitehouse, Ranking Member Senator Graham, Chairman Leahy, and distinguished members of the Committee——

Chairman WHITEHOUSE. Professor Luban, let me say one thing quickly, because you are our first witness. I would like to try to keep all of the witness statements here—some of them are quite lengthy on paper—to 5 minutes. And so at some point witnesses are going to start hearing this noise [gavels], which is your warning that the 5 minutes has run out and if you could please wrap it up. And if you extend too far beyond it, I will simply cut you off so that everybody has a fair chance and so that the Senators have a chance to engage in dialog, which is the most helpful part of a hearing.

I thank you. Please proceed.

Mr. LUBAN. I may go a minute or so over. Thank you for inviting me to testify today. You have asked me to talk about the legal ethics of the torture and interrogation memos written by lawyers in the Office of Legal Counsel. Based on the publicly available sources I have studied, I believe that the memos are an ethical train wreck.

When a lawyer advises a client about what the law requires, there is one basic ethical obligation: to tell it straight, without slanting or skewing. That can be a hard thing to do, if the legal answer is not the one the client wants. Very few lawyers ever enjoy saying "no" to a client who was hoping for "yes." But the profession's ethical standard is clear: a legal adviser must use independent judgment and give candid, unvarnished advice. In the words of the American Bar Association, "a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."

That is the governing standard for all lawyers, in public practice or private. But it is doubly important for lawyers in the Office of Legal Counsel. The mission of the OLC is to give the President advice to guide him in fulfilling an awesome constitutional obligation: to take care that the laws are faithfully executed. Faithful execution means interpreting the law without stretching it and without

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looking for loopholes. OLC's job is not to rubber-stamp administration policies, and it is not to provide legal cover for illegal actions.

No lawyer's advice should do that. The rules of professional ethics forbid lawyers from counseling or assisting clients in illegal conduct; they require competence; and they demand that lawyers explain enough that the client can make an informed decision, which surely means explaining the law as it is. These are standards that the entire legal profession recognizes.

Unfortunately, the torture memos fall far short of professional standards of candid advice and independent judgment. They involve a selective and, in places, deeply eccentric reading of the law. The memos cherry-pick sources of law that back their conclusions and leave out sources of law that do not. They read as if they were reverse engineered to reach a predetermined outcome: approval of waterboarding and the other CIA techniques.

Now, my written statement goes through the memos in detail, Mr. Chairman. Let me give just one example here of what I am talking about. Twenty-six years ago, President Reagan's Justice Department prosecuted law enforcement officers for waterboarding prisoners to make them confess. The case is called *United States* v. *Lee*. Four men were convicted and drew hefty sentences that the Court of Appeals upheld.

The Court of Appeals repeatedly referred to the technique of waterboarding as "torture." This is perhaps the single most relevant case in American law on the legality of waterboarding.

Any lawyer can find the *Lee* case in a few seconds on a computer just by typing the words "water torture" into a data base. But the authors of the torture memos never mentioned it. They had no trouble finding cases where courts didn't call harsh interrogation techniques "torture." It is hard to avoid the conclusion that Mr. Yoo, Judge Bybee, and Mr. Bradbury chose not to mention the *Lee* cases because it casts doubt on their conclusion that waterboarding is legal.

Without getting further into technicalities that, quite frankly, only a lawyer could love—maybe not even a lawyer, only a professor could love—I would like to mention briefly other ways that the torture memos twisted and distorted the law. The first Bybee memo advances a startlingly broad theory of executive power, according to which the President as commander-in-chief can override criminal laws. This was a theory that Jack Goldsmith, who headed the OLC after Judge Bybee's departure, described as an "extreme conclusion" that "has no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law." It comes very close to President Nixon's notorious statement that "when the President does it, that means it is not illegal"—except that Mr. Nixon was speaking off the cuff in a high-pressure interview, not a written opinion by the Office of Legal Counsel.

The first Bybee memo also wrenches language from a Medicare statute to explain the legal definition of torture. The Medicare statute lists "severe pain" as a symptom that might indicate a medical emergency. Mr. Yoo flips the statute and announces that only pain equivalent in intensity to "organ failure, impairment of bodily function, or even death" can be "severe." This definition was so bizarre that the OLC itself disowned it a few months after it became pub-

lic. It is unusual for one OLC opinion to disown an earlier one, and it shows just how far out of the mainstream Professor Yoo and Judge Bybee had wandered. The memo's authors were obviously looking for a standard of torture so high that none of the enhanced interrogation techniques would count. But legal ethics does not permit lawyers to make frivolous arguments merely because it gets them the results they wanted. I should note that on January 15th of this year, Mr. Bradbury found it necessary to withdraw six additional OLC opinions by Professor Yoo or Judge Bybee.

Mr. Chairman, recent news reports have said that the Justice Department's internal ethics watchdog, the Office of Professional Responsibility, has completed a 5-year investigation of the torture memos. OPR has the power to refer lawyers to their State bar disciplinary authorities, and news reports say they will do so.

I have no personal knowledge about what OPR has found. Presumably, investigators were looking either for evidence of incompetence, evidence that the lawyers knew their memos do not accurately reflect the law, or evidence that the process was short-circuited.

This morning, I have called the interrogation memos a "legal train wreck." I believe it is impossible that lawyers of such great talent and intelligence could have written these memos in the good-faith belief that they accurately state the law. But what I or anyone else believes is irrelevant. Ethics violations must be proved by clear and convincing evidence and not just asserted. That sets a high bar, and it should be a high bar.

In closing, I would like to emphasize to this Committee that when OLC lawyers write opinions, especially secret opinions, the stakes are high. Their advice governs the executive branch, and officials must be told frankly when they are on legal thin ice or crossing over into unlawful conduct. They and the American people deserve the highest level of professionalism and independent—let me emphasize "independent"—judgment, and I am sorry to say that they did not get it here.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Luban appears as a submission for the record.]

Chairman WHITEHOUSE. Thank you, Professor Luban.

One of the perils of Senate hearings is votes that happen, and a vote has just happened. And what I will do is recess the hearing for 5 minutes to give us a chance to vote. People usually take longer than that, but I will be back immediately to call the hearing back into session. And if other people need to take a bit more time, it will be underway, and we are glad to have you come back.

But, for now, the hearing is temporarily adjourned so that we can vote.

[Recess 10:42 a.m. to 10:55 a.m.]

Chairman WHITEHOUSE. Thank you all and my apologies again for the interruption, but it is one of our obligations around here.

The next witness is Philip Zelikow, who is the White Burkett Miller Professor of History at the University of Virginia, one of my alma maters. It is very good to have him here. He was counselor at the Department of State, a deputy to Secretary Condoleezza Rice from 2005 to 2007. From 1998 to 2005, Mr. Zelikow directed the

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University of Virginia's Miller Center of Public Affairs as well as three bipartisan commissions, including the National Commission on Terrorist Attacks upon the United States—referred to colloquially as the "9/11 Commission"—from 2003 to 2004. Previously, Mr. Zelikow served as a career Foreign Service officer at the State Department and on the White House National Security Council staff. He is currently a member of the board for the Global Development Program of the Bill and Melinda Gates Foundation. Mr. Zelikow received his baccalaureate degree from the University of Redlands, a law degree from the University of Houston, and his master's and Ph.D. from the Fletcher School at Tufts University.

Mr. Zelikow, welcome. We await your testimony.

STATEMENT OF PHILIP ZELIKOW, WHITE BURKETT MILLER PROFESSOR OF HISTORY, UNIVERSITY OF VIRGINIA, CHARLOTTESVILLE, VIRGINIA

Mr. ZELIKOW. Mr. Chairman, Senator Graham, thank you for giving me the opportunity to appear before you today. The Committee has my C.V. I will not detail my experience. I will just say that I was working on counterterrorism for a number of years before 9/11. I have experience looking at this as both a scholar and as a policymaker. I was a member of the President's Foreign Intelligence Advisory Board from 2001 to 2003, so I do remember what it was like after 9/11 and what some of the issues were at the time. And I have had some responsibility in having to make tough decisions on these issues from the policy side.

I submitted to the Committee a lengthy written statement that goes into a lot of detail, which I am not going to recapitulate in detail. Basically, the statement touches on some reasons why I think we chose to get into a program of this kind, just trying to step back and analyze it, because I think in many ways this was a large collective failure in which a lot of Americans—a lot of Americans from both parties—thought they needed a program like this in order to protect the country.

I think we can now judge that to have been a mistake, as Senator Graham said in his opening statement. Therefore, it is important, since this is a collective failure and it was a mistake, to learn from that mistake, comprehend why we made it. So I have a few things in the statement that go into that.

Further, I then talk about my work on these issues. As our suspicions grew about them in the 9/11 Commission, the 9/11 Commission included a recommendation that was designed to anticipate some of these concerns, a recommendation that the administration ignored, which was itself an ominous sign, and then my getting involved more directly with these issues when I joined the State Department at the beginning of 2005.

During most of 2005, the main focus in our work to get this to change—and by "our work," I mean the work of Secretary Rice, Legal Adviser John Bellinger, and I—in a series of principals and deputies meetings that had been put in motion by President Bush because he clearly wanted his advisers to re-evaluate all these issues.

During 2005, we mainly focused hard on getting the administration to agree to the standard the 9/11 Commission had proposed,

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which is please accept the CID standard. The CID standard is an acronym that stands for "cruel, inhuman, and degrading." In other words, please accept that we are going to have all our intelligence programs covered by this basic provision of the law of armed conflict, which is codified in various ways, including in our domestic law, I believe, through the Federal war crimes statute.

By the end of 2005, those efforts had been successful. The various battles that went on are detailed in my statement, including a couple of documents that reflect the positions that I adopted, along with the Deputy Secretary of Defense and others, that give you some illustration of the way we were making these arguments in June and July of 2005. By December of 2005, that battle had been won, both because of internal work, but also because of the McCain amendment. It was clear that the CIA and the Government were going to have to accept a CID compliance analysis. Thus, by early 2006, there was no way for the administration to avoid the need to re-evaluate the CIA program against a CID standard.

The work of the NSC deputies that I was involved in intensified. The OLC had guarded against the contingency of a substantive CID review in its May 30, 2005, opinion. OLC had held that even if the standard did apply, the full CIA program, including waterboarding, complied with it—that is, the full CIA program, including waterboarding, did not violate proscriptions against cruel, inhuman, and degrading treatment.

The OLC view also meant, in effect, that the McCain amendment was a nullity. It would not prohibit the very program and procedures Senator McCain and his supporters thought they had targeted.

So with the battle to apply the standard having been won, my colleagues and I at the State Department then had to fight another battle over how to define the standard's meaning. That meant coming to grips with OLC's substantive analysis.

OLC contended that these subjective terms, like "cruel" or "humane," should be interpreted in light of the well-developed and analogous restrictions found in American constitutional law. Therefore, to challenge OLC's interpretation, it was necessary to challenge the Justice Department's interpretation of U.S. constitutional law. This was not easy since OLC is the authoritative interpreter of such law for the executive branch of the Government.

Many years earlier, I had worked in this area of law. It seemed to me that the OLC interpretation of U.S. constitutional law in this area was strained and indefensible in a whole variety of ways. My view was that I could not imagine any Federal court in America agreeing that the entire CIA program could be conducted and it would not violate the American Constitution.

While OLC's interpretations of other areas of law were well known to be controversial, I did not believe my colleagues had ever heard arguments challenging the way OLC had analyzed these constitutional protections. Further, the OLC position had implications way beyond the interpretation of international treaties. If the CIA program passed muster under an American constitutional compliance analysis, then, at least in principle, a program of this kind would pass American constitutional muster even if employed any-

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where in the United States on American citizens. We will reflect on that for a moment.

So I distributed my memo analyzing these legal issues to other deputies at one of our meetings in February 2006. I then took off to the Middle East on other work. When I came back, I heard the memo was not considered appropriate for further discussion and that copies of my memo should be collected and destroyed. That particular request, passed along informally, did not seem proper and I ignored it. This particular memo has evidently been located in State's files and is being reviewed for declassification.

The broader arguments over the future of the CIA program went on for months, even though the old program had effectively been discontinued.

Internal debate continued into July of 2006 after the *Hamdan* decision, culminating in several decisions by President Bush. Accepting positions that Secretary Rice had urged again and again, the President set the goal of closing the Guantanamo facility, deciding to bring all the high-value detainees out of the black sites and move them toward trial, seek legislation from the Congress that would address these developments, and defend the need for some continuing CIA program but one that would comply with relevant law. And President Bush announced those decisions on September 6, 2006.

I left the Government at the end of 2006 and returned to the University of Virginia. Secretary Rice and Mr. Bellinger remained deeply involved in these issues for the following 2 years, working for constructive change. But, in sum, the U.S. Government over the past 7 years adopted an unprecedented program in American history of coolly calculated dehumanizing abuse and physical torment to extract information. This was a mistake—perhaps a disastrous one. It was a collective failure in which a number of officials and Members of Congress and staffers of both parties played a part, endorsing a CIA program of physical coercion, even after the McCain amendment was passed and even after the *Hamdan* decision.

Precisely because this was a collective failure, it is all the more important to comprehend it and learn from it. For several years, our Government has been fighting terrorism without using these extreme methods. I can comment on that both worldwide and in Iraq. We have been doing this under international standards for years.

Now, we face some serious obstacles in defeating al Qaeda and its allies, and we could be hit again, and hit hard. But our decision to respect international standards does not appear to be a hindrance in this fight. In fact, if the U.S. regains higher ground in the wider struggle of ideas, our prospects in a long conflict will be better. Others may disagree. They may believe that recent history, even since 2005, shows that America needs an elaborate program of indefinite secret detention and physical coercion in order to protect the Nation. The Government and the country needs to decide whether they are right. If they are right, our laws must change, and our country must change. I think they are wrong.

[The prepared statement of Mr. Zelikow appears as a submission for the record.]

Chairman WHITEHOUSE. Thank you, Mr. Zelikow.

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Our next witness is Professor Jeffrey Addicott, an Associate Professor of Law and the Director of the Center for Terrorism Law at St. Mary's University School of Law in San Antonio, Texas. In 2000, he retired from the U.S. Army Judge Advocate Generals Corps after 20 years of service specializing in human rights law and national security law. Professor Addicott holds a Doctor of Juridical Science and a Master of Laws from the University of Virginia School of Law—we seem to be populating the place today—and Juris Doctor from the University of Alabama School of Law. The new Ranking Member of the Judiciary Committee would be very pleased.

Professor Addicott.

STATEMENT OF JEFFREY F. ADDICOTT, PROFESSOR, DIRECTOR, CENTER FOR TERRORISM LAW, ST. MARY'S UNIVERSITY SCHOOL OF LAW, SAN ANTONIO, TEXAS

Mr. ADDICOTT. Thank you, sir. Just for the record, I am a full professor now, but even though I am from Alabama, I am going to try to talk fast because I have got 5 minutes.

The purpose of this testimony is to provide information from a legal perspective on the issue of "enhanced interrogation practices" used on certain al Qaeda operatives by CIA interrogators during the Bush administration as approved by the subject legal memorandums. In the context of the approved interrogation methodologies, the primary concern is associated with the CIA's use of "waterboarding." My full testimony, of course, is in the record.

Since the al Qaeda detainees are not entitled to prisoner of war status——

Chairman WHITEHOUSE. Professor, if you intend to read rapidly, even that will not work with 16 pages of testimony. I think you will have to make some measure to summarize.

Mr. ADDICOTT. Well, let me just do it off the cuff, then. You know, the Torture Convention is the primary international document that we are looking at here in the context of how we are measuring what these CIA memos refer to. And when the United States signed the Torture Convention, we had certain reservations in there, and we said that we understood that, in order to constitute torture, an act must specifically intend to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm.

The memorandums looked at the issue of torture, of course, and the word "torture" rolls off the tongue with great ease; but you have to recognize that not every alleged incident of interrogation or mistreatment necessarily satisfies the legal definition of "torture." It is imperative that one view such allegations with a clear understanding of the applicable legal standards set out in law and judicial precedent. In this manner, allegations or claims of illegal interrogation practices—e.g., waterboarding—can be properly measured as falling above or below a particular legal threshold. In my legal opinion, the so-called enhanced interrogation practices detailed in the subject legal memorandums did not constitute torture under international law.

Why do I say that? There are very few international cases that really stand on point when you look at this issue. Perhaps the lead-

ing case, though, in the Anglo-Saxon tradition is the European Court of Human Rights Ruling of *Ireland* v. *United Kingdom*. By an overwhelming majority vote of 16–1, the Ireland court found certain interrogation practices—called the "five techniques"—utilized by British authorities to investigate suspected terrorism in Northern Ireland to be "inhumane and degrading," i.e., ill-treatment, but not torture, by a vote of 13–4. These five techniques, let me just describe for the Committee what some of them were.

One of them was wall-standing. They forced the detainees to stand for periods of hours in a stress position described as "spread-eagled against the wall, with their fingers put high above their head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers." Wall-standing was practiced for up to 30 hours with occasional periods for rest.

The British authorities also engaged in hooding, where they placed a dark hood over the head of the detainee, again, for prolonged periods of time—days.

They subjected the detainees to noise in a room where there was continuous loud and hissing noise for prolonged periods of time.

They deprived them of sleep for prolonged periods of time.

They deprived them of food and drink, reducing the food and drink to suspects pending interrogations.

Now, to the reasonable mind, considering the level of interrogation standards set out in the *Ireland* case, the conclusion is clear. Even the worst of the CIA techniques authorized by the DOJ legal memorandums—waterboarding—would not constitute torture; the CIA method of waterboarding appears similar to what we have done hundreds and hundreds of times to our own military special operations soldiers in military training courses on escape and survival.

I was also in the military for 20 years. I was a senior legal adviser for all the Green Berets in the world, so I am very familiar with the concept of waterboarding.

If you look at the *Ireland* case and use a fortiori logic, if you look at what they did in the *Ireland* case—and that court said that is not torture; they said it is ill treatment—then even the worst of what we have done, that level is going to be way below the *Ireland* standard. So, therefore, my legal conclusion based on the *Ireland* case is that we have not engaged in torture.

Another international case is the *Public Committee* case that comes out of the Supreme Court of Israel, which also looked at harsh interrogation tactics.

In conclusion, those who order, approve, or engage in torture must be criminally prosecuted. If we conclude, in fact, that we did engage in torture—in other words, that we are going to ignore the *Ireland* precedent and say, yes, our people engaged in torture—there is no way out of this. We have to prosecute under the Torture Convention those that approved it, those that authorized it, and those that carried it out. We cannot say on the one hand, yes, we engaged in torture, and not do anything. We are violating international law if we do that. On the other hand, if we conclude that the techniques did not rise to the level of torture, which I argue,

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then we are under no international obligation to prosecute those individuals under the Torture Convention.

Thank you.

[The prepared statement of Mr. Addicott appears as a submission for the record.]

Chairman WHITEHOUSE. Thank you very much, Professor Addicott.

Our next witness, our penultimate witness, is Professor Turner, who is the Associate Director of the University of Virginia's Center for National Security Law. I promise we did not set this up as a University of Virginia day.

He is the former Chair of the American Bar Association's Standing Committee on Law and National Security, a veteran of the Reagan administration, and a former National Security Adviser to Senator Robert P. Griffin, a member of the Senate Foreign Relations Committee. Professor Turner received his B.A. from Indiana University and a J.D. and S.J.D. from the University of Virginia. He is the author or editor of more than a dozen books and monographs on national security issues, and we welcome him to the Committee.

Professor Turner.

STATEMENT OF ROBERT TURNER, PROFESSOR, CENTER FOR NATIONAL SECURITY LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VIRGINIA

Mr. TURNER. Good morning, Mr. Chairman, and members of the Committee. I am honored to be here. Like most JAG officers I have dealt with, Senator Graham got these issues exactly right from the beginning. I would like to associate myself with his statement. And I am tempted just to stop there because mine is probably not going to be as good as his, but I will continue.

Shortly after the story of abusive treatment of detainees first broke, I was going on a short vacation with my 14-year-old son, driving down Interstate 64, when my cell phone rang. It was Voice of America wanting a comment on the story of the abusive techniques. And my comment was: "It appears that some good people have made some very bad decisions."

I have been a very strong critic of waterboarding and other abusive techniques. I co-authored an article in the Washington Post entitled "War Crimes and the White House" in July of 2007. I served with pride on the drafting committee for the Executive Order barring torture and inhumane treatment. Indeed, one of my suggestions was "torture" is not the controlling international standard. Under international law, we are bound by Common Article 3 of all four 1949 Geneva Conventions. That standard is that all detainees are entitled to humane treatment, so spending a lot of time deciding whether something is torture or not misses the point that we have a much higher duty in our treatment of detainees.

Some of the things that have been done since then have made me furious, to the point of wanting to kick a wall or something. But I continue to believe that the people who made these tragic decisions were decent, honorable, and able. They were also frightened for their fellow Americans and anxious to do everything within their power to prevent the next 9/11 attack.

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Now, some may think that good people cannot do bad things. I would remind those people that on February 19, 1942, President Franklin Roosevelt issued Executive Order 9066 that ordered the detention and incarceration of more than 100,000 Americans without probable cause, judicial sanction, or the slightest individualized suspicion of wrongdoing. Most of those detained were U.S. citizens. Many of them had been born in this country and never even visited Japan. Their crime was to have Japanese ancestors.

Today, we see this as one of the most outrageous abuses of civil liberties since the end of slavery. And yet it was strongly supported at the time, not only by the President but by California Attorney General Earl Warren, who later earned a reputation as perhaps the most liberal Chief Justice of the Supreme Court of the 20th century.

Another well-known civil libertarian involved in that case was Justice Hugo Black, who wrote the Court's majority opinion in the *Korematsu* case that upheld the detention as lawful. How could so many good and able people give their support to such a horrible policy? Indeed, one of the few people to speak out against this was J. Edgar Hoover of the FBI, interestingly. They did this because they were frightened, and they desperately wanted to prevent another Pearl Harbor. And I would submit that the OLC lawyers—I have met one of them two or three times at conferences, but I do not know any of them well—acted from precisely the same motive: they wanted to save the lives of their fellow Americans.

The title of this hearing is "What Went Wrong." Part of the problem, I believe, is a general ignorance of some of the fundamental details of national security law, not only at OLC but elsewhere in the government and, indeed, throughout the legal profession. In my prepared testimony, I give several examples where the country has been divided because of misunderstandings about very basic principles of international law. The Third Geneva Convention provides that prisoners of war are to be tried by military courts, not civilian courts, but this was not well known, and so people got very unhappy over proposals for military tribunals.

How could bright lawyers fail to understand that Common Article 3 applies? Again, it sets the standard of humane treatment. I think it is not that hard to understand why. Common Article 3 applies to armed conflicts "of a non-international character." Well, what the OLC people said was, well, there are at least 75 countries involved in this war in one way or another against al Qaeda. The Authorization for the Use of Military Force, approved by Congress in October of 2001, clearly authorized the use of force against foreign nations. Again, the sugestion of an international armed conflict.

It is not unreasonable to conclude that this was an international conflict, but without a sovereign state on the other side, the better view—and the view accepted by the Supreme Court in the *Hamdan* case—is that is not the best interpretation; that is to say, common Article 3 does apply.

Common Article 3 states further that in non-international armed conflicts, it applies to conflicts occurring "in the territory of one of the high contracting parties." Now, you can interpret that to mean that a conflict that occurs in the territory of more than one state

is not covered by Common Article 3. Al Qaeda was global in its scope. It attacked us inside the United States, in Saudi Arabia, Yemen, Kenya, Tanzania and so forth. So it was not difficult, I think, for non-experts to look at this language and say common Article 3 does not apply. I think they were horribly wrong, but I do not think it was an evil decision.

There seems to be an overwhelming consensus in which I share that waterboarding crosses both the humane treatment and the torture line. I have a dear colleague who is very outraged at all of this, who refers to it as "torture lite," and I think that is probably a good description. It is not comparable to what was done to our POWs in Vietnam. It is not comparable to the maiming and the branding and the dismemberment that has gone on through history. But it is wrong. It should not have happened. And the most important thing is to make sure it does not happen again.

Let me turn to what we do now about those who made these decisions. The Republicans came to power in Washington in 1953. They controlled the White House and both Houses of Congress. To the best of my knowledge and recollection, no one demanded a "truth commission" to go after the ghost of FDR or Justice Hugo Black or Governor Earl Warren. They understood that good people, fearful for the safety of their fellow Americans, trying to stop the next attack, made some very bad decisions. And I think that is what has happened here.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Turner appears as a submission for the record.]

Chairman WHITEHOUSE. Thank you, Professor Turner. It sounds as if you would agree with the observation of the old French Minister Talleyrand that "the greatest danger in times of crisis comes from the zeal of those who are inexperienced."

[Mr. Turner nods affirmatively.]

Chairman WHITEHOUSE. I will take a moment now to recess very briefly so that the necessary security measures for Mr. Soufan can be put into place. The witnesses can remain in their seats. It will just take a second to clear some of the cameras out of the front of the well.

[Pause.]

Chairman WHITEHOUSE. Thank you. Ali Soufan is the Chief Executive Officer of the Soufan Group LLC, an international strategic consultancy firm that advises governments and corporations on policy, strategy, security, risk management, and training. More significantly for our purposes, he is a former FBI supervisory special agent who investigated and supervised highly sensitive and complex international terrorism cases, including the attack on the USS *Cole* and the events surrounding 9/11.

Mr. Soufan has received numerous awards and commendations for his counterterrorism work. These include the Director of the FBI's Award for Excellence in Investigation, the Respect for Law Enforcement Award for relentless pursuit of truth and bringing terrorist subjects before the bar of justice, and a commendation from the U.S. Department of Defense that labeled him "an important weapon in the ongoing war on terrorism."

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Mr. Soufan is an honors graduate from Mansfield University of Pennsylvania where he received undergraduate degrees in international studies and political science. He is a magna cum laude graduate of Villanova University where he received a Master of Arts in international relations and appears to have no connection to the University of Virginia.

[Laughter.]

Chairman WHITEHOUSE. Mr. Soufan, thank you for being with us.

STATEMENT OF ALI SOUFAN, CHIEF EXECUTIVE OFFICER, THE SOUFAN GROUP LLC, NEW YORK, NEW YORK

Mr. SOUFAN. Thank you, sir. Mr. Chairman, Committee members, thank you for the opportunity to appear before you today. I know that each one of you cares deeply about——

Chairman WHITEHOUSE. Could you speak up, and clearly, with the microphone near you so that everybody can hear? Without the ability to see you, it is even more important that you be heard.

Mr. SOUFAN. Mr. Chairman, Committee members, thank you for the opportunity to appear before you today. I know that each one of you cares deeply about our Nation's security. It was always a comfort to me during the most dangerous of situations that I faced, from going undercover as an al Qaeda operative, to tracking down the killers of the 17 U.S. sailors murdered on the USS *Cole*, that those of us on the frontline had your support and the backing of the American people. So I thank you.

The issue that I am here to discuss today—interrogation methods used to question terrorists—is not, and should not be, a partisan matter. We all share a commitment to using the best interrogation method possible that serves our national security interests and fits within the framework of our Nation's principles.

As an FBI agent, I spent much of my career investigating and unraveling terrorist cells around the globe. I have had the privilege of learning and working alongside some of the most dedicated and talented individuals from the FBI and other law enforcement, military, and intelligence agencies.

I was the Government's main witness in both of the trials we have had in Guantanamo Bay so far, and I am currently helping the prosecution prepare for future ones.

From my experience, I strongly believe that it is a mistake to use what has become known as enhanced interrogation techniques, a position shared by professional operatives, including CIA officers who were present at the initial phases of the Abu Zubaydah interrogation. These techniques from an operational perspective are slow, ineffective, unreliable, and harmful to our efforts to defeat al Qaeda.

An example of a successful interrogation is that of an al Qaeda terrorist known as Abu Jandal. In the immediate aftermath of 9/11, together with my partner——

Chairman WHITEHOUSE. Let me interrupt just for one moment to ask unanimous consent that the 302s that were developed in the investigation of Abu Jandal be made a part of the record. I believe this is the first time they have been fully declassified.

Please proceed. Without objection.

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Mr. SOUFAN. In the immediate aftermath of 9/11, together with my partner Special Agent Robert McFadden, a first-class agent from the Naval Criminal Investigative Service, we obtained a treasure trove of highly significant actionable intelligence that proved instrumental in the war effort against al Qaeda and Taliban in the fall of 2001. It included extensive information on everyone from Osama bin Laden's network and modus operandi to details on individual operatives, some of them we later apprehended.

The approach we used was completely by the book, and it can be labeled as the "informed interrogation approach." It is outlined in the Army Field Manual and is derived from the cumulative experiences, wisdom, and successes of the most effective operatives from our country's military, intelligence, and law enforcement community.

The approach is based on leveraging our knowledge of the detainee's mindset, vulnerabilities, and culture, together with using intelligence already known about him. The interrogator uses a combination of interpersonal, cognitive, and emotional strategies to extract the information needed. If done correctly, this approach works quickly and effectively because it outsmarts the detainee using a method that he is not trained nor able to resist.

The Army Field Manual is not about being soft. It is about outwitting, outsmarting, and manipulating the detainee. The approach is in sharp contrast with the enhanced interrogation method that instead tries to subjugate the detainee into submission through humiliation and cruelty. The idea behind it is to force the detainee to see the interrogator as the master who controls his pain. It is merely an exercise in trying to force compliance rather than elicit cooperation.

A major problem is that it is ineffective. Al Qaeda terrorists are trained to resist torture. As shocking as these techniques are to us, their training prepares them for much worse—the torture that they would receive if caught by dictatorships for example. In a democracy, however, there is a glass ceiling the interrogator cannot breach, and eventually the detainee will call the interrogator's bluff. That is why, as we see from the recently released DOJ memos on interrogation, the contractors had to keep requesting authorization to use harsher and harsher methods. In the case of Abu Zubaydah, that continued for several months, right until waterboarding was introduced. And waterboarding itself had to be used 83 times, an indication that Abu Zubaydah had already called his interrogators bluff. In contrast, when we interrogated him using informed interrogation methods, within the first hour we gained important actionable intelligence.

The technique is also unreliable. We do not know whether the detainee is being truthful or just speaking to mitigate his discomfort. The technique is also slow. Waiting 180 hours as part of a sleep deprivation stage is time we cannot afford to waste in a ticking bomb scenario.

Just as importantly, this amateurish technique is harmful to our long-term strategy and interests. It plays into the enemy's handbook and re-creates a form of the so-called Chinese Wall between the CIA and the FBI. It also taints sources, risks outcomes, ignores the end game, and diminishes our moral high ground.

My interest in speaking about this issue is not to advocate the prosecution of anyone. Examining a past we cannot change is only worthwhile when it helps guide us toward claiming a future, a better future that is yet within our reach.

For the last 7 years, it has not been easy objecting to these methods when they had powerful backers. I stood up then for the same reason I am willing to take on critics now, because I took an oath swearing to protect this great nation. I could not stand by quietly while our country's safety was endangered and our moral standing damaged.

I know you are motivated by the same considerations, and I hope you help ensure that these grave mistakes are never, never, made again.

Thank you.

[The prepared statement of Mr. Soufan appears as a submission for the record.]

Chairman WHITEHOUSE. Thank you, Mr. Soufan.

Let me, now that we are in the questioning period, begin with questions to you, and let me ask you more specifically about the interrogation of Abu Zubaydah, again reminding you not to divulge any information that is classified.

You were present—indeed, you were one of the first, if not the first, interrogators present when Abu Zubaydah was brought into custody for the first time outside of Pakistan. Correct?

Mr. SOUFAN. Yes, sir.

Chairman WHITEHOUSE. And your testimony indicates that within the first hour of your interrogation of him, you had gained important actionable intelligence. Is that correct?

Mr. SOUFAN. Yes, sir.

Chairman WHITEHOUSE. At that point, his condition was such that you indicated that we had to take him to a hospital or he would die. But at the hospital, you continued your questioning, and it was during your questioning of him at the hospital that you elicited information regarding the previously unknown role of Khalid Sheikh Mohammed as the mastermind of the 9/11 attacks.

Mr. SOUFAN. Correct, sir.

Chairman WHITEHOUSE. One of the more significant pieces of intelligence information we have ever obtained in the war on terror. Correct?

Mr. SOUFAN. It is one of them, yes, sir.

Chairman WHITEHOUSE. And all of this happened before the CIA CTC team and the private contractors arrived. Correct?

Mr. SOUFAN. Yes, sir.

Chairman WHITEHOUSE. And then they arrived, and immediately you say on the instructions of the contractor, harsh techniques were introduced, which "did not produce results as Abu Zubaydah shut down and stopped talking." Correct?

Mr. SOUFAN. Correct, sir.

Chairman WHITEHOUSE. And with that happening, you knew he had good information. He had shut down under the harsh techniques, and so you again were given control of the interrogation. Correct?

Mr. SOUFAN. Yes, sir.

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Chairman WHITEHOUSE. And you used the same techniques you had originally, which were within the Army Field Manual.

Mr. SOUFAN. Yes, sir. It was me, another FBI agent who was with me, and a top CIA interrogator. So the interrogation team was a combination of FBI and CIA officials, and all of us had the same opinion that contradicted with the contractor.

Chairman WHITEHOUSE. And in this third interview, the one—or series of interviews, anyway, the one before the hospital, one in the hospital, and then one after the first round of harsh interrogation when you were brought back, was in the second round pursuant to appropriate tactics that Abu Zubaydah disclosed the details of Jose Padilla, the so-called dirty bomber. Correct?

Mr. SOUFAN. Yes, sir.

Chairman WHITEHOUSE. And then, again, the contractor reasserted himself and began reimplementing harsh techniques and, again, Abu Zubaydah shut down and stopped producing information. Is that correct?

Mr. SOUFAN. Yes, sir.

Chairman WHITEHOUSE. And once again you were brought back in to interrogate him. Now it was more difficult because some of these harsh techniques had been applied and his resistance was increased, but eventually you succeeded and you re-engaged again. But at that point, the contractor took over and began stepping up the notches of his experiment to the point where you protested to your superiors in the FBI that this was becoming inappropriate, illegal. I believe you even threatened——

Mr. SOUFAN. I think my description was——

Chairman WHITEHOUSE [continuing].—To arrest somebody if you were to stay there. Correct?

Mr. SOUFAN. Yes, sir. My description was "borderline torture."

Chairman WHITEHOUSE. And at that point, your participation in his interrogation ended.

Mr. SOUFAN. Yes. We were asked by Director Mueller to leave the facility.

Chairman WHITEHOUSE. So when you look at the Office of Legal Counsel opinion of May 30, 2005, on page 10, here is what the Office of Legal Counsel said was the fact: "Interrogations of Zubaydah, again, once enhanced techniques were employed, furnished detailed information regarding al Qaeda's organizational structure, key operatives, and modus operandi, and identified KSM as the mastermind of the September 11th attacks. You have informed us that Zubaydah also provided significant information on two operatives, including Jose Padilla, who planned to build and detonate a dirty bomb in the Washington, D.C., area."

From your position at the actual interrogation of Abu Zubaydah, you know that statement not to be true.

Mr. SOUFAN. Yes, sir.

Chairman WHITEHOUSE. On September 6, 2006, President Bush stated the following: "Within months of September 11, 2001, we captured a man named Abu Zubaydah. We believed that Zubaydah was a senior terrorist leader and a trusted associate of Osama bin Laden. Zubaydah was severely wounded during the firefight that brought him into custody, and he survived only because of the medical care arranged by the CIA. After he recovered, Zubaydah was

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defiant and evasive. He declared his hatred of America. During questioning, he at first disclosed what he thought was nominal information and then stopped all cooperation. We knew that Zubaydah had more information that could save innocent lives, but he stopped talking. As his questioning proceeded, it became clear that Zubaydah had received training on how to resist interrogation, and so the CIA used an alternative set of procedures.

Does that statement by the President accurately reflect the interrogation of Abu Zubaydah?

Mr. SOUFAN. Well, the environment that he is talking about, yes, he was injured and he needed medical care, but I think the President—my own personal opinion here based on my recollection is that he was told probably a half-truth.

Chairman WHITEHOUSE. And repeated a half-truth, obviously. His statement as presented does not conform with what you know to be the case from your experience on hand.

Mr. SOUFAN. Yes, sir.

Chairman WHITEHOUSE. I am over my time.

Senator Graham.

Senator GRAHAM. Well, since there is just the two of us, if you want to keep going.

Thank you, Mr. Chairman. What we have got is four lawyers who are very bright. All have one thing in common: they like Virginia. And I counted seven opinions among you. I think two of you disagree with yourselves somewhere along the line. And the point is that you are very bright. I appreciate you coming. And, Mr. Soufan, thank you for serving our country.

Mr. SOUFAN. Thank you, sir.

Senator GRAHAM. And I appreciate your view of how we should behave. The point that we are trying to make as we go forward is that we get this right, and as we look back in the past, we do not want to shade this one way or the other unnecessarily.

Is it your testimony that enhanced interrogation techniques that were employed right after 9/11 yielded no good information?

Mr. SOUFAN. I can only speak about my own personal experience.

Senator GRAHAM. That is the point, isn't it?

Mr. SOUFAN. Yes.

Senator GRAHAM. And I admire you. I really do. I really appreciate what you are doing.

And, Mr. Chairman, I think there is some information out there that shows that enhanced techniques did yield good information, and I would like that to be part of this inquiry if we are going to have it.

But having said that, Mr. Soufan, I appreciate what you are telling us. Were you involved in the KSM interrogation at all?

Mr. SOUFAN. No, sir. After my stand in the Abu Zubaydah——

Senator GRAHAM. Okay.

Mr. SOUFAN. And what I believed is right——

Senator GRAHAM. No, I don't——

Mr. SOUFAN [continuing].—Out of the program.

Senator GRAHAM. I do not doubt that at all, and I do not doubt that you are trying to help the country. I am just saying that this idea that no good information was acquired is probably not accurate. But that does not justify what we did. That is all I am saying.

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Now, as to the Geneva Convention, Mr. Turner—I appreciate the compliment, by the way. The Geneva Convention to me has always been a warehousing agreement between the signatory nations. We catch some of your guys, we are going to treat them well, and we expect like reciprocity. We catch a civilian, we are going to treat them well until the conflict is over. Is that generally the goal of the Geneva Convention?

Mr. TURNER. Senator, that is exactly the term that I use in teaching about the Geneva Convention. If you go back through history, the original practice was to put captured enemy soldiers to the sword. Somebody got smart and said, "Hey, we can turn them into slaves." They played around briefly with paroling them, which is to say, "Okay, go back to your flock or your farm, do not come back to the battlefield," and the king or the prince said "Get your tail back on the battlefield." And so they finally said, "Look, let's not kill them, let's just warehouse them, treat them humanely, feed them, when the war is over we will trade prisoners." And that has been the practice for several hundred years.

Senator GRAHAM. And isn't the problem in this war that, No. 1, al Qaeda is not a signatory to the Convention. The only way we are going to stop this enemy from attacking us to find good information and hit them before they hit us.

Mr. TURNER. Again, that is right out of my prepared testimony.

Senator GRAHAM. I have never taken your class, by the way, but I am liking it so far.

Mr. TURNER. Unlike any war we have ever had, this war is 90 percent, if not more, intelligence. Usually you need your intelligence service to identify the location of the enemy and their plans, and then you send your tanks, your armor, your aircraft carriers.

In this battle, a good police department could arrest al Qaeda if we can find them and know what they are doing. So intelligence is incredibly important.

Senator GRAHAM. Mr. Addicott, we are the only Nation that I know of that considers al Qaeda operatives a military threat. Every other nation looks at this through the law enforcement prism. Is that true? Does everyone agree with that?

Mr. ZELIKOW. No, sir. I do not think that is the case any longer.

Senator GRAHAM. Okay. What nation has adopted the enemy combatant theory?

Mr. ZELIKOW. We have actually been engaged in international conferences on just this point with our key allies for about the last 4 years. I helped initiate that.

Senator GRAHAM. Is there any country that holds a detainee under the theory of the law of armed conflict?

Mr. ZELIKOW. They do not hold detainees under that theory, but partly it is because other countries are holding them under that theory.

Senator GRAHAM. Well, my point is that we do hold people under the theory of the law of armed conflict. Have you ever been to an interrogation conducted by the Spanish police?

Mr. ZELIKOW. I have not had that rare privilege, sir.

Senator GRAHAM. Well, I have. Have you ever been to an interrogation conducted by the Carboneri in Italy?

Mr. ZELIKOW. Neither have I.

Senator GRAHAM. Do you believe, Mr. Turner, that these interrogations are Common Article 3 compliant?

Mr. TURNER. No, sir.

Senator GRAHAM. There is no law enforcement agency in the world dealing with terrorism interrogates in a Common Article 3 manner, because you cannot say "Hello" firmly under Common Article 3. I just want the world to understand—and my time is up—that the reason we have adopted a different theory is very important because I think we are at war, and the people we are prosecuting did not rob a liquor store. They are an ongoing military threat. And the odd thing about this is if you go down the military law of armed conflict, in many ways you restrict your ability to get information versus the law enforcement model. But I think that is the right model to have.

With that, I will yield to you. It is just the two of us. Take any time——

Chairman WHITEHOUSE. Let us go back and forth.

Senator GRAHAM. Yes.

Mr. TURNER. I agree, Senator, just for the record.

Senator GRAHAM. I mean, we have got to figure this out as a world, not just a nation. Right, Philip?

Mr. ZELIKOW. Absolutely. In fact, it is a coalition fight. We need coalition standards for the fight. And one reason we are having this discussion is let us work on standards that will also be interoperable with our allies.

Senator GRAHAM. Right.

Chairman WHITEHOUSE. One other question I wanted to pursue about the interrogation of Abu Zubaydah. There was obviously considerable conflict between one side that was achieving significant actionable information, so significant that when the Jose Padilla information became available, as I recall, the Attorney General of the United States had a press conference in Moscow to trumpet it, and the other method which was producing a shutdown, if you will, on the part of the detainee. And it has been often cast as the difference between the trained professionals of the CIA versus the amateurish military interrogators, teenagers who need the Army Field Manual sort of for their training wheels, and law enforcement investigators who are constrained by Miranda and other things and, therefore, cannot be serious interrogators.

It strikes me from your description that two elements of that framing of the issue are wrong. First of all, it seems very well that military and law enforcement investigators are actually the trained professionals. You refer to the other group as "amateurish Hollywood type." And the second is that the division was not between the CIA and the FBI. You had CIA professionals who were with you and wanted to continue. And on the other side of the equation was a private contractor who was not even a Government employee.

Could you comment on those observations?

Mr. SOUFAN. Yes, sir. It has been reported that it was a conflict during the interrogation between the FBI and CIA. I totally disagree with this assertion, and that is something that I mentioned in my——

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Chairman WHITEHOUSE. At the field level, at least.

Mr. SOUFAN. Field level.

Chairman WHITEHOUSE. At the point of the interrogation, yes.

Mr. SOUFAN. Yes. And that is why I supported the CIA officers in my op-ed in the New York Times on this issue. They were 100 percent supportive. Actually, the chief psychologist of the CIA, a forensic psychologist, objected to these techniques, and he even left the location before I did. Their top interrogator was 100 percent, I think, in sync with our view, with the FBI view, because he is a professional interrogator.

I think this technique using the harsh methods or using the enhanced interrogation methods misunderstands the threat that we face from ideological Islamic extremists like al Qaeda. And countries around the world, in the Middle East, who actually use these techniques as regularly as possible, have now pedaled away from these techniques when it comes to the terrorists of al Qaeda and Islamic extremists. They are ideologically motivated. They are expecting a lot to happen to them when they get caught. And the best way to deal with them is to be smart and to engage with them. And that is what provided a lot of actionable intelligence, before 9/11 and after 9/11. And, you know, in a classified session, we can actually talk about a lot of the successes versus the failures of these techniques.

One of the things that has been mentioned about this technique, the successes that have been talked about publicly are Padilla and Khalid Sheikh Mohammed. Well, waterboarding was not approved until August 1, 2002. Padilla, after an international manhunt in three countries, was finally arrested after he landed from Switzerland to the Chicago airport on May 8, 2002—almost 3 months before these techniques were imposed. We knew about Khalid Sheikh Mohammed in April of 2002. Again, waterboarding was not approved until August 1st of 2002.

So I am basing my opinion here on two things: from my recollection of the facts—I do not have any notes. I am just having my memory on these facts and what happened.

Chairman WHITEHOUSE. Understood.

Mr. SOUFAN. That is number one.

No. 2, I am basing on what I have been hearing in the public domain what had been classified.

Chairman WHITEHOUSE. I am going to turn to Senator Durbin. I have just a few seconds left. I just want to drop in one question to Professor Luban during this round. That is, in your review of the OLC memos, was there any mention of the role of private contractors?

Mr. LUBAN. I do not recall any specific mention of private contractors.

Chairman WHITEHOUSE. I do not recall it either, and it would seem that that might raise legal issues. It is interesting that that would be a fact in the lengthy, lengthy OLC opinions that never appears to have surfaced.

Mr. LUBAN. Well, I agree, Senator. And I should add that I was also very troubled by the chronology that Mr. Soufan just mentioned because when Mr. Bradbury was writing the opinion and wrote that the capture of Jose Padilla resulted from enhanced in-

terrogation techniques, it was already public information that Padilla had been captured in May and the techniques were not approved until August. So the legal opinion that he wrote stipulates something that was publicly known to be untrue.

Chairman WHITEHOUSE. Yes, he did not have to have special knowledge to know that that assertion in the OLC opinion was false. Correct?

Mr. LUBAN. That is correct.

Chairman WHITEHOUSE. Senator Durbin.

Senator DURBIN. Thank you very much, Mr. Chairman, for this hearing.

Mr. Zelikow, you have had fascinating assignments, working as counselor for Secretary of State Rice and serving as Executive Director of the 9/11 Commission. And I would like to ask you if you could amplify a little bit on what has been characterized as disclosures to leaders in Congress about interrogation techniques. I served on the Intelligence Committee of the Senate for 4 years and found myself constantly in a frustrating position of being told classified information and being warned not to breathe a word of it to the public at large for fear that it would endanger the lives of people who were helping the United States.

Chairman WHITEHOUSE. Or, if I might add, Senator Durbin, our colleagues, in some cases our staff.

Senator DURBIN. Yes. And so there were times when, frankly, I wanted to walk right out of the Senate Intelligence Committee room and call a press conference and say, "If America only knew."

Now, when I have said that on the floor before, people have said to me, "I don't get it. Aren't you supposed to say what you believe is true no matter what?" Well, I think you know better. You know that there are limits to sharing information, particularly when it might endanger someone's life.

So when Members of Congress were briefed of this, was it before the fact? Were they being asked to authorize these techniques and give their approval?

Mr. ZELIKOW. Sir, I think Senator Feinstein mentioned SSCI is apparently really trying to break down the chronology. The Office of the Director of National Intelligence has been publicizing chronologies of briefings, which then need to be matched up against when we were actually doing things. And so the honest answer is I do not know whether folks were briefed before the fact.

Formally, what is supposed to happen is a memorandum of notification is prepared that lets key Members of Congress know that a program is being undertaken with the authorization of the President pursuant to some prior Presidential finding. And, therefore, Members of Congress are being informed that pursuant to this finding we are now doing certain things.

Senator DURBIN. After the fact?

Mr. ZELIKOW. It could be after the fact. It should be at the time the program is initiated and before the program is implemented so that it appears that you are taking the congressional consultation seriously, which the administration should.

Senator DURBIN. And I recall only one instance where a Member—in this case, Senator Rockefeller—was briefed on the wiretap situation, and in his frustration, maybe desperation, hand-wrote a

letter to file about protesting this, which did not surface until much later. But it was the only way that he could create tangible evidence of his displeasure or disapproval of what was happening.

I raise this because I have spoken to Senator Rockefeller, and I think now he was duty-bound by the law and by his conscience not to make disclosures of classified information, and yet felt that there was something here that was worthy of at least being on the record, as crude as his method was. I raise this because many people seem to be suggesting that if Members of Congress at the highest level are informed, that they are somehow complicit. And I have not seen that. I have seen specific limitations on that information when it is given to me in the Senate Intelligence Committee and, by reference, from leaders when they are briefed.

Do you understand the difference here?

Mr. ZELIKOW. I think I do, and as I have listened to both sides of this argument, I step away from this with some concern. I will tell you on the inside, when I was arguing—we were having heated arguments about these policies on the inside in the White House Situation Room, and the argument would often be deployed against me and my colleagues that, well, we briefed the following Members of Congress—name, name, name, name, name—and they do not have a problem with it.

So, in other words, these briefings are being used actually to deal with arguments on the inside of the administration, yet I hear what you are saying and what other Members of Congress have said. And so I have to ask myself: Does the Congress think that the oversight process that accompanies these programs is working to their satisfaction?

Senator DURBIN. Well, the answer from me, after 4 years' experience on the Senate Intelligence Committee, it is not even close. Not even close. I mean, there were times when, you know, you wanted to express your disapproval, and there was no means to do it. If you were privy to the most important information, there was no means.

I just have a few seconds left, if I might. I would like to ask Mr. Zelikow his opinion on the notion of closing down the Guantanamo facility. Do you believe that is a good decision?

Mr. ZELIKOW. Yes, sir. In fact, Deputy Secretary of Defense Gordon England and I wrote a paper suggesting that the President announce his determination to close that facility in June 2005.

Senator DURBIN. I am aware of one detainee represented by an attorney in Chicago who was advised by e-mail—after 6 years of incarceration, he was advised by e-mail there were no charges against him—and this was 15 months ago—and that he could be released. He is still at Guantanamo. And it is an indication to me of a serious miscarriage of justice. And there are many now arguing to, I guess, maintain Guantanamo. I cannot imagine, after President Bush and President Obama have made these statements publicly and reached that same conclusion, that that is their position.

But what do you think would be the consequence if we kept Guantanamo open at this point?

Mr. ZELIKOW. When I was on the inside, I would make the argument sometimes that Guantanamo has now become as much sym-

bol as substance. I could ask people here, Has anyone here ever heard of the Federal correctional institution at Marion?

Senator DURBIN. I have. It is in my State.

Mr. ZELIKOW. But everyone in America has heard of Alcatraz. One reason Alcatraz was closed was because it had become a symbol as much as a substance of a particular kind of facility. Then we basically created super-max facilities that were at least maybe just as tough as Alcatraz in some ways that no one has really heard of. And it does not become the same focal point of controversy in the same way.

Guantanamo had become in world public opinion a toxic problem for the United States of America. And so we needed to address that as an issue in our foreign policy.

Senator DURBIN. Do you have any doubt in your mind that if the decision is made that any of these prisoners of Guantanamo would be transferred to Federal correctional institutions that they could be held safely and securely?

Mr. ZELIKOW. Sir, we hold people who are far more dangerous in such institutions, including quite dangerous terrorists like Ramzi Yousef, who is currently residing in a super-max facility inside the United States now.

I will also add that when we—I have had the opportunity on behalf of one of the Federal judges who has been working through the habeas petitions to be asked to examine classified files and provide expert advice on holding these folks. And one of the things that strikes me now and struck me then is we have a vast amount of experience in how to judge the continued incarceration of highly dangerous prisoners since we do this with thousands of prisoners every month all over the United States, including some really quite dangerous people. We routinely make these decisions, and for better or worse, we have worked out a lot of ways of deciding how to make those calls. And I think that that is a whole body of knowledge that actually has not been tapped very well in making judgments about how long you can incapacitate a really pretty broad spectrum of people at Guantanamo, many of whom do not show large signs of future dangerousness.

Senator DURBIN. Thank you very much.

Thank you, Mr. Chairman.

Chairman WHITEHOUSE. Senator Graham.

Senator GRAHAM. Mr. Zelikow, what is the recidivism rate regarding the people who have been released from Guantanamo Bay? Do you know?

Mr. ZELIKOW. There are no reliable statistics on the recidivism rate. What we do know is that some number of people who have been released have been encountered again on the battlefield. Numbers range—dozens, perhaps, of people who have been released have been encountered again. And so as with—that is an important——

Senator GRAHAM. Would that be a miscarriage of justice?

Mr. ZELIKOW. Not necessarily.

Senator GRAHAM. What if it were your son or daughter that was killed by one of these guys? How would you feel about it?

Mr. ZELIKOW. I would feel the same way I would if a parole board had released someone from a prison and then that person

committed a crime. That problem happens all over the country, and we are pretty familiar with it. And sometimes——

Senator GRAHAM. Is there a difference between KSM and a guy that robbed a liquor store?

Mr. ZELIKOW. I beg your pardon?

Senator GRAHAM. Is there a difference between KSM and a domestic criminal?

Mr. ZELIKOW. There sure is, sir, and I think——

Senator GRAHAM. And the only reason I mention it—I generally agree with you. The only reason I mention that is we have got to understand there are two sides to this story. There is very much two sides to this story, and we need to move on and get it right. We need a facility somewhere—Senator Durbin has left. I do not take by his examination that he is volunteering Illinois as the housing site. And I am not going to ask my friend from Rhode Island would he take these people, because if you are waiting for a Member of Congress to stand up and say, "Bring them to my State," you are going to be waiting until hell freezes over, because nobody is going to do that.

But I do believe we need to close Guantanamo Bay. I do believe we can handle 100 or 250 prisoners and protect our national security interests, because we had 450,000 German and Japanese prisoners in the United States. So this idea that they cannot be housed somewhere safely, I disagree. But the decision to put them somewhere is very important. It needs to be well thought out. And the idea that you have to let these people go or try them, I completely disagree with that.

Mr. Turner, how do you believe about that?

Mr. TURNER. Well, I was going to suggest a correction for the record. Senator Durbin was talking about somebody being held for years without being charged. As you well know——

Senator GRAHAM. That is——

Mr. TURNER [continuing].—The theory of a POW is he is being warehoused, he is not considered a wrongdoer. Now, if he has committed a war crime or murdered someone as a prison, you charge him and try him. But international law does not require that military combatants be charged to be detained. Indeed, you mentioned the 400,000-plus mostly German POWs we had in more than 40 States during World War II. Two or three of them got to courts briefly because they claimed American citizenship. They were quickly sent back. None of them got a day in court. They did not get a lawyer. You know, the theory of POWs is they are not wrongdoers; they are enemy soldiers who had the misfortune of falling into the hands of their enemy. You warehouse them and then you send them home. If they have committed crimes, you have the option of charging them and trying them, but you are not supposed to keep them in a civilian prison, and you are not supposed to try them in a civilian court.

Senator GRAHAM. That is exactly right. Now, the point that we are trying to make, Mr. Turner and myself, is that when a member of al Qaeda is captured, all of them are not subject to war crime trials simply by their status. But if an independent judiciary agrees with the military and the CIA that the person is, in fact, the evidence supports the decision that you are a member of al Qaeda, an

enemy combatant, a military threat, there is no requirement under military law to let people go. Do you agree with that, Mr. Addicott?

Mr. ADDICOTT. Yes, I mean, part of the premise here, if we are not using the law of war, we have done a lot of illegal stuff. If we are operating under the law of war, we are doing what we perfectly do in every war. In my opinion, closing down Gitmo is a mistake. It is a propaganda victory for our enemies because we are saying to the world we have something to apologize for, we are hold these people illegally, we are torturing them—which has never occurred at Gitmo. And that is the exact opposite message that we should be sending. We are in a state of war with these people. If you are trying to stop them at the airport, you are too late.

Senator GRAHAM. Right. Well, I agree with that, but I agree with Mr. Zelikow that it is an image problem. See, this is why we need to move on. I mean, the moral high ground, Mr. Addicott, is the place to be. The only way we are going to persuade people on the fence to come our way is to show a difference between us and our enemy.

Now, I do not want to treat these people with kid gloves, but I want to—do you agree with this concept, that once we capture an enemy combatant, it becomes about us, not them.

Mr. ADDICOTT. I think, you know, if we detain that individual under the law of war—and that is an issue that we have not made——

Senator GRAHAM. But we will do things that they will not do to us, and that is good.

Mr. ADDICOTT. Oh, absolutely. I mean, we——

Senator GRAHAM. That is a good thing.

Mr. ADDICOTT. Absolutely.

Senator GRAHAM. That we will treat them better than they will treat us.

Mr. ADDICOTT. Exactly. And that is why my testimony is—the propaganda here is that we have tortured people is a lie. We have tortured no one.

Senator GRAHAM. See, I—if I may just for a moment here, waterboarding at the time of 2002, it was not clear what law it violated. The Geneva Convention did not apply until 2006——

Chairman WHITEHOUSE. That would depend what case you read.

Senator GRAHAM. Yes, well, here is what I am saying. The difference between law enforcement and intelligence gathering is a big difference. And what you would do to a military member, an MP who abused a detainee, would be a violation of the UCMJ. The CIA or the FBI, you are not controlled by the UCMJ, are you, Mr. Soufan?

Mr. SOUFAN. No.

Senator GRAHAM. Was your interrogation Common Article 3 compliant?

Mr. SOUFAN. Not after 9/11. We get instructions that we do not read people, for example, their Miranda rights; we do not follow with a lot of things that we used to do, after 9/11, when it comes——

Senator GRAHAM. I would say that there is no FBI interrogation of a high-value target Common Article 3 compliant simply because Common Article 3 was written to make sure that military forces do

not abuse civilians. It was never written to restrict the ability of a nation to defend itself. And we have made a huge mistake here. We have made two big mistakes. We adopted interrogation techniques from the Inquisition that have survived time because in some cases they do work, Mr. Soufan, but they always come back to bite you.

So I will turn it over now to the Chairman, and hopefully we will find some way to move forward here.

Mr. LUBAN. Senator, may I comment on something that the other witnesses have said?

Chairman WHITEHOUSE. Very briefly.

Mr. LUBAN. First, I do not agree that everybody in Guantanamo is an enemy combatant. We do know that there have been a number of people that the CSRTs have already cleared of being enemies of the United States.

Senator GRAHAM. Right. I agree with that.

Mr. LUBAN. They are still being held there.

Second, I do not agree that people have not been tortured in Guantanamo. I think that it is very clear that Mohamed al-Kahtani was. As was made, I think, perfectly clear in the Schmidt Report, four of the tactics that were used on al-Kahtani later surfaced to worldwide consternation——

Senator GRAHAM. Should President Bush be prosecuted for authorizing these techniques?

Mr. LUBAN. Sir, I do not have any opinion about who should be prosecuted for what was done to al-Kahtani.

Chairman WHITEHOUSE. Well, I have suggested there are too many opinions on that going around. We have prosecutors who look at that stuff professionally, and we should let them do their jobs.

Mr. Zelikow, you have described the reaction to your report, and Senator Graham serves with great distinction on the Armed Services Committee, which has done a report of its own. Without objection, I would ask that 119 to 128, those pages of the report, be admitted into the record. And, selectively, I can report from that that there was a great deal of disagreement with the OLC analysis and serious concerns and objections over some of the legal conclusion reached by OLC; that the Navy General Counsel Alberto Mora called the OLC memo, relied on by the working group in 2003, "profoundly in error and a travesty of the applicable law"; that now Rear Admiral Dalton likewise said that, "To the extent that the working group report relied on the OLC memo, it did not include what I consider to be a fair and complete legal analysis of the issues involved."

There was a chart that was created based on the OLC opinion, and the result of that chart, it had a sort of "green means go" column for techniques that were authorized. Real Admiral Dalton again, "That green column was absolutely wrong legally. It was embarrassing to have it in there. Most, if not all, working group members and judge advocates general disagreed with significant portions of the OLC opinion but were forced to accept it."

"At Mr. Hain's direction," the report continues, "Ms. Walker instructed the working group, instructed them to consider the OLC memorandum as authoritative and directed that it supplant the legal analysis being prepared by the working group action officers."

You in your testimony, Mr. Zelikow, said that when your alternative views, if you will, were made known, you heard that the memo was not considered appropriate for further discussion, to use your phrase, and that copies of your memo should be collected and destroyed.

What do those behaviors tell you about the environment for proper legal debate and discussion about this question at the highest levels of the administration?

Mr. ZELIKOW. It told me that the lawyers involved in that opinion did not welcome peer review of their conclusions and, indeed, would shut down challenges from peers even inside the Government.

Chairman WHITEHOUSE. Lawyers love to debate. It is our nature to quarrel with each other and to exchange views. Is there any suggestion that you would draw that they were less than perfectly confident in their views when they were not willing to subject them to peer review? That is ordinarily viewed as the test of confidence in one's judgments.

Mr. ZELIKOW. Well, the arguments I was making were pretty profound, because if I was right, their whole interpretation of the CID standard was fundamentally unsound and raised really quite grave issues about their interpretation of constitutional law.

Now, they have a couple of options there. One option is either they or the NSC Legal Adviser or the White House Counsel is to say, "Gee, let's take another look at this. The case law you cite has some merit. We will take another look."

Or they could say, "Zelikow, boy, this shows how rusty you are in practicing law. We need to set you straight and tell you why you have just fundamentally misunderstood this whole area of the law."

They did not do either of those things. Instead, what they preferred to do was, C, "We do not want to talk about it."

Chairman WHITEHOUSE. Thank you very much.

I am going to ask a question of Professor Luban. Then I am going to give the distinguished Ranking Member some time, and then I think the hearing is already a bit over time, and I have a plane to catch to an important engagement. So I will make a closing statement after that.

My question for you, Professor Luban, has to do with the *Lee* decision, a Texas decision. I note that Professor Addicott did not cite it in his opinion, despite the fact that he is from Texas and it was a Texas decision. I do not know if we have the diagram, but *Lee* describes waterboarding and describes it as "torture" over and over again. Here is a picture of the actual pages of the Federal Reporter highlighting the U.S. Department of Justice prosecution about all the times in which the court refers to this technique as "torture."

And what is astonishing to me is that in 93 pages where they dig out Medicare reimbursement law as relevant, they do not find a case on point or they do not discuss a case on point in which one of the highest courts in the land, the United States Court of Appeals for the Fifth Circuit, describes waterboarding and called it repeatedly—I think it is 12 times in the opinion—"torture."

I have pressed the Department of Justice on this question because I think it is unimaginable. I have discussed this on the Senate floor. I have pursued it in hearings. Attorney General

Mukasey's response was that it was not relevant because it was brought under the Civil Rights Act, and a case brought under the Civil Rights Act does not relate to a case brought under the torture statute or under the Convention Against Torture. And at that time, I was out of time, and I did not have the chance to follow up. But I would like your legal opinion on that, because it strikes me that the Civil Rights Act under which Sheriff Lee was prosecuted, convicted, and jailed for the crime of waterboarding has no substantive elements of its own. It is a vehicle for enforcing constitutional requirements and for punishing constitutional violations. So that the Civil Rights Act leads directly, with no interference from the statutory point of view, directly to constitutional standards of torture.

If you look at the Convention Against Torture and what OLC itself said about it, the definition of that treaty obligation is also founded, according to OLC itself, directly in the constitutional standards of the United States. And to the extent that the statute against torture applies, it is impossible for Congress by statute to overrule the Constitution. And so as a matter of fundamental law, the statute criminalizing torture cannot create a definition of torture that narrows the constitutional definition.

So it seems to me that wherever you go with this, all roads lead to Rome. Rome is the Constitution, and what it says about torture, and that the distinction that is drawn is yet another false device thrown out there to confuse and distract from the fundamental fact that they either missed the case on point or they found it, hated it, and did not bother to put it in the memo. And I guess we will find out from the OPR which it was.

But what are your comments on this, Professor Luban?

Mr. LUBAN. Senator, I agree with your diagnosis of it. Now, the *Lee* case was decided in 1983. That was before the Convention——

Chairman WHITEHOUSE. Under President Reagan. This was charged by the Department of Justice of President Reagan.

Mr. LUBAN. That is correct. It preceded the Convention Against Torture and the torture statutes, so it is not surprising that it did not mention these because they did not exist yet.

The word "torture" was not defined eccentrically or in a way to change its meaning in the Torture Convention or the torture statutes. It is roughly severe mental or physical pain or suffering.

I took the liberty of looking at dictionary definitions of torture from around—the dictionaries that would have been available to the court that was writing the *Lee* opinion, and that is more or less the same definition that you find in the Oxford English Dictionary edition at that time. So the word had not mysteriously changed its meaning.

The torture statute and the Torture Convention were giving the words very, very common-sense, everyday, non-technical meanings, and what is striking about the *Lee* case is that the court just used the word again and again and again as if it was obvious that this technique of leaning the guy back in the chair, putting the towel over his face, pouring the water on until he thought he was suffocating and started jerking and twitching—they had no problem calling it "torture." The word means exactly the same thing in the dictionary definitions of 1983 as the definition in the treaty and the statutes that followed. So there is absolutely no reason in the world

that we should think that the fact that it was decided as a constitutional case rather than a torture statute case would have led to a different outcome.

Chairman WHITEHOUSE. Thank you, Professor Luban.

Senator Graham.

Senator GRAHAM. Thank you.

Professor, would it be torture to put a spider in the jail cell of a person who was afraid of spiders?

Mr. LUBAN. Conceivably. If that person was afraid——

Senator GRAHAM. I need a black-and-white, yes-or-no answer.

Mr. LUBAN. You know, it depends on whether the person believes——

Senator GRAHAM. We believe the person in the jail cell was part of a terrorist organization who had information about an impending attack, and we know he is afraid of spiders. Would you say that if we put a spider in the jail cell that we would torture that person?

Mr. LUBAN. I would not. There is one circumstance in which the answer would be yes—that is, if he knew or believed—if it was known that he believed that spiders are deadly, because part of the torture statute says that you can inflict mental pain and suffering that is torture by threatening death to someone if it causes mental——

Senator GRAHAM. Isn't the point to it——

Mr. LUBAN. To an ordinary person, no.

Senator GRAHAM. Okay. Well, we are trying to exploit phobias here without—Mr. Addicott has a different view of what happened here in terms of torture. Do you think he is unethical if he arrives at a different view of what happened here?

Mr. LUBAN. I think that he—I do not think that he is unethical for arriving at a different view. I think he would be unethical if he ignored the relevant law and told you that——

Senator GRAHAM. Have you ever met Mr.——

Mr. LUBAN [continuing].—His official legal opinion was——

Senator GRAHAM. Have you ever met Mr. Bybee?

Mr. LUBAN [continuing].—That it was not torture.

Senator GRAHAM. Have you ever met Mr. Bybee?

Mr. LUBAN. I have never met him.

Senator GRAHAM. Have you met any of these people?

Mr. LUBAN. I met——

Senator GRAHAM. So you are basing——

Mr. LUBAN [continuing].—John Yoo once.

Senator GRAHAM. You are basing your opinion because they did not cite a case that you think is dispositive, they are a bunch of crooks? I mean, is that what this comes down to, your opinion that no reasonable lawyer could write a memo and exclude this case without being unethical? Is that what you are telling this Committee?

Mr. LUBAN. This case is just one example out of many. I think that no reasonable lawyer could discuss the commander-in-chief power——

Senator GRAHAM. How could Mr. Addicott——

Mr. LUBAN [continuing].—And not cite *Youngstown*.

Senator GRAHAM. How could Mr. Addicott come to a completely different conclusion about the common definition of torture and not be unethical?

Mr. LUBAN. Well, Senator, I cannot speak for Mr. Addicott, but——

Senator GRAHAM. Well, let him speak for himself.

Mr. LUBAN [continuing].—I will—I would be happy to mention that the *Ireland* case that he leaned his opinion on is not the only European court case on the meaning of torture——

Senator GRAHAM. Well, the fact that you did not tell me about the *Ireland* case——

Mr. LUBAN [continuing].—There are subsequent cases that have called, for example, for hosing somebody down with water——

Senator GRAHAM. Mr. Luban, the fact that——

Mr. LUBAN [continuing].—Torture.

Senator GRAHAM. Please. The fact that you did not tell me about the *Ireland* case, can I assume that you were trying to hide something from me?

Mr. LUBAN. Sir, I am not writing an opinion that is binding on——

Senator GRAHAM. Why doesn't it work both——

Mr. LUBAN [continuing].—The entire executive branch——

Senator GRAHAM [continuing].—Ways?

Mr. LUBAN [continuing].—Of Government.

Senator GRAHAM. Well, you are telling the Nation what is wrong and what is right, and he has told me about a case that I did not even know about that suggests that the techniques in question have been looked at by an international body, and the ones that we used are less severe than the ones that were found not to be torture, and you did not tell me about it. Did you know about it?

Mr. LUBAN. Sir, I am not telling you what is right and wrong. I am telling you——

Senator GRAHAM. Did you know about the case?

Mr. LUBAN [continuing].—What is ethical and unethical conduct——

Senator GRAHAM. Did you know about the case?

Mr. LUBAN [continuing].—By a lawyer.

Senator GRAHAM. Did you know about the case, the *Ireland* case?

Mr. LUBAN. Of course I did.

Senator GRAHAM. Well, you know what? I do not think you are unethical.

Mr. LUBAN. Thank you. I greatly appreciate that, and my——

Senator GRAHAM. Mr. Addicott.

Mr. ADDICOTT. I have also got some further bad news for Mr. Soufan, who I respect very greatly in his interrogation work. If you look at the 2003 Supreme Court case of *Chavez* v. *Martinez*, you have an identical set of facts here. You had an individual that was interrogated while in an emergency room. He had been shot five times in the face by a police official, and Justice Stevens said that that practice was torture. Now, thank goodness he was in the minority——

Senator GRAHAM. This hearing is bordering on——

Mr. SOUFAN. Can I respond to——

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Mr. ADDICOTT. Thank goodness he was in the minority in that case, because Justice Clarence Thomas, of course, rendered——

Chairman WHITEHOUSE. Professor Addicott, wouldn't it depend on—you are not suggesting that it is torture to interview somebody in a hospital?

Mr. ADDICOTT. That is what Justice Stevens suggested in *Chavez* v. *Martinez* in——

Chairman WHITEHOUSE. So it is your opinion as a law professor that *Chavez* v. *Martinez* stands for the proposition that it is torture for law enforcement to ever question a suspect in a hospital?

Mr. ADDICOTT. My opinion is that Stevens was wrong, but I am just saying that is what Stevens' opinion was.

Chairman WHITEHOUSE. You think it stands for the proposition that Stevens would oppose any interrogation of any criminal defendant in a hospital?

Mr. ADDICOTT. That is what he said in his opinion, page 10 of my testimony.

Mr. SOUFAN. Can I respond, please, to some of those assertions. First, the timeline that was criticized before, the memo that——

Senator GRAHAM. Excuse me. We will let you explain, but I have got a few questions, then you can say anything you want, because you are a great American.

Mr. SOUFAN. Okay. Thank you.

Senator GRAHAM. Now, about the interrogation of this suspect, do you know a gentleman named John K-I-R-I-A-K-O-U?

Mr. SOUFAN. Me?

Senator GRAHAM. Yes.

Mr. SOUFAN. No, I do not know him.

Senator GRAHAM. Okay. He gave an interview—he is a retired CIA officer, and he said Abu Zubaydah—is that the guy's name?

Mr. SOUFAN. Yes.

Senator GRAHAM. Did I say it right? He said that they waterboarded the guy and he broke within 35 seconds.

Mr. SOUFAN. Is this question for me, sir?

Senator GRAHAM. Yes.

Mr. SOUFAN. Well, last week, he retracted that and he said he was misinformed, and actually he was not at the Abu Zubaydah location.

Senator GRAHAM. Okay. So he just——

Mr. SOUFAN. He retracted that, yes, sir. That is one of the things that was mentioned before.

Senator GRAHAM. Right, right.

Mr. SOUFAN. And now we know it is 83 times, not 35 seconds.

Senator GRAHAM. Now, do you believe that any good information was obtained through harsh interrogation techniques? Can you say that there was no good information?

Mr. SOUFAN. Well, from what I know on the Abu Zubaydah, I would like you to evaluate the information that we got before——

Senator GRAHAM. Well, the Vice President is suggesting that there was good information obtained, and I would like the Committee to get that information. Let's have both sides of the story here.

One of the reasons these techniques have survived for about 500 years is apparently they work.

Mr. SOUFAN. Because, sir, there are a lot of people who do not know how to interrogate, and it is easier to hit somebody than outsmart them.

Senator GRAHAM. I understand that you believe you got it right and you know how to do it and these other people do not. I understand. I understand that. In many ways, I agree with you. But this idea that you are the complete knowledge of what happened in terms of interrogation techniques and what was gained is not accurate. Your testimony is not a complete repository of what happened during these interrogation techniques of high-value targets. There are other interrogations going on, and there is an allegation made that these interrogations yielded information that protected Americans. If we are going to talk about it, let's talk about it in complete terms.

Chairman WHITEHOUSE. And to be fair to the witness, Senator, I think he has not represented himself——

Senator GRAHAM. No, and I do not think——

Chairman WHITEHOUSE.—as anything more than somebody who can——

Mr. SOUFAN. I mentioned my own personal experience.

Chairman WHITEHOUSE.—that arose from the——

Senator GRAHAM. Right, and I have nothing but the——

Chairman WHITEHOUSE.—interrogation of Abu Zubaydah.

Senator GRAHAM.—highest regard for this gentleman. I just know this is not it. This is not the whole story. And the point is, Do we need to keep doing this? I think we have cleaned up this mess. We have got it right, generally speaking. And the more we get into this, the more we are going to make it chilling for the next group of people who are asked to defend this Nation, and that leads me to my last question.

Do you believe it would be wrong for President Obama to authorize a technique outside the Army Field Manual if the CIA told him they had a high-value target that they believe possesses information about an imminent attack?

Mr. SOUFAN. I believe that they should ask other professional interrogators to evaluate——

Senator GRAHAM. I am telling you what the——

Mr. SOUFAN.—that detainee.

Senator GRAHAM. Do you believe that the CIA—do you think Leon Panetta is qualified for his job?

Mr. SOUFAN. Well, I believe he is extremely qualified for his job. I did not agree with a lot——

Senator GRAHAM. Let me tell you, these—I am going to read something to you.

Chairman WHITEHOUSE. If we are going to get into the qualifications of Panetta.

Senator GRAHAM. Yes, this is important, though.

Mr. SOUFAN. Right.

Senator GRAHAM. Ron Wyden asked him, "If a person has critical threat information, urgent information, and you need to be able to secure that information," he asked Panetta, "What would you do?"

"In that particular situation that you mentioned, where you have someone who could be a ticking time bomb and it is absolutely necessary to find out what information that individual has, I think we

would have to do everything possible, everything possible within the law to get that information. If we had a ticking time bomb situation, obviously whatever was being used I felt was not sufficient, I would not hesitate to go to the President of the United States and request whatever additional authority I would need. But obviously I will again state that I think this President would do nothing that would violate the laws that were in place."

Having said——

Chairman WHITEHOUSE. Wrap it up. I am sorry.

Senator GRAHAM. Okay. Wrap it up. Would the President of the United States, President Obama, be wrong in considering a request from the CIA to engage in interrogation techniques beyond the Field Manual but that yet were lawful?

Mr. SOUFAN. Sir, from the quote that you read, the key word in it from Director Panetta, "within the law." Within the law, yes, the President can authorize whatever——

Senator GRAHAM. Right. Is the Army Field Manual the complete law on what is——

Mr. SOUFAN. No. It is an outline for interrogations.

Senator GRAHAM. Thank you.

Chairman WHITEHOUSE. All right. Thank you all very much. I appreciate——

Mr. SOUFAN. Can I—can I just——

Chairman WHITEHOUSE. I am sorry. I have to end the hearing. I have a plane that I cannot miss, and I just want to wrap up by adding the following statements into the record: from Mike Ritz, a former U.S. military interrogator; from Peter Shane, a professor at Ohio State University, Moritz College of Law; from Colonel Steve Kleinman, U.S. Air Force Reserve, a professional interrogator; from Matthew Alexander, a professional interrogator in the U.S. Air Force Reserve and author of "How to Break a Terrorist"; from Elisa Massimino of Human Rights First; the Senate Armed Services Committee report I think I already put into the record; and the testimony of Michael Stokes Paulson.

I would like to close with the words of Matthew Alexander from his statement. "As an interrogator in Iraq, I conducted more than 300 interrogations and supervised more than 1,000. I led the interrogations team that located Abu Musab al-Zarqawi, the former leader of al Qaeda in Iraq and one of the most notorious mass murderers of our generation. At the time that we killed Zarqawi, he was the No. 1 priority for the United States military, higher than Osama bin Laden. I strongly oppose the use of torture or abuse as interrogation methods for both pragmatic and moral reasons."

"There are many pragmatic reasons against torture and abuse. The first is the lack of evidence that torture or abuse as an interrogation tactic is faster or more efficient than other methods. In my experience, when an interrogator uses harsh methods that fit the definition of abuse, in every instance that method served only to harden the resolve of the detainee and made them more resistant to interrogation."

"The second pragmatic argument against torture and abuse is the fact that al Qaeda used our policy that authorized and encouraged these illegal methods as their No. 1 recruiting tool for foreign fighters. While I supervised interrogations in Iraq, I listened to a

majority of foreign fighters state that the reason they had come to Iraq to fight was because of the torture and abuse committed at both Abu Ghraib and Guantanamo Bay. These foreign fighters made up approximately 90 percent of the suicide bombers in Iraq at that time. In addition to leading and participating in thousands of attacks against coalition and Iraqi forces, it is not an exaggeration to say that hundreds, if not thousands, of American soldiers died at the hands of these foreign fighters. The policy that authorized and encouraged the torture and abuse of prisoners has cost us American lives."

"I deployed to the war with four other Air Force special agents with experience as criminal investigators. We brought with us skills and training that were unique compared to our Army counterparts. We learned to interrogate criminal suspects using relationship building and non-coercive police investigative techniques. I learned quickly that al Qaeda has much more in common with criminal organizations than with traditional rank-and-file soldiers. I used techniques permitted by the Army Manual under the terms psychological ploys, verbal trickery, or other non-violent or non-coercive subterfuge to great success, and I taught these techniques to other members of my interrogation team."

"I also want to address the so-called ticking time bomb scenario that is so often used as an excuse for torture and abuse. My team lived through this scenario every day in Iraq. The men that we captured and interrogated were behind Zarqawi's suicide bombing campaign. Most of our prisoners had knowledge of future suicide bombing operations that could have been prevented with the quick extraction of accurate intelligence information. What works best in the ticking time bomb scenario is relationship building, which is not a time-consuming effort when conducted by a properly trained interrogator and non-coercive deception."

"Contrary to popular belief, building a relationship with a prisoner is not necessarily a time-consuming exercise. I conducted point-of-capture interrogations in Iraqi homes, streets, and cars, and I discovered that in these time-constrained environments where an interrogator has 10 or 15 minutes to assess a detainee and obtain accurate intelligence information, relationship building and deception were again the most effective interrogation tools. It is about being smarter, not being harsher."

"When I took the oath of office as a military officer, I swore to uphold and defend the Constitution of the United States of America, which specifically prohibits cruelty toward any person in the Eighth Amendment. In addition, torture and abuse are inconsistent with the basic principles of freedom, liberty, and justice upon which our country was founded. George Washington during the Revolutionary War specifically prohibited his troops from torturing prisoners. Abraham Lincoln prohibited Union troops from torturing Confederate prisoners. We have a long history of abiding by American principles while conducting war."

"I can offer no better words than those of General George C. Marshall, the orchestrator of the Allied victory in Europe during World War II, who stated, 'Once an army is involved in war, there is a beast in every fighting man which begins tugging at its chains.

A good officer must learn early on how to keep the beast under control, both in his men and in himself.' "

"We are smart enough to effectively interrogate our adversaries, and we should not doubt our ability to convince our detainees to cooperate. American culture gives us unique advantages that we can leverage during interrogations—tolerance, cultural understanding, intellect, and ingenuity."

"In closing, the same qualities that make us great Americans will make us great interrogators."

I had planned longer remarks, but given the hour, I think I will conclude with those words, which are very helpful, and I would add for the record pages from a book called "Camp 020," describing the techniques employed by British Military Intelligence when the Nazi threat loomed over their country, presumably a threat at least equal to the threat of al Qaeda to our country, and their findings, among other things, that violence in interrogations is inappropriate. For one thing, it is the act of a coward; for another, it is unintelligent.

Senator GRAHAM. Well, thank you, Mr. Chairman. Maybe we will end this hearing with some agreement. If we are talking about do I agree with what the—was it the lieutenant that you read, the statement?

Chairman WHITEHOUSE. Michael Alexander.

Senator GRAHAM. Yes. I mean, I generally agree with that. I have been a military lawyer all my life. I believe in the Geneva Convention. I believe that the moment we capture somebody, the obligation falls upon us to abide by the Convention. And if you do not want to live by the Convention, get out of it.

Now, there are people who have a different view. There are people, quite frankly, Mr. Soufan, that if we called as witnesses would probably graphically describe what they did and the information they received gave us knowledge about the enemy we would not have had otherwise.

Chairman WHITEHOUSE. I am terribly sorry to have to do this.

Senator GRAHAM. Can I——

Chairman WHITEHOUSE. Yes.

Senator GRAHAM. Okay.

Chairman WHITEHOUSE. What I would like to do is to close the hearing at the conclusion of Senator Graham's remarks. There is a week to add any testimony that anybody wishes. I cannot miss this plane. I apologize very much.

Senator GRAHAM. You go.

Chairman WHITEHOUSE. You have the floor, and at the conclusion of your remarks, the hearing is over.

Senator GRAHAM. [Presiding.] Thank you. They will not be long. Go to the airport, and you will get screened, but that is good.

Now, the point that I am trying to make is that how you come down on this situation does not mean you are unethical and it does not make you a criminal. I have always believed that when you engage in harsh interrogation techniques like waterboarding, eventually it comes back to bite you. And it has. It is just not, I think, necessary to win the war.

But the people who were devising these interrogation techniques right after 9/11 were not criminals. They were what you said, Mr.

Turner. They were Americans who were afraid that the next attack is on its way. And if you are going to be balanced about this——

[Protester interrupts.]

Senator GRAHAM. Have a good day.

If you are really going to be balanced about this, that needs to be told, too. And we need to look forward. And Abraham Lincoln suspended habeas corpus, OK? That is part of his legacy, is he thought the Nation was coming apart, and he was right. And he was trying to keep it together. A hundred thousand Japanese Americans were put in jail for being nothing other than Japanese. Did we go back and try anybody for that abuse?

All I am saying is that these interrogation techniques were shared with Members of Congress who somehow cannot remember what they are told. And to me, that is the best evidence that we were trying to make policy, not violate the law.

Now, Mr. Luban, I do not believe these people are unethical. I just think they did what Mr. Turner said. They made some mistakes out of fear. And we have learned from those mistakes. And here is my biggest fear: that if we keep doing this, and I bring a CIA agent in that tells the country, "Let me tell you what I got when I waterboarded somebody or what I did to this person, let me tell you what I learned," we are going to tear this country apart.

I agree with you, but there are other people out there who took a different view and understood the law was subject to different interpretations, and the British may not have tortured people in Northern Ireland, but they turned the people in Northern Ireland against them. That is the downside of what they were doing. They were legally probably not torturing people. I agree with you, Mr. Addicott. But they made a mistake when it came to winning over the people of Northern Ireland. And that is the point I am trying to make.

We have made mistakes in this war. We are going to make new ones. And I do not want to take off the table for this President the ability to do things beyond the Army Field Manual to protect this Nation. If we restrict ourselves to the Army Field Manual, shame on us. It is the Field Manual, written for soldiers to make sure they do not get themselves in trouble, not to get intelligence about the next impending attack. Isn't that right, Mr. Turner?

Mr. TURNER. I agree.

Senator GRAHAM. It is a guide to the soldier in the field. It was never written to be the end-all and be-all of how you protect this Nation. And if we adopt that theory, we have made a huge mistake and learned nothing from the past. And if we put it online and that is the only way we can interrogate somebody, we are stupid.

So let's don't misunderstand the mistakes of the past to the point that we restrict ourselves in the future from being good Americans, but understanding that we are at war. We have put people in Guantanamo Bay that were not enemy combatants. The net was cast too large, and some people have been put there that should have never gone. There are some people who have been let go that should never have been let go.

My goal is to have a process, Mr. Zelikow, that would allow us as a Nation to hold our head up high and say no one is in jail at Guantanamo Bay because Dick Cheney said so. The only people

that are in jail in Guantanamo Bay are there because the evidence presented to an independent judiciary by our military passed muster with the judicial system. They are there because they are a military threat. And that when you try these people, they are tried not because we hate them, but because of what they did, and that that decision will go all the way up to the Supreme Court for review.

There is a way to move forward. There is a way to learn from the past. But if we look backward and we get the wrong message, we are going to make us less safe. The message coming from the mistakes of the past are not unilaterally surrender, not to treat these people as common criminals, because they are certainly not. The message from the past is when you abide by American principles, you are stronger than your enemy. When you go backward from those principles, it comes back to bite you. But the principle that I am advocating is an aggressive, forward-leaning, "hit them before they hit us" attitude. Find out what they are up to. Find out where they are getting their money and keep them on their back foot. And we can do that, Mr. Soufan, without having to go back to the Inquisition.

Mr. SOUFAN. I totally agree with you.

Senator GRAHAM. And I am so afraid that what we are doing here today is going to chill out the legal advice to come in the future and that we are putting men and women at risk of having their reputations ruined in the prosecution or civil lawsuits who did nothing but try their best to defend this Nation.

Thank you all.

[Whereupon, at 12:35 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record.]

QUESTIONS AND ANSWERS

Questions for the Record for Professor David Luban

(1) Some critics of investigations into the Bush Administration OLC have suggested that we shouldn't punish differences of opinion among lawyers relating to the legality of the alternative interrogation techniques. Based on your review of the OLC memos, is it your opinion that the criticism of these memos by you and others represents nothing more than a disagreement with their ultimate conclusions, or something more?

The criticism of the memos is not merely disagreement with their ultimate conclusions. The criticism is that the memos ignored contrary legal authority, made up statutory requirements out of whole cloth (the Bybee memo's definition of "severe pain," the Levin and Bradbury memos' requirement that "severe physical suffering" must be prolonged), misrepresented what a legal authority said in at least one place, and employed arguments so stretched that it is hard to believe that lawyers of such great talent and intelligence could have done so merely by mistake. These departures from ordinary standards of legal analysis are evidence that the authors were writing result-oriented memoranda rather than the candid and independent analyses required by legal ethics rules. Please note that I am not suggesting that this evidence is proof positive of bad faith. That is for investigators to determine.

(2) Professor Michael Stokes Paulsen has submitted a statement for the record in which he rejects criticisms of the interrogation memoranda. He writes:

> The quality of the analysis (despite my quarrels with certain points) is clearly well within professional standards. This is not even a close question. There is simply no plausible, objective basis on which it could be said that the legal opinions expressed were illegitimate or unprofessional.

How do you respond to this conclusion? Professor Paulsen appears to be ruling out the possibility that OPR could validly conclude that OLC attorneys failed to meet professional standards in drafting the interrogation memoranda. Is that a correct conclusion, even assuming that Professor Paulsen's reading of the President's power in foreign relations is correct?

Much as I admire Professor Paulsen as a constitutional scholar, I completely disagree with his assessment of the torture memos. Without simply repeating my written testimony, let me mention some of the specifics that went into my diagnosis. A legal scholar writes in a law review article, "The literal law of self-defense is not available to justify...torture." The Bybee memo twists this to say, "interrogation... using methods that might violate [the anti-torture statute] would be justified under the doctrine of self-defense." Quite frankly, I don't see how Professor Paulsen could describe this distortion of legal authority as "clearly well within professional standards" without debasing the very idea of professional standards. Lawyers are, after all, forbidden from misrepresentation. (Model Rules of Professional Conduct, Rule 8.4(c).) The Bybee and Bradbury memos approve the legality of waterboarding without even mentioning that a U.S. Court of Appeals had described waterboarding as "torture," or that the U.S. military had court-martialed soldiers for waterboarding and prosecuted a Japanese general for doing it; the Bybee

memo approves the defense of necessity in torture cases without mentioning a recently-decided Supreme Court case that questions whether the defense of necessity even exists in U.S. criminal law; and it declares presidential power to torture captives despite a federal law prohibiting torture, without so much as mentioning the Youngstown *case, which sets out the basic framework for constitutional analysis of presidential power. Again, I can't believe that Professor Paulsen really thinks that cavalier neglect of clearly relevant precedent meets professional standards. If he does, I must disagree with him. (It is difficult to know whether Professor Paulsen was fully aware of the memos' significant omissions when he drafted his statement, because he does not discuss the specifics of the memos.) Much of Professor Paulsen's written statement centers on the Bybee memo's aggressive views about the President's commander-in-chief power, and perhaps he approves of the memo because he agrees with its expansive view of presidential power. Even here, however, I find it hard to believe that Professor Paulsen has fully considered whether the failure to discuss* Youngstown *conforms to professional standards of legal analysis. I should think he does not believe that. After all, in 2002, Professor Paulsen wrote that* Youngstown*'s opinions "have proven enduringly relevant to nearly every constitutional issue of war and peace, foreign policy, domestic legislative power, presidential power, and even judicial power that has confronted the United States in the past fifty years." (Michael Stokes Paulsen,* Youngstown Goes To War, *19 Constitutional Commentary 215, at 215-16 (2002)) He also wrote: "In the world after September 11, 2001, there can no longer be any doubt: Youngstown Sheet & Tube Co. v. Sawyer is one of the most significant Supreme Court decisions of all time. The decision resolved a major constitutional crisis, and it did so during time of war and at a crucial juncture in the nation's political history. It resolved the crisis correctly, with both immediate and long-term important effect." Id. at 215. Given his published views, I cannot fathom why Professor Paulsen thinks that a ground-breaking assertion of presidential power to override federal laws which ignores the* Youngstown *framework is "clearly well within professional standards."*

(3) Everyone has seen lawyers advocating forcefully and skillfully in movies, television, plays, etc. In general, we allow lawyers to make novel legal arguments to benefit their clients – even if it means a criminal avoiding a conviction or a party losing out on a rightful claim because of technicality. Why is this situation different? Why couldn't the OLC attorneys simply give their client, the United States, the legal reasoning it wanted?

There is a large, and long-recognized, difference between the lawyer's roles as advocate and adviser. Movies and television depict dramatic courtroom battles: one advocate against another. The structure of the adversary system is that each side will counteract the excesses and overstatements of the other side, and an impartial judge will decide which view of the law is better. The underlying theory is that neither side should pull its punches, because judges can make better decisions about the law hearing the two sides' arguments in their most uninhibited form.

The legal adviser's role is totally different. The lawyer gives clients advice about the law in confidential conversations or memos. There is no adversary to counteract misstatements, and no impartial judge to decide whether the lawyer's view is right. The lawyer's opinion will govern the client's conduct. When a client comes to a lawyer to ask "I want to do this, but is it legal?" the lawyer is required by long-standing ethics rules to give a candid, independent analysis.

Model Rule 2.1—the ABA's rule for lawyers as advisers—says this outright, and in its comments it emphasizes that sometimes this may mean telling the client something that the client does not want to hear. The rule of law depends on lawyers' independence and candor when they advise clients on the legality of their actions: we count on people to obey the law, and when they ask a lawyer what the law requires, we count on the lawyer to tell them.

You ask: "Why couldn't the OLC lawyers simply give their client, the United States, the legal reasoning it wanted?" The answer is: because wishing something is legal doesn't make it so. If clients could do whatever they want simply by getting their lawyers to write dispensations to them, there would be no such thing as law.

(4) Are you concerned that ethics investigations by OPR will "chill" advice-giving in the executive branch in the future? Should lawyers in the executive branch be unconstrained by ethical principles in the future? Are ethical lawyers an impediment to national security?

(1) I am not concerned that ethics investigations will chill future advice-giving in the executive branch. The investigation concerns whether the lawyers twisted and distorted the law to enable torture. It is a rare event—I know of no similar investigation of the OLC in its 75-year history. Executive branch lawyers will know from this history that honest advice-giving, which fully analyses the law both for and against the conclusion the lawyer reaches, insulates them from the kind of criticism that led to these investigations. Rather than chilling them, the investigation should reassure them that honest opinion-writing offers a safe harbor from ethics charges. Fundamentally, we WANT to deter lawyers from secretly rewriting the law, and we want to deter lawyers from enabling torture.

(2) The basic principles of legal ethics should continue to bind executive branch lawyers in the future. There is simply no reason to exempt government lawyers from the same standards of conduct that we rightfully expect other lawyers to adhere to. Congress emphasized this when it enacted the McDade Amendment (28 U.S.C. § 530B), which requires Department of Justice lawyers to conform to the ethics rules of their state bars.

(3) Far from being impediments to national security, ethical lawyers enhance national security. National security is a paramount concern of both political branches of government, and both branches embody their national security decisions in laws and regulations. The job of ethical legal advisers is to interpret those laws and regulations candidly and honestly. If they don't, the legal advisers are undercutting the national security policy of the United States. Some officials may think they know better; they may pressure lawyers to tailor their legal advice to the officials' personal brainstorms about what is good for national security. But rewriting the law because officials have brainstorms is far more likely to harm national security than to help it. For the last five years, the United States has been playing defense worldwide on the torture issue, and that is in large part because the OLC lawyers decided to ratify somebody's

interrogation brainstorms rather than following the law. In my testimony, I described this episode as an "ethical train wreck," and I did not pick my image carelessly. The torture scandal has tarnished the U.S. image worldwide, diverted government resources to damage control, and created a mess that we are still cleaning up five years later. It is hard to believe that infuriating potential HUMINT sources worldwide has helped rather than hurt U.S. national security. Lawyers are supposed to keep their clients out of trouble, not plunge them into it.

SUBMISSIONS FOR THE RECORD

Testimony of
Professor Jeffrey F. Addicott[1]
St. Mary's University School of Law

Before the
Senate Judiciary Committee, Subcommittee on Administrative Oversight and the Courts.

"What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration"

Room 226 Dirksen Senate Office Building
Washington, DC

May 13, 2009

The purpose of this testimony is to provide information from a legal perspective on the issue of "enhanced interrogation practices" used on certain al-Qa'eda operatives by CIA interrogators during the Bush Administration as approved in the recently released memorandums from the Office of the Legal Counsel, Department of Justice. In the context of the approved interrogation methodologies, the primary concern is associated with the CIA's use of "waterboarding" on at least three al-Qa'eda high value detainees.

Since the al-Qa' eda detainees are not entitled to prisoner of war status, international law does not forbid interrogation. The American position - both in the Bush Administration and the Obama Administration - on the question of torture is that the United States does not engage in torture, either in questioning or housing detainees. One matter is fundamentally certain: if al-Qa'eda is to be kept at bay, the United States must rely on detainee interrogation as an integral antiterrorist tool. The need for the interrogator to get information to protect the lives of innocents is a legitimate and perfectly lawful exercise. By its very nature, even the

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most reasonable interrogation places the detainee in emotional duress and causes stress to his being—both physical and mental.

On September 6, 2006, the DOD issued its new military detainee and terror suspect treatment guidelines. The DOD Directive 2310.01E is entitled: *The Department of Defense Detainee Program*. In announcing the new rules, President Bush also informed the public that 14 "high value" terror suspects had been transferred from undisclosed CIA locations to Guantanamo Bay. This speech was the first official acknowledgement of the existence of the previously secret CIA detainee program. President Bush said that the CIA program had been authorized by a secret presidential directive issued on September 17, 2001. Relating that the program was subject to internal legal review by the Department of Justice, the Bush Administration promoted the legal view that the CIA detainees were wartime detainees held under the law of war. Believing that the CIA program had "saved lives," President Bush confirmed that with the transfer of the 14 there were "now no terrorists in the CIA program." Further, the Bush Administration denied that any of the CIA detainees were subjected to interrogation techniques that violated international or domestic law. The "waterboarding" interrogation technique used on a handful of detainees in the CIA program was viewed as constituting a level of force that did not rise to the level of torture under the Torture Convention.

Allegations of "torture" role off the tongue with ease. Recognizing that not every alleged incident of interrogation or mistreatment necessarily satisfies the legal definition of torture, it is imperative that one view such allegations with a clear understanding of the applicable legal standards set out in law and judicial precedent. In this manner, allegations or claims of illegal interrogation practices, e.g., waterboarding, can be properly measured as falling above or below a particular legal threshold. In my legal opinion, the so-called enhanced interrogation practices detailed in the subject legal memorandums did not constitute torture under international law or U.S. domestic law.

Torture as an instrument of the State to either punish or extract information from certain individuals has a long and dark history which need not be fully recounted here. Suffice it to say that in the West, the practice can be traced to the Romans who codified the use of torture as part of the Roman criminal law. In the modern era, by fixed law and customary practice, the prohibition on torture is now universal in nature. Nevertheless, even though no State allows torture in its domestic law, the practice continues to flourish. It is estimated that one in four States regularly engages in the torture of various prisoners and detainees. Added to this paradox is the dilemma that some of the acts that should clearly constitute

torture do not enjoy a uniformity of definition within the international community. As one legal commentator rightly pointed out, "The prohibition of torture ... is not, itself, controversial. The prohibition in application, however, yields endless contention as each perpetrator [State actor] seeks to define its own behavior so as not to violate the ban."

Before exploring the common international legal definition of torture, it is useful to survey the general understanding of the term. Torture comes from the Latin verb "torquere" (to twist) and is defined in leading dictionaries as follows: "Infliction of severe physical pain as a means of punishment or coercion;" "[t]he act of inflicting excruciating pain, as punishment or revenge, as a means of getting a confession or information, or for sheer cruelty;" "[t]he infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure."

Certainly the red thread in these definitions is a combination of two essential elements: (1) the infliction of severe physical pain to the body or mind used to; (2) punish or obtain information. International law adopts this formula but sharpens it by stipulating that a State actor must carry out the act of torture. Thus, one may describe certain criminals as torturing their victims during the commission of a particularly gruesome murder, but such criminal acts carried out by non-State actors are not violations of the international law on torture. In addition, international law expands the prohibition of torture to include other less abusive acts commonly designated in the world community as "other acts of cruel, inhuman, or degrading treatment or punishment," which is shortened simply to "ill-treatment."

Currently, the 1984 United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) is the primary international agreement governing torture and ill-treatment. As suggested by the title, the point which had served as a source of controversy in earlier international treaties and agreements was more fully addressed in the Torture Convention—the distinction between "torture" and "other acts of cruel, inhuman, or degrading treatment or punishment." While both acts were previously prohibited in other documents and conventions, for the first time the Torture Convention spelled out the obligations and consequences attendant to each type of act. Still, the Torture Convention did not exhibit the same care in defining what it meant by ill-treatment as it did with regard to torture. Without question, the Torture Convention devoted far more attention to crafting the meaning of the term torture, which it defined as:

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> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of ... a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

According to the Torture Convention, for torture to exist in the context of an interrogation the following criteria must be present: (1) the behavior must be based on an intentional act; (2) it must be performed by a State agent; (3) the behavior must cause severe pain or suffering to body or mind; and (4) it must be accomplished with the intent to gain information or a confession. In adopting the Torture Convention, the United States Senate provided the following reservations which require specific intent and better define the concept of mental suffering:

> [T]he United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Since Article 2 of the Torture Convention absolutely excludes the notion of exceptional circumstances to serve as an excuse to the prohibition of torture. Indeed, if any of the CIA's enhanced interrogation techniques are deemed to be torture, the United States must prosecute those who ordered the acts, those who approved the acts, and well as those who performed the acts. Article 2 states: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a

justification for torture."

As noted, the phrase "other acts of cruel, inhuman, or degrading treatment or punishment," e.g., "ill-treatment," is not defined in the Torture Convention. It is just stated. Nevertheless, the Torture Convention certainly obliges each State party to the document to "undertake to prevent ... other acts of cruel, inhuman, or degrading treatment or punishment." Article 16 of the Torture Convention is the only part of the treaty that addresses ill-treatment.

Since the Torture Convention desires to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world," the distinction rests in the fact that torture and ill-treatment are viewed as two limbs of the same formula with torture, quite understandably, being predominant. Thus, while all acts of torture must necessarily include ill-treatment, not all acts of ill-treatment constitute torture. Clearly, a greater stigma is associated with the insidious evil of torture so that all intuitively realize that international law forbids torture, even if few are cognizant of the fact that ill-treatment is also prohibited. In turn, interrogation practices that do not rise to the level of ill-treatment may be repugnant by degree, but would be perfectly legal under the Torture Convention (such conduct may still be a violation of other national or international laws such as Common Article 3 of the Geneva Conventions which prohibits "humiliating and degrading treatment").

Article 4 of the Torture Convention requires each State Party to ensure that torture is a criminal offense under its domestic criminal law. Currently, torture is defined in 18 U.S.C. § 2340 as:

> [A]n act committed by a person acting under the color of the 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.

18 U.S.C. § 2340A makes it a federal offense for an American national to either commit or attempt to commit torture outside the United States. Unfortunately, case law on this statute is so lacking that there exists no firm guidance as to which techniques would be considered torture.

Article 12 dictates that each State Party investigate any allegations of torture under its jurisdiction when reasonable grounds exist to believe that such acts have occurred. Article 7 further requires the State Party to either extradite the alleged

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torturer or "submit the case to competent [domestic] authorities for the purpose of prosecution." Also, Article 15 excludes all statements elicited through torture from evidence, while Article 14 requires the State Party to make compensation to the victims of torture.

In contrast, Article 16 has no similar requirements mandating that ill-treatment be criminalized in domestic penal codes, requiring the prosecution of individuals charged with ill-treatment, or limitations on "illegal rendition." In addition, Article 16 has no requirement that victims of ill-treatment be compensated or that statements obtained as the fruit of ill-treatment must be excluded from evidence at a criminal trial. According to commentator Matthew Lippman, "[t]he failure to strengthen article [sic] 16 appears to have been based on a belief that the concept of cruel, inhuman or degrading treatment or punishment was too vague a legal standard upon which to base legal culpability and judgments."

Real world enforcement mechanisms to ensure compliance with the Torture Convention's prohibition of torture and ill-treatment are weak. This is because the individual State Party is expected to police itself and, if this fails, the only remaining hope for meaningful pressure is international condemnation from the court of world opinion. While the Torture Convention did create an investigatory body called the Committee Against Torture, its responsibilities revolve around a complex maze of reports and recommendations which, as one might anticipate, have generally accomplished very little. In fact, the biggest stick that the Committee Against Torture wields is the threat that it may provide an unfavorable summary of a particular country in its yearly report. As always, the chief enforcement tool in a democracy is the rule of law coupled with the judgment of its citizens - civilized peoples are repulsed by the concept of torture.

In the Anglo-Saxon legal tradition, we generally look to authoritative judicial decisions to define key terms in treaty and legislation. Perhaps the leading international case in the realm of defining "severe pain or suffering" in the context of interrogation practices against suspected "terrorists" comes from the often cited European Court of Human Rights ruling, *Ireland v. United Kingdom*.[2] By an overwhelming majority vote (16-1), the *Ireland* court found certain interrogation practices (called the "five techniques") by English authorities to investigate suspected terrorism in Northern Ireland to be "inhuman and degrading," i.e., ill-treatment, under the European Convention on Human Rights, but not severe enough to rise to the level of torture (13-4). According to the Court, the finding of

[2] *Ireland vs. United Kingdom*, 2 EHRR 25 (1978).

ill-treatment rather than torture "derives principally from a difference in the intensity of the suffering inflicted." In *Ireland*, the Court considered the use of five investigative measures known as "the five techniques" which were practiced by British authorities for periods of "four or five" days pending or during interrogation sessions.

- Wall-standing: Forcing the detainees to stand for some period of hours in a stress position described as "spreadeagled against the wall, with their fingers put high above their head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers." Wall-standing was practiced for up to 30 hours with occasional periods for rest.
- Hooding: Placing a dark hood over the head of the detainee and keeping it on for prolonged periods of time except during interrogation.
- Subjection to noise: Holding the detainees in a room where there was a continuous loud and hissing noise.
- Deprivation of Sleep: Depriving detainees of sleep for prolonged periods of time.
- Deprivation of Food and Drink: Reducing the food and drink to suspects pending interrogations.

To the reasonable mind, considering the level of interrogation standards set out in the *Ireland* case, the conclusion is clear. Even the worst of the CIA techniques authorized by the Department of Justice legal memorandums – waterboarding – would not constitute torture (the CIA method of waterboarding appears similar to what we have done hundreds and hundreds of times to our own military special operations soldiers in military training courses on escape and survival).

Another source of guidance to distinguish a lawful interrogation from an interrogation that crosses the line into ill-treatment or torture is found in the 1999 Israeli High Court decision entitled *Public Committee Against Torture v. State of Israel.*[3] In the context of outlawing certain interrogation practices by Israeli officials, the High Court considered how otherwise reasonable interrogation practices could become illegal if taken to an extreme point of intensity. Playing music to disorient a subject prior to questioning is not illegal per se, but if the music is played in a manner that causes undue suffering, it is arguably a form of ill-treatment or torture. Depriving subjects of sleep during a lengthy interrogation process may be legitimate, but depending on the extent of sleep deprivation, could

[3] *Public Committee Against Torture v. Israel*, H.C.J. 5100/94 (1999).

also constitute ill-treatment or torture. The use of handcuffing for the protection of the interrogators is a common and acceptable practice, so long as the handcuffs are not unduly tightened so as to cause excess pain. Similarly, the use of blindfolds is acceptable if done for legitimate security reasons, while the use of sacks over the head without proper ventilation is unacceptable.

The Supreme Court of Israel found that the primary techniques used by the Israeli General Security Service (GSS) involved the following:

- Shaking: The practice of shaking was deemed to be the most brutal and harshest of all the interrogation methods. The method is defined as "the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly."
- Shabach Position: The practice of binding the subject in a child's chair "tilted forward towards the ground, in a manner that causes him real pain and suffering." Other reports amplify the method and add that the subject's head is "covered in a hood while powerfully deafening music is emitted within inches of the suspect's head."
- Frog Crouch: The practice of making the subject crouch on the tips of their toes for five-minute intervals.
- Excessive Tightening of Handcuffs: The practice of inflicting injury to a suspect by excessive tightening of handcuffs or through the use of small handcuffs.
- Sleep Deprivation: The practice of intentionally keeping the subject awake for prolonged periods of time.

In ruling that there existed an absolute prohibition on the use of torture as a means of interrogation, the Israeli Supreme Court held some of the practices of the GSS violated Israel's Basic Law—Human Dignity and Liberty. Specifically, the Court found that shaking, the use of the shabach, the use of the frog crouch, and, in certain instances, the deprivation of sleep, were all illegal and prohibited investigation methods.

In tandem with international law, U.S. domestic law prohibits torture. The American experience has not been guiltless in terms of the sanctioned use of torture and ill-treatment to elicit confessions in criminal investigations, particularly in the early part of the last century. By 1931, the appalling practice of torture by local law enforcement had become so common throughout the nation that a special government fact-finding commission was set up to investigate the matter. The

Wickersham Commission issued a report on abusive police interrogation practices that not only educated the public, but also energized the United States Supreme Court to hand down a string of cases in which police interrogation abuses that "shocked the conscience" of the Court were equated with torture. The developed case law employ the subjective "shock the conscience" standard, taken from the 1952 case of *Rochin v. California*,[4] for determining when the police cross the threshold for conduct that violates the Fourteenth Amendment. In *Rochin*, police officers witnessed the defendant swallow two capsules which they suspected were illegal substances. Rochin was handcuffed and taken to a hospital where a doctor forced an emetic solution through a tube into Rochin's stomach and against Rochin's will. Rochin vomited two morphine capsules and was subsequently convicted. Overturning the conviction, the Supreme Court held that obtaining evidence by methods that are "so brutal and so offensive to human dignity" stands in violation of the Fourteenth Amendment's due process clause:

> [W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that *shocks the conscience* .... They are methods too close to the rack and screw to permit of constitutional differentiation [emphasis added].

In the 2003 case of *Chavez vs. Martinez*,[5] which dealt with the interrogation of a suspect who had just been shot in the face numerous times by a police officer and was receiving emergency medical treatment, at least five of the justices apparently were not "shocked" that Sergeant Chavez engaged in a repetitive interrogation even though Martinez was suffering "excruciating pain." Writing for the majority, Justice Thomas wrote that "we cannot agree with Martinez's characterization of Chavez's behavior as egregious or conscience shocking." The fact that Chavez did not interfere with medical treatment and did not cause the pain experienced by Martinez (the bullet wounds to Martinez occurred prior to and totally apart from the questioning process) were certainly important factors which influenced some, but not all, of the justices. Expressing an opposite view on the matter, Justice Stevens saw the interrogation conducted by Sergeant Chavez as tantamount to torture and a clear violation of the Fourteenth Amendment:

> As a matter of fact, the interrogation of respondent was the functional

[4] *Rochin v. California*, 342 U.S. 165 (1952).
[5] *Chavez v. Martinez*, 538 U.S. 760 (2003).

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> equivalent of an attempt to obtain an involuntary confession from a prisoner by torturous methods. As a matter of law, that type of brutal police conduct constitutes an immediate deprivation of the prisoner's constitutionally protected interest in liberty.

Interestingly, the *Chavez* Court refused to even acknowledge the existence of the Torture Convention and its place in the matter of coercive interrogations.

In discussing the threshold for shocking the conscience, the Court in *County of Sacramento v. Lewis*[6] "made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." Indeed, "[i]n a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."

An equally important aspect of *Lewis* centered on the Court's view that not only does the conduct have to be egregious, but that "conduct intended to injure in some way unjustifiable by any government interest is the sort of an official action most likely to rise to the conscience-shocking level." This means that the Court will provide greater deference if the government can demonstrate a justification for its conduct based on the totality of the circumstances. The stronger the justification, the more flexibility allowed.

This deference factor certainly played out in a 1966 Ninth Circuit case entitled *Blefare v. United States*.[7] In a fact pattern similar to *Rochin*, the appellants were suspected of swallowing narcotics which were lodged in their rectums or stomachs. Appellants were searched by U.S. officials at a border crossing from Mexico into the United States where they consented to a rectal probe by a doctor. When the rectal probe found no drugs, a "saline solution was ... given the appellants to drink to produce vomiting." Blefare, one of the suspects, "was seen by the doctor to have regurgitated an object and reswallowed it." Then, without Blefare's consent the doctor forcefully passed a soft tube into the "nose, down the throat and into the stomach," through which fluid flowed in order to induce vomiting. This resulted in the discovery of packets of heroin and the subsequent conviction of Blefare.

Unlike *Rochin*, the Ninth Circuit refused to hold that the involuntary intrusion

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[6] County of Sacramento v. Lewis, 523 U.S. 833 (1988).
[7] *Blefare v. United States*, 741 F.2d 870 (9th Cir. 1966).

into Blefare's stomach shocked the conscience. Arguably, the ruling hinged on the fact that the State had an important governmental interest in keeping heroin from entering the United States. In the Court's view, it would have been shocking had they overturned the conviction based on the due process clause. On the contrary, the Court felt that it would "shock the conscience" if Blefare's conviction were set aside:

> It would shock the conscience of law abiding citizens if the officers, with the knowledge these officers had, were frustrated in the recovery and use of this evidence. It is shocking to know that these appellants swallowed narcotics to smuggle it into and through the United States for sale for profit .... If we were mechanically to invoke Rochin to reverse this conviction, we would transform a meaningful expression of concern for the rights of the individual into a meaningless mechanism for the obstruction of justice.

To be sure, there are a number of cases that proponents of coercive questioning techniques can cite to buttress the view that in exigent circumstances the police may be obliged to use force to get life saving information. For instance, in *Leon v. Wainwright*[8] the Eleventh Circuit brushed aside the fact that police officers had used "force and threats" on kidnap suspect Jean Leon in order to get the suspect to reveal the location of his victim. When apprehended by a group of police officers in a Florida parking lot, Leon refused to reveal the location of his kidnap victim (the victim, Louis Gachelin, had been taken by gunpoint to an apartment where he was undressed and bound). In order to get the suspect to talk, police officers then physically abused Leon by twisting his arm and choking him until he revealed where the kidnap victim was being held. In speaking to the use of brutal force to get the information needed to protect the victim, the Court deemed that the action of the officers was reasonable given the immediate concern to find the victim and save his life.

> We do not by our decision sanction the use of force and coercion by police officers. Yet this case does not represent the typical case of unjustified force. We do not have an act of brutal law enforcement agents trying to obtain a confession in total disregard of the law. This was instead a group of concerned officers acting in a reasonable manner to obtain information they needed in order to protect another individual from bodily harm or death.

[8] *Leon v. Wainwright*, 734 F2d 770 (11th Cir. 1984).

Finally, many legal scholars who understand the threat of al-Qa'eda-styled terrorism often paraphrase with approval former Supreme Court Justice Jackson's observation that "the Constitution is not a suicide pact." One issue that gains a tremendous amount of attention in this debate is how to deal with a suspected terrorist in a "ticking time bomb scenario." Even noted civil rights advocates like Harvard law professor Laurence Tribe understand that the landscape has changed. After 9/11 he wrote: "The old adage that it is better to free 100 guilty men than to imprison one innocent describes a calculus that our Constitution—which is no suicide pact—does not impose on government when the 100 who are freed belong to terrorist cells that slaughter innocent civilians, and may well have access to chemical, biological, or nuclear weapons."

Different commentators have varying turns on the theme of the ticking time bomb, but it commonly goes something like this. Suppose a terrorist suspect is taken into custody in a major city and is found to be in possession of bomb-making materials and detailed maps of the downtown area. The terrorist blurts out to police that he is a member of al-Qa'eda and that a car bomb is on a timer set to detonate in ten hours (the time he had estimated he could safely get away from the blast). The suspect then demands a lawyer and refuses to answer any more questions. Of course, law enforcement may legitimately ignore his demands and conduct a reasonable interrogation as long as they do not engage in torture. But what if reasonable interrogation techniques yield no information—the suspect refuses to talk? This Hobson's choice poses one of the strongest arguments for the use of non-lethal torture.

Given the premise of the ticking time bomb scenario, it is difficult to portray oneself as a centrist—either one uses whatever means necessary to get the information to stop the blast or one simply allows the slaughter of innocent civilians. Should a reasonable law enforcement officer with a spouse and children residing in the blast zone simply resign himself to the fact that they are all going to perish since it is unlawful under both international and domestic law to use torture? Or is it more likely that the law officer faced with this scenario would in fact engage in torture and argue the defense of necessity at a subsequent criminal trial?

Indeed, despite its absolute stance rejecting the legality of moderate physical pressure and the associated administrative directives promulgated to regulate the use of moderate physical pressure *vis a vis* the interrogation of terrorist suspects, the Supreme Court of Israel in *Public Committee* went on to recognize the defense

of necessity if individual GSS investigators were charged with employing such prohibited interrogation techniques in the case of a ticking time bomb scenario. Citing Israeli penal law regarding necessity—engaging in illegal conduct in order to promote a greater good—the Court recognized that GSS interrogators would have the right to raise the defense of necessity in a subsequent prosecution. The Court stated that "[o]ur decision does not negate the possibility that the 'necessity' defense be available to GSS investigators [in ticking time bomb scenarios] ... if criminal charges are brought against them, as per the Court's discretion." The Court said that "if a GSS investigator—who applied physical interrogation methods for the purpose of saving human life—is criminally indicted, the 'necessity' [defense] is likely open to him in the appropriate circumstances."

Actually, the Israeli High Court seemed to anticipate that any reasonable GSS investigator, charged with protecting innocent lives, would apply "physical interrogation methods for the purpose of saving human life" when confronted with a ticking time bomb terrorist. In other words, GSS investigators would use whatever means necessary to avert the explosion of the bomb. The Court noted, however, that the threat of the explosion must be a "concrete level of imminent danger:"

> [The] "necessity" exception is likely to arise in instances of "ticking time bombs," and that the immediate need ... refers to the imminent nature of the act rather than that of the danger. Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, provided the danger is certain to materialize and there is no alternative means of preventing its materialization. In other words, there exists a concrete level of imminent danger of the explosion's occurrence.

The defense of necessity is a doctrine well-known to the common law. It is defined as "[a] justification defense for a person who acts in an emergency that he or she did not create and who commits a harm that is less severe than the harm that would have occurred but for the person's actions." Professor Wayne Lafave's criminal law text amplifies this definition by explaining that "the harm done is justified by the fact that the action taken either accomplished a greater good or prevented a greater harm."

The general understanding of the necessity defense at common law was that it was in response to circumstances emanating from the forces of nature and not from people. "With the defense of necessity, the traditional view has been that the

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pressure must come from the physical forces of nature (storms, privations) rather than from human beings." When the pressure is from human beings, the defense, if applicable, is duress, not necessity.

In the modern era, the distinction between the pressure coming from nature or human beings has merged. According to Lafave, defense of necessity extends to both instances.

> [T]he reason is of public policy: the law ought to promote the achievement of high values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law .... The matter is often expressed in terms of choice of evils: when the pressure of circumstances presents one with a choice of evil, the law prefers that he avoid the greater evil by bringing about the lesser evil.

Prior to *Public Committee*, the government of Israel had taken the unusual step of trying to regulate the use of torture if not by means of a judicial torture warrant, then by administrative rules. In short, the government directives had provided a justification defense to an interrogator who engaged in torture. This practice was struck down as unlawful. A similar move to regulate torture in the United States would certainly meet the same end—a democracy cannot sanction torture. Once it does, it has abandoned the moral high ground; it is no longer a democracy. Whether justification flows from the legislative, executive, or judicial branch, it is anathema to a freedom loving people.

Drawn from the Israeli approach in *Public Committee*, a defense of necessity would require the defendant to satisfy a four pronged test: (1) the investigator had reasonable grounds to believe that the suspect had direct knowledge which could be used to prevent the weapon from detonating; (2) that the weapon posed an imminent danger to human life; (3) that there existed no alternative means of preventing the weapon from exploding; and (4) that the investigator was acting to save human life.

In conclusion, those who order, approve, or engage in torture must be criminally charged. If the United States determines that waterboarding as practiced by the CIA is torture, there is no option. Under the Torture Convention violators must be prosecuted. Similarly, lawyers at the Department of Justice who approved the practice must also be prosecuted. As discussed, however, the CIA enhanced interrogation techniques approved in the subject legal memorandums

puts one in an ambiguous zone, a zone unknowable without firm judicial guidance. As foreboding as the term enhanced interrogation techniques may sound, there are many techniques that involve acts which are clearly permissible under any analysis. For example, one would be hard pressed to argue that the reported use of female interrogators, trickery, or a day long interrogation session would constitute a prima facie case of torture or even ill-treatment as some have suggested. Further, based on the majority decision in the *Ireland* case, one cannot simply conclude that the use of waterboarding, or bugs, or positioning of a particular detainee violates legal norms. In short, in my legal opinion, the subject waterboarding technique used on the al-Qa'eda operatives did not constitute torture and requires no binding obligation to prosecute.

The War on Terror provides Americans an opportunity to reexamine much of what this nation represents to the world. The War on Terror is not simply about putting steel on target, it is a propaganda war as well. While it is necessary to assess the decisions related to the use of enhanced interrogation of certain al-Qa'eda operatives, it is not useful to drag the process out. Nevertheless, those who believe that the United States can defend freedom by subverting the rule of law are as misguided as those who demand that the government fight the War on Terror with our heads in the sand. As such, I applaud the work of this committee and look forward to assisting in the process.

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Statement of Matthew Alexander

Chairman Leahy and Esteemed Members of the Committee,

Thank you for the opportunity to address the Committee on the issue of interrogation. I especially thank Senator Sheldon Whitehouse for his invitation to submit this written testimony.

I submit this testimony as a private citizen and not as an official representative of the United States Air Force or as a representative of the Department of Defense. I am currently still in the Air Force Reserves. I have served for seventeen years in the United States Air Force and Air Force Reserves and have completed five combat deployments to three wars. I feel that nothing less than our national soul is at stake in the debate concerning the torture and abuse of prisoners.

In 2006, I deployed to Iraq as an interrogator at the bequest of the Army. Prior to my deployment I was a special agent for the Air Force Office of Special Investigations, both on Active Duty and in the Reserves. Before I was a special agent, I was a special operations helicopter pilot. I've served in the conflicts in Bosnia, Kosovo, Colombia, and Iraq.

As an interrogator in Iraq, I conducted more than 300 interrogations and supervised more than 1,000. I led the interrogations team that located Abu Musab Al Zarqawi, the former leader of Al Qaida in Iraq, and one of the most notorious mass murderers of our generation. At the time that we killed Zarqawi, he was the number one priority for the United States military, higher than Osama Bin Laden.

I strongly oppose the use of torture or abuse as interrogation methods for both pragmatic and moral reasons. For purposes of clarity, I endorse the semantic clarification offered by Alberto Mora, former General Counsel to the Department of the Navy, who states that cruelty is a more accurate term than abuse, citing the prohibition against cruelty in the Eighth Amendment to the U.S. Constitution. For the purpose of this testimony, however, I will use the commonly used term "abuse" instead of the word "cruelty" to denote those actions that are prohibited by the U.S. Constitution, Geneva Conventions, or U.S. military regulations.

There are many pragmatic arguments against torture and abuse. The first is the lack of evidence that torture or abuse as an interrogation tactic is faster or more efficient than other method such as relationship building or deception. In my experience, when interrogators used harsh methods that fit the definition of abuse, in every instance, that method served only to harden the resolve of the detainee and made them more resistant to interrogation. As revealed in the so-called Torture Memos, the mere fact that Khalid Sheikh Mohammad was waterboarded 183 times is ample evidence that torture made him more resistant to interrogation and that because coercion was used, he gave only the minimum amount of information necessary to stop the pain.

The second pragmatic argument against torture and abuse is the fact that Al Qaida used our policy that authorized and encouraged these illegal methods as their number one recruiting tool for foreign fighters. While I supervised interrogations in Iraq, I listened to a majority of foreign

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fighters state that the reason they had come to Iraq to fight was because of the torture and abuse committed at both Abu Ghraib and Guantanamo Bay. These foreign fighters made up approximately 90% of the suicide bombers in Iraq at that time, in addition to leading and participating in thousands of attacks against Coalition and Iraqi forces. It is not an exaggeration to say that hundreds, if not thousands, of American soldiers died at the hands of these foreign fighters. The policy that authorized and encouraged the torture and abuse of prisoners has cost us American lives. The torture and abuse of prisoners is counterproductive to our efforts to thwart terrorist attacks in the long term and to keep all Americans safe.

In addition, torture and abuse of prisoners causes present and future detainees to be more resistant to interrogations. When we torture or abuse detainees, it hardens their resolve and reinforces the reasons why they picked up arms against us. In addition, it makes all Americans appear as hypocrites, thereby betraying the trust that is necessary to establish prior to convincing a detainee to cooperate. Detainees are more likely to cooperate when they see us live up to our principles. Several high-ranking Al Qaida members that I interrogated in Iraq decided to cooperate with me for the very reason that I did not torture or abuse them and because I treated them and their religion and culture with respect. In fact, that was one of the main reasons I was able to convince a member of Zarqawi's inner circle to cooperate with us.

The final pragmatic argument that I offer against torture and abuse is that future adversaries will be less likely to surrender to us during combat. During the first Gulf War, thousands of Iraqi troops surrendered to American forces knowing that they would be fairly treated as prisoners of war. This same rational was present during World War II, where German soldiers fought and evaded in the vicinity of Berlin for the privilege of being captured by American versus Russian troops. If future adversaries are unwilling to surrender to us because of the manner in which we've treated prisoners in the current conflict, it will have a real cost in American lives.

As a military officer, it is my obligation not just to point out the broken wheel, but to fix it. So allow me to address the effective interrogation methods that led to the successes of my team in Iraq. World War II interrogators used relationship building approaches to great success against captured Germans and Japanese, and my team imitated their methods. However, we also added new techniques to our arsenal.

I deployed to the war with four other Air Force special agents with experience as criminal investigators and we brought with us skills and training that were unique compared to our Army counterparts. Through the Air Force, we had learned to interrogate criminal suspects using relationship building and non-coercive police investigative techniques. I learned quickly in Iraq that Al Qaida has much more in common with criminal organizations than with traditional rank and file soldiers. The interrogation methods in the Army Field Manual 2-22.3 are valid approaches and sometimes applicable for interrogating members of Al Qaida, but even more effective are the techniques that I learned as a criminal investigator. I used these techniques, permitted by the Army Manual under the terms "...psychological ploys, verbal trickery, or other

nonviolent or non-coercive subterfuge…" to great success and I taught these techniques to other members of my interrogation team. Just one example of a commonly used criminal investigative technique that has been adopted into the Army Field Manual is the Good Cop/Bad Cop approach, but there are numerous others that are absent from both the manual and the Army's interrogator training. The U.S. law enforcement community has much to add to the improvement of our interrogation methods and the United States Army would do well to consult with experienced criminal investigators from our police departments and federal law enforcement agencies.

I also want to address the so called "ticking time bomb" scenario that is so often used as an excuse for torture and abuse. My team lived through this scenario every day in Iraq. The men that we captured and interrogated were behind Zarqawi's suicide bombing campaign. Most of our prisoners had knowledge of future suicide bombing operations that could have been prevented with the quick extraction of accurate intelligence information. Even if we assume that torture or abuse are more effective or efficient than other methods of interrogation, which in my experience they are not, my team knew that we could not save lives today at the expense of losing lives tomorrow. We knew that we would be recruiting future fighters for Al Qaida's ranks, some of whom would surely kill Americans and other innocent civilians and, most likely, our brothers and sisters in arms.

What works best in the ticking time bomb scenario is relationship building, which is not a time-consuming effort when conducted by a properly trained interrogator, and non-coercive deception. By reciting a line from the Quran at the beginning of an interrogation, I often built rapport in a matter of minutes. Contrary to popular belief, building a relationship with a prisoner is not necessarily a time consuming exercise.

I also conducted point-of-capture interrogations in Iraqi homes, streets, and cars, and I discovered that in these time-constrained environments where an interrogator has ten or fifteen minutes to assess a detainee and obtain accurate intelligence information, relationship building and deception were again the most effective interrogation tools. It is about being smarter, not harsher.

I have addressed the pragmatic arguments against torture and abuse and discussed effective non-coercive interrogation methods, but let me address the more important issue in this debate – the moral argument against torture and abuse. When I took the oath of office as a military officer, I swore to uphold and defend the Constitution of the United States of America, which specifically prohibits cruelty towards any person in the Eighth Amendment. In addition, torture and abuse are inconsistent with the basic principles of freedom, liberty, and justice, upon which our country was founded. George Washington, during the Revolutionary War, specifically prohibited his troops from torturing prisoners. Abraham Lincoln prohibited Union troops from torturing Confederate prisoners. We have a long history of abiding by American principles while conducting war.

Statement of Matthew Alexander

Some have argued that the arguments against torture and abuse are clear on a "sunny day" in 2009 versus after the dark cloud of 9/11. There is no mention of sunny days versus dark days in the military officer's oath of office. As leaders, military officers bear the responsibility to keep their emotions in check and to fulfill their duties consistent with American principles. I can offer no better words than those of General George C. Marshall, the orchestrator of the Allied victory in Europe during World War II, who stated, "Once an army is involved in war, there is a beast in every fighting man which begins tugging at its chains… a good officer must learn early on how to keep the beast under control, both in his men and in himself."

As a proud American, I know that we have the intellectual ability to defeat our enemies in the battle of wits in the interrogation room. We will not convince every detainee to cooperate, but we can lose battles and still win the war. No profession can boast of perfect performance in combat – infantry soldiers don't shoot every target. On the road to Zarqawi, my interrogation team encountered several high ranking members of Al Qaida who did not cooperate, but we used those interrogations as opportunities to improve our skills. In fact, it was in one such case that I developed a non-coercive technique that I later used on the detainee who led us to Zarqawi.

We are smart enough to effectively interrogate our adversaries and we should not doubt our ability to convince detainees to cooperate. American culture gives us unique advantages that we can leverage during interrogations – tolerance, cultural understanding, intellect, and ingenuity. In closing, the same qualities that make us great Americans will make us great interrogators.

I want to thank the Committee again for this opportunity to submit testimony based on my experiences.

Respectfully,

Matthew Alexander

Note: I write under the pseudonym Matthew Alexander because I am still in the Reserves and may in the future conduct interrogations or counterintelligence in combat operations or hostile environments. I also use this name to protect my family, one of whom works in the Middle East. I have no reservations about revealing, in private, my true name to the members of the Committee.

BRENNAN
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FOR JUSTICE

SENATE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON ADMINISTRATIVE
OVERSIGHT AND THE COURTS

"WHAT WENT WRONG: TORTURE AND THE OFFICE OF LEGAL COUNSEL IN THE BUSH ADMINISTRATION"

Wednesday, May 20, 2009

Written Testimony of

Emily Berman
Counsel and Katz Fellow

This statement addresses some of the most troubling legal deficiencies in three May 2005 memoranda issued by the Justice Department's Office of Legal Counsel (OLC) in which OLC determined that the "enhanced" interrogations techniques employed by the U.S. government neither ran afoul of the Torture Statute nor constituted cruel, inhuman, or degrading treatment. The statement identifies and discusses three flaws in the memos' legal reasoning. First, they consistently assume legal conclusions rather than engaging in meaningful analysis. Second, they engage in selective use of precedent. And finally, they misconstrue or ignore relevant legal standards.

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Introduction

In the public sphere, the debate over whether the United States government engaged in torture—and thus violated the law—has largely been resolved. Most Americans now recognize that some of the CIA's so-called "enhanced" interrogation techniques amounted to torture. The discussion has moved on to a different set of questions: Should the architects of the interrogation policy be held accountable? Does a nation's interest in protecting itself ever justify torture? If so, did the techniques in fact help us by providing intelligence that could not otherwise have been obtained? Or did they harm us by alienating our allies and providing recruiting tools to our enemies?

But before we can truly move on to those important and compelling questions, we first must answer this one: How did a team of Justice Department lawyers, operating in an office renowned for its integrity and legal acumen, repeatedly conclude that behavior most Americans recognize as torture is, in fact, humane treatment?

Non-lawyers might surmise that the laws prohibiting torture are full of loopholes or define "torture" in a technical manner that departs from common understanding. But that is not the case. Consistent with our obligations under the Convention Against Torture ("CAT"), Congress enacted the Torture Act. The Act criminalized as "torture" any "act committed by a [government actor or agent] specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control."[1] This definition is straightforward. There are no loopholes to accommodate claims of necessity—indeed, the opposite is true: the CAT provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture"[2]—and the concept of "severe pain or suffering," while qualitative in nature, is readily comprehensible by lawyer and layperson alike.

This statement will address some of the ways in which the Justice Department's Office of Legal Counsel (OLC), in three May 2005 memoranda that were released to the public on April 16, 2009,[3] applied this and other legal standards in ways that are anything but straightforward. The memos—which determined that the "enhanced" interrogation

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[1] 18 U.S.C. § 2340.

[2] Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Art. 2(2).

[3] This statement does not address previously released 2002 and 2003 OLC memoranda regarding the application of the Torture Statute. In those memos, OLC lawyers attempted to evade the plain import of the Torture Statute by arguing that it contains an unwritten exception for torture authorized by the President when acting as Commander in Chief. Memorandum for Alberto R. Gonzales, Counsel to the President, re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002). In the alternative, OLC lawyers redefined torture by arguing that "severe pain or suffering" occurs only when the pain approaches the level associated with "organ failure or death." *Id.* These arguments were so unpersuasive that OLC subsequently withdrew those memos, disclaiming any future reliance on them. The flaws in these arguments have been thoroughly catalogued and are not repeated here. *See, e.g.*, Frederick A. O. Schwarz Jr. & Aziz Huq, Unchecked and Unbalanced, Presidential Power in a Time of Terror, Ch. 7 (2007).

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techniques employed by the U.S. government neither ran afoul of the Torture Act nor constituted cruel, inhuman, or degrading treatment—exhibit several flaws in their reasoning. First, they assume legal conclusions rather than engaging in meaningful analysis. Second, they engage in selective use of precedent. And finally, they misconstrue or ignore relevant legal standards.

I. Assuming the Conclusion

No law can be analyzed in a vacuum. Legal reasoning involves considering the relevant legal standard as applied to a specific set of facts. Under the Torture Act, the legal standard is whether the techniques in question were specifically intended to cause "severe physical or mental pain or suffering." The relevant facts ostensibly would include a detailed description of the techniques in question and the manner and circumstances in which they are implemented.

The May 2005 memos that address the question whether the CIA's interrogation program violated the Torture Act are structured in a manner that appears consistent with this approach of applying law to facts. First, the memos describe the techniques in question. Second, they set forth the applicable legal standard. And finally, they apply the legal standard to the facts.

In reality, though, the outcome of this critical third step is a foregone conclusion. That is because the "facts" set forth in the first step of the memo do not simply describe the techniques at issue and their implementation; they also accept—based entirely on what the CIA has told OLC's lawyers—the premise that the techniques in question do not cause severe pain or suffering. In other words, the memos explicitly assume as a factual predicate the very legal issue that they are purporting to decide.

In the May 10, 2005, memo that analyzed individual interrogation techniques[4] ("Techniques Memo"), for example, the description of almost every technique includes an explicit assumption that severe pain or suffering does not result (or is not intended to result) from the technique's application:

- From description of "stress positions": "You have informed us that these positions are not designed to produce the pain associated with contortions or twisting of the body. . . . [T]hey are designed to produce the physical discomfort associated with temporary muscle fatigue."[5]

- From description of "sleep deprivation": "We understand from discussions with [the CIA's Office of Medical Services (OMS)] that the shackling does not result in any significant physical pain for the subject." "OMS has advised us that this condition

[4] Memorandum for John A. Rizzo, Senior Deputy General Counsel, CIA, re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005).

[5] *Id.* at 9.

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[i.e., swollen limbs resulting from being shackled in a standing position] is not painful." "We understand that these alternative restraints, although uncomfortable, are not significantly painful, according to the experience and professional judgment of OMS and other personnel."[6]

- From description of "the waterboard": "We are informed that based on extensive experience, the process is not physically painful."[7]

- From description of "walling": "We understand that this technique is not designed to, and does not, cause severe pain, even when used repeatedly as you have described."[8]

- From description of the "facial slap": "We understand that the goal of the facial slap is not to inflict physical pain that is severe or lasting."[9]

- From description of "abdominal slap": "It is not intended to—and based on experience you have informed us that it does not—inflict any injury or cause any significant pain."[10]

The Techniques Memo does not undertake to evaluate the CIA's claims that its actions do not meet the "severe pain or suffering" standard; instead, it repeatedly cautions that its conclusions apply only if the CIA adheres to the conduct it has described. But the acceptance of these claims reduces the memo's "analysis" to a meaningless tautology. At its essence, the memo's reasoning is as follows: "The Torture Act prohibits techniques that cause severe pain or suffering. You have informed us that these techniques, as applied by you, do not cause severe pain or suffering. We therefore conclude that they do not violate the statute. We caution that our conclusion is valid only if you apply the techniques in a manner that does not inflict severe pain or suffering." It is difficult to see the purpose of such an "analysis," other than to attach the imprimatur of the Justice Department to the CIA's own conclusions.

The tautological nature of the memo's analysis alone is cause for concern. But accepting the CIA's inherently subjective judgment[11] about whether its techniques cause "severe pain and suffering" is problematic for another reason as well. The CIA has an obvious institutional interest in obtaining legal approval of its programs. That interest was particularly strong in this case, where the techniques in question had already been employed, and so a conclusion that they had been applied *un*lawfully would expose the agency or its agents to legal liability. Moreover, OLC chose to rely on the CIA's

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[6] *Id.* at 11-12.

[7] *Id.* at 13.

[8] *Id.* at 8.

[9] *Id.* at 8.

[10] *Id.* at 8-9.

[11] *Id.* at 20 n. 4 (citing a medical journal for the proposition that "[p]ain is a complex, subjective, perceptual phenomenon with a number of dimensions . . . that are uniquely experienced by each individual and, thus, can only be assessed indirectly. Pain is a subjective experience . . . .").

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subjective assessment even when more objective evidence was at hand. The CIA had videotapes in its possession—which it subsequently destroyed—of the way that these techniques had actually been implemented. OLC does not rely upon such videotape evidence when analyzing the CIA's interrogation program. Instead, it refers repeatedly to its "understandings" of the techniques, or to "assurances" provided by the CIA.

Indeed, whether or not OLC lawyers had seen—or been told about—the videotapes, they knew, at the time the 2005 memos were drafted, that the CIA had *not* always conducted its interrogations in a manner consistent with the descriptions contained in the memos. A 2004 report issued by the CIA's Inspector General and referenced in the Techniques Memo indicates that the use of medical personnel to monitor interrogations, as well as the frequency and manner of use of the waterboard, differed significantly from the techniques described in the Techniques Memo.[12]

The use of factual assumptions and hypotheticals to obviate the need for any real analysis is also on display in the May 10, 2005, memo regarding the legality of the combined use of certain interrogation techniques ("Combined Techniques Memo").[13] This memo explicitly notes that it cannot answer the question whether any combination of techniques actually applied would be like the ones hypothesized in the memo. It goes on to say that "our advice does not extend to combinations of techniques unlike the ones discussed here."[14] Taken together, these statements make clear that the advice pertains to hypothetical interrogations, not real ones. Similarly, "whether other detainees would, in the relevant ways, be like the ones previously at issue would be a factual question we cannot now decide. Our advice, therefore, does not extend to the use of techniques on detainees" whose medical and psychological examinations indicate that interrogation is likely to result in severe physical or mental pain or suffering.[15]

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[12] *Id.* at 29 n.34, 41 n.51. An independent report issued to the CIA's General Counsel, who was the recipient of the 2005 opinions, by the International Committee of the Red Cross ("ICRC") catalogs the treatment of fourteen detainees as described by the detainees themselves. ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody (2007). In this report, the ICRC noted that the consistency of the detailed allegations made by all fourteen detainees lent weight and credibility to their accounts. ICRC Report, at 6. Like the 2004 Inspector General Report, the ICRC Report indicates that the techniques actually employed during interrogations differed in material ways from the descriptions of those techniques supplied by the CIA. For example, Abu Zubaydah reported that the box in which he was confined was not large enough for him to sit upright. ICRC Report, at 13. According to the CIA, however, the cramped confinement technique involves only spaces "large enough for the subject to sit down. Techniques Memo, at 9.

A very helpful comparison between the techniques as described by the Techniques Memo and the treatment described by the detainees themselves and reported in the ICRC report is available here: http://www.propublica.org/special/torture-memos-vs.-red-cross-report-prisoners-recollections-differ-0424.

[13] Memorandum for John A. Rizzo, Senior Deputy General Counsel, CIA, re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005).

[14] Combined Techniques memo, at 9.

[15] *Id.* at 10.

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In short, in the Combined Techniques Memo, OLC gives legal advice regarding combinations of techniques that may or may not reflect the combinations used in practice, for a subset of detainees that may or may not be the subset to which these techniques are being applied.

Further divorcing its analysis from reality, the memo states that, because there is "less certainty and definition about the use of techniques in combination, it is necessary to draw more inferences in assessing what may be expected."[16] This is a carefully worded concession that there is no evidence regarding the effects of combining these techniques (though, of course, the CIA's subsequently destroyed videotapes presumably contained such evidence).

Having admitted that its analysis is based on hypothetical combination of techniques, the effect of which is unknown, the memo reverts to the analytical trick described in the Techniques Memo. While acknowledging that some techniques might make a detainee more susceptible to the pain and suffering imposed by another technique, it assumes—because the CIA has said so—that medical personnel will stop any interrogation before it reaches that point. The memo thus presents the same basic tautology as the Techniques Memo: "Techniques that by themselves do not amount to torture might, when combined, rise to the level of torture, but since the CIA has assured us that it will not permit that to happen, what the CIA proposes to do does not amount to torture." By assuming the conclusion, the memo avoids the need to address and answer the two critical conceded unknowns: what the CIA is actually doing and how it impacts the detainees. It also avoids an independent assessment of whether the CIA's actions constitute torture.

II. Selective Use of Precedent

Rather than relying solely on the CIA's claims regarding whether its actions met the standard for torture, the OLC lawyers should have considered more carefully a resource routinely relied upon by judges and others called upon to assess the legality of a particular course of action: how that course of action has been viewed in the past, both by the courts and by the entities charged with enforcing the law.

In the Techniques Memo, however, relevant precedents that go against OLC's conclusions are dismissed if they can be distinguished in any respect. For example, the U.S. Court of Appeals for the Ninth Circuit in 1996 held that a course of conduct that included sleep deprivation and waterboarding—both of which are techniques analyzed in the memos—amounted to torture.[17] The Techniques Memo relegates discussion of this case to the footnotes, downplaying its precedential force because the court was considering "a variety of techniques taken together," not sleep deprivation or waterboarding alone.[18] In one of those same footnotes, the memo notes that the

[16] *Id.* at 9.

[17] *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Circuit 1996).

[18] Techniques Memo, at 40 n.50 & 44 n.57. Notably, this case is not mentioned at all in the Combined Techniques Memo. If the case did not establish that individual techniques were torture because it did not

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Committee Against Torture (the international body charged with interpreting the Convention Against Torture, which the Torture Act implements) concluded that "sleep deprivation for prolonged periods" constitutes torture. The memo nevertheless opines that this fact "provide[s] little or no useful guidance" since "[t]he Committee provided no details on the length of the sleep deprivation or how it was implemented and no analysis to support its conclusion."[19]

While declining to accord significance to precedents that actually address techniques used by the CIA, the Techniques Memo repeatedly features a case that does not even mention any of the CIA's techniques: *Mehinovic v. Vuckovic.*[20] In that case, the court found that a course of conduct including "severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat, and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim's forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of 'Russian Roulette'" constituted torture.[21] This case is clearly highlighted to make the CIA's techniques look mild by comparison. Yet the fact that techniques worse than those implemented by the CIA may exist is irrelevant to whether the CIA's techniques themselves constitute torture.

The Techniques Memo also relies heavily on the U.S. military training known as "SERE training," in which members of U.S. forces are trained to withstand harsh interrogation methods. The memos acknowledge that the experience of individuals undergoing SERE training is fundamentally unlike that of detainees subjected to CIA interrogations:

> Individuals undergoing SERE training are obviously in a very different situation from detainees undergoing interrogation; SERE trainees know it is part of a training program, not a real-life interrogation regime, they presumably know it will last only a short time, and they presumably have assurances that they will not be significantly harmed by the training.[22]

Moreover, as noted in a unanimous Senate Armed Services Committee Report regarding the Committee's inquiry into detainee treatment, "SERE school is voluntary; students are even given a special phrase they can use to immediately stop the techniques from being

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analyze those techniques in isolation, it seems that the analysis of those techniques used in combination would be particularly relevant to the Combined Techniques Memo's analysis.

[19] *Id.* at 40 n.50.

[20] 198 F. Supp. 2d 1332 (N.D. Ga. 2002).

[21] *Id.* at 22, 24, 26, 38; *see also* Combined Techniques Memo, at 14.

[22] Techniques Memo, at 6; Memorandum for John A. Rizzo, Senior Deputy General Counsel, CIA, re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees 38 (May 30, 2005) ("Article 16 Memo").

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used against them."[23] The differences between SERE training and actual interrogations are far more significant than the distinctions cited by OLC as the basis for dismissing the Ninth Circuit and Committee Against Torture decisions mentioned above. Indeed, to assume that the effects of SERE training, administered by fellow servicemen and women in a controlled environment, can meaningfully be compared to the effects of indefinite interrogations at the hands of hostile forces on detainees kept isolated in harsh conditions flies in the face of all common sense.

Yet, instead of relegating the SERE program to a footnote, the Techniques Memo repeatedly cites the use of techniques in SERE training as evidence that CIA detainees do not experience "severe pain or suffering" when subjected to modified versions of these techniques.[24]

Not only does the Techniques Memo take a selective approach to emphasizing or de-emphasizing precedent; it conspicuously fails to cite the executive branch's own history of treating waterboarding as torture. It makes no mention, for instance, of *United States v. Lee*,[25] in which a Texas law enforcement officer was prosecuted by the United States for subjecting prisoners to "water torture" in order to extract confessions. The court martial of Major Edwin F. Glenn for his use of "the water cure" during the Philippines war to obtain intelligence from counter-insurgents is similarly absent from the memo.[26] And a discussion of the prosecutions in the International Military Tribunal for the Far East of members of the Japanese armed forces who applied water torture to Allied prisoners during World War II is nowhere to be found.[27]

Another relevant source—the U.S. State Department's Country Reports on Human Rights Practices—is also absent from the Techniques and Combined Techniques Memos.[28] Each year, the reports condemn practices that resemble several of the CIA's interrogation tactics, including food and sleep deprivation, stripping and blindfolding, and dousing with cold water. The U.S. government's consistent condemnation of these techniques, however, does not find its way into OLC's analysis.

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[23] Senate Armed Services Committee Inquiry Into the Treatment of Detainees in U.S. Custody xix (2008).

[24] Techniques Memo, at 6, 29, 34, 35, 42, 44. Remarkably, the memo addressing the question whether the interrogation techniques constitute cruel, inhuman, or degrading treatment also cite the existence of SERE training as evidence that "use of these techniques in some circumstances consistent with executive tradition and practice." Article 16 Memo, at 37.

[25] 744 F.2d 1124 (5th Cir. 1984).

[26] Guenael Mettraux, *U.S. Courts-Martial and the Armed Conflict in the Philippines (1899-1902): Their Contribution to National Case Law on War Crimes*, 1 J. Int'l Crim. Just. 135, 143 (2003).

[27] Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat'l L. 468, 477-82 (2007).

[28] Interestingly, another 2005 memo discussing the requirements of Article 16 of the Convention Against Torture, *see infra*, does mention the State Department Country Reports when discussing whether the techniques are "cruel, inhuman, and degrading." The memos seem to acknowledge the existence of the Reports only when they can simultaneously offer an explanation—however implausible—of why they are not relevant.

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This is not to say that the CIA's practices were necessarily illegal according to the omitted and discounted precedents, or that the practices were factually identical. But in analyzing the legality of the techniques at issue, these precedents were certainly relevant. Their omission thus constitutes a hole in the memos' reasoning and contributes to the impression that the memos were intended merely to rubber stamp government policies rather than evaluate them.

III. Problematic Treatment of Legal Standards

All of the 2005 memos err in applying relevant legal standards.

A. Redefining the Prohibitions of the Torture Act

While it does so on a much less conspicuous scale than did OLC's 2002 and 2003 memos—which notoriously redefined "severe pain" such that only the levels of pain associated with "organ failure or death" would qualify—the 2005 memos also redefine the plain language of key terms in the Torture Act. A notable example is the Techniques Memo's and the Combined Techniques Memo's definition of "suffering." OLC opined that the term "suffering" has an inherent temporal component, applying only to "a state or condition . . . that persists for a significant period of time" and not to "discomfort" that is "merely transitory." To support this reading, OLC cited a dictionary that defined "suffering" as a "state," an "experience," or "pain endured." Yet none of these terms suggests a prolonged temporal component. People are commonly described as being in a "state of shock" in the immediate aftermath of an accident; such a state is transitory by nature. The term "experience" is even less susceptible to a temporal minimum; anyone would agree that a robbery at gunpoint is a traumatic "experience" even if it takes mere seconds. And the term "endure"—according to the very same dictionary OLC relied on to define "suffering" – encompasses definitions that include no temporal component (e.g., "to undergo").

Even if one were to accept the memos' definition of "suffering," it would be impossible to apply that definition to any technique lasting longer than a few minutes without understanding what constitutes "a significant period of time." The memos dispense with this step, and assume that any time-limited technique is acceptable. Thus, the memos conclude that dousing detainees with cold water for 20 minutes, 40 minutes, or 60 minutes (depending on water temperature) cannot cause "severe physical suffering" because "the duration is limited by specific times." The memos further conclude that stress positions cannot cause "severe physical suffering" because "the duration of the technique is self-limited by the individual's ability to sustain the position"—without even bothering to guess, let alone determine, what that time period would be. The definition of "suffering" is thus narrowed to exclude any technique that is finite.

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B. Misreading of the Constitutional "Shocks the Conscience" Standard

A May 30, 2005, memo considering the application of Article 16 of the Convention Against Torture[29] to the CIA's interrogation techniques ("Article 16 Memo")[30] appropriately notes that, according to the terms of a reservation entered when the U.S. ratified the treaty, the United States is obligated to prevent any cruel, inhuman, or degrading treatment that amounts to treatment or punishment prohibited by the Fifth, Eighth, or Fourteenth Amendments to the Constitution.

As the Article 16 Memo recognizes, the due process clause of the Fifth Amendment prohibits federal government action that "shocks the conscience." This standard is intended to protect against arbitrary (in the constitutional sense) government action so as to "prevent government officials from abusing their power, or employing it as an instrument of oppression."[31] In applying this standard, the Supreme Court has described it as prohibiting conduct that is "so brutal and offensive that it [does] not comport with traditional ideas of fair play and decency."[32]

Admittedly, "the measure of what is conscience shocking is no calibrated yard stick."[33] But the Article 16 Memo concedes that the use of the CIA's interrogation techniques might shock the contemporary conscience in some contexts.[34] It concludes, nevertheless, that they do not shock the conscience in the context of the CIA interrogations.

In reaching this conclusion, OLC misreads the relevant case law. As an initial matter, OLC reasons that the CIA program does not involve conduct that is constitutionally arbitrary because there is no evidence of "conduct intended to injure in some way unjustifiable by any government interest."[35] Instead, because the program is designed to protect the national security, it cannot be "the exercise of power without any

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[29] Article 16 reads, in relevant part, as follows: "Each State Party shall undertake to prevent in any territory under its jurisdiction . . . acts of cruel, inhuman or degrading treatment or punishment . . . when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

[30] Memorandum for John A. Rizzo, Senior Deputy General Counsel, CIA, re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005).

[31] *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). *County of Sacramento v. Lewis*, which concerned the actions of Sacramento County law enforcement officers, considered the requirements of the Fourteenth Amendment, which applies due process standards to state and local government. The same standards apply in the evaluation of federal government action under the Due Process Clause of the Fifth Amendment.

[32] *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957).

[33] *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973).

[34] Article 16 memo, at 32.

[35] Article 16 memo, at 28 (quoting *County of Sacramento*, 523 U.S. at 849).

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reasonable justification in the service of a legitimate government objective" that can be said to shock the conscience.[36]

But the Supreme Court has found that the existence of a legitimate government objective alone cannot render otherwise conscience-shocking conduct constitutionally sound. In the landmark case of *Rochin v. California*, the Supreme Court found the forced pumping of a suspect's stomach sufficient to offend due process.[37] In that case, the purpose of the official conduct was not unjustifiable by any government interest. Instead, it was carried out in order to preserve evidence of a narcotics crime. Nevertheless, the conduct was found to shock the conscience and was therefore impermissible.

The articulation of a legitimate government interest is therefore not sufficient to excuse an otherwise impermissible course of conduct. To be sure, *County of Sacramento v. Lewis* does contemplate the possibility that something may shock the conscience in some contexts but not in others. In that case, the Supreme Court considered whether due process is offended when a government official causes death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender. In answering in the negative, the Court reasoned that prohibitions on deliberate indifference are reasonable "when actual deliberation is practical," such as in the context of dispensing medical care to prisoners in the custodial setting of a prison.[38] In contrast, "when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose" to shock the conscience.[39]

Thus the context in which a decision regarding official action is made—whether an official can afford the luxury of deliberation or whether the circumstances demand the exercise of instant judgment—can affect the mental state required for conduct to be considered conscience-shocking. As the conduct moves on a continuum from indifference to recklessness to intent, it becomes more and more likely to offend the due process clause. And the less time there is for deliberation, the closer the mental state must move to the intentional side of the continuum.

In the case of the CIA interrogations, there is ample evidence of time for deliberation. The very existence of the memos indicates that there was time to devise and propose a course of action and to seek advice regarding its legality. Any application of these interrogation techniques was thus nothing less than highly intentional, under conditions of significant deliberation. This is especially true in the context of the 2005 memos, which were written three years after the initial request for a legal opinion had been conveyed. Moreover, the high value detainees had been in custody for some time and the interrogation program had been discontinued, so no subsequently captured high value detainees would be subjected to it. The urgency to government efforts to discover

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[36] *Id.* (quoting *County of Sacramento*, 523 U.S. at 846).

[37] 342 U.S. 165 (1952).

[38] *County of Sacramento*, 523 U.S. at 851.

[39] *Id.* at 853.

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what intelligence was in their possession had receded as that intelligence grew more and more outdated.

Mischaracterizing the significance of *County of Sacramento*'s discussion of the shocks-the-conscience analysis, OLC essentially argues that, in the context of interrogating high value al Qaeda suspects in the name of protecting the national security, government conduct can never shock the conscience.[40] The memo notes that the techniques at issue might shock the conscience in the law enforcement context, that they likely violate the rules contained in the Army Field Manual and the Geneva Conventions, and that they resemble techniques regularly condemned by the State Department. Nonetheless, because "the CIA program is designed to subject detainees to no more duress than is justified by the Government's interest in protecting the United States from further terrorist attacks,"[41] the standard applicable in those contexts should not be applied to the CIA interrogation program.

Thus under OLC's analysis, certain conduct is impermissible, unless the government determines that the goals the conduct furthers are sufficiently important to render the conduct permissible, in which case the conduct is permissible. But it simply cannot be the case that concerns over national security render otherwise conscience-shocking behavior constitutionally acceptable. If this is so, the CAT's Article 16 is gutted of its meaning whenever the government makes a self-interested determination that the government interests at issue are sufficiently crucial to render what it is doing to pursue those interests acceptable. It cannot have been the intention of President Reagan in signing the CAT nor the Congress's intention in ratifying it to commit the U.S. to such an empty promise.

C. Ignoring the Constitutional Requirements for Conditions of Confinement

One area of law entirely absent from the discussion in the Article 16 Memo is the due process doctrine governing permissible conditions of confinement for individuals not convicted of any crime. There are many categories of individuals outside the criminal justice system who may nonetheless be confined under certain circumstances. The mentally ill, sexual offenders, pretrial detainees, and immigrants awaiting deportation are a few examples.

The Supreme Court has discussed the how to determine the due process requirements concerning the conditions of confinement in several of these circumstances. For pretrial detainees, the evaluation of the constitutionality of the conditions or restrictions of their detention turns on "whether those conditions amount to punishment."[42] The civilly committed retain their due process rights to liberty from bodily restraint and personal security.[43] And when it comes to individuals confined as

[40] Article 16 memo, at 34-37.

[41] Article 16 memo, at 37.

[42] *Bell v. Wolfish*, 441 U.S. 520, 536 (1979).

[43] *Youngberg v. Romeo*, 457 U.S. 305, 316 (1982).

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sexual predators, "due process requires that the conditions and duration of confinement . . . bear some reasonable relation to the purpose for which persons are committed."[44] While no court has yet considered what conditions due process demands for detainees such as the ones subjected to the CIA's interrogation practices, existing case law makes plain that individuals not convicted of any crime cannot be held in detention conditions that amount to punishment.[45]

To determine whether particular confinement conditions are punitive, the operative question is whether "the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose."[46] Such a determination "generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'"[47]

To be sure, any attorney evaluating the CIA program could argue that the conditions imposed on high value detainees by the CIA's interrogation techniques are "but an incident of [the] legitimate governmental purpose" of protecting the national security, or of gleaning important intelligence information. Nonetheless, as the Supreme Court has pointed out,

> loading a detainee with chains and shackles and throwing him in a dungeon may [further the legitimate purpose of ensuring] his presence at trial. . . . But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.[48]

As this example illustrates, even actions taken for a legitimate reason may be so "excessive in relation to the . . . purpose assigned to it" as to constitute an impermissible, punitive condition of confinement.

The Supreme Court has made clear that "captivity in war is neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war."[49] Thus, though the United States has deprived many detainees of their liberty for years in its battle against al Qaeda and the Taliban, those subjected to the CIA interrogation program have not been convicted of

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[44] *Seling v. Young*, 531 U.S. 264, 265 (2001).

[45] *E.g.*, *Bell*, 441 U.S. at 535-39.

[46] *Id.* at 538.

[47] *Id.* (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 168-69 (1963) (alterations in the original)).

[48] *Id.* at 539 n.20.

[49] *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality op.) (internal quotation marks and citation omitted).

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any offense. Instead, they are being held to incapacitate them from engaging in hostilities against the United States. They are accordingly entitled to non-punitive conditions of confinement under the due process clause.

These remarks take no position with respect to whether the conditions imposed by the interrogation tactics discussed in the Techniques Memo and the Combined Techniques Memo amount to punishment, though there is certainly a strong argument that they do. It is sufficient simply to point out the conspicuous absence of any analysis of this question in OLC's 2005 memos.

Conclusion

While the release of the 2005 OLC memos provides significant and important insight into the U.S. interrogation program and how it was justified, the memos raise as many questions as they answer. Did interrogators adhere to the limits imposed by OLC? Were the CIA tapes destroyed because they showed instances of non-compliance? Was OLC aware of the existence of these tapes when engaged in its legal analysis? If not, why note? Were any agents identified in the 2004 Inspector General's report subject to discipline for their use of techniques beyond what was authorized?

But the questions about the CIA program that the memos describe should not obscure the equally important questions about OLC's approval of that program: How did such a highly respected legal office produce such deeply flawed legal analyses? What happened to the proud tradition of independence and integrity that has characterized the office throughout its history? And what can be done to restore that tradition?

The Brennan Center has advocated the creation of an independent commission of inquiry to examine not only the details of the counter-terrorism policies (like the CIA's enhanced interrogation program) that strayed from the rule of law, but also the systemic failures that enabled these policies to be created and sustained. Without doubt, the role that the Office of Legal Counsel played in endorsing the policies is one of those systemic failures. That role must continue to be probed. We commend Senator Whitehouse for beginning this process, and we urge that the process be continued, whether through additional hearings or—ideally—in the context of an independent commission.

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U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General — *Washington, D.C. 20530*

August 1, 2002

Memorandum for Alberto R. Gonzales
Counsel to the President

Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A

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 of 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. We further conclude that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A's proscription against torture. We conclude by examining possible defenses that would negate any claim that certain interrogation methods violate the statute.

In Part I, we examine the criminal statute's text and history. We conclude that for an act to constitute torture as defined in Section 2340, it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years. We conclude that the mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual's personality; or threatening to do any of these things to a third party. The legislative history simply reveals that Congress intended for the statute's definition to track the Convention's definition of torture and the reservations, understandings, and declarations that the United States submitted with its ratification. We conclude that the statute, taken as a whole, makes plain that it prohibits only extreme acts.

In Part II, we examine the text, ratification history, and negotiating history of the Torture Convention. We conclude that the treaty's text prohibits only the most extreme

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acts by reserving criminal penalties solely for torture and declining to require such penalties for "cruel, inhuman, or degrading treatment or punishment." This confirms our view that the criminal statute penalizes only the most egregious conduct. Executive branch interpretations and representations to the Senate at the time of ratification further confirm that the treaty was intended to reach only the most extreme conduct.

In Part III, we analyze the jurisprudence of the Torture Victims Protection Act, 28 U.S.C. § 1350 note (2000), which provides civil remedies for torture victims, to predict the standards that courts might follow in determining what actions reach the threshold of torture in the criminal context. We conclude from these cases that courts are likely to take a totality-of-the-circumstances approach, and will look to an entire course of conduct, to determine whether certain acts will violate Section 2340A. Moreover, these cases demonstrate that most often torture involves cruel and extreme physical pain. In Part IV, we examine international decisions regarding the use of sensory deprivation techniques. These cases make clear that while many of these techniques may amount to cruel, inhuman or degrading treatment, they do not produce pain or suffering of the necessary intensity to meet the definition of torture. From these decisions, we conclude that there is a wide range of such techniques that will not rise to the level of torture.

In Part V, we discuss whether Section 2340A may be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President's Commander-in-Chief powers. We find that in the circumstances of the current war against al Qaeda and its allies, prosecution under Section 2340A may be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war. In Part VI, we discuss defenses to an allegation that an interrogation method might violate the statute. We conclude that, under the current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A.

I. 18 U.S.C. §§ 2340–2340A

Section 2340A makes it a criminal offense for any person "outside the United States [to] commit[] or attempt[] to commit torture."[1] Section 2340 defines the act of torture as an:

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[1] If convicted of torture, a defendant faces a fine or up to twenty years' imprisonment or both. If, however, the act resulted in the victim's death, a defendant may be sentenced to life imprisonment or to death. *See* 18 U.S.C.A. § 2340A(a). Whether death results from the act also affects the applicable statute of limitations. Where death does not result, the statute of limitations is eight years; if death results, there is no statute of limitations. *See* 18 U.S.C.A. § 3286(b) (West Supp. 2002); *id.* § 2332b(g)(5)(B) (West Supp. 2002). Section 2340A as originally enacted did not provide for the death penalty as a punishment. *See* Omnibus Crime Bill, Pub. L. No.103-322, Title VI, Section 60020, 108 Stat. 1979 (1994) (amending section 2340A to provide for the death penalty); H. R. Conf. Rep. No. 103-711, at 388 (1994) (noting that the act added the death penalty as a penalty for torture).

Most recently, the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), amended section 2340A to expressly codify the offense of conspiracy to commit torture. Congress enacted this amendment as part of a broader effort to ensure that individuals engaged in the planning of terrorist activities could be prosecuted irrespective of where the activities took place. *See* H. R. Rep. No. 107-236, at 70 (2001)

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> 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.

18 U.S.C.A. § 2340(1); *see id.* § 2340A. Thus, to convict a defendant of torture, the prosecution must establish that: (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) that the act inflicted severe physical or mental pain or suffering. *See also* S. Exec. Rep. No. 101-30, at 6 (1990) ("For an act to be 'torture,' it must . . . cause severe pain and suffering, and be intended to cause severe pain and suffering."). You have asked us to address only the elements of specific intent and the infliction of severe pain or suffering. As such, we have not addressed the elements of "outside the United States," "color of law," and "custody or control."[2] At your request, we would be happy to address these elements in a separate memorandum.

A. "Specifically Intended"

To violate Section 2340A, the statute requires that severe pain and suffering must be inflicted with specific intent. *See* 18 U.S.C. § 2340(1). In order for a defendant to have acted with specific intent, he must expressly intend to achieve the forbidden act. *See United States v. Carter*, 530 U.S. 255, 269 (2000); Black's Law Dictionary at 814 (7th ed. 1999) (defining specific intent as "[t]he intent to accomplish the precise criminal act that one is later charged with"). For example, in *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994), the statute at issue was construed to require that the defendant act with the "specific intent to commit the crime." (Internal quotation marks and citation omitted). As a result, the defendant had to act with the express "purpose to disobey the law" in order for the *mens rea* element to be satisfied. *Ibid.* (internal quotation marks and citation omitted)

Here, because Section 2340 requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective. If the statute had required only general intent, it would be sufficient to establish guilt by showing that the defendant "possessed knowledge with respect to the *actus reus* of the crime." *Carter*, 530 U.S. at 268. If the defendant acted knowing that severe pain or

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(discussing the addition of "conspiracy" as a separate offense for a variety of "Federal terrorism offense[s]").

[2] We note, however, that 18 U.S.C. § 2340(3) supplies a definition of the term "United States." It defines it as "all areas under the jurisdiction of the United States including any of the places described in" 18 U.S.C. §§ 5 and 7, and in 49 U.S.C. § 46501(2). Section 5 provides that United States "includes all places and waters, continental or insular, subject to the jurisdiction of the United States." By including the definition set out in Section 7, the term "United States" as used in Section 2340(3) includes the "special maritime and territorial jurisdiction of the United States." Moreover, the incorporation by reference to Section 46501(2) extends the definition of the "United States" to "special aircraft jurisdiction of the United States."

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suffering was reasonably likely to result from his actions, but no more, he would have acted only with general intent. *See id.* at 269; Black's Law Dictionary 813 (7th ed. 1999) (explaining that general intent "usu[ally] takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence)"). The Supreme Court has used the following example to illustrate the difference between these two mental states:

> [A] person entered a bank and took money from a teller at gunpoint, but deliberately failed to make a quick getaway from the bank in the hope of being arrested so that he would be returned to prison and treated for alcoholism. Though this defendant knowingly engaged in the acts of using force and taking money (satisfying "general intent"), he did not intend permanently to deprive the bank of its possession of the money (failing to satisfy "specific intent").

Carter, 530 U.S. at 268 (citing 1 W. LaFave & A. Scott, Substantive Criminal Law § 3.5, at 315 (1986)).

As a theoretical matter, therefore, knowledge alone that a particular result is certain to occur does not constitute specific intent. As the Supreme Court explained in the context of murder, "the . . . common law of homicide distinguishes . . . between a person who knows that another person will be killed as a result of his conduct and a person who acts with the specific purpose of taking another's life[.]" *United States v. Bailey*, 444 U.S. 394, 405 (1980). "Put differently, the law distinguishes actions taken 'because of' a given end from actions taken 'in spite of their unintended but foreseen consequences." *Vacco v. Quill*, 521 U.S. 793, 802–03 (1997). Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control. While as a theoretical matter such knowledge does not constitute specific intent, juries are permitted to infer from the factual circumstances that such intent is present. *See, e.g., United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001); *United States v. Karro*, 257 F.3d 112, 118 (2d Cir. 2001); *United States v. Wood*, 207 F.3d 1222, 1232 (10th Cir. 2000); *Henderson v. United States*, 202 F.2d 400, 403 (6th Cir.1953). Therefore, when a defendant knows that his actions will produce the prohibited result, a jury will in all likelihood conclude that the defendant acted with specific intent.

Further, a showing that an individual acted with a good faith belief that his conduct would not produce the result that the law prohibits negates specific intent. *See, e.g., South Atl. Lmtd. Ptrshp. of Tenn. v. Reise*, 218 F.3d 518, 531 (4th Cir. 2002). Where a defendant acts in good faith, he acts with an honest belief that he has not engaged in the proscribed conduct. *See Cheek v. United States*, 498 U.S. 192, 202 (1991); *United States v. Mancuso*, 42 F.3d 836, 837 (4th Cir. 1994). For example, in the context of mail fraud, if an individual honestly believes that the material transmitted is truthful, he has not acted with the required intent to deceive or mislead. *See, e.g., United States v. Sayakhom*, 186

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F.3d 928, 939–40 (9th Cir. 1999). A good faith belief need not be a reasonable one. *See Cheek*, 498 U.S. at 202.

Although a defendant theoretically could hold an unreasonable belief that his acts would not constitute the actions prohibited by the statute, even though they would as a certainty produce the prohibited effects, as a matter of practice in the federal criminal justice system it is highly unlikely that a jury would acquit in such a situation. Where a defendant holds an unreasonable belief, he will confront the problem of proving to the jury that he actually held that belief. As the Supreme Court noted in *Cheek*, "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury . . . will find that the Government has carried its burden of proving" intent. *Id.* at 203–04. As we explained above, a jury will be permitted to infer that the defendant held the requisite specific intent. As a matter of proof, therefore, a good faith defense will prove more compelling when a reasonable basis exists for the defendant's belief.

B. "Severe Pain or Suffering"

The key statutory phrase in the definition of torture is the statement that acts amount to torture if they cause "severe physical or mental pain or suffering." In examining the meaning of a statute, its text must be the starting point. *See INS v. Phinpathya*, 464 U.S. 183, 189 (1984) ("This Court has noted on numerous occasions that in all cases involving statutory construction, our starting point must be the language employed by Congress, . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used.") (internal quotations and citations omitted). Section 2340 makes plain that the infliction of pain or suffering per se, whether it is physical or mental, is insufficient to amount to torture. Instead, the text provides that pain or suffering must be "severe." The statute does not, however, define the term "severe." "In the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The dictionary defines "severe" as "[u]nsparing in exaction, punishment, or censure" or "[I]nflicting discomfort or pain hard to endure; sharp; afflictive; distressing; violent; extreme; as *severe* pain, anguish, torture." Webster's New International Dictionary 2295 (2d ed. 1935); *see* American Heritage Dictionary of the English Language 1653 (3d ed. 1992) ("extremely violent or grievous: *severe* pain") (emphasis in original); IX The Oxford English Dictionary 572 (1978) ("Of pain, suffering, loss, or the like: Grievous, extreme" and "of circumstances . . .: hard to sustain or endure"). Thus, the adjective "severe" conveys that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure.

Congress's use of the phrase "severe pain" elsewhere in the United States Code can shed more light on its meaning. *See, e.g., West Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991) ("[W]e construe [a statutory term] to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law."). 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.* §

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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 to 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 the level of death, organ failure, or the permanent impairment of a significant body function. These statutes suggest that "severe pain," as used in Section 2340, must rise to a similarly high level—the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions—in order to constitute torture.[3]

C. "Severe mental pain or suffering"

Section 2340 gives further guidance as to the meaning of "severe mental pain or suffering," as distinguished from severe physical pain and suffering. The statute defines "severe mental pain or suffering" as:

> the prolonged mental harm caused by or resulting from—
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or

[3] One might argue that because the statute uses "or" rather than "and" in the phrase "pain or suffering" that "severe physical suffering" is a concept distinct from "severe physical pain." We believe the better view of the statutory text is, however, that they are not distinct concepts. The statute does not define "severe mental pain" and "severe mental suffering" separately. Instead, it gives the phrase "severe mental pain or suffering" a single definition. Because "pain or suffering" is single concept for the purposes of "severe mental pain or suffering," it should likewise be read as a single concept for the purposes of severe physical pain or suffering. Moreover, dictionariesdefine the words "pain" and "suffering" in terms of each other. *Compare, e.g.*, Webster's Third New International Dictionary 2284 (1993) (defining suffering as "the endurance of . . . pain" or "a pain endured"); Webster's Third New International Dictionary 2284 (1986) (same); XVII The Oxford English Dictionary 125 (2d ed. 1989) (defining suffering as "the bearing or undergoing of pain"); *with, e.g.*,Random House Webster's Unabridged Dictionary 1394 (2d ed. 1999) (defining "pain" as "physical suffering"); The American Heritage Dictionary of the English Language 942 (College ed. 1976) (defining pain as "suffering or distress"). Further, even if we were to read the infliction of severe physical suffering as distinct from severe physical pain, it is difficult to conceive of such suffering that would not involve severe physical pain. Accordingly, we conclude that "pain or suffering" is a single concept within the definition of Section 2340.

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> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

18 U.S.C. § 2340(2). In order to prove "severe mental pain or suffering," the statute requires proof of "prolonged mental harm" that was caused by or resulted from one of four enumerated acts. We consider each of these elements.

1. "Prolonged Mental Harm"

As an initial matter, Section 2340(2) requires that the severe mental pain must be evidenced by "prolonged mental harm." To prolong is to "lengthen in time" or to "extend the duration of, to draw out." Webster's Third New International Dictionary 1815 (1988); Webster's New International Dictionary 1980 (2d ed. 1935). Accordingly, "prolong" adds a temporal dimension to the harm to the individual, namely, that the harm must be one that is endured over some period of time. Put another way, the acts giving rise to the harm must cause some lasting, though not necessarily permanent, damage. For example, the mental strain experienced by an individual during a lengthy and intense interrogation—such as one that state or local police might conduct upon a criminal suspect—would not violate Section 2340(2). On the other hand, the development of a mental disorder such as posttraumatic stress disorder, which can last months or even years, or even chronic depression, which also can last for a considerable period of time if untreated, might satisfy the prolonged harm requirement. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 426, 439–45 (4th ed. 1994) ("DSM-IV"). *See also* Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477, 509 (1997) (noting that posttraumatic stress disorder is frequently found in torture victims); *cf.* Sana Loue, *Immigration Law and Health* § 10:46 (2001) (recommending evaluating for post-traumatic stress disorder immigrant-client who has experienced torture).[4] By contrast to "severe pain," the phrase "prolonged mental harm" appears nowhere else in the U.S. Code nor does it appear in relevant medical literature or international human rights reports.

[4] The DSM-IV explains that posttraumatic disorder ("PTSD") is brought on by exposure to traumatic events, such as serious physical injury or witnessing the deaths of others and during those events the individual felt "intense fear" or "horror." *Id.* at 424. Those suffering from this disorder reexperience the trauma through, *inter alia*, "recurrent and intrusive distressing recollections of the event," "recurrent distressing dreams of the event," or "intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event." *Id.* at 428. Additionally, a person with PTSD "[p]ersistent[ly]" avoids stimuli associated with the trauma, including avoiding conversations about the trauma, places that stimulate recollections about the trauma; and they experience a numbing of general responsiveness, such as a "restricted range of affect (e.g., unable to have loving feelings)," and "the feeling of detachment or estrangement from others." *Ibid.* Finally, an individual with PTSD has "[p]ersistent symptoms of increased arousal," as evidenced by "irritability or outbursts of anger," "hypervigilance," "exaggerated startle response," and difficulty sleeping or concentrating. *Ibid.*

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Not only must the mental harm be prolonged to amount to severe mental pain and suffering, but also it must be caused by or result from one of the acts listed in the statute. In the absence of a catchall provision, the most natural reading of the predicate acts listed in Section 2340(2)(A)–(D) is that Congress intended it to be exhaustive. In other words, other acts not included within Section 2340(2)'s enumeration are not within the statutory prohibition. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius.*"); Norman Singer, 2A Sutherland on Statutory Construction § 47.23 (6th ed. 2000) ("[W]here a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions.") (footnotes omitted). We conclude that torture within the meaning of the statute requires the specific intent to cause prolonged mental harm by one of the acts listed in Section 2340(2).

A defendant must specifically intend to cause prolonged mental harm for the defendant to have committed torture. It could be argued that a defendant needs to have specific intent only to commit the predicate acts that give rise to prolonged mental harm. Under that view, so long as the defendant specifically intended to, for example, threaten a victim with imminent death, he would have had sufficient *mens rea* for a conviction. According to this view, it would be further necessary for a conviction to show only that the victim factually suffered prolonged mental harm, rather than that the defendant intended to cause it. We believe that this approach is contrary to the text of the statute. The statute requires that the defendant specifically intend to inflict severe mental pain or suffering. Because the statute requires this mental state with respect to the infliction of severe mental pain, and because it expressly defines severe mental pain in terms of prolonged mental harm, that mental state must be present with respect to prolonged mental harm. To read the statute otherwise would read the phrase "the prolonged mental harm caused by or resulting from" out of the definition of "severe mental pain or suffering."

A defendant could negate a showing of specific intent to cause severe mental pain or suffering by showing that he had acted in good faith that his conduct would not amount to the acts prohibited by the statute. Thus, if a defendant has a good faith belief that his actions will not result in prolonged mental harm, he lacks the mental state necessary for his actions to constitute torture. A defendant could show that he acted in good faith by taking such steps as surveying professional literature, consulting with experts, or reviewing evidence gained from past experience. *See, e.g., Ratlzlaf*, 510 U.S. at 142 n.10 (noting that where the statute required that the defendant act with the specific intent to violate the law, the specific intent element "might be negated by, e.g., proof that defendant relied in good faith on advice of counsel.") (citations omitted). All of these steps would show that he has drawn on the relevant body of knowledge concerning the result proscribed that the statute, namely prolonged mental harm. Because the presence of good faith would negate the specific intent element of torture, it is a complete defense to such a charge. *See, e.g., United States v. Wall*, 130 F.3d 739, 746 (6th Cir. 1997); *United States v. Casperson*, 773 F.2d 216, 222–23 (8th Cir.1985).

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2. Harm Caused By Or Resulting From Predicate Acts

Section 2340(2) sets forth four basic categories of predicate acts. First in the list is the "intentional infliction or threatened infliction of severe physical pain or suffering." This might at first appear superfluous because the statute already provides that the infliction of severe physical pain or suffering can amount to torture. This provision, however, actually captures the infliction of physical pain or suffering when the defendant inflicts physical pain or suffering with general intent rather than the specific intent that is required where severe physical pain or suffering alone is the basis for the charge. Hence, this subsection reaches the infliction of severe physical pain or suffering when it is but the means of causing prolonged mental harm. Or put another way, a defendant has committed torture when he intentionally inflicts severe physical pain or suffering with the specific intent of causing prolonged mental harm. As for the acts themselves, acts that cause "severe physical pain or suffering" can satisfy this provision.

Additionally, the threat of inflicting such pain is a predicate act under the statute. A threat may be implicit or explicit. *See, e.g., United States v. Sachdev*, 279 F.3d 25, 29 (1st Cir. 2002). In criminal law, courts generally determine whether an individual's words or actions constitute a threat by examining whether a reasonable person in the same circumstances would conclude that a threat had been made. *See, e.g., Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that whether a statement constituted a threat against the president's life had to be determined in light of all the surrounding circumstances); *Sachdev*, 279 F.3d at 29 ("a reasonable person in defendant's position would perceive there to be a threat, explicit, or implicit, of physical injury"); *United States v. Khorrami*, 895 F.2d 1186, 1190 (7th Cir. 1990) (to establish that a threat was made, the statement must be made "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates a statement as a serious expression of an intention to inflict bodily harm upon [another individual]") (citation and internal quotation marks omitted); *United States v. Peterson*, 483 F.2d 1222, 1230 (D.C. Cir. 1973) (perception of threat of imminent harm necessary to establish self-defense had to be "objectively reasonable in light of the surrounding circumstances"). Based on this common approach, we believe that the existence of a threat of severe pain or suffering should be assessed from the standpoint of a reasonable person in the same circumstances.

Second, Section 2340(2)(B) provides that prolonged mental harm, constituting torture, can be caused by "the administration or application or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality." The statute provides no further definition of what constitutes a mind-altering substance. The phrase "mind-altering substances" is found nowhere else in the U.S. Code nor is it found in dictionaries. It is, however, a commonly used synonym for drugs. *See, e.g., United States v. Kingsley*, 241 F.3d 828, 834 (6th Cir.) (referring to controlled substances as "mind-altering substance[s]") *cert. denied*, 122 S. Ct. 137 (2001); *Hogue v. Johnson*, 131 F.3d 466, 501 (5th Cir. 1997) (referring to drugs and alcohol as "mind-altering substance[s]"), *cert. denied*, 523 U.S. 1014 (1998). In addition, the phrase appears in a number of state statutes, and the context

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in which it appears confirms this understanding of the phrase. *See, e.g.*, Cal. Penal Code § 3500(c) (West Supp. 2000) ("Psychotropic drugs also include mind-altering . . . drugs . . . ."); Minn. Stat. Ann. § 260B.201(b) (West Supp. 2002) ("'chemical dependency treatment'" define as programs designed to "reduc[e] the risk of the use of alcohol, drugs, or other mind-altering substances").

This subparagraph, however, does not preclude any and all use of drugs. Instead, it prohibits the use of drugs that "disrupt profoundly the senses or the personality." To be sure, one could argue that this phrase applies only to "other procedures," not the application of mind-altering substances. We reject this interpretation because the terms of Section 2340(2) expressly indicate that the qualifying phrase applies to both "other procedures" *and* the "application of mind-altering substances." The word "other" modifies "procedures calculated to disrupt profoundly the senses." As an adjective, "other" indicates that the term or phrase it modifies is the remainder of several things. *See* Webster's Third New International Dictionary 1598 (1986) (defining "other" as "the one that remains of two or more") Webster's Ninth New Collegiate Dictionary 835 (1985) (defining "other" as "being the one (as of two or more) remaining or not included"). Or put another way, "other" signals that the words to which it attaches are of the same kind, type, or class as the more specific item previously listed. Moreover, where statutes couple words or phrases together, it "denotes an intention that they should be understood in the same general sense." Norman Singer, 2A Sutherland on Statutory Construction § 47:16 (6th ed. 2000); *see also Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). Thus, the pairing of mind-altering substances with procedures calculated to disrupt profoundly the senses or personality and the use of "other" to modify "procedures" shows that the use of such substances must also cause a profound disruption of the senses or personality.

For drugs or procedures to rise to the level of "disrupt[ing] profoundly the senses or personality," they must produce an extreme effect. And by requiring that they be "calculated" to produce such an effect, the statute requires for liability the defendant has consciously designed the acts to produce such an effect.28 U.S.C. § 2340(2)(B). The word "disrupt" is defined as "to break asunder; to part forcibly; rend," imbuing the verb with a connotation of violence. Webster's New International Dictionary 753 (2d ed. 1935); *see* Webster's Third New International Dictionary 656 (1986) (defining disrupt as "to break apart: Rupture" or "destroy the unity or wholeness of"); IV The Oxford English Dictionary 832 (1989) (defining disrupt as "[t]o break or burst asunder; to break in pieces; to separate forcibly"). Moreover, disruption of the senses or personality alone is insufficient to fall within the scope of this subsection; instead, that disruption must be profound. The word "profound" has a number of meanings, all of which convey a significant depth. Webster's New International Dictionary 1977 (2d ed. 1935) defines profound as: "Of very great depth; extending far below the surface or top; unfathomable[;] . . . [c]oming from, reaching to, or situated at a depth or more than ordinary depth; not superficial; deep-seated; chiefly with reference to the body; as a *profound* sigh, wound, or pain[;] . . . [c]haracterized by intensity, as of feeling or quality; deeply felt or realized; as, *profound* respect, fear, or melancholy; hence, encompassing;

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thoroughgoing; complete; as, *profound* sleep, silence, or ignorance." *See* Webster's Third New International Dictionary 1812 (1986) ("having very great depth: extending far below the surface . . . not superficial"). Random House Webster's Unabridged Dictionary 1545 (2d ed. 1999) also defines profound as "originating in or penetrating to the depths of one's being" or "pervasive or intense; thorough; complete" or "extending, situated, or originating far down, or far beneath the surface." By requiring that the procedures and the drugs create a *profound* disruption, the statute requires more than that the acts "forcibly separate" or "rend" the senses or personality. Those acts must penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality.

The phrase "disrupt profoundly the senses or personality" is not used in mental health literature nor is it derived from elsewhere in U.S. law. Nonetheless, we think the following examples would constitute a profound disruption of the senses or personality. Such an effect might be seen in a drug-induced dementia. In such a state, the individual suffers from significant memory impairment, such as the inability to retain any new information or recall information about things previously of interest to the individual. *See* DSM-IV at 134.[5] This impairment is accompanied by one or more of the following: deterioration of language function, e.g., repeating sounds or words over and over again; impaired ability to execute simple motor activities, e.g., inability to dress or wave goodbye; "[in]ability to recognize [and identify] objects such as chairs or pencils" despite normal visual functioning; or "[d]isturbances in executive level functioning," i.e., serious impairment of abstract thinking. *Id.* at 134–35. Similarly, we think that the onset of "brief psychotic disorder" would satisfy this standard. *See id.* at 302–03. In this disorder, the individual suffers psychotic symptoms, including among other things, delusions, hallucinations, or even a catatonic state. This can last for one day or even one month. *See id.* We likewise think that the onset of obsessive-compulsive disorder behaviors would rise to this level. Obsessions are intrusive thoughts unrelated to reality. They are not simple worries, but are repeated doubts or even "aggressive or horrific impulses." *See id.* at 418. The DSM-IV further explains that compulsions include "repetitive behaviors (e.g., hand washing, ordering, checking)" and that "[b]y definition, [they] are either clearly excessive or are not connected in a realistic way with what they are designed to neutralize or prevent." *See id.* Such compulsions or obsessions must be "time-consuming." *See id.* at 419. Moreover, we think that pushing someone to the brink of suicide, particularly where the person comes from a culture with strong taboos against suicide, and it is evidenced by acts of self-mutilation, would be a sufficient disruption of the personality to constitute a "profound disruption." These examples, of course, are in no way intended to be exhaustive list. Instead, they are merely intended to

[5] Published by the American Psychiatric Association, and written as a collaboration of over a thousand psychiatrists, the DSM-IV is commonly used in U.S. courts as a source of information regarding mental health issues and is likely to be used in trial should charges be brought that allege this predicate act. *See, e.g., Atkins v. Virginia*, 122 S. Ct. 2242, 2245 n.3 (2002); *Kansas v. Crane*, 122 S. Ct. 867, 871 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 359–60 (1997); *McClean v. Merrifield*, No. 00-CV-0120E(SC), 2002 WL 1477607 at *2 n.7 (W.D.N.Y. June 28, 2002); *Peeples v. Coastal Office Prods.*, 203 F. Supp. 2d. 432, 439 (D. Md. 2002); *Lassiegne v. Taco Bell Corp.*, 202 F. Supp. 2d 512, 519 (E.D. La. 2002).

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illustrate the sort of mental health effects that we believe would accompany an action severe enough to amount to one that "disrupt[s] profoundly the senses or the personality."

The third predicate act listed in Section 2340(2) is threatening a prisoner with "imminent death." 18 U.S.C. § 2340(2)(C). The plain text makes clear that a threat of death alone is insufficient; the threat must indicate that death is "imminent." The "threat of imminent death" is found in the common law as an element of the defense of duress. *See Bailey*, 444 U.S. at 409. "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette v. United States*, 342 U.S. 246, 263 (1952). Common law cases and legislation generally define imminence as requiring that the threat be almost immediately forthcoming. 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.7, at 655 (1986). By contrast, threats referring vaguely to things that might happen in the future do not satisfy this immediacy requirement. *See United States v. Fiore*, 178 F.3d 917, 923 (7th Cir. 1999). Such a threat fails to satisfy this requirement not because it is too remote in time but because there is a lack of certainty that it will occur. Indeed, timing is an indicator of certainty that the harm *will* befall the defendant. Thus, a vague threat that someday the prisoner *might* be killed would not suffice. Instead, subjecting a prisoner to mock executions or playing Russian roulette with him would have sufficient immediacy to constitute a threat of imminent death. Additionally, as discussed earlier, we believe that the existence of a threat must be assessed from the perspective of a reasonable person in the same circumstances.

Fourth, if the official threatens to do anything previously described to a third party, or commits such an act against a third party, that threat or action can serve as the necessary predicate for prolonged mental harm. *See* 18 U.S.C. § 2340(2)(D). The statute does not require any relationship between the prisoner and the third party.

3. Legislative History

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 the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987), which requires signatories to "ensure that all acts of torture are offenses under its criminal law." CAT art. 4. These sections 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 already 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

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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.").

4. Summary

Section 2340's definition of torture must be read as a sum of these component parts. *See Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434–35 (1989) (reading two provisions together to determine statute's meaning); *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 405 (1988) (looking to "the language and design of the statute as a whole" to ascertain a statute's meaning). Each component of the definition emphasizes that torture is not the mere infliction of pain or suffering on another, but is instead a step well removed. The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. If that pain or suffering is psychological, that suffering must result from one of the acts set forth in the statute. In addition, these acts must cause long-term mental harm. Indeed, this view of the criminal act of torture is consistent with the term's common meaning. Torture is generally understood to involve "intense pain" or "excruciating pain," or put another way, "extreme anguish of body or mind." Black's Law Dictionary at 1498 (7th Ed. 1999); Random House Webster's Unabridged Dictionary 1999 (1999); Webster's New International Dictionary 2674 (2d ed. 1935). In short, reading the definition of torture as a whole, it is plain that the term encompasses only extreme acts.[6]

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[6] Torture is a term also found in state law. Some states expressly proscribe "murder by torture." *See, e.g.*, Idaho Code § 18-4001 (Michie 1997); N.C. Gen. Stat. Ann. § 14-17 (1999) ; *see also* Me. Rev. Stat. Ann. tit. 17-A, § 152-A (West Supp. 2001) (aggravated attempted murder is "[t]he attempted murder . . . accompanied by torture, sexual assault or other extreme cruelty inflicted upon the victim"). Other states have made torture an aggravating factor supporting imposition of the death penalty. *See, e.g.*, Ark. Code Ann. § 5-4-604(8)(B); Del. Code Ann. tit. 11, § 4209(e)(1)*(l)* (1995); Ga. Code Ann. § 17-10-30(b)(7) (1997); ; 720 Ill. Comp. Stat. Ann. 5/9-1(b)(14) (West Supp. 2002); Mass. Ann. Laws ch. 279, § 69(a) (Law. Co-op. 1992); Mo. Ann. Stat. § 565.032(2)(7) (West 1999); Nev. Rev. Stat. Ann. 200-033(8) (Michie 2001); N.J. Stat. Ann. § 2C:11-3 (West Supp. 2002) (same); Tenn. Code Ann. § 39-13-204(i)(5) (Supp. 2001); *see also* Alaska Stat. § 12.55.125(a)(3) (2000) (term of 99 years' imprisonment mandatory where defendant subjected victim to "substantial physical torture"). *All of these laws support the conclusion that torture is generally an extreme act far beyond the infliction of pain or suffering alone.*

California law is illustrative on this point. The California Penal Code not only makes torture itself an offense, see Cal. Penal Code § 206 (West Supp. 2002), it also prohibits murder by torture, see Cal. Penal Code § 189 (West Supp. 2002), and provides that torture is an aggravating circumstance supporting the imposition of the death penalty, see Cal. Penal Code § 190.2 (West Supp. 2002). California's definitions of torture demonstrate that the term is reserved for especially cruel acts inflicting serious injury. Designed to "fill[] a gap in existing law dealing with extremely violent and callous criminal conduct[,]" *People v. Hale*, 88 Cal. Rptr. 2d 904, 913 (1999) (internal quotation marks and citation omitted), Section 206 defines the offense of torture as:

> [e]very person who, with the intent to cause *cruel* or *extreme* pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily

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II. U.N. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.

Because Congress enacted the criminal prohibition against torture to implement CAT, we also examine the treaty's text and history to develop a fuller understanding of the context of Sections 2340–2340A. As with the statute, we begin our analysis with the treaty's text. *See Eastern Airlines Inc. v. Floyd*, 499 U.S. 530, 534–35 (1991) ("When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used.) (quotation marks and citations omitted). CAT defines torture as:

> any act by which *severe* pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Article 1(1) (emphasis added). Unlike Section 2340, this definition includes a list of purposes for which such pain and suffering is inflicted. The prefatory phrase "such purposes as" makes clear that this list is, however, illustrative rather than exhaustive. Accordingly, severe pain or suffering need not be inflicted for those specific purposes to constitute torture; instead, the perpetrator must simply have a purpose of the same kind.

> injury . . . upon the person of another, is guilty of torture. The crime of torture does not require any proof that the victim suffered pain.

(Emphasis added). With respect to sections190.2 and 189, neither of which are statutorily defined, California courts have recognized that torture generally means an "[a]ct or process of inflicting severe pain, esp[ecially] as a punishment to extort confession, or in revenge. . . . Implicit in that definition is the requirement of an intent to cause pain and suffering in addition to death." *People v. Barrera*, 18 Cal. Rptr. 2d 395, 399 (Ct. App. 1993) (quotation marks and citation omitted). Further, "'murder by torture was and is considered among the most reprehensible types of murder because of the calculated nature of the acts causing death.'" *Id.* at 403 (quoting *People v. Wiley*, 133 Cal. Rptr. 135, 138 (1976) (in bank)). The definition of murder by torture special circumstance, proscribed under Cal. Penal Code § 190.2, likewise shows an attempt to reach the most heinous acts imposing pain beyond that which a victim suffers through death alone. To establish murder by torture special circumstance, the "intent to kill, intent to torture, and infliction of an extremely painful act upon a living victim" must be present. *People v. Bemore*, 94 Cal. Rptr. 2d 840, 861 (2000). The intent to torture is characterized by a "'sadistic intent to cause the victim to suffer pain in addition to the pain of death.'" *Id.* at 862 (quoting *People v. Davenport*, 221 Cal. Rptr. 794, 875 (1985)). Like the Torture Victims Protection Act and the Convention Against Torture, discussed *infra* at Parts II and III, each of these California prohibitions against torture require an evil intent—such as cruelty, revenge or even sadism. Section 2340 does not require this additional intent, but as discussed *supra* pp. 2–3, requires that the individual specifically intended to cause severe pain or suffering. Furthermore, unlike Section 2340, neither section 189 nor section 206 appear to require proof of actual pain to establish torture.

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More importantly, like Section 2340, the pain and suffering must be severe to reach the threshold of torture. Thus, the text of CAT reinforces our reading of Section 2340 that torture must be an extreme act.[7]

CAT also distinguishes between torture and other acts of cruel, inhuman, or degrading treatment or punishment.[8] Article 16 of CAT requires state parties to "undertake to prevent . . . other acts of cruel, inhuman or degrading treatment or punishment *which do not amount to torture* as defined in article 1." (Emphasis added). CAT thus establishes a category of acts that are not to be committed and that states must endeavor to prevent, but that states need not criminalize, leaving those acts without the stigma of criminal penalties. CAT reserves criminal penalties and the stigma attached to those penalties for torture alone. In so doing, CAT makes clear that torture is at the farthest end of impermissible actions, and that it is distinct and separate from the lower level of "cruel, inhuman, or degrading treatment or punishment." This approach is in keeping with CAT's predecessor, the U.N. Declaration on the Protection from Torture. That declaration defines torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." Declaration on Protection from Torture, UN Res. 3452, Art. 1(2) (Dec. 9, 1975).

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[7] To be sure, the text of the treaty requires that an individual act "intentionally." This language might be read to require only general intent for violations of the Torture Convention. We believe, however, that the better interpretation is that that the use of the phrase "intentionally" also created a specific intent-type standard. In that event, the Bush administration's understanding represents only an explanation of how the United States intended to implement the vague language of the Torture Convention. If, however, the Convention established a general intent standard, then the Bush understanding represents a modification of the obligation undertaken by the United States.

[8] Common article 3 of Geneva Convention on prisoners of war, Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3517 ("Geneva Convention III") contains somewhat similar language. Article 3(1)(a) prohibits "violence to life and person, in particular murder of all kinds, mutilation, *cruel treatment and torture*." (Emphasis added). Article 3(1)(c) additionally prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment." Subsection (c) must forbid more conduct than that already covered in subsection (a) otherwise subsection (c) would be superfluous. Common article 3 does not, however, define either of the phrases "outrages upon personal dignity" or "humiliating and degrading treatment." International criminal tribunals, such as those respecting Rwanda and former Yugoslavia have used common article 3 to try individuals for committing inhuman acts lacking any military necessity whatsoever. Based on our review of the case law, however, these tribunals have not yet articulated the full scope of conduct prohibited by common article 3. Memorandum for John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, from James C. Ho, Attorney-Advisor, Office of Legal Counsel, *Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War* (Feb. 1, 2002).

We note that Section 2340A and CAT protect any individual from torture. By contrast, the standards of conduct established by common article 3 of Convention III, do not apply to "an armed conflict between a nation-state and a transnational terrorist organization." Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 8 (Jan. 22, 2002).

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A. Ratification History

Executive branch interpretation of CAT further supports our conclusion that the treaty, and thus Section 2340A, prohibits only the most extreme forms of physical or mental harm. As we have previously noted, the "division of treaty-making responsibility between the Senate and the President is essentially the reverse of the division of law-making authority, with the President being the draftsman of the treaty and the Senate holding the authority to grant or deny approval." *Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 31 (Apr. 9, 1987) ("Sofaer Memorandum"). Treaties are negotiated by the President in his capacity as the "sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Moreover, the President is responsible for the day-to-day interpretation of a treaty and retains the power to unilaterally terminate a treaty. *See Goldwater v. Carter*, 617 F.2d 697, 707–08 (D.C. Cir.) (en banc) *vacated and remanded with instructions to dismiss on other grounds*, 444 U.S. 996 (1979). The Executive's interpretation is to be accorded the greatest weight in ascertaining a treaty's intent and meaning. *See, e.g., United States v. Stuart*, 489 U.S. 353, 369 (1989) ("'the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight'") (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the department of government particularly charged with their negotiation and enforcement is given great weight."); *Charlton v. Kelly*, 229 U.S. 447, 468 (1913) ("A construction of a treaty by the political departments of the government, while not conclusive upon a court . . . , is nevertheless of much weight.").

A review of the Executive branch's interpretation and understanding of CAT reveals that Congress codified the view that torture included only the most extreme forms of physical or mental harm. When it submitted the Convention to the Senate, the Reagan administration took the position that CAT reached only the most heinous acts. The Reagan administration included the following understanding:

> The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.

S. Treaty Doc. No. 100-20, at 4–5. Focusing on the treaty's requirement of "severity," the Reagan administration concluded, "The extreme nature of torture is further emphasized in [this] requirement." S. Treaty Doc. No. 100-20, at 3 (1988); S. Exec. Rep. 101-30, at 13 (1990). The Reagan administration also determined that CAT's definition of torture fell in line with "United States and international usage, [where it] is usually reserved for extreme deliberate and unusually cruel practices, for example, sustained systematic beatings, application of electric currents to sensitive parts of the body and tying up or hanging in positions that cause extreme pain." S. Exec. Rep. No. 101-30, at

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14 (1990). In interpreting CAT's definition of torture as reaching only such extreme acts, the Reagan administration underscored the distinction between torture and other cruel, inhuman, or degrading treatment or punishment. In particular, the administration declared that article 1's definition of torture ought to be construed in light of article 16. *See* S. Treaty Doc. No. 100-20, at 3. Based on this distinction, the administration concluded that: "'Torture' is thus to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in case of torture." S. Treaty Doc. 100-20, at 3. Moreover, this distinction was "adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment." S. Treaty Doc. No. 100-20, at 3. Given the extreme nature of torture, the administration concluded that "rough treatment as generally falls into the category of 'police brutality,' while deplorable, does not amount to 'torture.'" S. Treaty Doc. No. 100-20, at 4.

Although the Reagan administration relied on CAT's distinction between torture and "cruel, inhuman, or degrading treatment or punishment," it viewed the phrase "cruel, inhuman, or degrading treatment or punishment" as vague and lacking in a universally accepted meaning. Of even greater concern to the Reagan administration was that because of its vagueness this phrase could be construed to bar acts not prohibited by the U.S. Constitution. The administration pointed to *Case of X v. Federal Republic of Germany* as the basis for this concern. In that case, the European Court of Human Rights determined that the prison officials' refusal to recognize a prisoner's sex change might constitute degrading treatment. *See* S. Treaty Doc. No. 100-20, at 15 (citing European Commission on Human Rights, *Dec. on Adm.*, Dec. 15, 1977, *Case of X v. Federal Republic of Germany* (No. 6694/74), 11 Dec. & Rep. 16)). As a result of this concern, the Administration added the following understanding:

> The United States understands the term, 'cruel, inhuman or degrading treatment or punishment,' as used in Article 16 of the Convention, to mean the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."

S. Treaty Doc. No. 100-20, at 15–16. Treatment or punishment must therefore rise to the level of action that U.S. courts have found to be in violation of the U.S. Constitution in order to constitute cruel, inhuman, or degrading treatment or punishment. That which fails to rise to this level must fail, *a fortiori*, to constitute torture under Section 2340.[9]

[9] The vagueness of "cruel, inhuman and degrading treatment" enables the term to have a far-ranging reach. Article 3 of the European Convention on Human Rights similarly prohibits such treatment. The European Court of Human Rights has construed this phrase broadly, even assessing whether such treatment has occurred from the subjective stand point of the victim. *See* Memorandum from James C. Ho, Attorney-Advisor to John C. Yoo, Deputy Assistant Attorney General, *Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War* (Feb. 1, 2002) (finding that European Court of Human Right's construction of inhuman or degrading treatment "is broad enough to arguably forbid even standard U.S. law enforcement interrogation techniques, which endeavor to break down a detainee's 'moral resistance' to answering questions.").

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The Senate did not give its advice and consent to the Convention until the first Bush administration. Although using less vigorous rhetoric, the Bush administration joined the Reagan administration in interpreting torture as only reaching extreme acts. To ensure that the Convention's reach remained limited, the Bush administration submitted the following understanding:

> The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental pain caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36. This understanding accomplished two things. First, it ensured that the term "intentionally" would be understood as requiring specific intent. Second, it added form and substance to the otherwise amorphous concept of *mental* pain or suffering. In so doing, this understanding ensured that mental torture would rise to a severity seen in the context of physical torture. The Senate ratified CAT with this understanding, and as is obvious from the text, Congress codified this understanding almost verbatim in the criminal statute.

To be sure, it might be thought significant that the Bush administration's language differs from the Reagan administration understanding. The Bush administration said that it had altered the CAT understanding in response to criticism that the Reagan administration's original formulation had raised the bar for the level of pain necessary for the act or acts to constitute torture. *See* Convention Against Torture: Hearing Before the Senate Comm. On Foreign Relations, 101st Cong. 9–10 (1990) ("1990 Hearing") (prepared statement of Hon. Abraham D. Sofaer, Legal Adviser, Department of State). While it is true that there are rhetorical differences between the understandings, both administrations consistently emphasize the extraordinary or extreme acts required to constitute torture. As we have seen, the Bush understanding as codified in Section 2340 reaches only extreme acts. The Reagan understanding, like the Bush understanding, ensured that "intentionally" would be understood as a specific intent requirement.

Moreover, despite the Reagan and Bush administrations' efforts to limit the reach of the cruel, inhuman and degrading treatment language, it appears to still have a rather limitless reach. *See id.* (describing how the Eighth Amendment ban on "cruel and unusual punishment" has been used by courts to, *inter alia*, "engage in detailed regulation of prison conductions, including the exact size cells, exercise, and recreational activities, quality of food, access to cable television, internet, and law libraries.")

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Though the Reagan administration required that the "act be deliberate and calculated" *and* that it be inflicted with specific intent, in operation there is little difference between requiring specific intent alone and requiring that the act be deliberate and calculated. The Reagan understanding's also made express what is obvious from the plain text of CAT: torture is an extreme form of cruel and inhuman treatment. The Reagan administration's understanding that the pain be "excruciating and agonizing" is in substance not different from the Bush administration's proposal that the pain must be severe.

The Bush understanding simply took a rather abstract concept—excruciating and agonizing mental pain—and gave it a more concrete form. Executive branch representations made to the Senate support our view that there was little difference between these two understandings and that the further definition of mental pain or suffering merely sought remove the vagueness created by concept of "agonizing and excruciating" mental pain. *See* 1990 Hearing, at 10 (prepared statement of Hon. Abraham D. Sofaer, Legal Adviser, Department of State) ("no higher standard was intended" by the Reagan administration understanding than was present in the Convention or the Bush understanding); *id.* at 13–14 (statement of Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice) ("In an effort to overcome this unacceptable element of vagueness [in the term "mental pain"], we have proposed an understanding which defines severe mental pain constituting torture with sufficient specificity . . . to protect innocent persons and meet constitutional due process requirements.") Accordingly, we believe that the two definitions submitted by the Reagan and Bush administrations had the same purpose in terms of articulating a legal standard, namely, ensuring that the prohibition against torture reaches only the most extreme acts. Ultimately, whether the Reagan standard would have been even higher is a purely academic question because the Bush understanding clearly established a very high standard.

Executive branch representations made to the Senate confirm that the Bush administration maintained the view that torture encompassed only the most extreme acts. Although the ratification record, i.e., testimony, hearings, and the like, is generally not accorded great weight in interpreting treaties, authoritative statements made by representatives of the Executive Branch are accorded the most interpretive value. *See* Sofaer Memorandum, at 35–36. Hence, the testimony of the executive branch witnesses defining torture, in addition to the reservations, understandings and declarations that were submitted to the Senate by the Executive branch, should carry the highest interpretive value of any of the statements in the ratification record. At the Senate hearing on CAT, Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice, offered extensive testimony as to the meaning of torture. Echoing the analysis submitted by the Reagan administration, he testified that "[t]orture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct." 1990 Hearing, at 16 (prepared statement of Mark Richard). He further explained, "As applied to physical torture, there appears to be some degree of consensus that the concept involves conduct, the mere mention of which sends chills down one's spine[.]" *Id.* Richard gave the following examples of conduct satisfying this standard: "the needle under the fingernail, the application of electrical shock to the genital area, the piercing of

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eyeballs, etc." *Id.* In short, repeating virtually verbatim the terms used in the Reagan understanding, Richard explained that under the Bush administration's submissions with the treaty "the essence of torture" is treatment that inflicts " "excruciating and agonizing physical pain." *Id.* (emphasis added).

As to mental torture, Richard testified that "no international consensus had emerged [as to] what degree of mental suffering is required to constitute torture[,]" but that it was nonetheless clear that severe mental pain or suffering "does not encompass the normal legal compulsions which are properly a part of the criminal justice system[:] interrogation, incarceration, prosecution, compelled testimony against a friend, etc,—notwithstanding the fact that they may have the incidental effect of producing mental strain." *Id.* at 17. According to Richard, CAT was intended to "condemn as torture intentional acts such as those designed to damage and destroy the human personality." *Id.* at 14. This description of mental suffering emphasizes the requirement that any mental harm be of significant duration and lends further support for our conclusion that mind-altering substances must have a profoundly disruptive effect to serve as a predicate act.

Apart from statements from Executive branch officials, the rest of a ratification record is of little weight in interpreting a treaty. *See generally* Sofaer Memorandum. Nonetheless, the Senate understanding of the definition of torture largely echoes the administrations' views. The Senate Foreign Relations Committee Report on CAT opined: "[f]or an act to be 'torture' it must be an *extreme* form of cruel and inhuman treatment, cause *severe* pain and suffering and be *intended to cause severe* pain and suffering." S. Exec. Rep. No. 101-30, at 6 (emphasis added). Moreover, like both the Reagan and Bush administrations, the Senate drew upon the distinction between torture and cruel, inhuman or degrading treatment or punishment in reaching its view that torture was extreme.[10] Finally, the Senate concurred with the administrations' concern that "cruel, inhuman, or degrading treatment or punishment" could be construed to establish a new standard above and beyond that which the Constitution mandates and supported the inclusion of the reservation establishing the Constitution as the baseline for determining whether conduct amounted to cruel, inhuman, degrading treatment or punishment. *See* 136 Cong. Rec. 36,192 (1990); S. Exec. Rep. 101-30, at 39.

B. Negotiating History

CAT's negotiating history also indicates that its definition of torture supports our reading of Section 2340. The state parties endeavored to craft a definition of torture that reflected the term's gravity. During the negotiations, state parties offered various formulations of the definition of torture to the working group, which then proposed a

[10] Hearing testimony, though the least weighty evidence of meaning of all of the ratification record, is not to the contrary. Other examples of torture mentioned in testimony similarly reflect acts resulting in intense pain: the "gouging out of childrens' [sic] eyes, the torture death by molten rubber, the use of electric shocks," cigarette burns, hanging by hands or feet. 1990 Hearing at 45 (Statement of Winston Nagan, Chairman, Board of Directors, Amnesty International USA); *id.* at 79 (Statement of David Weissbrodt, Professor of Law, University of Minnesota, on behalf of the Center for Victims of Torture, the Minnesota Lawyers International Human Rights Committee).

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definition based on those formulations. Almost all of these suggested definitions illustrate the consensus that torture is an extreme act designed to cause agonizing pain. For example, the United States proposed that torture be defined as "includ[ing] any act by which extremely severe pain or suffering . . . is deliberately and maliciously inflicted on a person." J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment* 41 (1988) ("CAT Handbook"). The United Kingdom suggested an even more restrictive definition, i.e., that torture be defined as the "*systematic and intentional* infliction of *extreme* pain or suffering rather than *intentional* infliction of *severe* pain or suffering." *Id.* at 45 (emphasis in original). Ultimately, in choosing the phrase "severe pain," the parties concluded that this phrase "sufficient[ly] . . . convey[ed] the idea that only acts of a certain gravity shall . . . constitute torture." *Id.* at 117.

In crafting such a definition, the state parties also were acutely aware of the distinction they drew between torture and cruel, inhuman, or degrading treatment or punishment. The state parties considered and rejected a proposal that would have defined torture merely as cruel, inhuman or degrading treatment or punishment. *See id.* at 42. Mirroring the Declaration on Protection From Torture, which expressly defined torture as an "aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment," some state parties proposed that in addition to the definition of torture set out in paragraph 2 of article 1, a paragraph defining torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment" should be included. *See id.* at 41; *see also* S. Treaty Doc. No. 100-20, at 2 (the U.N. Declaration on Protection from Torture (1975) served as "a point of departure for the drafting of [CAT]"). In the end, the parties concluded that the addition of such a paragraph was superfluous because Article 16 "impl[ies] that torture is the gravest form of such treatment or punishment." *CAT Handbook* at 80; *see* S. Exec. Rep. No. 101-30, at 13 ("The negotiating history indicates that [the phrase 'which do not amount to torture'] was adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment and that Article 1 should be construed with this in mind.").

Additionally, the parties could not reach a consensus about the meaning of "cruel, inhuman, or degrading treatment or punishment." *See CAT Handbook* at 47. Without a consensus, the parties viewed the term as simply "'too vague to be included in a convention which was to form the basis for criminal legislation in the Contracting States.'" *Id.* This view evinced by the parties reaffirms the interpretation of CAT as purposely reserving criminal penalties for torture alone.

CAT's negotiating history offers more than just support for the view that pain or suffering must be extreme to amount to torture. First, the negotiating history suggests that the harm sustained from the acts of torture need not be permanent. In fact, "the United States considered that it might be useful to develop the negotiating history which indicates that although conduct resulting in permanent impairment of physical or mental faculties is indicative of torture, it is not an essential element of the offence." *Id.* at 44.

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Second, the state parties to CAT rejected a proposal to include in CAT's definition of torture the use of truth drugs, where no physical harm or mental suffering was apparent. This rejection at least suggests that such drugs were not viewed as amounting to torture per se. *See id.* at 42.

C. Summary

The text of CAT confirms our conclusion that Section 2340A was intended to proscribe only the most egregious conduct. CAT not only defines torture as involving severe pain and suffering, but also it makes clear that such pain and suffering is at the extreme end of the spectrum of acts by reserving criminal penalties solely for torture. Executive interpretations confirm our view that the treaty (and hence the statute) prohibits only the worst forms of cruel, inhuman, or degrading treatment or punishment. The ratification history further substantiates this interpretation. Even the negotiating history displays a recognition that torture is a step far-removed from other cruel, inhuman or degrading treatment or punishment. In sum, CAT's text, ratification history and negotiating history all confirm that Section 2340A reaches only the most heinous acts.

III. U.S. Judicial Interpretation

There are no reported cases of prosecutions under Section 2340A. *See* Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 Hastings Int'l & Comp. L. Rev. 401, 408 & n.29 (2001); Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 Harv. Int'l L. J. 141, 148–49 (2001); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 327–28. Nonetheless, we are not without guidance as to how United States courts would approach the question of what conduct constitutes torture. Civil suits filed under the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note (2000), which supplies a tort remedy for victims of torture, provide insight into what acts U.S. courts would conclude constitute torture under the criminal statute.

The TVPA contains a definition similar in some key respects to the one set forth in Section 2340. Moreover, as with Section 2340, Congress intended for the TVPA's definition of torture to follow closely the definition found in CAT. *See Xuncax v. Gramajo*, 886 F. Supp. 162, 176 n.12 (D. Mass 1995) (noting that the definition of torture in the TVPA tracks the definitions in Section 2340 and CAT).[11] The TVPA defines torture as:

[11] *See also* 137 Cong. Rec. 34,785 (statement of Rep. Mazzoli) ("Torture is defined in accordance with the definition contained in [CAT]"); *see also* Torture Victims Portection Act: Hearing and Markup on H.R. 1417 Before the Subcomm. On Human Rights and International Organizations of the House Comm. on Foreign Affairs, 100th Cong. 38 (1988) (Prepared Statement of the Association of the Bar of the City of New York, Committee on International Human Rights) ("This language essentially tracks the definition of 'torture' adopted in the Torture Convention.").

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> (1). . . any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
>
> (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from–
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

28 U.S.C. § 1350 note § 3(b). This definition differs from Section 2340's definition in two respects. First, the TVPA definition contains an illustrative list of purposes for which such pain may have been inflicted. *See id.* Second, the TVPA includes the phrase "arising only from or inherent in, or incidental to lawful sanctions"; by contrast, Section 2340 refers only to pain or suffering "incidental to lawful sanctions." *Id.* Because the purpose of our analysis here is to ascertain acts that would cross the threshold of producing "severe physical or mental pain or suffering," the list of illustrative purposes for which it is inflicted, generally would not affect this analysis.[12] Similarly, to the extent that the absence of the phrase "arising only from or inherent in" from Section 2340 might affect the question of whether pain or suffering was part of lawful sanctions and thus not torture, the circumstances with which we are concerned here are solely that of interrogations, not the imposition of punishment subsequent to judgment. These differences between the TVPA and Section 2340 are therefore not sufficiently significant to undermine the usefulness of TVPA cases here.[13]

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[12] This list of purposes is illustrative only. Nevertheless, demonstrating that a defendant harbored any of these purposes "may prove valuable in assisting in the establishment of intent at trial." Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, 17 B.C. Int'l & Comp. L. Rev. 275, 314 (1994).

[13] The TVPA also requires that an individual act "intentionally." As we noted with respect to the text of CAT, see *supra* n. 7, this language might be construed as requiring general intent. It is not clear that this is so. We need not resolve that question, however, because we review the TVPA cases solely to address the acts that would satisfy the threshold of inflicting "severe physical or mental pain or suffering."

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In suits brought under the TVPA, courts have not engaged in any lengthy analysis of what acts constitute torture. In part, this is due to the nature of the acts alleged. Almost all of the cases involve physical torture, some of which is of an especially cruel and even sadistic nature. 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. Because of this approach, it is difficult to take a specific act out of context and conclude that the act in isolation would constitute torture. Certain acts do, however, consistently reappear in these cases or are of such 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, 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. Given the highly contextual nature of whether a set of acts constitutes torture, we have set forth in the attached appendix the circumstances in which courts have determined that the plaintiff has suffered torture, which include the cases from which these seven acts are drawn. While we cannot say with certainty that acts falling short of these seven would *not* constitute torture under Section 2340, we believe that interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate the law.

Despite the limited analysis engaged in by courts, a recent district court opinion provides some assistance in predicting how future courts might address this issue. In *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, (N.D. Ga. 2002), the plaintiffs, Bosnian Muslims, sued a Bosnian Serb, Nikola Vuckovic, for, among other things, torture and cruel and inhumane treatment. The court described in vivid detail the treatment the plaintiffs endured. Specifically, the plaintiffs experienced the following:

Vuckovic repeatedly beat Kemal Mehinovic with a variety of blunt objects and boots, intentionally delivering blows to areas he knew to already be badly injured, including Mehinovic's genitals. *Id.* at 1333–34. On some occasions he was tied up and hung against windows during beatings. *Id.* Mehinovic, was subjected to the game of "Russian roulette" *See id.* Vuckovic, along with other guards, also forced Mehinovic to run in a circle while the guards swung wooden planks at him. *Id.*

Like Mehinovic, Muhamed Bicic was beaten repeatedly with blunt objects, to the point of loss of consciousness. *See Id* at 1335. He witnessed the severe beatings of other prisoners, including his own brother. "On one occasion, Vuckovic ordered Bicic to get on all fours while another soldier stood or rode on his back and beat him with a baton—a game the soldiers called 'horse.'" *Id.* Bicic, like Mehinovic, was subjected to the game of Russian roulette. Additionally, Vuckovic and the other guards forcibly extracted a number of Bicic's teeth. *Id.* at 1336.

Safet Hadzialijagic was subjected to daily beatings with "metal pipes, bats, sticks, and weapons." *Id.* at 1337.He was also subjected to Russian roulette *See id.* at 1336–37.

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Hadzialijagic also frequently saw other prisoners being beaten or heard their screams as they were beaten. Like Bicic, he was subjected to the teeth extraction incident. On one occasion, Vuckovic rode Hadzialijagic like a horse, simultaneously hitting him in the head and body with a knife handle. During this time, other soldiers kicked and hit him. He fell down during this episode and was forced to get up and continue carrying Vuckovic. *See id.* "Vuckovic and the other soldiers [then] tied Hadzialijagic with a rope, hung him upside down, and beat him. When they noticed that Hadzialijagic was losing consciousness, they dunked his head in a bowl used as a toilet." *Id.* Vuckovic then forced Hadzialijagic to lick the blood off of Vuckovic's boots and kicked Hadzialijagic as he tried to do so. Vuckovic then used his knife to carve a semi-circle in Hadzialijagic's forehead. Hadzialijagic went into cardiac arrest just after this incident and was saved by one of the other plaintiffs. *See id.*

Hasan Subasic was brutally beaten and witnessed the beatings of other prisoners, including the beating and death of one of his fellow prisoners and the beating of Hadzialijagic in which he was tied upside down and beaten. *See id.* at 1338–39. *Id.* at 1338. Subasic also was subjected to the teeth pulling incident. Vuckovic personally beat Subasic two times, punching him and kicking him with his military boots. In one of these beatings, "Subasic had been forced into a kneeling position when Vuckovic kicked him in the stomach." *Id.*

The district court concluded that the plaintiffs suffered both physical and mental torture at the hands of Vuckovic.[14] With respect to physical torture, the court broadly outlined with respect to each plaintiff the acts in which Vuckovic had been at least complicit and that it found rose to the level of torture. Regarding Mehinovic, the court determined that Vuckovic's beatings of Mehinovic in which he kicked and delivered other blows to Mehinovic's face, genitals, and others body parts, constituted torture. The court noted that these beatings left Mehinovic disfigured, may have broken ribs, almost caused Mehinovic to lose consciousness, and rendered him unable to eat for a period of time. As to Bicic, the court found that Bicic had suffered severe physical pain and suffering as a result of Vuckovic's repeated beatings of him in which Vuckovic used various instruments to inflict blows, the "horse" game, and the teeth pulling incident. *See id.* at 1346. In finding that Vuckovic inflicted severe physical pain on Hadzialijagic, the court unsurprisingly focused on the beating in which Vuckovic tied Hadzialijagic upside down and beat him. *See id.* The court pointed out that in this incident, Vuckovic almost killed Hadzialijagic. *See id.* The court further concluded that Subasic experienced severe physical pain and thus was tortured based on the beating in which Vuckovic kicked Subasic in the stomach. *See id.*

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[14] The court also found that a number of acts perpetrated against the plaintiffs constituted cruel, inhuman, or degrading treatment but not torture. In its analysis, the court appeared to fold into cruel, inhuman, or degrading treatment two distinct categories. First, cruel, inhuman, or degrading treatment includes acts that "do not rise to the level of 'torture.'" *Id.* at 1348. Second, cruel, inhuman, or degrading treatment includes acts that "do not have the same purposes as 'torture.'" *Id.* By including this latter set of treatment as cruel, inhuman or degrading, the court appeared to take the view that acts that would otherwise constitute torture fall outside that definition because of the absence of the particular purposes listed in the TVPA and the treaty. Regardless of the relevance of this concept to the TVPA or CAT, the purposes listed in the TVPA are not an element of torture for purposes of sections 2340–2340A.

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The court also found that the plaintiffs had suffered severe mental pain. In reaching this conclusion, the court relied on the plaintiffs' testimony that they feared they would be killed during beatings by Vuckovic or during the "game" of Russian roulette. Although the court did not specify the predicate acts that caused the prolonged mental harm, it is plain that both the threat of severe physical pain and the threat of imminent death were present and persistent. The court also found that the plaintiffs established the existence of prolonged mental harm as each plaintiff "*continues* to suffer long-term psychological harm as a result of [their] ordeals." *Id.* (emphasis added). In concluding that the plaintiffs had demonstrated the necessary "prolonged mental harm," the court's description of that harm as ongoing and "long-term" confirms that, to satisfy the prolonged mental harm requirement, the harm must be of a substantial duration.

The court did not, however, delve into the nature of psychological harm in reaching its conclusion. Nonetheless, the symptoms that the plaintiffs suffered and continue to suffer are worth noting as illustrative of what might in future cases be held to constitute mental harm. Mehinovic had "anxiety, flashbacks, and nightmares and has difficulty sleeping." *Id.* at 1334. Similarly, Bicic, "suffers from anxiety, sleeps very little, and has frequent nightmares" and experiences frustration at not being able to work due to the physical and mental pain he suffers. *Id.* at 1336. Hadzialijagic experienced nightmares, at times required medication to help him sleep, suffered from depression, and had become reclusive as a result of his ordeal. *See id.* at 1337–38. Subasic, like the others, had nightmares and flashbacks, but also suffered from nervousness, irritability, and experienced difficulty trusting people. The combined effect of these symptoms impaired Subasic's ability to work. *See id.* at 1340. Each of these plaintiffs suffered from mental harm that destroyed his ability to function normally, on a daily basis, and would continue to do so into the future.

In general, several guiding principles can be drawn from this case. First, this case illustrates that a single incident can constitute torture. The above recitation of the case's facts shows that Subasic was clearly subjected to torture in a number of instances, e.g., the teeth pulling incident, which the court finds to constitute torture in discussing Bicic. The court nevertheless found that the beating in which Vuckovic delivered a blow to Subasic's stomach while he was on his knees sufficed to establish that Subasic had been tortured. Indeed, the court stated that this incident "caus[ed] Subasic to suffer severe pain." *Id.* at 1346. The court's focus on this incident, despite the obvious context of a course of torturous conduct, suggests that a course of conduct is unnecessary to establish that an individual engaged in torture. It bears noting, however, that there are no decisions that have found an example of torture on facts that show the action was isolated, rather than part of a systematic course of conduct. Moreover, we believe that had this been an isolated instance, the court's conclusion that this act constituted torture would have been in error, because this single blow does not reach the requisite level of severity.

Second, the case demonstrates that courts may be willing to find that a wide range of physical pain can rise to the necessary level of "severe pain or suffering." At one end of the spectrum is what the court calls the "nightmarish beating" in which Vuckovic hung

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Hadzialijagic upside down and beat him, culminating in Hadzialijagic going into cardiac arrest and narrowly escaping death. *Id.* It takes little analysis or insight to conclude that this incident constitutes torture. At the other end of the spectrum, is the court's determination that a beating in which "Vuckovic hit plaintiff Subasic and kicked him in the stomach with his military boots while Subasic was forced into a kneeling position[]" constituted torture. *Id.* To be sure, this beating caused Subasic substantial pain. But that pain pales in comparison to the other acts described in this case. Again, to the extent the opinion can be read to endorse the view that this single act and the attendant pain, considered in isolation, rose to the level of "severe pain or suffering," we would disagree with such a view based on our interpretation of the criminal statute.

The district court did not attempt to delineate the meaning of torture. It engaged in no statutory analysis. Instead, the court merely recited the definition and described the acts that it concluded constituted torture. This approach is representative of the approach most often taken in TVPA cases. The adoption of such an approach suggests that torture generally is of such an extreme nature—namely, the nature of acts are so shocking and obviously incredibly painful—that courts will more likely examine the totality of the circumstances, rather than engage in a careful parsing of the statute. A broad view of this case, and of the TVPA cases more generally, shows that only acts of an extreme nature have been redressed under the TVPA's civil remedy for torture. We note, however, that *Mehinovic* presents, with the exception of the single blow to Subasic, facts that are well over the line of what constitutes torture. While there are cases that fall far short of torture, see *infra* app., there are no cases that analyze what the lowest boundary of what constitutes torture. Nonetheless, while this case and the other TVPA cases generally do not approach that boundary, they are in keeping with the general notion that the term "torture" is reserved for acts of the most extreme nature.

IV. International Decisions

International decisions can prove of some value in assessing what conduct might rise to the level of severe mental pain or suffering. Although decisions by foreign or international bodies are in no way binding authority upon the United States, they provide guidance about how other nations will likely react to our interpretation of the CAT and Section 2340. As this Part will discuss, other Western nations have generally used a high standard in determining whether interrogation techniques violate the international prohibition on torture. In fact, these decisions have found various aggressive interrogation methods to, at worst, constitute cruel, inhuman, and degrading treatment, but not torture. These decisions only reinforce our view that there is a clear distinction between the two standards and that only extreme conduct, resulting in pain that is of an intensity often accompanying serious physical injury, will violate the latter.

A. European Court of Human Rights

An analogue to CAT's provisions can be found in the European Convention on Human Rights and Fundamental Freedoms (the "European Convention"). This convention prohibits torture, though it offers no definition of it. It also prohibits cruel,

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inhuman, or degrading treatment or punishment. By barring both types of acts, the European Convention implicitly distinguishes between them and further suggests that torture is a grave act beyond cruel, inhuman, or degrading treatment or punishment. Thus, while neither the European Convention nor the European Court of Human Rights decisions interpreting that convention would be authority for the interpretation of Sections 2340–2340A, the European Convention decisions concerning torture nonetheless provide a useful barometer of the international view of what actions amount to torture.

The leading European Court of Human Rights case explicating the differences between torture and cruel, inhuman, or degrading treatment or punishment is *Ireland v. the United Kingdom* (1978).[15] In that case, the European Court of Human Rights examined interrogation techniques somewhat more sophisticated than the rather rudimentary and frequently obviously cruel acts described in the TVPA cases. Careful attention to this case is worthwhile not just because it examines methods not used in the TVPA cases, but also because the Reagan administration relied on this case in reaching the conclusion that the term torture is reserved in international usage for "extreme, deliberate, and unusually cruel practices." S. Treaty Doc. 100-20, at 4.

The methods at issue in *Ireland* were:

(1) Wall Standing. The prisoner stands spread eagle against the wall, with fingers high above his head, and feet back so that he is standing on his toes such that his all of his weight falls on his fingers.
(2) Hooding. A black or navy hood is placed over the prisoner's head and kept there except during the interrogation.
(3) Subjection to Noise. Pending interrogation, the prisoner is kept in a room with a loud and continuous hissing noise.
(4) Sleep Deprivation. Prisoners are deprived of sleep pending interrogation.
(5) Deprivation of Food and Drink. Prisoners receive a reduced diet during detention and pending interrogation.

[15] According to one commentator, the Inter-American Court of Human Rights has also followed this decision. *See* Julie Lantrip, *Torture and Cruel, Inhuman and Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights*, 5 ILSA J. Int'l & Comp. L. 551, 560–61 (1999). The Inter-American Convention to Prevent and Punish Torture, however, defines torture much differently than it is defined in CAT or U.S. law. *See* Inter-American Convention to Prevent and Punish Torture, opened for signature Dec. 9, 1985, art. 2, OAS T.S. No. 67 (entered into force Feb. 28, 1987 but the United States has never signed or ratified it). It defines torture as "any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish." Art. 2. While the Inter-American Convention to Prevent and Punish Torture does not require signatories to criminalize cruel, inhuman, or degrading treatment or punishment, the textual differences in the definition of torture are so great that it would be difficult to draw from that jurisprudence anything more than the general trend of its agreement with the *Ireland* decision.

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The European Court of Human Rights concluded that these techniques used in combination, and applied for hours at a time, were inhuman and degrading but did not amount to torture. In analyzing whether these methods constituted torture, the court treated them as part of a single program. *See Ireland.* ¶ 104. The court found that this program caused "if not actual bodily injury, at least intense physical and mental suffering to the person subjected thereto and also led to acute psychiatric disturbances during the interrogation." *Id.* ¶ 167. Thus, this program "fell into the category of inhuman treatment[.]" *Id.* The court further found that "[t]he techniques were also degrading since they were such as to arouse in their victims feeling of fear, anguish and inferiority capable of humiliating and debasing them and possible [sic] breaking their physical or moral resistance." *Id.* Yet, the court ultimately concluded:

> Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confession, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular *intensity* and *cruelty* implied by the word torture . . .

Id. (emphasis added). Thus, even though the court had concluded that the techniques produce "intense physical and mental suffering" and "acute psychiatric disturbances," they were not sufficient intensity or cruelty to amount to torture.

The court reached this conclusion based on the distinction the European Convention drew between torture and cruel, inhuman, or degrading treatment or punishment. The court reasoned that by expressly distinguishing between these two categories of treatment, the European Convention sought to "attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering." *Id.* ¶ 167. According to the court, "this distinction derives principally from a difference in the intensity of the suffering inflicted." *Id.* The court further noted that this distinction paralleled the one drawn in the U.N. Declaration on the Protection From Torture, which specifically defines torture as "'an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.'" *Id.* (quoting U.N. Declaration on the Protection From Torture).

The court relied on this same "intensity/cruelty" distinction to conclude that some physical maltreatment fails to amount to torture. For example, four detainees were severely beaten and forced to stand spread eagle up against a wall. *See id.* ¶ 110. Other detainees were forced to stand spread eagle while an interrogator kicked them "continuously on the inside of the legs." *Id.* ¶ 111. Those detainees were beaten, some receiving injuries that were "substantial" and, others received "massive" injuries. *See id.* Another detainee was "subjected to . . . 'comparatively trivial' beatings" that resulted in a perforation of the detainee's eardrum and some "minor bruising." *Id.* ¶ 115. The court concluded that none of these situations "attain[ed] the particular level [of severity] inherent in the notion of torture." *Id.* ¶ 174.

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B. Israeli Supreme Court

The European Court of Human Rights is not the only other court to consider whether such a program of interrogation techniques was permissible. In *Public Committee Against Torture in Israel v. Israel*, 38 I.L.M. 1471 (1999), the Supreme Court of Israel reviewed a challenge brought against the General Security Service ("GSS") for its use of five techniques. At issue in *Public Committee Against Torture In Israel* were: (1) shaking, (2) the Shabach, (3) the Frog Crouch, (4) the excessive tightening of handcuffs, and (5) sleep deprivation. "Shaking" is "the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly." *Id.* ¶ 9. The "Shabach" is actually a combination of methods wherein the detainee

> is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair's seat and back support. His second hand is tied behind the chair, against its back support. The suspect's head is covered by an opaque sack, falling down to his shoulders. Powerfully loud music is played in the room.

Id. ¶ 10.

The "frog crouch" consists of "consecutive, periodical crouches on the tips of one's toes, each lasting for five minute intervals." *Id.* ¶ 11. The excessive tightening of handcuffs simply referred to the use handcuffs that were too small for the suspects' wrists. *See id.* ¶ 12. Sleep deprivation occurred when the Shabach was used during "intense non-stop interrogations."[16] *Id.* ¶ 13.

While the Israeli Supreme Court concluded that these acts amounted to cruel, and inhuman treatment, the court did not expressly find that they amounted to torture. To be sure, such a conclusion was unnecessary because even if the acts amounted only to cruel and inhuman treatment the GSS lacked authority to use the five methods. Nonetheless, the decision is still best read as indicating that the acts at issue did not constitute torture. The court's descriptions of and conclusions about each method indicate that the court viewed them as merely cruel, inhuman or degrading but not of the sufficient severity to reach the threshold of torture. While its descriptions discuss necessity, dignity, degradation, and pain, the court carefully avoided describing any of these acts as having the severity of pain or suffering indicative of torture. *See id.* at ¶¶ 24–29. Indeed, in assessing the *Shabach* as a whole, the court even relied upon the European Court of Human Right's *Ireland* decision for supportand it did not evince disagreement with that decision's conclusion that the acts considered therein did not constitute torture. *See id.* ¶ 30.

[16] The court did, however, distinguish between this sleep deprivation and that which occurred as part of routine interrogation, noting that some degree of interference with the suspect's regular sleep habits was to be expected. *Public Committee Against Torture in Israel* ¶ 23.

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Moreover, the Israeli Supreme Court concluded that in certain circumstances GSS officers could assert a necessity defense. [17] CAT, however, expressly provides that "[n]o exceptional circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification of torture." Art. 2(2). Had the court been of the view that the GSS methods constituted torture, the Court could not permit this affirmative defense under CAT. Accordingly, the court's decision is best read as concluding that these methods amounted to cruel and inhuman treatment, but not torture.

In sum, both the European Court on Human Rights and the Israeli Supreme Court have recognized a wide array of acts that constitute cruel, inhuman, or degrading treatment or punishment, but do not amount to torture. Thus, they appear to permit, under international law, an aggressive interpretation as to what amounts to torture, leaving that label to be applied only where extreme circumstances exist.

V. The President's Commander-in-Chief Power

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 the 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.

A. The War with Al Qaeda

At the outset, we should make clear the nature of the threat presently posed to the nation. While your request for legal advice is not specifically limited to the current circumstances, we think it is useful to discuss this question in the context of the current war against the al Qaeda terrorist network. The situation in which these issues arise is unprecedented in recent American history. Four coordinated terrorist attacks, using hijacked commercial airliners as guided missiles, took place in rapid succession on the

[17] In permitting a necessity defense, the court drew upon the ticking time bomb hypothetical proffered by the GSS as a basis for asserting a necessity defense. In that hypothetical, the GSS has arrested a suspect, who holds information about the location of a bomb and the time at which it is set to explode. The suspect is the only source of this information, and without that information the bomb will surely explode, killing many people. Under those circumstances, the court agreed that the necessity defense's requirement of imminence, which the court construed as the "imminent nature of the act rather than that of danger," would be satisfied. *Id.* ¶ 34. It further agreed "that in appropriate circumstances" this defense would be available to GSS investigators. *Id.* ¶ 35.

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morning of September 11, 2001. These attacks were aimed at critical government buildings in the Nation's capital and landmark buildings in its financial center. These events reach a different scale of destructiveness than earlier terrorist episodes, such as the destruction of the Murrah Building in Oklahoma City in 1994. They caused thousands of deaths. Air traffic and communications within the United States were disrupted; national stock exchanges were shut for several days; and damage from the attack has been estimated to run into the tens of billions of dollars. Moreover, these attacks are part of a violent campaign against the United States that is believed to include an unsuccessful attempt to destroy an airliner in December 2001; a suicide bombing attack in Yemen on the *U.S.S. Cole* in 2000; the bombings of the United States Embassies in Kenya and in Tanzania in 1998; a truck bomb attack on a U.S. military housing complex in Saudi Arabia in 1996; an unsuccessful attempt to destroy the World Trade Center in 1993; and the ambush of U.S. servicemen in Somalia in 1993. The United States and its overseas personnel and installations have been attacked as a result of Usama Bin Laden's call for a "jihad against the U.S. government, because the U.S. government is unjust, criminal and tyrannical."[18]

In response, the Government has engaged in a broad effort at home and abroad to counter terrorism. Pursuant to his authorities as Commander-in-Chief, the President in October, 2001, ordered the Armed Forces to attack al Qaeda personnel and assets in Afghanistan, and the Taliban militia that harbored them. That military campaign appears to be nearing its close with the retreat of al Qaeda and Taliban forces from their strongholds and the installation of a friendly provisional government in Afghanistan. Congress has provided its support for the use of forces against those linked to the September 11 attacks, and has recognized the President's constitutional power to use force to prevent and deter future attacks both within and outside the United States. S. J. Res. 23, Pub. L. No. 107-40, 115 Stat. 224 (2001). We have reviewed the President's constitutional power to use force abroad in response to the September 11 attacks in a separate memorandum. *See* Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001) ("September 11 War Powers Memorandum"). We have also discussed the President's constitutional authority to deploy the armed forces domestically to protect against foreign terrorist attack in a separate memorandum. *See* Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States* at 2–3 (Oct. 17, 2001). The Justice Department and the FBI have launched a sweeping investigation in response to the September 11 attacks, and last fall Congress enacted legislation to expand the Justice Department's powers of surveillance against terrorists. *See* The USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). This spring, the President proposed the creation of a new cabinet

[18] *See Osama Bin Laden v. The U.S.: Edicts and Statements,* CNN Interview with Osama bin Laden, March 1997, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/edicts.html.

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department for homeland security to implement a coordinated domestic program against terrorism.

Despite these efforts, numerous upper echelon leaders of al Qaeda and the Taliban, with access to active terrorist cells and other resources, remain at large. It has been reported that the al Qaeda fighters are already drawing on a fresh flow of cash to rebuild their forces. *See* Paul Haven, *U.S.: al-Qaida Trying to Regroup*, Associated Press, Mar. 20, 2002. As the Director of the Central Intelligence Agency has recently testified before Congress, "Al-Qa'ida and other terrorist groups will continue to plan to attack this country and its interests abroad. Their modus operandi is to have multiple attack plans in the works simultaneously, and to have al-Qa'ida cells in place to conduct them." Testimony of George J. Tenet, Director of Central Intelligence, Before the Senate Armed Services Committee at 2 (Mar. 19, 2002). Nor is the threat contained to Afghanistan. "Operations against US targets could be launched by al-Qa'ida cells already in place in major cities in Europe and the Middle East. Al-Qa'ida can also exploit its presence or connections to other groups in such countries as Somalia, Yemen, Indonesia, and the Philippines." *Id.* at 3. It appears that al Qaeda continues to enjoy information and resources that allow it to organize and direct active hostile forces against this country, both domestically and abroad.

Al Qaeda continues to plan further attacks, such as destroying American civilian airliners and killing American troops, which have fortunately been prevented. It is clear that bin Laden and his organization have conducted several violent attacks on the United States and its nationals, and that they seek to continue to do so. Thus, the capture and interrogation of such individuals is clearly imperative to our national security and defense. Interrogation of captured al Qaeda operatives may provide information concerning the nature of al Qaeda plans and the identities of its personnel, which may prove invaluable in preventing further direct attacks on the United States and its citizens. 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 (if not greater) magnitude from occurring in the United States. The case of Jose Padilla, a.k.a. Abdullah Al Mujahir, illustrates the importance of such information. Padilla allegedly had journeyed to Afghanistan and Pakistan, met with senior al Qaeda leaders, and hatched a plot to construct and detonate a radioactive dispersal device in the United States. After allegedly receiving training in wiring explosives and with a substantial amount of currency in his position, Padilla attempted in May, 2002, to enter the United States to further his scheme. Interrogation of captured al Qaeda operatives allegedly allowed U.S. intelligence and law enforcement agencies to track Padilla and to detain him upon his entry into the United States.

B. Interpretation to Avoid Constitutional Problems

As the Supreme Court has recognized, and as we will explain further below, the 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

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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*, 88 U.S. (21 Wall.) 73, 87 (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. *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."). 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, 800–1 (1992) (citation omitted) ("Out of respect for 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 American Bar Association to the President on judicial nominations, to avoid potential constitutional question regarding encroachment on Presidential power to appoint judges).

In the area of foreign affairs, and war powers in particular, the avoidance canon has special force. *See, e.g., 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. American Cetacean Soc'y*, 478 U.S. 221, 232–33 (1986) (construing federal statutes to avoid curtailment of traditional presidential prerogatives in foreign affairs). We do 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. *See Egan*, 484 U.S. at 529 (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)). *See also Agee*, 453 U.S. at 291 (deference to Executive Branch is "especially" appropriate "in the area . . . of . . . national security").

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

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the conduct of operations during a war. *See, e.g.*, Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Swift Justice Authorization Act* (Apr. 8, 2002); Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sep. 25, 2001) ("Flanigan Memorandum"); Memorandum for Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Defense Authorization Act* (Sep. 15, 1995). As we discuss below, the President's power to detain and interrogate enemy combatants arises out of his constitutional authority as Commander in Chief. A construction of Section 2340A that applied the provision to regulate the President's authority as Commander-in-Chief to determine the interrogation and treatment of enemy combatants would raise serious constitutional questions. Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. Accordingly, we would construe Section 2340A to avoid this constitutional difficulty, and conclude that it does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority.

This approach is consistent with previous decisions of our Office involving the application of federal criminal law. For example, we have previously construed the congressional contempt statute not to apply to executive branch officials who refuse to comply with congressional subpoenas because of an assertion of executive privilege. In a published 1984 opinion, we concluded that

> if executive officials were subject to prosecution for criminal contempt whenever they carried out the President's claim of executive privilege, it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties. Therefore, the separation of powers principles that underlie the doctrine of executive privilege also would preclude an application of the contempt of Congress statute to punish officials for aiding the President in asserting his constitutional privilege.

Prosecution for Contempt of Congress of an Executive Branch Offical Who Has Asserted A Claim of Executive Privilege, 8 Op. O.L.C. 101, 134 (May 30, 1984). Likewise, we believe that, if executive officials were subject to prosecution for conducting interrogations when they were carrying out the President's Commander-in-Chief powers, "it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties." These constitutional principles preclude an application of Section 2340A to punish officials for aiding the President in exercising his exclusive constitutional authorities. *Id.*

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C. The Commander-in-Chief Power

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 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. We opined that "courts ... would surely conclude that a criminal prosecution for the exercise of a presumptively valid, constitutionally based privilege is not consistent with the Constitution." 8 Op. O.L.C. at 141. Further, we concluded that the Department of Justice could not bring a criminal prosecution against a defendant who had acted pursuant to an exercise of the President's constitutional power. "The President, through a United States Attorney, need not, indeed may not, prosecute criminally a subordinate for asserting on his behalf a claim of executive privilege. Nor could the Legislative Branch or the courts require or implement the prosecution of such an individual." *Id.* 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.

We have even greater concerns with respect to prosecutions arising out of the exercise of the President's express authority as Commander in Chief than we do with prosecutions arising out of the assertion of executive privilege. In a series of opinions examining various legal questions arising after September 11, we have explained the scope of the President's Commander-in-Chief power.[19] We briefly summarize the findings of those opinions here. 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 "cloathed with all the powers requisite to the complete execution of its trust." *The Federalist* No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961). 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,"

[19] *See, e.g.*, September 11 War Powers Memorandum; Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* (Nov. 6, 2001).

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

Id. at 147–48. Within the limits that the Constitution itself imposes, the scope and distribution of the powers to protect national security must be construed to authorize the most efficacious defense of the nation and its interests in accordance "with the realistic purposes of the entire instrument." *Lichter v. United States*, 334 U.S. 742, 782 (1948).

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. The decision to deploy military force in the defense of United States interests is expressly placed under Presidential authority by the Vesting Clause, U.S. Const. Art. I, § 1, cl. 1, and by the Commander-in-Chief Clause, *id.*, § 2, cl. 1.[20] This Office has long understood the Commander-in-Chief Clause in particular as an affirmative grant of authority to the President. *See, e.g.*, Memorandum for Charles W. Colson, Special Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President and the War Power: South Vietnam and the Cambodian Sanctuaries* (May 22, 1970) ("Rehnquist Memorandum"). The Framers understood the Clause as investing the President with the fullest range of power understood at the time of the ratification of the Constitution 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 in the Constitution 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." That sweeping grant vests in the President an unenumerated "executive power" and contrasts with the specific enumeration of the powers—those "herein"—granted to Congress in Article I. The implications 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.[21]

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[20] *See Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (President has authority to deploy United States armed forces "abroad or to any particular region"); *Fleming v. Page*, 50 U.S. (9 How.) 603, 614–15 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual") *Loving v. United States*, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in judgment) (The "inherent powers" of the Commander in Chief "are clearly extensive."); *Maul v. United States*, 274 U.S. 501, 515-16 (1927) (Brandeis & Holmes, JJ., concurring) (President "may direct any revenue cutter to cruise in any waters in order to perform any duty of the service"); *Commonwealth of Massachusetts v. Laird*, 451 F.2d 26, 32 (1st Cir. 1971) (the President has "power as Commander-in-Chief to station forces abroad"); *Ex parte Vallandigham*, 28 F.Cas. 874, 922 (C.C.S.D. Ohio 1863) (No. 16,816) (in acting "under this power where there is no express legislative declaration, the president is guided solely by his own judgment and discretion"); *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 6 (Dec. 4, 1992) (Barr, Attorney General).

[21] Judicial decisions since the beginning of the Republic confirm the President's constitutional power and duty to repel military action against the United States and to take measures to prevent the recurrence of an attack. As Justice Joseph Story said long ago, "[i]t may be fit and proper for the government, in the

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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*, 339 U.S. 763, 788 (1950). In wartime, it is for the President alone to decide what methods to use to best prevail against the enemy. *See, e.g.*, Rehnquist Memorandum; Flanigan Memorandum at 3. The President's complete discretion in exercising the Commander-in-Chief power has been recognized by the courts. In the *Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862), for example, 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. *See, e.g.*, Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations* at 3 (March 13, 2002) ("the Commander-in-Chief Clause constitutes an independent grant of substantive authority to engage in the detention and transfer of prisoners captured in armed conflicts"). 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.[22] Numerous Presidents have ordered the capture, detention, and questioning of

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exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws." *The Apollon*, 22 U.S. (9 Wheat.) 362, 366–67 (1824). If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat with whatever means are necessary. *See, e.g., The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority."); *United States v. Smith*, 27 F. Cas. 1192, 1229-30 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice) (regardless of statutory authorization, it is "the duty . . . of the executive magistrate . . . to repel an invading foe"); *see also* 3 Story, *Commentaries* § 1485 ("[t]he command and application of the public force . . . to maintain peace, and to resist foreign invasion" are executive powers).

[22] The practice of capturing and detaining enemy combatants is as old as war itself. *See* Allan Rosas, The Legal Status of Prisoners of War 44–45 (1976). In modern conflicts, the practice of detaining enemy combatants and hostile civilians generally has been designed to balance the humanitarian purpose of sparing lives with the military necessity of defeating the enemy on the battlefield. *Id.* at 59–80. While Article 17 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3517, places restrictions on interrogation of enemy combatants, members of al Qaeda and the Taliban militia are not legally entitled to the status of prisoners of war as defined in the Convention. *See* Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 22, 2002).

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enemy combatants during virtually every major conflict in the Nation's history, including recent conflicts such as the Gulf, Vietnam, and Korean wars. Recognizing this authority, Congress has never attempted to restrict or interfere with the President's authority on this score. *Id.*

Any effort by 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. 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 secret operations and surprise attacks against civilians. It may be the case that only successful interrogations can provide the information necessary to prevent the success of covert terrorist 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 seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.

VI. Defenses

In the foregoing parts of this memorandum, we have demonstrated that the ban on torture in Section 2340A is limited to only the most extreme forms of physical and mental harm. We have also demonstrated that Section 2340A, as applied to interrogations of enemy combatants ordered by the President pursuant to his Commander-in-Chief power would be unconstitutional. Even if an interrogation method, however, might arguably cross the line drawn in Section 2340, and application of the statute was not held to be an unconstitutional infringement of the President's Commander-in-Chief authority, we believe that under the current circumstances certain justification defenses might be available that would potentially eliminate criminal liability. 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.

A. Necessity

We believe that a defense of necessity could be raised, under the current circumstances, to an allegation of a Section 2340A violation. Often referred to as the "choice of evils" defense, necessity has been defined as follows:

> Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

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> (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; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Model Penal Code § 3.02. *See also* Wayne R. LaFave & Austin W. Scott, 1 Substantive Criminal Law § 5.4 at 627 (1986 & 2002 supp.) ("LaFave & Scott"). Although there is no federal statute that generally establishes necessity or other justifications as defenses to federal criminal laws, the Supreme Court has recognized the defense. *See United States v. Bailey*, 444 U.S. 394, 410 (1980) (relying on LaFave & Scott and Model Penal Code definitions of necessity defense).

The necessity defense may prove especially relevant in the current circumstances. As it has been described in the case law and literature, the purpose behind necessity is one of public policy. According to LaFave and Scott, "the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." LaFave & Scott, at 629. In particular, the necessity defense can justify the intentional killing of one person to save two others because "it is better that two lives be saved and one lost than that two be lost and one saved." *Id.* Or, put in the language of a choice of evils, "the evil involved in violating the terms of the criminal law (. . . even taking another's life) may be less than that which would result from literal compliance with the law (. . . two lives lost)." *Id.*

Additional elements of the necessity defense are worth noting here. First, the defense is not limited to certain types of harms. Therefore, the harm inflicted by necessity may include intentional homicide, so long as the harm avoided is greater (i.e., preventing more deaths). *Id.* at 634. Second, it must actually be the defendant's intention to avoid the greater harm; intending to commit murder and then learning only later that the death had the fortuitous result of saving other lives will not support a necessity defense. *Id.* at 635. Third, if the defendant reasonably believed that the lesser harm was necessary, even if, unknown to him, it was not, he may still avail himself of the defense. As LaFave and Scott explain, "if A kills B reasonably believing it to be necessary to save C and D, he is not guilty of murder even though, unknown to A, C and D could have been rescued without the necessity of killing B." *Id.* Fourth, it is for the court, and not the defendant to judge whether the harm avoided outweighed the harm done. *Id.* at 636. Fifth, the defendant cannot rely upon the necessity defense if a third alternative is open and known to him that will cause less harm.

It appears to us that under the current circumstances the necessity defense could be successfully maintained in response to an allegation of a Section 2340A violation. On September 11, 2001, al Qaeda launched a surprise covert attack on civilian targets in the United States that led to the deaths of thousands and losses in the billions of dollars. According to public and governmental reports, al Qaeda has other sleeper cells within the

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United States that may be planning similar attacks. Indeed, al Qaeda plans apparently include efforts to develop and deploy chemical, biological and nuclear weapons of mass destruction. Under these circumstances, a detainee may possess information that could enable the United States to prevent attacks that potentially 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 circumstances that prevail, and the knowledge of the government actors involved, when the interrogation is conducted. While every interrogation that might violate Section 2340A does not trigger a necessity defense, we can say that certain circumstances could support such a defense.

Legal authorities identify an important exception to the necessity defense. The defense is available "only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values." *Id.* at 629. Thus, if Congress explicitly has made clear that violation of a statute cannot be outweighed by the harm avoided, courts cannot recognize the necessity defense. LaFave and Israel provide as an example an abortion statute that made clear that abortions even to save the life of the mother would still be a crime; in such cases the necessity defense would be unavailable. *Id.* at 630. Here, however, Congress has not explicitly made a determination of values vis-à-vis torture. In fact, Congress explicitly removed efforts to remove torture from the weighing of values permitted by the necessity defense.[23]

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[23] In the CAT, torture is defined as the intentional infliction of severe pain or suffering "for such purpose[] as obtaining from him or a third person information or a confession." CAT art. 1.1. One could argue that such a definition represented an attempt to to indicate that the good of of obtaining information—no matter what the circumstances—could not justify an act of torture. In other words, necessity would not be a defense. In enacting Section 2340, however, Congress removed the purpose element in the definition of torture, evidencing an intention to remove any fixing of values by statute. By leaving Section 2340 silent as to the harm done by torture in comparison to other harms, Congress allowed the necessity defense to apply when appropriate.

Further, the CAT contains an additional provision that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." CAT art. 2.2. Aware of this provision of the treaty, and of the definition of the necessity defense that allows the legislature to provide for an exception to the defense, see Model Penal Code § 3.02(b), Congress did not incorporate CAT article 2.2 into Section 2340. Given that Congress omitted CAT's effort to bar a necessity or wartime defense, we read Section 2340 as permitting the defense.

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B. Self-Defense

Even if a court were to find that a violation of Section 2340A was not justified by necessity, 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. As the Court of Appeals for the D.C. Circuit has explained:

> More than two centuries ago, Blackstone, best known of the expositors of the English common law, taught that "all homicide is malicious, and of course amounts to murder, unless . . . excused on the account of accident or self-preservation. . . ." Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone's time.

United States v. Peterson, 483 F.2d 1222, 1228–29 (D.C. Cir. 1973). Self-defense is a common-law defense to federal criminal law offenses, and nothing in the text, structure or history of Section 2340A precludes its application to a charge of torture. In the absence of any textual provision to the contrary, we assume self-defense can be an appropriate defense to an allegation of torture.

The doctrine of self-defense permits the use of force to prevent harm to another person. As LaFave and Scott explain, "one is justified in using reasonable force in defense of another person, even a stranger, when he reasonably believes that the other is in immediate danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger." *Id.* at 663–64. Ultimately, even deadly force is permissible, but "only when the attack of the adversary upon the other person reasonably appears to the defender to be a deadly attack." *Id.* at 664. As with our discussion of necessity, we will review the significant elements of this defense.[24] According to LaFave and Scott, the elements of the defense of others are the same as those that apply to individual self-defense.

First, self-defense requires that the use of force be *necessary* to avoid the danger of unlawful bodily harm. *Id.* at 649. A defender may justifiably use deadly force if he reasonably believes that the other person is about to inflict unlawful death or serious bodily harm upon another, and that it is necessary to use such force to prevent it. *Id.* at 652. Looked at from the opposite perspective, the defender may not use force when the force would be as equally effective at a later time and the defender suffers no harm or risk by waiting. *See* Paul H. Robinson, 2 Criminal Law Defenses § 131(c) at 77 (1984). If, however, other options permit the defender to retreat safely from a confrontation without having to resort to deadly force, the use of force may not be necessary in the first place. La Fave and Scott at 659–60.

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[24] Early cases had suggested that in order to be eligible for defense of another, one should have some personal relationship with the one in need of protection. That view has been discarded. LaFave & Scott at 664.

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Second, self-defense requires that the defendant's belief in the necessity of using force be reasonable. If a defendant honestly but unreasonably believed force was necessary, he will not be able to make out a successful claim of self-defense. *Id.* at 654. Conversely, if a defendant reasonably believed an attack was to occur, but the facts subsequently showed no attack was threatened, he may still raise self-defense. As LaFave and Scott explain, "one may be justified in shooting to death an adversary who, having threatened to kill him, reaches for his pocket as if for a gun, though it later appears that he had no gun and that he was only reaching for his handkerchief." *Id.* Some authorities, such as the Model Penal Code, even eliminate the reasonability element, and require only that the defender honestly believed—regardless of its unreasonableness—that the use of force was necessary.

Third, many legal authorities include the requirement that a defender must reasonably believe that the unlawful violence is "imminent" before he can use force in his defense. It would be a mistake, however, to equate imminence necessarily with timing—that an attack is immediately about to occur. Rather, as the Model Penal Code explains, what is essential is that , the defensive *response* must be "immediately necessary." Model Penal Code § 3.04(1). Indeed, imminence may be merely another way of expressing the requirement of necessity. Robinson at 78. LaFave and Scott, for example, believe that the imminence requirement makes sense as part of a necessity defense because if an attack is not immediately upon the defender, the defender has other options available to avoid the attack that do not involve the use of force. LaFave and Scott at 656. If, however, the fact of the attack becomes certain and no other options remain, the use of force may be justified. To use a well-known hypothetical, if A were to kidnap and confine B, and then tell B he would kill B one week later, B would be justified in using force in self-defense, even if the opportunity arose before the week had passed. *Id.* at 656; *see also* Robinson at § 131(c)(1) at 78. In this hypothetical, while the attack itself is not imminent, B's use of force becomes immediately necessary whenever he has an opportunity to save himself from A.

Fourth, the amount of force should be proportional to the threat. As LaFave and Scott explain, "the amount of force which [the defender] may justifiably use must be reasonably related to the threatened harm which he seeks to avoid." LaFave and Scott at 651. Thus, one may not use deadly force in response to a threat that does not rise to death or serious bodily harm. If such harm may result, however, deadly force is appropriate. As the Model Penal Code § 3.04(2)(b) states, "[t]he use of deadly force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat."

Under the current circumstances, we believe that a defendant accused of violating Section 2340A could have, in certain circumstances, 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. Whether such a defense will be upheld depends on the specific context within which the interrogation decision is made. If an attack appears increasingly likely, but our intelligence services and armed forces cannot prevent it without the information from the interrogation of a specific individual, then the

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more likely it will appear that the conduct in question will be seen as necessary. If intelligence and other information support the conclusion that an attack is increasingly certain, then the necessity for the interrogation will be reasonable. 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.

To be sure, this situation is different from the usual self-defense justification, and, indeed, it overlaps with elements of the necessity defense. Self-defense as usually discussed involves using force against an individual who is about to conduct the attack. In the current circumstances, however, an enemy combatant in detention does not himself present a threat of harm. He is not actually carrying out the attack; rather, he has participated in the planning and preparation for the attack, or merely has knowledge of the attack through his membership in the terrorist organization. Nonetheless, leading scholarly commentators believe that interrogation of such individuals using methods that might violate Section 2340A would be justified under the doctrine of self-defense, because the combatant by aiding and promoting the terrorist plot "has culpably caused the situation where someone might get hurt. If hurting him is the only means to prevent the death or injury of others put at risk by his actions, such torture should be permissible, and on the same basis that self-defense is permissible." Michael S. Moore, *Torture and the Balance of Evils*, 23 Israel L. Rev. 280, 323 (1989) (symposium on Israel's Landau Commission Report).[25] Thus, some commentators believe that by helping to create the threat of loss of life, terrorists become culpable for the threat even though they do not actually carry out the attack itself. They may be hurt in an interrogation because they are part of the mechanism that has set the attack in motion, *id.* at 323, just as is someone who feeds ammunition or targeting information to an attacker. Under the present circumstances, therefore, even though a detained enemy combatant may not be the exact attacker—he is not planting the bomb, or piloting a hijacked plane to kill civilians—he still may be harmed in self-defense if he has knowledge of future attacks because he has assisted in their planning and execution.

Further, we believe that 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. This fact can bolster and support an individual claim of self-defense in a prosecution, according to the teaching of the Supreme Court in *In re Neagle*, 135 U.S. 1 (1890). In that case, the State of California arrested and held deputy U.S. Marshal Neagle for shooting and killing the assailant of Supreme Court Justice Field. In granting the writ of habeas corpus for Neagle's release, the Supreme Court did not rely alone upon the marshal's right to defend another or his right to self-defense. Rather, the 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

[25] Moore distinguishes that case from one in which a person has information that could stop a terrorist attack, but who does not take a hand in the terrorist activity itself, such as an innocent person who learns of the attack from her spouse. Moore, 23 Israel L. Rev. at 324. Such individuals, Moore finds, would not be subject to the use of force in self-defense, although they might be under the doctrine of necessity.

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the executive branch's inherent constitutional authority to protect the United States government. *Id.* at 67 ("We cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death."). 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.

If the right to defend the national government can be raised as a defense in an individual prosecution, as *Neagle* suggests, then a government defendant, acting in his official capacity, should be able to argue that any conduct that arguably violated Section 2340A was undertaken pursuant to more than just individual self-defense or defense of another. In addition, the defendant could claim that he was fulfilling the Executive Branch's authority to protect the federal government, and the nation, from attack. The September 11 attacks have already triggered that authority, as recognized both under domestic and international law. Following the example of *In re Neagle*, we conclude that 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.

There can be little doubt that the nation's right to self-defense has been triggered under our law. The Constitution announces that one of its purposes is "to provide for the common defense." U.S. Const., Preamble. Article I, § 8 declares that Congress is to exercise its powers to "provide for the common Defence." *See also* 2 Pub. Papers of Ronald Reagan 920, 921 (1988-89) (right of self-defense recognized by Article 51 of the U.N. Charter). The President has a particular responsibility and power to take steps to defend the nation and its people. *In re Neagle*, 135 U.S. at 64. *See also* U.S. Const., art. IV, § 4 ("The United States shall . . . protect [each of the States] against Invasion"). As Commander-in-Chief and Chief Executive, he may use the armed forces to protect the nation and its people. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). And he may employ secret agents to aid in his work as Commander-in-Chief. *Totten v. United States*, 92 U.S. 105, 106 (1876). As the Supreme Court observed in *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), in response to an armed attack on the United States "the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority." *Id.* at 668. The September 11 events were a direct attack on the United States, and as we have explained above, the President has authorized the use of military force with the support of Congress.[26]

[26] While the President's constitutional determination alone is sufficient to justify the nation's resort to self-defense, it also bears noting that the right to self-defense is further recognized under international law. Article 51 of the U.N. Charter declares that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security." The attacks of September 11, 2001 clearly constitute an armed attack against the United States, and indeed were the latest in a long history of al Qaeda sponsored attacks against the United States. This conclusion was acknowledged by the United Nations Security Council on September 28, 2001, when it unanimously adopted Resolution 1373 explicitly "reaffirming the inherent right of individual and collective self-defence

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As we have made clear in other opinions involving the war against al Qaeda, the 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 Section 2340A, 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 his actions were justified by the executive branch's constitutional authority to protect the nation from attack. This national and international version of the right to self-defense could supplement and bolster the government defendant's individual right.

Conclusion

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

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

Please let us know if we can be of further assistance.

Jay S. Bybee
Assistant Attorney General

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as recognized by the charter of the United Nations." This right of self-defense is a right to effective self-defense. In other words, the victim state has the right to use force against the aggressor who has initiated an "armed attack" until the threat has abated. The United States, through its military and intelligence personnel, has a right recognized by Article 51 to continue using force until such time as the threat posed by al Qaeda and other terrorist groups connected to the September 11th attacks is completely ended." Other treaties re-affirm the right of the United States to use force in its self-defense. See, e.g., Inter-American Treaty of Reciprocal Assistance, art. 3, Sept. 2, 1947, T.I.A.S. No. 1838, 21 U.N.T.S. 77 (Rio Treaty); North Atlantic Treaty, art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

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APPENDIX

Cases in which U.S. courts have concluded the defendant tortured the plaintiff:

- Plaintiff was beaten and shot by government troops while protesting the destruction of her property. *See Wiwa v. Royal Dutch Petroleum*, 2002 WL 319887 at *7 (S.D.N.Y. Feb. 28, 2002).

- Plaintiff was removed from ship, interrogated, and held incommunicado for months. Representatives of defendant threatened her with death if she attempted to move from quarters where she was held. She was forcibly separated from her husband and unable to learn of his welfare or whereabouts. *See Simpson v. Socialist People's Libyan Arab Jamahiriya*, 180 F. Supp. 2d 78, 88 (D.D.C. 2001) (Rule 12(b)(6) motion).

- Plaintiff was held captive for five days in a small cell that had no lights, no window, no water, and no toilet. During the remainder of his captivity, he was frequently denied food and water and given only limited access to the toilet. He was held at gunpoint, with his captors threatening to kill him if he did not confess to espionage. His captors threatened to cut off his fingers, pull out his fingernails, and shock his testicles. *See Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22–23, 25 (D.D.C. 2001) (default judgment).

- Plaintiff was imprisoned for 205 days. He was confined in a car park that had been converted into a prison. His cell had no water or toilet and had only a steel cot for a bed. He was convicted of illegal entry into Iraq and transferred to another facility, where he was placed in a cell infested with vermin. He shared a single toilet with 200 other prisoners. While imprisoned he had a heart attack but was denied adequate medical attention and medication. *See Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22–23 (D.D.C. 2001) (default judgment).

- Plaintiff was imprisoned for 126 days. At one point, a guard attempted to execute him, but another guard intervened. A truck transporting the plaintiff ran over pedestrian at full speed without stopping. He heard other prisoners being beaten and he feared being beaten. He had serious medical conditions that were not promptly or adequately treated. He was not given sufficient food or water. *See Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22–23 (D.D.C. 2001) (default judgment).

- Allegations that guards beat, clubbed, and kicked the plaintiff and that the plaintiff was interrogated and subjected to physical and verbal abuse sufficiently stated a claim for torture so as to survive Rule 12(b)(6) motion. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 110 F. Supp. 2d 10 (D.D.C. 2000).

- Plaintiffs alleged that they were blindfolded, interrogated and subjected to physical, mental, and verbal abuse while they were held captive. Furthermore,

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one plaintiff was held eleven days without food, water, or bed. Another plaintiff was held for four days without food, water, or a bed, and was also stripped naked, blindfolded, and threatened with electrocution of his testicles. The other two remaining plaintiffs alleged that they were not provided adequate or proper medical care for conditions that were life threatening. The court concluded that these allegations sufficiently stated a claim for torture and denied defendants Rule 12(b)(6) motion. *See Daliberti v. Republic v. Iraq*, 97 F. Supp. 2d 38, 45 (D.D.C. 2000) (finding that these allegations were "more than enough to meet the definition of torture in the [TVPA]").

- Plaintiff's kidnappers pistol-whipped him until he lost consciousness. They then stripped him and gave him only a robe to wear and left him bleeding, dizzy, and in severe pain. He was then imprisoned for 1,908 days. During his imprisonment, his captors sought to force a confession from him by playing Russian Roulette with him and threatening him with castration. He was randomly beaten and forced to watch the beatings of others. Additionally, he was confined in a rodent and scorpion infested cell. He was bound in chains almost the entire time of his confinement. One night during the winter, his captors chained him to an upper floor balcony, leaving him exposed to the elements. Consequently, he developed frostbite on his hands and feet. He was also subjected to a surgical procedure for an unidentified abdominal problem. *See Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998).

- Plaintiff was kidnapped at gunpoint. He was beaten for several days after his kidnapping. He was subjected to daily torture and threats of death. He was kept in solitary confinement for two years. During that time, he was blindfolded and chained to the wall in a six-foot by six-foot room infested with rodents. He was shackled in a stooped position for 44 months and he developed eye infections as a result of the blindfolds. Additionally, his captors did the following: forced him to kneel on spikes, administered electric shocks to his hands; battered his feet with iron bars and struck him in the kidneys with a rifle; struck him on the side of his head with a hand grenade, breaking his nose and jaw; placed boiling tea kettles on his shoulders; and they laced his food with arsenic. *See Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C.1998).

- Plaintiff was pistol-whipped, bound and gagged, held captive in darkness or blindfold for 18 months. He was kept chained at either his ankles or wrists, wearing nothing but his undershorts and a t-shirt. As for his meals, his captors gave him pita bread and dry cheese for breakfast, rice with dehydrated soup for lunch, and a piece of bread for dinner. Sometimes the guards would spit into his food. He was regularly beaten and incessantly interrogated; he overheard the deaths and beatings of other prisoners. *See Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, (D.D.C.1998).

- Plaintiff spent eight years in solitary or near solitary confinement. He was threatened with death, blindfolded and beaten while handcuffed and fettered. He

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was denied sleep and repeatedly threatened him with death. At one point, while he was shackled to a cot, the guards placed a towel over his nose and mouth and then poured water down his nostrils. They did this for six hours. During this incident, the guards threatened him with death and electric shock. Afterwards, they left him shackled to his cot for six days. For the next seven months, he was imprisoned in a hot, unlit cell that measured 2.5 square meters. During this seven-month period, he was shackled to his cot—at first by all his limbs and later by one hand or one foot. He remained shackled in this manner except for the briefest moments, such as when his captors permitted him to use the bathroom. The handcuffs cut into his flesh. *See Hilao v. Estate of Marcos*, 103 F.3d 789, 790 (9th Cir. 1996). The court did not, however, appear to consider the solitary confinement per se to constitute torture. *See id.* at 795 (stating that to the extent that [the plaintiff's] years in solitary confinement do not constitute torture, they clearly meet the definition of prolonged arbitrary detention.").

- High-ranking military officers interrogated the plaintiff and subjected him to mock executions. He was also threatened with death. *See Hilao v. Estate of Marcos*, 103 F.3d 789, 795 (9th Cir. 1996).

- Plaintiff, a nun, received anonymous threats warning her to leave Guatemala. Later, two men with a gun kidnapped her. They blindfolded her and locked her in an unlit room for hours. The guards interrogated her and regardless of the answers she gave to their questions, they burned her with cigarettes. The guards then showed her surveillance photographs of herself. They blindfolded her again, stripped her, and raped her repeatedly. *See Xuncax v. Gramajo*, 886 F. Supp. 162, 176 (1995).

- Plaintiffs were beaten with truncheons, boots, and guns and threatened with death. Nightsticks were used to beat their backs, kidneys, and the soles of their feet. The soldiers pulled and squeezed their testicles. When they fainted from the pain, the soldiers revived them by singeing their nose hair with a cigarette lighter. They were interrogated as they were beaten with iron barks, rifle butts, helmets, and fists. One plaintiff was placed in the "djak" position, *i.e.*, with hands and feet bound and suspended from a pole. Medical treatment was withheld for one week and then was sporadic and inadequate. *See Paul v. Avril*, 901 F. Supp. 330, 332 (S.D. Fla. 1994).

- Alien subjected to sustained beatings for the month following his first arrest. After his second arrest, suffered severe beatings and was burned with cigarettes over the course of an eight-day period. *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (deportation case).

- Decedent was attacked with knifes and sticks, and repeatedly hit in the head with the butt of a gun as he remained trapped in his truck by his attackers. The attackers then doused the vehicle with gasoline. Although he managed to get out

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of the truck, he nonetheless burned to death. *Tachiona v. Mugabe*, No. 00 Civ. 6666VMJCF, 2002 WL 1424598 at *1 (S.D.N.Y. July 1, 2002).

- Decedent was attacked by spear, stick, and stone wielding supporters of defendant. He was carried off by the attackers and "was found dead the next day, naked and lying in the middle of the road[.]" From the physical injuries, it was determined that the had been severely beaten. According to his death certificate, he died from "massive brain injury from trauma; [] assault; and [] laceration of the right lung." *Tachiona v. Mugabe*, No. 00 Civ. 6666VMJCF, 2002 WL 1424598 at *2 (S.D.N.Y. July 1, 2002).

- Decedent was abducted, along with five others. He and the others were severely beaten and he was forced to drink diesel oil. He was then summarily executed. *Tachiona v. Mugabe*, No. 00 Civ. 6666VMJCF, 2002 WL 1424598 at *4 (S.D.N.Y. July 1, 2002).

- Forced sterilization constitutes torture. *Bi Zhu Lin v. Ashcroft*, 183 F. Supp. 2d 551 (D. Conn. 2002) (noting determination by immigration judge that such conduct constitutes torture).

There are two cases in which U.S. courts have rejected torture claims on the ground that the alleged conduct did not rise to the level of torture. In *Faulder v. Johnson*, 99 F. Supp. 2d 774 (S.D. Tex. 1999), the district court rejected a death row inmate's claim that psychological trauma resulting from repeated stays of his execution and his 22-year-wait for that execution was torture under CAT. The court rejected this contention because of the United States' express death penalty reservation to CAT. *See id.* In *Eastman Kodak v. Kavlin*, 978 F. Supp. 1078, 1093 (S.D. Fla. 1997), the plaintiff was held for eight days in a filthy cell with drug dealers and an AIDS patient. He received no food, no blanket and no protection from other inmates. Prisoners murdered one another in front of the plaintiff. *Id.* The court flatly rejected the plaintiff's claim that this constituted torture.

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U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General Washington, D.C. 20530

May 10, 2005

MEMORANDUM FOR JOHN A. RIZZO
SENIOR DEPUTY GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY

Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees

In our Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005) ("*Techniques*"), we addressed the application of the anti-torture statute, 18 U.S.C. §§ 2340-2340A, to certain interrogation techniques that the CIA might use in the questioning of a specific al Qaeda operative. There, we considered each technique individually. We now consider the application of the statute to the use of these same techniques in combination. Subject to the conditions and limitations set out here and in *Techniques*, we conclude that the authorized combined use of these specific techniques by adequately trained interrogators would not violate sections 2340-2340A.

Techniques, which set out our general interpretation of the statutory elements, guides us here.[1] While referring to the analysis provided in that opinion, we do not repeat it, but instead

[1] As noted in *Techniques*, the Criminal Division of the Department of Justice is satisfied that our general interpretations of the legal standards under sections 2340-2340A, found in *Techniques*, is consistent with its concurrence in our Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* (Dec. 30, 2004). In the present memorandum, we address only the application of 18 U.S.C. §§ 2340-2340A to combinations of interrogation techniques. Nothing in this memorandum or in our prior advice to the CIA should be read to suggest that the use of these techniques would conform to the requirements of the Uniform Code of Military Justice that governs members of the Armed Forces or to United States obligations under the Geneva Conventions in circumstances where those Conventions would apply. We do not address the possible application of article 16 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force for U.S. Nov. 20,

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presume a familiarity with it. Furthermore, in referring to the individual interrogation techniques whose combined use is our present subject, we mean those techniques as we described them in *Techniques*, including all of the limitations, presumptions, and safeguards described there.

One overarching point from *Techniques* bears repeating: Torture is abhorrent and universally repudiated, *see Techniques* at 1, and the President has stated that the United States will not tolerate it. *Id.* at 1-2 & n.2 (citing Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167-68 (July 5, 2004)). In *Techniques*, we accordingly exercised great care in applying sections 2340-2340A to the individual techniques at issue; we apply the same degree of care in considering the combined use of these techniques.

I.

Under 18 U.S.C. § 2340A, it is a crime to commit, attempt to commit, or conspire to commit torture outside the United States. "Torture" is defined as "an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." 18 U.S.C. § 2340(1). "Severe mental pain or suffering" is defined as "the prolonged mental harm caused by or resulting from" any of four predicate acts. *Id.* § 2340(2). These acts are (1) "the intentional infliction or threatened infliction of severe physical pain or suffering"; (2) "the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality"; (3) "the threat of imminent death"; and (4) "the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality."

In *Techniques*, we concluded that the individual authorized use of several specific interrogation techniques, subject to a variety of limitations and safeguards, would not violate the statute when employed in the interrogation of a specific member of al Qaeda, though we concluded that at least in certain respects two of the techniques presented substantial questions under sections 2340-2340A. The techniques that we analyzed were dietary manipulation, nudity, the attention grasp, walling, the facial hold, the facial slap or insult slap, the abdominal slap, cramped confinement, wall standing, stress positions, water dousing, extended sleep deprivation, and the "waterboard." *Techniques* at 7-15.

1994), nor do we address any question relating to conditions of confinement or detention, as distinct from the interrogation of detainees. We stress that our advice on the application of sections 2340-2340A does not represent the policy views of the Department of Justice concerning interrogation practices. Finally, we note that section 6057(a) of H.R. 1268 (109th Cong. 1st Sess.), if it becomes law, would forbid expending or obligating funds made available by that bill "to subject any person in the custody or under the physical control of the United States to torture," but because the bill would define "torture" to have "the meaning given that term in section 2340(1) of title 18, United States Code," § 6057(b)(1), the provision (to the extent it might apply here at all) would merely reaffirm the preexisting prohibitions on torture in sections 2340-2340A.

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Techniques analyzed only the use of these techniques individually. As we have previously advised, however, "courts tend to take a totality-of-the-circumstances approach and consider an entire course of conduct to determine whether torture has occurred." Memorandum for John Rizzo, Acting General Counsel, Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Interrogation of al Qaeda Operative* at 9 (Aug. 1, 2002) ("*Interrogation Memorandum*") (TS). A complete analysis under sections 2340-2340A thus entails an examination of the combined effects of any techniques that might be used.

In conducting this analysis, there are two additional areas of general concern. First, it is possible that the application of certain techniques might render the detainee unusually susceptible to physical or mental pain or suffering. If that were the case, use of a second technique that would not ordinarily be expected to—and could not reasonably be considered specifically intended to—cause severe physical or mental pain or suffering by itself might in fact cause severe physical or mental pain or suffering because of the enhanced susceptibility created by the first technique. Depending on the circumstances, and the knowledge and mental state of the interrogator, one might conclude that severe pain or suffering was specifically intended by the application of the second technique to a detainee who was particularly vulnerable because of the application of the first technique. Because the use of these techniques in combination is intended to, and in fact can be expected to, physically wear down a detainee, because it is difficult to assess as to a particular individual whether the application of multiple techniques renders that individual more susceptible to physical pain or suffering, and because sleep deprivation, in particular, has a number of documented physiological effects that, in some circumstances, could be problematic it is important that all participating CIA personnel, particularly interrogators and personnel of the CIA Office of Medical Services ("OMS"), be aware of the potential for enhanced susceptibility to pain and suffering from each interrogation technique. We also assume that there will be active and ongoing monitoring by medical and psychological personnel of each detainee who is undergoing a regimen of interrogation, and active intervention by a member of the team or medical staff as necessary, so as to avoid the possibility of severe physical or mental pain or suffering within the meaning of 18 U.S.C. §§ 2340-2340A as a result of such combined effects.

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

Your office has outlined the manner in which many of the individual techniques we previously considered could be combined in *Background Paper on CIA's Combined Use of Interrogation Techniques* (undated, but transmitted Dec. 30, 2004) ("*Background Paper*"). The *Background Paper*, which provides the principal basis for our analysis, first divides the process of interrogation into three phases: "Initial Conditions," "Transition to Interrogation," and "Interrogation." *Id.* at 1. After describing these three phases, *see id.* at 1-9, the *Background Paper* "provides a look at a prototypical interrogation with an emphasis on the application of

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interrogation techniques, in combination and separately," *id.* at 9-18. The *Background Paper* does not include any discussion of the waterboard; however, you have separately provided to us a description of how the waterboard may be used in combination with other techniques, particularly dietary manipulation and sleep deprivation. *See* Fax for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from [redacted] Assistant General Counsel, CIA, at 3-4 (Apr. 22, 2005) ("*April 22* [redacted] *Fax*").

Phases of the Interrogation Process

The first phase of the interrogation process, "Initial Conditions," does not involve interrogation techniques, and you have not asked us to consider any legal question regarding the CIA's practices during this phase. The "Initial Conditions" nonetheless set the stage for use of the interrogation techniques, which come later.[2]

According to the *Background Paper*, before being flown to the site of interrogation, a detainee is given a medical examination. He then is "securely shackled and is deprived of sight and sound through the use of blindfolds, earmuffs, and hoods" during the flight. *Id.* at 2. An on-board medical officer monitors his condition. Security personnel also monitor the detainee for signs of distress. Upon arrival at the site, the detainee "finds himself in complete control of Americans" and is subjected to "precise, quiet, and almost clinical" procedures designed to underscore "the enormity and suddenness of the change in environment, the uncertainty about what will happen next, and the potential dread [a detainee] may have of US custody." *Id.* His head and face are shaved; his physical condition is documented through photographs taken while he is nude; and he is given medical and psychological interviews to assess his condition and to make sure there are no contraindications to the use of any particular interrogation techniques. *See id.* at 2-3.

The detainee then enters the next phase, the "Transition to Interrogation." The interrogators conduct an initial interview, "in a relatively benign environment," to ascertain whether the detainee is willing to cooperate. The detainee is "normally clothed but seated and shackled for security purposes." *Id.* at 3. The interrogators take "an open, non-threatening approach," but the detainee "would have to provide information on actionable threats and location information on High-Value Targets at large—not lower-level information—for interrogators to continue with [this] neutral approach." *Id.* If the detainee does not meet this "very high" standard, the interrogators submit a detailed interrogation plan to CIA headquarters

[2] Although the *OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation and Detention* (Dec. 2004) ("*OMS Guidelines*") refer to the administration of sedatives during transport if necessary to protect the detainee or the rendition team, *id.* at 4-5, the *OMS Guidelines* do not provide for the use of sedatives for interrogation. The *Background Paper* does not mention the administration of any drugs during the detainee's transportation to the site of the interrogation or at any other time, and we do not address any such administration. OMS, we understand, is unaware of any use of sedation during the transport of a detainee in the last two years and states that the interrogation program does not use sedation or medication for the purpose of interrogation. We caution that any use of sedatives should be carefully evaluated, including under 18 U.S.C. § 2340(2)(B). For purposes of our analysis, we assume that no drugs are administered during the relevant period or that there are no ongoing effects from any administration of any drugs; if that assumption does not hold, our analysis and conclusions could change.

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for approval. If the medical and psychological assessments find no contraindications to the proposed plan, and if senior CIA officers at headquarters approve some or all of the plan through a cable transmitted to the site of the interrogation, the interrogation moves to the next phase. *Id.*[3]

Three interrogation techniques are typically used to bring the detainee to "a baseline, dependent state," "demonstrat[ing] to the [detainee] that he has no control over basic human needs" and helping to make him "perceive and value his personal welfare, comfort, and immediate needs more than the information he is protecting." *Id.* at 4. The three techniques used to establish this "baseline" are nudity, sleep deprivation (with shackling and, at least at times, with use of a diaper), and dietary manipulation. These techniques, which *Techniques* described in some detail, "require little to no physical interaction between the detainee and interrogator." *Background Paper* at 5.

Other techniques, which "require physical interaction between the interrogator and detainee," are characterized as "corrective" and "are used principally to correct, startle, or . . . achieve another enabling objective with the detainee." *Id.* These techniques "are not used simultaneously but are often used interchangeably during an individual interrogation session." *Id.* The insult slap is used "periodically throughout the interrogation process when the interrogator needs to immediately correct the detainee or provide a consequence to a detainee's response or non-response." *Id.* at 5-6. The insult slap "can be used in combination with water dousing or kneeling stress positions"—techniques that are not characterized as "corrective." *Id.* at 6. Another corrective technique, the abdominal slap, "is similar to the insult slap in application and desired result" and "provides the variation necessary to keep a high level of unpredictability in the interrogation process." *Id.* The abdominal slap may be simultaneously combined with water dousing, stress positions, and wall standing. A third corrective technique, the facial hold, "is used sparingly throughout interrogation." *Id.* It is not painful; but "demonstrates the interrogator's control over the [detainee]." *Id.* It too may be simultaneously combined with water dousing, stress positions, and wall standing. *Id.* Finally, the attention grasp "may be used several times in the same interrogation" and may be simultaneously combined with water dousing or kneeling stress positions. *Id.*

Some techniques are characterized as "coercive." These techniques "place the detainee in more physical and psychological stress." *Id.* at 7. Coercive techniques "are typically not used

[3] The CIA maintains certain "detention conditions" at all of its detention facilities. (These conditions "are not interrogation techniques," *id.* at 4, and you have not asked us to assess their lawfulness under the statute.) The detainee is "exposed to white noise/loud sounds (not to exceed 79 decibels) and constant light during portions of the interrogation process." *Id.* These conditions enhance security. The noise prevents the detainee from overhearing conversations of staff members, precludes him from picking up "auditory clues" about his surroundings, and disrupts any efforts to communicate with other detainees. *Id.* The light provides better conditions for security and for monitoring by the medical and psychological staff and the interrogators. Although we do not address the lawfulness of using white noise (not to exceed 79 decibels) and constant light, we note that according to materials you have furnished to us, (1) the Occupational Safety and Health Administration has determined that there is no risk of permanent hearing loss from continuous, 24-hour per day exposure to noise of up to 82 decibels, and (2) detainees typically adapt fairly quickly to the constant light and it does not interfere unduly with their ability to sleep. *See* Fax for Dan Levin, Acting Assistant Attorney General, Office of Legal Counsel, from [redacted] Assistant General Counsel, Central Intelligence Agency at 3 (Jan. 4, 2005) ("[redacted] Fax").

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in combination, although some combined use is possible." *Id.* Walling "is one of the most effective interrogation techniques because it wears down the [detainee] physically, heightens uncertainty in the detainee about what the interrogator may do to him, and creates a sense of dread when the [detainee] knows he is about to be walled again." *Id.*[4] A detainee "may be walled one time (one impact with the wall) to make a point or twenty to thirty times consecutively when the interrogator requires a more significant response to a question," and "will be walled multiple times" during a session designed to be intense. *Id.* Walling cannot practically be used at the same time as other interrogation techniques.

Water temperature and other considerations of safety established by OMS limit the use of another coercive technique, water dousing. *See id.* at 7-8. The technique "may be used frequently within those guidelines." *Id.* at 8. As suggested above, interrogators may combine water dousing with other techniques, such as stress positions, wall standing, the insult slap, or the abdominal slap. *See id.* at 8.

The use of stress positions is "usually self-limiting in that temporary muscle fatigue usually leads to the [detainee's] being unable to maintain the stress position after a period of time." *Id.* Depending on the particular position, stress positions may be combined with water dousing, the insult slap, the facial hold, and the attention grasp. *See id.* Another coercive technique, wall standing, is "usually self-limiting" in the same way as stress positions. *Id.* It may be combined with water dousing and the abdominal slap. *See id.* OMS guidelines limit the technique of cramped confinement to no more than eight hours at a time and 18 hours a day, and confinement in the "small box" is limited to two hours. *Id.* Cramped confinement cannot be used in simultaneous combination with corrective or other coercive techniques.

We understand that the CIA's use of all these interrogation techniques is subject to ongoing monitoring by interrogation team members who will direct that techniques be discontinued if there is a deviation from prescribed procedures and by medical and psychological personnel from OMS who will direct that any or all techniques be discontinued if in their professional judgment the detainee may otherwise suffer severe physical or mental pain or suffering. *See Techniques* at 6-7.

A Prototypical Interrogation

In a "prototypical interrogation," the detainee begins his first interrogation session stripped of his clothes, shackled, and hooded, with the walling collar over his head and around

[4] Although walling "wears down the [detainee] physically," *Background Paper* at 7, and undoubtedly may startle him, we understand that it is not significantly painful. The detainee hits "a flexible false wall," designed "to create a loud sound when the individual hits it" and thus to cause "shock and surprise." *Interrogation Memorandum* at 2. But the detainee's "head and neck are supported with a rolled hood or towel that provides a c-collar effect to help prevent whiplash"; it is the detainee's shoulder blades that hit the wall; and the detainee is allowed to rebound from the flexible wall in order to reduce the chances of any injury. *See id.* You have informed us that a detainee is expected to feel "dread" at the prospect of walling because of the shock and surprise caused by the technique and because of the sense of powerlessness that comes from being roughly handled by the interrogators, not because the technique causes significant pain.

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his neck. *Background Paper* at 9-10. The interrogators remove the hood and explain that the detainee can improve his situation by cooperating and may say that the interrogators "will do what it takes to get important information." *Id.*[3] As soon as the detainee does anything inconsistent with the interrogators' instructions, the interrogators use an insult slap or abdominal slap. They employ walling if it becomes clear that the detainee is not cooperating in the interrogation. This sequence "may continue for several more iterations as the interrogators continue to measure the [detainee's] resistance posture and apply a negative consequence to [his] resistance efforts." *Id.* The interrogators and security officers then put the detainee into position for standing sleep deprivation, begin dietary manipulation through a liquid diet, and keep the detainee nude (except for a diaper). *See id.* at 10-11. The first interrogation session, which could have lasted from 30 minutes to several hours, would then be at an end. *See id.* at 11.

If the interrogation team determines there is a need to continue, and if the medical and psychological personnel advise that there are no contraindications, a second session may begin. *See id.* at 12. The interval between sessions could be as short as an hour or as long as 24 hours. *See id.* at 11. At the start of the second session, the detainee is released from the position for standing sleep deprivation, is hooded, and is positioned against the walling wall, with the walling collar over his head and around his neck. *See id.* Even before removing the hood, the interrogators use the attention grasp to startle the detainee. The interrogators take off the hood and begin questioning. If the detainee does not give appropriate answers to the first questions, the interrogators use an insult slap or abdominal slap. *See id.* They employ walling if they determine that the detainee "is intent on maintaining his resistance posture." *Id.* at 13. This sequence "may continue for multiple iterations as the interrogators continue to measure the [detainee's] resistance posture." *Id.* The interrogators then increase the pressure on the detainee by using a hose to douse the detainee with water for several minutes. They stop and start the dousing as they continue the interrogation. *See id.* They then end the session by placing the detainee into the same circumstances as at the end of the first session: the detainee is in the standing position for sleep deprivation, is nude (except for a diaper), and is subjected to dietary manipulation. Once again, the session could have lasted from 30 minutes to several hours. *See id.*

Again, if the interrogation team determines there is a need to continue, and if the medical and psychological personnel find no contraindications, a third session may follow. The session begins with the detainee positioned as at the beginning of the second. *See id.* at 14. If the detainee continues to resist, the interrogators continue to use walling and water dousing. The corrective techniques—the insult slap, the abdominal slap, the facial hold, the attention grasp—"may be used several times during this session based on the responses and actions of the [detainee]." *Id.* The interrogators integrate stress positions and wall standing into the session. Furthermore, "[i]ntense questioning and walling would be repeated multiple times." *Id.* Interrogators "use one technique to support another." *Id.* For example, they threaten the use of walling unless the detainee holds a stress position, thus inducing the detainee to remain in the position longer than he otherwise would. At the end of the session, the interrogators and security

[3] We address the effects of this statement below at pp. 18-19.

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personnel place the detainee into the same circumstances as at the end of the first two sessions, with the detainee subject to sleep deprivation, nudity, and dietary manipulation. *Id.*

In later sessions, the interrogators use those techniques that are proving most effective and drop the others. Sleep deprivation "may continue to the 70 to 120 hour range, or possibly beyond for the hardest resisters, but in no case exceed the 180-hour time limit." *Id.* at 15.[6] If the medical or psychological personnel find contraindications, sleep deprivation will end earlier. *See id.* at 15-16. While continuing the use of sleep deprivation, nudity, and dietary manipulation, the interrogators may add cramped confinement. As the detainee begins to cooperate, the interrogators "begin gradually to decrease the use of interrogation techniques." *Id.* at 16. They may permit the detainee to sit, supply clothes, and provide more appetizing food. *See id.*

The entire process in this "prototypical interrogation" may last 30 days. If additional time is required and a new approval is obtained from headquarters, interrogation may go longer than 30 days. Nevertheless, "[o]n average, the actual use of interrogation techniques covers a period of three to seven days, but can vary upwards to fifteen days based on the resilience of the [detainee]." *Id.* As in *Techniques*, our advice here is limited to an interrogation process lasting no more than 30 days. *See Techniques* at 5.

Use of the Waterboard in Combination with Other Techniques

We understand that for a small number of detainees in very limited circumstances, the CIA may wish to use the waterboard technique. You have previously explained that the waterboard technique would be used only if: (1) the CIA has credible intelligence that a terrorist attack is imminent; (2) there are "substantial and credible indicators the subject has actionable intelligence that can prevent, disrupt or delay this attack"; and (3) other interrogation methods have failed or are unlikely to yield actionable intelligence in time to prevent the attack. *See* Attachment to Letter from John A. Rizzo, Acting General Counsel, CIA, to Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel (Aug. 2, 2004). You have also informed us that the waterboard may be approved for use with a given detainee only during, at most, one single 30-day period, and that during that period, the waterboard technique may be used on no more than five days. We further understand that in any 24-hour period, interrogators may use no more than two "sessions" of the waterboard on a subject—with a "session" defined to mean the time that the detainee is strapped to the waterboard—and that no session may last more than two hours. Moreover, during any session, the number of individual applications of water lasting 10 seconds or longer may not exceed six. The maximum length of any application of water is 40 seconds (you have informed us that this maximum has rarely been reached). Finally, the total cumulative time of all applications of water of any length in a 24-hour period may not exceed 12 minutes. *See* Letter from [redacted] Associate General Counsel, CIA, to Dan Levin, Acting Assistant Attorney General, Office of Legal Counsel, at 1-2 (Aug. 19, 2004).

[6] As in *Techniques*, our advice here is restricted to one application of no more than 180 hours of sleep deprivation.

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You have advised us that in those limited cases where the waterboard would be used, it would be used only in direct combination with two other techniques, dietary manipulation and sleep deprivation. *See April 22 [redacted] Fax* at 3-4. While an individual is physically on the waterboard, the CIA does not use the attention grasp, walling, the facial hold, the facial or insult slap, the abdominal slap, cramped confinement, wall standing, stress positions, or water dousing, though some or all of these techniques may be used with the individual before the CIA needs to resort to the waterboard, and we understand it is possible that one or more of these techniques might be used on the same day as a waterboard session, but separately from that session and not in conjunction with the waterboard. *See id.* at 3.

As we discussed in *Techniques*, you have informed us that an individual undergoing the waterboard is always placed on a fluid diet before he may be subjected to the waterboard in order to avoid aspiration of food matter. The individual is kept on the fluid diet throughout the period the waterboard is used. For this reason, and in this way, the waterboard is used in combination with dietary manipulation. *See April 22 [redacted] Fax* at 3.

You have also described how sleep deprivation may be used prior to and during the waterboard session. *Id.* at 4. We understand that the time limitation on use of sleep deprivation, as set forth in *Techniques*, continues to be strictly monitored and enforced when sleep deprivation is used in combination with the waterboard (as it is when used in combination with other techniques). *See April 22 [redacted] Fax* at 4. You have also informed us that there is no evidence in literature or experience that sleep deprivation exacerbates any harmful effects of the waterboard, though it does reduce the detainee's will to resist and thereby contributes to the effectiveness of the waterboard as an interrogation technique. *Id.* As in *Techniques*, we understand that in the event the detainee were perceived to be unable to withstand the effects of the waterboard for any reason, any member of the interrogation team has the obligation to intervene and, if necessary, to halt the use of the waterboard. *See April 22 [redacted] Fax* at 4.

II.

The issue of the combined effects of interrogation techniques raises complex and difficult questions and comes to us in a less precisely defined form than the questions treated in our earlier opinions about individual techniques. In evaluating individual techniques, we turned to a body of experience developed in the use of analogous techniques in military training by the United States, to medical literature, and to the judgment of medical personnel. Because there is less certainty and definition about the use of techniques in combination, it is necessary to draw more inferences in assessing what may be expected. You have informed us that, although "the exemplar [that is, the prototypical interrogation] is a fair representation of how these techniques are actually employed," "there is no template or script that states with certainty when and how these techniques will be used in combination during interrogation." *Background Paper* at 17. Whether any other combination of techniques would, in the relevant senses, be like the ones presented—whether the combination would be no more likely to cause severe physical or mental pain or suffering within the meaning of sections 2340-2340A—would be a question that cannot be assessed in the context of the present legal opinion. For that reason, our advice does not extend to combinations of techniques unlike the ones discussed here. For the same reason, it is especially important that the CIA use great care in applying these various techniques in

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combination in a real-world scenario, and that the members of the interrogation team, and the attendant medical staff, remain watchful for indications that the use of techniques in combination may be having unintended effects, so that the interrogation regimen may be altered or halted, if necessary, to ensure that it will not result in severe physical or mental pain or suffering to any detainee in violation of 18 U.S.C. §§ 2340-2340A.

Finally, in both of our previous opinions about specific techniques, we evaluated the use of those techniques on particular identified individuals. Here, we are asked to address the combinations without reference to any particular detainee. As is relevant here, we know only that an enhanced interrogation technique, such as most of the techniques at issue in *Techniques*, may be used on a detainee only if medical and psychological personnel have determined that he is not likely, as a result, to experience severe physical or mental pain or suffering. *Techniques* at 5. Once again, whether other detainees would, in the relevant ways, be like the ones previously at issue would be a factual question we cannot now decide. Our advice, therefore, does not extend to the use of techniques on detainees unlike those we have previously considered. Moreover, in this regard, it is also especially important, as we pointed out in *Techniques* with respect to certain techniques, *see, e.g., id.* at 37 (discussing sleep deprivation), that the CIA will carefully assess the condition of each individual detainee and that the CIA's use of these techniques in combination will be sensitive to the individualized physical condition and reactions of each detainee, so that the regimen of interrogation would be altered or halted, if necessary, in the event of unanticipated effects on a particular detainee.

Subject to these cautions and to the conditions, limitations, and safeguards set out below and in *Techniques*, we nonetheless can reach some conclusions about the combined use of these techniques. Although this is a difficult question that will depend on the particular detainee, we do not believe that the use of the techniques in combination as you have described them would be expected to inflict "severe physical or mental pain or suffering" within the meaning of the statute. 18 U.S.C. § 2340(1). Although the combination of interrogation techniques will wear a detainee down physically, we understand that the principal effect, as well as the primary goal, of interrogation using these techniques is psychological—"to create a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner," *Background Paper* at 1—and numerous precautions are designed to avoid inflicting "severe physical or mental pain or suffering."

For present purposes, we may divide "severe physical or mental pain or suffering" into three categories: "severe physical . . . pain," "severe physical . . . suffering," and "severe . . . mental pain or suffering" (the last being a defined term under the statute). *See Techniques* at 22-26; Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* (Dec. 30, 2004).

As explained below, any physical pain resulting from the use of these techniques, even in combination, cannot reasonably be expected to meet the level of "severe physical pain" contemplated by the statute. We conclude, therefore, that the authorized use in combination of these techniques by adequately trained interrogators, as described in the *Background Paper* and the *April 22* [redacted] *Fax*, could not reasonably be considered specifically intended to do so.

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Moreover, although it presents a closer question under sections 2340-2340A, we conclude that the combined use of these techniques also cannot reasonably be expected to—and their combined use in the authorized manner by adequately trained interrogators could not reasonably be considered specifically intended to—cause severe physical suffering. Although two techniques, extended sleep deprivation and the waterboard, may involve a more substantial risk of physical distress, nothing in the other specific techniques discussed in the *Background Paper* and the *April 22* [redacted] *Fax*, or, as we understand it, in the CIA's experience to date with the interrogations of more than two dozen detainees (three of whose interrogations involved the use of the waterboard), would lead to the expectation that any physical discomfort from the combination of sleep deprivation or the waterboard and other techniques would involve the degree of intensity and duration of physical distress sufficient to constitute severe physical suffering under the statute. Therefore, the use of the technique could not reasonably be viewed as specifically intended to cause severe physical suffering. We stress again, however, that these questions concerning whether the combined effects of different techniques may rise to the level of physical suffering within the meaning of sections 2340-2340A are difficult ones, and they reinforce the need for close and ongoing monitoring by medical and psychological personnel and by all members of the interrogation team and active intervention if necessary.

Analyzing the combined techniques in terms of severe mental pain or suffering raises two questions under the statute. The first is whether the risk of hallucinations from sleep deprivation may become exacerbated when combined with other techniques, such that a detainee might be expected to experience "prolonged mental harm" from the combination of techniques. Second, the description in the *Background Paper* that detainees may be specifically told that interrogators will "do what it takes" to elicit information, *Id.* at 10, raises the question whether this statement might qualify as a threat of infliction of severe physical pain or suffering or another of the predicate acts required for "severe mental pain or suffering" under the statute. After discussing both of those possibilities below, however, we conclude that the authorized use by adequately trained interrogators of the techniques in combination, as you have described them, would not reasonably be expected to cause prolonged mental harm and could not reasonably be considered specifically intended to cause severe mental pain or suffering. We stress that these possible questions about the combined use of the techniques under the statutory category of severe mental pain or suffering are difficult ones and they serve to reinforce the need for close and ongoing monitoring and active intervention if necessary.

Severe Physical Pain

Our two previous opinions have not identified any techniques that would inflict pain that approaches the "sever[ity]" required to violate the statute. A number of the techniques—dietary manipulation, nudity, sleep deprivation, the facial hold, and the attention grasp—are not expected to cause physical pain at all. *See Techniques* at 30-36. Others might cause some pain, but the level of pain would not approach that which would be considered "severe." These techniques are the abdominal slap, water dousing, various stress positions, wall standing, cramped confinement, walling, and the facial slap. *See id.* We also understand that the waterboard is not physically painful. *Id.* at 41. In part because none of these techniques would individually cause pain that even approaches the "severe" level required to violate the statute, the combined use of the techniques under the conditions outlined here would not be expected to—

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and we conclude that their authorized use by adequately trained interrogators could not reasonably be considered specifically intended to—reach that level.[7]

We recognize the theoretical possibility that the use of one or more techniques would make a detainee more susceptible to severe pain or that the techniques, in combination, would operate differently from the way they would individually and thus cause severe pain. But as we understand the experience involving the combination of various techniques, the OMS medical and psychological personnel have not observed any such increase in susceptibility. Other than the waterboard, the specific techniques under consideration in this memorandum—including sleep deprivation—have been applied to more than 25 detainees. *See* [redacted] *Fax* at 1-3. No apparent increase in susceptibility to severe pain has been observed either when techniques are used sequentially or when they are used simultaneously—for example, when an insult slap is simultaneously combined with water dousing or a kneeling stress position, or when wall standing is simultaneously combined with an abdominal slap and water dousing. Nor does experience show that, even apart from changes in susceptibility to pain, combinations of these techniques cause the techniques to operate differently so as to cause severe pain. OMS doctors and psychologists, moreover, confirm that they expect that the techniques, when combined as described in the *Background Paper* and in the *April 22* [redacted] *Fax*, would not operate in a different manner from the way they do individually, so as to cause severe pain.

We understand that experience supports these conclusions even though the *Background Paper* does give examples where the distress caused by one technique would be increased by use of another. The "conditioning techniques"—nudity, sleep deprivation, and dietary manipulation—appear designed to wear down the detainee, physically and psychologically, and to allow other techniques to be more effective, *see Background Paper* at 5,12; *April 22* [redacted] *Fax* at 4; and "these [conditioning] techniques are used in combination in almost all cases," *Background Paper* at 17. And, in another example, the threat of walling is used to cause a detainee to hold a stress position longer than he otherwise would. *See id.* at 14. The issue raised by the statute, however, is whether the techniques would be specifically intended to cause the detainee to experience "severe . . . pain." 18 U.S.C. § 2340(1). In the case of the conditioning

[7] We are not suggesting that combinations or repetitions of acts that do not individually cause severe physical pain could not result in severe physical pain. Other than the repeated use of the "walling" technique, however, nothing in the *Background Paper* suggests the kind of repetition that might raise an issue about severe physical pain; and, in the case of walling, we understand that this technique involves a false, flexible wall and is not significantly painful, even with repetition. Our advice with respect to walling in the present memorandum is based on the understanding that the repetitive use of walling is intended only to increase the shock and drama of the technique, to wear down the detainee's resistance, and to disrupt expectations that he will not be treated with force, and that such use is not intended to, and does not in fact, cause severe physical pain to the detainee. Along these lines, we understand that the repeated use of the insult slap and the abdominal slap gradually reduces their effectiveness and that their use is therefore limited to times when the detainee's overt disrespect for the question or questioner requires immediate correction, when the detainee displays obvious efforts to misdirect or ignore the question or questioner, or when the detainee attempts to provide an obvious lie in response to a specific question. Our advice assumes that the interrogators will apply those techniques as designed and will not strike the detainee with excessive force or repetition in a manner that might result in severe physical pain. As to all techniques, our advice assumes that the use of the technique will be stopped if there is any indication that it is or may be causing severe physical pain to the detainee.

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techniques, the principal effect, as you have described it, is on the detainee's will to resist other techniques, rather than on the pain that the other techniques cause. *See Background Paper* at 5, 12; *April 22* [redacted] *Fax* at 4. Moreover, the stress positions and wall standing, while inducing muscle fatigue, do not cause "severe physical . . . pain," and there is no reason to believe that a position, held somewhat longer than otherwise, would create such pain. *See Techniques* at 33-34.[8]

In any particular case, a combination of techniques might have unexpected results, just as an individual technique could produce surprising effects. But the *Background Paper* and the *April 22* [redacted] *Fax*, as well as *Techniques*, describe a system of medical and psychological monitoring of the detainee that would very likely identify any such unexpected results as they begin to occur and would require an interrogation to be modified or stopped if a detainee is in danger of severe physical pain. Medical and psychological personnel assess the detainee before any interrogation starts. *See, e.g., Techniques* at 5. Physical and psychological evaluations are completed daily during any period in which the interrogators use enhanced techniques, including those at issue in *Techniques* (leaving aside dietary manipulation and sleep deprivation of less than 48 hours). *See id.* at 5-7. Medical and psychological personnel are on scene throughout the interrogation, and are physically present or are otherwise observing during many of the techniques. *See id.* at 6-7. These safeguards, which were critically important to our conclusions about individual techniques, are even more significant when techniques are combined.

In one specific context, monitoring the effects on detainees appears particularly important. The *Background Paper* and the *April 22* [redacted] *Fax* illustrate that sleep deprivation is a central part of the "prototypical interrogation." We noted in *Techniques* that extended sleep deprivation may cause a small decline in body temperature and increased food consumption. *See Techniques* at 33-34. Water dousing and dietary manipulation and perhaps even nudity may thus raise dangers of enhanced susceptibility to hypothermia or other medical conditions for a detainee undergoing sleep deprivation. As in *Techniques*, we assume that medical personnel will be aware of these possible interactions and will monitor detainees closely for any signs that such interactions are developing. *See id.* at 33-35. This monitoring, along with quick intervention if any signs of problematic symptoms develop, can be expected to prevent a detainee from experiencing severe physical pain.

We also understand that some studies suggest that extended sleep deprivation may be associated with a reduced tolerance for some forms of pain.[9] Several of the techniques used by

[8] Our advice about wall standing and stress positions assumes that the positions used in each technique are not designed to produce severe pain that might result from contortions or twisting of the body, but only temporary muscle fatigue.

[9] For example, one study found a statistically significant drop of 8-9% in subjects' tolerance thresholds for mechanical or pressure pain after 40 hours of total sleep deprivation. *See* S. Hakki Onen, et al., *The Effects of Total Sleep Deprivation, Selective Sleep Interruption and Sleep Recovery on Pain Tolerance Thresholds in Healthy Subjects*, 10 J. Sleep Research 35, 41 (2001); *see also id.* at 35-36 (discussing other studies). Another study of extended total sleep deprivation found a significant decrease in the threshold for heat pain and some decrease in the cold pain threshold. *See* B. Kundermann, et al., *Sleep Deprivation Affects Thermal Pain Thresholds but not Somatosensory Thresholds in Healthy Volunteers*, 66 Psychosomatic Med. 932 (2004).

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the CIA may involve a degree of physical pain, as we have previously noted, including facial and abdominal slaps, walling, stress positions, and water dousing. Nevertheless, none of these techniques would cause anything approaching severe physical pain. Because sleep deprivation appears to cause at most only relatively moderate decreases in pain tolerance, the use of these techniques in combination with extended sleep deprivation would not be expected to cause severe physical pain.

Therefore, the combined use of techniques, as set out in the *Background Paper* and the *April 22 [redacted] Fax*, would not reasonably be expected by the interrogators to result in severe physical pain. We conclude that the authorized use of these techniques in combination by adequately trained interrogators, as you have described it, could not reasonably be considered specifically intended to cause such pain for purposes of sections 2340-2340A. The close monitoring of each detainee for any signs that he is at risk of experiencing severe physical pain reinforces the conclusion that the combined use of interrogation techniques is not intended to inflict such pain. OMS has directed that "[m]edical officers must remain cognizant at all times of their obligation to prevent 'severe physical or mental pain or suffering.'" *OMS Guidelines* at 10. The obligation of interrogation team members and medical staff to intercede if their observations indicate a detainee is at risk of experiencing severe physical pain, and the expectation that all interrogators understand the important role played by OMS and will cooperate with them in the exercise of this duty, are here, as in *Techniques*, essential to our advice. *See Techniques* at 14.

Severe Physical Suffering

We noted in *Techniques* that, although the statute covers a category of "severe physical . . . suffering" distinct from "severe physical pain," this category encompasses only "physical distress that is 'severe' considering its intensity and duration or persistence, rather than merely mild or transitory." *Id.* at 23 (internal quotation marks omitted). Severe physical suffering for purposes of sections 2340-2340A, we have concluded, means a state or condition of physical distress, misery, affliction, or torment, usually involving physical pain, that is both extreme in intensity and significantly protracted in duration or persistent over time. *Id.* Severe physical suffering is distinguished from suffering that is purely mental or psychological in nature, since mental suffering is encompassed by the separately defined statutory category of "severe mental pain or suffering," discussed below. To amount to torture, conduct must be "sufficiently extreme and outrageous to warrant the universal condemnation that the term 'torture' both connotes and invokes." *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002) (interpreting the TVPA); *cf. Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1332-40, 1345-46 (N.D. Ga. 2002) (standard met under the TVPA by a course of conduct that included severe beatings to the genitals, head, and other parts of the body with metal pipes and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim's forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of "Russian roulette").

In *Techniques*, we recognized that, depending on the physical condition and reactions of a given individual, extended sleep deprivation might cause physical distress in some cases. *Id.* at 34. Accordingly, we advised that the strict limitations and safeguards adopted by the CIA are

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important to ensure that the use of extended sleep deprivation would not cause severe physical suffering. *Id.* at 34-35. We pointed to the close medical monitoring by OMS of each detainee subjected to sleep deprivation, as well as to the power of any member of the interrogation team or detention facility staff to intervene and, in particular, to intervention by OMS if OMS concludes in its medical judgment that the detainee may be experiencing extreme physical distress. With those safeguards in place, and based on the assumption that they would be strictly followed, we concluded that the authorized use of sleep deprivation by adequately trained interrogators could not reasonably be considered specifically intended to cause such severe physical suffering. *Id.* at 34. We pointed out that "[d]ifferent individual detainees may react physically to sleep deprivation in different ways," *id.*, and we assumed that the interrogation team and medical staff "will separately monitor each individual detainee who is undergoing sleep deprivation, and that the application of this technique will be sensitive to the individualized physical condition and reactions of each detainee." *Id.*

Although it is difficult to calculate the additional effect of combining other techniques with sleep deprivation, we do not believe that the addition of the other techniques as described in the *Background Paper* would result in "severe physical . . . suffering." The other techniques do not themselves inflict severe physical pain. They are not of the intensity and duration that are necessary for "severe physical suffering"; instead, they only increase, over a short time, the discomfort that a detainee subjected to sleep deprivation experiences. They do not extend the time at which sleep deprivation would end, and although it is possible that the other techniques increase the physical discomfort associated with sleep deprivation itself, we cannot say that the effect would be so significant as to cause "physical distress that is 'severe' considering its intensity and duration or persistence." *Techniques* at 23 (internal quotation marks omitted). We emphasize that the question of "severe physical suffering" in the context of a combination of techniques is a substantial and difficult one, particularly in light of the imprecision in the statutory standard and the relative lack of guidance in the case law. Nevertheless, we believe that the combination of techniques in question here would not be "extreme and outrageous" and thus would not reach the high bar established by Congress in sections 2340-2340A, which is reserved for actions that "warrant the universal condemnation that the term 'torture' both connotes and invokes." *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d at 92 (interpreting the TVPA)

As we explained in *Techniques*, experience with extended sleep deprivation shows that "'[s]urprisingly, little seemed to go wrong with the subjects physically. The main effects lay with sleepiness and impaired brain functioning, but even these were no great cause for concern.'" *Id.* at 36 (quoting James Horne, *Why We Sleep: The Functions of Sleep in Humans and Other Mammals* 23-24 (1988)). The aspects of sleep deprivation that might result in substantial physical discomfort, therefore, are limited in scope; and although the degree of distress associated with sleepiness, as noted above, may differ from person to person, the CIA has found that many of the at least 25 detainees subjected to sleep deprivation have tolerated it well. The general conditions in which sleep deprivation takes place would not change this conclusion. Shackling is employed as a passive means of keeping a detainee awake and is used in a way designed to prevent causing significant pain. A detainee is not allowed to hang by his wrists. When the detainee is shackled in a sitting position, he is on a stool adequate to bear his weight; and if a horizontal position is used, there is no additional stress on the detainee's arm or leg

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joints that might force his limbs beyond their natural extension or create tension on any joint. Furthermore, team members, as well as medical staff, watch for the development of edema and will act to relieve that condition, should significant edema develop. If a detainee subject to sleep deprivation is using an adult diaper, the diaper is checked regularly and changed as needed to prevent skin irritation.

Nevertheless, we recognize, as noted above, the possibility that sleep deprivation might lower a detainee's tolerance for pain. *See supra* p.13 & n.9. This possibility suggests that use of extended sleep deprivation in combination with other techniques might be more likely than the separate use of the techniques to place the detainee in a state of severe physical distress and, therefore, that the detainee might be more likely to experience severe physical suffering. However, you have informed us that the interrogation techniques at issue would not be used during a course of extended sleep deprivation with such frequency and intensity as to induce in the detainee a persistent condition of extreme physical distress such as may constitute "severe physical suffering" within the meaning of sections 2340-2340A. We understand that the combined use of these techniques with extended sleep deprivation is not designed or expected to cause that result. Even assuming there could be such an effect, members of the interrogation team and medical staff from OMS monitor detainees and would intercede if there were indications that the combined use of the techniques may be having that result, and the use of the techniques would be reduced in frequency or intensity or halted altogether, as necessary. In this regard, we assume that if a detainee started to show an atypical, adverse reaction during sleep deprivation, the system for monitoring would identify this development.

These considerations underscore that the combination of other techniques with sleep deprivation magnifies the importance of adhering strictly to the limits and safeguards applicable to sleep deprivation as an individual technique, as well as the understanding that team personnel, as well as OMS medical personnel, would intervene to alter or stop the use of an interrogation technique if they conclude that a detainee is or may be experiencing extreme physical distress.

The waterboard may be used simultaneously with two other techniques: it may be used during a course of sleep deprivation, and as explained above, a detainee subjected to the waterboard must be under dietary manipulation, because a fluid diet reduces the risks of the technique. Furthermore, although the insult slap, abdominal slap, attention grasp, facial hold, walling, water dousing, stress positions, and cramped confinement cannot be employed during the actual session when the waterboard is being employed, they may be used at a point in time close to the waterboard, including on the same day. *See April 22 [redacted] Fax* at 3.

In *Techniques*, we explained why neither sleep deprivation nor the waterboard would impose distress of such intensity and duration as to amount to "severe physical suffering," and, depending on the circumstances and the individual detainee, we do not believe the combination of the techniques, even if close in time with other techniques, would change that conclusion. The physical distress of the waterboard, as explained in *Techniques*, lasts only during the relatively short periods during a session when the technique is actually being used. Sleep deprivation would not extend that period. Moreover, we understand that there is nothing in the literature or experience to suggest that sleep deprivation would exacerbate any harmful effects of the waterboard. *See supra* p. 9. Similarly, the use of the waterboard would not extend the time

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of sleep deprivation or increase its distress, except during the relatively brief times that the technique is actually being used. And the use of other techniques that do not involve the intensity and duration required for "severe physical suffering" would not lengthen the time during which the waterboard would be used or increase, in any apparent way, the intensity of the distress it would cause. Nevertheless, because both the waterboard and sleep deprivation raise substantial questions, the combination of the techniques only heightens the difficulty of the issues. Furthermore, particularly because the waterboard is so different from other techniques in its effects, its use in combination with other techniques is particularly difficult to judge in the abstract and calls for the utmost vigilance and care.

Based on these assumptions, and those described at length in *Techniques*, we conclude that the combination of techniques, as described in the *Background Paper* and the *April 22 [redacted] Fax*, would not be expected by the interrogators to cause "severe physical . . . suffering," and that the authorized use of these techniques in combination by adequately trained interrogators could not reasonably be considered specifically intended to cause severe physical suffering within the meaning of sections 2340-2340A.

Severe Mental Pain or Suffering

As we explained in *Techniques*, the statutory definition of "severe mental pain or suffering" requires that one of four specified predicate acts cause "prolonged mental harm." 18 U.S.C. § 2340(2); *see Techniques* at 24-25. In *Techniques*, we concluded that only two of the techniques at issue here—sleep deprivation and the waterboard—could even arguably involve a predicate act. The statute provides that "the administration or application . . . of . . . procedures calculated to disrupt profoundly the senses or the personality" can be a predicate act. 18 U.S.C. § 2340(2)(B). Although sleep deprivation may cause hallucinations, OMS, supported by the scientific literature of which we are aware, would not expect a profound disruption of the senses and would order sleep deprivation discontinued if hallucinations occurred. We nonetheless assumed in *Techniques* that any hallucinations resulting from sleep deprivation would amount to a profound disruption of the senses. Even on this assumption, we concluded that sleep deprivation should not be deemed "calculated" to have that effect. *Techniques* at 35-36. Furthermore, even if sleep deprivation could be said to be "calculated" to disrupt the senses profoundly and thus to qualify as a predicate act, we expressed the understanding in *Techniques* that, as demonstrated by the scientific literature about which we knew and by relevant experience in CIA interrogations, the effects of sleep deprivation, including the effects of any associated hallucinations, would rapidly dissipate. Based on that understanding, sleep deprivation therefore would not cause "prolonged mental harm" and would not meet the statutory definition for "severe mental pain or suffering." *Id.* at 36.

We noted in *Techniques* that the use of the waterboard might involve a predicate act. A detainee subjected to the waterboard experiences a sensation of drowning, which arguably qualifies as a "threat of imminent death." 18 U.S.C. § 2340(2)(C). We noted, however, that there is no medical basis for believing that the technique would produce any prolonged mental harm. As explained in *Techniques*, there is no evidence for such prolonged mental harm in the CIA's experience with the technique, and we understand that it has been used thousands of times

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(albeit in a somewhat different way) during the military training of United States personnel, without producing any evidence of such harm.

There is no evidence that combining other techniques with sleep deprivation or the waterboard would change these conclusions. We understand that none of the detainees subjected to sleep deprivation has exhibited any lasting mental harm, and that, in all but one case, these detainees have been subjected to at least some other interrogation technique besides the sleep deprivation itself. Nor does this experience give any reason to believe that, should sleep deprivation cause hallucinations, the use of these other techniques in combination with sleep deprivation would change the expected result that, once a person subjected to sleep deprivation is allowed to sleep, the effects of the sleep deprivation, and of any associated hallucinations, would rapidly dissipate.

Once again, our advice assumes continuous, diligent monitoring of the detainee during sleep deprivation and prompt intervention at the first signs of hallucinatory experiences. The absence of any atypical, adverse reaction during sleep deprivation would buttress the inference that, like others deprived of sleep for long periods, the detainee would fit within the norm established by experience with sleep deprivation, both the general experience reflected in the medical literature and the CIA's specific experience with other detainees. We understand that, based on these experiences, the detainee would be expected to return quickly to his normal mental state once he has been allowed to sleep and would suffer no "prolonged mental harm."

Similarly, the CIA's experience has produced no evidence that combining the waterboard and other techniques causes prolonged mental harm, and the same is true of the military training in which the technique was used. We assume, again, continuous and diligent monitoring during the use of the technique, with a view toward quickly identifying any atypical, adverse reactions and intervening as necessary.

The *Background Paper* raises one other issue about "severe mental pain or suffering." According to the *Background Paper*, the interrogators may tell detainees that they "will do what it takes to get important information." *Background Paper* at 10. (We understand that interrogators may instead use other statements that might be taken to have a similar import.) Conceivably, a detainee might understand such a statement as a threat that, if necessary, the interrogators will imminently subject him to "severe physical pain or suffering" or to "the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality," or he perhaps even could interpret the statement as a threat of imminent death (although, as the detainee himself would probably realize, killing a detainee would end the flow of information). 18 U.S.C. § 2340(2)(A)-(C).

We doubt that this statement is sufficiently specific to qualify as a predicate act under section 2340(2). Nevertheless, we do not have sufficient information to judge whether, in context, detainees understand the statement in any of these ways. If they do, this statement at the beginning of the interrogation arguably requires considering whether it alters the detainee's perception of the interrogation techniques and whether, in light of this perception, prolonged mental harm would be expected to result from the combination throughout the interrogation process of all of the techniques used. We do not have any body of experience, beyond the CIA's

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own experience with detainees, on which to base an answer to this question. SERE training, for example, or other experience with sleep deprivation, does not involve its use with the standing position used here, extended nudity, extended dietary manipulation, and the other techniques which are intended "to create a state of learned helplessness," *Background Paper* at 1, and SERE training does not involve repeated applications of the waterboard. A statement that the interrogators "will do what it takes to get important information" moves the interrogations at issue here even further from this body of experience.

Although it may raise a question, we do not believe that, under the careful limitations and monitoring in place, the combined use outlined in the *Background Paper*, together with a statement of this kind, would violate the statute. We are informed that, in the opinion of OMS, none of the detainees who have heard such a statement in their interrogations has experienced "prolonged mental harm," such as post-traumatic stress disorder, *see Techniques* at 26 n.31, as a result of it or the various techniques utilized on them. This body of experience supports the conclusion that the use of the statement does not alter the effects that would be expected to follow from the combined use of the techniques. Nevertheless, in light of these uncertainties, you may wish to evaluate whether such a statement is a necessary part of the interrogation regimen or whether a different statement might be adequate to convey to the detainee the seriousness of his situation.

* * *

In view of the experience from past interrogations, the judgment of medical and psychological personnel, and the interrogation team's diligent monitoring of the effects of combining interrogation techniques, interrogators would not reasonably expect that the combined use of the interrogation methods under consideration, subject to the conditions and safeguards set forth here and in *Techniques*, would result in severe physical or mental pain or suffering within the meaning of sections 2340-2340A. Accordingly, we conclude that the authorized use, as described in the *Background Paper* and the *April 22* [redacted] *Fax*, of these techniques in combination by adequately trained interrogators could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering, and thus would not violate sections 2340-2340A. We nonetheless underscore that when these techniques are combined in a real-world scenario, the members of the interrogation team and the attendant medical staff must be vigilant in watching for unintended effects, so that the individual characteristics of each detainee are constantly taken into account and the interrogation may be modified or halted, if necessary, to avoid causing severe physical or mental pain or suffering to any detainee. Furthermore, as noted above, our advice does not extend to combinations of techniques unlike the ones discussed here, and whether any other combination of techniques would be more likely to cause severe physical or mental pain or suffering within the meaning of sections 2340-2340A would be a question that we cannot assess here. Similarly, our advice does not extend to the use of techniques on detainees unlike those we have previously considered, and whether other detainees would, in the relevant ways, be like the ones at issue in our previous advice would be a factual question we cannot now decide. Finally, we emphasize that these are issues about which reasonable persons may disagree. Our task has been made more difficult by the imprecision of the statute and the relative absence of judicial guidance, but we have applied our best reading of the law to the specific facts that you have provided.

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Please let us know if we may be of further assistance.

Steven G. Bradbury
Principal Deputy Assistant Attorney General

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U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General — Washington, D.C. 20530

May 10, 2005

MEMORANDUM FOR JOHN A. RIZZO
SENIOR DEPUTY GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY

Re: Application of 18 U.S.C. §§ 2340-2340A to ~~Certain Techniques~~ That May Be Used in the Interrogation of a High Value al Qaeda Detainee

You have asked us to address whether certain specified interrogation techniques designed to be used on a high value al Qaeda detainee in the War on Terror comply with the federal prohibition on torture, codified at 18 U.S.C. §§ 2340-2340A. Our analysis of this question is controlled by this Office's recently published opinion interpreting the anti-torture statute. *See* Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* (Dec. 30, 2004) ("*2004 Legal Standards Opinion*"), *available at* www.usdoj.gov. (We provided a copy of that opinion to you at the time it was issued.) Much of the analysis from our *2004 Legal Standards Opinion* is reproduced below; all of it is incorporated by reference herein. Because you have asked us to address the application of sections 2340-2340A to specific interrogation techniques, the present memorandum necessarily includes additional discussion of the applicable legal standards and their application to particular facts. We stress, however, that the legal standards we apply in this memorandum are fully consistent with the interpretation of the statute set forth in our *2004 Legal Standards Opinion* and ~~constitute~~ our authoritative view of the legal standards applicable under sections 2340-2340A. Our task is to explicate those standards in order to assist you in complying with the law.

A paramount recognition emphasized in our *2004 Legal Standards Opinion* merits re-emphasis at the outset and guides our analysis: Torture is abhorrent both to American law and values and to international norms. The universal repudiation of torture is reflected not only in our criminal law, *see, e.g.*, 18 U.S.C. §§ 2340-2340A, but also in international agreements,[1] in

[1] *See, e.g.*, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force for U.S. Nov. 20,

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centuries of Anglo-American law, *see, e.g.*, John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (1977) ("*Torture and the Law of Proof*"), and in the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.[2] Consistent with these norms, the President has directed unequivocally that the United States is not to engage in torture.[3]

The task of interpreting and applying sections 2340-2340A is complicated by the lack of precision in the statutory terms and the lack of relevant case law. In defining the federal crime of torture, Congress required that a defendant "*specifically intend*[] to inflict *severe* physical or mental pain or suffering," and Congress narrowly defined "severe mental pain or suffering" to mean "the *prolonged* mental harm caused by" enumerated predicate acts, including "the threat of *imminent* death" and "procedures *calculated* to disrupt *profoundly* the senses or personality." 18 U.S.C. § 2340 (emphases added). These statutory requirements are consistent with U.S. obligations under the United Nations Convention Against Torture, the treaty that obligates the United States to ensure that torture is a crime under U.S. law and that is implemented by sections 2340-2340A. The requirements in sections 2340-2340A closely track the understandings and reservations required by the Senate when it gave its advice and consent to ratification of the Convention Against Torture. They reflect a clear intent by Congress to limit the scope of the prohibition on torture under U.S. law. However, many of the key terms used in the statute (for example, "severe," "prolonged," "suffering") are imprecise and necessarily bring a degree of uncertainty to addressing the reach of sections 2340-2340A. Moreover, relevant judicial decisions in this area provide only limited guidance.[4] This imprecision and lack of judicial guidance, coupled with the President's clear directive that the United States does not condone or engage in torture, counsel great care in applying the statute to specific conduct. We have attempted to exercise such care throughout this memorandum.

With these considerations in mind, we turn to the particular question before us: whether certain specified interrogation techniques may be used by the Central Intelligence Agency ("CIA") on a high value al Qaeda detainee consistent with the federal statutory prohibition on

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1994) ("Convention Against Torture" or "CAT"); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 7, 999 U.N.T.S. 171.

[2] *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167 (July 5, 2004) ("Freedom from torture is an inalienable human right . . . ."); Statement on United Nations International Day in Support of Victims of Torture, 39 Weekly Comp. Pres. Doc. 824 (June 30, 2003) ("Torture anywhere is an affront to human dignity everywhere."); *see also Letter of Transmittal from President Ronald Reagan to the Senate* (May 20, 1988), *in Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Treaty Doc. No. 100-20, at iii (1988) ("Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice still prevalent in the world today.").

[3] *See, e.g.*, 40 Weekly Comp. Pres. Doc. at 1167-68 ("America stands against and will not tolerate torture. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.").

[4] What judicial guidance there is comes from decisions that apply a related but separate statute (the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note (2006)). These judicial opinions generally contain little if any analysis of specific conduct or of the relevant statutory standards.

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torture, 18 U.S.C. §§ 2340-2340A.[5] For the reasons discussed below, and based on the representations we have received from you (or officials of your Agency) about the particular techniques in question, the circumstances in which they are authorized for use, and the physical and psychological assessments made of the detainee to be interrogated, we conclude that the separate authorized use of each of the specific techniques at issue, subject to the limitations and safeguards described herein, would not violate sections 2340-2340A.[6] Our conclusion is straightforward with respect to all but two of the techniques discussed herein. As discussed below, use of sleep deprivation as an enhanced technique and use of the waterboard involve more substantial questions, with the waterboard presenting the most substantial question.

We base our conclusions on the statutory language enacted by Congress in sections 2340-2340A. We do not rely on any consideration of the President's authority as Commander in Chief under the Constitution, any application of the principle of constitutional avoidance (or any conclusion about constitutional issues), or any arguments based on possible defenses of "necessity" or self-defense.[7]

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[5] We have previously advised you that the use by the CIA of the techniques of interrogation discussed herein is consistent with the Constitution and applicable statutes and treaties. In the present memorandum, you have asked us to address only the requirements of 18 U.S.C. §§ 2340-2340A. Nothing in this memorandum or in our prior advice to the CIA should be read to suggest that the use of these techniques would conform to the requirements of the Uniform Code of Military Justice that governs members of the Armed Forces or to United States obligations under the Geneva Conventions in circumstances where those Conventions would apply. We do not address the possible application of article 16 of the CAT, nor do we address any question relating to conditions of confinement or detention, as distinct from the interrogation of detainees. We stress that our advice on the application of sections 2340-2340A does not represent the policy views of the Department of Justice concerning interrogation practices. Finally, we note that section 6057(a) of H.R. 1268 (109th Cong. 1st Sess.), if it becomes law, would forbid expending or obligating funds made available by that bill "to subject any person in the custody or under the physical control of the United States to torture," but because the bill would define "torture" to have "the meaning given that term in section 2340(1) of title 18, United States Code," § 6057(b)(1), the provision (to the extent it might apply here at all) would merely reaffirm the preexisting prohibitions on torture in sections 2340-2340A.

[6] The present memorandum addresses only the separate use of each individual technique, not the combined use of techniques as part of an integrated regimen of interrogation. You have informed us that most of the CIA's authorized techniques are designed to be used with particular detainees in an interrelated or combined manner as part of an overall interrogation program, and you have provided us with a description of a typical scenario for the CIA's combined use of techniques. *See Background Paper on CIA's Combined Use of Interrogation Techniques* (Dec. 30, 2004) ("*Background Paper*"). A full assessment of whether the use of interrogation techniques is consistent with sections 2340-2340A should take into account the potential combined effects of using multiple techniques on a given detainee, either simultaneously or sequentially within a short time. We will address in a separate memorandum whether the combined use of certain techniques, as reflected in the *Background Paper*, is consistent with the legal requirements of sections 2340-2340A.

[7] In preparing the present memorandum, we have reviewed and carefully considered the report prepared by the CIA Inspector General, *Counterterrorism Detention and Interrogation Activities (September 2001-October 2003)*, No. 2003-7123-IG (May 7, 2004) ("*IG Report*") [redacted] Various aspects of the *IG Report* are addressed below.

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I.

A.

In asking us to consider certain specific techniques to be used in the interrogation of a particular al Qaeda operative, you have provided background information common to the use of all of the techniques. You have advised that these techniques would be used only on an individual who is determined to be a "High Value Detainee," defined as:

> a detainee who, until time of capture, we have reason to believe: (1) is a senior member of al-Qai'da or an al-Qai'da associated terrorist group (Jemaah Islamiyyah, Egyptian Islamic Jihad, al-Zarqawi Group, etc.); (2) has knowledge of imminent terrorist threats against the USA, its military forces, its citizens and organizations, or its allies; or that has/had direct involvement in planning and preparing terrorist actions against the USA or its allies, or assisting the al-Qai'da leadership in planning and preparing such terrorist actions; and (3) if released, constitutes a clear and continuing threat to the USA or its allies.

Fax for Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, from [redacted] Assistant General Counsel, CIA, at 3 (Jan. 4, 2005) ("*January 4 [redacted] Fax*"). For convenience, below we will generally refer to such individuals simply as detainees.

You have also explained that, prior to interrogation, each detainee is evaluated by medical and psychological professionals from the CIA's Office of Medical Services ("OMS") to ensure that he is not likely to suffer any severe physical or mental pain or suffering as a result of interrogation.

> [T]echnique-specific advanced approval is required for all "enhanced" measures and is conditional on on-site medical and psychological personnel confirming from direct detainee examination that the enhanced technique(s) is not expected to produce "severe physical or mental pain or suffering." As a practical matter, the detainee's physical condition must be such that these interventions will not have lasting effect, and his psychological state strong enough that no severe psychological harm will result.

OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation and Detention at 9 (Dec. 2004) ("*OMS Guidelines*") (footnote omitted). New detainees are also subject to a general intake examination, which includes "a thorough initial medical assessment . . . with a complete, documented history and physical addressing in depth any chronic or previous medical problems. This assessment should especially attend to cardio-vascular, pulmonary, neurological and musculoskeletal findings. . . . Vital signs and weight should be recorded, and blood work drawn. . . ." *Id.* at 6. In addition, "subsequent medical rechecks during the interrogation period should be performed on a regular basis." *Id.* As an additional precaution, and to ensure the objectivity of their medical and psychological assessments, OMS personnel do not participate in administering interrogation techniques; their function is to monitor interrogations and the health of the detainee.

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The detainee is then interviewed by trained and certified interrogators to determine whether he is actively attempting to withhold or distort information. If so, the on-scene interrogation team develops an interrogation plan, which may include only those techniques for which there is no medical or psychological contraindication. You have informed us that the initial OMS assessments have ruled out the use of some—or all—of the interrogation techniques as to certain detainees. If the plan calls for the use of any of the interrogation techniques discussed herein, it is submitted to CIA Headquarters, which must review the plan and approve the use of any of these interrogation techniques before they may be applied. *See* George J. Tenet, Director of Central Intelligence, *Guidelines on Interrogations Conducted Pursuant to the* [redacted] (Jan. 28, 2003) ("*Interrogation Guidelines*"). Prior written approval "from the Director, DCI Counterterrorist Center, with the concurrence of the Chief, CTC Legal Group," is required for the use of any enhanced interrogation techniques. *Id.* We understand that, as to the detainee here, this written approval has been given for each of the techniques we discuss, except the waterboard.

We understand that, when approved, interrogation techniques are generally used in an escalating fashion, with milder techniques used first. Use of the techniques is not continuous. Rather, one or more techniques may be applied—during or between interrogation sessions—based on the judgment of the interrogators and other team members and subject always to the monitoring of the on-scene medical and psychological personnel. Use of the techniques may be continued if the detainee is still believed to have and to be withholding actionable intelligence. The use of these techniques may not be continued for more than 30 days without additional approval from CIA Headquarters. *See generally Interrogation Guidelines* at 1-2 (describing approval procedures required for use of enhanced interrogation techniques). Moreover, even within that 30-day period, any further use of these interrogation techniques is discontinued if the detainee is judged to be consistently providing accurate intelligence or if he is no longer believed to have actionable intelligence. This memorandum addresses the use of these techniques during no more than one 30-day period. We do not address whether the use of these techniques beyond the initial 30-day period would violate the statute.

Medical and psychological personnel are on-scene throughout (and, as detailed below, physically present or otherwise observing during the application of many techniques, including all techniques involving physical contact with detainees), and "[d]aily physical and psychological evaluations are continued throughout the period of [enhanced interrogation techni[que]use." *IG Report* at 30 n.35; *see also* George J. Tenet, Director of Central Intelligence, *Guidelines on Confinement Conditions for CIA Detainees*, at 1 (Jan. 28, 2003) ("*Confinement Guidelines*") ("Medical and, as appropriate, psychological personnel shall be physically present at, or reasonably available to, each Detention Facility. Medical personnel shall check the physical condition of each detainee at intervals appropriate to the circumstances and shall keep appropriate records."); *IG Report* at 28-29.[8] In addition, "[i]n each interrogation session in which an Enhanced Technique is employed, a contemporaneous record shall be created setting forth the nature and duration of each such technique employed." *Interrogation Guidelines* at 3.

[8] In addition to monitoring the application and effects of enhanced interrogation techniques, OMS personnel are instructed more generally to ensure that "[a]dequate medical care shall be provided to detainees, even those undergoing enhanced interrogation." *OMS Guidelines* at 10.

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At any time, any on-scene personnel (including the medical or psychological personnel, the chief of base, substantive experts, security officers, and other interrogators) can intervene to stop the use of any technique if it appears that the technique is being used improperly, and on-scene medical personnel can intervene if the detainee has developed a condition making the use of the technique unsafe. More generally, medical personnel watch for signs of physical distress or mental harm so significant as possibly to amount to the "severe physical or mental pain or suffering" that is prohibited by sections 2340-2340A. As the *OMS Guidelines* explain, "[m]edical officers must remain cognizant at all times of their obligation to prevent 'severe physical or mental pain or suffering.'" *OMS Guidelines* at 10. Additional restrictions on certain techniques are described below.

These techniques have all been imported from military Survival, Evasion, Resistance, Escape ("SERE") training, where they have been used for years on U.S. military personnel, although with some significant differences described below. *See IG Report* at 13-14. Although we refer to the SERE experience below, we note at the outset an important limitation on reliance on that experience. Individuals undergoing SERE training are obviously in a very different situation from detainees undergoing interrogation; SERE trainees know it is part of a training program, not a real-life interrogation regime, they presumably know it will last only a short time, and they presumably have assurances that they will not be significantly harmed by the training.

B.

You have described the specific techniques at issue as follows:[9]

[9] The descriptions of these techniques are set out in a number of documents including: the *OMS Guidelines; Interrogations Guidelines; Confinement Guidelines; Background Paper*; Letter from [redacted] Associate General Counsel, CIA, to Dan Levin, Acting Assistant Attorney General, Office of Legal Counsel ("OLC") (July 30, 2004) ("*July 30 [redacted] Letter*"); Letter from John A. Rizzo, Acting General Counsel, CIA, to Daniel Levin, Acting Assistant Attorney General, OLC (Aug. 2, 2004) ("*August 2 Rizzo Letter*"); Letter from [redacted] Associate General Counsel, CIA, to Dan Levin, Acting Assistant Attorney General, OLC (Aug. 19, 2004) ("*August 19 [redacted] Letter*"); Letter from [redacted] Associate General Counsel, CIA, to Dan Levin, Acting Assistant Attorney General, OLC (Aug. 25, 2004) ("*August 25 [redacted] Letter*"); Letter from [redacted] Associate General Counsel, CIA, to Dan Levin, Acting Assistant Attorney General, OLC (Oct. [illegible], 2004) ("*October 12 [redacted] Letter*"); Letter from [redacted] Associate General Counsel, CIA, to Dan Levin, Acting Assistant Attorney General, OLC (Oct. 22, 2004) ("*October 22 [redacted] Letter*"). Several of the techniques are described and discussed in an earlier memorandum to you. *See* Memorandum for John Rizzo, Acting General Counsel, Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Interrogation of al Qaeda Operative* (Aug. 1, 2002) ("*Interrogation Memorandum*") (TS). We have separately reanalyzed all techniques in the present memorandum, and we will note below where aspects of particular techniques differ from those addressed in the *Interrogation Memorandum*. In order to avoid any confusion in this extremely sensitive and important area, the discussions of the statute in the *2004 Legal Standards Opinion* and this memorandum supersede that in the *Interrogation Memorandum*; however, this memorandum confirms the conclusion of *Interrogation Memorandum* that the use of these techniques on a particular high value al Qaeda detainee, subject to the limitations imposed herein, would not violate sections 2340-2340A. In some cases additional facts set forth below have been provided to us in communications with CIA personnel. The CIA has reviewed this memorandum and confirmed the accuracy of the descriptions and limitations. Our analysis assumes adherence to these descriptions and limitations.

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1. *Dietary manipulation.* This technique involves the substitution of commercial liquid meal replacements for normal food, presenting detainees with a bland, unappetizing, but nutritionally complete diet. You have informed us that the CIA believes dietary manipulation makes other techniques, such as sleep deprivation, more effective. *See August 25 [redacted] Letter* at 4. Detainees on dietary manipulation are permitted as much water as they want. In general, minimum daily fluid and nutritional requirements are estimated using the following formula:

- Fluid requirement: 35 ml/kg/day. This may be increased depending on ambient temperature, body temperature, and level of activity. Medical officers must monitor fluid intake, and although detainees are allowed as much water as they want, monitoring of urine output may be necessary in the unlikely event that the officers suspect that the detainee is becoming dehydrated.

- Calorie requirement: The CIA generally follows as a guideline a calorie requirement of 900 kcal/day + 10 kcal/kg/day. This quantity is multiplied by 1.2 for a sedentary activity level or 1.4 for a moderate activity level. Regardless of this formula, the recommended minimum calorie intake is 1500 kcal/day, and in no event is the detainee allowed to receive less than 1000 kcal/day.[10] Calories are provided using commercial liquid diets (such as Ensure Plus), which also supply other essential nutrients and make for nutritionally complete meals.[11]

Medical officers are required to ensure adequate fluid and nutritional intake, and frequent medical monitoring takes place while any detainee is undergoing dietary manipulation. All detainees are weighed weekly, and in the unlikely event that a detainee were to lose more than 10 percent of his body weight, the restricted diet would be discontinued.

2. *Nudity.* This technique is used to cause psychological discomfort, particularly if a detainee, for cultural or other reasons, is especially modest. When the technique is employed, clothing can be provided as an instant reward for cooperation. During and between interrogation sessions, a detainee may be kept nude, provided that ambient temperatures and the health of the detainee permit. For this technique to be employed, ambient temperature must be at least 68°F.[12] No sexual abuse or threats of sexual abuse are permitted. Although each detention cell has full-time closed-circuit video monitoring, the detainee is not intentionally exposed to other detainees or unduly exposed to the detention facility staff. We understand that interrogators "are trained to

[10] This is the calorie requirement for males; the CIA presently has no female detainees.

[11] While detainees subject to dietary manipulation are obviously situated differently from individuals who voluntarily engage in commercial weight-loss programs, we note that widely available commercial weight-loss programs in the United States employ diets of 1000 kcal/day for sustained periods of weeks or longer without requiring medical supervision. While we do not equate commercial weight loss programs and this interrogation technique, the fact that these calorie levels are used in the weight-loss programs, in our view, is instructive in evaluating the medical safety of the interrogation technique.

[12] You have informed us that it is very unlikely that nudity would be employed at ambient temperatures below 75°F. *See October 12 [redacted] Letter* at 1. For purposes of our analysis, however, we will assume that ambient temperatures may be as low as 68°F.

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avoid sexual innuendo or any acts of implicit or explicit sexual degradation." *October 12* [redacted] *Letter* at 2. Nevertheless, interrogators can exploit the detainee's fear of being seen naked. In addition, female officers involved in the interrogation process may see the detainees naked; and for purposes of our analysis, we will assume that detainees subjected to nudity as an interrogation technique are aware that they may be seen naked by females.

3. *Attention grasp.* This technique consists of grasping the individual with both hands, one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the individual is drawn toward the interrogator.

4. *Walling.* This technique involves the use of a flexible, false wall. The individual is placed with his heels touching the flexible wall. The interrogator pulls the individual forward and then quickly and firmly pushes the individual into the wall. It is the individual's shoulder blades that hit the wall. During this motion, the head and neck are supported with a rolled hood or towel that provides a C-collar effect to help prevent whiplash. To reduce further the risk of injury, the individual is allowed to rebound from the flexible wall. You have informed us that the false wall is also constructed to create a loud noise when the individual hits it in order to increase the shock or surprise of the technique. We understand that walling may be used when the detainee is uncooperative or unresponsive to questions from interrogators. Depending on the extent of the detainee's lack of cooperation, he may be walled one time during an interrogation session (one impact with the wall) or many times (perhaps 20 or 30 times) consecutively. We understand that this technique is not designed to, and does not, cause severe pain, even when used repeatedly as you have described. Rather, it is designed to wear down the detainee and to shock or surprise the detainee and alter his expectations about the treatment he believes he will receive. In particular, we specifically understand that the repetitive use of the walling technique is intended to contribute to the shock and drama of the experience, to dispel a detainee's expectations that interrogators will not use increasing levels of force, and to wear down his resistance. It is not intended to—and based on experience you have informed us that it does not—inflict any injury or cause severe pain. Medical and psychological personnel are physically present or otherwise observing whenever this technique is applied (as they are with any interrogation technique involving physical contact with the detainee).

5. *Facial hold.* This technique is used to hold the head immobile during interrogation. One open palm is placed on either side of the individual's face. The fingertips are kept well away from the individual's eyes.

6. *Facial slap or insult slap.* With this technique, the interrogator slaps the individual's face with fingers slightly spread. The hand makes contact with the area directly between the tip of the individual's chin and the bottom of the corresponding earlobe. The interrogator thus "invades" the individual's "personal space." We understand that the goal of the facial slap is not to inflict physical pain that is severe or lasting. Instead, the purpose of the facial slap is to induce shock, surprise, or humiliation. Medical and psychological personnel are physically present or otherwise observing whenever this technique is applied.

7. *Abdominal slap.* In this technique, the interrogator strikes the abdomen of the detainee with the back of his open hand. The interrogator must have no rings or other jewelry on

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his hand. The interrogator is positioned directly in front of the detainee, generally no more than 18 inches from the detainee. With his fingers held tightly together and fully extended, and with his palm toward the interrogator's own body, using his elbow as a fixed pivot point, the interrogator slaps the detainee in the detainee's abdomen. The interrogator may not use a fist, and the slap must be delivered above the navel and below the sternum. This technique is used to condition a detainee to pay attention to the interrogator's questions and to dislodge expectations that the detainee will not be touched. It is not intended to—and based on experience you have informed us that it does not—inflict any injury or cause any significant pain. Medical and psychological personnel are physically present or otherwise observing whenever this technique is applied.

8. *Cramped confinement.* This technique involves placing the individual in a confined space, the dimensions of which restrict the individual's movement. The confined space is usually dark. The duration of confinement varies based upon the size of the container. For the larger confined space, the individual can stand up or sit down; the smaller space is large enough for the subject to sit down. Confinement in the larger space may last no more than 8 hours at a time for no more than 18 hours a day; for the smaller space, confinement may last no more than two hours. Limits on the duration of cramped confinement are based on considerations of the detainee's size and weight, how he responds to the technique, and continuing consultation between the interrogators and OMS officers.[13]

9. *Wall standing.* This technique is used only to induce temporary muscle fatigue. The individual stands about four to five feet from a wall, with his feet spread approximately to shoulder width. His arms are stretched out in front of him, with his fingers resting on the wall and supporting his body weight. The individual is not permitted to move or reposition his hands or feet.

10. *Stress positions.* There are three stress positions that may be used. You have informed us that these positions are not designed to produce the pain associated with contortions or twisting of the body. Rather, like wall standing, they are designed to produce the physical discomfort associated with temporary muscle fatigue. The three stress positions are (1) sitting on the floor with legs extended straight out in front and arms raised above the head, (2) kneeling on the floor while leaning back at a 45 degree angle, and (3) leaning against a wall generally about three feet away from the detainee's feet, with only the detainee's head touching the wall, while his wrists are handcuffed in front of him or behind his back, and while an interrogator stands next to him to prevent injury if he loses his balance. As with wall standing, we understand that these positions are used only to induce temporary muscle fatigue.

11. *Water dousing.* Cold water is poured on the detainee either from a container or from a hose without a nozzle. This technique is intended to weaken the detainee's resistance and persuade him to cooperate with interrogators. The water poured on the detainee must be potable,

[13] In *Interrogation Memorandum*, we also addressed the use of harmless insects placed in a confinement box and concluded that it did not violate the statute. We understand that—for reasons unrelated to any concern that it might violate the statute—the CIA never used that technique and has removed it from the list of authorized interrogation techniques; accordingly, we do not address it again here.

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and the interrogators must ensure that water does not enter the detainee's nose, mouth, or eyes. A medical officer must observe and monitor the detainee throughout application of this technique, including for signs of hypothermia. Ambient temperatures must remain above 64°F. If the detainee is lying on the floor, his head is to remain vertical, and a poncho, mat, or other material must be placed between him and the floor to minimize the loss of body heat. At the conclusion of the water dousing session, the detainee must be moved to a heated room if necessary to permit his body temperature to return to normal in a safe manner. To ensure an adequate margin of safety, the maximum period of time that a detainee may be permitted to remain wet has been set at two-thirds the time at which, based on extensive medical literature and experience, hypothermia could be expected to develop in healthy individuals who are submerged in water of the same temperature. For example, in employing this technique:

- For water temperature of 41°F, total duration of exposure may not exceed 20 minutes without drying and rewarming.
- For water temperature of 50°F, total duration of exposure may not exceed 40 minutes without drying and rewarming.
- For water temperature of 59°F, total duration of exposure may not exceed 60 minutes without drying and rewarming.

The minimum permissible temperature of the water used in water dousing is 41°F, though you have informed us that in practice the water temperature is generally not below 50°F, since tap water rather than refrigerated water is generally used. We understand that a version of water dousing routinely used in SERE training is much more extreme in that it involves complete immersion of the individual in cold water (where water temperatures may be below 40°F) and is usually performed outdoors where ambient air temperatures may be as low as 10°F. Thus, the SERE training version involves a far greater impact on body temperature; SERE training also involves a situation where the water may enter the trainee's nose and mouth.[14]

You have also described a variation of water dousing involving much smaller quantities of water; this variation is known as "flicking." Flicking of water is achieved by the interrogator wetting his fingers and then flicking them at the detainee, propelling droplets at the detainee. Flicking of water is done "in an effort to create a distracting effect, to awaken, to startle, to irritate, to instill humiliation, or to cause temporary insult." *October 22 [redacted] Letter* at 2. The water used in the "flicking" variation of water dousing also must be potable and within the water and ambient air temperature ranges for water dousing described above. Although water may be flicked into the detainee's face with this variation, the flicking of water at all times is done in such a manner as to avoid the inhalation or ingestion of water by the detainee. *See id.*

[14] *See October 12 [redacted] Letter* at 2-3. Comparison of the time limits for water dousing with those used in SERE training is somewhat difficult as we understand that the SERE training time limits are based on the ambient air temperature rather than water temperature.

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12. *Sleep deprivation (more than 48 hours).* This technique subjects a detainee to an extended period without sleep. You have informed us that the primary purpose of this technique is to weaken the subject and wear down his resistance.

The primary method of sleep deprivation involves the use of shackling to keep the detainee awake. In this method, the detainee is standing and is handcuffed, and the handcuffs are attached by a length of chain to the ceiling. The detainee's hands are shackled in front of his body, so that the detainee has approximately a two- to three-foot diameter of movement. The detainee's feet are shackled to a bolt in the floor. Due care is taken to ensure that the shackles are neither too loose nor too tight for physical safety. We understand from discussions with OMS that the shackling does not result in any significant physical pain for the subject. The detainee's hands are generally between the level of his heart and his chin. In some cases, the detainee's hands may be raised above the level of his head, but only for a period of up to two hours. All of the detainee's weight is borne by his legs and feet during standing sleep deprivation. You have informed us that the detainee is not allowed to hang from or support his body weight with the shackles. Rather, we understand that the shackles are only used as a passive means to keep the detainee standing and thus to prevent him from falling asleep; should the detainee begin to fall asleep, he will lose his balance and awaken, either because of the sensation of losing his balance or because of the restraining tension of the shackles. The use of this passive means for keeping the detainee awake avoids the need for using means that would require interaction with the detainee and might pose a danger of physical harm.

We understand from you that no detainee subjected to this technique by the CIA has suffered any harm or injury, either by falling down and forcing the handcuffs to bear his weight or in any other way. You have assured us that detainees are continuously monitored by closed-circuit television, so that if a detainee were unable to stand, he would immediately be removed from the standing position and would not be permitted to dangle by his wrists. We understand that standing sleep deprivation may cause edema, or swelling, in the lower extremities because it forces detainees to stand for an extended period of time. OMS has advised us that this condition is not painful, and that the condition disappears quickly once the detainee is permitted to lie down. Medical personnel carefully monitor any detainee being subjected to standing sleep deprivation for indications of edema or other physical or psychological conditions. The *OMS Guidelines* include extensive discussion on medical monitoring of detainees being subjected to shackling and sleep deprivation, and they include specific instructions for medical personnel to require alternative, non-standing positions or to take other actions, including ordering the cessation of sleep deprivation, in order to relieve or avoid serious edema or other significant medical conditions. *See OMS Guidelines* at 14-16.

In lieu of standing sleep deprivation, a detainee may instead be seated on and shackled to a small stool. The stool supports the detainee's weight, but is too small to permit the subject to balance himself sufficiently to be able to go to sleep. On rare occasions, a detainee may also be restrained in a horizontal position when necessary to enable recovery from edema without interrupting the course of sleep deprivation.[15] We understand that these alternative restraints,

[15] Specifically, you have informed us that on three occasions early in the program, the interrogation team and the attendant medical officers identified the potential for unacceptable edema in the lower limbs of detainees

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although uncomfortable, are not significantly painful, according to the experience and professional judgment of OMS and other personnel.

We understand that a detainee undergoing sleep deprivation is generally fed by hand by CIA personnel so that he need not be unshackled; however, "[i]f progress is made during interrogation, the interrogators may unshackle the detainee and let him feed himself as a positive incentive." *October 12 [redacted] Letter* at 4. If the detainee is clothed, he wears an adult diaper under his pants. Detainees subject to sleep deprivation who are also subject to nudity as a separate interrogation technique will at times be nude and wearing a diaper. If the detainee is wearing a diaper, it is checked regularly and changed as necessary. The use of the diaper is for sanitary and health purposes of the detainee; it is not used for the purpose of humiliating the detainee, and it is not considered to be an interrogation technique. The detainee's skin condition is monitored, and diapers are changed as needed so that the detainee does not remain in a soiled diaper. You have informed us that to date no detainee has experienced any skin problems resulting from use of diapers.

The maximum allowable duration for sleep deprivation authorized by the CIA is 180 hours, after which the detainee must be permitted to sleep without interruption for at least eight hours. You have informed us that to date, more than a dozen detainees have been subjected to sleep deprivation of more than 48 hours, and three detainees have been subjected to sleep deprivation of more than 96 hours; the longest period of time for which any detainee has been deprived of sleep by the CIA is 180 hours. Under the CIA's guidelines, sleep deprivation could be resumed after a period of eight hours of uninterrupted sleep, but only if OMS personnel specifically determined that there are no medical or psychological contraindications based on the detainee's condition at that time. As discussed below, however, in this memorandum we will evaluate only one application of up to 180 hours of sleep deprivation.[15]

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undergoing standing sleep deprivation, and in order to permit the limbs to recover without impairing interrogation requirements, the subjects underwent horizontal sleep deprivation. Fax for Steven G. Bradbury, Principal Deputy Assistant Attorney General, OLC, from [redacted] Assistant General Counsel, CIA, at 2 (Apr. 22, 2005) ("*April 22 [redacted] Fax*"). In horizontal sleep deprivation, the detainee is placed prone on the floor on top of a thick towel or blanket (a precaution designed to prevent reduction of body temperature through direct contact with the cell floor). The detainee's hands are manacled together and the arms placed in an outstretched position—either extended beyond the head or extended to either side of the body—and anchored to a far point on the floor in such a manner that the arms cannot be bent or used for balance or comfort. At the same time, the ankles are shackled together and the legs are extended in a straight line with the body and also anchored to a far point on the floor in such a manner that the legs cannot be bent or used for balance or comfort. *Id.* You have specifically informed us that the manacles and shackles are anchored without additional stress on any of the arm or leg joints that might force the limbs beyond natural extension or create tension on any joint. *Id.* The position is sufficiently uncomfortable to detainees to deprive them of unbroken sleep, while allowing their lower limbs to recover from the effects of standing sleep deprivation. We understand that all standard precautions and procedures for shackling are observed for both hands and feet while in this position. *Id.* You have informed us that horizontal sleep deprivation has been used until the detainee's affected limbs have demonstrated sufficient recovery to return to sitting or standing sleep deprivation mode, as warranted by the requirements of the interrogation team, and subject to a determination by the medical officer that there is no contraindication to resuming other sleep deprivation modes. *Id.*

[15] We express no view on whether any further use of sleep deprivation following a 180-hour application of the technique and 8 hours of sleep would violate sections 2340-2340A.

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You have informed us that detainees are closely monitored by the interrogation team at all times (either directly or by closed-circuit video camera) while being subjected to sleep deprivation, and that these personnel will intervene and the technique will be discontinued if there are medical or psychological contraindications. Furthermore, as with all interrogation techniques used by the CIA, sleep deprivation will not be used on any detainee if the prior medical and psychological assessment reveals any contraindications.

13. *The "waterboard."* In this technique, the detainee is lying on a gurney that is inclined at an angle of 10 to 15 degrees to the horizontal, with the detainee on his back and his head toward the lower end of the gurney. A cloth is placed over the detainee's face, and cold water is poured on the cloth from a height of approximately 6 to 18 inches. The wet cloth creates a barrier through which it is difficult—or in some cases not possible—to breathe. A single "application" of water may not last for more than 40 seconds, with the duration of an "application" measured from the moment when water—of whatever quantity—is first poured onto the cloth until the moment the cloth is removed from the subject's face. *See August 19 [redacted] Letter* at 1. When the time limit is reached, the pouring of water is immediately discontinued and the cloth is removed. We understand that if the detainee makes an effort to defeat the technique (e.g., by twisting his head to the side and breathing out of the corner of his mouth), the interrogator may cup his hands around the detainee's nose and mouth to dam the runoff, in which case it would not be possible for the detainee to breathe during the application of the water. In addition, you have informed us that the technique may be applied in a manner to defeat efforts by the detainee to hold his breath by, for example, beginning an application of water as the detainee is exhaling. Either in the normal application, or where countermeasures are used, we understand that water may enter—and may accumulate in—the detainee's mouth and nasal cavity, preventing him from breathing.[17] In addition, you have indicated that the detainee as a countermeasure may swallow water, possibly in significant quantities. For that reason, based on advice of medical personnel, the CIA requires that saline solution be used instead of plain water to reduce the possibility of hyponatremia (i.e., reduced concentration of sodium in the blood) if the detainee drinks the water.

We understand that the effect of the waterboard is to induce a sensation of drowning. This sensation is based on a deeply rooted physiological response. Thus, the detainee experiences this sensation even if he is aware that he is not actually drowning. We are informed that, based on extensive experience, the process is not physically painful, but that it usually does cause fear and panic. The waterboard has been used many thousands of times in SERE training provided to American military personnel, though in that context it is usually limited to one or two applications of no more than 40 seconds each.[18]

[17] In most applications of this technique, including as it is used in SERE training, it appears that the individual undergoing the technique is not in fact completely prevented from breathing, but his airflow is restricted by the wet cloth, creating a sensation of drowning. *See IG Report* at 15 ("Airflow is restricted . . . and the technique produces the sensation of drowning and suffocation."). For purposes of our analysis, however, we will assume that the individual is unable to breathe during the entire period of any application of water during the waterboard technique.

[18] The Inspector General was critical of the reliance on the SERE experience with the waterboard in light of these and other differences in the application of the technique. We discuss the Inspector General's criticisms

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You have explained that the waterboard technique is used only if: (1) the CIA has credible intelligence that a terrorist attack is imminent; (2) there are "substantial and credible indicators the subject has actionable intelligence that can prevent, disrupt or delay this attack"; and (3) other interrogation methods have failed or are unlikely to yield actionable intelligence in time to prevent the attack. *See* Attachment to *August 2 Rizzo Letter*. You have also informed us that the waterboard may be approved for use with a given detainee only during, at most, one single 30-day period, and that during that period, the waterboard technique may be used on no more than five days. We further understand that in any 24-hour period, interrogators may use no more than two "sessions" of the waterboard on a subject—with a "session" defined to mean the time that the detainee is strapped to the waterboard—and that no session may last more than two hours. Moreover, during any session, the number of individual applications of water lasting 10 seconds or longer may not exceed six. As noted above, the maximum length of any application of water is 40 seconds (you have informed us that this maximum has rarely been reached). Finally, the total cumulative time of all applications of whatever length in a 24-hour period may not exceed 12 minutes. *See August 19[redacted] Letter* at 1-2. We understand that these limitations have been established with extensive input from OMS, based on experience to date with this technique and OMS's professional judgment that use of the waterboard on a healthy individual subject to these limitations would be "medically acceptable." *See OMS Guidelines* at 18-19.

During the use of the waterboard, a physician and a psychologist are present at all times. The detainee is monitored to ensure that he does not develop respiratory distress. If the detainee is not breathing freely after the cloth is removed from his face, he is immediately moved to a vertical position in order to clear the water from his mouth, nose, and nasopharynx. The gurney used for administering this technique is specially designed so that this can be accomplished very quickly if necessary. Your medical personnel have explained that the use of the waterboard does pose a small risk of certain potentially significant medical problems and that certain measures are taken to avoid or address such problems. First, a detainee might vomit and then aspirate the emesis. To reduce this risk, any detainee on whom this technique will be used is first placed on a liquid diet. Second, the detainee might aspirate some of the water, and the resulting water in the lungs might lead to pneumonia. To mitigate this risk, a potable saline solution is used in the procedure. Third, it is conceivable (though, we understand from OMS, highly unlikely) that a detainee could suffer spasms of the larynx that would prevent him from breathing even when the application of water is stopped and the detainee is returned to an upright position. In the event of such spasms, a qualified physician would immediately intervene to address the problem, and, if necessary, the intervening physician would perform a tracheotomy. Although the risk of such spasms is considered remote (it apparently has never occurred in thousands of instances of SERE training), we are informed that the necessary emergency medical equipment is always present—although not visible to the detainee—during any application of the waterboard. *See generally id.* at 17-20.[19]

further below. Moreover, as noted above, the very different situations of detainees undergoing interrogation and military personnel undergoing training counsels against undue reliance on the experience in SERE training. That experience is nevertheless of some value in evaluating the technique.

[19] OMS identified other potential risks:

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We understand that in many years of use on thousands of participants in SERE training, the waterboard technique (although used in a substantially more limited way) has not resulted in any cases of serious physical pain or prolonged mental harm. In addition, we understand that the waterboard has been used by the CIA on three high level al Qaeda detainees, two of whom were subjected to the technique numerous times, and, according to OMS, none of these three individuals has shown any evidence of physical pain or suffering or mental harm in the more than 25 months since the technique was used on them. As noted, we understand that OMS has been involved in imposing strict limits on the use of the waterboard, limits that, when combined with careful monitoring, in their professional judgment should prevent physical pain or suffering or mental harm to a detainee. In addition, we understand that any detainee is closely monitored by medical and psychological personnel whenever the waterboard is applied, and that there are additional reporting requirements beyond the normal reporting requirements in place when other interrogation techniques are used. *See OMS Guidelines* at 20.

* * *

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

C.

You asked for our advice concerning these interrogation techniques in connection with their use on a specific high value al Qaeda detainee named [redacted] You informed us that the

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In our limited experience, extensive sustained use of the waterboard can introduce new risks. Most seriously, for reasons of physical fatigue or psychological resignation, the subject may simply give up, allowing excessive filling of the airways and loss of consciousness. An unresponsive subject should be righted immediately, and the interrogator should deliver a sub-xyphoid thrust to expel the water. If this fails to restore normal breathing, aggressive medical intervention is required. Any subject who has reached this degree of compromise is not considered an appropriate candidate for the waterboard, and the physician on the scene can not concur in the further use of the waterboard without specific [Chief, OMS] consultation and approval.

OMS Guidelines at 18. OMS has also stated that "[b]y days 3-5 of an aggressive program, cumulative effects become a potential concern. Without any hard data to quantify either this risk or the advantages of this technique, we believe that beyond this point continued intense waterboard applications may not be medically appropriate." *Id.* at 19. As noted above, based on OMS input, the CIA has adopted and imposed a number of strict limitations on the frequency and duration of use of the waterboard.

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had information about al Qaeda's plans to launch an attack within the United States. According to had extensive connections to various al Qaeda leaders, members of the Taliban, and the al-Zarqawi network, and had arranged meetings between an associate and to discuss such an attack. *August 25 Letter* at 2-3. You advised us that medical and psychological assessments were completed by a CIA physician and psychologist, and that based on this examination, the physician concluded " medically stable and has no medical contraindications to interrogation, including the use of interrogation techniques" addressed in this memorandum.[20] *Medical and Psychological Assessment of* attached to *August 2 Rizzo Letter* at 1.[21] The psychological assessment found was alert and oriented and his concentration and attention were appropriate." *Id.* at 2. The psychologist further found 'thought processes were clear and logical; there was no evidence of a thought disorder, delusions, or hallucinations[, and t]here were not significant signs of depression, anxiety or other mental disturbance." *Id.* The psychologist evaluated 'psychologically stable, reserved and defensive," and "opined that there was no evidence that the use of the approved interrogation methods would cause any severe or prolonged psychological disturbance *Id.* at 2. Our conclusions depend on these assessments. Before using the techniques on other detainees, the CIA would need to ensure, in each case, that all medical and psychological assessments indicate that the detainee is fit to undergo the use of the interrogation techniques.

II.

A.

Section 2340A provides that "[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life."[22] Section 2340(1) defines "torture" as "an

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[20] You have advised us that the waterboard has not been used We understand that there may have been medical reasons against using that technique in his case. Of course, our advice assumes that the waterboard could be used only in the absence of medical contraindications.

[21] The medical examination reported was obese, and that he reported a "5-6 year history of non-exertional chest pressures, which are intermittent, at times accompanied by nausea and depression and shortness of breath." *Medical and Psychological Assessment of* at 1, attached to *August 2 Rizzo Letter*. he has never consulted a physician for this problem," and was "unable or unwilling to be more specific about the frequency or intensity of the aforementioned symptoms." *Id.* He also reported suffering "long-term medical and mental problems" from a motor vehicle accident "many years ago," and stated that he took medication as a result of that accident until ten years ago. *Id.* He stated that he was not currently taking any medication. He also reported seeing a physician for kidney problems that caused him to urinate frequently and complained of a toothache. *Id.* The medical examination showed a rash on his chest and shoulders and that "his nose and chest were clear, [and] his heart sounds were normal with no murmurs or gallops." *Id.* The physician opined 'likely has some reflux esophagitis and mild check folliculitis, but doubt[ed] that he has any coronary pathology." *Id.*

[22] Section 2340A provides in full:

> (a) Offense.—Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any

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act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."[23]

Congress enacted sections 2340-2340A to carry out the obligations of the United States under the CAT. *See* H.R. Conf. Rep. No. 103-482, at 229 (1994). The CAT, among other things, requires the United States, as a state party, to ensure that acts of torture, along with attempts and complicity to commit such acts, are crimes under U.S. law. *See* CAT arts. 2, 4-5. Sections 2340-2340A satisfy that requirement with respect to acts committed outside the United States.[24] Conduct constituting "torture" within the United States already was—and remains—prohibited by various other federal and state criminal statutes.

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person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction.—There is jurisdiction over the activity prohibited in subsection (a) if—

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy.—A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

18 U.S.C. § 2340A.

[23] Section 2340 provides in full:

As used in this chapter—

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

(2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and

(3) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

18 U.S.C. § 2340 (as amended by Pub. L. No. 108-375, 118 Stat. 1811 (2004)).

[24] Congress limited the territorial reach of the federal torture statute by providing that the prohibition applies only to conduct occurring "outside the United States," 18 U.S.C. § 2340A(a), which is currently defined in the statute to mean outside "the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States." *Id.* § 2340(3) (as amended by Pub. L. No. 108-375, 118 Stat. 1811

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The CAT defines "torture" so as to require the intentional infliction of "severe pain or suffering, whether physical or mental." Article 1(1) of the CAT provides:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Senate included the following understanding in its resolution of advice and consent to ratification of the CAT:

> The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36 (1990). This understanding was deposited with the U.S. instrument of ratification, *see* 1830 U.N.T.S. 320 (Oct. 21, 1994), and thus defines the scope of United States obligations under the treaty. *See Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 32-33 (1987). The criminal prohibition against torture that Congress codified in 18 U.S.C. §§ 2340-2340A generally tracks the CAT's definition of torture, subject to the U.S. understanding.

B.

Under the language adopted by Congress in sections 2340-2340A, to constitute "torture," conduct must be "specifically intended to inflict severe physical or mental pain or suffering." In the discussion that follows, we will separately consider each of the principal components of this key phrase: (1) the meaning of "severe"; (2) the meaning of "severe physical pain or suffering";

(2004)). You have advised us that the CIA's use of the techniques addressed in this memorandum would occur "outside the United States" as defined in sections 2340-2340A.

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(3) the meaning of "severe mental pain or suffering"; and (4) the meaning of "specifically intended."

(1) The meaning of "severe."

Because the statute does not define "severe," "we construe [the] term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The common understanding of the term "torture" and the context in which the statute was enacted also inform our analysis. Dictionaries define "severe" (often conjoined with "pain") to mean "extremely violent or intense: *severe pain*." *American Heritage Dictionary of the English Language* 1653 (3d ed. 1992); *see also* XV *Oxford English Dictionary* 101 (2d ed. 1989) ("Of pain, suffering, loss, or the like: Grievous, extreme" and "Of circumstances . . . : Hard to sustain or endure."). The common understanding of "torture" further supports the statutory concept that the pain or suffering must be severe. *See Black's Law Dictionary* 1528 (8th ed. 2004) (defining "torture" as "[t]he infliction of *intense pain* to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure") (emphasis added); *Webster's Third New International Dictionary of the English Language Unabridged* 2414 (2002) (defining "torture" as "the infliction of *intense pain* (as from burning, crushing, wounding) to punish or coerce someone") (emphasis added); *Oxford American Dictionary and Language Guide* 1064 (1999) (defining "torture" as "the infliction of *severe bodily pain*, esp. as a punishment or a means of persuasion") (emphasis added). Thus, the use of the word "severe" in the statutory prohibition on torture clearly denotes a sensation or condition that is extreme in intensity and difficult to endure.

This interpretation is also consistent with the historical understanding of torture, which has generally involved the use of procedures and devices designed to inflict intense or extreme pain. The devices and procedures historically used were generally intended to cause extreme pain while not killing the person being questioned (or at least not doing so quickly) so that questioning could continue. Descriptions in Lord Hope's lecture, "Torture," University of Essex/Clifford Chance Lecture at 7-8 (Jan. 28, 2004) (describing the "boot," which involved crushing of the victim's legs and feet; repeated pricking with long needles; and thumbscrews), and in Professor Langbein's book, *Torture and the Law of Proof*, cited *supra* p. 2, make this clear. As Professor Langbein summarized:

> The commonest torture devices—strappado, rack, thumbscrews, legscrews—worked upon the extremities of the body, either by distending or compressing them. We may suppose that these modes of torture were preferred because they were somewhat less likely to maim or kill than coercion directed to the trunk of the body, and because they would be quickly adjusted to take account of the victim's responses during the examination.

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Torture and the Law of Proof at 15 (footnote omitted).[25]

The statute, moreover, was intended to implement United States obligations under the CAT, which, as quoted above, defines "torture" as acts that intentionally inflict "severe pain or suffering." CAT art. 1(1). As the Senate Foreign Relations Committee explained in its report recommending that the Senate consent to ratification of the CAT:

> The [CAT] seeks to define "torture" in a relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned. . . .
>
> . . . .
>
> . . . The term "torture," in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.

S. Exec. Rep. No. 101-30 at 13-14. *See also* David P. Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 Nova L. Rev. 449, 455 (1991) ("By stressing the extreme nature of torture, . . . [the] definition [of torture in the CAT] describes a relatively limited set of circumstances likely to be illegal under most, if not all, domestic legal systems.").

Drawing distinctions among gradations of pain is obviously not an easy task, especially given the lack of any precise, objective scientific criteria for measuring pain.[26] We are given some aid in this task by judicial interpretations of the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note (2000). The TVPA, also enacted to implement the CAT, provides a civil remedy to victims of torture. The TVPA defines "torture" to include:

> any act, directed against an individual in the offender's custody or physical control, by which *severe pain or suffering* (other than pain or suffering arising

[25] We emphatically are not saying that only such historical techniques—or similar ones—can constitute "torture" under sections 2340-2340A. But the historical understanding of torture is relevant in interpreting Congress's intent in prohibiting the crime of "torture." *Cf. Morissette v. United States*, 342 U.S. 246, 263 (1952).

[26] Despite extensive efforts to develop objective criteria for measuring pain, there is no clear, objective, consistent measurement. As one publication explains:

> Pain is a complex, subjective, perceptual phenomenon with a number of dimensions—intensity, quality, time course, impact, and personal meaning—that are uniquely experienced by each individual and, thus, can only be assessed indirectly. *Pain is a subjective experience and there is no way to objectively quantify it.* Consequently, assessment of a patient's pain depends on the patient's overt communications, both verbal and behavioral. Given pain's complexity, one must assess not only its somatic (sensory) component but also patients' moods, attitudes, coping efforts, resources, responses of family members, and the impact of pain on their lives.

Dennis C. Turk, *Assess the Person, Not Just the Pain*, Pain: Clinical Updates, Sept. 1993 (emphasis added). This lack of clarity further complicates the effort to define "severe" pain or suffering.

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> only from or inherent in, or incidental to, lawful sanctions), *whether physical or mental*, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind . . . .

28 U.S.C. § 1350 note, § 3(b)(1) (emphases added). The emphasized language is similar to section 2340's phrase "severe physical or mental pain or suffering."[27] As the Court of Appeals for the District of Columbia Circuit has explained:

> The severity requirement is crucial to ensuring that the conduct proscribed by the [CAT] and the TVPA is sufficiently extreme and outrageous to warrant the universal condemnation that the term "torture" both connotes and invokes. The drafters of the [CAT], as well as the Reagan Administration that signed it, the Bush Administration that submitted it to Congress, and the Senate that ultimately ratified it, therefore all sought to ensure that "only acts of a certain gravity shall be considered to constitute torture."
>
> The critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim. The more intense, lasting, or heinous the agony, the more likely it is to be torture.

Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 92-93 (D.C. Cir. 2002) (citations omitted). The D.C. Circuit in *Price* concluded that a complaint that alleged beatings at the hands of police but that did not provide details concerning "the severity of plaintiffs' alleged beatings, including their frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out," did not suffice "to ensure that [it] satisf[ied] the TVPA's rigorous definition of torture." *Id.* at 93.

In *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C. Cir. 2003), the D.C. Circuit again considered the types of acts that constitute torture under the TVPA definition. The plaintiff alleged, among other things, that Libyan authorities had held her incommunicado and threatened to kill her if she tried to leave. *See id.* at 232, 234. The court acknowledged that "these alleged acts certainly reflect a bent toward cruelty on the part of their perpetrators," but, reversing the district court, went on to hold that "they are not in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture within the meaning of the [TVPA]." *Id.* at 234. Cases in which courts have found torture illustrate the extreme nature of conduct that falls within the statutory definition. *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 789, 790-91, 795 (9th Cir. 1996) (concluding that a course of conduct that included, among other things, severe beatings of plaintiff, repeated threats of death and electric shock, sleep deprivation, extended shackling to a cot (at times with a towel over his nose and mouth and water poured down his nostrils), seven months of confinement in a "suffocatingly hot" and

[27] Section 3(b)(2) of the TVPA defines "mental pain or suffering" using substantially identical language to section 2340(2)'s definition of "severe mental pain or suffering."

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cramped cell, and eight years of solitary or near-solitary confinement, constituted torture); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1332-40, 1345-46 (N.D. Ga. 2002) (concluding that a course of conduct that included, among other things, severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat, and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim's forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of "Russian roulette," constituted torture); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22-23 (D.D.C. 2001) (entering default judgment against Iraq where plaintiffs alleged, among other things, threats of "physical torture, such as cutting off . . . fingers, pulling out . . . fingernails," and electric shocks to the testicles); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64-66 (D.D.C. 1998) (concluding that a course of conduct that included frequent beatings, pistol whipping, threats of imminent death, electric shocks, and attempts to force confessions by playing Russian roulette and pulling the trigger at each denial, constituted torture).

(2) The meaning of "severe physical pain or suffering."

The statute provides a specific definition of "severe mental pain or suffering," *see* 18 U.S.C. § 2340(2), but does not define the term "severe physical pain or suffering." The meaning of "severe physical pain" is relatively straightforward; it denotes physical pain that is extreme in intensity and difficult to endure. In our *2004 Legal Standards Opinion*, we concluded that under some circumstances, conduct intended to inflict "severe physical suffering" may constitute torture even if it is not intended to inflict "severe physical pain." *Id.* at 10. That conclusion follows from the plain language of sections 2340-2340A. The inclusion of the words "or suffering" in the phrase "severe physical pain or suffering" suggests that the statutory category of physical torture is not limited to "severe physical pain." *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) (explaining presumption against surplusage).

"Severe physical suffering," however, is difficult to define with precision. As we have previously noted, the text of the statute and the CAT, and their history, provide little concrete guidance as to what Congress intended by the concept of "severe physical suffering." *See 2004 Legal Standards Opinion* at 11. We interpret the phrase in a statutory context where Congress expressly distinguished "severe physical pain or suffering" from "severe mental pain or suffering." Consequently, we believe it a reasonable inference that "physical suffering" was intended by Congress to mean something distinct from "mental pain or suffering."[25] We presume that where Congress uses different words in a statute, those words are intended to have different meanings. *See, e.g., Barnes v. United States*, 199 F.3d 386, 389 (7th Cir. 1999) ("Different language in separate clauses in a statute indicates Congress intended distinct meanings."). Moreover, given that Congress precisely defined "mental pain or suffering" in sections 2340-2340A, it is unlikely to have intended to undermine that careful definition by

[25] Common dictionary definitions of "physical" support reading "physical suffering" to mean something different from mental pain or suffering. *See, e.g., American Heritage Dictionary of the English Language* at 1366 ("Of or relating to the body as distinguished from the mind or spirit"); *Oxford American Dictionary and Language Guide* at 748 ("of or concerning the body (*physical exercise; physical education*)").

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including essentially mental distress within the separate category of "physical suffering."[29]

In our *2004 Legal Standards Opinion*, we concluded, based on the understanding that "suffering" denotes a "state" or "condition" that must be "endured" over time, that there is "an extended temporal element, or at least an element of persistence" to the concept of physical suffering in sections 2340-2340A. *Id.* at 12 & n.22. Consistent with this analysis in our *2004 Legal Standards Opinion*, and in light of standard dictionary definitions, we read the word "suffering," when used in reference to physical or bodily sensations, to mean a state or condition of physical distress, misery, affliction, or torment (usually associated with physical pain) that persists for a significant period of time. *See, e.g.*, *Webster's Third New International Dictionary* at 2284 (defining "suffering" as "the state or experience of one who suffers: the endurance of or submission to affliction, pain, loss"; "a pain endured or a distress, loss, or injury incurred"); *Random House Dictionary of the English Language* 572, 1229, 1998 (2d ed. unabridged 1987) (giving "distress," "misery," and "torment" as synonyms of "suffering"). Physical distress or discomfort that is merely transitory and that does not persist over time does not constitute "physical suffering" within the meaning of the statute. Furthermore, in our *2004 Legal Standards Opinion*, we concluded that "severe physical suffering" for purposes of sections 2340-2340A requires "a condition of some extended duration or persistence as well as intensity" and "is reserved for physical distress that is 'severe' considering its intensity and duration or persistence, rather than merely mild or transitory." *Id.* at 12.

We therefore believe that "severe physical suffering" under the statute means a state or condition of physical distress, misery, affliction, or torment, usually involving physical pain, that is both extreme in intensity and significantly protracted in duration or persistent over time. Accordingly, judging whether a particular state or condition may amount to "severe physical suffering" requires a weighing of both its intensity and its duration. The more painful or intense is the physical distress involved—i.e., the closer it approaches the level of severe physical pain separately proscribed by the statute—the less significant would be the element of duration or persistence over time. On the other hand, depending on the circumstances, a level of physical

[29] This conclusion is reinforced by the expressions of concern at the time the Senate gave its advice and consent to the CAT about the potential for vagueness in including the concept of mental pain or suffering as a definitional element in any criminal prohibition on torture. *See, e.g., Convention Against Torture: Hearing Before the Senate Comm. On Foreign Relations*, 101st Cong. 8, 10 (1990) (prepared statement of Abraham Sofaer, Legal Adviser, Department of State: "The Convention's wording . . . is not in all respects as precise as we believe necessary. . . . [B]ecause [the Convention] requires establishment of criminal penalties under our domestic law, we must pay particular attention to the meaning and interpretation of its provisions, especially concerning the standards by which the Convention will be applied as a matter of U.S. law. . . . [W]e prepared a codified proposal which . . . clarifies the definition of mental pain and suffering."); *id.* at 15-16 (prepared statement of Mark Richard: "The basic problem with the Torture Convention—one that permeates all our concerns—is its imprecise definition of torture, especially as that term is applied to actions which result solely in mental anguish. This definitional vagueness makes it very doubtful that the United States can, consistent with Constitutional due process constraints, fulfill its obligation under the Convention to adequately engraft the definition of torture into the domestic criminal law of the United States."); *id.* at 17 (prepared statement of Mark Richard: "Accordingly, the Torture Convention's vague definition concerning the mental suffering aspect of torture cannot be resolved by reference to established principles of international law. In an effort to overcome this unacceptable element of vagueness in Article I of the Convention, we have proposed an understanding which defines severe mental pain constituting torture with sufficient specificity to . . . meet Constitutional due process requirements.").

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distress or discomfort that is lacking in extreme intensity may not constitute "severe physical suffering" regardless of its duration—i.e., even if it lasts for a very long period of time. In defining conduct proscribed by sections 2340-2340A, Congress established a high bar. The ultimate question is whether the conduct "is sufficiently extreme and outrageous to warrant the universal condemnation that the term 'torture' both connotes and invokes." *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d at 92 (interpreting the TVPA); *cf. Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1332-40, 1345-46 (standard met under the TVPA by a course of conduct that included severe beatings to the genitals, head, and other parts of the body with metal pipes and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim's forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of "Russian roulette").

(3) The meaning of "severe mental pain or suffering."

Section 2340 defines "severe mental pain or suffering" to mean:

> the prolonged mental harm caused by or resulting from—
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality[.]

18 U.S.C. § 2340(2). Torture is defined under the statute to include an act specifically intended to inflict severe mental pain or suffering. *See id.* § 2340(1).

An important preliminary question with respect to this definition is whether the statutory list of the four "predicate acts" in section 2340(2)(A)-(D) is exclusive. We have concluded that Congress intended the list of predicate acts to be exclusive—that is, to satisfy the definition of "severe mental pain or suffering" under the statute, the prolonged mental harm must be caused by acts falling within one of the four statutory categories of predicate acts. *2004 Legal Standards Opinion* at 13. We reached this conclusion based on the clear language of the statute, which provides a detailed definition that includes four categories of predicate acts joined by the disjunctive and does not contain a catchall provision or any other language suggesting that additional acts might qualify (for example, language such as "including" or "such acts as"). *Id.*[30]

[30] These four categories of predicate acts "are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). *See also, e.g.,*

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Congress plainly considered very specific predicate acts, and this definition tracks the Senate's understanding concerning mental pain or suffering on which its advice and consent to ratification of the CAT was conditioned. The conclusion that the list of predicate acts is exclusive is consistent with both the text of the Senate's understanding, and with the fact that the understanding was required out of concern that the CAT's definition of torture would not otherwise meet the constitutional requirement for clarity in defining crimes. *See 2004 Legal Standards Opinion* at 13. Adopting an interpretation of the statute that expands the list of predicate acts for "severe mental pain or suffering" would constitute an impermissible rewriting of the statute and would introduce the very imprecision that prompted the Senate to require this understanding as a condition of its advice and consent to ratification of the CAT.

Another question is whether the requirement of "prolonged mental harm" caused by or resulting from one of the enumerated predicate acts is a separate requirement, or whether such "prolonged mental harm" is to be presumed any time one of the predicate acts occurs. Although it is possible to read the statute's reference to "*the* prolonged mental harm caused by or resulting from" the predicate acts as creating a statutory presumption that each of the predicate acts will always cause prolonged mental harm, we concluded in our *2004 Legal Standards Opinion* that that was not Congress's intent, since the statutory definition of "severe mental pain or suffering" was meant to track the understanding that the Senate required as a condition to its advice and consent to ratification of the CAT:

> in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30 at 36. As we previously stated, "[w]e do not believe that simply by adding the word 'the' before 'prolonged harm,' Congress intended a material change in the definition of mental pain or suffering as articulated in the Senate's understanding to the CAT." *2004 Legal Standards Opinion* at 13-14. "The definition of torture emanates directly from article 1 of the [CAT]. The definition for 'severe mental pain and suffering' incorporates the [above mentioned] understanding." S. Rep. No. 103-107, at 58-59 (1993) (emphasis added). This understanding, embodied in the statute, defines the obligation undertaken by the United States. Given this understanding, the legislative history, and the fact that section 2340(2) defines "severe mental pain or suffering" carefully in language very similar to the understanding, we believe that Congress did not intend to create a presumption that any time one of the predicate

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Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993); 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.23 (6th ed. 2000). Nor do we see any "contrary indications" that would rebut this inference. *Vonn*, 535 U.S. at 65.

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acts occurs, prolonged mental harm is automatically deemed to result. *See 2004 Legal Standards Opinion* at 13-14. At the same time, it is conceivable that the occurrence of one of the predicate acts alone could, depending on the circumstances of a particular case, give rise to an inference of intent to cause prolonged mental harm, as required by the statute.

Turning to the question of what constitutes "prolonged mental harm caused by or resulting from" a predicate act, we have concluded that Congress intended this phrase to require mental "harm" that has some lasting duration. *Id.* at 14. There is little guidance to draw upon in interpreting the phrase "prolonged mental harm," which does not appear in the relevant medical literature. Nevertheless, our interpretation is consistent with the ordinary meaning of the statutory terms. First, the use of the word "harm"—as opposed to simply repeating "pain or suffering"—suggests some mental damage or injury. Ordinary dictionary definitions of "harm," such as "physical or mental *damage: injury*," *Webster's Third New International Dictionary* at 1034 (emphasis added), or "[p]hysical or psychological *injury or damage*," *American Heritage Dictionary of the English Language* at 825 (emphasis added), support this interpretation. Second, to "prolong" means to "lengthen in time," "extend in duration," or "draw out," *Webster's Third New International Dictionary* at 1815, further suggesting that to be "prolonged," the mental damage must extend for some period of time. This damage need not be permanent, but it must be intended to continue for a "prolonged" period of time.[31] Moreover, under section 2340(2), the "prolonged mental harm" must be "caused by" or "resulting from" one of the enumerated predicate acts. As we pointed out in *2004 Legal Standards Opinion*, this conclusion is not meant to suggest that, if the predicate act or acts continue for an extended period, "prolonged mental harm" cannot occur until after they are completed. *Id.* at 14-15 n.26. Early occurrences of the predicate act could cause mental harm that could continue—and become prolonged—during the extended period the predicate acts continued to occur. *See, e.g., Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601-02 (E.D. Pa. 2003) (finding that predicate acts had continued over a three-to-four-year period and concluding that "prolonged mental harm" had occurred during that time).

Although there are few judicial opinions discussing the question of "prolonged mental harm," those cases that have addressed the issue are consistent with our view. For example, in the TVPA case of *Mehinovic v. Vuckovic*, the district court explained that:

[31] Although we do not suggest that the statute is limited to such cases, development of a mental disorder—such as post-traumatic stress disorder or perhaps chronic depression—could constitute "prolonged mental harm." *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 369-76, 463-68 (4th ed. 2000) ("DSM-IV-TR"). *See also, e.g., Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/59/324, at 14 (2004) ("The most common diagnosis of psychiatric symptoms among torture survivors is said to be post-traumatic stress disorder."); *see also* Metin Basoglu et al., *Torture and Mental Health: A Research Overview*, *in* Ellen Gerrity et al. eds., *The Mental Health Consequences of Torture* 48-49 (2001) (referring to findings of higher rates of post-traumatic stress disorder in studies involving torture survivors); Murat Parker et al., *Psychological Effects of Torture: An Empirical Study of Tortured and Non-Tortured Non-Political Prisoners*, *in* Metin Basoglu ed., *Torture and Its Consequences: Current Treatment Approaches* 77 (1992) (referring to findings of post-traumatic stress disorder in torture survivors). OMS has advised that—although the ability to predict is imperfect—they would object to the initial or continued use of any technique if their psychological assessment of the detainee suggested that the use of the technique might result in PTSD, chronic depression, or other condition that could constitute prolonged mental harm.

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> [The defendant] also caused or participated in the plaintiffs' mental torture. Mental torture consists of "prolonged mental harm caused by or resulting from: the intentional infliction or threatened infliction of severe physical pain or suffering; . . . the threat of imminent death . . . ." As set out above, plaintiffs noted in their testimony that they feared that they would be killed by [the defendant] during the beatings he inflicted or during games of "Russian roulette." *Each plaintiff continues to suffer long-term psychological harm as a result of the ordeals they suffered at the hands of defendant and others.*

198 F. Supp. 2d at 1346 (emphasis added; first ellipsis in original). In reaching its conclusion, the court noted that each of the plaintiffs were continuing to suffer serious mental harm even ten years after the events in question. *See id.* at 1334-40. In each case, these mental effects were continuing years after the infliction of the predicate acts. *See also Sackie v. Ashcroft*, 270 F. Supp. 2d at 597-98, 601-02 (victim was kidnapped and "forcibly recruited" as a child soldier at the age of 14, and, over a period of three to four years, was repeatedly forced to take narcotics and threatened with imminent death, all of which produced "prolonged mental harm" during that time). Conversely, in *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003), the court rejected a claim under the TVPA brought by individuals who had been held at gunpoint overnight and repeatedly threatened with death. While recognizing that the plaintiffs had experienced an "ordeal," the court concluded that they had failed to show that their experience caused lasting damage, noting that "there is simply no allegation that Plaintiffs have suffered any prolonged mental harm or physical injury as a result of their alleged intimidation." *Id.* at 1294-95.

(4) The meaning of "specifically intended."

It is well recognized that the term "specific intent" has no clear, settled definition, and that the courts do not use it consistently. *See* 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e), at 355 & n.79 (2d ed. 2003). "Specific intent" is most commonly understood, however, "to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." *Id.* at 354; *see also Carter v. United States*, 530 U.S. 255, 268 (2000) (explaining that general intent, as opposed to specific intent, requires "that the defendant possessed knowledge [only] with respect to the *actus reus* of the crime"). Some cases suggest that only a conscious desire to produce the proscribed result constitutes specific intent; others suggest that even reasonable foreseeability may suffice. In *United States v. Bailey*, 444 U.S. 394 (1980), for example, the Court suggested that, at least "[i]n a general sense," *id.* at 405, "specific intent" requires that one consciously desire the result. *Id.* at 403-05. The Court compared the common law's *mens rea* concepts of specific intent and general intent to the Model Penal Code's *mens rea* concepts of acting purposefully and acting knowingly. *See id.* at 404-05. "[A] person who causes a particular result is said to act purposefully," wrote the Court, "if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct.'" *Id.* at 404 (internal quotation marks omitted). A person "is said to act knowingly," in contrast, "if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'" *Id.* (internal quotation marks omitted). The Court then stated: "In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general

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intent." *Id.* at 405. In contrast, cases such as *United States v. Neiswender*, 590 F.2d 1269 (4th Cir. 1979), suggest that to prove specific intent it is enough that the defendant simply have "knowledge or notice" that his act "would have likely resulted in" the proscribed outcome. *Id.* at 1273. "Notice," the court held, "is provided by the reasonable foreseeability of the natural and probable consequences of one's acts." *Id.*

As in *2004 Legal Standards Opinion*, we will not attempt to ascertain the precise meaning of "specific intent" in sections 2340-2340A. *See id.* at 16-17. It is clear, however, that the necessary specific intent would be present if an individual performed an act and "consciously desire[d]" that act to inflict severe physical or mental pain or suffering. 1 LaFave, *Substantive Criminal Law* § 5.2(a), at 341. Conversely, if an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not be expected to inflict severe physical or mental pain or suffering, he would not have the specific intent necessary to violate sections 2340-2340A. Such an individual could be said neither consciously to desire the proscribed result, *see, e.g.*, *Bailey*, 444 U.S. at 405, nor to have "knowledge or notice" that his act "would likely have resulted in" the proscribed outcome, *Neiswender*, 590 F.2d at 1273.

As we did in *2004 Legal Standards Opinion*, we stress two additional points regarding specific intent: First, specific intent is distinguished from motive. A good motive, such as to protect national security, does not excuse conduct that is specifically intended to inflict severe physical or mental pain or suffering, as proscribed by the statute. Second, specific intent to take a given action can be found even if the actor would take the action only upon certain conditions. *Cf., e.g., Holloway v. United States*, 526 U.S. 1, 11 (1999) ("[A] defendant may not negate a proscribed intent by requiring the victim to comply with a condition the defendant has no right to impose."). *See also id.* at 10-11 & nn. 9-12; Model Penal Code § 2.02(6). Thus, for example, the fact that a victim might have avoided being tortured by cooperating with the perpetrator would not render permissible the resort to conduct that would otherwise constitute torture under the statute. *2004 Legal Standards Opinion* at 17.[32]

III.

In the discussion that follows, we will address each of the specific interrogation techniques you have described. Subject to the understandings, limitations, and safeguards discussed herein, including ongoing medical and psychological monitoring and team intervention as necessary, we conclude that the authorized use of each of these techniques, considered individually, would not violate the prohibition that Congress has adopted in sections 2340-2340A. This conclusion is straightforward with respect to all but two of the techniques. Use of sleep deprivation as an enhanced technique and use of the waterboard, however, involve more substantial questions, with the waterboard presenting the most substantial question. Although we conclude that the use of these techniques—as we understand them and subject to the limitations you have described—would not violate the statute, the issues raised by these two techniques counsel great caution in their use, including both careful adherence to the limitations and

[32] The Criminal Division of the Department of Justice has reviewed this memorandum and is satisfied that our general interpretation of the legal standards under sections 2340-2340A is consistent with its concurrence in the *2004 Legal Standards Opinion*.

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restrictions you have described and also close and continuing medical and psychological monitoring.

Before addressing the application of sections 2340-2340A to the specific techniques in question, we note certain overall features of the CIA's approach that are significant to our conclusions. Interrogators are trained and certified in a course that you have informed us currently lasts approximately four weeks. Interrogators (and other personnel deployed as part of this program) are required to review and acknowledge the applicable interrogation guidelines. *See Confinement Guidelines* at 2; *Interrogation Guidelines* at 2 ("The Director, DCI Counterterrorist Center shall ensure that all personnel directly engaged in the interrogation of persons detained pursuant to the authorities set forth in [redacted] have been appropriately screened (from the medical, psychological and security standpoints), have reviewed these Guidelines, have received appropriate training in their implementation, and have completed the attached Acknowledgement."). We assume that all interrogators are adequately trained, that they understand the design and purpose of the interrogation techniques, and that they will apply the techniques in accordance with their authorized and intended use.

In addition, the involvement of medical and psychological personnel in the adaptation and application of the established SERE techniques is particularly noteworthy for purposes of our analysis.[33] Medical personnel have been involved in imposing limitations on—and requiring changes to—certain procedures, particularly the use of the waterboard.[34] We have had extensive

[33] As noted above, each of these techniques has been adapted (although in some cases with significant modifications) from SERE training. Through your consultation with various individuals responsible for such training, you have learned facts relating to experience with them, which you have reported to us. Again, fully recognizing the limitations of reliance on this experience, you have advised us that these techniques have been used as elements of a course of training without any reported incidents of prolonged mental harm or of any severe physical pain, injury, or suffering. With respect to the psychological impact [redacted] of the SERE school advised that during his three and a half years in that position, he trained 10,000 students, only two of whom dropped out following use of the techniques. Although on rare occasions students temporarily postponed the remainder of the training and received psychological counseling, we understand that those students were able to finish the program without any indication of subsequent mental health effects. [redacted] who has had over ten years experience with SERE training, told you that he was not aware of any individuals who completed the program suffering any adverse mental health effects (though he advised of one person who did not complete the training who had an adverse mental health reaction that lasted two hours and spontaneously dissipated without resulting treatment and with no further symptoms reported). In addition, the [redacted] who has had experience with all of the techniques discussed herein, has advised that the use of these procedures has not resulted in any reported instances of prolonged mental harm and very few instances of immediate and temporary adverse psychological responses to the training. Of 26,829 students in Air Force SERE training from 1992 through 2001, only 0.14% were pulled from the program for psychological reasons (specifically, although 4.3% had some contact with psychology services, only 3% of those individuals with such contact in fact withdrew from the program). We understand that the [redacted] expressed confidence—based on debriefing of students and other information—that the training did not cause any long-term psychological harm and that if there are any long-term psychological effects of the training at all, they "are certainly minimal."

[34] We note that this involvement of medical personnel in designing safeguards for, and in monitoring implementation of, the procedures is a significant difference from earlier uses of the techniques catalogued in the Inspector General's Report. *See IG Report* at 21 n.26 ("OMS was neither consulted nor involved in the initial analysis of the risk and benefits of [enhanced interrogation techniques], nor provided with the OTS report cited in the OLC opinion [the *Interrogation Memorandum*].."). Since that time, based on comments from OMS, additional constraints have been imposed on use of the techniques.

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meetings with the medical personnel involved in monitoring the use of these techniques. It is clear that they have carefully worked to ensure that the techniques do not result in severe physical or mental pain or suffering to the detainees.[35] Medical and psychological personnel evaluate each detainee before the use of these techniques on the detainee is approved, and they continue to monitor each detainee throughout his interrogation and detention. Moreover, medical personnel are physically present throughout application of the waterboard (and present or otherwise observing the use of all techniques that involve physical contact, as discussed more fully above), and they carefully monitor detainees who are undergoing sleep deprivation or dietary manipulation. In addition, they regularly assess both the medical literature and the experience with detainees.[36] OMS has specifically declared that "[m]edical officers must remain cognizant at all times of their obligation to prevent 'severe physical or mental pain or suffering.'" *OMS Guidelines* at 10. In fact, we understand that medical and psychological personnel have discontinued the use of techniques as to a particular detainee when they believed he might suffer such pain or suffering, and in certain instances, OMS medical personnel have not cleared certain detainees for some—or any—techniques based on the initial medical and psychological assessments. They have also imposed additional restrictions on the use of techniques (such as the waterboard) in order to protect the safety of detainees, thus reducing further the risk of severe pain or suffering. You have informed us that they will continue to have this role and authority. We assume that all interrogators understand the important role and authority of OMS personnel and will cooperate with OMS in the exercise of these duties.

Finally, in sharp contrast to those practices universally condemned as torture over the centuries, the techniques we consider here have been carefully evaluated to avoid causing severe pain or suffering to the detainees. As OMS has described these techniques as a group:

> In all instances the general goal of these techniques is a psychological impact, and not some physical effect, with a specific goal of "dislocat[ing] [the detainee's] expectations regarding the treatment he believes he will receive. . . ." The more physical techniques are delivered in a manner carefully limited to avoid serious pain. The slaps, for example, are designed "to induce shock, surprise, and/or humiliation" and "not to inflict physical pain that is severe or lasting."

Id. at 8-9.

~~[35] We are mindful that, historically, medical personnel have sometimes been used to enhance, not prevent, torture—for example, by keeping a torture victim alive and conscious so as to extend his suffering. It is absolutely clear, as you have informed us and as our own dealings with OMS personnel have confirmed, that the involvement of OMS is intended to prevent harm to the detainees and not to extend or increase pain or suffering. As the *OMS Guidelines* explain, "OMS is responsible for assessing and monitoring the health of all Agency detainees subject to 'enhanced' interrogation techniques, and for determining that the authorized administration of these techniques would not be expected to cause serious or permanent harm." *OMS Guidelines* at 9 (footnote omitted).~~

[36] To assist in monitoring experience with the detainees, we understand that there is regular reporting on medical and psychological experience with the use of these techniques on detainees and that there are special instructions on documenting experience with sleep deprivation and the waterboard. *See OMS Guidelines* at 6-7, 16, 20.

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With this background, we turn to the application of sections 2340-2340A to each of the specific interrogation techniques.

1. *Dietary manipulation.* Based on experience, it is evident that this technique is not expected to cause any physical pain, let alone pain that is extreme in intensity. The detainee is carefully monitored to ensure that he does not suffer acute weight loss or any dehydration. Further, there is nothing in the experience of caloric intake at this level that could be expected to cause physical pain. Although we do not equate a person who voluntarily enters a weight-loss program with a detainee subjected to dietary manipulation as an interrogation technique, we believe that it is relevant that several commercial weight-loss programs available in the United States involve similar or even greater reductions in caloric intake. Nor could this technique reasonably be thought to induce "severe physical suffering." Although dietary manipulation may cause some degree of hunger, such an experience is far from extreme hunger (let alone starvation) and cannot be expected to amount to "severe physical suffering" under the statute. The caloric levels are set based on the detainee's weight, so as to ensure that the detainee does not experience extreme hunger. As noted, many people participate in weight-loss programs that involve similar or more stringent caloric limitations, and, while such participation cannot be equated with the use of dietary manipulation as an interrogation technique, we believe that the existence of such programs is relevant to whether dietary manipulation would cause "severe physical suffering" within the meaning of sections 2340-2340A. Because there is no prospect that the technique would cause severe physical pain or suffering, we conclude that the authorized use of this technique by an adequately trained interrogator could not reasonably be considered specifically intended to do so.

This technique presents no issue of "severe mental pain or suffering" within the meaning of sections 2340-2340A, because the use of this technique would involve no qualifying predicate act. The technique does not, for example, involve "the intentional infliction or threatened infliction of severe physical pain or suffering," 18 U.S.C. § 2340(2)(A), or the "application . . . of . . . procedures calculated to disrupt profoundly the senses or the personality," *id.* § 2340(2)(B). Moreover, there is no basis to believe that dietary manipulation could cause "prolonged mental harm." Therefore, we conclude that the authorized use of this technique by an adequately trained interrogator could not reasonably be considered specifically intended to cause such harm.[37]

2. *Nudity.* We understand that nudity is used as a technique to create psychological discomfort, not to inflict any physical pain or suffering. You have informed us that during the use of this technique, detainees are kept in locations with ambient temperatures that ensure there is no threat to their health. Specifically, this technique would not be employed at temperatures below 68°F (and is unlikely to be employed below 75°F). Even if this technique involves some physical discomfort, it cannot be said to cause "suffering" (as we have explained the term

[37] In *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978), the European Court of Human Rights concluded by a vote of 13-4 that a reduced diet, even in conjunction with a number of other techniques, did not amount to "torture," as defined in the European Convention on Human Rights. The reduced diet there consisted of one "round" of bread and a pint of water every six hours, *see id.*, separate opinion of Judge Zekia, Part A. The duration of the reduced diet in that case is not clear.

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above), let alone "severe physical pain or suffering," and we therefore conclude that its authorized use by an adequately trained interrogator could not reasonably be considered specifically intended to do so. Although some detainees might be humiliated by this technique, especially given possible cultural sensitivities and the possibility of being seen by female officers, it cannot constitute "severe mental pain or suffering" under the statute because it does not involve any of the predicate acts specified by Congress.

3. *Attention grasp.* The attention grasp involves no physical pain or suffering for the detainee and does not involve any predicate act for purposes of severe mental pain or suffering under the statute. Accordingly, because this technique cannot be expected to cause severe physical or mental pain or suffering, we conclude that its authorized use by an adequately trained interrogator could not reasonably be considered specifically intended to do so.

4. *Walling.* Although the walling technique involves the use of considerable force to push the detainee against the wall and may involve a large number of repetitions in certain cases, we understand that the false wall that is used is flexible and that this technique is not designed to, and does not, cause severe physical pain to the detainee. We understand that there may be some pain or irritation associated with the collar, which is used to help avoid injury such as whiplash to the detainee, but that any physical pain associated with the use of the collar would not approach the level of intensity needed to constitute severe physical pain. Similarly, we do not believe that the physical distress caused by this technique or the duration of its use, even with multiple repetitions, could amount to severe physical suffering within the meaning of sections 2340-2340A. We understand that medical and psychological personnel are present or observing during the use of this technique (as with all techniques involving physical contact with a detainee), and that any member of the team or the medical staff may intercede to stop the use of the technique if it is being used improperly or if it appears that it may cause injury to the detainee. We also do not believe that the use of this technique would involve a threat of infliction of severe physical pain or suffering or other predicate act for purposes of severe mental pain or suffering under the statute. Rather, this technique is designed to shock the detainee and disrupt his expectations that he will not be treated forcefully and to wear down his resistance to interrogation. Based on these understandings, we conclude that the authorized use of this technique by adequately trained interrogators could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of sections 2340-2340A.[39]

5. *Facial hold.* Like the attention grasp, this technique involves no physical pain or suffering and does not involve any predicate act for purposes of severe mental pain or suffering. Accordingly, we conclude that its authorized use by adequately trained interrogators could not

[39] In *Interrogation Memorandum*, we did not describe the walling technique as involving the number of repetitions that we understand may be applied. Our advice with respect to walling in the present memorandum is specifically based on the understanding that the repetitive use of walling is intended only to increase the drama and shock of the technique, to wear down the detainee's resistance, and to disrupt expectations that he will not be treated with force, and that such use is not intended to, and does not in fact, cause severe physical pain to the detainee. Moreover, our advice specifically assumes that the use of walling will be stopped if there is any indication that the use of the technique is or may be causing severe physical pain to a detainee.

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reasonably be considered specifically intended to cause severe physical or mental pain or suffering.

6. *Facial slap or insult slap.* Although this technique involves a degree of physical pain, the pain associated with a slap to the face, as you have described it to us, could not be expected to constitute severe physical pain. We understand that the purpose of this technique is to cause shock, surprise, or humiliation, not to inflict physical pain that is severe or lasting; we assume it will be used accordingly. Similarly, the physical distress that may be caused by an abrupt slap to the face, even if repeated several times, would not constitute an extended state or condition of physical suffering and also would not likely involve the level of intensity required for severe physical suffering under the statute. Finally, a facial slap would not involve a predicate act for purposes of severe mental pain or suffering. Therefore, the authorized use of this technique by adequately trained interrogators could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of sections 2340-2340A.[39]

7. *Abdominal slap.* Although the abdominal slap technique might involve some minor physical pain, it cannot, as you have described it to us, be said to involve even moderate, let alone *severe*, physical pain or suffering. Again, because the technique cannot be expected to cause severe physical pain or suffering, we conclude that its authorized use by an adequately trained interrogator could not reasonably be considered specifically intended to do so. Nor could it be considered specifically intended to cause severe mental pain or suffering within the meaning of sections 2340-2340A, as none of the statutory predicate acts would be present.

8. *Cramped confinement.* This technique does not involve any significant physical pain or suffering. It also does not involve a predicate act for purposes of severe mental pain or suffering. Specifically, we do not believe that placing a detainee in a dark, cramped space for the limited period of time involved here could reasonably be considered a procedure calculated to disrupt profoundly the senses so as to cause prolonged mental harm. Accordingly, we conclude that its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of sections 2340-2340A.

9. *Wall standing.* The wall standing technique, as you have described it, would not involve severe physical pain within the meaning of the statute. It also cannot be expected to cause severe physical suffering. Even if the physical discomfort of muscle fatigue associated with wall standing might be substantial, we understand that the duration of the technique is self-limited by the individual detainee's ability to sustain the position; thus, the short duration of the discomfort means that this technique would not be expected to cause, and could not reasonably be considered specifically intended to cause, severe physical suffering. Our advice also assumes that the detainee's position is not designed to produce severe pain that might result from contortions or twisting of the body, but only temporary muscle fatigue. Nor does wall standing

[39] Our advice about both the facial slap and the abdominal slap assumes that the interrogators will apply those techniques as designed and will not strike the detainee with excessive force or repetition in a manner that might result in severe physical pain.

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involve any predicate act for purposes of severe mental pain or suffering. Accordingly, we conclude that the authorized use of this technique by adequately trained interrogators could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of the statute.

10. *Stress positions.* For the same reasons that the use of wall standing would not violate the statute, we conclude that the authorized use of stress positions such as those described in *Interrogation Memorandum*, if employed by adequately trained interrogators, could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of sections 2340-2340A. As with wall standing, we understand that the duration of the technique is self-limited by the individual detainee's ability to sustain the position; thus, the short duration of the discomfort means that this technique would not be expected to cause, and could not reasonably be considered specifically intended to cause, severe physical suffering. Our advice also assumes that stress positions are not designed to produce severe pain that might result from contortions or twisting of the body, but only temporary muscle fatigue.[40]

11. *Water dousing.* As you have described it to us, water dousing involves dousing the detainee with water from a container or a hose without a nozzle, and is intended to wear him down both physically and psychologically. You have informed us that the water might be as cold as 41°F, though you have further advised us that the water generally is not refrigerated and therefore is unlikely to be less than 50°F. (Nevertheless, for purposes of our analysis, we will assume that water as cold as 41°F might be used.) OMS has advised that, based on the extensive experience in SERE training, the medical literature, and the experience with detainees to date, water dousing as authorized is not designed or expected to cause significant physical pain, and certainly not severe physical pain. Although we understand that prolonged *immersion* in very cold water may be physically painful, as noted above, this interrogation technique does not involve immersion and a substantial margin of safety is built into the time limitation on the use of the CIA's water dousing technique—use of the technique with water of a given temperature must be limited to no more than two-thirds of the time in which hypothermia could be expected to occur from *total immersion* in water of the same temperature.[41] While being cold can involve physical discomfort, OMS also advises that in their professional judgment any resulting discomfort is not expected to be intense, and the duration is limited by specific times tied to

[40] A stress position that involves such contortion or twisting, as well as one held for so long that it could not be aimed only at producing temporary muscle fatigue, might raise more substantial questions under the statute. *Cf. Army Field Manual 34-52: Intelligence Interrogation* at 1-8 (1992) (indicating that "[f]orcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time" may constitute "torture" within the meaning of the Third Geneva Convention's requirement that "[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war," but not addressing 18 U.S.C. §§ 2340-2340A); United Nations General Assembly, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/59/150 at 6 (Sept. 1, 2004) (suggesting that "holding detainees in painful and/or stressful positions" might in certain circumstances be characterized as torture).

[41] Moreover, even in the extremely unlikely event that hypothermia set in, under the circumstances in which this technique is used—including close medical supervision and, if necessary, medical attention—we understand that the detainee would be expected to recover fully and rapidly.

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water temperature. Any discomfort caused by this technique, therefore, would not qualify as "severe physical suffering" within the meaning of sections 2340-2340A. Consequently, given that there is no expectation that the technique will cause severe physical pain or suffering when properly used, we conclude that the authorized use of this technique by an adequately trained interrogator could not reasonably be considered specifically intended to cause these results.

With respect to mental pain or suffering, as you have described the procedure, we do not believe that any of the four statutory predicate acts necessary for a possible finding of severe mental pain or suffering under the statute would be present. Nothing, for example, leads us to believe that the detainee would understand the procedure to constitute a threat of imminent death, especially given that care is taken to ensure that no water will get into the detainee's mouth or nose. Nor would a detainee reasonably understand the prospect of being doused with cold water as the threatened infliction of severe pain. Furthermore, even were we to conclude that there could be a qualifying predicate act, nothing suggests that the detainee would be expected to suffer any prolonged mental harm as a result of the procedure. OMS advises that there has been no evidence of such harm in the SERE training, which utilizes a much more extreme technique involving total immersion. The presence of psychologists who monitor the detainee's mental condition makes such harm even more unlikely. Consequently, we conclude that the authorized use of the technique by adequately trained interrogators could not reasonably be considered specifically intended to cause severe mental pain or suffering within the meaning of the statute.

The flicking technique, which is subject to the same temperature limitations as water dousing but would involve substantially less water, *a fortiori* would not violate the statute.

12. *Sleep deprivation.* In the *Interrogation Memorandum*, we concluded that sleep deprivation did not violate sections 2340-2340A. *See id.* at 10, 14-15. This question warrants further analysis for two reasons. First, we did not consider the potential for physical pain or suffering resulting from the shackling used to keep detainees awake or any impact from the diapering of the detainee. Second, we did not address the possibility of severe physical suffering that does not involve severe physical pain.

Under the limitations adopted by the CIA, sleep deprivation may not exceed 180 hours, which we understand is approximately two-thirds of the maximum recorded time that humans have gone without sleep for purposes of medical study, as discussed below.[42] Furthermore, any detainee who has undergone 180 hours of sleep deprivation must then be allowed to sleep without interruption for at least eight straight hours. Although we understand that the CIA's guidelines would allow another session of sleep deprivation to begin after the detainee has gotten

[42] The *IG Report* described the maximum allowable period of sleep deprivation at that time as 264 hours or 11 days. *See IG Report* at 15. You have informed us that you have since established a limit of 180 hours, that in fact no detainee has been subjected to more than 180 hours of sleep deprivation, and that sleep deprivation will rarely exceed 120 hours. To date, only three detainees have been subjected to sleep deprivation for more than 96 hours.

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at least eight hours of uninterrupted sleep following 180 hours of sleep deprivation, we will evaluate only one application of up to 180 hours of sleep deprivation.[43]

We understand from OMS, and from our review of the literature on the physiology of sleep, that even very extended sleep deprivation does not cause physical pain, let alone severe physical pain.[44] "The longest studies of sleep deprivation in humans . . . [involved] volunteers [who] were deprived of sleep for 8 to 11 days. . . . Surprisingly, little seemed to go wrong with the subjects physically. The main effects lay with sleepiness and impaired brain functioning, but even these were no great cause for concern." James Horne, *Why We Sleep: The Functions of Sleep in Humans and Other Mammals* 23-24 (1988) ("*Why We Sleep*") (footnote omitted). We note that there are important differences between sleep deprivation as an interrogation technique used by the CIA and the controlled experiments documented in the literature. The subjects of the experiments were free to move about and engage in normal activities and often led a "tranquil existence" with "plenty of time for relaxation," *see id.* at 24, whereas a detainee in CIA custody would be shackled and prevented from moving freely. Moreover, the subjects in the experiments often increased their food consumption during periods of extended sleep loss, *see id.* at 38, whereas the detainee undergoing interrogation may be placed on a reduced-calorie diet, as discussed above. Nevertheless, we understand that experts who have studied sleep deprivation have concluded that "[t]he most plausible reason for the uneventful physical findings with these human beings is that . . . sleep loss is not particularly harmful." *Id.* at 24. We understand that this conclusion does not depend on the extent of physical movement or exercise by the subject or whether the subject increases his food consumption. OMS medical staff members have also informed us, based on their experience with detainees who have undergone extended sleep deprivation and their review of the relevant medical literature, that extended sleep deprivation does not cause physical pain. Although edema, or swelling, of the lower legs may sometimes develop as a result of the long periods of standing associated with sleep deprivation, we understand from OMS that such edema is not painful and will quickly dissipate once the subject is removed from the standing position. We also understand that if any case of significant edema develops, the team will intercede to ensure that the detainee is moved from the standing position and that he receives any medical attention necessary to relieve the swelling and allow the edema to dissipate. For these reasons, we conclude that the authorized use of extended sleep

[43] As noted above, we are not concluding that additional use of sleep deprivation, subject to close and careful medical supervision, would violate the statute, but at the present time we express no opinion on whether additional sleep deprivation would be consistent with sections 2340-2340A.

[44] Although sleep deprivation is not itself physically painful, we understand that some studies have noted that extended total sleep deprivation may have the effect of reducing tolerance to some forms of pain in some subjects. *See, e.g.*, B. Kundermann, et al., *Sleep Deprivation Affects Thermal Pain Thresholds but not Somatosensory Thresholds in Healthy Volunteers*, 66 Psychosomatic Med. 932 (2004) (finding a significant decrease in heat pain thresholds and some decrease in cold pain thresholds after one night without sleep); S. Hakki Onen, et al., *The Effects of Total Sleep Deprivation, Selective Sleep Interruption and Sleep Recovery on Pain Tolerance Thresholds in Healthy Subjects*, 10 J. Sleep Research 35, 41 (2001) (finding a statistically significant drop of 8-9% in tolerance thresholds for mechanical or pressure pain after 40 hours); *id.* at 35-36 (discussing other studies). We will discuss the potential interactions between sleep deprivation and other interrogation techniques in the separate memorandum, to which we referred in footnote 6, addressing whether the combined use of certain techniques is consistent with the legal requirements of sections 2340-2340A.

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deprivation by adequately trained interrogators would not be expected to cause and could not reasonably be considered specifically intended to cause severe physical pain.

In addition, OMS personnel have informed us that the shackling of detainees is not designed to and does not result in significant physical pain. A detainee subject to sleep deprivation would not be allowed to hang by his wrists, and we understand that no detainee subjected to sleep deprivation to date has been allowed to hang by his wrists or has otherwise suffered injury.[45] If necessary, we understand that medical personnel will intercede to prevent any such injury and would require either that interrogators use a different method to keep the detainee awake (such as through the use of sitting or horizontal positions), or that the use of the technique be stopped altogether. When the sitting position is used, the detainee is seated on a small stool to which he is shackled; the stool supports his weight but is too small to let the detainee balance himself and fall asleep. We also specifically understand that the use of shackling with horizontal sleep deprivation, which has only been used rarely, is done in such a way as to ensure that there is no additional stress on the detainee's arm or leg joints that might force the limbs beyond natural extension or create tension on any joint. Thus, shackling cannot be expected to result in severe physical pain, and we conclude that its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to do so. Finally, we believe that the use of a diaper cannot be expected to—and could not reasonably be considered intended to—result in any physical pain, let alone severe physical pain.

Although it is a more substantial question, particularly given the imprecision in the statutory standard and the lack of guidance from the courts, we also conclude that extended sleep deprivation, subject to the limitations and conditions described herein, would not be expected to cause "severe physical suffering." We understand that some individuals who undergo extended sleep deprivation would likely at some point experience physical discomfort and distress. We assume that some individuals would eventually feel weak physically and may experience other unpleasant physical sensations from prolonged fatigue, including such symptoms as impairment to coordinated body movement, difficulty with speech, nausea, and blurred vision. *See Why We Sleep* at 30. In addition, we understand that extended sleep deprivation will often cause a small drop in body temperature, *see id.* at 31, and we assume that such a drop in body temperature may also be associated with unpleasant physical sensations. We also assume that any physical discomfort that might be associated with sleep deprivation would likely increase, at least to a point, the longer the subject goes without sleep. Thus, on these assumptions, it may be the case that at some point, for some individuals, the degree of physical distress experienced in sleep deprivation might be substantial.[46]

On the other hand, we understand from OMS, and from the literature we have reviewed on the physiology of sleep, that many individuals may tolerate extended sleep deprivation well

[45] This includes a total of more than 25 detainees subjected to at least some period of sleep deprivation. *See January 4 [redacted] Fax* at 1-3.

[46] The possibility noted above that sleep deprivation might heighten susceptibility to pain, *see supra* note 44, magnifies this concern.

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and with little apparent distress, and that this has been the CIA's experience.[47] Furthermore, the principal physical problem associated with standing is edema, and in any instance of significant edema, the interrogation team will remove the detainee from the standing position and will seek medical assistance. The shackling is used only as a passive means of keeping the detainee awake and, in both the tightness of the shackles and the positioning of the hands, is not intended to cause pain. A detainee, for example, will not be allowed to hang by his wrists. Shackling in the sitting position involves a stool that is adequate to support the detainee's weight. In the rare instances when horizontal sleep deprivation may be used, a thick towel or blanket is placed under the detainee to protect against reduction of body temperature from contact with the floor, and the manacles and shackles are anchored so as not to cause pain or create tension on any joint. If the detainee is nude and is using an adult diaper, the diaper is checked regularly to prevent skin irritation. The conditions of sleep deprivation are thus aimed at preventing severe physical suffering. Because sleep deprivation does not involve physical pain and would not be expected to cause extreme physical distress to the detainee, the extended duration of sleep deprivation, within the 180-hour limit imposed by the CIA, is not a sufficient factor alone to constitute severe physical suffering within the meaning of sections 2340-2340A. We therefore believe that the use of this technique, under the specified limits and conditions, is not "extreme and outrageous" and does not reach the high bar set by Congress for a violation of sections 2340-2340A. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d at 92 (to be torture under the TVPA, conduct must be "extreme and outrageous"); *cf. Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1332-40, 1345-46 (standard met under the TVPA by a course of conduct that included severe beatings to the genitals, head, and other parts of the body with metal pipes and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim's forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of "Russian roulette").

Nevertheless, because extended sleep deprivation could in some cases result in substantial physical distress, the safeguards adopted by the CIA, including ongoing medical monitoring and intervention by the team if needed, are important to ensure that the CIA's use of extended sleep deprivation will not run afoul of the statute. Different individual detainees may react physically to sleep deprivation in different ways. We assume, therefore, that the team will separately monitor each individual detainee who is undergoing sleep deprivation, and that the application of this technique will be sensitive to the individualized physical condition and reactions of each detainee. Moreover, we emphasize our understanding that OMS will intervene to alter or stop the course of sleep deprivation for a detainee if OMS concludes in its medical judgment that the detainee is or may be experiencing extreme physical distress.[48] The team, we

[47] Indeed, although it may seem surprising to those not familiar with the extensive medical literature relating to sleep deprivation, based on that literature and its experience with the technique, in its guidelines, OMS lists sleep deprivation as less intense than water dousing, stress positions, walling, cramped confinement, and the waterboard. *See OMS Guidelines* at 8.

[48] For example, any physical pain or suffering associated with standing or with shackles might become more intense with an extended use of the technique on a particular detainee whose condition and strength do not permit him to tolerate it, and we understand that personnel monitoring the detainee will take this possibility into account and, if necessary, will ensure that the detainee is placed into a sitting or horizontal position or will direct that the sleep deprivation be discontinued altogether. *See OMS Guidelines* at 14-16.

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understand, will intervene not only if the sleep deprivation itself may be having such effects, but also if the shackling or other conditions attendant to the technique appear to be causing severe physical suffering. With these precautions in place, and based on the assumption that they will be followed, we conclude that the authorized use of extended sleep deprivation by adequately trained interrogators would not be expected to and could not reasonably be considered specifically intended to cause severe physical suffering in violation of 18 U.S.C. §§ 2340-2340A.

Finally, we also conclude that extended sleep deprivation cannot be expected to cause "severe mental pain or suffering" as defined in sections 2340-2340A, and that its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to do so. First, we do not believe that use of the sleep deprivation technique, subject to the conditions in place, would involve one of the predicate acts necessary for "severe mental pain or suffering" under the statute. There would be no infliction or threatened infliction of severe physical pain or suffering, within the meaning of the statute, and there would be no threat of imminent death. It may be questioned whether sleep deprivation could be characterized as a "procedure[] calculated to disrupt profoundly the senses or the personality" within the meaning of section 2340(2)(B), since we understand from OMS and from the scientific literature that extended sleep deprivation might induce hallucinations in some cases. Physicians from OMS have informed us, however, that they are of the view that, in general, no "profound" disruption would result from the length of sleep deprivation contemplated by the CIA, and again the scientific literature we have reviewed appears to support this conclusion. Moreover, we understand that any team member would direct that the technique be immediately discontinued if there were any sign that the detainee is experiencing hallucinations. Thus, it appears that the authorized use of sleep deprivation by the CIA would not be expected to result in a profound disruption of the senses, and if it did, it would be discontinued. Even assuming, however, that the extended use of sleep deprivation may result in hallucinations that could fairly be characterized as a "profound" disruption of the subject's senses, we do not believe it tenable to conclude that in such circumstances the use of sleep deprivation could be said to be "calculated" to cause such profound disruption to the senses, as required by the statute. The term "calculated" denotes something that is planned or thought out beforehand: "Calculate," as used in the statute, is defined to mean "to plan the nature of beforehand: think out"; "to design, prepare, or adapt by forethought or careful plan: fit or prepare by appropriate means." *Webster's Third New International Dictionary* at 315 (defining "calculate"—"used chiefly [as it is in section 2340(2)(B)] as [a] past part[iciple] with complementary infinitive <*calculated* to succeed>"). Here, it is evident that the potential for any hallucinations on the part of a detainee undergoing sleep deprivation is not something that would be a "calculated" result of the use of this technique, particularly given that the team would intervene immediately to stop the technique if there were signs the subject was experiencing hallucinations.

Second, even if we were to assume, out of an abundance of caution, that extended sleep deprivation could be said to be a "procedure[] calculated to disrupt profoundly the senses or the personality" of the subject within the meaning of section 2340(2)(B), we do not believe that this technique would be expected to—or that its authorized use by adequately trained interrogators could reasonably be considered specifically intended to—cause "*prolonged* mental harm" as required by the statute, because, as we understand it, any hallucinatory effects of sleep deprivation would dissipate rapidly. OMS has informed us, based on the scientific literature and

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on its own experience with detainees who have been sleep deprived, that any such hallucinatory effects would not be prolonged. We understand from OMS that *Why We Sleep* provides an accurate summary of the scientific literature on this point. As discussed there, the longest documented period of time for which any human has gone without sleep is 264 hours. *See id.* at 29-34. The longest study with more than one subject involved 205 hours of sleep deprivation. *See id.* at 37-42. We understand that these and other studies constituting a significant body of scientific literature indicate that sleep deprivation temporarily affects the functioning of the brain but does not otherwise have significant physiological effects. *See id.* at 100. Sleep deprivation's effects on the brain are generally not severe but can include impaired cognitive performance and visual hallucinations; however, these effects dissipate rapidly, often with as little as one night's sleep. *See id.* at 31-32, 34-37, 40, 47-53. Thus, we conclude, any temporary hallucinations that might result from extended sleep deprivation could not reasonably be considered "prolonged mental harm" for purposes of sections 2340-2340A.[49]

In light of these observations, although in its extended uses it may present a substantial question under sections 2340-2340A, we conclude that the authorized use of sleep deprivation by adequately trained interrogators, subject to the limitations and monitoring in place, could not reasonably be considered specifically intended to cause severe mental pain or suffering. Finally, the use of a diaper for sanitary purposes on an individual subjected to sleep deprivation, while potentially humiliating, could not be considered specifically intended to inflict severe mental pain or suffering within the meaning of the statute, because there would be no statutory predicate act and no reason to expect "prolonged mental harm" to result.[50]

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[49] Without determining the minimum time for mental harm to be considered "prolonged," we do not believe that "prolonged mental harm" would occur during the sleep deprivation itself. As noted, OMS would order that the technique be discontinued if hallucinations occurred. Moreover, even if OMS personnel were not aware of any such hallucinations, whatever time would remain between the onset of such hallucinations, which presumably would be well into the period of sleep deprivation, and the 180-hour maximum for sleep deprivation would not constitute "prolonged" mental harm within the meaning of the statute. Nevertheless, we note that this aspect of the technique calls for great care in monitoring by OMS personnel, including psychologists, especially as the length of the period of sleep deprivation increases.

[50] We note that the court of appeals in *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996), stated that a variety of techniques taken together, one of which was sleep deprivation, amounted to torture. The court, however, did not specifically discuss sleep deprivation apart from the other conduct at issue, and it did not conclude that sleep deprivation alone amounted to torture. In *Ireland v. United Kingdom*, the European Court of Human Rights concluded by a vote of 13-4 that sleep deprivation, even in conjunction with a number of other techniques, did not amount to torture under the European Charter. The duration of the sleep deprivation at issue was not clear, *see* separate opinion of Judge Fitzmaurice at ¶ 19, but may have been 96-120 hours, *see* majority opinion at ¶ 104. Finally, we note that the Committee Against Torture of the Office of the High Commissioner for Human Rights, in *Concluding Observations of the Committee Against Torture: Israel*, U.N. Doc. A/52/44, at ¶ 257 (May 9, 1997), concluded that a variety of practices taken together, including "sleep deprivation for prolonged periods," "constitute torture as defined in article 1 of the [CAT]." *See also* United Nations General Assembly, *Report of the Committee Against Torture*, U.N. Doc. A/52/44 at ¶ 56 (Sept. 10, 1997) ("sleep deprivation practised on suspects . . . may in some cases constitute torture"). The Committee provided no details on the length of the sleep deprivation or how it was implemented and no analysis to support its conclusion. These precedents provide little or no helpful guidance in our review of the CIA's use of sleep deprivation under sections 2340-2340A. While we do not rely on this fact in interpreting sections 2340-2340A, we note that we are aware of no decision of any foreign court or international tribunal finding that the techniques analyzed here, if subject to the limitations and conditions set out, would amount to torture.

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13. *Waterboard.* We previously concluded that the use of the waterboard did not constitute torture under sections 2340-2340A. *See Interrogation Memorandum* at 11, 15. We must reexamine the issue, however, because the technique, as it would be used, could involve more applications in longer sessions (and possibly using different methods) than we earlier considered.[51]

We understand that in the escalating regimen of interrogation techniques, the waterboard is considered to be the most serious, requires a separate approval that may be sought only after other techniques have not worked (or are considered unlikely to work in the time available), and in fact has been—and is expected to be—used on very few detainees. We accept the assessment of OMS that the waterboard "is by far the most traumatic of the enhanced interrogation techniques." *OMS Guidelines* at 15. This technique could subject a detainee to a high degree of distress. A detainee to whom the technique is applied will experience the physiological sensation of drowning, which likely will lead to panic. We understand that even a detainee who knows he is not going to drown is likely to have this response. Indeed, we are informed that even individuals very familiar with the technique experience this sensation when subjected to the waterboard.

Nevertheless, although this technique presents the most substantial question under the statute, we conclude for the reasons discussed below that the authorized use of the waterboard by adequately trained interrogators, subject to the limitations and conditions adopted by the CIA and in the absence of any medical contraindications, would not violate sections 2340-2340A. (We understand that a medical contraindication may have precluded the use of this particular technique on [redacted]. In reaching this conclusion, we do not in any way minimize the

[51] The *IG Report* noted that in some cases the waterboard was used with far greater frequency than initially indicated, *see IG Report* at 5, 44, 46, 103-04, and also that it was used in a different manner. *See id.* at 37 ("[T]he waterboard technique . . . was different from the technique described in the DoJ opinion and used in the SERE training. The difference was in the manner in which the detainee's breathing was obstructed. At the SERE school and in the DoJ opinion, the subject's airflow is disrupted by the firm application of a damp cloth over the air passages; the interrogator applies a small amount of water to the cloth in a controlled manner. By contrast, the Agency interrogator . . . applied large volumes of water to a cloth that covered the detainee's mouth and nose. One of the psychologists/interrogators acknowledged that the Agency's use of the technique is different from that used in SERE training because it is 'for real' and is more poignant and convincing."); *see also id.* at 14 n.14. The Inspector General further reported that "OMS contends that the expertise of the SERE psychologist/interrogators on the waterboard was probably misrepresented at the time, as the SERE waterboard experience is so different from the subsequent Agency usage as to make it almost irrelevant. Consequently, according to OMS, there was no *a priori* reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe." *Id.* at 21 n.26. We have carefully considered the *IG Report* and discussed it with OMS personnel. As noted, OMS input has resulted in a number of changes in the application of the waterboard, including limits on the frequency and cumulative use of the technique. Moreover, OMS personnel are carefully instructed in monitoring this technique and are personally present whenever it is used. *See OMS Guidelines* at 17-20. Indeed, although physician assistants can be present when other enhanced techniques are applied, "use of the waterboard requires the presence of a physician." *Id.* at 9 n.2.

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experience. The panic associated with the feeling of drowning could undoubtedly be significant. There may be few more frightening experiences than feeling that one is unable to breathe.[32]

However frightening the experience may be, OMS personnel have informed us that the waterboard technique is not physically painful. This conclusion, as we understand the facts, accords with the experience in SERE training, where the waterboard has been administered to several thousand members of the United States Armed Forces.[33] To be sure, in SERE training, the technique is confined to at most two applications (and usually only one) of no more than 40 seconds each. Here, there may be two sessions, of up to two hours each, during a 24-hour period, and each session may include multiple applications, of which six may last 10 seconds or longer (but none more than 40 seconds), for a total time of application of as much as 12 minutes in a 24-hour period. Furthermore, the waterboard may be used on up to five days during the 30-day period for which it is approved. *See August 19 [redacted] Letter* at 1-2. As you have informed us, the CIA has previously used the waterboard repeatedly on two detainees, and, as far as can be determined, these detainees did not experience physical pain or, in the professional judgment of doctors, is there any medical reason to believe they would have done so. Therefore, we conclude that the authorized use of the waterboard by adequately trained interrogators could not reasonably be considered specifically intended to cause "severe physical pain."

We also conclude that the use of the waterboard, under the strict limits and conditions imposed, would not be expected to cause "severe physical suffering" under the statute. As noted above, the difficulty of specifying a category of physical suffering apart from both physical pain and mental pain or suffering, along with the requirement that any such suffering be "severe," calls for an interpretation under which "severe physical suffering" is reserved for physical distress that is severe considering both its intensity and duration. To the extent that in some applications the use of the waterboard could cause choking or similar physical—as opposed to mental—sensations, those physical sensations might well have an intensity approaching the degree contemplated by the statute. However, we understand that any such physical—as opposed to mental—sensations caused by the use of the waterboard end when the application

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[32] As noted above, in most uses of the technique, the individual is in fact able to breathe, though his breathing is restricted. Because in some uses breathing would not be possible, for purposes of our analysis we assume that the detainee is unable to breathe during applications of water.

[33] We understand that the waterboard is currently used only in Navy SERE training. As noted in the *IG Report*, "[a]ccording to individuals with authoritative knowledge of the SERE program, . . . [e]xcept for Navy SERE training, use of the waterboard was discontinued because of its dramatic effect on the students who were subjects." *IG Report* at 14 n.14. We understand that use of the waterboard was discontinued by the other services not because of any concerns about possible physical or mental harm, but because students were not successful at resisting the technique and, as such, it was not considered to be a useful training technique. We note that OMS has concluded that "[w]hile SERE trainers believe that trainees are unable to maintain psychological resistance to the waterboard, our experience was otherwise. Some subjects unquestionably can withstand a large number of applications, with no immediately discernible cumulative impact beyond their strong aversion to the experience." *OMS Guidelines* at 17. We are aware that at a recent Senate Judiciary Committee hearing, Douglas Johnson, Executive Director of the Center for Victims of Torture, testified that some U.S. military personnel who have undergone waterboard training have apparently stated "that it's taken them 15 years of therapy to get over it." You have informed us that, in 2002, the CIA made inquiries to Department of Defense personnel involved in SERE training and that the Department of Defense was not aware of any information that would substantiate such statements, nor is the CIA aware of any such information.

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ends. Given the time limits imposed, and the fact that any physical distress (as opposed to possible mental suffering, which is discussed below) would occur only during the actual application of water, the physical distress caused by the waterboard would not be expected to have the duration required to amount to severe physical suffering.[54] Applications are strictly limited to at most 40 seconds, and a total of at most 12 minutes in any 24-hour period, and use of the technique is limited to at most five days during the 30-day period we consider. Consequently, under these conditions, use of the waterboard cannot be expected to cause "severe physical suffering" within the meaning of the statute, and we conclude that its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to cause "severe physical suffering."[55] Again, however, we caution that great care should be used in adhering to the limitations imposed and in monitoring any detainee subjected to it to prevent the detainee from experiencing severe physical suffering.

The most substantial question raised by the waterboard relates to the statutory definition of "severe mental pain or suffering." The sensation of drowning that we understand accompanies the use of the waterboard arguably could qualify as a "threat of imminent death" within the meaning of section 2340(2)(C) and thus might constitute a predicate act for "severe mental pain or suffering" under the statute.[56] Although the waterboard is used with safeguards that make actual harm quite unlikely, the detainee may not know about these safeguards, and even if he does learn of them, the technique is still likely to create panic in the form of an acute instinctual fear arising from the physiological sensation of drowning.

Nevertheless, the statutory definition of "severe mental pain or suffering" also requires that the predicate act produce "prolonged mental harm." 18 U.S.C. § 2340(2). As we understand from OMS personnel familiar with the history of the waterboard technique, as used both in SERE training (though in a substantially different manner) and in the previous CIA interrogations, there is no medical basis to believe that the technique would produce any mental effect beyond the distress that directly accompanies its use and the prospect that it will be used again. We understand from the CIA that to date none of the thousands of persons who have undergone the more limited use of the technique in SERE training has suffered prolonged mental harm as a result. The CIA's use of the technique could far exceed the one or two applications to which SERE training is limited, and the participant in SERE training presumably understands that the technique is part of a training program that is not intended to hurt him and will end at some foreseeable time. But the physicians and psychologists at the CIA familiar with the facts

[54] We emphasize that physical suffering differs from physical pain in this respect. Physical pain may be "severe" even if lasting only seconds; whereas, by contrast, physical distress may amount to "severe physical suffering" only if it is severe both in intensity and duration.

[55] As with sleep deprivation, the particular condition of the individual detainee must be monitored so that, with extended or repeated use of the technique, the detainee's experience does not depart from these expectations.

[56] It is unclear whether a detainee being subjected to the waterboard in fact experiences it as a "threat of imminent death." We understand that the CIA may inform a detainee on whom this technique is used that he would not be allowed to drown. Moreover, after multiple applications of the waterboard, it may become apparent to the detainee that, however frightening the experience may be, it will not result in death. Nevertheless, for purposes of our analysis, we will assume that the physiological sensation of drowning associated with the use of the waterboard may constitute a "threat of imminent death" within the meaning of sections 2340-2340A.

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have informed us that in the case of the two detainees who have been subjected to more extensive use of the waterboard technique, no evidence of prolonged mental harm has appeared in the period since the use of the waterboard on those detainees, a period which now spans at least 25 months for each of these detainees. Moreover, in their professional judgment based on this experience and the admittedly different SERE experience, OMS officials inform us that they would not expect the waterboard to cause such harm. Nor do we believe that the distress accompanying use of the technique on five days in a 30-day period, in itself, could be the "prolonged mental harm" to which the statute refers. The technique may be designed to create fear at the time it is used on the detainee, so that the detainee will cooperate to avoid future sessions. Furthermore, we acknowledge that the term "prolonged" is imprecise. Nonetheless, without in any way minimizing the distress caused by this technique, we believe that the panic brought on by the waterboard during the very limited time it is actually administered, combined with any residual fear that may be experienced over a somewhat longer period, could not be said to amount to the "prolonged mental harm" that the statute covers.[57] For these reasons, we conclude that the authorized use of the waterboard by adequately trained interrogators could not reasonably be considered specifically intended to cause "prolonged mental harm." Again, however, we caution that the use of this technique calls for the most careful adherence to the limitations and safeguards imposed, including constant monitoring by both medical and psychological personnel of any detainee who is subjected to the waterboard.

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[57] In *Hilao v. Estate of Marcos*, the Ninth Circuit stated that a course of conduct involving a number of techniques, one of which has similarities to the waterboard, constituted torture. The court described the course of conduct as follows:

> He was then interrogated by members of the military, who blindfolded and severely beat him while he was handcuffed and fettered; they also threatened him with death. When this round of interrogation ended, he was denied sleep and repeatedly threatened with death. In the next round of interrogation, all of his limbs were shackled to a cot and a towel was placed over his nose and mouth; his interrogators then poured water down his nostrils so that he felt as though he were drowning. This lasted for approximately six hours, during which time interrogators threatened [him] with electric shock and death. At the end of this water torture, [he] was left shackled to the cot for the following three days, during which time he was repeatedly interrogated. He was then imprisoned for seven months in a suffocatingly hot and unlit cell, measuring 2.5 meters square; during this time he was shackled to his cot, at first by all his limbs and later by one hand and one foot, for all but the briefest periods (in which he was allowed to eat or use the toilet). The handcuffs were often so tight that the slightest movement . . . made them cut into his flesh. During this period, he felt 'extreme pain, almost undescribable, the boredom' and 'the feeling that tons of lead . . . were falling on [his] brain. [He] was never told how long the treatment inflicted upon him would last. After his seven months shackled to his cot, [he] spent more than eight years in detention, approximately five of them in solitary confinement and the rest in near-solitary confinement.

103 F.3d at 790-91. The court then concluded, "it seems clear that all of the abuses to which [a plaintiff] testified—including the eight years during which he was held in solitary or near-solitary confinement—constituted a single course of conduct of torture." *Id.* at 795. In addition to the obvious differences between the technique in *Hilao* and the CIA's use of the waterboard subject to the careful limits described above (among other things, in *Hilao* the session lasted six hours and followed explicit threats of death and severe physical beatings), the court reached no conclusion that the technique by itself constituted torture. However, the fact that a federal appellate court would even colloquially describe a technique that may share some of the characteristics of the waterboard as "water torture" counsels continued care and careful monitoring in the use of this technique.

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Even if the occurrence of one of the predicate acts could, depending on the circumstances of a particular case, give rise to an inference of intent to cause "prolonged mental harm," no such circumstances exist here. On the contrary, experience with the use of the waterboard indicates that prolonged mental harm would not be expected to occur, and CIA's use of the technique is subject to a variety of safeguards, discussed above, designed to ensure that prolonged mental harm does not result. Therefore, the circumstances here would negate any potential inference of specific intent to cause such harm.

Assuming adherence to the strict limitations discussed herein, including the careful medical monitoring and available intervention by the team as necessary, we conclude that although the question is substantial and difficult, the authorized use of the waterboard by adequately trained interrogators and other team members could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering and thus would not violate sections 2340-2340A.[58]

* * *

In sum, based on the information you have provided and the limitations, procedures, and safeguards that would be in place, we conclude that—although extended sleep deprivation and use of the waterboard present more substantial questions in certain respects under the statute and the use of the waterboard raises the most substantial issue—none of these specific techniques, considered individually, would violate the prohibition in sections 2340-2340A. The universal rejection of torture and the President's unequivocal directive that the United States not engage in torture warrant great care in analyzing whether particular interrogation techniques are consistent with the requirements of sections 2340-2340A, and we have attempted to employ such care throughout our analysis. We emphasize that these are issues about which reasonable persons may disagree. Our task has been made more difficult by the imprecision of the statute and the relative absence of judicial guidance, but we have applied our best reading of the law to the specific facts that you have provided. As is apparent, our conclusion is based on the assumption that close observation, including medical and psychological monitoring of the detainees, will continue during the period when these techniques are used; that the personnel present are authorized to, and will, stop the use of a technique at any time if they believe it is being used improperly or threatens a detainee's safety or that a detainee may be at risk of suffering severe physical or mental pain or suffering; that the medical and psychological personnel are continually assessing the available literature and ongoing experience with detainees, and that, as they have done to date, they will make adjustments to techniques to ensure that they do not cause severe physical or mental pain or suffering to the detainees; and that all interrogators and other team members understand the proper use of the techniques, that the techniques are not designed

[58] As noted, medical personnel are instructed to exercise special care in monitoring and reporting on use of the waterboard. *See QMS Guidelines* at 20 ("NOTE: In order to best inform future medical judgments and recommendations, it is important that every application of the waterboard be thoroughly documented: how long each application (and the entire procedure) lasted, how much water was used in the process (realizing that much splashes off), how exactly the water was applied, if a seal was achieved, if the naso- or oropharynx was filled, what sort of volume was expelled, how long was the break between applications, and how the subject looked between each treatment.") (emphasis omitted).

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or intended to cause severe physical or mental pain or suffering, and that they must cooperate with OMS personnel in the exercise of their important duties.

Please let us know if we may be of further assistance.

Steven G. Bradbury
Principal Deputy Assistant Attorney General

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U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General Washington, D.C. 20530

May 30, 2005

MEMORANDUM FOR JOHN A. RIZZO
SENIOR DEPUTY GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY

Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees

You have asked us to address whether certain "enhanced interrogation techniques" employed by the Central Intelligence Agency ("CIA") in the interrogation of high value al Qaeda detainees are consistent with United States obligations under Article 16 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force for U.S. Nov. 20, 1994) ("CAT"). We conclude that use of these techniques, subject to the CIA's careful screening criteria and limitations and its medical safeguards, is consistent with United States obligations under Article 16.[1]

By its terms, Article 16 is limited to conduct within "territory under [United States] jurisdiction." We conclude that territory under United States jurisdiction includes, at most, areas

[1] Our analysis and conclusions are limited to the specific legal issues we address in this memorandum. We note that we have previously concluded that use of these techniques, subject to the limits and safeguards required by the interrogation program, does not violate the federal prohibition on torture, codified at 18 U.S.C. §§ 2340-2340A. *See* Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques that May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005); *see also* Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005) (concluding that the anticipated combined use of these techniques would not violate the federal prohibition on torture). The legal advice provided in this memorandum does not represent the policy views of the Department of Justice concerning the use of any interrogation methods.

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This memorandum is classified in its entirety.

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over which the United States exercises at least de facto authority as the government. Based on CIA assurances, we understand that the interrogations do not take place in any such areas. We therefore conclude that Article 16 is inapplicable to the CIA's interrogation practices and that those practices thus cannot violate Article 16. Further, the United States undertook its obligations under Article 16 subject to a Senate reservation, which, as relevant here, explicitly limits those obligations to "the cruel, unusual and inhumane treatment . . . prohibited by the Fifth Amendment . . . to the Constitution of the United States."[2] There is a strong argument that through this reservation the Senate intended to limit the scope of United States obligations under Article 16 to those imposed by the relevant provisions of the Constitution. As construed by the courts, the Fifth Amendment does not apply to aliens outside the United States. The CIA has assured us that the interrogation techniques are not used within the United States or against United States persons, including both United States citizens and lawful permanent residents. Because the geographic limitation on the ties of Article 16 renders it inapplicable to the CIA interrogation program in any event, we need not decide in this memorandum the precise effect, if any, of the Senate reservation on the geographic reach of United States obligations under Article 16. For these reasons, we conclude in Part II that the interrogation techniques where and as used by the CIA are not subject to, and therefore do not violate, Article 16.

Notwithstanding these conclusions, you have also asked whether the interrogation techniques at issue would violate the substantive standards applicable to the United States under Article 16 if, contrary to our conclusion in Part II, those standards did extend to the CIA interrogation program. As detailed below in Part III, the relevant constraint here, assuming Article 16 did apply, would be the Fifth Amendment's prohibition of executive conduct that "shocks the conscience." The Supreme Court has emphasized that whether conduct "shocks the conscience" is a highly context-specific and fact-dependent question. The Court, however, has not set forth with precision a specific test for ascertaining whether conduct can be said to "shock the conscience" and has disclaimed the ability to do so. Moreover, there are few Supreme Court cases addressing whether conduct "shocks the conscience," and the few cases there are have all arisen in very different contexts from that which we consider here.

For these reasons, we cannot set forth or apply a precise test for ascertaining whether conduct can be said to "shock the conscience." Nevertheless, the Court's "shocks the conscience" cases do provide some signposts that can guide our inquiry. In particular, on [illegible] the cases are best read to require a determination whether the conduct is "'arbitrary in the constitutional sense,'" *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (citation

[2] The reservation provides in full:

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

136 Cong. Rec. 36198 (1990). As we explain below, the Eighth and Fourteenth Amendments are not applicable in this context.

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

The Supreme Court's decisions also instruct that it is appropriate to consider whether, in light of "traditional executive behavior, of contemporary practice, and the standards of fairness generally applied to them," use of the techniques in the CIA interrogation program "is so egregious as outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 847 n.8. We have not found evidence of traditional executive behavior or contemporary practice either condemning or condoning an interrogation program carefully limited to further a vital government interest and designed to avoid unnecessary or serious harm. We recognize, however, that use of coercive interrogation techniques in other contexts—in different settings, for other purposes, or absent the CIA's safeguards—might be thought to "shock the conscience." *Cf., e.g., Rochin v. California*, 342 U.S. 165, 172 (1952) (finding that pumping the stomach of a criminal defendant to obtain evidence "shocks the conscience"); *U.S. Army Field Manual 34-52: Intelligence Interrogation* (1992) ("*Field Manual 34-52*") (detailing guidelines for interrogations in the context of traditional warfare); Department of State, Country Reports on Human Rights Practices (describing human-rights abuses condemned by the United States). We believe, however, that each of these other contexts, which we describe more fully below, differs critically from the CIA interrogation program in ways that would be unreasonable to ignore in examining whether the conduct involved in the CIA program "shock[s] the contemporary conscience." Ordinary criminal investigations within the United States, for example, involve fundamentally different government interests and implicate specific constitutional guarantees, such as the privilege against self-incrimination, that are not at issue here. Furthermore, the CIA interrogation techniques have all been adapted from military Survival, Evasion, Resistance, Escape ("SERE") training. Although there are obvious differences between training exercises and actual interrogations, the fact that the United States uses similar techniques on its own troops for training purposes strongly suggests that these techniques are not categorically beyond the pale.

Given that the CIA interrogation program is carefully limited to further the Government's paramount interest in protecting the Nation while avoiding unnecessary or serious harm, we conclude that the interrogation program cannot "be said to shock the contemporary conscience"

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when considered in light of "traditional executive behavior" and "contemporary practice." *Lewis*, 523 U.S. at 847 n.8.

I.

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Elsewhere, we have described the CIA interrogation program in great detail. *See* Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques that May Be Used in the Interrogation of a High Value al Qaeda Detainee* at 4-15, 28-45 (May 10, 2005) ("*Techniques*"); Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* at 3-9 (May 10, 2005) ("*Combined Use*"). The descriptions of the techniques, including all limitations and safeguards applicable to their use, set forth in *Techniques* and *Combined Use* are incorporated by reference herein, and we assume familiarity with those descriptions. Here, we highlight those aspects of the program that are most important to the question under consideration. Where appropriate, throughout this opinion we also provide more detailed background information regarding specific high value detainees who are representative of the individuals on whom the techniques might be used.[3]

A.

Under the CIA's guidelines, several conditions must be satisfied before the CIA considers employing enhanced techniques in the interrogation of any detainee. The CIA must,

[3] The CIA has reviewed and confirmed the accuracy of our description of the interrogation program, including its purposes, methods, limitations, and results.

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based on available intelligence, conclude that the detainee is an important and dangerous member of an al Qaeda-affiliated group. The CIA must then determine, at the Headquarters level and on a case-by-case basis with input from the on-scene interrogation team, that enhanced interrogation methods are needed in a particular interrogation. Finally, the enhanced techniques, which have been designed and implemented to minimize the potential for serious or unnecessary harm to the detainees, may be used only if there are no medical or psychological contraindications.

[redacted] determines an individual to be a "High Value Detainee," which the CIA defines as:

> a detainee who, until time of capture, we have reason to believe: (1) is a senior member of al-Qai'da or an al-Qai'da associated terrorist group (Jemaah Islamiyyah, Egyptian Islamic Jihad, al-Zarqawi Group, etc.); (2) has knowledge of imminent terrorist threats against the USA, its military forces, its citizens and organizations, or its allies; or that has/had direct involvement in planning and preparing terrorist actions against the USA or its allies, or assisting the al-Qai'da leadership in planning and preparing such terrorist actions; and (3) if released, constitutes a clear and continuing threat to the USA or its allies.

Fax for Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, from [redacted] Assistant General Counsel, Central Intelligence Agency at 4 (Jan. 4, 2005) ("[redacted]"). The CIA, therefore, must have reason to believe that the detainee is a senior member (rather than a mere "foot soldier") of al Qaeda or an associated terrorist organization, who likely has actionable intelligence concerning terrorist threats, and who poses a significant threat to United States interests.

The "waterboard," which is the most intense of the CIA interrogation techniques, is subject to additional limits. It may be used on a High Value Detainee only if the CIA has "credible intelligence that a terrorist attack is imminent", "substantial and credible indicators that the subject has actionable intelligence that can prevent, disrupt or delay this attack"; and "[o]ther interrogation methods have failed to elicit the information [or] CIA has clear indications that other . . . methods are unlikely to elicit this information *within the perceived time limit for preventing the attack.*" Letter from John A. Rizzo, Acting General Counsel, Central Intelligence Agency, to Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel at 5 (Aug. 2, 2004) ("*August 2 Rizzo Letter*") (attachment).

To date, the CIA has taken custody of 94 detainees [redacted] and has employed enhanced techniques to various degrees in the interrogations of 28 of these detainees. We understand that two individuals [redacted]

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[redacted] representative of the high value detainees on whom enhanced techniques have been, or might be, used. On [redacted] the CIA took custody of [redacted] whom the CIA believed had actionable intelligence concerning the pre-election threat to the United States. *See* Letter from [redacted] Associate General Counsel, Central Intelligence Agency, to Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel at 2 (Aug. 25, 2004) ("*August 25 [redacted] Letter*"). [redacted] extensive connections to various al Qaeda leaders, members of the Taliban, and the [redacted] network, and intelligence indicated [redacted] arranged a . . . meeting between [redacted] at which [redacted] were discussed. *Id.* at 2-3; *see also* Undated CIA Memo, [redacted]

Intelligence indicated that prior to his capture, [redacted] "perform[ed] critical facilitation and finance activities for al-Qa'ida," including "transporting people, funds, and documents." [redacted] Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, from [redacted] General Counsel, Central Intelligence Agency (March 12, 2004); [redacted] participate in planning attacks against United States forces [redacted] and extensive contacts with key members of al Qaeda, including [redacted] Khalid Shaykh Muhammad ("KSM"), and Abu Zubaydah. *See id.* [redacted] was captured while on a mission from [redacted] to establish contact [redacted]. *See* CIA Directorate of Intelligence, *US Efforts Grinding Down al-Qa'ida* 2 (Feb. 21, 2004).

Consistent with its heightened standard for use of the waterboard, the CIA has used this technique in the interrogations of only three detainees to date (KSM, Zubaydah, and 'Abd Al-Rahim Al-Nashiri) and has not used it since the March 2003 interrogation of KSM. *See* Letter from Scott W. Muller, General Counsel, Central Intelligence Agency, to Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel at 1 (June 14, 2004).

We understand that Abu Zubaydah and KSM are representative of the types of detainees on whom the waterboard has been, or might be, used. Prior to his capture, Zubaydah was "one of Usama Bin Ladin's key lieutenants." CIA, *Zayn al-Abidin Muhammad Husayn ABU ZUBAYDAH* at 1 (Jan. 7, 2002) ("*Zubaydah Biography*"). Indeed, Zubaydah was al Qaeda's third or fourth highest ranking member and had been involved "in every major terrorist operation carried out by al Qaeda." Memorandum for John Rizzo, Acting General Counsel, Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Interrogation of al Qaeda Operative* at 7 (Aug. 1, 2002) ("*Interrogation Memorandum*"); Zubaydah Biography (noting Zubaydah's involvement in the September 11 attacks). Upon his capture on March 27, 2002, Zubaydah became the most senior member of al Qaeda in United States custody. *See IG Report* at 12.

KSM, "a mastermind" of the September 11, 2001, attacks, was regarded as "one of al-Qa'ida's most dangerous and resourceful [redacted]" (Nov. 1, 2003) ("*CIA KSM Biography*"). [redacted] Prior to his capture, the CIA considered KSM to be one of al Qaeda's "most important operational leaders . . . based on his

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close relationship with Usama Bin Laden and his reputation among the al-Qa'ida rank and file." *Id.* After the September 11 attacks, KSM assumed "the role of operations chief for al-Qa'ida around the world." CIA Directorate of Intelligence, *Khalid Shaykh Muhammad: Preeminent Source on Al-Qa'ida* 7 (July 13, 2004) ("*Preeminent Source*"). KSM also planned additional attacks within the United States both before and after September 11. *See id.* at 7-8; *see also The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 150 (official gov't ed. 2004) ("*9/11 Commission Report*").[4]

2.

Even with regard to detainees who satisfy these threshold requirements, enhanced techniques are considered only if the on-scene interrogation team determines that the detainee is withholding or manipulating information. In order to make this assessment, interrogators conduct an initial interview "in a relatively benign environment." [redacted], Acting Assistant Attorney General, Office of Legal Counsel, [redacted], Associate General Counsel, Central Intelligence Agency, *Re: Background Paper on CIA's Combined Use of Interrogation Techniques* at 3 (Dec. 30, 2004) ("*Background Paper*"). At this stage, the detainee is "normally clothed but soiled and shackled for security purposes," and the interrogators take "an open, non-threatening approach." *Id.* In order to be judged participatory, however, a high value detainee "would have to willingly provide information on actionable threats and location information on High-Value Targets at large—not lower level information." *Id.* If the detainee fails to meet this "very high" standard, the interrogation team develops an interrogation plan, which generally calls for the use of enhanced techniques only as necessary and in escalating fashion. *See id.* at 3-4; *Techniques* at 5.

Any interrogation plan that involves the use of enhanced techniques must be reviewed and approved by "the Director, DCI Counterterrorist Center, with the concurrence of the Chief, CTC Legal Group." George J. Tenet, [redacted] 3 (Jan. 28, 2003) ("*Interrogation Guidelines*"). Approval lasts for a period of at most 30 days, *see id.* at 1-2, although enhanced interrogation techniques are generally not used for more than seven days, *see Background Paper* at 17.

For example, after medical and psychological examinations found no contraindications, [redacted] interrogation team sought and obtained approval to use the following techniques: attention grasp, walling, facial [redacted], cramped confinement, wall standing, stress positions, and sleep deprivation. *See* August 23 [redacted] *other* at 2. The interrogation team "carefully analyzed Gul's responsiveness to different areas of inquiry" during this time and noted that his resistance increased as questioning moved to his "knowledge of operational terrorist activities." *Id.* at 3.

[4] Al-Nashiri, the only other detainee to be subjected to the waterboard, planned the bombing of the U.S.S. Cole and was subsequently "recognized as the chief of al Qaeda operations in and around the Arabian Peninsula." *9/11 Commission Report* at 153.

[5] You have informed us that the current practice is for the Director of the Central Intelligence Agency to make this determination personally.

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[redacted] feigned memory problems (which CIA psychologists ruled out through intelligence and memory tests) in order to avoid answering questions. *Id.*

At that point, the interrogation team believed [redacted] "maintains a tough, Mujahidin fighter mentality and has conditioned himself for a physical interrogation." *Id.* The team therefore concluded that "more subtle interrogation measures designed more to weaken [redacted] physical ability and mental desire to resist interrogation over the long run are likely to be more effective." *Id.* For these reasons, the team sought authorization to use dietary manipulation, nudity, water dousing, and abdominal slap. *Id.* at 4-5. In the team's view, adding these techniques would be especially helpful [redacted] because he appeared to have a particular weakness for food and also seemed especially modest. *See id.* at 4.

The CIA used the waterboard extensively in the interrogations of KSM and Zubaydah, but did so only after it became clear that standard interrogation techniques were not working. Interrogators used enhanced techniques in the interrogation of al-Nashiri with notable results as early as the first day. *See IG Report* at 35-36. Twelve days into the interrogation, the CIA subjected al-Nashiri to one session of the waterboard during which water was applied two times. *See id.* at 36.

3.

Medical and psychological professionals from the CIA's Office of Medical Services ("OMS") carefully evaluate detainees before any enhanced technique is authorized in order to ensure that the detainee "is not likely to suffer any severe physical or mental pain or suffering as a result of interrogation." *Techniques* at 4; *see OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation and Detention* at 9 (Dec. 2004) ("*OMS Guidelines*"). In addition, OMS officials continuously monitor the detainee's condition throughout any interrogation using enhanced techniques, and the interrogation team will stop the use of particular techniques or the interrogation altogether if the detainee's medical or psychological condition indicates that the detainee might suffer significant physical or mental harm. *See Techniques* at 5-6. OMS has, in fact, prohibited the use of certain techniques in the interrogations of certain detainees. *See id.* at 5. Thus, no technique is used in the interrogation of any detainee—no matter how valuable the information the CIA believes the detainee has—if the medical and psychological evaluations or ongoing monitoring suggest that the detainee is likely to suffer serious harm. Careful records are kept of each interrogation, which ensures accountability and allows for ongoing evaluation of the efficacy of each technique and its potential for any unintended or inappropriate results. *See id.*

B.

Your office has informed us that the CIA believes that "the intelligence acquired from these interrogations has been a key reason why al-Qa'ida has failed to launch a spectacular attack in the West since 11 September 2001." Memorandum for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from [redacted] DCI Counterterrorist Center, *Re: Effectiveness of the CIA Counterintelligence Interrogation Techniques* at 2 (Mar. 2, 2005) ("*Effectiveness Memo*"). In particular, the CIA

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believes that it would have been unable to obtain critical information from numerous detainees, including KSM and Abu Zubaydah, without these enhanced techniques. Both KSM and Zubaydah had "expressed their belief that the general US population was 'weak,' lacked resilience, and would be unable to 'do what was necessary' to prevent the terrorists from succeeding in their goals." *Id.* at 1. Indeed, before the CIA used enhanced techniques in its interrogation of KSM, KSM resisted giving any answers to questions about future attacks, simply noting, "Soon, you will know." *Id.* We understand that the use of enhanced techniques in the interrogations of KSM, Zubaydah, and others, by contrast, has yielded critical information. *See IG Report* at 86, 90-91 (describing increase in intelligence reports attributable to use of enhanced techniques). As Zubaydah himself explained with respect to enhanced techniques, "brothers who are captured and interrogated are permitted by Allah to provide information when they believe they have 'reached the limit of their ability to withhold it' in the face of psychological and physical hardships." *Effectiveness Memo* at 2. And, indeed, we understand that since the use of enhanced techniques, "KSM and Abu Zubaydah have been pivotal sources because of their ability and willingness to provide their analysis and speculation about the capabilities, methodologies, and mindsets of terrorists." *Preeminent Source* at 4.

Nevertheless, current CIA threat reporting indicates that, despite substantial setbacks over the [redacted] informed us that the CIA believes that enhanced interrogation techniques remain essential to obtaining vital intelligence necessary to detect and disrupt such emerging threats.

In understanding the effectiveness of the interrogation program, it is important to keep two related points in mind. First, the total value of the program cannot be appreciated solely by focusing on individual pieces of information. According to the CIA Inspector General:

> CTC frequently uses the information from one detainee, as well as other sources, to vet the information of another detainee. Although lower-level detainees provide less information than the high value detainees, information from these detainees has, on many occasions, supplied the information needed to probe the high value detainees further. . . . [T]he triangulation of intelligence provides a fuller knowledge of Al-Qa'ida activities than would be possible from a single detainee.

IG Report at 86. As illustrated below, we understand that even interrogations of comparatively lower-tier high value detainees supply information that the CIA uses to validate and assess information elicited in other interrogations and through other methods. Intelligence acquired

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from the interrogation program also enhances other intelligence methods and has helped to build the CIA's overall understanding of al Qaeda and its affiliates. Second, it is difficult to quantify with confidence and precision the effectiveness of the program. As the *IG Report* notes, it is difficult to determine conclusively whether interrogations have provided information critical to interdicting specific imminent attacks. *See id.* at 88. And, because the CIA has used enhanced techniques sparingly, "there is limited data on which to assess their individual effectiveness." *Id.* at 89. As discussed below, however, we understand that interrogations have led to specific, actionable intelligence as well as a general increase in the amount of intelligence regarding al Qaeda and its affiliates. *See id.* at 85-91.

With these caveats, we turn to specific examples that you have provided to us. You have informed us that the interrogation of KSM—once enhanced techniques were employed—led to the discovery of a KSM plot, the "Second Wave," "to use East Asian operatives to crash a hijacked airliner into" a building in Los Angeles. *Effectiveness Memo* at 3. You have informed us that information obtained from KSM also led to the capture of Riduan bin Isomuddin, better known as Hambali, and the discovery of the Guraba Cell, a 17-member Jemaah Islamiyah cell tasked with executing the "Second Wave." *See id.* at 3-4; CIA Directorate of Intelligence, *Al-Qa'ida's Ties to Other Key Terror Groups: Terrorists Links in a Chain* 2 (Aug. 28, 2003). More specifically, we understand that KSM admitted that he had [redacted] a large sum of money to an al Qaeda associate. *See* Fax from [redacted] CI Counterterrorist Center, *Briefing Notes on the Value of Disrupted Regarding* at 1 (Apr. 15, 2005) ("*Briefing Notes*"). Khan subsequently identified the associate (Zubair), who was then captured. Zubair, in turn, provided information that led to the arrest of Hambali. *See id.* The information acquired from these captures allowed CIA interrogators to pose more specific questions to KSM, which led the CIA to Hambali's brother, al-Hadi. Using information obtained from multiple sources, al-Hadi was captured, and he subsequently identified the Guraba cell. *See id.* at 1-2. With the aid of this additional information, interrogations of Hambali confirmed much of what was learned from KSM.[6]

Interrogations of Zubaydah—again, once enhanced techniques were employed—furnished detailed information regarding al Qaeda's "organizational structure, key operatives, and modus operandi" and identified KSM as the mastermind of the September 11 attacks. *See Briefing Notes* at 4. You have informed us that Zubaydah also "provided significant information on two operatives, [including] Jose Padilla,] who planned to build and detonate a 'dirty bomb' in the Washington DC area." *Effectiveness Memo* at 4. Zubaydah and KSM have also supplied important information about al Zarqawi and his network. [redacted] Quintanilla III, Assistant Attorney General, [redacted] General Counsel, CIA, [redacted]

[6] [redacted] KSM. [redacted]

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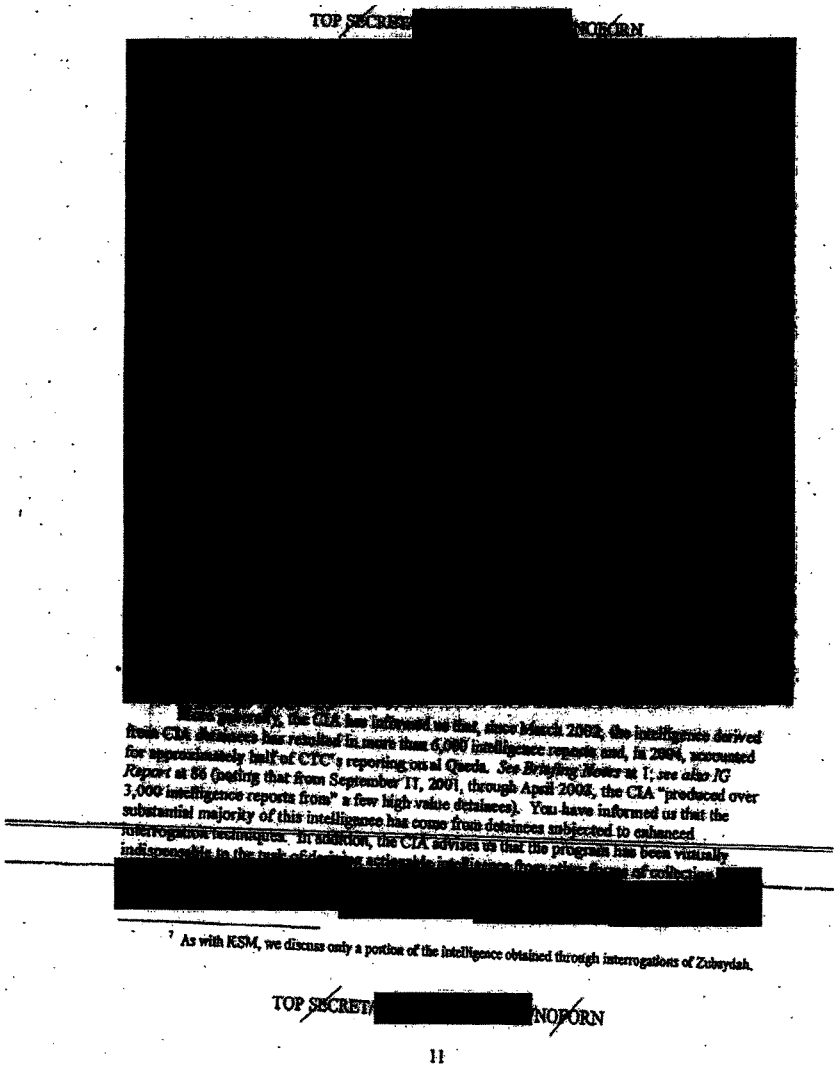

[redacted] the CIA has informed us that, since March 2002, the intelligence derived from CIA detainees has resulted in more than 6,000 intelligence reports and, in 2004, accounted for approximately half of CTC's reporting on al Qaeda. *See Briefing Memo* at 1; *see also IG Report* at 86 (noting that from September 11, 2001, through April 2003, the CIA "produced over 3,000 intelligence reports from" a few high-value detainees). You have informed us that the substantial majority of this intelligence has come from detainees subjected to enhanced interrogation techniques. In addition, the CIA advises us that the program has been virtually indispensable in the task of [redacted]

[redacted]

[7] As with KSM, we discuss only a portion of the intelligence obtained through interrogations of Zubaydah.

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C.

There are three categories of enhanced interrogation techniques: conditioning techniques, corrective techniques, and coercive techniques. *See Background Paper* at 4. As noted above, each of the specific enhanced techniques has been adapted from SERE training, where similar techniques have been used, in some form, for years on United States military personnel. *See Techniques* at 6; *IG Report* at 13-14.

1. Conditioning techniques

Conditioning techniques are used to put the detainee in a "baseline" state, and to "demonstrate to the [detainee] that he has no control over basic human needs." *Background Paper* at 4. This "creates . . . a mindset in which the detained learns to perceive and value his personal welfare, comfort, and immediate needs more than the information he is protecting." *Id.* Conditioning techniques are not designed to bring about immediate results. Rather, these techniques are useful in view of their "cumulative effect . . . , used over time and in combination with other interrogation techniques and intelligence exploitation methods." *Id.* at 5. The specific conditioning techniques are nudity, dietary manipulation, and sleep deprivation.

Nudity is used to induce psychological discomfort and because it allows interrogators to reward detainees instantly with clothing for cooperation. *See Techniques* at 7. Although this technique might cause embarrassment, it does not involve any sexual abuse or threats of sexual abuse. *See id.* at 7-8. Because ambient air temperatures are kept above 69°F, the technique is at most mildly physically uncomfortable and poses no threat to the detainee's health. *Id.* at 7.

Dietary manipulation involves substituting a bland, commercial liquid meal for a detainee's normal fare. We understand that its use can increase the effectiveness of other techniques, such as sleep deprivation. As a guideline, the CIA uses a formula for caloric intake that (depends on a detainee's body weight and expected level of activity and that ensures that caloric intake will always be set at or above 1,000 kcal/day. *See id.* at 7 & n.10.[8] By comparison, commercial weight-loss programs used within the United States not uncommonly limit intake to 1000 kcal/day regardless of body weight. Detainees are monitored at all times to ensure that they do not lose more than 10% of their starting body weight. *See id.* at 7. The CIA also sets a minimum fluid intake, but a detainee undergoing dietary manipulation may drink as much water as he pleases. *See id.*

Sleep deprivation involves subjecting a detainee to an extended period of sleeplessness. Interrogators employ sleep deprivation in order to weaken a detainee's resistance. Although up to 180 hours may be authorized, the CIA has in fact subjected only three detainees to more than

[8] As we explained in *Techniques*: "The CIA generally follows as a guideline a caloric requirement of 900 kcal/day + 10 kcal/kg/day. This number is multiplied by 1.2 for a sedentary activity level, or 1.4 for a moderate activity level. Regardless of this formula, the recommended minimum caloric intake is 1500 kcal/day, and in no event is the detainee allowed to receive less than 1000 kcal/day." *Id.* at 7 (footnote omitted). The guideline caloric intake for a detainee who weighs 150 pounds (approximately 68 kilograms) would therefore be nearly 1,900 kcal/day for sedentary activity and would be more than 2,200 kcal/day for moderate activity.

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96 hours of sleep deprivation. Generally, a detainee undergoing this technique is shackled in a standing position with his hands in front of his body, which prevents him from falling asleep but also allows him to move around within a two- to three-foot diameter. The detainee's hands are generally positioned below his chin, although they may be raised above the head for a period not to exceed two hours. *See id.* at 11-13 (explaining the procedures at length). As we have previously noted, sleep deprivation itself generally has few negative effects (beyond temporary cognitive impairment and transient hallucinations), though some detainees might experience transient "unpleasant physical sensations from prolonged fatigue, including such symptoms as impairment to coordinated body movement, difficulty with speech, nausea, and blurred vision." *Id.* at 37; *see also id.* 37-38. Subjects deprived of sleep in scientific studies for longer than the 180-hour limit imposed by the CIA generally return to normal neurological functioning with as little as one night of normal sleep. *See id.* at 46. In light of the ongoing and careful medical monitoring undertaken by OMS and the authority and obligation of all members of the interrogation team, and of OMS personnel and other facility staff, to stop the procedure if necessary, this technique is not be expected to result in any detainee experiencing extreme physical distress. *See id.* at 38-39.[8]

With respect to the shackling, the procedures in place (which include constant monitoring by detention personnel, via closed-circuit television, and intervention if necessary) minimize the risk that a detainee will hang by his wrists or otherwise suffer injury from the shackling. *See id.* at 11. Indeed, these procedures appear to have been effective, as no detainee has suffered any lasting harm from the shackling. *See id.*

Because releasing a detainee from the shackles would present a security problem and would interfere with the effectiveness of the technique, a [redacted] undergoing sleep deprivation frequently wears an adult diaper. *See* Letter from [redacted] Associate General Counsel, Central Intelligence Agency, to Dan Levin [redacted] Attorney General, Office of Legal Counsel at 4 (Oct. 12, 2004) ("*October 12* [redacted] *Letter*"). Diapers are checked and changed as needed so that no detainee would be allowed to remain in a soiled diaper, and the detainee's skin condition is monitored. *See Techniques* at 12. You have informed us that diapers are used solely for sanitary and health reasons and not in order to humiliate the detainee.

2. Corrective techniques

Corrective techniques entail some degree of physical interaction with the detainee and are used "to correct, startle, or to achieve another enabling objective with the detainee." *Background Paper* at 5. These techniques "condition a detainee to pay attention to the interrogator's questions and . . . dislodge expectations that the detainee will not be touched." *Techniques* at 9.

[8] In addition, as we observed in *Techniques*, certain studies indicate that sleep deprivation might lower pain thresholds in some detainees. *See Techniques* at 36 n.44. The ongoing medical monitoring is therefore especially important when interrogators employ this technique in conjunction with other techniques. *See Combined Use* at 13-14 & n.9, 16. In this regard, we note once again that the CIA has "informed us that the interrogation techniques at issue would not be used during a course of extended sleep deprivation with such frequency and intensity as to induce in the detainee a persistent condition of extreme physical distress such as may constitute 'severe physical suffering.'" *Id.* at 16.

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This category comprises the following techniques: insult (facial) slap, abdominal slap, facial hold, and attention grasp. *See Background Paper* at 5; *see also Techniques* at 8-9 (describing these techniques).[10] In the facial hold technique, for example, the interrogator uses his hands to immobilize the detainee's head. The interrogator's fingers are kept closely together and away from the detainee's eyes. *See* Pre-Academic Laboratory (PREAL) Operating Instructions at 19 ("*PREAL Manual*"). The technique instills fear and apprehension with minimal physical force. Indeed, each of these techniques entails only mild uses of force and does not cause any significant pain or any lasting harm. *See Background Paper* at 5-7.

3. Coercive techniques

Coercive techniques "place the detainee in more physical and psychological stress" than the other techniques and are generally "considered to be more effective tools in persuading a resistant [detainee] to participate with CIA interrogators." *Background Paper* at 7. These techniques are typically not used simultaneously. The *Background Paper* lists walling, water dousing, stress positions, wall standing, and cramped confinement in this category. We will also treat the waterboard as a coercive technique.

Walling is performed by placing the detainee against what seems to be a normal wall but is in fact a flexible false wall. *See Techniques* at 8. The interrogator pulls the detainee towards him and then quickly slams the detainee against the false wall. The false wall is designed, and a c-collar or similar device is used, to help avoid whiplash or similar injury. *See id.* The technique is designed to create a loud sound and to shock the detainee without causing significant pain. The CIA regards walling as "one of the most effective interrogation techniques because it wears down the [detainee] physically, heightens uncertainty in the detainee about what the interrogator may do to him, and creates a sense of dread when the [detainee] knows he is about to be walled again." *Background Paper* at 7. A detainee "may be walled one time (one impact with the wall) to make a point or twenty to thirty times consecutively when the interrogator requires a more significant response to a question," and "will be walled multiple times" during a session designed to be intense. *Id.* At no time, however, is the technique employed in such a way that could cause severe physical pain. *See Techniques* at 32 n.38.[11]

In the water dousing technique, potable cold water is poured on the detainee either from a container or a hose without a nozzle. Ambient air temperatures are kept above 64°F. The

[10] As noted in our previous opinions, the slap techniques are not used in a way that could cause severe pain. *See, e.g., Techniques* at 8-9, 33 & n.39; *Combined Use* at 11.

[11] Although walling "wears down the [detainee] physically," *Background Paper* at 7, and undoubtedly may startle him, we understand that it is not significantly painful. The detainee hits a flexible false wall designed to create a loud sound when the individual hits it and thus to cause shock and surprise. *See Combined Use* at 6 n.4. But the detainee's head and neck are supported with a rolled towel or towel that provides a C-collar effect to help prevent whiplash; it is the detainee's shoulder blades that hit the wall; and the detainee is allowed to rebound from the flexible wall in order to reduce the chances of any injury. *See id.* You have informed us that a detainee is expected to feel "dread" at the prospect of walling because of the shock and surprise caused by the technique and because of the sense of powerlessness that comes from being roughly handled by the interrogators, not because the technique causes significant pain. *See id.*

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maximum permissible duration of water exposure depends on the water temperature, which may be no lower than 41°F and is usually no lower than 50°F. *See id.* at 10. Maximum exposure durations have been "set at two-thirds the time at which, based on extensive medical literature and experience, hypothermia could be expected to develop in healthy individuals who are submerged in water of the same temperature" in order to provide adequate safety margins against hypothermia. *Id.* This technique can easily be used in combination with other techniques and "is intended to weaken the detainee's resistance and persuade him to cooperate with interrogators." *Id.* at 9.

Stress positions and wall standing are used to induce muscle fatigue and the attendant discomfort. *See Techniques* at 9 (describing techniques); *see also PREAL Manual* at 20 (explaining that stress positions are used "to create a distracting pressure" and "to humiliate or insult"). The use of these techniques is "usually self-limiting in that temporary muscle fatigue usually leads to the [detainee's] being unable to maintain the stress position after a period of time." *Background Paper* at 8. We understand that these techniques are used only to induce temporary muscle fatigue; neither of these techniques is designed or expected to cause severe physical pain. *See Techniques* at 33-34.

Cramped confinement involves placing the detainee in an uncomfortably small container. Such confinement may last up to eight hours in a relatively large container or up to two hours in a smaller container. *See Background Paper* at 8; *Techniques* at 9. The technique "accelerate[s] the physical and psychological stresses of captivity." *PREAL Manual* at 22. In OMS's view, however, cramped confinement "ha[s] not proved particularly effective" because it provides "a safehaven offering respite from interrogation." *OMS Guidelines* at 16.

The waterboard is generally considered to be "the most traumatic of the enhanced interrogation techniques," *id.* at 17, a conclusion with which we have readily agreed, *see Techniques* at 41. In this technique, the detainee is placed face-up on a gurney with his head inclined downward. A cloth is placed over his face on which cold water is then poured for periods of at most 40 seconds. This creates a barrier through which it is either difficult or impossible to breathe. The technique thereby "induce[s] a sensation of drowning." *Id.* at 13. The waterboard may be authorized for, at most, one 30-day period, during which the technique can actually be applied on no more than five days, [redacted] describing, in detail, these and additional limitations); *see also* Letter from [redacted] Associate General Counsel, Central Intelligence Agency, to Dan Levin, [redacted] Acting General Counsel, Office of Legal Counsel at 1 (Aug. 18, 2004) ("*August [redacted] Letter*"). Further, there can be no more than two sessions in any 24-hour period. Each session—the time during which the detainee is strapped to the waterboard—lasts no more than two hours. There may be at most six applications of water lasting 10 seconds or longer during any session, and water may be applied for a total of no more than 12 minutes during any 24-hour period. *See Techniques* at 14.

As we have explained, these limitations have been established with extensive input from OMS, based on experience to date with this technique and OMS's professional judgment that the health risks associated with use of the waterboard on a healthy individual subject to these limitations would be 'medically acceptable.'" *Id.* at 14 (citing *OMS Guidelines* at 18-19). In addition, although the waterboard induces fear and panic, it is not painful. *See id.* at 13.

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II.

We conclude, first, that the CIA interrogation program does not implicate United States obligations under Article 16 of the CAT because Article 16 has limited geographic scope. By its terms, Article 16 places no obligations on a State Party outside "territory under its jurisdiction." The ordinary meaning of the phrase, the use of the phrase elsewhere in the CAT, and the negotiating history of the CAT demonstrate that the phrase "territory under its jurisdiction" is best understood as including, at most, areas where a State exercises territory-based jurisdiction; that is, areas over which the State exercises at least de facto authority as the government. As we explain below, based on CIA assurances, we understand that the interrogations conducted by the CIA do not take place in any "territory under [United States] jurisdiction" within the meaning of Article 16. We therefore conclude that the CIA interrogation program does not violate the obligations set forth in Article 16.

Apart from the terms of Article 16 as stated in the CAT, the United States undertook its obligations under the CAT subject to a Senate reservation that provides: "[T]he United States considers itself bound by the obligation under Article 16 . . . only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." There is a strong argument that in requiring this reservation, the Senate intended to limit United States obligations under Article 16 to the existing obligations already imposed by these Amendments. These Amendments have been construed by the courts not to extend protections to aliens outside the United States. The CIA has also assured us that the interrogation techniques are not used within the United States or against United States persons, including both U.S. citizens and lawful permanent resident aliens.

A.

"[W]e begin with the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991) (quotation marks omitted). *See also* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340 (1980) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."). [12] Article 16 states that "[e]ach State Party shall undertake to prevent *in any territory under its jurisdiction* other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture." CAT Art. 16(1) (emphasis added). [13] This territorial limitation is confirmed

[12] The United States is not a party to the Vienna Convention and is therefore not bound by it. Nevertheless, Article 31(1)'s emphasis on textual analysis reflects international interpretive practice. *See, e.g.*, Richard Bernhardt, "Interpretation in International Law," *in* 2 *Encyclopedia of Public International Law* 1416, 1420 (1995) ("According to the prevailing opinion, the starting point in any treaty interpretation is the treaty text and the normal or ordinary meaning of its terms.").

[13] Article 16(1) provides in full:

> Each State Party undertakes to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in

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by Article 16's explication of this basic obligation: "In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment." *Id.* Articles 11 through 13 impose on each State Party certain specific obligations, each of which is expressly limited to "territory under its jurisdiction." *See infra* pp. 18-19 (describing requirements). Although Article 10, which as incorporated in Article 16 requires each State Party to "ensure that education and information regarding the prohibition" against cruel, inhuman, or degrading treatment or punishment is given to specified government personnel, does not expressly limit its obligation to "territory under [each State's] jurisdiction," Article 10's reference to the "prohibition" against such treatment or punishment can only be understood to refer to the territorially limited obligation set forth in Article 16.

The obligations imposed by the CAT are thus more limited with respect to cruel, inhuman, or degrading treatment or punishment than with respect to torture. To be sure, Article 2, like Article 16, imposes an obligation on each State Party to prevent torture "in any territory under its jurisdiction." Article 4(1), however, separately requires each State Party to "ensure that *all* acts of torture are offenses under its criminal law." (Emphasis added.) The CAT imposes no analogous requirement with respect to cruel, inhuman, or degrading treatment or punishment.[14]

Because the CAT does not define the phrase "territory under its jurisdiction," we turn to the dictionary definitions of the relevant terms. *See Olympic Airways v. Husain*, 540 U.S. 644, 654-55 (2004) (drawing on dictionary definitions in interpreting a treaty); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 180-81 (1993) (same). Common dictionary definitions of "jurisdiction" include "[t]he right and power to interpret and apply the law[; a]uthority or control[; and t]he territorial range of authority or control." *American Heritage Dictionary* 711 (1973); *American Heritage Dictionary* 978 (3d ed. 1992) (same definitions); *see also Black's Law Dictionary* 766 (5th ed. 1979) ("[a]rea of authority"). Common dictionary definitions of "territory" include "[a]n area of land[; or t]he land and waters under the jurisdiction of a state, nation, or sovereign." *American Heritage Dictionary* at 1329 (1973); *American Heritage Dictionary* at 1854 (3d ed. 1992) (same); *see also Black's Law Dictionary* at 1321 ("A part of a country separated from the rest, and subject to a particular jurisdiction. Geographical area under the jurisdiction of another country or sovereign power."); *Black's Law Dictionary* at 1512 (8th ed. 2004) ("[a] geographical area included within a particular government's jurisdiction; the portion of the earth's surface that is in a state's exclusive possession and control"). Taking these

article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

[14] In addition, although Article 2(2) emphasizes that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture," the CAT has no analogous provision with respect to cruel, inhuman, or degrading treatment or punishment. Because we conclude that the CIA interrogation program does not implicate United States obligations under Article 16 and that the program would conform to United States obligations under Article 16 even if that provision did apply, we need not consider whether the absence of a provision analogous to Article 2(2) implies that State Parties could derogate from their obligations under Article 16 in extraordinary circumstances.

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definitions together, we conclude that the most plausible meaning of the term "territory under its jurisdiction" is the land over which a State exercises authority and control as the government. *Cf. Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004) (concluding that "the territorial jurisdiction of the United States" subsumes areas over which "the United States exercises complete jurisdiction and control") (internal quotation marks omitted); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123 (1923) ("It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control[.]").

This understanding of the phrase "territory under its jurisdiction" is confirmed by the way the phrase is used in various provisions throughout the CAT. *See Air France v. Saks*, 470 U.S. 392, 398 (1985) (treaty drafters "logically would . . . use[] the same word in each article" when they intend to convey the same meaning throughout); J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 53 (1988) ("*CAT Handbook*") (noting that "it was agreed that the phrase 'territory under its jurisdiction' had the same meaning" in different articles of the CAT).

For example, Article 5 provides:

> Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 [requiring each State Party to criminalize all acts of torture] in the following cases:
>
> (a) When the offences are committed in any *territory under its jurisdiction* or on board a ship or aircraft registered in that State;
>
> (b) When the alleged offender is a national of that State;
>
> (c) When the victim is a national of that State if that State considers it appropriate.

CAT art. 5(1) (emphasis added). The CAT thereby distinguishes jurisdiction based on territory from jurisdiction based on the nationality of either the victim or the perpetrator. Paragraph (a) also distinguishes jurisdiction based on territory from jurisdiction based on registry of ships and aircraft. To read the phrase "territory under its jurisdiction" to subsume these other types of jurisdiction would eliminate these distinctions and render most of Article 5 surplusage. Each of Article 5's provisions, however, "like all the other words of the treaty, is to be given a meaning, if reasonably possible, and rules of construction may not be resorted to to render it meaningless or inoperative." *Factor v. Laubenheimer*, 290 U.S. 276, 303-04 (1933).

Articles 11 through 13, moreover, use the phrase "territory under its jurisdiction" in ways that presuppose that the relevant State exercises the traditional authorities of the government in such areas. Article 11 requires each State to "keep under systematic review . . . arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction." Article 12 mandates that "[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is

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reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." Similarly, Article 13 requires "[e]ach State Party [to] ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities." These provisions assume that the relevant State exercises traditional governmental authority—including the authority to arrest, detain, imprison, and investigate crime—within any "territory under its jurisdiction."

Three other provisions underscore this point. Article 2(1) requires each State Party to "take effective legislative, administrative, judicial or other measures to prevent such acts of torture in any territory under its jurisdiction." "Territory under its jurisdiction," therefore, is most reasonably read to refer to areas over which States exercise broad governmental authority—the areas over which States could take legislative, administrative, or judicial action. Article 5(2), moreover, enjoins "[e]ach State Party . . . to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him." Article 7(1) similarly requires State Parties to extradite suspects or refer them to "competent authorities for the purpose of prosecution." These provisions evidently contemplate that each State Party has authority to extradite and prosecute those suspected of torture in any "territory under its jurisdiction." That is, each State Party is expected to operate as the government in "territory under its jurisdiction."[15]

This understanding is supported by the negotiating record. *See Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) ("Because a treaty ratified by the United States is not only the law of this land, see U.S. Const., Art. II, § 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history . . . ."); Vienna Convention on the Law of Treaties, art. 32 (permitting recourse to "the preparatory work of the treaty and the circumstances of its conclusion" *inter alia* "to confirm" the ordinary meaning of the text). The original Swedish proposal, which was the basis for the first draft of the CAT, contained a predecessor to Article 16 that would have required that "[e]ach State Party undertake[] to ensure that [a proscribed act] does not take place *within its jurisdiction*." Draft International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, submitted by Sweden on January 18, 1978, arts. 2-3, E/CN.4/1285, *in CAT Handbook* app. 6, at 203 (emphasis added); *CAT Handbook* at 47. France objected that the phrase "within its jurisdiction" was too broad. For example, it was concerned that the phrase might extend to signatories' citizens located in territory belonging to other nations. *See* Report of the Pre-Sessional Working Group, E/CN.4/L.1470 (1979), *reprinted in*

[15] Article 6 may suggest an interpretation of the phrase "territory under its jurisdiction" that is potentially broader than the traditional notion of "territory." Article 6(2) directs a State Party "in whose territory a person alleged to have committed [certain offenses] is *present*" to take the suspected offender into custody. (Emphases added.) The use of the word "territory" in Article 6 rather than the phrase "territory under its jurisdiction" suggests that the terms have distinct meanings. *See Factor*, 290 U.S. at 303-04 (stating that treaty language should not be construed to render certain phrases "meaningless or inoperative"). Article 6 may thus support the position, discussed below, that "territory under its jurisdiction" may extend beyond sovereign territory to encompass areas where a State exercises de facto authority as the government, such as occupied territory. *See infra* p. 28. Article 20, which refers to "the territory of a State Party" may support the same inference.

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Report of the United Nations Commission on Human Rights, E/CN.4/1347 35, 40 (1979); *CAT Handbook* at 48. Although France suggested replacing "within its jurisdiction" with "in its territory," the phrase "any territory under its jurisdiction" was chosen instead. *See CAT Handbook* at 48.

There is some evidence that the United States understood these phrases to mean essentially the same thing. *See, e.g.*, Exec. Report 101-30, 101st Cong., 2d Sess., 23-24 (Aug. 30, 1990) (Senate Foreign Relations Committee Report) (suggesting that the phrase "in any territory under its jurisdiction" would impose obligations on a State Party with respect to conduct committed "in its territory" but not with respect to conduct "occurring abroad"); *Convention Against Torture: Hearing Before the Committee on Foreign Relations, United States Senate*, S. Hrg. 101-718 at 7 (Jan. 30, 1990) (prepared statement of Hon. Abraham D. Sofaer, Legal Adviser, Department of State) (stating that under Article 2, State Parties would be obligated "to take administrative, judicial or other measures to prevent torture *within their territory*") (emphasis added). Other evidence, however, suggests that the phrase "territory under its jurisdiction" has a somewhat broader meaning than "in its territory." According to the record of the negotiations relating to Articles 10 and 13 of the CAT, "[i]n response to the question on the scope of the phrase 'territory under its jurisdiction' as contained in these articles, it was said that it was intended to cover, *inter alia*, territories still under colonial rule and occupied territory." U.N. Doc. E/CN.4/1367, Mar. 5, 1980, at 13. And one commentator has stated that the negotiating record suggests that the phrase "territory under its jurisdiction" "is not limited to a State's land territory, its territorial sea and the airspace over its land and sea territory, but it also applies to territories under military occupation, to colonial territories and to any other territories over which a State has factual control." *Id.* at 131. Others have suggested that the phrase would also reach conduct occurring on ships and aircraft registered in a State. *See CAT Handbook* at 48; Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20, at 3 (1988) (Secretary of State Schultz) (asserting that "territory under its jurisdiction" "refers to all places that the State Party controls as a governmental authority, including ships and aircraft registered in that State").[16]

Thus, although portions of the negotiating record of the CAT may support reading the phrase "any territory under its jurisdiction" to include not only sovereign territory but also areas subject to de facto government authority (and perhaps registered ships and aircraft), the negotiating record as a whole tends to confirm that the phrase does not extend to places where a State Party does not exercise authority as the government.

The CIA has assured us that the interrogations at issue here do not take place within the sovereign territory or special maritime and territorial jurisdiction ("SMTJ") of the United States. *See* 18 U.S.C. § 5 (defining "United States"); *Id.* § 7 (defining SMTJ). As relevant here, we

[16] This suggestion is in tension with the text of Article 5(1)(a), which seems to distinguish "territory under [a State's] jurisdiction" from "ship[s] or aircraft registered in that State." *See Chew v. Korean Air Lines, Ltd.*, 498 U.S. 122, 134 n.5 (1989) (noting that where treaty text is not perfectly clear, the "natural meaning" of the text "could properly be contradicted only by clear drafting history"). Because the CIA has assured us that its interrogations do not take place on ships or aircraft registered in the United States, we need not resolve this issue here.

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believe that the phrase "any territory under its jurisdiction" certainly reaches no further than the sovereign territory and the SMTJ of the United States.[17] Indeed, in many respects, it probably does not reach this far. Although many provisions of the SMTJ invoke territorial bases of jurisdiction, other provisions assert jurisdiction on other grounds, including, for example, sections 7(5) through 7(9), which assert jurisdiction over certain offenses committed by or against United States citizens. Accordingly, we conclude that the interrogation program does not take place within "territory under [United States] jurisdiction" and therefore does not violate Article 16—even absent the Senate's reservation limiting United States obligations under Article 16, which we discuss in the next section.

B.

As a condition to its advice and consent to the ratification of the CAT, the Senate required a reservation that provides that the United States is

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

Cong. Rec. 36,198 (1990). This reservation, which the United States deposited with its instrument of ratification, is legally binding and defines the scope of United States obligations under Article 16 of the CAT. *See Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 33 (1987) (Reservations deposited with the instrument of ratification "are generally binding . . . both internationally and domestically . . . in . . . subsequent interpretation of the treaty.").[18]

Under the terms of the reservation, the United States is obligated to prevent "cruel, inhuman or degrading treatment" only to the extent that such treatment amounts to "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments." Giving effect to the terms of this reservation, treatment that is not

[17] As we have explained, there is no argument that "territory under [a State's] jurisdiction" might also include occupied territory. Accordingly, at least absent the Senate's reservation, Article 16's obligations might extend to occupied territory. Because the United States is not currently an occupying power within the meaning of the laws of war anywhere in the world, we need not decide whether occupied territory is "territory under [United States] jurisdiction."

[18] "The Senate's right to qualify its consent to ratification by reservations, amendments and interpretations was established through a reservation to the ratification of 1788." Quincy Wright, *The Control of American Foreign Relations* 253 (1922), and has been frequently exercised since then. The Supreme Court has indicated its acceptance of this practice. *See Haver v. Yaker*, 76 U.S. (9 Wall.) 32, 35 (1869); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 107 (1801). *See also Constitutionality of Proposed Conditions to Senate Consent to the Interim Convention on the Conservation of North Pacific Fur Seals*, 10 Op. O.L.C. 12, 15 (1986) ("[T]he Senate's practice of conditioning its consent to particular treaties is well-established.").

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"prohibited by" these amendments would not violate United States obligations as limited by the reservation.

Conceivably, one might read the text of the reservation as limiting only the substantive (as opposed to the territorial) reach of United States obligations under Article 16. That would not be an unreasonable reading of the text. Under this view, the reservation replaced only the phrase "cruel, inhuman or degrading treatment or punishment" and left untouched the phrase "in any territory under its jurisdiction," which defines the geographic scope of the Article. The text of the reservation, however, is susceptible to another reasonable reading—one suggesting that the Senate intended to ensure that the United States would, with respect to Article 16, undertake no obligations not already imposed by the Constitution itself. Under this reading, the reference to the treatment or punishment prohibited by the constitutional provisions does not distinguish between the substantive scope of the constitutional prohibitions and their geographic scope. As we discuss below, this second reading is strongly supported by the Senate's ratification history of the CAT.

The Summary and Analysis of the CAT submitted by the President to the Senate in 1988 expressed concern that "Article 16 is arguably broader than existing U.S. law." Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *in* S. Treaty Doc. No. 100-20, at 15. "In view of the ambiguity of the terms," the Executive Branch suggested "that U.S. obligations under this article [Article 16] should be limited to *conduct prohibited by the U.S. Constitution*." S. Exec. Rep. No. 101-30, at 8 (1990) (emphasis added); *see also id.* at 25-26. Accordingly, it proposed what became the Senate's reservation in order "[t]o make clear that the United States construes the phrase ["cruel, inhuman or degrading treatment or punishment"] to be coextensive with its constitutional guarantees against cruel, unusual, and inhumane treatment." *Id.* at 25-26; S. Treaty Doc. No. 100-20, at 15 (same). As State Department Legal Adviser Abraham D. Sofaer explained, "because the Constitution of the United States directly addresses this area of the law . . . [the reservation] would limit our obligations under this Convention to the prescriptions already covered in our Constitution." *Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 11 (1990) (prepared statement). The Senate Foreign Relations Committee expressed the same concern about the potential scope of Article 16 and recommended the same reservation to the Senate. *See* S. Exec. Rep. No. 101-30, at 8, 25-26.

Furthermore, the Senate declared that Articles 1 through 16 of the CAT are not self-executing, *see* Cong. Rec. 36,198 (1990), and the discussions surrounding this declaration in the ratification history also indicate that the United States did not intend to undertake any obligations under Article 16 that extended beyond those already imposed by the Constitution. The Administration expressed the view that "as indicated in the original Presidential transmittal, existing Federal and State law appears sufficient to implement the Convention," except that "new Federal legislation would be required *only to establish criminal jurisdiction under Article 5*." Letter for Senator Pressler, from Janet Mullins, Assistant Secretary, Legislative Affairs, Department of State (April 4, 1990), *in* S. Exec. Rep. No. 101-30, at 41 (emphasis added). It was understood that "the majority of the obligations to be undertaken by the United States pursuant to the Convention [were] already covered by existing law" and that "additional implementing legislation [would] be needed *only with respect to article 5*." S. Exec. Rep. No. 101-30, at 10

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(emphasis added). Congress then enacted 18 U.S.C. §§ 2340-2340A, the only "necessary legislation to implement" United States obligations under the CAT, noting that the United States would "not become a party to the Convention until the necessary implementing legislation is enacted," S. Rep. No. 103-107, at 366 (1993). Reading Article 16 to extend the substantive standards of the Constitution in contexts where they did not already apply would be difficult to square with the evident understanding of the United States that existing law would satisfy its obligations under the CAT except with respect to Article 5. The ratification history thus strongly supports the view that United States obligations under Article 16 were intended to reach no further—substantively, territorially, or in any other respect—than its obligations under the Fifth, Eighth, and Fourteenth Amendments.

The Supreme Court has repeatedly suggested in various contexts that the Constitution does not apply to aliens outside the United States. *See, e.g., United States v. Belmont*, 301 U.S. 324, 332 (1937) ("[O]ur Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . . ."); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (noting that cases relied upon by an alien asserting constitutional rights "establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"). Federal courts of appeals, in turn, have held that "[t]he Constitution does not extend its guarantees to nonresident aliens living outside the United States," *Palestinian Women's Health Collective Soc'y v. A.H. Robins Co.*, 829 F.2d 1359, 1363 (4th Cir. 1987); that "non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States," *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) (per curiam); and that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise," *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (quoting *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)).[19]

As we explain below, it is the Fifth Amendment that is potentially relevant in the present context. With respect to that Amendment, the Supreme Court has "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Verdugo-Urquidez*, 494 U.S. at 269. In *Verdugo-Urquidez*, 494 U.S. at 269, the Court noted its "emphatic" "rejection of extraterritorial application of the Fifth Amendment" in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which rejected "[t]he doctrine that the term 'any person' in the Fifth Amendment spreads its protection over alien enemies anywhere in the world engaged in hostilities against us," *Id.* at 782. *Accord Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Verdugo-Urquidez* and *Eisentrager* and noting that "[i]t is well established that" Fifth Amendment protections "are unavailable to aliens outside of our geographic borders"). Federal

[19] The Restatement (Third) of Foreign Relations Law asserts that "[a]lthough the matter has not been authoritatively adjudicated, at least some actions by the United States in respect to foreign nationals outside the country are also subject to constitutional limitations." *Id.* § 722, cmt. m. This statement is contrary to the authorities cited in the text.

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courts of appeals have similarly held that "non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections." *Jifry v. F.A.A.*, 370 F.3d 1174, 1182 (D.C. Cir. 2004); *see also Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000) (relying on *Eisentrager* and *Verdugo-Urquidez* to conclude that an alien could not state a due process claim for torture allegedly inflicted by United States agents abroad), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002); *Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1428-29 (11th Cir. 1995) (relying on *Eisentrager* and *Verdugo-Urquidez* to conclude that aliens held at Guantanamo Bay lack Fifth Amendment rights).[20]

The reservation required by the Senate as a condition of its advice and consent to the ratification of the CAT thus tends to confirm the territorially limited reach of U.S. obligations under Article 16. Indeed, there is a strong argument that, by limiting United States obligations under Article 16 to those that certain provisions of the Constitution already impose, the Senate's reservation limits the territorial reach of Article 16 even more sharply than does the text of Article 16 standing alone. Under this view, Article 16 would impose no obligations with respect

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[20] The Court's decision in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), is not to the contrary. To be sure, the Court stated in a footnote that:

> Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States."

Id. at 2698 n.15. We believe this footnote is best understood to leave intact the Court's settled understanding of the Fifth Amendment. First, the Court limited its holding to the issue before it: whether the federal courts have *statutory jurisdiction* over habeas petitions brought by such aliens held at Guantanamo as enemy combatants. *See id.* at 2699 ("Whether and what further proceedings may become necessary . . . are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."). Indeed, the Court granted the petition for writ of certiorari "limited to the following Question: Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." *Rasul v. Bush*, 540 U.S. 1003 (2003).

Second, the footnote relies on a portion of Justice Kennedy's concurrence in *Verdugo-Urquidez* "and the cases cited therein," *Rasul*, 124 S. Ct. at 2698 n.15. In this portion of Justice Kennedy's *Verdugo-Urquidez* concurrence, Justice Kennedy discusses the *Insular Cases*. These cases stand for the proposition that although not every provision of the Constitution applies in United States territory overseas, certain core constitutional protections may apply in certain insular territories of the United States. *See also, e.g., Reid v. Covert*, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring in judgment) (discussing *Insular Cases*); *Balzac v. Porto Rico*, 258 U.S. 298 (1922). Given that the Court in *Rasul* pointed to GTMO's unique status as territory subject to the long-term, exclusive jurisdiction and control of the United States, "*Rasul*, 124 S. Ct. at 2698 n.15; in the very sentence that cited Justice Kennedy's concurrence, it is conceivable that footnote 15 might reflect, at most, a willingness to consider whether GTMO is similar in significant respects to the territories at issue in the *Insular Cases*. *See also id.* at 2696 (noting that under the agreement with Cuba "the United States exercises complete jurisdiction and control over the Guantanamo Bay Naval Base") (internal quotation marks omitted); *id.* at 2700 (Kennedy, J., concurring) (asserting that "Guantanamo Bay is in every practical respect a United States territory" and explaining that "[w]hat matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay").

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to aliens outside the United States.[21] And because the CIA has informed us that these techniques are not authorized for use against United States persons, or within the United States, they would not, under this view, violate Article 16. Even if the reservation is read only to confirm the territorial limits explicit in Article 16, however, or even if it is read not to bear on this question at all, the program would still not violate Article 16 for the reasons discussed in Part II.A. Accordingly, we need not decide here the precise effect, if any, of the Senate reservation on the geographic scope of U.S. obligations under Article 16.[22]

III.

You have also asked us to consider whether the CIA interrogation program would violate the substantive standards applicable to the United States under Article 16 if, contrary to the conclusions reached in Part II above, those standards did extend to the CIA interrogation program. Pursuant to the Senate's reservation, the United States is bound by Article 16 to prevent "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." As we explain, the relevant test is whether use of the CIA's enhanced interrogation techniques constitutes government conduct that "shocks the conscience." Based on our understanding of the relevant case law and the CIA's descriptions of the interrogation program, we conclude that use of the enhanced interrogation techniques, subject to all applicable conditions, limitations, and safeguards, does not "shock the conscience." We emphasize, however, that this analysis calls for the application of a somewhat subjective test with only limited guidance from the Court. We therefore cannot predict with confidence whether a court would agree with our conclusions, though, as discussed more fully below, we believe the interpretation of Article 16's substantive standard is unlikely to be subject to judicial inquiry.

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[21] Additional analysis may be required in the case of aliens entitled to lawful permanent resident status. *Compare Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), *with Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). You have informed us that the CIA does not use these techniques on any United States persons, including lawful permanent residents, and we do not here address United States obligations under Article 16 with respect to such aliens.

[22] Our analysis is not affected by the recent enactment of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005). Section 1031(a)(1) of that law provides that

> [n]one of the funds appropriated or otherwise made available by this Act shall be obligated or expended to subject any person in the custody or under the physical control of the United States to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.

119 Stat. at 256. Because the Senate reservation, as deposited with the United States instrument of ratification, defines United States obligations under Article 16 of the CAT, this statute does not prohibit the expenditure of funds for conduct that does not violate United States obligations under Article 16, as limited by the Senate reservation. Furthermore, this statute itself defines "cruel, inhuman, or degrading treatment or punishment" as "the cruel, unusual, and inhumane treatment or punishment prohibited by the fifth amendment, eighth amendment, or fourteenth amendment to the Constitution of the United States." *Id.* § 1031(b)(2).

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century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience."[24]

B.

We must therefore determine whether the CIA interrogation program involves conduct that "shocks the conscience." The Court has indicated that whether government conduct can be said to "shock the conscience" depends primarily on whether the conduct is "arbitrary in the constitutional sense," *Lewis*, 523 U.S. at 846 (internal quotation marks omitted); that is, whether it amounts to the "exercise of power without any reasonable justification in the service of a legitimate governmental objective," *id.* "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level," *id.* at 849, although, in some cases, deliberate indifference to the risk of inflicting such unjustifiable injury might also "shock the conscience," *id.* at 850-51. The Court has also suggested that it is appropriate to consider whether, in light of "traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them," conduct "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 847 n.8.[25]

Several considerations complicate our analysis. First, there are relatively few cases in which the Court has analyzed whether conduct "shocks the conscience," and these cases involve contexts that differ dramatically from the CIA interrogation program. Further, the Court has emphasized that there is "no calibrated yard stick" with which to determine whether conduct "shocks the conscience." *Id.* at 847. To the contrary, "Rules of due process are not . . . subject to mechanical application in unfamiliar territory." *Id.* at 850. A claim that government conduct "shocks the conscience," therefore, requires "an exact analysis of circumstances." *Id.* The Court has explained:

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[24] Because what is at issue under the text of the Senate reservation is the subset of "cruel, inhuman or degrading treatment" that is "the cruel, unusual and inhumane treatment . . . prohibited by the Fifth . . . Amendment[]," we do not believe that the procedural aspects of the Fifth Amendment are relevant, at least in the context of interrogation techniques employed by the criminal justice system. Nor, given the language of Article 16 and the reservation, do we believe that United States obligations under this Article include other aspects of the Fifth Amendment, such as the Takings Clause or the various privacy rights that the Supreme Court has found to be protected by the Due Process Clause.

[25] It appears that conscience-shocking conduct is a necessary but perhaps not sufficient condition to establishing that executive conduct violates substantive due process. *See Lewis*, 523 U.S. at 847 n.8 ("Only if the *necessary condition* of egregious behavior were satisfied would there be a *possibility* of recognizing a substantive due process right to be free of such executive action, and only then might there be a debate about the sufficiency of historical examples of enforcement of the right claimed, or its recognition in other ways.") (emphases added); *see also, e.g., Terrell v. Larsen*, 396 F.3d 975, 978 n.1 (8th Cir. 2005) ("To violate substantive due process, the conduct of an executive official must be constitutionally shocking and must violate a fundamental right."); *Shoemaker v. Hoff*, 346 F.3d 1178, 1181 (8th Cir. 2003). It is therefore arguable that conscience-shocking behavior would not violate the Constitution if it did not violate a fundamental right or if it were narrowly tailored to serve a compelling state interest. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Because we conclude that the CIA interrogation program does not "shock the conscience," we need not address these issues here.

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A.

Although, pursuant to the Senate's reservation, United States obligations under Article 16 extend to "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States," only the Fifth Amendment is potentially relevant here. The Fourteenth Amendment provides, in relevant part: "No *State* shall . . . deprive any person of life, liberty, or property, without due process of law." (Emphasis added.) This Amendment does not apply to actions taken by the federal Government. *See, e.g., San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (explaining that the Fourteenth Amendment "does not apply" to the federal Government); *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954) (noting that the Fifth Amendment rather than the Fourteenth Amendment applies to actions taken by the District of Columbia). The Eighth Amendment prohibits the infliction of "cruel and unusual *punishments*." (Emphasis added.) As the Supreme Court has repeatedly held, the Eighth Amendment does not apply until there has been a formal adjudication of guilt. *E.g., Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979); *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977). *See also In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480 (D.D.C. 2005) (dismissing detainees' claims based on Eighth Amendment because "the Eighth Amendment applies only after an individual is convicted of a crime") (stayed pending appeal). The same conclusion concerning the limited applicability of the Eighth Amendment under Article 16 was expressly recognized by the Senate and the Executive Branch during the CAT ratification deliberations:

> The Eighth Amendment prohibition of cruel and unusual punishment is, of the three [constitutional provisions cited in the Senate reservation], the most limited in scope, as this amendment has consistently been interpreted as protecting only "those convicted of crimes." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). The Eighth Amendment does, however, afford protection against torture and ill-treatment of persons in prison and similar situations of *involuntary punishment*.

Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *in* S. Treaty Doc. No. 100-20, at 9 (emphasis added). Because the high value detainees on whom the CIA might use enhanced interrogation techniques have not been convicted of *any* crime, the substantive requirements of the Eighth Amendment would not be relevant here, even if we assume that Article 16 has application to the CIA's interrogation program.[25]

The Fifth Amendment, however, is not subject to these same limitations. As potentially relevant here, the substantive due process component of the Fifth Amendment protects against executive action that "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("To this end, for half a

[25] To be sure, treatment amounting to punishment (let alone, cruel and unusual punishment) generally cannot be imposed on individuals who have not been convicted of crimes. But this prohibition *flows* from the Fifth Amendment rather than the Eighth. *See Wolfish*, 441 U.S. at 535 n.16; *United States v. Salerno*, 481 U.S. 739, 746-47 (1987). *See also infra* note 26.

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> The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other considerations, fall short of such a denial.

Id. at 850 (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)) (alteration in *Lewis*). Our task, therefore, is to apply in a novel context a highly fact-dependent test with little guidance from the Supreme Court.

I.

We first consider whether the CIA interrogation program involves conduct that is "constitutionally arbitrary." We conclude that it does not. Indeed, we find no evidence of "conduct intended to injure in some way unjustifiable by any government interest," *id.* at 849, or of deliberate indifference to the possibility of such unjustifiable injury, *see id.* at 853.

As an initial matter, the Court has made clear that whether conduct can be considered to be constitutionally arbitrary depends vitally on whether it furthers a government interest, and, if it does, the nature and importance of that interest. The test is not merely whether the conduct is "intended to injure," but rather whether it is "intended to injure *in some way unjustifiable by any government interest*." *Id.* at 849 (emphasis added). It is the "exercise of power *without any reasonable justification in the service of a legitimate governmental objective*" that can be said to "shock the conscience." *Id.* at 846 (emphasis added). In *United States v. Salerno*, 481 U.S. 739, 748 (1987), for example, the Court explained that the Due Process Clause "lays down [no] . . . categorical imperative," and emphasized that the Court has "repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *See also Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2646 (2004) (plurality opinion) (explaining that the individual's interests must be weighed against the government's). The government's interest is thus an important part of the context that must be carefully considered in evaluating an asserted violation of due process.[26]

[26] The pretrial detention context is informative. Analysis of the government's interest and purpose in imposing a condition of confinement is essential to determining whether there is a violation of due process in this context. *See Salerno*, 481 U.S. at 747-50. The government has a legitimate interest in "effectuat[ing] this] detention," *Wolfish*, 441 U.S. at 537, which supports government action that "may reasonably be connected" to the detention, *Salerno*, 481 U.S. at 747 (quoting *Wolfish*, 441 U.S. at 538). By contrast, inflicting cruel and unusual punishment on such detainees would violate due process because the government has no legitimate interest in inflicting punishment prior to conviction. *See Wolfish*, 441 U.S. at 535 & n.16.

In addition, *Lewis* suggests that the Court's Eighth Amendment jurisprudence sheds at least some light on the due process inquiry. *See* 523 U.S. at 850-53 (analogizing the due process inquiry to the Eighth Amendment context and noting that in both cases "liability should turn on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm'") (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). The interrogation program we consider does not involve or allow

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Al Qaeda's demonstrated ability to launch sophisticated attacks causing mass casualties within the United States and against United States interests worldwide, as well as its continuing efforts to plan and to execute such attacks, *see supra* p. 9, indisputably pose a grave and continuing threat. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citations omitted); *see also Salerno*, 481 U.S. at 748 (noting that "society's interest is at its peak" "in times of war or insurrection"). It is this paramount interest that the Government seeks to vindicate through the interrogation program. Indeed, the program, which the CIA believes "has been a key reason why al-Qa'ida has failed to launch a spectacular attack in the West since 11 September 2001," *Effectiveness Memo* at 2, directly furthers that interest, producing substantial quantities of otherwise unavailable actionable intelligence. As detailed above, ordinary interrogation techniques had little effect on either KSM or Zubaydah. Use of enhanced techniques, however, led to critical, actionable intelligence such as the discovery of the Gunbe Cell, which was tasked with executing KSM's planned Second Wave attacks against Los Angeles. Interrogations of [redacted] detainees and comparatively lower-tier high value detainees [redacted] have also greatly increased the CIA's understanding of the enemy and its plans.

As evidenced by our discussion in Part I, the CIA goes to great lengths to ensure that the techniques are applied only as reasonably necessary to protect this paramount interest in "the security of the Nation." Various aspects of the program ensure that enhanced techniques will be used only in the interrogations of the detainees who are most likely to have critical, actionable intelligence. The CIA screening procedures, which the CIA imposes in addition to the standards applicable to activities conducted pursuant to paragraph four of the Memorandum of Notification, ensure that the techniques are not used unless the CIA reasonably believes that the detainee is a "senior member of al-Qai'da or [its affiliates]," *and* the detainee has "knowledge of imminent terrorist threats against the USA" or has been directly involved in the planning of attacks. *January 4 [redacted] Letter* at 4; *supra* p. 5. The fact that enhanced techniques have been used to date in the interrogations of only 28 high value detainees out of the 94 detainees in CIA custody demonstrates this selectivity.

Use of the waterboard is limited still further, requiring "credible intelligence that a terrorist attack is imminent; . . . substantial and credible indicators that the subject has actionable intelligence that can prevent, disrupt or delay this attack; and [a determination that o]ther interrogation methods have failed to elicit the information [and that] . . . other . . . methods are unlikely to elicit this information *within the perceived time limit for preventing the attack*." *August 2 Rhue Letter* (attachment). Once again, the CIA's practice confirms the program's selectivity. CIA interrogators have used the waterboard on only three detainees to date—KSM, Zubaydah, and Al-Nashiri—and have not used it at all since March 2003.

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the malicious or sadistic infliction of harm. Rather, as discussed in the text, interrogation techniques are used only as reasonably deemed necessary to further a government interest of the highest order, and have been carefully designed to avoid inflicting severe pain or suffering or any other lasting or significant harm and to minimize the risk of any harm that does not further this government interest. *See infra* pp. 29-31.

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Moreover, enhanced techniques are considered only when the on-scene interrogation team considers them necessary because a detainee is withholding or manipulating important, actionable intelligence or there is insufficient time to try other techniques. For example, as recounted above, the CIA used enhanced techniques in the interrogations of KSM and Zubaydah only after ordinary interrogation tactics had failed. Even then, CIA Headquarters must make the decision whether to use enhanced techniques in any interrogation. Officials at CIA Headquarters can assess the situation based on the interrogation team's reports and intelligence from a variety of other sources and are therefore well positioned to assess the importance of the information sought.

Once approved, techniques are used only in escalating fashion so that it is unlikely that a detainee would be subjected to more duress than is reasonably necessary to elicit the information sought. Thus, no technique is used on a detainee unless use of that technique at that time appears necessary to obtaining the intelligence. And use of enhanced techniques ceases "if the detainee is judged to be consistently providing accurate intelligence or if he is no longer believed to have actionable intelligence." *Techniques* at 5. Indeed, use of the techniques usually ends after just a few days when the detainee begins participating. Enhanced techniques, therefore, would not be used on a detainee not reasonably thought to possess important, actionable intelligence that could not be obtained otherwise.

Not only is the interrogation program closely tied to a government interest of the highest order, it is also designed, through its careful limitations and screening criteria, to avoid causing any severe pain or suffering or inflicting significant or lasting harm. As the *OMS Guidelines* explain, "[i]n all instances the general goal of these techniques is a psychological impact, and not some physical effect, with a specific goal of 'dislocat[ing] [the detainee's] expectations regarding the treatment he believes he will receive.'" *OMS Guidelines* at 8-9 (second alteration in original). Furthermore, techniques can be used only if there are no medical or psychological contraindications. Thus, no technique is ever used if there is reason to believe it will cause the detainee significant mental or physical harm. When enhanced techniques are used, OMS closely monitors the detainee's condition to ensure that he does not, in fact, experience severe pain or suffering or sustain any significant or lasting harm.

This facet of our analysis bears emphasis. We do not conclude that any conduct, no matter how extreme, could be justified by a sufficiently weighty government interest coupled with appropriate tailoring. Rather, our inquiry is limited to the program under consideration, in which the techniques do not amount to torture considered independently or in combination. *See Techniques* at 28-45; *Combined Use* at 9-19. Torture is categorically prohibited both by the CAT, *see* art. 2(2) ("No exceptional circumstances whatsoever . . . may be invoked as a justification of torture."), and by implementing legislation, *see* 18 U.S.C. §§ 2340-2340A.

The program, moreover, is designed to minimize the risk of injury or any suffering that is unintended or does not advance the purpose of the program. For example, in dietary manipulation, the minimum caloric intake is set at or above levels used in commercial weight-loss programs, thereby avoiding the possibility of significant weight loss. In nudity and water dousing, interrogators set ambient air temperatures high enough to guard against hypothermia. The walling technique employs a false wall and a C-collar (or similar device) to help avoid

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whiplash. *See Techniques* at 8. With respect to sleep deprivation, constant monitoring protects against the possibility that detainees might injure themselves by hanging from their wrists, suffer from acute edema, or even experience non-transient hallucinations. *See Techniques* at 11-13. With the waterboard, interrogators use potable saline rather than plain water so that detainees will not suffer from hyponatremia and to minimize the risk of pneumonia. *See id.* at 13-14. The board is also designed to allow interrogators to place the detainee in a head-up position so that water may be cleared very quickly, and medical personnel and equipment are on hand should any unlikely problems actually develop. *See id.* 14. All enhanced techniques are conducted only as authorized and pursuant to medical guidelines and supervision.[27]

As is clear from these descriptions and the discussion above, the CIA uses enhanced techniques only as necessary to obtain information that it reasonably views as vital to protecting the United States and its interests from further terrorist attacks. The techniques are used only in the interrogation of those who are reasonably believed to be closely associated with al Qaeda and senior enough to have actionable intelligence concerning terrorist threats. Even then, the techniques are used only to the extent reasonably believed to be necessary to obtain otherwise unavailable intelligence. In addition, the techniques are designed to avoid inflicting severe pain or suffering, and no technique will be used if there is reason to believe it will cause significant harm. Indeed, the techniques have been designed to minimize the risk of injury or any suffering that does not further the Government's interest in obtaining actionable intelligence. The program is clearly not intended "to injure in some way unjustifiable by any government interest." *Lewis*, 523 U.S. at 849. Nor can it be said to reflect "deliberate indifference" to a substantial risk of such unjustifiable injury. *Id.* at 851.[28]

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[27] The CIA's CTC generally consults with the CIA's Office of General Counsel (which in turn may consult with this Office) when presented with novel circumstances. This consultation further reduces any possibility that CIA interrogators could be thought to be "[illegible] power, or employing it as an instrument of oppression," *Lewis*, 523 U.S. at 849 (citation and quotation marks omitted; alteration in *Lewis*); *see also Chavez*, 538 U.S. at 774 (opinion of Thomas, J.), so as to render their conduct constitutionally arbitrary.

[28] This is not to say that the interrogation program has worked perfectly. According to the *IG Report*, the CIA, at least initially, could not always distinguish detainees who had information but were successfully resisting interrogation from those who did not actually have the information. *See IG Report* at 85-86. On at least one occasion, this may have resulted in what might be deemed in retrospect to have been the unnecessary use of enhanced techniques. On that occasion, although the [illegible] [redacted] *See id.* at 84-85.

This example, however, does not show CIA "conduct [illegible] to injure in some way unjustifiable by any government interest," or "deliberate indifference" to the possibility of such unjustifiable injury. *Lewis*, 523 U.S. at 849. As long as the CIA reasonably believed that Zubaydah continued to withhold [illegible] important information, use of the waterboard will [illegible] by the Government's interest in protecting the United States subsequent terrorist attacks. The existence of a reasonable, good faith belief is not negated because the factual predicates for that belief are subsequently determined to be false. Moreover, in the Zubaydah example, CIA Headquarters dispatched officials to observe the last waterboard session. These officials reported that enhanced techniques were no longer needed. *See IG Report* at 85. Thus, the CIA did not simply rely on what appeared to be credible intelligence but rather ceased using enhanced techniques despite this intelligence.

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We next address whether, considered in light of "an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them," use of the enhanced interrogation techniques constitutes government behavior that "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 847 n.8. We have not found evidence of traditional executive behavior or contemporary practice either condemning or condoning an interrogation program carefully limited to further a vital government interest and designed to avoid unnecessary or serious harm.[29] However, in many contexts, there is a strong tradition against the use of coercive interrogation techniques. Accordingly, this aspect of the analysis poses a more difficult question. We examine the traditions surrounding ordinary criminal investigations within the United States, the military's tradition of not employing coercive techniques in intelligence interrogations, and the fact that the United States regularly condemns conduct undertaken by other countries that bears at least some resemblance to the techniques at issue.

These traditions provide significant evidence that the use of enhanced interrogation techniques might "shock the contemporary conscience" in at least some contexts. *Id.* As we have explained, however, the due process inquiry depends critically on setting and circumstance, *see, e.g., id.* at 847, 850, and each of these contexts differs in important ways from the one we consider here. Careful consideration of the underpinnings of the standards of conduct expected in these other contexts, moreover, demonstrates that those standards are not controlling here. Further, as explained below, the enhanced techniques are all adapted from techniques used by the United States on its own troops, albeit under significantly different conditions. At a minimum, this confirms that use of these techniques cannot be considered to be categorically impermissible; that is, in some circumstances, use of these techniques is consistent with "traditional executive behavior" and "contemporary practice." *Id.* at 847 n.8. As explained below, we believe such circumstances are present here.

Domestic Criminal Investigations. Use of interrogation practices like those we consider here in ordinary criminal investigations might well "shock the conscience." In *Rochin v.*

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[29] CIA interrogation practices appear to have varied over time. The *IG Report* explains that the CIA "has had [discussions] on the issue of the interrogation of [redacted] whose interests are protected by the United States." [redacted] The CIA [redacted] *Id.*

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California, 342 U.S. 165 (1952), the Supreme Court reversed a criminal conviction where the prosecution introduced evidence against the defendant that had been obtained by the forcible pumping of the defendant's stomach. The Court concluded that the conduct at issue "shocks the conscience" and was "too close to the rack and the screw." *Id.* at 172. Likewise, in *Williams v. United States*, 341 U.S. 97 (1951), the Court considered a conviction under a statute that criminalized depriving an individual of a constitutional right under color of law. The defendant suspected several persons of committing a particular crime. He then

> over a period of three days took four men to a paint shack . . . and used brutal methods to obtain a confession from each of them. A rubber hose, a pistol, a blunt instrument, a sash cord and other implement were used in the project. . . . Each was beaten, threatened, and unmercifully punished for several hours until he confessed.

Id. at 98-99. The Court characterized this as "the classic use of force to make a man testify against himself," which would render the confessions inadmissible. *Id.* at 101. The Court concluded:

> But where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court.

Id. at 101.

More recently, in *Chavez v. Martinez*, 538 U.S. 760 (2003), the police had questioned the plaintiff, a gunshot wound victim who was in severe pain and believed he was dying. At issue was whether a section 1983 suit could be maintained by the plaintiff against the police despite the fact that no charges had ever been brought against the plaintiff. The Court rejected the plaintiff's Fifth Amendment Self-Incrimination Clause claim, *see id.* at 773 (opinion of Thomas, J.); *id.* at 778-79 (Souter, J., concurring in judgment), but remanded for consideration of whether the questioning violated the plaintiff's substantive due process rights, *see id.* at 779-80. Some of the justices expressed the view that the Constitution categorically prohibits such coercive interrogations. *See id.* at 783, 788 (Stevens, J., concurring in part and dissenting in part) (describing the interrogation at issue as "torturous" and asserting that such interrogation "is a classic example of a violation of a constitutional right implicit in the concept of ordered liberty") (internal quotation marks omitted); *id.* at 796 (Kennedy, J., concurring in part and dissenting in part) ("The Constitution does not countenance the official imposition of severe pain or pressure for purposes of interrogation. This is true whether the protection is found in the Self-Incrimination Clause, the broader guarantees of the Due Process Clause, or both.").

The CIA program is considerably less invasive or extreme than much of the conduct at issue in these cases. In addition, the government interest at issue in each of these cases was the general interest in ordinary law enforcement (and, in *Williams*, even that was doubtful). That government interest is strikingly different from what is at stake here: the national security—in particular, the protection of the United States and its interests against attacks that may result in

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massive civilian casualties. Specific constitutional constraints, such as the Fifth Amendment's Self-Incrimination Clause, which provides that "[n]o person . . . shall be compelled *in any criminal case* to be a witness against himself," (emphasis added), apply when the government acts to further its general interest in law enforcement and reflect explicit fundamental limitations on how the government may further that interest. Indeed, most of the Court's police interrogation cases appear to be rooted in the policies behind the Self-Incrimination Clause and concern for the fairness and integrity of the trial process. In *Rochin*, for example, the Court was concerned with the use of evidence obtained by coercion to bring about a criminal conviction. *See, e.g.*, 342 U.S. at 173 ("Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'") (citation omitted); *id.* (refusing to hold that "in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach"). *See also Jackson v. Denno*, 378 U.S. 368, 377 (1964) (characterizing the interest at stake in police interrogation cases as the "right to be free of a conviction based upon a coerced confession"); *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944) (explaining that "[a] coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt"). Even *Chavez*, which might indicate the Court's receptiveness to a substantive due process claim based on coercive police interrogation practices irrespective of whether the evidence obtained was ever used against the individual interrogated, involved an interrogation implicating ordinary law enforcement interests.

Courts have long distinguished the government's interest in ordinary law enforcement from other government interests such as national security. The Foreign Intelligence Surveillance Court of Review recently explained that, with respect to the Fourth Amendment, "the [Supreme] Court distinguishe[s] general crime control programs and those that have another particular purpose, such as protection of citizens against special hazards or protection of our borders." *In re Sealed Case*, 310 F.3d 717, 745-46 (For. Intel. Surv. Ct. Rev. 2002) (discussing the Court's "special needs" cases and distinguishing "FISA's general programmatic purpose" of "protect[ing] the nation against terrorists and espionage threats directed by foreign powers" from general crime control). Under the "special needs" doctrine, the Supreme Court has approved of warrantless and even suspicionless searches that serve "special needs, beyond the normal need for law enforcement." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (quotation marks and citation omitted). Thus, although the Court has explained that it "cannot sanction [suspicionless] stops justified only by the" "general interest in crime control," *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (quotation marks and citation omitted), it suggested that it might approve of a "roadblock set up to thwart an imminent terrorist attack," *id. See also* Memorandum for James B. Comey, Deputy Attorney General, from Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Whether OFAC May Without Obtaining a Judicial Warrant Enter the Commercial Premises of a Designated Entity To Secure Property That Has Been Blocked Pursuant to IEEPA* (April 11, 2005). Notably, in the due process context, the Court has distinguished the Government's interest in detaining illegal aliens generally from its interest in detaining suspected terrorists. *See Zadvydas*, 533 U.S. at 691. Although the Court concluded that a statute permitting the indefinite detention of aliens subject to a final order of removal but who could not be removed to other countries would raise

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substantial constitutional questions, it suggested that its reasoning might not apply to a statute that "appl[ied] narrowly to a small segment of particularly dangerous individuals, say, suspected terrorists." *Id.* at 691 (quotation marks and citation omitted).

Accordingly, for these reasons, we do not believe that the tradition that emerges from the police interrogation context provides controlling evidence of a relevant executive tradition prohibiting use of these techniques in the quite different context of interrogations undertaken solely to prevent foreign terrorist attacks against the United States and its interests.

United States Military Doctrine. *Army Field Manual 34-52* sets forth the military's basic approach to intelligence interrogations. It lists a variety of interrogation techniques that generally involve only verbal and emotional tactics. In the "emotional love approach," for example, the interrogator might exploit the love a detainee feels for his fellow soldiers, and use this to motivate the detainee to cooperate. *Id.* at 3-15. In the "fear-up (harsh) approach," "the interrogator behaves in an overpowering manner with a loud and threatening voice [and] may even feel the need to throw objects across the room to heighten the [detainee's] implanted feelings of fear." *Id.* at 3-16. The *Field Manual* counsels that "[g]reat care must be taken when [using this technique] so any actions would not violate the prohibition on coercion and threats contained in the GPW, Article 17." *Id.* Indeed, from the outset, the *Field Manual* explains that the Geneva Conventions "and US policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation." *Id.* at 1-8. As prohibited acts of physical and mental torture, the *Field Manual* lists "[f]ood deprivation" and "[a]bnormal sleep deprivation" respectively. *Id.*

The *Field Manual* provides evidence "of traditional executive behavior[and] of contemporary practice," *Lewis*, 523 U.S. at 847 n.8, but we do not find it dispositive for several reasons. Most obviously, as the *Field Manual* makes clear, the approach it embodies is designed for traditional armed conflicts, in particular, conflicts governed by the Geneva Conventions. *See Field Manual 34-52* at 1-7 to 1-8; *see also id.* at iv-v (noting that interrogations must comply with the Geneva Conventions and the Uniform Code of Military Justice). The United States, however, has long resisted efforts to extend the protections of the Geneva Conventions to terrorists and other unlawful combatants. As President Reagan stated when the United States rejected Protocol I to the Geneva Conventions, the position of the United States is that it "must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law." President Ronald Reagan, Letter of Transmittal to the Senate of Protocol II additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977 (Jan. 29, 1987). President Bush, moreover, has expressly determined that the Geneva Convention Relative to the Treatment of Prisoners of War ("GPW") does not apply to the conflict with al Qaeda. *See* Memorandum from the President, *Re: Humane Treatment of al Qaeda and Taliban Detainees* at 1 (Feb. 7, 2002); *see also* Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 9-10 (Jan. 22, 2002) (explaining that GPW does not apply to non-state actors such as al Qaeda).

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We think that a policy premised on the applicability of the Geneva Conventions and not purporting to bind the CIA does not constitute controlling evidence of executive tradition and contemporary practice with respect to untraditional armed conflict where those treaties do not apply, where the enemy flagrantly violates the laws of war by secretly attacking civilians, and where the United States cannot identify the enemy or prevent its attacks absent accurate intelligence.

State Department Reports. Each year, in the State Department's Country Reports on Human Rights Practices, the United States condemns coercive interrogation techniques and other practices employed by other countries. Certain of the techniques the United States has condemned appear to bear some resemblance to some of the CIA interrogation techniques. In their discussion of Indonesia, for example, the reports list as "[p]sychological torture" conduct that involves "food and sleep deprivation," but give no specific information as to what these techniques involve. In their discussion of Egypt, the reports list as "methods of torture" "stripping and blindfolding victims; suspending victims from a ceiling or doorframe with feet just touching the floor; binding victims [with various objects] . . . and dousing victims with cold water." *See also, e.g.*, Algeria (describing the "cloth" method, which involves "placing a rag drenched in dirty water in someone's mouth"); Iran (counting sleep deprivation as either torture or severe prisoner abuse); Syria (discussing sleep deprivation and "having cold water thrown on" detainees as either torture or "ill-treatment"). The State Department's inclusion of nudity, water dousing, sleep deprivation, and food deprivation among the conduct it condemns is significant and provides some indication of an executive foreign relations tradition condemning the use of these techniques.[35]

To the extent they may be relevant, however, we do not believe that the reports provide evidence that the CIA interrogation program "shocks the contemporary conscience." The reports do not generally focus on or provide precise descriptions of individual interrogation techniques. Nor do the reports discuss in any detail the contexts in which the techniques are used. From what we glean from the reports, however, it appears that the condemned techniques are often part of a course of conduct that involves techniques and is undertaken in ways that bear no resemblance to the CIA interrogation program. Much of the condemned conduct goes far beyond the CIA techniques and would almost certainly constitute torture under United States law. *See, e.g.*, Egypt (discussing "suspending victims from a ceiling or doorframe with feet just touching the floor" and "beating victims [with various objects]"); Syria (discussing finger crushing and severe beatings); Pakistan (beatings, burning with cigarettes, electric shock); Uzbekistan (electric shock, rape, sexual abuse, beatings). The condemned conduct, moreover, is often undertaken for reasons totally unlike the CIA's. For example, Indonesia security forces apparently use their techniques in order to obtain confessions, to punish, and to extort money. Egypt "employ[s] torture to extract information, coerce opposition figures to cease their political activities, and to deter others from similar activities." There is no indication that techniques are

[35] We recognize that as a matter of diplomacy, the United States may for various reasons in various circumstances call another nation to account for practices that may in some respects resemble conduct in which the United States might in some circumstances engage, covertly or otherwise. Diplomatic relations with regard to foreign countries are not reliable evidence of United States executive practice and thus may be of only limited relevance here.

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used only as necessary to protect against grave terrorist threats or for any similarly vital government interests (or indeed for any legitimate government interest). On the contrary, much of the alleged abuses discussed in the reports appears to involve either the indiscriminate use of force, *see, e.g.*, Kenya, or the targeting of critics of the government, *see, e.g.*, Liberia, Rwanda. And there is certainly no indication that these countries apply careful screening procedures, medical monitoring, or any of the other safeguards required by the CIA interrogation program.

A United States foreign relations tradition of condemning torture, the indiscriminate use of force, the use of force against the government's political opponents, or the use of force to obtain confessions in ordinary criminal cases says little about the propriety of the CIA's interrogation practices. The CIA's careful screening procedures are designed to ensure that enhanced techniques are used in the relatively few interrogations of terrorists who are believed to possess vital, actionable intelligence that might avert an attack against the United States or its interests. The CIA uses enhanced techniques only to the extent reasonably believed necessary to obtain the information and takes great care to avoid inflicting severe pain or suffering or any lasting or unnecessary harm. In short, the CIA program is designed to subject detainees to no more duress than is justified by the Government's interest in protecting the United States from further terrorist attacks. In these essential respects, it differs from the conduct condemned in the State Department reports.

SERE Training. There is also evidence that use of these techniques is in some circumstances consistent with executive tradition and practice. Each of the CIA's enhanced interrogation techniques has been adapted from military SERE training, where the techniques have long been used on our own troops. *See Techniques* at 6; *IG Report* at 13-14. In some instances, the CIA uses a milder form of the technique than SERE. Water dousing, as done in SERE training, involves complete immersion in water that may be below 40°F. *See Techniques* at 10. This aspect of SERE training is done outside with ambient air temperatures as low as 10°F. *See id.* In the CIA technique, by contrast, the detainee is splashed with water that is never below 41°F and is usually warmer. *See id.* Further, ambient air temperatures are never below 64°F. *See id.* Other techniques, however, are undeniably more extreme as applied in the CIA interrogation program. Most notably, the waterboard is used quite sparingly in SERE training—at most two times on a trainee for at most 40 seconds each time. *See id.* at 13, 42. Although the CIA program authorizes waterboard use only in narrow circumstances (to date, the CIA has used the waterboard on only three detainees), where authorized, it may be used for two "sessions" per day of up to two hours. During a session, water may be applied up to six times for ten seconds or longer (but never more than 40 seconds). In a 24-hour period, a detainee may be subjected to up to twelve minutes of water application. *See id.* at 42. Additionally, the waterboard may be used on as many as five days during a 30-day approval period. *See August 19[redacted] Letter* at 1-2. The CIA used the waterboard "at least 83 times during August 2002" in the interrogation of Zubaydah, *IG Report* at 90, and 183 times during March 2003 in the interrogation of KSM, *see id.* at 91.

In addition, as we have explained before:

> Individuals undergoing SERE training are obviously in a very different situation from detainees undergoing interrogation; SERE trainees know it is part of a

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training program, not a real-life interrogation regime, they presumably know it will last only a short time, and they presumably have assurances that they will not be significantly harmed by the training.

Techniques at 6. On the other hand, the interrogation program we consider here furthers the paramount interest of the United States in the security of the Nation more immediately and directly than SERE training, which seeks to reduce the possibility that United States military personnel might reveal information that could harm the national security in the event they are captured. Again, analysis of the due process question must pay careful attention to these differences. But we can draw at least one conclusion from the existence of SERE training. Use of the techniques involved in the CIA's interrogation program (or at least the similar techniques from which these have been adapted) cannot be considered to be *categorically* inconsistent with "traditional executive behavior" and "contemporary practice" regardless of context.[31] It follows that use of these techniques will not shock the conscience in at least some circumstances. We believe that such circumstances exist here, where the techniques are used against unlawful combatants who deliberately and secretly attack civilians in an untraditional armed conflict in which intelligence is difficult or impossible to collect by other means and is essential to the protection of the United States and its interests, where the techniques are used only when necessary and only in the interrogations of key terrorist leaders reasonably thought to have actionable intelligence, and where every effort is made to minimize unnecessary suffering and to avoid inflicting significant or lasting harm.

Accordingly, we conclude that, in light of "an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them," the use of the enhanced interrogation techniques in the CIA interrogation program as we understand it, does not constitute government behavior that "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 847 n.8.

C.

For the reasons stated, we conclude that the CIA interrogation techniques, with their careful screening procedures and medical monitoring, do not "shock the conscience." Given the relative paucity of Supreme Court precedent applying this test at all, let alone in anything resembling this setting, as well as the context-specific, fact-dependent, and sometimes subjective nature of the inquiry, however, we cannot predict with confidence that a court would agree with our conclusion. We believe, however, that the question whether the CIA's enhanced interrogation techniques violate the substantive standard of United States obligations under Article 16 is unlikely to be subject to judicial inquiry.

As discussed above, Article 16 imposes no legal obligations on the United States that implicate the CIA interrogation program in view of the language of Article 16 itself and

[31] In addition, the fact that individuals voluntarily undergo the techniques in SERE training is probative. *See Breithaupt v. Abram*, 352 U.S. 432, 436-37 (1957) (noting that people regularly voluntarily allow their blood to be drawn and concluding that involuntary blood testing does not "shock the conscience").

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independently, the Senate's reservation. But even if this were less clear (indeed, even if it were false), Article 16 itself has no domestic legal effect because the Senate attached a non-self-execution declaration to its resolution of ratification. *See* Cong. Rec. 36,198 (1990) ("the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing"). It is well settled that non-self-executing treaty provisions "can only be enforced pursuant to legislation to carry them into effect." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *see also Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) ("A treaty is in its nature a contract between two nations; not a legislative act. It does not generally effect, of itself, the object to be accomplished, . . . but is carried into execution by the sovereign power of the respective parties to the instrument."). One implication of the fact that Article 16 is non-self-executing is that, with respect to Article 16, "the courts have nothing to do and can give no redress." *Head Money Cases*, 112 U.S. 580, 598 (1884). As one court recently explained in the context of the CAT itself, "Treaties that are not self-executing do not create judicially-enforceable rights unless they are first given effect by implementing legislation." *Auguste v. Ridge*, 395 F.3d 123, 132 n.7 (3d Cir. 2005) (citations omitted). Because (with perhaps one narrow exception[32]) Article 16 has not been legislatively implemented, the interpretation of its substantive standard is unlikely to be subject to judicial inquiry.[33]

* * *

Based on CIA assurances, we understand that the CIA interrogation program is not conducted in the United States or "territory under [United States] jurisdiction," and that it is not authorized for use against United States persons. Accordingly, we conclude that the program does not implicate Article 16. We also conclude that the CIA interrogation program, subject to its careful screening, limits, and medical monitoring, would not violate the substantive standards

[32] As noted above, Section 1031 of Public Law 109-13 provides that "[n]one of the funds appropriated or otherwise made available by this Act shall be obligated or expended to subject any person in the custody or under the physical control of the United States to . . . cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States." To the extent this appropriations rider implements Article 16, it creates a narrow domestic law obligation not to expend funds appropriated under Public Law 109-13 for conduct that violates Article 16. This appropriations rider, however, is unlikely to result in judicial interpretation of Article 16's substantive standards since it does not create a private right of action. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."); *Restrict Council of Allen Parkway Vill. v. Dep't of Hous. & Urban Dev.*, 980 F.2d 1043, 1052 (5th Cir. 1993) ("courts have been reluctant to infer congressional intent to create private rights under appropriations measures") (citing *California v. Sierra Club*, 451 U.S. 287 (1981)).

It is possible that a court could address the scope of Article 16 if a prosecution were brought under the Antideficiency Act, 31 U.S.C. § 1341 (2000), for a violation of section 1031's spending restriction. Section 1341(a)(1)(A) of title 31 provides that officers or employees of the United States may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." "[K]nowing[] and willful[] violati[ons]" of section 1341(a) are subject to criminal penalties. *Id.* § 1350.

[33] Although the interpretation of Article 16 is unlikely to be subject to judicial inquiry, it is conceivable that a court might attempt to address substantive questions under the Fifth Amendment if, for example, the United States sought a criminal conviction of a high value detainee in an Article III court in the United States using evidence that had been obtained from the detainee through the use of enhanced interrogation techniques.

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applicable to the United States under Article 16 even if those standards extended to the CIA interrogation program. Given the paucity of relevant precedent and the subjective nature of the inquiry, however, we cannot predict with confidence whether a court would agree with this conclusion, though, for the reasons explained, the question is unlikely to be subject to judicial inquiry.

Please let us know if we may be of further assistance.

Steven G. Bradbury
Principal Deputy Assistant Attorney General

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Senate Judiciary Committee Subcommittee on Administrative Oversight and the Courts
Hearing on
"What Went Wrong:
Torture and the Office of Legal Counsel in the Bush Administration"
Hearing Date: May 13, 2009

Written Testimony of Kathleen Clark
Submitted: May 20, 2009

Chairman Whitehouse,

Thank you for inviting me to submit written testimony about Torture and the Office of Legal Counsel (OLC) in the Bush Administration.

In this testimony, I will focus on the legal ethics implications of the Aug. 1, 2002 legal memorandum regarding "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," ((hereinafter Bybee-Gonzales Memorandum)[1] which was written in response to White House Counsel Alberto Gonzales' request for legal advice about the scope of the torture statute. Deputy Assistant Attorney General John Yoo drafted the memorandum, and Assistant Attorney General Jay Bybee signed it.[2]

In the testimony below, I will show that two legal assertions in this memorandum are grossly inaccurate. Then I will discuss the legal ethics implications of these inaccuracies.[3]

Substantive Inaccuracies in the Memorandum

In this section, I will discuss two key inaccuracies in the legal memorandum: its assertion that the torture prohibition is narrow in scope and its claim that the President can authorize torture despite the criminal prohibition.

The memorandum asserts that the federal criminal statute prohibiting torture is very narrow in scope, applying only where a government official specifically intends to and actually causes pain so severe that it "rises to . . . the level that would ordinarily be associated with . . . death, organ failure, or serious impairment of body functions."[4] This claimed standard is bizarre for a number of reasons. In the first place, organ failure is not necessarily associated with pain at all. In addition, this legal standard is lifted from a statute wholly unrelated to torture -- a Medicare statute setting out the conditions under which hospitals must provide emergency medical care.[5] That statute mentions severe pain as one possible indicator that a person is in a condition calling for such care, and defines "emergency medical condition" as one in which failure to provide medical care could result in "serious jeopardy" to an individual's health, "serious impairment to bodily functions," or "serious dysfunction of any bodily organ or part." The Bybee-Gonzales Memorandum twists this legal standard, and asserts that "severe pain" occurs only in connection with a "serious physical condition or injury such as death, organ failure, or serious impairment of body functions."[6] It purports to give interrogators wide latitude to cause any kind of pain short of that kind of severe pain.

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1 This memorandum was made public by the Washington Post in June of 2004, and can be found at http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

2 John Yoo, Behind the "Torture Memos'; As Confirmation Hearings Near, Lawyer Defends Wartime Policy, San Jose Mercury News, Jan. 2, 2005, at 1P (acknowledging that he "helped draft" the Bybee-Gonzales Memorandum); Toni Locy & Joan Biskupic, Interrogation Memo To Be Replaced, USA Today, June 23, 2004, at 2A (identifying Yoo as "the memo's principal author").

3 This testimony is based in part on my article, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455 (2005).

4 Bybee-Gonzales Memorandum at 6.

5 42 U.S.C. § 1395w-22(d)(3)(B).

6 Bybee-Gonzales Memorandum at 6.

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Another major inaccuracy is found in the memorandum's discussion of presidential authority. The Bybee-Gonzales Memorandum asserts that the President can, at least under some circumstances, authorize torture despite the federal criminal statute prohibiting it.[7] This position is based on an expansive view of inherent executive power, but the memorandum does not even mention - let alone address - *Youngstown Sheet & Tube Co. v. Sawyer*, the leading Supreme Court case on this aspect of separation of powers.[8] *Youngstown*, which invalidated President Truman's seizure of the nation's steel mills during the Korean War, seriously undermines any claim of unilateral executive power. The Bybee-Gonzales Memorandum does not even acknowledge that the Constitution explicitly grants to Congress the powers to define "Offences against the Law of Nations; . . . make Rules concerning Captures on Land and Water; . . . [and] make Rules for the Government and Regulation of the land and naval Forces,"[9] all of which suggest that Congress was well within its constitutional authority in banning torture.

On both of these points -- the threshold of pain that constitutes torture and unilateral executive power -- the Bybee-Gonzales Memorandum presents highly questionable legal claims as settled law. It does not present either the counter arguments to these claims or an assessment of the risk that other legal actors - including courts - would reject them. The legal analysis in this memorandum was so indefensible that it could not -- and did not -- withstand public scrutiny. Press reports about and excerpts from the memorandum began to surface in early June, 2004, and there was a wave of criticism.[10] The Justice Department resisted congressional pressure to turn over the memorandum, insisting that the President had a right to confidential legal advice.[11] When The Washington Post posted the complete text of the memorandum on its Web site, the wave of criticism turned into a flood.[12] Eight days later, the Bush administration disavowed the memorandum.[13]

Ethical Analysis of the Bybee-Gonzales Memorandum

The substantive inaccuracies in the Bybee-Gonzales Memorandum are so serious that they implicate the legal ethics obligations of its authors. In analyzing the legal ethics issues, it is important to make three preliminary observations. First, lawyers who work for the federal government are subject to state ethics rules. Under the McDade Amendment,[14] federal government lawyers must comply with state ethics rules in the states where they represent the government, so both Jay Bybee and John Yoo were subject to the D.C. Rules of Professional Conduct.

Second, these OLC lawyers had as their client an organization - the executive branch of the United States government - rather than any individual officeholder.[15] Although White House Counsel Alberto Gonzales requested the Bybee-Gonzales Memorandum, he was not the client. Instead, he was simply a constituent of the organizational client. Ordinarily, lawyers must accept the decisions made by such constituents when those constituents are authorized to act on behalf of the organization. But where a

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7 Bybee-Gonzales Memorandum at 31-39.

8 343 U.S. 579 (1952).

9 U.S. Const. art. I, 8, cls. 10, 11, 14.

10 See Dana Priest & R. Jeffrey Smith, Memo Offered Justification for Use of Torture; Justice Dept. Gave Advice in 2002, Wash. Post, June 8, 2004, at A1; Susan Schmidt, Ashcroft Refuses To Release "02 Memo; Document Details Suffering Allowed In Interrogations, Wash. Post, June 9, 2004, at A1.

11 Susan Schmidt, Ashcroft Refuses To Release "02 Memo; Document Details Suffering Allowed In Interrogations, Wash. Post, June 9, 2004, at A1.

12 The Washington Post posted the memorandum on its Web site on June 14, 2004. See David Ignatius, Small Comfort, Wash. Post, June 15, 2004, at A23. Critical commentary on the memorandum included Stephen Gillers, Tortured Reasoning; The U.S. Department of Justice Attorneys Who Advised the White House on Military Prisoner Policy Bear Responsibility - Both Ethical and Moral - for the Abuse Scandals, Am. Law., July 2004, at 65; Wedgwood & Woolsey, supra note 19. But see Eric Posner & Adrian Vermuele, A "Torture' Memo and Its Tortuous Critics, Wall St. J., July 6, 2004, at A22 (defending the memorandum and claiming that its "arguments are standard lawyerly fare, routine stuff").

13 See Mike Allen & Susan Schmidt, Memo on Interrogation Tactics Is Disavowed; Justice Document Had Said Torture May Be Defensible, Wash. Post, June 23, 2004, at A1; Locy & Biskupic, supra note 15 (quoting a Justice Department official as saying, "We're scrubbing the whole thing . . . . It will be replaced.").

14 28 U.S.C. § 530B(a).

15 See D.C. Rules of Prof'l Conduct R. 1.13 [hereinafter D.C. Rules] ("Organization as Client").

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lawyer knows that a constituent is acting illegally and that conduct could be imputed to the organization, the lawyer must take action to prevent or mitigate that harm. Where the constituent can exercise control over the lawyer's future career, taking such action may jeopardize the lawyer's advancement. Nevertheless, the legal ethics rules require lawyers to take action to protect entity clients from harm committed by their constituents.

Third, in analyzing the performance of the lawyers who wrote the Bybee-Gonzales Memorandum, it is important to determine whether they were acting as legal advisors or as legal advocates. Different ethics rules apply to these two distinct functions. The role of the lawyer as an advocate before a tribunal is a familiar one. In that role, the lawyer may make any legal argument as long as it is not frivolous. Her only obligation of candor regarding legal argument is that if her opponent fails to mention directly adverse controlling authority, she must bring it to the tribunal's attention. When a lawyer gives legal advice, on the other hand, she has a professional obligation of candor toward her client. One finds this obligation in Rule 2.1, which states that in representing a client, "a lawyer shall . . . render candid advice."[16] In advising a client, the lawyer's role is not simply to spin out creative legal arguments. It is to offer her assessment of the law as objectively as possible. The lawyer must not simply tell the client what the client wants to hear, but instead must tell the client her best assessment of what the law requires or allows.[17] Similarly, Rule 1.4(b) requires a lawyer to explain the law adequately to her client, so that the client can make informed decisions about the representation.[18]

In giving legal advice, a lawyer may provide advice that is contrary to the weight of authority, spinning out imaginative legal theories for the client to use. When doing so, however, the candor obligation requires the lawyer to inform the client that the weight of authority is contrary to that advice, and that other legal actors may come to the opposite conclusion. A lawyer who fails to warn a client about the possible illegality of proposed conduct has violated her professional obligations.[19]

If a lawyer inaccurately advises a client that proposed illegal action is legal, she harms the client. A client may want to hear that conduct she wants to engage in is legal, but the client may face serious long-term consequences for such illegal conduct. While a client can choose to act illegally, the consequences of illegal conduct should not come as a surprise to the client. Just as a patient can take action that is contrary to medical advice, a client can take action even though it is against the law. But such a decision should not be accompanied by his lawyer's false assurance that the conduct is legal.

The harm to the client from failing to advise about the illegal character of proposed conduct may be even greater when the client is an entity rather than an individual. Indeed, a lawyer working for an entity client has an enhanced obligation to guard the interests of the entity against wrongdoing by the entity's constituents.[20]

The Bybee-Gonzales Memorandum purports to offer legal advice. Its authors, Jay Bybee and John Yoo, had an obligation to be candid with their client, the executive branch. The constituent who requested the memorandum, then White House Counsel Alberto Gonzales, may have wanted a particular answer to his questions about the torture statute. But the OLC lawyers had a professional obligation to give accurate legal advice to their client, whether or not the client's constituent wanted to hear it. Based on the available facts, it appears that Bybee and Yoo failed to give candid legal advice, violating D.C. Rule 2.1, and that they failed to inform their client about the state of the law of torture, violating D.C. Rule 1.4.

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16 D.C. Rule 2.1.

17 Comment 1 to D.C. Rule 2.1 states that "a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."

18 D.C. Rule 1.4(b) states: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

19 See Summit, Rovins & Feldesman v. Fonar Corp., 213 A.D.2d 201 (N.Y. App. Div. 1995) (lawyer sued for negligently failing to predict and explain to client the likelihood that corporate strategy would not succeed).

20 D.C. Rule 1.13.

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Legal Uncertainty and Second-Guessing

The legal ethics issue with respect to the Bybee-Gonzales memorandum is not simply whether the memorandum got the law wrong. Other OLC memoranda have made legal claims that courts have later rejected, and yet there is no issue about whether the authors of those memoranda violated their ethical obligation to give candid legal advice.

For example, during the fall of 2001, when the George W. Bush administration wanted to imprison and interrogate alleged al Qaeda members in a place insulated from the supervision of United States courts, the Defense Department asked the Justice Department's OLC whether federal courts would entertain habeas corpus petitions filed by prisoners at the Naval Base at Guantanamo Bay, Cuba, or whether they would dismiss such petitions as beyond their jurisdiction.

On December 28, 2001, OLC responded with a thorough and balanced analysis of how the federal courts were likely to resolve the jurisdictional question.[21] The memorandum explained the arguments against such jurisdiction, but it also explored possible strengths in the opposing position. The memorandum predicted that federal courts would not exercise jurisdiction but explained the risk of a contrary ruling. Acting in reliance on this memorandum, the government started imprisoning and interrogating alleged al Qaeda members at Guantanamo the following month, cognizant of the risk that a federal court might find habeas jurisdiction.

In 2004, the Supreme Court considered habeas corpus claims by prisoners at Guantanamo, and reached a result contrary to that predicted by the Justice Department memorandum, ruling that the district court did have jurisdiction.[22] The fact that the Court came to a different conclusion than that advanced by OLC does not, however, mean that the OLC attorneys failed to fulfill their professional obligations to their client. The authors appropriately explained the risk of an adverse decision, and they provided enough information for the client to understand that risk and make decisions accordingly.

Whenever a lawyer offers a legal opinion, there is always a possibility that other legal actors will take a contrary view. If that risk is substantial and the lawyer apprises the client of the magnitude of that risk, the lawyer has adequately advised and informed the client.[23] Even if a court later disagrees with the lawyer's opinion, that does not mean that the lawyer failed to fulfill her professional obligation to her client. As long as the lawyer explained the risk of an adverse decision and provided enough information for the client to understand that risk, the lawyer has fulfilled her obligations to candidly advise and adequately inform her client. That is where the Bybee-Gonzales memorandum fails.

Accountability for the OLC Lawyers

Lawyers at the Office of Legal Counsel played a key role in the Bush Administration's decisions about the treatment of captured al Qaeda prisoners. Their inaccurate statements about the criminal prohibition on torture may have contributed to the torture of these prisoners. These inaccuracies are so glaring that these lawyers appear to have violated their professional duty to candidly inform their client of the law. The authors of this memorandum should be held accountable for their conduct.

Last year, bar authorities dismissed an ethics complaint against one of these lawyers, noting that "[m]any of the witnesses and documents relevant to an investigation into his conduct are beyond the subpoena power of this office."[24] This week, news reports indicate that additional ethics charges are

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[21] Memorandum for William J. Haynes II, General Counsel, Dept. of Defense, from Patrick F. Philbin & John C. Yoo, Deputy Asst. Attorneys General, Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba, Dec. 28, 2001.

[22] Rasul v. Bush, 542 U.S. 466, 484 (2004).

[23] 1 Geoffrey C. Hazard, Jr. & William W. Hodes, The Law of Lawyering 3.2, at 3-5 (3d ed. 2001) ("A thoughtful opinion on a difficult or unsettled question is not incompetent even if it later proves to have been wrong. . . . On the other hand, . . . failure to ascertain readily accessible precedents . . . may . . . be [a] violation[] of [Model] Rule 1.1.)."

[24] May 7, 2008 letter from Paul J. Killion, Pennsylvania Chief Disciplinary Counsel, to Steven R. Newcomb (available at http://www.afterdowningstreet.org/sites/afterdowningstreet.org/files/yoobar2.pdf).

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being filed against Yoo, Bybee and other Bush Administration lawyers. If bar authorities are going to investigate these charges, they will need access to information about what these lawyers did.

Congress can play an important role in ensuring that these lawyers are held accountable. By investigating and disclosing information about what these OLC lawyers did, Congress can help ensure that bar authorities will have access to the information they need to determine whether John Yoo and Jay Bybee complied with their professional obligations.

Kathleen Clark is a law professor at Washington University in St. Louis, where she teaches courses on national security law and ethics. She also teaches in the law school's Congressional and Administrative Law Clinic in Washington, DC, and has taught at the University of Michigan and Cornell law schools. She is past Chair of the National Security Law Section of the Association of American Law Schools, and is a member of the American Law Institute. Clark has led government and legal ethics workshops in Europe, Africa, and South America. After graduating from Yale Law School, she clerked for Federal District Judge Harold H. Greene in Washington, D.C., and then served as counsel to the U.S. Senate Judiciary Committee. She has written about government lawyers' ethical obligations in *Confidentiality Norms and Government Lawyers*, 85 WASH. U.L. REV. 1033 (2007) and *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NATL. SECURITY L. & POL'Y 455 (2005).

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Statement of Charles J. Cooper

Hearing before the
Senate Judiciary Committee
Subcommittee on Administrative Oversight and the Courts

"What Went Wrong:
Torture and the Office of Legal Counsel in the Bush Administration"

May 13, 2009

Thank you Senator Whitehouse, and members of the Subcommittee, for inviting me to submit testimony on the controversy that has attended the Office of Legal Counsel's legal opinions concerning the use of harsh interrogation techniques on detainees captured in the War on Terror.

I think that it is important at the outset to remember the extraordinary context in which this and other terrorism-related legal issues have arisen. Our country is well into the eighth year of an out-and-out war with those who seek the destruction of our nation and our way of life. And in times of war there is one constitutional officer charged with day-in, day-out responsibility to protect the lives, liberty, and property of the American people: the Commander-in-Chief. The President is constitutionally obliged to prosecute this war so as to protect our nation and to secure our freedom and way of life.

Daily, then, the war-time President must strive to strike and maintain a delicate balance between ordering measures deemed necessary to protect us from terrorists and keeping faith with the Constitution that grants and cabins his powers, and that guarantees our liberties. The questions of executive power that the Bush Administration faced are not academic. The threat assessment that the President reads each and every morning makes the President and his advisors painfully aware of the gravity of their decisions and the urgent circumstances in which they must be made. As each issue comes to the President's desk for decision, he is faced with the stark reality that the lives of Americans are genuinely at constant risk. The war-time Executive must often act without the benefit of time for prolonged study and reflection, and his national security decisions sometimes must be shrouded in secrecy, must call for harsh and intrusive measures, and must place American lives at risk. In dangerous times such as these, with regard to difficult decisions such as these, can the imperative to grant the Executive the benefit of genuine legal doubt be any greater? Like Robert Jackson, the former Attorney General and Supreme Court Justice, I believe the President, especially in time of war, is surely entitled to "the benefit of a reasonable doubt as to the law."[1]

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[1] *See* JACK L. GOLDSMITH, THE TERROR PRESIDENCY 35 (2007) (quoting EUGENE C. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 221-22 (1958)).

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This has traditionally been the view of the President's legal advisors in the Office of Legal Counsel; certainly it was OLC's view during the time when I served in that office in the Reagan Administration. To be sure, the President must be able to rely on OLC for *independent* legal analysis and advice; advocacy in defense of an Administration policy or action is a responsibility that falls on other components of the Department. OLC is obliged to "provide advice based on its best understanding of what the law requires," and the office's faithful performance of that function will at times require it to advise that "the law precludes an action that [the] President strongly desires to take."[2] But OLC is not a court, and its independence does not entail the neutrality that is the hallmark of judicial independence. "OLC differs from a court in that its responsibilities include *facilitating* the work of the Executive Branch and the *objectives* of the President, consistent with the requirements of the law."[3] Indeed, "OLC must take account of the administration's goals and assist their accomplishment within the law."[4] Thus, OLC should maintain a relationship of what I call "friendly independence" to the Administration and the President it serves.

OLC often confronts legal issues that do not have black or white answers; many are close and difficult questions of law, and the answer is sufficiently uncertain—sufficiently gray—that OLC cannot properly, conscientiously say that the proposed Executive Branch action is legally precluded. If the answer falls in the gray area—it is neither yes or no, but rather is maybe yes and maybe no—then the action is not controlled by law, and the President is free to choose the course that best serves his purpose and goals, in full view of the legal risks.

I am a Republican, and in general, I was a supporter of many of former President Bush's policies. But on occasion I too was critical of the Bush Administration's positions, including positions concerning the scope of executive authority. For example, President Bush's attempt to direct state courts to "give effect" to a ruling of the International Court of Justice was, to my mind, well beyond the scope of his powers under the Constitution and the relevant treaty.[5] But my disagreement with the Bush Administration on this issue did not bring me to the conclusion that President Bush had forsaken the rule of law.[6] To the contrary, this is not an easy question, and President Bush presented reasoned and reasonable arguments in support of his position. Indeed, the question whether the President has authority to direct state courts to obey a judgment of the ICJ was resolved by the Supreme Court just last Term, and while President Bush's position was rejected by a majority of the Court, three Justices

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[2] *Guildelines for the President's Legal Advisors*, 81 INDIANA L. J. 1345, 1348-49 (2006).

[3] *Id.*

[4] *Id.*

[5] *See Medellin v. Texas*, 128 S. Ct. 1346, 1355 (2008).

[6] I have studied these two issues deeply enough to have formed an opinion on them; I have not done so on any other issue discussed in this testimony.

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dissented and one concurred only in the Court's judgment. It cannot reasonably be said, therefore, that President Bush's legal position was unreasonable.[7]

So while the Bush Administration, in my view, may have erred in its analysis of certain legal questions, it is entirely proper and natural for the Executive Branch generally to favor, and to jealously protect, the powers and prerogatives of the office of the Presidency. That each branch of government will be alert to and guard against encroachment by the others is a fundamental premise on which the separation of powers is based. Indeed, the Clinton Administration was itself sharply criticized for its "absolutist pretensions" in military matters, and his Office of Legal Counsel was no shrinking violet when it came to enunciating a robust vision of executive power.[8] During the Clinton Administration, OLC approved the CIA's original rendition program,[9] the attempted assassination of Osama bin Laden,[10] the use of presidential signing statements,[11] and presidential override of statutes impinging on what might be called unitary executive powers.[12]

The closeness of the questions that confronted the Bush Administration in the War on Terror is perhaps best reflected in the series of cases dealing with the detention and prosecution of foreign terrorists and enemy combatants. The debate over these issues, more than any other separation-of-powers issue in the last eight years, has been settled in our courts. And in the federal courts of appeals—that is, in the courts that are bound to follow faithfully Supreme Court precedent—the Bush Administration is

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[7] The question whether the executive privilege exempts close White House advisors from the compulsion of a lawful congressional subpoena is pending before the Court of Appeals for the District of Columbia Circuit.

[8] GOLDSMITH, *supra* note 1, at 36-37 & nn. 20-22 (citing David Gray Adler, *Clinton, the Constitution, and the War Power*, in THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY 46 (David Gray Adler & Michael A. Genovese eds., 2002)).

[9] *See id.*

[10] *See id.* at 36, 104, 106.

[11] Memorandum from Walter Dellinger, Assistant Attorney General, to Bernard N. Nussbaum, Counsel to the President (Nov. 3, 1993).

[12] *See, e.g.*, Memorandum from Walter Dellinger, Assistant Attorney General, to Abner J. Mikva, Counsel to the President, Presidential Authority to Decline to Execute Unconstitutional Statutes, (Nov. 2, 1994) ("Let me start with a general proposition that I believe to be uncontroversial: there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional."); *id.* ("The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency."); Memorandum from Walter Dellinger, Assistant Attorney General, to Alan J. Kreczko, Special Assistant to the President and Legal Advisor to the National Security Council, Placing of United States Armed Forces under United Nations Operational or Tactical Control (May 8, 1996) ("The proposed amendment unconstitutionally constrains the President's exercise of his constitutional authority as Commander-in-Chief. Further, it undermines his constitutional role as the United States' representative in foreign relations.").

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undefeated in the major War on Terror Cases. In those cases—*Rasul*,[13] *Hamdi*,[14] *Hamdan*,[15] and *Boumediene*[16]—of the twelve votes cast by court of appeals judges, eleven of them came down on the side of the Bush Administration. That striking judicial endorsement of the Bush Administration's positions surely establishes that they were well grounded in Supreme Court precedent and fell squarely within the mainstream of constitutional thought on these issues. And while the Supreme Court ultimately rejected the Bush Administration's positions in these cases, each of them was decided by a closely divided Court over vigorous dissents.

Thus, one can hardly fault OLC for failing to predict, for example, the *Boumediene* Court's abandonment of a venerable case like *Eisentrager*.[17] As Justice Scalia explained:

> The President relied on our settled precedent in *Johnson v. Eisentrager* . . . when he established the prison at Guantanamo Bay for enemy aliens. Citing that case, the President's Office of Legal Counsel advised him "that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay]." . . . Had the law been otherwise, the military surely would not have transported prisoners there, but would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention. Those other facilities might well have been worse for the detainees themselves.[18]

Justice Scalia also explained, convincingly I think, why the *Eisentrager* Court was faithful to the Constitution and the *Boumediene* majority was not.[19] But quite apart from the merits of the *Boumediene* decision, as a policy matter it represents a clear and present threat to our military's effectiveness in fighting the War on Terror. As Chief Justice Roberts asked, who wins with the Court's usurpation of the political branches' prerogative of "control over the conduct of this Nation's foreign policy?"[20] The Chief Justice answered: "Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants."[21] Indeed, in the vacuum created by the Court's decision, it is not at all clear what law applies to the detainees, what rights they have, or

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[13] *Rasul v. Bush*, 542 U.S. 466 (2004).
[14] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[15] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
[16] *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).
[17] *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
[18] 128 S. Ct. at 2294 (Scalia, J., dissenting).
[19] *See id.* at 2303-06.
[20] *Id.* at 2293 (Roberts, C.J., dissenting).
[21] *Id. See also id.* at 2302 (Scalia, J., dissenting) ("It is a sad day for the rule of law when such an important constitutional precedent is discarded without an *apologia*, much less an apology.").

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how our military personnel may conduct captures and detentions anywhere in the world.[22] As Justice Jackson aptly explained in *Eisentrager*: "It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States."[23]

The *Boumediene* Court, it should be noted, overturned the Military Commission Act of 2006, which was *Congress's* carefully considered statutory framework for prosecuting the Guantanamo detainees. In other words, *both* political branches—not just President Bush—made a constitutional determination regarding a proper course of action with regard to the detainees, only to have it, in the words of Chief Justice Roberts, "unceremoniously brushed aside"[24] by five Justices who no longer thought a well-settled World-War-II-era decision was worthy of respect. Worse still is that the statute eviscerated by *Boumediene* resulted from the precise legislative process that four members of the *Boumediene* majority had recommended just two years earlier in Justice Breyer's *Hamdan* concurrence, which stated that "nothing prevents the President from returning to Congress to seek the authority [for the trial of detainees by military commissions] he believes necessary."[25] Thus, the *Boumediene* majority essentially ignored Justice Jackson's famous formulation in the *Steel Seizure Case* that when the President acts pursuant an act of Congress his authority is "at its maximum" and should be accorded "the strongest of presumptions and the widest latitude of judicial interpretation."[26]

Indeed, prior to the War on Terror cases, the Supreme Court had uniformly accorded the President great deference in the area of national security and foreign and military affairs. This bedrock constitutional principle was recognized by Alexander Hamilton in The Federalist,[27] and has been respected by Justices of all eras and

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[22] *Maqaleh v. Gates*, 2009 U.S. Dist. LEXIS 29464, No. 06-1669 (D.D.C. Apr. 2, 2009) (habeas protection extended to detainees held at Bagram Airfield in Afghanistan).

[23] *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

[24] 128 S. Ct. at 2293 (Roberts, C.J., dissenting).

[25] *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring).

[26] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

[27] THE FEDERALIST NO. 74 (Hamilton) at 446 (1788) (Clinton Rossiter ed., 1961) ("Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.").

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ideological stripes, from Chief Justice Marshall during his congressional career,[28] to Justice Story in his famous Commentaries,[29] to Justice Grier in *The Prize Cases*,[30] to Justice Sutherland in the *Curtiss-Wright* opinion,[31] to Justice Douglas in *Pink v. New York*,[32] to Justice Jackson in the *Steel Seizure Cases*[33] and *Eisentrager*,[34] to Justice Blackmun in *Department of the Navy v. Egan*,[35] to Chief Justice Rehnquist in *Regan v. Wald*.[36] As Justice Sutherland explained, the President "has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in

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[28] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (quoting Annals, 6th Cong., col. 613) ("'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'").

[29] 3 J. STORY, COMMENTARIES ON U.S. CONSTITUTION §1485 ("The command and application of the public force, to execute the laws, to maintain peace, and to resist foreign invasion, are powers so obviously of an executive nature, and require the exercise of qualities so peculiarly adapted to this department, that a well-organized government can scarcely exist, when they are taken away from it."); *id.* ("Of all the cases and concerns of government, the direction of war most peculiarly demands those qualities, which distinguish the exercise of power by a single hand."); *id.* ("Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power.").

[30] 67 U.S. (2 Black) 635, 670 (1863) ("Whether the President in fulfilling his duties, as Commander-in-[C]hief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.").

[31] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.").

[32] 315 U.S. 203, 229-30 (1942) (noting that the President "is the sole organ of the federal government in the field of international relations" and that "[e]ffectiveness in handling the delicate problems of foreign relations requires no less") (quotations marks omitted).

[33] 343 U.S. at 645 (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.").

[34] *See, e.g.*, 339 U.S. at 789 ("Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.").

[35] 484 U.S. 518, 529-30 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.").

[36] 468 U.S. 222, 243 (1984).

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time of war."[37] Perhaps the most striking, and alarming, feature of the majority opinions in the recent War on Terror cases is that they either entirely ignore, or only faintly hint at, this canonical separation of powers principle. That a bare majority of the Supreme Court has now effectively cast aside this long history of deference in an area so critical to our national security is, I submit, the most significant development in the separation-of-powers area to come out of the last eight years.

The legal opinions by OLC addressing the use of aggressive interrogation techniques on high-value terrorist detainees have understandably been the subject of intense controversy and congressional scrutiny. Indeed, it is in this area that the Bush Administration and its lawyers have faced the harshest criticism, with the most pointed vitriol directed at Professor John Yoo, the author of the August 2002 and March 2003 OLC opinions on this subject. Some of the criticism of the analysis in those opinions appears to me to be well taken, and the OLC itself—prior to any public disclosure of the memoranda—developed misgivings about the reasoning in the opinions and rightly set about the process of modifying them. Thus, while the so-called Yoo memoranda may well represent an instance of OLC erring in its legal analysis, the full story of these memoranda reflects OLC making difficult and close legal calls under exigent circumstances, continually reassessing its legal advice with the benefit of further study and experience, and then making corrections that were deemed warranted. This is respect for the rule of law at work.

And let me reemphasize that the Executive Branch lawyers who worked on this issue, both in the immediate aftermath of 9/11 and beyond, acted under some of the most trying circumstances imaginable for a lawyer. As Professor Jack Goldsmith, the Assistant Attorney General who withdrew the Yoo memoranda, explained: "When the original opinion was written in the weeks before the first anniversary of 9/11, threat reports were pulsing as they hadn't since 9/11."[38] And while some of the reasoning of Professor Yoo's memoranda has been officially overruled by OLC, I am aware of no evidence that he, or any of the other lawyers in the Justice Department who were involved in preparing the memoranda, acted in bad faith in performing their duties. Indeed, the initial decisions made by the Bush Administration with regard to specific interrogation techniques withstood the further legal scrutiny of three successive generations of leadership in OLC during that Administration.

Which brings me to the recent demands for ethical inquiries and criminal investigations of Bush Administration lawyers. I agree with Professor Alan Dershowitz, who has said this: "The real question is whether investigating one's political opponents poses too great a risk of criminalizing policy differences—especially when these differences are highly emotional and contentious, as they are with regard to Iraq,

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[37] *Curtiss-Wright Export Corp.*, 299 U.S. at 320; *see also id.* ("He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.").

[38] GOLDSMITH, *supra* note 1, at 165.

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terrorism and the like. The fear of being criminally prosecuted by one's political adversaries has a chilling effect on creative policy making and implementation."[39] The notion that Executive Branch lawyers are fair game for ethical investigation and criminal prosecution whenever their advice sparks controversy and disagreement is a recipe for denuding the Justice Department and other agencies of the best and brightest in the legal profession. Even tranquil times, let alone times of war and national peril, engender serious debate and vigorous disagreement over matters of policy and law. If disagreement between lawyers is sufficient to provoke criminal investigation or disciplinary proceedings, why would anyone—of either party or no party—serve as a lawyer for the government?

Lastly on the subject of harsh interrogation techniques, let me say a bit about the substance. Senator Schumer had this to say in 2004:

> I think there are probably very few people in this room or in America who would say that torture should never, ever be used, particularly if thousands of lives are at stake. Take the hypothetical: If we knew that there was a nuclear bomb hidden in an American city and we believed that some kind of torture, fairly severe maybe, would give us a chance of finding that bomb before it went off, my guess is most Americans and most senators, maybe all, would say, "Do what you have to do." [I]t's easy to sit back in the armchair and say that torture can never be used. But when you're in the foxhole, it's a very different deal. And I respect—I think we all respect the fact that the President's in the foxhole every day.[40]

Senator Schumer's forthright observations on this issue underscore just how difficult these decisions are for the President, sometimes even in the face of statutory prohibitions. Congress has now outlawed any "cruel, inhuman, or degrading treatment,"[41] apparently including waterboarding. But suppose a situation arose in which a detainee had information that might prevent a nuclear attack in this city. And suppose further that the President was told that waterboarding the detainee would probably prove effective in immediately eliciting the information? Should the President reject the tactic in unblinking obedience to the statute, at the risk of catastrophic loss to our Nation? Or do his powers as Commander-in-Chief exempt him from the requirements of the statute in such a dire emergency? This was certainly President Lincoln's view, and he famously defended his suspension of the writ of habeas corpus by asking whether we should allow "all the laws but one to go unexecuted and the

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[39] Alan M. Dershowitz, *Indictments Are Not the Best Revenge*, WALL STREET JOURNAL, Sept. 12, 2008, at A17, *available at* http://online.wsj.com/article/SB122117524229925725.html?mod=opinion_main_commentaries.

[40] Hearing Before the Senate Judiciary Committee, 108th Cong. 33-34 (June 8, 2004) (Statement of Charles E. Schumer).

[41] 42 U.S.C. § 2000dd.

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Government itself go to pieces lest that one be violated."[42] Yet there are some today who argue that the Constitution does not grant the President this power, that he acts at his peril if he elects to order measures that would violate the law. I am not certain that this view is wrong, but I am certain that it is not self-evidently correct, and anyone who says it is displays far more constitutional hubris than the lawyers in the Bush Administration. In any event, the notion that executive officials ought to be prosecuted, held liable in a civil court, or face bar discipline proceedings for venturing to answer such questions is indeed chilling, and misguided.

In sum, the Bush Administration's record on separation-of-powers must be reviewed and judged in the context of the extraordinarily difficult and perilous times in which it was made. While I have no doubt that the Bush Administration, like *all* administrations, made some errors, the record simply does not support the charge that the lawyers serving that Administration were indifferent to, let alone contemptuous of, the rule of law. I cannot imagine a more important, yet more difficult, more trying, more thankless, and, indeed, more perilous job for a lawyer than being a legal advisor to the President and the Administration in the weeks and months following 9-11. I give thanks that I was not confronted with so grave and difficult a responsibility during my time at OLC, and I am grateful to the men and women who have served their country in that office in these awful circumstances.

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[42] WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE, CIVIL LIBERTIES IN WARTIME, at 38 (1998) (quoting President Abraham Lincoln, Message to a Special Session of Congress (July 4, 1861)).

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Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
May 13, 2009

Statement of U.S. Senator Russ Feingold
Hearing on "Torture and the Office of Legal Counsel in the Bush Administration"
Senate Judiciary Subcommittee on Administrative Oversight and the Courts

"This hearing is an important step in shedding light on one of the worst abuses of the past administration. Let me be perfectly clear. This so-called enhanced interrogation program was illegal. It was contrary to our national values. And it undermined our national security. Like Chairman Whitehouse, I am a member of the Intelligence Committee. Nothing I have seen – including the two documents to which former Vice President Cheney has repeatedly referred – indicates that the torture techniques authorized by the last administration were necessary, or that they were the best way to get information out of detainees. The former vice president is misleading the American people when he says otherwise.

"Mr. Chairman, I support further declassifications, including of the rest of the Justice Department memos and letters on this program, the Inspector General report, and the work of the Intelligence Committee, provided their release would not jeopardize national security. I have also sought the declassification of my own correspondence, which I sent to then-CIA Director Hayden, detailing my opposition to the program.

"While the revelations of the past month are uncomfortable for some, they are absolutely essential if this country is to return to the rule of law. I am pleased that members of the Judiciary Committee and the Intelligence Committee are moving forward to determine exactly what happened. I continue to believe an independent commission, as Chairman Leahy has proposed, is needed, so that we can finally understand and come to terms with this dark chapter in our recent history."

STATEMENT BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
ADMINISTRATIVE OVERSIGHT AND THE COURTS SUBCOMMITTEE

HEARING ON THE TREATMENT OF DETAINEES IN U.S. CUSTODY

MAY 13TH, 2009

Submitted by
STEVEN M. KLEINMAN, COLONEL, USAFR

Mr. Chairman and distinguished members of the committee, it is an honor to submit this written testimony for your consideration.

I am hopeful that the military resume submitted with my written testimony—one that recounts a twenty-five year career invested in human intelligence operations, interrogation, special survival training, and intelligence support to special operations—will provide sufficient bona fides as to the experience and expertise upon which the following observations and arguments shall be rendered.

The challenges we face today with respect to the detention and interrogation of foreign nationals are substantial and multifaceted; enduring legal, operational, geostrategic, and moral consequences will almost certainly emerge from the decisions we make. To ensure those consequences are consistent with our long-term national interests will require nothing less than a transformation in U.S. policy and in the fundamental assumptions we have about the role of interrogation operations as an intelligence collection process and as a tool of statecraft. In support of this contention, I have delineated a number of critical questions surrounding this vital issue, along with key judgments that will serve to both illuminate the underlying factors and present recommendations for how we might respond.

1. Given America's unsurpassed capabilities and sophistication in technical intelligence, why are interrogation operations still considered necessary within the current geostrategic environment?

> Key Judgment: Many within the U.S. Intelligence Community (IC) were surprised at the emergence of interrogation—a craft that can be traced back to antiquity—as a critical means of collecting vital intelligence data in the first conflicts of the twenty-first century. This is largely the result of the unexpectedly sophisticated strategies executed by our current adversaries in countering America's technological edge, strategies that focused on substantially reducing their electronic footprint and employing creative new measures for communicating by ways both modern and ancient: through the worldwide web as well as through a global network of social contacts. In addition, in the asymmetric operational environment, the amorphous cellular structure of terrorist and insurgent groups simply does not present the

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physical size or electronic signature of a conventional force, making it far more difficult to complete the critical intelligence, surveillance, and reconnaissance cycle of find (i.e., locate), fix (i.e., pinpoint location at a precise time and place), and finish (i.e., confirm that a target or threat has been eliminated).

At the same time, the adversary has utilized off-the-shelf technology in novel ways that have proven difficult to counter (e.g., improvised explosive devices). Under such circumstances, the ability to gain timely and comprehensive insights into adversarial *plans and intentions* becomes of greater importance than simply a fundamental assessment of their capabilities. It should be noted that the ability to gather a comprehensive and timely understanding of plans and intentions has long been recognized as a unique strength of the human intelligence discipline, specifically to include interrogation.

In sum, counterinsurgency and counterterrorism are intelligence-driven activities where information collected directly from the adversary in a face-to-face encounter cannot be replaced by technical collection methods alone. Interrogation has therefore become—and will likely remain—a vital intelligence collection platform.

2. What is the foundation of current interrogation doctrine?

Key Judgment: The ultimate source material for the strategies and tactics set forth in such documents as the Army Field Manual on interrogation remains enigmatic. However, archival research strongly suggests that the interrogation approach strategies prescribed in the Field Manual (e.g., *Pride and Ego Down, We Know All*, etc.) were likely the product of an after-action study of tactical interrogations completed in the period shortly after the end of World War II.

Although this doctrine has formed the basis for interrogation training and operations in the decades that followed, many of the principles—even the paradigm—upon which it is founded are both unsubstantiated by science and/or outdated by best practices. To place this in proper context, one must consider the following:

- The last formal, scientific study of interrogation methodology by the U.S. Government (not counting the CIA-sponsored studies involving the administration of drugs and the use of sensory deprivation) was completed in 1956.

- None of the methods described in the Army Field Manual have ever been subjected to objective studies for the purpose of assessing their operational efficacy. While anecdotal representations abound, no one at this point can offer an objective, science-based argument for their effectiveness.

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- In contrast, a growing body of evidence drawn from extensive research in the behavioral sciences strongly suggests that many of these approaches are of little or no value in persuading, motivating, or inducing a detainee to provide meaningful information; furthermore, that same body of research provides compelling evidence that many of these tactics are arguably *counterproductive* in eliciting reliable and comprehensive information.

3. Are the Central Intelligence Agency's Enhanced Interrogation Techniques based on scientific research and/or longstanding operational experience?

Key Judgment: While the CIA has long been recognized as America's premier human intelligence organization, prior to the attacks of September 11th, 2001 the Agency had no interrogation program, did not employ interrogators, had no in-house interrogation training program, nor had it conducted research into interrogation since the questionable studies involving drug-augmented methods in the 1960s-70s. While Agency personnel had been involved in interrogations periodically throughout its history (e.g., on a limited scale during the Vietnam War, in the custodial interrogation of defectors such as the Russian Yuri Noseko in the early 1960s), interrogation has never been an element of its assigned mission set.

By 2002, the CIA unilaterally assumed an interrogation mission that focused on high-level detainees. This effort involved the expeditious deployment of Agency personnel—many of whom were analysts or human intelligence officers with little or no training in interrogation—augmented by outside contractors. Open source reports have established the interrogation paradigm that ultimately informed these activities was the product of two of these contractors. These individuals were retired military psychologists who, while having extensive experience in SERE (survival, evasion, resistance, and escape) training, collectively possessed absolutely no firsthand experience in the interrogation of foreign nationals for intelligence purposes.

To bring this unfolding scenario into better focus, it must be understood that the resistance to interrogation portion of SERE instruction takes place exclusively within a carefully controlled training environment and involves only U.S. military personnel. Nonetheless, the core of the enhanced interrogation techniques employed by the CIA in the war on terror were the very same methods *acted out* on a more limited scale—under carefully controlled conditions—by SERE instructors during the practical exercises that are an essential feature of resistance to interrogation training. These, in turn, were designed to replicate the interrogation methods employed during the Cold War and beyond by a number of hostile countries, including many that were not signatories to the Geneva Conventions. It is also important to emphasize that these methods—which formed the basis for what was once known as the Communist Interrogation Model—were used primarily to extract false confessions and/or to compel a prisoner to produce propaganda.

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Given this dynamic, the employment of such methods to elicit reliable and comprehensive intelligence from detainees would appear to be strongly contraindicated.

4. What are the potential risks involved in the employment of coercive methods of interrogation?

Key Judgment: Any policy that authorizes the systematic employment of coercive methods will inherently carry substantial risks on both an operational and geostrategic level.

As noted previously, there are no scientific data nor objective operational case studies to support the contention that a paradigm of interrogation that relies upon force, where compliance is obtained through the purposeful application of physical, psychological, and/or emotional stress, will consistently generate reliable, comprehensive, or timely intelligence from a resistant detainee. In fact, there are a number of substantive arguments against such a framework, including the following:

- The use of coercive methods is precisely the strategy most terrorist and insurgent detainees expect from U.S. interrogators; it is consistent with the treatment they have been told would be meted out by an adversary perceived as infidels who do not value the lives of Muslims and who are intent on destroying Islam. In many cases, detainees have been emboldened upon encountering a reality that mirrors that mental construct. In contrast, the highest form of warfare, as espoused by Sun Tzu, is to "take all under heaven *without fighting*," an outcome achieved primarily by countering the enemy's strategy. By approaching the detainee with cultural finesse, subject matter expertise, and a patient effort to bridge the interpersonal chasm, interrogators are often able to undercut the detainee's strategy for resisting. Looking for a Westerner ignorant of their culture and history, he finds an individual who understands and demonstrates respect. Looking for an animal who discounts the humanity of Muslims, he encounters an individual who shows high regard for life and an interest in exploring the possibility of shared interests. Looking for insanity, he finds reason. In sum, what he looks for, he does not find; instead, he finds himself engaged without a pre-planned, operationally useful strategy to resist against an enemy that is surprisingly difficult to hate. This is precisely the interrogation approach masterfully and successfully orchestrated by Mr. Ali Soufan and others.

- Just as signals intelligence seeks to capture electromagnetic emanations and imagery intelligence seeks to capture photographic evidence, intelligence collection by means of interrogation seeks to virtually capture the contents of a detainee's memory and avail itself of the detainee's critical thinking skills that can make reasoned connections (together, this is known in intelligence parlance as *knowledgeability*). Of considerable concern is

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the significant body of behavioral science literature that describes human memory as fragile and subject to compromise under environmental and intrapersonal stressors. Sleep and sensory deprivation, malnourishment, severe anxiety, and fear (among others) have repeatedly been shown to significantly diminish the ability of even cooperative individuals to accurately recall and report information. As the elicitation of reliable information recalled by the detainee forms the fundamental objective of any interrogation, the employment of methods that have been shown to diminish memory rather than enhance it would clearly not be recommended.

- Further, to effectively explore the full range of a detainee's knowledgeability, the interrogator must obtain cooperation rather than compliance. Essentially, the interrogator must be invited into the detainee's storehouse of knowledge.

  - Even in instances where a detainee capitulates under the employment of pressure tactics and grudgingly agrees to answer questions posed to him, that rarely leads to an offer of all the information he might possess. Instead, he can be expected to only provide information that responds directly to the questions asked, while information pertaining to questions not asked will likely be concealed. Furthermore, as coercive means often combine the use of leading questions along with the application of significant forms of pressure, there is an increased possibility that the detainee will affirm the interrogator's expectations —whether true or not—simply to end the suffering.

  - In contrast, interrogators who have elicited cooperation through a relationship-building approach routinely report instances where the detainee not only was fully responsive to the questions posed, but also spontaneously offered additional (sometimes critical) information in areas the interrogator had not expected due to the original assessment of the detainee's scope of knowledge.

- While the geostrategic domain is more complex, cause and effect may still be clearly established. Such is the case regarding U.S. policy on—or, more accurately, U.S. actions in—the conduct of interrogation.

  - There is broad agreement among counterterrorism experts that reports of prisoner abuse by American interrogators have meaningfully shifted the momentum in the strategic information campaign to the adversary. Extended isolation, the use of dogs, exposure to extremes in temperature and deafening noise, sexual humiliation, and desecration of religious articles have all been employed as tactics in an often vain effort to obtain critical intelligence data. At the same time, reports of these horrific actions—at times accompanied by graphic images—have formed the basis for the most effective recruiting themes used by the adversary to enlist new fighters and gather support for their cause. In

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calculating a risk/gain analysis, it would be difficult to imagine information (gain) obtained through these means that would be of such value that it would offset the enhanced threat to national security (risk) generated by these very same tactics.

- Conversely, substantial and enduring geostrategic advantages are likely to accrue from an interrogation policy that more accurately reflects this nation's traditional values. Consider, for example, how a doctrine that incorporates the widely accepted Common Article Three guidelines pertaining to the treatment of detainees, within the paradigm espoused by Colonel John Boyd, recognized by many as one of the most insightful strategists of the twentieth century:

> "For success over the long haul and under the most difficult conditions...what is needed is a vision rooted in human nature so noble, so attractive that it not only attracts the uncommitted and magnifies the spirit and strength of its adherents, but also undermines the dedication and determination of any competitors or adversaries."

5. Doesn't America need the flexibility to employ coercive methods in instances where time is limited and the potential loss of life is significant?

Key Judgment: In the argument over the use of coercion or torture, the focus remains on the attendant legal and moral issues. The erroneous presupposition that both sides to the argument have inexplicably accepted is that coercion is a proven means of effectively obtaining useful information from a resistant detainee. To emphasize a key point, there are no objective data to suggest that coercive interrogation methods are *consistently and reliably* effective in obtaining information of intelligence value. This fundamental operational reality holds true regardless of context or time restrictions; forcing compliance by administering physical and/or psychological stress is as ineffective and counterproductive in a so-called "ticking time bomb" scenario as it is in a long-term custodial setting.

The effective management of any intelligence collection methodology—technical or human-based—requires a mature, reasoned, and sophisticated understanding of both that methodology's capabilities and its limitations. In this regard, the scope of the information that might be obtained through the interrogation of knowledgeable individuals is theoretically infinite. However, there is an inherent and frequently overlooked limitation of interrogation regardless of the methods used: not every individual can be recruited, encouraged, motivated, cajoled, tricked, forced, or threatened to share all he

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knows. To use the popular if misleading term, not all detainees can be broken!

Despite this inescapable fact, national security continues to be held hostage to a myth. In support of this contention, consider the fact that the Intelligence Community provides all-source intelligence through an annual investment of approximately $45 billion spread among people, facilities, equipment, and services (according to the most recent official, unclassified data). Given such an imposing figure, it is difficult conceive how the taxpayer is enjoying a reasonable return on investment if the safety and security of the American people would ultimately rest upon the decision as to how much and for how long a captured terrorist must be tortured for the information necessary to neutralize the threat.

6. Is there a consensus among America's most experienced interrogators and human intelligence officers regarding the best overall strategy for eliciting reliable information from high value detainees?

Key Judgment: In June 2008, fifteen current and retired interrogators and intelligence officials representing a collective 350 years of field experience gathered to share their thoughts on the methods that have proven most effective in eliciting timely and credible information from even the most resistant individuals, including suspected terrorists and others who threaten the security of the United States. (Note: This gathering was sponsored by Human Rights First, which produced the event but did not shape the scope of the discussions nor the conclusions reached by the group. To date, however, no entity within the U.S. Intelligence Community has sponsored a similar gathering to address interrogation strategies for the current and future conflicts.)

This elite cadre of human intelligence professionals categorically identified a number of principles that warrant serious consideration as efforts to transform U.S. policies on the handling and interrogation of detainees moves forward. The agreed upon principles are summarized as follows:

- Non-coercive, culturally relevant, rapport-based approaches have consistently proven to be the most effective means of eliciting accurate and complete intelligence information under any circumstance.

- Torture and other inhumane and abusive questioning techniques are not only unlawful, they are both ineffective and counterproductive. The employment of coercion or torture is unconditionally rejected.

- The use of torture and other inhumane and abusive treatment consistently results in false and misleading information, the loss of critical intelligence, and has caused serious damage to the reputation and standing of the United States. The use of such techniques also facilitates enemy

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recruitment, misdirects or wastes scarce resources, and deprives the United States of the standing to demand humane treatment of captured Americans.

- There must be a single well-defined standard of conduct across all U.S. agencies to govern the detention and interrogation of individuals in U.S. custody at any location. This standard must be consistent with our values as a nation. (The utility of the Army Field Manual as the inaugural standard is addressed as Key Issue #8.)

- There is no conflict between adhering to our nation's essential values, including respect for inherent human dignity, and our ability to obtain the information we need to protect the nation.

7. Might a systematic review of past American interrogation operations uncover doctrine, practices, or strategies that would prove useful in improving the U.S. approach to interrogation in the current conflicts?

Key Judgment: Research conducted by officers completing the graduate program in strategic intelligence at the National Defense Intelligence College has uncovered an extensive body of knowledge in the National Archives concerning a uniquely successful U.S. strategic interrogation program conducted during World II. Although this program closed down in 1946, the historical records remained classified and securely archived until the 1990s; as a result, the many insightful, operationally effective principles and strategies developed during that time were never incorporated into contemporary doctrine nor into the curricula currently taught at the various interrogation training centers.

This program—operating under the code-name MIS-Y—effectively elicited invaluable intelligence from senior German and Japanese military officers, government officials, and scientists, many of whom were intractably resistant to questioning at the beginning of the process. MIS-Y interrogators—informed by the experiences and lessons learned from a similar British program—designed their own methods by drawing upon their considerable knowledge of human behavior, acute cultural awareness, and impressive linguistic talents. These strategies and tactics ultimately proved exceptionally effective in gaining the cooperation of even the most recalcitrant and taciturn prisoners, while also meeting the letter and spirit of the Geneva Conventions with respect to the treatment of prisoners.

Many Americans have forgotten how individual and collective allegiance to the Third Reich or the Japanese Empire during this period profoundly influenced the beliefs, values, and behaviors of our adversaries during the war. A similar phenomenon exists today regarding the religious and national extremism exhibited by many of America's current adversaries and offers a striking parallel.

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The individuals assigned as interrogators, as well as to key support positions, were part of an elite group. Many already possessed undergraduate and graduate degrees; most were skilled linguists who had lived for extended periods in Germany or Japan and therefore intimately understood the culture, politics, history, and geography of these countries; and each had been identified as being among the most intellectually gifted among their military peers. From a demographic perspective, they were ideally suited to engage with the top-tier enemy officers and government civilians they would encounter in the strategic interrogation setting.

8. Army Field Manual 2-22.3, *Human Intelligence Collector Operations,* was recently adopted as the single standard governing interrogations. Is this sufficient both as a standard of conduct and as a model for interrogation methodology under all circumstances, to include level of conflict (i.e., tactical, operational, and strategic), nature of conflict (i.e., conventional, counterterrorism, counterinsurgency), and function (i.e., criminal investigation, intelligence)?

Key Judgments: It is my professional judgment that the Army Field Manual provides a useful and comprehensive standard of conduct that allows for the operationally effective interrogation of detainees or suspects in the entire range of circumstances listed above. It is also my professional judgment that, while the interrogation paradigm described in the Army Field Manual is of substantial utility at the tactical level in a conventional conflict, a new and far more sophisticated, science-based model of interrogation is required to meet the more demanding challenges at the operational and strategic levels of conventional conflict and at all levels of an asymmetric conflict.

Key Judgment 1 - The Army Field Manual as a Standard of Conduct: While interrogations conducted within the law enforcement dimension must also adhere to an additional legal framework (e.g., laws of evidence, criminal procedures, etc.), the definitive guidance set forth in the Army Field Manual effectively encapsulates both national and international law and would shape an operational environment that would categorically prohibit abusive practices. In turn such a standard would also concomitantly eliminate the employment of coercive methods that are arguably counterproductive in eliciting reliable information.

- The philosophy underlying the handling and interrogation of detainees set forth in the Field Manual is succinctly rendered in the Napoleon maxim quoted within its pages: "*Prisoners of war do not belong to the power for which they have fought; they are all under the safeguard of honor and generosity of the nation that has disarmed them.*" A policy on the treatment of detainees that is informed by the concepts of honor and generosity would

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serve as a solid cornerstone of Boyd's "vision rooted in human nature so noble" referenced above.

- The authors of the revised version of the Field Manual expertly created a lucid and comprehensive architecture that provides unambiguous guidance for standards of conduct that apply across a wide spectrum of operational settings. Among the many critical issues addressed in the Field Manual are the following (with section citation):

  - **Who is ultimately responsible for ensuring applicable laws and regulations are followed and enforced?** Compliance with laws and regulations, including proper treatment of detainees, is a matter of command responsibility. (5-54)

  - **What are the guidelines governing the activities of interrogators from agencies outside the Department of Defense (DoD) when operating within DoD facilities?** Requests by non-DoD agencies for permission to conduct interrogations in Army facilities must be approved by the joint task force (or higher level) commander. As with DoD interrogators (active duty, civilian, or contractor employees), non-DoD personnel will only use DoD-approved interrogation approaches and techniques. All interrogations conducted by non-DoD agencies will be observed by DoD personnel. All perceived violations of DoD interrogation standards will be reported to the commander. If non-DoD personnel are observed mistreating any detainee, the event will be reported immediately and their access to the DoD facility will be suspended pending adjudication by appropriate authorities. Non-DoD personnel working in DoD interrogation facilities have no authority over DoD interrogators. (5-55)

  - **What are the guidelines governing the activities of interrogators from foreign government when operating within DoD facilities?** When approved by the appropriate chain of command, representatives of foreign governments may participate in interrogations conducted at Army facilities. Foreign government personnel must comply with U.S. DoD policies and observe the same standards for the conduct of interrogation operations and treatment of detainees as do DoD personnel. In all instances, interrogations conducted by foreign government interrogators will be observed by U.S .DoD personnel. (5-56)

  - **Are the standards of conduct in the Army Field Manual consistent with the guidelines for the treatment of captured individuals as set forth in the Geneva Conventions?** The Field Manual describes the Geneva Conventions as establishing specific standards for humane care and treatment of enemy personnel captured, retained, or detained by US military forces and its allies. In addition, it directs all persons who have knowledge of suspected or alleged

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violations of the Geneva Conventions to report such matters through command channels or to designated individuals, such as the Staff Judge Advocate or Inspector General. The Field Manual also specifically cites a number of directly applicable articles of the Geneva Convention Relative to the Treatment of Prisoners of War, including Article 17, which states, "No physical or mental torture or any other form of coercion may be inflicted on prisoners to secure from them information of any kind whatever. Prisoners who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." (5-69, 5-70, 5-73)

- **Are there options for reporting violations other than the chain-of-command?** Every soldier has the duty to report serious incidents, whether observed or suspected. Such incidents are reported to the chain of command; however, if the chain of command itself is implicated, the soldier can report the incident to the Staff Judge Advocate, Inspector General, chaplain, or provost marshal. (5-71)

- **Does the Field Manual provide guidance with respect to the treatment of detainees in accordance with U.S. law?** The Field Manual is unequivocal in describing the humane standards of treatment that must be, in accordance with U.S. law, afforded all prisoners and detainees in U.S. custody. Cruel, inhuman or degrading treatment is expressly forbidden (citing the Detainee Treatment Act of 2005 definition as that prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution). The Field Manual also refers to "an extensive body of law developed by the courts of the United States to determine when, under various circumstances, treatment of individuals would be inconsistent with American constitutional standards related to concepts of dignity, civilization, humanity, decency and fundamental fairness." (Page 5-21)

- **Would the methods referred to as "Enhanced Interrogation Techniques" be allowable under the standards of conduct set forth in the Field Manual?** The list of actions that are specifically prohibited by the Field Manual for employment in the course of intelligence interrogation include (but are not limited to):

  - Subjecting the individual to humiliating or degrading treatment;
  - Forcing an individual to be naked, perform or simulate sexual acts, or to pose in a sexual manner;
  - Exposing an individual to outrageously lewd and sexually provocative behavior;
  - Intentionally damaging or destroying an individual's religious articles;
  - Placing hoods or sacks over the head of a detainee or placing duct tape over the eyes;

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- Applying beatings, electric shock, burns, or other forms of physical pain;
- Waterboarding;
- Using military working dogs;
- Inducing hypothermia or heat injury;
- Conducting mock executions;
- Depriving the detainee of necessary food, water, or medical care;
- Threats to turn the individual over to others to be abused;
- Implying harm to the individual or his property;
- Implying a deprivation of applicable protections guaranteed by law because of a failure to cooperate;
- Threatening to separate parents from their children. (5-75, 5-76)

- **There is always the possibility that an interrogator might encounter a situation not expressly covered in the Field Manual. What standard, then, might the interrogator refer to in making a determination about acceptable treatment of a detainee?** In assessing the appropriateness of any technique, or set of techniques, for use in the interrogation of a detainee in U.S. custody, the Field Manual offers this insightful and useful question to guide an interrogator's conduct: *If the proposed approach technique were used by the enemy against one of your fellow soldiers, would you believe the soldier had been abused?*

Key Judgment 1 - The Army Field Manual as a Model for Effective Interrogation: As noted previously, the approach methodology set forth in the Field Manual has never been subjected to an evidence-based examination as to its efficacy in eliciting reliable and comprehensive intelligence from foreign detainees. As a normative system of approaches, the current Field Manual (and previous iterations) are prescriptive only insofar as they have been sanctioned by long-standing usage. In contrast, the descriptive value falls well short of the scientific foundation that might be expected.

- The above notwithstanding, there has been extensive research into the psychology of persuasion that would account for the more sophisticated approach strategies employed by the nation's most talented interrogators (e.g., Colonel Stewart Herrington, Jack Cloonan, Ali Soufan, Robert McFadden, Joe Navarro, Pierre Joly, and others). In the search for a psychological infrastructure to explain their operational success, one could arguably point to the six primary principles of persuasion described by social psychologist Robert Cialdini (i.e., *reciprocity, authority, scarcity, consistency, liking, and social proof*) in a science-based model of human behavior that has been extensively peer-reviewed and replicated.

- This brief assessment of the efficacy of the current model is not meant to be exhaustive. The intent is simply to emphasize the requirement that a transformation plan must include a robust effort to better understand the

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science that underscores the art of interrogation. In sum, meeting the multi-dimensional, cross-cultural, and complex challenges of eliciting reliable information from an array of knowledgeable detainees—from the reluctant to the recalcitrant—will require a new and far more sophisticated model of interrogation than that described in the Army Field Manual.

9. What key steps are necessary to complete a transformation in the policies, practices, and infrastructure that will shape how the U.S. conducts interrogation operations in the future?

Key Judgment: The term "transformation" was chosen specifically to describe the dramatic shift needed in U.S. policy on interrogation to more effectively support the nation's intelligence and security interests. This will require a sea-change in perspective, vision, action, and character.

The following actions are essential to realizing this transformation in the American way of interrogation and are respectfully recommended in order of priority:

- Establish a Center of Excellence for strategic and operational interrogation at the Intelligence Community-level. Staffed by a select group of skilled and experienced personnel in association with behavioral scientists, intelligence and security professionals, and an array of relevant subject matter experts, the primary mission of such an entity would be to:
  - Establish a robust research agenda to ensure current methods of interrogation are objectively valid as well as to identify and refine additional strategies and methods that will form the basis of the next generation model of interrogation.
  - Complete a global best practices study of interrogation and debriefing methods to identify, examine, assess, and adopt the most effective interrogation strategies and methods that would help support U.S. national security interests in a manner that carefully hewed to the nation's longstanding legal and moral standards.
  - Design and implement a new, more sophisticated and operationally relevant doctrine on the conduct of interrogations in the intelligence, counterintelligence, and counterterrorism domains.
  - Design, implement, and manage an overriding standard of ethics and conduct for interrogations conducted by all personnel employed by or contracted to the U.S. Government.
- Establish a strategic interrogation operational unit composed of the most experienced and accomplished members of the U.S. Government. The primary mission of this organization would be to:

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- Foster, in conjunction with the Center of Excellence, a truly professional approach to the craft of interrogation, including the introduction of competitive selection criteria; basic, advanced, and continuing education requirements; and a system of apprenticeship under experienced mentors.

- Design and implement a team approach to high-level cases that would involve a cadre of interrogators led by a senior officer and a supporting contingent of behavioral science consultants, cultural specialists, linguists, and relevant subject matter experts. A primary function assigned to behavioral science professionals within this structure would be to provide oversight and controls designed to substantially reduce the probability of behavioral drift on the part of the interrogator.

- Provide regularly scheduled briefings to the Director of National Intelligence, the Senate Select Committee on Intelligence, and the House Permanent Select Committee on Intelligence that would cover, at a minimum, updates on current and planned operations, progress in doctrinal development, and interactions with allied counterparts.

- Establish and enforce a single, U.S. Government-wide standard and doctrine for the conduct of strategic and operational interrogation. While the Army Field Manual currently sets forth a clear and universal standard for the conduct of interrogators (and interrogation at the tactical-level), revisions will be necessary to articulate emerging doctrine for interrogations at the operational and strategic levels.

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Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
May 13, 2009

Statement Of Senator Patrick Leahy (D-Vt.),
Hearing Before The Judiciary Subcommittee
On Administrative Oversight And The Courts,
"What Went Wrong: Torture And The Office Of Legal Counsel In The Bush Administration"
May 13, 2009

This morning's hearing again raises the question of how we got to a place where the Department of Justice's Office of Legal Counsel (OLC) came to write predetermined and premeditated legal opinions that allowed President Bush to authorize the torture of those in American custody and control. From General George Washington's example during the Revolutionary War through the Civil War, the World Wars, Korea and Vietnam, it was America that provided the model of a Nation that would not engage in such practices. It was America that led the world in the recognition of human dignity and human rights. That the elite legal office at the Justice Department responsible for guiding the Executive Branch, and with the power to issue binding interpretations of law, so misused its authority is one of the fundamental breakdowns in the rule of law that dominated the last eight years.

The recent release of four more OLC memos, written by two former heads of the OLC, Jay S. Bybee and Steven Bradbury, demonstrate in excruciating detail the methods authorized and used on people in American custody. Shackling naked people from the ceiling, keeping them inside a small box with an insect, beating them repeatedly, and waterboarding, are actions we have rightly protested being used against Americans anywhere in the world at any time for any supposed purpose.

The purported legal justifications for these policies are likewise disturbing. Some of the opinions use an ends-justify-the-means type of circular reasoning. Some seek to defend the use of these techniques by relying on hypertechnical interpretations that disregard the prohibitions in our laws. All seem posited on a belief that the President is somehow above the law or can override the laws. The rule of law means that no one is above the law, not even the President of the United States.

I thank Senator Whitehouse for holding this important hearing and for his commitment to the rule of law and to getting to the truth. I would like to see us move forward with a comprehensive, nonpartisan inquiry into these matters. Until Republican Senators come to support that approach, we will necessarily need to proceed piecemeal.

Two weeks ago I invited Judge Jay Bybee to testify before the Senate Judiciary Committee. I did so after reading accounts in The Washington Post suggesting that he had expressed regrets regarding his work product while at OLC. In comments he sent to The New York Times he turned around and defended his legal opinions that have now been withdrawn. I invited him to come forward to tell the truth, the complete truth, before the Committee. I ask that a copy of my April 29 letter to Judge Bybee be included in the record.

Since Judge Bybee, through his lawyers, has declined to testify before the Committee at this time about his role in the drafting and authorization of memoranda from the Office of Legal Counsel that permitted torture, I can only presume that he has no exonerating information to provide. Judge Bybee must know that the presumption in our civil law is that when a person fails to come forward with information in his possession that is relevant to a matter, it is presumed to be because the information is negative and not helpful to his cause.

Testifying voluntary before the Judiciary Committee about these now-public memoranda is one way in which Judge Bybee could have helped complete the record of what happened and why but he refused. This is especially inappropriate given that Judge Bybee has hardly maintained silence about these matters. He has talked to friends and employees, he has communicated to the press and he has communicated through his lawyers to the Justice Department regarding the Office of Professional Responsibility's review of his actions while a government employee in the Office of Legal Counsel. Apparently the only people he will not explain his actions to are the people who granted him a lifetime appointment to the Federal bench -- the American people through their elected representatives in Congress.

How we approach the mistakes of the past, and whether we choose to learn from them, will shape our way forward. Accountability can help restore our reputation around the world. Most importantly, we need to reestablish the trust of the American public in their Government. They deserve to know and understand what happened and why so that we can do our best to ensure that we do not make the same tragic mistakes, again.

# # # # #

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

February 4, 2005

Honorable William J. Haynes II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, D.C. 20101-1600

Re: Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (March 14, 2003) ("March 2003 Memorandum")

Dear Jim:

In December 2003, then-Assistant Attorney General Jack Goldsmith advised you that the March 2003 Memorandum was under review by this Office and should not be relied upon for any purpose. Assistant Attorney General Goldsmith specifically advised, however, that the 24 interrogation techniques approved by the Secretary of Defense for use with al Qaeda and Taliban detainees at Guantanamo Bay Naval Base were authorized for continued use as noted below. I understand that, since that time, the Department of Defense has not relied on the March 2003 Memorandum for any purpose. I also understand that, to the extent that the March 2003 Memorandum was relied on from March 2003 to December 2003, policies based on the substance of that Memorandum have been reviewed and, as appropriate, modified to exclude such reliance. This letter will confirm that this Office has formally withdrawn the March 2003 Memorandum.

The March 2003 Memorandum has been superseded by subsequent legal analyses. The attached Testimony of Patrick F. Philbin before the House Permanent Select Committee on Intelligence, July 14, 2004, reflects a determination by the Department of Justice that the 24 interrogation techniques approved by the Secretary of Defense mentioned above are lawful when used in accordance with the limitations and safeguards specified by the Secretary. This also accurately reflects Assistant Attorney General Goldsmith's oral advice in December 2003. In addition, as I have previously informed you, this Office has recently issued a revised interpretation of the federal criminal prohibition against torture, codified at 18 U.S.C. §§ 2340-2340A, which constitutes the authoritative opinion of this Office as to the requirements of that statute. See Memorandum for Deputy Attorney General James B. Comey from Daniel Levin,

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Acting Assistant Attorney General, Office of Legal Counsel, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004) (copy attached).

Please let us know if we can be of further assistance.

Sincerely,

Daniel Levin
Acting Assistant Attorney General

Attachments

LEGAL STANDARDS APPLICABLE UNDER 18 U.S.C. §§ 2340-2340A

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.

That statute prohibits conduct "specifically intended to inflict severe physical or mental pain or suffering." This opinion concludes that "severe" pain under the statute is not limited to "excruciating or agonizing" pain or pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death."

The statute also prohibits certain conduct specifically intended to cause "severe physical suffering" distinct from "severe physical pain."

December 30, 2004

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

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")[(1)]; customary international law[(2)]; centuries of Anglo-American law[(3)]; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.[(4)]

This Office interpreted the federal criminal prohibition against torture--codified at 18 U.S.C. §§ 2340-2340A--in *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002) ("August 2002 Memorandum"). The August 2002 Memorandum also addressed a number of issues beyond 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. *See id.* at 31-46.

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." *Id.* at 1. [(5)] 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. [(6)] 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.[7]

We have also modified in some important respects our analysis of the legal standards applicable under 18 U.S.C. §§ 2340-2340A. For example, we disagree with statements in the August 2002 Memorandum limiting "severe" pain under the statute to "excruciating and agonizing" pain, *id.* at 19, or to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," *id.* at 1. There are additional areas where we disagree with or modify the analysis in the August 2002 Memorandum, as identified in the discussion below. [8]

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

I.

Section 2340A provides that "[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life."[9] Section 2340(1) defines "torture" as "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."[10]

In interpreting these provisions, we note that Congress may have adopted a statutory definition of "torture" that differs from certain colloquial uses of the term. *Cf. Cadet v. Bulger*, 377 F.3d 1173, 1194 (11th Cir. 2004) ("[I]n other contexts and under other definitions [the conditions] might be described as torturous. The fact remains, however, that the only relevant definition of 'torture' is the definition contained in [the] CAT. . . ."). We must, of course, give effect to the statute as enacted by Congress.[11]

Congress enacted sections 2340-2340A to carry out the United States' obligations under the CAT. *See* H.R. Conf. Rep. No. 103-482, at 229 (1994). The CAT, among other things, obligates state parties to take effective measures to prevent acts of torture in any territory under their jurisdiction, and requires the United States, as a state party, to ensure that acts of torture, along with attempts and complicity to commit such acts, are crimes under U.S. law. *See* CAT arts. 2, 4-5. Sections 2340-2340A satisfy that requirement with respect to acts committed outside the United States.[12] Conduct constituting "torture" occurring within the United States was--and remains--prohibited by various other federal and state criminal statutes that we do not discuss here.

The CAT defines "torture" so as to require the intentional infliction of "severe pain or suffering, whether physical or mental." Article 1(1) of the CAT provides:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as

obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Senate attached the following understanding to its resolution of advice and consent to ratification of the CAT:

The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36 (1990). This understanding was deposited with the U.S. instrument of ratification, *see* 1830 U.N.T.S. 320 (Oct. 21, 1994), and thus defines the scope of the United States' obligations under the treaty. *See Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 32-33 (1987). The criminal prohibition against torture that Congress codified in 18 U.S.C. §§ 2340-2340A generally tracks the prohibition in the CAT, subject to the U.S. understanding.

II.

Under the language adopted by Congress in sections 2340-2340A, to constitute "torture," the conduct in question must have been "specifically intended to inflict severe physical or mental pain or suffering." In the discussion that follows, we will separately consider each of the principal components of this key phrase: (1) the meaning of "severe"; (2) the meaning of "severe physical pain or suffering"; (3) the meaning of "severe mental pain or suffering"; and (4) the meaning of "specifically intended."

(1) The meaning of "severe."

Because the statute does not define "severe," "we construe [the] term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The common understanding of the term "torture" and the context in which the statute was enacted also inform our analysis.

Dictionaries define "severe" (often conjoined with "pain") to mean "extremely violent or intense: *severe pain*." *American Heritage Dictionary of the English Language* 1653 (3d ed.

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1992); *see also* XV *Oxford English Dictionary* 101 (2d ed. 1989) ("Of pain, suffering, loss, or the like: Grievous, extreme" and "Of circumstances . . . : Hard to sustain or endure").[13]

The statute, moreover, was intended to implement the United States' obligations under the CAT, which, as quoted above, defines as "torture" acts that inflict "severe pain or suffering" on a person. CAT art. 1(1). As the Senate Foreign Relations Committee explained in its report recommending that the Senate consent to ratification of the CAT:

The [CAT] seeks to define "torture" in a relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned. . . .

. . . .

. . . The term "torture," in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.

S. Exec. Rep. No. 101-30, at 13-14. *See also* David P. Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 Nova L. Rev. 449, 455 (1991) ("By stressing the extreme nature of torture, . . . [the] definition [of torture in the CAT] describes a relatively limited set of circumstances likely to be illegal under most, if not all, domestic legal systems.").

Further, the CAT distinguishes between torture and "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1." CAT art. 16. The CAT thus treats torture as an "extreme form" of cruel, inhuman, or degrading treatment. *See* S. Exec. Rep. No. 101-30, at 6, 13; *see also* J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 80 (1988) ("*CAT Handbook*") (noting that Article 16 implies "that torture is the *gravest form* of [cruel, inhuman, or degrading] treatment [or] punishment") (emphasis added); Malcolm D. Evans, *Getting to Grips with Torture*, 51 Int'l & Comp. L.Q. 365, 369 (2002) (The CAT "formalises a distinction between torture on the one hand and inhuman and degrading treatment on the other by attributing different legal consequences to them.").[14] The Senate Foreign Relations Committee emphasized this point in its report recommending that the Senate consent to ratification of the CAT. *See* S. Exec. Rep. No. 101-30, at 13 ("'Torture' is thus to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in the case of torture. . . . The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to 'other acts of cruel, inhuman or degrading treatment or punishment *which do not amount to torture* . . . .'"). *See also Cadet*, 377 F.3d at 1194 ("The definition in CAT draws a critical distinction between 'torture' and 'other acts of cruel, inhuman, or degrading punishment or treatment.'").

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Representations made to the Senate by Executive Branch officials when the Senate was considering the CAT are also relevant in interpreting the CAT's torture prohibition--which sections 2340-2340A implement. Mark Richard, a Deputy Assistant Attorney General in the Criminal Division, testified that "[t]orture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct." *Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 16 (1990) ("*CAT Hearing*") (prepared statement). The Senate Foreign Relations Committee also understood torture to be limited in just this way. *See* S. Exec. Rep. No. 101-30, at 6 (noting that "[f]or an act to be 'torture,' it must be an extreme form of cruel and inhuman treatment, causing severe pain and suffering, and be intended to cause severe pain and suffering"). Both the Executive Branch and the Senate acknowledged the efforts of the United States during the negotiating process to strengthen the effectiveness of the treaty and to gain wide adherence thereto by focusing the Convention "on torture rather than on other relatively less abhorrent practices." *Letter of Submittal from George P. Shultz, Secretary of State, to President Ronald Reagan* (May 10, 1988), *in* S. Treaty Doc. No. 100-20, at v; *see also* S. Exec. Rep. No. 101-30, at 2-3 ("The United States" helped to focus the Convention "on torture rather than other less abhorrent practices."). Such statements are probative of a treaty's meaning. *See* 11 Op. O.L.C. at 35-36.

Although Congress defined "torture" under sections 2340-2340A to require conduct specifically intended to cause "severe" pain or suffering, we do not believe Congress intended to reach only conduct involving "excruciating and agonizing" pain or suffering. Although there is some support for this formulation in the ratification history of the CAT,[15] a proposed express understanding to that effect[16] was "criticized for setting too high a threshold of pain," S. Exec. Rep. No. 101-30, at 9, and was not adopted. We are not aware of any evidence suggesting that the standard was raised in the statute and we do not believe that it was.[17]

Drawing distinctions among gradations of pain (for example, severe, mild, moderate, substantial, extreme, intense, excruciating, or agonizing) is obviously not an easy task, especially given the lack of any precise, objective scientific criteria for measuring pain.[18] We are, however, aided in this task by judicial interpretations of the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note (2000). The TVPA, also enacted to implement the CAT, provides a civil remedy to victims of torture. The TVPA defines "torture" to include:

any act, directed against an individual in the offender's custody or physical control, by which *severe pain or suffering* (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), *whether physical or mental*, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind . . . .

28 U.S.C. § 1350 note, § 3(b)(1) (emphases added). The emphasized language is similar to section 2340's "severe physical or mental pain or suffering."[19] As the Court of Appeals for the District of Columbia Circuit has explained:

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The severity requirement is crucial to ensuring that the conduct proscribed by the [CAT] and the TVPA is sufficiently extreme and outrageous to warrant the universal condemnation that the term "torture" both connotes and invokes. The drafters of the [CAT], as well as the Reagan Administration that signed it, the Bush Administration that submitted it to Congress, and the Senate that ultimately ratified it, therefore all sought to ensure that "only acts of a certain gravity shall be considered to constitute torture."

The critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim. The more intense, lasting, or heinous the agony, the more likely it is to be torture.

Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 92-93 (D.C. Cir. 2002) (citations omitted). That court concluded that a complaint that alleged beatings at the hands of police but that did not provide details concerning "the severity of plaintiffs' alleged beatings, including their frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out," did not suffice "to ensure that [it] satisf[ied] the TVPA's rigorous definition of torture." *Id.* at 93.

In *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C. Cir. 2003), the D.C. Circuit again considered the types of acts that constitute torture under the TVPA definition. The plaintiff alleged, among other things, that Libyan authorities had held her incommunicado and threatened to kill her if she tried to leave. *See id.* at 232, 234. The court acknowledged that "these alleged acts certainly reflect a bent toward cruelty on the part of their perpetrators," but, reversing the district court, went on to hold that "they are not in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture within the meaning of the [TVPA]." *Id.* at 234. Cases in which courts have found torture suggest the nature of the extreme conduct that falls within the statutory definition. *See, e.g.*, *Hilao v. Estate of Marcos*, 103 F.3d 789, 790-91, 795 (9th Cir. 1996) (concluding that a course of conduct that included, among other things, severe beatings of plaintiff, repeated threats of death and electric shock, sleep deprivation, extended shackling to a cot (at times with a towel over his nose and mouth and water poured down his nostrils), seven months of confinement in a "suffocatingly hot" and cramped cell, and eight years of solitary or near-solitary confinement, constituted torture); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1332-40, 1345-46 (N.D. Ga. 2002) (concluding that a course of conduct that included, among other things, severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat, and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim's forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of "Russian roulette," constituted torture); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22-23 (D.D.C. 2001) (entering default judgment against Iraq where plaintiffs alleged, among other things, threats of "physical torture, such as cutting off . . . fingers, pulling out . . . fingernails," and electric shocks to the testicles); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64-66 (D.D.C. 1998) (concluding that a course of conduct that included frequent beatings, pistol whipping, threats of imminent death, electric shocks, and attempts to force confessions by playing Russian roulette and pulling the trigger at each denial, constituted torture).

(2) The meaning of "severe physical pain or suffering."

The statute provides a specific definition of "severe mental pain or suffering," *see* 18 U.S.C. § 2340(2), but does not define the term "severe physical pain or suffering." Although we think the meaning of "severe physical pain" is relatively straightforward, the question remains whether Congress intended to prohibit a category of "severe physical suffering" distinct from "severe physical pain." We conclude that under some circumstances "severe physical suffering" may constitute torture even if it does not involve "severe physical pain." Accordingly, to the extent that the August 2002 Memorandum suggested that "severe physical suffering" under the statute could in no circumstances be distinct from "severe physical pain," *id.* at 6 n.3, we do not agree.

We begin with the statutory language. The inclusion of the words "or suffering" in the phrase "severe physical pain or suffering" suggests that the statutory category of physical torture is not limited to "severe physical pain." This is especially so in light of the general principle against interpreting a statute in such a manner as to render words surplusage. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Exactly what is included in the concept of "severe physical suffering," however, is difficult to ascertain. We interpret the phrase in a statutory context where Congress expressly distinguished "physical pain or suffering" from "mental pain or suffering." Consequently, a separate category of "physical suffering" must include something other than any type of "mental pain or suffering."[20] Moreover, given that Congress precisely defined "mental pain or suffering" in the statute, it is unlikely to have intended to undermine that careful definition by including a broad range of mental sensations in a "physical suffering" component of "physical pain or suffering."[21] Consequently, "physical suffering" must be limited to adverse "physical" rather than adverse "mental" sensations.

The text of the statute and the CAT, and their history, provide little concrete guidance as to what Congress intended separately to include as "severe physical suffering." Indeed, the record consistently refers to "severe physical pain or suffering" (or, more often in the ratification record, "severe physical pain *and* suffering"), apparently without ever disaggregating the concepts of "severe physical pain" and "severe physical suffering" or discussing them as separate categories with separate content. Although there is virtually no legislative history for the statute, throughout the ratification of the CAT--which also uses the disjunctive "pain or suffering" and which the statutory prohibition implements--the references were generally to "pain *and* suffering," with no indication of any difference in meaning. The *Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which appears in S. Treaty Doc. No. 100-20, at 3, for example, repeatedly refers to "pain *and* suffering." *See also* S. Exec. Rep. No. 101-30, at 6 (three uses of "pain and suffering"); *id.* at 13 (eight uses of "pain and suffering"); *id.* at 14 (two uses of "pain and suffering"); *id.* at 35 (one use of "pain and suffering"). Conversely, the phrase "pain or suffering" is used less frequently in the Senate report in discussing (as opposed to quoting) the CAT and the understandings under consideration, *e.g.*, *id.* at 5-6 (one use of "pain or suffering"), *id.* at 14 (two uses of "pain or suffering"); *id.* at 16 (two uses of "pain or suffering"), and, when used, it is with no suggestion that it has any different meaning.

Although we conclude that inclusion of the words "or suffering" in "severe physical pain or suffering" establishes that physical torture is not limited to "severe physical pain," we also conclude that Congress did not intend "severe physical pain or suffering" to include a category of "physical suffering" that would be so broad as to negate the limitations on the other categories of torture in the statute. Moreover, the "physical suffering" covered by the statute must be "severe" to be within the statutory prohibition. We conclude that under some circumstances "physical suffering" may be of sufficient intensity and duration to meet the statutory definition of torture even if it does not involve "severe physical pain." To constitute such torture, "*severe* physical suffering" would have to be a condition of some extended duration or persistence as well as intensity. The need to define a category of "severe physical suffering" that is different from "severe physical pain," and that also does not undermine the limited definition Congress provided for torture, along with the requirement that any such physical suffering be "severe," calls for an interpretation under which "severe physical suffering" is reserved for physical distress that is "severe" considering its intensity and duration or persistence, rather than merely mild or transitory.[(22)] Otherwise, the inclusion of such a category would lead to the kind of uncertainty in interpreting the statute that Congress sought to reduce both through its understanding to the CAT and in sections 2340-2340A.

(3) The meaning of "severe mental pain or suffering."

Section 2340 defines "severe mental pain or suffering" to mean:

the prolonged mental harm caused by or resulting from--

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality[.]

18 U.S.C. § 2340(2). Torture is defined under the statute to include an act specifically intended to inflict severe mental pain or suffering. *Id.* § 2340(1).

An important preliminary question with respect to this definition is whether the statutory list of the four "predicate acts" in section 2340(2)(A)-(D) is exclusive. We conclude that Congress intended the list of predicate acts to be exclusive--that is, to constitute the proscribed "severe mental pain or suffering" under the statute, the prolonged mental harm must be caused by acts falling within one of the four statutory categories of predicate acts. We reach this conclusion based on the clear language of the statute, which provides a detailed definition that includes four categories of predicate acts joined by the disjunctive and does not contain a catchall provision or

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any other language suggesting that additional acts might qualify (for example, language such as "including" or "such acts as").[23] Congress plainly considered very specific predicate acts, and this definition tracks the Senate's understanding concerning mental pain or suffering when giving its advice and consent to ratification of the CAT. The conclusion that the list of predicate acts is exclusive is consistent with both the text of the Senate's understanding, and with the fact that it was adopted out of concern that the CAT's definition of torture did not otherwise meet the requirement for clarity in defining crimes. *See supra* note 21. Adopting an interpretation of the statute that expands the list of predicate acts for "severe mental pain or suffering" would constitute an impermissible rewriting of the statute and would introduce the very imprecision that prompted the Senate to adopt its understanding when giving its advice and consent to ratification of the CAT.

Another question is whether the requirement of "prolonged mental harm" caused by or resulting from one of the enumerated predicate acts is a separate requirement, or whether such "prolonged mental harm" is to be presumed any time one of the predicate acts occurs. Although it is possible to read the statute's reference to "*the* prolonged mental harm caused by or resulting from" the predicate acts as creating a statutory presumption that each of the predicate acts always causes prolonged mental harm, we do not believe that was Congress's intent. As noted, this language closely tracks the understanding that the Senate adopted when it gave its advice and consent to ratification of the CAT:

in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36. We do not believe that simply by adding the word "the" before "prolonged harm," Congress intended a material change in the definition of mental pain or suffering as articulated in the Senate's understanding to the CAT. The legislative history, moreover, confirms that sections 2340-2340A were intended to fulfill--but not go beyond--the United States' obligations under the CAT: "This section provides the necessary legislation to implement the [CAT]. . . . The definition of torture emanates directly from article 1 of the [CAT]. The definition for 'severe mental pain and suffering' incorporates the [above mentioned] understanding." S. Rep. No. 103-107, at 58-59 (1993). This understanding, embodied in the statute, was meant to define the obligation undertaken by the United States. Given this understanding, the legislative history, and the fact that section 2340(2) defines "severe mental pain or suffering" carefully in language very similar to the understanding, we do not believe that Congress intended the definition to create a presumption that any time one of the predicate acts occurs, prolonged mental harm is deemed to result.

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Turning to the question of what constitutes "prolonged mental harm caused by or resulting from" a predicate act, we believe that Congress intended this phrase to require mental "harm" that is caused by or that results from a predicate act, and that has some lasting duration. There is little guidance to draw upon in interpreting this phrase.[24] Nevertheless, our interpretation is consistent with the ordinary meaning of the statutory terms. First, the use of the word "harm"--as opposed to simply repeating "pain or suffering"--suggests some mental damage or injury. Ordinary dictionary definitions of "harm," such as "physical or mental *damage: injury*," *Webster's Third New International Dictionary* at 1034 (emphasis added), or "[p]hysical or psychological *injury or damage*," *American Heritage Dictionary of the English Language* at 825 (emphasis added), support this interpretation. Second, to "prolong" means to "lengthen in time" or to "extend in duration," or to "draw out," *Webster's Third New International Dictionary* at 1815, further suggesting that to be "prolonged," the mental damage must extend for some period of time. This damage need not be permanent, but it must continue for a "prolonged" period of time.[25] Finally, under section 2340(2), the "prolonged mental harm" must be "caused by" or "resulting from" one of the enumerated predicate acts. [26]

Although there are few judicial opinions discussing the question of "prolonged mental harm," those cases that have addressed the issue are consistent with our view. For example, in the TVPA case of *Mehinovic*, the court explained that:

[The defendant] also caused or participated in the plaintiffs' mental torture. Mental torture consists of "prolonged mental harm caused by or resulting from: the intentional infliction or threatened infliction of severe physical pain or suffering; . . . the threat of imminent death . . . ." As set out above, plaintiffs noted in their testimony that they feared that they would be killed by [the defendant] during the beatings he inflicted or during games of "Russian roulette." *Each plaintiff continues to suffer long-term psychological harm as a result of the ordeals they suffered at the hands of defendant and others.*

198 F. Supp. 2d at 1346 (emphasis added; first ellipsis in original). In reaching its conclusion, the court noted that the plaintiffs were continuing to suffer serious mental harm even ten years after the events in question: One plaintiff "suffers from anxiety, flashbacks, and nightmares and has difficulty sleeping. [He] continues to suffer thinking about what happened to him during this ordeal and has been unable to work as a result of the continuing effects of the torture he endured." *Id.* at 1334. Another plaintiff "suffers from anxiety, sleeps very little, and has frequent nightmares. . . . [He] has found it impossible to return to work." *Id.* at 1336. A third plaintiff "has frequent nightmares. He has had to use medication to help him sleep. His experience has made him feel depressed and reclusive, and he has not been able to work since he escaped from this ordeal." *Id.* at 1337-38. And the fourth plaintiff "has flashbacks and nightmares, suffers from nervousness, angers easily, and has difficulty trusting people. These effects directly impact and interfere with his ability to work." *Id.* at 1340. In each case, these mental effects were continuing years after the infliction of the predicate acts.

And in *Sackie v. Ashcroft*, 270 F. Supp. 2d 596 (E.D. Pa. 2003), the individual had been kidnapped and "forcibly recruited" as a child soldier at the age of 14, and over the next three to four years had been forced to take narcotics and threatened with imminent death. *Id.* at 597-98,

601-02. The court concluded that the resulting mental harm, which continued over this three-to-four-year period, qualified as "prolonged mental harm." *Id.* at 602.

Conversely, in *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003), the court rejected a claim under the TVPA brought by individuals who had been held at gunpoint overnight and repeatedly threatened with death. While recognizing that the plaintiffs had experienced an "ordeal," the court concluded that they had failed to show that their experience caused lasting damage, noting that "there is simply no allegation that Plaintiffs have suffered any prolonged mental harm or physical injury as a result of their alleged intimidation." *Id.* at 1294-95.

(4) The meaning of "specifically intended."

It is well recognized that the term "specific intent" is ambiguous and that the courts do not use it consistently. *See* 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e), at 355 & n.79 (2d ed. 2003). "Specific intent" is most commonly understood, however, "to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." *Id.* at 354; *see also Carter v. United States*, 530 U.S. 255, 268 (2000) (explaining that general intent, as opposed to specific intent, requires "that the defendant possessed knowledge [only] with respect to the *actus reus* of the crime"). As one respected treatise explains:

With crimes which require that the defendant intentionally cause a specific result, what is meant by an "intention" to cause that result? Although the theorists have not always been in agreement . . . , the traditional view is that a person who acts . . . intends a result of his act . . . under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.

1 LaFave, *Substantive Criminal Law*, § 5.2(a), at 341 (footnote omitted).

As noted, the cases are inconsistent. Some suggest that only a conscious desire to produce the proscribed result constitutes specific intent; others suggest that even reasonable foreseeability suffices. In *United States v. Bailey*, 444 U.S. 394 (1980), for example, the Court suggested that, at least "[i]n a general sense," *id.* at 405, "specific intent" requires that one consciously desire the result. *Id.* at 403-05. The Court compared the common law's *mens rea* concepts of specific intent and general intent to the Model Penal Code's *mens rea* concepts of acting purposefully and acting knowingly. *Id.* at 404-05. "[A] person who causes a particular result is said to act purposefully," wrote the Court, "if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct.'" *Id.* at 404 (internal quotation marks omitted). A person "is said to act knowingly," in contrast, "if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'" *Id.* (internal quotation marks omitted). The Court then stated: "In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." *Id.* at 405.

In contrast, cases such as *United States v. Neiswender*, 590 F.2d 1269 (4th Cir. 1979), suggest that to prove specific intent it is enough that the defendant simply have "knowledge or notice" that his act "would have likely resulted in" the proscribed outcome. *Id.* at 1273. "Notice," the court held, "is provided by the reasonable foreseeability of the natural and probable consequences of one's acts." *Id.*

We do not believe it is useful to try to define the precise meaning of "specific intent" in section 2340.[27] In light of the President's directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture. Some observations, however, are appropriate. It is clear that the specific intent element of section 2340 would be met if a defendant performed an act and "consciously desire[d]" that act to inflict severe physical or mental pain or suffering. 1 LaFave, *Substantive Criminal Law* § 5.2(a), at 341. Conversely, if an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering, it appears unlikely that he would have the specific intent necessary to violate sections 2340-2340A. Such an individual could be said neither consciously to desire the proscribed result, *see, e.g.*, *Bailey*, 444 U.S. at 405, nor to have "knowledge or notice" that his act "would likely have resulted in" the proscribed outcome, *Neiswender*, 590 F.2d at 1273.

Two final points on the issue of specific intent: First, specific intent must be distinguished from motive. There is no exception under the statute permitting torture to be used for a "good reason." Thus, a defendant's motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute. *See Cheek v. United States*, 498 U.S. 192, 200-01 (1991). Second, specific intent to take a given action can be found even if the defendant will take the action only conditionally. *Cf., e.g.*, *Holloway v. United States*, 526 U.S. 1, 11 (1999) ("[A] defendant may not negate a proscribed intent by requiring the victim to comply with a condition the defendant has no right to impose."). *See also id.* at 10-11 & nn. 9-12; Model Penal Code § 2.02(6). Thus, for example, the fact that a victim might have avoided being tortured by cooperating with the perpetrator would not make permissible actions otherwise constituting torture under the statute. Presumably that has frequently been the case with torture, but that fact does not make the practice of torture any less abhorrent or unlawful.[28]

DANIEL LEVIN
Acting Assistant Attorney General
Office of Legal Counsel

1. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. *See also, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

2. It has been suggested that the prohibition against torture has achieved the status of *jus cogens* (*i.e.*, a peremptory norm) under international law. *See, e.g.*, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); *Regina v. Bow Street Metro. Stipendiary Magistrate Ex Parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147, 198; *see also* Restatement (Third) of Foreign Relations Law of the United States § 702 reporters' note 5.

3. *See generally* John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (1977).

4. *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167 (July 5, 2004) ("Freedom from torture is an inalienable human right . . . ."); Statement on United Nations International Day in Support of Victims of Torture, 39 Weekly Comp. Pres. Doc. 824 (June 30, 2003) ("Torture anywhere is an affront to human dignity everywhere."); *see also Letter of Transmittal from President Ronald Reagan to the Senate* (May 20, 1988), *in Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Treaty Doc. No. 100-20, at iii (1988) ("Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today.").

5. *See, e.g.*, Anthony Lewis, *Making Torture Legal*, N.Y. Rev. of Books, July 15, 2004; R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos*, Wash. Post, July 4, 2004, at A12; Kathleen Clark & Julie Mertus, *Torturing the Law; the Justice Department's Legal Contortions on Interrogation*, Wash. Post, June 20, 2004, at B3; Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L. Rev. 97 (2004).

6. This memorandum necessarily discusses the prohibition against torture in sections 2340-2340A in somewhat abstract and general terms. In applying this criminal prohibition to particular circumstances, great care must be taken to avoid approving as lawful any conduct that might constitute torture. In addition, this memorandum does not address the many other sources of law that may apply, depending on the circumstances, to the detention or interrogation of detainees (for example, the Geneva Conventions; the Uniform Code of Military Justice, 10 U.S.C. § 801 et seq.; the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-3267; and the War Crimes Act, 18 U.S.C. § 2441, among others). Any analysis of particular facts must, of course, ensure that the United States complies with all applicable legal obligations.

7. *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167-68 (July 5, 2004) ("America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.").

8. While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.

9. Section 2340A provides in full:

(a) Offense.--Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction.--There is jurisdiction over the activity prohibited in subsection (a) if--

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy.--A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

18 U.S.C. § 2340A (2000).

10. Section 2340 provides in full:

As used in this chapter--

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

(2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from--

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and

(3) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

18 U.S.C. § 2340 (as amended by Pub. L. No. 108-375, 118 Stat. 1811 (2004)).

11. Our task is only to offer guidance on the meaning of the statute, not to comment on policy. It is of course open to policymakers to determine that conduct that might not be prohibited by the statute is nevertheless contrary to the interests or policy of the United States.

12. Congress limited the territorial reach of the federal torture statute, providing that the prohibition applies only to conduct occurring "outside the United States," 18 U.S.C. § 2340A(a), which is currently defined in the statute to mean outside "the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States." Id. § 2340(3).

13. Common dictionary definitions of "torture" further support the statutory concept that the pain or suffering must be severe. *See Black's Law Dictionary* 1528 (8th ed. 2004) (defining "torture" as "[t]he infliction of *intense pain* to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure") (emphasis added); *Webster's Third New International Dictionary of the English Language Unabridged* 2414 (2002) (defining "torture" as "the infliction of *intense pain* (as from burning, crushing, wounding) to punish or coerce someone") (emphasis added); *Oxford American Dictionary and Language Guide* 1064 (1999) (defining "torture" as "the infliction of *severe bodily pain*, esp. as a punishment or a means of persuasion") (emphasis added).

This interpretation is also consistent with the history of torture. *See generally* the descriptions in Lord Hope's lecture, *Torture*, University of Essex/Clifford Chance Lecture 7-8 (Jan. 28, 2004), and in Professor Langbein's book, *Torture and the Law of Proof: Europe and England in the Ancien Régime*. We emphatically are not saying that only

such historical techniques--or similar ones--can constitute "torture" under sections 2340-2340A. But the historical understanding of "torture" is relevant to interpreting Congress's intent. *Cf. Morissette v. United States*, 342 U.S. 246, 263 (1952).

14. This approach--distinguishing torture from lesser forms of cruel, inhuman, or degrading treatment--is consistent with other international law sources. The CAT's predecessor, the U.N. Torture Declaration, defined torture as "an *aggravated* and deliberate form of cruel, inhuman or degrading treatment or punishment." Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Res. 3452, art. 1(2) (Dec. 9, 1975) (emphasis added); *see also* S. Treaty Doc. No. 100-20 at 2 (The U.N. Torture Declaration was "a point of departure for the drafting of the [CAT]."). Other treaties also distinguish torture from lesser forms of cruel, inhuman, or degrading treatment. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, 213 U.N.T.S. 221 (Nov. 4, 1950) ("European Convention") ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); Evans, *Getting to Grips with Torture*, 51 Int'l & Comp. L.Q. at 370 ("[T]he ECHR organs have adopted . . . a 'vertical' approach . . . , which is seen as comprising three separate elements, each representing a progression of seriousness, in which one moves progressively from forms of ill-treatment which are 'degrading' to those which are 'inhuman' and then to 'torture'. The distinctions between them is [*sic*] based on the severity of suffering involved, with 'torture' at the apex."); Debra Long, Association for the Prevention of Torture, *Guide to Jurisprudence on Torture and Ill-Treatment: Article 3 of the European Convention for the Protection of Human Rights* 13 (2002) (The approach of distinguishing between "torture," "inhuman" acts, and "degrading" acts has "remained the standard approach taken by the European judicial bodies. Within this approach torture has been singled out as carrying a special stigma, which distinguishes it from other forms of ill-treatment."). *See also CAT Handbook* at 115-17 (discussing the European Court of Human Rights ("ECHR") decision in *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978) (concluding that the combined use of wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink constituted inhuman or degrading treatment but not torture under the European Convention)). Cases decided by the ECHR subsequent to *Ireland* have continued to view torture as an aggravated form of inhuman treatment. *See, e.g., Aktas v. Turkey*, No. 24351/94 ¶ 313 (E.C.H.R. 2003); *Akkoc v. Turkey*, Nos. 22947/93 & 22948/93 ¶ 115 (E.C.H.R. 2000); *Kaya v. Turkey*, No. 22535/93 ¶ 117 (E.C.H.R. 2000).

The International Criminal Tribunal for the Former Yugoslavia ("ICTY") likewise considers "torture" as a category of conduct more severe than "inhuman treatment." *See, e.g., Prosecutor v. Delalic*, IT-96-21, Trial Chamber Judgment ¶ 542 (ICTY Nov. 16, 1998) ("[I]nhuman treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture.").

15. Deputy Assistant Attorney General Mark Richard testified: "[T]he essence of torture" is treatment that inflicts "excruciating and agonizing physical pain." *CAT Hearing* at 16 (prepared statement).

16. *See* S. Treaty Doc. No. 100-20, at 4-5 ("The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.").

17. Thus, we do not agree with the statement in the August 2002 Memorandum that "[t]he Reagan administration's understanding that the pain be 'excruciating and agonizing' is in substance not different from the Bush administration's proposal that the pain must be severe." August 2002 Memorandum at 19. Although the terms are concededly imprecise, and whatever the intent of the Reagan Administration's understanding, we believe that in common usage "excruciating and agonizing" pain is understood to be more intense than "severe" pain.

The August 2002 Memorandum also looked to the use of "severe pain" in certain other statutes, and concluded that to satisfy the definition in section 2340, pain "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." *Id.* at 1; *see also id.* at 5-6, 13, 46. We do not agree with those statements. Those other statutes define an "emergency medical condition," for purposes of providing health benefits, as "a condition manifesting itself by acute symptoms of sufficient severity (including severe pain)" such that one could reasonably expect that the absence of immediate medical care might

result in death, organ failure or impairment of bodily function. *See, e.g.*, 8 U.S.C. § 1369 (2000); 42 U.S.C. § 1395w-22(d)(3)(B) (2000); *id.* § 1395dd(e) (2000). They do not define "severe pain" even in that very different context (rather, they use it as an indication of an "emergency medical condition"), and they do not state that death, organ failure, or impairment of bodily function cause "severe pain," but rather that "severe pain" may indicate a condition that, if untreated, could cause one of those results. We do not believe that they provide a proper guide for interpreting "severe pain" in the very different context of the prohibition against torture in sections 2340-2340A. *Cf. United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (phrase "wages paid" has different meaning in different parts of Title 26); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997) (term "employee" has different meanings in different parts of Title VII).

18. Despite extensive efforts to develop objective criteria for measuring pain, there is no clear, objective, consistent measurement. As one publication explains:

Pain is a complex, subjective, perceptual phenomenon with a number of dimensions--intensity, quality, time course, impact, and personal meaning--that are uniquely experienced by each individual and, thus, can only be assessed indirectly. *Pain is a subjective experience and there is no way to objectively quantify it.* Consequently, assessment of a patient's pain depends on the patient's overt communications, both verbal and behavioral. Given pain's complexity, one must assess not only its somatic (sensory) component but also patients' moods, attitudes, coping efforts, resources, responses of family members, and the impact of pain on their lives.

Dennis C. Turk, *Assess the Person, Not Just the Pain*, Pain: Clinical Updates, Sept. 1993 (emphasis added). This lack of clarity further complicates the effort to define "severe" pain or suffering.

19. Section 3(b)(2) of the TVPA defines "mental pain or suffering" similarly to the way that section 2340(2) defines "severe mental pain or suffering."

20. Common dictionary definitions of "physical" confirm that "physical suffering" does not include mental sensations. *See, e.g.*, *American Heritage Dictionary of the English Language* at 1366 ("Of or relating to the body as distinguished from the mind or spirit"); *Oxford American Dictionary and Language Guide* at 748 ("of or concerning the body (*physical exercise*; *physical education*)").

21. This is particularly so given that, as Administration witnesses explained, the limiting understanding defining mental pain or suffering was considered necessary to avoid problems of vagueness. *See, e.g.*, *CAT Hearing* at 8, 10 (prepared statement of Abraham Sofaer, Legal Adviser, Department of State: "The Convention's wording . . . is not in all respects as precise as we believe necessary. . . . [B]ecause [the Convention] requires establishment of criminal penalties under our domestic law, we must pay particular attention to the meaning and interpretation of its provisions, especially concerning the standards by which the Convention will be applied as a matter of U.S. law. . . . [W]e prepared a codified proposal which . . . clarifies the definition of mental pain and suffering."); *id.* at 15-16 (prepared statement of Mark Richard: "The basic problem with the Torture Convention--one that permeates all our concerns--is its imprecise definition of torture, especially as that term is applied to actions which result solely in mental anguish. This definitional vagueness makes it very doubtful that the United States can, consistent with Constitutional due process constraints, fulfill its obligation under the Convention to adequately engraft the definition of torture into the domestic criminal law of the United States."); *id.* at 17 (prepared statement of Mark Richard: "Accordingly, the Torture Convention's vague definition concerning the mental suffering aspect of torture cannot be resolved by reference to established principles of international law. In an effort to overcome this unacceptable element of vagueness in Article I of the Convention, we have proposed an understanding which defines severe mental pain constituting torture with sufficient specificity to . . . meet Constitutional due process requirements.").

22. Support for concluding that there is an extended temporal element, or at least an element of persistence, in "severe physical suffering" as a category distinct from "severe physical pain" may also be found in the prevalence of concepts of "endurance" of suffering and of suffering as a "state" or "condition" in standard dictionary definitions. *See, e.g.*, *Webster's Third New International Dictionary* at 2284 (defining "suffering" as "the endurance of or submission to affliction, pain, loss"; "a pain endured"); *Random House Dictionary of the English Language* 1901 (2d ed. 1987) ("the state of a person or thing that suffers"); *Funk & Wagnalls New Standard Dictionary of the*

English Language 2416 (1946) ("A state of anguish or pain"); *American Heritage Dictionary of the English Language* at 1795 ("The condition of one who suffers").

23. These four categories of predicate acts "are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). *See also, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.23 (6th ed. 2000). Nor do we see any "contrary indications" that would rebut this inference. *Vonn*, 535 U.S. at 65.

24. The phrase "prolonged mental harm" does not appear in the relevant medical literature or elsewhere in the United States Code. The August 2002 Memorandum concluded that to constitute "prolonged mental harm," there must be "significant psychological harm of significant duration, e.g., lasting for months or even years." *Id.* at 1; *see also id.* at 7. Although we believe that the mental harm must be of some lasting duration to be "prolonged," to the extent that that formulation was intended to suggest that the mental harm would have to last for at least "months or even years," we do not agree.

25. For example, although we do not suggest that the statute is limited to such cases, development of a mental disorder--such as post-traumatic stress disorder or perhaps chronic depression--could constitute "prolonged mental harm." *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 369-76, 463-68 (4th ed. 2000) ("DSM-IV-TR"). *See also, e.g., Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/59/324, at 14 (2004) ("The most common diagnosis of psychiatric symptoms among torture survivors is said to be post-traumatic stress disorder."); *see also* Metin Basoglu et al., *Torture and Mental Health: A Research Overview*, *in* Ellen Gerrity et al. eds., *The Mental Health Consequences of Torture* 48-49 (2001) (referring to findings of higher rates of post-traumatic stress disorder in studies involving torture survivors); Murat Parker et al., *Psychological Effects of Torture: An Empirical Study of Tortured and Non-Tortured Non-Political Prisoners*, *in* Metin Basoglu ed., *Torture and Its Consequences: Current Treatment Approaches* 77 (1992) (referring to findings of post-traumatic stress disorder in torture survivors).

26. This is not meant to suggest that, if the predicate act or acts continue for an extended period, "prolonged mental harm" cannot occur until after they are completed. Early occurrences of the predicate act could cause mental harm that could continue--and become prolonged--during the extended period the predicate acts continued to occur. For example, in *Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601-02 (E.D. Pa. 2003), the predicate acts continued over a three-to-four-year period, and the court concluded that "prolonged mental harm" had occurred during that time.

27. In the August 2002 Memorandum, this Office concluded that the specific intent element of the statute required that infliction of severe pain or suffering be the defendant's "precise objective" and that it was not enough that the defendant act with knowledge that such pain "was reasonably likely to result from his actions" (or even that that result "is certain to occur"). *Id.* at 3-4. We do not reiterate that test here.

28. In the August 2002 Memorandum, this Office indicated that an element of the offense of torture was that the act in question actually result in the infliction of severe physical or mental pain or suffering. *See id.* at 3. That conclusion rested on a comparison of the statute with the CAT, which has a different definition of "torture" that requires the actual infliction of pain or suffering, and we do not believe that the statute requires that the defendant actually inflict (as opposed to act with the specific intent to inflict) severe physical or mental pain or suffering. *Compare* CAT art. 1(1) ("the term 'torture' means any act by which severe pain or suffering, whether physical or mental, *is intentionally inflicted*") (emphasis added) *with* 18 U.S.C. § 2340 ("'torture' means an act . . . *specifically intended to inflict* severe physical or mental pain or suffering") (emphasis added). It is unlikely that any such requirement would make any practical difference, however, since the statute also criminalizes attempts to commit torture. *Id.* § 2340A(a).

Testimony of David Luban
Senate Judiciary Committee,
Subcommittee on Administrative Oversight and the Courts
Hearing: "What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration"
May 13, 2009

Chairman Whitehouse and members of the subcommittee.

Thank you for inviting me to testify today. You've asked me to talk about the legal ethics of the interrogation memos written by lawyers in the Office of Legal Counsel. Based on the publicly-available sources I've studied, I believe that the memos are an ethical train wreck.

When a lawyer advises a client about what the law requires, there is one basic ethical obligation: to tell it straight, without slanting or skewing. That can be a hard thing to do, if the legal answer isn't the one the client wants. Very few lawyers ever enjoy saying "no" to a client who was hoping for "yes". But the profession's ethical standard is clear: a legal adviser must use independent judgment and give candid, unvarnished advice. In the words of the American Bar Association, "a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."[1]

That is the governing standard for all lawyers, in public practice or private. But it's doubly important for lawyers in the Office of Legal Counsel. The mission of OLC is to give the President advice to guide him in fulfilling an awesome

[1] ABA Model Rules of Professional Conduct, Rule 2.1, cmt. 1. The identical rule and comment appears in the Pennsylvania Rules of Professional Conduct and the D.C. Rules of Professional Conduct. (I am told that Professor Yoo belongs to the Pennsylvania Bar, while Judge Bybee was a member of the D.C. Bar and is currently a judicial member. The Nevada Bar, Judge Bybee's second state of admission, has the identical Rule 2.1 but includes no interpretive comments.) The rule itself states: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Model Rule 2.1.

constitutional obligation: to take care that the laws are faithfully executed. Faithful execution means interpreting the law without stretching it and without looking for loopholes. OLC's job is not to rubber-stamp administration policies, and it is not to provide legal cover for illegal actions.

No lawyer's advice should do that. The rules of professional ethics forbid lawyers from counseling or assisting clients in illegal conduct;[2] they require competence;[3] and they demand that lawyers explain enough that the client can make an informed decision, which surely means explaining the law as it is.[4] These are standards that the entire legal profession recognizes.

Unfortunately, the interrogation memos fall far short of professional standards of candid advice and independent judgment. They involve a selective and in places deeply eccentric reading of the law. The memos cherry-pick sources of law that back their conclusions, and leave out sources of law that do not. They read as if they were reverse engineered to reach a pre-determined outcome: approval of waterboarding and the other CIA techniques.

My written statement goes through the memos in detail, Mr. Chairman. Let me give just one example here of what I am talking about. Twenty-six years ago, President Reagan's Justice Department prosecuted law enforcement officers for waterboarding prisoners to make them confess. The case is called *United States v.*

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[2] "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent...." ABA Model Rule 1.2(d).

[3] ABA Model Rule 1.1. "A lawyer shall provide competent representation to a client." The D.C. Bar's rules—pertinent to Mr. Bradbury, Judge Bybee, and Professor Yoo—add: "A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." D.C. Rules of Conduct 1.1(b).

[4] ABA Model Rule 1.4(b), "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Lee.[5] Four men were convicted and drew hefty sentences that the Court of Appeals upheld.[6]

The Court of Appeals repeatedly referred to the technique as "torture." This is perhaps the single most relevant case in American law to the legality of waterboarding.[7] Any lawyer can find the *Lee* case in a few seconds on a computer just by typing the words "water torture" into a database. But the authors of the interrogation memos never mentioned it. They had no trouble finding cases where courts *didn't* call harsh interrogation techniques "torture."[8] It's hard to avoid the

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[5] 744 F.2d 1124 (5th Cir. 1984). The Court of Appeals did not use the label "waterboarding," which had not yet been invented, but the description of the technique makes it clear that it is almost identical to waterboarding. It "included the placement of a towel over the nose and mouth of the prisoner and the pouring of water in the towel until the prisoner began to move, jerk, or otherwise indicate that he was suffocating and/or drowning." Brief of Petitioner-Appellee, United States v. Lee, No. 83-2675 (5th Cir. Nov. 9, 1984); see Evan Wallach, *Drop By Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. Transnat'l L. Rev. 468, 502-03 (2007).

[6] They drew sentences of two years (with three years suspended), four years, and ten years, respectively. *Ex-Sheriff Given 10-Year Sentence*, N.Y. Times, Oct. 27, 1983, at A11.

[7] Although *Lee* pre-dates the Convention Against Torture and the U.S. torture statutes, there is no reason to believe that the judges would have described it differently after these laws were enacted. The statutes' definition of torture as severe mental or physical pain or suffering is neither unusual nor technical. Indeed, a standard pre-CAT dictionary definition of torture describes it as "severe or excruciating pain or suffering (of body or mind)..." The Compact Oxford English Dictionary 3357 (1971); likewise The American Heritage Dictionary 1356 (1976)("severe physical pain"). Other *Lee*-era dictionaries use formulations that do not in any way suggest that at the time of *Lee* 'torture' meant something milder than the statutory standard—Webster's Third (1971) says "intense pain"; Webster's Second (1953) says "severe pain" and "extreme pain. " Although *Lee* was a civil rights case, Mr. Bradbury did not hesitate to refer to another civil rights case as an authority pertinent to the enhanced interrogation techniques. Bradbury "CID" memo, May 30, 2005, p. 33 (discussing *Williams v. United States*, 341 U.S. 97 (1951)(beating confessions out of subjects with a rubber hose is a violation of their civil rights).

[8] For example, Mr. Bradbury's May 10, 2005 opinion on individual CIA techniques cites *Hilao v. Estate of Marcos*, 103 F.3d 789, 790-91 (9th Cir. 1996), which describes numerous despicable tortures performed on the plaintiff, including waterboarding. Mr. Bradbury writes that "the court reached no conclusion that the technique by itself constituted torture. However, the fact that a federal court would even colloquially describe a technique that may share some of the characteristics of the waterboard as 'water torture' counsels continued care and careful monitoring of the technique." Bradbury "techniques" memo, p. 44, note 57. I find it disturbing that Mr. Bradbury chooses a case where "the court reached no conclusion" that waterboarding is torture, without mentioning *Lee*, a case where waterboarding was the only technique at issue, and the court described it as torture in nine places. Professor's Yoo and Judge Bybee's August 1, 2002 "torture" memo includes an appendix that purports to list all "[c]ases in which U.S. courts have concluded the defendant tortured the plaintiff." *Lee* does not appear on this list. Perhaps it is because *Lee* was criminal, not civil, and

conclusion that Mr. Yoo, Judge Bybee, and Mr. Bradbury chose not to mention the *Lee* case because it casts doubt on their conclusion that waterboarding is legal.[9]

Without getting further into technicalities that, quite frankly, only a lawyer could love, I'd like to briefly mention other ways that the interrogation memos twisted and distorted the law. The first Bybee memo advances a startlingly broad theory of executive power, according to which the President as commander-in-chief can override criminal laws. This was a theory that Jack Goldsmith, who headed the OLC after Judge Bybee's departure, described as an "extreme conclusion" that "has no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law."[10] It comes very close to President Nixon's notorious statement that "when the President does it, that means it is not illegal"—except that Mr. Nixon was speaking off the cuff in a high pressure interview, not a written opinion by the Office of Legal Counsel.

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therefore had no plaintiff; or perhaps it is because the court calls the technique 'torture' without formally "concluding" that it is torture. Even if these are the rationalizations for omitting *Lee* from the list, such hypertechnicality is wholly inappropriate for an opinion offering legal advice to a client. I note that Professor Yoo and Judge Bybee also did not mention *Lee* in the August 1, 2002 "techniques" memo which actually analyzes the legality of waterboarding.

[9] Other significant omissions are the failure of the August 1, 2002 "torture" memo to discuss or even mention the *Steel Seizure Case* in its analysis of the President's commander-in-chief power; and, in the discussion of the necessity defense, its failure to mention *United States v. Oakland Cannabis Buyers' Coop*, 532 U.S. 483, 490 (2001), which calls into question whether federal criminal law even contains a necessity defense if no statute specifies that there is one. Likewise, the opinion fails to mention that there is no reported case in which a federal court has accepted a necessity defense for a crime of violence. In one place, the opinion may fairly be said to falsify what a source says. Discussing whether interrogators accused of torture could plead self-defense, the memo says: "Leading scholarly commentators believe that interrogation of such individuals using methods that might violate [the anti-torture statute] would be justified under the doctrine of self-defense." The opinion refers to a law review article, Michael S. Moore, *Torture and the Balance of Evils*, 23 Israel L. Rev. 280, 323 (1989). What Moore actually says on the page cited is nearly the opposite: *"The literal law of self-defense is not available to justify their torture.* But the principle uncovered as the moral basis of the defense may be applicable" (emphasis added). Notice also the difference between OLC's assertive "would be justified" and Prof. Moore's cautious "may be applicable," which in any event refers to his own moral argument, not to existing law.

[10] Jack Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration 149 (2007).

The first Bybee memo also wrenches language from a Medicare statute to explain the legal definition of torture. The Medicare statute lists "severe pain" as a symptom that might indicate a medical emergency. Mr. Yoo flips the statute and announces that only pain equivalent in intensity to "organ failure, impairment of bodily function, or even death" can be "severe." This definition was so bizarre that the OLC itself disowned it a few months after it became public.[11] It is unusual for one OLC opinion to disown an earlier one, and it shows just how far out of the mainstream Professor Yoo and Judge Bybee had wandered. The memo's authors were obviously looking for a standard of torture so high that none of the enhanced interrogation techniques would count. But legal ethics does not permit lawyers to make frivolous arguments merely because it gets them the results they wanted. I should note that on January 15 of this year, Mr. Bradbury found it necessary to withdraw six additional OLC opinions by Professor Yoo or Judge Bybee.[12]

Mr. Chairman, recent news reports have said that the Justice Department's internal ethics watchdog, the Office of Professional Responsibility, has completed a five-

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[11] "We do not agree with those statements. Those other statutes define an 'emergency medical condition,' for purposes of providing health benefits, as 'a condition manifesting itself by acute symptoms of sufficient severity (including severe pain)' such that one could reasonably expect that the absence of immediate medical care might result in death, organ failure or impairment of bodily function. *See, e.g.*, 8 U.S.C. § 1369 (2000); 42 U.S.C. § 1395w-22(d)(3)(B) (2000); *id.* § 1395dd(e) (2000). They do not define 'severe pain' even in that very different context (rather, they use it as an indication of an 'emergency medical condition'), and they do not state that death, organ failure, or impairment of bodily function cause 'severe pain,' but rather that 'severe pain' may indicate a condition that, if untreated, could cause one of those results." Memorandum from Daniel Levin, Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, Dec. 30, 2004, note 17. The Medicare statute clearly does *not* intend to define "severe pain." On the contrary, it assumes that a "prudent lay person" knows what severe pain is: that is why the statute lists it as a symptom that the prudent lay person "could reasonably expect" might indicate a medical emergency.

[12] Steven G. Bradbury, Memo for the Files, Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 (Jan. 15, 2009).

year investigation of the torture memos. OPR has the power to refer lawyers to their state bar disciplinary authorities, and news reports say they will do so.

I have no personal knowledge about what OPR has found. Presumably, investigators were looking either for evidence of incompetence, evidence that the lawyers knew their memos don't accurately reflect the law, or evidence that process was short-circuited.

This morning I have called the interrogation memos a legal train wreck. I believe it's impossible that lawyers of such great talent and intelligence could have written these memos in the good faith belief that they accurately state the law. But what I or anyone else believes is irrelevant. Ethics violations must be proved, by clear and convincing evidence, not just asserted. That sets a high bar, and it should be a high bar.

In closing, I would like to emphasize to this Committee that when OLC lawyers write opinions, especially secret opinions, the stakes are high. Their advice governs the executive branch, and officials must be told frankly when they are on legal thin ice. They and the American people deserve the highest level of professionalism and independent judgment, and I am sorry to say that they did not get it here.



Testimony of Tom Malinowski, Director, Washington Advocacy, Human Rights Watch:

Senate Judiciary Subcommittee on Administrative Oversight and the Courts

"What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration "



Chairman Whitehouse, I want thank you for your consistent and principle leadership against torture, for holding this hearing, and for inviting Human Rights Watch to submit testimony.
Let me offer a few thoughts about the legal memos drafted by the Bush administration to justify – and immunize – its so-called "enhanced interrogation" program.

I would first suggest that the debate surrounding these memos has an only-in-America quality to it. By this I mean that if we had learned at any time in the last eight years that a prisoner in Iran or North Korea or Burma had been water boarded, or stuffed into a coffin- like box, or slammed repeatedly into walls, or deprived of sleep or hung naked from a ceiling for days on end, there would be no controversy about whether such conduct constituted torture. If the leaders of Iran or North Korea or Burma subsequently told us that lawyers in their Justice Ministries had advised them that the conduct was legal, we can only imagine how much fun the cable news shows would have with that excuse. You would certainly not be holding a hearing today examining whether such advice was ethical or whether those who followed it did so in good faith. Especially if the victims of such treatment were American, we would be calling it a crime and demanding that those responsible be brought to account.

It is only because this treatment was meted out by our government, and authorized at its highest levels, that we are having this debate and feeling its weight. Given the fact that torture is a serious crime under domestic and international law, the implications of following the facts to their logical conclusion are, indeed, enormous, as is the temptation to embrace arguments that allow us to avoid that painful path. The logical conclusion is hard to square with America's self-image as a law abiding nation that stands for human rights. It would require moving beyond the natural partisanship that leads most Americans to defend instinctively the president and party they support.

Second, the controversy about these interrogation techniques and the arguments used to justify them is extremely new – also a product of the politics of the last eight years. Prior to 2002, there had never been any debate in the

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United States about whether such methods were lawful. As you know, U.S. military courts have prosecuted water boarding as a crime on numerous occasions, from the Spanish American War, to World War II, to Vietnam, and civilian courts have prosecuted it when it arose in a domestic law enforcement context. (And since there has been some debate about this, let me stress that courts have never made a distinction between different "types" of waterboarding, based, for example, on whether water enters the lungs).

Many of the other techniques employed by the CIA, such as stress positions and extreme sleep deprivation, have also been prosecuted as torture by the United States and its allies over the years. And this is not an issue on which the courts have rendered a mixed verdict. I know of no case, in wartime or peacetime, in which a court has considered such conduct and found it to be lawful.

It is also important to note that these techniques have also been widely considered to be torture outside the courtroom for many centuries. They were employed by the Spanish Inquisition. They were the main techniques (particularly sleep deprivation and stress positions) used by the Soviet secret police to extract confessions from the victims of Stalin's show trials. In the Nazi period, the Gestapo employed an almost identical menu of techniques, calling it "sharpened interrogation." Indeed, we have learned that the CIA and the U.S. Army's SERE School trainers originally learned of these methods by studying the practices of America's totalitarian enemies. That was the point of SERE training – to help Americans survive torture, not to learn how to employ it.

The CIA's "enhanced interrogation" techniques deviated from longstanding law. The purpose of the Justice Department memos was, to borrow a phrase from my first boss in Washington, Daniel Patrick Moynihan, to define deviancy down -- so that the techniques would appear to be on the bright side of the line.

To do this, the lawyers had to ignore the case law. That is an extraordinary fact in and of itself. Somehow, the Justice Department and White House lawyers who told the president of the United States he could engage in this conduct neglected to tell him that people had gone to jail for engaging in the same conduct in the past. I hope, Mr. Chairman, that you will explore why these lawyers failed to inform their client of that fundamentally important fact.

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The task of defining deviancy down was made easier by the fact that the particular techniques used by the CIA were designed to leave no physical scars on prisoners, and, in some cases, to involve seemingly commonplace activities such as standing, or sitting, or losing sleep, that appear to be innocuous. In fact, techniques that cause extreme pain or suffering without wounding a prisoner allow pain to be inflicted for much longer periods of time than techniques that cause physical injury – for this reason, survivors of torture often say that such methods are worse than physical torture. They are also widely employed in repressive societies because they allow prisoners to be produced before tribunals without physical evidence of torture on their bodies. And, of course, they help salve torturers' consciences by allowing them to feel as if what they are doing is not really inhumane.
The lawyers also employed the technique of imposing limits on the duration and severity of certain forms of treatment – limiting the number of days a prisoner could be deprived of sleep, for example, or the length of a session of water boarding. This again allowed the lawyers and their clients to feel better: it seemed as if a line was being drawn, and that anything up to that line must not be torture.

In truth, the lines were drawn well beyond any normal notion of when harsh treatment devolves into outright torture. But even if they hadn't, the very idea of setting such limits on inherently cruel techniques is absurd. These techniques are designed for one purpose – to "break" a prisoner through pain and suffering. Telling interrogators that they can employ a little bit of sleep deprivation but not too much, or stress positions that cause discomfort, but not extreme pain, is like saying that they can apply red hot irons, but only if they don't burn. In the real world, these techniques are always used until they inflict pain or suffering beyond the limits of a prisoner's tolerance. That is why they always devolve into torture.

The lawyers also tried to reassure themselves and their clients by stressing that medical personnel would be present during interrogations. But this should not have been reassuring. In fact, many torture regimes throughout history have required the presence of doctors. The Spanish Inquisition did so explicitly, as did the Gestapo interrogation policy, when more extreme methods were to be used. Survivors of torture at the hands of the current dictatorship in Burma have reported that doctors would often be present when they were subjected to techniques like water boarding. Medical professionals – like legal professionals –

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help to ease the consciences of torturers. They also perform the very important role of preventing interrogators from actually killing their charges. In most cases, governments that employ torture do not wish to kill prisoners - they want to keep them alive for further interrogation, or to produce them eventually before a court.

The issue of the hour is not whether this conduct was lawful. It is whether the process of approving these techniques was conducted in good faith, and whether anyone can reasonably be held responsible. Were the lawyers simply offering their impartial and objective judgment on the law? Can it fairly be said that senior policy makers authorized this conduct based on good faith reliance on that advice?

There are several hard questions I hope you will ask in exploring this issue. **First:** Did the CIA only employ the "enhanced techniques" after it received approval from the Justice Department, or did it begin to do so before? Consider the timeline of events during 2002 leading up to the August 1, 2002 memorandum of Jay Bybee, authorizing the use of waterboarding and other methods on CIA detainee Abu Zubaydah. Those techniques then went on to be used on other detainees, including Khalid Shaikh Mohammad, and they spread to the military, where some techniques were authorized and used on detainees at Guantanamo and in Iraq and Afghanistan.

Bush administration officials have suggested that they did not act until they had heard the OLC's counsel, that the approval process was rigorous, that the OLC made a good faith and reasonable legal interpretation of the law, and that those who relied on that interpretation cannot reasonably be blamed.

Yet one of your witnesses today, FBI interrogator Ali Soufan, has said that aggressive interrogation of Abu Zubaydah began before August 1, 2002. In fact, the use of techniques including sleep deprivation, exposure to cold, and close confinement began in May 2002. At that early point, a CIA contractor psychologist from the Air Force SERE school was already present at Abu Zubaydah's interrogation and had already began using some of the techniques that were later approved in the August 2002 Bybee memorandum.

It appears, then, that the White House, OLC, and CIA discussed and arranged the drafting of the August 1 memo after abusive techniques had already begun.

For instance, we know from a recently released Senate Intelligence Committee report that in May 2002 lawyers in the CIA's Office of General Counsel, including the current Acting CIA General Counsel John Rizzo, discussed interrogation methods with Attorney General John Ashcroft; National Security Adviser Condoleezza Rice; and the Counsel to the President, Alberto Gonzales.

At the very least, this undermines the argument that all CIA actions should be insulated from investigation because the CIA was relying on the August memo. It also raises questions about whether the drafters of the memo were providing objective advice, or drafting memoranda with the express purpose of approving a plan that the administration had already begun to implement and had decided to continue.

Second: Were senior officials passive recipients of advice from the Justice Department, or did they guide the process? If it were to emerge that officials from the White House or Vice President's office steered the drafters of the OLC memos to a particular conclusion, or sought to manipulate appointments of individuals to lead the OLC for the purpose of producing a pre-ordained conclusion, that would undermine their argument that they were relying in good faith on the OLC's advice.

Third: Were the lawyers interpreting in good faith what Congress intended when it adopted laws against torture, or were they consciously trying to defy the will of the Congress?

This is a particularly important question to ask with regard to the memos drafted by Stephen Bradbury beginning in 2005. By that date, the Bush administration knew that the CIA program had caused considerable controversy in the Congress, and that Senator John McCain was leading an effort to rein the program in. To that point, the administration had argued that the prohibition on "cruel, inhuman or degrading treatment" contained in the Convention Against Torture did not legally bind US interrogators outside the United States. Senator McCain was pressing legislation that would have closed that loophole, explicitly extending the ban on such treatment to interrogations conducted overseas. It appears that one purpose of the 2005 Bradbury memos was to reassure the CIA that even if the McCain legislation passed, the Justice Department could still find arguments exempting the "enhanced techniques" from the new prohibition.

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And yet, Bradbury and other administration officials would have known at the time based on numerous statements by Senator McCain and other members of the Congress that the anti-torture legislation was expressly designed to end the use of the "enhanced techniques." This was even more clear after the legislation's overwhelming approval in the Congress, and following passage of the Military Commissions Act, which, according to public statements by its chief Republican sponsors, was drafted to criminalize the "enhanced techniques." And yet, OLC apparently continued to devise arguments to justify use of these techniques. Was the intent to protect the country from its enemies, as they claim, or to protect the administration from the Congress?

Fourth: The quality of the memos should also be a factor in making this judgment. I believe that incompetence explains far more of what goes wrong in government than conspiratorial intent. But it is still hard for me to imagine lawyers advising the president in good faith on the legality of a given action without even bothering to check the case law involving that particular action.

A final point Mr. Chairman: It is generally recognized that good faith reliance on the advice of counsel is an important fact to consider when deciding whether someone should be held accountable for wrongdoing. But can relying on advice of counsel to do something that a reasonable person should have known was wrong be said to have been in good faith?
If the answer to that question were yes, the consequences would be far reaching and, I think, disturbing to most Americans. It would mean that going forward, any administration could immunize itself from prosecution for any kind of wrongdoing so long as it could get a politically appointed lawyer to draft a memo, secretly file that memo away, and produce it when the wrongdoing is revealed.

This question was actually considered by the Congress when it adopted the Detainee Treatment Act. The Bush Administration, and Vice President Cheney in particular, asked the Congress to provide immunity in that legislation to any CIA officer who acted in good faith reliance on advice of counsel. Senator McCain, and the Congress, refused to go that far. Congress was not comfortable giving civilians in the government greater immunity for following unlawful orders or relying on unlawful advice than members of the Armed Forces receive. And so they included in the DTA a provision that tracks the rule governing such matters

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in the military. The DTA states that in any civil action or criminal prosecution of a government employee for practices involving officially authorized detainee treatment and interrogation, it "shall be a defense" that the employee did not know the practices were unlawful and that "a person of ordinary sense and understanding would not know that the practices are unlawful." The DTA then states that good faith reliance on advice of counsel "should be an important factor to consider, among others, in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful." In other words, the Congress made clear that reliance on OLC's advice should be a factor, but not the exclusive factor, in determining whether officials should be held accountable.

Given the legal and historical record and the blatantly cruel nature of these techniques, I believe that a person of ordinary sense and understanding would at the very least have had serious questions about the legality of these techniques when they were first proposed. By 2005, after the public controversy and Congressional opposition they inspired, matters should have been even more clear.

We should certainly not be sending the message that officers of the U.S. government, when presented with policies or orders involving conduct that shocks their conscience or that appears unlawful, should always without question accept the judgment of a lawyer that they can go ahead and engage in that conduct. We want to continue to send the message that Congress intended to send when it adopted the DTA: that outrageous orders and outrageous legal advice should be questioned, not blindly followed.

Thank you very much.

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STATEMENT OF ELISA MASSIMINO
CEO AND EXECUTIVE DIRECTOR OF
HUMAN RIGHTS FIRST

BEFORE THE SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

HEARING ON

"WHAT WENT WRONG: TORTURE AND THE OFFICE OF LEGAL COUNSEL IN THE BUSH ADMINISTRATION"

MAY 13, 2009

Chairman Whitehouse, thank you for the invitation to submit this statement for the record on behalf of Human Rights First. Human Rights First believes that building respect for human rights and the rule of law will help ensure the dignity to which every individual is entitled and will help stem tyranny, extremism, intolerance, and violence. For more than 30 years, Human Rights First has worked to support human rights activists who fight for basic freedoms and peaceful change in their societies; protect refugees in flight from persecution and repression; build a strong international system of justice and accountability; and ensure that human rights law and principles are enforced in the United States and abroad. Human Rights First welcomes this hearing and the Subcommittee's interest in uncovering how cruel and illegal interrogation techniques came to be authorized at the highest levels of the U.S. government.

Human Rights First has worked for more than five years to promote an accurate legal interpretation of the humane treatment standards that Bush administration legal opinions attempted to distort, obscure and evade. In June 2007, we published a joint report with Physicians for Human Rights entitled *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*. The report was the first comprehensive evaluation of the nature and extent of harm likely to result from "enhanced" interrogation techniques that were reportedly authorized for use in the CIA program and the legal risks faced by interrogators who employ them. Drawing on the findings of this report, in September 2007, I testified before the Senate Select Committee on Intelligence about the legal standards governing interrogation.

Since that time, hundreds of pages of additional legal opinion and factual details about the program and its negative impact on U.S. national security have come to light. A new study released this week from the University of North Carolina at Charlotte reinforces what so many senior military officers and intelligence officials know from long experience—that the use of torture and other cruelty obstructs efforts to combat terrorism, and that bolstering standards of humane treatment enhances security.[1] These more recent revelations reinforce the conclusion that the CIA's program was illegal under

[1] James I. Walsh and James A. Piazza, "Why Respecting Physical Integrity Rights Reduces Terrorism," *Comparative Political Studies* (forthcoming).

domestic and international law and that Congress and the Obama administration must take additional steps to ensure that such forms of official cruelty are never again authorized or employed by the U.S. government. As detailed in this testimony, those steps include:

- ***uphold a single standard of humane treatment across the government for all interrogations, and ensure transparency in the interpretation and enforcement of that standard;***
- ***publicly release key documents which document or attempt to justify cruel treatment;***
- ***ensure proper reform and increased oversight of the Office of Legal Counsel; and***
- ***provide proper accounting of and accountability for abuses against prisoners.***

I. The Bush Administration's Approach to Intelligence Interrogations and the Law

Intelligence gathering is clearly a necessary—and perhaps the most important—tool in disrupting terrorist networks. Effective interrogations designed to produce actionable intelligence are a legitimate and important part of this effort. Such interrogation can and must be conducted consistent with the laws and values of the United States.

But that was not the case under the previous administration. The Bush administration's approach to interrogations after 9/11 was to assert broad executive power and seek to redefine the rules governing treatment of prisoners under U.S. criminal law and U.S. humanitarian and human rights obligations. This approach is epitomized by the Justice Department Office of Legal Counsel's (OLC) infamous "torture memo" issued on August 1, 2002, which construed the domestic criminal statute prohibiting torture so narrowly that much of what the United States has rightly condemned as torture when done by other governments would not be prohibited. That same memo also sought to reassure interrogators that, even if their conduct constituted torture under the memo's narrow definition, they need not worry about being prosecuted under the statute because the President could authorize violations of the law in his power as commander in chief. The August 1 memo was eventually rescinded, but we now know that subsequent memoranda preserved the underlying legal justification for the continuation of torture and other cruelty against prisoners in U.S. custody.

The Bush administration likewise sought to evade U.S. obligations under the Convention Against Torture designed to prevent the use of cruel, inhuman or degrading treatment (CIDT), by reinterpreting a reservation to the treaty to mean that the United States was not bound by the prohibition on cruelty when it acted against foreigners abroad. As it became clear that this position was untenable, particularly in light of the McCain Amendment which explicitly prohibited the infliction of CIDT against any prisoner in U.S. custody *regardless* of location, administration lawyers argued that the CIDT

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prohibition did not rule out *all* official cruelty, but only that which "shocks the conscience."[2] The OLC also issued opinions interpreting the McCain Amendment in August 2006 and July 2007 that have yet to be made public.[3]

The administration took a similar approach to humane treatment obligations under the Geneva Conventions.[4] Early on, administration lawyers argued that the United States was not bound by the Geneva Conventions' prohibitions against torture, cruel treatment and outrages upon personal dignity because, as "unlawful combatants" in a transnational armed conflict that was not between two or more States, detainees in U.S. custody were not entitled to those protections. After the Supreme Court ruled in the *Hamdan v. Rumsfeld* case that the humane treatment standards of Common Article 3 of the Geneva Conventions, violations of which constituted war crimes at the time under U.S. law, were binding on the United States in its treatment of all detainees, the OLC issued a letter not yet made public that applied Common Article 3 to the CIA program.[5] The administration then tried to convince Congress to replace the Common Article 3 standard with its more flexible "shocks the conscience" standard. Congress refused. Though the Military Commissions Act of 2006 (MCA) narrowed the range of conduct that would be considered a war crime under domestic law, it did not redefine or narrow Common Article 3 itself. In July 2007, in conjunction with the President's issuance of Executive Order 13440 interpreting U.S. legal obligations under Common Article 3, the OLC then issued yet another legal opinion that has not yet been made public analyzing the war crimes defined in the MCA and Common Article 3.

II. Evaluating the Legality of the Techniques Authorized by Office of Legal Counsel Memos for Use by the CIA

A description of the CIA interrogation techniques was originally leaked in a November 2005 ABC News report and 13 of these techniques are described in greater detail in the three 2005 memoranda from then-Principal Deputy Assistant Attorney General Steven Bradbury (the 2005 OLC memos) released last month.[6] The 2005 OLC memos provide

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[2] *See* Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to William J. Haynes, General Counsel of the Department of Defense, "Military Interrogation of Alien Unlawful Combatants Held Outside the United States," March 14, 2003.

[3] Senate Select Committee on Intelligence, "OLC Opinions on the CIA Detention and Interrogation Program," Senator John D. Rockefeller, IV, 111th Congress, 1st sess., released on April 22, 2009.

[4] Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to the President, "Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949," February 7, 2002.

[5] Senate Select Committee on Intelligence, "OLC Opinions on the CIA Detention and Interrogation Program," Senator John D. Rockefeller, IV, 111th Congress, 1st sess., released on April 22, 2009.

[6] Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, "Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee," May 30, 2005; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, "Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee," May 10, 2005; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, "Application of 18 U.S.C. §§ 2340-2340A to the

shocking detail of the brutality involved in the CIA interrogation program and appallingly deficient analysis of the applicable legal standards. The three 2005 OLC memos ignore highly relevant case law,[7] dismiss important State Department conclusions that similar practices amount to torture when used by other governments, and provide largely circular arguments based on CIA assertions that the agency does not intend the techniques to result in severe mental or physical pain or suffering.[8] The 2005 OLC memos also rely heavily on the disturbing and dangerous notion that cruel interrogations long recognized as torturous can somehow be made legal by medical monitoring or when they are used to protect against terrorist threats. In fact, the Bush administration was warned early on that these techniques were not effective in gaining actionable intelligence.

Contrary to the conclusions of the 2005 OLC memos and the CIA Office of Medical Services guidelines that the memos extensively cite, medical literature and legal precedent overwhelmingly support the conclusion that interrogation techniques approved for use by the CIA are unlawful as cruel, inhuman or degrading treatment or punishment under the McCain Amendment and the Torture Convention, and as outrages upon personal dignity under Common Article 3. Those techniques are also known to cause the severe or serious mental or physical pain that must be intended for such acts to constitute a felony under either the War Crimes Act or the Anti-Torture Act.

Leading medical and psychological experts, including the American Psychiatric Association and the American Psychological Association, declared in fall 2006 that "[t]here must be no mistake about the brutality of the 'enhanced interrogation methods' reportedly used by the CIA" that "have a devastating impact on the victim's physical and mental health."[9] The 2005 OLC memos confirmed that many techniques were used most often in combination, amplifying the risk of the physical and psychological harm, for

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Combined Use of Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee," May 10, 2005.

[7] For instance, the memos fail to recognize the relevance of Eighth Amendment case law in determining substantive due process requirements under the Fifth Amendment. While the Eighth Amendment might not apply directly to non-punitive detentions, the Supreme Court has incorporated Eighth Amendment precedent into its substantive due process analysis by arguing that the Fifth Amendment requires individuals detained by the state who have not been convicted of a crime enjoy at least the same level of rights as convicted criminals. Human Rights First and Physicians for Human Rights, *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*, August 2007, p. 41 (citing *City of Revere v. Mass. Gen. Hospital*, 463 U.S. 239, 244 (1989)).

[8] Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, "Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee," May 10, 2005.

[9] Letter from Allen S. Keller, MD (Program Director, Bellevue/NYU Program for Survivors of Torture), Gerald P. Koocher, PhD (President, American Psychological Association), Burton J. Lee, MD (Physician to the President for George Herbert Walker Bush), Bradley D. Olson, PhD (Chair, Divisions for Social Justice, American Psychological Association), Pedro Ruiz, MD (President of the American Psychiatric Association), Steven S. Sharfstein, MD (former President, American Psychiatric Association), Brigadier General Stephen N. Xenakis, MD (USA-Ret.), Philip G. Zimbardo, PhD (professor emeritus, Stanford and past President, American Psychological Association) to Senator John McCain, September 21, 2006.

several hours at a time with a "prototypical interrogation" lasting 30 days or more.[10] Detainees were also put under extreme duress when they were told that the interrogators "will do what it takes to get important information."[11] Five of the techniques addressed in the 2005 OLC memos are described below.

Stress positions are extremely painful and dangerous and their use has long been considered a form of torture. These techniques are known to cause blood clots, which can travel to the lungs causing potentially fatal pulmonary embolisms as well as peripheral nerve damage. Forcing manacled prisoners to stand motionless for literally days on end is not only painful, but life-threatening. The 2005 OLC memos recognize that the stress positions used by the CIA were severe enough to have produced "unacceptable edema" or abnormal accumulation of fluid and swelling in the legs of at least three detainees.[12]

Stress positions have been employed by some of the world's most repressive states, including, according to the U.S. State Department, Burma, Iran and Libya. Ironically, it was the KGB that pioneered the use of the torture technique euphemistically dubbed "long time standing." Here is a description of the consequences of "long time standing" from a CIA-funded 1957 study of KGB interrogations conducted at Cornell University:

> After 18 to 24 hours of continuous standing, there is an accumulation of fluid in the tissues of the legs.... The ankles and feet of the prisoner swell to twice their normal circumference. The edema may rise up the legs...The skin becomes tense and intensely painful. Large blisters develop, which break and exude watery serum.... The heart rate increases, and fainting may occur. Eventually, there is a renal shutdown, and urine production ceases.[13]

If continued long enough, the study noted, this simple technique can lead to psychosis "produced by a combination of circulatory impairment, lack of sleep, and uremia," a toxic condition resulting from kidney failure.

After World War II, U.S. military commissions prosecuted Japanese troops for employing such "stress" techniques on American prisoners. Corporal Tetsuo Ando was sentenced to five years hard labor for, among other offenses, forcing American prisoners to "stand at attention for seven hours."[14] A Japanese seaman named Chikayoshi Sugota was sentenced to 10 years hard labor for, among other things, forcing a prisoner to "bend his knees to a half bend, raise his arms straight above his head, and stay in this position

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[10] Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, "Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee," May 10, 2005.
[11] *Id.*
[12] *Id at* FN 15.
[13] Lawrence E. Hinkle, Jr. and Harold G. Wolff, "Communist Interrogation and Indoctrination of 'Enemies of the State,'" *AMA Archives of Neurology and Psychiatry* 76, no. 2 (1956): p. 134.
[14] *United States v. Tetsuo Ando*, Yokahama, May 8, 1947.

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anywhere from five to fifteen minutes at a time" – treatment the military commission termed "torture."[15]

In *Hope v. Pelzer*, 536 US 730 (2002), the United States Supreme Court condemned the "obvious cruelty" of leaving a prisoner in the sun in a standing stress position, calling it "degrading," "dangerous" and "antithetical to human dignity." In this case, the Bush administration filed an *amicus* brief siding with the prisoner. The Court found that:

> The obvious cruelty inherent in this practice should have provided...notice that [the guards'] alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity – he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous.

Sleep deprivation, the 2005 OLC memos revealed, was authorized for use up to 180 hours, often in combination with forced standing and other coercive techniques. Sleep deprivation is a classic form of torture and one of the most efficient means of inflicting mental pain. Medical studies have established a relationship between sleep deprivation and psychiatric disorders such as major depression. The *tormentum insomniae* was a recognized form of judicial torture in the Middle Ages. Six decades ago the U.S. Supreme Court cited with approval an American Bar Association report that made the following observation: "It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired."[16]

Sleep deprivation was a classic technique of the totalitarian police state, as Robert Conquest explains in his classic work on Stalin's Russia, *The Great Terror*:

> [T]he basic [Soviet secret police] method for obtaining confessions and breaking the accused man was the 'conveyor' – a continual interrogation by relays of police for hours and days on end...[A]fter even twelve hours, it is extremely uncomfortable. After a day, it becomes very hard. And after two or three days, the victim is actually physically poisoned by fatigue. It was as painful as any torture...

In describing his torture by sleep deprivation by the Soviet police, former Israeli Prime Minister Menachem Begin stated that "not even hunger or thirst are comparable with it."[17]

Sleep deprivation was one of the "sharpened interrogation" techniques authorized in 1942 by German Gestapo Chief Heinrich Müller for prisoners with plans "hostile to the state."

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[15] *United States v. Chikayoshi Sugota*, Yokahama, April 4, 1949.
[16] *Ashcraft v. Tennessee*, 322 US 143, 150 (1944).
[17] Tom Malinowski, "The Logic of Torture," *Washington Post*, June 27, 2004 (quoting Mr. Begin).

In recent years, the State Department has condemned many other countries, including Iran, Saudi Arabia and Tunisia, for employing this method, which it has called torture.[18]

Dousing prisoners with cold water. It is hard to imagine that anyone could argue that keeping naked, shivering prisoners doused with water as cold as 41°F as described in the 2005 memos does not amount to an "outrage upon personal dignity." Such conduct also was prosecuted as a war crime by U.S. military commissions after World War II.[19] Exposure to cold can cause amnesia, cardiac arrest, organ failure, and long term mental slowing and diminished reflexes. In *Gates v. Collier* the Fifth Circuit held that "turning the fan on inmates while naked and wet" constituted cruel and unusual punishment.[20]

Forced Nudity in interrogation, including the combined use with other humiliating treatment such as shackling and use of a diaper, is clearly illegal and likely constitutes a war crime when used against persons covered by the Geneva Conventions. During the debate over the MCA, Senator John Warner, then-Chairman of the Senate Armed Services Committee, as well as other majority members of the Committee, stated that they intended forced nakedness, as a technique explicitly banned by the U.S. Army Field Manual, to constitute a "grave breach" of Common Article 3 criminalized by the MCA's amendments to the War Crimes Act.[21] While the 2005 memos summarily conclude that humiliation caused by forced nudity cannot constitute "severe mental pain or suffering," the likelihood that such humiliation is calculated to destroy the victim's sense of self, identity, autonomy and masculinity support the conclusion that it is calculated to "disrupt profoundly... the personality."[22] U.S. federal courts have repeatedly found that forced nakedness violates the Eighth Amendment, [23] with the Eighth Circuit stating "clothing is a 'basic necessity of human existence' which cannot be deprived in the same manner as a privilege an inmate may enjoy."[24]

Waterboarding. After years of Bush administration claims to the contrary, now-Attorney General Eric Holder recognized during his confirmation hearings before the

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[18] Bureau of Democracy, Human Rights, and Labor, U.S. Dept. of State, *Country Reports on Human Rights Practices-2005* (March 2006).
[19] *See United States v. Matsukichi Muta*, Yokahama, April 15-25, 1947.
[20] *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974).
[21] *See* 152 Cong. Rec. S10,390 (daily ed. Sept. 27, 2006) (statement of Sen. Warner); *see also* S10,384 (daily ed. Sept. 27, 2006) (statement of Sen. Levin).
[22] Torture Act, 18 U.S.C. § 2340 (2006).
[23] *Walker v. Johnson*, 544 F.Supp. 345, 349 (E.D. Mich. 1982) (holding that it was a violation of the Eighth Amendment to force detainees to walk to showers naked, stating "[t]he naked walk to the shower elicits a feeling of degradation and sexual humiliation.") *aff'd,Walker v. Mintzes*, 771 F.2d 920 (6th Cir. 1985); *Johnson v. Williams*, 788 F.2d 1319 (8th Cir. 1986) (Eighth Amendment violation found where prisoner in quiet cell for eighteen hours on two occasions with no clothing or bedding); *McGray v. Burrell*, 516 F.2d 357 (4th Cir. 1975) (Eighth Amendment violation where prisoner in isolation cell for 48 hours for mental observation with no clothing or bedding), *cert. dismissed*, 516 F.2d 357 (1976). *Maxwell v. Mason*, 668 F.2d 361, 363, 365 (8th Cir.1981) (holding that even inmates in solitary confinement have a dignitary interest in being clothed where inmate was kept in his undershorts) (citing *Finney v. Arkansas Board of Correction*, 505 F.2d 194, 207-8 (8th Cir. 1974)).
[24] *Maxwell v. Mason*, 668 F.2d 361, 365 (8th Cir.1981).

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Senate Judiciary Committee the obvious fact that waterboarding is torture. The May 2005 OLC memo recognizes that use of the waterboard forces water into the detainee's mouth and nasal cavity, preventing him from breathing. Medical complications from the asphyxiation caused by waterboarding include: acute or chronic respiratory problems; chronic pain in the back and head; panic attacks; depressive symptoms; and prolonged posttraumatic stress disorder. Waterboarding was used extensively during the Spanish Inquisition and has been used by the most brutal regimes in the world, including the Khmer Rouge and the military junta in Argentina. It was also prosecuted repeatedly after World War II as a war crime and is explicitly banned by the U.S. Army Field Manual. According to statements by Senators Durbin, McCain and Levin and former Senator Warner, waterboarding clearly constitutes a "grave breach" of Common Article 3 punishable under the War Crimes Act as amended by the MCA in 2006.[25]

III. The Way Forward: Recommendations for Congress and the Obama Administration

On January 22, 2009, on his second full day in office, President Obama by executive order withdrew authorization of these cruel and illegal interrogation techniques, wiping clean flawed existing orders and legal interpretations of humane treatment standards and requiring the CIA to follow the military's interrogation manual when interrogating detainees in armed conflict.[26] These actions constitute a significant step toward reclaiming the role of the United States as a champion of human rights and realigning U.S. policy on detainee treatment with the country's values and national interests. However, in order to build a sturdier bulwark against those who continue to promote torture and abuse as essential to U.S. national security, additional steps are necessary to reinforce humane treatment standards, prevent future abuse, and help rebuild U.S. moral authority.

- ***Uphold a Single Standard of Humane Treatment Across the Government for All Interrogations, and Ensure Transparency in the Interpretation and Enforcement of that Standard.***

In his January 22 Executive Order the President established a Special Task Force to, in-part, examine whether the practices and techniques laid out in the 2006 Army Field manual on Human Intelligence Collector Operations 2-22.3 are appropriate when employed by other departments or agencies outside the military and whether interrogators have the proper guidance needed to protect U.S. national security. This Special Task Force is currently set to release its recommendations by July 21. The Special Task Force's recommendations should seek to reinforce the importance of a single standard of interrogation for all detainees in armed conflict by adopting interrogation guidance that will apply across agencies and govern the interrogation of any detainee in U.S. custody. This includes restoring some of the important guidance provided by the Army Field

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[25] Cong. Rec. S10,236 (daily ed. Sept. 28, 2006) (Statement by Sen. Durbin); 153 152 Cong. Rec. S10, 413 (daily ed. Sept. 28, 2006) (Statement by Sen. McCain); 152 Cong. Rec. S10, 384 (daily ed. Sept. 28, 2006) (Statement by Levin); 152 Cong. Rec. S10,390 (daily ed. Sept. 28, 2006) (Statement by Sen. Warner).
[26] Executive Order no. 13,491, *Ensuring Lawful Interrogations* (January 22, 2009).

Manual before it was amended by the Bush administration in 2006, and eliminating techniques that are reserved only for so-called "unlawful enemy combatants."

Over the past seven years, the Bush administration engaged in a legal shell game to justify torture and other unlawful abuse, dodging attempts by Congress and the Supreme Court to enforce legal standards designed to prohibit such conduct by producing secret, flawed legal opinions made public only after they were replaced. But publicly demonstrating how our government is enforcing and interpreting treatment standards makes us more, not less, secure. To make clear to the world that the United States has abandoned the practice of using secret legal interpretations to hide abuse, the Obama administration should continue to maintain the transparency established in Executive Order no. 13491 by making public any new interrogation guidance or interpretation of the laws governing interrogation to fullest extent consistent with legitimate national security interests.

- ***Publicly Release Key Documents Which Document or Attempt to Justify Cruel Treatment***

One need not believe that the legal architects of the Bush administration's torture policies intended to destroy the lives or sanities of the prisoners tormented by them, or to damage the moral standing of the United States, or to undermine the ability of interrogators to obtain vital intelligence in order to recognize that this is precisely what resulted from those policies. That is why it is so critical that the American people understand how public servants who had pledged to uphold and defend the Constitution ended up promoting policies that did just the opposite. As Americans, it is painful to read the details of the torment inflicted on prisoners in the name of the United States, but we believe President Obama made the right decision in releasing four Office of Legal Counsel memos in April. Airing the facts about past mistakes is essential to ensuring that the right policies are in place to prevent future abuses while making our country stronger. The public must be fully informed about this troubling chapter in our nation's history to ensure that it is never repeated. There are additional documents that will aid this understanding but which have not been released; these should be made public to the fullest extent consistent with legitimate national security interests. They include, but are not limited to, the 2006 and 2007 OLC documents cited by the Senate Select Committee on Intelligence as applying Common Article 3 and the War Crimes Act to the CIA interrogation program and the 2004 CIA Inspector General's report on the program.[27]

- ***Ensure Proper Reform and Increased Oversight of the Office of Legal Counsel***

To prevent future prisoner abuses there needs to be a close examination of the oversight mechanisms, standards and processes governing the OLC and other administration lawyers who failed to prevent the authorization of torture and other cruelty. Restoring the independence and integrity of the OLC is a crucial component of repudiating torture. But effective reform will require strong leadership, and the confirmation of the Obama

[27] Note that a nearly fully redacted version of this report was released to the American Civil Liberties Union as result of a Freedom of Information Act lawsuit in 2008.

administration's nominee, Dawn Johnsen, to the head of this key office has been held up in the Senate.

This is why Human Rights First has joined three other leading human rights organizations in a letter urging the Senate to allow a vote on the nomination of Ms. Johnsen to head the OLC. If Johnsen's nomination continues to be blocked it will be a serious setback to bipartisan efforts to end the use of torture and cruel, inhuman, and degrading practices.

- ***Provide Proper Accounting of and Accountability for Abuses Against Prisoners***

Providing a clear picture of past policies and practices and their consequences for national security is essential to fortifying humane treatment standards. Moreover, a full understanding of how policies of torture and abuse came to be authorized at even the highest levels of government is vital to forging responsible forward-looking policies. To this end a nonpartisan inquiry should be established to examine the facts and circumstances relating to U.S. government detention and interrogation operations since September 11, 2001; to assess the strategic impact of these operations; to identify lessons learned; to make recommendations to avoid future abuses; and to make its findings public. Such a prompt, open and comprehensive accounting of past abuses and their strategic consequences is necessary to enable the United States to move beyond the highly criticized prisoner treatment policies and practices of the past administration.

Lack of accountability for torture and other cruel treatment creates a culture of impunity setting the stage for future abuses, and violates U.S. legal obligations to investigate and prosecute potential crimes of torture and war crimes and to provide remedies for victims.[28] To this end the Attorney General should direct an investigation of individuals and hold them accountable for authorizing or engaging in abuse of prisoners. The Attorney General should also work with Congress to reform the state secret privilege that has been used to deny victims of torture the opportunity to seek redress in the courts.

Conclusion

President Obama has taken many positive steps to reinforce the ban against torture and other forms of official cruelty. But further efforts are needed to prevent a return to abusive and ineffective prisoner treatment in the face of new security challenges. Fortifying legal standards that prohibit and punish torture will help prevent repetition of past mistakes and restore America's reputation as a leader in human rights. For the safety of U.S. personnel and the integrity of fundamental human rights and humanitarian law standards, the United States must make clear to the rest of the world that it has abandoned abusive practices and flawed legal reasoning of the past and that it is committed to strengthening humane treatment obligations and upholding domestic and international law.

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[28] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Arts. 7(1), 12; Geneva Convention relative to the Treatment of Prisoners of War (1949), Art.129; Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949), Art. 146.

Testimony of Michael Stokes Paulsen
Distinguished University Chair & Professor of Law
The University of St. Thomas

before the
Subcommittee on Administrative Oversight and the Courts
of the U.S. Senate Committee on the Judiciary
May 13, 2009

The Lawfulness of the Interrogation Memos

Dear Mr. Chairman and Members of the Committee:

My name is Michael Stokes Paulsen. I have been asked to provide written testimony concerning the lawfulness and propriety of the legal analysis and advice provided by attorneys in the Office of Legal Counsel of the U.S. Department of Justice, to the administration of President George W. Bush, concerning lawful interrogation methods and procedures used against certain high-level al Qaeda terrorists, captured by United States forces, at the direction of President Bush as Commander in Chief, in the course of the war authorized by Congress by the resolution of September 18, 2001. I apologize that I am not able to be there in person to present live testimony, because of scheduling conflicts. I would be happy to provide answers to any written questions that members of this subcommittee (or committee) may have.

I currently hold the position of Distinguished University Chair and Professor of Law at the University of St. Thomas, in Minneapolis - St. Paul, Minnesota, where I have taught for two years. Prior to that, I was McKnight Presidential Professor of Law and Public Policy, Law Alumni Distinguished Professor, and Associate Dean for Faculty Research and Scholarship at the University of Minnesota Law School, where I taught for sixteen years. My areas of primary legal scholarship include Constitutional Law, Separation of Powers, War, National Security, and the Constitution, and Legal Ethics and Professional Responsibility. My academic c.v. is attached.

I have written over sixty academic articles in these fields. Of possible particular interest and relevance are several articles concerning the Constitution's allocation of war and foreign affairs powers: *The Constitutional Power to Interpret International Law*, 118 Yale L. J. 1774 (2009); *The Emancipation Proclamation and the Commander in Chief Power*, 40 Georgia L.

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Rev. 807 (2006); *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257 (2004); *Youngstown Goes to War*, 19 Const. Comm. 215 (2002). In addition, I note that much of my scholarship concerns more generally the separation of powers and the independent province and duty of the executive branch with respect to constitutional, statutory, and treaty interpretation: *Lincoln and Judicial Authority*, 83 Notre Dame L. Rev. 1227 (2008); *The Irrepressible Myth of Marbury*, 101 Mich. L. Rev. 2706 (2003); *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 Minn. L. Rev. 1337 (1999); *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L. J. 217 (1994): *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 Georgetown L.J. 385 (1994); *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 Cardozo L. Rev. 81 (1993). Finally, also of relevance, I have written several articles in the field of legal ethics and professional responsibility, including especially articles concerning the role of attorneys representing the executive branch of the U.S. government, the structure of attorney-client privilege and confidentiality with respect to representation of the U.S. government, and the ethical and professional responsibility duties of government attorneys: *A Constitutional Independent Counsel Statute*, 5 Widener L. Symposium J. 111 (2000); *Nixon Now, supra*; *Dead Man's Privilege: Vince Foster and the Demise of Legal Ethics*, 68 Fordham L. Rev. 807 (1999): *Who "Owns" the Government's Attorney-Client Privilege?* 83 Minn. L. Rev. 473 (1998); *Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and its Limits*, 61 Law & Contemp. Prob. 83 (1998).

Prior to becoming a law professor, I served in the United States as an Attorney-Advisor in the Office of Legal Counsel of the U.S. Department of Justice, from 1989-1991, in the administration of President George H.W. Bush. In that capacity, I had the occasion to participate in the research and preparation of dozens of legal opinions, analyses, legislative comments, and other memoranda concerning matters of presidential constitutional power, separation of powers (including war and national security matters), foreign affairs powers, and other matters of constitutional, statutory, and treaty law involving the United States government. At the time, I possessed a Top Secret security clearance. I have not worked for the United States government in any capacity since fall of 1991. While I can state generally that I worked on matters of national security, foreign affairs, war powers, and actions concerning war criminals and terrorists, I retain an ongoing duty of confidentiality and attorney-client privilege with respect to matters in which I was engaged during those years. I am thoroughly familiar with the operations and role of the Office of Legal Counsel as legal counsel to the executive branch of the U.S. government, its customary practices and jurisprudence, its traditions, and its distinctive perspective on matters of constitutional law as attorney for the United States government's executive branch.

In addition to my time as an attorney in the Office of Legal Counsel, I have worked in the Department of Justice as a prosecutor and appellate attorney in the Criminal Division, including an assignment as Special Assistant U.S. Attorney for the Eastern District of Virginia (1985-1986).

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I provide this testimony in my personal capacity as a scholar in these areas, and not as a representative of any university institution or on behalf of any client or other organization. The views expressed are my own.

I have attached a copy of my recent article, forthcoming in *The Yale Law Journal*, entitled **"The Constitutional Power to Interpret International Law,"** which in some respects contains more extended discussion and documentation of certain points that I make in more abbreviated form here.

* * * * *

I understand that the premise of these hearings, as suggested by the title selected by the subcommittee majority, is that there exists a need to examine "what went wrong" in the provision of legal advice by attorneys of the Office of Legal Counsel (OLC) of the Department of Justice, in the administration of President George W. Bush, concerning the legal bounds governing the use of certain interrogation methods on captured unlawful (and thus legally "unprivileged") terrorist enemy combatants. In my view, this premise is seriously mistaken. I have studied the legal memoranda in question, drawing on my expertise as a legal scholar whose work over much of the past decade has embraced these types of issues as a major area of research and writing, and on my experience as a government attorney in OLC in the late 1980s and early 1990s. The analysis contained in the memoranda in question is analysis with which, in certain respects, persons of good will can reasonably disagree, but it is well within the range of customary, legitimate, proper, and entirely ethical legal advice that may be provided by confidential legal advisors to the president and his administration. The notion that something "went wrong" in the provision of such legal advice – in any sense other than that some persons now disagree vigorously with the legal analysis and advice in question – is unsound.

In this testimony, I will sketch four brief points.

1. First and most fundamentally, the core legal analysis set forth in the OLC memoranda in question is, in my opinion, not only within the range of legitimate legal analysis and advice but is in fact *substantively correct on the merits.* There exists a basic distinction in the law between what constitutes actual, legal "torture," under applicable standards, and what may be harsh, aggressive, unpleasant interrogation tactics but not, legally, "torture." Reasonable people will come to different conclusions as to where precisely that line is, but the Bush administration's lawyers' ultimate conclusions are certainly defensible. Indeed, I believe they are ultimately correct, both as an abstract, general matter and in their specific application (matters addressed in a variety of separate OLC memoranda).[1] I do not necessarily agree with every particular point, or

[1] The memoranda to which I refer in this testimony are as follows: Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002); Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to John Rizzo, Acting

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argument, made in support of OLC's specific statutory-interpretation conclusion. Some sub-issues I would have addressed differently; on some points I would have said more, and on others less. (I say this with some reticence, acutely aware that I speak from a retrospective vantage point that perhaps too easily permits Monday-morning-legal-quarterbacking.) Nonetheless, I believe that OLC's essential statutory conclusion that "torture" refers to a narrow, highly specific subcategory of coercive interrogation techniques, is correct. As a *legal* matter – that is, as a matter of the objective meaning of a particular statutory term-of-art – the term "torture" may differ from, and be more specific than, commonplace or public political usage. That is the distinction that the memoranda draw; and they draw that distinction on the basis of specifically legal analysis.

Moreover, as a matter of constitutional law, the OLC memoranda's most sweeping, categorical, and controversial conclusion – that at all events no statute or treaty may limit the President's sole *constitutional* powers as military" Commander in Chief" to direct and conduct the use of U.S. force – is in my opinion *unquestionably correct.* The Office of Legal Counsel has long and consistently defended the view, both in Republican and in Democratic administrations, that the President's constitutional powers under Article II of the Constitution, as chief executive and as Commander in Chief of the nation's military, afford the President substantial autonomy of action in the areas of the conduct of the nation's foreign affairs and the conduct of war and military actions. These powers, as *constitutional* powers of the President, cannot constitutionally be subject to congressional regulation or control. An act of Congress, or a treaty of the United States, that infringes upon the constitutional powers of the President of the United States is, by definition, unconstitutional, under the straightforward reasoning of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Accordingly, it has long been the view of the Office of Legal Counsel that any such enactments cannot legitimately constrain the actions of the President pursuant to his independent constitutional powers; and, further, that such enactments should be interpreted and understood, where fairly possible, to avoid such conflict with the constitutional powers of the President. See, e.g., Memorandum of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel to Abner Mikva, Counsel to the President, *Presidential Authority to Decline to Execute Unconstitutional Statutes* (Nov. 2, 1994).

These are views that should command the respect of all presidential administrations, including the incumbent administration. The Constitution itself prescribes that all presidents

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General Counsel of the Central Intelligence Agency (Aug. 1, 2002); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 30, 2005). In addition, I am familiar with two other memoranda relevant to these issues. Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to James B. Comey, Deputy Attorney General (Dec. 30, 2004) and Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel to the Files (January 15, 2009). I am familiar with further memoranda of the Office of Legal Counsel relevant to various issues of war, national security, military force, international law, and treaties that are not directly implicated here.

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swear the oath to "preserve, protect and defend" the Constitution. U.S. Const. art. VI, cl.3. It is therefore the duty of all presidents to protect the constitutional powers of the office of President of the United States. It follows that it is likewise the duty of all attorneys representing the executive branch to defend the constitutional powers and prerogatives of the President of the United States.

The constitutional arguments put forward in the OLC memoranda addressing legal standards applicable to interrogation methods are fully in accord with these views, and with the duty of executive branch attorneys to advance them, *and they are in my opinion legally correct.* My most recent academic scholarship includes a lengthy examination of precisely this genus of constitutional issues. See Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 Yale L.J. 1774 (2009) (forthcoming, June 2009). That article sets forth more detailed supporting analysis than is possible to provide here, and I incorporate it by reference for purposes of this testimony. I have provided a copy of that manuscript to the committee to accompany this testimony. I call the committee's attention specifically to pages 1777-1779, 1782-1799, 1824-1828, and 1834-1854, which address both at the general level of constitutional principle and in certain instances at the specific level of contemporary illustration, the points I have outlined in the preceding few paragraphs.

Certain points and arguments advanced in earlier-dated confidential (in fact, classified) OLC memoranda subsequently were withdrawn by Bush administration attorneys in later memoranda intended for public consumption. However, none of the most important, material legal conclusions – and none of the specific legal advice as to the application of such conclusions – was repudiated. Rather, arguments were withdrawn (once memoranda had been leaked publicly) where they were judged unnecessary to the ultimate legal conclusion, politically inappropriate, contrary to subsequently-stated public presidential determinations or proclamations, or for some other unstated reason. In particular, later memoranda declined to rely on the argument that the president retains the constitutional power to make orders to U.S. forces, in the exercise of his sole constitutional power as Commander in Chief, that are (or may be) inconsistent with statutory requirements. This is not because that argument was or is incorrect, but probably because it was unnecessary (and thus impolitic) to rely on such a legal position, given President Bush's stated policy position that the United States had not engaged, and would not engage, in interrogation tactics inconsistent with the statutory prohibition of torture. None of this, in my view, affects the propriety of the constitutional argument as advanced in the earlier memoranda.

2. Second, even if one disagreed with the statutory and constitutional analysis in the OLC memoranda in question, or with the application of that analysis to specific facts, the OLC legal analysis and advice *clearly falls within the range of legitimate legal analysis and the range of reasonable disagreement common to legal analysis of important statutory and constitutional issues.*

Not all lawyers agree on all legal questions. This observation is so obviously true as to be

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almost trite. Nothing is more common than for lawyers, each acting in entire good faith and employing sophisticated analysis, to reach differing conclusions. (To a certain extent, our entire adversary system of justice is predicated on this commonplace observation, and on the premise that the vigorous debate over the meaning and application of the law, by parties possessing different views and representing different interests, is the best way to provide the dynamic tension that best approximates systemic justice.) One may disagree (as I do) with certain conclusions or arguments contained in some of these memoranda; indeed, one may disagree with the analysis in its entirety. This is not surprising. Quite the contrary, I would be greatly surprised if, on some of these questions, reasonably lawyers did *not* disagree. There is evidence of disagreement within the Bush administration on these legal questions, and the vigorous expression of competing views.

This is probably as it should be. What is *not* legitimate is to assert that every view and legal analysis contrary to one's own is therefore somehow outside the range of appropriate, competent, good-faith analysis. Such an assertion is, in my opinion, simply foolishness – the arrogant projection of one's own political or legal opinions as being so indisputably and universally correct as to brook no dissent. I believe that such a view is dangerous to American political and legal traditions. People disagree. Lawyers disagree on legal questions. With all due respect: to ratchet-up simple disagreement with the legal analysis of a prior administration into the claim that such analysis was beyond the pale of legitimate legal analysis, and therefore should be investigated and punished, is to engage in a mild form of legal neo-McCarthyism.

To be sure, some legal arguments and some "legal" analysis is so far below the standards of competence, plausibility, and good faith as not to be legitimate. But the OLC memoranda in question do not come anywhere near that standard. As noted above, I believe the memoranda's conclusions to be in nearly every respect essentially *correct* as a matter of statutory and constitutional analysis. The quality of the analysis (despite my quarrels with certain points) is clearly well within professional standards. This is not even a close question. There is simply no plausible, objective basis on which it could be said that the legal opinions expressed were illegitimate or unprofessional. There is no plausible basis upon which one could fairly – objectively – conclude that the views expressed are outside the bounds of reasonable professional judgment and legal analysis. If anything, the suggestion that these memoranda lie outside the range of legal advice is *itself* a view of the applicable substantive law, and of the lawyer's professional role, so extreme and unreasonable as not to fall within the range of good-faith, objective, competent legal analysis.

Such views probably more reflect an intense political, *ideological* commitment than true legal analysis. It cannot be doubted that the issues in question raise important questions of morality about which people, quite legitimately, have passionate feelings. But one should never confuse the intensity of one's political passions and commitments with dispassionate analysis of difficult questions of law. If this distinction is observed, it is not possible fairly to assert that the views expressed in the OLC memoranda are outside the range of reasonable, professional legal analysis and advice on the statutory and constitutional questions presented.

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3. Third (and in some respects building on the observations just made), it is important to recognize the clear distinction between a lawyer's opinion on questions of *legality* and *endorsement* of a client's actions themselves. The former in no way implies the latter. This is a rudimentary principle of legal ethics, recognized in every bar code of professional responsibility. ABA Model Rule of Professional Conduct 1.2(a) clearly provides that "*a lawyer shall abide by a client's decisions concerning the objectives of representation . . .*". ABA Model Rule 1.2(b) provides that "*[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities.*" And ABA Model Rule 1.2(d) further provides that, while lawyers may not counsel clients to engage in conduct they know is illegal, a lawyer "*may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.*" It is plain from reading the memos involved that this is exactly what the OLC lawyers were doing – discussing with their clients the legal consequences of what they proposed to do and endeavoring to assist them to ascertain the meaning and scope of the laws and constitutional provisions involved.

Not everything that is legal is a good idea, or good policy, or just, or moral. While a lawyer may in most circumstances add his or her views on such matters as well – matters of policy, propriety, morality, see ABA Model Rule 2.1 – the core of the lawyer's role is to provide objective legal advice that assists a client in understanding the legal options available.

To ignore the distinction between legal advice and moral or political advice is to make an enormous and fundamental category mistake. With respect, the suggestion implied by the subcommittee's stated theme for these hearings – "What Went Wrong" – is precisely such a category mistake. From the standpoint of competing views of policy, propriety, and morality, it may be fair to make an argument that something was "wrong" with the Bush administration's policies in certain respects. From the standpoint of the *lawyering* involved, nothing "went wrong." In my opinion, based on the public record available to me at this date, there is simply no objective basis for any claim that the OLC lawyers in the prior administration engaged in any professional impropriety or unethical conduct whatsoever. They provided fair legal advice to their client, the United States government's executive branch, on important, difficult, and sensitive matters. Disagreement with the underlying *policies* to which that legal analysis was directed is not a fair or legitimate ground upon which to criticize, or impugn the integrity of, the lawyers' analysis.

Indeed, as a matter of legal ethics and a lawyer's professional role, this has matters precisely backwards. A lawyer is not responsible for the policies of his or her client that fall within the bounds of the law. If the objection is in fact really to the policies and practices themselves, the inquiry should be directed to the ultimate policy-makers and decision-makers with respect to interrogation practices. To target Department of Justice legal advisors – and not the ultimately accountable political decision-makers – is to engage in an odd form of political scapegoating that targets the persons whose professional role actually makes them the *least* responsible for the policies or practices at issue.

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4. Fourth and finally, as a practical matter, I believe it is both shortsighted and foolish to seek to punish lawyers of a prior administration because of disagreement with the content of their legal advice. In addition to reflecting a basic misunderstanding of lawyers' roles, such an approach unquestionably would have the effect (and probably already has had the effect) of chilling both valuable government service by talented attorneys and the candor, quality, and vigor of the legal advice provided by those who agree to serve as government lawyers in important roles. If a government attorney's legal advice in the service of one administration is subject not only to being reversed in a subsequent administration of different views (as is common, reasonable, and sometimes to be expected), but, further, also made the subject of retrospective investigation, punishment (in various forms), and personal attacks, there is *no question* that the attorney's advice will become more guarded, tepid, inhibited, over-cautious and – in many cases – ultimately unsound. This will be true of Democratic administrations as well as Republican administrations.

The result will be that presidents and administrations of both parties *will not obtain candid, vigorous legal advice reflecting the full range of views*, on sensitive matters of war, foreign affairs and national security. I believe that this will actually be, in subtle but material ways, over the long run, harmful to the national security of the United States. No one in the room (so to speak) will take the hard position – and certainly not commit it to writing. The product will be watered-down legal advice, offered more with a view to how future second-guessers might second-guess it, than with a view to serving the President of the United States, and the nation, as an objective legal advisor.

As noted earlier, I was a line attorney (career civil service) in the Office of Legal Counsel, from 1989-1991. I can state unequivocally, based on my experience, that this phenomenon will occur and will occur quickly. To investigate, and seek to impose political, personal, or other punishment on government attorneys who provide good-faith but controversial legal advice, whenever that advice might become out-of-favor politically, will damage the Office of Legal Counsel, the Department of Justice, and ultimately, the office of President of the United States. And, of course, ultimately, this would damage the interests of the nation that these men and women serve.

Respectfully submitted,

Michael Stokes Paulsen
University Chair & Professor of Law
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THE YALE LAW JOURNAL

MICHAEL STOKES PAULSEN

The Constitutional Power To Interpret International Law

ABSTRACT. What is the force of international law as a matter of U.S. law? Who determines that force? This Essay maintains that, for the United States, the U.S. Constitution is always supreme over international law. To the extent that the regime of international law yields determinate commands in conflict with the Constitution's commands or assignments of power, international law is, precisely to that extent, *unconstitutional*. Further, the force of treaties (and executive agreements) to which the United States is a party is always subject to the constitutional powers of Congress and the President to supersede or override them as a matter of U.S. domestic law. It follows from the Constitution's allocation of power exclusively to U.S. constitutional actors that the power to interpret, apply, enforce – or disregard – international law, for the United States, is a *U.S.* constitutional power not properly subject to external direction and control. The power "to say what the law is," including the power to determine the content and force of international law *for the United States*, is a power distributed and shared among the three branches of the U.S. government. It is not a power of international bodies or tribunals. This understanding of the relationship of international law to the U.S. Constitution's allocation of powers in matters of war and foreign affairs has important implications for many contemporary issues and the United States's actions with respect to compliance with international treaties and other international law norms in the areas of criminal law enforcement, the conduct of war, war prisoner detention and interrogation practices, and the imposition of military punishment on unprivileged enemy combatants.

AUTHOR. Distinguished University Chair and Professor of Law, The University of St. Thomas School of Law. My thanks to those who reviewed and commented on part or all of a draft version of this Essay: Curtis Bradley, Robert Delahunty, Vasan Kesavan, Saikrishna Prakash, Michael Ramsey, Nicholas Rosenkranz. My special thanks to Amelia Rawls for sensitive and amazingly patient editing. The views expressed are mine, not the commenters' or editors'.

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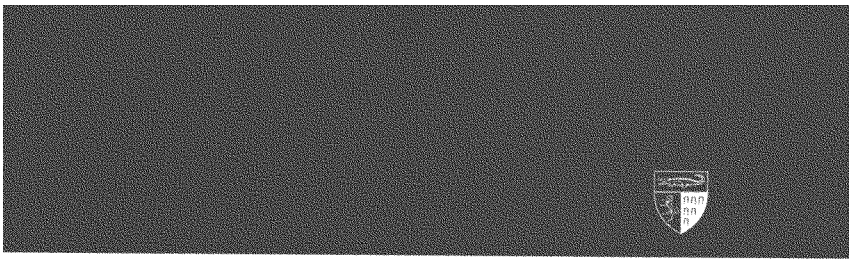

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INTRODUCTION

"International Law" is all the rage. The subject is one of the hottest courses in the law school curriculum. And it is frequently the focus of great public attention, given events in the post-9/11 world. Has particular conduct by the United States "violated international law"? Is some contemplated—or completed—course of conduct "consistent with international law"? These are very much the questions of the day.

But what is the force of international law *as a matter of the constitutional law of the United States*? To what extent is international law, whatever its content and the method for making or discerning its content, binding as U.S. law? More pointedly, to what extent is international law *not* recognized as authoritative by the U.S. Constitution? Just as importantly, *who determines* the force and content of international law—who interprets and applies it, authoritatively, for the United States? May international bodies define legal norms for the United States? Is interpretation of international law's commands uniquely within the province of international tribunals? Or, quite the reverse, is it "emphatically the province and duty" of U.S. officials to say (for the United States) "what the law is,"[1] *including international law* to whatever extent it is thought binding on American policymakers? If international law is, in some instance, in conflict with other commands or powers of the U.S. Constitution, how should such conflicting legal requirements and obligations be reconciled by courts and policymakers acting on behalf of the government of the United States?

These, too, are the vital questions of the day. Yet they are surprisingly undertheorized. These fundamental constitutional questions concerning international law are often shortchanged by international law scholarship, which frequently brushes by them, blithely assuming that the United States is bound by international law if that is what the regime of international law says, without giving serious attention to the acute U.S. constitutional problem posed by such an assumption. In part, this is attributable to the parochialism of academic legal specialties. "International Law" scholars form their own niche—clique, even—within the academy. Few international law scholars are also serious U.S. constitutional law scholars. The reverse is also the case to a large extent (though more and more constitutional law scholars have gravitated to

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). *Marbury* employed this phrase in describing the judicial power to interpret the Constitution independently of the views of the other branches. In this Essay, I consider the power to interpret international law as it is possessed and exercised by all three branches of the U.S. government.

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interests in the field of international law).[2] The result is a kind of segregation of legal thinking. International law has become, ironically, intellectually isolationist and parochial, excluding critique from a U.S. constitutional law perspective and declining (in the main) to engage with it.

My thesis in this Essay is a straightforward one and, from the perspective of basic postulates of U.S. constitutional law, should be an obvious one: *for the United States, the Constitution is supreme over international law*. International law, to the extent it issues determinate commands or obligations in conflict with the U.S. Constitution, is *unconstitutional*. Where there exists a conflict between the U.S. Constitution's assignments of rights, powers, and duties, and the obligations of international law, U.S. government officials must, as a matter of legal obligation, side with the Constitution and against international law, because the Constitution, and not international law, is what they have sworn to uphold. As a matter of domestic constitutional law, U.S. law *always* prevails over inconsistent international law.

Not all international law is of such description, of course. There is no necessary conflict between U.S. law and international law. To the contrary, some international law is explicitly made part of U.S. law by the terms of the Constitution itself. Article VI of the Constitution, for example, makes treaties to which the United States is a party part of "the supreme Law of the Land."[3] Other provisions of the Constitution appear to authorize various government actors to use international law as a predicate for the exercise of certain powers or duties. But in such cases—just as with the case of international law norms that might conflict with U.S. law—the Constitution remains supreme in determining the content and force of international law for the United States.

The constitutional supremacy thesis has an important corollary: as a matter of U.S. constitutional law, the constitutional power to interpret, apply, and enforce international law for the United States is not possessed by, is not dependent upon, and can never authoritatively be exercised by actors outside the constitutionally recognized Article I, Article II, and Article III branches of the U.S. government. The power to interpret and apply international law for

2. This includes constitutional scholars of the U.S. law of foreign relations, an area that intersects with international law. Among the leading lights in this growing area are Curtis Bradley, Brad Clark, Robert Delahunty, William Dodge, Jack Goldsmith, Saikrishna Prakash, Michael Ramsey, Carlos Vasquez, and John Yoo. I cite many of these scholars' work in this Essay. Nonetheless, it remains the case that most scholars of international law give scant attention or consideration to the relevance of U.S. constitutional law. Few seem prepared to acknowledge, or to consider, that U.S. law and U.S. interpreters may be (for the United States) of more relevance than the norms established by the regime of international law.

3. U.S. CONST. art. VI, cl. 2.

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the United States is a power vested in officers of the U.S. government, *not* in any foreign or international body. As a matter of U.S. constitutional law, the United Nations does not and cannot authoritatively determine the content of international law for the United States. As a matter of U.S. constitutional law, the International Court of Justice (ICJ) does not and cannot authoritatively determine the content of international law for the United States. As a matter of U.S. constitutional law, *no* international body authoritatively determines the content of international law for the United States.

Rather, the power to interpret international law for the United States is a power distributed among the three branches of the U.S. government, in a manner determined by the Constitution's separation of powers. The Congress interprets and applies international law for purposes of exercising its legislative constitutional powers to define and punish offenses against "the Law of Nations,"[4] thereby enacting (or declining to enact) legislation for carrying into execution treaties of the United States, and for purposes of exercising its autonomous constitutional judgment with respect to the decision whether or not to initiate ("declare") a state of war.[5] The President interprets and applies international law for purposes of exercising the Article II executive power to conduct the nation's foreign relations and the constitutional powers of the President as the nation's military Commander in Chief. And the courts interpret and apply international law for purposes of exercising their adjudicative constitutional powers with respect to lawsuits presenting questions of interpretation of treaties and other matters of international law.

These interpretive spheres overlap to some degree. But there are also areas of autonomous power for each branch. Each branch has a limited, exclusive power to determine the content of international law for purposes of its own powers. In accordance with the Constitution's scheme of separation of powers, *none* of the branches is literally bound by the views or actions of the others. And in accordance with the Constitution's exclusive assignment of U.S. lawmaking, law-executing, and law-adjudicating functions to actors designated by the Constitution, none of the branches is bound in any way by the views or actions of *non*-U.S. actors.

The following constitutes a thumbnail sketch of what follows: Part I, to which I give the Clausewitzian subtitle "The Fog of International Law," comprehensively addresses the surprisingly elusive (to most modern international law scholars) question of the status of international law as a matter of U.S. law. Confusion about the force of international law within the

4. *Id.* art I, § 8, cl. 10.

5. *Id.* art. I, § 8, cl. 11.

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U.S. legal order leads to further confusion and unclear thinking about who possesses the power to interpret and apply international law provisions and norms for the United States. I argue, first, that the Constitution mandates as a matter of U.S. domestic law the supremacy of the Constitution over international law in all respects; and, second, that in each major instance in which the Constitution incorporates international law as part of U.S. law, it retains the U.S. legislative, executive, and judicial power to determine—and revise—that content. The force of international law, for the United States, is a matter of U.S. law.

Part II, entitled "The Power To Say What International Law Is (for the United States)," addresses the interpretation of international law, for the United States, as an aspect of the Constitution's separation of powers. In this Section, I offer a detailed map of the U.S. constitutional power to interpret and apply international law.

Section II.A discusses Congress's power to interpret and apply international law in making U.S. law. The Congress, I submit, possesses exclusive constitutional power to determine the content of, and apply in the form of U.S. domestic criminal law, international law, as an aspect of its power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[6] In addition, Congress possesses substantial constitutional power to pass laws it fairly judges "necessary and proper" for the United States and, further, to enact laws contravening or superseding the requirements of such treaties as a matter of U.S. domestic law (pursuant to one or another of its enumerated legislative powers).[7] These legislative powers to some extent "bound" the President's power to interpret and apply international law. For example, the President has no constitutional power to prosecute or punish an asserted violation of international law except in conformity with Congress's legislative power. This does not, however, mean that Congress lacks power to delegate its authority, in accordance with constitutional standards concerning the permissible scope of such delegations (whatever these may be). Nor does it preclude the traditional view, long

6. *Id.* art. I, § 8, cl. 10.

7. For a powerful argument against an overbroad interpretation of the treaty-executing legislative powers of Congress, see Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005), which contests the view embodied in the Supreme Court's decision in *Missouri v. Holland*, 252 U.S. 416 (1920), that a treaty may expand Congress's constitutional powers beyond what would otherwise be the limits set by Article I, Section 8. One may agree with Rosenkranz's argument and yet recognize a broad sphere of legislative power to pass laws for carrying into execution treaties of the United States. *See infra* notes 124-126 and accompanying text.

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accepted by the courts (at least until recently[8]), that Congress, by authorizing war, by necessary implication authorizes the President to impose military punishment for violation of the law of war, in accordance with *the President's* interpretation thereof, against enemy combatants, as an incident of the President's wartime military powers as Commander in Chief.

Section II.B turns to executive power—the President's power—to interpret international law, as an aspect of the President's executive power over foreign affairs. The President possesses the constitutional power authoritatively to interpret and apply—and to terminate or suspend—treaties to which the United States is a party, for purposes of determining and conducting the nation's external relations with other nations, organizations, groups, and non-U.S. persons. The President also has the constitutional power to interpret and apply—or to disregard entirely—nontreaty customary international law norms, for the same purposes of executing the nation's foreign and external relations. Finally, the President possesses the exclusive constitutional power, as the military's Commander in Chief, to direct the conduct of the nation's military actions (where constitutionally authorized) and to interpret and apply international and domestic law relevant to those military actions. Significantly, however, the President possesses no constitutional power to make or rescind domestic U.S. law in connection with the exercise of any of these powers; nor does the President possess legitimate constitutional power to initiate war. These are powers of Congress, not of the President.

Section II.C discusses the judiciary's power to interpret and apply international law. My thesis here is that courts may interpret and apply treaties and statutes of the United States that touch on matters of foreign relations and international law in any "case or controversy" presented to them, the same as with any other matter of federal law. Such treaties and statutes are part of the law of the United States recognized by the Supremacy Clause of Article VI of the Constitution. Beyond this, courts exercising common law or admiralty court powers may interpret and apply customary international law, but only where no contrary written federal law (the Constitution, federal statutes, or U.S. treaties) applies. That is the better understanding of certain traditionally accepted but analytically loose canons of statutory interpretation, such as the

8. The Supreme Court's decisions in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and to a lesser degree *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), are departures from the traditional understanding that constitutional authorization to wage war delegates all decisions concerning the manner of the conduct of such war, including matters of detention and appropriate military punishment of enemy prisoners, to the President, pursuant to his powers as Commander in Chief of the nation's armed forces. I discuss these issues later in this Essay. *See infra* Section III.B.

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Paquete Habana and the *Charming Betsy* canons, which in some of their formulations are misleading and even unsound.

Part III of the Essay considers the logically straightforward but occasionally dramatic implications of these propositions for several important contemporary issues of war, peace, prisoner detention, interrogation, and torture. First, nothing in international law *constitutionally* may constrain the exercise by the United States of the decision to engage in war (*jus ad bellum*). International law constitutionally may not *require* the United States to go to war; nor may international law constitutionally *authorize* the United States to go to war, in the sense of serving as a substitute for the U.S. constitutional requirements for deciding upon war (however those are most properly understood). The weight to be accorded principles of international law in this regard is committed to the constitutional judgment of U.S. actors.

Second, international law may not of its own force, or as interpreted by non-U.S. actors or bodies, constitutionally constrain the *manner* in which the U.S. wages war (*jus in bello*), including rules for the treatment and questioning of captured enemy persons, except insofar as those principles constitutionally are made part of U.S. domestic law, and even then only to the extent and in the manner determined by U.S. actors' interpretation of this U.S. domestic law. This is not to say that the policies embodied in international law norms may not, or should not, form important policy considerations for U.S. officials. They may, and often they should. It is to say only that those are *policy* considerations, not binding "law" within our constitutional regime.

The propositions of this Essay provide a new perspective on—and often a critique of—the flurry of Supreme Court decisions in the areas of war powers, foreign affairs, and international law that has followed in the aftermath of September 11, 2001: *Hamdi v. Rumsfeld*,[9] *Rasul v. Bush*,[10] *Hamdan v. Rumsfeld*,[11] and *Boumediene v. Bush*[12]—the war prisoners cases—and *American Insurance Ass'n v. Garamendi*,[13] *Sosa v. Alvarez-Machain*,[14] *Medellín v. Dretke*,[15] *Sanchez-Llamas v. Oregon*,[16] and *Medellín v. Texas*.[17] It also furnishes a perspective on—

9. 542 U.S. 507 (2004).
10. 542 U.S. 466 (2004).
11. 548 U.S. 557 (2006).
12. 128 S. Ct. 2229 (2008).
13. 539 U.S. 396 (2003).
14. 542 U.S. 692 (2004).
15. 544 U.S. 660 (2005) (per curiam).
16. 548 U.S. 331 (2006).
17. 128 S. Ct. 1346 (2008).

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and to some extent a defense of—the controversial Department of Justice legal opinions concerning the (non)applicability of the Geneva Conventions and the (narrow) interpretation of the Convention Against Torture and Congress's criminal legislation implementing those treaties.[18]

I. THE FOG OF INTERNATIONAL LAW

Carl von Clausewitz famously referred to the "fog" of war as a metaphor for the inability to think clearly and sensibly in the midst of battle once the forces of war have been unleashed.[19] "Fog" is likewise a useful image for the phenomenon of unclear thinking about international law in contemporary legal and political discourse. Once the idea of international law has been unleashed, its rhetorical salience frequently seems to overtake careful thought.

What precisely is the force of international law as a matter of U.S. law, under the U.S. Constitution? How does it affect—*does* it affect—the U.S. constitutional law of war and foreign affairs powers? My contention is that international law is not binding law on the United States, and cannot be binding law except to the extent provided in the U.S. Constitution. That extent is very limited and subject to several important constitutional overrides—empowerments or restrictions that nearly always permit international law requirements to be superseded by contrary enactments or actions of U.S. governmental actors.

The result is that international law is primarily a *political* constraint on the exercise of U.S. power, not a true legal constraint; it is chiefly a policy consideration of international relations—of international politics. International law may be quite relevant in that sense. But it is largely *ir*relevant as a matter of U.S. *law*. While the legal regime of international law may consider international law supreme over the law of every nation, the U.S. Constitution does not.

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18. *See infra* Section III.B. This Essay is a work of synthesis. I stake no claims here with respect to dramatic originality, but draw heavily on arguments and conclusions first reached by others. I owe tremendous intellectual debts to the many scholars (and courts, and Founding-era theorists like Alexander Hamilton) cited throughout this Essay. My aim here is to distill and refine—and perhaps punch home with emphasis, and extend to their full logical conclusion—propositions that may have been advanced at earlier times in history, in judicial and executive branch opinions, and in the best of academic legal scholarship concerning foreign affairs and war powers.

19. CARL VON CLAUSEWITZ, ON WAR 140 (Michael Howard & Peter Paret trans., Princeton Univ. Press 1976) (1832).

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It follows that, to the extent international law is thought to yield determinate commands or obligations in conflict with the U.S. Constitution's assignments of powers and rights, international law is, precisely to that extent, *unconstitutional*—practically by definition. In such cases, U.S. government actors must not—constitutionally speaking, may not—follow international law.

The argument for the supremacy of the Constitution over international law within the American legal regime is remarkably straightforward. Article VI provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof," and federal treaties—about which I will say much more presently—are "the supreme Law of the Land."[20] For emphasis, the Supremacy Clause (or "Supreme Law Clause"[21]) adds the words, "and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[22] But the implication of the supremacy of federal law would be, in any event, that supreme federal law would bind those who exercise authority under the Federal Constitution and prevail over *any* "Thing" inconsistent with such law—not just state constitutional, statutory, or common law, but anything at all inconsistent with supreme federal law.[23] This would obviously include international law, or any other species of foreign law. The Constitution, and other federal law the Constitution designates as supreme, trumps any other source or body of law.

Moreover, again under Article VI, U.S. officials (both federal and state) swear an oath to uphold the U.S. Constitution and U.S. law, not international law. The Oath Clause states, in pertinent part, "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution . . . ."[24] This reinforces the effect of the Supreme Law Clause, by

20. U.S. CONST. art. VI, cl. 2.

21. I have suggested this different label in other writing. *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127 (2003); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 849, 850-51 n.6 (2009).

22. U.S. CONST. art. VI, cl. 2.

23. *See* Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2713-14 (2003) [hereinafter Paulsen, *The Irrepressible Myth of* Marbury].

24. U.S. CONST. art. VI, cl. 3. I have discussed the importance of the Oath Clause in other writing, as it relates both to constitutional interpretation and constitutional obligation. *See* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1260-67 (2004) [hereinafter Paulsen, *The Constitution of Necessity*]; Paulsen, *The Irrepressible Myth of* Marbury, *supra* note 23, at 2725-27; Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1290-92 (2008); Michael Stokes Paulsen, *The Most Dangerous*

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making the obligation to adhere to supreme federal law not simply a matter of abstract theory but also one of personal moral and constitutional obligation for all who would exercise any form of government authority under the U.S. constitutional regime. (The President is constitutionally required to swear a highly specific oath, which makes his personal constitutional duty to the Constitution yet clearer.[25]) Thus, where U.S. law and international law might be thought to conflict, U.S. officials—the President, the Congress, the federal courts, all state officials—are *constitutionally* required, by the document that confers or frames their powers, and by the oaths they have been constitutionally required to swear, to follow U.S. law and not international law.

To put the point as starkly and directly as possible: any President of the United States who would follow international law in preference to U.S. law would violate his (or her) oath of office in the most fundamental of ways. The President and all other federal and state officials must be loyal to the Constitution and U.S. law, and not to any foreign, external authority. Indeed, this is exactly the concern that motivated the Framers and influenced the drafting not only of the Oath Clauses of Article II and Article VI, but of various other provisions of the Constitution. These provisions include the natural-born citizen requirement concerning the President; the citizen-duration requirements for the President, senators, and representatives; the Foreign Emoluments (or "Foreign Princes") Clause; and arguably even the Title of Nobility Clauses.[26] At seemingly every turn, the Constitution is concerned with assuring the fidelity of U.S. government officials to the U.S. constitutional

Branch: Executive Power To Say What the Law Is, 83 GEO. L.J. 217, 257-62 (1994) [hereinafter Paulsen, *The Most Dangerous Branch*].

25. U.S. CONST. art. II, § 1, cl. 8 ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'"). On the force and importance of the Presidential Oath Clause, see Paulsen, *The Constitution of Necessity*, *supra* note 24, at 1260-67.

26. U.S. CONST. art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . ."); *id.* art. II, § 1, cl. 5 (requiring that the President have been a resident of the United States for fourteen years); *id.* art. I, § 2, cl. 2 (requiring that House members have been a citizen of the United States for seven years); *id.* art. I, § 3, cl. 3 (requiring that Senate members have been a citizen of the United States for nine years); *id.* art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."); *id.* art. I, § 10, cl. 1 ("No State shall . . . grant any Title of Nobility.").

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regime and to the supremacy of U.S. law that that regime prescribes.[27] For the Framers, that fidelity meant (and still means) *not* being governed by foreign law, foreign rulers, or undue foreign influence.

A certain measure of confusion on this point results from the fact that some of what constitutes "international law" within the regime of international law *is also* U.S. law, or may provide the basis for the exercise of U.S. constitutional powers, under the Constitution. In such cases (to which I turn presently) there is no intrinsic conflict between international law and the U.S. constitutional regime. But it is nonetheless important to keep the two spheres analytically distinct. Some international law is U.S. law, but some is not. And all international law that is U.S. law or is made into U.S. law must then be understood and applied *as U.S. law*, and not as external "international law." Its meaning is its U.S. law meaning, and its interpretation is committed to U.S. constitutional actors.

Let us consider, then, the three broad categories of international law in terms of their legal force within the U.S. constitutional regime: treaties to which the United States is a party, nontreaty executive agreements, and customary international law (CIL) norms and principles.

A. The Trouble with Treaties

Treaties of the United States *are* part of the "supreme Law of the Land," under the clear terms of Article VI. The Supreme Law Clause states that, after the Constitution and federal statutes, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[28] And some extremely important treaties, central to the regime of

27. I do not here enter the debate (except in this footnote) over the propriety of judicial citation to foreign sources of law in the course of interpreting U.S. law. My position is that such citation is not constitutionally problematic, so long as foreign law is not somehow deemed to control the understanding of U.S. law. Aside from that limitation, courts are free to cite and discuss whatever they like. This may create certain bad judicial habits, and lead to sloppy analysis and poor conclusions. But bad habits are not in and of themselves unconstitutional.

28. U.S. CONST. art. VI, cl. 2. For a powerful, systematic argument that the textual order and the structural logic of the three types of federal law listed in this provision imply a Constitution-statute-treaty hierarchy, see Vasan Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479 (2006). Kesavan's argument challenges conventional doctrinal formulations about the relative federal law status of federal statutes and treaties, suggesting that the last-in-time rule, which treats the two as having equivalent status, is wrong and that a treaty generally may not of its own force supersede the legal force of an earlier-enacted statute. *See also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 302-07 (2005) (making a similar argument in more telescoped form).

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international law and obviously highly relevant to the conduct of war, are explicitly part of U.S. law. These include, most prominently, the U.N. Charter, the Geneva Conventions, the Convention Against Torture, and the statute of the International Court of Justice. These treaties are part of supreme federal law, by virtue of their enactment as such pursuant to the constitutional process for treatymaking specified in Article II of the Constitution: the President has power, "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[29]

But it is important to keep in mind that when international treaties become domestic law, they are *U.S.* law. They may—they obviously do—*also* have legal force as international law and consequently give rise to obligations within the legal regime of international law. But the force and the interpretation they have as law within those two different legal regimes—the U.S. constitutional regime and the regime of international law—may be quite different. There are important constitutional limitations on the legal force of treaties as a matter of U.S. law. I offer four simple but important points about treaties' status under the U.S. Constitution.

First, and most obviously, a treaty may not override the Constitution. The Constitution is "higher" federal law; the Constitution trumps treaties. Just as the Constitution prevails over any inconsistent statute enacted by Congress[30] or any inconsistent executive act taken by the President[31] or (in theory at least) any inconsistent decision of the judiciary,[32] the Constitution prevails over any provision contained in a federal treaty that is inconsistent with a rule specified in the text of the Constitution.

29. U.S. CONST. art. II, § 2, cl. 2.

30. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

31. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Michael Stokes Paulsen, Youngstown *Goes to War*, 19 CONST. COMMENT. 215 (2002) [hereinafter Paulsen, Youngstown *Goes to War*].

32. *See, e.g.*, Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 679-81 (1995) (arguing that the Constitution is supreme over any precedents inconsistent with it); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005) (arguing that judicial decisions inconsistent with the Constitution are unconstitutional and should have no prospective stare decisis force); Paulsen, *The Irrepressible Myth of* Marbury, *supra* note 23, at 2731-34 (arguing that judicial decisions at variance with the Constitution are unconstitutional and of no legal force, under the reasoning of *Marbury*). *See generally* Paulsen, *The Most Dangerous Branch*, *supra* note 24 (arguing that the President is not bound to execute judicial decisions that are contrary to his interpretation of the Constitution).

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The principle is obvious enough in the abstract; it is when one thinks about what this means in practice that the power of this principle begins to become clear. It follows, for example, that a treaty cannot deprive Congress, the President, or the courts of any of their constitutional powers. Nor can a treaty override constitutional rights of U.S. citizens. (A treaty provision cannot impair First Amendment or Fifth Amendment rights, for example.) Thus, a treaty cannot override or impair Congress's constitutional power to declare war or the President's constitutional executive power and military power as Commander in Chief (whatever these are understood to be).[33]

Thus, the U.N. Treaty, for instance, cannot override Congress's power to declare war. It may not commit the United States to military action unless Congress authorizes it. And it may not *bar* U.S. military action, as a matter of U.S. constitutional law, if Congress *has* authorized it.[34] In terms of U.S. domestic constitutional authority with respect to the decision to go to war, the

33. Under current doctrine, "it is widely conceded that a duly enacted treaty cannot itself authorize a new expenditure, impose a new internal tax, create a new federal crime, raise a new army, or declare a war." AMAR, *supra* note 28, at 304. But why the limited roster? The issue—the relationship between treaties and statutes under the Constitution—has long proved a difficult one for courts and scholars. One possible correct statement of general principle is that a treaty may not *usurp*, *preclude*, *preempt*, or *irrevocably commit* the exercise of legislative power. Stated more simply, a treaty may not accomplish a result that effectually removes from Congress the ability to exercise its legislative power over a matter.

This general principle straddles (and accommodates) three prominent, somewhat competing, views of the treaty-statute relationship: (1) the last-in-time rule of present doctrine; (2) the view (associated with Akhil Amar and Vasan Kesavan, *see supra* note 28) that statutes always trump treaties; and (3) the view that treaties always require implementing legislation to have a domestic law effect. Under the last-in-time rule, Congress must retain full power to *rescind* or *override* a treaty enactment—and certain treaty enactments clearly cannot be undone as easily as done. War initiation, spending, and disposing or transfer of property seem to fit that description. Under the statutory supremacy view, Congress's statutes always trump treaties—and it might well be thought to follow that this has a comparable dormant preemptive effect on certain treaty enactments that cannot be undone as readily as done. And finally, under the non-self-execution view, no treaty may create any domestic legislative effect

Under any of these views, I submit, a treaty may not declare war in Congress's stead or bar Congress from declaring war. An exactly parallel argument can be made with respect to the President's constitutional powers as Commander in Chief, and the judicial branch's power to decide cases within its jurisdiction.

34. Congress has the domestic constitutional legislative power lawfully to initiate war and the President does not. For a brief defense of this point, see Paulsen, Youngstown *Goes to War*, *supra* note 31, at 239. For excellent and thorough textual, structural, and historical presentations, see Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45 (2007); and Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002).

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U.N. Treaty—which by its terms bans war and purports to limit treaty parties' military actions[35]—is of essentially no consequence as a legal restriction on what U.S. government officials may do in this regard. So too with the Geneva Conventions' provisions concerning the conduct of war, about which I will have more to say below.[36] If the President's conduct of military operations (including matters concerning the capture, detention, interrogation, and military punishment of lawful and unlawful enemy combatants) otherwise falls within his exclusive constitutional power as Commander in Chief of the nation's military, the provisions of the Geneva Conventions (and other treaties) cannot restrict those powers.[37]

The second limitation on the force of treaties flows from the first. Just as treaties may never trump the Constitution, treaties may always be trumped by a subsequent statute. This is true whether one accepts the "last-in-time" rule with respect to the relative force of statutes and treaties (the traditional view) or the hierarchical rule that statutes *always* trump treaties.[38] Under the traditional view that statutes and treaties possess equal status as U.S. law—both are subordinate to the Constitution but each is equal to the other—a later-enacted statute trumps an earlier-enacted treaty. So, as noted in the preceding paragraph, if Congress declares war in a circumstance inconsistent with a U.S. treaty (like the U.N. Treaty), the later declaration of war trumps the treaty obligation, as a matter of U.S. domestic constitutional law. Indeed, this applies to any species of legislative enactment within the scope of Congress's constitutional powers.

To make the point concrete: if the best reading of Congress's September 18, 2001, Authorization for Use of Military Force (AUMF) is that it authorizes war making in circumstances inconsistent with the U.N. Charter, the September 18 joint resolution prevails over the U.N. Charter, at least as a matter of U.S.

35. U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."). *But cf. id.* art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.").

36. *See infra* Section III.B.

37. I discuss this issue at length in Part III. For a general discussion of the Commander-in-Chief power, see Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 GA. L. REV. 807 (2006) [hereinafter Paulsen, *The Emancipation Proclamation*].

38. As noted, the hierarchical view is thoroughly defended in Kesavan, *supra* note 28.

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constitutional law.[39] Similarly, if Congress passes a Military Commissions Act of 2006 (MCA) that contradicts, or interprets narrowly, the Geneva Conventions or the Convention Against Torture, the MCA prevails over the Conventions as a matter of U.S. law.[40]

The point may be stated more generally. It follows, I submit, from the fact that a treaty may not restrict a constitutional power, that the subsequent exercise of a constitutional power supersedes, in legal effect, anything to the contrary in the treaty. (This has important specific implications for the exercise of presidential powers, as well as congressional powers, as I shall explain presently.)

Third, treaties are often not self-executing under U.S. domestic law, but frequently require implementing legislation that might narrow the treaties' impact as a matter of U.S. law.[41] Thus, while treaties may serve as an alternative means of enacting binding U.S. domestic law norms, they more frequently create only international obligations. Just as domestic law may supersede or repudiate such obligations, it may instantiate them as federal statutory commands in different forms. These commands may be narrower than the international law obligation. Or the international law obligation might not be given force as binding domestic law at all.

Fourth, and perhaps most importantly, the President possesses, as an aspect of the "executive Power" to direct and conduct the nation's external relations, the power to interpret, apply, suspend, supersede, or terminate U.S. treaty obligations as they concern our relationship with other nations. This remains a controversial point, and no specific Supreme Court decision has embraced it to date,[42] but it follows logically from the principle that treaties

39. Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001); *see infra* Section III.A; *cf.* Karnuth v. United States, 279 U.S. 231, 241 (1929) (concluding that a provision of the Jay Treaty was "brought to an end by the War of 1812").

40. *See infra* Section III.B.

41. Chief Justice Roberts's careful opinion for the Court in *Medellín v. Texas*, 129 S. Ct. 360 (2008), sets forth this distinction clearly. The distinction dates back to an early opinion by Chief Justice John Marshall. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 315 (1829), *overruled on other grounds by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

42. The en banc decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (en banc) (per curiam), *vacated on other grounds*, 444 U.S. 996 (1979) (mem.) remains the single best judicial exposition of the President's treaty-termination power. The case is the famous, paradigmatic constitutional challenge to President Jimmy Carter's termination of a mutual defense treaty with the Republic of China (Taiwan) as part of his foreign policy decision to recognize the People's Republic of China, rather than the government at Taiwan, as the government of China. The Supreme Court effectively upheld the denial of relief to plaintiffs challenging President

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may not trump the Constitution. Simply put, if the President's Article II executive power includes the power over foreign affairs (except where a specific power is assigned to Congress),[43] a treaty may not extinguish or limit such constitutional power; accordingly, the President's subsequent (later-in-time) exercise of that constitutional power over foreign affairs supersedes in legal effect anything to the contrary in the treaty.

How does this presidential treaty-supersession power play out in practice, and how far does it extend? A complete exposition would be an article of its own, but the main outlines can be sketched briskly: when the President of the United States terminates a treaty pursuant to his constitutional powers under Article II, he does not literally repeal a U.S. domestic law enactment. If a treaty is self-executing, or if it has been implemented by congressional legislation, the President's foreign affairs power does not rescind its domestic law effect. That result can only be accomplished by subsequent legislation (or by a subsequent, repealing self-executing treaty made in accordance with Article II's specified process). As a matter of U.S. constitutional law, the President's foreign affairs power can terminate only the foreign affairs obligation of the treaty. (Once again, it is possible that the regime of international law might regard such presidential actions as a breach or violation of the treaty, not its lawful termination. My point here is simply that, within the regime of the U.S. Constitution, the President's action is a lawful, effective exercise of the President's constitutional powers to alter the nation's foreign relations commitments on the international plane.)

Does the President's foreign affairs power include the power to take *lesser* actions—that is, less dramatic and absolute than outright treaty termination—with respect to the continuing legal force of treaties? The greater power does not always include the lesser, of course. But here it does: the President's

Carter's action, but on a mixture of justiciability and merits grounds, with no opinion commanding a majority of the Court. *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring) (providing the opinion of four Justices who found the issue a nonjusticiable political question); *id.* at 997 (Powell, J., concurring) (finding the issue not "ripe"); *id.* at 1006 (Brennan, J., dissenting) (voting to affirm the District of Columbia's conclusion on the merits); *see infra* notes 51-54 and accompanying text (discussing *Goldwater* at greater length).

For an excellent academic defense of the President's treaty-termination power, see Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 264-65 (2001).

43. This is the well-developed theory of Saikrishna Prakash and Michael Ramsey's definitive article. Prakash & Ramsey, *supra* note 42. Prakash and Ramsey cautiously reserve the question of whether the President may terminate a treaty in violation of international law, limiting their conclusion to treaty termination in accordance with a treaty's express terms. *Id.* at 265, 324-27. The caution, in my view, results from what actual historical practice has seen, not from any intrinsic limitation on the textual argument.

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foreign affairs power is not an all-or-nothing blunt instrument, but fairly admits of application in finer gradations. The President may decide that an existing treaty's requirements should be abandoned in part and followed in part—that the United States's current foreign policy interests (as determined by the President) do not necessitate repudiation of the entirety of a treaty's obligations. Applying the presidential equivalent of a "severability" determination, the President may determine that as a matter of the United States's relations with other nations, it is practical and sensible to leave as much of the treaty in operation as is fairly possible, discarding only what he judges must be discarded and repudiating nothing more.[44] If this is correct, it means that the President may repudiate a treaty in whole or in part.

Taking the analysis one step further—if the treaty-supersession power may be exercised in fine, rather than as an indivisible lump, it should follow that the President may determine that the United States's national foreign policy interests trump a treaty's obligations *as applied* to a particular case (so to speak) but do not require the conclusion that a treaty must be repudiated in its entirety, once and for all. Just as courts sometimes may determine that a law is not unconstitutional on its face but may be unconstitutional as applied, the President may determine that a treaty should remain legally operative on its face but not as applied. (Again, this is only with respect to the United States's foreign relations obligations as a matter of U.S. domestic constitutional law.) Put rather more bluntly—undiplomatically, as it were—the President may determine that a treaty should not be followed in a particular situation, where contrary to the nation's interests.

One more step: if the President may decide that a treaty itself ("on its face") is not at an end but is simply not to be followed in a particular situation for a particular foreign policy reason ("as applied"), it follows that the President (or his or her successor) subsequently may restore the treaty's application if the President judges that circumstances have changed. There exists now a new as-applied situation and the President may determine that the treaty now applies. Put more colloquially and straightforwardly, the President possesses a practical constitutional power to *suspend* the obligations of a treaty.

Note finally that all of this presupposes a presidential power of treaty *interpretation*. To determine that a treaty should be terminated outright,

44. This is similar to the Supreme Court's explication of modern severability doctrine. *See* Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987). For an excellent general treatment of the doctrine, see John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993). Under presidential severability of treaty obligations, as under current judicial doctrine, the presence of a severability provision in the text of the severed legal instrument is not strictly necessary to conclude that particular requirements are severable.

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abrogated in part, or suspended in its operation in a particular case or at a particular time, the President obviously must first determine what the treaty's terms *mean*. The President (with the assistance of subordinate executive branch officials) interprets the treaty for purposes of determining its legal effect and the desirability and form of the actions that the executive branch will take with respect to that treaty in the exercise of the President's foreign affairs power. That interpretation is not binding on the other branches of the U.S. government, of course—just as the President's exercise of his constitutional foreign affairs powers is not binding on the conduct of the other branches of the national government, within the U.S. constitutional scheme of separation of powers. But neither are the other branches' interpretations of the treaty binding on the President. (I shall have more to say about this in Part II, below.)

The President thus may decide, in good faith, that the best understanding of a treaty is that it does not in fact impose a treaty-law constraint on the United States, in opposition to the President's determination of appropriate U.S. foreign policy. In such case, there is no need for the President to repudiate, abrogate in part, or suspend the treaty—each arguably more sensitive and potentially provocative actions. To be sure, a dubious treaty interpretation may present the same diplomatic problems. And one legitimately can question whether too-creatively construing a treaty, so as to avoid the possible diplomatic consequences of terminating it or suspending it, really does avoid those consequences.[45] But in principle, where honestly engaged in, the power of the President to interpret the treaty is a lesser-included power of the foreign affairs power generally and the treaty-supersession power more specifically.

It thus follows, logically, from the President's constitutional power with respect to foreign affairs, that the President possesses the constitutional power to terminate, abrogate, suspend, and interpret treaties of the United States. His actions do not bind the other branches of the U.S. government or repeal or rescind the domestic law effects of a self-executing or legislatively implemented treaty. But they may authoritatively alter the nation's (present) international law obligations, at least as a matter of U.S. constitutional law.

There are many historical—and recent—illustrations of this presidential power to authoritatively alter the nation's international law obligations, and I

45. So, too, one can question whether the avoidance canon in the domestic judicial context really avoids anything. *See* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001); John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495, 1495-97 (1997).

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will discuss a few presently. But I begin with a hypothetical illustration that presents nearly all of the above points at once.

Suppose that the United States has an existing, constitutionally valid, lawful, and binding treaty relationship with a foreign nation, a group of foreign nations, or an international body consisting of several member nations. Suppose that the terms of the treaty appear materially to constrain the United States's autonomy—its freedom to act independently or unilaterally, in its own best interest as it judges that interest—with respect to the decision to use or not to use military force. In particular, the treaty seems to make the United States's decision about whether or not to go to war contingent on the views of one or more of its treaty partners. For purposes of simplicity, reduce the hypothetical to the simple proposition that the treaty permits France in effect to tell the United States what it must or must not do, with respect to war.

Enter a new President. Let's call him "President George W." The treaty predates President George W.'s entry into office and he believes that circumstances have changed materially since the time the treaty was made. He believes that the treaty is at least somewhat ambiguous as to how precisely it applies to the situation at hand. And President George W. believes it would now be bad for the interests of the United States for France (or any other nation for that matter) to dictate, or unduly influence, the United States's decision about whether to go to war under the circumstances. President George W. would rather that the United States go it alone.

Now, within the realm of the conduct of foreign relations, may President George W. announce that the U.S. interprets the treaty in a certain way, so as to preserve its freedom of unilateral action? Or, if such an interpretation is not fairly possible, does the President have the constitutional power to terminate the treaty, to determine that it does not apply to the instance at hand, or simply to suspend the treaty's operation as an obligation of the United States to the other party or parties to the treaty?

As you have probably guessed, this hypothetical illustration is no hypothetical. It describes a real situation and a real president. "President George W." is, of course, President George Washington. The year is 1793. The treaty at issue is a mutual defense treaty with France dating back to the American Revolution—the famous accomplishment of the distinguished emissary, Benjamin Franklin.[46] But that treaty was made well over a dozen years earlier, with a rather different (and since decapitated) French legal regime, for a different set of circumstances. The situation at hand in 1793 was

46. For a great account of Franklin in France, see Stacy Schiff, A GREAT IMPROVISATION: FRANKLIN, FRANCE, AND THE BIRTH OF AMERICA (2005).

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yet another, different war between France and Britain, from which President Washington (formerly General Washington) was determined to keep the United States removed.

President Washington declared American neutrality in the war, artfully dodging the terms of the treaty. President Washington's unilateral action was attacked by, among others, James Madison, writing as Helvidius, on two grounds—first, that such action was contrary to the Constitution's assignment of the war power to Congress (a clearly incorrect position that Alexander Hamilton, writing as Pacificus, effectively ripped to shreds) and, much more plausibly, that such action was a violation of the treaty with France and thus a violation of international law.[47]

President Washington's Neutrality Proclamation neatly illustrates several of the aspects of the presidential treaty-supersession power set forth above. The Proclamation arguably *did* depart from the terms of the treaty. But whether understood as an outright termination of the treaty (a stance President Washington avoided), a temporary suspension of the treaty's operation for purposes of the situation at hand, a determination that changed circumstances rendered the treaty inoperative as applied, or a (somewhat creative) narrowing construction of the treaty's terms so as not to question its validity or continued operation in any other respect but also so as not to involve the United States in this war, that change in the international law obligations of the United States—cast in any of these forms—was within the President's constitutional power to effectuate as an aspect of the executive power over foreign affairs.[48]

Although the President constitutionally may interpret treaties to determine the scope of their obligations upon the United States as a matter of international law and determine whether the United States should honor any such obligations or depart from them, his actions do not control Congress's.

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47. For Madison's argument, see *"Helvidius" No. 1* (Aug. 24, 1793), *in* 15 THE PAPERS OF JAMES MADISON 66, 70-72 (Thomas A. Mason, Robert A. Rutland & Jean K. Sissen eds., 1985); and *"Helvidius" No. 2* (Aug. 31, 1793), *in* 15 THE PAPERS OF JAMES MADISON, *supra*, at 80, 81-84. Hamilton's refutation of Madison's argument that Congress's war power precludes executive neutrality power is set forth in *"Pacificus" No. 1* (June 29, 1793), *in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 33-43 (Harold C. Syrett & Jacob E. Cooke eds., 1969).

48. Alexander Hamilton's "Pacificus" defense of the propriety of the Washington Administration's actions remains the classic exposition of the President's foreign affairs power, embracing (by implication) the treaty-interpretation and treaty-termination authority of the President. *"Pacificus" No. 1*, *supra* note 47, at 33.

For a modern echo of Hamilton's brilliant argument, see Prakash & Ramsey, *supra* note 42, at 252-65, which sets forth a comprehensive textual theory of the executive's power over foreign affairs under the Constitution; and *id.* at 324-39, which explicates this theory with reference to the actions of the Washington Administration.

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(Congress could still have declared war, or issued letters of marque and reprisal, in 1793.[49]) Nor can the President's actions by themselves create new U.S. domestic law. (President Washington's Neutrality Proclamation could not, in and of itself, form the basis for domestic law prosecution and punishment of individuals for acts violating the neutrality policy, as courts at the time properly held. It remained for Congress to enact legislation making it a crime to violate the Neutrality Proclamation—which it did.[50]) But the President's unilateral interpretation or supersession of a treaty *can* alter the United States's international obligations, as a matter of U.S. law.

That is an extraordinarily significant power. The same reasoning that sustains the propriety of President Washington's Neutrality Proclamation sustains the propriety of President Carter's termination of the mutual defense treaty with Taiwan and President George W. Bush's termination of the Anti-Ballistic Missile treaty with (the remnants of) the Soviet Union.[51]

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49. May the President veto a declaration of war? The correct answer to this interesting side question is *yes*. Article I, Section 7, Clause 3 provides for presidential review and possible return with respect to "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary," and a declaration of war falls within that category. U.S. CONST. art. I, § 7, cl. 3. No president has vetoed a war declaration. Presidential signature of war declarations has not been the consistent practice of all presidents, but this ought not be determinative of this issue. It is quite possible that practice has simply not conformed properly to the text of the Constitution. *See generally* J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 81-86 (1991) (arguing that presentment and presidential approval is required for declarations of war and noting the inconsistency of some historical practice). At all events, it appears that the lawfulness of all unsigned declarations of war in our nation's history can be sustained on the theory that they became law without the President's signature, pursuant to Article I, Section 7, Clause 2. None was (inadvertently) "pocket vetoed."

50. The Grand Jury instructions of Chief Justice John Jay, and of Associate Justice James Wilson, and Congress's subsequent enactment of the Neutrality Act of 1794, are set forth in CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 21-23 (2003).

51. Office of the Press Secretary, The White House, Announcement of Withdrawal from the ABM Treaty (Dec. 13, 2001), http://www.dod.mil/acq/acic/treaties/abm/ABMwithdrawal.htm. For the Bush Administration's initial defense of the propriety of termination or suspension of the ABM Treaty, see Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to John Bellinger, III, Senior Assoc. Counsel to the President & Legal Adviser to the Nat'l Sec. Council (Nov. 15, 2001) [hereinafter November 15 Memorandum to Bellinger]. The Administration revised its legal position, retreating (in part) from its earlier view, in Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel 8-9 (Jan. 15, 2009) [hereinafter Bradbury Memorandum]. The earlier memorandum, however, appears to be a sound exposition of the rationale for executive treaty-termination and treaty-suspension powers, along the lines of the D.C. Circuit's

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President Carter's action was sustained by the D.C. Circuit, in an en banc per curiam majority opinion that ably limned (despite being produced on a very short time frame) some of the better constitutional arguments in support of this presidential power. Those arguments included the logically necessary existence of a power in the national government to terminate treaties; the absence of any legitimate textual argument for a congressional power to participate in treaty termination; the logical and textual flaw of suggesting that the power to terminate or abrogate treaties parallels precisely the power of treaty formation or amendment; the traditionally recognized general executive power over foreign affairs under Article II of the Constitution; and the power of the President to interpret and apply treaties to determine the nation's obligations under those treaties, to determine whether other nations have breached their obligations under such treaties, and to determine whether circumstances have so changed as to render the treaty temporarily inoperative.[52]

The Supreme Court vacated the opinion on a mixture of justiciability grounds, with no controlling opinion and only Justice Brennan voting to affirm on the merits.[53] The result of that foggy disposition is, as a practical matter, to

opinion in *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (en banc) (per curiam), *vacated on other grounds*, 444 U.S. 996 (1979) (mem.). The Bradbury Memorandum appears to be a political document intended to provide cover for some subsequent Bush Administration officials and contains little substantive analysis of the point at issue. I discuss *Goldwater* presently.

52. *Goldwater*, 617 F.2d at 703-07.

53. *Goldwater*, 444 U.S. at 996-97; *see supra* note 42 (reviewing the various opinions).

I will discuss the justiciability issues in *Goldwater* only very briefly. The political question doctrine's first two "prongs," as is nearly always the case, really disguised merits questions: does the Constitution supply a rule of decision committing the treaty-termination power to a particular branch's determination (in which case, the corrective *substantive* result is that that branch's judgment cannot be disturbed)? Does the Constitution *not* supply any rule of decision at all (in which case, the correct *substantive* result is to deny the claim of relief under the Constitution, leaving the outcome to other sources of law or to the political process). If, as I submit, treaty termination falls within the residuum of the President's Article II executive power over foreign affairs not altered by the war-making or treaty-making powers assigned to or shared with Congress, *that* is the answer supplied by the text. The third prong of the political question doctrine, a grab bag of policies for nondecision—apparently even if the Constitution's text *does* supply a rule or a default decision rule—strikes me as simply illegitimate. *See* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 713 (1993) [hereinafter Paulsen, *A General Theory of Article V*].

Justice Powell's "ripeness" analysis in *Goldwater* is convoluted and confusing. The correct point is not that the dispute is *unripe* until Congress has acted—under that theory, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), was "unripe" for judicial

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leave treaty termination to the judgment of the President, at least so far as the courts are concerned. That is what happened with respect to the more recent notable example of unilateral presidential treaty termination: President Bush's termination of the Anti-Ballistic Missile Treaty similarly was made without any form of congressional approval. It, too, was sustained against judicial challenge, following to some extent the reasoning of the Supreme Court's disposition in *Goldwater v. Carter*, on the dual grounds that plaintiff U.S. representatives lacked standing to sue and that the issue was in any event a nonjusticiable political question.[54]

The treaty-supersession power has more dramatic implications yet. The same reasoning that justified President Washington's Neutrality Proclamation (and the many historical examples of unilateral presidential treaty termination) applies today to a treaty like the U.N. Charter, the Geneva Conventions, or the Convention Against Torture. The power to interpret and apply these treaty obligations, or to determine that they will no longer bind the United States, is—constitutionally and practically—the President's. The President's interpretive and executive powers with respect to international treaty obligations of the United States are thus quite obviously tremendously important ones with enormous consequences. While Congress may supersede a treaty for domestic law purposes by passing a statute, the President may repudiate a treaty (in whole or in part) for international purposes entirely on his own authority. (As we shall see presently, the President may maintain or re-create the international obligation of a treaty on his own, in the form of an "executive agreement," but may not properly create domestic U.S. legal obligations by such action.)

Thus, though treaties are part of the supreme law of the land under the U.S. Constitution, their legal force as they concern the international law obligations of the United States is, as a matter of U.S. law, always limited by (1) the Constitution's assignment of certain indefeasible constitutional powers to the President and to Congress with respect to foreign affairs and war; (2) the

determination—but that no proper party with injury was before the Court. The only parties claiming injury were individual senators and representatives not constituting the number sufficient to act to block a treaty's termination (one-third plus one of the Senate, or, on the alternative theory, a majority of both houses of Congress). Such individual members lack *standing* to sue on behalf of the body or group. *See* Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986) (finding that a dissenting school board member has no individual standing to appeal an adverse judgment against the school district). They also lack standing to sue in their own right. *See* Raines v. Byrd, 521 U.S. 811 (1997) (stating that there is no individual member standing simply for challenging the constitutionality of enactments alleged to violate separation of powers principles).

54. Kucinich v. Bush, 236 F. Supp. 2d 1 (D.D.C. 2002).

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power of Congress to enact inconsistent, overriding or limiting legislation; (3) the fact that many treaty commitments do not create self-executing U.S. domestic law obligations; and (4) the President's foreign affairs executive power to interpret, apply, suspend (in whole or in part), or even terminate a U.S. treaty's international obligation as a matter of U.S. law.

It is worth pausing to consider exactly what all of this means, for its implications are mildly stunning, especially with respect to U.S. war powers: it means that a treaty of the United States that is the law of the land under Article VI of the Constitution—be it the U.N. Charter, the Geneva Conventions or any other major agreement at the center of the contemporary regime of international law—may not constitutionally limit Congress's power to declare war or the President's Commander-in-Chief power to conduct war as he sees fit. It means that Congress always may act to displace, or disregard, a treaty obligation. It means that the President, too, always may act independently to displace, or disregard, a treaty obligation. It means that treaties, as a species of international law with the strongest claim to U.S. domestic constitutional law status, never meaningfully constrain U.S. governmental actors. Their force is utterly contingent on the prospective actions and decisions of U.S. constitutional actors.[55]

This conceptualization threatens all that the community of "international law" scholars hold most dear. For it seems to say that the United States may disregard the seemingly most sacred of international law treaty obligations almost at will. The answer to such a charge is *yes*, this analysis suggests precisely that. At least it does so as a matter of U.S. *constitutional law*. This does not mean, of course, that the United States must or should disregard important international law treaty obligations as a foreign policy matter. It certainly does not need to do so; other nations might validly regard such actions as a breach of international law; such nations might become very angry at the United States's actions (or they might not); and such breaches, and reactions, may have serious international political repercussions. These are very serious policy considerations. But as a matter of U.S. constitutional law, it remains the case that Congress, and the President, may lawfully take such actions, hugely undermining the force of such international treaties as binding national law for the United States.

The conclusion is blunt, but inescapable: international law in the form of U.S. treaties is primarily a *political* constraint on U.S. conduct—a constraint of international politics—more than a true *legal* constraint. The "binding"

55. For important contemporary applications of these principles, see *infra* Part III.

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international law character of a treaty obligation is, as a matter of U.S. law, largely illusory.

B. Executive Agreements

All of these same points apply with respect to a second species of international law, so-called executive agreements. Indeed, the points apply with even greater force.

An executive agreement is exactly what the name implies. It is an agreement made by the executive—that is, the President—with some other nation or entity as an aspect of the exercise of the President's foreign policy powers. It is not the same thing as a treaty for purposes of U.S. domestic law. It is not made in accordance with the lawmaking process for treaties specified in Article II of the Constitution. An executive agreement is an international compact, or deal, made by the President alone, without the two-thirds majority Senate consent required for Article II treaty formation.[56] Consequently, under the Supremacy Clause of Article VI, nontreaty international agreements made by the executive and not implemented by statute do not have the same force as U.S. domestic law that treaties and statutes do.

At least they *should* not be thought to have the same force. More on this point—and the tortured course of Supreme Court decisions departing from it—presently. But first, it should be noted that, while executive agreements may well constitute binding international law obligations of the United States (whatever their different U.S. domestic law status), they are at least as easily overridden by subsequent actions as treaties are, as a matter of U.S. domestic law. Indeed, they are even more readily superseded.

Recall the four ways in which treaties may be trumped, or their legal effect mitigated, by other features of the U.S. constitutional regime. Each applies a fortiori to nontreaty executive agreements.

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56. I deal here primarily with what are often termed "sole executive agreements," as distinguished from "congressional-executive agreements." In the latter type of agreement, the President completes an international agreement either pursuant to delegated legislative authority or subject to later legislative implementation in the form of a statutory enactment (or sometimes both). In such instances, the international agreement is made U.S. domestic law by virtue of the exercise of one of Congress's constitutional legislative powers. In my view, such agreements may be made U.S. law in such a manner *only* when they concern matters within the scope of Congress's enumerated powers. This will overlap substantially, but incompletely, with the treaty-making power of Article II, which is plenary. *See* John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001).

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First, an executive agreement may not trump the Constitution. If a treaty may not violate the Constitution, certainly a nontreaty agreement, made law neither by Article I nor Article II processes, cannot do so.

Second, an executive agreement may always be trumped by a subsequent inconsistent statute within Congress's powers. If the relationship status between treaty law and statutes is imperfectly clear, the relationship between a mere executive agreement, not enacted into domestic law in any form, and a subsequent contradicting law, is perfectly clear. An enacted law trumps a presidential agreement that is not a treaty.

Third, executive agreements are not self-executing as a matter of U.S. domestic law. Just as many treaties require implementing legislation to create enforceable domestic rights or obligations, *all* executive agreements should be thought to require legislative authorization or implementation to have domestic legal force. (As mentioned, this is in tension with certain notable Supreme Court decisions that I discuss momentarily.)

Fourth and finally, executive agreements, made by the President alone, may be terminated by the President alone. If the treaty-termination power is at least a difficult enough issue to require careful and nonobvious textual and structural analysis, executive agreement termination is not a tough issue at all. What one president may agree to, another president may disagree with and, at least prospectively, abandon or repudiate.

It is thus *at least* as easy to overcome, as a matter of U.S. domestic constitutional law, an executive agreement as it is to overcome a treaty. While the regime of international law may regard such agreements as creating binding obligations, the agreements properly have very little binding force as a matter of U.S. law.

Indeed, as noted, they should have *no* force as domestic law, since they are not law enacted in accordance with either Article I lawmaking or Article II treaty-making requirements. The Supreme Court has more than occasionally said otherwise, but nothing in what it has said meaningfully impairs the ability of the executive and legislative branches to *supersede,* by subsequent enactments or actions, whatever legal force an executive agreement might be thought to have had as domestic law.

The Court has held that unilateral executive agreements—agreements that are neither treaties nor authorized or implemented by legislation—constitute enforceable domestic law, ousting contrary federal law rights and powers[57] and

57. Dames & Moore v. Regan, 453 U.S. 654 (1981). In *Dames & Moore*, the Supreme Court unanimously upheld President Carter's executive order in implementation of an executive agreement settling the Iran hostage crisis of 1979-1980. President Carter's executive

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preempting contrary state law.[58] With all due respect, these decisions are manifestly unsound: the President may not, through his foreign affairs executive power, make new domestic law.[59] He can make a treaty. He can negotiate an executive agreement implemented by legislation within Congress's power. But he can no more make law on his own, through the exercise of the foreign affairs aspect of "the executive Power," than he can legislate on his own.[60]

Dames & Moore v. Regan, the 1980 Supreme Court decision upholding President Carter's executive agreement with Iran, which provided for release of American hostages seized at the U.S. Embassy in Tehran in exchange for release of frozen Iranian assets and the extinguishing of legal claims against Iran and its citizens, is a significant departure from the proper understanding of the Constitution in this regard. In *Dames & Moore*, the Court found implied unilateral presidential lawmaking authority to alter domestic legal rights and duties, resulting from a unilateral executive agreement with another nation. Its reasoning was thoroughly unpersuasive: though the President's actions had not been made law by treaty or by legislation, the President nonetheless possessed implied authority to act to resolve claims disputes, given that Congress had not demonstrably disagreed with the President's actions,[61] given Congress's general historical acquiescence in and periodic legislative authorization for other executive claims settlement agreements, and given Congress's grant of other emergency powers for dealing with such crises. Though no statutory provision authorized the President's actions, the Court nonetheless found that Congress's actions came within the general neighborhood of authorizing what the executive did, that similar things had

agreement committed to having all U.S. claims against Iranian assets resolved by an international claims tribunal; the executive branch's orders implementing that commitment essentially extinguished the legal rights and claims under domestic U.S. law of U.S. citizens and corporations – that is, the orders repealed or altered U.S. law. Congress did not enact implementing legislation for this aspect of the executive branch's actions, and the Court found that existing legislative authorization for presidential emergency action, under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1702(a)(1) (2000), did not go so far. *Dames & Moore*, 453 U.S. at 677.

58. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

59. See Prakash & Ramsey, *supra* note 42, at 254-55 ("[T]raditional executive power did not include the power to enact foreign affairs legislation.").

60. Youngstown Sheet & Tube Co v Sawyer, 343 U.S. 579, 587-88 (1952) (setting forth the proposition that the executive power does not include a unilateral power to make domestic law).

61. President Reagan ratified President Carter's actions. The Reagan Administration issued the Treasury Department regulations extinguishing private causes of action in U.S. courts, implementing the executive agreement. *See Dames & Moore*, 453 U.S. at 666.

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been done before, and that Congress never told the President he could not do such a thing. The Court's decision was unanimous (Justice Stevens and Justice Powell each wrote brief separate opinions),[62] but the decision's precedential weight is, perhaps, limited by the seeming necessity that the Court reach the result it did.[63]

American Insurance Ass'n v. Garamendi,[64] decided by a narrow 5-4 majority in 2003, is likewise a deviation from this understanding of executive agreements. In *Garamendi*, the Court found that the "National Government's *conduct of foreign relations*"[65] impliedly preempted state law inconsistent with such federal conduct—even where such federal foreign policy conduct was not reflected in law in the form of a treaty or statute. In principle, an executive agreement, though not enacted as Article VI law of the United States, nonetheless could have operative legal effect to preempt state law.[66] But this is clearly wrong in principle: the President, acting alone, may not enter into international agreements that have binding U.S. domestic legal effect without thereby rendering superfluous both Article II's treaty-making provisions and Article I's provisions for enacting statutes. Indeed, *Garamendi* does this absurdity one better, finding that there need not be an "executive agreement" at all, but merely an executive branch policy or practice, or mere discussions or negotiations involving foreign nations. Not only could the existence of an executive agreement preempt state law, but the *nonexistence* of an executive agreement apparently could do so, too.

At issue in *Garamendi* was a California law, the Holocaust Victim Insurance Relief Act of 1999,[67] requiring insurance companies doing business in California to disclose information about policies they wrote in Europe between

62. *Id.* at 690 (Stevens, J., concurring in part) (joining the Court's opinion in the main, but declining to join the Court's "takings" discussion); *id.* (Powell, J., concurring in part and dissenting in part) (same).

63. The Court very nearly said as much. The Court first stressed that "the expeditious treatment of the issues involved . . . makes us acutely aware of the necessity to rest decision on the narrowest possible ground capable of deciding the case." *Id.* at 660 (majority opinion). The Court then warned against reading its decision as attempting to set forth generally applicable principles readily transferable to other situations: "We attempt to lay down no general 'guidelines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case." *Id.* at 661.

64. 539 U.S. 396 (2003).

65. *Id.* at 401 (emphasis added).

66. *Id.* at 416 ("Generally, then, valid executive agreements are fit to preempt state law, just as treaties are . . . .").

67. Holocaust Victim Insurance Relief Act of 1999, CAL INS. CODE §§ 13800-13807 (West 2005 & Supp. 2009).

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1920 and 1945—so that all could see who may have paid claims to the Nazis or failed to pay survivors of Holocaust victims. The federal government had taken steps to resolve Holocaust-era insurance claims with foreign nations through diplomacy, but had neither produced executive agreements nor formally disapproved of state laws like California's. This was still sufficient to find federal-law preemption, according to the Court. As the majority put it, "The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves."[68]

This is preemption on stilts. One might call it "dormant kid-glove preemption." The logical implication of the *Garamendi* approach is that the President may preempt state law simply by announcing that it conflicts with his foreign policy, or that it might. The most sensible argument for this position is that the grant of general foreign policy power (and specific treaty-making power) to the President automatically preempts any state enactments that might affect foreign affairs in any way. While such an implied "field preemption" claim is not altogether implausible, it is still a rather extreme position The implication is difficult to square with the text of the Constitution. The existence of the specific treaty-making provision of Article II with its two-thirds Senate majority consent requirement, coupled with Article VI's specific designation of treaties and enacted statutes as supreme law that preempts contrary state law, cuts against the field preemption view that an unexercised "dormant" foreign policy power preempts the field. But at least such a theory would not require the truly antitextual conclusion that the President may *enact* federal law on his own, by his foreign policy actions or pronouncements.

The Bush Administration apparently thought this the correct understanding of *Garamendi*, and acted on that view in a notable matter that came before the Supreme Court shortly after *Garamendi* had been decided, involving application of the Vienna Convention on Consular Relations to U.S. state criminal felony prosecutions. After *Garamendi*, one may well forgive the Administration of President George W. Bush for thinking that it could simply declare a foreign policy view and thereby preempt inconsistent state law—for that is, after all, what *Garamendi* essentially holds, or at least very strongly suggests. But the course of subsequent Supreme Court decisions on the Vienna Convention issue, culminating in *Medellín v. Texas*, suggests that the Roberts Court might be starting on the road back to a more textually defensible position.

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68. 539 U.S. at 427.

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The *Medellín* legal saga is an interesting one, highly instructive on the dual questions of the force of international law as a matter of United States law and the power authoritatively to interpret international law for the United States. The facts are set forth in detail in the Court's three opinions concerning the Vienna Convention treaty's application in the United States,[69] but can be summarized briefly. José Medellín is a Mexican national who participated in a 1993 gang rape and murder of two girls in Houston, Texas: Jennifer Ertman, age fourteen, and Elizabeth Pena, age sixteen. Medellín personally strangled at least one of the two girls with her own shoelace. Medellín was caught, given *Miranda* warnings, confessed, and was convicted of capital murder.[70]

But Houston police officers never told Medellín about his "consular rights" under the Vienna Convention on Consular Relations, a treaty to which the United States is a party. The Vienna Convention provides that if a person is arrested in a foreign country, he or she is to be informed of the right to notify, and request the assistance of the consul of, his home nation.[71] Medellín first raised the Vienna Convention question in post-conviction proceedings in Texas state court. The Texas courts found that the issue was waived by procedural default and that, in any event, the nonnotification of his consular rights did not affect the validity of his conviction. Medellín then sought federal habeas corpus relief.[72]

While Medellín's case was winding its way through the federal courts, the ICJ ruled in a case submitted to its jurisdiction, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*,[73] that the United States had violated the Vienna Convention and must provide a means of its choosing for reconsideration of convictions and sentences to determine whether the violations had prejudiced the defendants in their criminal cases. Medellín was one of the "other Mexican nationals" party to the *Avena* case. The ICJ decision in *Avena* "indicated that such review was required without regard to state procedural default rules,"[74] but the lower federal courts continued to deny habeas relief. The U.S. Supreme Court granted certiorari to decide whether the

69. Medellín v. Texas (*Medellín II*), 128 S. Ct. 1346 (2008); Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006); Medellín v. Dretke (*Medellín I*), 544 U.S. 660 (2005) (per curiam).

70. *Medellín II*, 128 S. Ct. at 1354.

71. Vienna Convention on Consular Relations art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

72. *Medellín II*, 128 S. Ct. at 1354-55.

73. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

74. *Medellín II*, 128 S. Ct. at 1355.

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ICJ's decision was binding on the United States or, in the alternative, should be recognized as a matter of comity.

Now, the Bush Administration almost certainly believed—correctly in my view, as set forth above—that international law decisions and general norms interpreting international law are, as a matter of U.S. constitutional law, not legally binding on the United States, even when the international law being interpreted and applied is a treaty to which the United States is a party, and part of the "Law of the Land" recognized by Article VI of the U.S. Constitution. Treaties are part of U.S. law, but the *interpretation* of treaty-law obligations is for the U.S. executive as an aspect of the foreign affairs power and, in an appropriate case, for U.S. courts.

But there's the rub: the power of treaty interpretation, like interpretation of laws more generally, cannot readily be said to be an *exclusive* executive power; it is at best a power shared with the U.S. judiciary. There certainly could be no guarantee that the Supreme Court might not hold, as a matter of *its* independent interpretation of the treaty, that the ICJ's decision was binding on the United States as a matter of U.S. law. The Administration likely viewed the prospect of such an adverse decision as a potential constitutional, practical, and political disaster. Given the composition of the Court in 2005, and the recent decisions adverse to the President's position in the high-profile cases of *Hamdi v. Rumsfeld*[75] and *Rasul v. Bush*,[76] the Administration—counting noses on the Court—probably had reason to be concerned about this prospect. Rather than risk an adverse decision, President Bush announced that the Administration would, as a matter of the executive's foreign policy determination—not as a matter of international law or treaty obligation—direct state court compliance with the ICJ decision in *Avena*, in the particular cases of the Mexican nationals who were parties in the ICJ proceedings (which would include Medellín). The President thus *ordered* state courts to reconsider their decisions in these cases, *as a matter of U.S. foreign policy*. Put another way, President Bush invoked his "*Garamendi* power" to preempt state law.[77] (President Bush further announced

75. 542 U.S. 507 (2004).

76. 542 U.S. 466 (2004).

77. The President's Memorandum to the Attorney General provided as follows:

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in *Case Concerning Avena and the Other Mexican Nationals (Mexico v. United States of America)*, 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

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that the United States was withdrawing, prospectively, the United States's consent to ICJ jurisdiction in such matters—arguably, an example of presidential exercise of the power of (limited) treaty-termination.[78])

The Supreme Court had granted certiorari, but had not yet heard oral argument in *Medellín v. Dretke* (*Medellín I*). In light of the President's actions, the Court dismissed the writ as improvidently granted,[79] leaving the matter to a second round in the Texas state courts, who (politely) refused to comply with the President's directive, finding that neither *Avena* nor the President's Memorandum was "binding federal law" that could displace state law limitations on filing successive habeas petitions.[80]

Petition for Writ of Certiorari app. 187a, *Medellín II*, 128 S. Ct. 1346 (No. 06-984).

Note that the President's Memorandum rests his action not on any binding character of the *Avena* decision, but on his own U.S. domestic law constitutional authority. He refers to the United States's "international obligations" under the *Avena* decision, but rests the authority to give effect to such obligations on his U.S. constitutional power. The Memorandum further directs state courts to "give effect" to the *Avena* decision not as binding law but in accordance with "general principles of comity." The President's directive is also carefully limited so as not to require such state court comity consideration in any instances other than those of the specific parties in *Avena*.

78. *Id.* at 1354.

79. Medellín v. Dretke (*Medellin I*), 544 U.S. 660, 667 (2005) (per curiam).

80. *Ex parte* Medellín, 223 S.W.3d 315, 352 (Tex. Crim. App. 2006). The state courts' actions raise an interesting side issue: does international law bind *state* government actors? The short answer is that *U.S. federal law* binds states, under the Supreme Law and Oath Clauses of Article VI, and the supreme law of the land includes all legally valid treaties of the United States. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 346 (2006) ("Of course, it is well established that a self-executing treaty binds the States pursuant to the Supremacy Clause . . . ."). But treaties bind state courts (and elected officials) because they are *U.S.* law, not because they are international law. In principle, international law not enacted by treaty or statute as U.S. law is no more binding on state officials than on federal officials.

The somewhat longer answer is that the force of federal executive branch *interpretations* of U.S. treaty obligations is a more difficult question, turning on whether executive branch treaty interpretations are considered authoritative and binding generally as to the meaning of treaties as a matter of U.S. law. The view I have expressed here is that the President has the power authoritatively to interpret treaties (and other international law) for purposes of exercising his Article II executive power over foreign affairs, but that does not make his interpretations binding on other U.S. actors as a matter of domestic U.S. law. (Similarly, the President may not repeal the U.S. domestic law status of a ratified treaty.) President Bush's memorandum with respect to *Avena* did not even claim the status of a presidential interpretation of the underlying treaty, but merely represented his foreign policy judgment that the *Avena* judgments should be followed as a matter of domestic law, even if *not* binding as a matter of U.S. law. From a constitutional standpoint, President Bush's directive raised the question not of whether states are bound by international law, but whether they are bound, as a matter of domestic law, by presidential orders based on his foreign policy

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A betting man might well have predicted that the Supreme Court would reverse the Texas courts on the basis of *Garamendi*. But certain things had changed between 2005 and 2008. First, then-Judge John Roberts had become Chief Justice, replacing Chief Justice William Rehnquist. Second, then-Judge Samuel Alito had become an Associate Justice, replacing Justice Sandra Day O'Connor. And with the change in personnel had come a new intervening decision of the Court in *Sanchez-Llamas v. Oregon*, presenting the somewhat easier question of whether a violation of the Vienna Convention requires as a remedy a domestic exclusionary rule for subsequently obtained confessions.[81] The Court, in an opinion by Chief Justice Roberts, assuming arguendo that the Convention created judicially enforceable rights, found that the Convention itself did not require such a remedy and, in any event, did not bar state procedural default rules with respect to Vienna Convention claims.[82]

The latter point provided a new occasion for the Supreme Court to consider whether the ICJ's contrary view in *Avena*—that the Vienna Convention *does* oust a jurisdiction's procedural default rules—was binding in the United States. Before *Avena* had been decided, the Supreme Court had held that state procedural defaults did *not* violate the Vienna Convention, in *Breard v. Greene*.[83] Thus, the Supreme Court in *Breard* had interpreted an international treaty of the United States one way; the ICJ in *Avena* had interpreted it a different way, in a matter in which the United States had submitted to the ICJ's jurisdiction and had agreed (in another treaty, the U.N. Charter) to accept the ICJ's judgments. Which view should now prevail in U.S. courts?

The Court in *Sanchez-Llamas* held, significantly, that U.S. courts are not bound by international bodies' interpretations of treaties to which the U.S. is a party. Chief Justice Roberts's opinion of the Court rested this conclusion, correctly, on U.S. domestic constitutional law:

> Under our Constitution, "[t]he judicial Power of the United States" is "vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." That "judicial Power . . . extend[s] to . . . Treaties." And, as Chief Justice Marshall famously explained, that judicial power includes the duty "to say what

judgments not enacted into U.S. law by treaty or statute—a "*Garamendi* power" issue of dormant presidential foreign policy preemption and prescription of state action.

81. 548 U.S. 331.

82. *Id.* at 346-59.

83. 523 U.S. 371, 375 (1998).

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> the law is." *If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by the "one supreme Court" established by the Constitution.*[84]

This is a forthright, unabashed declaration of U.S. legal supremacy in interpretation of U.S. law, including treaties to which the United States is a party. Chief Justice Roberts's opinion quickly went on to argue, in addition, that "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts."[85] While each member of the United Nations had agreed to comply with specific judgments of the ICJ in which they were a party, such judgments were case-specific results, more like arbitration decisions than declarations of law. Moreover, the contemplated enforcement mechanism was international political pressure, not domestic judicial obligation. Thus, it was not as if the ICJ's judgment purported to have domestic U.S. legal effect, even as a matter of international law. But the Chief Justice's lead point remained unqualified: as a matter of U.S. constitutional law, international bodies' interpretations of treaties (or other international law) cannot determine the decisions of Article III courts of the United States.

I will return to this point in Part II, concerning the U.S. constitutional power to interpret international law, as a general set of propositions.[86] *Sanchez-Llamas* and *Medellín v. Texas* (*Medellín II*) stand for the proposition that the constitutional power to interpret international treaties to which the United States is a party is a domestic U.S. constitutional power to be exercised by U.S. constitutional actors (including the federal courts), and that such a power can never be deemed ceded to non-U.S. actors or institutions.

To return to the *Medellín* narrative, *Sanchez-Llamas* is also a significant link in the chain of reasoning rejecting the President's claimed power to transform nontreaty foreign policy determinations and actions into binding U.S. law. President Bush, as *Medellín I* was pending, had decided that U.S. policy would be to honor the *Avena* judgments in a case-specific manner and directed state courts to reconsider their judgments. In *Medellín II*, the Supreme Court held, again rightly (and again in an opinion by Chief Justice Roberts), that the

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84. *Sanchez-Llamas*, 548 U.S. at 353-54 (alterations in original) (emphasis added) (citations omitted) (quoting U.S. CONST. art. III, § 1; *id.* § 2; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

85. *Id.* at 354 (footnote omitted).

86. *See infra* Part II.

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President could not leverage his foreign policy power so as to make U.S. domestic law in such fashion. The Court first rejected Medellín's argument that the *Avena* decision was binding on U.S. courts, following reasoning similar to *Sanchez-Llamas*.[87] While *Avena* might well create "an *international* law obligation on the part of the United States,"[88] it did not follow that it created "binding federal law enforceable in United States courts."[89] The question of the "*domestic* legal effect" of the *Avena* judgment was quite a different one, the Court said, and the answer was that the treaty was more properly interpreted (by U.S. courts, of course) as not having such a self-executing, binding effect.[90] Along the way to deciding that first issue, the Court noted that treaties and international agreements could only be made, and only had legal force when made, in accordance with the processes specified in Article I and Article II:

> Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances. They also recognized that treaties could create federal law, but again through the political branches, with the President making the treaty and the Senate approving it.[91]

The Court concluded that, while it was of course possible that an international treaty obligation could, where made through these processes, create binding and conceivably even judicially enforceable U.S. domestic law obligations, "the particular treaty obligations on which Medellín relies do not of their own force create domestic law."[92]

But if a non-self-executing *treaty* does not of its own force create domestic legal obligations, how is it possible that an *executive agreement* or *executive foreign policy judgment* could do so? That is the question that the Court in *Medellín v. Texas* considered next. The issue was whether President Bush could "unilaterally create federal law" by giving effect to an international body's judgment that did not (and could not) itself create federal law.[93]

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87. Medellín v. Texas (*Medellín II*), 128 S. Ct. 1346, 1356 (2008).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1362 (citations omitted).

92. *Id.* at 1365.

93. *Id.* at 1367 n.13.

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The Administration argued that the President possessed authority "to establish binding rules of decision that preempt contrary state law."[94] That proposition, of course, follows from *Dames & Moore* and *Garamendi*, and the Administration's brief was liberally sprinkled with supporting citations to those cases. Indeed, the Administration equiated the President's actions in directing that domestic legal effect be given to the ICJ judgments to the making of an executive agreement.[95] The Supreme Court rightly rejected that argument, and in so doing may have started down the road away from the unsound reasoning of *Dames & Moore* and *Garamendi*:

> The requirement that Congress, rather than the President, implement a non-self-executing treaty derives from the text of the Constitution, which divides the treaty-making power between the President and the Senate.... Once a treaty is ratified without provisions clearly according it domestic effect ... whether the treaty will ever have such effect is governed by the fundamental constitutional principle that "[t]he power to make the necessary laws is in Congress; the power to execute in the President." .... [T]he terms of a non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto.
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> ....
>
> .... As Madison explained in The Federalist No. 47, under our constitutional system of checks and balances, "[t]he magistrate in whom the whole executive power resides cannot of himself make a law." That would, however, seem an apt description of the asserted executive authority unilaterally to give the effect of domestic law to obligations under a non-self-executing treaty.[96]

True enough, but that would *also* seem "an apt description of the asserted executive authority" to create domestic law rights and obligations on the basis

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94. *Id.* at 1368 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 5, *Medellín II*, 128 S. Ct. 1346 (No. 06-984)).

95. *See id.*; *see also* Brief for the United States as Amicus Curiae Supporting Respondent at 45, Medellín v. Dretke (*Medellín I*), 544 U.S. 660 (2005) (No. 04-5928) (making a similar claim).

96. *Medellín II*, 128 S. Ct. at 1368-70 (emphasis added) (citations omitted) (internal quotation marks omitted) (quoting Hamdan v. Rumsfeld, 548 U.S. 557, 591 (2006); The Federalist No. 47, at 326 (James Madison) (Jacob E. Cooke ed., 1961)).

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of purely executive agreements—exactly as was the case in *Dames & Moore*. Just as clearly, it is an apt description of the proposition that generalized executive foreign policy "conduct" has the domestic law effect of preempting state law, as the Court concluded in *Garamendi*. Simply put, the reasoning of *Medellín v. Texas* refutes the false claims of *Dames & Moore* and *Garamendi*. If the President may not unilaterally make a non-self-executing treaty into a binding U.S. domestic law obligation, he surely may not unilaterally make an executive agreement into a binding U.S. domestic law obligation. In one case as in the other, the very nature of the agreement entered into not only refutes the notion that the President can exercise such unilateral power, but "also implicitly prohibits him from doing so."[97] The President's constitutional power to formulate and conduct U.S. foreign affairs, while it may create international law obligations as a matter of the legal regime of international law, is not a power to create U.S. domestic law. Period.[98]

But the most fundamental point—the mutability of executive agreements under U.S. law—remains, however one decides the question of whether such agreements properly have any U.S. domestic law status in the first place. Executive agreements or other unilateral executive foreign policy actions could establish binding rules of decision as a matter of domestic law, it remains clear that such rules could always be undone. Whatever the status of such agreements as a matter of international law, executive agreements can be *unmade at will* by the executive or superseded by contrary legislation, and can never trump any power or right assigned by the Constitution. Executive agreements are international "law," under the U.S. legal regime, only in the most disposable sense of the term.

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97. *Id.* at 1369.

98. In classic early Roberts Court fashion, Chief Justice Roberts's opinion for the Court in *Medellín II* distinguished *Dames & Moore* and *Garamendi* as not quite apposite, rather than overruling them. The opinion noted that nothing in *Dames & Moore* or *Garamendi* (or in *Belmont v. United States*, 301 U.S. 324 (1937), or *United States v. Pink*, 315 U.S. 203 (1942)), pertaining to claims-settlement agreements required a different result. Without quite embracing those cases ("They are *based on the view that*" longstanding such practice raises a presumption of congressional consent, *Medellín II*, 128 S. Ct. at 1371 (emphasis added)), the opinion consigned them to a small corner: "The Executive's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum." *Id.* at 1372. Quite so. But in principle the constitutional rule that the President cannot alone make domestic law cannot be so narrowly and strictly limited, and this suggests that the *Dames & Moore-Garamendi* power should not merely be thought "strictly limited" but should be repudiated entirely.

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C. "Customary International Law"

The third type of international law, what is (customarily) referred to as customary international law, is the foggiest type of all. It refers to the norms and practices of nations, apart from treaties or other written agreements. Within the regime of international law, it is "law" inferred from "a general and consistent practice of states followed by them from a sense of legal obligation."[99] It is, in effect, a body of unwritten international "common law" principles. As such, the system of international law regards it as just as binding as treaties or other written conventions.[100] Before so much of international law became treaty-fied in the late nineteenth and twentieth centuries, such customary international law, referred to at the time of the Framing of the Constitution as the Law of Nations,[101] was the dominant form of international law. Indeed, it would not be far wrong to refer to international law, at the time of the Framing of the Constitution, as largely consisting of principles of *natural law*, applicable to the conduct of nations (and their citizens) toward each other on the international plane. What we today call customary international law was, originally, a body of principles of just, proper, and proportionate conduct – right conduct – deduced from general principles of natural justice.

What is the force of customary international law as a constraint on the United States, as a matter of U.S. constitutional law? The short answer is that customary international "norms," not embodied in treaties to which the United States is a party, are not part of the Article VI "supreme Law of the Land" of the United States *at all*.[102] Such norms are not "law" made in accordance with U.S. constitutional processes, as specified in Article I (legislation), Article II (treaties), or Article V (constitutional amendments) – the three processes set forth in the Constitution for the making of the three types of federal law. Accordingly, customary international law is not binding in any form on the President's conduct of foreign affairs or on the exercise of any of his constitutional powers (including the Commander-in-Chief power to conduct

99. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

100. *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS, at xxiii-xxiv (2003) ("Treaties and customary international law have essentially equal weight under international law.").

101. For discussion of the importance of the Law of Nations Clause of the Constitution, U.S. CONST. art. I, § 8, cl. 10, as a source of sweeping domestic U.S. legislative power, see *infra* notes 121-124 and accompanying text.

102. U.S. CONST. art. VI, cl. 2.

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war).[103] The same holds true for Congress and the courts: customary international law is not in any constitutional way a binding constraint on the exercise by Congress of any of its constitutional legislative powers, nor does it validly supply a *binding* federal legal rule of decision in U.S. courts that ever prevails over other law.

That is not to say that customary international law is utterly irrelevant. To the contrary, such customary norms are a kind of international common law that the United States *may* choose to follow and apply as a matter of our foreign relations policies or practices (as the President determines), as a predicate and informative source for the exercise of Congress's enumerated legislative power to "define and punish . . . Offences against the Law of Nations,"[104] and as a source of common law norms for the exercise of the admiralty jurisdiction of federal courts (in the absence of contrary treaty or statutory law).[105] As I discuss below, the presence of international law norms can furnish the basis for the exercise of U.S. constitutional powers, in the exercise of policymakers' policy discretion and judgment. Customary international law is properly "part of our law"[106] in the sense that principles of natural international law, customary and well-accepted international practice, and the evolving norms of the international community may inform and justify the exercise of several U.S. government constitutional powers.

But as a matter of U.S. law, such international law *never* prevails over contrary enacted U.S. law or the otherwise-legitimate exercise of a constitutional power possessed by any of the branches of the U.S. government. Customary international law is simply not, and cannot be, *binding* on the United States as a matter of U.S. constitutional law, because it is not part of the binding "law" identified in Article VI and is not made exclusively by U.S.

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103. The customary common law of war at the time of the adoption of the Constitution may also provide interpretive guidance concerning the original understanding of the scope of action embraced by the Commander-in-Chief Clause and constitutional military powers of the President. *See, e.g.*, Paulsen, *The Emancipation Proclamation*, *supra* note 37. For extensive elaboration, see *infra* Sections II.B., III.B.

104. U.S. CONST. art. I. § 8, cl. 10.

105. For a concise explanation of the notion that the Constitution's grant of admiralty jurisdiction is an unusual instance in which the grant of jurisdiction has been understood to entail the power of courts to develop and apply a body of general maritime law, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 742 (2004) (Scalia, J., concurring in part and concurring in the judgment).

106. I borrow here the familiar phrase from the case *The Paquete Habana*, 175 U.S. 677 (1900). *See infra* notes 108-110.

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constitutional actors in accordance with U.S. constitutional processes laid out in Articles I, II, and V.[107]

There of course has been occasional loose language in Supreme Court opinions suggesting the contrary. But such statements by the Court are either best read narrowly, so as to save the Court from the embarrassment of contradicting the Constitution, or rejected outright (so as not to spare the Court such embarrassment). In the construe-to-avoid category, one may place, with only a little charity, the well-known case of *The Paquete Habana*.[108] The case is best understood as a simple prize case in admiralty, applying common law admiralty principles in the absence of any contrary law. In the course of applying such principles, the Court remarked,

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.[109]

Far from being a general charter of customary international law as United States law, *The Paquete Habana* notes (fairly innocuously) that customary international law can provide a common law rule of decision in prize cases, and that such a rule can be trumped by any other federal law rule of decision or by contrary action of any branch of the national government.[110]

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107. There is much recent literature on this subject. For two excellent and thorough treatments of the question of the domestic law effect of customary international law, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); and Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (2002).

108. 175 U.S. 677.

109. *Id.* at 700.

110. Whether customary international law might ever prevail over inconsistent *state* law depends on the correct interpretation of 28 U.S.C. § 1652, commonly known as the Rules of Decision Act (of *Swift v. Tyson* and *Erie Railroad Co. v. Tompkins* fame): "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (2000).

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The equally familiar, traditional interpretive canon known as the *Charming Betsy* canon (after the case of *Murray v. Schooner Charming Betsy*) posits that federal law should not be construed in such manner as to conflict with the customary law of nations "if any other possible construction remains."[111] The *Charming Betsy* canon shares the problems with all interpretive canons that place a thumb on the interpretive scale in a particular policy direction. Like the construe-to-avoid canon with respect to potential conflicts of a federal statute with the Constitution, the *Charming Betsy* interpretive-push canon tends in its application to be either superfluous—adding an unnecessary and somewhat misleading and confusing layer to the analysis—or simply wrong. If the otherwise-correct interpretation of federal law does not in fact conflict with other law, then the construe-to-avoid canon is pure makeweight or hyper-decision-avoidance, a species of what might be called "activist judicial restraint." If the otherwise-correct interpretation of federal law *does* in fact lead to a conflict, the conflict must be resolved. In such event, it is better for the conflict to be resolved forthrightly—the Constitution trumps a conflicting statutory command, rendering the statute unconstitutional—than through indirection (that is, construing the statute to mean what it does not say).

For the *Charming Betsy* canon, there is a further problem. The rule it suggests for reconciling a conflict between federal law and customary international law differs from—indeed, is the opposite of—the rule for reconciling a conflict between a federal statute (or treaty) and the Constitution. Customary international law, unlike the Constitution, does *not* prevail over contrary federal law. Thus, the interpretive push, if any, is always in an unnecessary, or else incorrect, direction. If the otherwise-correct interpretation of federal law does not conflict with customary international law, *Charming Betsy* is an unnecessary fire drill. And if the otherwise-correct interpretation of federal law *does* conflict with customary international law, the otherwise-correct interpretation of federal law should prevail. In such event, the *Charming Betsy* canon always pushes the interpretation the wrong way.

Nevertheless, the essential point is simply this: even under the strongest reading of the force of customary international law, it may always be displaced (just as treaties and executive agreements always may be displaced, only all the more clearly so) by any official action within the constitutional powers of the federal government. The opinion in *The Paquete Habana* is explicit on the point, and the Supreme Court has never suggested anything to the contrary. It follows that customary international law is likewise never a meaningful,

111. 6 U.S. (2 Cranch) 64, 118 (1804); *see also* Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801) (employing a similar principle).

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binding *legal* constraint on the international conduct of the United States. Customary international law is *not* part of United States law that in any serious way limits the actions of Congress, the President, or the federal courts.

* * *

To summarize the argument so far: the Constitution mandates as a matter of U.S. domestic law the supremacy of the Constitution over international law in all respects. No norm, rule, principle, or command of the legal regime of "international law" in conflict with the Constitution's vesting of U.S. powers or recognition of individual or group rights can be given effect, as a matter of U.S. law. And even where international law is not in conflict with the Constitution, but actually embraced within the Constitution's terms, the Constitution's provisions maintain the supremacy of U.S. law over international law. The Constitution's assignment of powers makes every aspect of international law subject to being overridden by Congress, the President, or the courts.

The force of international law is thus largely an illusion. Once the fog has lifted, international law as it concerns the United States—treaties of the United States, executive agreements, customary international law norms and practices—can be seen as largely a matter of international politics and policy, not binding "law," at least not in the sense in which law is usually understood. It is international relations or international politics dressed up as law. It may be highly relevant in that sense—that is, as a rhetorical, political trope—but it is essentially irrelevant as law. To misquote Clausewicz once again, international law is simply the continuation of international politics by other means.

II. THE POWER TO SAY WHAT INTERNATIONAL LAW IS (FOR THE UNITED STATES)

What, then, of international bodies' *interpretations* of international law, including international treaties to which the United States is party—such as the U.N. Charter, the Geneva Conventions, and the Convention Against Torture? Are international bodies' (like the International Court of Justice's) interpretations of these international treaties binding on the United States?

It follows from what has already been discussed that the answer must be *no*. As a matter of U.S. constitutional law, the interpretation of U.S. law, including U.S. treaties, cannot be authoritatively or finally vested in non-U.S. authorities. Such persons or bodies possess no part of the Constitution's

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authority. They are not officers of the government of the United States, within the meaning of that term as used in the Constitution.[112] They are certainly not Article III judges. Their decisions may not *govern* the United States. Nor may U.S. government actors cede their constitutional powers to such persons or entities. U.S. officials of course may *consider* what international organizations or courts have to say about America's international obligations. And surely the President may contract (by treaty or by executive agreement) with other nations to agree to submit certain disputes to resolution by international or neutral authorities, and thereby create international and moral obligations. But no such agreement literally may dictate or control the actions of U.S. government authorities. It follows that no decision of an international tribunal or court may be self-executing—binding on U.S. executive, legislative, or judicial authorities—consistently with the Constitution, unless U.S. law (self-executing treaty or statute) both makes it so and makes it so in a fashion permitted by the U.S. Constitution.[113]

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112. Article I, Article II, and Article III vest the legislative, executive, and judicial powers of the United States, respectively, in persons for whom specific U.S. citizenship, age, and residency requirements are a prerequisite, and in no other persons. The Appointments Clause of Article II of the Constitution prescribes in fine detail the process by which persons may be appointed by the President to exercise national governmental authority under the Constitution, and when Congress may prescribe for the appointment of inferior "Officers." U.S. CONST. art. II, § 2, cl. 2; *see* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455 (1992); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 76-77 (2000); John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 88-89 (1998). Michael Dorf and, separately, Henry Monaghan, offer fine recent analyses of these questions from the standpoint of political accountability and Article III. *See* Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103 (2008); Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833 (2007).

113. May the United States, by self-executing treaty or by act of Congress, provide that certain judgments of international tribunals automatically become binding as a matter of U.S. law (subject, always, to repeal or modification by virtue of the exercise of U.S. constitutional powers, which cannot be delegated away)? As discussed below, the U.S. Supreme Court's decision in *Medellín* artfully elides this difficult issue, seemingly stating only that its opinion does not *foreclose* an affirmative answer (and saying that only in dictum) and always leaving *that* determination to U.S. government officials. The better view, I submit, is that the power to enter a judgment or determination that has the status of United States law is an exercise of U.S. government power that can only properly be exercised by U.S. government officials. A self-executing treaty or an act of Congress that purported to delegate such power to foreign persons or bodies would violate the Constitution's exclusive assignment of U.S.

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Indeed, the proposition may be stated more generally: to whatever extent "international law" legitimately may be thought a part of United States law, the power to interpret, apply, and enforce such international law *for the United States* is a U.S. constitutional power vested in U.S. constitutional authorities. That power is not possessed by, and cannot authoritatively be exercised by, non-U.S. actors. The meaning and application of international law, for the United States, is governed by the U.S. Constitution, not by the regime of international law.

The holdings and opinions in *Sanchez-Llamas v. Oregon* and *Medellín v. Texas*, discussed in Part I above, strongly support these conclusions. As noted, in *Sanchez-Llamas*, the U.S. Supreme Court specifically rejected the argument, advanced in an amicus brief of self-styled "ICJ Experts," that "the United States is *obligated* to comply with the [Vienna] Convention, *as interpreted by the ICJ*."[114] The ICJ's interpretations may deserve "respectful consideration," but they do not control American courts' interpretations. "Under our Constitution, '[t]he judicial Power of the United States' is 'vested in one supreme Court'" and lower U.S. courts, and that judicial power emphatically includes the authority "'to say what the law is,'" so far as the United States is concerned."[115]

Sanchez-Llamas is a declaration of U.S. interpretive independence with respect to international treaties to which the United States is a party. And it is a declaration of *constitutional* independence. Under the Constitution, only American office-holders recognized or created by that document, exercising authority under it, and holding office in a manner prescribed therein, may exercise U.S. governmental power—including the power authoritatively to interpret and apply, as law of the United States, international treaties. No foreign nation or group of nations, international body, or "world" court can dictate to American decisionmakers with respect to the interpretation of such treaties, consistently with the U.S. Constitution.

Medellín v. Texas reaffirmed and extended *Sanchez-Llamas*. Not only are the ICJ's interpretations of treaties not binding on the United States, its judgments are not binding either, unless the United States determines that its law says they are. The binding effect of an international tribunal's judgment, for the United States, is a matter of U.S. law:

governmental powers to Article I, Article II, and Article III constitutional actors. *See* Bradley, *supra* note 112; Chen, *supra* note 112; Ku, *supra* note 112; Yoo, *supra* note 112.

114. Sanchez-Llamas v. Oregon, 548 U.S. 331, 353 (2006).

115. *Id.* at 353 (quoting U.S. CONST. art III; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

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> A judgment is binding only if there is a rule of law that makes it so. And the question whether ICJ judgments can bind [U.S.] domestic courts depends upon the same analysis undertaken in *Sanchez-Llamas* and set forth above.... We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments—only that the U.N. Charter, the Optional Protocol, and the ICJ Statute do not do so. And whether the treaties underlying a judgment are self-executing so that the judgment is directly enforceable as domestic law in our courts is, of course, a matter for this Court to decide.[116]

To be sure, *Medellín* leaves open the possibility that a treaty *could* provide for automatic domestic law effect to be accorded an international tribunal's judgment: "We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments ...."[117] But *Medellín*'s double negative dictum does not actually *hold* the reverse of the proposition not denied; the Court does not say, quite—indeed, appears careful to avoid saying—that a treaty *could* do such a thing. At all events, the issue is "of course, a matter for this Court to decide"—an escape hatch that preserves the supremacy of U.S. law and U.S. interpretation of international obligations made a part of U.S. law, as against any claims to supranational supremacy of any foreign body or tribunal.[118]

Sanchez-Llamas v. Oregon and *Medellín v. Texas* thus stand for the proposition of U.S. legal supremacy in interpretation of U.S. law, including treaty law. International bodies' interpretations of international law are not binding on the United States. And what is true for the courts logically holds true for the other branches of the U.S. government: the ICJ's interpretations of U.S. treaties cannot constitutionally bind the President or Congress any more than they can bind the Supreme Court.

How, then, is the power to interpret international law allocated as among the three branches of the U.S. national government? Like the power to interpret and apply law generally, the power to interpret international law is not specifically vested by the text of the Constitution in any one branch of government, but arises as a necessary incident to the exercise by each branch of

116. Medellín v. Texas (*Medellín II*), 128 S. Ct. 1346, 1364-65 (2008).

117. *Id.*

118. *Id.* at 1365. As suggested above, were the Supreme Court to hold that international judgments made by non-U.S. actors may be accorded automatic U.S. domestic law effect, such a holding would be in conflict with the Appointments Clause and the Constitution's exclusive assignment of U.S. government power to U.S. actors. *See supra* note 113.

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the specific (and general) powers granted them by the Constitution.[119] The interplay of this separated, shared U.S. constitutional power to interpret international law is a function of the Constitution's separation of powers generally. Each branch has specified areas of exclusive or predominant interpretive power—its own emphatic duty and province to say what the law is. Each branch possesses important checks on the exercise of this power by others. And each is likewise checked in its own exercise of such power by the other branches' powers.

A. Congress's Power To Interpret and Apply International Law as Domestic U.S. Law

Congress possesses the U.S. legislative power to say what international law is—to ascertain, interpret and literally even to *define* it; to reduce it to domestic, enforceable law—for the United States. Though international law does not of its own force bind the United States, it can furnish the basis and supply the justification for the exercise of broadly cast enumerated legislative powers that the Constitution vests in Congress.

Consider the three most obvious, important examples. First, Congress possesses the specific enumerated power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[120] The Law of Nations Clause empowers Congress to choose to write certain principles or rules of international law into U.S. law, by exercising this legislative power. But *Congress* must define the "Offences"; the regime of international law may not dictate to Congress what those offenses may or must be.[121]

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119. It is not the case (contrary to some popular misunderstanding in this regard) that the power to interpret the law (including international law) is vested solely, or even finally, in the Supreme Court. For discussion and refutation of this common myth, see Paulsen, *The Irrepressible Myth of* Marbury, *supra* note 23; and Paulsen, *The Most Dangerous Branch*, *supra* note 24. Rather, the power to interpret law is a shared and separated power, divided among the three branches, with no one branch granted supremacy over the others. *See id.* at 228 ("The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers." (internal quotation marks omitted) (quoting THE FEDERALIST NO. 49, at 255 (James Madison) (Gary Wills ed., 1982)).

120. U.S. CONST. art. I, § 8, cl. 10.

121. The MCA is, in part, exactly such an exercise of congressional power. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28,

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The Law of Nations Clause power is the basis for that part of the MCA that defines (and provides for the punishment of) offenses against the customary international law of war, which is part of the Law of Nations.[122] The Law of Nations Clause is also the constitutional basis for the Alien Tort Statute, adopted more than two centuries earlier, which provides for federal jurisdiction (at least) and arguably a substantive cause of action (or at least the Supreme Court has so held) for claims to damages for violation of customary international law.[123]

It is worth pausing for a moment to absorb just how sweeping this legislative power may be. Congress may *define* what *it understands to be* a violation of "the Law of Nations" and use this judgment as the basis for legislative enactments. This is, potentially, an enormous substantive legislative power. Given international law's fogginess and (in part) common law nature, Congress possesses in effect a common-law-making power to pass criminal laws concerning matters it decides are a violation of the Law of Nations. To the extent that the original, eighteenth-century meaning of the Law of Nations was understood to be general principles of *natural law* applicable to the conduct of nations (and their citizens) with respect to one another, Congress has the extraordinarily sweeping enumerated legislative power to enact federal laws defining and punishing what it fairly considers to be violations of *international natural law*.

And if, as argued above, "customary international law" is not itself U.S. law, and if neither the international law regime's understanding nor that of any international body can control or dictate U.S. actors' interpretations of international law for the United States, then it follows that Congress is not constrained in the exercise of its Law of Nations Clause legislative power by "customary" international understandings of customary international law.

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and 42 U.S.C.). In particular, see *id.* subch. VII, § 950, which is entitled "Punitive Matters" and defines offenses.

122. *See id.*

123. The Alien Tort Statute provides that federal district courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2000). In *Sosa v. Alvarez-Machain*, the Court found that this language created a substantive cause of action for *some* types of claims in violation of international law. 572 U.S. 692, 712 (2004) ("Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."). Whether that is a correct interpretation of the statute is highly doubtful. *See id.* at 744-51 (Scalia, J., concurring in part and concurring in the judgment). But that issue is collateral to my point here: Congress surely possessed *legislative power*, under the Law of Nations Clause, to pass a statute of the type the majority believed the Alien Tort Statute to be.

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Congress's views can be broader, narrower, or simply different. Just as *M'Culloch v. Maryland* recognized, correctly, that the breadth of the Necessary and Proper Clause confers a broad sphere of judgment on Congress in the exercise of its legislative power,[124] so, too, the Law of Nations Clause confers on Congress a very broad range of interpretive judgment to say what international law *is*, and a corresponding national and international lawmaking power.

A second broad congressional power with respect to international law, in some respects overlapping with the Law of Nations Clause power, is the Senate's shared role in treatymaking and Congress's legislative power to implement treaty obligations as a matter of U.S. domestic law pursuant to the Necessary and Proper Clause. This is the familiar and controversial *Missouri v. Holland* legislative power.[125] The outstanding recent scholarship of Nicholas Rosenkranz has called into question this chestnut, which held (in Justice Holmes's classic, overly sweeping language) that treaties could confer upon Congress domestic legislative powers exceeding the Constitution's (other) specific grants of legislative power, and ousting state law and general federalism limitations.[126] The short answer to this long-running dispute is that, while a treaty may not create new constitutional powers or rights (or erase existing constitutional powers or constitutional rights), Congress may enact by statute, pursuant to the Necessary and Proper Clause, whatever domestic legal rules the President, acting together with the Senate, could have enacted by self-executing treaty. Whatever the outer bounds of such power, there is no denying that this is another significant legislative power to deploy international law—in the specific form of a treaty of the United States—as a basis for domestic legislative power.

A parallel power exists, of course, with respect to executive agreements—and, by implication, with respect to other exercises of the nation's foreign affairs power. If the power to make (nontreaty) international agreements is part of the President's constitutional power over foreign affairs, Congress possesses power, under the Necessary and Proper Clause, to legislate in support of the President's legitimate exercise of this constitutional power, including the power to make laws carrying it into execution and proscribing

124. 17 U.S. (4 Wheat.) 316, 324-25 (1819). For a brief originalist defense of the broad understanding of this enumerated legislative power of Congress (and other powers), see Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991 (2008).

125. 252 U.S. 416 (1920).

126. *Id.*; *see* Rosenkranz, *supra* note 7.

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interference with the President's constitutional foreign policy actions.[127] Thus, Congress surely could have enacted a *Dames & Moore*-like *statute*, implementing the Algiers Accords as a matter of domestic U.S. law. Indeed, the dubious aspect of the *Dames & Moore* reasoning, as discussed above, is the suggestion that Congress should be treated as having enacted a *Dames & Moore*-like statute simply by virtue of (1) the enactment of other tangentially related laws, (2) the general history of acquiescence by Congress in executive claim settlement, and (3) the failure to specifically *forbid* such a ("self-executing") executive agreement by the President.[128] Returning to an example from much earlier in the nation's history, Congress quite properly enacted legislation attaching domestic criminal law enforcement consequences to violations of President Washington's 1793 Neutrality Proclamation.[129]

If executive agreements, and even unilateral presidential neutrality proclamations, may form the basis for congressional enactments under the Necessary and Proper Clause, is there much left in the area of presidential foreign policy actions that Congress could not carry into execution through domestic legislation? Probably not. The examples illustrate the third, general legislative power with respect to international law (again overlapping the ones already noted): Congress possesses legislative power to pass laws it judges necessary and proper for carrying into execution the President's foreign affairs powers within the sphere of his powers. Thus, not merely executive agreements, but executive negotiations, executive proclamations, or even benign executive inaction, might validly form the basis for Congress's exercise of its legislative powers. *Garamendi* may be wrong on its own terms, but Congress possesses power to enact a "*Garamendi* statute" ousting in gross or in fine state laws that Congress judges to be interferences (or potential interferences) with the executive power of the President over foreign affairs.

Finally, recall first principles: nothing in international law trumps Congress's constitutional powers. Congress may consider—it may interpret, and choose to apply (or not apply)—international law in exercising its constitutional powers. But Congress's constitutional powers remain Congress's constitutional powers. Thus, while international law may purport to limit or prescribe how Congress's war (or other) powers are to be used, no such

127. Congress's early statute prescribing criminal penalties for violation of President Washington's Neutrality Proclamation is a perfect illustration of this principle. *See* Neutrality Act of 1794, ch. 50, 1 Stat. 381; Prakash & Ramsey, *supra* note 42, at 328-34, 346-54.

128. *See supra* notes 57-62 and accompanying text.

129. *See* Medellín v. Gretke (*Medellín I*), 544 U.S. 660 (2005) (per curiam).

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command ousts Congress's exercise of its independent judgment with respect to the exercise of those legislative powers.

Considered in combination, Congress has enormous power to interpret and enforce international law, as a matter of U.S. law. This does not make Congress the supreme expositor of the United States position on international law questions. That power is shared with other branches of the national government, especially the President, and the exercise of those powers frequently may clash, posing sometimes difficult questions of where one power leaves off and another begins (or of how to reconcile conflicts in cases where Congress and the President arguably possess concurrent constitutional power). But within the scope of Congress's province to enact statutes, and subject to the limitations created by other branches' overlapping or superior powers, this much remains true: it is emphatically the duty and province of Congress to say what international law is, or will be, for the United States.

B. The President's Power To Interpret and Enforce International Law

The President possesses U.S. *executive* power to interpret and apply international law as it concerns the nation's external relations and its exercise of military force. If the Constitution's grant of "the executive Power" is rightly understood as embracing the power to determine and direct the content of the United States's policies with respect to relations with other nations, this is truly an enormous sphere of constitutional power within which the President possesses authority to interpret the obligations of international law for the United States. If the Constitution's commissioning of the President as "Commander in Chief" of the nation's military force is rightly understood as embracing the traditional powers associated with the conduct of war, this too is an enormous sphere of constitutional power within which the President interprets the obligations of international law for the United States.

In addition to the power to make (and to interpret, terminate, or suspend) treaties and the power to enter into (and to interpret, terminate, or suspend) executive agreements, the President has the power faithfully to interpret international law as a body of general principles, not to *bind* him in the exercise of his powers over foreign affairs and as Commander in Chief, but as a resource upon which he may draw and a body of principles he may invoke, in support of his exercise of these powers. Put simply: the President has the largely discretionary power to adopt, interpret, and apply principles of international law, *as he thinks most proper*, as an aspect of the Article II "executive Power" with respect to foreign affairs and as an aspect of his powers as the military's Commander in Chief.

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An important illustration of this is President George W. Bush's 2002 decision that, notwithstanding the fact that no treaty obligation or principle of customary international law *legally required* him to apply the principles of the Geneva Conventions to members of al Qaeda or the Taliban, his constitutional powers as Commander in Chief and over foreign affairs *authorized* him to do so, at his discretion.[130] The power to interpret international law legitimately supported the President's power to interpret or suspend U.S. treaties (the Geneva Conventions) in ways that denied their force as binding U.S. legal obligations. Yet, conversely, the President's constitutional power to interpret international law supported the President's power to draw upon general international law principles, even though such principles are not binding on U.S. discretion, as a source of authority for his actions to *extend* protection to captured persons and to *subject* such persons to American military justice for violation of international norms.[131] The President's power to interpret and apply international law, pursuant to his executive power in foreign affairs, and his military authority as Commander in Chief, thus could be used in part as a shield and in part as a sword."[132]

Both positions flow from the President's constitutional power to interpret international law for the United States in the conduct of foreign and military affairs. International law may not constitutionally prevail over U.S. constitutional powers; the Constitution is sovereign over the regime of international law, as a matter of U.S. domestic law. But international law principles may supply a basis for the exercise of U.S. constitutional powers, including the President's largely discretionary powers over U.S. foreign policy and the conduct of U.S. military operations.[133] International law may not

130. *See* Memorandum from John Yoo, Deputy Assistant Att'y Gen. & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, U.S. Dep't of Justice to William J. Haynes II, Gen. Counsel, Dep't of Def. 25 (Jan. 9, 2002) [hereinafter Yoo-Delahunty Memorandum].

131. *See id.* at 38-39, 41. For more extended discussion, see *infra* Section III.C.

132. As discussed briefly below, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), held, as a matter of U.S. separation of powers, that the President lacked power to impose military justice solely as a matter of his independent constitutional power as Commander in Chief. While this holding was in my view clearly wrong as a matter of the original understanding of the President's constitutional war powers, Congress responded promptly, pursuant to *its* constitutional powers, to legislate strongly in support of the President's understanding, with the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.). *See infra* Section III.C.

133. For a discussion of the constitutional powers of the President as Commander in Chief, and their relationship to background norms embodied in the traditional, customary understanding of the (natural) law of war (including what might today be termed customary international law), see Paulsen, *The Emancipation Proclamation*, *supra* note 37.

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dictate the President's foreign policy choices. But international law, as interpreted and applied by the President, may influence the President's judgments.

In at least two important respects the President's power to interpret and apply international law does *not* give him a valid claim to constitutional power. The first such limitation is a corollary of Congress's legislative powers to define and punish offenses against the law of nations and to pass domestic legislation necessary and proper for carrying into execution treaties and the general foreign affairs powers of the President: *the President possesses no legislative powers of his own.* Aside from the President's participation in the lawmaking process by virtue of his Article I, Section 7 veto power, his authority and duty to recommend measures to Congress's consideration, and his political power skillfully to persuade Congress to adopt his preferred policies, the President's executive powers refute (in *Youngstown Sheet & Tube*'s famous words) the proposition the he is to be a legislator.[134] The President's power to interpret international law, as regards our external relations and military conduct, does not mean that he can make law.

Plainly, the constitutional powers of Congress and the President to interpret and apply international law for the United States intersect and overlap in important respects. And therein lies some of the most potent separation-of-powers controversies of the years of George W. Bush's presidency: Congress's legislative powers under the Law of Nations Clause and the Necessary and Proper Clause embrace the power to define substantive offenses for violations of Congress's understanding of international law principles and also to prescribe a domestic law offense for violating Congress's understanding of U.S. treaty law requirements. The President's general "executive Power" with respect to foreign affairs and his specific power as Commander in Chief embrace the power authoritatively to interpret international law for the United States in its foreign relations policies and practices generally and in connection with the waging of military hostilities in particular. What if Congress's interpretation of international law in its several forms, for purposes of exercising its legislative powers, differs from the President's interpretation of such international law for purposes of exercising his executive and Commander-in-Chief powers?[135]

134. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1951) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."). *See generally* Paulsen, Youngstown *Goes to War*, *supra* note 31, at 215-17 (commending *Youngstown* in vindicating this principle).

135. Congress also possesses the power "to make Rules for the Government and Regulation of the land and naval Forces," U.S. CONST. art. I, § 8, cl. 14, another power arguably in tension

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The answer is the same as for any other question involving the separation (and arguable overlap) of powers between Congress and the President. The correct substantive legal resolution will often be a matter of dispute. Sometimes it will be possible to say that there is an objective right answer to a specific issue. Other times, there is no such clearly correct resolution; Congress and the President simply have to fight it out, each with the powers at its disposal to enforce its view. The question of how Congress's and the President's overlapping powers to interpret and apply international law are reconciled, or accommodated, becomes a function of the pull and tug of competing interpreters and often of political power, personalities, circumstances, and compromise.

As with other issues of division and allocation of constitutional power, the Constitution does not supply a rule of interpretive priority. As James Madison put it in *The Federalist No. 49*, "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers . . . ."[136] Not even the courts—to whose role I turn next—possess an interpretive supremacy or primacy in this regard (notwithstanding current judicial supremacist assumptions to the contrary).[137] If the Constitution's text does not supply, with sufficient clarity, either a rule of construction or priority as between competing empowerments, or a sufficiently clear resolution that harmonizes an apparent conflict by reading one or another power as narrower (or broader) than claimed, the default answer has to be that the Constitution leaves the issue up for political grabs—that is, it remains part of the intrinsic separation-of-powers game of competition between or among branches devised by the Framers' structure.

With respect to international law, the phenomenon is perhaps especially acute. International law itself tends to be more vague, indefinite, and indeterminate in important respects than domestic statutory law. It embraces,

with the President's authority under the Commander-in-Chief Clause, and thus another source of tension between Congress and the President in these areas. *See* Paulsen, *The Emancipation Proclamation*, *supra* note 37, at 828 ("Congress's powers to make rules governing land and naval forces, whatever their scope as a general proposition, do not extend into the President's province to wage and conduct war. The Commander-in-Chief power, where it applies, marks the boundaries of Congress's general regulatory powers under Article I."). For further discussion of the intersection and interaction of these powers, as applied to important contemporary issues, see *infra* Section III.B.

136. THE FEDERALIST NO. 49, at 255 (James Madison) (G. Wills ed., 1982).

137. For a detailed presentation of this position, see Paulsen, *The Irrepressible Myth of* Marbury, *supra* note 23; Paulsen, *The Most Dangerous Branch*, *supra* note 24; and Paulsen, Nixon *Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1349-51 (1999).

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in various forms, "norms," "principles," "customs," and the "practices" of nations. Even international treaties—written texts—because of their subject matter, because of their embrace of such general terms and vague standards, and because of their international, negotiated, and often elliptical diplomatic language, may prove more indeterminate than purely domestic enactments. Finally, these relatively vaguer sources of law frequently provide, as a matter of U.S. domestic law, sources of general power for one or more branches, not direct rules governing primary conduct. It should not be altogether surprising, then, that the interaction of congressional and presidential powers with respect to the interpretation of international law should be unclear or indefinite—and susceptible more to political resolution than to single, bright-line authoritative constitutional rules.[138]

C. The U.S. Judicial Power To Interpret International Law for the United States

It is emphatically the (nonexclusive) province of the judiciary to say what international law is.[139] Those who apply a rule in particular cases must of necessity possess the authority to expound and interpret it. U.S. courts decide cases where international law rules or norms (or enactments derived from such rules or norms) potentially supply rules of decision for determining the rights of litigants in cases within their jurisdiction. In such cases, courts must expound and interpret international law, as well as its relationship with U.S. domestic law.

There is nothing especially unusual or peculiar about this. International law is simply a species of law that may be invoked by parties in cases before U.S. courts. In some situations it is written, enacted federal law—treaties, for example—that must be interpreted according to the usual conventions for interpreting authoritative written legal texts (accounting for any specialized interpretive principles that might apply to specialized types of written legal documents). In some situations it may (or may not—another and related interpretive question about international law) be a species of "federal common law." And in some situations it may simply be non-U.S. "foreign" law that

138. I will attempt to analyze some of the leading issues of the past several years involving the U.S. domestic constitutional law of international law. *See infra* Part III. In some cases, the Constitution supplies a relatively determinate answer in support of a particular resolution. In other instances, the Constitution's answer is that the question remains open for disputed political resolution. (That in itself is an *answer* supplied by the Constitution, of a particular type. It is an answer that says that neither side fairly may contend that the other position is flatly forbidden by the Constitution.)

139. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

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nonetheless might in certain circumstances form a rule of decision in a U.S. court case (just as, say, French law or Bolivian law, or Kentucky law, sometimes might supply a rule of decision in a case within the jurisdiction of a U.S. federal or state court). The *status* of such law in relation to other legal rules potentially applicable to a case (for example, rules supplied by the U.S. Constitution)—the topic of this Essay—is also properly a subject of judicial evaluation and decisionmaking. The fact that certain legal rules may derive from international law and consequently may have important implications for United States foreign or military policy does not, without more, remove such legal issues from U.S. judicial cognizance. Or (to put it more bluntly and colloquially), there is no "foreign affairs exception" to the power of American courts to decide questions of international law or of U.S. law that draw upon norms of international law. There is no requirement of dismissal, abstention, or even substantive interpretive deference to the political branches, with regard to such questions of law. They are matters of independent judicial interpretive power.

This is not to say the opposite—that U.S. courts possess interpretive *supremacy* over other branches of government with respect to such issues. They do not; any such claim would be inconsistent with the Constitution's system of separation of powers and its genuine division of federal government interpretive power among three co-equal branches of the national government.[140] But the courts do possess full, co-equal, co-ordinate, independent interpretive authority, along with Congress and the President. And while courts surely may *consider* what other branches, in the exercise of *their* co-ordinate interpretive power, have said about international law, they are just as surely not bound by those views.[141] The courts have the power to say what international law is, in the context of a judicial case.

What about the "political question" doctrine? Is not this formulation of the judicial power to interpret international law inconsistent with the statements of the Supreme Court, from time to time, that certain issues connected with foreign policy or military decisions of the President or Congress are (sometimes) nonjusticiable political questions?

Indeed, the theories *are* in conflict with one another. But this says more about the myriad problems with the political question doctrine than it does

140. *See generally* Paulsen, *The Most Dangerous Branch*, *supra* note 24, at 228-41 (setting forth textual, structural, and historical evidence that the Constitution does not grant interpretive supremacy to any one branch of the national government).

141. An exception is that actions of the political branches within their constitutional powers to interpret and apply international law trump, and displace, contrary *common law* determinations by the judiciary.

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about the proposition that courts may interpret and apply international law. As I have argued before (and will now argue again), the political question doctrine makes precious little sense. It is two-thirds false advertising (its first two "prongs" are really disguised merits inquiries); and it is one-third an invented judicial discretion to decline to decide a case within its jurisdiction for ad hoc policy reasons of the Court's own choosing.[142]

The political question doctrine as it pertains to issues of international law, foreign affairs, and war powers is an apt illustration of the doctrine's deficiencies generally. The doctrine's first inquiry is whether there exists a "textually demonstrable constitutional commitment of the issue to a coordinate political department."[143] If this means to imply that such a finding is anything other than a decision on the merits of the claimed exercise of constitutional power, it is false advertising. If resolution of an issue of foreign policy, war, or the application of international law is "textually committed" to Congress or the President, that does not mean the issue lies outside the judicial power. It means that the *correct exercise of* the judicial power is to hold that the Congress, or the President, possesses the constitutional authority to pursue the policy it thinks best on the matter in question. That is a constitutional merits holding, not a nonjusticiability holding, and it may apply to many such questions of international law and foreign affairs. But that does not mean the judiciary is disabled from ruling on such matters generally.

So too with the political question doctrine's second branch, which asks whether there is a "lack of judicially discoverable and manageable standards"[144] for invalidating actions of Congress or the President concerning war and foreign affairs. This too is a merits question. If the Constitution supplies no rule or controlling standard that makes such political action unlawful, then, on the merits, the courts have no legitimate constitutional authority to interfere with such action. Again, it is not that the judicial power does not exist in such instances. Rather, it is simply that the *correct exercise of* the judicial power, on the merits, is to leave a political policy decision undisturbed if the Constitution fails to supply a rule invalidating it. It is false advertising to label this as holding that the issue is a "nonjusticiable" political question. It is a justiciable

142. *See* Paulsen, *A General Theory of Article V*, *supra* note 53, at 713-718 (criticizing the political question doctrine as applied to the constitutional amendment process); Michael Stokes Paulsen, Marbury*'s Wrongness*, 20 CONST. COMMENT. 343, 351 (2003) (challenging the political question doctrine's validity and doubting whether *Marbury* can fairly be understood to support it).

143. Baker v. Carr, 369 U.S. 186, 217 (1962).

144. *Id.*

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constitutional question with a right answer on the merits—that the political branches' actions do not violate the Constitution.

This type of merits-in-disguise use of the doctrine may account for certain judicial decisions in the areas of war and foreign affairs that are cast in terms of political question rulings. *Goldwater v. Carter* is once again a good illustration.[145] A plurality of four Justices found the issue of treaty termination to be a nonjusticiable political question, essentially because it involved a matter of foreign affairs traditionally thought committed to executive, not judicial, determination and because the Constitution did not speak clearly to the issue, leaving the courts with no discernable and principled standards by which to reach a contrary adjudication.[146] But that view can be expressed in more straightforward fashion as a merits holding. The matter of treaty termination is "textually committed" to the President in the sense that it is (as I argue above) an aspect of the general "executive Power" over foreign affairs, not altered by the Senate advice-and-consent requirement for treatymaking. There is a "lack of judicially discoverable and manageable standards" for resolving the issue so as to disturb the President's action because the Constitution's text, structure, and history, fairly construed, supplies no rule to the contrary; the courts would have to make something up in order to dislodge the status quo resolution.

The third part of the political question doctrine—a grab bag collection of policy reasons for judicial nondecision—is the only part that is actually a true doctrine of nonjusticiability. That part evaluates "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," "an unusual need for unquestioning adherence to a political decision already made," and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[147] If the first two prongs of the political question doctrine are false advertising, this third spur is simply illegitimate. By hypothesis, for these factors to come into play, one must suppose that the Constitution's text does *not* commit the matter to plenary political discretion and *does* supply a principled rule of law susceptible of judicial ascertainment and manageable application that would invalidate the political branches' actions. Nonetheless, this branch of the doctrine posits, the judiciary will not decide the case in accordance with the Constitution's rule—for what amount to highly dubious policy reasons: doing so might be taken as a "lack of respect" to a coordinate branch; there might be a need for "unquestioning adherence" to the (by

145. 444 U.S. 996 (1979) (mem.).

146. *Id.* at 1002 (Rehnquist, J., concurring).

147. *Baker*, 369 U.S. at 217.

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hypothesis) unconstitutional action the branch has taken; or it would occasion "embarrassment" if the courts were to contradict what the political branches have said on the point in question.

Come again? Judicial decisions invalidating legislative and executive acts occur all the time; that is what judicial review *is*. If this implies disrespect for coordinate branches, then all independent judicial review is barred by the political question doctrine. The exercise of independent judicial review to invalidate legislative or executive acts will *always* mean the "embarrassment" of "multifarious pronouncements" by different branches. If the political question doctrine says this is a vice, then independent judicial review (indeed, the whole notion of separation of powers) would be problematic. *Marbury v. Madison*[148] was wrong (on this view) in discerning the disrespectful power of judicial review of unconstitutional legislative acts, and *Youngstown Sheet & Tube Co. v. Sawyer*[149] showed an embarrassing lack of respect due a coordinate branch by invalidating, with its contradicting multifarious constitutional view, President Harry S. Truman's unilateral seizure of the nation's steel mills. No one would (or should) take such propositions seriously, yet that is just what this spur of the political question doctrine, taken seriously, implies.

Even in the area of foreign affairs, international obligations, and war, the Supreme Court rarely has relied on this branch of the doctrine, standing alone. Yet these types of considerations may help explain outcomes like the seeming nondecision in *Goldwater v. Carter*[150] and the decisions upholding various purely presidential executive agreements, like *Dames & Moore v. Regan*[151] (and before that, the *United States v. Pink*[152] and *United States v. Belmont*[153] cases). The Court's seeming sentiment, in each instance, appears to have been that, irrespective of the merits, it simply ought not as a policy matter issue a decision that would (or might) muck up an important foreign policy action already taken, such as President Carter's new diplomatic recognition of the People's Republic of China (*Goldwater*) or his executive agreement making a deal with Iran for the release of American diplomatic personnel held hostage there (*Dames & Moore*). The decisions themselves were not cast explicitly in such

148. 5 U.S. (1 Cranch) 137 (1803).

149. 343 U.S. 579 (1952).

150. 444 U.S. 996.

151. 453 U.S. 654 (1981).

152. 315 U.S. 203 (1942) (holding that executive agreements have a similar status as supreme U.S. law as do treaties).

153. 301 U.S. 324 (1937) (sustaining the validity of an executive agreement as taking precedence over state law).

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terms. They were presented as decisions in which the judiciary lacked constitutional power to act (in *Goldwater*, on a combination of justiciability grounds, none commanding a majority of the Court) or as decisions on the merits resting to a substantial degree on deference to the political branches (*Dames & Moore*).[154]

This may have been good judicial politics—Alexander Bickel might have been delighted.[155] But it is not good constitutional law. The Constitution does not disable the judiciary from ruling on questions of international law and constitutional foreign affairs powers, when properly presented in a judicial case. And the Constitution's separation of powers renders implausible any assertion that the judiciary exercises such interpretive power only in subordination to the views of the political branches.

The courts possess the U.S. judicial power to interpret and apply international law for the United States in cases presenting such issues. They may exercise that power independently of the views of the branches of U.S. government, and independently of the views of foreign bodies or judicial tribunals. (That is almost exactly what the Supreme Court said in the *Sanchez-Llamas* and *Medellín* cases.)

Part I of this Essay argued for certain strong rules concerning the force of international law as U.S. rule. In exercising the power to interpret international law, the courts should adhere to such rules: there is a difference between the authority to interpret international law and the correct exercise of that authority. Thus, in a case within judicial cognizance, the courts must recognize the priority of the U.S. Constitution over international law, in the event of a conflict between them. The courts must recognize the ways in which U.S. constitutional powers enable U.S. authorities to supersede or displace international law incorporated into U.S. law by treaty, statute, or executive action. And the courts must recognize the inherently "common law" nature of all degrees of customary international law and its very limited province within American law.

Thus, if there is room for objection to the spate of Supreme Court decisions since 2001 in this area of law (and there is plenty such room), it is not the *fact* of judicial invasion, but the *substance* of the judicial decisions themselves that properly forms the grounds for objection. It is not (for example), the fact that the Supreme Court had the audacity to interfere with executive or

154. *See supra* text accompanying notes 145-146 (discussing *Goldwater*).

155. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111-98 (2d ed. 1988) (advancing the "passive virtues" of judicial decision avoidance).

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congressional action in military and foreign affairs issues that makes cases like *Hamdi v. Rumsfeld*,[156] *Rasul v. Bush*,[157] and *Hamdan v. Rumsfeld*[158] troubling; it is the fact that the decisions were (at least arguably) wrong on the merits. It is on the merits of such questions that the debate is properly joined.[159]

III. THE RELEVANCE AND IRRELEVANCE OF INTERNATIONAL LAW TO UNITED STATES LAW AND THE WAR ON TERROR

It follows from the above that international law, except to the extent made part of U.S. law (and then only until superseded by authoritative U.S. act) and as interpreted and applied by U.S. constitutional actors, cannot, consistent with the U.S. Constitution, lawfully constrain the actions of the United States with respect to war and peace. This has important implications for understanding and evaluating some of the more controversial aspects of the "war on terror" as conducted by the United States since September 11, 2001. In general, the charge that the United States has, in some respect or another, "violated international law" should have far less rhetorical and political salience than it has had in public discourse. International law is not, in the main, *law* for the United States. This perhaps impolitic proposition is one that nevertheless needs to be confronted and embraced.

More specifically, the foregoing discussion enables more appropriate discussion of the lawfulness of U.S. actions and policies from the perspective of U.S. domestic law, and especially the Constitution. And that discussion yields some significant specific conclusions. While it is not possible to address all such issues fully in a single article, it is worth at least some effort to think seriously about the implications of my thesis for some of the most important specific questions of the past several years. I will focus on two broad categories: (1) the relevance and irrelevance of international law to U.S. decisions *to wage* war; and (2) the relevance and irrelevance of international law to U.S. *conduct of* war, including matters of the capture, detention, interrogation, and military punishment of enemy combatants—a huge category of issues of enormous recent significance. (A third category, the force of international law as applied to U.S. courts' enforcement of U.S. domestic criminal laws against foreign nationals, in the United States, is sufficiently illustrated by the discussion of the *Sanchez-Llamas* and *Medellín* cases earlier in this Essay.) My discussion is

156. 542 U.S. 507 (2004).

157. 542 U.S. 466 (2004).

158. 548 U.S. 557 (2006).

159. I addressed in certain respects the merits of these decisions earlier. *See supra* Section II.B.

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necessarily broad-brush; a complete treatment would require an additional article. But the conclusions I present here, in telescoped form, follow from the premises set forth above.

A. The Power To Initiate War – Jus ad Bellum

Congress's constitutional power to initiate ("declare") war by legislative act, and the President's constitutional executive power to defend the nation against attacks,[160] embrace a subject matter that is of course also treated by international law, including the U.N. Charter. It is not my purpose here to discuss the international law of war as it concerns a nation's decision to use military force. Rather, my point is simply that nothing in international law *constitutionally* constrains the decision of the United States to go to war against an enemy. While international law may prescribe that some exercises of the decision of the United States to engage in war are unlawful within the regime of international law, such restrictions may not interfere with Congress's (and the President's) constitutional powers. They are, in U.S. domestic constitutional law terms, unconstitutional purported restrictions on U.S. actors. This applies whether international law purports to forbid military action or purports to require military action by the United States.

And significantly, it applies irrespective of the fact that international law commands and obligations may have been made part of U.S. law by treaty. For as noted above, a treaty may not foreclose Congress's constitutional power to declare war or the President's executive power with respect to war. Thus, whether Congress's justification for the authorizations of war in the September 18, 2001, AUMF, and with respect to the Iraq War[161] satisfied international law requirements is of no consequence as a matter of U.S. law. *Constitutionally*, these wars were legal, beyond question. The question of international law compliance is one of international politics and international relations, not one of binding U.S. law.

B. The Power To Wage War – Jus in Bello

International law has much to say about the manner in which war is conducted. Longstanding customary practices and norms have gradually given

160. On the allocation of war power between Congress and the President, see Paulsen, Youngstown *Goes to War*, *supra* note 31, at 239.

161. Authorization for Use of Military Force Against Iraq Resolution of 2002, 50 U.S.C. § 1541 (2000 & Supp. V 2005).

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way to an elaborate body of international treaty texts governing military practices in the waging of war, the treatment of civilian populations, and the treatment of captured enemy combatants. The United States is a party to some of the most important of these treaty provisions, including the four Geneva Conventions and the Convention Against Torture.[162] Arguments about the legal force and interpretation of these treaties as a matter of United States law have given rise to some of the most serious—not to mention vitriolic—disputes over the American conduct of the wars authorized by the 2001 and 2002 legislative enactments.

Some of these arguments have shed more partisan heat than scholarly light on the force, coverage, and meaning of these international agreements as a matter of U.S. treaty and statutory law. Some of this vitriol reflects simply strong, but nonlegal policy objections to United States policies with respect to military targeting, prisoner detention and interrogation, and military tribunal punishment. Clearly, there is vast room for policy debate over such matters. To the extent such arguments are cast in terms of the obligations of "law," however, they are misleading. Law is something different from policy, and those who would conflate the two are simply mixing up categories, whether deliberately or not.

So, too, *U.S.* law is something different from international law. Constitutionally, U.S. law has domestic priority over non-U.S. international law. Some of the vitriol simply reflects an intense but legally unsound ideological commitment to the *opposite* proposition: the primacy of international law over any nation's (including the United States's) domestic constitutional law and the primacy of international bodies' interpretations of international law over any nation's (including the United States's) interpretations of it. Such a position reflects disorganized thinking about the force of international law in relation to domestic law. Such a view appears to assume, sloppily, that just as U.S. national law trumps state law, international law trumps national law; the "bigger" jurisdiction's law beats the "smaller" jurisdiction's law. It has been the burden of this Essay to demonstrate that, as a matter of United States law, this is simply not so. Serious international law scholars should know this intellectually, but they often do not "know" it emotionally or by habit of mind. The consequence is a tendency to overvalue the importance of international law and the extent to which it binds nations,

162. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, § 1, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

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including the United States, and to disregard the structure, supremacy, and priority (as a domestic legal matter) of the U.S. Constitution.

Consider the most publicly prominent disputes over the Bush Administration's conduct of the war, as they concern matters touching international law.[163] First, there was President Bush's early 2002 determination, supported by a detailed Department of Justice legal memorandum, that the Geneva Conventions (and statutes providing criminal penalties for their violation) do not apply to the detention of captured members of al Qaeda or the Taliban (and the temporally attendant, but for the most part legally unrelated decision to detain many such unprivileged combatants at an offshore facility at Guantánamo Bay, Cuba).[164] Second, there was the heated controversy over the bounds of legally permissible interrogation of certain unprivileged combatants, posed by the Convention Against Torture and U.S. implementing legislation. This was also the subject of at least two (and possibly more) detailed Justice Department legal analyses, in late 2002 and again in 2004.[165] Third, there was the decision by President Bush, initially acting solely pursuant to his executive powers as Commander in Chief, to authorize the creation of military tribunals to try and punish violations of the laws of war determined to have been committed by captured unprivileged combatants, and the series of subsequent congressional enactments (the Detainee Treatment Act and the MCA[166]) and judicial decisions (most importantly, *Hamdan v. Rumsfeld*) addressing the same subject.

Common to each instance is the fact that international treaty law, made part of U.S. law through the Article II treaty process and in some instances implemented by federal criminal statutory prohibitions and penalties, applies to the conduct at issue. But also common to each instance are substantial

163. I do not address here the notable controversies over military detention of captured U.S. citizen enemy combatants (the subject of the U.S. Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)), which primarily presents issues of U.S. domestic constitutional law, or over the National Security Agency's surveillance and interception of communications, which likewise presents primarily issues of domestic law that are mainly unaffected by international law considerations.

164. *See* Yoo-Delahunty Memorandum, *supra* note 130. The opinion was finalized and signed by Assistant Attorney General Jay Bybee as a formal legal opinion of the Office of Legal Counsel. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, & William J. Haynes II, Gen. Counsel of the Dep't of Def. (Jan. 22, 2002). With respect to Guantánamo Bay, see Memorandum from Patrick F. Philbin, Deputy Assistant Att'y Gen., & John C. Yoo, Deputy Assistant Att'y Gen., to William J. Haynes, II, Gen. Counsel, Dep't of Def. (Dec. 28, 2001).

165. *See infra* note 205 and accompanying text.

166. *See infra* notes 200-202 and accompanying text.

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questions about the proper interpretation of such treaties and laws, and also about the relationship of such provisions to the constitutional powers of the President as Commander in Chief of the nation's armed forces. In each instance, the Department of Justice took an aggressive position concerning the President's constitutional powers with respect to the interpretation of international law and his constitutional authority as Commander in Chief. In some respects, the Supreme Court rejected these positions. And in some respects, Congress in turn rejected some of the Court's rejections.

Consider first the Office of Legal Counsel (OLC) memorandum supporting the President's determination that the Geneva Conventions do not cover al Qaeda or the Taliban ("Yoo-Delahunty Memorandum").[167] I treat the issues raised in this OLC opinion at length, because they frame a paradigmatic case for the questions raised in this Essay. In addition, the Yoo-Delahunty Memorandum contains extraordinarily careful and sophisticated legal analysis of the difficult constitutional and international law questions presented—the President's treaty-termination and treaty-suspension power, the meaning of the third Geneva Convention's provisions, their applicability to the distinctive circumstances of al Qaeda and the Taliban, and their relationship to implementing criminal legislation by Congress. It is in many ways superior in comprehensiveness and coherence to any Supreme Court opinion that has touched on similar points. Some of its arguments may fairly be regarded as controversial. But the Yoo-Delahunty Memorandum is nonetheless an important illustration of executive branch interpretation of international law as U.S. law.

Most of the Yoo-Delahunty Memorandum's essential points should be considered very nearly beyond dispute. First, the Third Geneva Convention's (GCIII) core provisions and prohibitions, violations of which are punishable under the War Crimes Act enacted by Congress, do not apply to al Qaeda as a matter of law. The GCIII does not apply to nonstate actors, but only to lawful combatants of a nation that is a "High Contracting Party" to the treaty. Nations sign treaties; private terrorist organizations do not. Al Qaeda plainly is not a High Contracting Party, but an international terrorist organization. As such, its members are not covered by the Geneva Conventions. Moreover, the terms of the treaty only cover lawful combatants, and al Qaeda does not itself comply with GCIII's requirements in this regard: it is not a militia whose members are readily identifiable by uniform or insignia, nor does it bear arms

167. Yoo-Delahunty Memorandum, *supra* note 130. As noted, the Yoo-Delahunty Memorandum was actually a circulated draft opinion that eventually became a final opinion, signed by Assistant Attorney General Bybee. *See supra* note 164. The final version is not materially different from the draft version.

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openly and abide by the laws of war. It thus seems plain that the War Crimes Act's provision punishing "grave breaches" of the Geneva Convention do not concern military actions with respect to al Qaeda.[168]

The Yoo-Delahunty Memorandum also considers whether "Common Article 3" of the Third Geneva Convention (so called because the language is common to the several Geneva Convention treaties) applies. Violations of Common Article 3 are also made punishable under the War Crimes Act. Common Article 3 addresses the situation of an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."[169] The Yoo-Delahunty Memorandum interprets this provision, almost certainly correctly as an original matter, as applying to civil wars or insurgencies occurring within a country. This interpretation is more consistent with the language than the competing interpretation that would make Common Article 3 a universal catch-all providing protection to terrorist organizations. It is also far more consistent with the international legislative history of the making of the treaty itself, with U.S. legislative history concerning its ratification, with evidence concerning subsequent protocols (*rejected* by the United States) that would have extended the treaty's coverage to terrorist groups, and perhaps most importantly with the language and legislative history reflected in the War Crimes Act. The Yoo-Delahunty Memorandum makes these points, fairly and patiently considering alternative interpretations.[170]

An interesting side note: on the Common Article 3 point, the Supreme Court would four years later embrace the alternative, catch-all interpretation in *Hamdan v. Rumsfeld*.[171] Congress, in turn, repudiated the Supreme Court's interpretation of international law on this point a few months later, exercising its legislative powers to define and implement international law with a provision of the MCA that essentially restored the executive branch's view. This interesting back-and-forth-and-back illustrates that competing branches of the U.S. government can and do reach competing interpretations of international law, each within their different spheres, and that the ultimate resolution of such matters, turns on the interaction of the separation of powers and the varying powers and views of the different branches of the *U.S.*

168. Yoo-Delahunty Memorandum, *supra* note 130, at 11-14.

169. *Id.* at 24 n.66.

170. *Id.* at 23-25.

171. 548 U.S. 557 (2006). The decision was five-to-three; the dissent was vigorous on this and other points. (Chief Justice Roberts was recused because he had decided the case—the opposite way—as a lower court judge.) In my view, the executive branch's interpretation was correct, and *Hamdan* was in error on this (and other) points.

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government. None of this, of course, demonstrates which interpretation is correct or superior. Congress's enactment was clearly within its power to legislate with respect to the implementation (or supersession) of U.S. treaty obligations as a matter of domestic U.S. law.

Returning to the Yoo-Delahunty Memorandum of January 2002, the next important question was whether the Third Geneva Convention might cover the Taliban, even though it did not cover al Qaeda. Was the Taliban the "government" of Afghanistan? The memorandum conceded that this was "a more difficult legal question."[172] The memo ultimately concluded, based on executive branch factual understandings supplied by the State Department and the Defense Department, that the Taliban was more properly classified not as a true government but as a criminal gang or association of warlords, operating hand-in-glove with al Qaeda in Afghanistan. Afghanistan, the memo concluded, based on such understandings, lacked a true functioning government and was more akin to a "failed state" (like Somalia). This view was predicated in part on the President's constitutional power to "recognize" (or not) foreign nations' governments.[173] "It is clear that, under the Constitution, the Executive has the plenary authority to determine that Afghanistan ceased at relevant times to be an operating State and therefore that members of the Taliban militia were and are not protected by the Geneva Conventions," the memo stated.[174] The memo set forth the Constitution's relevant language, the supporting early interpretations of President George Washington, President Thomas Jefferson, Alexander Hamilton, and Justice John Marshall, and decisions of the Supreme Court consistently recognizing the executive's plenary power over foreign affairs.[175]

While it is certainly possible to disagree with the State Department's factual assessment of the circumstances of Afghanistan, or with the Defense Department's factual assessment of the nature of the Taliban organization, it is harder to dispute that the judgment concerning these facts most properly rests with the President, and that determinations based on that judgment fall within the scope of the President's Article II power over foreign affairs. This is true as a matter of U.S. constitutional separation of powers. And significantly, it is true irrespective of whether the regime of "international law" might reach a

172. Yoo-Delahunty Memorandum, *supra* note 130, at 16-23.

173. Goldwater v. Carter, 444 U.S. 996 (1979) (mem.). Recall the relevance of this power to the various views expressed by the D.C. Circuit and by the Supreme Court opinions in the *Goldwater v. Carter* case, which involved President Carter's decision to recognize the People's Republic of China and to derecognize the competing government at Taiwan.

174. Yoo-Delahunty Memorandum, *supra* note 130, at 14.

175. *Id.* at 14-16.

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different result. The authoritative judgment on this arguable question of international law, for the United States, remains a question of United States law committed to the authority of U.S. constitutional actors. The Yoo-Delahunty Memo sets forth, correctly, the President's authority to interpret international law, including international treaty law made part of U.S. law: "Part of the President's plenary power over the conduct of the Nation's foreign relations is the interpretation of treaties and of international law. Interpretation of international law includes the determination whether a territory has the necessary political structure to qualify as a Nation State for purposes of treaty implementation."[176] (Interestingly, President Bush ultimately decided that, while the Taliban was not, in the Administration's view, *legally entitled* to protection under the Geneva Conventions, he would exercise his foreign affairs and military Commander-in-Chief powers to extend, in practice, certain protections of the conventions to captured members of the Taliban.[177])

The Yoo-Delahunty Memorandum continued that even if the Taliban were regarded as covered by GCIII as a High Contracting Party, the fact that Taliban forces, like al Qaeda, did not conform their conduct to the requirements of GCIII removed such forces from the terms and protections of the treaty.[178] Again, it is hard to dispute the legal propriety of, and authority for, this specific conclusion.

The Yoo-Delahunty Memorandum added a further argument (in the alternative) that touches prominently on one of the most important issues of the President's foreign affairs power with respect to treaty obligations under international law as discussed above: the power to terminate, abrogate, or suspend treaties. Even if the Taliban were regarded as the government of Afghanistan, the memo argued, it fell within the President's executive power over foreign affairs to decide whether, under the circumstances, the mutual obligations of the treaty should be deemed suspended. The memorandum noted that Afghanistan did not cease to be a party to the Geneva Conventions as a consequence of the fall of its prior government and the military successes

176. *Id.* at 16. The memo cited the Supreme Court's decision in *Clark v. Allen*, 331 U.S. 503 (1947), as supportive authority on this point. *Id. Clark* recognized the President's authority to determine whether postwar Germany was or was not in a position to perform treaty obligations under a prewar treaty.

177. Memorandum from George W. Bush, President, to the Vice President et al. (Feb. 7, 2002) [hereinafter Memorandum on Human Treatment] (accepting the Department of Justice's legal conclusions but declining to exercise authority in certain respects, and prescribing rules of treatment of detainees irrespective of the fact that Geneva Conventions may not legally entitle detainees to such treatment).

178. Yoo-Delahunty Memorandum, *supra* note 130, at 31-34.

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of the Taliban. Nonetheless, the memo laid out the constitutional authority of the President with respect to treaties and concluded that that power includes "the powers to suspend them, withhold performance of them, contravene them or terminate them."[179] "The treaty power," the memorandum continued, "is fundamentally an executive power established in Article II of the Constitution and therefore power over treaty matters after advice and consent by the Senate are within the President's plenary authority."[180] The memorandum cited the analysis of an earlier OLC memorandum addressing the propriety of proposed termination of the ABM treaty with successor nations to the U.S.S.R.[181] The Yoo-Delahunty Memorandum did not set forth at length the constitutional arguments supporting the President's power to suspend treaties—those arguments were set forth in the earlier memo on the ABM treaty—so much as summarize and apply them. The Yoo-Delahunty Memorandum explained several historical instances in which the U.S. had acted in contravention of, or had in practical effect suspended, the obligations of the Geneva Conventions with respect to alien prisoners.

Consistent with the arguments of Part I of this Essay, the OLC's analysis and application of the President's treaty power was logical and correct. Interestingly, the Yoo-Delahunty Memorandum separately discussed whether, notwithstanding the validity of presidential suspension of provisions of the Geneva Conventions as a matter of U.S. constitutional law, such suspension might be regarded as a violation of international law: "[T]here remains the distinct question whether such determinations would be valid as a matter of international law."[182] On this point, the memo expressed some doubts, and set forth the arguments on both sides, suggesting that "the better view" is that international law permitted treaty suspension in certain circumstances while simultaneously continuing to emphasize the distinction between that question of international law and the federal constitutional and statutory questions of presidential power and application of the War Crimes Act.[183] The international law issues, while legally having no direct bearing on the domestic U.S. law issues, "are worth consideration as a means of justifying the actions of the United States in the world of international politics," the memo said.[184]

179. *Id.* at 28.

180. *Id.*

181. *Id.* at 28 n.75 (citing November 15 Memorandum to Bellinger, *supra* note 51).

182. *Id.* at 31.

183. *Id.*

184. *Id.*

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This is an instructive and important distinction—and one that has been at the heart of my thesis here. International law, in the main, is international politics conducted by other means. International law may be highly relevant in that sense, but it is not binding and authoritative as law. Except to the extent it is made part of U.S. law by U.S. constitutional processes—and then always still subject to U.S. actors' constitutional powers and superseding actions, and governed by U.S. actors' legal interpretations—international law is not truly relevant as law with respect to U.S. actions in the conduct of war.

The Yoo-Delahunty Memorandum's treatment of customary international law is a succinct and precise distillation of the arguments that CIL lacks valid legal force as a matter of U.S. law: the Constitution's text nowhere recognizes general international law norms, other than treaties, as a source of federal law. The Supremacy Clause identifies only the Constitution, federal statutes, and treaties as federal law. To view nontreaty international law as automatically "part of our law" in the strong sense of possessing constitutional status as U.S. law would be inconsistent, not only with Article VI, but with the need to have granted Congress the power "[t]o define and punish . . . Offences against the Law of Nations."[185] It would also be in tension with Article II's careful description of how international law, in the form of treaties, can be made under domestic U.S. law. And it would potentially conflict in principle with the President's constitutional powers as Commander in Chief of the nation's armed forces. Moreover, in explaining the Constitution, the Framers never argued that international law was itself a source of federal jurisdiction. Early judicial decisions regarded customary international law norms as guidance "which the sovereign follows or abandons at his will."[186] At most, such norms might provide common law rules of decision in cases otherwise within federal jurisdiction (by virtue of admiralty or diversity jurisdiction) where there is no other rule of law supplied by federal law (including a contrary rule supplied by executive practice or policy), but even this light, *Paquete Habana*-ish force is probably a relic of the pre-*Erie*, *Swift v. Tyson*-era view of general federal common law and ought not be viewed as surviving outside of federal admiralty jurisdiction (a specialized exception).[187]

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185. U.S. CONST. art I, § 8.

186. Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (1814) (Marshall, C.J.); *see* Yoo-Delahunty Memorandum, *supra* note 130, at 36 (citing Brown v. United States).

187. The arguments limned in this paragraph are presented in the Yoo-Delahunty Memorandum, *supra* note 130, at 34-39. For further discussion of the force of customary international law under U.S. law, see *supra* Section I.C. On the possible validity (or at least tolerable nature) of the admiralty exception, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 739-42 (2004) (Scalia, J., concurring in part and concurring in the judgment).

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The arguments against reliance on customary international law as a source of restriction on U.S. military action with respect to members of al Qaeda and the Taliban are almost literally overwhelming. No responsible U.S. lawyer would maintain the contrary, though as the Yoo-Delahunty Memorandum faithfully records, some international law scholars nonetheless have suggested in academic writing that international law forms part of the law which the President is obliged to take care to faithfully execute, under Article II, and that the President cannot act contrary to customary international law unless he believes its commands to be unconstitutional.[188] And, of course, attacks on the lawfulness of President Bush's actions with respect to al Qaeda and the Taliban (and attacks on the legal analysis of this memo) have continued to invoke general international law norms in such fashion.

The final collection of points in the Yoo-Delahunty Memorandum concern the President's exclusive constitutional authority as Commander in Chief and the relationship of that power both to international law and to domestic statutes. First, to read international law treaties (such as the provisions of the Third Geneva Convention), statutes of Congress (like the War Crimes Act), or customary international law as restricting presidential authority to direct the conduct of U.S. Armed Forces in the field would be, in the words of the memo, "a *possible* infringement on presidential discretion to direct the military."[189] Such a construction should be avoided, the memo concluded (citing well-established principles of statutory and treaty construction[190]), unless congressional intent to pose such a possible conflict is clear.

As suggested above, the point can be put more strongly yet: neither treaties nor statutes may be applied in a manner that violates the Constitution. Accordingly, a treaty or statute may not be applied in such a manner as to violate the President's Commander-in-Chief and executive powers. If those powers are properly understood to embrace the power of the President to determine how best to deploy troops, to determine matters of military strategy and tactics, to prescribe rules for engagement with the enemy, to decide on the means to be employed in such engagements, and to capture, hold, and interrogate members of an enemy force—as I submit they are[191]—it follows that nothing in international law, U.S. treaty law, or U.S. statutes constitutionally may interfere with the President's choices in this regard.

188. Yoo-Delahunty Memorandum, *supra* note 130, at 34 (collecting sources).

189. *Id.* at 11 (emphasis added).

190. *Id.*

191. For a short explanation and defense, see Paulsen, *The Emancipation Proclamation*, *supra* note 37, at 814.

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To be sure, Congress has general legislative power to define "Offences against the Law of Nations" and a general power to provide rules for the "Government and Regulation" of the armed forces.[192] Those powers are best understood as bounded by the President's power to command the nation's military forces—to direct what actions the armed forces take. If a general regulation of military personnel conduct or a general definition of an offense against the Law of Nations contradicts a specific presidential military command concerning the use of force against enemies in time of constitutionally authorized war (including the use of force in interrogation of captured prisoners and the use of force to impose military punishment for violation of the laws of war), it is most doubtful that the general statute constitutionally may trump the Commander-in-Chief power of the President. While Congress legitimately may press its opposing position with the legislative powers at its disposal—action contemplated by the separation-of-powers game set up by the Constitution's structure and the arguable overlap of competing powers in this area—the President properly may resist such views in favor of a robust conception of the Commander-in-Chief Clause powers. The President's constitutional position may be a priori stronger, but that does not mean that Congress could not force concessions or limitations on presidential power in this area, as a practical matter. (That, of course, is what ultimately happened in the areas of detention, interrogation, electronic surveillance, and military commissions.)

The second point about the Commander-in-Chief power concerns the President's discretion and authority to invoke international law principles *offensively*, against enemies who commit offenses against the international law of war—and similarly to apply such principles against U.S. soldiers as well, within the regime of military authority. The President's authority to employ military commissions for the trial and punishment of enemy combatants was the subject of a separate (and only recently published) memo.[193] Both that memorandum and the Yoo-Delahunty Memorandum rest the power of the President to establish such military commissions in the *constitutional power* of the President, as Commander in Chief, *to interpret and apply the customary international law of war*, against enemy combatants and against members of the U.S. military forces. Thus, while international law may not trump or defeat the President's Commander-in-Chief power to direct the actions of U.S. military forces against an enemy, international law may furnish a body of substantive

192. U.S. CONST. art. I, § 8.

193. Memorandum Opinion from Patrick F. Philbin, Deputy Assistant Att'y Gen. to the President, on Legality of the Use of Military Commissions To Try Terrorists to the Counsel to the President (Nov. 6, 2001).

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principles the President is *empowered* to discern and apply, as an *aspect of* his Commander-in-Chief powers.

The two main consequences of this view appear to be sound as a matter of the constitutional power to interpret and apply international law. First, the President possesses U.S. domestic law power to prescribe military punishment for enemy violations of the international law of war; and in so doing he is not bound by how the regime of international law might interpret such principles. Second, the President possesses U.S. domestic law power to prescribe military punishment for U.S. soldiers based on his understanding of international law (or, conversely, to authorize military conduct based on his understanding of international law); and in so doing he is, again, not bound by how the regime of international law might assess such matters.

In fact, President Bush, stating that he was acting "[p]ursuant to my authority as Commander in Chief and Chief Executive," accepted the Department of Justice's interpretation of international law that members of al Qaeda were not covered by the Geneva Conventions.[194] He agreed, further, that he had legal power to suspend the application of the Geneva Conventions to the conflict with the Taliban in Afghanistan (but nevertheless declined to do so). He also agreed that Common Article 3 did not apply to this conflict; he determined that Taliban detainees were unlawful combatants not qualifying as prisoners of war within the meaning of the Geneva Conventions; and he adopted as an exercise of his own constitutional authority, as a matter of policy, the principles of the Geneva Convention with respect to humane treatment of captured persons.[195] Separately, the President, acting on similar legal advice, instituted military commissions on his own authority as Commander in Chief.[196]

Some of these determinations and actions were rejected by the U.S. Supreme Court four years later in the highly controversial case of *Hamdan v. Rumsfeld*.[197] *Hamdan* struck down the President's order creating military commissions for trying and punishing unlawful enemy combatants for alleged crimes against the international law of war. The Court was deeply and bitterly divided, five-to-three. After dubious holdings that the Detainee Treatment Act did not withdraw jurisdiction, and that abstention until final military judgment was inappropriate, the majority (1) implicitly rejected the argument

194. Memorandum on Human Treatment, *supra* note 177, at 1.

195. *Id.*

196. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001).

197. 548 U.S. 557 (2006).

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that the President possessed unilateral authority to establish military commissions by virtue of his constitutional power as Commander in Chief; (2) rejected the view that the Authorization for Use of Military Force of September 18, 2001, supported the President's action; (3) found that the Uniform Code of Military Justice (UCMJ) rejected military commissions as framed by President Bush; and (4) interpreted Common Article 3 of the Geneva conventions to apply and to require certain procedures that President Bush's executive order did not contain.

There is much wrong with the *Hamdan* decision, on each of these substantive points. The many problems with *Hamdan* have been laid out in detail elsewhere, by others, and I will not repeat those arguments at length here.[198] It is sufficient to note, for my purposes, that each of these central conclusions was almost certainly wrong, as a matter both of U.S. constitutional law and as a matter of international law, and that those wrong interpretations had potentially very serious consequences for U.S. national security policy (and may in the future have such consequences). But nonetheless, it lay within the judiciary's (nonexclusive) province to offer its independent interpretation of the law on these points, whether one views those holdings as correct or not. And the ultimate upshot of the Court's decision—as emphasized by the very narrow, far-more-succinct concurrence of four Justices[199]—was that the President lacked authority, in the Court's view, to take such actions *alone*. If Congress authorized military commissions, however, that was a different matter. This meant that any threats to U.S. interests posed by the *Hamdan* decision could be remedied by statute. And Congress could, in exercising *its* power to interpret international law in the course of exercising its legislative powers, modify the rules the Court found to derive from international law.

This is precisely what Congress (and President Bush) did, with the enactment of the MCA. The MCA is hugely significant, and a topic all its own. For purposes of this Essay, however, the MCA illustrates several important points. First, Congress "held" that the enactment of the provisions of the MCA, with respect to procedures for trying terrorist war criminals by military commission, *satisfied all requirements of international law*—specifically including Common Article 3 of the Geneva Conventions—as far as U.S. law was concerned. Congress also determined that alien enemy unlawful combatants subject to the MCA could not invoke the Geneva Conventions as a source of

198. For excellent treatments, see Samuel Estreicher & Diarmuid O'Scannlain, Hamdan's *Limits and the Military Commissions Act*, 23 CONST. COMMENT. 403 (2006); and Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179 (2006).

199. *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring).

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rights in U.S. courts or military commissions, to that extent specifically limiting the force of international law (in the form of a U.S. treaty) as U.S. domestic law.[200] Stated simply, in terms of the thesis of this Essay: Congress thus interpreted international law, and defined the scope and force of international law norms, for the United States.

Second, Congress defined the substantive international law offenses for which military tribunals could try enemy combatants, as a matter of U.S. law, pursuant (apparently) to its powers to define and punish offenses against the Law of Nations and pursuant to its power to legislate with respect to carrying into execution U.S. treaty commitments. Thus, whether the President constitutionally may prescribe by executive order such offenses on his own as an aspect of his Commander-in-Chief power to employ military punishment against enemy war criminals (as I think he does), or not (as *Hamdan* held), Congress may, in the exercise of its legislative powers, cover much the same ground. With Congress and the President rowing in the same direction, there is no plausible issue of constitutional power; the President, acting pursuant to all of his own powers in addition to those that Congress grants by statute, acts at the apex of his constitutional authority.[201]

Third, Congress specifically declared that the judgments or interpretations of international law by international tribunals are to be of no consequence in interpreting U.S. law adopting (in whole or in part) international law norms or implementing international treaties. Thus, not only did Congress declare that the provisions of the War Crimes Act, as modified by the MCA, "fully satisfy the obligation under . . . the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3," but Congress also directed that "[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in [the War Crimes Act]."[202]

200. *See* Military Commissions Act of 2006 § 950(w), Pub. L. No. 109-366, 120 Stat. 2600, 2631-32 (codified in scattered sections of 18 and 28 U.S.C.); *see id.* at 2631 ("No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.").

201. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (Jackson, J., concurring). In doctrinal terms, the MCA placed congressionally defined offenses and military commissions in the strongest "*Youngstown* Category I" box.

202. Military Commissions Act of 2006 § 6(a)(2).

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Fourth, consistent with the view of arguably overlapping presidential and congressional powers with respect to international law, Congress in the MCA endorsed—and thus added its weight to—a broad understanding of *presidential* interpretive authority with respect to the meaning and application of the Geneva Conventions, including a power to prescribe additional standards of conduct (presumably for U.S. military and other personnel) and regulations for treaty violations as the President understands them:

> As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.[203]

The MCA is, in significant part, a congressional exercise of the U.S. constitutional power to interpret international law. It is an exercise of that power in ways supportive of presidential understandings of international law and in opposition to the judicial understandings of international and domestic law set forth in *Hamdan*. And it is an exercise of that power in a fashion that makes clear the supremacy of U.S. interpretations of international law in U.S. courts.

Hamdan's specific result was overturned by the MCA, but it nonetheless remains a highly consequential decision. The Supreme Court's tendentious holding that the President's independent constitutional authority as Commander in Chief does not include the power to prescribe military policies and actions concerning enemy combatants is (to borrow a phrase) a constitutional loaded gun, lying around waiting to cause grave harm to the nation.[204] A powerful case can be made that the executive branch should publicly repudiate it, as a matter of constitutional principle, although such action would entail certain political costs. Because any concrete, immediate harm from the decision was so readily remediable by statute, President Bush chose not to take this course. The enactment by Congress of the MCA thus mitigated the specific harm of *Hamdan* but allowed its more diffuse (and speculative) harm to presidential power to remain unaltered. The cluster of issues framed by these several legal interpretive acts—executive, judicial, legislative—well demonstrate the division and separation, and practical

203. *Id.* § 6(a)(3).

204. *See* Korematsu v. United States, 323 U.S. 214, 242-48 (1944) (Jackson, J., dissenting).

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interaction and resolution, of the constitutional power to interpret and apply international law for the United States.

Hamdan and the MCA also, clearly, touch upon the issue of the force of international law as it concerns the detention, treatment, and interrogation of captured enemy combatants. This has been, rather notoriously, the subject of considerable academic and political traffic, as well as the topic of several important and controversial Department of Justice legal memoranda during the Bush Administration.[205] The issues presented by the Administration's legal position, its critics' charges, and the responses of the Court and Congress, are obviously significant. Yet they nonetheless may be discussed more briefly; shorn of their explosive political and policy dimension, there is less to the legal controversy over these points than meets the eye.

To compress drastically: the Office of Legal Counsel analysis contained three broad parts. First, the Administration analyzed, in excruciating (and sometimes gruesome) detail, the legal definition of "torture" within the meaning of the Convention Against Torture, an international treaty of the United States, as implemented by U.S. statutory criminal law. "Torture," as used in these legal texts, is a specific legal term of art with a specific legal meaning, distinguishable from commonplace usage, and limited to an extreme category of specific-intent misconduct of a more serious nature than "cruel, inhuman, or degrading treatment," a statutory term from which it is explicitly distinguished. Not all of the government's statutory interpretation arguments on this point were persuasive, but neither were all of them necessary to the conclusion. Many of them were, in the nature of things, impolitic-sounding. If the memorandum had been intended for public consumption, it was a work of extraordinarily bad public relations. Obviously, however, it was not intended for that purpose, but rather to provide confidential legal advice to a client concerning a highly difficult and sensitive issue of law concerning extraordinary wartime conduct. A later memorandum (the "Levin Memorandum") superseding the earlier one does not materially alter the essential legal conclusion and ended up reaffirming all previous specific legal advice flowing from the earlier analysis. But it *was* intended for public consumption and public relations, and therefore removed tendentious,

205. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002); Memorandum from John Yoo, Deputy Assistant Att'y Gen., to William J. Haynes II, Gen. Counsel of the Dep't of Def. (Mar. 14, 2003); Memorandum from Daniel Levin, Acting Assistant Att'y Gen., to James B. Comey, Deputy Att'y Gen. (Dec. 30, 2004) [hereinafter Levin Memorandum].

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unnecessary, and impolitic arguments or contentions.[206] The two different-in-tone memoranda are interesting in part as an illustration of the difference between what classified, confidential legal advice looks like and what public-relations legal advice looks like. But the statutory-interpretation conclusion is in the main sound, and at all events eminently defensible.

The more interesting point concerns an argument made in the earlier Bybee Memorandum but deleted from the later Levin Memorandum: does the Commander-in-Chief power of the President preclude applying the torture statute to conduct authorized by the President in the context of war? The later memo avoids this point on the premise that President Bush had determined that United States policy was not to engage in torture, for any purpose, within the meaning of the statute; thus, there was no need for legal advice concerning the purely hypothetical situation of presidential authorization, as a military measure pursuant to his Commander-in-Chief power, of conduct believed to be in violation of the criminal statute.

The question of course merits an answer, at least as an abstract proposition. And part of that answer must be that, as a matter of separation of powers, Congress may not by the exercise of one of its general, enumerated legislative powers enact a statute that impairs the Commander-in-Chief power of the President (whatever one understands that power to be). This is, as discussed above, straight-out, old-fashioned *Marbury v. Madison* reasoning: Congress may not (properly) enact statutes that are substantively unconstitutional. It may not enact statutes that (purport to) violate individual rights; nor may it enact statutes that (purport to) intrude upon the constitutional powers of another branch of the national government. If indeed it is the case that the President, as Commander in Chief, possesses *all* constitutional power with respect to the exercise of force by the United States against its enemies, then it is also true that no act of Congress validly may subtract from that constitutional power. Just as the President's constitutional Commander-in-Chief power trumps a treaty, it also trumps a statute.

To what types of actions does the trump-card Commander-in-Chief power of the President extend? As noted above, such power in practice is limited by the separation-of-powers game, and the pressures of Congress in the exercise of its trump-card powers (such as appropriations, and the power to authorize war, or to withhold or rescind such authorization). But in theory, such power properly extends to all matters of military strategy and conduct, including rules

206. The Levin Memorandum excludes the discussion, which had been present in the earlier memorandum, of affirmative defenses to criminal liability in the form of a "necessity" (or "choice-of-evils") defense and a "self-defense" or defense-of-others defense. *See* Levin Memorandum, *supra* note 205.

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of engagement with respect to members of an enemy force. This includes interrogation. This includes the imposition of military justice and punishment. This includes torture. To put it bluntly (if over-dramatically): it is within the President's constitutional power as Commander in Chief of the nation's military force in time of war to determine whether (*or not*) to kill, capture, hold, interrogate, torture, or release members of the enemy armed forces. Note well: this is a statement about the Constitution's allocation of *power* with respect to these determinations. It is not a statement about how that power should be exercised.[207]

The alternative, of course, is that it is *Congress's* power to determine all these things, within the U.S. constitutional regime—that Congress could prescribe whether the executive may or must detain, interrogate, kill, or torture enemy combatants (or not). As a matter of the Constitution's division and allocation of powers, this is by far the less plausible conclusion. Congress's power to declare war is an on-off switch, not a thermostat. Congress has the power to initiate war and the President does not.[208] But once the switch is flicked on, the President has the power to conduct war and Congress does not. Congress's legislative powers to define offenses against the Law of Nations, to provide rules for captures, and to prescribe rules for the governance of the military are all significant legislative powers. But none, fairly construed, nor all combined, extends its reach into the President's power to direct the conduct of war; if it were otherwise, the Commander-in-Chief Clause would be a title only, not an independent, substantive presidential power. The power to prescribe the actions and conduct of the nation's armed forces against the enemy would be Congress's, as a result of the accumulated weight of several peripheral powers, none of which addresses the power of military command directly. This is hard to square with the text of the Constitution and with what we know of the history of the Framers' decisions in allocating war powers between Congress and the President.[209]

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207. *See* Paulsen, *The Emancipation Proclamation*, *supra* note 37, at 814, 827-31.

208. I have set forth a brief defense of this understanding of the text's division of war powers in other writing. *See* Paulsen, Youngstown *Goes to War*, *supra* note 31, at 239.

209. Saikrishna Prakash has recently published a brilliant and compelling work of scholarship arguing that Congress and the President possess *concurrent* power over these matters. Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299 (2008). The strength of Prakash's theory lies in historical evidence of some preconstitutional and postenactment practices that depart from the model I have outlined here. Such evidence is potentially probative of the original meaning and understanding of the Commander-in-Chief Clause and of the various powers assigned to Congress. In addition, Prakash's theory gives plausible content to both sets of powers. The weakness of the theory, however (which deserves a more complete response than space

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But the point of critics of the Bush Administration's position was not really that *Congress*, rather than the President, had the power to order the torture (or coercive interrogation) of enemy prisoners. The objection, rather, was to the specter of torture itself. The fact that Congress had prohibited such conduct by statute, implementing the Convention Against Torture, was merely the vehicle for making the charge of presidential lawlessness. (Surely the critics of President Bush would not have been more pleased if Congress, by statute, had *ordered* torture). The concern was not with Congress's prerogatives; the point was not a separation-of-powers point, but a torture point.

That point derives, ultimately, from ideals of international law, embodied in both the Geneva Conventions and the Convention Against Torture and from the policy and moral judgments about proper conduct in time of war (and otherwise) that are embodied in those international agreements. One can fairly argue about matters of policy and morality concerning captured enemy combatants. But that is largely beside the *legal* point. The legal point is that the force and interpretation of these treaties, for the United States, is a matter of U.S. constitutional law. And U.S. constitutional legal principles, properly understood, indicate that determining such force, interpretation, and continued validity is a power almost entirely committed to the foreign affairs and military powers of the President of the United States.

The Justice Department legal memoranda did not say all this. Rather, for all the vitriol directed against the Administration's legal position, the memoranda's actual assertions with respect to the Commander-in-Chief power were remarkably restrained, seeking first to construe Congress's statute to

permits here), is that practice often does not conform to the meaning of the text; there are many possible explanations for why inconsistent practice may have occurred, may have been tolerated, and may fail to be fully probative of the correct understanding of the Constitution's text. While such practice cannot be disregarded, its evidentiary value in the interpretive enterprise is sometimes fairly debatable. In addition, Prakash's theory, while it acknowledges that the Commander-in-Chief Clause vests the President with substantive military powers to direct and command the actions of the nation's armed forces, simultaneously permits Congress to drain that grant of power of any autonomous force (or to attempt to do so). Aggressively employed, Congress could essentially "capture" all of the President's power of military command. Prakash's defense of concurrent congressional authority to regulate the conduct of war is the best argument advanced to date for that position, but it remains difficult to reconcile with giving full effective content to the Commander-in-Chief Clause as a substantive power of the President that is not given to Congress in the same terms. The better conclusion remains (in my view) that the Commander-in-Chief power is more properly understood as marking the *limits* of Congress's more narrowly stated minor military powers and not that those powers enable Congress potentially to occupy all of the same ground as the Commander-in-Chief power and to battle the President for primacy in matters of the actual conduct of U.S. forces in time of war.

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avoid any potential conflict with the President's constitutional power and, in the end, denying the need to rely on any such vigorous assertion of constitutional prerogative at all.

CONCLUSION

I conclude, briefly, with the questions with which I began: what is the force of international law, for the United States, and who determines that force and interprets and applies international law for the United States? For all the complexities and intricacies of the details, the summary answer is remarkably straightforward: under the U.S. Constitution, international law is only "law" for the United States when the U.S. Constitution makes it so or empowers U.S. constitutional officials to invoke it in support of their powers. Wherever the Constitution does make it so, such law is always controlled by the (sometimes conflicting) interpretations of the law by U.S. actors and never by the interpretations of international or foreign tribunals. And such international-law-as-U.S.-law is always subordinate to the superior constitutional powers of U.S. constitutional actors; it may be superseded, as a matter of U.S. law, almost at will.

The force of international law, as a body of law, upon the United States is thus largely an illusion. On matters of war, peace, human rights, and torture—some of the most valued matters on which international law speaks—its voice may be silenced by contrary U.S. law or shouted down by the exercise of U.S. constitutional powers that international law has no binding domestic-law power to constrain. International law, for the United States, is international policy and politics.

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HEADQUARTERS
MULTI-NATIONAL FORCE – IRAQ
BAGHDAD, IRAQ
APO AE 09342-1400

10 May 2007

Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen serving in Multi-National Force-Iraq:

Our values and the laws governing warfare teach us to respect human dignity, maintain our integrity, and do what is right. Adherence to our values distinguishes us from our enemy. This fight depends on securing the population, which must understand that we - not our enemies – occupy the moral high ground. This strategy has shown results in recent months. Al Qaeda's indiscriminate attacks, for example, have finally started to turn a substantial proportion of the Iraqi population against it.

In view of this, I was concerned by the results of a recently released survey conducted last fall in Iraq that revealed an apparent unwillingness on the part of some US personnel to report illegal actions taken by fellow members of their units. The study also indicated that a small percentage of those surveyed may have mistreated noncombatants. This survey should spur reflection on our conduct in combat.

I fully appreciate the emotions that one experiences in Iraq. I also know firsthand the bonds between members of the "brotherhood of the close fight." Seeing a fellow trooper killed by a barbaric enemy can spark frustration, anger, and a desire for immediate revenge. As hard as it might be, however, we must not let these emotions lead us – or our comrades in arms – to commit hasty, illegal actions. In the event that we witness or hear of such actions, we must not let our bonds prevent us from speaking up.

Some may argue that we would be more effective if we sanctioned torture or other expedient methods to obtain information from the enemy. They would be wrong. Beyond the basic fact that such actions are illegal, history shows that they also are frequently neither useful nor necessary. Certainly, extreme physical action can make someone "talk;" however, what the individual says may be of questionable value. In fact, our experience in applying the interrogation standards laid out in the Army Field Manual (2-22.3) on *Human Intelligence Collector Operations* that was published last year shows that the techniques in the manual work effectively and humanely in eliciting information from detainees

We are, indeed, warriors. We train to kill our enemies. We are engaged in combat, we must pursue the enemy relentlessly, and we must be violent at times. What sets us apart from our enemies in this fight, however, is how we behave. In everything we do, we must observe the standards and values that dictate that we treat noncombatants and detainees with dignity and respect. While we are warriors, we are also all human beings. Stress caused by lengthy deployments and combat is not a sign of weakness; it is a sign that we are human. If you feel such stress, do not hesitate to talk to your chain of command, your chaplain, or a medical expert.

We should use the survey results to renew our commitment to the values and standards that make us who we are and to spur re-examination of these issues. Leaders, in particular, need to discuss these issues with their troopers – and, as always, they need to set the right example and strive to ensure proper conduct We should never underestimate the importance of good leadership and the difference it can make.

Thanks for what you continue to do It is an honor to serve with each of you.

David H. Petraeus
General, United States Army
Commanding

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

May 8, 2009

Honorable Sheldon Whitehouse
Chairman
Select Committee on Intelligence
Subcommittee on Administrative Oversight
and the Courts
United States Senate
Washington, DC

Dear Mr. Chairman:

Please find enclosed documents provided by the FBI in response to your letter to Director Mueller dated May 6, 2009. This material is being provided to assist the Committee in its oversight responsibilities. Minimal redactions have been made to protect the identity of a foreign government and/or a foreign service, including the names of foreign law enforcement officials, as well as personal identifying information related to domestic law enforcement personnel, the disclosure of which is routinely guarded for security purposes.

We hope that this information is of assistance to the Committee. Please do not hesitate to call me if you need additional assistance.

Sincerely,

Richard C. Powers
Assistant Director
Office of Congressional Affairs

Enclosure

1 - Honorable Dianne Feinstein
Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

1 - Honorable Christopher S. Bond
Vice Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

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Document Production for:
Senator Sheldon Whitehouse, Chairman
Subcommittee on Administrative Oversight and the
Courts of the Committee on the Judiciary

Subject: Nasser Ahmad Nasser Al-Bahri
a.k.a. Abu Jandal

9/17 - 10/2/2001 Interview

Office of Congressional Affairs
Federal Bureau of Investigation
5/7/2009

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10/03/200

NASSER AHMAD NASSER AL-BAHRI, a.k.a. ABU JANDAL, a.k.a. ABU JANDAL AL-JADAWI, a.k.a. ABU JANDAL AL-YEMENI, a.k.a. ABU JANDAL AL-GHARBI, a.k.a. ABU HABIB, born in Jeddah, Saudi Arabia in 1973 of Yemeni parents, married with one son named HABIB was interviewed in the presence of [redacted] by Special Agent [redacted] (FBI) and Special Agent [redacted] Naval Criminal Investigative Service (NCIS).

NASSER AL-BAHRI, henceforth referred to as AL-BAHRI, is incarcerated in Yemen. After being advised of the identity of the interviewing Agents, which was conducted in Arabic, AL-BAHRI provided the following information relating to the composition of USAMA BIN LADEN's security detail, compounds, family, communication methods, travels, overall organizational background, along with past and present individuals associated with BIN LADEN. AL-BAHRI stated the information extends from a time period beginning in 19[redacted] to February 2001. All names in this document are spelled phonetically.

AL-BAHRI advised his strong religious devotions surfaced sometime in 1990, when he first started attending a local mosque and studying theology and the Qur'an. In 1993, his religious commitment was strengthened and deepened when the war in Bosnia started and learned about the massacres committed against Muslims there. AL-BAHRI advised many Muslim men, or "brothers", returned to Saudi from Bosnia and recounted the "horrific massacres" against the Muslim population, which had taken place in the Balkans.

BOSNIA 1994 - YEMEN 1996

AL-BAHRI stated in 1994, he convinced MARWAN SALEH AL-'AMOUDI, a.k.a., ABU AL-SA'SA', a Saudi of Yemeni origins and

9/17-10/2/01 Sana'a, Yemen

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a friend of his from school, to travel with him to Bosnia for Jihad. AL-BAHRI stated AL-'AMOUDI was from the Hadramout region, of Yemen and later died in Bosnia during the battle for Bader, which was the last major battle before the Dayton Peace Agreement was signed. AL-BAHRI advised he was accompanied on the trip to Bosnia by ABU MUS'AB AL-[illegible], ABU AL-KHATAB AL-YEMENI, ABU SA'ED AL-MADANI and MU'ATH [illegible]. Al-BAHRI stated he and his companions [illegible] from Sana'a, Yemen, to Damascus, Syria. They drove from Syria to Istanbul, Turkey, where they boarded a flight to Zagreb. AL-BAHRI stated after arriving in Zagreb, they drove to Zenitsia where they were received by the KATIBAT AL-MUJAHIDIN [illegible] MUJAHIDIN BRIGADE (MB) and surrendered their passports and valuables at the MB headquarters, which was located in the Orwasitch Military Camp in Zenitsia. AL-BAHRI stated the MB was composed of approximately 500 men, half of whom were from the Arabian Peninsula.

AL-BAHRI stated he and his companions were sent from Zenitsia to a military training camp, which he did not remember the name, for 45 days where they were trained in the use of Kashinkov machine guns ("P.K." machine guns, rocket propelled grenades ("RPG's"), topography, and combat tactics.

AL-BAHRI stated after completion of the training, he was sent to the front lines to fight against the Serbs and participated in an offensive attack against the Serbs, which resulted in the death of the Amir (Leader) of his group, AL-MU'EDAZ BILAH AL-[illegible]. AL-BAHRI advised five days later, his group was ordered to retreat from the front lines to the MB base in Zavidenich. AL-BAHRI advised the group remained there until they were ordered to travel to a village called Diboy.

AL-BAHRI stated during this period of time, Sheikh ANWAR SH[illegible] AL-MASRI was "assassinated", as were ABU AL-HARETH AL-LIBI, ABU HAMZA AL-JAZA'ERI, ABU ZIAD AL-NAJDI, and ABU HAMMAM AL-NAJAJI. The above individuals, who AL-BAHRI referred to as "martyrs", were traveling to visit his group in Diboy when

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they were ambushed in a Croatian controlled area.

AL-BAHRI stated one week after the incident [illegible] and his comrades returned to Zenitsia and learned they would be departing Bosnia because of the Dayton Peace Agreement.

AL-BAHRI stated ABU AYOUB AL-SHAMRANI spoke to the group members and informed them the Jihad in Bosnia was concluded and the Bosnian Muslims had achieved their rights. AL-BAHRI stated the Amir of the MB at time was [illegible]'ALI AL-JAZA'ERI.

AL-BAHRI advised while in Bosnia he held the position as the Amir of Guards at the Al-Qa'[illegible] Camp, which belonged to the MB.

AL-BAHRI stated after the peace agreement, the MB relocated its Headquarters to the city of Zagreb, via Bihatch. AL-BAHRI stated the group spent the first two weeks of Ramadan in Bihatch. AL-BAHRI stated [illegible] day the group arrived in Zagreb, he departed for Sana'a, Yemen, via Istanbul, Turkey and Amman, Jordan.

AL-BAHRI stated when he arrived in Yemen, he remained there for the remainder of the month of Ramadan and through the end of the month of the Islamic month of Shawal. (Approximately the end of 1995 to the beginning of 1996).

SOMALIA - [illegible] 1996

AL-BAHRI stated during the end of Shawal (approximately early 1996), he decided to travel to Somalia. AL-BAHRI stated he departed the Aden, Yemen airport, for Nairobi, accompanied by JULAYBIB AL-YEMENI, a Yemen national, and [illegible]NAJER AL-NAJDI, a Saudi. AL-BAHRI stated HAMZA AL-QU'AITI, in Sana'a, Yemen, handled all their travel arrangements. AL-QU'AITI advised them, prior to leaving, an individual would contact them in Nairobi at the Ramada Hotel,

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and would tell them he was sent by ABU HUTHAYFAH. They were instructed not to ask the individual any questions but only to follow him. AL-BAHRI advised he did not know ABU HUTHAYFAH, but later learned he was a Somali who resided in Somalia, Yemen.

AL-BAHRI stated after arriving in Nairobi, Kenya, the individual, who appeared to be Somali, met him, JULAYBIB and ABU HAJER at the Ramada Hotel and took them to a smaller hotel (NFI). AL-BAHRI stated on the following day he flew from Nairobi, Kenya to Luq, Somalia, where the aircraft landed on a dirt runway. He stated his two companions, JULAYBIB AL-YEMENI and ABU HAJER AL-HAJDI, remained in Nairobi, Kenya because there was only one seat on the plane. AL-BAHRI stated as result, the three drew straws to determine who would travel first, which AL-BAHRI won.

AL-BAHRI stated after arriving in Somalia, he was transported, along with other passengers (NFI), to a Somali military training camp in two land Cruiser vehicles. AL-BAHRI stated he remained at the training camp for approximately two weeks, until he was rejoined by his comrades, JULAYBIB AL-YEMENI and ABU HAJER AL-HAJDI.

Upon the arrival of his companions, they met 21 individuals known as "ministers" of the HARAKAT AL-ITIHAD AL-ISLAMI (the ISLAMIC UNION MOVEMENT). AL-BAHRI advised the ministers inquired as to the specific purpose and objectives of AL-BAHRI and his companion.

AL-BAHRI and his two colleagues advised the ministers of their intention to travel to Ogaden to fight the Ethiopian aggression against the Muslims. The ministers informed that only AL-BAHRI would be permitted to go to Ogaden due to his dark complexion. They did not want the individuals with lighter complexions to deploy inorder to "avoid complications." AL-BAHRI advised the ministers either they all would travel as a team, or none would go to the

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battle. The minister asked AL-BAHRI if he and his colleagues had money and the type of financial assistance they could provide to the Somali cause. At that point, Al [illegible] told the ministers "we are not here for the jihad of money, but the jihad of color." AL-BAHRI stated he did not like the attitude displayed by the AL-ITIHAD ministers so he decided to return to Yemen. His companions remained in Somalia.

TAJIKISTAN 1996

After returning to Yemen, AL-BAHRI got engaged to his cousin, the daughter of SALEM ALI AL-BAHRI, [illegible] who lives in Aden, Yemen. AL-BAHRI stayed with ABU SA'EED AL-YEMENI while in Aden. AL-BAHRI identified ABU SA'EED as a Saudi-born Yemeni who spoke with a Ta'izi dialect. AL-BAHRI advised ABU SA'EED left Saudi Arabia and returned to Yemen after the Gulf War.

In 1996, AL-BAHRI advised he met an individual known to him as MUHANNAD AL-JADAWI, the brother of KHALLAD, in BEIT AL-SHABAB, or House of Youths on October Street in Sana'a, Yemen. In 1997 AL-JADAWI was killed in Kabul at Murad Beg, fighting with the Taliban against AHMAD SHAH MASOUD's Northern Alliance force. AL-BAHRI advised AL-JADAWI has two brothers in Afghanistan, KHALLAD and [illegible]YER, and a brother in Yemen, known as ABU AL-[illegible] currently in jail.

In 1996, MUHANNAD AL-JADAWI convinced AL-BAHRI and ABU SA'ED AL-MADANI to travel to Tajikistan for jihad. MUHANNAD AL-JADAWI traveled to Tajikistan with ABU SA'ED AL-MADANI, who AL-BAHRI identified as a Yemeni-born in Al-Madina (Medina), Saudi Arabia, and speaks with a Yemeni dialect. Approximately [illegible] weeks after their arrival, they sent a facsimile to AL-[illegible] informing him the front of Tajikistan was "open for jihad." Soon after, AL-BAHRI departed Yemen for Karachi, Pakistan, where he purchased tailored Pakistani/Afghani clothes. He then traveled to Peshawar, Pakistan to Jalalabad, Afghanistan, From Kabul he moved to Takhar, Afghanistan, where

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he stayed with approximately 30-36 individuals for a period of three months before they all traveled to the Tajikistan border. AL-BAHRI referred to theses individuals as the "NORTHERN GROUP" (NG). The Emir of the NG was HAMZA AL-GHAMIDI, an associate of Sheikh USAMA BIN LADEN.

AL-BAHRI stated the Amir of the NG while it was conducting activity in Tajikistan was HAMZA AL-GHAMIDI, a BIN LADEN associate; however, he remained in Tajikistan when the NG met with BIN LADEN in Jalalabad. AL-GHAMDI fought with BIN LADEN against the Soviets, most notably in the battle of the Jaji area of Jalalabad, Afghanistan. AL-BAHRI stated AL-GHAMDI is a BIN LADEN operative and a veteran of the Afghan Jihad. In 1999, AL-GHAMDI departed for Pakistan but currently he is known to live in Afghanistan [illegible] in BIN LADEN's Mujama' (Compound) in Qandahar. AL-GHAMDI is single, in his mid-to-late 30s, muscular and strong. AL-GHAMDI is a very good wrestler (NOTE: an individual known as HAMZA AL-GHAMDI was listed as a passenger aboard UA Flight 175).

Upon their arrival in Tajikistan, they were informed that the AL-WAHDA ISLAMIC PARTY, the party for the Islamic opposition in Tajikistan, had signed an agreement with the Tajik government. AL-JADAWI therefore returned to Jalalabad, Pakistan with the 30-35 brothers. AL-BAHRI believed they returned to Jalalabad on the 26th of the Islamic month of Sha'ban (approximately Fall, 1996). The Emir HAMZA AL-GHAMIDI stayed on the Afghan-Tajikistan boarder.

AFGHANISTAN (LATE 1996-EARLY 1999)

At this point, AL-BAHRI wanted to return to Yemen; however, MUHAMMAD AL-JADAWI insisted that the brothers of the NG meet Sheikh USAMA BIN LADEN in Jalalabad. AL-JADAWI advised AL-BAHRI that BIN LADEN had "a cause" he advocated and wanted to propose it to the brothers regarding a "jihad against the Americans." AL-BAHRI stated he and the other NG members made the trip to Jalalabad, where AL-BAHRI

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had his first meeting with BIN LADEN. BIN LADEN discussed issues regarding Saudi Arabia, "the plundering of oil" by the Americans and their "imperialist plans" to occupy the Arabian peninsula and the Holy Lands.

Initially, AL-BAHRI believed that the NG did not fully understand BIN LADEN's message. Many of the brothers left early from the meeting. AL-BAHRI explained that the brothers from the NG "are fighters who fight the enemy face-to-face" and did not understand "the war and the [illegible]had" BIN LADEN was advocating.

For three days, the remaining brothers listened to BIN LADEN as BIN LADEN presented the [illegible] news clippings and BBC documentaries, which ultimately convinced the remaining NG brothers that the American presence in the Arabian peninsula was an "occupation". BIN LADEN reminded them that the Prophet Muhammad ordered infidels to be expelled from the Arabian Peninsula. Additionally, BIN LADEN urged the Saudi Royal family not to allow American troops in Saudi Arabia. BIN LADEN told the NG he suggested to the Saudis that Muslims would declare Jihad against SADDAM HUSSEIN, after Iraq's invasion of Kuwait, and the NG [illegible] would protect the Holy Lands from SADDAM HUSSEIN, but the Saudi government did not listen. Instead, the Saudis allowed the American "infidels" to enter the Arabian Peninsula.

BIN LADEN urged the NG members to obey the Messenger of God's (Prophet Muhammad) order to "expel the infidels from the Arabian Peninsula." BIN LADEN added that it is a religious duty of all Muslims to act on accomplishing the Prophet's wish. After three days of listening to BIN LADEN, only 17 of the NG brothers remained with him in Afghanistan.

Present at these meetings were the following "closest associates" of BIN LADEN:

ABU HAFS AL-MASRI, BIN LADEN's deputy.

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SAIF AL-ADEL AL-MASRI, who was is in charge of security for Sheikh ABU ABDULLAH, as BIN LADEN is known to his closest associates. SAIF AL-ADEL is "always with the S[illegible] (BIN LADEN)" and is considered one of the leaders in [illegible]EDA.

ABU MUHAMMAD AL-MASRI is one of the chiefs in [illegible]EDA. AL-MASRI was placed in charge of the AL-FAROUQ training [illegible] after the death of ABU ATTA AL-TUNISI[illegible] of at least February 2001. AL-FAROUQ camp had move[illegible]lmand, Afghanistan.

HUSAM AL-DEEN, a.k.a., ABDUL AZIZ, spea[illegible]h a Saudi dialect. AL-BAHRI advised he does not know much about him. AL-BAHRI stated HUSAM AL-DEEN was killed in Kabul during the war against AHMAD SHAH MASOUD'S tro[illegible]

AL-BAHRI stated that the conclusion of his lectures, BIN LADEN instructed the NG brothers to address any concerns they might have through MUHAMMAD AL-JADAWI. The NG members, however, were suspicious of BIN LADEN's guidance to seek counsel with MUHAMMAD AL-JADAWI, particularly as there was a growing belief that MUHAMMAD AL-JADAWI was attempting both to assume the leadership of the NG and pledge bay'at (unconditional oath of allegiance) to BIN LADEN, on their behalf. For his part, MUHAMMAD AL-JADAWI suggested it was most important for the brothers of the Arabian peninsula to surround and support BIN LADEN, as opposed to the Egyptians who were BIN LADEN'S primary associates.

Most of the NG members refused to address the matter with MUHAMMAD AL-JADAWI and instead decided to individually approach BIN LADEN. Some of the NG brothers then pledged a "conditional bayat" to BIN LADEN, the proviso being that if a [illegible] existed on another front, the individual was free to [illegible] to that location. AL-BAHRI was one of those who pledged a "conditional bay'at" to BIN LADEN and his cause against America. AL-BAHRI stated some may have pledged full bay'at to BIN LADEN.

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AL-BAHRI explained bay'at. According to AL-BAHRI bay'ay usually takes place through the training camps. A trainee commonly asks to meet with BIN LADEN. During the meeting the trainee might give bay'at to BIN LADEN. Those who wish to meet BIN LADEN secretly, usually do that through KHALID AL-FAWWAZ, MUHANNAD'S brother. The reason anyone requests to meet secretly with the Sheikh is for security reasons.

Bay'at is a pledge which states: "I pledge to God to assist and support, regardless of my own personal interest or reasoning, for good or for worst, regardless of my own well-being, and (I pledge) not to challenge the leadership."

AL-BAHRI provided the the identities of the 17 NG brothers who remained with BIN LADEN after their meeting in Jalalabad, of whom was AL-BAHRI himself. In most instances, AL-BAHRI was not aware of the individual's true name. The other 16 are:

1. ABU OBEYDAH AL-MAKI: AL-BAHRI stated ABU OBEYDAH departed Afghanistan for the [illegible] 1997 for an unknown location. AL-BAHRI stated that ABU OBEYDAH was the suicide bomber in the attack on the US Embassy in Nairobi, Kenya, August, [illegible] (NOTE: AL-BAHRI later identified a photograph of ABU OBEYDAH AL-MAKI. This individual is known to investigators as JIHAD MUHAMMAD ABDAH aka ABDULLAH AL-HARAZI, a.k.a., AZZAM, a.k.a., JIHAD [illegible].

2. FAROUQ AL-MAKI, a.k.a., MULLAH MUHAMMAD OMAR, a.k.a., AL-FAROUQ AL-HIJAZI: AL-BAHRI advised FAROUQ AL-MAKI departed Afghanistan sometime in 1997, for approximately six to seven months. He later returned to Afghanistan where he remained at the front lines for approximately three to four months. After this, FAROUQ AL-MAKI "disappeared" at an unknown location. He returned to Qandahar a few days after the East Africa bombings in August 1998. He remained in Qandahar at the BIN LADEN guesthouse and then "disappeared" again. He is known to be an expert in "artillery." (NOTE:

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AL-BAHRI later identified a photograph of FAROUQ AL-MAKI. This individual is known to investigators as ABDUL RAHIM HUSSEIN MUHAMMAD ABDAH NASHIR AL-SAFA'NI, a.k.a., ABDUL [illegible] AL-NASHIRI, a.k.a., MUHAMMAD OMAR AL-HARAZ[illegible] a.k.a. [illegible]AH BILAL AL-MAKI.

3. ABU JABBER AL-JADAWI: AL-BAHRI claimed ABU [illegible] no longer involved in jihad activities since he had left Afghanistan.

4. KHALLAD AL-JADAWI, a.k.a., KHALL[illegible] a., KHALLAD AL-HIJAZI: AL-BAHRI stated KHALLAD was know[illegible] in Afghanistan at least as of Februa[illegible]001. K[illegible]D was born in Saudi Arabia and his family [illegible]emeni origin. He is "constantly with BIN LADEN" and is [illegible] for his loyalty to BIN LADEN. KHALLAD lost one of his le[illegible] the knee during an advance of AHMAD SHAH MASOUD's forces when a Howitzer misfired and shrapnel struck KHALLAD. He received his first artificial limb from a non-governmental organization in Afghanistan, but the prosthesis caused him additional medical problems. KHALLAD received a [illegible]mb in Malaysia, and was known to travel [illegible] countries for treatment of his injuri[illegible]ALLAD [illegible]se to BIN LADEN and the Sheikh (UBL) charges [illegible]th mis[illegible]abroad (out-side Afghanistan). BIN LADEN has [illegible]ted Kh[illegible]to his inner circle. KHALLAD's father is [illegible] SALEH BIN ATTASH who helps the brothers specially fina[illegible] and advocates jihad. AL-BAHRI advised that KHALLAD has [illegible]ial relationship with the Sheikh, explaining that [illegible]AD talks to the Sheikh in a way nobody else can. Also, KHALLAD told AL-BAHRI that "ABU ABDULLAH (BIN LADEN) is going to find me a wife." AL-BAHRI added that "it is something big to have the Sheikh find you a wife." (NOTE: AL-[illegible] latet identified a photograph of KHALLAD. This [illegible] known to investigators as TAWFIQ MOHAMMAD BIN A[illegible]k.a., SALAH SA'EED MOHAMMAD BIN YOUSUF, a.k.a., KHALLAD).

5. ABU USAMA AL-NAJDI: ABU USAMA left Afghanistan to an

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unknown location in 1997.

6. AL-HAZBAR AL-KUWAITI: AL-HAZBAR left Afghanistan to an unknown location in 1997.

7. MUHANNAD AL-JADAWI: As previously noted MUHANNAD was KHALLAD'S brother, and was killed in 1997 fighting alongside the Taliban in Kabul, Afghanistan. AL-BAHRI advised that MUHANNAD first went to Afghanistan in 1989, however, AL-BAHRI did not meet him until 1996. MUHANNAD was trained at the KHALDAN Camp. MUHANNAD brought his brother AHMAD to Afghanistan in 1994 or 1995, and his brothers ZUBAYER and AL-BARA' arrived in Afghanistan in 1996 or 1997. Another brother, MU'ATH, arrived in 1999. KHALLAD, OMAR and AL-BARA' were trained at the KHALDAN Camp. MU'ATH trained at the LOGHAR Camp.

8. ABU ABDULLAH AL-MAGHREBI: ABDULLAH died in battle in Kashmir (year unknown).

9. ABU ZAYD AL-TURKI: ABU ZAYD died in battle in Kashmir (year unknown).

10. ABU ABDULLAH AL-TURKI: ABU ABDULLAH died in battle in Kashmir (year unknown).

11. ABU MAHJAN AL-SHAYBANI: ABU MAHJAN is a Saudi from the Uqaybah tribe. He is beloved and known for having high moral standards, as well as for his memorization of the Quran. He was married three years ago in Riyadh, Saudi Arabia. He departed Afghanistan in 1998.

12. ABU OMAR AL-YEMENI: No additional information.

13. ABU JAFFAR AL-YEMENI: ABU JAFFAR died in 1997 in Kabul, Afghanistan. ABU JAFFAR was the son of AHMAD AL-HADA. ABU JAFFAR had two sisters one married to SANNAN AL-MAKI and the other married to ABDUL AZIZ AL-MAKI. ABDUL AZIZ AL-MAKI

Exhibit

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currently resides at the BIN LADEN compound in Qandahar, Afghanistan. (NOTE: AL-BAHRI later identified a photograph of SANNAN. This individual is known to investigators as KHALID AL-MIHDHAR).

14. MU'AWIYAH AL-MADANI: MU'AWIYAH was in Afghanistan with BIN LADEN, as of at least February, 2001. After the East Africa bombings in August, 1998, BIN LADEN asked MU'AWIYAH along with SAQR AL-JADAWI, FAYADH AL-[illegible] and AL-BAHRI, to be part of his personal bodyguard force.

15. ABU ASSIM AL-YEMENI, a.k.a., AL-SHEBA (the old man): AL-BAHRI advised ABU ASSIM is a Yemeni, but he speaks with a Hijazi/Mecca accent (Note: Hijazi is a regional Saudi dialect). ABU ASSIM is known among the Mujahideen in Afghanistan to take "extra care" of himself, thus earning the nickname AL-SHEBA (the old man). He departed Afghanistan for unknown location in 1997. His current age is approximately 32 years old.

16. JUHAYMAN AL-EMIRATI: AL-BAHRI advised JUHAYMAN departed Afghanistan for an unknown destination a few days after meeting BIN LADEN, in early 1997.

In [illegible] ABU ABDULLAH (BIN LADEN) discussed with the remaining NG members others the topic of "jihad alongside the Taliban", during which AL-BAHRI advised the remaining 17 NG members agreed to fight with the Taliban.

AL-BAHRI traveled to the front lines to fight againstthe forces of AHMAD SHAH MASOUD. During the fighting he sustained an injury to the bottom of his foot and was evacuated to Khost. In Khost he stayed in the training camps for treatment and relaxation for three months. AL-BAHRI then departed Khost for Qandahar where he stayed with Sheikh BIN LADEN for approximately six months.

From Qandahar, AL-BAHRI returned to the training camps in Khost and remained at the JIHADWOL Camp in Khost, for

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approximately two months. AL-BAHRI was an administrator in this camp. During this period, BIN LADEN was present in Khost and gave an interview to the American television company, ABC News in 1998. After the interview, Sheikh BIN LADEN held a press conference attended by Pakistani and Chinese journalists. After the press conference, the Sheikh went to Qandahar and one month later AL-BAHRI followed the Sheikh (BIN LADEN) to Qandahar.

AL-BAHRI advised that the following individuals attended Sheikh BIN LADEN's press conference in 1998:

SAIF AL-ADEL: SAIF AL-ADEL appeared during the ABC report, participating in military exercise. SAIF AL-ADEL is a "big guy" in the BIN LADEN organization and always travels with and escorts the Sheikh (BIN LADEN).

ABU ATTA' AL-TUNISI: ABU ATTA' was in charge of the military training and the camps prior to his death. He was killed fighting with the Taliban against MASOUD's troops. ABU ATTA' served as the translator during the ABC interview.

AYMAN AL-ZAWAHIRI: AL-ZAWAHIRI is the Emir of the Egyptian Islamic Jihad (EIJ) and a close associate of BIN LADEN.

ABDUL HADI AL-ANSARI, Also known as ABU ABED AL-AZIZ: AL-BAHRI was not aware of his exact position in the BIN LADEN organization. ABDUL HADI spoke with the dialect of the Hijaz region in Saudi Arabia. ABDUL HADI was later killed in Kabul.

Also attending the press conference were three or four unidentified Pakistani brothers.

There were a number guards posted outside the press conference. They included: AL-BAHRI, SAQR AL-JADAWI (whose real name is SALEM HAMDAN), KHALLAD, AL-BATTAR, also known as ABU MU'ATH, and BASHIR AL-AWADHI, who was later killed during

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the U.S. missile attacks after the East African bombings. Also present were, AL-BALOUSHI and ABU OBEYDAH AL-MAKI. AL-BAHRI stated AL-BALOUSHI was the surviving suicide bomber in Nairobi and ABU OBEYDAH as the one who was killed in the bombing. (AL-BAHRI later identified photographs of AL-BALOUSHI and ABU OBEYDAH. These individuals are known to investigators as MOHAMMAD RASHID AL-AWHALI (BALOUSHI) and JIHAD MOHAMMED [illegible] (AL-MAKI) respectively.

AL-BAHRI had been with BIN LADEN in Qandahar for approximately one month when the Nairobi and Dar Es As-Salaam bombings occurred. AL-BAHRI added that on the night prior to the East African bombings, ABU HAFS spoke to the Arab brothers at the mosque of the BIN LADEN compound in Qandahar and read a list of names of those who would be evacuate the compound immediately and head to KABUL. ABU HAFS told them an airplane would be waiting for the individuals mentioned, and their families, at the Qandahar airport in order to transport them to Kabul. AL-BAHRI stated BIN LADEN, ABU HAFS AL-MASRI, AYMAN AL-ZAWAHIRI, SAIF AL-ADEL, and Sheikh SA'EED AL-MASRI, evacuated the compound to another facility in Qandahar (NFI). AL-BAHRI stated it was strange to see those guys leaving the compound in the drivers their own trucks with their families in the back. AL-BAHRI stated that even BIN LADEN did not take any of his bodyguards with him. SAIF AL-ADEL later returned to the compound alone, and instructed AL-BAHRI to dig trenches around the compound, especially next to the guard posts. SAIF AL-ADEL informed him "the Americans are going to bomb us soon."

The next day, AL-BAHRI heard that an attack took place against the American embassies in Nairobi, Kenya and Dar Es Salaam, Tanzania. AL-BAHRI subsequently joined up with BIN LADEN and escorted him to Kabul, via Hilux trucks.

Two weeks later, approximately 75 cruise missiles struck the Khost training camps. Seven Arab individuals were killed and many others were injured including ABED AL-AZIZ BIN

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ATTASH. Also, seven Pakistanis were killed when missiles hit a training camp belonging to the Pakistani group HARKAT AL-ANSAR. At the time of the missile strikes, HASSAN AL-KHAMIRI, who also uses the alias ABU YOUSUF AL-TAJIKI, was the Amir of AL-FAROUQ training camp in Khost. He was appointed by ABU ATA' AL-TUNISI. AL-BAHRI advised AL-FAROUQ camp provided basic military training for the Mujahidin. AL-BAHRI was close to HASSAN AL-KHAMIRI, who is older than he and is "considered like a father by all the brothers. AL-BAHRI described AL-KHAMIRI as a "friend and a companion", who became sick with typhoid and lost a significant amount of weight. (NOTE: AL-BAHRI identified a photograph of AL-KHAMIRI. This individual is known to investigators as HASSAN GHWADH AL-GHAMURI, a.k.a., ABDULLAH SA'EED MUSAWA, a.k.a. ABU HASSAN AL-TAJIKI).

When the training camps were hit by the U.S. missile strikes, AL-BAHRI was in Kabul with BIN LADEN. As previously noted, after the East African bombings, BIN LADEN requested AL-BAHRI, SAQR AL-JADANI, FAYASAL AL-MADANI, and MU'AWIYAH AL-MADANI to be his personal bodyguards. After the missile strikes these individuals remained with BIN LADEN and escorted him back to Qandahar and stayed with him for approximately three months. During this time they stayed in the Sheikh's compound in Qandahar. AL-BAHRI's duty was to protect BIN LADEN from any harm. AL-BAHRI was aware of the dangerous task of protecting and guarding BIN LADEN, as he knew "exactly who is the person he was protecting."

On the third day of the month of Ramadan (late 1998), Sheikh USAMA gave an interview to the Qatari news channel, AL-JAZIRA. During the interview with AL-JAZIRA which took place inside a tent, there were approximately 21 individuals in attendance. In addition to himself, AL-BAHRI recalled the following attendees:

ABU HAFS AL-MASRI
ABU MOHAMMED AL-MASRI
SAIF AL-ADEL

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DR. AYMAN AL-ZAWAHIRI
KHALIFA AL-MASRI
SAQR AL-JADAWI
ABU MUS'AB AL-HASHIDI
SAQR AL-MADANI
ABU HAMMAM AL-SA'AEDI

With regard to the last individual (ABU HAMMAM), AL-BAHRI noted he has green eyes.

Approximately five days later, AL-BAHRI requested permission from the Sheikh to travel to Yemen to get married. At this time, AL-BAHRI stated he first advised BIN LADEN that he would not be able to remain in Afghanistan because he wanted to settle down. The Sheikh did not oppose this, however, he told AL-BAHRI, "go and think about it after you are married." BIN LADEN presented AL-BAHRI with USD $2500 in cash as a wedding gift.

AL-BAHRI stated that one of the reasons he decided to leave Afghanistan was because he was disappointed when BIN LADEN gave bay'at to the Taliban because that signified him a member of the Taliban. AL-BAHRI felt that BIN LADEN's bay'at to the Taliban rejected the idependence of the jihad against America, and all the arguments regarding that cause, and makes BIN LADEN under obligation to obey the Taliban leadership. Thus BIN LADEN cannot be the leader to recieve a bay'at because he himself owes an unconditional obedience to the Taliban.

BIN LADEN secretly gave bay'at to the Taliban, because that made him a member of the Taliban. BIN LADEN's bay'at to the Taliban abandoned his cause because it makes him one of their members and under obligation to obey the Taliban leadership.

AL-BAHRI explained that BIN LADEN secretly gave bay'at to the Taliban in 1997, but only announced it publicly

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in 1998. AL-BAHRI stated after BIN LADEN's bay'at to MULLAH OMAR, the leader of the Taliban, obedience and loyalty to BIN LADEN based on any oath given to him contradicts the teachings of the religion. AL-BAHRI further explained after BIN LADEN gave the bay'at to Taliban, he is not independent in his decisions and thus he could not be the ultimate leader because he has a leader above him, namely, MULLAH OMAR.

BIN LADEN's bay'at to Taliban made AL-BAHRI begin to think about settling down away from Afghanistan.

SAIF AL-ADEL tried to justify the bay'at to Taliban by explaining BIN LADEN's motivation to AL-BAHRI; however, AL-BAHRI told to AL-ADEL that this is a religious matter, and that religion cannot be changed. ABU HAFS AL-MASRI also attempted to change AL-BAHRI's desire to leave without success. Afterwards, ABU HAFS furnished AL-BAHRI with US $100 for his expenses for his trip to Yemen.

AL-BAHRI departed Qandahar for Pakistan at the end of the month of Ramadan (approximately the beginning of 1999). Al-BAHRI arrived in Yemen a few days after leaving Qandahar on the second day of the Islamic month of Shawal.

BAYT HABRA, YEMEN (1999)

In the Islamic month of Thul Al-Hija, soon after his return to Yemen, AL-BAHRI met SAQR AL-JADAWI a.k.a, SALEM HAMDAN in Sana'a. SAQR advised AL-BAHRI that BIN LADEN asked him (SAQR) "to find AL-BAHRI in Yemen before he gets married" because the Sheikh (BIN LADEN)) wished them to marry two sisters. AL-BAHRI and SAQR carried out the Sheikh's wish and married sisters. AL-BAHRI's wife is the daughter of ALI QASEM AL-[illegible] her grandfather is ADEL AL-ANSI.

In the Islamic month of Safar in 1999 (approximately May 1999), the incident of BAIT HABRA (the house of Habra) occurred. AL-BAHRI advised BAYT HABRA is a house rented by

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"brothers" in Sana'a, Yemen. The "incident" was that AKRAMA, JULAYBIB and HAMZA AL-WA'ELI planned to steal rental vehicles from a company called "something like the Ameri[illegible]r Rental Company." The three intended to sell the vehicles in order to obtain money to purchase weapons. AL-BAHRI advised the weapons were to be used to mount a military operation to fr[illegible] AL-HASAN AL-MIHDHAR. AL-BAHRI stated the Yemeni authorities uncovered the plot and arrested all those who were in contact with AKRAMA, JULAYBIB and HAMZA AL-WA'[illegible] BAYT HABRA in Sana'a and other locations in Yemen.

During one particular day, possibly Friday, while AL-BAHRI was visiting and staying at the house of AL-BAHITH AL-JANA'I (Criminal Investigative [illegible] CID) entered and arrested AL-BAHRI along with ABU SA[illegible] AL-MADANI, HASSAN AL-TA'EFI (HASSAN AL-KHAMIRI), USAYD AL-MA[illegible] ABU ANAS AL-NAHDI, ABED AL-KARIM AL-MAKI, MASHHOOR, and ABU AL-BARA'(KHALLAD's brother). AL-BAHRI stated the following individuals were also arrested in connection to the same incident: FAWAZ, AKRAMA, HAMZA AL-WA'ELI, ABU GHANEM, JULAYBIB and BASHAR AL-SHADADI. (AL-BAHRI identified photographs of the above individuals and provided additional information regarding them).

AL-BAHRI stated the following individuals were also at the house and managed to escape: ABU MAHJAN, (AL-BAHRI later identified MAHJAN as KHALLAD's associate and the Amir of the single house in the UBL compound) ABU AL-HARETH AL-JADAWI, ABU AHMAD AL-IRAQI, MUTHANA AL-NIJIRI, (AL-BAHRI advised MUTHANA was later killed with RABE'I AL-AHDAL in Kabul), ABU IBRAHIM AL-QUSAYTI and ABU BILAL AL-MADANI.

AL-BAHRI stated KHALLAD was also arrested, at the [illegible]riod in Sa'da by AL-AMEN AL-SIYASI (Political Security Organization), days after the BAYT HABRA incident.

AL-BAHRI was released after one and a half hours. Approximately four hours after he was released, he met with

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IBRAHIM AL-NIBRASS. AL-NIBRASS warned AL-BAHRI that the police were searching for him, and intended to re-arrest him. AL-BAHRI stated there was a rumor of his re-arrest spreading among the brothers. Fearing truth to the rumor, AL-BAHRI told himself, "there is no one for you but the Sheikh (BIN LADEN)," and he decided to return to Afghanistan. AL-BAHRI contacted ABED AL-RAHIM AL-SHARQAWI in Ta'iz assisted him in making the travel arrangements to return to Afghanistan.

AL-BAHRI noted that ABU NIBRASS was very loved by the brothers," and had participated in the Afghan jihad, where he was injured during battle. AL-BAHRI provided his latest information regarding AL-NIBRASS after he received news of AL-NIBRASS's uncle who told him AL-NIBRASS was killed in Chechenya. AL-BAHRI advised AL-NIBRASS' uncle is YAHYA MUJALI who works at MARKAZ ABU SAIF (ABU SAIF'S CENTER) next to the American Embassy.

AFGHANISTAN (MID 1999 - AUGUST 2000)

AL-BAHRI advised after the SAYT NABRA incident he departed Yemen to Afghanistan where he stayed until 8/8/2000. AL-BAHRI advised that ABU MOHAMMED AL-MASRI recommended him to be the [illegible] of the guesthouse, located in the CARD BROWN area in Kabul. AL-BAHRI stated that the guesthouse in Kabul is currently [illegible], however it was a part of the castle of the former king of Afghanistan. It is comprised of five bedrooms, with one serving as the office of the Amir of the guesthouse. The living room also functions as a library and prayer area, and there are three bathrooms and a kitchen.

AL-BAHRI stated he was on the payroll and was paid about US $64/month by BIN LADEN while in Kabul. AL-BAHRI went and stayed to the different training camps, where he met many [illegible]. AL-BAHRI used to advocate the cause of BIN LADEN and the jihad against America, and explain it to the brothers and recruites.

AL-BAHRI later moved from Kabul to Qandahar, where he stayed in the BIN LADEN compound and remain to be an

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associate of BIN LADEN. Here he was paid about US $94/month by BIN LADEN. On one occasion, AL-BAHRI was sick and BIN LADEN visited him in his house in the compound. When BIN LADEN saw furniture, a book shelf and a carpet in AL-BAHRI's house, he joked with AL-BAHRI, "look at all this and you [illegible] yourself mujahid (holy warrior)."

In February 2000, BIN LADEN told AL-BAHRI that he had "a strategic mission for him." AL-BAHRI was excited and thought he was going to be involved with a martyrdom operation against American interests. BIN LADEN gave him US $5000 to take to ABU AL-BATTAR AL-YEMENI in Yemen. AL-BAHRI did not know the reason for the money delivery. When he arrived in Yemen, he was met by ABU AL-BATTAR AL-YEMENI and HASSAN AL-KHAMIRI at the airport in Sana'a. ABU AL-BATTAR advised AL-BAHRI that the money was a dowery for BIN LADEN's new Yemeni wife. Part of the money was for the expenses of the new bride and ABU AL-FIDA'A AL-YEMENI and his family to travel to Afghanistan. AL-BAHRI advised ABU AL-FIDA'A is an Imam of a mosque in Yemen, and he was the one who found BIN LADEN the bride.

After the bride was taken to Afghanistan, AL-BAHRI learned she was seventeen years of age. AL-BAHRI claimed he told BIN LADEN that she was too young, however BIN LADEN responded that he was aware of her age but since her family already brought her to Afghanistan, it would not look good to return her to Yemen.

RETURN TO YEMEN (AUGUST 2000-PRESENT)

AL-BAHRI went back to Afghanistan and stayed with BIN LADEN in Qandahar until August 2000, when he traveled back to Yemen with his family. Although AL-BAHRI still believes in the cause of BIN LADEN and the jihad against America, there were various reasons that caused him to leave Afghanistan and BIN LADEN for Yemen.

These reasons included AL-BAHRI's belief that constant war had hardend his heart, and he started to feel that he

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needed to soften up his heart. There was also the birth of his son, HABIB, which made him realize that he had a family to take care of. Also, AL-BAHRI was worried that BIN LADEN's wives, who thought he (AL-BAHRI) was behind BIN LADEN's latest marriage to the Yemeni girl, would give hard time to his (AL-BAHRI's) wife. Lastly, AL-BAHRI was still angered by the fact that BIN LADEN made bay'at to the Taliban.

Not long after his return to [illegible], the attack on the USS COLE occurred. AL-BAHRI heard media reports that it was "Islamists" who conducted the attack. Fearing arrest, he left Sana'a with his wife. They along with [illegible] AL-SHAMI traveled to the city of Ataq, Yemen, where they remained there approximately four months.

AL-BAHRI and his wife returned to Sana'a during the month of Ramadan (approximately December 2000) to visit her family. AL-BAHRI was surprised to learn his wife's parents were going to Saudi Arabia for al-umra (minor Hajj) with SAQR AL-JADAWI, his brother-in-law. AL-BAHRI did not secure in Yemen and feared the arrest. He left his wife and his baby at her parents' home and decided to leave Yemen and return to Afghanistan. As he was leaving from the Sana'a airport, AL-BAHRI stated he was arrested on February 24, 2001.

PLANNING OF TERRORIST OPERATION

In planning an operation of the magnitude of the attackon the USS COLE or the September 11, 2001 attacks in the United States, the USAMA BIN LADEN organization, AL-QA'EDA would execute extensive planning sessions and meetings. As head of the Military Committee, MOHAMMED ATEF, a.k.a. ABU HAFS AL-[illegible], a.k.a. ABU HAFS AL-KABIR, a.k.a. AL-KOMANDAT, would [illegible] head the plan. Those involved in developing the [illegible] for the operation would include BIN LADEN's important military consultants/commanders, such as ABU MOHAMMED AL-MASRI, SAIF AL-ADEL, ABU HAFS AL-MASRI, and BIN LADEN himself. The above commanders are usually assisted by YAQOUB AL-DUSARI

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(AL-BAHRI identified the photograph of HARUN as AL-DUSARI) in refining the details or the planning stage.

BIN LADEN will also meet with the consultative committee to discuss all phases and implications of the operation. The consultative committee includes SHEIKH SAEED AL-MASRI, ABU HAFS AL-MURITANI, and DR. AYMAN AL-ZAWAHIRI.

BIN LADEN and ABU HAFS AL-MASRI are the effective "brains" of the QA'EDA organization and the planners of (terrorist) operations. Usually, ABU HAFS issues the orders for operations after obtaining ABU ABDULLAH's (BIN LADEN) approval. It is impossible for ABU HAFS or KHALLAD to carry out any mission without the prior approval of the Sheikh. Prior to implementation, all operations must have the approval of BIN LADEN himself.

The role of key operatives, such as KHALLAD, in a large-scale operation would be to advocate the cause and motivate those selected to carry out the operation. As KHALLAD is one of the younger brothers of the organization, he would not be among the planners of the attack operation. KHALLAD would, however, be assigned tasks "overseas" (outside of Afghanistan) designed to facilitate the operation, such as providing passports, distributing funds, and relaying instructions. Although relatively young, KHALLAD's influence is notable. If a "mujahid" desires to meet privately with BIN LADEN, KHALLAD is known to have easy and immediate access to him and often facilitates introductions. For example, IBRAHIM AL-THAWR, a.k.a. ABU NIBRASS, "secretly" met with Sheikh ABU ABDULLAH (BIN LADEN), through KHALLAD's assistance.

As a side note, AL-BAHRI stated he did not have the opportunity to speak with anyone who came from Afghanistan to learn if it was HASSAN AL-KAHMIRI and IBRAHIM AL-NIBRASS were indeed who carried out the attack against the USS Cole.

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In cinjunction with a major operation, higher associates of BIN LADEN and AL-QA'EDA are informed of the reasons and justifications for the operation. For instance, BIN LADEN the following reasons/justifications for the bombing of the US Embassy in Nairobi, Kenya in August,

a. It was directing operations to restore hope in Somalia, which resulted in the death of 30,000 Muslims;

b. It was the base of support for JOHN GARANG in Southern Sudan;

c. It was the biggest center for American Intelligence in East Africa; and

d. BIN LADEN's continued animosity towards the U.S.

BIN LADEN would have prior knowledge of any suicide missions carried out by AL-QA'EDA operatives or any other group financed by AL-QA'EDA associated with BIN LADEN. Although not specifically known or talked about among rank-and-file BIN LADEN associates, it is understood there are a number of individuals willing to undertake suicide missions on behalf of BIN LADEN. Although was unaware of the identity of any specific suicide operative, however he added that all brothers are ready for martyrdom.

BIN LADEN AND YEMEN

Most individual USAMA BIN LADEN associates and AL-QA'EDA members in Yemen would not commit violent acts of terrorism in Yemen because their families live there. However, some of these individuals will act without regard to where their families reside. For example, FAROUQ AL-MAKI, would commit a terrorist act "in Mecca inside the KA'ABA itself"

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(the holiest site in Islam) if he believed there was a need to do so. AL-BAHRI identified the photograph of FAROUQ AL-MAKI from a photo array as MOHAMMAD OMAR AL-HARAZI, [illegible], ABED AL-RAHIM AL-NASHIRI.

According to AL-BAHRI, the following are BIN LADEN associates and probable AL-QA'EDA members with ties to Yemen, who have shown a proclivity toward violence. They are notable in exhibiting no ideological or religious conflicts in committing acts of terror in Yemen and the Gulf Region. AL-BAHRI is uncertain of their current locations.

ABU ANAS AL-TA'IZI, from Ta'izz, Yemen, is considered very radical. He would advocate undertaking military operations in Yemen. ABU ANAS studied with ABU MUS'AB AL-SURI, and believed in concepts that BIN LADEN espouses. For instance, ABU ANAS wanted BIN LADEN to carry on operations against Arab and Islamic governments such as that in Yemen with no regards to the consequences of such actions on the mujahidin.

ABU BARA' AL-TA'IZI, from Ta'izz, Yemen, is a bodyguard for BIN LADEN. ABU BARA' was among those trained at a close-quarters combat course at LOGHAR Camp in Afghanistan in 1999. AL-BAHRI saw ABU BARA' AL-TA'IZI in Qandahar, Afghanistan at one time in 2000. (NOTE: Details regarding the close-quarters combat course that took place at Loghar in 1999 are provided below.)

ABU BILAL AL-MADANI, from Madina, Saudi Arabia, was in Chechenya between 1995-1997. AL-BAHRI described ABU BILAL as 28 years of age, medium height, well-built with a fair complexion ("white skin"), and full beard. He was trained at LOGHAR Camp in Afghanistan, and in Chechenya. He is known among [illegible] others as one who would commit an act of violence anywhere if asked. ABU BILAL was another graduate of the special close-quarters combat training in LOGHAR Camp in 1999.

ABU MAHJAN is a Saudi, who has participated in jihad

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activities in Afghanistan, Bosnia and Kashmir. MAHJAN used to work in a popular hospital in Mecca, Saudi Arabia, maybe AL-NOOR's HOSPITAL. AL-BAHRI characterized him as [illegible] and as easily convinced by leaders to commit acts of [illegible]. After he traveled to Afghanistan in 1998, he returned to Yemen and remained there for two months. He stayed with individuals he knew from Afghanistan (NFI). His traveling companion from Afghanistan to Yemen was USAYD AL-MADANI. He is a close comrade of AKRAMA, JULAYBIB, and MASHHOUR. He is also an associate of KHALLAD and OMAYER, KHALLAD's brother. He and OMAYER hang out together in Qandahar. MAHJAN was among the brothers connected to the BAIT HABRA incident in May 1999 (previously described); and was one of those who escaped capture by Yemen authorities.

ABU MUS'AB AL-TA'IZI, from Taiz, Yemen, is a bodyguard for BIN LADEN who also trained at the Lo[illegible] close-quarters combat course. He is slightly built. AL-BAHRI last saw ABU MUS'AB in Qandahar in 2000.

ABU MU'ATASEM AL-TAHRANI AL-YEMENI is a bodyguard for BIN LADEN. ABU MU'ATASEM also trained at the close-quarters combat [illegible] in [illegible] Camp. He is approximately 24 years old but [illegible] much older. AL-BAHRI last saw ABU MU'ATASEM in Qandahar [illegible] in 2000.

IRSHAN AL-HASHIMI has a reputation as a fighter much like OMAYER, KHALLAD's brother. AL-HASHIMI is described as approximately 25 years old, with dark skin and curly hair. He is short in height and well built. He speaks with the accent of the Hijaz region of western Saudi Arabia.

SHEHAB AL-DIN from Al-Hudaydah, Yemen, is known to [illegible] Shamsa Mosque in Sana'a. SHEHAB was arrested by the Yemeni authorities because they suspected him of having a role in a bomb explosion in the Shamsa mosque in Yemen.

KHATHAYMA, a.k.a. ABU KHATHAYMA AL-YEMENI, is "the most

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radical" (and) "even more" extremist than ABU ANIS and SHEHAB AL-DIN. KHATHAYMA would likely commit an act of terror without thinking about the consequences. He is described as in his late 20s, no beard (sparse growth), short in height, and has a large amount of freckles on his face. He is "very emotional" and insecure. KHATHAYMA was at the KHALDAN Camp in Afghanistan in 1997, along with a large number of trainees from Algeria, Tajikistan and Morocco. At the end of the training the individuals went forth with a "very extremist" frame of mind. After his experience in KHALDAN Camp, KHATHAYMA would not associate or greet friends who were not among the KHALDAN trainees. He has a reputation as a "know-it-all."

HASSAN AL-KHAMIRI, is a mujahid with a connection to Yemen, and potentially included to violence after the Yemeni authorities arrested him in 1999. HASSAN is well-educated and a participant in the Islamic Movement in Saudi Arabia. HASSAN has a liver problem, and he has displayed for AL-BAHRI all the medicine he must take to stay alive. AL-KHAMIRI's arrest in Yemen for nine months in 1998, related to the BEIT HABRA incident, affected his perception of life. After release from custody, AL-KHAMIRI exhibited a hatred for the Yemeni government and all matters related to the United States. AL-BAHRI offered that as a result of his prison experience, AL KHAMIRI appeared to be susceptible to "brain-washing," which might lead him to conduct acts of terrorism.

OTHER BIN LADEN ASSOCIATES

AL-BAHRI provided additional information regarding individuals associated with BIN LADEN and his network. AL-[redacted] advised he (AL-BAHRI) considers ABU AL-BARA' very dear [redacted]. AL-BAHRI identified ABU AL-BARA' as KHALLAD's [redacted] he was arrested as part of the Bayt Habra incident. AL-BARA' was sent to Afghanistan by his father and brother because he was having problems with the law in Saudi Arabia; AL-BARA' was involved with some gangs and was sentenced to a

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reform school in Saudi Arabia. His father and brothers feared he will get involved with drugs so they decided to send him to Afghanistan. AL-BARA' fell behind enemy lines and was lost in the mountains for three days during a battle with AHMAD SHAH MASOOD's forces. AL-BARA' and his brother OMAYER went back to Saudi Arabia in 1997, but they returned to Afghanistan shortly after, approximately at the end of 1997 (prior to the month of Ramadan). After their return, the attended the KHALDAN Camp, and then they went to JIHAD WAL for additional training. After that OMAYER returned to Jalalabad and became with TAKFIRIS who were mostly Algerians and Tunisians, while AL-BARA' stayed in the camps and was present in Khost, in the [redacted] AL Camp, during the US missile strike that followed the East African bombings. Immediately after the East African bombings, AL-BARA' after getting permission from [redacted] left Afghanistan. OMAYER, however, remained in Jalalabad until Ramadan 1998, when he returned to Qandahar. In 1999, another brother of OMAYER and AL-BARA' known as MU'ATH also went to Afghanistan and was trained in the LOGHAR Camp.

At one point AL-BARA' confronted KHALLAD and told him that as OMAYER's big brother he was responsible for him and that KHALLAD to get OMAYER away from the TAKFIRIS. KHALLAD appeared [redacted] as concerned for his younger brothers as was his older brother MUHANNAD. AL-BAHRI advised that KHALLAD lost his leg in the same battle in which MUHANNAD was killed. OMAYER eventually left the TAKFIRIS and currently he "hangs out" with ABU MARJAN.

ABU ABDUL RAHMAN AL-MUHAJIR is an explosives trainer and master bomb-maker residing in Qandahar, Afghanistan. ABU [redacted] told AL-BAHRI that AL-MUHAJIR studied chemistry and [redacted]gy. He does not currently provide training in the open [redacted] Qandahar compound or AL-FAROOQ training camp. He is [redacted] in bomb making and chemical matters (NFI) from his house in the main BIN LADEN compound in Qandahar, with "specific instructions" from BIN LADEN as to who will be trained. It is known among BIN LADEN associates when ABU

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ABDUL RAHMAN travels outside of Afghanistan, it is for operational purposes and only with the express approval of BIN LADEN himself.

AL-BAHRI stated wife is an Egyptian and they have three children, two boys and a girl. The girl is the oldest and she is approximately five years old. The boys are approximately three and two years old.

ABU ABDUL RAHMAN's laboratory was in one of the rooms of his house. The laboratory contained test tubes and other equipment (NFI). It is known among AL-QA'EDA associates in Qandahar that many brothers avoided visiting ABU ABDUL RAHMAN at home because they fear an explosion. An incident which may be indicative of the situation occurred sometime in 1999. ABDUL RAHMAN had brought his wife to a hospital in Kabul because she was pregnant. While he and his wife were in Kabul, two children of other BIN LADEN associates "broke into" ABU ABDUL RAHMAN's house by entering through a window into the laboratory. A BIN LADEN associate passing by heard the laughter of children inside the house. Because this individual was aware ABU ABDUL RAHMAN was in Qandahar, he went inside the house to see about the commotion, only to find the two children mixing chemicals in test tubes." The brother screamed instructions to the children to be still and then removed the test tubes from them.

AL-BAHRI stated ABU ABDUL RAHMAN cannot walk for extended periods of time due to a probable lung or other condition he developed from inhaling chemicals and/or explosive materials while working in his laboratory.

AL-BAHRI advised ABU ABDUL RAHMAN left Qandahar in the month prior to the August 1998 bombings in East Africa. He returned to the main BIN LADEN compound one week before the attacks. (AL-BAHRI identified a photograph of ABU ABDUL RAHMAN AL-MUHAJIR. This individual is known to investigators as MUHSIN MUSA MATWALI ATWAH, AKA, ABDUL RAHMAN AL-MUHAJIR, AKA, MUHAMMAD K.A. AL-NIMR).

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ABU OMAR AL-MASRI was in charge of the Kabul guesthouse. ABU OMAR was also in charge of buying supplies for the Kabul front lines, because he was probably the former accountant. AL-BAHRI advised ABU OMAR was a member of the EGYPTIAN ISLAMIC JIHAD (EIJ) and later joined AL-QA'EDA. ABU OMAR is about 33-34 years of age.

ABU KHALIL AL-MADANI is an "old timer" who has been with the Sheikh (BIN LADEN) for a long time and fought along side BIN LADEN in the battle of Jaji in the late 1980's. ABU KHALIL was with BIN LADEN in Sudan in the early 1990s and came with him to Afghanistan. ABU KHALIL has dark skin and is approximately the same age as BIN LADEN. ABU KHALIL works in the BIN LADEN farms and resides with them in Qandahar compound.

KHALIFA AL-MASRI also known as ABU ABDEL AL-JABBER, was a member of the EGYPTIAN ISLAMIC JIHAD before he joined AL-QA'EDA. AL-BAHRI stated that many of the Egyptians with BIN LADEN were previously members of EIJ. KHALIFA is in his thirties, and currently resides in the Qandahar compound and works at the BIN LADEN farms. He is married and has one child. KHALIFA participates from time to time, in BIN LADEN's security details.

[redacted] AL-MASRI is an AL-QA'EDA member. His role is to call for prayers at the BIN LADEN mosque in the Qandahar compound. He resides in the Qandahar compound with his family.

RIDA AL-[redacted]NISI; Tunisian, resides at the Qandahar compound with his family.

ABU [redacted]REQ AL-TUNISI; Tunisian, resides at the Qandahar compound with his family.

ABU ASSIM AL-MAGHREBI is in charge of BIN LADEN security details.

ABU HAFS AL-ARAB is Egyptian and was a member of the

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EIJ before becoming an AL-QA'EDA member. ABU HAFS AL-ARAB is short and stocky. He was in charge if the guest house in Kabul before AL-BAHRI took charge of it. He is close to SAIF AL-ADEL, and occasionally helps him with security issues. ABU HAFS AL-ARAB currently lives at the Qandahar compound with his family.

AWS AL-MADANI also known as AL-HUSAN, is an AL-QA'EDA member, about 26-27 years old, with dark skin. He has a rectangular shaped face and cannot grow a beard. His hair is black and curly. He went to Afghanistan in 1996 and never left. He is married to BIN LADEN's 14 years old daughter.

ABDULLAH AL-HALABI also known as AL-HUSSEIN, is an AL-QA'EDA member. ABDULLAH is married to BIN LADEN's daughter who was 15 when she got married. AL-BAHRI described ABDULLAH as approximately 5'8", with a full black beard, white skin and balding. ABDULLAH is about 26-27 years old and frequently travels abroad for BIN LADEN.

AL-BAHRI stated that AWS and ABDULLAH are good friends who came to Afghanistan together. BIN LADEN is very fond of them and has personally sent his sons to ask AWS and ABDULLAH to marry his two daughters.

[redacted]-SHADADI was in Bosnia where he got injured. AL-SHADADI also went to Tajikistan in 1996 with the NG, however he was not with the NG members who visited BIN LADEN. AL-SHADADI instead left Afghanistan along with ABU AL-NASSER AL-YAMAN and ABDULLAH AL-TURKI. AL-SHADADI's sisters are married to ABU SALEH AL-YEMENI, HUSAM AL-DEEN AL-HIMYARI, and ABU AL-KHOUD AL-YEMENI. AL-SHADADI was arrested during the Nayt Habar incident.

AL-BAHRI Advised Abu AL-NASSER is about 24-25 years old from Sana'a, Yemen. ABU ABDULLAH AL-TURKI identified AL-TURKI as the former boxing champion in Turkey.

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ABU ABED AL-RAHMAN AL-BADAWI: AL-BAHRI stated that he saw ABU ABED AL-RAHMAN AL-BADAWI meeting with BIN LADEN in Khost. ABED AL-RAHMAN attended basic training at AL-SIDDIQ camp. After training he traveled to Qandahar, [illegible] there he departed to Yemen. ABU ABED AL-RAHMAN has a [illegible] relationship with ABU BASHIR AL-YEMENI, one of BIN [illegible] personal body guards, who used to be the Amir of the [illegible] guest house.

AL-BAHRI identified the following individuals as "brothers from Aden" who participated in the jihad in Afghanistan: ABU AL-HARETH AL-ADANI, ABU OMAR AL-ADANI, ABU OMAR AL-NAJAR, ABU AL-FATEH AL-ADANI, MAYSARAH AL-ADANI, ABU HUTHAYFAH and ABU SUHAIB AL-ADANI.

AL-BAHRI advised that ABU AL-[illegible] AL-YEMENI participated in the jihad in Bosnia. When in Afghanistan, he attended the JIHAD WAL Camp. AL-BAHRI advised that ABU HUTHAYFAH also participated in the Bosnian jihad and also attended JIHAD WAL.

MAYSARAH AL-ADANI went to Afghanistan after the above mentioned individuals.

[illegible] AL-MAKI AL-BAHRI is not aware if OBADAH is AL-QA'EDA member. AL-BAHRI met OBADAH at AHMAD AL-HADA's residence in [illegible] when he was visiting SANNAN AL-MAKI, (aka KHALID AL-MIHDHAR). When OBADAH is in the BIN LADEN's presence, he tells him he is with him and he loves him, however when the BIN LADEN is not around he criticizes the Sheikh strategies.

ABED AL-WAHAB AL-MAKI was married to AHMAD AL-HADA's eldest daughter. ABED AL-WAHAB was killed in Juzur Al-molook (Moluccas Islands) in Indonesia at the end of 1999.

ABED AL-AZIZ AL MAKI is married to another of Ahmad AL-HADA's daughter. ABED AL-AZIZ got married on the same night

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as SANNAN Al-MAKI, who also was married to one of AL-HADA's daughter. ABED AL-AZIZ is AL-QA'EDA member who is loved by the Sheikh (UBL). ABED AL-AZIZ was a trainer at AL-[illegible] Camp when it was located at Loghar. ABED AL-[illegible] taught basic training at the camp. While there, he resided with his wife and child in Kabul. Currently, he resides in the Qandahar compound. ABUL AZIZ is described by AL-BAHRI as being a strong supporter of the Sheikh. Al-BAHRI added the SHEIKH loves HIm (ABDUL AZIZ) and he, likewise. ABDUL AZIZ was with his wife (Al-HADA's daughter) in Qandahar at the [illegible] compound. ABDUL AZIZ was a trainer in AL-FAROUQ Camp when it was located in Loghar.

ABED AL-KARIM AL-MAKI [illegible]d to AHMAD AL-HADA's youngest daughter. SANNAN (AKA, KHA[illegible]MIRBHAR) wanted AL-BAHRI to marry the youngest daughter, however, she changed her mind. Later, SANNAN brought in ABED AL-KARIM and introduced him to the family to marry AL-HADA's youngest daughter. ABED AL-KARIM was arrested during the BAYT ALABRA incident. Currently his location is unknown to AL-BAHRI.

BILAL [illegible]: The first time AL-BAHRI met BILAL was just a few days after AL-BAHRI left for Afghanistan in August 2000. BILAL plan[illegible] to go back to Saudi Arabia. AL-BAHRI advised BILAL trained [illegible] LOGHAR Camp which belongs to the Sheikh (UBL). The LOGHAR camp is the same as the AL-FAROUQ Camp. The camp was later moved to Helmand Province next to Qandahar. BILAL [illegible] in the Sheikh's (UBL) guesthouse in Kabul. AL-BAHRI [illegible]ed BILAL enjoyed playing volleyball with the guys.

AM (UNCLE) AHMAD AL-HADA trained at the FAROUQ Camp [illegible]ghar in 1999. AL-BAHRI was surprised to see him at the [illegible] in Qandahar. AL-HADA was a little bit shy of AL-BAHRI because AL-BAHRI previously asked him for his youngest daughter's hand and the daughter refused. AL-HADA stayed in Afghanistan approximately 4-5 months. AL-HADA met with the Sheikh (UBL) once in Qandahar and once in Loghar. During a

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Exhibit

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dinner in Qandahar, BIN LADEN honored him by seating AL-HADA next to him. During the training at Loghar, the trainees were to walk 30 kilometers in military formation. The trainers advised AL-HADA, he is forgiven to do the walk because of his age. Al-HADA however, insisted to do the walk because he wanted the heavenly rewards and blessing of participating. AL-BAHRI witnessed the events and stated "he" honored him by making him the UMDA (leader) of the formation, in which he led the formation and carryied their flag. AL-HADA's son ABU JAFFAR was killed in AFGHANISTAN when he was publishing using Electricity in Jalalabad.

ABED AL-RAHMAN AL-HADA is the younger son of AHMAD AL-HADA. He trained in Afghanistan before his father. ABED AL-RAHMAN is short and stocky. He was present with his father in Qandahar in 1999. He participated in the battles against AHMAD SHAH MASOUD in Kabul. ABED AL-RAHMAN is approximately 27-28 years of age.

ABU KHALIL AL-HADA: ABU KHALIL is AHMAD AL-HADA's eldest son. ABU KHALIL went to Afghanistan after his father returned to Yemen. ABU KHALIL has "blondish brown" hair and is approximately 31 years old.

AL-KHALDAN trained at the KHALDAN camp in Afghanistan. AL-KHALDAN was the host during the U.S. missile strike in August 1998.

ABU AMER AL-MAKI trained at the KHALDAN Camp in Afghanistan.

YAQOUB AL-DUSARI, assists ABU HAFS at the Military Committee. AL-DUSARI provides special training to AL-QA'EDA members. The nature of the training is only disclosed on a need to know basis. DUSARI speaks English, French and broken Arabic. (NOTE: Later AL-BAHRI identified AL-DUSARI as FAZUL ABDULLAH MOHAMMED A.K.A., HARUN).

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SA'EED AL-MASRI is an Egyptian AL-QA'EDA member, and supervised communication for BIN LADEN in Qandahar. His office was co-located in the Military Committee's building. SA'ED is in his thirties, has a thick and curly beard and wears thick glasses.

SAQR AL-JADAWI is an AL-QA'EDA member and a friend of AL-BAHRI's. SAQR is in his thirties. After AL-BAHRI got BIN LADEN's permission to leave Afghanistan for Yemen, as previously noted, inorder to get married, BIN LADEN instructed SAQR to follow AL-BAHRI to Yemen. BIN LADEN told SAQR he (SAQR) and AL-BAHRI should marry sisters, which they did. AL-BAHRI advised SAQR's real name is [redacted] HAMDAN.

ABDUL HADI AL-IRAQI was in charge of the front lines in Afghanistan. He resides in Kabul, and is approximately 35-36 years of age.

SALEM AL-SHARIF is a Salafi Saudi national who used to be in Bosnia. SALEM trained at KHALDAN and he has been in Qandahar with the BIN LADEN group. He was trained at KHALDAN in 1996.

SANNAN AL-[redacted] A Saudi from Mecca, trained at the KHALDAN training camp. AL-BAHRI initially encountered him after the Embassy bombings, at BIN LADEN's guesthouse in Kabul. AL-BAHRI advised he spoke with him regarding the issue of marriage, since AL-BAHRI wanted to get married. SANNAN is married to one of [redacted] (UNCLE) AHMAD AL-HADA's daughters. She is the sister of ABU JAFFAR AL-YEMENI, who died fishing in the Dolanta River using electricity. ABU JAFFAR took both SANNAN and ABDUL AZIZ AL-MAKI to marry his two sisters. AL-BAHRI advised SANNAN is a strong supporter of BIN LADEN. AL-BAHRI [redacted] he is unaware if SANNAN gave the bay'at to the Shaykh. AL-BAHRI stated SANNAN and KHALLAD have a very special relationship. As previously noted, SANNAN wanted AL-BAHRI to marry his sister-in law, one of AHMED AL-HADA's daughters. SANNAN brought AL-BAHRI to AL-HADA's house and the

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father approved; however, on the following day AL-BAHRI was informed that the daughter changed here mind in marrying him. The daughter later married another brother who was trained at the BIN LADEN training camps in Afghanistan identified as ABDUL KARIM AL-MAKI. AL-MAKI was one of those arrested in connection with the Bayt Habra incident in Sana'a. ABDUL KARIM's current location is unknown. SANNAN's sister attended AL-BAHRI's wedding in Yemen, and AL-BAHRI visited SANNAN at AHMED AL-HADA's residence in Sana'a.

During one of his visits to AL-HADA's house, AL-BAHRI met with OBADAH AL-MAKI, ZAYED Al-KHAIRI and ABU AMER AL-MAKI.

SANNAN advised his father in Saudi Arabia disapproved of him marrying a Yemeni [illegible]

SANNAN told AL-BAHRI his father-in-law, AHMAD AL-HADA, is very cheap with money.

HUSAM [illegible] AL-HI[illegible] is a trainer at AL-QA'EDA's AL-FAR[illegible] camp. HUSAM [illegible]-DEEN is married to one of BASHIR AL-SHADADI [illegible]ers. [illegible]-SHADADI's other sister is married to ABU AL-KHOL[illegible] Al-Q[illegible] public relations director for the Qandahar [illegible]. The third sister is married to ABU SALEH AL-YEMENI, who [illegible] one of the main facilitators in Yemen for brothers who want to travel to Afghanistan. (NOTE: ABU SALEH is known to investigators as ABED AL-RAZZQA BA SALEH AL-NAJAR, aka: ABU SALEH AL-YEMENI).

AL-BAHRI advised that as of February 2000, ABU SALEH AL-YEMENI departed Sana'a and traveled to Kabul, Afghanistan, where he last resided.

SAQR AL-JADAWI and ABU SALEH are long-time friends from Jeddah. When SAQR and AL-BAHRI traveled from Afghanistan to Yemen in August 2000, they were invited to lunch at ABU

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SALEH's house. AL-BAHRI advised ABU SALEH "loves the Sheikh very much" and a strong supporter. However, AL-BAHRI claimed he was unaware if ABU SALEH is a AL-QA'EDA member.

DARWISH AL-YEMENI also known as YAQOUB [illegible] and ABED AL-SALAM, is married and resides with his family in Kabul. DARWISH is independent and does not belong to any group or organization. DARWISH believes in fighting with the Taliban and usually goes to fight on the front lines with the Arab Mujahidin. DARWISH frequently goes to Qandahar to see BIN LADEN and pay his respects. DARWISH has been in Afghanistan since 1993. DARWISH left Afghanistan in 1998 or 1999 after he got married to a Moroccan woman who is the daughter of one of the Arab mujahidin. DARWISH took his wife to Yemen, to meet his parents. AL-BAHRI advised his parents were in Saudi Arabia, but they went to Yemen to meet their son and his wife. DARWISH is a Yemeni who immigrated to Saudi Arabia and probably was born in SAUDI. He is approximately 28-29 years old. AL-BAHRI stated DARWISH usually hangs out with ABU MAHJAN AL-YEMENI, KHALLAD, and SALEM AL-SHARIF. DARWISH is an associate of OBADA AL-MAKI, and when IBADA visits Afghanistan he usually stays with DARWISH.

DARWISH AL-MASRI is an Egyptian who was previously in Chechnya with IBN [illegible]. He currently lives in the BIN LADEN's compound in Qandahar. DARWISH AL-MASRI is approximately [illegible] years old.

SUHAIB AL-AMRIKI an American who converted from Christianity to Islam. He studied at the Religious Institute (AL-MA'HAD AL-SHAR'EI) directed by ABU HAFS AL-MAURITANI. SUHAIB is quite and does not talk much. He is always in the company of Uzbeks and Turkmen. SUHAIB trained in the KHALDAN [illegible] and spent most of his time at the Kabul guesthouse. SUHAIB fought at the front lines against AHMAD SHAH MASOUD's forces along-side the Taliban. SUHAIB has white skin, a reddish face, and light brown hair. He is about 5'10" in height, and skinny. He has a soft beard, described as similar

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to that of the Chinese people. AL-BAHRI saw SUHAIB's American passport, in the guesthouse in Kabul. SUHAIB surrendered his passport, and AL-BAHRI, as the Amir of the guesthouse, saw it in the closet. AL-BAHRI recalled that the passport was canceled by the American consulate in Peshawar [illegible] and that the name on the passport was something like Ch[illegible]. BAHRI could not recall the exact name on the passport.

SALMAN AL-MAURITANI is an instructor in the MA'HAD AL-SHAR'EI, (Religious Institute). AL-B[illegible] called a lecture SALMAN gave in the Institute about martyrdom operations that inflamed and induced all who were present; [illegible] stated everybody wanted to do a martyrdom operation after they heard SALMAN.

ZAIN AL-ABEDIN ABU ZUBAYDAH [illegible] for the KHALDAN Camp. AL-BAHRI advised KHALDAN is an independent camp for the Arabs and it is headed by IBN AL-SHEIKH AL-LIBI.

ABU KHABAB AL-MASRI heads up a camp in Duranta to teach manufacturing of poisonous gases and chemical warfare. ABU KHABAB trains for money. BIN LADEN does not support ABU KHABAB's concepts because he believes that "its harms outweigh its benefits." AL-BAHRI explained, ABU KHABAB teaches chemical formulas for a making of explosives such as TNT but by that he "you prepare the ingredients for a cup full of TNT, you can actually build a huge truck bomb with TNT purchased from the market." ABU KHABAB's camp is currently closed.

ADEL ABED AL-MAJID ABDUL BARI resides in London. AL-BAHRI is not aware of AL-BARI's connections to AL-QA'EDA or BIN LADEN. AL-BAHRI has seen him on AL-JAZIRA participating in a discussion on Islamic issues.

KHALID AL-FAWAZ was in-charge of the ADVICE AND REFORM COMMITTEE in London. AL-FAWAZ was arrested by the British authorities which saddened BIN LADEN. According to AL-

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BAHRI, BIN LADEN "told us, we said to KHALID, leave London and come to Afghanistan, however he did not listen." BIN LADEN described AL-FAWAZ as "a good exemplar and a ca[illegible] that we hope God will compensate us in return." AL-BAHRI [illegible]d AL-FAWAZ was at one point in-charge of AL-SIDDIQ t[illegible] camp.

AL-QA'EDA ORGANIZATION

AL-BAHRI advised the leadersh[illegible]uncil of AL-QA'EDA is made of the below listed BIN LADEN [illegible]es:

ABU MOHAMMED AL-MASRI. (EGYPTIAN)
SAIF AL-ADEL (EGYPTIAN)
ABU HAFS AL-MASRI, a.k.a. [illegible]MODANT, (EGYPTIAN)
ABU HAFS AL-MAURITANI (MAURITAN[illegible]
ABU SA'ED AL-MASRI, (EGYPTIAN)
DR. AYMAN AL-ZAWAHIRI, (EGYPTIAN)
ABU ASSIM AL-MAGHREBI, (MOROCCAN)

ABU HAFS AL-MASRI and some of the above mentioned individuals would [illegible]arly me[illegible] BIN LADEN. On occasion, all of [illegible] would [illegible]ctively [illegible]et at which time AL-BAHRI joking[illegible]ed the [illegible]hers used to say, "Al-Shiba, (the old men), are [illegible]ing, ma[illegible] help us."

[illegible] provided the structure of various AL-QA'EDA units and the [illegible]hy of the BIN LADEN's associates in their respective leade[illegible]positions this information was current as of at least m[illegible]ebruary 2000.

a. The Military Committee: The offices of the Military Committee were located outside and adjacent to the main BIN [illegible] compound in Qandahar, Afghanistan. The Military [illegible] headed by ABU HAFS AL-MASRI a.k.a. ABU-HAFS-AL-K[illegible]a. AL-COMMANDANT. Deputies included YAQOUB AL-DUSARI. (AL-BAHRI identified a photograph of AL-DUSARI. The individual is known to investigators as FAZUL ABDULLAH MOHAMMED, a.k.a, HARUN. Assisting ABU HAFS on the military

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committee, for matters related to computers, topography and surveillance, is ABU ZIAD AL-IRAQI, assisted by ABDUL HADI AL-URDINI a Jordanian who speaks English. ABDUL HA[illegible] injured in his right eye in 1999. He is married to one [illegible] AYMAN AL-ZAWAHIRI's daughters.

b. The Special Operations Committee: Offices for the Special Operations Committee were located in the Military Committee building, although it was unclear if Special Operations is actually a part of the military committee. It was headed by ABU HAFS AL-MASRI. AL-BAHRI believed that SAIF AL-ADEL may also be associated with Special Operations Committee.

c. Public Relations/Media Office: Located outside and adjacent to the main BIN LADEN compound in Qandahar, is headed by ABU HUSSEIN AL MASRI and ABU ANNAS AL YEMENI.

d. Finance Committee: The Finance Committee was headed by Sheikh SA'ED AL-MASRI, who is director of funds, and AL-FATEH AL-MASRI who is the Amir of salaries.

e. Qandahar Guesthouse: The Qandahar guesthouse was located in the Qandahar city center. The Amir of Reception was ABU SUHAIB [illegible]'IZI, the Amir of Documentation and Valuables was MUS'AB [illegible]'IDI, the Amir of Public Relations and Instructions was [illegible] AL-KHOLUD AL YEMENI, and the Amir of funds was MAYSARA [illegible]'IZI.

f. The Communications Committee: The office of the Communication Committee was located in the Miliary Committee building. The Amir of the Committee is SA'ED AL-MASRI.

g. Guesthouses House (for unmarried mujahidin): This house was located in the main BIN LADEN compound in Qandahar. Its Amir was ABU MAHJAN AL-TA'EFI, a close friend and associate of KHALLAD.

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h. Farming Committee: The farming Committee was headed by ABU HAMMAM AL-SA'EIDI, who was assisted by ABU KHALIL AL-MADANI, and KHALIFA AL-MASRI.

i. EGYPTIAN ISLAMIC JIHAD (EIJ) Leadership: The Amir of the EIJ is Dr. AYMAN AL-ZAWAHIRI, who resided in Qandahar. His deputies included ABU AL-SAMAH and MOHAMMAD SALAH. Both ABU AL-SAMAH and SALAH reside in Kabul.

j. Front lines: The Amir for Front Lines was ABDUL HADI AL-IRAQI.

k. Training Camps: The Amir for the training Camps was ABU MUHAMMAD AL-MASRI. Artillery training was headed by ABU IBRAHIM AL-YEMENI, and basic military training was directed by HAMZA AL-DOUSI, HUSAM AL-DIN AL-HIMYARI and SALHA AL-MAKI.

l. SHEIKH ABU ABDULLAH BIN LADEN personal security detail; the Amir is ABU ASSIM AL-MAGHREBI, a Moroccan.

Each committee files reports with the leadership. All reports are entered directly into computer files. The computers are in Military Committee Offices and are not connected to the Internet or any Intranet server. Security reports and personnel files are retained by SAIF AL-ADEL. Every committee has its own computer and BIN LADEN meets with the heads of these committees to discuss their issues.

SPECIAL CLOSE COMBAT TRAINING (LATE 1999)

AL-BAHRI advised in the second half of 1999, BIN LADEN met with approximately 30 graduates of a "close-combat" training session held in the LOGHAR training camp in [redacted]. The training was facilitated by KHALLAD. KHALLAD who arranged for a Pakistani trainer, known as FAROUQ AL-PAKISTANI, approximately 36 years old, specifically for the purpose of instructing hand-to-hand and close-combat operations. The trainees were provided training in Tae Kwan

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Do, other forms of martial arts and "close-order weapons" drills.

AL-BAHRI stated after the graduation from the course, the class traveled to Qandahar and visited with BIN LADEN who lectured them about the operational details of the East African bombings. BIN LADEN discussed the vehicles and type of explosives used and the planning and "reasons" for the attack.

KHALLAD served as the administrative officer if the training session. AL-BAHRI provided the names of some of the graduates of the course. They included:

SANNAN AL-MAKI, (previously discussed and identified as KHALID AL-MIHDHAR);

IBRAHIM NIBRASS; previously discussed;

ABU BILAL AL-MADANI described as short in height, and a Saudi who escaped from detention in Yemen following his arrest for involvement in the BAIT HABRA incident in 1998;

ABU IBRAHIM [illegible]YBI also an escapee from detention in Yemen, arrested for involvement in BAIT HABRA;

ABU [illegible]-TA'EZI (was previously discussed as being KHALLAD's associate);

ABU BARA' AL-TA'EZI, currently a member of BIN LADEN's security detail;

ABU SA'ED AL-TA'EZI, currently a member of BIN LADEN's security detail;

ABU MUS'AB AL-HASHIDI, who is often seen at BIN LADEN's QANDAHAR guesthouse;

ABU TALHA AL-MAKI who is described as having long hair,

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dark skin, is between 25-26 years old and an expert in kung-fu;

ABU JAFFAR AL-SHARQI, a Saudi;

ABU TURAB AL-NAJDI, who is described as in his [illegible], approximately 1.75 meters (5'9") tall, and having [illegible] skin, a slim build and a long beard;

AL-MU'ATASEM AL-JAHRANI, who is a [illegible], approximately 20-21 years old, has a "soft beard," and is [illegible] in height; AL-BATTAR AL-YEMENI, who was a previous member of BIN LADEN's security detail. AL-BATTAR traveled from Yemen to QANDAHAR in February 2000.

KENBOM/TANBOM PHOTOBOOK

AL-BAHRI was shown the main Kenbom/Tanbom photograph book, a copy of which is enclosed in the attached FD-340 (1A) envelope. The fact that this book was known as the KENBOM/TANBOM photo book was not disclosed to AL-BAHRI. After a review of the photobook, AL-BAHRI identified the following:

Photograph 6A is ABU YAHYA AL-KINI who resides in BIN LADEN's compound in Qandahar with his family. He speaks both Arabic and Swahili. (Photograph 6A is known to investigators as SHEIKH AHMED SALIM SWEDAN).

Photograph [illegible] also ABU YAHAYA AL-KINI. (Photograph 6A is known to investigators as SHEIKH AHMED SALIM SWEDAN).

Photograph [illegible] is ABU SA'EED AL-KINI who AL-BAHRI first met in 1996. ABU SA'EED AL-KINI was last known to be residing in the BIN LADEN compound in Qandahar, Afghanistan. (Photograph 7 is known to investigators as HARUN ABDISHEIKH BAMUSA).

Photograph 21 is ABED AL-WAKEEL AL-MASRI. The last AL-BAHRI knew of him was that he was in Kabul, Afghanistan. ABED AL-WAKEEL used to reside in the Qandahar compound that belongs

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to BIN LADEN. AL-BAHRI did not know if ABED AL-WAKEEL was currently in Qandahar or in Kabul. (Photograph 2[illegible] is known to investigators as MUSTAFA MOHAMED FADHIL).

Photograph 65A is ABU HAFS AL-MASRI, a.k.a. ABU HAFS AL-KABIR, a.k.a., THE COMMANDANT. In addition to what AL-BAHRI has already realted about him, he advised that ABU HAFS is a fierce fighter, even fiercer than ABU [illegible]AH (BIN LADEN). He has injured one of his hands. His relationship with BIN LADEN goes back to the Soviet jihad when ABU [illegible] and BIN LADEN fought the battle of Jaji against the Russians. AL-BAHRI advised during the battle of JAJI, ABU HAFS killed a Russian officer, then stood up on officer's dead body while speaking to UBL on a walkie-talkie and told BIN LADEN he "had a Russian officer under his shoes". ABU HAFS is the person in charge of the military committee. (Photograph 65A is known to investigators as MUHAMMAD ATEF).

Photograph 71 is [illegible]SA'EDA, an Egyptian who AL-BAHRI first met in 1998. AL-BAHRI is currently unaware if he is in Qandahar or Jalalabad. He was a trainer at the Farouq Camp. (Photograph 71 is [illegible] to investigators as AHMED MOHAMED HAMED [illegible]).

Photograph 2 is [illegible], a.k.a., YOUSUF AL-DUSARI, an AL-QA'EDA member who speaks English, French and broken Arabic. AL-BAHRI met him in Kabul in 1998. He was last in Qandahar, where he resides without his family, in BIN LADEN's compound. He is an assistant to ABU HAFS on the military committee. (Photograph 2 is known to investigators as FAZOL ABDULLAH MOHAMMED, a.k.a HARUN).

Photograph 3 is AL-BALOUSHI, a.k.a KHALID SALIM who AL-BAHRI first met in Jalalabad, when AL-BALOUSHI was meeting [illegible] BIN LADEN. Later, AL-BAHRI developed a relationship with AL-BALOUSHI who he described as religious and as a "fierce warrior", who is loyal to the Sheik and has memorized the Qur'an. AL-BAHRI advised that the best thing that can be done with AL-BALOUSHI in America is to execute him, "he wants to be

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a martyr and does not want to live." (Photograph 3 is known to investigators as Mohamed Rashid DAOUD Al-OWHALI, a.k.a., KHALID SALIM SALEH BIN RASHID).

Photograph 5 is USAMA AL-KINI who AL-BAHRI [illegible] in Khost in 1997. AL-BAHRI described him as about 29-30 years old. He claims he is from Arabic origins, however, he was born in Kenya. AL-BAHRI described him as good [illegible] driving all types of trucks, and currently is driving one of BIN LADEN's red Japanese truck known as Henna. USAMA AL-KINI delivers water by truck from the compound to the farms and other locations. He is expert in driving tanks. He is a very good volleyball player. He does not frequently interact with Arabs. AL-KINI is single and AL-BAHRI last encountered him in 2000 in the Qandahar compound where he lived with the other single guys. His closest friend is ABED AL-WAKEEL AL-[illegible], who invites him to his house at the compound. USAMA AL-KINI was trained at the Pakistani HARAKAT AL-ANSAR training camp. AL-BAHRI is unaware of any connection USAMA AL-KINI has to the East African bombings. (Photograph 5 is known to investigators as FAHD MOHAMMED ALLY MSALAM).

Photograph 15 is [illegible] AL-HAYTHAM who speaks Arabic in a Ta'ezi, [illegible] dialect from associating with individuals from Ta'iz, who taught him [illegible]. Al-BAHRI met him in 1998 at Qandahar and currently lives at the Al-Farouq training camp. (Photograph is known to FBI/NCIS investigators as AHMED KHALFAN GHAILANI).

Photograph [illegible] is MUTHANA AL-SUDANI, who he met in 1998, prior to the month of Ramadan (late 1998) in Kabul. AL-SUDANI currently lives at the BIN LADEN's guesthouse in Qandahar. In approximately 1993, he was in TAJIKISTAN with IBN AL-KHATAB. (Photograph 22 is known to investigators as MIR GHANI ABDUL [illegible]).

Photograph 26 is AHMAD ABDULLAH AL-ALMANI (the German). The photograph is not recent because AHMAD was "bald and looked different". In 1997, AL-BAHRI met AHMAD in Khost, when AHMAD was an explosives trainer in the military camp. AHMAD is

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Egyptian, and he was probably a member of the GAMA'AT ISLAMIYAH (Islamic Group). AL-ALMANI was the suicide bomber in the attack against the American Embassy in Tanz[illegible] AL-ALMANI met with AL-BAHRI in Khost prior of his departu[illegible] East Africa. AL-BAHRI claimed he was unaware of AL-AL[illegible] destination at that time and presumed he was going Qandahar. AL-BAHRI recalled AL-ALMANI was upset becau[illegible] some brothers" were saying "he likes little [illegible] and were suspicious of his morals. AL-BAHRI ass[illegible] L-ALMANI he would defend him in case he heard anybody mak[illegible] claims. (Photograph 26 is known to investigators a[illegible] BEN KHALIF ALLAH AWADH).

Photograph 27 is ABU OBEYD[illegible], who was one of the members of the NP in Tajikistan. He [illegible] of the 17 NG members who stayed with BIN LADEN in Afg[illegible]stan. The last time AL-BAHRI met him was in 199[illegible] The brothers called him JAWA because he looks Indonesian. ABU OBEYDAH had a close relationship with AL-FAROUQ AL-MAKI and listened to everything FAROUQ said. (Photograph 27 is known to investigators as JIHAD MOHAMMED ALI, a.k.a. AZ-ZAM).

Photograph 33 [illegible] AL-FAROUQ AL-MAKI, who was one of the members [illegible] NP in [illegible]istan. He was one of the 17 NG members who [illegible]ed wit[illegible] LADEN in Afghanistan (Photograph 33 is know[illegible] investigators as ABED AL-RAHIM AL-NASHIR, a.k.a ABU BILAL, a.k.[illegible] BILAL AL-MAKI).

Photograph [illegible] ABU MOHAMMED AL-MASRI, who is married and currently lives in Qandahar. He was in charge of the AL-FAROUQ Camp and one of the leaders of AL-QA'EDA who was always with BIN LADEN. It appeared he studied theology because he is very religious and extremely knowledgeable on the Qur'an. Photograph 42 is known to investigators as ABU MOHAMMED AL-MASRI.

Photograph 60 is an old photograph of SAIF AL-ADEL. since the photograph was taken, He had an injury under his right eye and an injury he sustained on hand (probably the right

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one) when shooting an illumination round which ricocheted and struck him. The Arabian Peninsula AL-QA'EDA members do not like him which causes him difficulties interacting with them. He has a temper and caustic tongue and makes numerous threats. He has five children. (Photograph 60 is known to investigators as SAIF AL-ADEL).

Photograph 65 is ABU ABDULLAH BIN LADEN. (Photograph 65 is known to investigators as USAMA BIN LADEN).

AL-BAHRI stated the most famous individual in Afghanistan who participated in the East African bombings is ABDUL WAKEEL AL-MASRI. AL-BAHRI advised he asked ABDUL WAKEEL about the East Africa bombings and he responded it was "all talk," and therefore determined AL-MASRI did not want to discuss the matter. AL-MASRI stayed at the Kabul guesthouse when AL-BAHRI was the Amir of the guesthouse. AL-BAHRI advised prior to leaving Afghanistan in 2001, ABDUL WAKEEL was in Kabul.

AL-BAHRI recalled ABU MOHAMMED AL-MASRI departed Afghanistan for an unknown location and returned approximately 15-20 days prior to the East African bombings.

AL-BAHRI advised the "brothers who were martyred" in the East African bombings were AHMAD ABDULLAH AL-ALMANI (THE GERMAN), who was an Egyptian brother who lived at the Khost training camp, is an explosives trainer, who was present at BIN LADEN's interview and press conference at the JIHAD WOL training camp in Khost. AL-BAHRI added he has memorized the Quran.

AL-BAHRI advised ABDUL WAKEEL was in Afghanistan prior to the East African bombings. AL-BAHRI stated he drove ABDUL WAKEEL to the airport in Qandahar when AL-BAHRI was traveling to Kabul with his wife and child. AL-BAHRI is unaware how many children ABDUL WAKEEL has.

AL-BAHRI stated "our brother" participated in the

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Nairobi bombing. AL-BALOUSHI from the MAJID (Saudi region) as per his dialects. He memorized the Qur'an and is considered to be a "first class fighter." He is approximately 24-25 years old and was at the Kabul front. AL-BAHRI stated the first time he met AL-BALOUSHI was when he was with the Sheikh in Jalalabad in 1997. Their relationship continued on the Kabul front line. AL-BAHRI stated AL-BALOUSHI loved USAMA and spoke highly of him. AL-BAHRI advised he saw AL-BALOUSHI's photograph in the newspaper because he survived the bombings in Nairobi and the papers reported his name to be KHALID SALEM. AL-BAHRI stated the first time he heard the name KHALID SALEM was after reading it in the paper.

AL-BAHRI stated he is unaware of the identity of the second bomber in Nairobi; however, he heard from other brothers (NFI) it was a individual known to them as AZZAM. AL-BAHRI stated he does not know AZZAM. AL-BAHRI later stated advised the second suicide bomber in Nairobi was ABU OBEYDAH AL-MAKI.

AL-BAHRI advised the Sheikh and the brothers were happy with the bombing operations in Nairobi and Dar Al-Salaam.

GROUP 1 PHOTOGRAPHS

AL-BAHRI was shown a photographic array identified as Group 1 photographs numbered 1-4, a copy of which is enclosed in the attached 1A envelope.

Group 1, photograph number 4 was identified as KHALLAD. AL-BAHRI advised he is "very positive" the photograph depicts KHALLAD, because he has known him for a long period of time. (Group 1 photographs number 4 is known to investigators as TAWFIQ BIN SALEH BIN ATTASH, a.k.a. KHALLAD).

GROUP 2 PHOTOGRAPHS

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AL-BAHRI was shown Group 2 photographs, a copy of which is enclosed in the attached 1A envelope.

Group 2, photograph #4 was identified as [redacted] MOHAMMED AL-SHARQI. AL-BAHRI described AL-SHARQI as a Saudi who stayed at the BIN LADEN Qandahar guesthouse during Ramadan 19[redacted]. AL-BAHRI added AL-SHARQI became sick because of stomach problems due to an operation to "staple his stomach" which resulted in him leaving Afghanistan for medical treatment (NFI). AL-BAHRI advised he was with a Yemeni companion [redacted] as ABBAS, who was later killed while "playing" with other trainees with a Kalakov machine gun. (Group 2, photograph #4 is known to investigators as MARWAN AL-SHEHHI).

Group 2, photograph #6 was identified as an Egyptian whom AL-BAHRI met in the mosque at the BIN LADEN compound in Qandahar, Afghanistan, during Ramadan 19[redacted]. AL-BAHRI recalled the alias of the Egyptian as possibly ABU ABDUL RAHMAN AL-MASRI. (Group 2, photograph #6 is known to investigators as MOHAMED ATTA).

Group 2, photograph #9 was identified as SANNAN AL-MAKI, an individual AL-BAHRI knew in Afghanistan, from the BIN LADEN guesthouse in Kabul and at the front-line. AL-BAHRI who already discussed SANNAN AL-MAKI at length herein, advised that he is a [redacted] of Yemeni origins. (Group 2, photograph #9 is known to investigators as KHALID AL-MIHDHAR).

Group 2, photograph #15 was identified as an individual AL-BAHRI probably met in the BIN LADEN's Kabul guesthouse. AL-BAHRI advised he does not recall any alias for this individual. He stated numerous young men enter and exit Kabul [redacted] Afghanistan, and he does not remember any of their [redacted] (Group 2, photograph #15 is known to investigators as [redacted] AL-HAZMI).

Group 2, photograph #18 was identified as an individual AL-BAHRI possibly met in BIN LADEN's Kabul guesthouse. AL-

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BAHRI did not recall the name or the alias of the individual depicted in the photograph. (Group 2, photograph #18 is known to investigators as AHMED AL-GHAMDI).

Group 2, photograph #19 was identified as an individual AL-BAHRI possibly met in BIN LADEN's Kabul guesthouse. AL-BAHRI did not recall the name or the alias of the individual depicted in photograph #19. (Group 2, photograph #19 is known to investigators as MOHANAD AL-SHEHRI).

Group 2, photograph #30 was identified as ABU BILAL AL-MAKI. ABU BILAL is a Saudi who was at the front line in Kabul, Afghanistan in 1999. AL-BAHRI stated while AL-MAKI was launching a howitzer, the shell exploded in the air resulting in an injury to his hand, from the explosion. (Group 2, photograph #30 is known to investigators as SALEM AL-HAZMI).

Group 2, photograph #46 was identified as ABU KHALID AL-SAHRAWI, who does not speak Arabic, but probably speaks some Arabic (broken Arabic) that he learned from his association with the Mothers. However, AL-SAHRAWI does speak fluent French. AL-BAHRI observed him in Khost. He has also trained at the KHALDEN military training camp in 1997. While on his way from Jalalabad to Khost, ABU KHALID AL-SAHRAWI used to stop at the guesthouse in Kabul. AL-BAHRI did not hear him speak English. AL-BAHRI described ABU KHALID AL-SAHRAWI as tall, muscular and fit. ABU KHALID AL-SAHRAWI is good with hiking mountains at the front lines where AL-BAHRI recalled he (AL-SAHRAWI) used carry two big containers of water on each shoulder and hike up to the trenches on the front lines. AL-BAHRI advised he used to provoke ABU KHALID by telling him he (AL-BAHRI) can defeat him in wrestling. AL-BAHRI added that ABU KHALID got aggravated when AL-BAHRI refused to wrestle AL-SAHRAWI from the western desert in Morocco and approximately 33-34 years old. (Group 2, photograph # 46 is known to investigators as ZACARIAS MOUSSAOUI).

GROUP 3 PHOTOGRAPHS

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AL-BAHRI was shown a photographic array identified as Group 3 photographs numbered 1-17, a copy of which is enclosed in the attached 1A envelope. AL-BAHRI identified the following:

Group 3, photograph 2 was identified as an individual who looks like USAMA AL-KINI. AL-BAHRI stated he knew AL-KINI in Khost, Afghanistan in 1997. AL-KINI is an Arab but he was at the Pakistani training camp. AL-BAHRI advised AL-KINI speaks Arabic with an Undue, Oklahoman, accent. (Group 3, photograph number 2 is known to investigators as MURAD AL-SURURI).

Group 3, photograph number 3 was identified as ABU SA'ED AL-MADANI. AL-BAHRI stated ABU SA'ED is one of the four he traveled with to Bosnia. (Group 3, photograph number 3 is known to investigators as SAMIR AL-HAZMI).

Group 3, photograph number 4 was identified as FAWAZ AL-RUBA'I. AL-RUBA'I was one of the individuals arrested during the BEIT HABRA incident. (Group 3, photograph number 4 is known to investigators as FAWAZ AL-RUBA'I).

Group 3, photograph number 5 was identified as USAYD AL-YEMENI. AL-BAHRI was acquainted with USAYD in Yemen, and was arrested with him during the BEIT HABRA incident. (Group 3, photograph number 5 is known to investigators as OMAR AL-HIBAYSI).

Group 3, photograph number 6, was identified as SA'D BIN ABDULLAH. AL-BAHRI did not recognized the photograph right away. AL-BAHRI stated BIN ABDULLAH was killed in Afghanistan while fighting alongside the TALIBAN. AL-BAHRI added that ABDULLAH was killed in the same battle as ABU AL-AHBAL. (Group3, photograph 6 is known to investigators as ABDUL RAB AL-SAYFI).

Group 3, photograph number 7, was identified as JULAYBIB. AL-BAHRI did not recognize the photograph right away. (Group 3, photograph 7 is known to investigators as

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AHMAD AL-BAYDHANI).

AL-BAHRI advised he knows the individual depicted in Group 3, photograph number 8, but he cannot recall his name. (Group 3, photograph number 8 is known to investigators as MASHHOOR AL-SABRI).

Group 3, photograph number 9 was identified as BASHIR AL-SHADADI. AL-BAHRI did not recognize the photograph right away. AL-BAHRI stated AL-SHADADI participated in the Jihad in Bosnia, Tajikistan and Afghanistan. AL-BAHRI advised SHADADI is one of the main travel facilitators for Mujahidin from Yemen to BIN LADEN training camps in Afghanistan. (Group 3, photograph number 9 is known to investigators as BASHIR AL-SHADADI).

Group 3, photograph number 10 was identified as ABU ANAS AL-NAHDI. AL-BAHRI met AL-NAHDI in Yemen when Al-BAHRI returned to Yemen to marry in 1998-1999. (Group 3 photograph, number 10 is known to investigators as BASSAM AL-NAHDI).

Group 3, photograph number 11 was identified as AKRAMA AL-AZIZI. AL-BAHRI knew AKRAMA's brother, ABED AL-MALIK, who was killed in Bosnia. (Group 3 photograph, number 11 is known to investigators as ISSAM AL-MIKHLAFI).

Group 3, photograph number 12 was identified as ABU HAMZA AL-WA'ELI whom AL-BAHRI met in Afghanistan in early 1997. AL-BAHRI met him again in Yemen. (Group 3 photograph, number 12 is known to investigators as ALYAN AL-WA'ELI).

Group 3, photograph number 13 was identified as AL-[redacted]. AL-BAHRI met AL-BARA' at the front line in [redacted]. He is the brother of KHALLAD, MUHANNAD, MU'ATH, and [redacted]R. (Group 3, photograph number 13 is known to investigators as ABDUL AZIZ BIN ATTASH, a.k.a., ABU AL-BARA').

Group 3, photograph number 14 was identified as ABED

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AL-KARIM who participated in the Jihad in Afghanistan. ABED AL-KARIM was trained in AL-FAROUQ Camp. He speaks with a Hijazi regional dialect (Saudi) and has not heard from the individual recently. ABED AL-KARIM married to [redacted] AL-HADA's youngest daughter, the same one SANNAN AL-MAKI [redacted] AL-BAHRI to marry. AL-BAHRI did not recognize the photograph right away. (Group 3, photograph number 14 is known to investigators as MUSTAFA AL-ANSARI).

Group 3, photograph number 15 was identified as ABU GHANEM. AL-BAHRI met ABU GHANEM in Bosnia and later in Afghanistan where he met him at the Qandahar guesthouse. AL-BAHRI described ABU GHANEM as "a good man and "a product of war." (Group 3, photograph number 15 is known to investigators as MOHAMMED ABU GHANEM).

Group 3, photograph number 16 was identified as HASSAN AL-KHAMIRI, a.k.a., ABU YOUSUF AL-TA'EFI. Upon seeing the photograph AL-BAHRI stated, "this is HASSAN, may God bless his soul." When asked by investigators if he said this because he knows HASSAN is dead, AL-BAHRI responded, "it is a feeling inside me which tells me he is dead." AL-BAHRI advised he saw HASSAN's photographs in the newspapers as being one of the suicide bombers in the USS Cole attack.

[redacted] stated that AL-KHAMIRI was a brother and a friend, but was not certain if AL-KHAMIRI was the suicide bomber. AL-BAHRI described AL-KHAMIRI as an individual of high moral virtue who was appointed by ABU ATA' AL-TUNISI as the "Amir" of "AL-FAROUQ Camp in Khost, which belongs to Sheikh USAMA." AL-BAHRI stated AL-KHAMIRI was the Amir during the U.S. missile strikes on the Khost Camps, after the East African bombings. (Group 3, photograph number 16 is known to [redacted] as HASSAN AL-KHAMIRI, A.K.A., ABU HASSAN AL-TA[redacted]

ADENBOM PHOTOBOOK

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AL-BAHRI was shown the ADENBOM photobook, a copy of which is enclosed in the attached 1(A) envelope. The fact that this book was known as the ADENBOM photobook was not disclosed to AL-BAHRI. After a review of the photobook, AL-BAHRI identified the following:

Photograph number 1 was identified as KHALLAD. AL-BAHRI stated KHALLAD is always with the Sheikh (BIN LADEN). (Photograph number 1 is known to investigators as TAWFIQ BIN ATTASH, A.K.A., KHALLAD).

Photograph number 2 was identified as a photograph of himself. AL-BAHRI advised he took this photograph in order to produce a Yemeni identification card in 1999. (Photograph number 2 is known to investigators as NASSER AL-BAHRI, a.k.a., ABU JANDAL).

Photograph number 3 was identified as ABU AL-BARA', KHALLAD's brother. (Photograph number 3 is known to investigators to be ABDUL AZIZ MOHAMMED SALEH ATTASH).

Photograph number 7 was identified as ABU ABDUL RAHMAN AL-BADAWI. AL-BAHRI knew AL-BADAWI in Bosnia, and both went for training in Afghanistan. (Photograph number 7 is known to investigators as JAMAL MOHAMMED AHMED ALI AL-BADAWI, a.k.a. ABU ABDUL RAHMAN).

Photograph number 8 was identified as RABE'I AL-MAKKI. AL-BAHRI described RABE'I is "a monster" during battles and stated that "we were scared to go to the front lines with him because he has courage no one has." AL-BAHRI stated RABE'I speaks a Saudi dialect of Arabic and was killed on the Kabul front lines in the beginning of 2000. AL-BAHRI advised his brothers informed him about RABE'I's death, and they told him he was buried in Afghanistan. AL-BAHRI stated RABE'I was killed in the same battle with OMAR SAIF, SA'ED BIN ABDULLAH, a Yemeni, KHALID AL-PAKISTANI, and MUTHANA AL-NIJIRI, who looks African but speaks with a Mecca dialect

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(Saudi Arabia). (Photograph number 8 is known to investigators to be TAHA IBRAHIM HUSSEIN AL-AHDAL).

Photograph number 10 was identified as HASSAN AL-KHAMIRI. (Photograph number 10 is known to investigators as HASSAN SA'ED AWADH AL-KHAMIRI).

Photograph number 11 was identified as HASSAN AL-KHAMIRI. (Photograph number 11 is known to investigators as HASSAN SA'ED AWADH AL-KHAMIRI).

Photograph number 14 was identified as HASSAN AL-KHAMIRI. (Photograph number 14 is known to investigators as HASSAN SA'ED AWADH AL-KHAMIRI).

Photograph number 15 as HASSAN AL-KHAMIRI. (Photograph number 15 is known to investigators as HASSAN SA'ED AWADH AL-KHAMIRI).

Photograph number 16 was identified as DAIFULLAH AL-QATARI. AL-BAHRI advised he knew AL-QATARI in Sana'a, Yemen in the summer of 2000. AL-BAHRI did not recognize the photograph number 17. Photograph number 17 is known to investigators as, [redacted] SHEHRI, a.k.a. NASIM AL-SAQAF, a.k.a. DAI[redacted] AL-QA[redacted]

Photograph number 20 was identified as FAROUQ AL-MAKI, whom AL-BA[redacted] advised is also known as MULLAH MOHAMMED OMAR or AL-MULLA[redacted] AL-MAKI advocated fighting the enemy anywhere, even in the KA'ABA mosque (in Mecca, Saudi Arabia), if necessary. AL-MAKI sometimes criticized the Sheikh after meetings with him because he thought the Sheikh was not sufficiently forceful. (Photograph number 20 is known to investigators to be ABDUL RAHIM HUSSEIN MOHAMMED ABDAH AL-[redacted] a.k.a BILAL AL-MAKI, a.k.a, ABU BILAL AL-MAKI).

Photograph number 22 was identified as FAROUQ AL-

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MAKI. (Photograph number 22 is known to investigators as ABDUL RAHIM HUSSEIN MOHAMMED ABDAH AL-NASHIRI,a.k.a BILAL AL-MAKI, a.k.a, ABU BILAL AL-MAKI).

Photograph number 27 appeared similar to ABDUL RAHMAN AL-LAHAJI. AL-BAHRI advised he met AL-LAHAJI in Bosnia but did not encounter him in Afghanistan. (Photograph number 27 is known to investigators as FAHD MOHAMMED AHMED AL-QUSO).

AL-BAHRI advised the individual depicted in photograph number 29 looked familiar, however he could not remember his name. (Photograph number 29 is known to investigators as ABDULLAH AHMAD ABDULLAH AL-RHAIL).

Photograph number 30 was identified as ABU MUSLIM AL-ADANI. AL-ADANI was with AL-BAHRI in Bosnia in the MUJAHIDIN BRIGADE (MB). (Photograph number 30 is known to investigators as YASSER AHMAD QASIM SA'EO).

AL-BAHRI advised he positively knows the individual depicted in photograph number [illegible] who he met in Afghanistan in 1998-[illegible] but was unable to recall his name or alias. (Photograph number 31 is known to investigators to be YASSER ABED RABOH [illegible] AHMAD AL-[illegible]ANI).

QANDAHAR GUESTHOUSE AND COMPOUND

AL-BAHRI advised operatives/visitors are to surrender their weapons to the Amir of the camp before going to local towns, per UBL instructions. Unless an operative has permission from the TALIBAN to carry a personal weapon, he must leave the weapons with the Amir. This instruction was [illegible] to avoid inadvertent armed confrontations with [illegible].

BIN LADEN personally appointed ABU BASHIR AL-YEMENI to be the Amir of the guesthouse in Qandahar, circa 1999-2000.

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ABU BASHIR is short in height, has a dark complexion, a soft beard," "is always smiling," and is approximately 23-24 years old. He previously resided in Sana'a, Yemen, but probably originally from the south of Yemen.

There are approximately 50 families residing in the Qandahar compound. AL-BAHRI advised that all the families are Arabs and "we consider ourselves one family with BIN LADEN as the Sheikh of the family." The compound previously housed Russian soldiers and officers in Qandahar and is located next to the former Russian air base (NFI).

AL-BAHRI advised BIN LADEN's Qandahar compound is a former Russian military base surrounded by a fence. It has a wheat storage facility, a water tank and a mosque in the center of the compound. Photographs of the compound was BIN LADEN published in AL-Qabas Kuwaiti newspaper in 1999.

OTHER AL-QA'EDA FACILITIES

AL-BAHRI provided the following information on various Al-Qa'eda facilities.

AL-MA' 6, (Compound 6), is located in Qandahar, in the direction of BAYT AL-RUMAN, towards the mountains. BIN LADEN and his wives moved into it from the main Bin Laden Compound during the U.S. strikes after the East Africa bombings, and lived there for about a year and half. Part of the fence around the compound fell down so the brothers put sandbags to support the surrounding fence.

BAYT AL RUMAN is an old Afghani school and currently a home of AL-MU'AHAD AL-SHAR'EI (The Religious Institute). AL-[illegible] the Sheikh occasionally holds meetings at the [illegible] with his followers. This facility is located in the vicinity of a gas station, which also has a car/truck wash for the Taliban.

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KHAN GHULAM PATSHEH, is also known as the BIN LADEN guest house in Kabul. The guest house is located in KA[illegible] BROWN district of the city. The facility was previous[illegible]rt of the Castle of the former King of Afghanista[illegible] AL-B[illegible]tated as far as he is aware of, the last BIN LA[illegible]N visite[illegible] was in 1999, and he stayed in a house provide[illegible] by th[illegible]. The house was located in the Shaher Nu (The New Market). [illegible] house, formerly an old hotel, is pres[illegible] comprised of [illegible] floors surrounded by a fence, and is l[illegible] in the middle of the market.

AL-BAHRI advised there are four m[illegible] bases for Al-Qa'eda. All the bases are locate[illegible] mounta[illegible] at the front lines. The bases are named to h[illegible]rs" and they are: ABU ATTA, AL-BARUD, ABED AL-MALIK, [illegible]

The individual in charge of th[illegible] Kabul region of AL-QA'EDA is ABU MOHAMMED A[illegible]ASRI AL-MASRI, who appointed him (AL-BAHRI) as the Amir [illegible]it o[illegible] the Kabul guesthouse. At the same time there was a confli[illegible] between the Egyptians and those from the Ara[illegible] Peninsu[illegible]ich resulted in the appoint[illegible] of a[illegible] from [illegible] Arabian Peninsula (AL-BAHRI) as the [illegible] of the [illegible]und. Also, BIN LADEN wanted to place an indiv[illegible]n Kabu[illegible] is respected by both groups. This was the re[illegible] AL-QA'E[illegible]adership chose AL-BAHRI .

AL-BA[illegible] advised that prior to the East Africa bombings other [illegible]ers of the Sheikh who did not give bay[illegible]t and becam[illegible]EDA member were being appointed by the She[illegible]kh for such positions. This changed after 1998, BIN LADEN a[illegible]ointed only Al-Qa'eda members to key committees, [illegible]thouses an[illegible] training camp positions in Afghanistan.

[illegible]MUNICATION

BIN LADEN utilizes what AL-QA'EDA and associates refer to as the "Yaesu" radio system, which is solar powered, in order to communicate with his guesthouses and various

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facilities in Afghanistan. Message can be encrypted through a "small Casio computer" (NFI) where the text is typed on a keyboard and converted to numbers. The communications operator reads numbers through the "Yaesu" radio. The communication operator on the receiving side inputs the numbers into a Casio computer and decrypts the message. The message is then relayed to the Amir of the guesthouse facility, or directly to BIN LADEN. The communication system was implemented by ABU ATA'A AL-TUNISI. Messages are sent regularly to Qandahar for encryption/decryption. As of 2/2001, the communication operator in Qandahar was ABU SA'EED AL-MASRI.

In order to communicate to/from the Taliban front lines against the Northern Alliance forces of AHMAD SHAH MASOUD, the AL-QA'EDA guesthouses, [illegible] BIN LADEN facilities, and BIN LADEN operatives used smaller, hand-held "Yaesu system." There are repeaters installed on points of higher elevation between the facilities.

BIN LADEN does not use the communications system himself, as SA'ED AL-MASRI oversees all electronic communications for BIN LADEN. The chief of communications for the BIN LADEN guesthouse in Kabul was ABU AMMAR AL-DHALE'I.

AL-BAHRI provided further details regarding the communications procedures and equipment used by AL-QA'EDA in Afghanistan.

AL-BAHRI stated there are three AL-QA'EDA communications centers in Afghanistan: Jalalabad, Kabul and Qandahar. Each location has a "Yaesu" system. The Qandahar guesthouse has no such communication system and all communications go through the main compound. AL-BAHRI [illegible] bandwidth used by AL-QA'EDA functioned in the "[illegible]nge, but was otherwise uncertain of the exact number.

AL-BAHRI stated in the event of a private communication, the operator switches to a pre-determined

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frequency which is referred to by name; for example, "go to Mohammed." Based on the pre-arranged code, the operator tunes to the corresponding frequency in order to make the connection for the calling party. The frequencies and code words are prepared by the AL-QA'EDA military committee in advance every three months. The lists are provided to all of the AL-QA'EDA communications centers.

AL-BAHRI advised when an official AL-QA'EDA message is sent, it is encrypted with software from a CASIO system. AL-BAHRI identified the keyboard/hardware as similar to the photograph of the CASIO FX-795P. The English letter portion of the keyboards used by the AL-QA'EDA system operators are covered with the Arabic script. The operator types the given message on the keyboard and the software provides a series of numbers after the operator hits the "execute" button. The system then queries to what city the message is being sent. After the operator enters the city (either Qandahar, Kabul or Jalalabad), the software produces a series of numbers. The transmitting operator then broadcasts the numbers over the "Yaesu" system. The operator on the receiving end enters the numbers into the CASIO computer and with the execute command deciphers the message.

When the Arabs and Taliban wanted to communicate via radio during battles, for example during battles, there is usually a Taliban who speaks Arabic, and or an Arab who speaks Farsi and the communication between the Taliban and the Arabs go through them.

AL-BAHRI stated the AL-QA'EDA military committee uses a version (NFI) of commercially available Palm Pilots.

UBL SECURITY DETAIL

AL-BAHRI advised that the oldest individual in BIN LADEN's security unit is approximately 26 years old. Almost all of the members of the security detail team were in Khost

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during the US missile strikes on Afghanistan in August 1998, and they currently live in the mosque in BIN LADEN's Kandahar compound. BIN LADEN's sons also live in the same mosque.

AL-BAHRI provided the aliases of members of the current (as per February 2000) BIN LADEN security detail:

ABU MUS'AB AL-TA'EZI from Ta'ez, Yemen.
BAR'A AL-TA'EZI from Ta'ez,
GHARIB AL-TA'EZI from Ta'ez,
ABU BASIR AL-YEMENI, from Yemen.
ABU SUHAIB AL-TA'EZI, from Ta'ez,
ABU AL-SHAHID AL-SANA'I from Sana'a, Yemen.
SA'D AL-TA'EZI, from Yemen.
KHALLAD
SAQR AL-MADANI, from Madina, Saudi Arabia.
OMAR ASEM, the son of ABU ASEM who leads the BIN LADEN security team.

BIN LADEN personally selects the members of his security detail. The mujahideen attend training camps in Afghanistan and operate on the front lines with the Taliban usually as a guest to meet and visit with BIN LADEN. Known for his hospitality, in accordance with Arab customs, BIN LADEN usually invites his visitors to stay in his compound or other nearby facilities for three days. During this time, BIN LADEN interacts and observes the guests, after which he selects those he deems appropriate for his security detail.

The coordinators for the BIN LADEN security detail are SAIF AL-ADEL and ABU HAFS AL-MASRI, who provide lectures on basic security procedures to the security detachment.

The standard compliment of weapons carried by BIN LADEN's security team include SAM-7 (grail) and stinger missiles; however, there has been a chronic shortage of batteries for these weapons. The effective range of these weapons, as spoken among BIN LADEN's security personnel, is

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six (6) kilometers. AL-BAHRI does not profess knowledge of SAM and anti-aircraft artillery (AAA) capabilities and nomenclature. Because of the battery shortage, BIN LADEN's security detail does not at all times carry the response to air missiles, but only on "special occasions" as determined by SAIF AL-ADEL or BIN LADEN, himself. The security element typically has with it a combination of AK-47 assault rifles, "PK machine guns" and rocket propelled grenades. AL-BAHRI described the "PK" as heavy but man-portable, un-mounted, having "a box" with 100 rounds; and resembling the American M-60. Protecting BIN LADEN's compounds and AL-QA'EDA facilities are AAA. The various AAA pieces consist of dual and quad guns. AL-BAHRI learned of the ZSU 23/4, ZSU 57/2 and other former Eastern block AAA, but was uncertain as to the specific equipment used by BIN LADEN's security and AL-QA'EDA and TALIBAN fighters.

The individual currently in charge of the BIN LADEN security detail is ABU ASSIM AL-MAGHREBI. AL-BAHRI described ABU ASSIM as a Moroccan who claims his ancestors were originally from Lahij, Yemen. He is one year older than the Sheikh, or approximately 46-47 years old, but appears youthful and does not have gray hairs in his beard. ABU ASSIM has been with BIN LADEN for a long time, since they both resided in the Sudan in the early to mid-1990's. He lives in the BIN LADEN compound adjacent to the Qandahar airport. Prior to assuming his duties as Chief of Security, ABU ASSIM was a farmer, in charge of BIN LADEN's farms (wheat farms), next to the airport in Qandahar.

AL-BAHRI advised BIN LADEN's personal security detail escorts him everywhere. For example, when he goes to the mosque within the Qandahar compound, security is with him going to the mosque and on the return to his living quarters. When he enters his house, some members of the detail remain and the others go to their quarters. It is said among the mujahidin that BIN LADEN has a large, constant security contingent as "all the Arabs in the compound will protect the SHEIKH" if there is an attack.

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AL-BAHRI advised the majority of the vehicles used by AL-QA'EDA were Toyota pick-up trucks, Hilux model, along with 14 unidentified passenger buses.

BIN LADEN's transportation convoy for movements outside the Qandahar compound employs Toyota pick-up trucks. He purchased the vehicles from the United Arab Emirates and prefers the Toyotas because of their maneuverability. Prior to BIN LADEN's departure to a particular location, an advance security team comprised of five individuals leaves the compound for the intended destination. The advance security personnel carry American manufactured mine detectors (NFI) which BIN LADEN purchased from the Pakistanis, possibly from the Pakistani military or arms dealers. AL-BAHRI described the "mine detectors" as portable, hand-held sweep-devices.

When BIN LADEN travels from Qandahar to Kabul, the trip is approximately 3[illegible] hours in duration and the route is via a dirt road (NFI). The head of the security detail assigns individual duties. On the occasions when BIN LADEN is visiting another guesthouse and he trusts the brothers there, the security leader assigns for the associates at the guesthouse to relieve BIN LADEN's personal guards. The detail leader ensures the guards of the host brothers man positions around surrounding buildings and on nearby rooftops. However, at least one BIN LADEN personal security detail stays with him at all times. Security detail shifts range from 45 minutes to one hour dependent on the time of day. For example, if BIN LADEN arrives at a location at 1900 hours or later, the time on-watch for each man would be shorter than if the detail arrived earlier in the day.

The men of BIN LADEN's security unit sleep in the same room with him; however, AL-BAHRI selected not to stay in the room while BIN LADEN is sleeping as he (AL-BAHRI) "make noises with his teeth," and was embarrassed to annoy the BIN LADEN while sleeping. To BIN LADEN's closest associates and personal security guards, anything less than complete dignity

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or even the perception of embarrassment concerning the BIN LADEN is to be avoided.

Prior to the current security detail, [illegible] 1998-99. In addition to AL-BAHRI the individuals who usually comprised BIN LADEN's security detail were:

ABU AMMAR AL-DHALE'I
THAFER AL-NAJAR
WASEL AL-ANSARI
SAQR AL-JADAWI
ABU ZAKARIYA
ABU HUSSEIN AL-YEMENI
ABU BASHIR AL-YEMENI
ABU OMAYER AL-BAHRAINI
ABU MU'ATH AL-BATTER
ABU JANDAL
KHALLAD

Following the US missile strikes on targets in Sudan and Afghanistan in August 1998, BIN LADEN reorganized his personal security detail. Through at least February 2001, BIN LADEN's security detail consisted of 12-14 individuals, and motorcade movements included three vehicles, each having a maximum of [illegible] armed guards. Members of BIN LADEN's most trusted personal security detail included in addition to AL-BAHRI, SAQR AL-JADAWI, ABU FAYADH AL-MADANI, a.k.a. FAYADH, and ABU MUAWIYA AL-MADANI, a.k.a. MU'AWIYAH.

SAIF AL-ADEL is in charge of security for BIN LADEN. SAIF AL-ADEL issues security awareness bulletins and puts them in the guesthouses, the Religious Institute, and at different facilities. The security announcements advise [illegible] to talk about official business, need to know basis, and other security awareness issues. SAIF AL ADEL also issues security advisements such as "do's and don'ts" for travelers, such as "do not wear the watch on the right hand as it is customary among the mujahidin," "do not travel with your

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wife," "have a barber cut your hair prior to traveling," "shave your beared prior of traveling," and so forth.

There were several incidents where AL-[redacted] was successful in discovering "spies" working on behalf of outside intelligence agencies. AL-BAHRI provided the following accounts:

AL-BAHRI advised while visiting the guesthouse in Qandahar he observed one of the brothers, [redacted] as JUHAYMAN AL-EMERITI, sitting alone outside the guesthouse. He introduced himself to AL-EMERITI, because he likes to [redacted] be close to all brothers, as AL-EMERITI appeared to be in a sad and lonely mood. AL-EMERITI advised [redacted] asked to leave the guesthouse in Afghanistan. AL-BAHRI [redacted] about the situation with ABU AL-KHOLUD who told him that SAIF AL-ADEL advised him (ABU AL-KHOLUD) that AL-EMERITI was "suspicious" and had to immediately leave and a vehicle would transport him from Qandahar to Pakistan.

AL-BAHRI stated if there was any evidence for AL-ADEL's suspicions regarding AL-EMERITI, but KHOLUD was unaware of any. AL-BAHRI then confronted AL-ADEL and stated he needed evidence to [redacted]" a brother who traveled to fulfill his religious obligation to train and prepare for jihad. AL-ADEL advised [redacted] know everything about AL-EMERITI" and it is "best for him [redacted]". AL-BAHRI was not furnished any evidence, which [redacted] him. He advised AL-ADEL he will personally bring the issue to BIN LADEN. AL-ADEL departed as AL-EMERITI was escorted away. When AL-BAHRI told BIN LADEN about the story of AL-EMERITI the Sheikh answered "may God forgive SAIF (AL-ADEL)". AL-BAHRI was upset because when he discussed the issue with BIN LADEN, the Sheikh claimed to be unaware and ignorant of the situation. AL-BAHRI advised BIN LADEN should be aware of the situation, as AL-ADEL would not make a decision to suspend AL-EMERITI without BIN LADEN's knowledge and prior approval.

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Another account involved ABU DAJANAH AL-SURI and ABU ISLAM AL-IRAQI. ABU DAJANAH AL-SURI was recruited at a hotel by the Emirate Intelligence Service (EIS) in United Arab Emirates(UAE). The individual who recruited him is known as AL-THAMARI, allegedly from Thamar, Yemen. AL-BAHRI described AL-THAMARI "works with or for the Emirate Intelligence". AL-BAHRI advised AL-THAMARI took AL-SURI to a well-recalled location where together they watched pornographic movies. Afterwards, a third individual joined them who is from the AL-QASIMI family, the ruling family in UAE. While inside the room, AL-QASIMI sodomized AL-SURI which was video recorded and eventually used to blackmail and recruit AL-SURI.

After his recruitment by the EIS, AL-SURI was instructed by EIS to travel and stay at the Kabul guesthouse and join the Arab Mujahidin. While in the guesthouse, with discussion with other brothers, an unidentified individual would be present with the brothers and would state: "stop talking nonsense", as instructed by EIS. That unnamed individual would be his contact in Afghanistan. AL-SURI complied with EIS instructions and subsequently contacted ABU ISLAM AL-IRAQI, an Iraqi Kurd who had been recruited by the United States in Northern Iraq.

AL-IRAQI had been in Afghanistan for a long period of time and was in charge of fixing the machinery and vehicles for the Taliban and Arab forces fighting against AHMAD SHAH MASOUD.

ABU HAFS AL-ARAB, an associate of SAIF AL-ADEL who was in charge of the Kabul guesthouse, was suspicious of AL-SURI and one day jokingly stated, "You are a spy." AL-SURI suddenly collapsed and told AL-ARAB, "I will tell you the truth." AL-SURI then confessed about AL-IRAQI. AL-IRAQI was then arrested and confessed on his American UN handler, who immediately fled Afghanistan after AL-IRAQI's arrest.

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AL-BAHRI recalled a third account from when he was previously in Qandahar. ABU ISLAM visited the guesthouse. AL-BAHRI was advised by some unidentified Iraqi Kurds and others that they were surprised to see ABU ISLAM in the guesthouse. The EMIR of the Iraqi Kurds brother told AL-BAHRI that the individual (ABU ISLAM) is a spy who worked for the United Nations and that they knew him from back home in Northern Iraq. AL-BAHRI relayed their concerns to ABDUL HADI AL-IRAQI who disregarded the incident and told AL-BAHRI "I won't think much of it, in Iraq if there are two people talking together one of them thinks the other is a spy." After ABU ISLAM's arrest, AL-BAHRI remembered the story of the Iraqi Kurds. AL-SURI and AL-IRAQI was interrogated by SAIF AL-ADEL and ABU HAFS AL-ARAB and subsequently sent to Qandahar where they were placed into the custody of the Taliban. AL-BAHRI advised the Taliban usually allows SAIF AL-ADEL to participate in interrogations involving matters related to Arab mujahidin and AL-QA'EDA security.

AL-BAHRI advised of another incident. Within a week after U.S. missile strike after the East African bombings, a jeep was suspiciously driving around the hospital in Khost, where [redacted] injured from the U.S. missile strikes were hospitalized. Two Egyptians, ABU TAREQ AL-SA'EDI and ABU HAMZA AL-[redacted] noticed the vehicle. ABU TAREQ and ABU HAMZA stopped the [redacted] and determined the driver was an Afghan and the passenger was an individual from Turkmenistan, who was born in Ta'ef, Saudi Arabia. After confronting the individuals, the Afghani driver immediately fled the scene while the two Egyptians "roughed-up" (physically) the passenger. Immediately after the first slap, the passenger admitted he worked for SALMAN BIN ABED AL-AZIZ, the Royal Amir of the city of Riyadh. The passenger stated SALMAN promised him [redacted] a Saudi citizenship if he assassinated BIN LADEN. After being interrogated by AL-ADEL, he was placed into the custody of the Taliban.

Another incident involved ABU AL-MUBTASEM AL-URDINI

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(the Jordanian), who traveled to Afghanistan in 1986, when he was about 17 years old. He fought at the front lines with ABU AL-HARETH AL-URDINI during the jihad against the Soviets. During the jihad against the Soviets, AL-MUBTASEM periodically resided at Al-ayen, Emirate in the UAE where he collected money during the Soviet jihad and provided it to ABU AL-HARETH and JALAL AL-DEEN HAQANI, one of the main mujahedin leaders during the Soviet jihad era. [illegible] spoke to him for a period of time (NFI) until he suddenly emerged in Afghanistan in 1998.

AL-MUBTASEM AL-URDINI traveled Afghanistan in 1998. AL-BAHRI stated he was talking about himself a lot which made him not liked by the brothers. [illegible] AL-MUBTASEM went back to Jordan to come back months later. When AL-MUBTASEM came back, he had money which he was giving to other Jordanians and was in possession of Hilwayat or sweets from very expensive stores in Jordan which made some brothers very suspicious. Additionally, AL-MUBTASEM's passport included a visa to enter Afghanistan as it was very suspicious to have an Afghani visa on his passport from his previous trip in 1998 and he was not arrested by the Jordanians. AL-BAHRI commented that ABDUL HADI AL-[illegible] was suspicious of AL-MUBTASEM AL-URDINI and told AL-BAHRI that AL-MUBTASEM AL-URDINI was a "spy".

[illegible] advised AL-MUBTASEM AL-URDINI was making a telephone call from a telephone-calling center in Kabul to his handler in Jordan. AL-MUBTASEM AL-URDINI was reporting on his progress advising his handler the details and progress of the operation. Unknown to AL-MUBTASEM Al-URDINI, in the adjacent partition, there were two EIJ operatives, ABU AL-SAMAH AL-MASRI and ABU AL-HASAN AL-MASRI, who were using the telephone. When AL-MUBTASEM AL-URDINI was leaving the telephone center, he saw the two Egyptians looking at him and he surmised they had heard his conversation. At this time, AL-MUBTASEM had to go back to the guesthouse in Kabul where he had previously surrendered his money and his passport, a standard practice by all those who reside at the guesthouse. The two

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Egyptians who overheard his conversation reported the incident to ABU MOHAMMED AL MASRI and SAIF AL-ADEL who were in Kabul. AL-MUBTASEM AL-URDINI was staying at the Kabul guesthouse and AL-BAHRI was the Emir of the guesthouse. ABU [redacted] AL-MASRI told AL-BAHRI when AL-MUBTASEM AL-URDINI [redacted] at the guesthouse "ask him to come in the office to see me." AL-BAHRI complied and ABU MOHAMMED AL-MASRI interrogated AL-MUBTASEM AL-URDINI who admitted working for the Jordanian intelligence. AL-MASRI advised AL-MUBTASEM AL-URDINI if his goal is to meet BIN LADEN, he will take him to see the Sheikh. AL-MASRI then transported AL-URDINI in the guesthouse vehicle to the training camp in Loghar.

Afterwards, SAIF AL-ADEL arrived at the guesthouse and instructed AL-BAHRI to take ABU [redacted] MOHAMAD SALAH, ABU MUS'AB AL-URDINI, ABU ASSIM AL-URDINI, MOHAMMED/AHMAD SALEM, in the pick-up truck to the Loghar Camp where ABU MOHAMMED AL-MASRI transported AL-URDINI. Upon their arrival, AL-MASRI was upset and advised AL-BAHRI "who told you to bring these guys here, these guys are criminals". AL-BAHRI responded SAIF AL-ADEL authorized the movement and he is following orders. ABU MOHAMMED AL-MASRI instructed no individuals to [redacted] with AL-MUBTASEM Al-URDINI and secreted him alone, in a room in the camp.

[redacted] DEL arrived, AL-MASRI spoke with SAIF AL-ADEL and told him these guys are criminals and reminded him how they beat the [redacted] in Peshawar" to death after they were suspicious of him being a spy, and also what happened to ABU AL-FARAJ Al-SHARQI's son and how they executed him with no right to do so.

AL-MASRI then advised AL-ADEL the best thing is to [redacted] MUBTASEM AL-URDINI to the Taliban because the least thing AL-QA'EDA wants is to be accused in taking law into their hands and interrogating suspects or killing them without the Taliban's knowledge. AL-ADEL agreed and they surrendered AL-MUBTASEM AL-URDINI to the Taliban in Qandahar.

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Three days after the incident, another Jordanian, known as ABU KHABAB, escaped from Afghanistan and traveled to Peshawar, Pakistan.

AL-MUBTASEM AL-URDINI advised the recruitment occurred by the Jordanian service approximately a year or two years, prior to his arrest.

The recruitment officers were two Jordanians known as ABU RA'AD and ABU ABEER. ABU RA'AD asked AL-MUBTASEM AL-URDINI for help in preforming exorcism on his cousin. AL-MUBTASEM AL-URDINI was unaware the cousin was actually a Jordanian Intelligence officer posing as ABU RA'AD's cousin.

While AL-MUBTASEM AL-URDINI was performing exorcism the woman (the cousin) seduced him and he had sexual intercourse with her. At this point, ABU RA'AD entered the room and appeared upset to observe AL-MUBTASEM AL-URDINI sleeping with his cousin and started to physically beat him. The police (Jordanian Intelligence officers) arrested him for what he did to ABU RA'AD's cousin. He was videotaped by hidden cameras in jail and again physically beat and sodomize him, an incident that was videotaped for the purpose of blackmail.

The Jordanian Intelligence requested the following from AL-MUBTASEM AL-URDINI:

1. Where is BIN LADEN?

2. Where is ABU HAFS AL-KABIR?

3. Does BIN LADEN have chemical laboratories?

4. What is the relationship between BIN LADEN and the Jordanians in Afghanistan?

5. Does BIN LADEN plan to strike any targets in Jordan during the millennium?

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6. Take any position of responsibility if offered any?

Upon the arrest of Al-MUBTASEM, ABU [redacted]RETH AL-URDINI interfered with JALAL AL-DEEN HAQANI, who [redacted] interceded with the Taliban regarding [redacted]-MUBTASEM [redacted]-BAHRI was upset with ABU AL-HARETH and asked him if he was interceding as a matter of nationalism and because he Jordanian. ABU AL-HARETH answered, "Y[redacted] Jordan there are tribes that can cause problems."

Taliban sentenced AL-MUBTASEM [redacted] to a jail sentence and AL-BAHRI believes AL-MUBTASEM [redacted]NI was released by MULLAH MOHAMMED OMAR [redacted] three months, due to the fact his mother traveled from Jordan and begged MULLAH OMAR for her son's release. AL-BAHRI believed OMAR released AL-MUBTASEM due to respect for the old [redacted] (AL-MUBTASEM AL-URDINI's mother). AL-BAHRI added one of the reasons OMAR released AL-MUBTASEM [redacted] also be contributed to the fact there is no rule in the Islamic Shari'a regarding spying.

AL-MUBTASEM is a Jordanian of Palestinian heritage and lives in a refugee camp in Amman, Jordan.

BIN LADEN AND HIS FAMILY

BIN LADEN has nine male children: ABDULLAH, MOHAMMAD, ABDUL RAHMAN, SA'EED, UTHMAN, OMAR, KHALID, HAMZA, and LADEN. With the exception of BIN LADEN's oldest son, ABDULLAH, all reside with BIN LADEN in Qandahar, Afghanistan. UBL's son ABDULLAH has not lived with his father since BIN LADEN departed Sudan in the mid 1990s. ABDULLAH currently resides with his uncles (NFI) in Saudi Arabia. AL-BAHRI believed BIN LADEN's son MOHAMMED is very similar to BIN LADEN [redacted]. AL-BAHRI stated that MOHAMMED is well respected among the brothers and he recently married ABU HAFS's daughter.

BIN LADEN's children live in the mosque and each of

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his older sons has a piece of land they farm to earn a living.

BIN LADEN has four wives, all of whom reside with him in Afghanistan. The wives are referred to as UMM ABDULLAH, a Syrian who is the mother of most of his children; UMM HAMZA from Saudi Arabia; UMM KHALID from Saudi Arabia; and a Yemeni woman (NFI) from Ibb, Yemen. Each wife occupies a separate apartment on the BIN LADEN compound in Qandahar, Afghanistan.

BIN LADEN is known to rise before dawn, pray at the mosque in the compound, and return to his home until the 0800-hour. At this time of the day he typically returns to the family apartments and spends time with his family and tends to their needs. He returns to the mosque for the Dhúha prayer (not required prayer) and then meets with his followers and addresses their needs and concerns. His daily routine includes appointments and other leadership matters (NFI). BIN LADEN usually dines at home unless he receives a guest, whereby a sheep is slaughtered and the meal is cooked in the main kitchen located in the compound and consumed at the hall of the compound.

AL-BAHRI advised Sheikh USAMA (BIN LADEN) always is "the first" on the front line and always "wishes for martyrdom." Al-BAHRI reported BIN LADEN graduated with a degree in Administration and Economics in Saudi Arabia. AL-BAHRI advised the Sheikh is approximately 46 years old.

AL-BAHRI stated "God chooses a Contractor (reference to BIN LADEN), and high school students to defend His religion in practicing jihad in Afghanistan against his enemies."

AL-BAHRI advised Sheikh BIN LADEN always carries his weapon with him, even while sleeping. He is in excellent health and he frequently plays soccer with his men. AL-BAHRI advised BIN LADEN is a very good soccer player and he usually scores. AL-BAHRI advise during soccer matches "everybody wants

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ABU ABDULLAH on their team because he scores goals." AL-BAHRI said the Sheikh is a good swimmer and a horse rider and enjoys participating in horse racing events.

BIN LADEN joked and told AL-BAHRI that he was living the "high life" for a mujahid. AL-BAHRI further described BIN LADEN as "very down to earth" and his house is "very [illegible] with not even a carpet on the floor."

BIN LADEN enjoys traveling to the desert and surrounding villages. AL-BAHRI recalled the Sheikh took the brothers (NFI) to the desert and presented them with a training session he called "Desert Fox", where BIN LADEN taught them how to maneuver at night in the desert. On one occasion during one very hot day, he also took them to the desert where he instructed them to run to the top of one hill in the hot sand and back. BIN LADEN ran with them until they reached the hill at which point BIN LADEN ran back along with the brothers to the start point. After returning to the starting point, BIN LADEN advised the exhausted [illegible] "your path is as difficult and hard [illegible] running [illegible] at the end as on the peak of the hill [illegible] conquering it, it is God's paradise.

BIN LADEN was problems with his larynx because he inhaled napalm during the Soviet Jihad, which is why he drinks lots of water during [illegible].

AL-BAHRI advised the Sheikh used to tell the brothers about his father. BIN LADEN stated his father was a poor immigrant from Yemen, but built one of the biggest construction companies in the Middle East. The father started by building a driveway for King ABED AL-AZIZ so the king could [illegible] room in his car. The King appreciated the good work of BIN LADEN's father and rewarded him with money and a truck. The father wrote on the truck the word BIN, and from that truck he built one of the biggest construction companies in the world. BIN LADEN also told AL-BAHRI that his father

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built the road of AL-HUDA, one of the biggest roads in SAUDI ARABIA.

BIN LADEN was visited once by his mother from Ghahar. Accompanying the mother was his maternal brother who is about 26-27 years old.

AL-BAHRI predicted that Taliban will never surrender BIN LADEN. MULLAH OMAR once said "only if the whole country of Afghanistan was burned and every Afghan was killed, then we will be excused to surrender a Muslim to the infidels." AL-BAHRI stated the former Foreign Minister of Afghanistan, MULLAH JALLIL, once told BIN LADEN "our protection to you is a matter of religious duty."

AL-BAHRI stated that MULLAH AHMAD MUTAWEKEL, the Taliban Foreign minister does not like BIN LADEN however MUTAWEKEL cannot "do much" because of MULLAH OMAR's support to BIN LADEN.

AL-BAHRI advised that various Islamic groups unified their efforts under the leadership of BIN LADEN by forming the INTERNATIONAL ISLAMIC FRONT. The FRONT included Arab and non-Arab organizations such as EIJ, Islamic Gama'at, and other Pakistani and non-Arab groups.

AL-BAHRI stated "the reason of such attacks (9-11-2001) and the reason of you (pointing at the investigating Agents) presence here is the American foreign policies, the reason is your occupation of the Arabian Peninsula, the continuous blockade and attacks on Iraq, and the support of Israel in killing and occupaying the Palestinians." AL-BAHRI continued "for every action there is a reaction." He added the war did not start yet and if we can hit more we will."

AL-BAHRI predicted if the United States hit Afghanistan "mujahidin will rebel with operations inside America itself."

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AL-BAHRI claimed no knowledge of the group that might be behind the September 11 attacks. He doubted it was BIN LADEN's group. When some of the suicide bombers identified as KHALID AL-MIHDHAR, MOHAMMED ATTA, MARWAN AL-SHEHHI, were revealed to AL-BAHRI, AL-BAHRI responded, "I am shocked, I know these guys, they are the BIN LADEN's supporters, we use to hang-out" together, I do not know what to say." (AL-BAHRI previously had identified the photographs of the above individuals as associates of BIN LADEN. However, he was not aware of the reason the photographs were being shown to him).

AL-BAHRI advised he is against the recent terrorist attacks (September 11). He added he believes in confrontation; however, "not things like this where civilians are killed." He added: "Please tell my honest condolences to the American people from a terrorist who one day used to be with USAMA BIN LADEN."

AL-QA'EDA WEAPONRY

AL-BAHRI provided the following are various infantry weapons currently in use in Afghanistan by the Taliban and/or Al-QA'EDA Afghan-Arab fighters associated with USAMA BIN LADEN.

1. Sub-Machine Guns

a. Sub-machine guns: 5.45mm AKSU-74 sub-machine gun, referred to as KLINKOV" (ph). This is the personal weapon of BIN LADEN allegedly acquired from a Russian officer he killed during a battle in Afghanistan.

b. HK MP-5 9mm, referred to as the "MP-5" possessed only by [illegible].

c. UZI 9mm, possessed solely by Al-QA'EDA.

2. Rifles

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a. AK family of rifle, referred to by Al-QA'EDA associates as "ALY" (arabic for automatic), and also referred to as "KALASHNIKOV."

b. 7.62mm DRAGUNOV sniper rifle, referred to as "DRAGUNOV." Also existent in Afghanistan in a newer version having a folding stock. This weapon takes the same caliber round as the PK.

c. 7.62mm HK G-3, commonly referred to as the "G3."

d. 5.56mm M-16 rifle.

e. .50 cal. BARRETT sniper rifle, called the "American sniper." Al-QA'EDA has a number of these weapons in its inventory. The Taliban does not have this weapon. It fires a similar round as the 12.7mm "DUSHKA." During a battle between AL-QA'EDA and the northern alliance forces of AHMAD SHAH MASOUD, two of these sniper rifles were captured by the MASOUD forces.

f. Grenade launcher, referred to as "TRAMBLON." Al-QA'EDA developed a system whereby a standard hand grenade is mounted on the end of an AK-47 and a blank round is fired. The grenade is propelled up to 300m. This technique is called "KASAT AL-GRANADA" (Arabic for mug of grenades).

g. 30mm automatic grenade launcher, referred to in Afghanistan as "[illegible]GUACK." Known among Al-QA'EDA associates as particularly effective weapon. (AL-BAHRI indicated the AGS-17 may also be found in Afghanistan.) Al-QA'EDA fighters discussed loading up to 75 rounds.

h. 40mm BG-15 rifle mounted grenade launcher, mounted on the AK-47.

3. Light support weapons

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a. LACROIX grapnel launcher, referred to as "THOU'BAN" (Arabic for snake). This system is used to clear a path in minefields. It is in the inventory of both the Taliban and Al-QA'EDA.

b. 122m support rocket launcher, the "KATYUSHA".

c. 40mm ARMSCOR MGL 6 shot grenade launcher, referred to as "nitroglycerine." AL-BAHRI advised this system was widely used in Bosnia among the "Mujahidin battalions" [Katibat Al-Mujahedin], but not observed in Afghanistan.

d. M2A1-7 portable flame thrower, referred to as "al-tanin" (Arabic for "dragon"). Both Al-QA'EDA and the Taliban own this system; however, only Al-QA'EDA uses it because the Afghanis are fearful of fire.

4. Crew served weapons

a. 7.62mm type 59 machine gun, referred to as "BK" (Note: actually the PK version of the PK as the letter "p" does not exist in Arabic). Possessed by both Al-QA'EDA and the Taliban.

b. 12.7mm type 77 anti-aircraft machine gun, referred to as "12.7." Possessed solely by Al-QA'EDA.

c. 14.5mm KPV 14.5-1 anti-aircraft machine gun, referred to as "MIM TA" (Arabic acronym for mudhadh ta'erat - anti-aircraft) and "ZURIK" (NFI). This weapon is in the inventory of Al-QA'EDA and the Taliban.

d. 7.62mm SQM medium machine gun, referred to as "DUSKA machine gun." Al-QA'EDA and the Taliban possess the newer version of this weapon.

e. 7.62mm RPK light machine gun, Al-QA'EDA uses the 75 round drum with this system.

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f. 7.62mm PKM and PKB light machine gun, used by both Al-QA'EDA and the Taliban. (The PKM was previously identified as the 7.62mm type 80 machine gun.) The Taliban and Al-QA'EDA use both the standard and the armor piercing rounds.

g. 14.5mm KPV heavy machine gun, referred to as "DSHK TA" (anti-aircraft).

5. Anti-Tank Weapons

a. RPG-7 portable rocket launcher, used widely by both AL QA'EDA and the Taliban.

b. RPG-18 light anti-armor weapon: this system is used solely by AL-QA'EDA. AL-QA'EDA also uses a US version of this system, the M-72 light anti-tank weapon (LAW).

c. SAGGER anti-tank guided missile, referred to as "SAQR" (Arabic for "hawk"). This system is usually mounted on a tank.

d. ERYX short range anti-tank missile, referred to as "ERYX." Used for anti-tank, anti-fortification, and anti-vehicular targets. Known within AL-QA'EDA as small but effective.

e. Milan portable anti-tank weapon: only AL-QA'EDA fighters use this and other anti-tank weapons systems against the SHAH MASOUD forces (SHAH MASOUD also use this weapon system). It is known among AL-QA'EDA that the SHAH MASOUD forces therefore do not direct tank and armor assets against the Afghan-Arab AL-QA'EDA fighters. The trainers for the weapon system among the AL-QA'EDA are ABU TAREQ AL-TUNSI and MUHAMMED AL-HABIB. These two trainers also provide instruction on the STINGER missiles. The training is conducted in the instructors' houses. Both instructors live in the BIN LADEN's compound in Qandahar, Afghanistan.

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f. RBS 56 bill medium range anti-tank system, similar to the RBO system by AL-QA'EDA.

g. Law 80 light anti-tank weapon system, referred to as the "LAW." There are few (NFI) LAW 80 in Afghanistan and are only used for training.

h. 64mm RBR M80 LAW, used solely by AL-QA'EDA.

i. 90mm M79 rocket launcher, used by the Taliban.

j. 9M14P1 anti-tank guided missile, similar to SAGGER.

6. Mortars: The Taliban have in its inventory 45mm to 240mm mortar systems. AL-QA'EDA possesses 45mm to 120mm mortar systems to include various armored mortar carriers.

7. Hand Grenades:

a. AL-QA'EDA and the Taliban have in their inventory numerous types of Pakistan manufactured hand grenades. There are also "small" [illegible] hand grenades that detonate upon impact.

b. [illegible]-tank grenade, this is a Chinese manufactured grenade employing a parachute which allows it to drop on the top of a tank. It is in the AL-QA'EDA and Taliban inventories.

8. Pyrotechnics: comet white parachute signal rockets which employ a trip wire in conjunction with the rocket to act as an early warning system, used by AL-QA'EDA.

9. Cluster Bombs: The Taliban have in their munitions depots cluster bombs. The cluster bombs were previously delivered on opposition targets via aircraft (NFI) but now the devices are launched from probable artillery. AL-BAHRI was

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uncertain of the exact method the Taliban employs to deliver the cluster bombs, however he stated that the Taliban once used aircrafts to launch cluster bombs against [illegible] troops of SHAH MASOUD.

AL-BAHRI provided a listing of the various air defense weapons systems currently in Afghanistan in the possession of the Taliban and/or AL-QA'EDA/Afghan-Arab fighters.

1. Man Portable SAM Systems:

a. "AL-RBO" and "AL-RBS" (RPS 70 low altitude surface-to-air missile system), both AL-QA'EDA and Taliban possess this system in various locations in Afghanistan.

b. Shorts blowpipe SAM system. AL-QA'EDA refers to this system as "blops" and uses it for both anti-aircraft and anti-personnel. It is located in Qandahar; however, its presence in Kabul cannot be ruled out. The Taliban is not known to have in its possession.

c. SA-7a and SA-7b (GRAIL) the "STRELLA" is seen "throughout in Afghanistan" and is in the stores of AL-QA'EDA and the Taliban. USAMA BIN LADEN's personal security have the SA-7a and SA-7b among their inventory of weapons. Al-BAHRI, after viewing photographs of the SA-7, SA-14 and SA-16, advised of seeing only the SA-7s in Afghanistan.

d. Stinger [illegible] stinger missiles are stored in the JIHADWOL camp; however, there is a general awareness among AL-QA'EDA associates regarding the shortage of batteries for the system. BIN LADEN's personal security unit is said to have this weapon in their inventory. Al-BAHRI has not personally observed this weapon in Afghanistan.

2. Self-Propelled Anti-Aircraft Systems: there are "numerous" types of self-propelled anti-aircraft systems throughout Afghanistan. The following represent the most

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commonly observed in Afghanistan:

a. A system "similar" (in appearance) to the NORINCO PL-9 low altitude SAM system. It is possessed solely by the Taliban and has been observed in Kabul and Qandahar.

b. ZIL 136 vehicles with mounted SA-6 (GAINFUL) missiles, in the stores of the Taliban and left over from the "communist regime." Locations, operational readiness and degree of proficiency unknown.

c. SA-10 (GRUMBLE), possessed by the Taliban and observed in Kabul, Afghanistan. These weapons were acquired after the Taliban occupied Mazar-e Sharif, Afghanistan, in August 1998. It is known among Taliban and AL-QA'EDA associates that the Russians provided this SAM system to General DUSTUM (Field Comment: opposition forces to the Taliban). Readiness and proficiency unknown.

d. SA-11 (GADFLY) observed in Kabul and possessed solely by the Taliban. This weapon was seized after the Taliban occupied Mazar-e Sharif. Readiness and proficiency unknown.

e. [illegible] (GLADIATOR): the Taliban acquired this system during the occupation of Mazar-e Sharif.

3. Towed Anti-aircraft (AA) Guns: there are numerous systems observed throughout Afghanistan.

a. NORINCO 12.7 mm (quad) AA gun, referred to as "dushka mashawir." This system has a night scope and is used in Afghanistan for both AA and anti-personnel targets. Widely used by the Taliban and Afghan-Arab fighters.

b. NORINCO 25mm light AA gun, referred to as "shilka," this weapon is possessed by both the Taliban and AL-QA'EDA. AL-QA'EDA has this system among its inventory in Qandahar.

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c. Quad 12.7mm anti-aircraft machine gun, in the possession of the Taliban, both Russian and Chinese versions, and placed around the Qandahar airport.

4. *Static and towed SAM's:*

a. SA-3 (GOA) mounted on a ZIL [illegible]. The Taliban [illegible] this weapon system upon its occupation [illegible] Mazar-e Sharif. It has been observed in "parade formation" in Qandahar during Taliban "display(s) of strength." Operational readiness unknown.

b. SA-5 (GAMMON) Al-BAHRI has observed missiles similar in appearance in Qandahar; however, Al-BAHRI is uncertain if the SA-5 is actually present in Afghanistan.

c. SA-2 (GUIDELINE). Al-BAHRI has "heard about" the SA-2 presence in Afghanistan, but has not observed same.

5. Radars:

a. Observed in areas of Jalalabar, Khost, Qandahar and Kabul. Systems similar in appearance to the (German manufactured) 4 meter telescopic mast antennae mounted on trucks.

b. Missile with radars (turning) in an operational mode are often seen in the Kabul and Qandahar areas. AL-BAHRI is otherwise unfamiliar with radars and electronic systems associated with AAA and SAM systems.)

AL-BAHRI advised there is a seven (7) kilometer tunnel in a mountain in the vicinity of SHARSIAB Camp (Kabul area) in which large quantities of munitions and equipment are stored. Trucks routinely travel into this tunnel to deliver these munitions.

AL-BAHRI advised Afghani fighters have shown fear when

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confronted with land mines, hand grenades and flame-throwers. Arab Mujahidin in Afghanistan, conversely, express no such fear. Taliban fighters have a great fear of burning to death. The fear of death by fire is a generations-old superstition in Afghanistan. The Arab mujahidin use this factor to their advantage in engagements with the Northern Alliance forces of AHMAD SHAH MASOUD, when simply producing a flame-thrower causes the MASOUD forces to retreat. The Taliban fighters, however, also express the same fear of fire.

AL-BAHRI advised that in contrast, the Arab Mujahidin in Afghanistan do not exhibit a specific, inherent fear of fire. AL-QA'EDA associates derisively refer to the Afghanis' fear of fire, particularly since it impedes the Taliban's ability in battle.

AL-BAHRI stated there is no indication of discussion, knowledge or operations among BIN LADEN or AL-QA'EDA associates of activities regarding chemical, nuclear or biological weapons. However, there is a general awareness among BIN LADEN's top deputies and the mujahidin at large of the existence and location of a nuclear facility in Turkmenistan near the border with Afghanistan, in the city of Ashkhabad. It is also commonly mentioned among AL-QA'EDA associates that there is a nuclear missile base in Turkmenistan near the border with northern Afghanistan (NFI). AL-BAHRI speculated parenthetically, added," imagine if the Taliban suddenly secure that base, everything will be different."

AL-BAHRI advised within the last two years, BIN LADEN has been heard in Jalalabad, Afghanistan, stating to his followers that (persons) should have the right to own such (nuclear) weapons in order to defend themselves against the enemy."

TRAINING FACILITIES

AL-BAHRI advised that AL-FAROUQ camp is currently located

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in Helmand. The camp is located 3-4 hours out of Qandahar towards Helmand and Herat. The camp offers various military training. The main trainers in the camp are: HUSSAM AL-DEEN AL-HIMYARI, HAMZA AL-DUSI, ABU AL-TAYEB AL-[illegible]EZI, [illegible]ALHA.

AL-BAHRI advised when the trainees arrive in [illegible]stan, they go through an introductory orientation in the guesthouse. the orientation in usually given by the Amir of Public Relations of the guesthouse. The Amir emphasizes to the new trainees the importance of patience and the heavenly rewards bestowed on those who be patient and disciplined during training. The Amir stresses the importance of morals and Islamic behaviors.

After the guesthouse, the trainees depart to training camps. Initially they go through a [illegible] practical course in discipline, administrative issues, and military formations.

Then the trainees subsequently proceed to the following training courses: light weapons training course, artillery training course which include howitzers and 82mm guns, anti aircraft weapons, topography, first aid, basic explosives. After the trainees finish the above courses, then they advance to a course in guerrilla warfare tactics.

Finally, concluding the training session, the trainees conduct a military training exercise where they attack imaginative targets. During this exercise the trainees use all the techniques and the weapons they studied during the training session.

AL-BAHRI advised some trainees are selected, because of their dedication, morals and discipline, to attend advanced specialized training. AL-BAHRI stated SAIF AL-ADEL gives, for example, an advanced security session in Kabul. The session is to teach trainees the methods of selecting a target for a military (terrorist) operation, gathering information on the target, taking photographs, and evaluate the target for

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the upcoming military operation. AL-BAHRI advised SAIF AL-ADEL personally select the trainees in this course.

AL-BAHRI advised that others also provide advanced and specialized training. For instance YAQOUB (HARUN) provides close combat, hand guns, and Klashinkovs. Also, YAQOUB conducts secret training that nobody knows its contents and it is provided only on need-to-know basis. AL-BAHRI advised that usually these trainees, 3-4 people, stay with YAQOUB daily and until the training session is over from morning to late afternoon. AL-BAHRI advised ABU YAHYA AL-LIBI assists YAQOUB with the training.

ABED AL-WAKEEL also instructs selected trainees on city warfare and sabotage. He conducts this training in the FAROOQ CAMP.

Special training in artillery is provided by an Afghani known as MU'ALEM ABDULLAH (Mr. ABDULLAH). The sessions are also given in AL-FAROOQ CAMP.

AL-BAHRI advised there are three AL-QA'EDA associates who provide "special training" from their residences in the main BIN LADEN compound in Kandahar, Afghanistan:

ABU TH[illegible]L-TUNISI and ABU KHALID AL-HABIB are instructors in electronic circuits for explosives, SA-7 and STINGER surface-to-air missile systems, and the MILAN anti-tank missile. ABU [illegible] RAHMAN AL-MUHAJIR is a master bomb maker and explosives expert who instructs in the construction of explosive devices.

AL-BAHRI opined all trainees must have "specific and direct instructions" from BIN LADEN prior to being approved [illegible] from the three home-based specialists.

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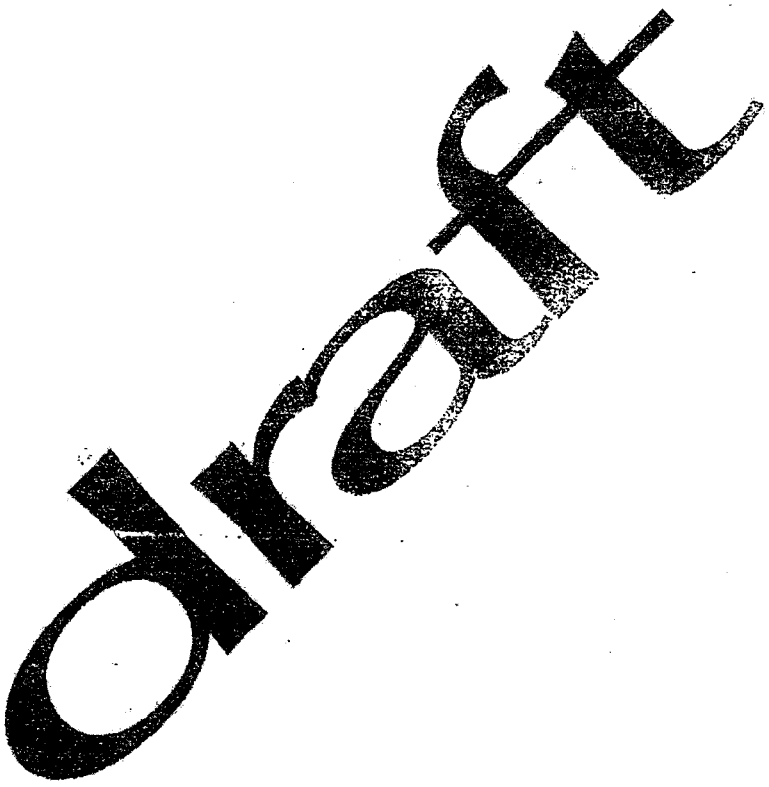

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Document Production for:
Senator Sheldon Whitehouse, Chairman
Subcommittee on Administrative Oversight and the
Courts of the Committee on the Judiciary

Subject: Nasser Ahmad Nasser Al-Bahri
a.k.a. Abu Jandal

10/18/2001 Interview

Office of Congressional Affairs
Federal Bureau of Investigation
5/7/2009

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FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 10/22/2001

NASSER AHMAD NASSER AL-BAHRI, a.k.a. ABU JANDAL, a.k.a. ABU JANDAL AL-JADAWI, a.k.a. ABU JANDAL AL-YEMENI, a.k.a. ABU JANDAL AL-GHARBI, a.k.a. ABU HABIB, a Yemeni citizen born in Jeddah, Saudi Arabia in 1973 was interviewed in the presence of

Special Agent an (FBI), Special Agent (FBI), and Special Agent Naval Criminal Investigative Service (NCIS).

AL-BAHRI was advised of his rights as set forth in FD-395.1 (Arabic version). AL-BAHRI verball waived his rights, but refused to sign the form and thereafter provided the following information.

AL- BAHRI advised that HASSAN AL-KHAMIRI was released from jail around February 2000 after being arrested during the Bayt HABRA incident in May 1999.

AL-KHAMIRI, NIBRAS and AL-BATAR met AL-BAHRI at the airport in Sana'a, Yemen. AL-BAHRI was visiting Yemen to pay the dowry for USAMA BIN LADEN's (UBL) Yemeni wife. AL-BAHRI stayed at the Al-Lewa'a Al-Akhdhar hotel, Ta'ez street, Sana'a, Yemen. Two days after AL-BAHRI's arrival to Yemen, he began arranging for his return to Afghanistan.

AL-KHAMIRI told AL-BAHRI that he used to visit the brothers in prison especially KHALLAD's brother ABD AL-AZIZ BIN ATTASH. Approximately four days after AL-BAHRI's arrival to Yemen, AL-KHAMIRI advised him that he has to take care of some business. AL-BAHRI was not aware of the nature of the business. AL-BAHRI did not see AL-KHAMIRI again. AL-BAHRI advised, he stayed in Yemen approximately two months but only saw AL-KHAMIRI several times during the first 10 days. AL-BAHRI does not believe AL-KHAMIRI went to Afghanistan at that time period, since AL-BAHRI was not told by AL-KHAMIRI nor by anybody else that AL-KHAMIRI was going to Afghanistan.

Investigation on 10/18/01 at Sana'a, Yemen

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by (NCIS)

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Continuation of FD-302 of Nasser Al-Bahri, On 10/18/01, Page 2

AL-KHAMIRI used to speak with AL-BAHRI about marriage, and AL-BAHRI felt that it would be a good idea for AL-KHAMIRI to get married since AL-BAHRI felt that AL-KHAMIRI was very emotional after he was jailed in the BAYT HABRA incident. AL-KHAMIRI used to speak about some of the brothers in prison and how every one is acting independently, and that there are no organization among them. AL-KHAMIRI felt if any of the brothers committed a terrorist act in Yemen without any direction, the act will affect brothers who are not imprisoned. AL-KHAMIRI used to tell AL-BAHRI about all the religious and ideological arguments he (AL-KHAMIRI) had with AKRAMA while in jail. AL-BAHRI advised to his knowledge, AL-KHAMIRI never gave Bayat to BIN LADEN. AL-BAHRI stated AL-KHAMIRI first attended military training in Bosnia and then he had additional training at AL-FAROUQ camp in Afghanistan.

AL-BAHRI stated that BIN LADEN opposed the ABU AL-HASAN AL-MIHADAR incident in 1998, because according to BIN LADEN, AL-MIHDAR was acting alone without direction or coordination.

AL-BAHRI stated that during BIN LADEN's interview with Al-Jazira Channel in 1998, BIN LADEN publicly gave Bayat to the Taliban. AL-BAHRI advised that BIN LADEN originally gave Bayat to the Taliban in 1997.

After the BIN LADEN's Bayat to Taliban, AL-BAHRI decided to return to Yemen in order to get married and start a family. AL-BAHRI stayed in Yemen until he was arrested during the Bayt HABRA incident where he then returned to Afghanistan. AL-BAHRI stated that BIN LADEN was concerned about the Bayt HABRA arrests and asked AL-BAHRI if the arrests were as a result of the Yemeni government's crack down on Islamists in Yemen. AL-BAHRI advised BIN LADEN that the arrests were nothing but against a group of brothers who decided to steal in order to make some money. BIN LADEN was relieved after he heard that the arrests were not based on the Yemeni government cracking down on Islamists, stating that the "ship of ALI ABDALLAH SALEH is the only ship we have."

AL-BAHRI advised that ABU ANAS AL-TAEZI was very much affected by the five booklets written by ABU MUSAB AL-SURI. The five booklets are:

1. Afghanistan and the Taliban
2. Republics of Central Asia
3. Republic of Qafqaz (Caucausus)
4. Damascus and Palestine

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FD-302a (Rev. 10-6-95)

265A-NY-200350

Continuation of FD-302 of Nasser Al-Bahri, On 10/18/01, Page 3

5. The obligation of Yemen towards Muslims in the world.

ABU ANAS was trained at the GHORABA'A CAMP that belongs to ABU MUSAB.

AL-BAHRI advised that towards the end of 1999, AL-TAEZI stated in front of BIN LADEN that they should revenge the execution of ABU HASAN AL-MIHDAR by the Yemeni government. BIN LADEN was very upset with AL-TAEZI and his thoughts. AL-BAHRI advised that KHAYTHAMA and SHEHAB AL-DIN are also affected by ABU MUSAB's booklets. KHAYTHAMA trained for one year and five months at Khaldan camp and studied for a year at the Al-Iman center in Khaldan.

AL-BAHRI stated during the Northern Group (NG) visit to BIN LADEN in 1996, BIN LADEN did not appear to treat FAROUQ AL-MAKI (NASHIRI) any different from the other brothers. AL-MAKI used to visit BIN LADEN regularly, however the meetings only lasted several minutes. AL-BAHRI believes that AL-MAKI may acted as a messenger for BIN LADEN. AL-BAHRI advised that on the other hand, KHALLAD used to stay in the meetings with BIN LADEN for a long time.

AL-BAHRI advised ABU OBEIDA AL-MAKI had a "close relationship" with FAROUQ. AL-BAHRI heard ABU OBEIDA call FAROUQ by the name of BULBUL (nickname for BILAL). ABU OBEIDA and FAROUQ had a special relationship. ABU OBEIDA listened to anything FAROUQ said to him and always obeyed him.

AL-BAHRI advised that BIN LADEN treated AL-QAEDA members and non AL-QAEDA members the same. AL-BAHRI stated only AL-QAEDA members would possibly know who are the other AL-QAEDA members.

AL-BAHRI explained that his relationship with MUTHANA AL-JADDAWI is superficial. AL-BAHRI advised that MUTHANA came to Bosnia towards the end of the war and stayed there after most of the Arabs left. AL-BAHRI advised that MUTHANA knows the Holly Quran by heart, and to his knowledge, MUTHANA did not go to Afghanistan.

AL-BAHRI advised he heard of SULIMAN ABU GEITH but never met him. AL-BAHRI knows that ABU GEITH is in Kuwait and that he made a tape called Kalimat Haq or Al-Jabal Al-Asham to defend BIN LADEN.

AL-BAHRI advised that he had heard some Anti Tank and Anti Aircraft missile were smuggled to Saudi Arabia, but AL-BAHRI does not know who planned the operation nor does he know the individuals who smuggled the missile into the Kingdom.

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FD-302a (Rev. 10-6-95)

265A-NY-280350

Continuation of FD-302 of Nasser Al-Bahri, On 10/18/01, Page 4

AL-BAHRI stated he knew SALEM AL-SHARIF from Bosnia. AL-SHARIF acts on his own and does not listen to anybody. He is a Saudi from Mekka. He trained in the Khaldan camp and fought at the front lines in Kabul. AL-SHARIF has been inside the compound in Kandahar since 1998 and he is not married.

AL-BAHRI advised he knows ABU AL-DHAHAK as a person who was in charge of the Babi guest house belonging to IBN AL-KHATTAB. He is a Yemeni approximately 33 years of age and married. He lives with his family in Kandahar.

AL-BAHRI had heard that ABU SALEH is a facilitator for brothers to travel to Afghanistan. AL-BAHRI does not know where ABU SALEH get his funds, however ABU SALEH travels often to Saudi Arabia. AL-BAHRI heard that ABU SALEH was imprisoned in Saudi Arabia after he returned from Bosnia, but AL-BAHRI did not know the reason. AL-BAHRI advised that ABU SALEH trained at the Khaldan camp for six months in 1996. AL- BAHRI advised that ABU SALEH, ABU AL-KHULOUD and HUSAM AL-DIN, are all married to BASHIR AL-SHADADI's sisters and are currently in Afghanistan.

AL-BAHRI advised he had met DEIF ALLAH AL-QATARI three times. AL-BAHRI met AL-QATARI while he (AL-BAHRI) was being treated in Kandahar in 1999. AL-QATARI and AL-BAHRI met again in Kabul while fighting at the front line, and AL-BAHRI advised that AL-QATARI is an expert in Rocket Propelled Grenades (RPG). AL-BAHRI and AL-QATARI attended a special training session in 1999. AL-BAHRI and AL-QATARI did not finish the training session. AL-QATARI left to Jalalabad, then to Peshawar Pakistan. AL-BAHRI witnessed AL-QATARI, clean shaven, accompanying KHALLAD to a private meeting with BIN LADEN in late December 1999 in Khandahar. After this meeting both AL-QATARI and KHALLAD disappeared.

AL-BAHRI advised he later met AL-QATARI in the summer of 2000 in Sana'a. AL-QATARI was in the company of ABU AL-ZUBEIR, a BIN LADEN personal bodyguard. AL-BAHRI invited AL-QATARI and AL-ZUBEIR to his house in Yemen for lunch. AL-BAHRI advised that there was no pertinent discussions during the luncheon.

AL-BAHRI advised there was some type of operation execution training in which the trainees learned how to hijack airplanes and also learned assassination techniques. AL-BAHRI explained that once they build a skeleton of a base behind the Khaldan camp, and they raised an American flag on one of the buildings. The trainees were to imagine that the base is an American base , attack it and take it over.

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FD-302a (Rev. 10-6-95)

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Continuation of FD-302 of Nasser Al-Bahri, On 10/18/01, Page 5

AL-BAHRI advised that BIN LADEN used to induce the brothers against America. AL-BAHRI stated he was present during these discussions. AL-BAHRI advised he used to explain the cause of BIN LADEN inducing the brothers against America and advocating jihad. AL-BAHRI also used to explain to the brothers on behalf of BIN LADEN that they will be better fighters against the Americans if they fought along side the Taliban at the front lines first.

AL-BAHRI explained that he had asked BIN LADEN's permission to become a suicide martyr against American interests six months prior to the East Africa Embassy bombings. BIN LADEN advised AL-BAHRI to wait and be patient. AL-BAHRI did not have prior knowledge of any plans to target the U.S. Embassies in East Africa. AL-BAHRI stated that after the bombings of the Embassies in East Africa, many brothers were ready to carry-out suicide missions.

AL-BAHRI stated that after his wife delivered his son HABIB, BIN LADEN was the first to feed the new born, even before his mother. AL-BAHRI stated that SAQR AL-JADDAWI took AL-BAHRI's son in his arms and went to BIN LADEN's residence. BIN LADEN chewed some dates and placed it in the mouth of the child. BIN LADEN also called the prayer in both ears of AL-BAHRI's son.

AL-BAHRI advised that when he decided to leave Afghanistan and return to Yemen, ABU MOHAMAD AL-MASRI advised him "if you think by leaving Afghanistan they will leave you alone (Americans), you are wrong. This a war, either we will win or die and there is no place for returning back." AL-BAHRI advised that AL-MASRI was right in his statement because now AL-BAHRI is incarcerated in Yemen and being questioned by the United States.

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Document Production for:
Senator Sheldon Whitehouse, Chairman
Subcommittee on Administrative Oversight and the
Courts of the Committee on the Judiciary

Subject: Nasser Ahmad Nasser Al-Bahri a.k.a. Abu Jandal

11/7/2001 Interview

Office of Congressional Affairs
Federal Bureau of Investigation
5/7/2009

UNCLASSIFIED

11/07/2001

NASSER AHMAD NASSER AL-BAHRI, a.k.a. ABU JANDAL, a.k.a. ABU JANDAL AL-JADAWI, a.k.a. ABU JANDAL AL-YEMENI, a.k.a. ABU JANDAL AL-GHARBI, a.k.a. ABU HABIB, a Yemeni citizen born in Jeddah, Saudi Arabia in 1973 was interviewed in the presence of

Special Agent (FBI), Special Agent (FBI), and Special Agent Naval Criminal Investigative Service (NCIS).

NASSER AL-BAHRI, henceforth referred to as AL-BAHRI, is incarcerated in Yemen. After being advised of the identity of the interviewing Agents, AL-BAHRI was reminded that he still has the same rights as set forth in the document that was provided and explained to him during previous interviews. AL-BAHRI acknowledged that fact and agreed to cooperate with the interviewing agents. AL-BAHRI thereafter provided the following information during an interview that was conducted in Arabic.

AL-BAHRI advised he first met ABED AL-AZIZ in Bosnia, during the Bosnian Jihad. ABED AL-AZIZ was known by the alias ABED AL-RAHIM AL-JANOUBI, and at one time worked in the kitchen as a cook for the "brothers". Later, he changed his alias to ABED AL-AZIZ AL-MAKI after arriving in Afghanistan. After the peace accord (Dayton), ABED AL-AZIZ traveled to Saudi Arabia with other Saudi "brothers", meanwhile AL-BAHRI returned to Yemen. ABED AL-AZIZ stayed in Bosnia for eight months.

AL-BAHRI advised AL-JANOUBI gave him his name and telephone number in Saudi Arabia before he departed from Bosnia. AL-BAHRI stated he does not recall the name AL-JANOUBI gave him, however he remembered the telephone number was of a cement factory in Jizan, southern Saudi Arabia, with an extension to the residence of AL-JANOUBI's parents.

AL-BAHRI stated he then encountered ABED AL-AZIZ in the Jihad Wal Camp in Afghanistan. In Jihad Wal AL-JANOUBI changed his alias to ABED AL-AZIZ. AL-BAHRI advised ABED AL-AZIZ participated in fighting with the Taliban, against the Masoud troops at the front line in Kabul.

After a major offensive by Masoud against the Taliban, where KHALLAD was injured, ABED AL-AZIZ departed Afghanistan in early 1997 to Yemen, where he got married with SINAN AL-MAKI, to two of AHMED AL-HADA's daughters. AL-BAHRI advised AL-HADA's son, ABU JAFAR AL-YEMENI, arranged for the marriage back in Afghanistan. ABU JAFAR was later killed in Afghanistan. AL-BAHRI stated ABED AL-AZIZ remained outside of Afghanistan until approximately one week prior to the U.S. missile attacks in retaliation for the U.S. Embassy bombings in East Africa, when he came back with his wife. AL-BAHRI recalled ABED AL-AZIZ returned

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in mid August and stayed in Qandahar for a while.

AL-BAHRI advised ABED AL-AZIZ is an Al Qa'eda member and pledged bay'at to BIN LADEN. ABED AL-AZIZ was a trainer at the Loghar training camp were he provided basic training to recruits. He resided in Kabul, with his wife, and while in Kabul he had a daughter. While in Kabul, AHMED AL-HADA visited them prior to the birth of his daughter. AL-BAHRI was unaware if AL-HADA stayed in Kabul until after the birth of his granddaughter. AL-BAHRI advised AL-HADA went for training in the Loghar Camp in Afghanistan in 1999, he was dispatched to the front line for fighting against Masoud; however, because of his age the "brothers" kept him in the rear next to the artillery. After the training AL-HADA attended a dinner party in the BIN LADEN Qandahar compound where BIN LADEN recognized AL-HADA and seated him on his right side for the duration of the dinner.

After the Loghar Camp was moved to Kabul and then to Qandahar, ABED AL-AZIZ was "excused" of training by the leadership and he moved down to Qandahar where he resided at the Qandahar Compound.

AL-BAHRI advised ABED AL-AZIZ is a very sensitive and emotional individual, and is easily offended by "simple words." AL-BAHRI advised "even KHALLAD use to ask me (AL-BAHRI) to put some sense into him (ABED AL-AZIZ)." AL-BAHRI advised ABED AL-AZIZ has a close relationship with ABED AL-MAJID AL-TABOUKI, who is married to the daughter of ABU ASSEM AL-MAGHRIBI. ABU ASSEM is in-charge of the BIN LADEN security detail. AL-TABOUKI resides with his family in Afghanistan. AL-BAHRI stated ABU ASSEM has two other daughters, the oldest was married to ABU ATA AL-TUNISI; however, after his death she got married to ABU KHUBAIB AL-SUDANI. The other daughter is married to ABU AL-FARAJ AL-LIBI. AL-BAHRI advised ABU KHUBAIB AL-SUDANI, ABU AL-FARAJ AL-LIBI and ABD AL-MAJID AL-TABOUKI are all AL-Qa'eda members. AL-BAHRI stated ABED AL-AZIZ had a close relationship with HASSAN AL-KHAMERI. ABED AL-AZIZ trained with AL-KHAMERI in Jihad Wal camp on Special Operations. AL-BAHRI stated this session included the learning of assassinations, city sabotage and explosives.

AL-BAHRI advised ABED AL-AZIZ is "very much liked" by ABU DUJANA AL-MASRI, the son-in-law of AYMAN AL-ZAWAHRI. AL-BAHRI stated ABU DUJANA is an Egyptian Islamic Jihad (EIJ) and Al-Qa'eda member who is married to the daughter of ZAWAHRI. AL-BAHRI explained ABU DUJANA lost one of his legs when a mortar missile came in between him and AL-BAHRI. AL-BAHRI also sustain injuries in his foot as a result of the explosion. AL-BAHRI sustained a minor injury to is heel and stated the other daughter of Al-ZAWAHRI, is married to another Al-Qa'eda member known as ABD AL-HADI AL-URDUNI.

AL-BAHRI stated ABED AL-AZIZ has a "brotherly" relationship with BIN LADEN's associate HAMZA AL-GHAMIDI.

AL-BAHRI advised ABED AL-AZIZ was a good friend of MO'ATH AL-BALUSHI (AL-AWHALI). AL-BAHRI remembers an incident were AL-BALUSHI and ABED AL-AZIZ removed the safety pin from an

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offensive hand grenade and could not render it safe. AL- BALUSHI came to AL-BAHRI since AL-BAHRI was in charge and asked him to help secure the grenade. AL-BAHRI was able to secure the grenade and punished both AL-BALUSHI and ABED AL-AZIZ and had them crawl around the base for what they have done.

AL-BAHRI advised ABED AL-AZIZ is a friend of SAQR AL-JADDAWI, and SAQR really knows how to deal with ABED AL-AZIZ. AL-BAHRI described ABED AL-AZIZ as 5'7", full frame, 26-27 years of age, black curly hair, black eyes, white to tan skin color and cannot grow a full beard. AL-BAHRI advised ABED AL-AZIZ speaks with a Saudi dialect and is either from Uhod Al-Masareha or Abu Al-Arish from the Jizan area.

AL-BAHRI stated he has no knowledge of the current location of ABED AL-AZIZ. AL-BAHRI advised if ABED AL-AZIZ's wife is in Yemen, then definitely, ABED AL-AZIZ is not in Afghanistan. AL-BAHRI explained, if ABED AL-AZIZ has a mission he will send his wife back to her parents and will never let her by herself in Afghanistan. AL-BAHRI added if ABED AL-AZIZ's wife is in Yemen with her parents without him, then he is of course involved in a mission outside Afghanistan. AL-BAHRI advised ABED AL-AZIZ is not a planner, however he might be an executioner in an upcoming operation.

AL-BAHRI advised BIN LADEN frequently told his associates and operatives "we have to withdraw America to a face to face war." AL-BAHRI commented with the latest operation in New York, BIN LADEN was successful in obtaining his goal.

AL-BAHRI identified an unmakerd photograph, a copy of which is enclosed in the attached FD-340 (1A) envelope as being ABED AL-AZIZ. (The photograph is known to investigators as of MOHAMMED HAZA'A).

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5/10/09

Dear Senator Sheldon Whitehouse,

I want to thank you for steadily spearheading the necessary efforts to investigate interrogation practices and possible abuses perpetrated by the United States in the War on Terror.

At Ms. Renaud's request I submit written testimony for your upcoming hearing on the impact of the torture memos. Please feel free to contact me for clarification or elaboration on any of the topics contained herein or additional subject matters related to the military's Survival, Evasion, Resistance and Escape course, (SERE), Team Delta's training, or psychological and physical interrogation techniques in general. I have committed over a decade of my life conducting interrogations, experimenting with psychological and physical techniques, and expressing the critical importance of interrogation in human intelligence and the weaknesses we have in the system that prevent efficiency and hinder our abilities to improve.

Personal Background

I, Mike Ritz, am a former Arabic/Spanish speaking Army interrogator who currently resides in Providence, Rhode Island. During my military service I had the honor to work strategic level assignments at echelons above corp and was attached to the SERE course at Camp MacKall (Fort Bragg), North Carolina. I co-founded a corporation, called Team Delta in 1997, which I transferred into full-time upon leaving the military in 1999. We offered military simulation training experiences; such as Boot Camp Fitness and Battle Tactics, to individual paying civilian, law enforcement, and military personnel. Our most popular and most frequently offered experience over the past 10 years was the POW/Interrogation Resistance Program. This psychologically and physically demanding outward bound styled program was a simulated version of the "Resistance" portion of the SERE course. The program was staffed by former military interrogators and military police. Because of the widespread misinterpretation and misuse of SERE tactics in the War on Terror, we shut our doors to individuals in the public sector two years ago. Now, our website serves as a way to connect to the media in order to generate open dialogue or create publicly visible demonstrations of various interrogation techniques in an attempt to advocate for positive change in human intelligence gathering.

Due to my past SERE experience in the military followed by more extensive work in resistance to interrogation programs in my private company, where I've experimented with various tactics on willing participants on numerous occasions for years, I am in the unique position of having first-hand knowledge of physical interrogation techniques. I am, also, in the unique situation of being able to express the results of these techniques without fear of reprisal or forced censorship. As a result, I have provided on-call analysis to nearly every major media outlet in the United States as well as many others around the world. I was the only military interrogator invited to participate in the *Leadership Roundtable on National Security and the Rule of Law: The Challenge of Human Intelligence Gathering* at Georgetown University Law Center in September of 2005. I and my company have provided reality interrogation experiences for five

documentary/reality film productions ranging from *We Can Make You Talk* on the History Channel to *The Guantanamo Guidebook* on Sundance to perhaps the most viewed waterboarding footage in the world, *Getting Waterboarded*, originally filmed for CurrentTV. I've participated in interrogation/torture panel discussions at Brown University, MIT, and NYU. I also lecture to law students several times a year in the Torture and National Security course at Roger Williams University School of Law.

Enhanced Interrogation Techniques

None of the ten techniques listed in the recently released Bybee memos (attention grasp, walling, facial hold, facial slap, cramped confinement, wall standing, stress positions, sleep deprivation, insects placed in a confinement box, and waterboarding) were taught or discussed in the Army interrogation course from which I graduated. Furthermore, they were not and are not currently included in the Army interrogation field manual. The common principle taught to interrogator trainees is that these and other physical techniques promote a coercive environment that hinder the interrogator from collecting actionable, accurate intelligence because a person will say anything to make the technique stop. In addition, these techniques violate The Geneva Conventions.

I've witnessed and/or employed all of these physical techniques and more in SERE training environments both within the Army SERE course and within Team Delta's POW/Interrogation Resistance Program. Human beings are fragile when placed in highly stressful, out of control circumstances. Their fragility manifests in compliance when techniques are orchestrated in such a way as to demand it.

While I may or may not be able to coerce a trainee using any one isolated technique listed above, except for waterboarding, I have been able to do so in 100% of all cases through the timely orchestration of several techniques together over the period of three days during the Team Delta course. In both the Army SERE course and Team Delta these techniques are employed to create complete compliance that includes the gathering of coercive false confessions through the use of high stress and trickery. These courses rely on in-role teaching and stress inoculation, thereby allowing the trainee to learn captivity survival techniques that may assist him/her at a future time at the hands of an enemy who does not adhere to The Geneva Conventions. Neither of these courses is intended to teach interrogation methods, nor do they imply that the use of such methods will result in obtaining accurate intelligence.

I encourage anyone contemplating whether these techniques are defined as torture to consider the coercive nature of these techniques against the compounding stressful circumstances that naturally occur through war, shock of capture, captivity, and prisoner handling while in our custody during the confinement and interrogation process. It is common knowledge among interrogators that stress is useful in the interrogation process because of the contrast with the release from stress. The futile emotions and fear of the unknown that accompany a prisoner in capture and confinement is incredibly stressful. Captivity is so stressful that when contrasted with rapport building techniques using psychological approaches consisting of skillful questioning/dialogue based on empathy and understanding, a source will cooperate and provide responses which can then be exploited further. These responses can then be assessed by baselining the individual and gauging those responses which indicate those areas of most stress. Forcefully generating

responses through the use of physical techniques where a person will say anything to make it stop will compel the individual to answer whatever he thinks the interrogator wants to hear, and will hinder the interrogator's ability to detect stress and/or false information through reading body language. Forced deception by the interrogator runs the risk of the intelligence community reacting to false information such has been theorized as the results of the false confession provided by Ibn Al-Shaykh Al-Libi that linked Al Qaeda to Iraq. This confession is believed to have been provided through harsh CIA interrogation methods after the FBI was successfully obtaining accurate intelligence through rapport building techniques prior to Al-Libi being taken into CIA custody through extraordinary rendition.

Many have argued that because the U.S. uses the above methods in SERE school on our own soldiers that these methods cannot possibly be considered torture. There are critically significant psychological differences on a detainee versus that of a SERE school participant that cannot be overlooked. The real sense of futility and fear of the unknown that a detainee experiences through shock of capture, confinement, and the interrogation process cannot be simulated in a training environment.

When incorporating Team Delta years ago we consulted with forensic psychiatrists to determine whether our training program could create any lasting trauma for our participants. We were told by two different doctors that as long as we gave the participant the opportunity to stop the training at any time, the participant would still remain ultimately in control and would not suffer any psychological trauma.

Whereas SERE and Team Delta trainees are volunteers, a real detainee does not enter his circumstances willingly. He is uncertain of the duration of his captivity, his whereabouts, and what may be done to him. He often comes from a country or culture where physical torture is commonplace. He cannot stop anything. He has no control. This causes survival instincts that when pushed to the limits compromises rational thought and fosters an environment ripe for coercion should coercive techniques be used.

I would like to point out two particular techniques listed in the Bybee memos that I find particularly effective in coercing prisoners; the results of which can be easily be misinterpreted during attempts to obtain accurate information.

1. Sleep Deprivation
   I have had trainees, who have the knowledge that they are in a safe, controlled environment where they are aware of the duration of the training, voice hallucinations in as short a period as three days. I cannot see any value or benefit to keeping a prisoner/detainee awake for 11 days straight. This extreme duration of sleep deprivation will most assuredly create easily coercive circumstances where the power of suggestion is so strong and the person's ability to recall memories so weak that nothing the individual says can be relied upon. A prolonged lack of sleep impedes the individual's judgment and assessment of the circumstances.

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2. Waterboarding
Although the conventional method of waterboarding which has been cited in the Bybee Memos was not conducted while I was in Army SERE, I have waterboarded participants as detailed in the memos as well as varying waterboarding methods during Team Delta's programs. An example on a variation of the method I used can be seen in CurrentTV's 15-minute short, *"Getting Waterboarded"*.

Of the ten techniques listed in the Bybee Memos, this is the one isolated method I most consider torture. At the very base of Maslow's Hierarchy of Needs is air. Waterboarding an individual restricts and blocks the flow of air by pouring water up the nose and mouth of the individual strapped to an inclined board, thereby drowning/suffocating the person each time the water is poured. The repeated and prolonged use of this method creates such fear in the individual undergoing it that he will say or do anything to make it stop. Individuals who have been stress inoculated by experiencing this method repeatedly over time do fair better than those who have not. This ability to better withstand the practice session after session may compel an interrogator to increase the length of time the person is subjected to the technique; thereby increasing the risk of death.

This method was condemned by the United States when our enemy used it against our troops during World War II. Many cases have been documented around the world demonstrating that this technique and its variations have elicited false confessions. Waterboarding is extremely coercive. The only conclusion I can form from the 183 times that Khalid Sheikh Mohammed was waterboarded would be that the more often a physical technique is employed to "break" an individual (get a person to talk), the more the technique must be amplified the next time to obtain the same degree of cooperation.

Slippery Slope
Beyond the legal constraints outlined in The Geneva Conventions and the question of the lack of effectiveness and reliability of physical interrogation techniques, the additional psychological knowledge obtained from The Stanford Prison Experiment and The Milgram Experiment indicate a slippery slope. This slippery slope naturally occurs for the interrogator and the interrogatee. An interrogator employing a harsh method loses sight of the intensity being increased with each repetition of the technique. Consequently, one enduring this technique develops more resistance to the technique each time it is employed. Most interrogations require the individual to be questioned on numerous occasions. If the individual speaks due to the stress of an enhanced interrogation technique, the interrogator will likely have to use a harsher version at a future interrogation session in order to achieve the same compliance results. This slippery slope creates the perception that the interrogator must go further achieve the same results. The permanent physical and/ psychological damage increases as resistance builds and the end result remains unreliable.

Effects of Torture on the Torturer
The effects of war leave lasting marks on soldier's conscience. A, interrogator friend of mine involved as a translator in activities he thought were harmful to the subject returned

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from Iraq stating that his soul had been amputated. In considering the effects of torture on the torturer I'm reminded of French author Alec Mellor who wrote about French General Jacques Massu's use of torture in Algeria. Quoting a former French career soldier, now a priest, Pere Gilbert, he recorded the following:

"But let us admit for a moment that it might be possible to justify torture for the 'noble motives': have they (those who justify torture) thought for one moment of the individual who does it, that is, of the man whom, whether he wishes or not, one is going to turn into a torturer? I have received enough confidences in Algeria and in France to know into what injuries, perhaps irreparable, torture can lead the human conscience. Many young men have 'taken up the game' and have thereby passed from mental health and stability into terrifying states of decay, from which some will probably never recover."

Rendition

Part II, Article 12 of The Geneva Conventions states that prisoners of war are the responsibility of the state not the persons who capture them and that they may not be transferred to a state that is not party to the Convention. The United State's move to ban certain enhanced interrogation techniques like waterboarding is appropriate, but those attempts will be in vain if we neglect to address rendition, i.e. outsourcing waterboarding is not a solution.

In Conclusion

Aside from the moral and legal questions regarding the use of enhanced interrogation techniques, the fact that these techniques do not produce reliable information is shared by the vast majority of interrogators in the private, public, and government sectors. In the rare occasion that physical techniques may produce actionable intelligence, there is no way to measure or verify the source's response. When a subject answers an interrogator's questions through extreme duress the interrogator does not have the opportunity to make an educated evaluation of the sources level of stress through body language. This creates additional risk and the potential for detrimental reactions such as those theorized in the Al-Libi case.

Sincerely,

Mike Ritz

STATEMENT OF PETER M. SHANE
JACOB. E DAVIS AND JACOB E. DAVIS II CHAIR IN LAW
OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW
TO THE SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS
OF THE U.S. SENATE COMMITTEE ON THE JUDICIARY
ON "WHAT WENT WRONG? TORTURE AND
THE OFFICE OF LEGAL COUNSEL IN THE BUSH ADMINISTRATION"[1]

Senator Whitehouse and Members of the Subcommittee:

I am pleased to offer this statement in support of the subcommittee's inquiry into the Office of Legal Counsel's advice to the George W. Bush Administration concerning the interrogation of CIA and military detainees. From 1978 to 1981, I was a career attorney in the Justice Department's Office of Legal Counsel (OLC), serving under Assistant Attorney Generals John Harmon and Theodore B. Olson. For several months during this period, I was also detailed to serve as an Assistant General Counsel in the Office of Management and Budget. Since 1981, I have been a law teacher and scholar, specializing in constitutional and administrative law, with a special focus on separation of powers law. I am the author or co-author of five books, including what is still the only law school course book on separation of powers law, and have written roughly forty scholarly articles and book chapters on such topics as signing statements, presidential war powers, executive privilege, judicial independence, independent prosecutors, and legislative-executive relations. Your topic is one I address, therefore, as a concerned citizen, a separation of powers scholar, and a former government lawyer.

What I can say about OLC's role at this stage must be based on those OLC opinions so far released publicly that relate to torture and interrogation. A few of these became available after the abuses at Abu Ghraib became public. One of these – I will call it the "Framework Memo" – announces *ex cathedra* and without any citation of authority: "Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief clause of the President."[2] This is the same memo in which OLC interpreted the "severe physical . . . pain or suffering" that constitutes the result of physical torture to be pain or suffering at "the level that would ordinarily be associated with a sufficiently serious physical injury such as death, organ failure, or serious impairment of body functions."[3] I have also consulted the four memos more recently released from 2002 and 2005 applying OLC's analysis to particular interrogation techniques.[4]

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[1] Portions of this statement are based on, PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (University of Chicago Press, 2009).

[2] Memorandum of Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice for Alberto Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 26, 2002), reprinted in KAREN J. GREENBERG AND JOSHUA L. DRATEL, THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172, 207 (2005) (hereafter, TORTURE PAPERS).

[3] Id. at 176.

[4] Memorandum of Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice for John Rizzo, Acting General Counsel of the Central Intelligence Agency re: Interrogation of al Qaeda Operative (Aug.1, 2002); Memorandum of Steven G. Bradbury, Assistant Attorney General, U.S. Department of Justice for John Rizzo,

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To my mind, these memoranda raise one of the most profound questions of professionalism that government counselors ever confront, namely, when is legal advice so patently defective in its failure to address critical issues that it passes from being incompetent to being unethical? My main criticism of these memos is not just that they are wrong at critical points, but that they give little evidence of anything like objectivity or balance in the effort. I can do no better than quote the verdict of former Assistant Attorney General Jack Goldsmith, who wrote of the OLC interrogation opinions: "[T]hey seemed more like an exercise of sheer power than reasoned analysis."[5]

Given the length and technical complexity of the issues, I would like to identify just several of the key points that illustrate these memos' deficiencies. Consider first the assertion that Congress simply lacks authority to regulate the interrogation of U.S. detainees during wartime because the treatment of such prisoners is within the complete and unreviewable scope of the President's commander-in-chief powers. As far as I know, this proposition rests on a view of presidential wartime authority that is supported by only two legal scholars, John Yoo[6] and Robert F. Turner.[7] Their interpretation has been decisively rejected by virtually every other mainstream legal scholar, liberal or conservative. But what is most startling about the OLC memo is, again, not that it comes to its particular conclusion, however wrong that conclusion may be. What is startling is that the memo does not cite, much less interpret Congress's own constitutional authorities regarding war and international law, including the power to define for domestic purposes what shall be considered offenses against international law. On January 15, 2009, shortly before leaving office, Principal Deputy Attorney General Stephen G. Bradbury released his own devastating critique of the earlier memo:

> [S]weeping assertions . . .that the President's Commander in Chief authority categorically precludes Congress from enacting any legislation concerning the detention, interrogation, prosecution, and transfer of enemy combatants are not

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Senior Deputy General Counsel of the Central Intelligence Agency re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees (May 10, 2005); Memorandum of Steven G. Bradbury, Assistant Attorney General, U.S. Department of Justice for John Rizzo, Senior Deputy General Counsel of the Central Intelligence Agency re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005); Memorandum of Steven G. Bradbury, Assistant Attorney General, U.S. Department of Justice for John Rizzo, Senior Deputy General Counsel of the Central Intelligence Agency re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques they May be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005). Copies of these memos are linked to Carrie Johnson and Julie Tate, *New Interrogation Details Emerge: As It Releases Justice Dept. Memos, Administration Reassures CIA Questioners*, WASH. POST, Apr. 17, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/04/16/AR2009041602768.html.

[5] JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 150 (2007).

[6] JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005).

[7] See Robert F. Turner, *Executive Power in Wartime*, CHRON. OF HIGHER EDUCATION, Sept. 15, 2006, available at http://chronicle.com/weekly/v53/i04/04b00901.htm.

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sustainable.

Congress's power to "define and punish ... Offences against the Law of Nations," U.S. Const. art. I, § 8, cl. 10, provides a basis for Congress to establish the federal crime of torture, in accordance with U.S. treaty obligations under the Convention Against Torture, and the War Crimes Act offenses, in accordance, for example, with the "grave breach" provisions of the Geneva Conventions. . . . Furthermore, the power "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl, 14, gives Congress a basis to establish standards governing the U.S. military's treatment of detained enemy combatants, including standards for, among other things, detention, interrogation, and transfer to foreign nations. This grant of authority would support, for example, the provisions of the Detainee Treatment Act of 2005 that address the treatment of alien detainees held in the custody of the Department of Defense. . . .

The Captures Clause of Article I, which grants Congress power to "make Rules concerning Captures on Land and Water," *id.* cl. 11, also would appear to provide separate authority for Congress to legislate with respect to the treatment and disposition of enemy combatants captured by the United States in the War on Terror. . . .Sources from around the time of the Framing suggest that the Founders understood battlefield "captures" to include the capture of enemy prisoners. During the Revolutionary War, the Continental Congress passed legislation concerning not simply the capture of enemy vessels, but also the capture and treatment of persons on board those vessels. *See, e.g.*, 4 Journals of the Continental Congress 1774-1789, at 254 (Worthington Chauncey Ford ed., William S. Hein & Co. 2005) (1906) (prohibiting the treatment of persons "contrary to common usage, and the practice of civilized nations in war"); 10 Journals of the Continental Congress 1774-1789, at 295 (Worthington Chauncey Ford ed., William S. Hein & Co. 2005) (1908) ("[I]f the enemy will not consent to exempt citizens from capture, agreeably to the law of nations, the commissioners be instructed positively to insist on their exchange, without any relation to rank.").

Likewise, in 1801, Alexander Hamilton observed that belligerents in war have the right "to *capture the persons* and property of each other." Alexander Hamilton, *The Examination*, No. 1 (Dec. 17, 1801) (emphasis added), *quoted in* 3 *The Founders' Constitution* at 100 (Philip B. Kurland & Ralph Lerner eds. 1997). *See id.* ("War, of itself, gives to the parties a mutual right to kill in battle, and to capture the persons and property of each other. This is a rule of natural law; a necessary and inevitable consequence of the state of war."). Other early commentators similarly understood the "law of capture" to encompass the capture of prisoners of war, as well as the seizure of property. *See* Richard Lee, *Treatise of Captures in War* 45-63 (2d ed. 1803) (tracing the evolution of the law concerning definition and treatment of captured enemies); Emmerich de Vattel, *The Law of Nations* 394 (Joseph Chitty ed., London, S. Sweet 1834) (1758) (explaining that persons or things "captured" by the enemy are usually freed as soon as they fall into the hands of soldiers belonging to their own nation); G.F. Martens, *An Essay on Privateers, Captures, and Particularly on Recaptures* (Thomas Hartwell trans.,

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> Lawbook Exchange 2004) (1801) (addressing the treatment by various nations of prisoners of war as part of the law of captures).
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> The Supreme Court also presumed this understanding of the Captures Clause in the early decision *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), in which Chief Justice Marshall considered whether by virtue of a declaration of war the President possessed authority to detain enemy aliens (both enemy civilians and enemy combatants) and to confiscate their property. After quoting the Captures Clause, the Court noted that Congress had enacted laws regulating both enemy aliens and their property in the War of 1812, and concluded that those laws should govern the actions of the Executive Branch in the conflict. *See id.* at 126 ("The act concerning alien enemies, which confers on the president very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war."); *see id.* (citing an "act for the safe keeping and accommodation of prisoners of war"). Insofar as the early Supreme Court, relying on the Captures Clause, commented favorably on Congress's authority to regulate the treatment of prisoners of war—and, indeed, actually suggested that the exercise of such congressional authority counseled against locating the authority to detain enemy prisoners solely in the general war powers of the President—we have substantial doubts about the assertion that the Captures Clause grants no power to Congress with regard to the detention and treatment of enemy combatants.[8]

It defies belief that such sources would not have been consulted, much less cited in an opinion purporting to tell the Counsel to the President that Congress lacked all power to regulate the executive branch's treatment of detainees.

The Framework Opinion's definition of torture is more labyrinthine, but no less implausible. OLC determined that physical torture is limited to pain of only the most unendurable, excruciating sort by relying on the idea that other statutes with similar phrasing may shed light on the textual meaning in question through analogy. Specifically, OLC turned to other statutes that refer to "severe pain." Purporting not to find any such statutes that would apply to a military context, however, they cited statutes that define emergency medical conditions that would entitle their victims to federally funded health benefits. As OLC notes:

> These statutes define an emergency condition as one "manifesting itself by acute symptoms of sufficient security (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 to bodily functions, or (iii) serious dysfunction of any bodily organ or part." Although these statutes address a substantially different subject from [the

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[8] Opinion re: the Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, 2009 WL 1267352 (O.L.C.) (Jan. 15, 2009).

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> statutory prohibition on torture], they are nonetheless helpful for understanding what constitutes severe physical pain.[9]

In other words, to count as "torture," physical pain would have to be of comparable severity to the pain that would entitle its sufferer to government-provided health insurance![10]

This is an amazing performance for two reasons. First, whatever policy considerations underlay the structuring of our Medicare statutes, they surely have nothing to do with the policies underlying the Convention Against Torture. In defining "severe pain" for emergency health insurance purposes, Congress was presumably creating a very narrow entitlement to fill a hole in a much more comprehensive scheme of health insurance. This has nothing to do with levels of brutality appropriate to military detainees. As I wrote in a just-published book: "Looking at health insurance statutes to determine the meaning of torture is a little like defining the rules in a 'court' of law by looking up the rules that apply to a basketball 'court.' It is more of a play on words than serious lawyering."[11]

OLC's argument is also implausible, however, because, as it happens, the phrase "severe physical pain or suffering" actually does appears elsewhere in the United States Code. It appears in 18 U.S.C. § 2340 itself. Federal law also bans the infliction of severe *mental* pain, and Section 2340 defines "severe *mental* pain or suffering," in part, as "the prolonged mental harm caused by or resulting from – . . . the intentional infliction or threatened infliction of severe *physical* pain or suffering."[12] In other words, Congress perceived a direct connection between the severe mental pain it intended to prevent and the separate category of pain, "severe physical pain," that was also not to be inflicted. OLC's argument that "severe physical pain" includes only pain at "the level that would ordinarily be associated with a sufficiently serious physical injury such as death, organ failure, or serious impairment of body functions" makes the connection Congress drew between physical and mental pain bizarre. It suggests, if we do a word substitution, that Congress had a weirdly narrow view of several mental harm. We would have to believe Congress intended to outlaw only "the prolonged mental harm caused by or resulting from – . . . the intentional infliction or threatened infliction of death, organ failure, or serious impairment of body functions." But this does not make sense. There is no logical reason why Congress would limit its concern for mental harm in this way.

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[9] TORTURE PAPERS, *supra* note 2, at 176.

[10] OLC relied on this analysis also in a subsequent March 14, 2003 opinion issued regarding the legal limits (or lack of them) regarding interrogations conducted by members of the Armed Services. See Memorandum from John C. Yoo, Deputy Assistant Attorney General, for William J. Haynes II, General Counsel of the Department of Defense, re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States 38-39 (Mar. 14, 2003), available at http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/doj/johnyooolc2003interrogationmemo.pdf.

[11] PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 101-102 (2009).

[12] 18 U.S.C. § 2340(2) (emphasis added).

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The obvious inference from the mental pain portion of the statute is that Congress intended to protect against the prolonged mental harm caused by or resulting from the actual or threatened infliction of *any* physical pain or suffering so severe that, in a reasonable person, it could be expected to result in lasting mental or emotional damage. The degree of mental pain that the infliction of physical pain might elicit would thus become a measure of what physical pain counts as severe. The most sensible reading of the statute requires us to interpret "severe physical pain or suffering" as that level of physical pain or suffering which, upon its actual or threatened infliction, poses a reasonable threat of severe and prolonged mental harm. Certainly, one can imagine forms of physical pain short of the pain associated with death or organ failure, the threat of which could induce lasting mental or emotional trauma – but if threats of those forms of physical pain qualify as inducing mental pain that counts as "severe," then these forms of physical pain should also count as "severe," and thus, unlawful. This reading may not reconcile the torture statute with the Medicaid statute, but it reconciles the torture statute with itself. None of this is mentioned in the OLC opinion.

We now know that, on the same day AAG Bybee released the framework opinion, he also issued an opinion applying the framework analysis to a series of harsh interrogation techniques, including waterboarding, to be applied to a particular detainee, Abu Zubaydah. It thus cannot be said that, when he signed off on his implausibly narrow reading of physical torture or the implausibly expansive view of presidential authority that AAG Bybee was unaware of the operational implications of his advice. The August 1, 2002 memorandum for John Rizzo makes the operational implications quite clear. On the issues I have addressed here, namely, the definition of physical torture and the scope of Congress's authority to prohibit torture, the August 1, 2002 Bybee to Rizzo memorandum, like the May 10, 2005 Bradley-to-Rizzo memos most recently released, add little by way of law. They mostly recount in elaborate detail the interrogation techniques for which the CIA was seeking legal advice, and offer byzantine explanations why these techniques fall outside the scope of the definitions of torture that OLC has framed.[13] They are so one-sided in their analysis that the impression is inescapable that they were written tendentiously, for the purpose of exculpating the interrogators involved.

There are three reasons, from an ethical point of view, why this performance – so short of appropriate professional standards – is shocking. The first, of course, is the gravity of the context. Advising the President and his subordinates on their authorities regarding matters of national security ought to implicate the very highest standards of professional analysis. When so much is stake, government lawyers surely owe the United States their highest standard of care and sobriety.

Second, the conduct at issue was plainly troubling. Precise legal interpretation sometimes requires judges and lawyers to recognize that the words that appear in statutes and regulations can depart from their common sense meaning. In that vein, it is perhaps theoretically possible to exclude from some definition of torture keeping a detainee awake for over 48 hours "standing and . . . handcuffed, [with] the handcuffs . . . attached by a length of chain to the ceiling. The

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[13] I have not had time to analyze the issue addressed in the May 30, 2005 Bradley-to-Rizzo memorandum regarding the territorial scope of the Convention Against Torture.

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detainee's hands are shackled in front of his body, so that the detainee has approximately a two- to three-foot diameter of movement. The detainee's feet are shackled to a bolt in the floor."[14] One could, I suppose, hypothesize a counterintuitive definition in which torture would not include binding a detainee:

> securely to an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual's blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of 'suffocation and incipient panic,' i.e., the perception of drowning.[15]

But it ought to be recognized that these would be wildly counterintuitive uses of the word, "torture." If these are the facts on which a lawyer is asked to opine, that lawyer surely must recognize that finding the practices I have described *not* to be torture will run strongly counter to common and moral sense. Before exonerating such conduct, one would expect a careful weighing of the competing arguments and to be astounded when there is none.

Finally, the opinions are shocking because they utterly abdicate the essential obligation of government lawyers to the rule of law. This obligation is never more serious than in contexts where the government conduct at issue might never come to light, and the counselor's sense of professional obligation and fidelity to the law may offer the one and only check on executive branch conduct. If advising counsel do not give the law its most conscientious interpretation, there will frequently be no one else effectively situated to do the job of assuring diligence in legal compliance.

As an alumnus of the Office of Legal Counsel, I offer these views in a genuine spirit of sadness both for my country and for a Justice Department I so proudly served. I was a career lawyer in OLC at the time Iranian revolutionaries seized our embassy in Tehran. My duties did not involve me personally in counseling our government on an appropriate response, but I was, in 1979 and 1980, under the impression that many extreme proposals were mooted with regard to that response. It was likewise my impression that the people in charge of OLC stood up resolutely, as called for, in defense of the rule of law, and I was proud that our government did nothing at the time to bring even the slightest stain of dishonor on our nation.

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[14] Memorandum of Steven G. Bradbury, Assistant Attorney General, U.S. Department of Justice for John Rizzo, Senior Deputy General Counsel of the Central Intelligence Agency re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005), at 11.

[15] Memorandum of Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice for John Rizzo, Acting General Counsel of the Central Intelligence Agency re: Interrogation of al Qaeda Operative (Aug.1, 2002), at 3-4.

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I think it a safe prediction that America will always be tested by adversaries whose strategies threaten us and whose conduct repulses us. Such tests do not mitigate the President's obligation to take care that the laws be faithfully executed. Government lawyers are essential actors in giving the rule of law meaning under pressure, and there is no doubt that the lawyers who wrote and approved the memos reviewed here abdicated their responsibilities to an appalling degree.

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Statement of Ali Soufan

Mr. Chairman, Committee members, thank you for inviting me to appear before you today. I know that each one of you cares deeply about our nation's security. It was always a comfort to me during the most dangerous of situations that I faced, from going undercover as an al Qaeda operative, to unraveling terrorist cells, to tracking down the killers of the 17 U.S. sailors murdered in the USS Cole bombing, that those of us on the frontline had your support and the backing of the American people. So I thank you.

The issue that I am here to discuss today – interrogation methods used to question terrorists – is not, and should not be, a partisan matter. We all share a commitment to using the best interrogation method possible that serves our national security interests and fits squarely within the framework of our nation's principles.

From my experience – and I speak as someone who has personally interrogated many terrorists and elicited important actionable intelligence– I strongly believe that it is a mistake to use what has become known as the "enhanced interrogation techniques," a position shared by many professional operatives, including the CIA officers who were present at the initial phases of the Abu Zubaydah interrogation.

These techniques, from an operational perspective, are ineffective, slow and unreliable, and as a result harmful to our efforts to defeat al Qaeda. (This is aside from the important additional considerations that they are un-American and harmful to our reputation and cause.)

My interest in speaking about this issue is not to advocate the prosecution of anyone. People were given misinformation, half-truths, and false claims of successes; and reluctant intelligence officers were given instructions and assurances from higher authorities. Examining a past we cannot change is only worthwhile

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when it helps guide us towards claiming a better future that is yet within our reach.

And my focus is on the future. I wish to do my part to ensure that we never again use these harmful, slow, ineffective, and unreliable techniques instead of the tried, tested, and successful ones – the ones that are also in sync with our values and moral character. Only by doing this will we defeat the terrorists as effectively and quickly as possible.

Most of my professional career has been spent investigating, studying, and interrogating terrorists. I have had the privilege of working alongside, and learning from, some of the most dedicated and talented men and women our nation has– individuals from the FBI, and other law enforcement, military, and intelligence agencies.

In my capacity as a FBI Agent, I investigated and supervised highly sensitive and complex international terrorism cases, including the East Africa bombings, the USS Cole bombing, and the events surrounding the attacks of 9/11. I also coordinated both domestic and international counter-terrorism operations on the Joint Terrorist Task Force, FBI New York Office.

I personally interrogated many terrorists we have in our custody and elsewhere, and gained confessions, identified terror operatives, their funding, details of potential plots, and information on how al Qaeda operates, along with other actionable intelligence. Because of these successes, I was the government's main witness in both of the trials we have had so far in Guantanamo Bay – the trial of Salim Ahmed Hamdan, a driver and bodyguard for Osama Bin Laden, and Ali Hamza Al Bahlul, Bin Laden's propagandist. In addition I am currently helping the prosecution prepare for upcoming trials of other detainees held in Guantanamo Bay.

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There are many examples of successful interrogations of terrorists that have taken place before and after 9/11. Many of them are classified, but one that is already public and mirrors the other cases, is the interrogation of al Qaeda terrorist Nasser Ahmad Nasser al-Bahri, known as Abu Jandal. In the immediate aftermath of 9/11, together with my partner Special Agent Robert McFadden, a first-class intelligence operative from the Naval Criminal Investigative Service (NCIS), (which, from my experience, is one of the classiest agencies I encountered in the intelligence community), I interrogated Abu Jandal.

Through our interrogation, which was done completely by the book (including advising him of his rights), we obtained a treasure trove of highly significant actionable intelligence. For example, Abu Jandal gave us extensive information on Osama Bin Laden's terror network, structure, leadership, membership, security details, facilities, family, communication methods, travels, training, ammunitions, and weaponry, including a breakdown of what machine guns, rifles, rocket launchers, and anti-tank missiles they used. He also provided explicit details of the 9/11plot operatives, and identified many terrorists who we later successfully apprehended.

The information was important for the preparation of the war in Afghanistan in 2001. It also provided an important background to the 9/11 Commission report; it provided a foundation for the trials so far held in Guantanamo Bay; and it also has been invaluable in helping to capture and identify top al Qaeda operatives and thus disrupt plots.

The approach used in these successful interrogations can be called the Informed Interrogation Approach. Until the introduction of the "enhanced" technique, it was the sole approach used by our military, intelligence, and law enforcement community.

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It is an approach rooted in experiences and lessons learned during World War II and from our Counter-insurgency experience in Vietnam – experiences and lessons that generated the Army Field Manual. This was then refined over the decades to include how to interrogate terrorism suspects specifically, as experience was gained from interrogations following the first World Trade Center bombing, the East Africa Embassy bombings, and the USS Cole bombing. To sum up, it is an approach derived from the cumulative experiences, wisdom, and successes of the most effective operational people our country has produced.

Before I joined the Bureau, for example, traditional investigative strategies along with intelligence derived from human sources successfully thwarted the 1993 New York City Landmark Bomb Plot (TERRSTOP), a plot by the Blind Sheikh Omar Abdel-Rahman, to attack the UN Headquarters, the FBI's New York office, and tunnels and bridges across New York City, -- as a follow-up to the 1993 World Trade Center bombings. That remains to this day the largest thwarted attack on our homeland. I had the privilege of working with, and learning from, those who conducted this successful operation.

The Informed Interrogation Approach is based on leveraging our knowledge of the detainee's culture and mindset, together with using information we already know about him.

The interrogator knows that there are three primary points of influence on the detainee:

First, there is the fear that the detainee feels as a result of his capture and isolation from his support base. People crave human contact, and this is especially true in some cultures more than others. The interrogator turns this knowledge into an advantage by becoming the one person the detainee can talk to and who listens to what he has to say, and uses this to encourage the detainee to open up.

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In addition, acting in a non-threatening way isn't how the detainee is trained to expect a U.S. interrogator to act. This adds to the detainee's confusion and makes him more likely to cooperate.

Second, and connected, there is the need the detainee feels to sustain a position of respect and value to interrogator. As the interrogator is the one person speaking to and listening to the detainee, a relationship is built – and the detainee doesn't want to jeopardize it. The interrogator capitalizes on this and compels the detainee to give up more information.

And third, there is the impression the detainee has of the evidence against him. The interrogator has to do his or her homework and become an expert in every detail known to the intelligence community about the detainee. The interrogator then uses that knowledge to impress upon the detainee that everything about him is known and that any lie will be easily caught.

For example, in my first interrogation of the terrorist Abu Zubaydah, who had strong links to al Qaeda's leaders and who knew the details of the 9/11 plot before it happened, I asked him his name. He replied with his alias. I then asked him, "how about if I call you Hani?" That was the name his mother nicknamed him as a child. He looked at me in shock, said "ok," and we started talking.

The Army Field Manual is not about being nice or soft. It is a knowledge-based approach. It is about outwitting the detainee by using a combination of interpersonal, cognitive, and emotional strategies to get the information needed. If done correctly it's an approach that works quickly and effectively because it outwits the detainee using a method that he is not trained, or able, to resist.

This Informed Interrogation Approach is in sharp contrast with the harsh interrogation approach introduced by outside contractors and forced upon CIA officials to use.

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The harsh technique method doesn't use the knowledge we have of the detainee's history, mindset, vulnerabilities, or culture, and instead tries to subjugate the detainee into submission through humiliation and cruelty. The approach applies a force continuum, each time using harsher and harsher techniques until the detainee submits.

The idea behind the technique is to force the detainee to see the interrogator as the master who controls his pain. It is an exercise in trying to gain compliance rather than eliciting cooperation. A theoretical application of this technique is a situation where the detainee is stripped naked and told: "Tell us what you know."

If the detainee doesn't immediately respond by giving information, for example he asks: "what do you want to know?" the interviewer will reply: "you know," and walk out of the interrogation room. Then the next step on the force continuum is introduced, for example sleep deprivation, and the process will continue until the detainee's will is broken and he automatically gives up all information he is presumed to know.

There are many problems with this technique.

A major problem is that it is ineffective. Al Qaeda terrorists are trained to resist torture. As shocking as these techniques are to us, the al Qaeda training prepares them for much worse – the torture they would expect to receive if caught by dictatorships for example.

This is why, as we see from the recently released Department of Justice memos on interrogation, the contractors had to keep getting authorization to use harsher and harsher methods, until they reached waterboarding and then there was nothing they could do but use that technique again and again. Abu Zubaydah had to be waterboarded 83 times and Khalid Shaikh Mohammed 183 times. In a democracy there is a glass ceiling of harsh techniques the

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interrogator cannot breach, and a detainee can eventually call the interrogator's bluff.

In addition the harsh techniques only serves to reinforce what the detainee has been prepared to expect if captured. This gives him a greater sense of control and predictability about his experience, and strengthens his will to resist.

A second major problem with this technique is that evidence gained from it is unreliable. There is no way to know whether the detainee is being truthful, or just speaking to either mitigate his discomfort or to deliberately provide false information. As the interrogator isn't an expert on the detainee or the subject matter, nor has he spent time going over the details of the case, the interrogator cannot easily know if the detainee is telling the truth. This unfortunately has happened and we have had problems ranging from agents chasing false leads to the disastrous case of Ibn Sheikh al-Libby who gave false information on Iraq, al Qaeda, and WMD.

A third major problem with this technique is that it is slow. It takes place over a long period of time, for example preventing the detainee from sleeping for 180 hours as the memos detail, or waterboarding 183 times in the case of KSM. When we have an alleged "ticking timebomb" scenario and need to get information quickly, we can't afford to wait that long.

A fourth problem with this technique is that ignores the end game. In our country we have due process, which requires evidence to be collected in a certain way. The CIA, because of the sensitivity of its operations, by necessity, operates secretly. These two factors mean that by putting the CIA in charge of interrogations, either secrecy is sacrificed for justice and the CIA's operations are hampered, or justice is not served. Neither is a desirable outcome.

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Another disastrous consequence of the use of the harsh techniques was that it reintroduced the "Chinese Wall" between the CIA and FBI – similar to the wall that prevented us from working together to stop 9/11. In addition, the FBI and the CIA officers on the ground during the Abu Zubaydah interrogation were working together closely and effectively, until the contractors' interferences. Because we in the FBI would not be a part of the harsh techniques, the agents who knew the most about the terrorists could have no part in the investigation. An FBI colleague of mine, for example, who had tracked KSM and knew more about him than anyone in the government, was not allowed to speak to him.

Furthermore, the CIA specializes in collecting, analyzing, and interpreting intelligence. The FBI, on the other hand, has a trained investigative branch. Until that point, we were complimenting each other's expertise, until the imposition of the "enhanced methods." As a result people ended doing what they were not trained to do.

It is also important to realize that those behind this technique are outside contractors with no expertise in intelligence operations, investigations, terrorism, or al Qaeda. Nor did the contractors have any experience in the art of interview and interrogation. One of the contractors told me this at the time, and this lack of experience has also now been recently reported on by sources familiar with their backgrounds.

The case of the terrorist Abu Zubaydah is a good example of where the success of the Informed Interrogation Approach can be contrasted with the failure of the harsh technique approach. I have to restrict my remarks to what has been unclassified. (I will note that there is documented evidence supporting everything I will tell you today.)

Immediately after Abu Zubaydah was captured, a fellow FBI agent and I were flown to meet him at an undisclosed location. We were

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both very familiar with Abu Zubaydah and have successfully interrogated al-Qaeda terrorists. We started interrogating him, supported by CIA officials who were stationed at the location, and within the first hour of the interrogation, using the Informed Interrogation Approach, we gained important actionable intelligence.

The information was so important that, as I later learned from open sources, it went to CIA Director George Tennet who was so impressed that he initially ordered us to be congratulated. That was apparently quickly withdrawn as soon as Mr. Tennet was told that it was FBI agents, who were responsible. He then immediately ordered a CIA CTC interrogation team to leave DC and head to the location to take over from us.

During his capture Abu Zubaydah had been injured. After seeing the extent of his injuries, the CIA medical team supporting us decided they were not equipped to treat him and we had to take him to a hospital or he would die. At the hospital, we continued our questioning as much as possible, while taking into account his medical condition and the need to know all information he might have on existing threats.

We were once again very successful and elicited information regarding the role of KSM as the mastermind of the 9/11 attacks, and lots of other information that remains classified. (It is important to remember that before this we had no idea of KSM's role in 9/11 or his importance in the al Qaeda leadership structure.) All this happened before the CTC team arrived.

A few days after we started questioning Abu Zubaydah, the CTC interrogation team finally arrived from DC with a contractor who was instructing them on how they should conduct the interrogations, and we were removed. Immediately, on the

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instructions of the contractor, harsh techniques were introduced, starting with nudity. (The harsher techniques mentioned in the memos were not introduced or even discussed at this point.)

The new techniques did not produce results as Abu Zubaydah shut down and stopped talking. At that time nudity and low-level sleep deprivation (between 24 and 48 hours) was being used. After a few days of getting no information, and after repeated inquiries from DC asking why all of sudden no information was being transmitted (when before there had been a steady stream), we again were given control of the interrogation.

We then returned to using the Informed Interrogation Approach. Within a few hours, Abu Zubaydah again started talking and gave us important actionable intelligence.

This included the details of Jose Padilla, the so-called "dirty bomber." To remind you of how important this information was viewed at the time, the then-Attorney General, John Ashcroft, held a press conference from Moscow to discuss the news. Other important actionable intelligence was also gained that remains classified.

After a few days, the contractor attempted to once again try his untested theory and he started to re-implementing the harsh techniques. He moved this time further along the force continuum, introducing loud noise and then temperature manipulation.

Throughout this time, my fellow FBI agent and I, along with a top CIA interrogator who was working with us, protested, but we were overruled. I should also note that another colleague, an operational psychologist for the CIA, had left the location because he objected to what was being done.

Again, however, the technique wasn't working and Abu Zubaydah wasn't revealing any information, so we were once again brought

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back in to interrogate him. We found it harder to reengage him this time, because of how the techniques had affected him, but eventually, we succeeded, and he re-engaged again.

Once again the contractor insisted on stepping up the notches of his experiment, and this time he requested the authorization to place Abu Zubaydah in a confinement box, as the next stage in the force continuum. While everything I saw to this point were nowhere near the severity later listed in the memos, the evolution of the contractor's theory, along with what I had seen till then, struck me as "borderline torture."

As the Department of Justice IG report released last year states, I protested to my superiors in the FBI and refused to be a part of what was happening. The Director of the FBI, Robert Mueller, a man I deeply respect, agreed passing the message that "we don't do that," and I was pulled out.

As you can see from this timeline, many of the claims made in the memos about the success of the enhanced techniques are inaccurate. For example, it is untrue to claim Abu Zubaydah wasn't cooperating before August 1, 2002. The truth is that we got actionable intelligence from him in the first hour of interrogating him.

In addition, simply by putting together dates cited in the memos with claims made, falsehoods are obvious. For example, it has been claimed that waterboarding got Abu Zubaydah to give up information leading to the capture of Jose Padilla. But that doesn't add up: Waterboarding wasn't approved until 1August 2002 (verbally it was authorized around mid July 2002), and Padilla was arrested in May 2002.

The same goes for KSM's involvement in 9/11: That was discovered in April 2002, while waterboarding was not introduced

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until almost three months later. It speaks volumes that the quoted instances of harsh interrogation methods being a success are false.

Nor can it be said that the harsh techniques were effective, which is why we had to be called back in repeatedly. As we know from the memos, the techniques that were apparently introduced after I left did not appear to work either, which is why the memos granted authorization for harsher techniques. That continued for several months right till waterboarding was introduced, which had to be used 83 times – an indication that Abu Zubaydah had called the interrogator's bluff knowing the glass ceiling that existed.

Authoritative CIA, FBI, and military sources have also questioned the claims made by the advocates of the techniques. For example, in one of the recently released Justice Department memos, the author, Stephen Bradbury, acknowledged a (still classified) internal CIA Inspector General report that had found it "difficult to determine conclusively whether interrogations have provided information critical to interdicting specific imminent attacks."

In summary, the Informed Interrogation Approach outlined in the Army Field Manual is the most effective, reliable, and speedy approach we have for interrogating terrorists. It is legal and has worked time and again.

It was a mistake to abandon it in favor of harsh interrogation methods that are harmful, shameful, slower, unreliable, ineffective, and play directly into the enemy's handbook. It was a mistake to abandon an approach that was working and naively replace it with an untested method. It was a mistake to abandon an approach that is based on the cumulative wisdom and successful tradition of our military, intelligence, and law enforcement community, in favor of techniques advocated by contractors with no relevant experience.

The mistake was so costly precisely because the situation was, and remains, too risky to allow someone to experiment with

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amateurish, Hollywood style interrogation methods- that in reality- taints sources, risks outcomes, ignores the end game, and diminishes our moral high ground in a battle that is impossible to win without first capturing the hearts and minds around the world. It was one of the worst and most harmful decisions made in our efforts against al Qaeda.

For the last seven years, it was not easy objecting to these methods when they had powerful backers. I stood up then for the same reason I'm willing to take on critics now, because I took an oath swearing to protect this great nation. I could not stand by quietly while our country's safety was endangered and our moral standing damaged.

I know you are motivated by the same considerations, and I hope you help ensure that these grave mistakes are never made again.

Thank you.

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What Went Wrong?:

Torture and the Office of Legal Counsel in the Bush Administration

Prepared Statement of

Prof. Robert F. Turner, SJD

Co-Founder and Associate Director

CENTER FOR NATIONAL SECURITY LAW

University of Virginia School of Law

before the

U.S. Senate Committee on the Judiciary

Subcommittee on Administrative Oversight and the Courts

Wednesday, May 13, 2009 • 10:00 AM

Dirksen Senate Office Building • Room 226

About the Witness



Professor Robert F. Turner holds both professional and academic doctorates from the University of Virginia School of Law, where in 1981 he co-founded the Center for National Security Law. He has also served as the Charles H. Stockton Professor of International Law at the Naval War College and a Distinguished Lecturer at the U.S. Military Academy at West Point. In addition to teaching seminars on Advanced National Security Law at the law school, for several years he taught International Law, U.S. Foreign Policy, and seminars on the Vietnam War and Foreign Policy and the Law in what is now the Woodrow Wilson Department of Politics at Virginia.

His academic expertise is supplemented by many years of governmental service, including five years during the mid-1970s as national security adviser to Senator Robert P. Griffin with the Senate Foreign Relations Committee and subsequent Executive Branch service as Special Assistant to the Under Secretary of Defense for Policy, Counsel to the President's Intelligence Oversight Board at the White House, and Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs in 1984-85. His last government service was as the first President of the U.S. Institute of Peace, which he left in 1987 to return to the University of Virginia.

A veteran of two voluntary tours of duty as an Army officer in Vietnam, Dr. Turner has spent much of his professional life studying the separation of national security powers under the Constitution. Senator John Tower wrote the foreword to his 1983 book *The War Powers Resolution: Its Implementation in Theory and Practice*; and former President Gerald Ford wrote the foreword to *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* (1991). Dr. Turner authored the separation-of-powers and war powers chapters of the 1400-page law school casebook, *National Security Law,* which he co-edits with Professor John Norton Moore. Turner's most comprehensive examination of these issues, *National Security and the Constitution,* has been accepted for publication as a trilogy by Carolina Academic Press and is based upon his 1700-page, 3000-footnote doctoral dissertation by the same name. On July 26, 2007, he co-authored a *Washington Post* op-ed (with former Marine Corps Commandant General P.X. Kelley) entitled "War Crimes and the White House" that was highly critical of an executive order authorizing extraordinary CIA interrogation techniques.

Professor Turner served for three terms as chairman of the prestigious ABA Standing Committee on Law and National Security in the late 1980s and early 1990s and for many years was editor of the ABA *National Security Law Report.* He has also chaired the Committee on Executive-Congressional Relations of the ABA Section of International Law and Practice and the National Security Law Subcommittee of the Federalist Society.

The views expressed herein are personal and should not be attributed to the Center or any other entity with which the witness is or has in the past been affiliated.

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MR. CHAIRMAN, it is a distinct honor to once again appear before a subcommittee of the Senate Committee of the Judiciary – all the more so given the strong representation of the University of Virginia at this morning's hearing.[1] I doubt you will recall it, but thirty-five years ago this month I believe we shared an Air Laos *Electra* aircraft on a flight from Vientiane, Laos, to Hong Kong in a rather severe storm. I was a Senate staff member and your very distinguished father, our Ambassador to Laos at the time, was on the flight with his teenaged son. We also overlapped two years at law school in Charlottesville. It is good to see you again.

Holding Wrongdoers Accountable is Generally Desirable

The question of holding wrongdoers accountable for "war crimes" is not a new one for me. When Saddam Hussein sent much of the Iraqi army into neighboring Kuwait on August 2, 1990, my colleague Professor John Norton Moore and I immediately sat down and penned an op-ed that was ultimately published[2] in the *International Herald Tribune* under the title "Apply the Rule of Law."[3] I have been assured by several experts in the field – including Professors Michael Scharpf of Case Western University and Michael Newton of Vanderbilt – that this was the first public call for a war crimes trial for Saddam. In August of the following year, as chairman of the American Bar Association's Standing Committee on Law and National Security, I wrote the first

[1] The University of Virginia School of Law takes great pride in having more of our alumni serving in the Senate than those of any other law school. Although in the past two elections we lost Senators John Warner and George Allen, we still have six alumni in the Senate. In addition to Chairman Whitehouse, currently serving senators who are graduates of the University of Virginia School of Law include Senator Edward Kennedy, Senator Kit Bond, Senator Evan Bayh (my friend and classmate), Senator John Cornyn, and Senator Bill Nelson. I am pleased as well to see my old friend Dr. Jeffrey Addicott (who received his SJD from our Law School) and more recent friend Dr. Philip Zelikow (who teaches in the UVA History Department) also on this morning's panel.

[2] We initially submitted the article to the *New York Times*, which delayed publication several weeks.

[3] John Norton Moore & Robert F. Turner, *Apply the Rule of Law*, INT'L HERALD TRIB., Sept. 12, 1990.

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resolution and report endorsing a war crimes trial ever approved by the ABA House of Delegates. It was approved without a single voice of opposition. I also worked with both houses of Congress to get unanimous resolutions approved endorsing the idea of such a trial, and in this process I served at the request of Chairman Tom Lantos as informal counsel to the Congressional Human Rights Caucus during a hearing on the issue.

Even earlier, in 1986, it was my great honor to be selected as the first President of the United States Institute of Peace, which was established by Congress to study and promote the peaceful resolution of international conflicts. Professor Moore served as the first Chairman of the Board. We both became interested in the role of incentive structures in the deterrence of international aggression, and in 1995 we began co-teaching a seminar at the Law School on "War and Peace: New Thinking About the Causes of War and War Avoidance." In 2004, John published a landmark book entitled *Solving the War Puzzle*[4] that has been favorably compared with the writings of Clausewitz in its importance.[5]

Put simply, *incentives matter* – and if we want to discourage armed international aggression, war crimes, and other undesirable behavior we must attach costs to such conduct so that rational decision-makers will make other choices. This is one of the reasons that I have long defended the legality of intentionally targeting regime elites who have committed armed international aggression.[6]

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[4] JOHN NORTON MOORE, SOLVING THE WAR PUZZLE: BEYOND THE DEMOCRATIC PEACE (2004).

[5] James P. Terry, Book Review, 58(2) NAVAL WAR COLLEGE REV. 149 (Spring 2005), ("*Solving the War Puzzle* may be the most insightful and important examination of the causes of war since Clausewitz published *On War* in 1832.")

[6] Lest I be misunderstood, I have not defended something I believe not to be lawful because I like the policy implications of the act. But I have chosen to spend the time to explain why it is lawful because I believe it sends a useful message to aspiring aggressors. *See, e.g.,* Robert F. Turner, *Killing Saddam: Would It Be a Crime?*, WASH. POST, Oct. 7, 1990 at D1; and Robert F. Turner, In Self-Defense, U.S. Has Right to Kill Terrorist bin Laden, USA Today, Oct. 26, 1998, at 17A.

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In principle I'm a big believer in holding wrongdoers accountable. I think the decision to authorize waterboarding in the current conflict was a tremendous blunder that was clearly contrary to our treaty obligations and has contributed to seriously undermining the coalition against al Qaeda and its allies. Indeed, in July 2007, I co-authored a powerful indictment of an Executive order approving non-traditional CIA interrogation techniques in the *Washington Post* entitled "War Crimes and the White House"[7] that, according to the *Post's* Web site, was the most frequently e-mailed article in the *Post* for nearly twenty-four hours. Late last year, I had the honor of serving on a drafting committee to prepare a new Executive order banning torture and other acts of detainee abuse under the auspices of the Center for Victims of Torture. Nevertheless, I am opposed to either a "truth commission" inquiry or the prosecution of those involved at any level in this tragic decision. Let me explain some of the reasons why.

Good People Sometimes Make Horrible Mistakes: A Parallel

I submit there is a useful parallel to the issue before us that occurred on February 19, 1942, when President Franklin D. Roosevelt signed Executive Order 9066 authorizing the apprehension and detention in "War Relocation Camps" of well over 100,000 people living lawfully and peacefully in this country. More than sixty percent of those detained were U.S. citizens, and many of them had never even *visited* Japan – their only "crime" being that they were descendants of people who had once lived in Japan.

Sadly, some of the most famous civil libertarians of the twentieth century approved this horrendous abuse of the rights of innocent American citizens. In addition to President Roosevelt, California Attorney General (and later Supreme Court Chief Justice) Earl Warren argued strongly for the detention, and Justice Hugo Black wrote the majority

[7] P.X. Kelley & Robert F. Turner, *War Crimes and the White House*, WASH. POST, July 26, 2007, at A21.

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opinion for the Supreme Court in the *Korematsu* case upholding the detention.[8] It was not until 1988, when former California Governor Ronald Reagan was president, that Senator Alan Simpson took the lead in this chamber in enacting legislation to formally apologize to the victims of that policy, which had been broadly supported within the government at the time. Ironically given the way in which he is perceived by many today, one of the most determined critics of the incarceration was Federal Bureau of Investigation Director J. Edgar Hoover. Hoover wrote to Attorney General Biddle that "Every complaint in this regard has been investigated, but in no case has any information been obtained which would substantiate the allegation," and argued it would be unconstitutional to detain American citizens without probable cause and due process in any event.[9]

To the best of my knowledge, when World War II ended, the Senate Judiciary Committee did not hold a "What Went Wrong?" hearing investigating those horrible decisions – not even when Republican Dwight Eisenhower became president and the Republicans briefly controlled both chambers of Congress. Surely by 1953, in hindsight, many Americans realized that a terrible wrong had been done to our fellow citizens. But most had the common sense to realize that good people had made a horrible decision because they honestly believed that a failure to act might cost a large number of American lives. It is true that they didn't violate the Geneva Conventions (which in their current form had not yet been written), but they clearly violated the U.S. Constitution – and surely no one will deny that their decision to incarcerate more than 100,000 Americans without the slightest probable cause or individualized suspicion was a greater offense than what was done to a small number of foreign terrorists following 9/11.

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[8] *Korematsu v. United States*, 323 U.S. 214 (1944).

[9] For an excellent discussion of Hoover's views and actions, see GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 293 (2004). *See also* CONRAD BLACK, FRANKLIN DELANO ROOSEVELT: CHAMPION OF FREEDOM 721 (2003).

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Those who planned, authorized, and carried out the detention policies acted out of *fear*, and their motive was not cruelty or evil minds, but rather a sincere belief that subjecting more than 100,000 "U.S. persons" (to use the modern vernacular) to temporary detention was a lesser moral evil than permitting a small number of possible saboteurs within their ranks to engage in terrorist attacks or otherwise undermine the war effort that might ultimately jeopardize the freedom of all Americans.

It is easy to forget that less than three months before the decision to incarcerate Americans of Japanese ancestry was made, the Japanese Navy had sunk a good part of our Pacific Fleet, and it was far from clear that we were going to emerge from the war victorious. People were afraid – very afraid – and those entrusted with the national security were particularly anxious to do everything reasonably possible within their powers to protect the lives and freedom of the American people. Their motives were admirable and honorable; the decision they made was neither.

And I submit the same is true of the OLC lawyers who are under fire this morning. The only one that I know personally is Professor John Yoo, with whom I have shared a few panels at law schools and legal conferences since 9/11. I doubt I've ever spent more than two or three minutes in conversation with him, and I've written one law review article that was more than a little critical of one of his books.[10] But my strong sense is he is an exceptionally able legal scholar and an honorable man of principle. And I have no reason to believe the other lawyers involved in drafting and approving these memoranda were otherwise.

Did they provide perfectly balanced, objective, sterile legal opinions – or is it likely they very much wanted to reach a particular outcome and they let their interest in that outcome color their scholarship? I don't know. But my strong guess is that they were not in the

[10] *See* Robert F. Turner, *An Insider's Look at the War on Terrorism*, 93 CORNELL L. REV. 471 (2008).

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least neutral or objective in their approach to these issues. They were dedicated patriots who dearly loved this country, watched the horrors of the 9/11 attacks replay on television time and again, and felt very strongly that the United States ought to do everything reasonably possible and appropriate to prevent future such attacks. That is to say, their mindset was probably very much like that of FDR, Earl Warren, and Hugo Black in the aftermath of Pearl Harbor (which actually claimed fewer lives than the 9/11 attacks).

As I stated, I don't know most of the individuals who worked at OLC when these memoranda were written at all, and the one I do know I don't know well. I am therefore a bit reticent to speculate about their motives. But my guess is they did want to reach a certain outcome – one that would allow America to get the intelligence information they felt necessary to reduce the chances of another 9/11 attack or an even greater slaughter of their fellow citizens by a fanatical enemy that had repeatedly proven itself unwilling to abide by the most fundamental principles of civilized behavior. And, as I will discuss, I doubt seriously they understood at the time that some of their recommendations were contrary to America's domestic law or our obligations under international law.

The Importance of Good Intelligence in the Struggle Against Al Qaeda

This is an unusual if not unique armed conflict. From the American Revolution through both World Wars to Operation Desert Storm, intelligence has throughout our history been an important element in the struggle for victory. Through intelligence sources and methods we learn the enemy's locations and intentions, and then we call upon our own military establishment – our infantry, armor, naval vessels and aircraft – to close with and destroy that enemy. But in the struggle against al Qaeda, intelligence is by far the single most important factor in achieving victory and preventing attacks. One day, if we don't prevail in this struggle, al Qaeda may be armed with biological toxins or primitive nuclear or radiological weapons. But at present they have no tanks, no warships, and no

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airplanes. If our intelligence assets can locate them, a big city police force could either destroy them or apprehend them for trial.

The importance of the intelligence function in this conflict was no secret, and when the CIA—to its credit—sought legal guidance on the limits to which they could subject captured high-value enemy leaders in their quest for actionable intelligence, the lawyers charged with responding almost certainly knew that their answers might affect whether hundreds, thousands, or even tens of thousands of their fellow Americans might live or die in future al Qaeda terrorist attacks.

Had they advocated incarcerating tens of thousands of American Muslims in "War Relocation Camps," or authorized beheadings, branding, maiming, severe beatings, or other traditional techniques of "torture" – many used regularly by our enemies in this conflict – I hope and assume that all Americans would have voiced their disgust. Had I been on Lieutenant William Calley's Courts Martial board following My Lai, I would have favored the death penalty. That same year I was a reconnaissance platoon leader in an Army infantry unit, and indeed I was responsible for training my men (which in those days they all were) about our obligations under the Geneva POW Convention. We knew the rules, and they didn't include waterboarding.

But like virtually every other national security lawyer, after the 9/11 attacks I told everyone who asked that the protections of the Geneva Conventions did not apply to al Qaeda. Like pirates and slave-traders, international terrorists were *hostis humani generis* (common enemies of mankind). But I also would usually note that, once apprehended, even pirates were entitled to humane treatment and fundamental international standards of due process of law.

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It is interesting to note the detail in which some of the authorized "enhanced" interrogation procedures were spelled out – exactly how a slap could be administered, how long a detainee could be exposed to cold water of a certain temperature, and the like. Even for the interrogations of Abu Zubaydah – believed by the CIA to be "one of the highest ranking members of the al Qaeda organization"[11] – interrogations were to be monitored by medical experts,[12] "facial slaps" were not to be used "to inflict physical pain that is severe or lasting,"[13] and "a rolled hood or towel" had to be used "to help prevent whiplash" if Zubaydah was to be pushed against a wall.[14]

These detailed restrictions strongly suggest that the authors of these instructions were trying very hard to walk the difficult line between what Judge Gonzales recently admitted were "harsh" interrogations intended to elicit actionable intelligence that might save lives, on the one hand, and prohibited "torture" on the other. (I don't think they realized that the proper legal standard here was not "torture" but the humane treatment requirements of Common Article 3.) Let me make it clear – I believe that waterboarding crosses the line and is "torture" by any reasonable interpretation – but as a close colleague who has been outraged by these activities has put it, it is "torture lite." Clearly, the officials who wrote these memoranda were trying to draw an admittedly difficult bright line and prohibit acts they felt were clearly across that line. These were not memos that intentionally advocated "torture" in my judgment – they simply got the answer tragically wrong.

I personally am very fond of the Army's "Golden Rule" for interrogation: If you would be offended to learn our enemies were treating our POWs in this manner, don't do it to

[11] Memorandum from Jay S. Bybee, Assistant Attorney General, Dep't of Justice, to John Rizzo, Acting General Counsel, Central Intelligence Agency, Interrogation of al Qaeda Operative (Aug. 1, 2002), at 1.

[12] *Id.* at 4.

[13] *Id.* at 2.

[14] *Id.*

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them. I must confess that I have not greatly focused on the precise meaning of "torture," because in my view Common Article 3 requires us to treat all detainees "humanely" – a much higher standard.

By far the most extreme measure approved was waterboarding. Until recently I had the impression that large numbers of al Qaeda suspects had been waterboarded by the CIA. But, according to the recently released once top-secret OLC memos, waterboarding was used on only three individuals – Khalid Sheikh Mohammed, Zubaydah, and 'Abd Al-Rahim Al-Nashiri – and the practice was ended in March 2003.[15] An OLC memorandum of May 10, 2005, noted:

> You have previously explained that the waterboard technique would be used only if: (1) the CIA has credible intelligence that a terrorist attack is imminent; (2) there are "substantial and credible indicators the subject has actionable intelligence that can prevent, disrupt or delay this attack"; and (3) other interrogation methods have failed or are unlikely to yield actionable intelligence in time to prevent the attack.

This doesn't sound too far off from the "ticking bomb" scenario that Professor Alan Dershowitz argued might justify resorting to torture.[16] I am not defending it. I think it was wrong, and the resulting publicity has done very serious harm to our national security by costing us public support both within the United States and among people of

[15] Memorandum from Steven G. Bradbury, Assistant Attorney General, Dep't of Justice, to John Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005), at 6.

[16] *See* Alan M. Dershowitz, "Want to torture? Get a warrant," *San Francisco Chronicle* January 22, 2002.

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good will around the world. But I have no reason to doubt the assertions by those in the know who say it probably saved American lives.

The fact that I believe the use of waterboarding was a tragic mistake does not mean I don't understand how a reasonable person might conclude that such conduct was morally justified as the lesser evil. If confronted with a moral hypothetical requiring one to either kill a known wrongdoer whom one is convinced is about to murder hundreds or thousands of innocent people, or to sit quietly and watch the resulting slaughter unfold, no mater how many times I try I can't come down on the side of preserving the wrongdoer's rights.

Under American law, depending upon the specific facts, such an act might well be found totally justified under the doctrine of self-defense/defense of others. But even if one were certain that preventing the slaughter would be breaching the law, moral principles might counsel violating the law.

In a September 20, 1810, letter to John Colvin, Thomas Jefferson observed:

> A strict observance of the written laws is doubtless one of the highest duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving the country when in danger are of higher obligation. To lose our country by a scrupulous adherence to written laws, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.[17]

Candidly, I don't think we are there yet. We didn't have to resort to torturing POWs during World War II, and I don't sense the al Qaeda threat to be even close to that level of threat. But a Gallup Poll conducted within the past month reports that by a margin of

[17] *Jefferson to Colvin*, Sept. 20, 1810, *reprinted in* 11 WRITINGS OF THOMAS JEFFERSON 146 (Paul Leicester Ford ed., Fed. Ed. 1905).

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fifty-five to thirty-six percent – and an even larger split of sixty-one to thirty-seven percent among those polled who claimed to have followed the story closely – the American people believe the harsh interrogation techniques were justified.[18] My guess is that had we experienced more terrorist attacks within the United States in recent years, those figures in support of enhanced interrogation techniques would be much larger.

However, when one steps back from trying to balance the relative evils of killing (or torturing) one terrorist leader versus permitting that terrorist to detonate a weapon of mass destruction in a major American city, and looks at the big picture, the benefits of breaking the law to eliminate the terrorist are less compelling. Among other considerations, it is imperative for a democracy to maintain the moral high ground if it wishes to maintain the support of its people. Foreign governments we traditionally consider among our strongest allies have reportedly instructed their intelligence services not to cooperate with U.S. intelligence agencies in several key areas because of outrage over waterboarding and allegations of misconduct. America's ability to pressure Iran and North Korea to comply with their legal obligations has also suffered with perceptions that we have violated our own obligations. And it is likely that American POWs in future armed conflicts will pay an extra price as our enemies rely upon our own behavior and public statements about the scope of the Geneva Conventions.

Put simply, I think we erred horribly on this issue. The mistakes have made me at times very angry. Yet, even in my anger, as I look at these decisions I don't see evil people at OLC, in the uniformed military, or at CIA. I see good and able people who in my view made mistakes.

[18] Jeffrey M. Jones, Slim Majority Wants Bush-Era Interrogations Investigated: Majority Says Use of Harsh Techniques on Terrorism Suspects Was Justified (Apr. 27, 2009), http://www.gallup.com/poll/118006/Slim-Majority-Wants-Bush-Era-Interrogations-Investigated.aspx.

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What Went Wrong?

Mr. Chairman, the title of this morning's hearing is "What went wrong?" – how could some obviously very able and honorable lawyers approve the use of waterboarding against defenseless human beings held in United States custody? I think the short answer is a simple one – a tragic ignorance about the important field of "national security law" among most lawyers trained before at least 1991. I may have been the first individual to enter an American law school for the express purpose of studying "law and national security" (as national security law was then known at the one law school in the Nation where it was taught – the University of Virginia School of Law). I had worked as the national security adviser to a member of the Senate Foreign Relations Committee for five years, and during that time I had frequently encountered issues of constitutional and international law that I did not feel competent to address. I had studied aspects of treaty law and the separation of powers between Congress and the Executive at considerable length on my own by reading treatises, law review articles, and getting to know some of the preeminent legal scholars that appeared before our Committee. (I am especially indebted to Professor Myres McDougal at Yale, who became a cherished friend for decades; and to Richard Baxter at Harvard and William Bishop at the University of Michigan School of Law – both of whom proved patient and willing to assist me in my independent studies.) Indeed, I take great pride in the fact that, seven years before the Supreme Court struck down "legislative vetoes" as unconstitutional, I wrote a lengthy floor statement for Senator Griffin making the same point for the same reasons.[19] I had first become interested in these issues listening to a lecture by the great Professor Quincy Wright in 1966, and by the time I actually entered law school I was already a pretty good national security lawyer on some issues.

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[19] The statement appears in the *Congressional Record* of June 11, 1976, from page 17,643 to 17,646, and can be found on line at: http://www.virginia.edu/ensl/pdf/Griffin-Congressional-Record_6-11-1976.pdf .

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But, at that time, Virginia was the only law school in America even offering a course in national security law, which was first taught by my colleague John Norton Moore in 1969 under the title "International Law II – Law and National Security." When I graduated, John and I co-founded the Center for National Security Law in order to promote interdisciplinary advanced scholarship in the field. Our first major project was to prepare a major law school casebook on *National Security Law*,[20] which in its most recent (2005) edition is more than 1400 pages long. In 1991, we began teaching a National Security Law Institute each summer to help train law professors to teach in this rapidly growing field, and today national security law is taught at most American law schools. But most such courses began in response to the 9/11 attacks and were probably not available for most of the lawyers working at OLC during the Bush Administration, and my guess is that none of the lawyers who helped write or signed the so-called "torture memos" that have recently been released had any significant knowledge of Common Article 3 of the 1949 Geneva Conventions prior to the attacks of September 11, 2001.

This general lack of understanding of *jus in bello* and other aspects of national security law has caused a great deal of confusion and helped divide our country over the past eight years. Some very able lawyers, trained to believe that if the government detains a citizen it must charge that individual with a crime and take the evidence to federal court, simply assumed that the last administration was betraying the most fundamental principles of due process – totally oblivious to the firmly-established international law norm that enemy combatants captured during armed conflict may be detained (under humane conditions) for the duration of hostilities. During World War II, more than 400,000 German POWs were detained at POW camps spread across more than forty American states. And as for the hated idea of "military commissions," Article 84 of the POW Convention sets forth the general rule that "A prisoner of war shall be tried only by a military court . . . ." This is not the time to start a major debate about the President's

[20] JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW (2d. ed. 2005).

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independent constitutional power to authorize warrantless foreign intelligence surveillance, but Congress itself acknowledged that power when it enacted the first wiretap statute and every appellate court to decide the issue has affirmed such a power.[21] I think there would have been a lot less criticism of the previous administration had more Americans understood national security law.

Common Article 3 – Did It Really Apply?

On the morning of June 29, 2006, I was making a presentation at the Naval War College during which I argued that, while the general provisions of the Third 1949 Geneva Convention (the POW Convention) did not apply in the struggle against al Qaeda, we were nevertheless constrained by Common Article 3 of those conventions to treat all detainees "humanely." [22] After my talk was over I learned the Supreme Court had just

[21] This is an issue I have addressed at great length both before this Committee and its counterpart in the House of Representatives. *See, e.g., Congress, Too, Must "Obey the Law": Why FISA Must Yield to the President's Independent Constitutional Power to Authorize the Collection of Foreign Intelligence: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Robert F. Turner), *available at* http://www.virginia.edu/cnsl/pdf/TURNER-SJC-28Feb06_FINAL.pdf; *Is Congress the Real "Lawbreaker?": Reconciling FISA with the Constitution: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Robert F. Turner), *available at* http://www.virginia.edu/cnsl/pdf/Turner-HJC-5Sept07-(final).pdf.

[22] Common Article 3 provides:

> ***Article 3***
>
> In the case of *armed conflict not of an international character occurring in the territory of one of the High Contracting Parties*, each party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1. *Persons taking no active part in the hostilities, including members of armed forces* who have laid down their arms and those *placed hors de combat by* sickness, wounds, *detention*, or any other cause, *shall in all circumstances be treated humanely*, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel

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handed down its opinion in *Hamdan v. Rumsfeld*, in which it declared: "[T]here is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not between signatories[:] Common Article 3 [which] appears in all four Conventions . . . ."[23]

But it is important to understand that, before the Supreme Court resolved the issue, not everyone was in agreement that Common Article 3 applied to this struggle. Under international law, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[24] There is obvious ambiguity in the first sentence of Common Article 3, which reads: "In the case of armed conflict not of an international character

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treatment and *torture*;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular, *humiliating and degrading treatment*;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art, 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 135 (emphasis added).

[23] *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006).

[24] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331. The U.S. is not a party to this treaty but considers the quoted portion to be declaratory of customary international law.

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occurring in the territory of one of the High Contracting Parties . . . ." Was the struggle against al Qaeda (the "Global War on Terrorism"), that had something like seventy-five sovereign States (all Parties to the Geneva Conventions) participating in one form or another, an "armed conflict not of an international character," or was it an international conflict? Keep in mind that Senate Joint Resolution 23, overwhelmingly approved by this body on September 14, 2001 and later signed into law, clearly authorized an "international" conflict by empowering the President to use force against other "nations." Section 2 provided:

> **Section 2 - Authorization For Use of United States Armed Forces**
>
> (a) IN GENERAL- That the President is authorized to use all necessary and appropriate force against those *nations*, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[25]

Nor can it be said that the struggle against al Qaeda was clearly "occurring in the territory of *one* of the High Contracting Parties" (my emphasis), as al Qaeda had attacked the United States in our own country, in Tanzania and Kenya by bombing our embassies in 1998, in Saudi Arabia (Khobar Towers bombing), and in Yemen (*U.S.S. Cole*). Other attacks have occurred in Europe and elsewhere. Obviously, "occurring in the territory of one of the High Contracting Parties" could merely be a jurisdictional clause making it clear that the Geneva Conventions did not pretend to establish legal rules for conflicts entirely between non-Parties to the treaties, but it could equally as easily be interpreted as excluding from the coverage of Common Article 3 armed conflicts involving more than one state Party to the Conventions.

[25] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (emphasis added).

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It was my pleasure to testify on these issues before the Senate Select Committee on Intelligence in September 2007, and at that time I noted that the *travaux préparatoires* (preparatory works or negotiating history) of Common Article 3 clearly reveal that it was originally designed to deal with "civil wars" or "rebellions" within the territory of a single state. [26] Indeed, it is clear that well after the Conventions had entered into force prominent legal scholars continued to view Common Article 3 as a set of minimal guarantees for civil wars and rebellions within a single state. With the permission of the Committee, I will append a portion of my prepared statement for the Senate Select Committee on Intelligence at the end of this testimony for those who might wish a more detailed discussion of Common Article 3.

My conclusion is that, because the struggle against al Qaeda and its allies does not clearly involve sovereign states openly taking part on both sides, the Supreme Court in *Hamdan* got it right – and this is the view of most *jus in bello* specialists with whom I have spoken. I would note that the majority view of the specialists with whom I have communicated is that a violation of Common Article 3 is not a "grave breach" of the Conventions and thus technically not a "war crime." That was not my own interpretation of the Conventions, but it was supported by a strong majority of experts with whom I communicated in this country and abroad. As a technical matter, however, for purposes of U.S. law that is clearly not the rule. For the War Crimes Act of 1996 includes within its definition of "war crimes" any conduct "(3) which constitutes a grave breach of common Article 3 . . . ."[27]

[26] A copy of my prepared statement is available on line at: http://www.virginia.edu/cnsl/pdf/Turner-SSCI-testimony-9-25-07.pdf .

[27] War Crimes Act of 1996, 18 U.S.C. § 2441, *available at* http://www.law.cornell.edu/uscode/18/usc_sec_18_00002441----000-.html .

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Why Not a Truth Commission?

In some ways having a national inquiry into what really happened in connection with these enhanced interrogation techniques is appealing. If we could get Lee Hamilton, George Mitchell, Howard Baker, Larry Eagleburger, Jim Schlesinger, and the like to take on the task independent of outside pressures, we might even learn what Speaker Pelosi knew and when she knew it.

But my guess is we would instead wind up with more partisan commissioners, or even something like the 1975-76 Church Committee that investigated intelligence abuses in a very partisan and sensational manner – in the process doing serious damage to our national security and our Intelligence Community that continues to haunt us today. As a Senate staff member at the time I sat through some of those hearings, as senators of both parties competed to see who could make the front pages of the next day's newspapers with the more sensational allegations. (In the end, I would note, the Church Committee admitted that it has been unable to find a single instance in which the CIA had "assassinated" anyone; and Directors of Central Intelligence Richard Helms and William Colby had each issued internal CIA regulations prohibiting any involvement with assassination years before the Church hearings began.) Last month, a former Commandant of the Marine Corps and a former supervisor of FBI counter-terrorism activities joined me in signing an op-ed that opposed the idea of a "truth commission."[28] We are still engaged in a dangerous war, and President Obama is right when he says we ought to move forward.

Should We Prosecute Anyone?

Nor do I believe it would be useful to bring criminal charges against CIA or military interrogators who carried out their orders and were told the Attorney General had

[28] P.X. Kelley, Oliver Revell & Robert F. Turner, *"Truth Commission" Duplicity*, WASH. TIMES, Mar. 3, 2009.

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determined that these techniques were lawful. Indeed, I can think of few steps more calculated to impose a chilling effect on those who go into harm's way on our behalf. If interrogators who in good faith engaged in rough treatment of detained enemy combatants are subjected to criminal trials upon the election of a president from a different political party, what message are we sending to the young infantrymen we train and then send out to kill and perhaps die for us? If shoving and slapping a terrorist leader is impermissible even when the orders come from the very top, what soldier is likely to risk killing an enemy soldier without at least a court order? Who knows? Perhaps the angry looking man carrying the AK-47 across the battlefield was actually just heading over to the local rod and gun club for a turkey shoot. Without federal judges on the scene to review the evidence and determine the existence of probable cause, only a fool will actually try to engage the enemy. Mistakes were in my view clearly made by some very able and honorable individuals who, in their quest to save American lives, drew the line in the wrong place. If we now punish them for giving too much attention to trying to protect American lives, they will be unlikely to miss the lesson.

Some agree we ought not go after the small fish, but rather the lawyers like John Yoo, Jay Bybee, and David Addington; or even go for bigger game like Secretary Rumsfeld, Vice President Cheney, and President Bush. But I don't see evidence that the lawyers lied – at worst they tried too hard to prevent another 9/11. As for Bush, Cheney, and Rumsfeld – as non-lawyers they presumably followed the advice of the lawyers around them. These were not simple issues, and few of the lawyers involved fully understood them well. We should learn from our mistakes, but having show trials of people from the previous administration is not going to solve our problems.

Indeed, that was tried in 1977 when the Carter Justice Department decided it should make examples of two senior FBI officials named Mark Felt and Edward Miller.[29] They had

[29] Felt, of course, was later unmasked as "Deep Throat."

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authorized counter-terrorism FBI agents to cross the line in trying to prevent a major terrorist attack by members of the Weather Underground. Both were convicted at great personal expense. The message was not lost, and for years thereafter it was almost impossible to get FBI agents to volunteer for counter-terrorism/counter-intelligence duty. Years later, Griffin Bell declared that his biggest mistake as the nation's Attorney General during the Carter Administration was in approving those prosecutions.

Candidly, another reason for not prosecuting those involved in this matter is that the odds of getting a conviction are very slim. I've already noted that the latest Gallup Poll shows that roughly two-thirds of those polled approve of the use of enhanced interrogation techniques. When a jury hears testimony that the motive for these techniques was to save American lives during wartime, and the only people waterboarded were the three most senior al Qaeda terrorists in U.S. custody, the odds of finding a jury of twelve Americans willing to convict anyone involved in this matter are extremely slim.

Mr. Chairman, this concludes my prepared statement. I will be delighted to take questions at the appropriate time.

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APPENDIX

Excerpts from Professor Turner's September 25, 2007, Prepared Statement to the Senate Select Committee on Intelligence[30]

. . . .

A Brief History of *Jus in Bello* and Common Article 3

The "law of war"[31] (today often referred to as the "law of armed conflict" or LOAC) has developed over centuries as States began in their own self-interest to find ways to mitigate the horrors of war. The first multinational treaty dealing with these issues was the 1856 Declaration of Paris, which among other things outlawed privateers and ultimately made the power of Congress to "grant Letters of Marque and Reprisal"[32] an anachronism.

American specialists in this field take pride in the fact that the first effort to codify the customary rules of warfare was in this country during the Civil War. General order No. 100, entitled "Instructions for the Government of Armies of the United States in the Field" and written by former Columbia University legal scholar Francis Lieber, was issued by President Abraham Lincoln in 1863. The "Lieber Code" is still cited today for its landmark effort to collect in one place the customary law of war.

The first Geneva Convention dealing with humanitarian principles of armed conflict was concluded in 1864. It provided that members of armed forces during war who

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[30] The full text of this statement is available on line at: http://www.virginia.edu/cnsl/pdf/Turner-SSCI-testimony-9-25-07.pdf .

[31] For a good overview of the history and modern law of armed conflict, see generally Howard S. Levie & Jack Grunawalt, *The Law of War and Neutrality*, in NATIONAL SECURITY LAW (John Norton Moore & Robert F. Turner, eds. 2d ed. 2005).

[32] U.S. CONST., Art. I, Sec. 8, cl. 11.

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were wounded, sick, or "harmless" were to be respected and cared for. By 1867, all of the great powers except the United States had ratified it, and we did in 1882. Another Geneva Convention followed in 1906.

Historically, conflicts within a single State - armed revolutions or civil wars - were viewed as outside the scope of the law of nations. Indeed, even inquiring about how a sovereign State treated its own nationals was viewed as wrongful interference in that State's internal affairs. However, in 1756, Emerich de Vattel wrote in *The Law of Nations* that parties to a civil war had a duty to observe the established customs of war.[33] In 1912 the International Committee of the Red Cross (ICRC) sought to interest States in a draft convention on the role of the Red Cross in civil wars and insurrections, but there was no interest.

The first convention to provide humane treatment for prisoners of war came in 1929 but was limited to international armed conflicts. In 1938, at the Sixteenth International Red Cross Conference, a resolution was passed urging the application of the "essential principles" of the Geneva Convention to "civil wars."[34]

The horrors of World War II led to demands for a new multilateral treaty regime. At a preliminary Conference of National Red Cross Societies in 1946, the ICRC recommended that "in the event of civil war in a country, the parties should be invited to state that they were prepared to apply the principles of the Convention on a basis of reciprocity." The conference went even further, and recommended inserting a new article at the beginning of the Convention to the effect that: "In the case of armed conflict within the borders of a State, the Convention shall also be applied by each of the adverse parties, unless one of them announces expressly its intention to the contrary."[35] In 1947, the ICRC convened a Conference of Government Experts that drafted an article providing that "the principles of the Convention" were to be applied in civil wars by contracting parties "provided the adverse Party did the same."[36]

This principle of "reciprocity" was a key element in international law, as nations

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[33] G. I. A. D. Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253, 256-57 (1983).

[34] Much of this historical material can be found in 1 JEAN S. PICTET, COMMENTARY ON THE GENEVA CONVENTIONS 39-43 (1952).

[35] *Id.* at 41-42.

[36] *Id.* at 42.

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agreed to surrender rights in return for assurances that their treaty partners would obey the same constraints. If one country abused prisoners of war, its adversary in the conflict would reciprocate – in the process providing an incentive for the first violator to adjust its behavior in order to protect its own soldiers from abuse. Indeed, Thomas Jefferson – an early champion of the humane treatment of prisoners of war[37] – argued that engaging in reprisals in response to mistreatment of prisoners of war was the most humane approach,[38] as it would promote compliance with the law by both sides. As international humanitarian and human rights law rapidly developed in the years following World War II and the birth of the United Nations, a different view emerged asserting that no State had a "right" to engage in torture or inhumane treatment in the first place, so no derogation should be permitted from these rules. This is logically true, but it undermines the incentives by which much of international law is routinely enforced.

Pictet asserts that the reciprocity clause was ultimately omitted because "doubt was expressed as to whether insurgents could be legally bound by a convention which they had not themselves signed.[39] If the insurgents claimed to be the lawful government of the country, they would then be bound by the country's treaties. Besides, there was no harm to the *de jure* government, "for no Government can possibly claim that it is *entitled* to make use of torture and other inhumane acts prohibited by the Convention, as a means of combating its enemies."[40]

The ICRC drafted a new article for submission to the 17th International Red Cross Conference in Stockholm, which read in part:

> In all cases of armed conflict which are *not of an international character,* especially cases of civil war, colonial conflicts, or wars of religion, which may occur *in the territory of one or more of the High Contracting parties,* the implementing of the principles of the present Convention shall be obligatory on each of the adversaries.[41]

This was the first time the idea of extending what became Common Article 3 beyond "civil wars" was suggested. But the language "especially in cases of civil war, colonial conflicts, or wars of religion" was objected to and omitted by conference

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[37] *See, e.g., Jefferson to William Phillips,* July 22, 1779, in 3 PAPERS OF THOMAS JEFFERSON 44 (Julian P. Boyd, ed., 1951).

[38] "When a uniform exercise of kindness to prisoners on our part has been returned by as uniform severity on the part of our enemies, you must excuse me for saying it is high time, by other lessons, to teach respect to the dictates of humanity; in such a case, retaliation becomes an act of benevolence." *Id.* at 45-46.

[39] 1 PICTET, *supra* note 34, at 51.

[40] *Id.* at 52.

[41] *Id.* at 42-43 (emphasis added).

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delegates, as were the words "or more."

Pictet asserts that this deletion had the effect of enlarging the scope of the provision,[42] which is a reasonable but hardly the only reasonable interpretation. He notes that the principal objections to the Stockholm draft involved concerns that "it would cover in advance all forms of insurrection, rebellion, anarchy, and the break-up of States, and even plain brigandage."[43] In response, he notes:

> Others argued that the behaviour of the insurgents in the field would show whether they were in fact mere brigands, or, on the contrary, genuine soldiers deserving of the benefit of the Conventions. Again, it was pointed out that the inclusion of the reciprocity clause in all four Conventions . . . would be sufficient to allay the apprehensions of the opponents of the Stockholm proposals. It was not possible to talk of "terrorism", "anarchy" or "disorders" in the case of rebels who complied with humanitarian principles.[44]

Specifically deleting the words "or more" in the sentence "which may occur in the territory of one or more of the High Contracting parties" could reasonably be interpreted as a *narrowing* of the scope of Common Article 3 to cover only conflicts occurring within the territory of a single State, such as a civil war or internal revolution. As will be discussed, this was the understanding of the language by several prominent international experts on the Geneva Conventions.

The lack of agreement on the Stockholm draft led to the appointment of a Working Party to prepare new drafts. The second of these provided in part: "This obligation presupposes, furthermore, that the adverse party likewise recognizes its obligation in the conflict at issue to comply with the present Convention and the other laws and customs of war."[45] Pictet observes that that there was "almost universal opposition to the application of the Convention, with all its provisions, to all cases of non-international conflict."[46]

A second Working Party was established to attempt to find a solution, and the final language is largely a product of this effort. It dropped the requirement for reciprocity.[47] In 1949, delegates from fifty-nine countries took part in a diplomatic

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[42] *Id.* at 43.

[43] *Id.*

[44] *Id.* at 44.

[45] *Id.* at 45.

[46] *Id.* at 46.

[47] *Id.* at 47-48.

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conference that produced four Geneva Conventions dealing with the humanitarian law of armed conflict. The United States ratified all four in 1955, and today all 194 sovereign States are parties to all four conventions. Indeed, more States are parties to the 1949 Geneva Conventions than to any other treaty in the history of the world.

The Text and Meaning of Common Article 3

Initial plans to have a formal preface to the Geneva Conventions were scrapped, and instead all four Conventions began with the same first three articles. Pictet asserts that the purpose was to place at the beginning of all four conventions "the principal provisions of a general character, in particular those which enunciated fundamental principles"[48] of international law. He adds that Article 3 was viewed by the ICRC as "one of the most important articles" of the Conventions, and also one of the most controversial. Twenty-five meetings were devoted to it.[49]

In the end, Common Article 3 (called "Common" because it appears as the third article of each of the four treaties) provided:

Article 3

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, *each Party* to the conflict shall be bound to apply, as a *minimum*, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, *detention*, or any other cause, *shall in all circumstances be treated humanely*, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain *prohibited at any time and in any place whatsoever* with respect to the above-mentioned persons:

[48] *Id.* at 36.

[49] *Id.* at 38.

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

(b) taking of hostages;

(c) *outrages upon personal dignity*, in particular *humiliating* and *degrading* treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.[50]

There are several points to note here:

- The article attempts to set "minimum standards" for all parties to the conflict;
- Everyone detained who is no longer taking an active part in the conflict is entitled to be "treated humanely";

[50] Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 22, art. 3 (emphasis added).

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- All "violence to life and person," especially including "cruel treatment" and "torture," is prohibited;

- "Outrages upon personal dignity" and "humiliating" and "degrading" treatment are expressly outlawed.

Many scholars have observed that the *travaux préparatoires* (negotiating history) provide very little clarity on the meaning of these terms.[51] Indeed, Pictet writes that it was viewed as "dangerous" to try to enumerate all of the rights of protected persons under Common Article 3, because it would be difficult to anticipate every conceivable form of abuse, and a detailed list of specific examples might be interpreted as the exclusion of others (*expressio unius est exclusio alterius*) that should be covered.[52]

The interpretation of treaties and other international agreements is government by the 1969 Vienna Convention on the Law of Treaties. Although the treaty has been in force for most of the world since 1980 and was signed and submitted to the Senate by President Nixon in 1976, the United States is still not a Party. While serving as Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs in 1984-85 I attempted without success to urge the Senate to take action on the Vienna Convention, but my efforts were halted when I was informed by staff members to Senator Helms that the Senator was not going to permit the treaty to be "railroaded through" the Senate. I was already working hard to obtain Senate consent to the ratification of the Genocide Convention, and elected to expend my energies in that direction.

Although not a Party, the United States has repeatedly acknowledged that most of the provisions of the Vienna Convention on the Law of Treaties were binding on all States as customary international law. Theses include Article 31, governing the interpretation of treaties. The basic rule is that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[53] Recourse may be had to the *travaux* and other supplemental means of interpretation only when the "ordinary meaning" test leaves the meaning of the treaty "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable."

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[51] David A. Elder, *The Historical Background of Common Article 3 of the Geneva Convention of 1949*, 11 CASE W. RES. J. INT'L L. 37, 59 (1979).

[52] I PICTET, *supra* note 34, at 52-53.

[53] Vienna Convention on the Law of Treaties, *supra* note 24, art. 31.

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Obviously, terms like "humane treatment" are not only ambiguous but also contextual. During the Vietnam War, for example, it would not have been reasonable to demand that North Vietnam – whose own people were subsisting on rations of rice and small servings of fish – feed American POWs the kinds of meals to which they were accustomed in the United States or on Navy aircraft carriers. (But this was no excuse for striking POWs with rifle butts and hanging them from the ceiling with their arms painfully bound with ropes – behavior that outraged Americans and led to sufficient international criticism that torture was largely stopped by the end of 1969.)

Does Common Article 3 Apply to the War Against Al Qaeda?

The White House and Department of Justice have argued that Common Article 3 was intended only to apply 'to internal conflicts between a State and an insurgent group,"[54] and the conflict with al Qaeda is clearly taking place in several nations. Thus, the argument goes, it is an international conflict and not an "armed conflict not of an international character" so as to be covered by Common Article 3. Like most legal scholars,[55] I have always dismissed this argument, for the same reason the Supreme Court did in *Hamdan* – the test is not where the conflict takes place but whether there are sovereign States on both sides. True, the Conventions say "occurring in the territory of *one* of the High Contracting Parties," but I have explained this away on the theory that if a conflict occurred on the territory of one (or more) States that were not Parties to the Conventions, that State could not be bound by a treaty it had never accepted. Thus, to be applicable, the non-international conflict had to occur within the territory of (at least) one Party State.

However, in candor, while researching the issue further in preparation for this hearing, it became clear to me that the argument that Common Article 3 was intended to apply only to civil wars and internal conflicts has some support for it both in *travaux* and the scholarly literature. Pictet's *Commentary* on the 1949 Geneva Conventions – published by the ICRC – are replete with references to Common Article 3 as addressing "civil wars, " "insurrections," and armed conflicts "of an internal character."[56]

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[54] *Quoted in* A. John Radsan, *The Collision Between Common Article Three and the Central Intelligence Agency*, 56 CATH. U. L. REV. 959, 972 (2007).

[55] Fionnuala Ní Aoláin, *Hamdan and Common Article 3*, 91 MINN. L. REV. 1523, 1556 (2007) ("Because of the apparent absence of a nexus between al Qaeda and any sovereign State, most legal scholars seem to have viewed this as a conflict not of an international character.")

[56] *See, e.g.*, 1 PICTET, *supra* note 34, at 38-43 (where "civil war" is used well over a dozen times, along with "armed conflicts . . . of an internal character," "insurrections," "social or revolutionary disturbances," and conflicts "within the borders of a state.").

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Pictet notes this is a "general" and "vague" expression, and discusses the various amendments that were proposed in an effort to explain the intentions of the delegates. All of them referred to "revolt" or "insurgents" – strongly suggesting that this was viewed as a provision addressing *internal* conflicts or civil wars.[57] And in discussing the Article, Pictet himself repeatedly refers to "cases where armed strife breaks out in a country," "civil disturbances," and conflicts involving "internal enemies."[58] But the actual language adopted was broader, and the "ordinary meaning" of "armed conflicts not of an international character" would seem to encompass transnational conflicts in which there are not sovereign States on both sides. Further, in the *Paramilitary Activities Case* in 1986, the International Court of Justice concluded that Common Article 3 provided a "minimum yardstick" for international and non-international conflicts alike.[59] However, this view is rejected by some of the world's foremost scholars of international law.[60]

Writing in a special issue of the *Georgia Journal of International and Comparative Law* honoring former Secretary of State Dean Rusk, the late and legendary British scholar Col. G.I.A.D. Draper, OBE – who served as Director of Legal Services for the British Army and participated in the Nuremberg War Crimes Trials – introduced his discussion of Common Article 3 by asserting: "This is the sole article in each of the four Conventions that deals exclusively with so-called 'internal armed conflicts.'"[61] Other scholars make similar points.[62]

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[57] *Id.* at 49-50.

[58] *Id.*

[59] *Nicaragua v. United States* (*Paramilitary Activities Case*), 1986 I.C.J. 14, 113-14. This has been among the World Court's most criticized opinions, including in my own writing. *See* Robert F. Turner, *Peace and the World Court: A Comment on the Paramilitary Activities Case,* 20 VAND. J. TRANSNAT'L. L. 53, 56-69 (1987).

[60] Included in this group would be Professor Yoram Dinstein, former President of the University of Tel Aviv and Dean of its Law School. We share the common bond of having both occupied the Charles H. Stockton Chair of International Law at the Naval War College, and I took the liberty of communicating with him in preparation for this hearing.

[61] Draper, *supra* note 33, at 268. Elsewhere in the same article he added: "No convention dealing with the law of war made any reference to conduct in *internal armed conflicts* until the four Geneva Conventions of 1949." *Id.* at 259.

[62] *See, e.g.*, Fionnuala Ni Aoláin, *Hamdan and Common Article 3*, *supra* note 55, at 1558 (2007). ("[A] 'formal' legal application issue arises when applying Common Article 3: the provision only textually applies to armed conflicts occurring in the territory of a state party. This issue raises the question of whether Common Article 3 applies in transnational contexts. A formalistic approach would suggest that a conflict must be either an interstates (international) conflict or an internal conflict taking place in the territory of a specific state.") *See also* ALBERTO T. MUYOT & ANA THERESA B. DEL ROSARIO, THE HUMANITARIAN LAW ON NON-INTERNATIONAL ARMED CONFLICTS 14-15, 27-28 (1994).

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It may or may not be of interest to the Committee that the International Criminal Tribunal for the Former Yugoslavia also applied Common Article 3 in a non-civil war setting in its 1997 *Tadic* case.[63] Ultimately, for our purposes, the issue is arguably moot because the Supreme Court in *Hamdan* declared that Common Article 3 does apply. However, that was based upon an interpretation of the 1949 Conventions, and, under *Whitney v. Robertson*, the Court will be bound by an inconsistent statute of more recent date.

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[63] *Prosecutor v. Tadic,* Case No. IT-94-1-T, Opinion and Judgment (ICTY App. Chamber, May 7, 1997).

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United States Senate
Committee on the Judiciary

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Statement of

The Honorable Sheldon Whitehouse

United States Senator
Rhode Island
May 13, 2009

Opening Statement of Sheldon Whitehouse
Chairman, Subcommittee on Administrative Oversight and the Courts
Hearing on "What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration"
As Prepared for Delivery

Winston Churchill said, "In wartime, truth is so precious that she should always be attended by a bodyguard of lies." The truth of our country's descent into torture is not precious, it is noxious. But it has also been attended by a bodyguard of lies. This hearing is designed to begin to expose some of those lies, to prepare us to struggle with that noxious truth, and to examine the battlements of legal authority upon which that truth and its bodyguard of lies was constructed.

The lies are legion.

President Bush told us "America does not torture" while authorizing conduct that America has prosecuted – both as crime and war crime – as torture.

Vice President Cheney agreed in an interview that waterboarding was like "a dunk in the water," when it was used as a torture technique by tyrannical regimes from the Spanish Inquisition to Cambodia's Killing Fields.

John Yoo told Esquire Magazine that waterboarding was only done "three times," when public reports now indicate that two detainees were waterboarded 83 and 183 times. About Khalid Sheik Muhammad, reportedly waterboarded 183 times, a former CIA official had told ABC News, "KSM lasted the longest under waterboarding, about a minute and a half, but once he broke it never had to be used again." This, too, was a lie.

We were told that waterboarding was determined to be legal, but were not told how badly the law was ignored, bastardized and manipulated by the Department of Justice's Office of Legal Counsel, nor were we told how furiously government and military lawyers rejected the defective OLC opinions – but were ignored.

We were told we couldn't second-guess the brave CIA officers who did this, and now we hear that the program was led by private contractors with a profit motive and no real interrogation experience.

Former CIA Director Hayden and former Attorney General Mukasey told a particularly meretricious lie: that the Army Field Manual restrains abuse by naïve young soldiers but isn't needed by the experienced experts at the CIA.

The Army Field Manual is a code of honor, as reflected by General Petraeus' May 10, 2007, letter to the troops. Moreover, military and FBI interrogators such as Matthew Alexander, Steve Kleinman and Ali Soufan are the true professionals. We now know that the "experienced interrogators" referenced by Hayden and Mukasey had little to no experience. In fact, the CIA cobbled its program together from techniques used by

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the SERE program, designed to prepare captured U.S. military personnel for interrogation by tyrant regimes who torture to generate propaganda. To the proud, experienced and successful interrogators of the military and the FBI, I believe Judge Mukasey and General Hayden owe an apology.

Finally, we were told that torturing detainees was justified by American lives saved – saved as a result of actionable intelligence produced on the waterboard. That is far from clear. Nothing I have seen as a Member of the Intelligence Committee convinces me this was the case. FBI Director Mueller has said he is unaware of any evidence that waterboarding produced actionable information. The example of Zubaydah providing critical intelligence on Khalid Sheikh Mohammed and Jose Padilla, often given, is false, as the information was obtained before waterboarding was even authorized.

And there has been no accounting of wild goose chases our national security personnel may have been sent on by false statements made by torture victims just to end the agony; no accounting of intelligence lost if other sources held back from dealing with us after our descent to what Vice President Cheney refers to as "the dark side"; no accounting of the harm to our national standing or our international goodwill; no accounting of the benefit to our enemies' standing and goodwill – particularly as measured in militant recruitment or fundraising; and not accounting of the impact this program has on information sharing with foreign governments, whose laws prohibit the type of treatment and detention policies the Administration had enacted.

I could relate other lies, a near avalanche of falsehood, on the subject of torture and what I have been told about interrogation techniques, but I suffer a disability: I am a legislator. Legislators have no authority to declassify. Our Senate procedure for declassification is so cumbersome that it has never been used. All of the "declassifiers" in government are executive branch officials. And the Bush Administration knew this. So they spouted their rhetoric, again much of it outright false, and though we knew it to be false we in Congress could not reply. It is intensely frustrating.

We've been told you shouldn't criminalize conduct by prosecuting it. You criminalize conduct by making it a crime under the law of the land at the time the crime was committed. Prosecution doesn't criminalize anything; prosecution vindicates the law in place at the time, based on the facts admissible as evidence.

We've been told you shouldn't prosecute people who followed lawful orders, or relied on proper legal authorities, or in good faith offered their best legal advice. But those are the questions, aren't they, and not the answers?

This is the first of what I hope will be a series of hearings looking into these questions. I hope we will soon be provided the Department of Justice Office of Professional Responsibility's report on its investigation of the Office of Legal Counsel, and hold more thorough hearings in the wake of that.

I'd like to thank Chairman Leahy for allowing me to hold this hearing. I also want to acknowledge the tireless work of Senator Feinstein, my chairman on the Intelligence Committee, who is leading its detailed investigation into the Bush Administration's interrogation and detention program. I applaud her for her efforts to get to the bottom of this shameful period of our country's history.

Today, we will hear from a distinguished panel of witnesses who will help us shed light on this topic. I thank them for their appearance this morning. I want to make one note about our last witness, Ali Soufan. Mr. Soufan interviewed Al Qaida terrorists and went undercover against Al Qaida. Threats against him have been documented. We ask the press to respect the security procedures we have in place and avoid photographing his face.

I'd now like to recognize Senator Graham for any statement he'd like to give.

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Statement of Views of Senator Sheldon Whitehouse

Introduction

On May 13, 2009, the Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts held a hearing entitled **"What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration."** The focus of this hearing was the memoranda prepared by the Department of Justice's Office of Legal Counsel (OLC) during the George W. Bush Administration to authorize the "enhanced interrogation techniques" used by that Administration against detainees connected with Al Qaeda.[1] One such technique was the now-infamous "waterboarding," a practice that is widely acknowledged to be illegal torture, and that has been previously prosecuted by the United States. These memoranda have only recently been declassified, and this was the first public hearing on this topic.

Five witnesses testified at the hearing:

- Professor David Luban is teaches legal ethics at Georgetown University Law Center. He has written a leading textbook in the legal ethics field, and has also devoted considerable time recently to studying the legal ethics implications of the OLC memos.

- Professor Philip Zelikow is a Professor of History at the University of Virginia who was Counselor of the Department of State from 2005 to 2007, where he was directly involved in the Administration's efforts to craft an interrogation policy and had occasion to evaluate the OLC memos in connection with those efforts.

- Mr. Ali Soufan is a former FBI supervisory special agent who investigated and supervised highly sensitive and complex international terrorism cases including the attack on the USS Cole and the events surrounding the September 11, 2001 attacks.

- Professor Robert F. Turner is the associate director of the University of Virginia's Center for National Security Law and, among other things, a former chair of the American Bar Association's standing committee on law and national security.

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[1] The hearing focused on six memoranda: (1) Jay Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002); (2) Jay Bybee, Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, *Interrogation of al Qaeda Operative* (Aug. 1, 2002); (3) John Yoo, Memorandum for William J. Haynes II, General Counsel of the Department of Defense, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (March 14, 2003); (4) Steven Bradbury, Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005); (5) Steven Bradbury, Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, *Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005); and (6) Steven Bradbury, Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of High Value al Qaeda Detainees* (May 30, 2005). These memoranda were all later retracted by the Bush Administration.

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- Professor Jeffrey Addicott, is a professor of law and the director of the Center for Terrorism Law at St. Mary's University School of Law in San Antonio, Texas, and a former attorney in U.S. Army Judge Advocate General Corps.

These witnesses' oral and written testimony, as well as the written testimony submitted by others, made several key points:

First, waterboarding is – clearly and contrary to the conclusions of OLC – torture.

Second, the OLC memoranda used by the Administration to give cover for its illegal actions were ill-conceived and poorly-reasoned and -researched legal opinions that strongly suggest that the Department of Justice lawyers who prepared them failed to adhere to the minimum ethical standards governing the legal profession.

Third, the OLC failed to consider, in assessing the legality, necessity and legitimacy of the interrogation techniques, the role of inexperienced government contractors in conducting the interrogations. In fact, contractors with little or no background in interrogations – and not FBI or CIA officials – were principal perpetrators of these techniques.

Fourth, many of the OLC memoranda relied on facts and assumptions about the effectiveness and necessity of the enhanced interrogation techniques that were demonstrably untrue, but which were accepted by the OLC in reaching the outcome desired by the Bush Administration.

Fifth, efforts within the Administration to call into question the legal analysis found in the OLC opinions were suppressed or ignored.

Sixth, there remain serious questions as to whether interrogators acted outside the limits set out in the OLC memos for the use of the enhanced techniques.

Each of these issues is addressed in turn and in detail below. The overall picture that emerged from the hearing is of an OLC that, in an unprecedented departure from its history, traditions, and culture, ignored the law, ignored the facts, and produced a legal conclusion that fit the needs of political principals in the Bush Administration, whether that conclusion was right or wrong.

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I. Contrary to the OLC's Conclusion, Waterboarding is Clearly Torture

The August 1, 2002, OLC memorandum authored by now-Ninth Circuit Judge Jay Bybee, and the May 10, 2005, and May 30, 2005, OLC memoranda authored by Steven Bradbury both authorize the use of "waterboarding," a technique defined as simulated drowning and historically used by such despotic regimes as the Spanish Inquisition and the Khmer Rouge. Bush Administration officials have acknowledged that three Al Qaeda detainees had been waterboarded.[2] The OLC revoked the authority of both waterboarding memoranda, but without expressly addressing whether that technique constituted torture and its illegality under U.S. and international law. Bush Administration Attorney General Michael Mukasey refused at his confirmation hearing to agree that waterboarding was torture. The testimony of the witnesses at the May 13 hearing makes clear that it is.

Professor Turner, a witness designated by the minority, was particularly unequivocal in his oral testimony: "Let me make it clear – I believe that waterboarding crosses the line and is 'torture' by any reasonable interpretation."[3] These views square with the opinions of everyone from President Obama to CIA Director Panetta to Republican Senator (and former POW) John McCain.[4] There can be little question that waterboarding is illegal torture.[5] Indeed, it has been

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[2] *See* CIA Director General Michael V. Hayden, Senate Select Committee on Intelligence, "Open Hearing: Current and Projected National Security Threats" (Feb. 5, 2009) (testifying that "[w]aterboarding has been used on only three detainees. It was used on Khalid Sheikh Mohammed, it was used on Abu Zubaydah, and it was used on [Abd al Rahim al] Nashiri.").

[3] Other witnesses objected more broadly to the "enhanced interrogation" program, not just to waterboarding. Mr. Soufan testified that "nudity," "loud noise," "temperature manipulation," and finally "a confinement box" struck him as "borderline torture." Professor Zelikow has made public statements that the entire program was designed to "disorient, abuse, dehumanize, and torment individuals over time." Foreign Policy, *The OLC "Torture Memos": Thoughts from A Dissenter* (Apr. 21, 2009).

[4] *See, e.g.*, President Barack H. Obama, *Press Briefing* (Apr. 29, 2009) ("[W]aterboarding violates our ideals and our values. I do believe that it is torture."); testimony of CIA Director Leon E. Panetta, Senate Select Committee on Intelligence, *Open Hearing: Nomination of Leon Panetta to be Director of the Central Intelligence Agency* (Feb. 5, 2009) ("I've expressed the opinion that I believe that water-boarding is torture and that it's wrong."); New York Times, *McCain Rebukes Giuliani on Waterboarding Remark* (Oct. 26, 2007) (quoting John McCain discussing waterboarding and stating, "It is torture.").

[5] In his written testimony, the other witness called by the minority, Professor Jeffrey Addicott, concluded differently: "To the reasonable mind, considering the level of interrogation standards set out in the *Ireland* [*vs. United Kingdon*, 2 EHRR 25 (1978)] case, the conclusion is clear. Even the worst of the CIA techniques authorized by the Department of Justice legal memorandums – waterboarding – would not constitute torture (the CIA method of waterboarding appears similar to what we have done hundreds and hundreds of times to our own military special operations soldiers in military training courses on escape and survival)." Notably, however, the *Ireland* case never addressed an interrogation method like waterboarding, and as Professor Luban testified, "[T]he *Ireland* case that he leaned his opinion on is not the only European court case on the meaning of torture. Subsequent cases that have called, for example, hosing somebody down with water as torture." Additionally, waterboarding as employed to train U.S. military personnel far different from the use of the technique against the detainees. *See* testimony of Col. Steven Kleinman (discussing SERE). Professor Addicott also failed to address *United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984), discussed *infra.*

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prosecuted by American military lawyers and federal prosecutors as both crime and war crime.[6]

II. The OLC Memos Raise Serious Questions as to Whether the Lawyers Who Prepared Them Met the Minimum Ethical Standards for the Legal Profession

The OLC memoranda were of such poor quality that they were later retracted.[7] Professor Luban, the Georgetown legal ethics expert, testified that the memos were "an ethical train wreck" that "[fell] far short of professional standards of candid advice and independent judgment. They involve a selective – and in places, deeply eccentric – reading of the law."

The nub of the problem was that these opinions used shoddy legal scholarship to reach a legal conclusion that appears predetermined to fit the desires of the Bush Administration. As Professor Luban stated, "[t]he memos cherry-pick sources of law that back their conclusions and leave out sources of law that do not. They read as if they were reverse-engineered to reach a predetermined outcome: approval of waterboarding and the other CIA techniques." But as all lawyers know, the rules governing legal ethics do not permit frivolous arguments merely because they support the result the client wants.

A recent Senate Armed Services Committee (SASC) Report prepared by Chairman Levin, entitled "Inquiry into the Treatment of Detainees in U.S. Custody," also recounts how Department of Defense lawyers who were forced to rely on a 2003 OLC memorandum written by John Yoo when crafting a Working Group report on appropriate interrogation techniques for detainees at Guantanamo Bay, concluded that the legal advice it contained was poorly reasoned and outcome-determined. A portion of the report was included in the record of this Subcommittee hearing. According to now-RADM Jane Dalton, who was the Legal Counsel to the Chirman of the Joint Chiefs of Staff, "to the extent that [the Working Group report] relied on the OLC memo, it did not include what I considered to be a fair and complete legal analysis of the issues involved. ..." The report, she said, had been "geared toward a particular conclusion[]" and the legal analysis was written to support that conclusion. RADM Dalton also testified that a "stoplight" chart governed by the OLC memorandum "was absolutely wrong legally. It was embarrassing to have it in there, and one of my comments to the report was, you need to delete

[6] Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat'l L. 468 (2007).

[7] These memoranda were all retracted by the Bush Administration. *See* Memorandum for the Files, from Steven Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* (Jan. 15, 2009); Letter to William J. Haynes II, General Counsel, Department of Defense, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (March 14, 2003)* (Feb. 4, 2005); Memorandum for James Comey, Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* (Dec. 30, 2004); *see also* Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

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that column entirely because ... it's not reflective of the law." Navy General Counsel Alberto Mora agreed, and called the OLC memo "profoundly in error."

Professor Zelikow's testimony echoed Professor Luban's, noting that OLC's interpretation of U.S. constitutional law in determining whether certain techniques violated the Fifth, Eight, and Fourteenth Amendments was "strained and indefensible" and "unsound, even unreasonable." He continued:

> It relied on a "shocks the conscience" standard in judging interrogations but did not seem to present a fair reading of the caselaw under that standard. The OLC analysis also neglected another important line of caselaw, on conditions of confinement. ...
>
> Further, the OLC position had implications beyond the interpretation of international treaties. If the CIA program passed muster under an American constitutional compliance analysis, then – at least in principle -- a program of this kind would pass American constitutional muster even if employed anywhere in the United States, on American citizens.

Professor Zelikow concluded that he "could not imagine any federal court in America agreeing that the entire CIA program could be conducted and it would not violate the American Constitution." Professor Turner, too, noted OLC's "ignorance of some of the fundamental details of national security law." He also expressed his agreement with Professor Luban that the OLC lawyers "did want a certain outcome – one that would allow America to get the intelligence information they felt necessary to reduce the chances of another 9/11[.]" Unfortunately, however, that outcome was "contrary to America's domestic law or our obligations under international law," as Professor Turner acknowledged.

The specific flaws in the OLC opinions are legion, but Professor Luban's testimony highlighted some of the more egregious errors:

The August 1, 2002, OLC memo discussing the scope of executive power failed to mention what is widely regarded as the single most important Supreme Court case on the issue, the so-called *Steel Seizure* case, *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579 (1952) – a case that delineates the circumstances under which the President's power under the Commander-in-Chief Clause of Article II may trump Congress' will. Obviously, the nuanced, careful analysis found in *Youngstown* (in particular, in Justice Jackson's famous concurrence) was not useful to an administration bent on expanding the scope of executive power far beyond constitutional limits. Similarly, OLC's analysis of the necessity defense in the August 1, 2002, OLC memo failed to mention *United States v. Oakland Cannabis Buyers' Coop*, 532 U.S. 483, 490 (2001), which calls into question whether federal criminal law even contains a necessity defense if no statute specifies that there is one. Likewise, the opinion fails to mention that there is no reported case in which a federal court has accepted a necessity defense for a crime of violence.

Perhaps the most glaring failure of legal scholarship to be found in the OLC memos is the failure of any of the memos to cite or even mention the Fifth Circuit's decision in *United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984), a case involving criminal prosecutions by the Reagan

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Administration Justice Department of local law enforcement officials who had engaged in waterboarding. As Professor Luban noted, *Lee* "is perhaps the single most relevant case in American law on the legality of waterboarding. Any lawyer can find the *Lee* case in a few seconds on a computer, just by typing the words 'water torture' into a database. ... But the authors of the torture memos never mentioned it. They had no trouble finding a case where lawyers didn't call harsh interrogation techniques torture. It's hard to avoid the conclusion that Mr. Yoo, Judge Bybee and Mr. Bradbury chose not to mention the *Lee* case, because it cast doubt on their conclusion that waterboarding is legal."

The Justice Department's Office of Professional Responsibility (OPR) has conducted an extensive investigation into whether the OLC lawyers who prepared the torture memoranda acted within the ethical guidelines of their profession. OPR's report is imminent, and it may recommend that these lawyers be referred to their respective state bars for discipline, including, potentially, disbarment. Although we await the final judgment of the OLC lawyers' professional conduct, the mere fact that the OPR was forced to examine the conduct of the most respected division at the Justice Department is itself shocking. Whatever the report's conclusions, it is already clear that the attorneys' conduct raised serious questions whether they met the high legal and ethical standards one would expect of the office.

III. In Assessing the Legality of the Interrogation Techniques, OLC Failed to Consider the Role of Inexperienced Government Contractors in Conducting the Interrogations

As noted by Professor Luban, the OLC memos never mentioned that contractors, not government interrogators, employed the "enhanced interrogation techniques" authorized by the OLC memos. The OLC's failure to acknowledge, or examine the implications of, the use of private contractors is another troubling oversight of the memos.

The OLC opinions were premised on the expertise and experience of the interrogators. But witnesses at the hearing demonstrated that this factual premise was flawed. Mr. Soufan testified that "those behind [the "enhanced techniques"] [were] outside contractors with no expertise in intelligence operations, investigations, terrorism, or al Qaeda. Nor did the contractors have any experience in the art of interview and interrogation. One of the contractors told me this at the time, and this lack of experience has also now been recently reported on by sources familiar with their backgrounds."

Professor Zelikow agreed that the CIA had "no significant institutional capability to question enemy captives" and had to "improvise[] an unprecedented, elaborate, systematic program of medically monitored physical torment to break prisoners and make them talk."

The specialty of these contractors was not interrogation; rather, the so-called "SERE" program was used to prepare U.S. military personnel for brutal treatment by enemy captors seeking to produce propaganda. According to the written testimony of Colonel Steven Kleinman, submitted for this hearing: "[T]he interrogation paradigm that ultimately informed these activities was the product of two of these contractors. These individuals were retired military psychologists who, while having extensive experience in SERE (survival, evasion, resistance,

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and escape) training, collectively possessed *absolutely no firsthand experience in the interrogation of foreign nationals for intelligence purposes*." (Emphasis added).

The implications of using government contractors include the particular motivations of these for-profit entities. Did the profit motive affect the contractors' decisions about the use of the techniques? If so, how? In addition, might different legal questions apply to government contractors hired to conduct interrogations? These questions remain unanswered, as the OLC failed to even consider them.

CIA Director Panetta recently announced that contractors would no longer be responsible for interrogations at the CIA.[8] This is a good and necessary start; but this hearing has shown that more must be learned about the role, influence, and motivations of the private organizations conducting interrogations of America's highest-value detainees.

IV. Many OLC Memoranda Relied on Facts and Assumptions about the Effectiveness and Necessity of the Enhanced Interrogation Techniques that were Demonstrably False

The failings of the OLC were not limited to shoddy legal scholarship. The OLC lawyers also rested their conclusions that waterboarding and the other enhanced techniques were legal on a set of factual assumptions about the need for and effectiveness of the enhanced techniques that were demonstrably incorrect. It appears that the OLC did not examine these assumptions; rather, it bought them hook, line, and sinker.[9]

For example, one of the Bush Administration's principal justifications for the harsh interrogation techniques is that critical intelligence could not be elicited any other way. In his May 30, 2005 memorandum, OLC attorney Steven Bradbury emphasized that critical information was gained from Al Qaeda operative Abu Zubaydah only as a result of enhanced interrogation: "Interrogations of Zubaydah, again, once enhanced techniques were employed, furnished detailed information ... and identified KSM [Khalid Sheikh Mohammed] as the mastermind of the September 11 attacks. ... Zubaydah also provided significant information on two operatives, including Jose Padilla, who planned to build and detonate a dirty bomb in the Washington, DC, area[.]"[10]

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[8] CIA Director Leon E. Panetta, *Message from the Director: Interrogation Policy and Contracts* (Apr. 9, 2009) (stating "No CIA contractors will conduct interrogations.").

[9] Professor Zelikow noted in his written testimony that a substantial body of knowledge existed about effectiveness of different methods of interrogation, from different countries in different wars. The August 1, 2002, OLC memo undertook a "factual analysis" about whether the proposed methods caused severe pain and mental suffering – without ever referring back to the experiences of interrogators in the field – either those working with Al Qaeda or those who had interrogated suspects during past conflicts.

[10] By way of background, Abu Zubaydah was a member of Al Qaeda who had "strong connections with Jordanian and Palestinian groups and was sentenced to death in absentia by a Jordanian court for his role in a thwarted plot to bomb hotels there during millennium celebrations. During the 1990s he was al-Qaeda's chief recruiter, selecting new members and arranging their visits to training camps." BBC News, *Profile: Abu Zubaydah* (Apr. 2, 2002).

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The testimony of Mr. Soufan, however, is to the contrary, with respect both to information gleaned regarding KSM and information regarding Jose Padilla.

Regarding KSM, Mr. Soufan, who interrogated Zubaydah for the FBI, testified that Zubaydah gave interrogators useful information about KSM *before* CIA Counterterrorist Center contractors arrived and began to use the harsh techniques, and that, in fact, use of the harsh techniques caused Zubaydah to "shut down" and stop giving useful information:

> WHITEHOUSE: [I]t was during your questioning of [Zubaydah] at the hospital that you elicited information regarding the previously unknown role of Khalid Sheikh Mohammed as the mastermind of the 9/11 attacks.
> SOUFAN: Correct, sir. ...
> WHITEHOUSE: And all this happened before the CIA CTC team and the private contractors arrived, correct?
> SOUFAN: Yes, sir.
> WHITEHOUSE: And then they arrived, and immediately, you say, "On the instructions of the contractor, harsh techniques were introduced, which did not produce results as Abu Zubaydah shut down and stopped talking," correct?
> SOUFAN: Correct, sir.
> WHITEHOUSE: And with that happening – you knew we had good information, he had shut down under the harsh techniques, and so you, again, were given control of the interrogation, correct?
> SOUFAN: Yes, sir. ...
> WHITEHOUSE: [I]t was in the second round pursuant to appropriate tactics that Abu Zubaydah disclosed the details of Jose Padilla, the so-called dirty bomber, correct?
> SOUFAN: Yes, sir.

Regarding Mr. Padilla, the May 30, 2005, OLC memorandum indicated that use of the enhanced techniques on Zubaydah had yielded useful information that led to Mr. Padilla's capture. Not only did Mr. Soufan establish that this was false, Mr. Padilla had in fact been captured on May 8, 2002, *before* Zubaydah was interrogated under the enhanced techniques and, indeed, before these techniques had even been approved. During the hearing, Professor Luban noted this factual inconsistency:

Khalid Sheikh Mohammed, "was indicted in 1996 with plotting to blow up 11 or 12 American airliners flying from south-east Asia to the United States in January, 1995. ...[T]he self-proclaimed head of al-Qaeda's military committee admitted to: [t]he organization, planning, follow-up and execution of the 9/11 operation; [r]esponsibility for the 1993 attack on the World Trade Center in New York, the bombing of nightclubs in Bali in 2002 and a Kenyan hotel in the same year; [r]esponsibility for the failed attempt by the so-called shoe bomber, Richard Reid, to bring down an American plane; [p]lots to attack Heathrow Airport, Canary Wharf and Big Ben in London, to hit targets in Israel, and to blow up the Panama Canal; [a] plot to hit towers in the US cities of Los Angeles, Seattle, Chicago and the Empire State Building in New York, and to attack US nuclear power stations; [and] [p]lots to assassinate the late Pope John Paul II and former US President Bill Clinton." BBC News, *Profile: Al-Qaeda 'Kingpin'* (Jan. 21, 2009).

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> I am also very troubled by the chronology that Mr. Soufan just mentioned, because when Mr. Bradbury was writing the opinion, and wrote that the capture of Jose Padilla resulted from enhanced interrogation techniques, that was already public information that Padilla had been captured in May. And the techniques weren't approved until August. So, the legal opinion that he wrote stipulates something that was common public knowledge to be untrue.

In short, the facts regarding enhanced interrogation that undergirded at least some of the OLC memoranda were false, and should have been known to be false by the OLC lawyers at the time the memoranda were written, had they been engaged in a truly comprehensive and careful assessment of the techniques' legality.

The May 13 hearing was replete with testimony that enhanced interrogation techniques of torment and humiliation were in fact inferior to professional interrogation techniques. These views were clearly available to the OLC, had they sought them. For example, Mr. Soufan was the lead terrorist interrogator for a fellow DOJ component agency, the FBI. He stated in written testimony that the enhanced methods suffer from numerous defects. As he put it:

> A major problem with [the enhanced interrogation approach] is it is ineffective. Al Qaida are trained to resist torture. ...
>
> The technique is also unreliable. We don't know whether the detainee is being truthful or just speaking to mitigate his discomfort. ...
>
> The technique is also slow. Waiting 180 hours as part of a sleep deprivation stage is time we cannot afford to waste in a ticking-bomb scenario. ...
>
> Just as importantly, this amateurish technique is harmful to our long-term strategy and interests.

Two other interrogators, Matthew Alexander, who interrogated Al Qaeda members in Iraq, and Colonel Steven Kleinman, who had 25 years experience with interrogation, special survival training, and intelligence gathering, submitted written testimony supporting Mr. Soufan's assessment of the inefficacy of harsh interrogation methods. Mr. Alexander also noted that in Iraq: "Al Qaida used our policy that authorized and encouraged these illegal methods as their number one recruiting tool for foreign fighters," and "the policy that authorized and encouraged the torture and abuse of prisoners has cost us American lives."

In contrast, Mr. Soufan argued that a better method is the "Informed Interrogation Approach" – which he used on Zubaydah – consistent with the Army Field Manual:

> [This approach] is based on leveraging our knowledge of a detainee's mindset, vulnerabilities, and culture together with using intelligence already known about him. The interrogator uses a combination of interpersonal, cognitive, and emotional strategies to exact the information needed. If done correctly, this approach works quickly and

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> effectively because it outsmarts the detainee using a method that he is not trained nor able to resist.
>
> The Army Field Manual is not about being soft; it's about outwitting, outsmarting, and manipulating the detainee. The approach is in sharp contrast of the enhanced interrogation method that instead tries to subjugate the detainee into submission through humiliation and cruelty.

According to Mr. Alexander, even the most time-sensitive and critical intelligence situations are better served using professional interrogation methods based on the Army Field Manual than torture:

> I also want to address the so called "ticking time bomb" scenario that is so often used as an excuse for torture and abuse. My team lived through this scenario every day in Iraq. The men that we captured and interrogated were behind Zarqawi's suicide bombing campaign. Most of our prisoners had knowledge of future suicide bombing operations that could have been prevented with the quick extraction of accurate intelligence information. Even if we assume that torture or abuse are more effective or efficient than other methods of interrogation, which in my experience they are not, my team knew that we could not save lives today at the expense of losing lives tomorrow. We knew that we would be recruiting future fighters for Al Qaida's ranks, some of whom would surely kill Americans and other innocent civilians and, most likely, our brothers and sisters in arms.

These criticisms were echoed by Colonel Steven Kleinman, who participated in a program that gathered an "elite cadre of human intelligence officials" that "categorically identified a number of principles that warrant serious consideration as efforts to transform U.S. policies on the handling and interrogation of detainees moves forward." These officials concluded that:

> The use of torture and other inhumane and abusive treatment consistently results in false and misleading information, the loss of critical intelligence, and has caused serious damage to the reputation and standing of the United States.

Other Senate Committees are examining in more detail the effectiveness of different methods of interrogation. What is clear, however, is that the OLC analysis bought the company line that the techniques were necessary and effective, even though the example given to establish that point was not only false, but demonstrably false.

V. Opposition from within the Administration to the OLC Analysis was Suppressed or Ignored

The hearing testimony also made clear that criticism of the OLC opinions from within the Administration was intense, but was rigorously suppressed. The lengths to which elements within the Administration went to protect the OLC analysis underscore the weakness of that analysis.

The SASC Report documented the dissent of military lawyers to the OLC memos:

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> Among the Working Group members there was a "great deal of disagreement" with the OLC analysis and "serious concerns and objections over some of the legal conclusions reached by OLC." Nevertheless, at [Department of Defense General Counsel William J.] Haynes' direction, [Air Force General Counsel Mary] Walker instructed the Working Group to consider "the OLC memorandum as authoritative[.]"

The Report further concludes that when military lawyers raised objections, they were silenced:

> [Now-RADM] Dalton... told the Committee: "There was a point [during the Working Group process] where we were told that we could not argue against the OLC opinion." ...
>
> Mr. Mora stated that "contributions from the members of the Working Group, including [contributions from his office], began to be rejected if they did not conform to the OLC guidance." ...
>
> [T]he Deputy Judge Advocate General (JAG) of the Air Force Jack Rives, the Navy JAG Michael Lohr, the Army JAG Thomas Romig, and the Staff Judge Advocate to the Commandant of the Marine Corps Kevin Sandkuhlar submitted memoranda expressing serious concerns about the [Working Group report, which relied on the OLC legal analysis]. ...
>
> Over the objections of the military lawyers, all 36 techniques from the February 4, 2003 draft report remained a part of the Working Group's recommendations and were included in the March 6, 2003 report. ... Upon receiving the March 6, 2003 version, senior military lawyers continued to raise concerns that the recommendations were based on a flawed OLC legal analysis. One JAG noted that the draft report's introduction, which said it was "informed by the OLC opinion ... created an incorrect impression" since "most (if not all) working group members and TJAGs disagreed with significant portions of the OLC opinion, but were forced to accept it."

Similarly, Professor Zelikow deemed it necessary to draft his own memorandum to his working group arguing his strong objections to the legal analysis in the May 30, 2005, OLC memorandum written by Steven Bradbury.[11] In written testimony for this hearing, Professor Zelikow stated:

> I distributed my memo analyzing these legal issues to other deputies at one of our meetings, probably in February 2006. I later heard the memo was not considered appropriate for further discussion and that copies of my memo should be collected and destroyed. That particular request, passed along informally, did not seem proper and I ignored it.

Professor Zelikow testified that his arguments called into question the legal reasoning of the OLC opinions, and that the order to destroy the memo "told me that the lawyers involved in that

[11] This memo was requested from the State Department on April 28 in advance of the hearing. Although it was located, it remains classified although efforts are under way to make the memo public.

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opinion did not welcome peer review of their conclusions and indeed, would shut down challenges from peers, even inside the government."

The memos to which Professor Zelikow and the military lawyers objected were retracted by the OLC itself – the Yoo memo was reversed less than a year after it was written. The dissenters were in fact spot-on in their legal criticisms. It appears that shutting off discussion was easier than re-examining the basis of an interrogation program that was on shaky legal footing. The question remains whether it was a conscious awareness of the inadequacy of the OLC memos that led to this rigorous suppression of dissent from senior officials. It is at least circumstantial evidence consistent with bad faith on the part of the authors and advocates of the OLC opinions.

VI. There Remain Serious Questions Regarding Whether the OLC's Factual Predicates for the Application of the Enhanced Techniques Were Met

Even if the OLC memos properly set forth the circumstances under which enhanced interrogation techniques could legally be applied, the evidence suggests that these factual predicates were likely not met in at least some cases where the techniques were used. This bears on whether interrogators acted within the bounds of their legal authority, and in good faith – crucial questions in assessing their criminal exposure.

The OLC memoranda make clear that interrogators could only use enhanced techniques in a carefully limited fashion in a very small set of circumstances. The factual predicates for waterboarding in the OLC memoranda are particularly narrow. For example, page 5 of the May 30, 2005, memo from Steven Bradbury to John Rizzo indicates:

> The CIA uses enhanced interrogation techniques only if the CIA's Counterterrorist Center "CTC") determines an individual to be a "High Value Detainee," which the CIA defines as: a detainee who, until time of capture, we have reason to believe: (1) is a senior member of al-Qaida or an al-Qaida associated terrorist group (Jemaah Islamiyyah, Egyptian Islamic Jihad, al-Zarqawi Group, etc.); (2) has knowledge of imminent terrorist threats against the USA, its military forces, its citizens and organizations, or its allies; or that has/ had direct involvement in planning and preparing terrorist actions against the USA or its allies, or assisting the al-Qaida leadership in planning and preparing such terrorist actions; and (3) if released, constitutes a clear and continuing threat to the USA or its allies.
>
> The "waterboard," which is the most intense of the CIA interrogation techniques, is subject to additional limits. It may be used on a High Value Detainee only if the CIA has "credible intelligence that a terrorist attack is imminent"; "substantial and credible indicators that the subject has actionable intelligence that can prevent, disrupt or delay this attack"; and "other interrogation methods have failed to elicit the information [or] CIA has clear indications that other … methods are unlikely to elicit this information within the perceived time limit for preventing the attack."

It is for further inquiry whether the interrogations fell within the narrow predicates described in the authorizing memoranda. But there are reasons to suspect that interrogations exceeded the

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limits of the OLC authorizations. The May 10, 2005, OLC memorandum suggests that past interrogations went beyond the factual predicates of previous OLC authorizations:

> The IG Report noted that in some cases the waterboard was used with far greater frequency that initially indicated, see [CIA] IG Report at 5, 44, 46, 103-04, and also that it was used in a different manner . . . The Inspector General further reported that 'OMS contends that the expertise of the SERE psychologist/interrogators on the waterboard was probably misrepresented at the time, as the SERE waterboard experience is so different from the subsequent Agency usage as to make it almost irrelevant. Consequently, according to OMS, there was no *a priori* reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe.[12]

As a further example, the May 30, 2005, memo indicates that waterboarding may only be used on 5 days during a 30-day authorization. It explains that there only can be two two-hour sessions a day and that there may be "at most six applications of water lasting 10 seconds or longer during any session." The August 1, 2002, memorandum indicates that waterboarding occurs for 20 to 40 seconds. Assuming that each application takes 20 seconds, only six applications could occur in one session, 12 applications could occur in one day (2 sessions x 6/session), and 60 applications could occur in one 30 day authorization (5 days per authorization x 12 applications per day). This would mean that the 183 applications of waterboarding to Khalid Sheik Mohammed would have had to have occurred in four separate 30 day authorizations in a more than three month period (60/month for three months, plus 3 applications in beginning of next authorization period). If the figures in the OLC memoranda are to be believed, either the waterboarding of KSM lasted for many months, or interrogators did not stick to the constraints identified in the OLC memoranda.

Conclusion

This hearing shed considerable light on how a small group of lawyers, in an office long-regarded as the gold standard of legal analysis and scholarship, abandoned these principles to produce the outcome sought by political masters. It appears with little dispute that the interrogation techniques sanctioned by the Bush Administration OLC, even in the sanitized guise presented by those opinions, were in fact illegal. There is even less dispute – even from those who might argue their legality – that these techniques set us back in the war against terror, alienated our allies, emboldened our enemies, and deprived America of the power of example that gives us leadership in the world.

The hearing showed that in the light of afterthought, a legal ethics expert could demonstrate the incompetence of the opinions' legal analysis, demonstrate their deliberate and selective slant, and suggest that the inadequacy of the analysis is too profound to be unintentional. The hearing further showed that it did not require afterthought to detect the legal failings of the opinions – many lawyers within the Administration did at the time, but their efforts to object were rigorously suppressed. The suppression itself proves further circumstantial evidence of bad faith

[12] The CIA IG Report was titled *Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)*, No. 2003-7123-IG (May 7, 2004).

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awareness of the memos' failings. Finally, the hearing showed that factual representations made in the OLC opinions were false, and could have been proven false at the time from open-source information, had OLC exercised due diligence. Indeed, with reasonable due diligence, OLC would have discovered the alternative views of professional interrogators, including the lead terrorists interrogator of the FBI (like the OLC, a component of the Department of Justice).

It is noteworthy that actual violations of the OLC requirements, which would remove the offending conduct from any purported shelter of these memoranda, can take two forms: one can exceed the limitations on *how* the techniques can be applied (limitations on number, duration, etc. of applications); or one can exceed the limitations on *when* the techniques can be applied (the predicates that must exist in order for *any* application of the techniques to be justified). Failure of either form strips away any protection arguably provided by the memos.

It is a sad story – and for a lawyer and former Justice Department employee like myself, it is particularly sad. But it is a story that must be told. This hearing was only the beginning of the inquiry into the OLC and its role in giving cover to the Administration's illegal policies. The OPR report will soon come out, and the Senate Intelligence Committee's investigation into the Bush interrogation policies will no doubt shed light on OLC's role. The Judiciary Committee's examination of these issues will also continue, and I, like Chairman Leahy, will continue to advocate for a commission of inquiry to do a comprehensive assessment and accounting. I look forward to learning all the facts, however, they come out, surrounding this sordid episode in our nation's history – not simply to apportion blame, but also to ensure that such a thing never happens again. This hearing was one small step toward that goal.

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U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

August 1, 2002

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, D.C.

Dear Judge Gonzales:

You have requested the views of our Office concerning the legality, under international law, of interrogation methods to be used during the current war on terrorism. More specifically, you have asked whether interrogation methods used on captured al Qaeda operatives, which do not violate the prohibition on torture found in 18 U.S.C. § 2340-2340A, would either: a) violate our obligations under the Torture Convention,[1] or b) create the basis for a prosecution under the Rome Statute establishing the International Criminal Court (ICC).[2] We believe that interrogation methods that comply with § 2340 would not violate our international obligations under the Torture Convention, because of a specific understanding attached by the United States to its instrument of ratification. We also conclude that actions taken as part of the interrogation of al Qaeda operatives cannot fall within the jurisdiction of the ICC, although it would be impossible to control the actions of a rogue prosecutor or judge. This letter summarizes our views; a memorandum opinion will follow that will more fully explain our reasoning.

I.

Section 2340A makes it a criminal offense for any person "outside the United States [to] commit[] or attempt[] to commit torture."[3] The act of torture is defined as an:

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[1] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ,adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987)

[2] U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999 (1998) [hereinafter ICC Statute].

[3] If convicted of torture, a defendant faces a fine or up to twenty years' imprisonment or both. If, however, the act resulted in the victim's death, a defendant may be sentenced to life imprisonment or to death. *See* 18 U.S.C.A. § 2340A(a). Whether death results from the act also affects the applicable statute of limitations. Where death does not result, the statute of limitations is eight years; if death results, there is no statute of limitations. *See* 18 U.S.C.A. § 3286(b) (West Supp. 2002); *id.* § 2332b(g)(5)(B) (West Supp. 2002). Section 2340A as originally enacted did not provide for the death penalty as a punishment. *See* Omnibus Crime Bill, Pub. L. No.103-322, Title VI, Section 60020, 108 Stat. 1979 (1994) (amending section 2340A to provide for the death penalty); H. R. Conf. Rep. No. 103-711, at 388 (1994) (noting that the act added the death penalty as a penalty for torture).

Most recently, the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), amended section 2340A to expressly codify the offense of conspiracy to commit torture. Congress enacted this amendment as part of a broader

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> 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.

18 U.S.C.A. § 2340(1); *see id.* § 2340A. Thus, to convict a defendant of torture, the prosecution must establish that: (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) that the act inflicted severe physical or mental pain or suffering. *See also* S. Exec. Rep. No. 101-30, at 6 (1990) ("For an act to be 'torture,' it must . . . cause severe pain and suffering, and be intended to cause severe pain and suffering."). As we have explained elsewhere, in order to violate the statute a defendant must have specific intention to inflict severe pain or suffering – in other words, "the infliction of such pain must be the defendant's precise objective." See Memorandum for Alberto R. Gonzales, Counsel to the President, from: Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation under under 18 U.S.C. §§ 2340-2340A* at 3 (August 1, 2002).

> Section 2340 further defines "severe mental pain or suffering" as:
>
> the prolonged mental harm caused by or resulting from—
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

18 U.S.C. § 2340(2). As we have explained, in order to inflict severe mental or suffering, a defendant both must commit one of the four predicate acts, such as threatening imminent death, and intend to cause "prolonged mental harm."

II.

You have asked whether interrogation methods used on al Qaeda operatives that comply with 18 U.S.C. §§ 2340-2340A nevertheless could violate the United States' obligations under the Torture Convention. The Torture Convention defines torture as:

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effort to ensure that individuals engaged in the planning of terrorist activities could be prosecuted irrespective of where the activities took place. *See* H. R. Rep. No. 107-236, at 70 (2001) (discussing the addition of "conspiracy" as a separate offense for a variety of "Federal terrorism offense[s]").

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> any act by which *severe* pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Article 1(1) (emphasis added).

Despite the apparent differences in language between the Convention and § 2340, international law clearly could not hold the United States to an obligation different than that expressed in § 2340. When it acceded to the Convention, the United States attached to its instrument of ratification a clear understanding that defined torture in the exact terms used by § 2340. The first Bush administration submitted the following understanding of the treaty:

> The United States understands that, in order to constitute torture, an act must be *specifically intended* to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental pain caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36. The Senate approved the Convention based on this understanding, and the United States included the understanding in its instrument of ratification.[4]

This understanding accomplished two things. First, it made crystal clear that the intent requirement for torture was specific intent. By its terms, the Torture Convention might be read to require only general intent although we believe the better argument is that that the Convention's use of the phrase "intentionally inflicted" also created a specific intent-type standard. Second, it added form and substance to the otherwise amorphous concept of *mental* pain or suffering. In so doing, this understanding ensured that mental torture would rise to a severity comparable to that required in the context of physical torture.

It is one of the core principles of international law that in treaty relations a nation is not bound without its consent. Under international law, a reservation made when ratifying a treaty validly alters or modifies the treaty obligation, subject to certain conditions that will be discussed below. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); 1 Restatement of the Law (Third) of the Foreign Relations Law of the

[4] *See* http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html.

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United States § 313 (1987).[5] The right to enter reservations applies to multilateral international agreements just as in the more familiar context of bilateral agreements. *Id.* Under international law, therefore, the United States thus is bound only by the text of the Torture Convention as modified by the first Bush administration's understanding.[6] As is obvious from its text, Congress codified the understanding almost verbatim when it enacted § 2340. The United States' obligation under the Torture Convention is thus identical to the standard set by § 2340. Conduct that does not violate the latter does not violate the former. Put another way, so long as the interrogation methods do not violate § 2340, they also do not violate our international obligations under the Torture Convention.

Although the Vienna Convention on Treaties recognizes several exceptions to the right to make reservations, none of them apply here.[7] First, a reservation is valid and effective unless it purports to defeat the object and purpose of the treaty. Vienna Convention, art. 19. Our initial research indicates that international law has provided little guidance regarding the meaning of the "object and purpose" test. Nonetheless, it is clear that here the United States had not defeated the object and purpose of the Torture Convention. The United States nowhere reserved the right to conduct torture; in fact, it enacted Section 2340 to expand the prohibition on torture in its domestic criminal law. Rather than defeat the object of the Torture Convention, the United States simply accepted its prohibition and attempted, through the Bush administration's understanding, to make clear the scope and meaning of the treaty's obligations.

Second, a treaty reservation will not be valid if the treaty itself prohibits states from taking reservations. The Torture Convention nowhere prohibits state parties from entering reservations. To be sure, two provisions of the Torture Convention – the competence of the Committee Against Torture, art. 28, and the mandatory jurisdction of the International Court of Justice, art. 30 – specifically note that nations may take reservations from their terms. Nonetheless, the Convention contains no provision that explicitly attempts to preclude states from exercising their basic right under international law to enter reservations to other provisions. Without such a provision, we do not believe that the Torture Convention precludes reservations.

Third, in regard to multilateral agreements, a treaty reservation may not be valid if it is objected to in a timely manner by other states. Vienna Convention art. 20. If another state does not object within a certain period of time, it is deemed to have acquiesced in the reservation. Even if, however, another nation objects, that only means that the provision of the treaty to which the reservation applies is not in force between the two nations – unless the objecting nation opposes entry into force of the treaty as a whole between the two nations. *Id.* art 21(3). Here, no nation appears to have objected to the United States' further definition of torture. Only

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[5] Although, under domestic law, the Bush administration's definition of torture was categorized as an "understanding," it was deposited with the instrument of ratification as a condition of the United States' ratification, and so under international law we consider it to be a reservation if it indeed modifies the Torture Convention standard. *See* Restatement (Third) at § 313 cmt. g.

[6] Further, if we are correct in our suggestion that the Torture Convention itself creates a heightened intent standard, then the understanding attached by the Bush Administration is less a modification of the Convention's obligations and more of an explanation of how the United States would implement its somewhat ambiguous terms.

[7] It should be noted that the United States is not a signatory to the Vienna Convention, although it has said that it considers some of its provisions to be customary international law.

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one nation, Germany appears to have commented on the United States' reservations, and even Germany did not oppose any U.S. reservation outright.

Thus, we conclude that the Bush administration's understanding created a valid and effective reservation to the Torture Convention. Even if it were otherwise, there is no international court to review the conduct of the United States under the Convention. In an additional reservation, the United States refused to accept the jurisdiction of the ICJ (which, in any event, could hear only a case brought by another state, not by an individual) to adjudicate cases under the Convention. Although the Convention creates a Committee to monitor compliance, it can only conduct studies and has no enforcement powers.

III.

You have also asked whether interrogations of al Qaeda operatives could be subject to criminal investigation and prosecution by the ICC. We believe that the ICC cannot take action based on such interrogations.

First, as noted earlier, one of the most established principles of international law is that a state cannot be bound by treaties to which it has not consented. Although President Clinton signed the Rome Statute, the United States has withdrawn its signature from the agreement before submitting it to the Senate for advice and consent – effectively terminating it. The United States, therefore, cannot be bound by the provisions of the ICC Treaty nor can U.S. nationals be subject to ICC prosecution. We acknowledge, however, that the binding nature of the ICC treaty on non-parties is a complicated issue and do not attempt to definitively answer it here.

Second, even if the ICC could in some way act upon the United States and its citizens, interrogation of an al Qaeda operative could not constitute a crime under the Rome Statute. Even if certain interrogation methods being contemplated amounted to torture (and we have no facts that indicate that they would), the Rome Statute makes torture a crime subject to the ICC's jurisdiction in only two contexts. Under article 7 of the Rome Statute, torture may fall under the ICC's jurisdiction as a crime against humanity if it is committed as "part of a widespread and systematic attack directed against any civilian population." Here, however, the interrogation of al Qaeda operatives is not occurring as part of such an attack. The United States' campaign against al Qaeda is an attack on a non-state terrorist organization, not a civilian population. If anything, the interrogations are taking place to elicit information that could prevent attacks on civilian populations.

Under article 8 of the Rome statute, torture can fall within the ICC's jurisdiction as a war crime. In order to constitute a war crime, torture must be committed against "persons or property protected under the provisions of the relevant Geneva Conventions." Rome Statute, art. 8. On February 27, 2002, the President determined that neither members of the al Qaeda terrorist network nor Taliban soldiers were entitled to the legal status of prisoners of war under the Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3517 ("GPW"). As we have explained elsewhere, members of al Qaeda cannot receive the protections accorded to POWs under GPW because al Qaeda is a non-state terrorist organization that has not signed the Conventions. Memorandum for Alberto R. Gonzales, Counsel to the President and William J.

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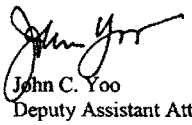
Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 8 (Jan. 22, 2002). The President has appropriately determined that al Qaeda members are not POWs under the GPW, but rather are illegal combatants, who are not entitled to the protections of any of the Geneva Conventions. Interrogation of al Qaeda members, therefore, cannot constitute a war crime because article 8 of the Rome Statute applies only to those protected by the Geneva Conventions.

We cannot guarantee, however, that the ICC would decline to investigate and prosecute interrogations of al Qaeda members. By the terms of the Rome Statute, the ICC is not checked by any other international body, not to mention any democratically-elected or accountable one. Indeed, recent events indicate that some nations even believe that the ICC is not subject to the authority of the United Nations Security Council. It is possible that an ICC official would ignore the clear limitations imposed by the Rome Statute, or at least disagree with the President's interpretation of GPW. Of course, the problem of the "rogue prosecutor" is not limited to questions about the interrogation of al Qaeda operatives, but is a potential risk for any number of actions that have been undertaken during the Afghanistan campaign, such as the collateral loss of civilian life in the bombing of legitimate military targets. Our Office can only provide the best reading of international law on the merits. We cannot predict the political actions of international institutions.

Please let us know if we can be of further assistance.

Sincerely,



John C. Yoo
Deputy Assistant Attorney General

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U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

March 14, 2003

Memorandum for William J. Haynes II,
General Counsel of the Department of Defense

Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States

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.[1]

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.

Although we do not believe that these laws would apply to authorized military interrogations, we outline the various federal crimes that apply in the special maritime and territorial jurisdiction of the United States: assault, 18 U.S.C. § 113 (2000); maiming, 18 U.S.C. § 114 (2000); and interstate stalking, 18 U.S.C. § 2261A (2000). In Part II.C., we address relevant criminal prohibitions that apply to conduct outside the jurisdiction of the United States: war crimes, 18 U.S.C. § 2441 (2000); and torture, 18 U.S.C. § 2340A (2000 & West Supp. 2002).

In Part III, we examine the international law applicable to the conduct of interrogations. First, we examine the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Apr. 18, 1988, 1465 U.N.T.S. 113 ("CAT") and conclude that U.S. reservations, understandings, and declarations ensure that our international obligations mirror the standards of 18 U.S.C. § 2340A. Second, we address the U.S. obligation under CAT to undertake to prevent the commission of "cruel, inhuman, or degrading treatment or punishment." We conclude that based on its reservation, the United States' obligation extends only to conduct

[1] By delimiting the legal boundaries applicable to interrogations, we of course do not express or imply any views concerning whether and when legally-permissible means of interrogation should be employed. That is a policy judgment for those conducting and directing the interrogations.

Declassify under authority of Executive Order 1958
By Acting General Counsel, Department of Defense
By Daniel J. Dell'Orto
31 March 2008

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that is "cruel and unusual" within the meaning of the Eighth Amendment or otherwise "shocks the conscience" under the Due Process Clauses of the Fifth and Fourteenth Amendments.

Third, we examine the applicability of customary international law. We conclude that as an expression of state practice, customary international law cannot impose a standard that differs from U.S. obligations under CAT, a recent multilateral treaty on the same subject. In any event, our previous opinions make clear that customary international law is not federal law and that the President is free to override it at his discretion.

In Part IV, we discuss defenses to an allegation that an interrogation method might violate any of the various criminal prohibitions discussed in Part II. We believe that necessity or self-defense could provide defenses to a prosecution.

I. U.S. Constitution

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 enemy combatants during armed conflict. Two constitutional provisions that might be thought to extend to interrogations—the Fifth and Eighth Amendments—do not apply here. The Fifth Amendment provides in relevant part that "[n]o person . . . shall be deprived of life, liberty, or property, without due process of law." U.S. Const., amend V.[2] The Eighth Amendment bars the "inflict[ion]" of "cruel and unusual punishments." U.S. Const., amend. VIII. These provisions, however, 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.[3]

A. The President's Commander-in-Chief Authority

We begin by discussing the factual and legal context within which this question arises. 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

[2] The Fifth Amendment further provides that "No person shall be held to answer for a capital crime, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury[,]" that no person "shall . . . be subject for the same offense to be twice put in jeopardy," "nor shall be compelled in any criminal case to be a witness against himself," "nor shall private property be taken for public use, without just compensation." These provisions are plainly inapplicable to the conduct of interrogations.

[3] As we explain in Part III, U.S. obligations under international law are limited to the prevention of conduct that would constitute cruel, unusual or inhuman treatment prohibited by the Fifth, Eighth, and Fourteenth Amendments. *See id.* The applicable standards under the Fifth, Fourteenth, and Eighth Amendments are thus useful to understanding U.S. obligations under international law, which we discuss in Part III.

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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.

1. The War with al Qaeda

The situation in which these issues arise is unprecedented in recent American history. Four coordinated terrorist attacks, using hijacked commercial airliners as guided missiles, took place in rapid succession on the morning of September 11, 2001. These attacks were aimed at critical government buildings in the Nation's capital and landmark buildings in its financial center, and achieved an unprecedented level of destruction. They caused thousands of deaths. Air traffic and communications within the United States were disrupted; national stock exchanges were shut for several days; and damage from the attack has been estimated to run into the tens of billions of dollars. Government leaders were dispersed to ensure continuity of government operations. These attacks are part of a violent campaign by the al Qaeda terrorist organization against the United States that is believed to include an unsuccessful attempt to destroy an airliner in December 2001; a suicide bombing attack in Yemen on the *U.S.S. Cole* in 2000; the bombings of the United States Embassies in Kenya and in Tanzania in 1998; a truck bomb attack on a U.S. military housing complex in Saudi Arabia in 1996; an unsuccessful attempt to destroy the World Trade Center in 1993; and the ambush of U.S. servicemen in Somalia in 1993.

The September 11, 2001 attacks triggered the Nation's right under domestic and international law to use force in self-defense.[4] In response, the Government has engaged in a broad effort at home and abroad to counter terrorism. Pursuant to his authorities as Commander in Chief, the President in October, 2001, ordered the Armed Forces to attack al Qaeda personnel and assets in Afghanistan, and the Taliban militia that harbored them. Although the breadth of that campaign has lessened, it is still ongoing. Congress has provided its support for the use of forces against those linked to the September 11 attacks, and has recognized the President's constitutional power to use force to prevent and deter future attacks both within and outside the United States. S. J. Res. 23, Pub. L. No. 107-40, 115 Stat. 224 (2001). The Justice Department and the FBI have launched a sweeping investigation in response to the September 11 attacks, and Congress enacted legislation to expand the Justice Department's powers of surveillance against terrorists. *See* The USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). Last year, Congress enacted the President's proposed new cabinet department for homeland security in

[4] Article 51 of the U.N. Charter declares that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security." The attacks of September 11, 2001 clearly constitute an armed attack against the United States, and indeed were the latest in a long history of al Qaeda sponsored attacks against the United States. This United Nations Security Council recognized this on September 28, 2001, when it unanimously adopted Resolution 1373 explicitly "reaffirming the inherent right of individual and collective self-defence as recognized by the charter of the United Nations." This right of self-defense is a right to effective self-defense. In other words, the victim state has the right to use force against the aggressor who has initiated an "armed attack" until the threat has abated. The United States, through its military and intelligence personnel, has a right recognized by Article 51 to continue using force until such time as the threat posed by al Qaeda and other terrorist groups connected to the September 11th attacks is completely ended." Other treaties re-affirm the right of the United States to use force in its self-defense. *See, e.g.*, Inter-American Treaty of Reciprocal Assistance, art. 3, Sept. 2, 1947, T.I.A.S. No. 1838, 21 U.N.T.S. 77 (Rio Treaty); North Atlantic Treaty, art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

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order to implement a coordinated domestic program against terrorism. The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

Leaders of al Qaeda and the Taliban, with access to active terrorist cells and other resources, remain at large. It has been reported that they have regrouped and are communicating with their members. *See, e.g.*, Cam Simpson, *Al Qaeda Reorganized, German Official Says, Minister Fears Reprisals if U.SA attacks Iraq*, Star-Ledger, Jan. 26, 2003, at 18. In his recent testimony to the Senate Select Committee on Intelligence on February 11, 2003, the Director of the Central Intelligence Agency, testified that another al Qaeda attack was anticipated as early as mid-February. *See* Rowan Scarborough & Jerry Seper, *Bin Laden Tape Vows Al Qaeda Will Aid Iraq; Says U.S. Bombing Nearly Killed Him*, Wash. Times, Feb. 12, 2003, at A1. It appears that al Qaeda continues to enjoy information and resources that allow it to organize and direct active hostile forces against this country, both domestically and abroad.

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 nation-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 operatives and their plans may prove to be the only way to prevent direct attacks on the United States. Interrogation of captured al Qaeda 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 (if not greater) magnitude from occurring in the United States.

2. Commander-in-Chief Authority

In a series of opinions examining various legal questions arising after September 11, we have explained the scope of the President's Commander-in-Chief power.[5] In those opinions, we explained that the 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, U.S. Const. art. I, § 1, cl. 1, and by the Commander-in-Chief Clause, *id.*, § 2, cl. 1.[6] The Framers understood the

[5] *See, e.g.*, Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001) ("*Flanigan Memorandum*"); Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* (Nov. 6, 2001).

[6] *See Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (President has authority to deploy United States armed forces "abroad or to any particular region"); *Fleming v. Page*, 50 U.S. (9 How.) 603, 614–15 (1850) ("As

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Commander-in-Chief 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." That 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.[7]

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*, 339 U.S. 763, 788 (1950). In wartime, it is for the President alone to decide what methods to use to best prevail against the enemy. *See, e.g.*, *Flanigan Memorandum* at 3; Memorandum for Charles W. Colson, Special Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President and the War Power: South Vietnam and the Cambodian Sanctuaries* (May 22, 1970).[8] The President's

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commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual"); *Loving v. United States*, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in judgment) (The "inherent powers" of the Commander in Chief "are clearly extensive."); *Maul v. United States*, 274 U.S. 501, 515–16 (1927) (Brandeis & Holmes, JJ., concurring) (President "may direct any revenue cutter to cruise in any waters in order to perform any duty of the service"); *Commonwealth of Massachusetts v. Laird*, 451 F.2d 26, 32 (1st Cir. 1971) (the President has "power as Commander-in-Chief to station forces abroad"); *Ex parte Vallandigham*, 28 F.Cas. 874, 922 (C.C.S.D. Ohio 1863) (No. 16,816) (in acting "under this power where there is no express legislative declaration, the president is guided solely by his own judgment and discretion"); *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 6 (1992).

[7] Judicial decisions since the beginning of the Republic confirm the President's constitutional power and duty to repel military action against the United States and to take measures to prevent the recurrence of an attack. As Justice Joseph Story said long ago, "[i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws." *The Apollon*, 22 U.S. (9 Wheat.) 362, 366–67 (1824). If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat with whatever means are necessary. *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority."); *United States v. Smith*, 27 F. Cas. 1192, 1229–30 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice) (regardless of statutory authorization, it is "the duty . . . of the executive magistrate . . . to repel an invading foe"); *see also* 3 Story, *Commentaries* § 1485 ("[t]he command and application of the public force . . . to maintain peace, and to resist foreign invasion" are executive powers).

[8] *See also* Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Legal Constraints to Boarding and Searching Foreign Vessels on the High Seas* at 3 (June 13, 2002) ("*High Seas Memorandum*") ("[T]he Commander-in-Chief and

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complete discretion in exercising the Commander-in-Chief power has been recognized by the courts. In the *Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862), for example, 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." *See also Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (by virtue of the Commander-in-Chief Clause, it is "the President alone[] who is constitutionally invested with the entire charge of hostile operations.").

One of the core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy. *See, e.g.*, Memorandum for William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations* at 3 (Mar. 13, 2002) ("*Transfers Memorandum*") ("the Commander-in-Chief Clause constitutes an independent grant of substantive authority to engage in the detention and transfer of prisoners captured in armed conflicts"). 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.[9] Numerous Presidents have ordered the capture, detention, and questioning of enemy combatants during virtually every major conflict in the Nation's history, including recent conflicts such as the Gulf, Vietnam, and Korean wars. Recognizing this authority, Congress has never attempted to restrict or interfere with the President's authority on this score. *Id.*

C. Fifth Amendment Due Process Clause

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. We address each of these reasons in turn.

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 Speed explained the unquestioned rule that, as Commander in Chief, the President waging a war may authorize

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Vesting Clauses grant the President the authority not just to set broad military strategy, but also to decide all operational and tactical plans."); Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of 18 U.S.C. § 4001(a) to Military Detention of United States Citizens* at 2 (June 27, 2002) (The Constitution "vests full control of the military operations of the United States in the President.").

[9] Although Article 17 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3517, places restrictions on interrogation of enemy combatants, members of al Qaeda and the Taliban militia are not legally entitled to the status of prisoners of war under the Convention. *See generally* Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 22, 2002) ("*Treaties and Laws Memorandum*").

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soldiers to engage in combat that could not be authorized as a part of the President's role in enforcing the laws. The strictures that bind the Executive in its role as a magistrate enforcing the civil laws have no place in constraining the President in waging war:

> Soldiers regularly in the service have the license of the government to deprive men, the active enemies of the government, of their liberty and lives; their commission so to act is as perfect and legal as that of a judge to adjudicate . . . . *Wars never have been and never can be conducted upon the principle that an army is but a posse comitatis of a civil magistrate.*

Military Commissions, 11 Op. Att'y Gen. 297, 301–02 (1865) (emphasis added); *see also The Modoc Indian Prisoners*, 14 Op. Att'y Gen. 249, 252 (1873) ("it cannot be pretended that a United States soldier is guilty of murder if he kills a public enemy in battle, which would be the case if the municipal law was in force and applicable to an act committed under such circumstances"). 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.

11 Op. Att'y Gen. at 313–14.

Moreover, the Supreme Court's reasoning in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), addressing the extra-territorial application of the Fourth Amendment is equally instructive as to why the Fifth Amendment cannot be construed to apply to the President's conduct of a war:

> The United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of American citizens or national security. . . . Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest. Were respondent to prevail, aliens with no attachment to this country might well bring actions for damages to remedy

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> 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.

Id. at 273–74 (citations omitted).[10] 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.[11]

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. As the Court has broadly stated in *United States v. Salerno*, 481 U.S. 739, 748 (1987), "in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous" without violating the Due Process Clause. *See also Ludecke v. Watkins*, 335 U.S. 160, 171 (1948). Similarly, as the Supreme Court has explained with respect to enemy property, "[b]y exertion of the war power, and untrammeled by the due process or just compensation clause," Congress may "enact[] laws directing seizure, use, and disposition of property in this country belonging to subjects of the enemy." *Cummings v. Deutsche Bank Und Discontogesellschaft*, 300 U.S. 115, 120 (1937). These authorities of the federal government during armed conflict were recognized early in the Nation's history. Chief Justice Marshall concluded for the Court in 1814 that "war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found." *Brown v. United States*, 12 U.S. (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 "untrammeled and free to authorize the seizure, use or appropriation of [enemy] properties without any compensation. . . . There is no constitutional prohibition against confiscation of enemy properties." *See also White v. Mechs. Sec. Corp.*, 269 U.S. 283, 301 (1925) (Holmes, J.) (when U.S. seizes property from an enemy it may "do with it what it liked").

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[10] Indeed, drawing in part on the reasoning of *Verdugo-Urquidez*, as well as the Supreme Court's treatment of the destruction of property for the purposes of military necessity, our Office recently concluded that the Fourth Amendment had no application to *domestic* military operations. *See* Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, *Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States* at 25 (Oct. 23, 2001).

[11] Our analysis here should not be confused with a theory that the Constitution somehow does not "apply" during wartime. The Supreme Court squarely rejected such a proposition long ago in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119–20 (1866), and at least that part of the *Milligan* decision is still good law. *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164–65 (1963); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 88 (1921) ("[T]he mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments . . . ."). Instead, we conclude that the restrictions outlined in the Fifth Amendment simply do not address actions the Executive takes in conducting a military campaign against the Nation's enemies.

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

Second, even if the Fifth Amendment applied to enemy combatants in wartime, it is clear that that the Fifth Amendment does not operate outside the United States to regulate the Executive's conduct toward aliens. The Supreme Court has squarely held that the Fifth Amendment provides no rights to non-citizens who have no established connection to the country and who are held outside sovereign United States territory. *See Verdugo-Urquidez*, 494 U.S. at 269 ("[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."). *See also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections[, such as the Fifth Amendment,] available to persons inside the United States are unavailable to aliens outside of our geographic borders.") (citing *Verdugo-Urquidez*, 494 U.S. at 269; and *Eisentrager*, 339 U.S. at 784). 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, 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.

339 U.S. at 784. *See also Harbury v. Deutch*, 233 F.3d 596, 603–04 (D.C. Cir. 2000), *rev'd on other grounds, Christopher v. Harbury*, 122 S. Ct. 2179 (2002); *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 of Columbia Circuit in *Harbury*, have all held that there is no extraterritorial application of the Fifth Amendment to aliens."). Indeed, in *Harbury v. Deutch*, the D.C. Circuit expressly considered a claim that various U.S. officials had participated in the torture of a non-U.S. citizen outside the sovereign territory of the United States during peacetime. *See* 233 F.3d at 604–05. The D.C. Circuit rejected the contention that the Due

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Process clause applied extraterritorially to a person in such circumstances. The court found *Verdugo-Urquidez* to be controlling on the question, and determined that the Supreme Court's rejection of the extraterritorial application the Fifth Amendment precluded any claim by an alien held outside the United States even when the conduct at issue had not occurred in wartime. *See id.* at 604 (finding that "the Supreme Court's extended and approving citation of *Eisentrager* [in *Verdugo-Urquidez*] suggests that its conclusions regarding the extraterritorial application of the Fifth Amendment are not . . . limited" to wartime). We therefore believe that it is clear that the Fifth Amendment does not apply to alien enemy combatants held overseas.

D. Eighth Amendment

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. As the Supreme Court has explained, the Cruel and Unusual Punishments Clause "was designed to protect those convicted of crimes." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). As a result, "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Id.* at 671 n.40. 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. *See Bell v. Wolfish*, 441 U.S. 520, 536 n.16 (1979) (holding that condition of confinement claims brought by pretrial detainee must be considered under the Fifth Amendment, not the Eighth Amendment). 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 Transfers Memorandum* at 2 (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").

The detention of enemy combatants can in no sense be deemed "punishment" for purposes of the Eighth Amendment. Unlike imprisonment pursuant to a criminal sanction, the detention of enemy combatants involves no sentence judicially imposed or legislatively required and those detained will be released at the end of the conflict. Indeed, it has long been established that "'[c]aptivity [in wartime] is neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character.'" William Winthrop, *Military Law and Precedents* 788 (2d ed. 1920) (quoting British War Office, *Manual of Military Law* (1882)). Moreover, "[t]he object of capture is to prevent the captured individual from serving the enemy." *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946). *See also Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950); Marco Sassoli & Antoine A. Bouvier, *How Does Law Protect in War? Cases Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* 125 (1999) (the purpose of detaining enemy combatants "is not to punish them, but . . . to hinder their direct participation in hostilities"). 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.

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II. Federal Criminal Law

A. Canons of Construction

We discuss below several canons of construction that indicate that ordinary federal criminal statutes do not apply to the properly-authorized interrogation of enemy combatants by the United States Armed Forces during an armed conflict.[12] These canons include the avoidance of constitutional difficulties, inapplicability of general criminal statutes to the conduct of the military during war, inapplicability of general statutes to the sovereign, and the specific governs the general. The Criminal Division concurs in our conclusion that these canons of construction preclude the application of the assault, maiming, interstate stalking, and torture statutes to the military during the conduct of a war.

1. Interpretation to Avoid Constitutional Problems

As the Supreme Court has recognized, and as we will explain further below, 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*, 88 U.S. (21 Wall.) 73, 87 (1874) (emphasis added).

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. The Supreme Court has recognized, and this Office has similarly adopted, 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. *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 for 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

[12] One exception to this general statement is the War Crimes Statute, 18 U.S.C. § 2441, which expressly applies to the military's conduct of war. This statute does not apply to the interrogations in the current conflict for the reasons we explain *infra* Part II.C.1.

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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 American Bar Association to the President on judicial nominations, to avoid potential constitutional question regarding encroachment on Presidential power to appoint judges).

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. "The direction of war implies the direction of the common strength," Alexander Hamilton observed, "and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority." *The Federalist No. 74*, at 415. Thus, earlier in this current armed conflict against the al Qaeda terrorist network, we concluded that "[t]he power of the President is at its zenith under the Constitution when the President is directing military operations of the armed forces." *Flanigan Memorandum* at 3. 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. *See, e.g., The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862).

Construing generally-applicable statutes so as not to apply to the conduct of military operations against the enemy during an armed conflict respects the Constitution's basic allocation of wartime authority. As our Office recently explained in rejecting the application of 18 U.S.C. § 2280, which prohibits the seizure of vessels, to conduct during the current war:

> we have previously concluded that the President's authority in the areas of foreign relations and national security is very broad, and that in the absence of a clear statement in the text or context of a statutory prohibition to suggest that it was Congress's intent to circumscribe this authority, we do not believe that a statute should be interpreted to impose such a restriction on the President's constitutional powers.

High Seas Memorandum at 8 n.5. Federal courts similarly have agreed that 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. *See, e.g., 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. American Cetacean Soc'y*, 478 U.S. 221, 232–33 (1986) (construing federal statutes to avoid curtailment of traditional presidential prerogatives in foreign affairs). 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. *See Egan*, 484 U.S. at 529 (quoting *Haig v. Agee*, 453 U.S. 280, 293–94 (1981)). *See also Agee*, 453 U.S. at 291 (deference to executive branch is "especially" appropriate "in the area . . . of . . . national security").

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In order to respect the President's inherent constitutional 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 President's exercise of his authority as Commander in Chief to control the conduct of operations during a war. *See, e.g.*, Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Swift Justice Authorization Act* (Apr. 8, 2002); *Flanigan Memorandum* at 6; Memorandum for Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Defense Authorization Act* (Sept. 15, 1995). 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 authority 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.[13]

To avoid this constitutional difficulty, therefore, we will construe potentially applicable criminal laws, reviewed in more detail below, not to apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority. We believe that this approach fully respects Congress's authority. First, we will not read a statute to create constitutional problems because we assume that Congress fully respects the limits of its own constitutional authority and would not knowingly seek to upset the separation of powers. Second, we will not infer a congressional attempt to spark a constitutional confrontation with the executive branch in wartime unless Congress clearly and specifically seeks to do so.

[13] It might be thought that Congress could enact legislation that regulated the conduct of interrogations under its authority to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. The question whether Congress could use this power to regulate military commissions was identified and reserved by the Supreme Court. *Ex Parte Quirin*, 317 U.S. 1, 29 (1942). Our Office has determined that Congress cannot exercise its authority to make rules for the Armed Forces to regulate military commissions. Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Swift Justice Authorization Act* at 7 (Apr. 8, 2002). If military commissions are considered an integral part of the conduct of military operations, , then the conduct of interrogations of enemy combatants during wartime must be as much a core element of the President's power to successfully prosecute war. Any effort by Congress to use its power to make rules for the armed forces would thus be just as unconstitutional as such rules would be with regard to military commissions.

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2. Application of Laws of General Applicability to the Conduct of the Military During War

Not only do we construe statutes to avoid intruding upon the President's power as Commander in Chief, but we also apply a more specific and related canon to the conduct of war. As this Office has previously opined, 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. *Shoot Down Opinion*, 18 Op. O.L.C. at 164. *See* Memorandum for Alan Kreczko, Legal Adviser to the National Security Council, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of 47 U.S.C. § 502 to Certain Broadcast Activities* at 3 (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 express statement, the Neutrality Act does not apply to U.S. "Government officials acting within the course and scope of their official duties," in light of the legislative history and historical practice that demonstrated a contrary intent). For many years, our Office has also applied this canon in several highly classified contexts that cannot be discussed in this memorandum.

This canon of construction 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." *Id.* at 164. The mere potential for prosecution could impair the military's completion of its duties during a war as military officials became 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.

This canon of construction, of course, establishes only a presumption. While the federal criminal statutes of general applicability reviewed below do not overcome that presumption, in some cases it has been done. For example, it is clear that the War Crimes Statute, 18 U.S.C. § 2441, which we address below, is intended to apply to the conduct of the U.S. military. It expressly provides that the statute applies where the perpetrator of the crime "is a member of the Armed Forces of the United States" and the conduct it prohibits is conduct that occurs during war. *Id.* § 2441(b). That presumption has not, however, been overcome with respect to the assault, maiming, interstate stalking, or the torture statutes. We will not infer an intention by Congress to interfere with the conduct of military operations in an armed conflict without a clear statement otherwise.

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3. Generally Applicable Statutes Are Not Construed to Apply to the Sovereign

It is also a canon of construction that laws of general applicability are not read to apply to the sovereign. In *United States v. Nardone*, 302 U.S. 379 (1937), the Supreme Court explained its application: (1) where it "would deprive the sovereign of a recognized or established prerogative title or interest," *id.* at 383; or (2) "where a reading which would include such officers would work obvious absurdity[,]" *id.* at 384. As the Court explained, "[a] classical instance" of the deprivation of a recognized or established prerogative title or interest "is the exemption of the state from the operation of general statutes of limitation." *Id.* at 383.

Here, the application of these statutes to the conduct of interrogations of unlawful combatants would deprive the sovereign of a recognized prerogative. Historically, nations have been free to treat unlawful combatants as they wish, and in the United States this power has been vested in the President through the Commander-in-Chief Clause. As one commentator has explained, unlawful belligerents are "more often than not treated as war or national criminals liable to be treated *at will by the captor. There are almost no regulatory safeguards with respect to them and the captor owes no obligation towards them.*" R.C. Hingorani, *Prisoners of War* 18 (1982) (emphasis added). *See* Ingrid Detter, *The Law of War* 148 (2d ed. 2000) ("Unlawful combatants . . . enjoy no protection under international law); William Winthrop, *Military Law and Precedents* 784 (2d ed. 1920) (unlawful belligerents are "[n]ot . . . within the protection of the laws of war"); A. Berriedale Keith, 2 *Wheaton's Elements of International Law* 716 (6th ed. 1929) ("irregular bands of marauders are . . . not entitled to the protection of the mitigated usages of war as practised 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.").[14] The United States Supreme Court has recognized the important distinction between lawful and unlawful combatants. As the Supreme Court unanimously stated 60 years ago, "[b]y universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations *and also between those who are lawful and unlawful combatants.*" *Ex parte Quirin*, 317 U.S. 1, 30–31 (1942) (emphasis added).

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[14] *See also* Alberico Gentili, 2 *De Iure Belli Libri Tres* 22 (1612) (John C. Rolfe translation 1933) ("malefactors do not enjoy the privileges of a law to which they are foes"); E. de Vattel, 3 *The Law of Nations or the Principles of Natural Law* 318 (1758) (Charles G. Fenwick translation 1916) ("The troops alone carry on the war and the rest of the people remain at peace. . . . [I]f the peasantry commit of their own accord any acts of hostility, the enemy treats them without mercy, and hangs them as he would robbers or brigands."); Sir Robert Phillimore, 3 *Commentaries Upon International Law* 164 (2d ed. 1873) (listing "[b]ands of marauders, acting without the authority of the Sovereign or the order of the military commander," "[d]eserters," and "[s]pies" as examples of unlawful belligerents who "have no claim to the treatment of prisoners of War"); Sir G. Sherston Baker, 1 *Halleck's International Law* 614–17 (4th ed. 1908) (noting distinction between lawful and unlawful belligerency and concluding unlawful combatants are "not entitled to the mitigated rules of modern warfare"); Pasquale Fiore, *International Law Codified*, § 1459, at 548 (1918) ("Any act of hostility, any armed violence against the person or property of the hostile sovereign or state and of its citizens, even though legitimate under the laws of war, shall be deemed unlawful and punishable according to 'common' law, if committed by one who is not properly a belligerent."); *id.* § 1475, at 552 ("Armed bands committing hostile acts in time of war by engaging in operations on their own account and without authorization of the Government and, when necessary, concealing their identity as combatants, cannot invoke the application of the laws of war nor be recognized as belligerents.").

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Under traditional practice as expressed in the customary laws of war, the treatment of unlawful belligerents is left to the sovereign's discretion. As one commentator has stated, the treatment of "unprivileged belligerents . . . [is] left to the discretion of the belligerent threatened by their activities." Julius Stone, *Legal Controls of International Conflict* 549 (1954). Under our Constitution, the sovereign right of the United States on the treatment of enemy combatants is reserved to the President as Commander-in-Chief. In light of the long history of discretion given to each nation to determine its treatment of unlawful combatants, to construe these statutes to regulate the conduct of the United States toward such combatants would interfere with a well-established prerogative of the sovereign. While the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364 ("GPW"), imposes restrictions on the interrogations of prisoners of war, it does not provide prisoner of war status to those who are unlawful combatants. *See Treaties and Laws Memorandum* at 8–9. Those restrictions therefore would not apply to the interrogations of unlawful belligerents such as al Qaeda or Taliban members.

The second exception recognized by the Supreme Court arises where 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. *Nardone*, 302 U.S. at 384. *See also United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486–87 (1868) (holding that statute punishing obstruction of mail did not apply to an officer's temporary detention of mail caused by his arrest of the carrier for murder). In those situations and others, such as undercover investigations of narcotics trafficking, the government officer's conduct would constitute a literal violation of the law. And while "[g]overnment law enforcement efforts frequently require the literal violation of facially applicable statutes[,] . . . courts have construed prohibitory laws as inapplicable when a public official is engaged in the performance of a necessary public duty." Memorandum for Maurice C. Inman, Jr., General Counsel, Immigration and Naturalization Service, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, *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.* For the reasons we explain above, the application of these general laws to the conduct of the military during the course of a war would create untenable results.

Like the canon of construction against the application of general criminal statutes to the conduct of the military during war, this canon of construction is not absolute. The rule excluding the sovereign is only one of construction. It may be overcome where the legislative history or obvious policies of the statue demonstrate that the sovereign and its officers should be included. With respect to assault, maiming, or interstate stalking, no such history or obvious legislative policy indicates an intention to regulate lawful military activities in an armed conflict. Although the torture statute, as we explain below, applies to persons acting under color of law, the legislative history indicates no intent to apply this to the conduct of military personnel. Indeed, as we explained in discussing the prerogative of the sovereign, it is well established that the sovereign retains the discretion to treat unlawful combatants as it sees fit.

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4. **Specific Governs the General**

The canon of construction that specific statutes govern general statutes also counsels that generally applicable criminal statutes should not apply to the military's conduct of interrogations in the prosecution of a war. Where a specific statute or statutory scheme has been enacted, it and not a more general enactment will govern. *See, e.g., Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). Here, the UCMJ provides a detailed regulatory regime for the conduct of military personnel apart from the federal criminal code. Congress enacted the UCMJ pursuant to its constitutional authority "[t]o make Rules for the government and Regulation of the land and naval Forces." U.S. Const. art. I, sec. 8, cl. 14. As the specific code of conduct, the UCMJ governs the conduct of the military during a war, not the general federal criminal laws.

The Military Extraterritorial Jurisdiction Act makes clear that it is the UCMJ—not the criminal code—that governs the conduct of the members of the Armed Forces. As explained above, 18 U.S.C. § 3261(d) ensures that the military punishes and disciplines its members. To be sure, section 3261(a)(1) provides that members of the Armed Forces may be punished for conduct that would constitute a felony if committed in the special maritime and territorial jurisdiction. But section 3261(d) precludes the prosecution of such persons in an Article III court, with only two exceptions: (1) where an individual is no longer a member of the Armed Forces, though he was a member at the time of the offense the individual; and (2) where the member committed the offense with someone who was not a member of the Armed Forces.

It could be argued that Congress specifically enacted section 3261 to extend special maritime and territorial jurisdiction crimes to the members of the Armed Forces and those accompanying or employed by them. Such a contention would, however, be incorrect. Nothing in that provision, or its legislative history suggests an intention to impose general criminal liability on the military for properly-authorized acts undertaken in the prosecution of a war. Rather, the legislative history reveals a desire to ensure that when persons accompanying or employed by the Armed Forces, acting solely in their personal capacity, commits a felony, they can be punished for those crimes.[15] We therefore believe that this canon of construction, as with the others outlined above, supports our conclusion that the statutes outlined in this opinion, with the exception of the war crimes statute, do not govern the properly authorized interrogation of enemy combatants during an armed conflict.

5. **Application of the Canons of Construction**

The assault, maiming, interstate stalking, and torture statutes discussed below are generally applicable criminal prohibitions, applying on their faces to "whoever" engages in the

[15] Congress enacted the Military Extraterritorial Jurisdiction Act of 2000 to fill a jurisdictional gap. In a series of cases, the Supreme Court held that the Constitution barred the military from trying civilians accompanying the military in military courts during peacetime. *See, e.g., Reid v. Covert*, 354 U.S. 1 (1957). Because of these decisions, and the frequent failure of other nations to prosecute such individuals, persons employed by or accompanying the Armed Forces outside the United States often escaped prosecution for crimes committed on bases or against other U.S. nationals. *See* Military Extraterritorial Jurisdiction Act of 2000, H. Rep. No. 106-778(I), at 10–11 (July 20, 2000). *See also* H. R. Rep. No. 106-1048, at 120 (2001); *United States v. Gatlin*, 216 F.3d 207, 209 (2d Cir. 2000). Though this gap was long recognized, see *Gatlin*, 216 F.3d at 208–09, it was not until 2000 that Congress closed it.

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conduct they proscribe. 18 U.S.C. § 113; *id.* § 114; *id.* § 2261A; *id.* § 2340A. Each of the canons outlined above counsels against the application of these statutes to the conduct of the military during war. As we explained above, the application of these statutes to the President's conduct of the war would potentially infringe upon his power as Commander in Chief. Furthermore, the conduct at issue here—interrogations—is a core element of the military's ability to prosecute a war. As a general matter, we do not construe generally applicable criminal statutes to reach the conduct of the military during a war. Moreover, the application of these statutes to the conduct of the military during war would touch upon a prerogative of the sovereign, namely its discretion regarding the treatment of unlawful belligerents.[16] Congress has not provided a clear statement with respect to any of these statutes that would suggest that these canons of construction do not apply. Additionally, as we explained above, the UCMJ provides a specific statutory scheme that governs the conduct of the military and as the more specific enactment it governs here.

To be sure, section 2340 applies to individuals who are acting "under color of law." 18 U.S.C. § 2340(1). As such, it applies to governmental actors and it could be argued that Congress enacted it with the intention of restricting the ability of the Armed Forces to interrogate enemy combatants during an armed conflict. We believe that these canons of construction nevertheless counsel against the application of this statute to the conduct of the military during the prosecution of a war. As we explained above, applying this statute to the President's conduct of the war would raise grave separation of powers concerns. Such a construction is unnecessary to give effect to the criminal prohibition. Though we believe that the statute would not apply to the conduct of the military during the prosecution of a war, it would reach the conduct of other governmental actors in peacetime. We further note that where Congress intends to apply statutes to the conduct of our military it has done so far more clearly than by requiring the individuals act "under color of law." For example, the War Crimes Statute, 18 U.S.C. § 2441 applies to the conduct "any member of the Armed Forces of the United States." 18 U.S.C. § 2441(b). Moreover, here, it is the UCMJ, a specific statutory scheme, that governs the conduct of the Armed Forces rather than this general statute.

6. Commander-in-Chief Authority

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. This approach is consistent with previous decisions of our Office involving the application of federal criminal law. For example, we have previously construed the congressional contempt statute not to apply to executive branch officials who refuse to comply with congressional subpoenas because of an assertion of executive privilege. In a published 1984 opinion, we concluded:

[16] We emphasize that this opinion concerns the application of these statutes solely to the President's conduct of a war. We express no opinion as to their applicability outside of this context.

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> [I]f executive officials were subject to prosecution for criminal contempt whenever they carried out the President's claim of executive privilege, it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties. Therefore, the separation of powers principles that underlie the doctrine of executive privilege also would preclude an application of the contempt of Congress statute to punish officials for aiding the President in asserting his constitutional privilege.

Prosecution for Contempt of Congress of an Executive Branch Offical Who Has Asserted A Claim of Executive Privilege, 8 Op. O.L.C. 101, 134 (1984). *Cf. Shoot Down Memorandum* at 163–64. And should the statute not be construed in this manner, our Office concluded that the Department of Justice could not enforce the statute against federal officials who properly execute the President's constitutional authority. "The President, through a United States Attorney, need not, indeed may not, prosecute criminally a subordinate for asserting on his behalf a claim of executive privilege. Nor could the Legislative Branch or the courts require or implement the prosecution of such an individual." 8 Op. O.L.C. at 141. We opined that "courts . . . would surely conclude that a criminal prosecution for the exercise of a presumptively valid, constitutionally based privilege is not consistent with the Constitution." *Id.*

We have even greater concerns with respect to prosecutions arising out of the exercise of the President's express authority as Commander in Chief than we do with prosecutions arising out of the assertion of executive privilege. 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.

B. Special Maritime and Territorial Jurisdiction of the United States

1. Jurisdiction

Before turning to the specific federal criminal statutes that may be relevant to the conduct of interrogations, we must examine whether these statutes apply. Federal criminal statutes generally do not apply within the special maritime and territorial jurisdiction of the United States. *See United States v. Bowman*, 260 U.S. 94, 98 (1922). As noted above, this opinion addresses solely those alien enemy combatants held outside the United States. The application of federal criminal laws to the conduct of interrogations overseas is determined by the complex

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interaction of 18 U.S.C.A. § 7 (2000 & West Supp. 2002) and 18 U.S.C. § 3261 (2000), which is part of the Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (2001). Section 7 defines the term "special maritime and territorial jurisdiction," which we conclude includes permanent U.S. military bases outside the United States, like the U.S. Naval Station, Guantanamo Bay ("GTMO"). Section 3261 defines military extraterritorial jurisdiction. We conclude that all persons who are neither members of the Armed Forces nor persons accompanying or employed by the Armed Forces are subject to the special maritime and territorial jurisdiction of the United States when they are in locations that Section 7 defines as part of that jurisdiction. Members of the Armed Forces and persons accompanying or employed by them, however, are subject to a slightly different rule. Members of the Armed Forces are subject to military discipline under the UCMJ anyplace outside the United States for conduct that would constitute a felony if committed within the special maritime and territorial jurisdiction of the United States. Those accompanying or employed by the Armed Forces can be prosecuted in an Article III court for their conduct outside the United States that would constitute a felony offense if committed within the special maritime and territorial jurisdiction of the United States. Finally, members of the Armed Forces and those accompanying or employed by the military are punishable for misdemeanor offenses in an Article III court when they commit such offenses within the special maritime and territorial jurisdiction of the United States.

As a general matter, GTMO and other U.S. military bases outside the United States fall within the special maritime and territorial jurisdiction of the United States.[17] Section 7(9) of Title 18 of the U.S. Code provides, in relevant part, that the special maritime and territorial jurisdiction of the United States includes:

> offenses committed by or against a national of the United States . . . on the premises of United States . . . military . . . missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership.

18 U.S.C.A. § 7(9)(A).[18] By its terms, this section applies to GTMO and other U.S. military bases in foreign states, although no court has interpreted the scope of section 7(9)'s reach.[19]

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[17] The United States occupies GTMO under a lease entered into with the Cuban Government in 1903. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16–23, 1903, U.S.-Cuba, art. III, T.S. No. 418, 6 Bevans 1113. In 1934, the United States and Cuba entered into a new treaty that explicitly reaffirmed the continuing validity of the 1903 Lease of Lands Agreement. *See* Relations With Cuba, May 29, 1934, U.S.-Cuba, T.S. No. 866, 6 Bevans 1161.

[18] The USA PATRIOT Act, Pub. L. No. 107-56, § 804, 115 Stat. 272, 377 (2001) amended the special maritime jurisdiction statute to include subsection 9. Congress added this section to resolve a circuit split on the reach of section 7(3), which provides that the special maritime and territorial jurisdiction of the United States includes "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." 18 U.S.C. § 7(3). There was some question as to whether section 7(3) reached lands outside of United States territory. *Compare United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000) (section 7(3) applies only to land acquired within U.S. territorial borders) *with United States v. Erdos*, 474 F.2d 157 (4th Cir. 1973) (section 7(3) covers American Embassy in Equatorial Guinea). *See* Provide Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001, H.R. Rep. No. 107-236, pt. 1, at 74 (2001) (noting the circuit split and that "[t]his [sub]section would

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Section 7(9) further provides that it "does not apply with respect to an offense committed by a person described in" 18 U.S.C. § 3261(a). Persons described in section 3261(a) are those "employed by or accompanying the Armed Forces outside the United States" or "member[s] of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice)," who engage in "conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States[.]" *Id.* The interaction of section 7(9) and section 3261(a) in effect differentiates between three classes of persons: (1) all persons who are neither members of the Armed Forces nor persons accompanying or employed by the Armed Forces; (2) members of the Armed Forces subject to the UCMJ; (3) those persons employed by or accompanying the Armed Forces.

First, those persons who are neither members of the Armed Forces nor are employed by or accompanying the Armed Forces are subject to prosecution for violations of federal criminal law when they are at a location that is included within the special maritime and territorial jurisdiction. Conversely, when the acts in question are committed outside of the special maritime and territorial jurisdiction, these individuals are not subject to those federal criminal laws. So, for example, a federal, non-military officer who is conducting interrogations in a foreign location, one that is not on a permanent U.S. military base or diplomatic establishment, would not be subject to the federal criminal laws applicable in the special maritime and territorial jurisdiction.

The rules that apply to the second and third classes of persons are more complicated. Section 7(9), in conjunction with 18 U.S.C. § 3261, provides that members of the Armed Forces subject to the UCMJ are not within the special maritime and territorial jurisdiction when they, while outside the United States, engage in conduct that would constitute a felony if committed within the special maritime and territorial jurisdiction. Section 3261(a) exempts such persons, however, only if their conduct constitutes a felony. If they were to commit a misdemeanor offense while stationed at GTMO, they would fall outside section 3261(a)'s exception and would be subject to the special maritime and territorial jurisdiction. *See* 18 U.S.C. § 3261(a).[20]

Section 7(9), in conjunction with 18 U.S.C. § 3261, likewise provides that those persons employed by or accompanying members of the Armed Forces subject to the UCMJ are not within the special maritime and territorial jurisdiction of the United States when they, while outside the United States, engage in conduct that would constitute a felony if committed within the special maritime and territorial jurisdiction.[21] And, like members of the Armed Forces, if

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make it clear that embassies and embassy housing of the United States in foreign states are included in the special maritime and territorial jurisdiction of the United States.").

[19] We express no opinion as to the full scope of the meaning of subsection (9)'s phrase "military . . . missions or entities in foreign states." We simply note that it is clear that permanent U.S. military bases such as the one at GTMO fall within subsection (9).

[20] Under 18 U.S.C. § 3559(a), any offense for which the maximum sentence is more than one year is defined as a felony. Offenses for which the maximum sentence is one year or less are classified as misdemeanors. *See* 18 U.S.C. § 3559(a) (2000).

[21] The term "accompanying the Armed Forces outside the United States" is further defined by statute. Section 3267 defines "accompanying the Armed Forces outside the United States" as:

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such persons commit a misdemeanor offense while in an area that falls within the special maritime and territorial jurisdiction, they are within the special maritime and territorial jurisdiction.

Although these two classes of persons are not within the special maritime and territorial jurisdiction when they engage in conduct that would constitute a felony if engaged in within the special maritime and territorial jurisdiction, they are in fact punishable for such conduct when they are outside the United States—whether they are in an area that is otherwise part of the special maritime and territorial jurisdiction or elsewhere outside the United States, such as in a foreign state. Section 3261(a) provides that when such persons are outside the United States and they engage in conduct that would be a felony if committed in the special maritime and territorial jurisdiction, those persons "shall be punished as provided for that offense." 18 U.S.C. § 3261(a). Section 3261(a) therefore gives extraterritorial effect to the criminal prohibitions applicable to the special maritime and territorial jurisdiction of the United States. Thus, with respect to interrogations, members of the Armed Forces and those employed by or accompanying the Armed Forces will be subject to the felony criminal prohibitions that apply in the special maritime and territorial jurisdiction irrespective of whether the interrogations occur at, for example, a U.S. military base or at the military facilities of a foreign state.

Although members of the Armed Forces are to be punished for conduct that would constitute a felony if committed in the special maritime and territorial jurisdiction, they can only be prosecuted under the UCMJ for that conduct. Section 3261 prohibits the prosecution of members of the Armed Forces under the laws applicable to the special maritime and territorial jurisdiction. For persons who are members of the Armed Forces subject to the UCMJ, section 3261(d) provides that "no prosecution may be commenced against" them "under section

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(A) A dependent of—
  (i) a member of the Armed Forces;
  (ii) a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
  (iii) a Department of Defense contractor (including a subcontractor at any tier) or an employee of a Department of Defense contractor (including a subcontractor at any tier);
(B) residing with such member, civilian employee, contractor, or contractor employee outside the United States; and
(C) not a national of or ordinarily resident in the host nation.

18 U.S.C. § 3267 (2000).

Likewise, the statute also defines "employed by the Armed forces." Section 3267(1) provides that this term includes those persons:

> (A) employed as a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department), as a Department of Defense contractor (including a subcontractor at any tier), or as an employee of a Department of Defense contractor (including a subcontractor at any tier);
> (B) present or residing outside the United States in connection with such employment; and
> (C) not a national of or ordinarily resident in the host nation.

Id.

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3261(a)." 18 U.S.C. § 3261(d).[22] Section 3261(d) is subject to two exceptions. First, the bar on prosecutions applies only so long as the member continues to be subject to the UCMJ. *See* 18 U.S.C. § 3261(d)(1). Second, if "an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject" to the UCMJ, the bar does not apply. 18 U.S.C. § 3261(d)(2). In limited circumstances, namely in time of war, persons employed by or accompanying the Armed Forces are subject to the UCMJ. *See* 10 U.S.C. § 802 (a)(11) (2000) (providing that "persons serving with, employed by, or accompanying the armed forces outside the United States" are subject to the UCMJ); *Reid v. Covert*, 354 U.S. 1 (1957).[23] If the indictment charged that such persons committed the offense in wartime with members of the Armed Forces subject to the UCMJ, this bar on prosecution would not be removed for the member. The indictment would, for example, have to charge that the member of the Armed Forces committed the offense with, for example, a government official not subject to the UCMJ (and not physically accompanying the Armed Forces in the field) to survive.

2. Criminal Statutes Applicable in the Special Maritime and Territorial Jurisdiction of the United States

Because the interaction of 18 U.S.C. § 7 and 18 U.S.C. § 3261(a) renders the criminal statutes that apply in special maritime and territorial jurisdiction applicable to the conduct of members of the Armed Forces, and those accompanying or employed by the Armed Forces, we have examined below the criminal statutes that could conceivably cover interrogation conduct. Specifically, we have addressed: assault, 18 U.S.C. § 113; maiming, 18 U.S.C. § 114; and interstate stalking, 18 U.S.C. § 2261A. Of course, as we explained above, various canons of construction preclude the application of these laws to authorized military interrogations of alien enemy combatants during wartime.

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[22] Section 3261 ensures that the military can prosecute its members under the UCMJ. Section 3261(c) makes clear that neither section 3261(d)'s bar nor any other portion of the statute precludes proceeding against persons covered by section 3261(a) in a military commission. It provides that "[n]othing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal." 18 U.S.C. § 3261(d).

[23] Although in construing 10 U.S.C. § 802(a)(10), which provides that persons subject to the UCMJ includes "[i]n time of war, persons serving with or accompanying an armed force in the field," we opined that "in time of war" meant both declared and undeclared wars, we found that due to ambiguity in the case law we could not predict whether the Court of Military Appeals or the Supreme Court would agree with our reading of the phrase. *See* Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, *Re: Possible Criminal Charges Against American Citizen Who Was a Member of the Al Qaeda Terrorist Organization or the Taliban Militia* at 18 (Dec. 21, 2001).

Additionally, we note that with respect to meaning of the term "employed by or accompanying the Armed Forces," we have construed those terms to have essentially the same meaning as that which 18 U.S.C. § 3267 provides. Specifically, we have opined that "the phrase 'employed by or accompanying' is a well understood reference to civilian employees of the military establishment and to the dependents of military personnel." Memorandum for Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division from Frank M. Wozencraft, Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 11244, A Bill To Amend Title 18 of the United States Code to Give United States District Courts Jurisdiction of Certain Offenses Committed by Americans Outside The United States, and for Other Purposes* (Aug. 23, 1967). It is, however, unclear whether the meaning of "employed by the armed forces" for purposes of the UCMJ extends to Department of Defense contractors as does section 3267.

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a. Assault

Section 113 of Title 18 proscribes assault within the special maritime and territorial jurisdiction of the United States.[24] Although section 113 does not define assault, courts have construed the term "assault" in accordance with its common law meaning. *See, e.g., United States v. Estrada-Fernandez*, 150 F.3d 491, 494 n.1 (5th Cir. 1998); *United States v. Juvenile-Male*, 930 F.2d 727, 728 (9th Cir. 1991). At common law, an assault is an attempted battery or an act that puts another person in reasonable apprehension of bodily harm. *See, e.g., United States v. Bayes*, 210 F.3d 64, 68 (1st Cir. 2000). Section 113, as we explain below, sweeps more broadly than the common law definition of simple assault and sweeps within its ambit acts that would at common law constitute battery. We analyze below each form of assault section 113 proscribes.

First, we begin with the least serious form of assault: simple assault, which section 113(a)(5) proscribes.[25] This form of assault includes attempted battery. *See, e.g., United States v. Dupree*, 544 F.2d 1050 (9th Cir. 1976).[26] Courts have employed various formulations of what constitutes an attempted battery. By the far most common formulation is that attempted battery is "a willful attempt to inflict injury upon the person of another." *United States v. Fallen*, 256

[24] 18 U.S.C. § 113 provides in full:

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

(1) Assault with intent to commit murder, by imprisonment for not more than twenty years.
(2) Assault with intent to commit any felony, except murder or a felony under chapter 109A, by a fine under this title or imprisonment for not more than ten years, or both.
(3) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by a fine under this title or imprisonment for not more than ten years, or both.
(4) Assault by striking, beating, or wounding, by a fine under this title or imprisonment for not more than six months, or both.
(5) Simple assault, by a fine under this title or imprisonment for not more than six months, or both, or if the victim of the assault is an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 1 year, or both.
(6) Assault resulting in serious bodily injury, by a fine under this title or imprisonment for not more than ten years, or both.
(7) Assault resulting in substantial bodily injury to an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 5 years, or both.

(b) As used in this subsection—

(1) the term "substantial bodily injury" means bodily injury which involves—
(A) a temporary but substantial disfigurement; or
(B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty; and
(2) the term "serious bodily injury" has the meaning given that term in section 1365 of this title.

[25] Simple assault carries a penalty of not more than six months' imprisonment, a fine, or both. If, however, the victim under age 16, the defendant faces a penalty of up to one year's imprisonment, a fine, or both. *See* 18 U.S.C. § 113(a)(5).

[26] As the Seventh Circuit has explained, this latter type of assault is drawn from tort law. *See United States v. Bell*, 505 F.2d 539, 540–41 (7th Cir. 1974). *See also* LaFave at 746 (same).

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F.3d 1082, 1088 (11th Cir. 2001), *cert. denied*, 534 U.S. 1170 (2002). *See United States v. McCulligan*, 256 F.3d 97, 102–03 (3d Cir. 2001) (same); *Juvenile Male*, 930 at 728 (same). An assault at common law does not require actual physical contact. If the defendant does make such contact, it does not preclude a charge of simple assault. *See Dupree*, 544 F.2d at 1052 ("[A]n assault is an attempted battery and proof of a battery will support conviction of assault"); *Cf. Bayes*, 210 F.3d at 69 ("in a prosecution for simple assault . . . , it is sufficient to show that the defendant deliberately touched another in a patently offensive manner without justification or excuse"). The attempted battery form of assault is, like all other forms of attempt, a specific intent crime. *See* Wayne R. LaFave and Austin W. Scott, Jr., *Substantive Criminal Law* § 7.16, at 312 (1986) ("LaFave & Scott"). Thus, the defendant must have specifically intended to commit a battery—i.e., he must have specifically intended to "to cause physical injury to the victim." *See id:* Some courts construe that physical injury to extend to offensive touchings. An offensive touching can be anything from attempting to spit on someone to trying to touch someone's buttocks. *See Bayes*, 210 F.3d at 69; *United States v. Frizzi*, 491 F.2d 1231, 1232 (1st Cir. 1974). *See also United States v. Whitefeather*, 275 F.3d 741, 743 (8th Cir. 2002) (urinating on victim was an offensive touching). And as one of the leading commentators explains, "[a]n attempt to commit any crime requires that the attempting party come pretty close to committing it." Wayne R. LaFave, *Criminal Law*, § 7.16, at 745 (3d ed. 2000) ("LaFave"). In the context of interrogations, if, for example, an interrogator attempted to slap the detainee, such an act would constitute simple assault. On the other hand, changing the detainee's environment such as by altering the lighting or temperature would not constitute simple assault.

Simple assault also includes the placement of another in reasonable apprehension of immediate bodily harm. To convict a defendant of this type of assault, the prosecution must establish that: (1) the defendant intended to cause apprehension of immediate bodily harm; (2) the victim actually experienced such apprehension; and (3) the defendant engaged in some conduct that reasonably arouses such apprehension. *See, e.g., United States v. Skeet*, 665 F.2d 983, 986–87 (9th Cir. 1982) (defendant's actions must actually cause victim apprehension); *United States v. Sampson*, No. 00-50689, 2002 WL 1478552, at *2 (9th Cir. July 10, 2002) (where defendant's firing of a gun failed to frighten police officer because he had not heard the gun fire or seen the defendant fire the gun the defendant had not committed simple assault); LaFave, § 7.16, at 747.[27] In interrogating a detainee, if interrogators were to, for example, show a detainee a device for electrically shocking him and to threaten to use it should he refuse to divulge information, such an action would constitute this type of assault. In so doing, the interrogator would have intended to cause apprehension of immediate bodily harm, it would have been reasonable for the detainee to experience such apprehension, and more than likely he would have experienced such apprehension.

Second, section 113(a)(4) proscribes assault by "striking, beating, or wounding."[28] This crime requires only general intent. *See, e.g., United States v. Felix*, 996 F.2d 203, 207 (8th Cir.

[27] Some courts have labeled this requirement of reasonable apprehension as the requirement that the defendant had the "present apparent ability" to inflict harm. *See Fallen*, 256 F.3d at 1088 (defendant's "repeated assertion that he had a gun and was willing to use it" sufficed to establish that the defendant had the "present apparent ability" to harm victim). Under either formulation, the inquiry is still one that looks to whether the circumstances would have caused a reasonable person to think that the defendant would harm her.

[28] This form of assault carries a penalty of up to six months' imprisonment, a fine, or both. 18 U.S.C. § 113(a)(4).

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1993) (general intent crime). Courts have construed this section to preclude essentially what at common law would have been simple battery. *See, e.g., United States v. Chavez*, 204 F.3d 1305, 1317 (11th Cir. 2000); *United States v. Duran*, 127 F.3d 911, 915 (10th Cir. 1997). By contrast to the simple assault section 113(a)(5) proscribes, this subsection requires that a defendant make physical contact with the victim. *See Estrada-Fernandez*, 150 F.3d at 494; *United States v. Johnson*, 637 F.2d 1224, 1242 n.26 (9th Cir. 1980). Notably, however, assault by striking, beating, or wounding "requires no particular degree of severity in the injury" to the victim. *Felix*, 996 F.2d at 207. *See Chavez*, 204 F.3d at 1317 (same). Because this section requires physical contact, interrogation methods that do not involve physical contact will not run afoul of this section.

Before turning to the remaining types of assault that section 113 proscribes, it bears noting that both simple assault and assault by striking, beating or wounding are punishable by a maximum sentence of six months' imprisonment, a fine, or both. *See* 18 U.S.C. § 113(a)(5); *id.* § 113(a)(4).[29] Because the maximum sentence for each of these crimes is less than a year, charges brought against a member of the Armed Forces subject to the UCMJ or those employed by or accompanying the Armed Forces for either of these crimes would not bring that member within the scope of 18 U.S.C. § 3261(a). As a result, a member of the Armed Forces engaging in such conduct at a military base, such as GTMO, would be within the special maritime and territorial jurisdiction of the United States and could be prosecuted for this offense in an Article III court, subject, of course, to any defenses or any protections stemming from the exercise of the President's constitutional authority. If, however, members of the Armed Forces were engaging in such conduct on a foreign state's military base, they would not be covered by 3261(a) nor would they be within the special maritime and territorial jurisdiction. The remaining types of assault prohibited under section 113(a) addressed below would, however, bring a member of the Armed Forces or someone employed by or accompanying the Armed Forces squarely within section 3261(a).

Section 113 proscribes assault resulting in "serious bodily injury" and assault resulting in "substantial bodily injury to an individual who has not attained the age of 16 years." 18 U.S.C. § 113(a)(6); *id.* § 113(a)(7). These crimes are general intent crimes. *See, e.g., United States v. Belgard*, 894 F.2d 1092, 1095 n.1 (9th Cir. 1990); *Felix*, 996 F.2d at 207. To establish assault resulting in serious bodily injury, the prosecution must prove that the defendant "assault[ed] the victim and that the assault happen[ed] to result" in the necessary level of injury. *United States v. Davis*, 237 F.3d 942, 944 (8th Cir. 2001). "Serious bodily injury" is defined as "bodily injury which involves . . . a substantial risk of death; . . . extreme physical pain; . . . protracted and obvious disfigurement; or . . . protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 18 U.S.C. § 1365(g)(3) (2000); *see id.* § 113(b)(2) ("[T]he term 'serious bodily injury' has the meaning given that term in section 1365 of this title.").[30] By contrast, section 113(b)(1) defines "substantial bodily injury" as "bodily injury which involves . .

[29] If, however, an individual were charged with the simple assault of a person "who has not attained the age of 16 years," that individual would face a maximum sentence of up to one year in prison. This charge still would not bring a member of the Armed Forces or those accompanying or employed by the Armed Forces within section 3261(a)'s coverage because the conduct must constitute an offense punishable by more than a year in prison.

[30] 18 U.S.C. § 1365(g)(4) further defines "bodily injury" to mean: (1) "a cut, abrasion, bruise, burn, or disfigurement"; (2) "physical pain"; (3) "illness"; (4) "impairment of the function of a bodily member, organ, or mental faculty"; (5) "or any other injury to the body no matter how temporary."

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. a temporary or substantial disfigurement; or . . . a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." *Id.* § 113(b)(1). Thus, an assault resulting in serious bodily injury requires a more severe injury, that in some instances may have a more lasting impact on the victim than that which might be considered "substantial bodily injury."

No court has definitively addressed the minimum thresholds of injury necessary to rise to the level of "substantial bodily injury" or "serious bodily injury," respectively. Nonetheless, reported opinions regarding these crimes offer some idea as to the severity and type of injuries that would be sufficient to establish violations of these subsections. With respect to substantial bodily injury, for example, a defendant was convicted of assault resulting in substantial bodily injury for injuries to the victim that included: fracturing the victim's skull, burning his face, and biting him, which left a human bite mark on the victim's leg. *See United States v. Brown*, 287 F.3d 684, 687 (8th Cir. 2002). And in *In re Murphy*, No. 98-M-168, 1998 WL 1179109 (W.D.N.Y. June 30, 1998), the magistrate concluded that "a loss of consciousness and a two-day stay in the sick room could qualify as allegations of substantial bodily injury." *Id.* at *6. With respect to serious bodily injury, evidence establishing that the victim's cheekbone and eye socket were fractured, and a large laceration created, requiring the victim to undergo reconstructive surgery and leaving her suffering from a permanent disfigurement, established that she had suffered serious bodily injury. *See United States v. Waloke*, 962 F.2d 824, 827 (8th Cir. 1992). With respect to "serious bodily injury," in *United States v. Dennison*, 937 F.2d 559 (10th Cir. 1991), the Tenth Circuit concluded that the infliction of seven lacerations over the victim's neck and chest that required extensive suturing and had produced scarring "involve[ing] a 'substantial risk of . . . protracted and obvious disfigurement.'" *Id.* at 562. And in *United States v. Brown*, 276 F.3d 930 (7th Cir.), *cert. denied*, 123 S. Ct. 126 (2002), the Seventh Circuit concluded that the tearing of a muscle in the victim's calf and leg that required hospitalization and crutches did not constitute protracted loss or impairment of the function of the leg nor did it cause disfigurement within the meaning of section 1365(g). *See id.* at 931–32. Nonetheless, the court concluded that because the victim had suffered from extreme pain for eight days due to the injuries sustained to his leg, he had suffered serious bodily injury. *See id.*

It bears emphasizing that for the purposes of sections 113(a)(6) and 113(a)(7) the concepts of serious bodily injury and substantial bodily injury include injury to an individual's mental faculties. *See, e.g., United States v. Lowe*, 145 F.3d 45, 53 (1st Cir. 1998); 18 U.S.C. § 113(b)(1)(B); *id.* § 1365(g)(3). We have not, however, found any reported cases in which a mental harm absent physical contact constituted assault. For example, in *Lowe*, the only reported case in which mental harm fulfilled the serious bodily injury requirement for the purposes of assault under this section, the defendant kidnapped and raped the victim and this physical brutality caused her mental harm. *See id.* at 48. We note that with the exception of the undefined reference to "mental faculties," all of the injuries described in the statute connote some (and more likely extensive) physical contact with the victim. In defining substantial bodily injury, for example, the statute speaks in terms of disfigurement, or loss of the function of some bodily member or organ. In the case of serious bodily injury, the statute reaches more serious injuries to include those injuries that bear a substantial risk of death, result in extreme physical pain, as well as protracted disfigurement or the impairment of a bodily member or organ. The "impairment" of one's "mental faculty" might be construed in light of the obvious physical

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contact required for all other injuries listed in the statute. Moreover, these crimes must be construed consistently with the common law definitions of assault and battery. Simple assault, as we explained above, is a specific intent crime and requires no physical contact. By contrast, battery is a general intent crime and requires physical contact. Courts have construed assault resulting in serious bodily harm to require only general intent, rendering it akin to battery in that regard and thereby suggesting that it too requires actual physical contact. Indeed, the only other general intent crime under section 113 is assault by striking, beating, or wounding. Courts have construed that form of assault to be the equivalent of simple battery, requiring actual physical contact as an element. Thus, given the requisite intent and remainder of the other injuries that constitute serious bodily injury or substantial bodily injury, we believe the better view of these forms of assault is that they require actual physical contact. Indeed, no court has found mental harm in the absence of physical contact sufficient to satisfy the requisite injury. Nonetheless, we cannot conclude with certainty that no court would make such a finding.

In the context of interrogations, we believe that interrogation methods that do not involve physical contact will not support a charge of assault resulting in substantial injury or assault resulting in serious bodily injury or substantial bodily injury. Moreover, even minimal physical contact, such as poking, slapping, or shoving the detainee, is unlikely to produce the injury necessary to establish either one of these types of assault.

Section 113(a)(3) prohibits "assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse." To establish this type of assault, the prosecution must prove that the defendant "(1) assaulted the victim (2) with a dangerous weapon (3) with the intent to do bodily harm." *Estrada-Fernandez*, 150 F.3d at 494. *See also United States v. Gibson*, 896 F.2d 206, 209 (6th Cir. 1990) (to establish assault with a dangerous weapon, the prosecution must establish that the defendant acted with the specific intent to commit bodily harm). It does not, however, require the defendant to make physical contact with the victim. *See Estrada-Fernandez*, 150 F.3d at 494; *United States v. Duran*, 127 F.3d 911 (10th Cir. 1997). It is also therefore not necessary for the victim to have suffered actual bodily injury. *See United States v. Phelps*, 168 F.3d 1048, 1056 (8th Cir. 1999) ("The government is required to present sufficient evidence only that the appellant assaulted the victim with an object capable of inflicting bodily injury, *and not that the victim actually suffered bodily injury* as a result of the assault.") (emphasis added).

Although the statutory text provides that this type of assault must be committed "without just cause or excuse," courts have held that the prosecution is not required to establish the absence of just cause or excuse. Instead, these are affirmative defenses for which the defendant bears the burden. *See United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982); *United States v. Phillippi*, 655 F.2d 792, 793 (7th Cir. 1981); *Hockenberry v. United States*, 422 F.2d 171, 173 (9th Cir. 1970); *United States v. Peters*, 476 F. Supp. 259, 262 (E.D. Wis. 1979). *See also United States v. Jackson*, No. 99-4388, 2000 WL 194284, at *2 (4th Cir. Feb. 18, 2000) (unpublished opinion) (following *Guilbert*).[31]

[31] Although it could be argued that this subsection's express mention of "just cause or excuse" indicate that such defenses are not available with respect to the other types of assault under section 113, we believe that the better view is that these affirmative defenses remain available. As we explain *infra* Part IV, absent a clear statement eliminating such defenses, they remain available.

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An item need not fall within the classic examples of dangerous weapons—e.g., a knife or a gun—to constitute a "dangerous weapon" for the purposes of section 113(a)(3). Instead, the touchstone for whether an object is a "dangerous weapon" is whether it has been used in a manner likely to cause serious injury. *See Guilbert*, 692 F.2d at 1343; *United States v. LeCompte*, 108 F.3d 948 (8th Cir. 1997); *United States v. Bey*, 667 F.2d 7, 11 (5th Cir. 1982) ("[W]hat constitutes a dangerous weapon depends not on the nature of the object itself but on its capacity, given the manner of its use to endanger life or inflict great bodily harm.") (internal quotation marks and citation omitted). *See also United States v. Riggins*, 40 F.3d 1055, 1057 (9th Cir. 1994) (quoting *Guilbert* with approval). For example, courts have found that a telephone receiver and a broom handle can be, under certain circumstances, "dangerous weapons." *See LeCompte*, 108 F.3d at 952 (telephone receiver); *Estrada-Fernandez*, 150 F.3d 491 (broom or mop handle). For that matter, a speeding car could constitute a dangerous weapon. *See United States v. Gibson*, 896 F.2d 206, 209 n.1 (6th Cir. 1990). At a minimum, however, it requires that a defendant employ some object as a dangerous weapon. Ultimately, whether or not an item constitutes a dangerous weapon is a question of fact for a jury. *See Riggins*, 40 F.3d at 1057; *Phelps*, 168 F.3d at 1055. As the Fourth Circuit has explained, "[t]he test of whether a particular object was used as a dangerous weapon is not so mechanical that it can be readily reduced to a question of law. Rather, it must be left to the jury to determine whether, under the circumstances of each case, the defendant used some instrumentality, [or] object, . . . to cause death or serious injury." *United States v. Sturgis*, 48 F.3d 784, 788 (4th Cir. 1995).[32]

Here, so long as the interrogation method does not involve a dangerous weapon, this type of assault has not been committed. Physical contact would be insufficient to demonstrate this type of assault. Methods of interrogation that involve alterations to the detainee's cell environment would not be problematic under this section, not only because no dangerous weapon would have been used, but also because such alterations are unlikely to involve the necessary intent to inflict bodily injury.

Finally, section 113 prohibits assault with intent to commit murder and assault with the intent to commit any other felony except murder or sexual abuse crimes.[33] 18 U.S.C. § 113(a)(1)–(2). Both of these crimes are specific intent crimes—the former requiring that the individual specifically intend to commit murder and the latter requiring the intent to commit a felony, such as maiming or torture. *See, e.g., United States v. Perez*, 43 F.3d 1131, 1137–38 (7th Cir. 1994). *See also* 18 U.S.C. § 114 (prohibiting maiming within the special maritime jurisdiction); *id.* § 2340A (prohibiting torture outside the United States). Although neither of these crimes requires actual physical contact with the victim, demonstrating the requisite intent may be more difficult to establish absent such contact. Here, as long as the interrogators do not intend to murder the detainee, they will not have run afoul of section 113(a)(1). Moreover, as to

[32] We note that one court has construed "dangerous weapon" to include the use of one's body parts. In *Sturgis*, the Fourth Circuit concluded that the defendant's teeth and mouth constituted a dangerous weapon where an HIV positive inmate bit the officer in an effort to infect the officer with HIV and the bites inflicted wounds that bled "profusely." 48 F.3d at 788.

[33] Assault with intent to commit murder carries a maximum penalty of 20 years' imprisonment. *See* 18 U.S.C. § 113(a)(1). Assault with the intent to commit any other felony may be punished by up to 10 years' imprisonment, a fine, or both. *See id.* § 113(a)(2).

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section 113(a)(2), the intent to torture appears to be the most relevant. As we will explain *infra* Part II.C.2, to satisfy this intent element, the interrogator would have to intend to cause other severe physical pain or suffering or to cause prolonged mental harm. Absent such intent, the interrogator would not have committed assault with intent to torture. We caution, however, that specific intent, as will be discussed in more detail in Part II.C.2., can be inferred from the factual circumstances. *See also United States v. Hinton*, 31 F.3d 817, 822 (9th Cir. 1994).[34]

b. Maiming

Another criminal statute applicable in the special maritime and territorial jurisdiction is 18 U.S.C. § 114. Section 114 makes it a crime for an individual (1) "with the intent to torture (as defined in section 2340), maim, or disfigure" to (2) "cut[], bite[], or slit[] the nose, ear, or lip, or cut[] out or disable[] the tongue, or put[] out or destroy[] an eye, or cut[] off or disable[] a limb or any member of another person." 18 U.S.C. § 114. It further prohibits individuals from "throw[ing] or pour[ing] upon another person any scalding water, corrosive acid, or caustic substance" with like intent. *Id.*[35]

The offense requires the specific intent to torture, maim or disfigure. *See United States v. Chee*, No. 98-2038, 1999 WL 261017 at *3 (10th Cir. May 3, 1999) (maiming is a specific intent crime) (unpublished opinion); *see also United States v. Salamanca*, 990 F.2d 629, 635 (D.C. Cir. 1993) (where defendant inflicted "enough forceful blows to split open [the victim's] skull, shatter his eye socket, knock out three of his teeth, and break his jaw" requisite specific intent had been established.). Moreover, the defendant's method of maiming must be one of the types the statute specifies—i.e., cutting, biting, slitting, cutting out, disabling, or putting out—and the injury must be to a body part the statute specifies—i.e., the nose, ear, lip, tongue, eye, or limb. *See United States v. Stone*, 472 F.2d 909, 915 (5th Cir. 1973). Similarly, the second set of acts applies to a very narrow band of conduct. It applies only to the throwing or pouring of some sort of scalding, corrosive, or caustic substance. *See id.*

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[34] Although section 113 appears to encompass a wide range of conduct, particularly simple assault and assault by striking, beating or wounding, we note that there are no reported cases in which section 113 charges have been brought against a federal officer—FBI, DEA, correctional officer or any other federal officer. Certainly, in the course of completing their duties, federal officers will invariably at some point touch or attempt to touch individuals in a way that they would view as offensive, such as during the course of an arrest or in restraining an unruly inmate. Nonetheless, charges are not brought against officers for such conduct. For reasons explained in Part II.A., such actions by officers are not acts that we view as criminal.

[35] Section 114 provides in full:

> Whoever, within the special maritime and territorial jurisdiction of the United States, and with intent to torture (as defined in section 2340), maim, or disfigure, cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person; or
>
> Whoever, within the special maritime and territorial jurisdiction of the United States, and with like intent, throws or pours upon another person, any scalding water, corrosive acid, or caustic substance—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

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Here, so long as the interrogation methods under contemplation do not involve the acts enumerated in section 114, the conduct of those interrogations will not fall within the purview of this statute. Because the statute requires specific intent, i.e., the intent to maim, disfigure or torture, the absence of such intent is a complete defense to a charge of maiming.

c. Interstate Stalking

Section 2261A of Title 18 prohibits "[w]hoever . . . travels in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States . . . with the intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury to that person."[36] Thus, there are three elements to a violation of section 2261A: (1) the defendant traveled in interstate or foreign commerce or within the special maritime and territorial jurisdiction; (2) he did so with the intent to injure, harass, intimidate another person; (3) the person he intended to harass or injure was reasonably placed in fear of death or serious bodily injury as a result of that travel. *See United States v. Al-Zubaidy*, 283 F.3d 804, 808 (6th Cir.), *cert. denied*, 122 S. Ct. 2638 (2002).

To establish the first element, the prosecution need only show that the defendant engaged in interstate travel. Section 2261A also applies to "travel[] . . . *within* the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 2261A(1) (emphasis added). *See also* National Defense Authorization Act for Fiscal Year 1997, H. Conf. Rep. No. 104-724, at 793 (1996) (the statute was intended to apply to "any incident of stalking involving interstate

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[36] Section 2261A provides in full:

> Whoever—
>
> (1) travels in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury to, that person, a member of the immediate family (as defined in section 115) of that person, or the spouse or intimate partner of that person; or
>
> (2) with the intent—
>
> (A) to kill or injure a person in another State or tribal jurisdiction or within the special maritime and territorial jurisdiction of the United States; or
> (B) to place a person in another State or tribal jurisdiction, or within the special maritime and territorial jurisdiction of the United States, in reasonable fear of the death of, or serious bodily injury to—
>
> (i) that person;
> (ii) a member of the immediate family (as defined in section 115) of that person; or
> (iii) a spouse or intimate partner of that person,
>
> uses the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, any of the persons described in clauses (i) through (iii),
>
> shall be punished as provided in section 2261(b).

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movement or which occurs on federal property"). Thus, travel simply *within* the special maritime and territorial jurisdiction satisfies this element. As a result, proof that an individual traveled within a military base in a foreign state would be sufficient to establish this element.

To establish the requisite intent, the prosecution must demonstrate that the defendant undertook the travel with the specific intent to harass, or intimidate another. *See Al-Zubaidy*, 283 F.3d at 809 (the defendant "must have intended to harass or injure [the victim] at the time he crossed the state line"). Thus, for example, a member of the Armed Forces who traveled to a base solely pursuant to his orders to be stationed there, and subsequently came to be involved in the interrogation of operatives, would lack the requisite intent. He would have traveled for the purpose of complying with his orders but not for the purpose of harassment. Nevertheless, because travel within the special maritime and territorial jurisdiction is also covered, the intent to travel within that base for the purpose of intimidating or harassing another person would satisfy the intent element.

In determining whether the third element has been demonstrated, a court will look to the defendant's entire course of conduct. *See id.* This third element is not fulfilled by the mere act of travel itself. *See United States v. Crawford*, No. 00-CR-59-B-S, 2001 WL 185140, at *2 (D. Me. Jan. 26, 2001) ("A plain reading of the statute makes clear that the statute requires the actor to place the victim in reasonable fear, rather than, as Defendant would have it, that his travel place the victim in reasonable fear."). Additionally, serious bodily injury has the same meaning as it does for assault resulting in serious bodily injury. *See* 18 U.S.C. § 2266(6) (for the purposes of section 2261A "[t]he term 'serious bodily injury' has the meaning stated in [18 U.S.C. §] 2119(2)"); *id.* § 2119(2) ("serious bodily injury" is defined in 18 U.S.C. § 1365); *id.* § 113 (section 1365 defines "serious bodily injury" for the purposes of "assault resulting in serious bodily injury"). Thus, an individual must have a reasonable fear of death or a reasonable fear of "bodily injury which involves . . . a substantial risk of death; . . . extreme physical pain . . . protracted and obvious disfigurement; or . . . protracted loss or impairment of the function of a bodily member, organ, or mental faculty." *Id.* § 1365(g).[37]

C. Criminal Prohibitions Applicable to Conduct Occurring Outside the Jurisdiction of the United States

There are two criminal prohibitions that apply to the conduct of U.S. persons outside the United States: the War Crimes Act, 18 U.S.C. § 2441, and the prohibition against torture, 18 U.S.C. §§ 2340–2340A. We conclude that the War Crimes Act does not apply to the interrogation of al Qaeda and Taliban detainees because, as illegal belligerents, they do not qualify for the legal protections under the Geneva or Hague Conventions that section 2441 enforces. In regard to section 2340, we conclude that the statute, by its terms, does not apply to interrogations conducted within the territorial United States or on permanent military bases outside the territory of the United States. Nonetheless, we identify the relevant substantive

[37] The use of such interrogation techniques as alterations in the lighting, e.g., around the clock lighting of the cell, or changes in the detainee's diet, e.g., using something akin to the Nutraloaf used in prisons, could not be said to reasonably cause a detainee to fear for his life or to fear that he will suffer serious bodily injury. It is important, however, to bear in mind that the entire course of the interrogations must be examined to determine whether the person has been reasonably placed in fear of death or serious bodily injury.

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standards regarding the prohibition on torture should interrogations occur outside that jurisdictional limit.

1. War Crimes

Section 2441 of Title 18 criminalizes the commission of war crimes by U.S. nationals and members of the U.S. Armed Forces.[38] It criminalizes such conduct whether it occurs inside or outside the United States, including conduct within the special maritime and territorial jurisdiction. *See id.* § 2441(a). Subsection (c) of section 2441 defines "war crimes" as (1) grave breaches of any of the Geneva Conventions; (2) conduct prohibited by certain provisions of the Hague Convention IV, Hague Convention IV Respecting the Laws and Customs of War on Land, Oct.18, 1907, 36 Stat. 2277;[39] or (3) conduct that constitutes a violation of common Article 3 of the Geneva Conventions. We have previously concluded that this statute does not apply to conduct toward the members of al Qaeda and the Taliban. *See Treaties and Laws Memorandum* at 8–9. We reached this conclusion because we found al Qaeda to be a non-governmental terrorist organization whose members are not legally entitled to the protections of

[38] Section 2441 provides in full:

> (a) Offense.—Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
>
> (b) Circumstances.—The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).
>
> (c) Definition.—As used in this section the term 'war crime' means any conduct—
> (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
> (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
> (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non- international armed conflict; or
> (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

[39] With respect to the Hague Convention IV, section 2441(c)(2) criminalizes conduct barred by articles 23, 25, 27, 28, of the Annex to the Hague Convention IV. Under the Hague Convention, the conduct in these articles, like all of the regulations the Annex contains, is prohibited solely as between parties to the Convention. Hague Convention IV, art. 2 ("The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention."). Since Afghanistan is not a party to the Hague Convention IV, no argument could be made that the Convention covers the Taliban. As a non-state, al Qaeda is likewise not a party to the Hague Convention IV. Moreover, Hague Convention IV requires that belligerents meet the same requirements that they must meet in order to receive the protections of GPW, which al Qaeda and the Taliban do not meet. Thus, conduct toward enemy combatants in the current war would not fall within the conduct proscribed by these articles.

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GPW. Since its members cannot be considered to be POWs under the Convention, conduct toward members of al Qaeda could not constitute a grave breach of the Geneva Conventions. *See* 18 U.S.C. § 2441(c)(1). We further found that common Article 3 of the Geneva Conventions covers either traditional wars between state parties to the convention or non-international civil wars, but not an international conflict with a non-governmental terrorist organization. As a result, conduct toward members of al Qaeda could not constitute a violation of common Article 3, see *Treaties and Law Memorandum* at 9, and thus could not violate Section 2441(c)(3).

We also concluded that the President had reasonable grounds to find that the Taliban had failed to meet the requirements for POW status under GPW. *See* Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, *Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949* at 3 (Feb. 7, 2002). On February 7, 2002, the President determined that these treaties did not protect either the Taliban or al Qaeda. *See* Statement by White House Press Secretary Ari Fleischer, *available at* http://www.us-mission.ch/press2002/0802fleischerdetainees.htm (Feb. 7, 2002).[40]

Thus, section 2441 is inapplicable to conduct toward members of the Taliban or al Qaeda. We further note that the *Treaties and Law Memorandum* is the Justice Department's binding interpretation of the War Crimes Act, and it will preclude any prosecution under it for conduct toward members of the Taliban and al Qaeda. *See* Letter for William H. Taft, IV, Legal Adviser, Department of State, from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel (Jan. 14, 2002).

2. 18 U.S.C. §§ 2340–2340A

Section 2340A of Title 18 makes it a criminal offense for any person "outside the United States [to] commit[] or attempt[] to commit torture."[41] The statute defines "the United States" as "all areas under the jurisdiction of the United States including any of the places described in" 18 U.S.C. § 5,[42] and 18 U.S.C.A. § 7.[43] 18 U.S.C. § 2340(3).[44] Therefore, to the extent that

[40] *See also* Fact Sheet: Status of Detainees at Guantanamo *available at* http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

[41] If convicted of torture, a defendant faces a fine or up to twenty years' imprisonment or both. If, however, the act resulted in the victim's death, a defendant may be sentenced to life imprisonment or to death. *See* 18 U.S.C.A. § 2340A(a). Whether death results from the act also affects the applicable statute of limitations. Where death does not result, the statute of limitations is eight years; if death results, there is no statute of limitations. *See* 18 U.S.C.A. § 3286(b) (West Supp. 2002); *id.* § 2332b(g)(5)(B) (West Supp. 2002). Section 2340A as originally enacted did not provide for the death penalty as a punishment. *See* Omnibus Crime Bill, Pub. L. No.103-322, Title VI, Section 60020, 108 Stat. 1979 (1994) (amending section 2340A to provide for the death penalty); H. R. Conf. Rep. No. 103-711, at 388 (1994) (noting that the act added the death penalty as a penalty for torture).

Most recently, the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), amended section 2340A to expressly codify the offense of conspiracy to commit torture. Congress enacted this amendment as part of a broader effort to ensure that individuals engaged in the planning of terrorist activities could be prosecuted irrespective of where the activities took place. *See* H. R. Rep. No. 107-236, at 70 (2001) (discussing the addition of "conspiracy" as a separate offense for a variety of "Federal terrorism offense[s]").

[42] 18 U.S.C. § 5 (2000) provides: "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." As we understand it, the persons discussed in this memorandum are not within United States as it is defined in section 5.

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interrogations take place 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. If, however, the interrogations take place outside the special maritime and territorial jurisdiction and are otherwise outside the United States, the torture statute applies. Thus, for example, interrogations conducted at GTMO would not be subject to this prohibition, but interrogations conducted at a non-U.S. base in Afghanistan would be subject to section 2340A.[45]

Moreover, we note that because the statute criminalizes conduct only when it is committed outside the United States—which under section 2340(3) means it must be committed outside the special maritime jurisdiction—the proviso contained in 18 U.S.C.A. § 7(9) excluding those persons covered by 18 U.S.C. § 3261(a) does *not* apply. As discussed above, this proviso excluding members of the Armed Forces, those employed by the Armed Forces or the Department of Defense, and those persons accompanying members of the Armed Forces or their employees applies *only* when their conduct is a felony if committed *within* the special maritime and territorial jurisdiction of the United States. *See id.* Here, the conduct under section 2340A is a felony only when committed outside the special maritime and territorial jurisdiction. Thus, so long as members of the Armed Forces and those accompanying or employed by the Armed Forces are in an area that 18 U.S.C. § 7 defines as part of the special maritime and territorial jurisdiction, they too are within the special maritime and territorial jurisdiction for the purposes

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[43] 18 U.S.C. § 7, as discussed *supra* Part II.B., defines the special maritime and territorial jurisdiction of the United States.

[44] The statute further includes those places described in 49 U.S.C. § 46501(2) (2000), which sets forth the special aircraft jurisdiction. Under section 46501(2), the special aircraft jurisdiction includes "any of the following aircraft *in flight*":

> (A) a civil aircraft of the United States.
> (B) an aircraft of the armed forces of the United States.
> (C) another aircraft in the United States.
> (D) another aircraft outside the United States—
> (i) that has its next scheduled destination or last place of departure in the United States, if the aircraft next lands in the United States;
> (ii) on which an individual commits an offense (as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft) if the aircraft lands in the United States with the individual still on the aircraft; or
> (iii) against which an individual commits an offense (as defined in subsection (d) or (e) of article I, section I of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation) if the aircraft lands in the United States with the individual still on the aircraft.
> (E) any other aircraft leased without crew to a lessee whose principal place of business is in the United States or, if the lessee does not have a principal place of business, whose permanent residence is in the United States.

(Emphasis added).

[45] We also note that there are several statutes that would permit the prosecution of individuals who, while not conducting the interrogations themselves, were otherwise involved in the interrogations. Section 2340A(c) expressly criminalizes conspiracy to commit torture. 18 U.S.C. § 2339A makes it an offense to "provide[] material support or resources or conceal[] or disguise[] the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or carrying out, a violation of section . . . 2340A." *Id.* § 2339A(a). As a general matter, the federal criminal code also provides for accessory liability. *See* 18 U.S.C. § 2 (accessory punishable as principal); 18 U.S.C. § 3 (accessory after the fact).

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of the conduct section 2340A criminalizes. Accordingly, they are considered to be within the United States for purposes of that statute. The criminal prohibition against torture therefore would not apply to their conduct of interrogations at U.S. military bases located in a foreign state. If, however, such persons are involved in interrogations outside the special maritime and territorial jurisdiction and outside the United States, they are subject to the prohibition against torture as well as those criminal statutes applicable to the special maritime and territorial jurisdiction.

Section 2340 defines the act of torture as 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.

18 U.S.C.A. § 2340(1); *see id.* § 2340A. Thus, to establish the offense of torture, the prosecution must show that: (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) that the act inflicted severe physical or mental pain or suffering. *See also* S. Exec. Rep. No. 101-30, at 6 (1990) ("For an act to be 'torture,' it must . . . cause severe pain and suffering, and be intended to cause severe pain and suffering.").[46]

At the outset we note that no prosecutions have been brought under section 2340A. There is therefore no case law interpreting sections 2340–2340A. In light of this paucity of case law, we have discussed at length below the text of the statute, its legislative history, and the judicial interpretation of a closely related statute—the Torture Victims Protection Act—in order to provide guidance as to the meaning of the elements of torture.

a. "Specifically Intended"

To violate section 2340A, the statute requires that severe pain and suffering be inflicted with specific intent. *See* 18 U.S.C. § 2340(1). For a defendant to act with specific intent, he must expressly intend to achieve the forbidden act. *See United States v. Carter*, 530 U.S. 255, 269 (2000); *Black's Law Dictionary* at 814 (7th ed. 1999) (defining specific intent as "[t]he intent to accomplish the precise criminal act that one is later charged with"). For example, in *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994), the statute at issue was construed to require that the defendant act with the "specific intent to commit the crime." (Internal quotation marks and citation omitted). As a result, the defendant had to act with the express "purpose to disobey the law" for the *mens rea* element to be satisfied. *Id.* (internal quotation marks and citation omitted)

Here, because section 2340 requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective. If the statute

[46] For the purposes of our analysis, we have assumed that interrogators would be acting under color of law and that the person interrogated would be within the custody or control of those interrogators.

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had required only general intent, it would be sufficient to establish guilt by showing that the defendant "possessed knowledge with respect to the *actus reus* of the crime." *Carter*, 530 U.S. at 268. If the defendant acted knowing that severe pain or suffering was reasonably likely to result from his actions, but no more, he would have acted only with general intent. *See id.* at 269; *Black's Law Dictionary* 813 (7th ed. 1999) (explaining that general intent "usu[ally] takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence)"). The Supreme Court has used the following example to illustrate the difference between these two mental states:

> [A] person entered a bank and took money from a teller at gunpoint, but deliberately failed to make a quick getaway from the bank in the hope of being arrested so that he would be returned to prison and treated for alcoholism. Though this defendant knowingly engaged in the acts of using force and taking money (satisfying "general intent"), he did not intend permanently to deprive the bank of its possession of the money (failing to satisfy "specific intent").

Carter, 530 U.S. at 268 (citing 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 3.5, at 315 (1986)).

As a theoretical matter, therefore, knowledge alone that a particular result is certain to occur does not constitute specific intent. As the Supreme Court explained in the context of murder, "the . . . common law of homicide distinguishes . . . between a person who knows that another person will be killed as a result of his conduct and a person who acts with the specific purpose of taking another's life[.]" *United States v. Bailey*, 444 U.S. 394, 405 (1980). "Put differently, the law distinguishes actions taken 'because of' a given end from actions taken 'in spite' of their unintended but foreseen consequences." *Vacco v. Quill*, 521 U.S. 793, 802–03 (1997). Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite intent. While as a theoretical matter such knowledge does not constitute specific intent, juries are permitted to infer from the factual circumstances that such intent is present. *See, e.g., United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001); *United States v. Karro*, 257 F.3d 112, 118 (2d Cir. 2001); *United States v. Wood*, 207 F.3d 1222, 1232 (10th Cir. 2000); *Henderson v. United States*, 202 F.2d 400, 403 (6th Cir.1953). Therefore, when a defendant knows that his actions will produce the prohibited result, a jury will in all likelihood conclude that the defendant acted with specific intent.

Further, an individual who acts with a good faith belief that his conduct would not produce the result that the law prohibits would not have the requisite intent. *See, e.g., South Atl. Lmtd. Ptrshp. of Tenn. v. Reise*, 218 F.3d 518, 531 (4th Cir. 2002). Where a defendant acts in good faith, he acts with an honest belief that he has not engaged in the proscribed conduct. *See Cheek v. United States*, 498 U.S. 192, 202 (1991); *United States v. Mancuso*, 42 F.3d 836, 837 (4th Cir. 1994). A good faith belief need not be a reasonable one. *See Cheek*, 498 U.S. at 202.

Although a defendant theoretically could hold an unreasonable belief that his acts would not constitute the actions the statute prohibits, even though they would as a certainty produce the prohibited effects, as a matter of practice it is highly unlikely that a jury would acquit in such a situation. Where a defendant holds an unreasonable belief, he will confront the problem of

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proving to the jury that he actually held that belief. As the Supreme Court noted in *Cheek*, "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury . . . will find that the Government has carried its burden of proving" intent. *Id.* at 203–04. As we explained above, a jury will be permitted to infer that the defendant held the requisite specific intent. As a matter of proof, therefore, a good faith defense will prove more compelling when a reasonable basis exists for the defendant's belief.

b. "Severe Pain or Suffering"

The key statutory phrase in the definition of torture is the statement that acts amount to torture if they cause "severe physical or mental pain or suffering." In examining the meaning of a statute, its text must be the starting point. *See INS v. Phinpathya*, 464 U.S. 183, 189 (1984). Section 2340 makes plain that the infliction of pain or suffering per se, whether it is physical or mental, is insufficient to amount to torture. Instead, the pain or suffering must be "severe." The statute does not, however, define the term "severe." "In the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The dictionary defines "severe" as "[u]nsparing in exaction, punishment, or censure" or "[I]nflicting discomfort or pain hard to endure; sharp; afflictive; distressing; violent; extreme; as *severe* pain, anguish, torture." *Webster's New International Dictionary* 2295 (2d ed. 1935); *see American Heritage Dictionary of the English Language* 1653 (3d ed. 1992) ("extremely violent or grievous: *severe* pain") (emphasis in original); IX *The Oxford English Dictionary* 572 (1978) ("Of pain, suffering, loss, or the like: Grievous, extreme" and "of circumstances . . .: hard to sustain or endure"). Thus, the adjective "severe" conveys that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure.

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) ("[W]e construe [a statutory term] to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law."). 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 to 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 the 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

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with a physical condition or injury sufficiently serious that it would result in death, organ failure, or serious impairment of body functions.[47]

c. "Severe mental pain or suffering"

Section 2340 gives more express guidance as to the meaning of "severe mental pain or suffering." The statute defines "severe mental pain or suffering" as:

> the prolonged mental harm caused by or resulting from—
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

18 U.S.C. § 2340(2). To prove "severe mental pain or suffering," the statute requires proof of "prolonged mental harm" that was caused by or resulted from one of four enumerated acts. We consider each of these elements.

i. "Prolonged Mental Harm"

As an initial matter, section 2340(2) requires that the severe mental pain must be evidenced by "prolonged mental harm." To prolong is to "lengthen in time" or to "extend the duration of, to draw out." *Webster's Third New International Dictionary* 1815 (1988); *Webster's New International Dictionary* 1980 (2d ed. 1935). Accordingly, "prolong" adds a temporal dimension to the harm to the individual, namely, that the harm must be one that is endured over some period of time. Put another way, the acts giving rise to the harm must cause some lasting, though not necessarily permanent, damage. For example, the mental strain experienced by an

[47] One might argue that because the statute uses "or" rather than "and" in the phrase "pain or suffering" that "severe physical suffering" is a concept distinct from "severe physical pain." We believe the better view of the statutory text is, however, that they are not distinct concepts. The statute does not define "severe mental pain" and "severe mental suffering" separately. Instead, it gives the phrase "severe mental pain or suffering" a single definition. Because "pain or suffering" is a single concept for the purposes of "severe mental pain or suffering," it should likewise be read as a single concept for the purposes of "severe physical pain or suffering." Moreover, dictionaries define the words "pain" and "suffering" in terms of each other. *Compare, e.g.*, *Webster's Third New International Dictionary* 2284 (1993) (defining suffering as "the endurance of . . . pain" or "a pain endured"); *Webster's Third New International Dictionary* 2284 (1986) (same); XVII *The Oxford English Dictionary* 125 (2d ed. 1989) (defining suffering as "the bearing or undergoing of pain"); *with, e.g.*, *Random House Webster's Unabridged Dictionary* 1394 (2d ed. 1999) (defining "pain" as "physical suffering"); *The American Heritage Dictionary of the English Language* 942 (College ed. 1976) (defining pain as "suffering or distress"). Further, even if we were to read the infliction of severe physical suffering as distinct from severe physical pain, it is difficult to conceive of such suffering that would not involve severe physical pain. Accordingly, we conclude that "pain or suffering" is a single concept in section 2340.

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individual during lengthy and intense questioning by law enforcement would not violate section 2340(2). On the other hand,the development of a mental disorder such as posttraumatic stress disorder, which can last months or even years, or even chronic depression, which also can last for a considerable period of time if untreated, might satisfy the prolonged harm requirement. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 426, 439–45 (4th ed. 1994) ("DSM-IV"). *See also* Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477, 509 (1997) (noting that posttraumatic stress disorder is frequently found in torture victims); *cf.* Sana Loue, *Immigration Law and Health* § 10:46 (2001) (recommending evaluating for post-traumatic stress disorder immigrant-client who has experienced torture).[48] By contrast to "severe pain," the phrase "prolonged mental harm" appears nowhere else in the U.S. Code nor does it appear in relevant medical literature or international human rights reports.

Not only must the mental harm be prolonged to amount to severe mental pain and suffering, but also it must be caused by or result from one of the acts listed in the statute. In the absence of a catchall provision, the most natural reading of the predicate acts listed in section 2340(2)(A)–(D) is that Congress intended it to be exhaustive. In other words, other acts not included within section 2340(2)'s enumeration are not within the statutory prohibition. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius.*"); Norman Singer, 2A *Sutherland on Statutory Construction* § 47.23 (6th ed. 2000) ("[W]here a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions.") (footnotes omitted). We conclude that torture within the meaning of the statute requires the specific intent to cause prolonged mental harm by one of the acts listed in section 2340(2).

A defendant must specifically intend to cause prolonged mental harm for the defendant to have committed torture. It could be argued that a defendant needs to have specific intent only to commit the predicate acts that give rise to prolonged mental harm. Under that view, so long as the defendant specifically intended to, for example, threaten a victim with imminent death, he would have had sufficient *mens rea* for a conviction. According to this view, it would be necessary for a conviction to show only that the victim suffered prolonged mental harm, rather than that the defendant intended to cause it. We believe that this approach is contrary to the text of the statute. The statute requires that the defendant specifically intend to inflict severe mental pain or suffering. Because the statute requires this mental state with respect to the infliction of severe mental pain, and because it expressly defines severe mental pain in terms of prolonged

[48] The DSM-IV explains that posttraumatic disorder ("PTSD") is brought on by exposure to traumatic events, such as serious physical injury or witnessing the deaths of others and during those events the individual felt "intense fear" or "horror." *Id.* at 424. Those suffering from this disorder reexperience the trauma through, *inter alia*, "recurrent and intrusive distressing recollections of the event," "recurrent distressing dreams of the event," or "intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event." *Id.* at 428. Additionally, a person with PTSD "[p]ersistent[ly]" avoids stimuli associated with the trauma, including avoiding conversations about the trauma, places that stimulate recollections about the trauma; and they experience a numbing of general responsiveness, such as a "restricted range of affect (e.g., unable to have loving feelings)," and "the feeling of detachment or estrangement from others." *Id.* Finally, an individual with PTSD has "[p]ersistent symptoms of increased arousal," as evidenced by "irritability or outbursts of anger," "hypervigilance," "exaggerated startle response," and difficulty sleeping or concentrating. *Id.*

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mental harm, that mental state must be present with respect to prolonged mental harm. To read the statute otherwise would read the phrase "the prolonged mental harm caused by or resulting from" out of the definition of "severe mental pain or suffering."

A defendant could negate a showing of specific intent to cause severe mental pain or suffering by showing that he had acted in good faith that his conduct would not amount to the acts prohibited by the statute. Thus, if a defendant has a good faith belief that his actions will not result in prolonged mental harm, he lacks the mental state necessary for his actions to constitute torture. A defendant could show that he acted in good faith by taking such steps as surveying professional literature, consulting with experts, or reviewing evidence gained from past experience. *See, e.g., Ratzlaf*, 510 U.S. at 142 n.10 (noting that where the statute required that the defendant act with the specific intent to violate the law, the specific intent element "might be negated by, e.g., proof that defendant relied in good faith on advice of counsel.") (citations omitted). All of these steps would show that he has drawn on the relevant body of knowledge concerning the result proscribed by the statute, namely prolonged mental harm. Because the presence of good faith would negate the specific intent element of torture, it is a complete defense to such a charge. *See, e.g., United States v. Wall*, 130 F.3d 739, 746 (6th Cir. 1997); *United States v. Casperson*, 773 F.2d 216, 222–23 (8th Cir.1985).

ii. Harm Caused By Or Resulting From Predicate Acts

Section 2340(2) sets forth four basic categories of predicate acts. First on the list is the "intentional infliction or threatened infliction of severe physical pain or suffering." This provision might at first appear superfluous because the statute already provides that the infliction of severe physical pain or suffering can amount to torture. This provision, however, actually captures the infliction of physical pain or suffering when the defendant inflicts physical pain or suffering with general intent rather than the specific intent that is required where severe physical pain or suffering alone is the basis for the charge. Hence, this subsection reaches the infliction of severe physical pain or suffering when it is but the means of causing prolonged mental harm. Or put another way, a defendant has committed torture when he intentionally inflicts severe physical pain or suffering with the specific intent of causing prolonged mental harm. As for the acts themselves, acts that cause "severe physical pain or suffering" can satisfy this provision.

Additionally, the threat of inflicting such pain is a predicate act under the statute. A threat may be implicit or explicit. *See, e.g., United States v. Sachdev*, 279 F.3d 25, 29 (1st Cir. 2002). In criminal law, courts generally determine whether an individual's words or actions constitute a threat by examining whether a reasonable person in the same circumstances would conclude that a threat had been made. *See, e.g., Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that whether a statement constituted a threat against the president's life had to be determined in light of all the surrounding circumstances); *Sachdev*, 279 F.3d at 29 ("a reasonable person in defendant's position would perceive there to be a threat, explicit, or implicit, of physical injury"); *United States v. Khorrami*, 895 F.2d 1186, 1190 (7th Cir. 1990) (to establish that a threat was made, the statement must be made "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates a statement as a serious expression of an intention to inflict bodily harm upon [another individual]") (citation and internal quotation marks omitted); *United*

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States v. Peterson, 483 F.2d 1222, 1230 (D.C. Cir. 1973) (perception of threat of imminent harm necessary to establish self-defense had to be "objectively reasonable in light of the surrounding circumstances"). Based on this common approach, we believe that the existence of a threat of severe pain or suffering should be assessed from the standpoint of a reasonable person in the same circumstances.

Second, section 2340(2)(B) provides that prolonged mental harm, constituting torture, can be caused by "the administration or application or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality." The statute provides no further definition of what constitutes a mind-altering substance. The phrase "mind-altering substances" is found nowhere else in the U.S. Code nor is it found in dictionaries. It is, however, a commonly used synonym for drugs. *See, e.g., United States v. Kingsley*, 241 F.3d 828, 834 (6th Cir.) (referring to controlled substances as "mind-altering substance[s]") *cert. denied*, 122 S. Ct. 137 (2001); *Hogue v. Johnson*, 131 F.3d 466, 501 (5th Cir. 1997) (referring to drugs and alcohol as "mind-altering substance[s]"), *cert. denied*, 523 U.S. 1014 (1998). In addition, the phrase appears in a number of state statutes, and the context in which it appears confirms this understanding of the phrase. *See, e.g.*, Cal. Penal Code § 3500(c) (West Supp. 2000) ("Psychotropic drugs also include mind-altering . . . drugs . . . ."); Minn. Stat. Ann. § 260B.201(b) (West Supp. 2002) ("'chemical dependency treatment'" define as programs designed to "reduc[e] the risk of the use of alcohol, drugs, or other mind-altering substances").

This subparagraph, however, does not preclude any and all use of drugs. Instead, it prohibits the use of drugs that "disrupt profoundly the senses or the personality." To be sure, one could argue that this phrase applies only to "other procedures," not the application of mind-altering substances. We reject this interpretation because the terms of section 2340(2) indicate that the qualifying phrase applies to both "other procedures" *and* the "application of mind-altering substances." The word "other" modifies "procedures calculated to disrupt profoundly the senses." As an adjective, "other" indicates that the term or phrase it modifies is the remainder of several things. *See Webster's Third New International Dictionary* 1598 (1986) (defining "other" as "the one that remains of two or more") *Webster's Ninth New Collegiate Dictionary* 835 (1985) (defining "other" as "being the one (as of two or more) remaining or not included"). Or put another way, "other" signals that the words to which it attaches are of the same kind, type, or class as the more specific item previously listed. Moreover, where statutes couple words or phrases together, it "denotes an intention that they should be understood in the same general sense." Norman Singer, 2A *Sutherland on Statutory Construction* § 47:16 (6th ed. 2000); *see also Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). Thus, the pairing of mind-altering substances with procedures calculated to disrupt profoundly the senses or personality and the use of "other" to modify "procedures" shows that the use of such substances must also cause a profound disruption of the senses or personality.

For drugs or procedures to rise to the level of "disrupt[ing] profoundly the senses or personality," they must produce an extreme effect. And by requiring that they be "calculated" to produce such an effect, the statute requires that the defendant has consciously designed the acts to produce such an effect. 28 U.S.C. § 2340(2)(B). The word "disrupt" is defined as "to break

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asunder; to part forcibly; rend," imbuing the verb with a connotation of violence. *Webster's New International Dictionary* 753 (2d ed. 1935); *see Webster's Third New International Dictionary* 656 (1986) (defining disrupt as "to break apart: Rupture" or "destroy the unity or wholeness of"); IV *The Oxford English Dictionary* 832 (1989) (defining disrupt as "[t]o break or burst asunder; to break in pieces; to separate forcibly"). Moreover, disruption of the senses or personality alone is insufficient to fall within the scope of this subsection; instead, that disruption must be profound. The word "profound" has a number of meanings, all of which convey a significant depth. *Webster's New International Dictionary* 1977 (2d ed. 1935) defines profound as: "Of very great depth; extending far below the surface or top; unfathomable[;] . . . [c]oming from, reaching to, or situated at a depth or more than ordinary depth; not superficial; deep-seated; chiefly with reference to the body; as a *profound* sigh, wound, or pain[;] . . . [c]haracterized by intensity, as of feeling or quality; deeply felt or realized; as, *profound* respect, fear, or melancholy; hence, encompassing; thoroughgoing; complete; as, *profound* sleep, silence, or ignorance." *See Webster's Third New International Dictionary* 1812 (1986) ("having very great depth: extending far below the surface . . . not superficial"). *Random House Webster's Unabridged Dictionary* 1545 (2d ed. 1999) also defines profound as "originating in or penetrating to the depths of one's being" or "pervasive or intense; thorough; complete" or "extending, situated, or originating far down, or far beneath the surface." By requiring that the procedures and the drugs create a *profound* disruption, the statute requires more than that the acts "forcibly separate" or "rend" the senses or personality. Those acts must penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality.

The phrase "disrupt profoundly the senses or personality" is not used in mental health literature nor is it derived from elsewhere in U.S. law. Nonetheless, we think the following examples would constitute a profound disruption of the senses or personality. Such an effect might be seen in a drug-induced dementia. In such a state, the individual suffers from significant memory impairment, such as the inability to retain any new information or recall information about things previously of interest to the individual. *See* DSM-IV at 134.[49] This impairment is accompanied by one or more of the following: deterioration of language function, e.g., repeating sounds or words over and over again; impaired ability to execute simple motor activities, e.g., inability to dress or wave goodbye; "[in]ability to recognize [and identify] objects such as chairs or pencils" despite normal visual functioning; or "[d]isturbances in executive level functioning," i.e., serious impairment of abstract thinking. *Id.* at 134–35. Similarly, we think that the onset of "brief psychotic disorder" would satisfy this standard. *See id.* at 302–03. In this disorder, the individual suffers psychotic symptoms, including among other things, delusions, hallucinations, or even a catatonic state. This can last for one day or even one month. *See id.* We likewise think that the onset of obsessive-compulsive disorder behaviors would rise to this level. Obsessions are intrusive thoughts unrelated to reality. They are not simple worries, but are

[49] Published by the American Psychiatric Association, and written as a collaboration of over a thousand psychiatrists, the DSM-IV is commonly used in U.S. courts as a source of information regarding mental health issues and is likely to be used in trial should charges be brought that allege this predicate act. *See, e.g., Atkins v. Virginia*, 122 S. Ct. 2242, 2245 n.3 (2002); *Kansas v. Crane*, 534 U.S. 407, 413–14 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 359–60 (1997); *McClean v. Merrifield*, No. 00-CV-0120E(SC), 2002 WL 1477607, at *2 n.7 (W.D.N.Y. June 28, 2002); *Peeples v. Coastal Office Prods.*, 203 F. Supp. 2d. 432, 439 (D. Md. 2002); *Lassiegne v. Taco Bell Corp.*, 202 F. Supp. 2d 512, 519 (E.D. La. 2002).

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repeated doubts or even "aggressive or horrific impulses." *See id.* at 418. The DSM-IV further explains that compulsions include "repetitive behaviors (e.g., hand washing, ordering, checking)" and that "[b]y definition, [they] are either clearly excessive or are not connected in a realistic way with what they are designed to neutralize or prevent." *See id.* Such compulsions or obsessions must be "time-consuming." *See id.* at 419. Moreover, we think that pushing someone to the brink of suicide, particularly where the person comes from a culture with strong taboos against suicide, and it is evidenced by acts of self-mutilation, would be a sufficient disruption of the personality to constitute a "profound disruption." These examples, of course, are in no way intended to be exhaustive list. Instead, they are merely intended to illustrate the sort of mental health effects that we believe would accompany an action severe enough to amount to one that "disrupt[s] profoundly the senses or the personality."

The third predicate act listed in section 2340(2) is threatening a prisoner with "imminent death." 18 U.S.C. § 2340(2)(C). The plain text makes clear that a threat of death alone is insufficient; the threat must indicate that death is "imminent." The "threat of imminent death" is found in the common law as an element of the defense of duress. *See Bailey*, 444 U.S. at 409. "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette v. United States*, 342 U.S. 246, 263 (1952). Common law cases and legislation generally define imminence as requiring that the threat be almost immediately forthcoming. 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7, at 655 (1986). By contrast, threats referring vaguely to things that might happen in the future do not satisfy this immediacy requirement. *See United States v. Fiore*, 178 F.3d 917, 923 (7th Cir. 1999). Such a threat fails to satisfy this requirement not because it is too remote in time but because there is a lack of certainty that it will occur. Indeed, timing is an indicator of certainty that the harm *will* befall the defendant. Thus, a vague threat that someday the prisoner *might* be killed would not suffice. Instead, subjecting a prisoner to mock executions or playing Russian roulette with him would have sufficient immediacy to constitute a threat of imminent death. Additionally, as discussed earlier, we believe that the existence of a threat must be assessed from the perspective of a reasonable person in the same circumstances.

Fourth, if the official threatens to do anything previously described to a third party, or commits such an act against a third party, that threat or action can serve as the necessary predicate for prolonged mental harm. *See* 18 U.S.C. § 2340(2)(D). The statute does not require any relationship between the prisoner and the third party.

Summary

Section 2340's definition of torture must be read as a sum of these component parts. *See Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434–35 (1989) (reading two provisions together to determine statute's meaning); *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 405 (1988) (looking to "the language and design of the statute as a whole" to ascertain a statute's meaning). Each component of the definition emphasizes that torture is not the mere

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infliction of pain or suffering on another, but is instead a step well removed. The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. If that pain or suffering is psychological, that suffering must result from one of the acts set forth in the statute. In addition, these acts must cause long-term mental harm. Indeed, this view of the criminal act of torture is consistent with the term's common meaning. Torture is generally understood to involve "intense pain" or "excruciating pain," or put another way, "extreme anguish of body or mind." *Black's Law Dictionary* 1498 (7th Ed. 1999); *Random House Webster's Unabridged Dictionary* 1999 (1999); *Webster's New International Dictionary* 2674 (2d ed. 1935). In short, reading the definition of torture as a whole, it is plain that the term encompasses only extreme acts.

e. Legislative History

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.").

f. U.S. Judicial Interpretation

As previously noted, there are no reported cases of prosecutions under section 2340A. *See* Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 Hastings Int'l & Comp. L. Rev. 401, 408 & n.29 (2001); Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 Harv. Int'l L.J. 141, 148–49 (2001); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 327–28. Nonetheless, we are not without guidance as to how United States courts would approach the question of what conduct constitutes torture. Civil suits filed under the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note (2000), which supplies a tort remedy for victims of torture, provide insight into what acts U.S. courts would conclude constitute torture under the criminal statute.

The TVPA contains a definition similar in some key respects to the one set forth in section 2340. Moreover, as with section 2340, Congress intended for the TVPA's definition of torture to follow closely the definition found in CAT. *See Xuncax v. Gramajo*, 886 F. Supp. 162,

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176 n.12 (D. Mass 1995) (noting that the definition of torture in the TVPA tracks the definitions in section 2340 and CAT).[50] The TVPA defines torture as:

> (1). . . any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
>
> (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from–
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or
>
> (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

28 U.S.C. § 1350 note § 3(b). This definition differs from section 2340's definition in two respects. First, the TVPA definition contains an illustrative list of purposes for which such pain may have been inflicted. *See id.* Second, the TVPA includes the phrase "arising only from or inherent in, or incidental to lawful sanctions"; by contrast, section 2340 refers only to pain or suffering "incidental to lawful sanctions." *Id.* Because the purpose of our analysis here is to ascertain acts that would cross the threshold of producing "severe physical or mental pain or suffering," the list of illustrative purposes for which it is inflicted generally would not affect this analysis.[51] Similarly, to the extent that the absence of the phrase "arising only from or inherent in" from section 2340 might affect the question of whether pain or suffering was part of lawful sanctions and thus not torture, the circumstances with which we are concerned here are solely that of interrogations, not the imposition of punishment subsequent to judgment. These

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[50] *See also* 137 Cong. Rec. 34,785 (1991) (statement of Rep. Mazzoli) ("Torture is defined in accordance with the definition contained in [CAT]"); *see also Torture Victims Protection Act: Hearing and Markup on H.R. 1417 Before the Subcomm. On Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 100th Cong. 38 (1988) (Prepared Statement of the Association of the Bar of the City of New York, Committee on International Human Rights) ("This language essentially tracks the definition of 'torture' adopted in the Torture Convention.").

[51] While this list of purposes is illustrative only, demonstrating that a defendant harbored any of these purposes "may prove valuable in assisting in the establishment of intent at trial." Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, 17 B.C. Int'l & Comp. L. Rev. 275, 314 (1994).

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differences between the TVPA and section 2340 are therefore not sufficiently significant to undermine the usefulness of TVPA cases here.[52]

In suits brought under the TVPA, courts have not engaged in any lengthy analysis of what acts constitute torture. In part, the absence of such analysis is due to the nature of the acts alleged. Almost all of the cases involve physical torture, some of which is of an especially cruel and even sadistic nature. 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. Because of this approach, it is difficult to take a specific act out of context and conclude that the act in isolation would constitute torture. Certain acts do, however, consistently reappear in these cases or are of such 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, 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. While we cannot say with certainty that acts falling short of these seven would *not* constitute torture under Section 2340, we believe that interrogation techniques would have to be similar to these acts in their extreme nature and in the type of harm caused to violate the law.

III. International Law

In this Part, we examine CAT. Additionally, we examine the applicability of customary international law to the conduct of interrogations. At the outset, it is important to emphasize that the President can suspend or terminate any treaty or provision of a treaty. *See generally* Memorandum for John Bellinger, III, Senior Associate Counsel to the President and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001); Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, *Re: Authority of the President to Denounce the ABM Treaty* (Dec. 14, 2001). 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 obligations under domestic law on the Executive Branch, nor can it create any cause of action in federal court. Letter for Alberto R. Gonzales, Counsel to the President from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, 1 (July 22, 2002). Similarly, customary international law lacks domestic legal effect, and in any event can be overridden by the President at his discretion.

[52] The TVPA also requires that an individual act "intentionally." As we noted with respect to the text of CAT, this language might be construed as requiring general intent. It is not clear that this is so. We need not resolve that question, however, because we review the TVPA cases solely to address the acts that would satisfy the threshold of inflicting "severe physical or mental pain or suffering."

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A. U.N. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment ("CAT").

The most relevant international convention here is CAT.[53] The treaty's text and negotiating history establish that the definition of torture is limited only to the most egregious conduct. Further, because the United States' instrument of ratification defined torture in exactly the same manner as in 18 U.S.C. §§ 2340–2340A, the United States' treaty obligation is no different than the standard set by federal criminal law. With respect to CAT's provision concerning cruel, inhuman, or degrading treatment or punishment, the United States' instrument of ratification defined that term as the cruel, unusual and inhuman treatment prohibited by the Eighth, Fifth, and Fourteenth Amendments. We review the substantive standards established by those Amendments in order to fully identify the scope of the United States' CAT obligations.

1. CAT's Text

We begin our analysis with the treaty's text. *See Eastern Airlines Inc. v. Floyd*, 499 U.S. 530, 534–35 (1991) ("When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used.) (quotation marks and citations omitted). CAT defines torture as:

> any act by which *severe* pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or

[53] You have also asked whether U.S. interrogation of al Qaeda and Taliban detainees could lead to liability and potential prosecution before the International Criminal Court ("ICC"). The ICC cannot take action against the United States for its conduct of interrogations for two reasons. First, under international law a state cannot be bound by treaties to which it has not consented. Although President Clinton signed the Rome Statute, which establishes the ICC, the United States has withdrawn its signature from that agreement and has not submitted it to the Senate for advice and consent—effectively terminating it. *See* Letter for Kofi Annan, U.N. Secretary General, from John R. Bolton, Under Secretary of State for Arms Control and International Security (May 6, 2002) (notifying the U.N. of U.S. intention not to be a party to the treaty); Rome Statute of the International Criminal Court, 37 I.L.M. 999, U.N. Doc. A/Conf.183/9 (1998). The United States cannot, therefore, be bound by the provisions of the ICC treaty nor can U.S. nationals be subject to ICC prosecution. Second, even if the ICC could in some way act upon the United States and its citizens, interrogation of an al Qaeda or Taliban operative could not constitute a crime under the Rome Statute. The Rome Statute makes torture a crime subject to the ICC's jurisdiction in only two contexts. Under article 7 of the Rome Statute, torture may fall under the ICC's jurisdiction as a crime against humanity if it is committed as "part of a widespread and systematic attack directed against any civilian population." Here, however, the interrogation of al Qaeda or Taliban operatives is part of an international armed conflict against a terrorist organization, not an attack on a civilian population. Indeed, our conflict with al Qaeda does not directly involve any distinct civilian population. Rather, al Qaeda solely constitutes a group of illegal belligerents who are dispersed around the world into cells, rather than being associated with the civilian population of a nation-state. Under article 8 of the Rome Statute, torture can fall within the ICC's jurisdiction as a war crime. To constitute a war crime, torture must be committed against "persons or property protected under the provisions of the relevant Geneva Conventions." Rome Statute, art. 8. As we have explained, neither members of the al Qaeda terrorist network nor Taliban soldiers are entitled to the legal status of prisoners of war under the GPW. *See Treaties and Laws Memorandum* at 8 (Jan. 22, 2002); *see also United States v. Lindh*, 212 F.2d 541, 556–57 (E.D. Va. 2002). Interrogation of al Qaeda or Taliban members, therefore cannot constitute a war crime because article 8 of the Rome Statute applies only to those protected by the Geneva Conventions.

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> a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Article 1(1). Unlike section 2340, this definition includes a list of purposes for which pain and suffering cannot be inflicted. The prefatory phrase "such purposes as" makes clear that this list is illustrative rather than exhaustive. Severe pain or suffering need not be inflicted for those specific purposes to constitute torture. Instead, the perpetrator must simply have a purpose of the same kind. More importantly, as under section 2340, the pain and suffering must be severe to reach the threshold of torture. As with section 2340, the text of CAT makes clear that torture must be an extreme act.

CAT also distinguishes between torture and other acts of cruel, inhuman, or degrading treatment or punishment.[54] Article 16 of CAT requires state parties to "undertake to prevent . . . other acts of cruel, inhuman or degrading treatment or punishment *which do not amount to torture* as defined in article 1." (Emphasis added). CAT thus establishes a category of acts that states should endeavor to prevent but need not criminalize. CAT reserves for torture alone the criminal penalties and the stigma attached to those penalties. In so doing, CAT makes clear that torture is at the farthest end of impermissible actions, and that it is distinct and separate from the lower level of "cruel, inhuman, or degrading treatment or punishment." This approach is in keeping with the earlier, but non-binding, U.N. Declaration on the Protection from Torture, which defines torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." Declaration on Protection from Torture, UN Res. 3452, Art. 1(2) (Dec. 9, 1975).

2. Ratification History

Executive branch interpretation of CAT further supports our conclusion that the treaty prohibits only the most extreme forms of physical or mental harm. As we have previously noted, the "division of treaty-making responsibility between the Senate and the President is essentially the reverse of the division of law-making authority, with the President being the draftsman of the treaty and the Senate holding the authority to grant or deny approval." *Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 31 (1987) ("*Sofaer*

[54] Common article 3 of GPW contains somewhat similar language. Article 3(1)(a) prohibits "violence to life and person, in particular murder of all kinds, mutilation, *cruel treatment and torture*." (Emphasis added). Article 3(1)(c) additionally prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment." Subsection (c) must forbid more conduct than that already covered in subsection (a) otherwise subsection (c) would be superfluous. Common article 3 does not, however, define either of the phrases "outrages upon personal dignity" or "humiliating and degrading treatment." International criminal tribunals, such as those respecting Rwanda and former Yugoslavia have used common article 3 to try individuals for committing inhuman acts lacking any military necessity whatsoever. These tribunals, however, have not yet articulated the full scope of conduct prohibited by common article 3. Memorandum for John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, from James C. Ho, Attorney-Advisor, Office of Legal Counsel, *Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War* (Feb. 1, 2002). We note that section 2340A and CAT protect any individual from torture. By contrast, the standards of conduct established by common article 3 do not apply to "an armed conflict between a nation-state and a transnational terrorist organization." *Treaties and Laws Memorandum* at 8.

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Memorandum"). In his capacity as the "sole organ of the federal government in the field of international relations," *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), the President alone decides whether to initiate treaty discussions and he alone controls the course and substance of negotiations. The President conducts the day-to-day interpretation of a treaty and may terminate a treaty unilaterally. *See Goldwater v. Carter*, 617 F.2d 697, 707–08 (D.C. Cir.) (en banc), *vacated and remanded with instructions to dismiss on other grounds*, 444 U.S. 996 (1979). Courts accord the Executive Branch's interpretation the greatest weight in ascertaining a treaty's intent and meaning. *See, e.g., United States v. Stuart*, 489 U.S. 353, 369 (1989) ("'the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight'") (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the department of government particularly charged with their negotiation and enforcement is given great weight."); *Charlton v. Kelly*, 229 U.S. 447, 468 (1913) ("A construction of a treaty by the political departments of the government, while not conclusive upon a court . . . , is nevertheless of much weight.").

A review of the Executive branch's interpretation and understanding of CAT reveals that the United States understood that torture included only the most extreme forms of physical or mental harm. When it submitted the Convention to the Senate, the Reagan administration took the position that CAT reached only the most heinous acts. The Reagan administration included the following understanding:

> The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.

S. Treaty Doc. No. 100-20, at 4–5. Focusing on the treaty's requirement of "severity," the Reagan administration concluded, "[t]he extreme nature of torture is further emphasized in [this] requirement." S. Treaty Doc. No. 100-20, at 3 (1988); S. Exec. Rep. No. 101-30, at 13 (1990). The Reagan administration determined that CAT's definition of torture was consistent with "United States and international usage, [where it] is usually reserved for extreme deliberate and unusually cruel practices, for example, sustained systematic beatings, application of electric currents to sensitive parts of the body and tying up or hanging in positions that cause extreme pain." S. Exec. Rep. No. 101-30, at 14 (1990).

Further, the Reagan administration clarified the distinction between torture and lesser forms of cruel, inhuman, or degrading treatment or punishment. In particular, the administration declared that article 1's definition of torture ought to be construed in light of article 16. *See* S. Treaty Doc. No. 100-20, at 3. "'Torture' is thus to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in case of torture." *Id.* at 3. This distinction was "adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or

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punishment." *Id.* at 3. Given this definition, "rough treatment as generally falls into the category of 'police brutality,' while deplorable, does not amount to 'torture.'" *Id.* at 4.

Although the Reagan administration relied on CAT's distinction between torture and "cruel, inhuman, or degrading treatment or punishment," it viewed the phrase "cruel, inhuman, or degrading treatment or punishment" as vague and lacking in a universally accepted meaning. The vagueness of this phrase could even be construed to bar acts not prohibited by the U.S. Constitution. The Administration pointed to *Case of X v. Federal Republic of Germany* as the basis for this concern. In that case, the European Court of Human Rights determined that the prison officials' refusal to recognize a prisoner's sex change might constitute degrading treatment. *See* S. Treaty Doc. No. 100-20, at 15 (citing European Commission on Human Rights, *Dec. on Adm.*, Dec. 15, 1977, *Case of X v. Federal Republic of Germany* (No. 6694/74), 11 Dec. & Rep. 16)). As a result of this concern, the Administration added the following understanding to its proposed instrument of ratification:

> The United States understands the term, 'cruel, inhuman or degrading treatment or punishment,' as used in Article 16 of the Convention, to mean the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."

S. Treaty Doc. No. 100-20, at 15–16. Under this understanding, treatment or punishment must rise to the level of action that U.S. courts have found to be in violation of the U.S. Constitution in order to constitute cruel, inhuman, or degrading treatment or punishment. That which fails to rise to this level must fail, *a fortiori*, to constitute torture under section 2340 or CAT.

The Senate consented to the Convention during the first Bush administration. The Bush administration agreed with the Reagan administration's cruel, inhuman, and degrading treatment or punishment understanding and upgraded it from an understanding to a reservation. The Senate consented to the reservation in consenting to CAT. Although using less vigorous rhetoric, the Bush administration joined the Reagan administration in interpreting torture as reaching only extreme acts. To ensure that the Convention's reach remained limited, the Bush administration submitted the following understanding:

> The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental pain caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

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S. Exec. Rep. No. 101-30, at 36. This understanding accomplished two things. First, it ensured that the term "intentionally" would be understood as requiring specific intent. Second, it defined the amorphous concept of *mental* pain or suffering. In so doing, this understanding ensured that mental torture would rise to a severity seen in the context of physical torture. The Senate ratified CAT with this understanding, and Congress codified it in 18 U.S.C. § 2340.

To be sure, the Bush administration's language differs from the Reagan administration understanding. The Bush administration said that it had altered the CAT understanding in response to criticism that the Reagan administration's original formulation had raised the bar for the level of pain necessary to constitute torture. *See Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 9–10 (1990) ("*1990 Hearing*") (prepared statement of Hon. Abraham D. Sofaer, Legal Adviser, Department of State). While it is true that there are rhetorical differences, both administrations consistently emphasized the extreme acts required to constitute torture. As we have seen, the Bush understanding as codified in section 2340 reaches only extreme acts. The Reagan understanding, like the Bush understanding, declared that "intentionally" would be understood to require specific intent. Though the Reagan administration required that the "act be deliberate and calculated" *and* that it be inflicted with specific intent, in operation there is little difference between requiring specific intent alone and requiring that the act be deliberate and calculated. The Reagan administration's understanding also made express what is obvious from the plain text of CAT: torture is an extreme form of cruel and inhuman treatment. The Reagan administration's understanding that the pain be "excruciating and agonizing" does not substantively deviate from the Bush administration's view.

The Bush understanding simply took an amorphous concept—excruciating and agonizing mental pain—and gave it a more concrete form. Executive branch representations made to the Senate support our view that there was little difference between these two understandings. *See 1990 Hearing*, at 10 (prepared statement of Hon. Abraham D. Sofaer, Legal Adviser, Department of State) ("no higher standard was intended" by the Reagan administration understanding than was present in the Convention or the Bush understanding); *id.* at 13–14 (statement of Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice) ("In an effort to overcome this unacceptable element of vagueness [in the term "mental pain"], we have proposed an understanding which defines severe mental pain constituting torture with sufficient specificity . . . to protect innocent persons and meet constitutional due process requirements.") Accordingly, we believe that the two definitions submitted by the Reagan and Bush administrations had the same purpose in terms of articulating a legal standard, namely, ensuring that the prohibition against torture reaches only the most extreme acts.

Executive branch representations made to the Senate confirm that the Bush administration maintained the view that torture encompassed only the most extreme acts. Although the ratification record, such as committee hearings, floor statements, and testimony, is generally not accorded great weight in interpreting treaties, authoritative statements made by representatives of the Executive Branch are accorded the most interpretive value. *See Sofaer Memorandum* at 35–36. Hence, the testimony of the executive branch witnesses defining torture, in addition to the reservations, understandings and declarations that were submitted to the Senate by the Executive branch, should carry the highest interpretive value of any of the statements in

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the ratification record. At the Senate hearing on CAT, Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice, offered extensive testimony as to the meaning of torture. Echoing the analysis submitted by the Reagan administration, he testified that "[t]orture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct." *1990 Hearing* at 16 (prepared statement of Mark Richard). He further explained, "As applied to physical torture, there appears to be some degree of consensus that the concept involves conduct, the mere mention of which sends chills down one's spine[.]" *Id.* Richard gave the following examples of conduct satisfying this standard: "the needle under the fingernail, the application of electrical shock to the genital area, the piercing of eyeballs, etc." *Id.* In short, repeating virtually verbatim the terms used in the Reagan understanding, Richard explained that under the Bush administration's submissions with the treaty "the essence of torture" is treatment that inflicts "excruciating and agonizing physical pain." *Id.* (emphasis added).

As to mental torture, Richard testified that "no international consensus had emerged [as to] what degree of mental suffering is required to constitute torture[,]" but that it was nonetheless clear that severe mental pain or suffering "does not encompass the normal legal compulsions which are properly a part of the criminal justice system[:] interrogation, incarceration, prosecution, compelled testimony against a friend, etc,—notwithstanding the fact that they may have the incidental effect of producing mental strain." *Id.* at 17. According to Richard, CAT was intended to "condemn as torture intentional acts such as those designed to damage and destroy the human personality." *Id.* at 14. This description of mental suffering emphasizes the requirement that any mental harm be of significant duration and supports our conclusion that mind-altering substances must have a profoundly disruptive effect to serve as a predicate act.

Apart from statements from Executive branch officials, the rest of a ratification record is of little weight in interpreting a treaty. *See generally Sofaer Memorandum.* Nonetheless, the Senate understanding of the definition of torture largely echoes the administrations' views. The Senate Foreign Relations Committee Report on CAT opined: "[f]or an act to be 'torture' it must be an *extreme* form of cruel and inhuman treatment, cause *severe* pain and suffering and be *intended to cause severe* pain and suffering." S. Exec. Rep. No. 101-30, at 6 (emphasis added). Moreover, like both the Reagan and Bush administrations, the Senate drew upon the distinction between torture and cruel, inhuman or degrading treatment or punishment in reaching its view that torture was extreme.[55] Finally, concurring with the administration's concern that "cruel, inhuman, or degrading treatment or punishment" could be construed to go beyond constitutional standards, the Senate supported the inclusion of the reservation establishing the Constitution as the baseline for determining whether conduct amounted to cruel, inhuman, degrading treatment or punishment. *See* 136 Cong. Rec. 36,192 (1990); S. Exec. Rep. No. 101-30, at 39.

[55] Hearing testimony, though the least weighty evidence of meaning of all of the ratification record, is not to the contrary. Other examples of torture mentioned in testimony similarly reflect acts resulting in intense pain: the "gouging out of childrens' [sic] eyes, the torture death by molten rubber, the use of electric shocks," cigarette burns, hanging by hands or feet. *1990 Hearing* at 45 (Statement of Winston Nagan, Chairman, Board of Directors, Amnesty International USA); *id.* at 79 (Statement of David Weissbrodt, Professor of Law, University of Minnesota, on behalf of the Center for Victims of Torture, the Minnesota Lawyers International Human Rights Committee).

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3. **Negotiating History**

CAT's negotiating history also supports interpreting torture to include only the extreme acts defined in section 2340. The state parties endeavored to craft a definition that reflected the term's gravity. During the negotiations, state parties offered various formulations to the working group, which then proposed a definition. Almost all of these suggested definitions illustrate the consensus that torture is an extreme act designed to cause agonizing pain. For example, the United States proposed that torture be defined as "includ[ing] any act by which extremely severe pain or suffering . . . is deliberately and maliciously inflicted on a person." J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment* 41 (1988) ("*CAT Handbook*"). The United Kingdom suggested that torture be defined even more narrowly as the "*systematic and intentional* infliction of *extreme* pain or suffering rather than *intentional* infliction of *severe* pain or suffering." *Id.* at 45 (emphasis in original). Ultimately, in choosing the phrase "severe pain," the parties concluded that this phrase "sufficient[ly] . . . convey[ed] the idea that only acts of a certain gravity shall . . . constitute torture." *Id.* at 117.

State parties were acutely aware of the distinction they drew between torture and cruel, inhuman, or degrading treatment or punishment. The state parties considered and rejected a proposal that would have defined torture merely as cruel, inhuman or degrading treatment or punishment. *See id.* at 42. Mirroring the U.N. Declaration on Protection From Torture, some state parties proposed the inclusion of a paragraph defining torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." *See id.* at 41; *see also* S. Treaty Doc. No. 100-20, at 2 (the U.N. Declaration on Protection from Torture (1975) served as "a point of departure for the drafting of [CAT]"). In the end, the parties concluded that the proposal was superfluous because Article 16 "impl[ies] that torture is the gravest form of such treatment or punishment." *CAT Handbook* at 80; *see* S. Exec. Rep. No. 101-30, at 13 ("The negotiating history indicates that [the phrase 'which do not amount to torture'] was adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment and that Article 1 should be construed with this in mind.").

Additionally, the parties could not reach a consensus about the meaning of "cruel, inhuman, or degrading treatment or punishment." *See CAT Handbook* at 47. Without a consensus, the parties viewed the term as simply "'too vague to be included in a convention which was to form the basis for criminal legislation in the Contracting States.'" *Id.* This view reaffirms the interpretation of CAT as purposely reserving criminal penalties for torture alone.[56]

[56] CAT's negotiating history offers more than just support for the view that pain or suffering must be extreme to amount to torture. First, the negotiating history suggests that the harm sustained from the acts of torture need not be permanent. In fact, "the United States considered that it might be useful to develop the negotiating history which indicates that although conduct resulting in permanent impairment of physical or mental faculties is indicative of torture, it is not an essential element of the offence." *CAT Handbook* at 44. Second, the state parties to CAT rejected a proposal to include in CAT's definition of torture the use of truth drugs, where no physical harm or mental suffering was apparent. This rejection at least suggests that such drugs were not viewed as amounting to torture per se. *See id.* at 42.

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4. U.S. Obligations Under CAT

a. Torture

Despite the apparent differences in language between the Convention and 18 U.S.C. § 2340, the U.S. obligations under both are identical. As discussed above, the first Bush administration proposed an understanding of torture that is identical to the definition of that term found in section 2340. S. Exec. Rep. No. 101-30, at 36. The Senate approved CAT based on this understanding, and the United States included the understanding in its instrument of ratification.[57] As we explained above, the understanding codified at section 2340 accomplished two things. First, it made crystal clear that torture requires specific intent. Second, it added form and substance to the otherwise amorphous concept of *mental* pain or suffering. Because the understanding was included in the instrument of ratification, it defines the United States' obligation under CAT.

It is one of the basic principles of international law that a nation cannot be bound to a treaty without its consent. *See* Advisory Opinion on Reservations to the Convention on Genocide, 1951 I.C.J. 15, 21 (May 28, 1951) ("Genocide Convention Advisory Opinion"). *See also* 1 *Restatement (Third) of the Foreign Relations Law of the United States* pt. I, introductory note at 18 (1987) ("*Restatement (Third)*") ("Modern international law is rooted in acceptance by states which constitute the system."); Anthony Aust, *Modern Treaty Law and Practice* 75 (2000) (a state can only be bound by a treaty to which it has consented to be bound). In other words, the United States is only bound by those obligations of the Torture Convention to which it knowingly agreed. The United States cannot be governed either by provisions of the Convention from which it withheld its consent, or by interpretations of the Convention with which it disagreed, just as it could not be governed by the Convention itself if it had refused to sign it.

This does not mean that in signing the Torture Convention, the United States bound itself to every single provision. Rather, under international law, a reservation made when ratifying a treaty validly alters or modifies the treaty obligation. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980); *Restatement (Third)* at § 313.[58] The right to enter reservations applies to multilateral agreements just as to the

[57] *See* http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html.

[58] A reservation is generally understood to be a unilateral statement that modifies a state party's obligations under a treaty. The ratifying party deposits this statement with its instrument of ratification. *See, e.g.*, Memorandum for the Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Genocide Convention* at 1 n.1 (Jan. 20, 1984). By contrast, an understanding is defined as a statement that merely clarifies or interprets a State party's legal obligations under the treaty. Such a statement does not alter the party's obligations as a matter of international law. How a party characterizes a statement it deposits at ratification is not, however, dispositive of whether it is reservation or understanding. *See* Letter for Hon. Frank Church, Chairman, Ad Hoc Subcommittee on the Genocide Convention, Committee on Foreign Relations, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel at 2–3 (May 8, 1970). Instead, whether a statement is a reservation or understanding depends on the statement's substance. *See* Memorandum for the Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Genocide Convention*, at 2 n.4 (June 1, 1982). Here, although under domestic law, the Bush administration's definition of torture was categorized as an "understanding," it was deposited with the instrument of ratification as a condition of the United States' ratification, and so under international law we consider it to be a reservation if it indeed modifies CAT's standard. *See Restatement (Third)*, at § 313 cmt. g. Under either characterization, the section 2340 standard governs.

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more familiar context of bilateral agreements. *Restatement (Third)* at § 313. Under international law, therefore, the United States is bound only by the text of CAT as modified by the Bush administration's understanding.[59] As is obvious from its text, and as discussed at length above, Congress codified the understanding almost verbatim when it enacted section 2340. The United States' obligation under CAT is thus identical to the standard set by section 2340. Conduct that does not violate the latter does not violate the former. So long as the interrogation methods do not violate section 2340, they also do not violate our international obligations under CAT.

To be sure, the Vienna Convention on Treaties recognizes several exceptions to the power to make reservations. None of them, however, apply here. First, a reservation is valid and effective unless it purports to defeat the "object and purpose" of the treaty. Vienna Convention, art. 19.[60] International law provides little guidance regarding the meaning of the "object and purpose" test. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Penn. L. Rev. 399, 432–33 (2000) (explaining that "[n]either the Vienna Convention nor the [Genocide Convention Advisory Opinion] provides much guidance regarding the 'object and purpose' test" and that "there has been no subsequent judicial analysis of the test under either the Vienna Convention or customary international law, and no binding official determination that a reservation has ever violated the test."). Nonetheless, it is clear that here the United States did not defeat the object and purpose of the Convention. In fact, it enacted section 2340 to expand the prohibition on torture in its domestic criminal law. The United States could only have defeated the object and purpose of the Convention if it had *narrowed* the existing prohibitions on torture under its domestic law. Rather than defeat the object of CAT, the United States accepted its terms and attempted, through the Bush administration's understanding, to make clear the scope and meaning of the treaty's obligations.

Second, a treaty reservation will not be valid if the treaty itself prohibits states from taking reservations. CAT nowhere prohibits state parties from entering reservations. Two provisions of the Convention—the competence of the Committee Against Torture in Article 28, and the mandatory jurisdiction of the International Court of Justice in Article 30—specifically note that nations may take reservations from their terms. The Convention, however, contains no provision that explicitly attempts to preclude states from exercising their basic right under international law to enter reservations to other provisions. Other treaties are quite clear when they attempt to prohibit any reservations. Without such a provision, we do not believe that CAT precludes reservations.

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[59]. Further, if we are correct in our suggestion that CAT itself creates a heightened intent standard, then the understanding the Bush Administration attached is less a modification of the Convention's obligations and more of an explanation of how the United States would implement its somewhat ambiguous terms.

[60] The United States is not a party to the Vienna Convention on Treaties. Nonetheless, as we have previously explained, "some lower courts have said that the Convention embodies the customary international law of treaties," and the State Department has at various times taken the same view. *See* Letter for John Bellinger, III, Senior Associate Counsel to the President and Legal Advisor to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, at 1 (Nov.15, 2001). *See also* Memorandum for John H. Shenefield, Associate Attorney General, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: The Application of Sections 212(a)(27) and 212(a)(29) of the Immigration and Nationality Act of 1952 to Persons Within the Scope of the United Nations Headquarters Agreement and the Convention on the Privileges and Immunities of the United Nations* 22 (Oct. 20, 1980) (noting that the Vienna Convention is "generally accepted as the universal guide for the interpretation of treaties").

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Third, in regard to multilateral agreements, a treaty reservation may not be valid if other parties object in a timely manner. Vienna Convention, art. 20. If another state does not object within a certain period of time, it is deemed to have acquiesced in the reservation. If another nation objects, then the provision of the treaty to which the reservation applies is not in force between the two nations, unless the objecting nation opposes entry into force of the treaty as whole between the two nations. *Id.* art. 21(3). *See also* Genocide Convention Advisory Opinion, 1951 I.C.J. 15, 26 (May 28, 1951) (an objection "will only affect the relationship between the State making the reservation and the objecting State"). Here, no nation objected to the United States' further definition of torture.[61] Even if any nation had properly objected, that would mean only that there would be no provision prohibiting torture in effect between the United States and the objecting nation—effectively mooting the question whether an interrogation method violates the Torture Convention.

We conclude that the Bush administration's understanding created a valid and effective reservation to CAT. Even if it were otherwise, there is no international court that could take issue with the United States' interpretation of the Convention. In an additional reservation, the United States refused to accept the jurisdiction of the ICJ to adjudicate cases under the Convention. Although CAT creates a committee to monitor compliance, it can only conduct studies and has no enforcement powers.

Some may argue that permitting the assertion of justification defenses under domestic law, such as necessity or self-defense, would place the United States in violation of its international obligations. Such an argument would point to article 2(2) of CAT, which provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." We do not believe, however, that a treaty may eliminate the United States' right, under international law, to use necessary measures for its self-defense. The right of national self-defense is well established under international law. As we have explained elsewhere, it is a right that is inherent in international law and in the international system. *See* Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Authority of the President under Domestic and International Law to Use Force Against Iraq* at 30 (Oct. 23, 2002) ("*Iraq Memorandum*"). And, as we explained above, Article 51 of the U.N. Charter recognizes and reaffirms this inherent right:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.

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[61] Three nations commented. Finland and Sweden asserted that the understanding did not alter U.S. obligations under CAT. While the Netherlands noted that the understanding "appear[ed] to narrow" article 1's definition of torture, it too asserted that this understanding did not alter U.S. obligations under CAT. Comments such as these have no effect under international law. Moreover, even if these comments could be termed objections, they were in fact untimely and thus are invalid. An objection to a reservation must be raised within twelve months of the notification of the reservation or by the date on which the objecting party consented to be bound, whichever is later. *See Restatement (Third)*, at § 313 cmt. e. None of these countries entered their comments within that time frame.

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U.N. Charter art. 51; *see also* North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246 (agreeing that if an armed attack occurs against one of the parties, the others will exercise the right of individual or collective self-defense recognized by article 51); Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3, 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 93 (Rio Treaty) (same).

Although recognized by these agreements, the United States has long held the view that the right to self-defense is broader in scope, and could not be limited by these treaty provisions. Our Office has observed, for example, that Article 51 merely reaffirms a right that already existed independent of the Charter. As this Office explained forty years ago:

> The concept of self-defense in international law of course justifies more than activity designed merely to resist an armed attack which is already in progress. Under international law every state has, in the words of Elihu Root, "the right . . . to protect itself by preventing a condition of affairs in which it will be too late to protect itself."

Memorandum for the Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, *Re: Legality under International Law of Remedial Action Against Use of Cuba as a Missile Base by the Soviet Union* at 2 (Aug. 30, 1962); *cf. Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29 (1827) ("the [domestic] power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion"). We have opined that "it is likely that under international law no treaty could prevent a nation from taking steps to defend itself." *High Seas Memorandum* at 10. As Secretary of State Frank Kellogg explained, "The right of self-defense . . . is inherent in every sovereign state and implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense." *Id.* (internal quotation marks and citation omitted). Indeed, the United States has consistently defended the doctrine of anticipatory self-defense, even though the text of Article 51 of the United Nations Charter itself seems to permit the use of force only after an armed attack has occurred. We believe that Article 51 is only expressive of one element of the broader right to self-defense, and that it could not derogate from a nation's right to use force to prevent an imminent attack.

Thus, if interrogation methods were inconsistent with the United States' obligations under CAT, but were justified by necessity or self-defense, we would view these actions still as consistent ultimately with international law. Although these actions might violate CAT, they would still be in service of the more fundamental principle of self-defense that cannot be extinguished by CAT or any other treaty. Further, if the President ordered that conduct, such an order would amount to a suspension or termination of the Convention. In so doing, the President's order and the resulting conduct would not be a violation of international law because the United States would no longer be bound by the treaty.

The right to self-defense, of course, cannot be invoked in any and all circumstances. As this Office has recently explained, the use of force must meet two requirements to be legitimate.

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See Iraq Memorandum at 33. First, "the use of force must be necessary because the threat is imminent and thus pursuing peaceful alternatives is not an option." *Id.* "Second, the response must be proportionate to the threat[.]" *Id.* We further explained that to determine whether a threat is sufficiently imminent to make the use of force necessary, "[f]actors to be considered include: the probability of an attack; the likelihood that this probability will increase, and therefore the need to take advantage of a window of opportunity; whether diplomatic alternatives are practical; and the magnitude of the harm that could result from the threat." *Id.* at 44.

b. Cruel, Inhuman, or Degrading Treatment or Punishment

CAT provides that "[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture." Art. 16.[62] CAT does not require state parties to criminalize such conduct, nor does CAT (in contrast to the prohibition against torture) preclude its justification by exigent circumstances. Thus, the United States is within its international law obligations even if it uses interrogation methods that might constitute cruel, inhuman, or degrading treatment or punishment, so long as their use is justified by self-defense or necessity.

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. This reservation cannot be said to defeat CAT's object and purpose. As with the U.S. definition of torture, it does not expand the right to engage in cruel, inhuman, or degrading treatment. Rather, the reservation merely reaffirmed the United States' consistent interpretation of this ambiguous term.[63] While several countries commented on this reservation, those objections, if valid, mean simply that Article 16 is not in force between the United States and the objecting states.[64] As to the remaining countries, this reservation is a binding obligation.

The U.S. reservation is important in light of the lack of international consensus regarding the meaning of cruel, inhuman or degrading treatment. *See, e.g., Forti v. Suarez-Mason*, 694 F.

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[62] Article 16, like the other first 15 articles in the treaty, is non-self executing. The United States took a reservation to this section, as with the other first fifteen articles, that this section was non-self executing. As explained in text, therefore they not only "are not federal law cognizable in federal court, they also place no obligations on the Executive Branch." Letter for Alberto R. Gonzales, Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, at 1 (July 22, 2002). *See also Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001) ("Courts in the United States are bound to give effect to international law and to international agreements, except that a non-self-executing agreement will not be given effect as law in the absence of necessary authority.") (internal quotation marks and citation omitted).

[63] The United States took the same reservation with respect to a provision in the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, that prohibited cruel, inhuman, or degrading treatment or punishment.

[64] Three countries objected to this reservation. Finland and the Netherlands objected to this reservation on the ground that it was incompatible with the object and purpose of the treaty. Additionally, these two countries, along with Sweden objected to this reservation because of its reference to national law, which these countries found to fail to clearly define U.S. treaty obligations. A fourth country, Germany, merely commented that this reservation d[id] not touch upon the obligations of the United States of America as State Party to the Convention." These objections and comments, as noted earlier, were untimely and thus invalid.

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Supp. 707, 711–12 (N.D. Cal. 1988) (sustaining earlier dismissal of cruel, inhuman, or degrading treatment or punishment because the court concluded that there was insufficient consensus defining the prohibited conduct). *Cf. Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J. concurring in the denial of cert.) (noting that international courts were not in agreement as to whether a lengthy delay between sentencing and execution constituted "cruel inhuman or degrading treatment or punishment" and that every court of appeals to have addressed such a claim had rejected it). Indeed, the drafters of CAT expressly recognized the absence of any consensus as to what kind of treatment or punishment rose to the level of "cruel, inhuman, or degrading treatment or punishment." As noted above, it is precisely because this term had no coherent meaning under international law that the drafters chose not to require the criminalization of such conduct. *See CAT Handbook* at 47. *Compare* CAT, art. 4 ("Each State Party shall ensure that all acts of torture are offences under its criminal law.") *with id.* art. 16 ("Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, human, or degrading treatment or punishment which do not amount to torture . . . ."). Given the wide-ranging nature of international decisions regarding this phrase, some international decisions might give the phrase almost limitless application. For example, in *Iwanczuk v. Poland* (Eur. Ct. H.R. 2001), the European Court of Human Rights concluded that a strip search, undertaken because a prisoner had once been found with a knife, as well as certain humiliating remarks the guards allegedly made about the prisoner's body (which the government disputed), "amounted to degrading treatment . . . ." *Id.* at ¶ 59. In reaching that conclusion, the court reasoned, "[I]t is sufficient if the victim is humiliated in his or her own eyes." *Id.* at ¶ 51 (citations omitted). And in *Ireland v. United Kingdom* (Eur. Ct. H.R. 1977), a decision discussed in more detail below, the court concluded that actions that "arouse . . . feelings of fear, anguish and inferiority capable of humiliating and debasing [the prisoners] and possibly breaking their physical or moral resistance" constitutes degrading treatment. *Id.* at ¶ 167. Under these decisions anything that *a detainee* finds humiliating or offensive, or anything geared toward reducing that person's moral or physical resistance to cooperating could constitute degrading treatment or punishment. These opinions would reach conduct far below the standard articulated in the U.S. reservation and would produce precisely the expansive and limitless results that the United States sought to avoid. Ultimately, as explained above, the United States is bound only by the treaty obligations to which it has consented. We explain below the substantive standards that this reservation to the definition of cruel, inhuman, and degrading treatment or punishment establishes. We address first the Eighth Amendment and then the standard established by the Fifth and Fourteenth Amendments.[65]

i. Eighth Amendment

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. As a general matter, the excessive force analysis often arises in situations in which an inmate has attacked another inmate or a guard. Under this analysis, "a prisoner alleging excessive force must demonstrate that the defendant acted 'maliciously and sadistically'" for the very purpose of causing harm. *Porter v. Nussle*, 534 U.S. 516, 528 (2002) (quoting *Hudson v. McMillian*, 503

[65] As we explained in Part I, neither the Fifth Amendment nor the Eighth Amendment apply of their own force to the interrogations of alien enemy combatants held abroad.

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U.S. 1, 7 (1992)). Actions taken in "good-faith . . . to maintain or restore discipline" do not constitute excessive force. *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) ("[W]e think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.") (internal quotation marks and citation omitted). To determine whether an official has met this standard, factors such as "the need for the application of force, the relationship between the need and the amount of force that was used, [] the extent of injury inflicted[,]" are to be considered as well as "the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response." *Id.* at 321 (internal quotation marks and citation omitted). Put another way, the actions must be necessary and proportional in light of the danger that reasonably appears to be posed. Moreover, the Supreme Court has emphasized that deference must be accorded to the decisions of prison officials "taken in response to an actual confrontation with riotous inmates" as well as "to prophylactic or preventative measures intended to reduce the incidence of these or any other breaches of prison discipline." *Id.* at 322.

This standard appears to be most potentially applicable to interrogation techniques that may involve varying degrees of force. As is clear from above, the 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. As the Supreme Court recognized in *Haig v. Agee*, 435 U.S. 280 (1981), "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Id.* at 307 (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)). In the typical excessive force case, the protection of other inmates and officers or the maintenance of 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.

To be sure, no court has encountered the precise circumstances here. Nonetheless, Eighth Amendment cases most often concern instances in which the inmate is a threat to safety, and here force would be used to prevent a threat to the safety of the United States that went beyond a single inmate or a single prison. We believe it is beyond question that there can be no more compelling government interest than that which is presented here. Just as prison officials are given deference in their response to rioting inmates or prison discipline, so too must the Executive be given discretion in its decisions to respond to the grave threat to national security posed by the current conflict. Whether the use of more aggressive techniques that involve force is permissible will depend on the information that relevant officials have regarding the nature of the threat and the likelihood that the particular detainee has information relevant to that threat.

Whether the interrogators have acted in good faith would turn in part on the injury inflicted. For example, if the technique caused minimal or minor pain, it is less likely to be problematic under this standard. The use of force must also be proportional, i.e., there should

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also be some relationship between the technique used and the necessity of its use. So, if officials had credible threat information that a U.S. city was to be the target of a large-scale terrorist attack a month from now and the detainee was in a position to have information that could lead to the thwarting of that attack, physical contact such as shoving or slapping the detainee clearly would not be disproportionate to the threat posed. In such an instance, those conducting the interrogations would have acted in good faith rather than maliciously and sadistically for the very purpose of causing harm.

We also note that the excessive force analysis might also apply to the use of threats. Some courts have held that threats can state an excessive force claim. For example, in *Chandler v. District of Columbia Dept. of Corrections*, 145 F.3d 1355 (D.C. Cir. 1998), the D.C. Circuit found that a correctional officer's threat to the inmate had put him in "imminent fear of his life because she was in a position to carry it out." *Id.* at 1361. The court concluded that "[d]epending upon the gravity of the fear, the credibility of the threat, and on [the inmate's] psychological condition, the threat itself could have caused more than *de minimis* harm and therefore could have been sufficient to state a claim of excessive use of force." *Id.* at 1361. *See also Northington v. Jackson*, 973 F.2d 1518 (10th Cir. 1992) (holding that allegation that officer put a gun to the inmate's head and threatened to kill him stated an excessive force claim). *But see Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979) (sheriff's idle threat to hang prisoner did not state a claim for an Eighth Amendment violation); *Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987) (allegations that defendants threatened inmate with physical harm, where plaintiff also alleged the defendants had beaten him, did not state an Eighth Amendment claim).

The conditions of confinement cases provide a useful analogue to interrogation techniques that alter the conditions of a detainee's cell and surrounding environment. The conditions of confinement analysis often arises in claims concerning the use of administrative segregation and conditions attendant that segregation. In those cases, a condition of confinement is not "cruel and unusual" unless it (1) is "sufficiently serious" to implicate constitutional protection, *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), and (2) reflects "deliberate indifference" to the prisoner's health or safety, *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The failure to demonstrate either one of these components is fatal to the claim. The first element is objective, and inquires whether the challenged condition is cruel and unusual. The second, so-called "subjective" element requires an examination of the actor's intent and inquires whether the challenged condition is imposed as a punishment. *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) ("The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.").

The Supreme Court has noted that "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Rhodes*, 452 U.S. at 346 (1981) (internal quotations marks and citation omitted). *See also Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (stating that the Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency"). Despite

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this broad language, in recent years the Supreme Court clearly has sought to limit the reach of the Eighth Amendment in the prison context and certain guidelines emerge from these cases.

As to the objective element, the Court has established that "only those deprivations denying 'the minimal civilized measures of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson*, 501 U.S. at 298 (quoting *Rhodes*, 452 U.S. at 347). It is not enough for a prisoner to show that he has been subjected to conditions that are merely "restrictive and even harsh," as such conditions are simply "part of the penalty that criminal offenders pay for their offenses against society." *Rhodes*, 452 U.S. at 347. *See also id.* at 349 ("the Constitution does not mandate comfortable prisons"). Rather, a prisoner must show that he has suffered a "serious deprivation of basic human needs," *id.* at 347, such as "essential food, medical care, or sanitation," *id.* at 348. *See also Wilson*, 501 U.S. at 304 (requiring "the deprivation of a single, identifiable human need such as food, warmth, or exercise"). "The Amendment also imposes [the duty on officials to] provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates." *Farmer*, 511 U.S. at 832 (internal quotation marks and citations omitted). The Court has also articulated an alternative test inquiring whether an inmate was exposed to "a substantial risk of serious harm." *Id.* at 837. *See also DeSpain v. Uphoff*, 264 F.3d 965, 971 (10th Cir. 2001) ("In order to satisfy the [objective] requirement, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.") (internal quotation marks and citation omitted).

In these recent cases, the Court has made clear that the conditions of confinement are not to be assessed under a totality-of-the-circumstances approach. In *Wilson v. Seiter*, 501 US. 294 (1991), the Supreme Court expressly rejected the contention that "each condition must be considered as part of the overall conditions challenged." *Id.* at 304 (internal quotation marks and citation omitted). Instead, the Court concluded that "[s]ome conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets." *Id.* As the Court further explained, "Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." *Id.* at 305.

To show deliberate indifference under the subjective element of the conditions of confinement test, a prisoner must show that " the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference can be drawn that a substantial risk of serious harm exists and he must also draw the inference." *Farmer*, 511 U.S. at 837. This standard requires greater culpability than mere negligence. *See id.* at 835; *Wilson*, 501 U.S. at 305 ("mere negligence would satisfy neither [the *Whitley* standard of malicious and sadistic infliction] nor the more lenient deliberate indifference standard") (internal quotation marks omitted). Deliberate indifference is, however, "satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer*, 511 U.S. at 835. Moreover, the Court has emphasized that there need not be direct evidence of such intent. Instead, the "existence of this subjective state of mind [may be

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inferred] from the fact that the risk of harm is obvious." *Hope v. Pelzer*, 122 S. Ct. 2508, 2514 (2002).

One of its most recent opinions on conditions of confinement—*Hope v. Pelzer*, 122 S. Ct. 2508 (2002)—illustrates the Court's focus on the necessity of the actions undertaken in response to a disturbance in determining the officer's subjective state of mind.[66] In *Hope*, following an "exchange of vulgar remarks" between the inmate Hope and an officer, the two got into a "wrestling match." *Id.* at 2512. Additional officers intervened and restrained Hope. *See id.* These officers then took Hope back to the prison. Once there, they required him to take off his shirt and then attached him to the hitching post, where he remained in the sun for the next seven hours. *See id.* at 2512–13. During this time, Hope received no bathroom breaks. He was given water only once or twice and at least one guard taunted him about being thirsty. *See id.* at 2513. The Supreme Court concluded that the facts Hope alleged stated an "obvious" Eighth Amendment violation. *Id.* at 2514. The obviousness of this violation stemmed from the utter lack of necessity of the guard's actions. The Court emphasized that "[a]ny safety concerns" arising from the scuffle between Hope and the officer "had long since abated by the time [Hope] was handcuffed to the hitching post" and that there was a "clear lack of an emergency situation." *Id.* As a result, the Court found that "[t]his punitive treatment amount[ed] to [the] gratuitous infliction of 'wanton and unnecessary' pain that our precedent clearly prohibits." *Id.* at 2515. Thus, the necessity of the governmental action bears upon both the conditions of confinement analysis as well as the excessive force analysis.

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. *See Dixon v. Godinez*, 114 F.3d 640, 642 (7th Cir. 1997). A brief stay in solitary confinement alone is insufficient to state a deprivation. *See, e.g., Leslie v. Doyle*, 125 F.3d 1132, 1135 (7th Cir. 1997) ("A brief stay in disciplinary segregation[, here 15 days,] is, figuratively, a kind of slap on the wrist that does not lead to a cognizable Eighth Amendment claim."). Such things as insulting or verbally ridiculing detainees would not constitute the deprivation of a basic human need. *See Somers v. Thurman*, 109 F.3d 614, 624 (9th Cir. 1997) ("To hold that gawking, pointing, and joking [about nude prisoners] violates the prohibition against cruel and unusual punishment would trivialize the objective component of the Eighth Amendment test and render it absurd."). 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. *See, e.g., Seltzer-Bey v. Delo*, 66 F.3d 961, 964 (8th Cir. 1995). 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. As the Ninth Circuit has explained, "The Eighth Amendment requires only that prisoners receive food that is adequate to maintain health; it need not be tasty or aesthetically pleasing." *LaMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993).

[66] Although the officers' actions in *Hope* were undertaken in response to a scuffle between an inmate and a guard, the case is more properly thought of as a conditions of confinement case rather than as an "excessive force" case. By examining the officers' actions under the "deliberate indifference standard" the Court analyzed it as a conditions of confinement case. As explained in text, the deliberate indifference standard is inapplicable to claims of excessive force.

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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 or 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. An honest belief might be demonstrated by due diligence as to the effects of a particular interrogation technique combined with an assessment of the prisoner's psychological health.

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. In the typical conditions of confinement case, the protection of other inmates or officers, the protection of the inmate alleged to have suffered the cruel and unusual punishment, or even the maintenance of order in the prison, provide valid government interests that may justify various deprivations. *See, e.g., Anderson v. Nosser*, 438 F.2d 183, 193 (5th Cir. 1971) ("protect[ing inmates] from self-inflicted injury, [] protect[ing] the general prison population and personnel from violate acts on his part, [and] prevent[ing] [] escape" are all legitimate penological interests that would permit the imposition of solitary confinement); *McMahon v. Beard*, 583 F.2d 172, 175 (5th Cir. 1978) (prevention of inmate suicide is a legitimate interest). As with excessive force, no court has encountered the precise circumstances here under conditions of confinement jurisprudence. Nonetheless, we 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.

ii. Fifth and Fourteenth Amendments

Under the Due Process clauses of the Fifth and Fourteenth Amendments,[67] substantive due process protects an individual from "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Under substantive due process "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id.* at 846 (internal quotation marks and citation omitted). That conduct must "shock[] the conscience." *See generally id.*; *Rochin v. California*, 342 U.S. 165 (1952).[68] Unlike government actions subjected

[67] The substantive due process standard discussed in this section applies to both the Fourteenth and Fifth Amendment Due Process Clauses.

[68] In the seminal case of *Rochin v. California*, 342 U.S. 165 (1952), the police had some information that the defendant was selling drugs. Three officers went to and entered the defendant's home without a warrant and forced open the door to the defendant's bedroom. Upon the opening door, the officers saw two pills and asked the defendant about them. The defendant promptly put them in his mouth. The officers "jumped upon him and attempted to extract the capsules." *Id.* at 166. The police tried to pull the pills out of his mouth but despite considerable struggle the defendant swallowed them. The police then took the defendant to a hospital, where a doctor forced an emetic solution into the defendant's stomach by sticking a tube down his throat and into his stomach, which caused the defendant to vomit up the pills. The pills did in fact contain morphine. *See id.* The

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to scrutiny under procedural due process, which are constitutionally permissible so long as the government affords adequate processes, government actions that "shock the conscience" are prohibited irrespective of the procedures that the government may employ in undertaking those actions. *See generally Rochin v. California*, 342 U.S. 165 (1952). The Supreme Court has limited the use of the nebulous standards of substantive due process and sought to steer constitutional claims to more specific amendments. *See, e.g., Graham v. Connor*, 490 U.S. 386, 393–95 (1989) (holding that damages claim for injuries sustained when officers used physical force during a stop should be analyzed under the Fourth Amendment rather than substantive due process); *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (holding that substantive due process provides no greater protection to prisoner shot during a prison riot than does the Eighth Amendment). *See also Matta-Ballesteros v. Henman*, 896 F.2d 255, 261 (7th Cir. 1990) (declining to analyze claim under the "shock-the-conscience" standard because Fourth Amendment provided that court with an explicit textual constitutional protection under which to analyze the plaintiff's claim of excessive force). As the Court explained in *Albright v. Oliver*, 510 U.S. 266 (1994), "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of governmental behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Id.* at 273 (plurality opinion of Rehnquist, C.J.). *See also County of Sacramento*, 523 U.S. at 843 ("[s]ubstantive due process analysis is therefore inappropriate" if the claim is covered by a specific Amendment). Thus, although substantive due process offers another line of analysis, it does not provide any protection greater than that which the Eighth Amendment provides. *See Whitley*, 475 U.S. at 327.

To shock the conscience, the conduct at issue must involve more than mere negligence by the executive official. *See County of Sacramento*, 523 U.S. at 849. *See also Daniels v. Williams*, 474 U.S. 327 (1986) ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property.") (collecting cases). Instead, "[i]t is . . . behavior on the other end of the culpability spectrum that would most probably support a substantive due process claim: conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *County of Sacramento*, 523 U.S. at 849. In some circumstances, however, recklessness or gross negligence may suffice. *See id.* The requisite level of culpability is ultimately "not . . . subject to mechanical application in unfamiliar territory." *Id.* at 850. As the Supreme Court has explained: "Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Id.* As a general matter, deliberate indifference would be an appropriate standard where there is a real possibility for actual deliberation. In other circumstances, however, where quick decisions must be made (such as responding to a prison riot), a heightened level of culpability is more appropriate. *See id.* at 851–52.

The shock-the-conscience standard appears to be an evolving one. The Court's most recent opinion regarding this standard emphasized that the conscience shocked was the

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Court found that the actions of the police officers "shocked the conscience" and therefore violated Rochin's due process rights. *Id.* at 170.

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"*contemporary* conscience." *Id.* at 847 n.8 (emphasis added). The Court explained that while a judgment of what shocks the conscience "may be informed by a history of liberty protection, [] it necessarily reflects an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them." *Id.* Despite the evolving nature of the standard, it is objective rather than subjective. The Supreme Court has cautioned that although "the gloss has . . . not been fixed" as to what substantive due process is, judges "may not draw on [their] merely personal and private notions and disregard the limits that bind judges in their judicial function. . . . [T]hese limits are derived from considerations that are fused in the whole nature of our judicial process." 342 U.S. at 170. *See United States v. Lovasco*, 431 U.S. 783 (1973) (reaffirming that the test is objective rather than subjective). As the Court further explained, the conduct at issue must "do more than offend some fastidious squeamishness or private sentimentalism" to violate due process. *Rochin*, 342 U.S. at 172.

Additionally, *Ingraham v. Wright*, 430 U.S. 651 (1977), clarified that under substantive due process, "[t]here is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." *Id.* at 674. And as the Fourth Circuit has noted, it is a "principle" "inherent in the Eighth [Amendment] and [substantive due process]" that "[n]ot . . . every malevolent touch by a prison guard gives rise to a federal cause of action. *See Johnson v. Glick*, 481 F.2d at 1033 ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights")." *Riley v. Dorton*, 115 F.3d 1159, 1167 (4th Cir. 1997) (quoting *Hudson*, 503 U.S. at 9). Instead, "the [shock-the-conscience] . . . inquiry . . . [is] whether the force applied caused injury so severe, and was so disproportionate to the need presented and so inspired by malice or sadism . . . that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987). Examples of physical brutality that "shock the conscience" include: the rape of a plaintiff by a uniformed officer, see *Jones v. Wellham*, 104 F.3d 620 (4th Cir. 1997); a police officer striking the plaintiff in retaliation for the plaintiff photographing the police officer, see *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981); police officer shooting a fleeing suspect's legs without any probable cause other than the suspect's running and failure to stop, see *Aldridge v. Mullins*, 377 F. Supp. 850 (M.D. Tenn. 1972) *aff'd*, 474 F.2d 1189 (6th Cir. 1973). Moreover, beating or sufficiently threatening someone during the course of an interrogation can constitute conscience-shocking behavior. *See Gray v. Spillman*, 925 F.2d 90, 91 (4th Cir. 1991) (plaintiff was beaten and threatened with further beating if he did not confess). By contrast, for example, actions such as verbal insults and an angry slap of "medium force" did not constitute behavior that "shocked the conscience." *See Riley*, 115 F.3d at 1168 n.4 (4th Cir. 1997) (finding claims that such behavior shocked the conscience "meritless").

Physical brutality is not the only conduct that may meet the shock-the-conscience standard. In *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (en banc), the Ninth Circuit held that certain psychologically-coercive interrogation techniques could constitute a violation of substantive due process. The interrogators techniques were "designed to instill stress, hopelessness, and fear, and to break [the suspect's] resistance." *Id.* at 1229. The officers planned to ignore any request for a lawyer and to ignore the suspect's right to remain silent, with the express purpose that any statements he might offer would help keep him from testifying in his own defense. *See id.* at 1249. It was this express purpose that the court found to be the "aggravating factor" that led it to conclude that the conduct of the police "shocked the

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conscience." *Id.* at 1249. The court reasoned that while "[i]t is a legitimate purpose of police investigation to gather evidence and muster information that will surround a guilty defendant and make it difficult if not impossible for him to escape justice[,]" "when the methods chosen to gather such evidence and information are deliberately unlawful and flout the Constitution, the legitimacy is lost." *Id.* at 1250. In *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989), the Seventh Circuit found that severe mental distress inflicted on a suspect could be a basis for a substantive due process claim. *See id.* at 195. *See also Rhodes v. Robinson*, 612 F.2d 766, 771 (3d Cir. 1979) (claim of emotional harm could be the basis of a substantive due process claim). The *Wilkins* court found that under certain circumstances interrogating a suspect with gun at his head could violate those rights. *See* 872 F.2d at 195. Whether it would rise to the level of a violation depended upon whether the plaintiff was able to show "misconduct that a reasonable person would find so beyond the norm of proper police procedure as to shock the conscience, and that it is calculated to induce not merely momentary fear or anxiety, but severe mental suffering, in the plaintiff." *Id.* On the other hand, we note that merely deceiving the suspect does not shock the conscience, see, e.g., *United States v. Byram*, 145 F.3d 405 (1st Cir. 1998) (assuring defendant he was not in danger of prosecution did not shock the conscience), nor does the use of sympathy or friends as intermediaries, see, e.g., *United States v. Simtob*, 901 F.2d 799, 809 (9th Cir. 1990).

Although the 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." *Webb*, 828 F.2d at 1158. 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 severe 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. *See County of Sacramento*, 523 U.S. at 851–52. Thus, an official must know of a serious risk to the health or 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.

5. International Decisions on the Conduct of Interrogations

Although decisions by foreign or international bodies are in no way binding authority upon the United States, they provide guidance about how other nations will likely react to our interpretation of the CAT and Section 2340. As this Part will discuss, other Western nations have generally used a high standard in determining whether interrogation techniques violate the international prohibition on torture. In fact, these decisions have found various aggressive interrogation methods to, at worst, constitute cruel, inhuman, and degrading treatment, but not torture. These decisions only reinforce our view that there is a clear distinction between the two standards and that only extreme conduct, resulting in pain that is of an intensity often accompanying serious physical injury, will violate the latter.

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a. European Court of Human Rights

An analogue to CAT's provisions can be found in the European Convention on Human Rights and Fundamental Freedoms (the "European Convention"). This convention prohibits torture, though it offers no definition of it. It also prohibits cruel, inhuman, or degrading treatment or punishment, again without definition. By barring both types of acts, the European Convention implicitly distinguishes between them and further suggests that torture is a grave act beyond cruel, inhuman, or degrading treatment or punishment.

The leading European Court of Human Rights case explicating the differences between torture and cruel, inhuman, or degrading treatment or punishment is *Ireland v. the United Kingdom* (1978).[69] In that case, the European Court of Human Rights examined interrogation techniques somewhat more sophisticated than the rather rudimentary and frequently obviously cruel acts described in the TVPA cases. Careful attention to this case is worthwhile not just because the case examines methods not used in the TVPA cases, but also because the Reagan administration relied on this case in reaching the conclusion that the term torture is reserved in international usage for "extreme, deliberate, and unusually cruel practices." S. Treaty Doc. No. 100-20, at 4.

The methods at issue in *Ireland* were:

(1) Wall Standing. The prisoner stands spread eagle against the wall, with fingers high above his head, and feet back so that he is standing on his toes such that his all of his weight falls on his fingers.
(2) Hooding. A black or navy hood is placed over the prisoner's head and kept there except during the interrogation.
(3) Subjection to Noise. Pending interrogation, the prisoner is kept in a room with a loud and continuous hissing noise.
(4) Sleep Deprivation. Prisoners are deprived of sleep pending interrogation.
(5) Deprivation of Food and Drink. Prisoners receive a reduced diet during detention and pending interrogation.

The European Court of Human Rights concluded that these techniques used in combination, and applied for hours at a time, were inhuman and degrading but did not amount to torture. In analyzing whether these methods constituted torture, the court treated them as part of a single program. *See Ireland.* ¶ 104. The court found that this program caused "if not actual bodily injury, at least intense physical and mental suffering to the person subjected thereto and also led to acute psychiatric disturbances during the interrogation." *Id.* ¶ 167. Thus, this program "fell into the category of inhuman treatment[.]" *Id.* The court further found that "[t]he techniques were also degrading since they were such as to arouse in their victims feeling of fear,

[69] According to one commentator, the Inter-American Court of Human Rights has also followed this decision. *See* Julie Lantrip, *Torture and Cruel, Inhuman and Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights*, 5 ILSA J. Int'l & Comp. L. 551, 560–61 (1999). The Inter-American Convention to Prevent and Punish Torture, however, defines torture much differently from CAT or U.S. law and, as such, any cases under that treaty are not relevant here. *See* Inter-American Convention to Prevent and Punish Torture, *opened for signature* Dec. 9, 1985, art. 2, OAS T.S. No. 67, 25 I.L.M. 419 (1985) (entered into force Feb. 28, 1987 but the United States has never signed or ratified it).

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anguish and inferiority capable of humiliating and debasing them and possible [sic] breaking their physical or moral resistance." *Id.* Yet, the court ultimately concluded:

> Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confession, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular *intensity* and *cruelty* implied by the word torture . . . .

Id. (emphasis added). Thus, even though the court had concluded that the techniques produce "intense physical and mental suffering" and "acute psychiatric disturbances," they were not of sufficient intensity and cruelty to amount to torture.

The court reached this conclusion based on the distinction the European Convention drew between torture and cruel, inhuman, or degrading treatment or punishment. The court reasoned that by expressly distinguishing between these two categories of treatment, the European Convention sought to "attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering." *Id.* ¶ 167. According to the court, "this distinction derives principally from a difference in the intensity of the suffering inflicted." *Id.* The court further noted that this distinction paralleled the one drawn in the U.N. Declaration on the Protection From Torture, which specifically defines torture as "'an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.'" *Id.* (quoting U.N. Declaration on the Protection From Torture).

The court relied on this same "intensity/cruelty" distinction to conclude that some physical maltreatment fails to amount to torture. For example, four detainees were severely beaten and forced to stand spread eagle up against a wall. *See id.* ¶ 110. Other detainees were forced to stand spread eagle while an interrogator kicked them "continuously on the inside of the legs." *Id.* ¶ 111. Those detainees were beaten, some receiving injuries that were "substantial" and, others received "massive" injuries. *See id.* Another detainee was "subjected to . . . 'comparatively trivial' beatings" that resulted in a perforation of the detainee's eardrum and some "minor bruising." *Id.* ¶ 115. The court concluded that none of these situations "attain[ed] the particular level [of severity] inherent in the notion of torture." *Id.* ¶ 174.

b. Israeli Supreme Court

The European Court of Human Rights is not the only other court to consider whether such a program of interrogation techniques was permissible. In *Public Committee Against Torture in Israel v. Israel*, 38 I.L.M. 1471 (1999), the Supreme Court of Israel reviewed a challenge brought against the General Security Service ("GSS") for its use of five techniques. At issue in *Public Committee Against Torture In Israel* were: (1) shaking, (2) the Shabach, (3) the Frog Crouch, (4) the excessive tightening of handcuffs, and (5) sleep deprivation. "Shaking" is "the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly." *Id.* ¶ 9. The "Shabach" is actually a combination of methods wherein the detainee

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> is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair's seat and back support. His second hand is tied behind the chair, against its back support. The suspect's head is covered by an opaque sack, falling down to his shoulders. Powerfully loud music is played in the room.

Id. ¶ 10.

The "frog crouch" consists of "consecutive, periodical crouches on the tips of one's toes, each lasting for five minute intervals." *Id.* ¶ 11. The excessive tightening of handcuffs simply referred to the use handcuffs that were too small for the suspects' wrists. *See id.* ¶ 12. Sleep deprivation occurred when the Shabach was used during "intense non-stop interrogations."[70] *Id.* ¶ 13.

While the Israeli Supreme Court concluded that these acts amounted to cruel, and inhuman treatment, the court did not expressly find that they amounted to torture. To be sure, such a conclusion was unnecessary because even if the acts amounted only to cruel and inhuman treatment the GSS lacked authority to use the five methods. Nonetheless, the decision is still best read as indicating that the acts at issue did not constitute torture. The court's descriptions of and conclusions about each method indicate that the court viewed them as merely cruel, inhuman or degrading but not of the sufficient severity to reach the threshold of torture. While its descriptions discuss necessity, dignity, degradation, and pain, the court carefully avoided describing any of these acts as having the severity of pain or suffering indicative of torture. *See id.* at ¶¶ 24–29. Indeed, in assessing the *Shabach* as a whole, the court even relied upon the European Court of Human Right's *Ireland* decision for support and it did not evince disagreement with that decision's conclusion that the acts considered therein did not constitute torture. *See id.* ¶ 30.

In sum, both the European Court on Human Rights and the Israeli Supreme Court have recognized a wide array of acts that constitute cruel, inhuman, or degrading treatment or punishment, but do not amount to torture. Thus, they appear to permit, under international law, an aggressive interpretation as to what amounts to torture, leaving that label to be applied only where extreme circumstances exist.

B. Customary International Law

CAT constitutes the United States' primary international obligation on the issue of torture. Some, however, might argue that the United States is subject to a second set of obligations created by customary international law. Customary international law and treaties are often described as the two primary forms of international law. Unlike treaties, however, customary international law is unwritten, arises from the practice of nations, and must be followed out of a sense of legal obligation. While it may be the case that customary international

[70] The court did, however, distinguish between this sleep deprivation and that which occurred as part of routine interrogation, noting that some degree of interference with the suspect's regular sleep habits was to be expected. *Public Committee Against Torture In Israel* ¶ 23.

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law prohibits torture, we believe that it cannot impose a substantive obligation that would vary from that which CAT creates. As a broad, recent multilateral agreement, CAT *is* the very state practice allegedly represented by customary international law, and thus customary international law could not functionally be any different from CAT.

As our Office has previously explained, customary international law "evolves through a dynamic process of state custom and practice." *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163, 170 (1989). As one authority has described it, customary international law can be defined as a "general and consistent practice of states followed by them from a sense of legal obligation." *Restatement (Third)*, at § 102(2). The best evidence of customary international law is proof of state practice. *Id.* § 103 cmt. a; *see also Iraq Memorandum* at 23. Authorities observe that multilateral treaties are important evidence of state practice. *See Restatement (Third)*, pt. III introductory note at 144–45 ("Multilateral treaties are increasing used also to codify and develop customary international law. . . ."); *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)*, 1986 I.C.J. 14 (June 27) (relying on multilateral treaties as evidence of customary international law).

First, this must be the case because CAT, like other treaties, is the written expression of an agreement among signatories that willingly are bound by its terms. It provides a carefully crafted definition of the obligation regarding torture that nations, including the United States, have agreed to obey. By contrast, customary international law has no written definition, and the sources from which it can be drawn, such as the opinion of scholars, non-binding declarations by various meetings and assemblies, diplomatic notes and domestic judicial decisions, do not yield a defined and universal definition of the prohibited conduct. It is also unclear how universal and uniform state practice must be in order to crystallize into a norm of customary international law. Indeed, scholars will even argue that a norm has entered into customary international law, such as the prohibition on torture, while admitting that many states practice torture on their own citizens. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980); B. Simma & P. Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Australian Y. B. Int'l L. 82, 90–93 (1992). International law itself provides no guide for determining when the almost 200 nations in the world follow the same state practice sufficiently to create a new norm of customary international law. Even under the ambiguous methodology of international law, it is difficult to see how this form of law, which is never enacted through any accountable process nor accepted by any written form of consent, could supercede the obligations recently established through a carefully negotiated and written multilateral treaty on the identical subject.

Second, even if there is a uniform and universal state practice concerning torture sufficient to raise it to the level of customary international law, we believe it analytically incoherent to establish a norm of customary international law that differs from a recent, broadly accepted, multilateral agreement on the same exact issue. CAT provides substantive content to the prohibition on torture and cruel, inhuman, or degrading treatment or punishment. CAT is a multilateral agreement, ultimately joined by 132 state parties, to establish a definition of torture. In this context, we cannot see evidence of customary international law that could be a more compelling or conclusive definition of state practice. *See Restatement (Third)*, at § 102 cmt. i.

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("[i]nternational agreements constitute practice of states and as such can contribute to the growth of customary international law"). Indeed, any effort to draw forth a norm of customary international law at odds with the Torture Convention would ignore the most basic evidence of state practice—that of broad agreement to a written text—in favor of more speculative, ambiguous, and diverse definitions of dubious legitimacy.

Thus, it is CAT's substantive obligations as defined by our reservations, understandings, and declarations that govern the United States' international law obligations on torture. CAT not only governs U.S. obligations with respect to torture but it also does so with respect to cruel, inhuman, or degrading treatment or punishment. Thus, even if customary international law prohibits cruel, inhuman, or degrading treatment or punishment, CAT and the reservations, understandings, and declarations that the United States has taken with respect to the scope of that term's reach are definitive of United States' obligations. Customary international law cannot override carefully defined U.S. obligations through multilateral treaties on the exact same subject.

Finally, even if customary international law on torture created a different standard than that which the Torture Convention creates, and even if such a standard were somehow considered binding under international law, it could not bind the President as a matter of domestic law. We have previously concluded that customary international law is not federal law. *See Treaties and Laws Memorandum* at 32–33. This has been the longstanding view of this Office and of the Department of Justice. *See Authority of the Federal Bureau of Investigation to Override International in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. at 168–171. The constitutional text provides no support for the notion that customary international law is part of federal law. *See id.* at 33. Indeed, because customary international has not undergone the processes the Constitution requires for "the enactment of constitutional amendments, statutes, or treaties," it is not law and "can have no legal effect on the government or on American citizens." *Treaties and Laws Memorandum* at 33–34. As we explained, to elevate customary international law to federal law would "raise deep structural problems" by "import[ing] a body of law to restrain the three branches of American government that never underwent any approval by our democratic political process." *Id.* at 36. Further, treating customary international law as federal law would directly invade "the President's discretion as the Commander in Chief and Chief Executive to determine how best to conduct the Nation's military affairs." *Id.* at 36. Thus, we concluded that "customary international law does not bind the President or the U.S. Armed Forces in their decisions concerning the detention conditions of al Qaeda and Taliban prisoners." *Id.* at 37. That conclusion is no less true there than here. Customary international law cannot interfere, as a matter of domestic law, with the President and the U.S. Armed Forces as they carry out their constitutional duties to successfully prosecute war against an enemy that has conducted a direct attack on the United States.

Even if one were to accept the notion that customary international law has some standing within our domestic legal system, the President may decide to override customary international law at his discretion. "It is well accepted that the political branches have ample authority to override customary international law within their respective spheres of authority." *Id.* at 34 (discussing *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812) and *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814)); *The Paquete Habana*, 175 U.S. 677 (1900). Our

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Office has made clear its agreement with these Supreme Court cases that the President can unilaterally order the violation of customary international law. 13 Op. O.L.C. at 170. Indeed, there is a strong argument under international law that nations must have the ability to violate customary international law. Because the very essence of customary international law is that it evolves through state custom and practice, "'[s]tates necessarily must have the authority to contravene international norms.'" *Id.* at 36 (quoting *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. OL.C. at 170). Otherwise, custom itself could not change. Thus, if the President were to order interrogation methods that were inconsistent with some notion of customary international law, he would have the authority to override the latter as a matter of domestic law, and he could also argue that as a matter of international law such conduct was needed to shape a new norm to address international terrorism.

IV. Defenses

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 justification defenses 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. The availability of these defenses would depend upon the precise factual circumstances surrounding a particular interrogation.

A. Necessity

We believe that a defense of necessity might be raised in certain circumstances. Often referred to as the "choice of evils" defense, necessity has been defined as follows:

> Conduct that 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; and
> > (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
> > (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Model Penal Code § 3.02. *See also* LaFave & Scott, § 5.4 at 627. Although there is no federal statute that generally establishes necessity or other justifications as defenses to federal criminal laws, the Supreme Court has recognized the defense. *See United States v. Bailey*, 444 U.S. 394, 410 (1980) (relying on LaFave & Scott and Model Penal Code definitions of necessity defense).

The necessity defense might prove especially relevant in the current conflict. As it has been described in the case law and literature, the purpose behind necessity is one of public

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policy. According to LaFave and Scott, "the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." LaFave & Scott, at 629. In particular, the necessity defense can justify the intentional killing of one person to save two others because "it is better that two lives be saved and one lost than that two be lost and one saved." *Id.* Or, put in the language of a choice of evils, "the evil involved in violating the terms of the criminal law (. . . even taking another's life) may be less than that which would result from literal compliance with the law (. . . two lives lost)." *Id.*

Additional elements of the necessity defense are worth noting here. First, the defense is not limited to certain types of harms. Therefore, the harm inflicted by necessity may include intentional homicide, so long as the harm avoided is greater (i.e., preventing more deaths). *Id.* at 634. Second, it must actually be the defendant's intention to avoid the greater harm; intending to commit murder and then learning only later that the death had the fortuitous result of saving other lives will not support a necessity defense. *Id.* at 635. Third, if the defendant reasonably believed that the lesser harm was necessary, even if, unknown to him, it was not, he may still avail himself of the defense. As LaFave and Scott explain, "if A kills B reasonably believing it to be necessary to save C and D, he is not guilty of murder even though, unknown to A, C and D could have been rescued without the necessity of killing B." *Id.* Fourth, it is for the court, and not the defendant to judge whether the harm avoided outweighed the harm done. *Id.* at 636. Fifth, the defendant cannot rely upon the necessity defense if a third alternative is open and known to him that will cause less harm.

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 governmental 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.

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We note that legal authorities identify an important exception to the necessity defense. The defense is available "only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values." *Id.* at 629. Thus, if Congress explicitly has made clear that violation of a statute cannot be outweighed by the harm avoided, courts cannot recognize the necessity defense. LaFave and Israel provide as an example an abortion statute that made clear that abortions even to save the life of the mother would still be a crime; in such cases the necessity defense would be unavailable. *Id.* at 630. Here, however, Congress has not explicitly made a determination of values vis-à-vis torture. It has not made any such determination with respect to the federal criminal statutes applicable in the special maritime and territorial jurisdiction.

In fact, in enacting the torture statute to implement CAT, Congress declined to adopt language from the treaty's definition of torture that arguably seeks to prohibit the weighing of values. As discussed above CAT defines torture as the intentional infliction of severe pain or suffering "for such purpose[] as obtaining from him or a third person information or a confession." CAT art. 1.1. It could be argued that this definition means that the good of obtaining information—no matter what the circumstances—cannot justify an act of torture. In other words, necessity would not be a defense. In enacting section 2340, however, Congress removed the purpose element in the definition of torture, defining torture in terms of conduct rather than by reference to the purpose for which it was carried out. By leaving section 2340 silent as to the harm done by torture in comparison to other harms, Congress allowed the necessity defense to go forward when appropriate.

Further, CAT contains an additional provision that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." CAT art. 2.2. Given that Congress enacted 18 U.S.C. §§ 2340–2340A in light of CAT, Congress presumably was aware of this provision of the treaty, and of the definition of the necessity defense that allows the legislature to provide for an exception to the defense, see Model Penal Code § 3.02(b), yet Congress did not incorporate CAT article 2.2 into section 2340. Nor did Congress amend any of the generally applicable criminal statutes to eliminate this defense in cases of torture. Given that Congress omitted CAT's effort to bar a necessity or wartime defense, we read section 2340 and the federal criminal statutes applicable to the special maritime and territorial jurisdiction as permitting the defense.

Additionally, criminal statutes are to be "strictly construed in favor of the defendant." LaFave, at § 2.2(d). As noted above, sections 2340–2340A do not expressly preclude the common law defenses of necessity nor as we explain below do they preclude the defense of self-defense. To find the necessity defense barred based on art. 2, which is not part of our domestic law because it is non-self-executing, would be a gross breach of this fundamental tenet. Indeed, such a conclusion would raise constitutional concerns. It would not only raise the specter that section 2340A is unconstitutionally vague, in violation of a defendant's Fifth Amendment right to due process, but invoking this article to preclude either self-defense or necessity defenses could also raise ex post facto-like concerns that may implicate a defendant's Fifth Amendment right to due process. *See Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) ("[W]e conclude that a judicial alteration of a common law doctrine of criminal law violates the principle of fair

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warning, and hence must not be given retroactive effect, only where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.") (internal quotation marks and citations omitted). *Cf.* U.S. Const. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed").

B. Self-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. As the Court of Appeals for the D.C. Circuit has explained:

> More than two centuries ago, Blackstone, best known of the expositors of the English common law, taught that "all homicide is malicious, and of course amounts to murder, unless . . . excused on the account of accident or self-preservation. . . ." Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone's time.

United States v. Peterson, 483 F.2d 1222, 1228–29 (D.C. Cir. 1973). Self-defense is a common-law defense to federal criminal offenses, and nothing in the text, structure or history of section 2340A precludes its application to a charge of torture. Similarly, in light of Congress's failure to eliminate this defense for defendants accused of torture but charged with one of the offenses applicable to the special maritime and territorial jurisdiction, we believe that nothing precludes the assertion of this defense. In the absence of any textual provision to the contrary, we assume self-defense can be an appropriate defense to an allegation of torture, irrespective of the offense charged.

The doctrine of self-defense permits the use of force to prevent harm to another person. As LaFave and Scott explain, "one is justified in using reasonable force in defense of another person, even a stranger, when he reasonably believes that the other is in immediate danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger." *Id.* at 663–64. Ultimately, even deadly force is permissible, but "only when the attack of the adversary upon the other person reasonably appears to the defender to be a deadly attack." *Id.* at 664. As with our discussion of necessity, we will review the significant elements of this defense.[71] According to LaFave and Scott, the elements of the defense of others are the same as those that apply to individual self-defense.

First, self-defense requires that the use of force be *necessary* to avoid the danger of unlawful bodily harm. *Id.* at 649. A defender may justifiably use deadly force if he reasonably believes that the other person is about to inflict unlawful death or serious bodily harm upon another, and that it is necessary to use such force to prevent it. *Id.* at 652. Looked at from the opposite perspective, the defender may not use force when the force would be as equally effective at a later time and the defender suffers no harm or risk by waiting. *See* Paul H.

[71] Early cases had suggested that in order to be eligible for defense of another, one should have some personal relationship with the one in need of protection. That view has been discarded. LaFave & Scott at 664.

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Robinson, 2 *Criminal Law Defenses* § 131(c) at 77 (1984). If, however, other options permit the defender to retreat safely from a confrontation without having to resort to deadly force, the use of force may not be necessary in the first place. La Fave & Scott at 659–60.

Second, self-defense requires that the defendant's belief in the necessity of using force be reasonable. If a defendant honestly but unreasonably believed force was necessary, he will not be able to make out a successful claim of self-defense. *Id.* at 654. Conversely, if a defendant reasonably believed an attack was to occur, but the facts subsequently showed no attack was threatened, he may still raise self-defense. As LaFave and Scott explain, "one may be justified in shooting to death an adversary who, having threatened to kill him, reaches for his pocket as if for a gun, though it later appears that he had no gun and that he was only reaching for his handkerchief." *Id.* Some authorities, such as the Model Penal Code, even eliminate the reasonability element, and require only that the defender honestly believed—regardless of its unreasonableness—that the use of force was necessary.

Third, many legal authorities include the requirement that a defender must reasonably believe that the unlawful violence is "imminent" before he can use force in his defense. It would be a mistake, however, to equate imminence necessarily with timing—that an attack is immediately about to occur. Rather, as the Model Penal Code explains, what is essential is that, the defensive *response* must be "immediately necessary." Model Penal Code § 3.04(1). Indeed, imminence may be merely another way of expressing the requirement of necessity. Robinson at 78. LaFave and Scott, for example, believe that the imminence requirement makes sense as part of a necessity defense because if an attack is not immediately upon the defender, the defender has other options available to avoid the attack that do not involve the use of force. LaFave & Scott at 656. If, however, the fact of the attack becomes certain and no other options remain, the use of force may be justified. To use a well-known hypothetical, if A were to kidnap and confine B, and then tell B he would kill B one week later, B would be justified in using force in self-defense, even if the opportunity arose before the week had passed. *Id.* at 656; *see also* Robinson at § 131(c)(1) at 78. In this hypothetical, while the attack itself is not imminent, B's use of force becomes immediately necessary whenever he has an opportunity to save himself from A.

Fourth, the amount of force should be proportional to the threat. As LaFave and Scott explain, "the amount of force which [the defender] may justifiably use must be reasonably related to the threatened harm which he seeks to avoid." LaFave & Scott at 651. Thus, one may not use deadly force in response to a threat that does not rise to death or serious bodily harm. If such harm may result, however, deadly force is appropriate. As the Model Penal Code § 3.04(2)(b) states, "[t]he use of deadly force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat."

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. Whether such a defense will be upheld depends on the specific context within which the interrogation decision is made. 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

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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.

To be sure, this situation is different from the usual self-defense justification, and, indeed, it overlaps with elements of the necessity defense. Self-defense as usually discussed involves using force against an individual who is about to conduct the attack. In the current circumstances, however, an enemy combatant in detention does not himself present a threat of harm. He is not actually carrying out the attack; rather, he has participated in the planning and preparation for the attack, or merely has knowledge of the attack through his membership in the terrorist organization. Nonetheless, some leading scholarly commentators believe that interrogation of such individuals using methods that might violate section 2340A would be justified under the doctrine of self-defense, because the combatant by aiding and promoting the terrorist plot "has culpably caused the situation where someone might get hurt. If hurting him is the only means to prevent the death or injury of others put at risk by his actions, such torture should be permissible, and on the same basis that self-defense is permissible." Michael S. Moore, *Torture and the Balance of Evils*, 23 Israel L. Rev. 280, 323 (1989) (symposium on Israel's Landau Commission Report).[72] *See also* Alan M. Dershowitz, *Is It Necessary to Apply "Physical Pressure" to Terrorists—and to Lie About It?*, 23 Israel L. Rev. 192, 199–200 (1989). Thus, some commentators believe that by helping to create the threat of loss of life, terrorists become culpable for the threat even though they do not actually carry out the attack itself. If necessary, they may be hurt in an interrogation because they are part of the mechanism that has set the attack in motion, Moore, at 323, just as is someone who feeds ammunition or targeting information to an attacker. Under the present circumstances, therefore, even though a detained enemy combatant may not be the exact attacker—he is not planting the bomb, or piloting a hijacked plane to kill civilians—he still may be harmed in self-defense if he has knowledge of future attacks because he has assisted in their planning and execution.

In addition, we believe that 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*, 135 U.S. 1 (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. Marshal Neagle for shooting and killing the assailant of Supreme Court Justice Field. In granting the writ of habeas corpus for Neagle's release, the Supreme Court did not rely alone upon the marshal's right to defend another or his right to self-defense. Rather, the 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. *Id.* at 67 ("We cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States

[72] Moore distinguishes that case from one in which a person has information that could stop a terrorist attack, but who does not take a hand in the terrorist activity itself, such as an innocent person who learns of the attack from her spouse. Moore, 23 Israel L. Rev. at 324. Such individuals, Moore finds, would not be subject to the use of force in self-defense, although they might be under the doctrine of necessity.

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who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death."). 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.

If the right to defend the national government can be raised as a defense in an individual prosecution, as *Neagle* suggests, then a government defendant, acting in his official capacity, should be able to argue that any conduct that arguably violated a criminal prohibition was undertaken pursuant to more than just individual self-defense or defense of another. In addition, the defendant could claim that he was fulfilling the Executive Branch's authority to protect the federal government and the nation from attack after the events of September 11, which triggered the nation's right to self-defense. 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, 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.

There can be little doubt that the nation's right to self-defense has been triggered under our law. The Constitution announces that one of its purposes is "to provide for the common defense." U.S. Const., Preamble. Article I, § 8 declares that Congress is to exercise its powers to "provide for the common Defence." *See also* 2 Pub. Papers of Ronald Reagan 920, 921 (1988-89) (right of self-defense recognized by Article 51 of the U.N. Charter); *supra* Part III.A.4.a. The President has a particular responsibility and power to take steps to defend the nation and its people. *In re Neagle*, 135 U.S. at 64. *See also* U.S. Const. art. IV, § 4 ("The United States shall . . . protect [each of the States] against Invasion"). As Commander-in Chief and Chief Executive, he may use the armed forces to protect the nation and its people. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). And he may employ secret agents to aid in his work as Commander-in-Chief. *Totten v. United States*, 92 U.S. 105, 106 (1876). As the Supreme Court observed in *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), in response to an armed attack on the United States "the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority." *Id.* at 668. The September 11 events were a direct attack on the United States that triggered its right to use force under domestic and international law in self-defense, and as we have explained above, the President has authorized the use of military force with the support of Congress.

As we have made clear in other opinions involving the war against al Qaeda, the 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 defendant's individual right.

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Conclusion

For the foregoing reasons, we conclude that the Fifth and Eighth Amendments do not extend to alien enemy combatants held abroad. Moreover, we conclude that different canons of construction indicate that generally applicable criminal laws do not apply to the military interrogation of alien unlawful combatants held abroad. Were it otherwise, the application of these statutes to the interrogation of enemy combatants undertaken by military personnel would conflict with the President's Commander-in-Chief power.

We further conclude that CAT defines U.S. international law obligations with respect to torture and other cruel, inhuman, or degrading treatment or punishment. The standard of conduct regarding torture is the same as that which is found in the torture statute, 18 U.S.C. §§ 2340–2340A. Moreover, the scope of U.S. obligations under CAT regarding cruel, inhuman, or degrading treatment or punishment is limited to conduct prohibited by the Eighth, Fifth and Fourteenth Amendments. Customary international law does not supply any additional standards.

Finally, even if the criminal prohibitions outlined above applied, and an interrogation method might violate those prohibitions, necessity or self-defense could provide justifications for any criminal liability.

Please let us know if we can be of further assistance

John C. Yoo
Deputy Assistant Attorney General

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Statement of Philip Zelikow
United States Senate Committee on the Judiciary,
Subcommittee on Administrative Oversight and the Courts

May 13, 2009

Mr. Chairman, Senator Sessions, thank you for giving me the opportunity to appear before you today. The declassification of Justice Department legal opinions on the legality of an interrogation program operated by the CIA has reopened an important public debate. The debate is on how the United States should get intelligence from captives taken in the global armed conflict against the violent Islamist extremist organization, al Qaeda, its allies, and its affiliates, as these organizations wage war against our country, and our people.

The Committee has my c.v. so I won't detail my experience or scholarship. I will concentrate in this statement on my involvement in debates on the treatment of enemy captives in order to discuss the effectiveness of such methods and the legal reasoning employed to judge this and future intelligence programs.

At the outset, I will address a few frequently asked questions:

-- I have no view on whether former officials should be prosecuted. We have institutions to make those judgments. The factual and legal story is complicated, more complicated than is generally recognized. We should let our institutions do their job.

-- There should be a thorough inquiry, yielding a public report, to:

  -- *comprehend* how the United States came to operate such an unprecedented program so that we can learn from that; and

  -- *evaluate* whether the more constrained intelligence program we have been operating against al Qaeda in Iraq for at least four and a half years and against al Qaeda worldwide for at least three and a half years is adequate to protect the country. I think it is. But important people have challenged that view. Since the issue is so important, our

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current approach should be validated, or it should be changed.

-- I have no view on whether Justice Department lawyers acted unethically or improperly. I believed at least some of their legal opinions on this subject were unsound, even unreasonable. But I don't know how they did their work. Others should judge.

In 2003, while serving as executive director of the 9/11 Commission, some of my staff colleagues and I were concerned because the CIA was unwilling to disclose information about the conduct of the interrogations of key detainees and would not allow access to the detainees or the interrogators.[1] The Commission's concerns deepened as press reports in 2004 indicated that detainees might have been abused. Therefore, in its July 2004 report, the Commission formally recommended that the United States "engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists" drawing "upon Article 3 of the Geneva Conventions on the law of armed conflict," an article "specifically designed for those cases in which the usual laws of war did not apply."

This article, common to all four of the Geneva Conventions on armed conflict, was meant to provide a 'floor' to handle situations where usual POW status does not apply. It prohibits "cruel treatment" under any circumstances and bans "outrages upon personal dignity, in particular humiliating and degrading treatment." In its recommendation, the 9/11 Commission noted that these "minimum standards are generally accepted throughout the world as customary international law."

Although the Bush administration accepted most of the Commission's recommendations, this was one of the few it did not accept. That refusal plainly signaled that the administration was reserving the right to inflict

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[1] After the 2007 disclosure that the CIA had destroyed videotapes of interrogations, the Commission's efforts to learn more about the circumstances surrounding interrogations were summarized in a report that I prepared with our former deputy general counsel, Steve Dunne. That unclassified report has been made public. A federal special prosecutor, John Durham, is currently investigating the destruction of the videotapes.

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treatment that might violate the so-called "CID" standard. "CID" stands for "cruel, inhuman, or degrading" – a standard expressed, in slightly varying terms, in Common Article 3 of the Geneva Conventions that I just mentioned, in the Convention Against Torture, another signed and ratified treaty obligation, and is a standard also found in a Protocol to the Geneva Conventions that had been accepted by most countries and by the United States during the Reagan administration. The administration's initial rejection of the 9/11 Commission recommendation on this point was therefore both revealing and troubling.

As 2004 turned to 2005, the controversy about the treatment of captives intensified. There were the revelations of detainee abuse in military facilities in Iraq, and reports of alleged murders. There were reports of past abuses at the Guantanamo facility. There were growing rumors and reports about other sites run by the CIA. I later learned that, in 2004, the CIA Inspector General, John Helgerson, had prepared a secret report that was plainly skeptical and worried about the Agency's treatment of captives. I was acquainted with Helgerson and respected his judgment; I also later talked to CIA officials who worked on this study. An important critique, the IG report was also another reminder about the outstanding professionalism that can always be found in the Agency's ranks.

In 2005, I became Counselor of the Department of State. This should not be confused with the duties of the State Department's Legal Adviser. The "Counselor" is an old office at State, a place where the Secretary puts someone who serves as a kind of deputy on miscellaneous issues. Among my duties, I was to be the subcabinet "deputy" for the Department on issues of intelligence policy or counterterrorism.

By June 2005, President Bush wanted to reconsider the current approach. He asked his advisers to develop real options for the future of the Guantanamo facility, for the eventual disposition of detainees held by CIA, and to look at the standards governing the treatment of enemy captives.

Secretary of State Condoleezza Rice was in favor of change. Also supporting change was her Legal Adviser, John Bellinger, who had held

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the same job for her on the NSC staff. Bellinger was already deeply concerned about detainee policies and carried scars from earlier bureaucratic battles on the topic.

Subcabinet deputies began meeting regularly in highly sensitive meetings to consider these issues. I represented the Department at these meetings, along with Mr. Bellinger. I was thus 'read in' to the details of this particular CIA program for the first time.

Why was such a program adopted? I do not yet adequately understand how and why this happened. But four points stand out:

First, the atmosphere after 9/11. The country had suffered the most devastating single attack in its history. Attitudes toward those behind this mass murder were understandably merciless. The feeling of being at war was real, at least in the White House. Almost every morning, President Bush himself received nerve-jangling briefings just on the latest threats. Almost every afternoon, usually at 5 p.m., George Tenet would review the latest engagements as a de facto Combatant Commander in a global war. Some of the threat reports were apocalyptic, some scares have never become public. I saw many such reports when serving on the President's Foreign Intelligence Advisory Board.

One result was that the tough, gritty world of 'the field' worked its way into the consciousness of the nation's leaders to a degree rarely seen before, or since. A large cultural divide shadowed these judgments, a divide between the world of secretive, bearded operators in the field coming from their 3 a.m. meetings at safe houses, and the world of Washington policymakers in their wood-paneled suites. As the policymakers sense this divide, they often and naturally become more deferential – especially in a time of seemingly endless alarms. What policymakers can sometimes miss, though, is that the world of the field has many countries and cultures of its own. Seasoned operators often disagree about what the government should do, and did in this case, but policymakers were rarely aware of these arguments.

Second, the CIA – an agency that had no significant institutional capability to question enemy captives – improvised an unprecedented,

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elaborate, systematic program of medically monitored physical torment to break prisoners and make them talk. This program was apparently based on the SERE program familiar to civilian and military intelligence officials from their training. The program was reportedly reverse-engineered and then sold to policymakers as being no more than "what we do to our own trainees." Much about this policy development process is still unclear, though press reports have already discussed some of the fallacies and omissions in the reverse-engineering approach.

There have also been conflicting accounts about the role of "supply" and "demand": CIA policy entrepreneurs and officials in the White House or in the Office of the Vice President who were pushing for better intelligence. Nor is it clear just how the program evolved. It would be important to grasp how the program was understood and sold at each stage in this evolution. But the program would not have come into being unless an executive department or agency of the government was willing to develop it and defend it.

Third, the leaders of the CIA evidently believed, and told the government's leaders, that their program would be uniquely effective in getting information from high-value captives. "Uniquely" is the key word. After all, other kinds of interrogation programs were well known to experts in law enforcement and the U.S. armed forces. The Director of the CIA, the de facto combatant commander in an ongoing fight, apparently emphasized that there were no good alternatives to adoption of this proposal.

Fourth, Attorney General John Ashcroft and his Department of Justice, along with the White House Counsel, Alberto Gonzales, assured the government's leaders that the proposed program was lawful. Those assurances were renewed by Ashcroft's successor, Mr. Gonzales, and by Gonzales' successor as White House Counsel, Harriet Miers.

I will discuss the legal issues in more detail in a moment. For now, I wish to return to the issue of unique "effectiveness" and the supposed absence of alternatives.

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There is quite a bit of empirical and historical information available about interrogation experience in this country, in its past wars, and in the experiences of other democracies facing terrifying threats. I have done some work on the British, French, and Israeli experiences. These experiences and others are highly instructive. They show the damage that these programs can do to the counterterror effort, the process of trial and error as alternatives emerged, and the proven effectiveness of some of these alternatives. America has had extensive experience with interrogation of high-value detainees, especially in World War II when special facilities were created for this purpose. The national policy then was to treat the detainees humanely, even though thousands of lives were potentially at stake in the midst of a brutal, total war. It is not clear how much, if any, of this knowledge was canvassed and analyzed when the critical arguments over adoption of this unprecedented program were occurring in 2002 and 2003.

By the time I began engaging in these arguments, in the spring and summer of 2005, another important source of data had emerged. This was the American intelligence and interrogation effort against al Qaeda in Iraq. This was an interagency effort, including CIA and FBI experts, organized by the military's Joint Special Operations Command. By 2005, if not earlier, this program was complying with basic international standards in its interrogation of captives. The program was high-tempo and time-urgent. The officers running the interrogation program considered it effective and, at least by mid-2005, the government's leaders were aware of their positive assessment.

Nonetheless, the intelligence community's position in 2005, and later, was that a substantial program of intense physical coercion was uniquely necessary to protect the nation. The arguments that have appeared recently in the press are the same arguments, even using some of the same examples, used to defend the program against its internal critics four years ago.

Examples of success cite plots thwarted or terrorists captured. Some of these examples may not be accurate. Others may be exaggerated, or they may mask murky, internal arguments among operatives and analysts about whose source proved out, or which lead was key. Rival claims of credit that often accompany successful cases. But getting into

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a debate about whether the CIA program produced useful intelligence misses the point.

The point is not whether the CIA program produced useful intelligence. Of course it did. Quite a lot. The CIA had exclusive custody of a number of the most important al Qaeda captives in the world, for years. Any good interrogation effort would produce an important flow of information from these captives.

Complicating the story, the CIA did not just rely on physical coercion. A long-term interrogation program was also being employed, mustering a number of experts using growing skill in patiently mining for more information and assimilating it. Indeed, one of the tragedies of this program is that the association with physical coercion detracts attention away from some of the very high quality work the CIA did do for the country, quality work that has continued in recent years even after this program was substantially dismantled.

So the issue is not whether the CIA program of extreme physical coercion produced useful intelligence; it is about its net value when compared to the alternatives.[2] And, even though the program may have

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[2] While in government, I joined in encouraging the Intelligence Science Board, a federal advisory group, and its chairman, Robert Fein, to pursue a professional examination of the empirical data, science, and pseudo-science surrounding the topic of interrogation. The Board ultimately produced a valuable report with papers from a variety of experts.

A representative conclusion, from a veteran interrogator and former director of the Air Force Combat Interrogation Course, was that "the scientific community has never established that coercive interrogation methods are an effective means of obtaining reliable intelligence information." The author added that, "Claims from some members of the operational community as to the alleged effectiveness of coercive methods in educing meaningful information from resistant sources are, at best, anecdotal in nature and would be, in the author's view, unlikely to withstand the rigors of sound scientific inquiry." Col. Steven Kleinman, "KUBARK Counter-Intelligence Interrogation Review: Observations of an Interrogator – Lessons Learned and Avenues for Further Research," in Intelligence Science Board, *Educing Information – Interrogation: Science and Art – Foundations for the Future* (Washington, D.C.: National Defense Intelligence College Press, December 2006), p. 130 and note 91.

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some value against some prisoners, it has serious drawbacks just in the intelligence calculus, such as:

-- constraints in getting the optimal team of interrogators, since law enforcement and military experts could not take part;

-- whether the program actually produces much of the time-sensitive current intelligence that is one of its unique justifications;

-- loss of intelligence from allies who fear becoming complicit in a program they abhor and a whole set of fresh problems with coalition cooperation on intelligence operations;

-- poorer reliability of information obtained through torment;

-- possible loss of opportunities to turn some captives into more effective and even cooperative informants; and

-- problems in devising an end-game for the eventual trial or long-term disposition of the captives.

This skepticism about effectiveness links to wider concerns about how the United States should treat captured terrorists or terrorist suspects. By 2005, the raging controversy over "Abu Ghraib" or "Guantanamo" or "torture" was hurting the United States position in the world more than any other problem in our foreign policy.

As Secretary of State, Dr. Rice placed a high priority on changing the national approach to the treatment of detainees. Therefore, once the President indicated his readiness to hear alternatives, we first attempted to develop a 'big bang' approach, a presidential initiative that might take on the whole cluster of issues in a single announcement.

To show what such an initiative might look like and how it could be presented, and with help from Mr. Bellinger, I worked with the deputy secretary of defense, Gordon England, on a joint paper, a notional draft of the building blocks of such an initiative. Deputy Secretary England was aided by DOD's Deputy Assistant Secretary for detainee affairs, Matt

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Waxman, and other staff. Our (unclassified) joint paper outlining the elements of a presidential initiative was distributed in June 2005. (As an aid to the committee a copy of it is attached at Annex A.[3])

However the Secretary of Defense, Donald Rumsfeld, indicated that this paper did not represent his Department's views. He designated a different official as his deputy for these issues. The NSC staff then felt it was more appropriate for the interagency process to address the specific issues incrementally, rather than take up discussion of this broad paper.

At State we then focused much of our effort on recommending a different legal framework for evaluating the treatment of enemy captives. We felt it was very important to focus on the "CID" – cruel, inhuman, and degrading -- standard.

The administration had always conceded the applicability of the federal anti-torture statute and had repeatedly held that the CIA program did not violate it. The Justice Department's view was authoritative for the executive branch and was immovable. The anti-torture language, as interpreted by Justice, also turned on medical assessments by CIA doctors, assessments we could not challenge. Taking these facts into account, plus the fact that "CID" was actually a stronger standard codified in three relevant treaties, we concentrated our advocacy on adoption of the "CID" guideline.

The "CID" standard was critical for two other reasons.

-- It was the standard that had been proposed by Senator John McCain and his allies, including Senator Lindsey Graham, in the "McCain Amendment."

-- The "CID" standard, as codified in Article 3 of the Geneva Conventions, is also the relevant standard in the federal war

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[3] A copy was provided to the press more than a year later, apparently by a Defense Department source. See Tim Golden, "Detainee Memo Created Divide in White House," *New York Times*, October 1, 2006. The paper was thereafter made available to other reporters.

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> crimes law (18 U.S.C. section 2441) which then stated (it was later amended) that any conduct constituting a violation of Article 3 was a war crime, a felony punishable by up to life imprisonment.

The administration position on all these "CID" arguments had been this: We do not have to measure our conduct against this standard because none of these treaties apply. If the standard did apply, the CIA program did not violate it. The outer defenses, a series of technical, jurisdictional arguments, had received the most attention. Samples can be seen in the OLC opinion of May 30, 2005.

Also, OLC's view was that Geneva Common Article 3 did not apply because it was meant for civil conflict, not an international war (Article 3 was written that way because its drafters thought international wars would be covered by fuller Geneva protections; they thought civil war was the loophole they were closing with the minimum standard of Article 3.) And, although the federal war crimes statute's reference to "conduct constituting" could be construed as stating a substantive compliance standard, the OLC did not share that view.

In 2005 State worked to persuade the rest of the government to join in developing an option that would abandon these technical defenses and accept the "CID" standard. An illustration of these arguments, as made at the time, is in an unclassified paper prepared with Mr. Bellinger's help and circulated in July 2005. It is attached at Annex B.

Both deputies and principals battled over these topics on into the fall of 2005, including the issue of how the administration should deal with Senator McCain's proposed amendment. New press reports, by Dana Priest in the Washington Post, fueled further controversy – especially in Europe.

By the end of 2005 these debates in both the executive and legislative branches did lead to real change. On December 5, as Secretary Rice left on a European trip, she formally announced on behalf of the President that the "CID" standard would govern U.S. conduct by any agency,

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anywhere in the world.[4] On December 30 the McCain amendment (to a defense appropriations bill) was signed into law as well, as the Detainee Treatment Act of 2005.

Thus by early 2006 there was no way for the administration to avoid the need to reevaluate the CIA program against a "CID" standard. The work of the NSC deputies intensified, working to develop a comprehensive set of proposals for presidential decision about the future of the CIA program and the future of Guantanamo.

The OLC had guarded against the contingency of a substantive "CID" review in its May 30, 2005 opinion. OLC had held that, even if the standard did apply, the full CIA program -- including waterboarding – complied with it. This OLC view also meant, in effect, that the McCain amendment was a nullity; it would not prohibit the very program and procedures Senator McCain and his supporters thought they had targeted.

So, with the battle to apply the standard having been won, State then had to fight another battle over how to define its meaning. That meant coming to grips with OLC's substantive analysis.

OLC contended that these subjective terms – like "cruel" or "humane" -- should be interpreted in light of the well developed and analogous restrictions found in American constitutional law, specifically through the interaction of the 5th, 8th, and 14th amendments to the U.S. Constitution. As OLC observed in its May 30 opinion, the Congress had conditioned its ratification of one of the "CID"-type standards, the one found in the Convention Against Torture, on its being interpreted in just this way.

Therefore, to challenge OLC's interpretation, it was necessary to challenge the Justice Department's interpretation of U.S. constitutional law. This was not easy, since OLC is the authoritative interpreter of such law for the executive branch of the government. Many years earlier I had worked in this area of American constitutional law. The

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[4] Perhaps coincidentally, CIA officials destroyed existing videotapes of its coercive interrogations in this same time period, in November 2005.

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OLC interpretation of U.S. constitutional law in this area seemed strained and indefensible. It relied on a "shocks the conscience" standard in judging interrogations but did not seem to present a fair reading of the caselaw under that standard. The OLC analysis also neglected another important line of caselaw, on conditions of confinement.

While OLC's interpretations of other areas of law were well known to be controversial, I did not believe my colleagues had heard arguments challenging the way OLC had analyzed these constitutional rights. With the issue of "CID" definition now raised so squarely, and so important to the options being developed for the President, it seemed necessary to put that legal challenge in front of my government colleagues, citing relevant caselaw.

Further, the OLC position had implications beyond the interpretation of international treaties. If the CIA program passed muster under an American constitutional compliance analysis, then – at least in principle -- a program of this kind would pass American constitutional muster even if employed anywhere in the United States, on American citizens. Reflect on that for a moment.

I distributed my memo analyzing these legal issues to other deputies at one of our meetings, probably in February 2006. I later heard the memo was not considered appropriate for further discussion and that copies of my memo should be collected and destroyed. That particular request, passed along informally, did not seem proper and I ignored it. This particular legal memo has evidently been located in State's files. It is currently being reviewed for possible declassification.

The broader arguments over the future of the CIA program went on for months, even though the old program had effectively been discontinued. There were continuing issues over whether or how to maintain a different kind of CIA program. Both principals and deputies examined proposals to bring the high-value detainees out of the 'black sites' and to Guantanamo where they could be brought to justice (and would give accounts of their treatment to lawyers and the Red Cross); seek legislation that would close Guantanamo; accept fully the application of Common Article 3; and find some way of maintaining a standby CIA

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program that would comply with legal standards. A new OLC opinion was also being developed in the spring of 2006 to deal with the different circumstances, including the McCain amendment. We at State were concerned about this development, unless OLC had reconsidered how to interpret the "CID" standard.

We nonetheless believed these issues were moving in an encouraging direction, though the administration certainly remained divided. Options for action on all the major issues had been developed for possible presidential decision and had already been discussed repeatedly by the principal officers of the government.

Then, on June 29, the U.S. Supreme Court decided *Hamdan v. Rumsfeld*. That decision held that Geneva Common Article 3 applied to the U.S. government's treatment of these captives as a matter of law. Immediately, the potential exposure to criminal liability in the federal war crimes act became real.

Internal debate continued into July, culminating in several decisions by President Bush. Accepting positions that Secretary Rice had urged again and again, the President set the goal of closing the Guantanamo facility, decided to bring all the high-value detainees out of the 'black sites' and move them toward trial, sought legislation from the Congress that would address these developments (which became the Military Commissions Act) and defended the need for some continuing CIA program that would comply with relevant law. President Bush announced these decisions on September 6.

I left the government at the end of 2006 and returned to the University of Virginia. Both Secretary Rice and Mr. Bellinger remained deeply involved in these issues for the following two years, working for constructive change. Mr. Bellinger, in particular, also deserves credit for exhausting, patient diplomacy to carry forward the idea of working with our key allies to build common, coalition approaches on these tough problems. He has conducted several international conferences that have successfully advanced this effort.

The U.S. government adopted an unprecedented program of coolly calculated dehumanizing abuse and physical torment to extract

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information. This was a mistake, perhaps a disastrous one. It was a collective failure, in which a number of officials and members of Congress (and staffers), of both parties played a part, endorsing a CIA program of physical coercion even after the McCain amendment was passed and after the Hamdan decision . Precisely because this was a collective failure it is all the more important to comprehend it, and learn from it.

For several years our government has been fighting terrorism without using these extreme methods. We face some serious obstacles in defeating al Qaeda and its allies. We could be hit again, hit hard. But our decision to respect basic international standards does not appear to be a big hindrance us in the fight. In fact, if the U.S. regains some higher ground in the wider struggle of ideas, our prospects in a long conflict will be better.

Others may disagree. They may believe that recent history, even since 2005, shows that America needs an elaborate program of indefinite secret detention and physical coercion in order to protect the nation. The government, and the country, needs to decide whether they are right. If they are right, our laws must change and our country must change. I think they are wrong.

Attachments:

Annex A: "Elements of Possible Initiative" (June 2005)
Annex B: "Detainees – The Need for a Stronger Legal Framework" (July 2005)
Annex C: Zelikow c.v.

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Elements of Possible Initiative

Introduction

The United States has had to adapt in many ways to a new kind of global war. As we learn more from experience, the President has offered a vision of new institutions to sustain our effort for years to come.

A new Department of Homeland Security, a transformed Department of Defense, a refocused and restructured Intelligence Community, a different kind of FBI – these are just some examples of the way our government has been adjusting to a new era in world politics. With presidential leadership, America's strategies and institutions continue to evolve. In coming weeks and months we will be describing a fresh approach to our overall strategy, including the role of transformational diplomacy, so that we can build up constructive alternatives to violent extremism.

One of the issues in this new kind of war is what to do with the suspected terrorists captured by our side, including our allies. In the weeks after the mass murder of Americans on 9/11, the U.S. government quickly devised some initial procedures to support urgent military operations in Afghanistan and the intelligence and law enforcement efforts we were making around the world. Other governments around the world are now also struggling to cope with this challenge.

The dilemmas are not easy. The individuals come from many countries and are often captured far from their original homes. Some of them are effectively stateless, owing allegiance only to the extremist cause of a transnational terrorist movement. Some are extremely dangerous. Some have information that may save lives, perhaps even thousands of lives.

They do not fit readily into any existing system of criminal or military justice. And, while balancing the danger these individuals may present, they must be treated humanely, consistent with our values and the values of the free world.

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Learning from experience, the U.S. will now lead in designing an international system for handling captured combatants in this new kind of global conflict.

Outcomes

An effective system for handling terrorists and terrorist suspects captured in this global war, those who cannot properly be accommodated in the usual criminal process, must be durable – politically, legally, and within the coalition joining us in the fight. It should therefore aim at the following outcomes:

-- Hold the detainees who pose a high risk of returning to the war and killing innocents and interrogate detainees who may have significant, life-saving, intelligence.

-- Bring to justice those detainees who have committed war crimes – crimes against humanity, like the mass murder of innocents.

-- Gain broad, sustainable understanding and acceptance from the American people and from the nations that join us in the worldwide coalition against violent extremism.

-- Pass muster for years to come under American law and relevant standards of international law.

-- Give workable, clear, and unambiguous guidelines for the professional and humane conduct expected from those who will operate the system.

Necessities of a New Kind of War

In briefly summarizing how the current system evolved, it is important to convey the dilemmas the government faced in conducting the necessary combat, intelligence, and law enforcement operations after 9/11.

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-- The standard system for criminal justice does not fit.

-- The traditional formal system for Prisoners of War does not apply.

-- The potential dangers of follow-on attacks were – and are -- very real.

But, thanks in part to the successes of the first phases in this global war, we have now learned more about the enemy and can refine our approach. For example, hundreds of those originally detained at Guantanamo have been returned to their home countries, where some of them have been released.

-- The U.S. has instituted procedures to review every case and narrow down the number of individuals who must be detained either by us or others.

-- Wherever possible, we are returning individuals to their home country. Some of these countries, though, like the U.S., are still struggling to design legal arrangements that can adapt to this challenge.

-- As in the civilian world of parole for violent criminals, the U.S. is accepting some risk in the process of transfer and release. Some of those released have already returned to the fight.

-- Nevertheless, the U.S. will hold only those individuals who present a high risk and will not or cannot be held by anyone else.

Common Values, Common Standards

The new kind of war forced the United States to develop new procedures. As other nations face this challenge too, the U.S. will work with its key allies in this war to develop common approaches.

-- Each nation will have its own specific procedures. A foreign terrorist fighting in Afghanistan could be captured by Afghans, Americans, Australians, Italians, or forces from a dozen other countries. Regardless of such chance elements, the treatment of a prisoner

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should be built on **a foundation of common values and basic standards** – a system that is reasonably 'interoperable.'

The President will therefore appoint a special board (which could be his existing Foreign Intelligence Advisory Board) with the following charge:

-- **Recommend a policy and legal foundation to the President that he can propose to the Congress as a basis for any needed legislation and that he can also use as a basis for international discussion.**

-- **Review general U.S. government detainee policy and operations. Evaluate issues of effectiveness and intelligence value. Recommend a balanced path for detention and treatment that will achieve the long-term outcomes listed above.**

The policies of government agencies other than DOD cannot be walled off. That wall will inevitably be broken anyway, probably soon. It is better that this administration do it, and do it early in the second term, so that the review is constructive and forward-looking and form part of this President's worldwide strategy against violent extremism.

The U.S. will thus work with its key allies to agree upon a common international foundation for national practice.

In the interim, while a lasting foundation is being developed, the U.S. needs clear guidelines, applicable and interoperable worldwide, for detention and treatment of captured enemy combatants in this global war.

-- **As an interim approach, the U.S. will choose – as a matter of policy – to treat such captives, once they move into the regular detention system, as if they were civilian detainees under the law of war. This is the system generally being used by our forces in Iraq. We thus accept the applicability of the baseline Article 3 that appears in all four of the Geneva Conventions on the Law of War. We would thus also draw upon the standards in the Fourth Geneva Convention on the Law of War.**

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-- WE ARE NOT SAYING THAT THESE DETAINEES ARE NECESSARILY ENTITLED TO THIS STATUS. TO BE CLEAR: WE ARE GIVING THEM A TEMPORARY STATUS THEY DO NOT DESERVE. BUT WE ARE NOT DOING THIS FOR THEM. WE ARE DOING IT FOR US.

-- Adopting this interim approach allows us to handle the detainees on a well understood basis that gives our forces clear, unambiguous guidelines for conduct. We are already applying these standards in our deadliest counterterrorism fight today.

-- The effective significance of the change is relatively modest, given our experience and the procedures that have already evolved for screening, custody, interrogation, and disposition in Guantanamo, Afghanistan, and Iraq. But the impact of the change, and the clear alignment with Geneva, could be far-reaching.

-- By harmonizing these systems we will be better able to explain what we are already doing – combatant status review tribunals, administrative review boards, etc.

-- This interim approach also is one that civilian courts are more likely to understand. They will no longer feel they must intervene to fill a legal vacuum. Instead they will see an established framework to which civilian courts have traditionally deferred.

-- This interim approach also is one that Americans and the world are more likely to understand and accept as reasonable.

This interim approach allows our military and intelligence officials to conduct immediate post-capture interrogations on a special basis. In every country, individuals are held temporarily, away from public scrutiny, often after just after they are apprehended, in order to conduct humane but effective questioning and gather information while it is most current and operations – on both sides – are still ongoing.

-- This post-capture intelligence system will continue in a small number of selected cases. It will last for a defined period -- measured in days or weeks, not months or years – in a manner authorized and reviewed

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by senior civilian officials designated for this purpose by the President.

-- There is a risk that some intelligence may be lost when enemy captives are ultimately placed in a less coercive regular detention system. As in our prior wars, this risk should be recognized, but accepted as necessary to maintain the integrity of the system and our common, fundamental values.

-- The post-capture intelligence system may actually be more sustainable, over the long-haul, if it includes an appropriate transition stage so that people can be moved on to a durable detention system.

As part of this interim system, and as the number of detainees goes down, the U.S. will no longer need to maintain a detention facility in Guantanamo. That facility will close and we expect to transfer remaining detainees to a facility in the United States.

Training and Accountability

The U.S. entered this new kind of war without large numbers of experts trained in the custody and interrogation of terrorists captured from across the world. Since then the U.S. has learned from experience and has developed much stronger and more effective professional standards for the conduct of effective interrogations.

-- The U.S. will establish stronger baselines of common training, across the military departments, across different federal agencies, and reaching out to allies that share our interest in conducting effective, humane interrogations of dangerous suspects.

Abuses have occurred in detention and interrogations. The U.S. believes in holding those who have acted improperly accountable for their misconduct. That process is already well underway:

-- One general officer has been relieved of command and demoted;

-- 15 individuals have been convicted by court martial;

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-- 35 more have been referred to trial by court martial;

-- 84 more have received non-judicial punishments; and

-- 44 more have been reprimanded or discharged.

Hundreds of criminal investigations have either been completed or are continuing. There have been at least ten major reviews, assessments, inspections, and investigations of detention and interrogation operations.

Nonetheless we recognize the interest in an investigation conducted outside of the departments and agencies involved. **The presidential board described above will therefore also be asked to assess past and ongoing department and agency investigations to insure their completeness and accuracy and to recommend processes for the future.**

Transparency

If the U.S. acts as if it has something to hide, Americans and the world will assume it does.

A durable system for handling captured terrorist suspects will be conducted in a manner that can withstand outside scrutiny. Further, the mystery can be dispelled in a way that builds understanding for the system, and for the dilemmas each country must face if it joins in fighting these violent, transnational organizations.

Once individuals move into the longer-term detention system, the system should be accessible to outside visits by properly organized representatives of relevant international institutions, the press, and foreign governments.

Justice

Some individuals detained by the United States have committed war crimes – crimes against humanity. These individuals should finally be brought to justice.

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-- Military commissions should be limited to major criminals clearly guilty of war crimes. We should stop using the system to try small fry. Otherwise the coinage is debased; we trivialize the meaning of 'war crimes.'

-- Massive work has already occurred to prepare for a trial of conspirators in the 9/11 attack. This information has been gathered by the FBI, by the CIA and other intelligence agencies, by the Moussaoui prosecution team, and by the 9/11 Commission – among others.

-- **Khalid Sheikh Mohammed and others in custody should be brought to trial by military commission.**

-- **The President's Military Commission Order should be revised in various ways, already being worked on by the interagency process, to learn from experience and stand up under the kind of attention these trials will receive.**

As these individuals are brought to trial, aspects of their detention and interrogation will come to light. This is a fact. It must be faced. Better to face it now, and by this administration.

-- These individuals should be brought to justice. We should not assume they can just be secretly detained for the rest of their lives without trial.

-- Visible justice for the worst crime in American history cannot both begin and end with the strange case of Zacarias Moussaoui.

-- We place war criminals on trial not just for their benefit, but for the larger purposes of our own society and civilization.

-- **The basic facts about the treatment of some of these high value detainees are already known.** Despite any initial publicity, placing them on trial is ultimately the surest way of keeping these individuals from becoming objects of sympathy, and reminding the world of what these people did.

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Again, the American people will understand the need to hold individuals temporarily under special circumstances. Our intelligence system can continue. But that intelligence system should allow genuine war criminals to receive the justice they deserve.

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Detainees – The Need for a Stronger Legal Framework

U.S. handling of detainees captured in the war on terror should be durable – politically, legally, and among our key allies.

We do not adopt legal standards in our behavior as a favor to terrorists. We do it for ourselves, and to be able to exemplify the values that distinguish us from the terrorists.

In practice, we are already adopting de facto standards of conduct that are good and defensible. In some of the most challenging operations we now conduct, by Special Operations forces against the Zarqawi network in Iraq, our forces have found, for example, that they do not need physical coercion in their interrogations. But these practices are not yet reflected in a legal framework to underpin them.

Some Problems

No clear and consistent standard. It would be useful to have a clear standard we could publicly explain, and train all troops to employ. However:

-- We apply one set of standards in Iraq, which is the central front in the war on terror. We apply another set of standards in Afghanistan. We apply a third set of standards in Guantanamo. We apply a fourth for individuals held at undisclosed locations by other government agencies. And there is, of course, yet another set of standards for individuals held in the normal legal system.

-- Since we have not adopted a clear framework, and since our current approach relies on norms asserted by the U.S. President under his war powers, the world has difficulty understanding whether or how our practices are governed by the rule of law.

No underlying definition of humane treatment. The President has said the United States will treat any detainees "humanely." The USG has not yet defined what "humane" treatment means in the war on terror. Its position with respect to the universally accepted international legal definitions is unclear.

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-- Humane treatment is defined, as a "minimum" standard, in three different treaties (Article 3 of the Geneva Conventions, Article 75 of Additional Protocol I, and Article 16 of the Convention Against Torture).

-- The definitions given in one or more of those treaties have been accepted, at least as customary law of war, by all of our allies in the war on terror (e.g., Britain in 1978; Israel in 1999). The United States, having led the world in fostering such norms (beginning with the Lieber Code promulgated by President Lincoln in 1863) had also accepted these definitions, whatever the combatant's status, in all of its prior practice (e.g., in Korea, Vietnam, and Panama). The Reagan administration, in 1986, stated that the relevant article of Additional Protocol I was a customary norm accepted by the United States.

-- But the United States has not yet accepted any of these definitions in its current operations in the war on terror. Attorney General Gonzales said six months ago (in his confirmation hearings) that the USG accepts the standards in the Convention Against Torture, but is still reviewing whether its practices comply with Article 16 of that Convention.

-- Various international bodies, including the Red Cross and the UN Committee on Torture (a body created by the Convention Against Torture to monitor implementation of the treaty) are attempting to review U.S. practices as well.

-- The U.S. also has a domestic legal standard, in the Constitution's 8th Amendment that states that "cruel and unusual punishment" shall not be inflicted by the United States. The administration has not taken a clear position on whether this prohibition applies to U.S. behavior outside of the United States.

Adoption of standards below or inconsistent with those used by key coalition partners. We need partners who can also detain terrorists with practices analogous to ours, so they can hold them if they catch them, so they can more readily accept transfers from us, and so we have a common foundation for our work.

-- Our established allies who have been fighting desperate battles against terrorism for decades, like Britain and Israel, have – painfully – accepted internationally accepted definitions of humane treatment. Israel did so in 1999, and has been able to sustain its difficult balance throughout the current intifada. (Israel accepts targeted killings of enemies in war, but not cruel, inhuman, or degrading treatment of captives.)

-- We are now in the position of arguing to new partners, like the new Iraqi and Afghan governments, that they must change their laws, lowering their standards, so they can hold detainees the way we can. It will be easier for us to recommend such frameworks to them, if the frameworks are ones they can defend at home and abroad.

Alternatives

There are two basic alternatives to the current approach.

One, we can design our own definition of humane treatment, different from that in existing legal frameworks, and seek domestic or international acceptance for it, as a necessary adaptation to the war on terror.

Two, we can align the U.S. – as a matter of policy – with existing principles in the customary international law of war.

The Department of State prefers the second option. Specifically:

-- Accept as a matter of policy and customary law – not formally binding treaty obligation, the minimum definitions of humane treatment in Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I.

-- Deny POW status to captured terrorist suspects.

-- Accept as a matter of policy and customary law – not formally binding treaty obligation, that once captives are transferred to regular DOD detention facilities, that they will be detained as civilian detainees under the law of war (i.e., the Fourth Geneva Convention). (And allow relevant international observers access to these regular detention facilities.)

-- After a certain allowable period of undisclosed detention, acknowledge whether an individual is in US custody.

We believe that, with minor adjustments, adoption of this framework will not have any substantial detrimental effect on DOD detention operations as they have evolved to date.

Adoption of this framework also would not contradict positions taken to date in domestic litigation and would not be inconsistent with the President's decisions described in his memorandum of February 7, 2002.

The Department has prepared analytical papers on both of these points, which we are prepared to circulate to other agencies.

Concern about the Intelligence System

One reason to avoid any clear legal framework or definition of humane treatment is to allow maximum flexibility for interrogations and detention in the activities of other government agencies. Indeed, it is feared that adoption of such a framework anywhere in the detention system is dangerous, since the example of such a standard could eventually spill over into the activities of other government agencies.

These concerns can be addressed, at least in part, by:

-- Apply Geneva standards for civilian detainees under the law of war only to detainees held in DOD facilities.

-- Set an appropriate time period during which detainees can be held without disclosing that they are in US custody.

-- Ask the DNI whether, based on years of experience now accumulated worldwide and in Iraq, the U.S. can achieve its intelligence objectives while treating detainees humanely, as that term is defined under minimum international standards. Or, alternatively, ask whether experience shows it is necessary, in order to achieve intelligence objectives, to have the right to use practices regarded as cruel, inhuman, and degrading. If such practices are regarded as necessary, the tradeoffs should be clarified for an informed presidential decision.

These are difficult issues. In considering them we recalled how the Supreme Court of Israel (unanimously) wrestled with such questions, dealing in 1999 with the legality of certain interrogation practices used by the Shin Bet.

"Deciding these applications weighed heavy on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country." But they agreed with an earlier Commission that had "rejected an approach suggesting that the actions of security services in the context of fighting terrorism, shall take place in the recesses of the law."

Instead that Commission, and the Israeli Supreme Court chose what it called "the way of Truth and the Rule of Law." The Court observed: "Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand."

