

**NOMINATION TO THE
U.S. DEPARTMENT OF TRANSPORTATION
AND THE U.S. DEPARTMENT OF COMMERCE**

HEARING

BEFORE THE

**COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE**

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

—————
JUNE 28, 2017
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Printed for the use of the Committee on Commerce, Science, and Transportation



Available online: <http://www.govinfo.gov>

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U.S. GOVERNMENT PUBLISHING OFFICE

30-769 PDF

WASHINGTON : 2018

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

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RENAE BLACK, *Senior Counsel*

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**NOMINATION TO THE
U.S. DEPARTMENT OF TRANSPORTATION
AND THE U.S. DEPARTMENT OF COMMERCE**

WEDNESDAY, JUNE 28, 2017

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., in room SR-253, Russell Senate Office Building, Hon. John Thune, Chairman of the Committee, presiding.

Present: Senators Thune [presiding], Nelson, Sullivan, Young, Cantwell, Klobuchar, Blumenthal, Duckworth, Hassan, Cortez Masto, Fischer, and Heller.

**OPENING STATEMENT OF HON. JOHN THUNE,
U.S. SENATOR FROM SOUTH DAKOTA**

The CHAIRMAN. Good morning. Thank you, Mr. Bradbury and Ms. Walsh, for being here. We have two well-qualified nominees before our Committee today.

Steven Bradbury has been nominated to serve as the General Counsel at the Department of Transportation. Mr. Bradbury is currently a litigation partner at Dechert here in Washington, D.C., and his practice focuses on regulatory enforcement and investigations, rulemakings, and judicial review of agency actions, as well as appellate cases and antitrust matters.

From 2005 to 2009, Mr. Bradbury headed the Office of Legal Counsel at the Department of Justice, the office that provides essential legal advice to the President and the heads of executive departments and agencies. In that role, he received the Edmund J. Randolph Award and the Secretary of Defense Medal for Outstanding Public Service, among other awards.

Before serving in the Justice Department, Mr. Bradbury was a partner at Kirkland & Ellis for 10 years. He clerked for Justice Clarence Thomas on the Supreme Court and for Judge James L. Buckley on the D.C. Circuit. Mr. Bradbury graduated magna cum laude from Michigan Law School and received his B.A. from Stanford University.

If confirmed, Mr. Bradbury will serve as the Chief Legal Officer at the Department of Transportation, with final authority on questions of law. The General Counsel is the legal advisor to the Secretary and is responsible for the supervision, coordination, and review of the legal work of the almost 500 lawyers throughout the Department. The General Counsel is also responsible for the Office

of Aviation Consumer Protection and Enforcement, and coordinates the Department's legislative efforts, regulatory program, and involvement in legal proceedings before other agencies as well as various operational and international legal matters.

Elizabeth Walsh has been nominated to serve as Assistant Secretary and Director General of the United States and Foreign Commercial Service, within the Department of Commerce. She currently serves as a Senior Advisor to Secretary Wilbur Ross. Before that, she served as a Special Assistant to the President and Associate Director for Presidential Personnel. She has had an extensive career in the international arena in both the private and public sectors.

Ms. Walsh has served more than 12 years in the Federal Government, including at the Department of State, the U.S. Mission to the United Nations, and the Department of Energy. She also worked at the United Nations, serving 18 months in Bosnia, during the war. At the Department of State, Ms. Walsh was a senior advisor in the Bureau of Near Eastern Affairs. She holds a Bachelor of Arts degree in Government and International Relations from Georgetown University and a Master of Science degree from the London School of Economics and Political Science.

If confirmed, Ms. Walsh will lead the trade promotion arm of the U.S. Department of Commerce's International Trade Administration. U.S. Commercial Service trade professionals in over 100 U.S. cities and in more than 75 countries help U.S. companies get started in exporting or increasing their sales to new global markets.

As part of the Commerce Department's International Trade Administration, the Commercial Service helps American firms and workers navigate the often complicated and unpredictable waters of foreign trade, so that U.S. firms' sales abroad help to support jobs here in the United States.

Both nominees have consistently proven their willingness to address the challenges facing our Nation.

I would like to thank you both for testifying today and for your willingness to continue your service to our country.

And Senator Nelson, our Ranking Member, is at the DOD NDAA markup right now. The Senate Armed Services Committee is marking up the defense bill, so he is going to be joining us a little bit late.

Senator Cantwell, anything you would like to add?

Senator CANTWELL. [Off microphone.]

The CHAIRMAN. OK. We will then proceed to our panel, starting with Steven Gill Bradbury, of Virginia. He was nominated to be General Counsel, Department of Transportation.

As I mentioned Elizabeth Erin Walsh, of the District of Columbia, to be Director General of the United States and Foreign Commercial Service and Assistant Secretary for Global Markets at the Department of Commerce.

So if you would proceed with your opening remarks, and then we'll get a chance to ask some questions.

Mr. Bradbury.

**STATEMENT OF STEVEN GILL BRADBURY, NOMINEE TO BE
GENERAL COUNSEL, U.S. DEPARTMENT OF TRANSPORTATION**

Mr. BRADBURY. Well, thank you, Chairman Thune and Senator Cantwell. Before I begin, I would just like to introduce my family. My wife, Hilde Kahn, is here, and my daughter, Susanna Bradbury, who just graduated from TJ, Thomas Jefferson High School, in Fairfax. I'm very proud of her. And also here are my wife's parents, Barbara and Walter Kahn, of Bethesda. And I would also just like to introduce my partner and colleague Paul Dennis, who is here supporting me from our firm.

So thank you again, and to the distinguished members of the Committee. I am humbled and honored to come before you today as the nominee to serve as General Counsel of the Department of Transportation. I am deeply grateful to the President and Secretary Chao for the trust and confidence they have placed in me. And again I would like to thank my family and supporters who are here. And I especially want to thank my wife, Hilde, among other things for putting up with me for 29 years.

Someone who could not be here today, but who I know would be the proudest person in this hearing room if she were still alive is my mother, Cora Gill Bradbury. She raised me in Portland, Oregon, as a single mom after my father died before my first birthday. She took in ironing for 75 cents an hour and worked nights in a bakery to support me and my grandmother and to supplement our Social Security income. She encouraged me in every endeavor and always pointed me toward college and a better future. Because of her, I was the first in our family to attend a 4-year university, graduating from Stanford and later from Michigan Law School.

After serving judicial clerkships with Judge James Buckley on the D.C. Circuit and with Justice Clarence Thomas on the Supreme Court, my legal career has focused on administrative litigation and antitrust, agency rulemakings and enforcement actions, appellate cases, and constitutional issues. I have handled a number of substantial regulatory matters in private practice, including before the Department of Transportation.

As the Chairman said, I've also had the great good fortune to serve previously in the Executive Branch of our government. From 2005 to 2009, I headed the Office of Legal Counsel at the Justice Department, where I advised the President, the Attorney General, and the heads of executive departments and agencies on a wide range of complex legal questions arising under the Constitution and the laws and treaties of the United States.

OLC is the office in the Executive Branch where the buck stops on contentious legal issues. OLC does not make policy decisions or authorize any policies for the Executive Branch; rather, its essential function is to provide unvarnished legal advice, not distorted by policy objectives or political considerations to help ensure that the programs approved by senior policymakers are consistent with the rule of law.

Every opinion I gave for OLC represented my best judgment of what the laws in effect at that time required. I certainly recognize and respect that some of the questions we addressed during my tenure in the Office raised difficult issues about which reasonable people could disagree. Indeed, our opinions acknowledged as much.

My previous experiences in government and private practice have given me a working base of knowledge in administrative law and a healthy appreciation for the limits of government authority. They've also instilled in me an abiding reverence for the rule of law and a dedication to preserving the constitutional structures and traditions on which—

[Audience interruption.]

The CHAIRMAN. Order. Order in the hearing room.

Mr. Bradbury, please proceed.

Mr. BRADBURY. Thank you, Mr. Chairman.

These experiences really have instilled in me an abiding reverence for the rule of law and a dedication to preserving the constitutional structures and traditions on which our freedom depends, not least of which is the proper relationship between the Federal Government and the States. I pledge to this Committee that if confirmed, I will bring these same values to work with me every day at the Department of Transportation.

DOT's mission is exceptionally important. The liberty and prosperity of the American people depend in no small part on the safe, efficient operation of the Nation's transportation systems and infrastructure. If privileged to be confirmed by the Senate, I will work alongside the many dedicated career lawyers of DOT to ensure to the best of our abilities that the Department's decisions are well founded and consistent with the statutory authorities provided by Congress. We will devote ourselves to giving the Secretary and the administrators of the Department the legal support they need to maximize public safety in accordance with the law, to strengthen our nation's infrastructure through efficient implementation of authorized funding programs, and to preserve, as Congress intended, competitive markets for private investment and innovation in transportation technology.

Thank you.

[The prepared statement and biographical information of Mr. Bradbury follow:]

PREPARED STATEMENT OF STEVEN GILL BRADBURY, NOMINEE TO BE GENERAL COUNSEL, U.S. DEPARTMENT OF TRANSPORTATION

Thank you, Chairman Thune, Ranking Member Nelson, and distinguished Members of the Committee. I am humbled and honored to come before you today as the nominee to serve as General Counsel of the Department of Transportation.

I am deeply grateful to the President and Secretary Chao for the trust and confidence they have placed in me.

I want to thank my family for their love and support. I am especially thankful to my wife Hilde Kahn—among other things, for putting up with me for 29 years. Hilde is here today, along with our daughter Susanna, who is 18 and just graduated from Thomas Jefferson High School for Science and Technology in Fairfax County, Virginia, and my wife's parents, Barbara and Walter Kahn of Bethesda, Maryland. Our two sons, James and Will, are busy working in Silicon Valley and could not be with us.

Someone else who could not be here today, but who would be the proudest person in this hearing room if she were still alive, is my mother Cora Gill Bradbury. She raised me in Portland, Oregon, as a single mom after my father died before my first birthday. She took in ironing for 75 cents an hour and worked nights in a bakery to support me and my grandmother and to supplement our Social Security income. She encouraged me in every endeavor and always pointed me toward college and a better future.

Because of her, I was the first in our family to attend a four-year university, graduating from Stanford University and later from the University of Michigan Law School.

After serving judicial clerkships with Judge James L. Buckley on the U.S. Court of Appeals for the D.C. Circuit and for Justice Clarence Thomas on the Supreme Court of the United States, my legal career has focused on administrative litigation and antitrust law, agency rulemakings and enforcement actions, appellate cases, and constitutional issues. I have handled a number of substantial regulatory matters in private practice, including before the Department of Transportation.

I have also had the great fortune to serve previously in the Executive Branch of our government. From 2005 to 2009, I headed the Office of Legal Counsel (“OLC”) at the U.S. Department of Justice, where I was called upon to advise the President, the Attorney General, and the executive departments and agencies on a broad range of the most complex legal questions arising under the Constitution and the statutes and treaties of the United States.

As you may know, OLC is the office in the Executive Branch where the buck often stops on contentious legal issues. OLC does not make policy decisions or authorize any policies for the Executive Branch; rather OLC’s essential function is to provide unvarnished legal advice, not distorted by policy objectives or political considerations, to help ensure that the programs approved by senior policy makers are consistent with the rule of law.

In performing that duty, every opinion I gave for OLC represented my best judgment of what the law required. I certainly recognize and respect that some of the questions we addressed raised difficult issues about which reasonable people could disagree. Indeed, my opinions recognized as much at the time.

My previous experiences both in government and in private practice have given me a working base of knowledge in administrative law and a healthy appreciation for the limits of government authority. More broadly, they have instilled in me an abiding reverence for the rule of law and a dedication to the preservation of our Nation’s constitutional structures and traditions on which our freedom depends—not least of which is the proper relationship between the Federal Government and the states.

I pledge to this Committee that, if confirmed, I will bring those same values to work with me every day at the Department of Transportation.

DOT’s mission is exceptionally important. The liberty and prosperity of the American people depend in no small part on the safe, efficient operation of the Nation’s transportation systems and infrastructure.

If privileged to be confirmed by the Senate, I will work alongside the many dedicated career lawyers of DOT to ensure, to the best of our abilities, that the Department’s decisions are well-founded and consistent with the statutory authorities provided by Congress.

We will devote ourselves to giving the Secretary and the administrators of the Department the legal support they need to maximize public safety in accordance with the law, to strengthen our Nation’s infrastructure through efficient implementation of authorized funding programs, and to preserve, as Congress intended, competitive markets for private investment and innovation in transportation technology.

Thank you, Mr. Chairman. That concludes my statement, and I would be happy to answer the Committee’s questions.

A. BIOGRAPHICAL INFORMATION

1. Name (include any former names or nicknames used): Steven Gill (“Steve”) Bradbury. Former name used: Steven Dean Bradbury, 1958–1986 (judicial name change, July 15, 1986).

2. Position to which nominated: General Counsel, Department of Transportation.

3. Date of nomination: June 6, 2017.

4. Address (list current place of residence and office addresses):

Residence: Information not released to the public.

Office: 1900 K Street, N.W. Washington, D.C. 20006

5. Date and place of birth: September 12, 1958; Portland, Oregon.

6. Provide the name, position, and place of employment for your spouse (if married) and the names and ages of your children (including stepchildren and children by a previous marriage).

Spouse: Hilde Elisabeth Kahn. Occupation: Homemaker; registered real estate agent, affiliated with Long & Foster, McLean, VA; owner and developer of in-

vestment property (single family home) through a limited liability company, Chesterbrook Homes LLC, of which she is the sole member.
Three children: James, age 23; Will, age 21; Susanna, age 18.

7. List all college and graduate degrees. Provide year and school attended.

Stanford University (Sept. 1976 to June 1980), BA English, June 1980.
University of Michigan Law School (Aug. 1985 to May 1988), JD *magna cum laude*, May 1988.

8. List all post-undergraduate employment, and highlight all management-level jobs held and any non-managerial jobs that relate to the position for which you are nominated.

July 2009–Present:

Partner
Dechert LLP (law firm)
1900 K Street, N.W.
Washington, D.C. 20006

My practice with Dechert LLP has included representing clients in administrative proceedings and government investigations and enforcement actions, including matters before the Department of Transportation and matters involving public safety and competition issues. I have also represented clients in court cases at all levels raising constitutional issues and questions involving the interpretation of Federal statutes and judicial review of agency actions. In many of these matters, I have interacted extensively with officials of the Federal Government, including at the Department of Transportation. I have also managed complex projects and supervised teams of attorneys and support staff. Finally, during my years at Dechert, I have appeared in public, in court, and in Congress to address issues of public importance and significant legal questions. I believe these experiences are relevant and useful in approaching the duties of the position to which I have been nominated.

April 2004–January 2009:

Acting Assistant Attorney General (Feb. 2005; June 2005–Apr. 2007)
Principal Deputy Assistant Attorney General (Apr. 2004–Jan. 2009)
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

As head of the Office of Legal Counsel, I managed an office of numerous attorneys, including some of the most experienced and accomplished senior career lawyers in the executive branch. OLC is the office in the Justice Department that exercises the Attorney General's authority to provide legal advice to the President and the heads of executive departments and agencies on complex, difficult, and novel questions of constitutional law, statutory interpretation, and treaty matters. During my tenure in OLC, I interacted directly with the Attorney General, the President, the Vice President, the White House Counsel, Cabinet officers, and the general counsels of departments and agencies to address and resolve significant legal issues, including issues on which there was a division of views within the executive branch. I also interfaced extensively with the Committees and Members of Congress and their staffs to explain the legal positions of the Executive Branch and to assist in crafting legislative solutions for complex problems. These experiences in OLC are relevant preparation for potential service as General Counsel of the Department of Transportation.

September 1993–April 2004:

Partner (Oct. 1994–April 2004)
Associate (Sept. 1993–Oct. 1994)
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

As a partner at Kirkland & Ellis, I supervised teams of lawyers in several large cases of significance, including a proposed merger of major airlines, several high profile telecom mergers, large antitrust and securities litigation matters in court, and numerous other appellate matters, constitutional cases, and administrative law matters, several of which involved court challenges to agency rulemakings. I also served on the firm's Finance Committee and the Associate Review Committee for the firm's Washington office. These matters and assign-

ments provide relevant experience for potential service supervising the legal staff of a major department of government with responsibilities in a wide range of administrative law areas.

July 1992–July 1993:
Law Clerk to Justice Clarence Thomas
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

July 1991–July 1992:
Attorney-Adviser
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

July 1990–July 1991:
Law Clerk to Judge James L. Buckley
U.S. Court of Appeals for the D.C. Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001

September 1988–July 1990:
Associate
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

May 1987–July 1987:
Summer Associate
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

May 1986–August 1986:
Summer Associate
Miller, Nash, Wiener, Hager & Carlsen
111 SW Fifth Avenue
Portland, OR 97204

September 1983–August 1985:
Legal Assistant
Davis Polk & Wardwell
1 Chase Manhattan Plaza
New York, NY 10001
(Now located 47th Street & Park Avenue)

November 1981–September 1983:
Assistant Editor (Feb. 1983–Sept. 1983)
Editorial Assistant (Nov. 1981–Feb. 1983)
Avon Books (then a Division of the Hearst Corporation)
1790 Broadway
New York, NY 10019

August 1981–October 1981:
Waiter & Bus Boy
Off Broadway Company (restaurant)
West 69th Street & Broadway
New York, NY
(No longer in business)

April 1981–June 1981:
Waiter
Le Café Meursault (restaurant)
Palo Alto, CA
(No longer in business)

September 1980–October 1980:
Food Service (sandwich maker)
Stanford Coffee House
Tresidder Student Union
Stanford University
Stanford, CA 94305

June 1980–September 1980:

Installer of insulation blankets for water heaters in university housing
Stanford Conservation Center
Stanford University
Stanford, CA 94305

9. Attach a copy of your resume.

Please see Attachment A.

10. List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments, other than those listed above, within the last ten years. None.

11. List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business, enterprise, educational, or other institution within the last ten years.

Partner, Dechert LLP, 7/2009 to present.

Chair (9/2015 to present) and Member (9/2012 to present), Editorial Board for Annual Review of Antitrust Law Developments, ABA Section of Antitrust Law.
Member, 5/2012 to present, Capital Markets Litigation Advisory Committee, U.S. Chamber of Commerce Litigation Center.

Chair, 5/2015 to present, International Law Working Group. John Hay Initiative.

Member, 2/2012 to present, National Security Law Working Group, Heritage Foundation.

12. Please list each membership you have had during the past ten years or currently hold with any civic, social, charitable, educational, political, professional, fraternal, benevolent or religious organization, private club, or other membership organization. Include dates of membership and any positions you have held with any organization. Please note whether any such club or organization restricts membership on the basis of sex, race, color, religion, national origin, age, or handicap.

D.C. Bar; member since 12/1988.

American Bar Association; member, 1988–1992 and 2009 to present.

ABA Section of Antitrust Law, Editorial Board for Annual Review of Antitrust Law Developments; chair, 9/2015 to present, and member, 9/2012 to present.

U.S. Chamber of Commerce Litigation Center, Capital Markets Litigation Advisory Committee; member since 5/2012.

Federalist Society; member off and on beginning in 1993 and currently; was not a member while serving in government.

Heritage Foundation, National Security Law Working Group: participating member since 2/2012.

John Hay Initiative, International Law Working Group; chair, since 5/2015.

Alexander Hamilton Society; member 2012–2014.

Supreme Court Historical Society; member 2013.

Stanford University Alumni Association; member since 1980.

Michigan Law School Alumni Association; member since 1988.

Chesterbrook Swim and Tennis Club (community pool and tennis courts in McLean, VA); member from 06/2008 until 03/2013.

River Falls Community Center Association. Inc. (community pool and tennis courts in Potomac, MD); member from 08/1996 until 09/2007.

Civic Association of River Falls; member from 08/1996 until 09/2007.

Registered member of the Republican Party.

Maryland Republican Party; was a member while living in MD (until 2007).

Virginia Republican Party; currently a member.

To my knowledge, no organization of which I have been a member has ever had a policy of restricting membership on the basis of sex, race, color, religion, national origin, age, or handicap.

13. Have you ever been a candidate for and/or held a public office (elected, non elected, or appointed)? If so, indicate whether any campaign has any out standing debt, the amount, and whether you are personally liable for that debt.

As listed above, I have held appointed office in the U.S. Department of Justice and have served as law clerk to two Federal judges. I have not campaigned for public office and do not have any campaign debt.

14. Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$500 or more for the past ten years. Also list all offices you have held with, and services rendered to, a state or national political party or election committee during the same period.

I have made the following political contributions of \$500 or more in the last ten years:

09/26/2016	\$1,000	National Republican Senatorial Committee
02/21/2016	\$2,700	Marco Rubio for President
06/18/2015	\$2,700	JEB2016, Inc.
09/19/2012	\$2,500	Romney Victory, Inc.
05/08/2012	\$500	Ted Cruz for Senate
09/14/2011	\$1,500	Romney for President
07/26/2011	\$1,000	Romney for President
02/24/2010	\$1,000	National Republican Senatorial Committee

I have held no offices with any political party or election committee. I did serve as an unpaid legal adviser to presidential candidate Mitt Romney in 2012 and as an informal legal adviser to candidate Jeb Bush in 2015–2016.

15. List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals, and any other special recognition for outstanding service or achievements.

—Edmund J. Randolph Award for outstanding service to the Department of Justice, 2007.

—Secretary of Defense Medal for Outstanding Public Service, Nov. 2006.

—National Security Agency’s Intelligence Under Law Award, May 2008.

—Director of National Intelligence’s 2007 Intelligence Community Legal Award (Team of the Year, FISA Modernization).

—Criminal Division’s Award for Outstanding Law Enforcement Partnerships, Nov. 2006.

—Included in list of Washington’s top 40 lawyers under age 40, *Washingtonian* Magazine, Aug. 1998.

—J.D., *magna cum laude*, University of Michigan Law School, May 1988.

—Order of the Coif, University of Michigan Law School, 1988.

—Article Editor, *Michigan Law Review*, 1987–1988.

—Dean’s 1987–1988 Law Review Award for outstanding contribution to the *Michigan Law Review*.

—Book Awards for top grade in law school classes: Administrative Law, Civil Procedure II; and Legal Process.

—Supreme Court clerkship, Justice Thomas, October Term 1992.

—D.C. Circuit clerkship, Judge Buckley, 1990–1991.

—Student Body President, Washington High School, Portland, OR, 1976.

—Officer, Honor Society, Washington High School, Portland, OR, 1975–1976.

—National Merit Scholarship Letter of Commendation, Washington High School, Portland, OR, 1976.

16. Please list each book, article, column, or publication you have authored, individually or with others. Also list any speeches that you have given on topics relevant to the position for which you have been nominated. Do not attach copies of these publications unless otherwise instructed.

Publications:

—Steven G. Bradbury, “National Security and the New Yellow Press,” published as chapter 11 in *Journalism After Snowden: The Future of the Free Press in the Surveillance State*, p. 172 (Emily Bell, Taylor Owen, et al., eds., Columbia Journalism Review Books, Columbia Univ. Press 2017).

—Steven G. Bradbury, *Justice Thomas and the Second Amendment: Protecting Liberty and Promoting Equal Justice*, published online at JusticeThomas.com (Oct. 24, 2016).

—Steven Gill Bradbury, “Celebrating Justice Thomas’s 25 Years of Service on the Supreme Court,” Letter of Tribute Addressed to Sen. Orrin G. Hatch, Sen-

- ate Committee on the Judiciary (Sept. 16, 2016) (published in the Congressional Record).
- Steven G. Bradbury, Opinion Piece, “Clarence Thomas’s 25 years on the Supreme Court are a triumph of perseverance,” FoxNews.com (online) (June 27, 2016).
- John Hay Initiative International Law Working Group, Chaired by Steven G. Bradbury. “Update on China’s Expansion in the South China Sea” (May 6, 2016) (published online).
- John Hay Initiative International Law Working Group, Chaired by Steven G. Bradbury, “JHI Backgrounder: China’s Maritime Expansion in the South and East China Seas” (Sept. 21, 2015) (published online).
- Steven G. Bradbury, *Balancing Privacy and Security*, Harv. J. L. & Pub. Pol’y (Federalist Ed.), Vol. 2, No. 1, p.5 (Winter 2015).
- Steven G. Bradbury, Op-Ed, “Opposing view: Preserve this critical tool [NSA telephone metadata program],” USA Today, p. 10A (Mar. 28, 2014).
- Steven G. Bradbury, Op-Ed, “Don’t limit the NSA’s effectiveness,” Wash. Post, p.A13 (Jan. 5, 2014).
- Michael B. Mukasey, Steven G. Bradbury, & David B. Rivkin Jr., Op-Ed, “An ill-founded ruling against the NSA,” Wash. Post, p.A27 (Dec. 20, 2013).
- Steven G. Bradbury, *Understanding the NSA Programs: Bulk Acquisition of Telephone Metadata Under Section 215 and Foreign-Targeted Collection Under Section 702*, Lawfare Research Paper Series 1, No. 3 (Aug. 30, 2013), available at <https://www.lawfareblog.com/topic/lawfare-research-paper-series>.
- Steven G. Bradbury, Op-Ed, “The use of phone data: Constraining the NSA would make Americans less safe,” Wash. Post, p.A15 (July 23, 2013).
- Steven G. Bradbury, Op-Ed, “Opposing view: ‘The system works well as it is’: FISA court judges serve the rule of law,” USA Today, p.8A (July 19, 2013).
- Thomas P. Vartanian & Steven G. Bradbury, *How to Fight Back Against Bad Agency Decisions*, American Banker BankThink (online) (Jan. 16, 2013).
- Steven G. Bradbury, *Anticipating How the U.S. Supreme Court May Rethink Fraud-on-the-Market Standards for Securities Class Actions*, Bloomberg BNA (online) (Aug. 24, 2012).
- George G. Gordon & Steven G. Bradbury, *K-Dur: The Rejection of “Scope of the Patent” Test*, Law360 (online) (July 24, 2012).
- FTC Recommends Improvements to Patent System*, Intellectual Prop. & Tech’y L.J. (June 2011).
- Timothy C. Blank, Steven G. Bradbury, & Christopher R. Boisvert, *The Dawn of Internet Privacy?*, Law360 (online) (Apr. 22, 2011).
- Steven G. Bradbury, Keynote Address, *The Developing Legal Framework for Defensive and Offensive Cyber Operations*, 2 Harv. Nat’l Sec. J. 629 (Mar. 2011).
- Steven G. Bradbury & John P. Elwood, Op-Ed, “Recess is canceled: President Obama should call the Senate’s bluff,” Wash. Post, p.A19 (Oct. 15, 2010).
- Steven G. Bradbury, Dechert LLP, *After further review, NFL’s “Hail Mary” pass ruled incomplete: Supreme Court holds NFL’s joint trademark licensing subject to Section 1 of the Sherman Act*, Lexology (online) (May 28, 2010).
- Steven G. Bradbury, *Gearing up for American Needle v. NFL*, Law360 (online) (Jan. 11, 2010).
- Steven G. Bradbury & Grant M. Dixon, *Court Ruling Wrongly Creates New Right to Sue Telecom Companies*, Washington Legal Foundation Legal Opinion Letter, Vol. 12, No. 22 (Aug. 30, 2002) (discussing *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 294 F.3d 307 (2d Cir. 2002), a case later reversed by the Supreme Court).
- Steven Bradbury & Kelion Kasler, Kirkland & Ellis, “Verizon Communications: The Merger of Bell Atlantic and GTE,” published in *Corporate Finance, Global M&A Yearbook 2000: New Strategies in M&A* at 47 (Nov. 2000).
- Steven G. Bradbury, Paul T. Cappuccio & Patrick F. Philbin, Kirkland & Ellis, “Telecommunications,” published in *International Financial Law Review, United States: A Legal Guide* at 33 (June 1998).
- Steven G. Bradbury, Paul T. Cappuccio & Patrick F. Philbin, Kirkland & Ellis, “United States,” published in *International Financial Law Review, Telecommunications: An International Legal Guide* at 69 (Aug. 1997).

—Steven G. Bradbury, *The Unconstitutionality of Qui Tam Suits*, Federalist Society Federalism & Separation of Powers News, Vol. 1 No. 1 (Fall 1996) (discussing pending cert. petition in *Hughes Aircraft Co. v. United States ex rel. Schumer*).

—Steven G. Bradbury, *Original Intent, Revisionism, and the Meaning of the CGL Comprehensive General Liability Insurance] Policies*, 1 Environmental Claims J. 279 (Spring 1989).

—Note, *Corporate Auctions and Directors' Fiduciary Duties: A Third-Generation Business Judgment Rule*, 87 Mich. L. Rev. 276 (1988).

—Book Note, 85 Mich. L. Rev. 941 (1987).

—*A Cattleman's Calling* (short story), published in *The Hoboken Terminal*, Vol. 1 No. 1 (Spring 1982).

In addition to the publications listed above, I have assisted in preparing client alerts issued online by Dechert LLP regarding a wide variety of legal topics. Those client alerts are available at https://www.dechert.com/steven_bradbury/ (click on "Related Publications"). I also authored or supervised the preparation of legal opinions for the Office of Legal Counsel ("OLC") of the U.S. Department of Justice from 2004 to 2009. Many of those opinions are posted on the OLC Website and can be found at www.usdoj.gov/olc/opinions-main and <https://www.usdoj.gov/olc/olc-foia-electronic-reading-room>.

Speeches and Other Public Remarks:

I have given numerous speeches, panel presentations, and other public remarks, mostly addressed to issues of national security law, cybersecurity, antitrust, securities law, and administrative law and regulation. Very few of my public remarks have been relevant to the position to which I have been nominated. The following is the most complete list I have been able to compile of my speeches and public remarks.

Panel Presentation, "How to Shut It Down: Creative Strategies that Ended Government Antitrust Investigations," Dechert LLP's 2017 Annual Antitrust Spring Seminar, Philadelphia, PA (Apr. 4, 2017).

Panel Presentation, "Financial Services Breakfast Briefing: Current Developments Affecting the Fund Industry—Washington Update," Investment Company Institute Annual Legal Conference, Palm Desert, CA (Mar. 14, 2017).

Panel Presentation, "A Term in Review: An Overview of Key Supreme Court Decisions from the 2015 Term & Thoughts About the Upcoming Term," Dechert LLP CLE Seminar, Washington, D.C. (Nov. 29, 2016).

Panel Presentations, "A Bitter Pill?: Recent Developments in Pharma"; and "Antitrust in the Next U.S. Administration," Dechert LLP's 2016 Annual Antitrust Spring Seminar, Philadelphia, PA (Apr. 13, 2016).

Panel Presentation, "What Every Lawyer Needs to Know About Recent Supreme Court Cases," Dechert LLP CLE Seminar, Washington, D.C. (Sept. 16, 2015).

Guest Appearance, Discussion and Debate on Reauthorizing the PATRIOT Act, C-SPAN Washington Journal, Washington, D.C. (May 16, 2015) (appeared with Neema Singh Guliani of ACLU).

Panel Presentation, Dechert LLP's 2015 Annual Antitrust Spring Seminar, Philadelphia, PA (Apr. 28, 2015).

Participant in Panel Debate, Legality of Section 215 Telephone Metadata Acquisition, Heritage Foundation, Washington, D.C. (Mar. 17, 2015).

Remarks, "The Legal Framework for Cybersecurity," Presented to the Legal Department of Raytheon Company, Waltham, MA (Nov. 4, 2014).

Featured Speaker (with John B. Bellinger, II), Discussing the President's Use of the 2001 AUMF to Combat ISIS, Event Organized by Alexander Hamilton Society and Federalist Society, Mayflower Hotel, Washington, D.C. (Oct. 22, 2014).

Moderator, Discussion between Two Former SEC Commissioners Regarding "Corporate Disclosure Effectiveness: Ensuring a Balanced System [of SEC Disclosure] that Informs and Protects Investors and Facilitates Capital Formation," U.S. Chamber of Commerce, Washington, D.C. (July 29, 2014).

Panel Speaker, Discussion Regarding Supreme Court's Decision in *Utility Air Regulatory Group v. EPA* Striking Down EPA Rule on Greenhouse Gas Emis-

- sions from Stationary Sources, ABA Administrative Law Section Forum, Washington, D.C. (July 24, 2014).
- Panel Presentation, Dechert LLP, “So the Government Thinks Your Deal Is Anticompetitive: Restructuring Your Deal to Overcome Antitrust Hurdles,” Lawline CLE Webinar, New York, NY (June 24, 2014).
- Video-Recorded Remarks Discussing Supreme Court’s Decision in *Halliburton* Case (Addressing Securities Law Class Action Standards), Federalist Society YouTube Video Series, Washington, D.C. (June 23, 2014).
- Panel Speaker, “Executive Branch Action in a Time of Political Dysfunction,” American Constitution Society, Annual Convention, Washington, D.C. (June 20, 2014).
- Panel Speaker “Debrief on Supreme Court’s *UARG v. EPA* Opinion Regarding Greenhouse Gas Rules,” Environmental Law Institute, Associates Seminar, Washington, D.C. (June 19, 2014).
- Panel Speaker, “Foreign Intelligence Surveillance in an Era of ‘Big Data’—Is There a Need to Recalibrate Boundaries?,” ABA Standing Committee on Law and National Security, Washington, D.C. (May 2, 2014).
- Panel Presentation, “What Every Lawyer Needs to Know About Recent Supreme Court Cases,” Dechert LLP CLE Seminar, New York, NY (Apr. 30, 2014).
- Panel Presentation, Dechert LLP’s 2014 Annual Antitrust Spring Seminar, Philadelphia, PA (Apr. 29, 2014).
- Panel Speaker, Forum on Data Privacy and Balancing National Security and Civil Liberties, Clements Center for History, Strategy, & Statecraft, University of Texas Law School, Austin, TX (Apr. 3, 2014).
- Panel Speaker, Panel Discussing Data Privacy and Constitutionality of National Security Surveillance Activities, Georgetown Journal of Law & Public Policy Spring Symposium, Washington, D.C. (Mar. 27, 2014).
- Panel Speaker, Panel Discussing Constitutionality of Border Searches of Electronic Media by TSA Officials, National Press Club, Washington, D.C. (Mar. 20, 2014).
- Featured Speaker, “National Security versus Data Privacy,” Ferrum College Annual Forum, Roanoke, VA (Mar. 19, 2014).
- Panel Speaker, “Balancing Privacy and Security,” Federalist Society’s 33rd Annual National Student Symposium, Univ. of Florida Levin College of Law, Gainesville, FL (Mar. 8, 2014).
- Panel Speaker, Addressing the *Halliburton* case and the Supreme Court’s Reconsideration of the *Basic v. Levinson* Presumption of Reliance in Securities Fraud Litigation, D.C. Bar Luncheon, Washington, D.C. (Mar. 5, 2014).
- Panel Speaker, Addressing Individual Privacy and National Security, Chicago Bar Association Forum, Union League Club, Chicago, IL (Mar. 3, 2014).
- Panel Speaker, “*Erica P. John Fund* & Beyond: The Past, Present, and Future of Securities Class Actions,” U.S. Chamber of Commerce, Washington, D.C. (Feb. 28, 2014).
- Panel Speaker, “Debrief of the Supreme Court’s Oral Argument on EPA’s Greenhouse Gas Rulemakings,” D.C. Bar Association, Washington, D.C. (Feb. 25, 2014).
- Panel Speaker, Constitutionality of NSA Programs, Organized by the National Security Law Committee of the Federalist Society, Held at the Offices of Jones Day, Washington, D.C. (Feb. 24, 2014).
- Panel Speaker, Addressing Fallout from the NSA Revelations for Foreign Relations and the Legal Regime Governing Surveillance in the U.S. and Among Our Allies, Breakfast Panel Debate, Council on Foreign Relations, Washington, D.C. (Feb. 20, 2014).
- Panel Speaker, Conference on Privacy and Security, Chicago Council on Global Affairs and Notre Dame Law School’s International Security Program, Chicago, IL (Feb. 14, 2014).
- Panel Speaker, “Reforming the NSA Surveillance System: Assessing the Options,” at the State of the Net Conference, organized by the Internet Education Foundation and the National Cable and Telecommunications Association, The Newseum, Washington, D.C. (Jan. 28, 2014).
- Featured Speaker, Address on the Constitutional Underpinnings of the NSA Programs, Stanford Law School Constitutional Law Center, Stanford, CA (Jan. 23, 2014).

Guest on radio program discussing FISA Court process and NSA programs, NPR Philadelphia affiliate (Jan. 21, 2014).

Audio Teleconference and Podcast, Discussing District Court Decision Enjoining NSA Metadata Program, Federalist Society Teleforum, Washington, D.C. (Dec. 19, 2013).

Webinar Presentation, “Supreme Court Takes on the Clean Air Act: *EME Homer and Utility Air Regulatory Group v. EPA*,” Bloomberg BNA Webinar (Dec. 17, 2013).

Panel Speaker, Addressing Cybersecurity and the NSA Disclosures, Federalist Society Annual Convention, Washington, D.C. (Nov. 15, 2013).

Debate, “NSA Surveillance: A Necessary Evil?,” Paul H. Nitze School of Advanced International Studies (SAIS), Johns Hopkins University, Washington, D.C. (Oct. 28, 2013) (debating Prof. David Cole of Georgetown Law School; moderated by SAIS Prof. John McLaughlin, former Deputy Director of the CIA).

Participant, Debate on National Security versus Privacy Interests, St. Thomas Law School, St Paul, MN (Oct 3, 2013).

Panel Presentation, CLE Seminar on Antitrust Law Developments, presented to Time Warner Inc. Legal Department, New York, NY (Sept. 24, 2013).

Participant, Debate on Legality of NSA Programs, Milbank Tweed Forum, NYU Law School, New York, NY (Sept 18, 2013) (debating Liza Goitein of the Brennan Center for Justice, among others).

Participant in nationally televised debate addressing the propriety and legality of the NSA programs disclosed by Edward Snowden, PBS News Hour, Shirlington, VA (July 31, 2013) (debating author and NSA critic Jim Bamford).

Participant in radio debate addressing the legality of the NSA programs disclosed by Edward Snowden, Minnesota Public Radio’s *Daily Circuit* program (July 30, 2013) (debating Marc Rotenberg of EPIC),

Debate on constitutionality of NSA programs disclosed by Edward Snowden, Federalist Society Teleforum, Washington, D.C. (July 23, 2013) (debating Prof. Randy Barnett of Georgetown Law School).

Webinar Presentation, “*FTC v. Actavis, Inc.*: The Unsettling of Hatch-Waxman Settlements,” BNA Bloomberg Webinar (July 16, 2013).

Guest on Public Radio Program *To The Point With Warren Olney* Discussing the FISA Court and NSA Programs (July 10, 2013).

Prepared Remarks and Q&A Addressing Legal Bases for NSA Programs, Delivered before the Privacy and Civil Liberties Oversight Board, Washington, D.C. (July 9, 2013).

Live Analysis, SCOTUS Decision in *FTC v. Actavis, Inc.*, Dechert LLP, Washington, D.C. (June 19, 2013).

Panel Speaker, Addressing Cost-Benefit Analysis and OMB Review of Administrative Rulemaking, Federalist Society Luncheon Event, National Press Club, Washington, D.C. (June 11, 2013).

Panel Speaker in Live Conference and Pod cast, “The Pentagon, the National Security Agency, and Domestic Cybersecurity,” Federalist Society International & National Security Law Practice Group, Washington, D.C. (May 3, 2013).

Panel Presentation, Dechert LLP’s 2013 Annual Antitrust Spring Seminar, Philadelphia, PA (April 17, 2013).

Webinar Participant, Briefing on Supreme Court case *FTC v. Actavis, Inc.* regarding intersection of patent law and antitrust, American Intellectual Property Law Association Webinar, Washington, D.C. (Apr. 2, 2013).

Panel Speaker, “The Importance of Cost-Benefit Analysis in Agency Rulemaking,” U.S. Chamber of Commerce Center for Capital Markets Competitiveness, Washington, D.C. (Mar. 12, 2013).

Featured Speaker, “Agency v. Agency (and other problems of overlapping jurisdiction),” Federalist Society event, Duke Law School, Durham, NC (Jan. 31, 2013).

Debate Presentation, “Debating the USA PATRIOT Act: 10 Years Later,” Appellate Judges Education Institute, 2012 Annual Summit, New Orleans, LA (Nov. 18, 2012) (debating Susan Herman, National President of the ACLU).

Webinar Participant, “The Legal Challenge to the CFTC’s New Registration Regime for Mutual Funds” Mutual Fund Directors Forum Webinar, Washington, D.C. (Oct 9, 2012).

Web Video, Addressing Federal Trade Commission's Policy Change in Seeking Restitution in Enforcement Proceedings, Washington Legal Foundation Web Video, Washington, D.C. (Aug. 30, 2012).

Debate on the Constitutionality of the Individual Mandate in the Affordable Care Act Following Oral Argument in the Supreme Court, American Constitution Society, Annual Convention, Washington, D.C. (June 16, 2012) (debating Walter Dellinger; moderated by Adam Liptak).

Mock Oral Argument on the Constitutionality of the Individual Mandate in the Affordable Care Act, Georgetown Law School Supreme Court Institute, Washington, D.C. (Feb. 1, 2012) (arguing opposite Walter Dellinger before a distinguished panel of Supreme Court practitioners sitting as mock justices).

Panel Speaker, Addressing Developments in Cybersecurity Law, Steptoe & Johnson Forum, Washington, D.C. (June 28, 2011).

Featured Speaker, Roundtable Discussion on the Developing Legal Framework for Defensive and Offensive Cybersecurity, Council on Foreign Relations, Washington, D.C. (Apr. 18, 2011).

Keynote Address, "The Developing Legal Framework for Defensive and Offensive Cyber Operations," Harvard National Security Journal Forum on Cybersecurity, Harvard Law School, Cambridge, MA (Mar. 4, 2011).

Remarks Addressing *Matrix Initiatives* Supreme Court Case, Federalist Society Press Call, Washington, D.C. (Jan. 6, 2011).

Moderator, "*Merck & Co. v. Reynolds*," Law Seminars International TeleBriefing (May 18, 2010) (panel presentation included Richard Cordray, then Attorney General of Ohio).

Panel Presentation, Dechert LLP, Spring Antitrust CLE Seminar, Philadelphia, PA (Apr. 28, 2010).

Remarks on Receiving the Intelligence Under Law Award, NSA's Law Day, National Security Agency, Fort Meade, MD (May 1, 2008).

Remarks on the Departure of Attorney General Alberto R. Gonzales, Great Hall of the U.S. Department of Justice, Washington, D.C. (Sept. 17, 2007).

Remarks delivered to attorneys of my former law firm, Kirkland & Ellis LLP, concerning the functions of the Office of Legal Counsel and my experiences as Acting AAG, Washington, D.C. (Jan. 22, 2007).

Guest on NPR's Morning Edition radio program, Explaining the Legal Basis for the Special NSA Surveillance Program Authorized by the President, Washington, D.C. (Feb. 14, 2006).

Guest Appearance, Explaining the Legal Basis for the Special NSA Surveillance Program Authorized by the President, C-SPAN Washington Journal, Washington, D.C. (Feb. 8, 2006).

In addition to the speaking engagements listed above, in private practice with Kirkland & Ellis LLP between 1993 and 2004, I participated in several public discussions for industry or bar associations concerning matters or issues on which I was working; these included: a Washington Legal Foundation panel discussing an upcoming Supreme Court term; a panel discussing antitrust litigation in the securities industry at the Securities Industry Association Annual Law and Compliance Seminar; and a panel discussing airline industry mergers at the ABA's Air and Space Law Section annual conference. I also appeared as a guest on a cable television program discussing Justice Thomas.

17. Please identify each instance in which you have testified orally or in writing before Congress in a governmental or non-governmental capacity and specify the date and subject matter of each testimony.

Hearing before the House Committee on the Judiciary, "Examining Recommendations to Reform FISA Authorities" (Feb. 4, 2014).

Hearing before the House Permanent Select Committee on Intelligence, "Legislative Proposals for Modifying NSA Programs and Amending FISA Authorities" (Oct. 29, 2013).

Hearing before the House Committee on the Judiciary, "Oversight Hearing into the Administration's Use of FISA Authorities" (July 17, 2013).

Hearing before the House Ways and Means Committee, "The Ramifications of the Supreme Court's Ruling on the Affordable Care Act" (July 10, 2012).

Hearing before the House Ways and Means Committee, "The Constitutionality of the Individual Mandate in the Affordable Care Act" (Mar. 29, 2012).

Hearing before the Senate Committee on the Judiciary, "The Due Process Guarantee Act: Banning Indefinite Detention of Americans" (Feb. 29, 2012).

Hearing before the House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, "Oversight of the Justice Department's Office of Legal Counsel" (Feb. 14, 2008).

Classified Hearing before the Senate Select Committee on Intelligence Concerning Legal and Policy Review of CIA Program (Apr. 12, 2007).

Hearing before the House Committee on Armed Services, "Standards of Military Commissions and Tribunals Following the Supreme Court's Decision in *Hamdan v. Rumsfeld*" (Sept. 7, 2006).

Hearing before the House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, "Legislative Proposals to Update the Foreign Intelligence Surveillance Act" (Sept. 6, 2006).

Hearing before the Senate Committee on the Judiciary, "The Authority to Prosecute Terrorists under the War Crimes Provisions of Title 18" (Aug. 2, 2006).

Hearing before the Senate Committee on the Judiciary, "FISA for the 21st Century" (July 26, 2006).

Hearing before the House Committee on Armed Services, "Standards of Military Commissions and Tribunals Following the Supreme Court's Decision in *Hamdan v. Rumsfeld*" (July 12, 2006).

Hearing before the Senate Committee on the Judiciary, "*Hamdan v. Rumsfeld*: Establishing a Constitutional Process for Military Commissions" (July 11, 2006).

Confirmation Hearing before the Senate Committee on the Judiciary, Nominations of several nominees, including Steven G. Bradbury, to be Assistant Attorney General for the Office of Legal Counsel, Department of Justice (Oct. 6, 2605).

18. Given the current mission, major programs, and major operational objectives of the department/agency to which you have been nominated, what in your background or employment experience do you believe affirmatively qualifies you for appointment to the position for which you have been nominated, and why do you wish to serve in that position?

Through my work in private practice and in the Justice Department's Office of Legal Counsel ("OLC"), I am familiar with the statutory and administrative authorities of Federal departments and agencies, specifically including the Department of Transportation. Every major mission and program administered by the Department depends on accurate and reliable legal advice for policymakers on the application and limits of such authorities, and I have extensive experience supervising teams of attorneys in providing such legal advice.

19. What do you believe are your responsibilities, if confirmed, to ensure that the department/agency has proper management and accounting controls, and what experience do you have in managing a large organization?

Proper management and accounting controls are critical to the Department's appropriate and effective administration of its statutory authorities. My responsibilities in OLC included providing legal advice to department heads and the White House on compliance with Federal budget and accounting controls, including under the Anti-Deficiency Act. I have managed teams of lawyers in carrying out this legal role, and I have advised senior appointed officials at various departments and agencies in the proper supervision of their statutory mandates. In private practice, I have advised general counsels and other senior legal offices to ensure compliance with applicable laws and regulations.

20. What do you believe to be the top three challenges facing the department/agency, and why?

I see the top three challenges facing the Department of Transportation to be (a) promoting public safety through reasonable and effective application of the legal authorities provided by Congress; (b) achieving rational rulemaking consistent with law and with the preservation of competitive markets and incentives for private investment in innovation; and (c) advancing critical transportation infrastructure improvements through cooperation with Congress in the budget process and through the efficient administration of grants and other funding programs authorized by Congress. If confirmed as General Counsel, my role will be to ensure that the Secretary and the Department have the legal advice and support needed in exercising their authorities to address these and other challenges.

B. POTENTIAL CONFLICTS OF INTEREST

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients, or customers. Please include information related to retirement accounts.

I currently am employed as a partner at Dechert LLP. If confirmed, I will resign from that position. Pursuant to Dechert's partnership agreement, following my withdrawal from the firm, I will receive a *pro rata* partnership share based on the value of my partnership interests for services performed in 2017 through the date of my withdrawal. The firm will calculate the value of that share based on the firm's 2016 earnings. Consistent with the partnership agreement, I will receive the partnership share no later than April 2018. Also pursuant to the partnership agreement, following my withdrawal from the firm, I will receive a lump-sum payment of my capital account, calculated as of the date of my withdrawal. This payment will be made on or before 60 days from the date of my withdrawal. Dechert may withhold a portion of my capital account as a reserve for account reconciliations and tax payments, pursuant to the partnership agreement.

I also currently participate in Dechert's defined contribution savings and pension plans, which I will continue to participate in if confirmed; the firm as plan sponsor does not contribute to these plans and will not contribute to them after my separation. I also currently hold residual interests in certain contingent-fee cases from my previous law firm, Kirkland & Ellis LLP, and I will forfeit these interests upon confirmation.

In addition, I currently hold uncompensated positions with the American Bar Association Section of Antitrust Law, the Capital Markets Litigation Advisory Committee of the U.S. Chamber of Commerce Litigation Center, the National Security Law Working Group of the Heritage Foundation, and the John Hay Initiative. If confirmed, I will resign from those positions.

I have a Thrift Savings Plan ("TSP") account from my previous government service; if confirmed, I will retain my TSP account.

2. Do you have any commitments or agreements, formal or informal, to maintain employment, affiliation, or practice with any business, association or other organization during your appointment? If so, please explain: No.

3. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Transportation ("DOT") Designated Agency Ethics Official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved consistent with the terms of an ethics agreement I have entered into with the DOT Designated Agency Ethics Official, which has been provided to this Committee. I am not aware of any other potential conflicts of interest.

4. Describe any business relationship, dealing, or financial transaction which you have had during the last ten years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the DOT Designated Agency Ethics Official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved consistent with the terms of an ethics agreement I have entered into with the DOT Designated Agency Ethics Official, which has been provided to this Committee. I am not aware of any other potential conflicts of interest.

5. Describe any activity during the past ten years in which you have been engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any legislation or affecting the administration and execution of law or public policy.

I have not been engaged by a client in private practice during the past ten years to influence legislation. In 2013–2014, based on my prior experiences as a senior official in the Department of Justice and acting in my personal capacity, not for any client, I provided testimony and authored letters and other writings urging Congress not to enact certain legislative proposals concerning important national security programs. I also signed a letter on behalf of former government officials urging Congress to reduce the number of committees with responsibility for oversight of the Department of Homeland Security. I have represented clients involved in agency investigations and enforcement actions and similar matters in which I presented good faith arguments relating to the interpretation and application of relevant laws.

Earlier, during my tenure as head of the Office of Legal Counsel of the Department of Justice, I represented the President and the Executive Branch in working with Congress on legislative reforms of the Foreign Intelligence Surveillance Act, the procedures for military commissions of enemy combatants, and the War Crimes Act.

6. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the DOT Designated Agency Ethics Official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved consistent with the terms of an ethics agreement I have entered into with the DOT Designated Agency Ethics Official, which has been provided to this Committee. I am not aware of any other potential conflicts of interest.

C. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics, professional misconduct, or retaliation by, or been the subject of a complaint to, any court, administrative agency, the Office of Special Counsel, professional association, disciplinary committee, or other professional group? If yes:

- (a) Provide the name of agency, association, committee, or group;
- (b) Provide the date the citation, disciplinary action, complaint, or personnel action was issued or initiated;
- (c) Describe the citation, disciplinary action, complaint, or personnel action; and
- (d) Provide the results of the citation, disciplinary action, complaint, or personnel action.

No.

2. Have you ever been investigated, arrested, charged, or held by any Federal, State, or other law enforcement authority of any Federal, State, county, or municipal entity other than for a minor traffic offense? If so, please explain. No.

3. Have you or any business or nonprofit of which you are or were an officer ever been involved as a party in an administrative agency proceeding, criminal proceeding or civil litigation? If so, please explain.

I have not been a party to civil litigation, administrative agency proceedings, or criminal proceedings, except as described in response to Question 4 below. The law firms of which I have been a partner have on occasion been parties to litigation, but none of those litigation matters has concerned activities involving me personally, and I am not personally familiar with the details of any such litigation matters. Certain legal opinions issued by the Office of Legal Counsel in 2002 and 2003 (before my time as Principal Deputy in OLC) were the subject of an investigation by the Office of Professional Responsibility ("OPR") of the Department of Justice, and in the course of that investigation, OPR also considered certain later OLC opinions that I authored. OPR did not make any finding that my opinions failed to satisfy standards of professional responsibility. The final OPR report made recommendations concerning the earlier OLC opinions, but that report was overruled and its recommendations were rejected by the senior career official of the Department of Justice (the Associate Deputy Attorney General), and the OPR report does not have continuing official force or validity.

4. Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense? If so, please explain.

Yes, as follows:

- (a) Moving violation: Failure to yield right of way on a left turn (in connection with a traffic accident on Bradley Blvd. in Montgomery County, MD on 06/05/2002). On 10/01/2002, I pleaded guilty in Circuit Court of Montgomery County, MD, and paid a \$37 fine plus \$23 in court costs. The court reduced the points for this violation from 3 to 1.
- (b) I received a citation on 10/02/1981 and paid a \$10 fine on 11/02/1981 for entering the New York City subway system without paying the fare.

5. Have you ever been accused, formally or informally, of sexual harassment or discrimination on the basis of sex, race, religion, or any other basis? If so, please explain. No.

6. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be disclosed in connection with your nomination. None.

D. RELATIONSHIP WITH THE COMMITTEE

1. Will you ensure that your department/agency complies with deadlines for information set by congressional committees?

Yes, to the extent reasonable and feasible.

2. Will you ensure that your department/agency does whatever it can to protect congressional witnesses and whistleblowers from reprisal for their testimony and disclosures? Yes.

3. Will you cooperate in providing the Committee with requested witnesses, including technical experts and career employees, with firsthand knowledge of matters of interest to the Committee?

Yes, to the extent consistent with legal and customary requirements.

4. Are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so? Yes.

ATTACHMENT A

RESUMÉ OF STEVEN GILL BRADBURY

Work Experience

Dechert LLP, Washington, D.C., 2009–Present

Law Partner, Litigation & Regulatory Enforcement

Practice includes regulatory enforcement matters; administrative law and judicial review of agency actions; congressional investigations; all aspects of antitrust, including government enforcement, merger reviews, and private litigation; other Supreme Court cases and appellate litigation; constitutional issues; general commercial litigation; data privacy and national security law.
See separate sheets for significant representations.

U.S. Department of Justice, Washington, D.C., 2004–2009

Acting Assistant Attorney General and Principal Deputy, Office of Legal Counsel

Served as senior appointed official in charge of the Office of Legal Counsel (“OLC”). Nominated by President to be Assistant Attorney General. As head of OLC, advised the President, the Attorney General, and the heads of executive departments and agencies of the Federal Government on significant questions of constitutional, statutory, and administrative law and treaty interpretation; represented the Justice Department and Executive Branch before Congress.

Awards received during government service:

Edmund J. Randolph Award for outstanding service to the Department of Justice

Secretary of Defense Medal for Outstanding Public Service

National Security Agency’s Intelligence Under Law Award

Director of National Intelligence’s 2007 Intelligence Community Legal Award (Team of the Year, FISA Modernization)

Criminal Division’s Award for Outstanding Law Enforcement Partnerships

Kirkland & Ellis LLP, Washington, D.C., 1993–2004

Litigation Partner (1994–2004); Associate (1993–1994)

Practice included all aspects of antitrust, including government enforcement, merger reviews, and private litigation; other regulatory enforcement matters; administrative law and judicial review of agency actions; Supreme Court cases and appellate litigation; constitutional issues; and general commercial litigation.
See separate sheets for significant representations.

Honorable Clarence Thomas, Supreme Court of the United States, 1992–1993

Law Clerk

U.S. Department of Justice, Washington, D.C., 1991–1992

Attorney-Adviser, Office of Legal Counsel

Honorable James L. Buckley, U.S. Court of Appeals for the D.C. Circuit, 1990–1991

Law Clerk

Covington & Burling, Washington, D.C., 1988–1990

Associate

Gained substantial Federal trial and appellate court experience. Represented Missouri and Washington State in defending suits brought by hospitals and nursing homes seeking additional Medicaid reimbursements. Represented pol-

icyholders and *amici* in suits seeking insurance coverage for environmental liabilities.

Davis Poll & Wardwell, New York, N.Y., 1983–1985
Legal Assistant

Avon Books, a Division of Hearst Corporation, New York, N.Y., 1981–1983
Assistant Editor (1982–1983); Editorial Assistant (1981–1982)

Education

University of Michigan Law School, Ann Arbor, Michigan
J.D., *magna cum laude*, May 1988. Order of the Coif

Article Editor, *Michigan Law Review*.

Dean's 1987–1988 Law Review Award for outstanding contribution to the *Review*.

Note, *Corporate Auctions and Directors' Fiduciary Duties: A Third Generation Business Judgment Rule*, 87 Mich. L. Rev. 276 (1988).

Book Awards: Administrative Law, Civil Procedure 11, Legal Process.

Stanford University, Stanford, California

B.A., June 1980. Major in English.

Additional course work in history, politics, languages, and philosophy, including tutorial study in theory of knowledge at Lincoln College, Oxford University.

Bar and Court Memberships

District of Columbia Bar

Supreme Court of the United States

U.S. District Court for the District of Columbia

U.S. Courts of Appeals for D.C., First, Second, Fourth, Fifth, Sixth, and Seventh Circuits

Personal

Born and raised, Portland, Oregon. Spouse: Hilde E. Kahn.

Children: James (B.A., Stanford, 2016); Will (Stanford, Class of 2018); Susanna (Thomas Jefferson High School for Science & Technology, Class of 2017)

Significant Representations

- Represent provider of cloud-based software solutions before the National Highway Traffic Safety Administration (“NHTSA”) in connection with a recall involving potential safety risks from lithium ion batteries.
- Represent Internet registry company in connection with antitrust issues raised by ICANN award of top-level domain rights.
- Represented the Independent Community Bankers of America in Federal court action challenging a final rule of the National Credit Union Administration relating to commercial lending by insured credit unions (E.D.Va.).
- Represented TK Holdings Inc. (Takata Corporation) in connection with investigations of airbag inflator ruptures by NHTSA, Congress, and other entities, and in related civil litigation.
- Represent Verizon in connection with wireless data roaming rate cases before the Federal Communications Commission.
- Represent American Airlines, Inc., in Department of Transportation rulemaking proceedings on competition and consumer protection issues and in international route authorization proceedings.
- Represented major media company in connection with Department of Justice and FCC antitrust review of the proposed merger of Comcast Corporation and Time Warner Cable, Inc., and the merger of Charter Communications and Time Warner Cable.
- Represented U.S. Airways Group in defending merger with AMR Corp. (American Airlines) against antitrust challenge by the U.S. Department of Justice and several States—*United States v. U.S. Airways Group & AMR Corp.* (D.D.C.).
- Represented Polypore International, Inc., in appeal from FTC antitrust order requiring divestiture of assets acquired from Microporous Products LP—*Polypore International, Inc. v. FTC* (11th Cir. and U.S. Sup. Ct.).
- Represented Turing Pharmaceuticals in connection with congressional investigation of drug pricing practices.
- Represented leading claims administrator in connection with congressional hearing concerning administration of historic settlement of Indian trust fund claims.

- Represent various financial industry associations and companies, including as *amici*, in judicial challenges to agency rulemakings under the Dodd-Frank Act.
- Represent U.S. Chamber of Commerce and Investment Company Institute as *amici* in support of MetLife, Inc.’s challenge to its designation as “too big to fail” by the Financial Stability Oversight Council under the Dodd-Frank Act.
- Represent U.S. Chamber of Commerce and National Association of Manufacturers as *amici* in various appellate cases before the Supreme Court and U.S. courts of appeals.
- Represented the American Intellectual Property Law Association as *amicus* before the Supreme Court in *FTC v. Actavis, Inc.* (U.S. Sup. Ct. 2013), concerning antitrust analysis of “reverse payment” patent settlements.
- Represented 215 economists as *amici* in appellate challenge to the Federal health care reform law (11th Cir. and U.S. Sup. Ct.).
- Represented Dean Foods Company in defending litigation brought by the Antitrust Division of the U.S. Department of Justice and the States of Wisconsin, Illinois, and Michigan challenging Dean Foods’ acquisition of milk processing plants—*United States v. Dean Foods Co.* (E.D. Wis.).
- Represented third party before DOJ and FCC in connection with antitrust issues raised by AT&T’s proposed acquisition of T-Mobile.
- Represented industry stakeholders in antitrust challenge to restrictive trademark licensing practices by NCAA colleges and their exclusive licensing agent.
- Lead counsel to Morgan Stanley in defending dozens of consolidated securities class action suits involving the allocation of shares in high-tech IPOs—*In re IPO Securities Litigation* (S.D.N.Y.)—and related litigation in various other courts.
- Lead counsel to Morgan Stanley in SEC and NASD investigations of IPO allocation practices.
- Lead counsel to Verizon Communications in successfully obtaining dismissal of antitrust class action against Bell companies relating to competition for local telephone service—*Twombly v. Bell Atlantic Corp.* (S.D.N.Y.).
- Lead counsel to Morgan Stanley in successfully obtaining dismissal of antitrust class action relating to the allocation of shares in IPOs—*In re IPO Antitrust Litigation* (S.D.N.Y.).
- Represented Bell Atlantic and DSC Communications Corp. in \$3.5 billion monopolization suit against AT&T and Lucent Technologies (E.D. Texas).
- Represented Bell Atlantic and NYNEX in challenge to AT&T’s \$19 billion acquisition of McCaw Communications (E.D.N.Y.).
- Lead antitrust counsel to United Air Lines in obtaining DOJ approval of code-share agreement with U.S. Airways.
- Lead antitrust counsel to United Air Lines in proposed acquisition of U.S. Airways (abandoned).
- Lead antitrust and regulatory counsel to GTE Corporation in its \$56 billion merger with Bell Atlantic to create Verizon.
- Represented AOL in defending AOL-Time Warner merger before the Competition Directorate of the European Commission (“EC”).
- Lead counsel to GTE before DOJ, FCC, EC, and D.D.C. in successfully challenging Internet aspects of MCI-WorldCom merger.
- Represented Bell Atlantic in antitrust defense of \$23 billion acquisition of NYNEX.
- Lead counsel to Verizon Directories Corp. in Lanham Act action against Yellow Book USA, Inc. for false advertising and sales claims (E.D.N.Y.).
- Handled jury trial and argued appeal in magazine trademark suit between Petersen Publishing Co. and Time, Inc. (S.D.N.Y. & 2d Cir.).
- Represented NFL football players in Supreme Court case addressing the non-statutory labor exemption to the antitrust laws—*Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

The CHAIRMAN. Thank you, Mr. Bradbury.

[Audience interruption.]

The CHAIRMAN. Order.

[Audience interruption.]

The CHAIRMAN. This hearing will come to order.

[Audience interruption.]

The CHAIRMAN. The hearing will come to order.

Ms. Walsh, please proceed.

**STATEMENT OF ELIZABETH ERIN WALSH, NOMINEE TO BE
ASSISTANT SECRETARY OF COMMERCE AND DIRECTOR
GENERAL OF THE UNITED STATES AND FOREIGN
COMMERCIAL SERVICE, U.S. DEPARTMENT OF COMMERCE**

Ms. WALSH. Senator Cantwell and distinguished members of the Committee, I am grateful for the opportunity to appear before you today. I am very honored to be nominated by President Trump for the position of Assistant Secretary for Global Markets and Director General of the U.S. and Foreign Commercial Services.

If you don't mind, I would like to take a moment to introduce you to the people that are here to support me and my guests: my sister Molly Walsh, who works at the Pentagon; my sister Anne Walsh; and my best friend from home, Mary Glass. We all grew up in Portland together. And my friend here, Rick Ardell.

I bring to this nomination over 30 years of public and private sector experience. Through my work, I have had the opportunity to gain extensive knowledge of foreign and economic affairs in Asia, the Middle East, and Africa, and I have traveled to or worked in 100 countries at this time.

After graduating from Georgetown University, I worked at the White House, the Department of Energy, and the Department of State at Blair House. In 1989, I moved to New York to serve as Chief of Protocol to the U.S. Mission to the United Nations. I left and joined UNICEF as head of emergency operations in Tuzla, Bosnia. Following that, I went to the London School of Economics and Political Science and then returned back to Sarajevo to serve in the Office of Political Affairs and Economic Affairs.

Returning home from Bosnia, I went to work at Cisco, and there I built a strong partnership organization to bring the Cisco Networking Academy Program to 90 countries, including 41 of the least developed countries in the world.

After several years in the private sector, I went back in the State Department in 2005, a Senior Advisor in the Bureau of Near Eastern Affairs. There, I formulated and executed a strategic plan to advance U.S. policy interests, strengthen alliances, and establish programs focused on women across 16 countries in the Middle East and North Africa.

I also served on the U.S.-Saudi Strategic Dialogue in the Human Development Working Group.

At Goldman Sachs, I was based in China and led the firm's philanthropic activities across Asia Pacific. I developed a long-term strategic platform in Asia, seeking to foster economic growth and opportunity through investment in the community, public engagement, and partnership building.

Through this experience, I have seen firsthand the role that the private sector can play in facilitating and enhancing America's prominence abroad and in advancing U.S. values. Furthermore, I know the critical role the U.S. Government plays in leveling the playing field to ensure U.S. companies can compete around the world and to ensure that our foreign competitors abide by their

commitments and play by the same rules. At the same time, I've also seen what happens when U.S. policy is not carried out or implemented in a way that facilitates businesses.

I am passionate about the mission of the Department of Commerce, and I can think of nothing more meaningful and impactful than working with a team that is highly skilled and dedicated professionals in the U.S. and Foreign Commercial Services to create jobs through promoting U.S. exports and attracting foreign direct investment into the United States.

Trade, exports, and FDI are a powerful engine for growth in the United States. With 95 percent of the world's population outside of the U.S. and more than 1 in 5 American jobs supported by trade, the Office of Global Markets has a critical role to play particularly with its focus on small- and medium-sized enterprises, the engine for growth in America.

In addition, I believe the direction that Secretary Ross is taking to ensure we have fair and reciprocal trade with our partners will promote America's continued growth and vitality. I am deeply grateful to the Secretary for his leadership and confidence in me.

If confirmed, I look forward to having the opportunity to lead this organization and will bring to it my global experience and business background as well as my knowledge of how to leverage government resources and assure efficiency and effectiveness.

Thank you for your time today and for your consideration of my nomination.

[The prepared statement and biographical information of Ms. Walsh follow:]

PREPARED STATEMENT OF ELIZABETH ERIN WALSH, NOMINEE TO BE ASSISTANT SECRETARY OF COMMERCE AND DIRECTOR GENERAL OF THE UNITED STATES AND FOREIGN COMMERCIAL SERVICE, U.S. DEPARTMENT OF COMMERCE

Thank you Chairman Thune, Ranking member Senator Nelson, members of the Commerce Committee. I am grateful for the opportunity to appear before you today. I am very honored to be here as the President Trump's nominee for Assistant Secretary for Global Markets and D.G. for the U.S. and Foreign Commercial Service.

And I am so honored to have my family with me on this special day. If you don't mind, I would like to take a moment to introduce them. My mother, June and my father Michael a retired attorney—they both served in the Reagan and Bush Administrations. My sister Molly, currently serving at the Department of Defense and my beloved sister Anne. While my parents met in Washington, we grew up in Portland Oregon.

I bring to this nomination over 30 years of public and private sector experience.

During this time, I have built a strong track record in four key areas: *Strategy and Program Development* for market entry/expansion, political and/or policy advancement; *Design-Build Scalable Models* to promote products or programs regionally or globally; *Complex Negotiations*; and *Public-Private Partnership Creation* at local, national and international levels. I have extensive knowledge of foreign affairs in Asia, Middle East, and Africa and have traveled or worked in 100 countries.

I earned my undergraduate work at Georgetown University and started as an intern for three years at the White House before landing a full-time position in the Office of Political Affairs. I also worked at the Department of Energy, and from there had the opportunity to join the U.S. Department of State and serve as the Deputy Manager and then acting Manager of Blair House, the President's guest house. During my tenure there, we hosted over 60 heads of State and Governments. I was then asked by Ambassador Thomas Pickering to come to the U.S. Mission to the UN and serve as Chief of Protocol. It was an incredible five

years in the world's largest diplomatic community. But starting in 1992 I started to see cables come across my desk that seemed unimaginable. Particularly after witnessing the revolutionary Fall of the Berlin wall in 1989 and the euphoria that came with it. These cables referred to the conflict in Bosnia. As I continued to read

the news and the cables I felt I had to go to see for myself. I resigned my position at USUN to join UNICEF as head of emergency operations in Tuzla during in 1994. I later left Bosnia to attend graduate school at the London School of Economics and then returned to Sarajevo to work with the UN as an Economic and Political Affairs Officer. In preparing for post war conflict operations, there was an enormous gap in the lack of focus on economic development and investment. Over 20 years later, we can see the outcome and results today. No economic development, high unemployment and the presence of ISIS in Europe.

After returning from Bosnia, I came home and wrote a proposal focused on Education, Technology and job creation and got an offer from Cisco. The firm provided a platform allowing me to build a strong partnership organization to bring the Cisco Networking Academy Program to 90 countries, in Africa, Asia Pacific, central America and included 41 of the Least Developed Countries in the world. In the late 1990s we began to strong Chinese investment in these areas. Times were changing and so was the playing field.

After several years in the private sector, I returned to the State Department in 2005 to serve as Senior Advisor in the Bureau of Near Eastern Affairs. I was Recruited to formulate and execute a strategic plan to advance U.S. policy interests, strengthen alliances and establish and/or expand programs focused on women across 16 countries in the Middle East and North Africa. I also served on the U.S.-Saudi Arabia Strategic Dialogue, Human Development Working Group.

I was then hired by Goldman Sachs to lead the firm's philanthropic activities in Asia Pacific. I developed a long-term strategic platform in Asia, seeking to foster economic growth and opportunity, through investment in the community, public engagement and partnership building. I incorporated global Goldman Sachs Foundation programs and *Goldman Sachs Gives*, and created a portfolio of multi-year, regional and country specific programs aligned with the firms focus and the economic/development goals of 11 countries where investments had been made. Major programs included: Goldman Sachs *10,000 Women* Initiative (40 percent of women from Asia); China Breast Cancer Initiative.

From I have seen first-hand the role that the private sector can play in facilitating and enhancing America's prominence abroad and in advancing U.S. values.

I know the critical role the U.S. Government plays in leveling the playing field to ensure U.S. companies can compete abroad, and to ensure that our foreign competitors abide by their commitments and play by the same rules.

I have also seen what happens when U.S. policy is not carried out or implement in a way that facilitates business.

I am passionate about the mission of the Department of Commerce. And can think of nothing more meaningful or impactful then creating jobs through promoting U.S. exports or attracting foreign direct investment into the United States. In addition, I believe the direction that Secretary Ross is taking to ensure we have fair and reciprocal trade with our partners will ensure American's continued growth and vitality.

I am deeply grateful to President Trump, and Secretary Ross for their leadership. I am honored to be nominated by the President and am grateful to the Secretary for his confidence and support.

In the past couple of weeks, I have had the opportunity to meet with a number of the dedicated civil servants and foreign commercial officers who constitute the leadership of the International Trade Administration's Global Markets, and the U.S. Foreign Commercial Service, and I find in them a kindred spirit, one that is driven to help American companies succeed. Because they share my belief that there is nothing more meaningful or powerful than helping to create jobs that put people to work. Trade, exports and FDI are a powerful engine for economic growth. With 95 percent of the world' population outside of the U.S. and more than 1 in 5 American jobs supported by trade, the Office of Global Markets has a critical role to play.

If confirmed I look forward to having the opportunity to lead this organization, and will bring to it my global experience and business background as well as my knowledge of how to leverage government resources to ensure its efficiency and effectiveness.

Thank you for your time today and for your consideration of my nomination.

A. BIOGRAPHICAL INFORMATION

1. Name (Include any former names or nicknames used): Elizabeth Erin Walsh.
2. Position to which nominated: Assistant Secretary for Global Markets and Director General for the U.S. and Foreign Commercial Services.
3. Date of Nomination: June 6, 2017.

4. Address (List current place of residence and office addresses):

Residence: Information not released to the public.

Office: Department of Commerce, 1401 Constitution Avenue, NW, Washington, D.C. 20230

5. Date and Place of Birth: Portland, Oregon, USA; 12/18/1961.

6. Provide the name, position, and place of employment for your spouse (if married) and the names and ages of your children (including stepchildren and children by a previous marriage).

Single

7. List all college and graduate degrees. Provide year and school attended.

Masters of Science, London School of Economics and Political Science, 1995

Bachelor of Arts, Georgetown University, 1983

8. List all post-undergraduate employment, and highlight all management-level jobs held and any non-managerial jobs that relate to the position for which you are nominated.

U.S. Department of Commerce, Washington, D.C. (6/17 to present)

Senior Advisor, Office of the Secretary

The White House, Washington, D.C. (1/20–6/17)

Special Assistant to the President and Associate Director for Presidential Personnel, Foreign Affairs

Presidential Transition, Washington, D.C.

Co-lead of the State Department transition and landing team (11/16–11/17)

Donald J. Trump for President, Inc. Washington, D.C.

Lead for the State Department (8/16–11/16)

Goldman Sachs, Washington, Beijing, Hong Kong, China

Executive Director, Head of the Office of Corporate Engagement, Asia Pacific (5/10–4/15)

Led the firm's philanthropic activities in Asia Pacific. Developed a long-term strategic platform in Asia, seeking to foster economic growth and opportunity, through investment in the community, public engagement and partnership building.

U.S. Department of State, Washington, D.C.

Senior Advisor, Bureau of Near Eastern Affairs (5/05–5/08)

Recruited to formulate and execute a strategic plan to advance U.S. policy interests, strengthen alliances and establish and/or expand programs focused on women across 16 countries in the Middle East and North Africa.

Cisco Systems, Inc., Washington, D.C. and San Jose, CA

Senior Manager, International Strategies and Partnerships, Corporate Affairs (8/98–4/05)

Built a multi-million dollar public-private partnership organization at Cisco. Brought together strategic partners to deliver the Cisco Networking Academy Program to 90 developing and emerging market countries around the globe. Produced a program that successfully fused multi-stakeholder interests, integrated sound business practices and promoted pro-competitive policies and regulatory reform.

United Nations Mission, Sarajevo, Bosnia-Herzegovina

Economic and Political Affairs Officer (11/95–10/96)

Economic advisor to Chief of UN Civil Affairs.

UNICEF, Tuzla, Bosnia-Herzegovina

Head of Office (4/94–9/94)

Directed UNICEF's emergency operations in the Tuzla region.

United States Mission to the United Nations, New York, NY

Chief Protocol (4/89–4/94)

Directed and managed an effective Protocol Affairs program based on U.S. Foreign policy objectives. Organized a program which fostered positive relations with the other 184 member states of the UN.

U.S. Department of State, Washington, D.C.

Deputy to the Assistant Chief of Protocol for Ceremonials (6/88–4/89)

Blair House, the President's Guest House, Washington, D.C.

Assistant Manager and Acting Manager (9/85–6/88)

U.S. Department of Energy, Washington, D.C.

Legislative Affairs Specialist (2/85–8/85)

Presidential Inaugural Committee, Washington, D.C.
Assistant to the Director of Events and Inaugural balls (12/84–2/85)
Reagan-Bush '84, Washington, D.C.
Administrative Assistant to the Campaign Director (10/83–11/84)
The White House, Washington, D.C.
Staff Assistant—Office of Political Affairs (4/83–10/83)

9. Attach a copy of your resumé.
 A copy is attached.

10. List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments, other than those listed above, within the last ten years. None

11. List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business, enterprise, educational, or other institution within the last ten years.

Managing Member of Chinoiserie Style, LLC (4/16–3/17)

12. Please list each membership you have had during the past ten years or currently hold with any civic, social, charitable, educational, political, professional, fraternal, benevolent or religious organization, private club, or other membership organization. Include dates of membership and any positions you have held with any organization. Please note whether any such club or organization restricts membership on the basis of sex, race, color, religion, national origin, age, or handicap.

A. Council on Foreign Relations

B. The Sulgrave Club, Washington (no restrictions)

13. Have you ever been a candidate for and/or held a public office (elected, non elected, or appointed)? If so, indicate whether any campaign has any outstanding debt, the amount, and whether you are personally liable for that debt. No

14. Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$500 or more for the past ten years. Also list all offices you have held with, and services rendered to, a state or national political party or election committee during the same period.

\$500	2008	John McCain
\$1,000	2012	Romney Victory, Inc.
\$1,000	2012	Romney/Ryan
\$1,000	2015	Right to Rise PAC

Full time Volunteer Trump for President—8/4/2016–12/1/2016

15. List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals, and any other special recognition for outstanding service or achievements. None.

16. Please list each book, article, column, or publication you have authored, individually or with others. Also list any speeches that you have given on topics relevant to the position for which you have been nominated. Do not attach copies of these publications unless otherwise instructed. None.

17. Please identify each instance in which you have testified orally or in writing before Congress in a governmental or non-governmental capacity and specify the date and subject matter of each testimony. None.

18. Given the current mission, major programs, and major operational objectives of the department/agency to which you have been nominated, what in your background or employment experience do you believe affirmatively qualifies you for appointment to the position for which you have been nominated, and why do you wish to serve in that position?

I have extensive professional experience running operations of large international firms, having worked for five years as Vice President and Head of the Office of Corporate Engagement for Asia Pacific for Goldman Sachs and seven years at Cisco as Senior Manager of International Strategies and Partnerships. I have also served more than twelve years in the U.S. Government at the White House, State Department and Department of Energy as well as at the United Nations. I have put major programs in more than one hundred countries across the globe, managed budgets of over \$80m and, managed globally dispersed, culturally diverse teams. Working and living overseas has given me insight into the challenges that American companies face in exporting their products to global markets. I understand the requirement that the United States maintain a strong diplomatic presence in the markets in which American businesses operate.

19. What do you believe are your responsibilities, if confirmed, to ensure that the department/agency has proper management and accounting controls, and what experience do you have in managing a large organization?

Any government leader needs to be a good steward of the American taxpayer. I have been a senior manager in the private sector at large companies and have managed a dispersed global organization similar to the one that I will oversee at the Department of Commerce. My experience in financial management and accountability, and in implementing digital strategies to improve productivity of the corporate enterprise, should benefit the Department of Commerce's Global Markets division, which I will lead.

20. What do you believe to be the top three challenges facing the department/agency, and why?

1. Addressing the trade deficit: Growing exports and displacing imports with more U.S. production will lead to increased growth of GDP and job creation.

2. Battling unfair trade as it impacts U.S. companies and particularly small business: American companies need the U.S. Government to battle surges of unfairly priced imports and competitors that are subsidized by foreign governments.

3. Getting more companies to export to help grow the U.S. economy and American jobs: Companies that export pay their workers more than companies that don't. Most of the world's consumers live outside the United States. The United States will not prosper unless American companies and their workers are successfully competing in global markets.

B. POTENTIAL CONFLICTS OF INTEREST

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients, or customers. Please include information related to retirement accounts.

None with respect to business associates, clients or customers. However, information about my retirement accounts is included on the public financial disclosure reprim I filed and to which I understand you have access.

2. Do you have any commitments or agreements, formal or informal, to maintain employment, affiliation, or practice with any business, association or other organization during your appointment? If so, please explain.

In connection with the nomination process, I have consulted with the Office of Government and Department of Commerce agency ethics officials to identify any potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of my ethics agreement. I understand that my ethics agreement has been provided to the Committee. I am not aware of any potential conflict of interest other than those that are the subject of my ethics agreement.

3. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated. None.

4. Describe any business relationship, dealing, or financial transaction which you have had during the last ten years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated. None.

5. Describe any activity during the past ten years in which you have been engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any legislation or affecting the administration and execution of law or public policy. None.

6. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items.

Any potential conflicts of interest will be resolved in accordance with the terms of my ethics agreement. I understand that my ethics agreement has been provided to the Committee. I am not aware of any potential conflict of interest other than those that are the subject of my ethics agreement.

C. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics, professional misconduct, or retaliation by, or been the subject of a complaint to, any court, administrative agency, the Office of Special Counsel, professional association, disciplinary committee, or other professional group? If yes:

- Provide the name of agency, association, committee, or group;
- Provide the date the citation, disciplinary action, complaint, or personnel action was issued or initiated;
- Describe the citation, disciplinary action, complaint, or personnel action;
- Provide the results of the citation, disciplinary action, complaint, or personnel action.

No.

2. Have you ever been investigated, arrested, charged, or held by any Federal, State, or other law enforcement authority of any Federal, State, county, or municipal entity, other than for a minor traffic offense? If so, please explain. No.

3. Have you or any business or nonprofit of which you are or were an officer ever been involved as a party in an administrative agency proceeding, criminal proceeding, or civil litigation? If so, please explain. No.

4. Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense? If so, please explain. No.

5. Have you ever been accused, formally or informally, of sexual harassment or discrimination on the basis of sex, race, religion, or any other basis? If so, please explain. No.

6. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be disclosed in connection with your nomination. None.

D. RELATIONSHIP WITH COMMITTEE

1. Will you ensure that your department/agency complies with deadlines for information set by congressional committees? Yes.

2. Will you ensure that your department/agency does whatever it can to protect congressional witnesses and whistle blowers from reprisal for their testimony and disclosures? Yes.

3. Will you cooperate in providing the Committee with requested witnesses, including technical experts and career employees, with firsthand knowledge of matters of interest to the Committee? Yes.

4. Are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so? Yes.

RESUMÉ OF E. ERIN WALSH

Highly motivated leader and innovator with 25 years of progressively responsible management experience in government, the private sector and international organizations. Exceptional track record in four key areas: *Strategy and Program Development* for market entry/expansion, political and/or policy advancement; *Design-Build Scalable Models* to promote products or programs regionally or globally; *Complex Negotiations*; *Public-Private Partnership Creation* at local, national and international levels. Extensive knowledge of foreign affairs in Asia, Middle East, and Africa. Traveled or worked in 100 countries.

Professional Experience

U.S. Department of Commerce, Washington, D.C. (6/17–present)
Senior Advisor, Office of the Secretary

The White House, Washington, D.C. (1/16–6/17)
Special Assistant to the President and Associate Director for Presidential Personnel, Foreign Affairs

Presidential Transition, Washington, D.C.
Co-lead of the State Department transition and landing team (11/9/16–1/19/17)

Trump for America, Washington, D.C.
Full-time unpaid volunteer, lead for the State Department (8/16–11/8/16)

Goldman Sachs, Washington, Beijing, Hong Kong, China
Executive Director, Head of the Office of Corporate Engagement, Asia Pacific
(5/10–4/15)

Lead the firm's philanthropic activities in Asia Pacific. Developed a long-term strategic platform in Asia, seeking to foster economic growth and opportunity, through investment in the community, public engagement and partnership building.

- Incorporated global Goldman Sachs Foundation programs and *Goldman Sachs Gives*, and created a portfolio of multi-year, regional and country specific programs aligned with the firm's focus and the economic/development goals of 11 countries where investments had been made. Major programs include: Goldman Sachs *10,000 Women* Initiative (40 percent of women from Asia); China Breast Cancer Initiative in partnership with the All China Women's Federation launched under the umbrella of the U.S.-China People to People Exchange; Asia Breast Cancer Initiative in Korea and Hong Kong; "Women's Economic Empowerment through Entrepreneurship" program in partnership with the UN Economic and Social Commission of Asia Pacific.

- Establish and manage relationships with governments, non-profit organizations, international organizations and private sector clients.
- Advised the Vice Chairman and leadership on philanthropy in Asia Pacific, trends, and opportunities for investment and partnerships.

U.S. Department of State, Washington, D.C.

Senior Advisor, Bureau of Near Eastern Affairs (5/05–5/08)

Recruited to formulate and execute a strategic plan to advance U.S. policy interests, strengthen alliances and establish and/or expand programs focused on women across 16 countries in the Middle East and North Africa.

- Created 16 major demand-driven programs in four thematic areas: economy, law, democracy building and women's rights.
- Advised senior department officials, ambassadors and members of congress on regional progress, trends, risks and opportunities as they developed in these areas.
- Negotiated and managed a \$50 million budget (Middle East Partnership Initiative and NEA/Iraq) over three fiscal year cycles to support the implementation of programs.
- Designed, led and implemented the first women's programs sponsored by the U.S. Government in the Gulf region.
- Architect of several sustainable public-private partnership programs that have had demonstrable positive impact on U.S. foreign relations, societies at large and thousands of individuals in the Middle East. These programs include: *U.S.-Middle East Partnership for Breast Cancer Awareness and Research*, *MENA Businesswomen's Network*, *Women in Technology*, and *Women in Politics*.
- Served on the U.S.-Saudi Arabia Strategic Dialogue, Human Development Working Group.

Cisco Systems, Inc., Washington, D.C. and San Jose, CA

Senior Manager, International Strategies and Partnerships, Corporate Affairs

(8/98–4/05)

Built a multi-million dollar public-private partnership organization at Cisco. Brought together, for the first time, strategic partners that included: foreign governments, NGOs, U.S. Agency for International Development, and UN Agencies to deliver the Cisco Networking Academy Program (CNAP, the world's largest e-learning program), to 90 developing and emerging market countries around the globe. Produced a program that successfully fused multi-stakeholder interests, integrated sound business practices and promoted pro-competitive policies and regulatory reform. Founded and directed Cisco's Corporate Social Responsibility strategic initiatives including:

- Cisco's *Least Developed Countries Initiative*, launched at the G-8 Summit in 2000, which led the way in bridging the digital divide by rolling out CNAP in 39 Least Developed Countries. This resulted in training more than 25,000 students (as of '05) in industry standard IT skills, reaching 33 percent female enrollment and 78 percent employment for graduates in countries where 80 percent of the population live on less than \$2 per day.
- Cisco/CLI *Gender Initiative*. First major corporate initiative designed to level the playing field for women in IT. By mainstreaming gender in CNAP, investing in women and girls and institutionalizing policies and processes to ensure access and opportunities to women, the program had substantial impact on instructors, students, institutions and governments in more than 150 countries.

Eudy Nelson & Associates, Washington, D.C. (8/97–12/97)

Consulted on events for the National Republican Senatorial Committee

United Nations Mission, Sarajevo, Bosnia-Herzegovina

Economic and Political Affairs Officer (11/95–10/96)

Economic advisor to Chief of UN Civil Affairs. Responsible for analysis of economic situation in post-war Bosnia including: political and economic ramifications of delays in reconstruction, progress on financial institution building, bi-lateral economic aid, unemployment, downside risks and investment climate.

UNICEF, Tuzla, Bosnia-Herzegovina

Head of Office (4/94–9/94)

Directed UNICEF's emergency operations in the Tuzla region. Led training programs in the sectors of education, health, nutrition and psycho-social rehabilitation for children. Managed the joint UN supplementary feeding program, coordinating the efforts of three UN agencies and four NGOs. Supervised humanitarian missions

across confrontation lines, bringing doctors, medical and education supplies to children in conflict zones. Worked with government ministries to develop post-war education and health policies and systems. Served as regional spokesperson for UNICEF.

United States Mission to the United Nations, New York, NY
Chief of Protocol (4/89–4/94)

Directed and managed an effective Protocol Affairs program based on U.S. Foreign policy objectives. Organized a program which fostered positive relations with the other 184 member states of the UN. Planned and executed over 100 events annually. Managed budget and staff of four.

U.S. Department of State, Washington, D.C.
Deputy to the Assistant Chief of Protocol for Ceremonials (6/88–4/89)

Planned and organized all official social functions for the Secretary of State for Chiefs of State and other foreign guests. Acted as liaison between the diplomatic corps and the Department of State. Served as an authority on ceremonial protocol matters in the U.S. Government.

Blair House, the President's Guest House, Washington, D.C.
Assistant Manager and Acting Manager (9/85–6/88)

Responsible for Chiefs of State, their families and delegations from over 60 countries during official visits to Washington. Coordinated accommodations for all official visitors of the President and worked with the Chief of Protocol and visits staff to organize their schedules and activities. Assisted the general manager with oversight of the \$13 million renovation project, and all operations of the house, including the supervision of staff and budget.

U.S. Department of Energy, Washington, D.C.
Legislative Affairs Specialist (2/85–8/85)

Presidential Inaugural Committee, Washington, D.C.
Assistant to the Director of Events and Inaugural balls (12/84–2/85)

Reagan-Bush '84, Washington, D.C.
Administrative Assistant to the Campaign Director (10/83–11/84)

The White House, Washington, D.C.
Staff Assistant—Office of Political Affairs (4/83–10/83)
Research Assistant—Library and Research Center (4/82–4/83)
Intern—Office of Correspondence (10/81–4/82)

Education

The London School of Economics and Political Science, London, England
Masters of Science, Economics, Social Policy in Developing Countries. September, 1995

Georgetown University, Washington, D.C.
Bachelor of Arts, (Majors: International Relations and American Government). May, 1983

Other Activities

Member of the Council on Foreign Relations
Board Member, USA, King Hussein Cancer Center
Advisor, Antiquities Coalition

The CHAIRMAN. Thank you, Ms. Walsh.

Senator Nelson has arrived. And I'll turn to him for an opening statement.

STATEMENT OF HON. BILL NELSON, U.S. SENATOR FROM FLORIDA

Senator NELSON. And, Mr. Chairman, I've been in markup of the Senate Armed Services Committee, and we have successfully marked up the bill. I might say to Ms. Walsh, indeed I know Wilbur Ross is from Florida, and he is quite interested in trade. So if you will work with him—and hopefully this Committee will consider a Deputy Secretary for International Trade as well—I think we can have a good approach there.

Mr. Chairman, thank you for calling this hearing. The Department of Transportation's most important job is the regulation and oversight of safety, and that job never stops. Just last night, an Amtrak train fatally struck two CSX employees who were working on a nearby track. This is tragic. These kinds of accidents happen far too often, and we need to do more to prevent them.

I just rode Amtrak, the Acela, and when I got off in the Washington station, I looked up on the platform at those steel beams that cover the tracks. They are all up and down the tracks for the passengers to walk without getting into the elements. Lo and behold, all of the steel beams are rusting. We've got an infrastructure problem, and we've got to address it.

The Department also has a critical safety role in an issue that is important to so many of our constituents, especially in Florida, and that is the continuing Takata airbag mess. Back in 2014, this Senator chaired the first congressional hearing on the defective airbag failures, and at that time, we heard from a victim, Air Force Lieutenant Stephanie Erdman, who was seriously injured and almost lost an eye when a Takata airbag exploded after a minor accident in the Florida Panhandle, a minor accident. And we also heard from a senior Takata executive who stonewalled and failed to acknowledge the severity of the problem.

And in a series of reports, we uncovered evidence that the company routinely manipulated data about the safety of its airbags. Takata's actions were shameful and showed a lack of regard for human safety. And as a result, the Department of Justice charged Takata with criminal violations for wire fraud and conspiracy concerning the defective airbag inflators.

And because of all this, you would think that we would finally be making some serious progress on Takata recalls, but that's not the case. Earlier this month, this Senator released new statistics showing that two-thirds of over 46 million recalled Takata airbag inflators nationwide have not been repaired, 2 years later. And even more troubling is that 16 people have died and more than 180 people worldwide have been injured because of the airbags.

So this is a crisis, and we need leadership to get these recalls back on track. This is especially true in light of Takata's announcement that it will enter into bankruptcy, an announcement just made in the last few days, making it almost certain that the company will not be able to pay for all the replacement airbags needed to fix this mess or adequately compensate all the victims who have been injured or families who have lost their loved ones.

So this leads me to your nomination, Mr. Bradbury. You obviously know a lot about this issue because you represented Takata in regulatory and congressional investigations for more than 2 years. There's no problem that you are an advocate as an attorney at law representing a client. I understand that.

But we've got a problem of automobile safety. You have been generously compensated for being an advocate as an attorney at law. And I believe, as the Department's General Counsel, you must be free of any conflicts that could be perceived as affecting your ability to do the job of protecting the public.

As a result, I wrote you last week and I urged you, if confirmed, to recuse yourself from all matters involving Takata for your entire term as the Department's General Counsel.

So, Mr. Chairman, I would like to ask that my letter to Mr. Bradbury and his response be entered in the record.

The CHAIRMAN. Without objection, so ordered.
[The information referred to follows:]

UNITED STATES SENATE
Washington, DC, June 22, 2017

STEVEN G. BRADBURY, Esquire
McLean, VA

Dear Mr. Bradbury:

The U.S. Senate Committee on Commerce, Science, and Transportation is in receipt of your nomination to the position of General Counsel of the U.S. Department of Transportation.

This position plays a critical role in ensuring the safety of our Nation's transportation systems. As such, I believe that the person occupying this position must be free of any arrangements or entanglements that could be seen as impeding that duty to serve the American people.

In your response to the Committee questionnaire, you state that you "[r]epresented TK Holdings Inc. (Takata Corporation) in connection with investigations of airbag inflator ruptures by [the National Highway Traffic Safety Administration] NHTSA, Congress, and other entities, and in related civil litigation." As you know, defective Takata inflators have been linked to 11 deaths and approximately 180 injuries nationwide. Recently, Honda confirmed that another Takata airbag inflator ruptured in Las Vegas, Nevada, causing serious injury to the driver.

Both civil and criminal litigation surrounding the Takata recalls is ongoing, and on February 27, 2017, Takata pled guilty to one count of wire fraud related to fabrication of its inflators' safety record and agreed to pay \$1 billion in criminal penalties. Three Takata executives currently face criminal charges for their alleged involvement in the Takata scheme. On May 18, 2017, four automakers involved in multi-district civil litigation reached a settlement agreement to pay \$553 million to compensate vehicle owners affected by the recalls.

Furthermore, under Takata's Amended Consent Order and Coordinated Remedy Orders with NHTSA, the agency will play an active role in overseeing the recall process, including the production of replacement airbag inflators, well into the next decade. In light of the low recall completion rates, it is reasonable to expect that oversight of the recalls by NHTSA and the Department will only increase in the future. Additionally, by the end of 2019, Takata must demonstrate to NHTSA the safety of its desiccated ammonium nitrate-based inflators. NHTSA's determination on this matter could result in expanding the recalls to include millions of additional Takata inflators.

In your agreement with the Department's Designated Agency Ethics Official, you state, "I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d)." In addition, you state, "[F]or the duration of my appointment as General Counsel, I will not participate personally and substantially in any particular manner in which I know I previously appeared before, or directly communicated with, the U.S. Department of Transportation on behalf of Dechert LLP or any former client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d)."

Unfortunately, this language does not fully address how you intend to handle recusals from matters involving Takata Corporation or TK Holdings Inc. Accordingly, prior to taking further action on your nomination, I ask you to confirm in writing that you will:

- (1) Not participate in any NHTSA or Department matter involving Takata Corporation or TK Holdings, Inc, including all subsidiaries and successor entities, during your entire term as General Counsel; and
- (2) Not seek or accept an authorization under 5 C.F.R. § 2635.502(d) to participate in any matter involving Takata Corporation or TK Holdings Inc., including all subsidiaries and successor entities, during your entire term as General Counsel.

Thank you in advance for your prompt response to this request.
Sincerely,

BILL NELSON,
Ranking Member.

cc: The Honorable John Thune, Chairman

June 23, 2017

Hon. BILL NELSON,
Ranking Member,
Committee on Commerce, Science, and Transportation,
United States Senate,
Washington, DC.

Dear Senator Nelson:

Thank you for your letter of yesterday concerning my nomination to be General Counsel of the U.S. Department of Transportation (the "Department"). After reviewing my responses to the Committee's Questionnaire and my Ethics Agreement with the Department's Designated Agency Ethics Official, or "DAEO," you have asked me to make specific commitments regarding recusals from matters involving Takata Corporation, including its subsidiaries and successor entities (together, "Takata"), in the event I am confirmed as the Department's General Counsel.

I very much appreciate your interest in these questions, and I know from direct experience how much you personally care about addressing and resolving the safety issues relating to airbag inflator ruptures. As you know, I represented the U.S. subsidiary of Takata in connection with the airbag inflator rupture issues before the Department and elsewhere. Among other things, I participated directly in the discussions with the National Highway Traffic Safety Administration, or "NHTSA," that produced the consent orders governing the recalls of Takata airbag inflators and establishing the framework for expansion of those recalls going forward.

With regard to Takata, as in all matters, you can be assured I take my ethical responsibilities extremely seriously, both as an attorney representing clients in private practice and as a prospective officer of the Government whose only client will be the United States. I will honor my professional duties as a lawyer and will adhere scrupulously to the requirements of the Federal ethics laws and regulations, as well as the additional obligations I will assume under Executive Order 13770 ("Ethics Commitments by Executive Branch Appointees"), if confirmed.

Specifically: For the duration of my tenure with the Department, I will recuse myself from all aspects of the Takata airbag inflator recalls. Furthermore, under Executive Order 13770, for a period of two years following my confirmation as General Counsel of the Department, I will not participate in any other particular matter involving specific parties that is directly and substantially related to Takata, including regulations and contracts. I do not plan to seek a waiver under applicable ethics regulations to participate in particular matters involving Takata.

Respectfully submitted,

STEVEN G. BRADBURY.

cc: The Honorable John Thune, Chairman

Senator NELSON. Mr. Bradbury, I want to thank you for your prompt response and your written commitment to recuse yourself from Takata recall-related matters. I intend to seek clarification from you during my questioning on whether you would seek or accept any waivers that would allow you to participate in any Takata-related matters. I will be asking you those questions, and I expect a direct answer.

In the meantime, Ms. Walsh and Mr. Bradbury, I look forward to continuing this hearing today.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Nelson.

Mr. Bradbury and Ms. Walsh, I know you both appreciate the importance of cooperation between the branches of our government. Nevertheless, these hearings give us an opportunity to underscore that point. So a question for both of you is, if confirmed, will you

pledge to work collaboratively with this committee and provide thorough and timely responses to our requests for information as we work together to address various policies?

Ms. WALSH. Yes, Chairman, I will.

Mr. BRADBURY. Yes, absolutely, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Bradbury, as you know, a major part of the General Counsel's job is to help oversee the regulatory process at DOT. Though I know Deputy Secretary Rosen, who is the Department's Regulatory Reform Task Force Officer, will also play a large role in that, could you speak to the principles that you will use to evaluate regulations that come to your office?

Mr. BRADBURY. Yes. Thank you, Mr. Chairman. As——

[Audience interruption.]

The CHAIRMAN. Order in the hearing room!

Mr. Bradbury, again if you could speak to the principles that you will use to evaluate regulations that come to your office.

Mr. BRADBURY. Yes. Thank you. Mr. Chairman, as Senator Nelson stressed, the number one mission of the Department of Transportation is public safety. So the necessity of regulation to address safety issues is certainly the primary consideration, as I think the Secretary of Transportation has made clear in her testimony.

But I do look forward to working with the Regulatory Task Force, the Regulatory Reform Task Force, to review the regulations of the Department and to determine those that are necessary to address safety issues, and then to ensure that the regulations are focused in a way that will preserve incentives to invest in innovation because this is a transformational time in transportation and technology, and we need to preserve those investments to invest in new innovation. So I think that's a critical part of the equation.

Thank you.

The CHAIRMAN. Is there a way that maybe you could illustrate a couple of examples of DOT regulations that in your view do a good job of reflecting or incorporating those principles that you just alluded to?

Mr. BRADBURY. Yes. Thank you, Mr. Chairman. In a couple of different areas. One is in automotive safety regulation. The regulations I think that NHTSA has promulgated are very clear in terms of the disclosure obligations and the procedures that manufacturers have to follow, and I think that kind of clear procedural guidance is critical. Those types of regulations are I think extremely helpful in terms of achieving the safety mandate and leaving the markets free to innovate.

Similarly, on the aviations side, where the Department has very important authority to enforce prohibitions on unfair or deceptive trade practices, if the Department has a record, a factual record, it develops of practices that are unfair to consumers, for example, in the aviation industry, then a clear rule based on that record that prohibits that specific activity, we have several examples of that, I think, are examples of the right kind of regulation.

The CHAIRMAN. Thank you, Mr. Bradbury.

Ms. Walsh, if confirmed, your authority as Assistant Secretary for Global Markets will include the SelectUSA program, which is an initiative of the Department of Commerce to attract more direct

foreign investment in the United States. What are your thoughts about how the SelectUSA program could be used to further your goals for the Global Markets Division at the Department of Commerce should you be confirmed?

Ms. WALSH. Thank you, Mr. Chairman. The SelectUSA has just completed a fourth conference that they have done. It was highly successful. There were 3,000 participants from around the world, and it was really one of the highest rated and only event of its sort here in the United States.

SelectUSA's purpose is to attract foreign direct investment from around the world, something that we welcome, particularly the United States at this time. So certainly export promotion and FDI attraction into the United States will be critical, if confirmed, in this position.

The CHAIRMAN. Thank you.

Mr. Bradbury, tomorrow we are going to be marking up the FAA Reauthorization Act of 2017. What do you view as the proper role for the Office of General Counsel with respect to the protection of aviation, consumers, and DOT enforcement of laws enacted for their benefit?

Mr. BRADBURY. Well, I think as you well know, Mr. Chairman, the Office of General Counsel has a critical role in terms of enforcing the aviation standards against unfair deceptive practices in aviation. And then through its supervisory role with respect to the Chief Counsel at the FAA, the Federal Aviation Administration, a critical role in assisting the FAA in terms of legal support in ensuring that its regulation and enforcement of safety requirements for the air system are enforced and are clear and are effective. So it's certainly an important part, and I would, if confirmed, very much look forward to working closely with you and the members of this Committee in terms of your policy goals with respect to FAA Reauthorization and the issues that arise with respect to aviation. Thank you.

The CHAIRMAN. Thank you.

There are a series of letters I want to enter into the record. There are four letters signed by a total of over 60 prominent individuals, including the signatures of former DOT Secretary Norm Mineta, former DOT Secretary Rod Slater, as well as former Attorney General Michael Mukasey, and former Attorney General Ed Meese, and several state attorneys general, including the Attorney General of South Dakota, have also signed a letter of support for Mr. Bradbury's nomination. And he has also received some letters expressing concerns about Mr. Bradbury's nomination, and these too will be entered into the record for members of this Committee to review. So those will be entered into the record without objection.

[The information referred to follows:]

June 22, 2017

Hon. JOHN THUNE,
Chairman,
Committee on Commerce, Science, and
Transportation,
United States Senate,
Washington, DC.

Hon. BILL NELSON,
Ranking Member,
Committee on Commerce, Science, and
Transportation,
United States Senate,
Washington, DC.

Re: Nomination of Steven Gill Bradbury to be General Counsel of the Department
of Transportation

Dear Chairman Thune and Ranking Member Nelson:

We write in strong support of the nomination of Steven Bradbury to be General Counsel of the Department of Transportation. Each of us served with Steve in the Federal Government, and we believe him to be an excellent choice to serve as General Counsel.

Steve's education, prior public service and work in private practice make him exceptionally well-qualified for this important role. For the past eight years, Steve has served as a partner at a prominent law firm in Washington, D.C. and New York (and from 1994–2004 served as a partner at a different but equally prominent firm). He holds degrees from Stanford University and the University of Michigan Law School, and clerked for Associate Justice Clarence Thomas of the Supreme Court and Judge James L. Buckley of the U.S. Court of Appeals for the D.C. Circuit. From 2004 to 2009, he served as Acting Assistant Attorney General and Principal Deputy Assistant Attorney General at the Office of Legal Counsel, where he advised the President, the Attorney General and the heads of executive departments and agencies on significant questions of constitutional, statutory, and administrative law.

Because of Steve's extensive experience in both government and private practice, we believe he is very well-qualified to serve as General Counsel of the Department of Transportation. While at the Justice Department, Steve approached his work with extraordinary care, and we believe he will demonstrate the same exceptional commitment at the Department of Transportation. We also understand that Steve has valuable experience handling significant matters before the Department (including one of the largest automotive safety recalls in history), and has also handled issues involving aviation competition and international route authorizations. Most important, Steve has the integrity, temperament, judgment, and legal acumen to succeed in the role of General Counsel.

In short, we believe that Steve will serve in this position with distinction and honor. We respectfully urge the Committee and the Senate to approve his nomination to be General Counsel of the Department of Transportation.

Sincerely,

Alex M. Azar II
Deputy Secretary, Health and Human Services (2005–2007)
General Counsel, Health and Human Services (2001–2005)

Thomas O. Barnett
Assistant Attorney General, Antitrust Division (2006–2008)

C. Frederick Beckner III
Deputy Assistant Attorney General, Civil Division (2006–2009)

John B. Bellinger III
Legal Adviser to the Department of State (2005–2009)
Legal Adviser to the National Security Council (2001–2005)

Bradford A. Berenson
Associate Counsel to the President (2001–2003)

Megan L. Brown
Counsel to the U.S. Attorney General (2007–2008)

Reginald Brown
Associate Counsel to the President (2003–2005)

Jeffrey S. Bucholtz
Acting Assistant Attorney General, Civil Division (2007–2008)
Principal Deputy Assistant Attorney General, Civil Division (2006–2008)

Lily Fu Claffee
General Counsel, U.S. Department of Commerce (2008–2009)
Deputy General Counsel, U.S. Department of the Treasury (2006–2008)

Deputy Associate Attorney General, U.S. Department of Justice (2005–2006)

Gus P. Coldebella
Acting General Counsel, Department of Homeland Security (2007–2009)
Deputy General Counsel, Department of Homeland Security (2005–2009)

Jonathan Cohn
Deputy Assistant Attorney General, Civil Division (2004–2009)

Daniel J. Dell’Orto
Acting General Counsel, Department of Defense (2008–2009)
Principal Deputy General Counsel, Department of Defense (2000–2009)

Grant M. Dixton
Associate Counsel to the President (2003–2006)

Thomas H. Dupree Jr.
Deputy Assistant Attorney General, Civil Division (2007–2009)

John P. Elwood
Deputy Assistant Attorney General, Office of Legal Counsel (2005–2009)

Alice Fisher
Assistant Attorney General, Criminal Division (2005–2008)

Brett Gerry
Chief of Staff to the Attorney General (2007–2008)
Deputy Assistant Attorney General, National Security Division (2006–2007)

Matthew W. Friedrich
Acting Assistant Attorney General, Criminal Division (2008–2009)

William J. Haynes
General Counsel of the Department of Defense (2001–2008)

Richard Klingler
Senior Associate Counsel to the President and Legal Adviser, NSC Staff (2006–2007)
Special Assistant and Associate Counsel to the President (2005–2006)

C. Kevin Marshall
Deputy Assistant Attorney General, Office of Legal Counsel (2005–2007)
Counsel to the Assistant Attorney General, Office of Legal Counsel (2004)

William E. Moschella
Principal Associate Deputy Attorney General (2006–2008)
Assistant Attorney General, Office of Legislative Affairs (2003–2006)

Carl J. Nichols
Deputy Assistant Attorney General, Civil Division (2005–2008)
Principal Deputy Associate Attorney General (2008–2009)

Jake Phillips
Senior Counsel to the Deputy Attorney General (2008–2009)
Counsel to the Assistant Attorney General, Office of Legal Counsel (2007–2008)

Benjamin A. Powell
General Counsel, Office of the Director of National Intelligence (2006–2009)

J. Patrick Rowan
Assistant Attorney General, National Security Division (2008–2009)

Kate Comerford Todd
Associate Counsel to the President (2007–2009)

Ted Ulyot
White House and Department of Justice (2003–2005)

June 22, 2017

Hon. JOHN THUNE,
Chairman,
Committee on Commerce, Science, and
Transportation,
United States Senate,
Washington, DC.

Hon. BILL NELSON,
Ranking Member,
Committee on Commerce, Science, and
Transportation,
United States Senate,
Washington, DC.

Re: Nomination of Steven Gill Bradbury to be General Counsel of the Department
of Transportation

Dear Chairman Thune and Ranking Member Nelson:

We write to express our strong support for the nomination of Steven Bradbury to be General Counsel of the Department of Transportation. Each of us has previously served in one or more senior positions at the Department of Justice, the White House, or agencies within the Intelligence Community. We believe Mr. Bradbury is an excellent choice to serve as General Counsel.

Mr. Bradbury's professional experience, both in public service and in the private sector, render him exceptionally well-prepared for this position. A graduate of Stanford and the University of Michigan Law School, he clerked for Justice Clarence Thomas of the United States Supreme Court and Judge James Buckley of the United States Court of Appeals for the District of Columbia Circuit. He served during two Administrations in the Office of Legal Counsel at the Department of Justice, first as an Attorney-Adviser and later as the Principal Deputy Assistant Attorney General and Acting Assistant Attorney General. In those capacities, he was called upon to advise government officials at the highest levels, including many of us, on challenging and important issues of law. In private practice he has likewise been relied upon to handle matters of great significance and complexity, many of which have involved issues affecting the transportation industry.

The breadth and depth of Mr. Bradbury's background and experience, his demonstrated capacity for careful and thoughtful legal analysis, his consistent professionalism, and his strong integrity would enable him to provide exemplary service to the Department of Transportation—and the country—as General Counsel. We strongly urge the Committee to report favorably upon his nomination.

Sincerely,

William P. Barr
Attorney General (1991–1993)

William A. Burck
Deputy Counsel to the President (2007–
2009)

Paul D. Clement
Solicitor General (2005–2008)

Fred. F. Fielding
Counsel to the President (2007–2009;
1981–1986)
Commissioner, 9–11 Commission (2002–
2004)

Mark Filip
Deputy Attorney General (2008–2009)

Gregory G. Garre
Solicitor General (2008–2009)
Principal Deputy Solicitor General
(2005–2008)

Alberto R. Gonzales
Attorney General (2005–2007)
Counsel to the President (2001–2005)

Stephen J. Hadley
National Security Advisor (2005–2009)
Deputy National Security Advisor (2001–
2005)

General Michael V. Hayden, USAF
(retired)
Director, Central Intelligence Agency
(2006–2009)
Director, National Security Agency
(1999–2005)

Peter D. Keisler
Acting Attorney General (2007)
Assistant Attorney General, Civil
Division (2003–2007)

Edwin Meese III
Attorney General (1985–1988)

Michael B. Mukasey
Attorney General (2007–2009)
United States District Judge (1988–
2006)

Theodore B. Olson
Solicitor General (2001–2004)

George J. Terwilliger III
Deputy Attorney General (1991–1993)

Kenneth L. Wainstein
Homeland Security Advisor (2008–09)
Assistant Attorney General for National
Security (2006–08)

June 27, 2017

Hon. JOHN THUNE,
Chairman,
Committee on Commerce, Science, and
Transportation,
United States Senate,
Washington, DC.

Hon. BILL NELSON,
Ranking Member,
Committee on Commerce, Science, and
Transportation,
United States Senate,
Washington, DC.

Dear Chairman Thune and Ranking Member Nelson:

We write to endorse the nomination of Steven Gill Bradbury to serve as General Counsel of the Department of Transportation.

We have nothing but the highest respect for his legal skills, his judgment, his work ethic, and his professionalism. As a public servant, he undoubtedly will bring those same qualities to this important job in service to the country.

We thus urge you to report his nomination favorably to the full Senate. Thank you in advance for considering our views.

Sincerely,

Jeremy Bash
Chief of Staff, U.S. Department of Defense (2011–2013)
Chief of Staff, Central Intelligence Agency (2009–2011)
Democratic Counsel, House Permanent Select Committee on Intelligence (2005–2009)

John P. Carlin
Assistant Attorney General for the National Security Division, U.S. Department of Justice (2014–2016)
Chief of Staff, Federal Bureau of Investigation (2009–2011)

Daryl Joseffer
Principal Deputy Solicitor General (2008–2009)
Assistant to the Solicitor General (2004–2008)
Deputy General Counsel, Office of Management and Budget (2003–2004)

The Honorable Norman Y. Mineta
Secretary, U.S. Department of Transportation (2001–2006)

Matthew G. Olsen
Former Director, National Counterterrorism Center (2011–2014)
Former General Counsel, National Security Agency (2010–2011)

Virginia A. Seitz
Former Assistant Attorney General, Office of Legal Counsel (2011–2013)

The Honorable Rodney E. Slater
Secretary, U.S. Department of Transportation (1997–2001)

Jeffrey L. Turner
Managing Partner, Public Policy Practice Group, Squire Patton Boggs (U.S.) LLP

June 27, 2017

Hon. JOHN THUNE,
Chairman,
Committee on Commerce, Science, and
Transportation,
United States Senate,
Washington, DC.

Hon. BILL NELSON,
Ranking Member,
Committee on Commerce, Science, and
Transportation,
United States Senate,
Washington, DC.

Re: Nomination of Steven Gill Bradbury to be General Counsel of the Department
of Transportation

Dear Chairman Thune and Ranking Member Nelson:

We the undersigned Attorneys General for various States are writing in strong support of the President's nomination of Steven Gill Bradbury to serve as General Counsel of the U.S. Department of Transportation.

As Attorneys General responsible for protecting the rights and legal interests of the people of our States, we have a keen interest in the Federal Government's exercise of its broad authorities with respect to the Nation's interstate transportation systems. The public safety of our highways, rail lines, and other modes of transportation is critical to each of our states, and we look to the Department of Transportation for smart and effective enforcement action in cooperation with State and local authorities. It is also important that the Federal Government act wisely and efficiently in spending tax dollars in support of needed infrastructure projects. In addition, we expect that the Department of Transportation will pursue reasonable regulatory policies that are consistent with the law and that promote safety while preserving appropriate incentives for technological innovation, private investment, and variation in approach among the States.

In all of these areas, it is vital that the Department of Transportation receive sound legal counsel on the proper exercise of its statutory authorities. We believe that Mr. Bradbury has exactly the right background and set of experiences to provide that legal guidance. As the head of the Office of Legal Counsel at the U.S. Department of Justice from 2005 to 2009, Mr. Bradbury advised the entire Executive Branch on compliance with the laws and the Constitution. And as an attorney in private practice, he has gained experience with a range of regulatory and enforcement issues before the Department of Transportation. We applaud the President for nominating Mr. Bradbury, and we look forward to working with him and with Secretary Chao on important transportation issues of common interest.

Accordingly, we respectfully urge the Committee to move Mr. Bradbury's nomination forward.

Respectfully submitted,

ALAN WILSON
Attorney General
State of South Carolina

PATRICK MORRISEY
Attorney General
State of West Virginia

LESLIE RUTLEDGE
Attorney General
State of Arkansas

PAM BONDI
Attorney General
State of Florida

CHRIS CARR
Attorney General
State of Georgia

CURTIS HILL
Attorney General
State of Indiana

DEREK SCHMIDT
Attorney General
State of Kansas

JEFF LANDRY
Attorney General
State of Louisiana

JOSH HAWLEY
Attorney General
State of Missouri

TIM FOX
Attorney General
State of Montana

DOUG PETERSON
Attorney General
State of Nebraska

ADAM PAUL LAXALT
Attorney General
State of Nevada

SEAN REYES
Attorney General
State of Utah

BRAD SCHIMEL
Attorney General
State of Wisconsin

STEVE MARSHALL
Attorney General
State of Alabama

BILL SCHUETTE
Attorney General
State of Michigan

KEN PAXTON
Attorney General
State of Texas

MARTY JACKLEY
Attorney General
State of South Dakota

WAYNE STENEHJEM
Attorney General
State of North Dakota

UNITED STATES SENATE
 Washington, DC, June 28, 2017

Hon. MITCH MCCONNELL,
 Majority Leader,
 United States Senate,
 Washington, DC.

Dear Mitch:

I am writing to inform you of my strong objection to any consideration of the nomination of Steven G. Bradbury to serve as the general counsel of the Department of Transportation.

It has come to my attention that while serving as the acting head of the Department of Justice's Office of Legal Counsel from 2005 to 2009, Mr. Bradbury authored several legal memoranda that authorized the use of waterboarding and other forms of torture and degrading treatment.

I find his nomination to any position of trust in our government to be personally offensive.

Please know that I will use whatever means I have at my disposal to block consideration of this nominee.

Sincerely,

JOHN MCCAIN,
United States Senator.

July 31, 2017

Dear Senator,

We are a nonpartisan group of former national security, law enforcement, intelligence, and interrogation professionals. Our collective professional experience includes service in the U.S. military, the Federal Bureau of Investigation, the Central Intelligence Agency, the Drug Enforcement Administration, the Defense Intelligence Agency, the Army Criminal Investigation Command, and the Naval Criminal Investigative Service.

We write today to express our opposition to the nomination of Mr. Steven Bradbury to serve once again in a position of significant responsibility within the U.S. Government as general counsel of the Department of Transportation. Our opposition stems from the necessary judgment and personal courage this office requires to provide candid and objective legal advice to policymakers that may be seeking politically expedient policy solutions.

We dedicated our professional lives to keeping our Nation safe. That work demanded using every resource at our disposal, including and especially our moral authority. Our enemies act without conscience. We must not.

Mr. Bradbury spent many years serving in the Department of Justice—including as acting head of the Office of Legal Counsel—during the George W. Bush Administration. In this position, he prepared official memoranda that provided legal cover for other agencies in the U.S. Government to employ a program of interrogation tactics that amounted to torture or cruel, inhuman, or degrading treatment. These brutal methods—which included waterboarding—fundamentally violated domestic and international law governing detainee treatment and caused untold strategic and operational harm to our national security. As former interrogators, intelligence, and law enforcement professionals with extensive firsthand experience in the field of interrogation, we were shocked by Mr. Bradbury's attempt to defend the use of the waterboard and other torture tactics based on the incorrect assertions that their use would not cause severe physical pain or suffering and would produce valuable intelligence. In our professional judgment, torture and other forms of detainee abuse are not only immoral and unlawful, they are ineffective and counterproductive in gathering reliable intelligence. They also tarnish America's global standing, undermine critical alliances, and bolster our enemies' propaganda efforts. If the Senate confirms Mr. Bradbury, it would send a clear message to the American public that authorizing the use of torture is not only acceptable but is not a barrier to advancement into the upper ranks of our government. We understand that Mr. Bradbury did not act alone in authorizing torture, but as his nomination is before you, we ask you to take this opportunity to reaffirm our commitment to the ideals we strive to uphold by rejecting his nomination.

Torture is not a partisan issue. Our respect for human dignity is timeless, and we must never risk our national honor to prevail in any war. Your vote to reject

this nomination would reflect the morally sound leadership that this country needs and would not forget.

Signed,

Frank Anderson—CIA (Ret.)
 Glenn Carle—CIA (Ret.)
 Barry Easley—Former CIA
 Mark Fallon—NCIS (Ret.)
 Charlton Howard—NCIS (Ret.)
 Timothy James—NCIS (Ret.)
 Colonel Steven Kleinman—U.S. Air Force (Ret.)

Marcus Lewis—Former U.S. Army Interrogator
 Mike Marks—NCIS (Ret.)
 Robert McFadden—NCIS (Ret.)
 Joe Navarro—FBI (Ret.)
 William Quinn—Former U.S. Army Interrogator
 Ken Robinson—U.S. Army (Ret.)
 Patrick Skinner—CIA (Ret.)

UNITED STATES SENATE
 Washington, DC, August 1, 2017

Hon. JOHN THUNE,
 Chairman,
 Senate Committee on Commerce,
 Science, and Transportation,
 Washington, DC.

Hon. BILL NELSON,
 Ranking Member,
 Senate Committee on Commerce,
 Science, and Transportation,
 Washington, DC.

Dear Chairman Thune and Ranking Member Nelson:

I write to share my deep concerns about Steven G. Bradbury, who has been nominated by President Trump to serve as General Counsel of the Department of Transportation and whose vote before the Senate Commerce Committee is scheduled for August 2, 2017. Mr. Bradbury's role as an architect of the torture program, along with his proven unwillingness to exercise independence and objectivity at moments when those qualities were most warranted, in my view disqualify him from any position of public trust.

Mr. Bradbury was acting Assistant Attorney General from 2005 to 2007 and headed the Office of Legal Counsel at the U.S. Department of Justice from 2005 to 2009. During that time, along with John Yoo and Jay Bybee, he served as a principal author of what have come to be known as the "torture memos." While the torture program had already been developed by the administration prior to Mr. Bradbury's appointment, he contributed to secret OLC memos that provided the legal justification for a range of CIA interrogation tactics including waterboarding, cramped confinement, and dietary manipulation.

Mr. Bradbury's work has been sharply criticized inside and outside the Department of Justice. In 2007, State Department Legal Adviser John Bellinger warned Mr. Bradbury that his draft opinion analyzing Common Article 3 of the Geneva Convention "will not be considered the better interpretation of [the law] but rather a work of advocacy to achieve a desired outcome."¹ Mr. Bradbury's legal opinions were eventually overturned, and the Department's Office of Professional Responsibility (OPR) issued a report in 2009 citing "serious concerns about some of his analysis."² OPR's review "raised questions about the objectivity and reasonableness of some of the Bradbury Memos' analyses" and found that instead of providing objective legal analysis his memos "were written with a goal of allowing the ongoing CIA program to continue."³ As a coalition of human rights groups noted in their letter of June 22 to Chairman Thune and Ranking Member Nelson of the Committee on Commerce, Science, and Transportation, Mr. Bradbury's "analysis directly contradicted relevant domestic and international law regarding the treatment of prisoners, and helped establish an official policy of torture and detainee abuse that has caused incalculable damage to both the United States and the prisoners it has held."⁴

In testimony before the Senate Judiciary Committee in 2006, Mr. Bradbury justified the administration's interpretation of the Supreme Court's decision in *Hamdan v. Rumsfeld* by stating that the "president is always right."⁵ The general counsel of a Federal agency must not simply be a rubber stamp for the administration and its policies. In 2008, the Senate refused to confirm Mr. Bradbury as assistant attor-

¹Department of Justice Office of Professional Responsibility, Report on Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists, July 29, 2009.

²*Id.*

³*Id.*

⁴Coalition Letter Expressing Concern Regarding the Nomination of Steven Bradbury for General Counsel of the Department of Transportation, June 22, 2017, available at <https://cerjustice.org/coalition-letter-expressing-concern-regarding-nomination-steven-bradbury-general-counsel-department>.

⁵Senate Judiciary Committee, Hearing on *Hamdan v. Rumsfeld*: Establishing a Constitutional Process, July 11, 2006.

ney general for the Office of Legal Counsel in light of his role in crafting the torture memos and demonstrated lack of political independence. I urge you to again reject his nomination to this position of public trust.

Sincerely,

SHELDON WHITEHOUSE,
United States Senator.

PUBLIC CITIZEN
Washington, DC, August 1, 2017

Dear Senator,

We are writing to urge you to deny confirmation for Steven Bradbury, the nominee to become general counsel for the Department of Transportation.

Mr. Bradbury has a long record of opposing consumer and environmental interests that makes him singularly unfit for the general counsel position at an agency charged with developing a safe, affordable and environmentally sustainable transportation system for Americans.

Most notably, Mr. Bradbury has represented Takata Corporation as it has sought to defend itself from civil and criminal liability related to faulty air bags that have killed or injured more than 100 people. Recalls of the Takata airbags are proceeding at a disturbingly slow rate. As Senator Nelson said at Mr. Bradbury's confirmation hearing, he was "one of the main advocates for a company that has done dastardly things."

Unfortunately, that representation and advocacy was part of a long history of advocating on behalf of corporate wrongdoers. He has represented:

- Turing Pharmaceuticals, of Martin Shkreli fame, in connection with congressional investigations of outrageous drug price increases;
- Southeastern Legal Foundation in a Supreme Court challenge to EPA greenhouse gas emission rules;
- US Airways during its 2013 merger with AMR Corporation, the company that operates American Airlines, a merger that created the country's largest airline;
- Verizon, in a lawsuit against the Federal Communications Commission, challenging an early FCC net neutrality rule.
- The U.S. Chamber of Commerce and Investment Company Institute as *amici* in support of MetLife, Inc.'s challenge to its designation as "too big to fail" by the Financial Stability Oversight Council under the Dodd-Frank Act.

In Mr. Bradbury's world, corporations would be bigger, freer to pollute, price gouge and endanger the public.

This is not the resume of someone qualified to serve as general counsel at the Department of Transportation. Mr. Bradbury's record evinces a hostility to the very priorities he would be charged with upholding at the department. We urge you to reject his nomination.

Sincerely,

ROBERT WEISSMAN,
President.

The CHAIRMAN. Senator Nelson.

Senator NELSON. Mr. Chairman, this is an airbag. It goes in this device—in this case, this is a Honda—and it's right in the middle of the steering wheel. And it inflates. Even minor fender benders cause it to inflate. The actual inflator is inside the steering wheel. This is cut in half, and the explosive material is in the inside, and that has been the problem. Takata's ammonium nitrate, when exposed to humidity over time, can explode with great force. You can see how heavy that is. That explosive force starts to shred this metal, and that's what has killed 16 people and injured 180. The very device that is intended to save lives is killing lives.

Now, in response to the letter that I sent you last week, you said that you would agree to recuse yourself from all aspects of the Takata airbag inflator recall and that you, quote, do not plan to

seek a waiver that would allow you to participate in, quote, particular matters involving Takata since you were their counsel.

Well, I appreciate your response, but I want to get very specific. Will you agree to completely recuse yourself from all Takata matters and agree never to seek or accept a waiver of these restrictions?

Mr. BRADBURY. Thank you, Senator Nelson. And let me explain what the statements in the letter indicate just so it's clear. There would not be a waiver available at all with respect to the Takata airbag recall issues. Those I am recused from entirely. So as I've indicated to you, Senator Nelson, I recognize that I am recused for my entire time as General Counsel, if I am confirmed, from all aspects of the Takata airbag recalls.

With respect to any other unrelated matter that might come up, so let's say, for example, with respect to seatbelts, if the Takata successor, and based on what I read in the news, that could be the key systems company has an issue with seatbelts completed unrelated to airbags, I am indicating I would be recused under the ethics pledge of the President's Executive Order for 2 years from the commencement of my time at the Department if I am confirmed.

So I would not involve myself in any other particular matter that relates directly to Takata. Those unrelated matters are the ones for which at least theoretically a waiver might be available. And what I indicated in the letter is I do not plan to seek a waiver to participate in any of those unrelated matters that involve a Takata successor. I can't, as I sit here today, foresee what those matters might be, and if it did involve something completely unrelated and there was a strong need for the General Counsel to be involved, that's the kind of situation that I cannot foresee. But I do not plan to seek any such waiver for any such unforeseen matter, as I sit here. And, of course, if something came up like that, I would certainly be in touch with your office in advance of anything. But I think that's a pretty broad and clear statement.

Senator NELSON. Mr. Bradbury, I appreciate your good intentions, but the fact is that you were one of the main advocates for a company that has done dastardly things and that has, according to U.S. attorneys, violated criminal laws.

Now, we just need the understanding, as a committee, that you're still not going to be an advocate for Takata. And they've already said they're filing for bankruptcy. And this is at a time that the American public is still at risk because two-thirds of the recalled vehicles are not repaired. The Department of Transportation can in fact affect this, although it's specifically NHTSA. Why can't you just say that, "I'm not going to get involved in Takata"?

Mr. BRADBURY. Well, certainly, Senator Nelson, I will not in any way, shape, or form be an advocate for any private interest. I will represent only one client as General Counsel if I am confirmed, and that's the United States. I have no plans, as I indicated, to seek any waiver to be involved with respect to Takata on any matter that's unrelated to the airbag recalls. As to the airbag recalls, I would be entirely recused my entire time.

I agree with you completely, these are serious safety issues. One of the things I did as attorney for Takata was assist them in coming forward and disclosing these serious issues to NHTSA and to

the Department of Justice and assisting them in working out the consent order, and consent orders, with NHTSA to create the framework for these expanded recalls.

I agree entirely that they've got a long way to go, and it's critically important that they continue and that they be completed as promptly as possible. And so the Deputy General Counsel will be overseeing that. I know it has Secretary Chao's personal and direct attention. From personal experience, I well know how important it is to you and what a high priority it is and how it particularly affects Florida. So I'm not at all going to be an advocate for that company or any private company. Thank you.

Senator NELSON. OK. Mr. Chairman, I've just got to respond. So here's a potential hypothetical. We're rocking along into bankruptcy, and there is something in the bankruptcy with regard to creditors that would be favorable to Takata but would slow down the process of recall. That's something that you shouldn't get involved in because you had been the advocate, the spokesperson, the mouthpiece for Takata.

Mr. BRADBURY. I agree, and I would not get involved because that would have an effect potentially, as you have indicated there, on the completion of the recalls. So you have my pledge, I will not participate in any aspect of any work of the Department or the Department's activities with respect to that, that affect the recalls, the Takata airbag recalls, because we have to complete those as quickly as possible.

Thank you.

The CHAIRMAN. Thank you, Senator Nelson.
Senator Cantwell.

**STATEMENT OF HON. MARIA CANTWELL,
U.S. SENATOR FROM WASHINGTON**

Senator CANTWELL. Thank you, Mr. Chairman.

Ms. Walsh, thanks for your willingness to serve. You know, I'm sure you understand because you said you traveled to 100 different countries, that approximately 96 percent of global consumers are and over three-quarters of the world's purchasing power are overseas. So by some estimates, the middle class is expected to triple by 2030, creating booming markets in Asia, Africa, and India. Only 1 to 3 percent of the U.S. small businesses are currently exporters, so obviously we want our exporters to have all the help and support they can to break down those barriers and become champions.

One of the programs that I have supported and many of my colleagues have supported is the State Export Promotion Program, and I wanted to get your thoughts on whether you support that program. And, second, do you support the Export-Import Bank as a tool to help small business exporters?

Ms. WALSH. Thank you, Senator, for your interest and support in the Commerce Department. I definitely feel that the time is now to really be focusing on small and medium-sized enterprises in terms of the states. I think everyone has a role to play at the Federal, the state, and the local levels in ensuring that our small-and medium-sized enterprises are prepared to export for those that are interested in doing so.

The markets out there are huge, and the growth is exponential that we're seeing particularly in Asia. I would also say that obviously it's up on the upswing in Africa as well. And to answer your question with regard to the Export-Import Bank, I am not in a position to respond to that right now. The Export-Import Bank has definitely been part of the cycle of success in terms of our exports around the globe, but in terms of—I'm not in a position, but if confirmed, I would definitely look into working with them at the direction of the Secretary and Under Secretary.

Senator CANTWELL. You are not in a position to say whether you support it? Is that what you're saying?

Ms. WALSH. Not in a position to say personally? Is that what you're asking, Senator?

Senator CANTWELL. I mean, you are in such a big position to promote trade for the United States, the Export-Import Bank is one of the key tools.

Ms. WALSH. Right. And I think that it has been outstanding thus far from what I know of working with the Export-Import Bank, but in this position, I am not prepared to say what role the Department will play. But definitely, Senator, if confirmed—

Senator CANTWELL. Thank you.

Mr. Bradbury, I would love to ask you the same related question as it relates to DOT and trade because one of the things that will be in the purview of DOT is these FASTLANE grants that we were able to approve last administration to more quickly move freight, and we're still waiting for the awards for this year.

But I feel so compelled to ask you about your time in the Bush administration obviously regarding on this torture issue. Do you stand by your previous decisions now that you've seen how the Court has ruled on this issue?

Mr. BRADBURY. I'm sorry, Senator, how the Court has ruled? How the Court has ruled on what?

Senator CANTWELL. Do you think that you were right and do you stand by your positions on torture? Or do you now see a change or a problem with your philosophy that you were advocating?

Mr. BRADBURY. Well, first of all, I just really want to make it clear, I was not advocating for any policies. I didn't have a philosophy about these policies. I certainly didn't ask to be in the position to provide legal advice on these questions. You know, the Office of Legal Counsel is that office where tough questions come to you when senior policymakers need legal advice and clarity, and that's the function of the office.

I will say there is one point I really want to make about this, because certainly I don't feel the need to defend or discuss the analysis of opinions, which I think speak for themselves, and, of course, these opinions are not operative anymore. There's been a real, you know, major, major development.

At that time, when we were addressing these issues, it was recognized that there were two standards. There were the standards that applied to the Armed Forces in the military, which use the Army Field Manual, and very clear, and they have traditions and protocols that they followed. And then there were different standards for intelligence officers, and those standards were much less

well formulated, much more vague, less clear, very few precedents, and that's what we were really struggling with.

Now, of course, there has been a big sea change since that time because Congress has come——

Senator CANTWELL. Do you support that sea change?

Mr. BRADBURY. I do. I think it's tremendous for the country historically that Congress and the Executive Branch have come together on this highly contentious issue. And Congress has fully debated it. Senators I really have great affection and respect for led the charge, like Senator McCain and Senator Feinstein. And Congress has enacted new laws which essentially said for the United States, the standard is going to be the same, it's going to be one and the same——

Senator CANTWELL. So you didn't see a violation of the Geneva Convention in what you were recommending?

Mr. BRADBURY. Well, I wasn't recommending anything. OK? The office that I headed up is pure legal advisory, it doesn't recommend anything. So policymakers——

Senator CANTWELL. But you were interpreting the law——

Mr. BRADBURY. Correct, and——

Senator CANTWELL.—and standards.

Mr. BRADBURY. Yes. And, of course, what we faced in 2006 was a Supreme Court decision which really caught everybody by surprise which said the standard that applies in the war on terror is the Common Article III standard. That was something new. The President previously said, "it doesn't apply." So we needed to work on addressing what those standards in that framework would mean for the United States. And I actually was privileged at the time to work on behalf of the Executive Branch closely with Senator McCain and others to resolve those issues through legislation in 2006, legislation that actually got 67 votes in the Senate. I was very——

Senator CANTWELL. Well, my time is expired, Mr. Chairman, and I don't want to go on and on, but I think that people are here this morning because they don't think that you showed enough leadership. So now trying to say that—we'll go over this in more detail when I have an opportunity.

Mr. BRADBURY. OK.

Senator CANTWELL. But I think what people want to know is that, as an attorney, whether it's Takata airbags or this issue, you're bringing forth complete facts and information like somebody we're going to put in the position to be a government lawyer should.

Mr. BRADBURY. I understand, Senator.

Senator CANTWELL. Thank you.

Mr. BRADBURY. And, of course, in the work we did, we tried to lay out all of the factors that we considered, and I certainly appreciate the strong feelings on this issue. I appreciate them deeply. Thank you.

The CHAIRMAN. Thank you, Senator Cantwell.
Senator Cortez Masto.

**STATEMENT OF HON. CATHERINE CORTEZ MASTO,
U.S. SENATOR FROM NEVADA**

Senator CORTEZ MASTO. Thank you, Mr. Chair.

Thank you both. And it's nice to see your family here. Welcome. And thank you for your willingness to serve.

Mr. Bradbury, let me start with you, and I want to follow up on just some of the conversation we're having with respect to Takata and your representation. And let me just put this in context. Prior to becoming a Senator here for the state of Nevada, I was the Attorney General for 8 years, was general counsel for the state agencies when they were looking to implement the laws that were passed for their mission and help them interpret it. That's similar to what I see you are going to be doing.

And so I do have concerns about how you manage your private life and what you did in your private life, particularly when it comes to your advocacy for Takata and the recall of the airbags, and now how you're representing the very agency that you were fighting against on this public safety issue.

So let me just say this and ask you a couple of questions surrounding this because there was a young woman in Nevada by the name of Karina Dorado who was seriously injured, as you well know, from a defective Takata airbag, which exploded in her car after a minor accident in Las Vegas, causing severe damage to her trachea.

There are currently no laws or regulations prohibiting the sale of cars under recall or used parts that may be under recall. In other words, they can be recycled. That troubles me. As General Counsel of the Department, would you be supportive of NHTSA, should it be decided that such laws or regulations are indeed necessary, to prohibit the recycling of any defective products?

Mr. BRADBURY. Well, that issue certainly is a significant issue, and I would look forward, if confirmed, to working closely with the Chief Counsel of NHTSA to address whether there is an appropriate tool to bring to bear there or whether some new authority may be required. And I certainly would look forward to meeting with you and members of this committee to hear your perspective on those issues.

And just to emphasize again, I've been in government previously and I clearly know the difference between representing a client in private practice and representing the United States as an attorney, such as in the position of General Counsel, if I am fortunate enough to be confirmed by the Senate. So you certainly have my pledge that that difference will be very, very important to me, and I will not lose sight of it.

Senator CORTEZ MASTO. Good. I appreciate that. And so one final question on a similar track. So then do you think there are additional steps the Department can take to detect the type of behavior that Takata engaged in, which is data manipulation and deception, before it gets to the crisis stage we are in today? And it may not pertain to Takata, maybe the next company or another company there that is engaging in that data manipulation and deception, do you think there's a role that you can continue down that path and the Department can take to detect it?

Mr. BRADBURY. Well, I certainly look forward to exploring that issue and whether there are things that can be done differently perhaps in terms of new regulation. Certainly when there is a—my understanding is—and let me just say, through my experience in that matter, I gained a great respect for the career attorneys and the engineers in NHTSA, I really did. I think very highly of NHTSA and my experience with them. And that actually was a significant factor in my decision to pursue this position. I was—

Senator CORTEZ MASTO. I'm glad to hear that. And I'm just going to cut you off because I don't have enough time, and I would like to get to Ms. Walsh. But I will tell you I respect them as well, and they were great partners of mine as Attorney General representing the state in working together in public safety issues across this country. So thank you for that.

Ms. WALSH, welcome as well. In Nevada, actually in 2016, there are over \$10 billion worth of commodities that were sold to the international marketplace. So this space is very important for us in Nevada.

So I have a couple of questions when it comes to the foreign direct investment. A significant proportion in Nevada of previous foreign direct investment has come into the areas of renewable energy, which is an important space for us in Nevada, and I think we can continue to lead the country here. Unfortunately, the President recently made the decision to pull the United States out of the Paris climate agreement, signaling to other companies that the United States is no longer prioritizing the fight against climate change. Will you commit to continue efforts to increase foreign direct investment in the renewable energy sectors?

Ms. WALSH. Thank you, Senator, for that question. The renewable energies and the whole foreign direct investment piece is critically important I believe to the Department, certainly to the Secretary, and if confirmed, I commit to absolutely supporting the foreign direct investment in your state of Nevada.

Senator CORTEZ MASTO. Thank you. And then the President has made several statements throughout his campaign and into the start of the administration insinuating that certain foreigners are not welcome in the United States. Since then, we have seen a number of reports of companies who have chosen to take their business elsewhere. As the Director of SelectUSA, how will you promote future investment despite the President's divisive rhetoric with respect to foreigners?

Ms. WALSH. Thank you, Senator. Again, I think, if confirmed, I would definitely be one to look at all foreign direct investment. It's critically important to our country. I think that whatever the President's and the Secretary's direction is, I do feel that we can attract foreign direct investment particularly because of the new tax and regulation reforms that they are doing. America has a huge consumer population, and has always been the number one attraction for foreign investment.

Senator CORTEZ MASTO. Thank you very much.

Thank you.

The CHAIRMAN. Thank you, Senator Masto.
Senator Sullivan.

**STATEMENT OF HON. DAN SULLIVAN,
U.S. SENATOR FROM ALASKA**

Senator SULLIVAN. Thank you, Mr. Chair.

And welcome to the witnesses. I appreciate your desire to serve. Mr. Bradbury, I just wanted to follow up on a couple issues that first Senator Nelson talked about Takata. So you're going to fully recuse yourself on those issues, correct?

Mr. BRADBURY. That's correct. Yes.

Senator SULLIVAN. OK. So we appreciate that. That's the right thing to do. I think that's important for all of us to hear.

This is less likely, but there was a mention of the issue of turning pharmaceutical if there is any issue that, however remote that might be, would you recuse yourself on that as well?

Mr. BRADBURY. Yes. Any private client that might have business before the Department of Transportation that I've represented, of course, any matter I personally handled for a client, I'm recused for the rest of my career basically from representing any other client in that. And for 2 years under the Executive Order, I would not handle any matter in which that former client has a direct and substantial interest. So absolutely, yes, but I don't anticipate any pharmaceutical issues coming before the Department.

Senator SULLIVAN. No, I know, but I think it's very good to get it out there. It's pretty much your previous clients, and that's important for all of us to know. So I'm glad you're so direct on that.

You know, Senator Cantwell was talking about the interrogation issues, and you might get more questions on it, but the Justice Department career attorneys and the Office of Professional Responsibility took a look at all of this afterwards. Obviously, the context was very different.

As you mentioned, we have now passed laws, I voted for laws that make it very clear about where our nation is with regard to torture and not allowing it. Can you just give me a sense on where OPR was and everything in terms of any activities you were involved with? I think that's also important to hear what the career Justice Department officials, their judgment was during—

Mr. BRADBURY. Yes.

Senator SULLIVAN.—which was, let's face it, after 9/11, it was a very, very difficult time. A lot of us were involved in different ways on responding to the attack on our Nation and so it would be good to hear what they had to say.

Mr. BRADBURY. Well, thank you, Senator Sullivan. It's very important, I think. You know, it was a challenging time—

Senator SULLIVAN. Yes.

Mr. BRADBURY.—and the issues were very difficult ones, as I've stressed.

Senator SULLIVAN. Yes.

Mr. BRADBURY. I wasn't in the Administration in the early days, you know, after 9/11, and there were opinions given by the Office of Legal Counsel in those early days that, you know, have become very famous at this point—

Senator SULLIVAN. Right.

Mr. BRADBURY.—that relied on very expansive interpretations of executive power of the United States Commander in Chief.

Senator SULLIVAN. That you weren't part of.

Mr. BRADBURY. I was not in the office then, I did not author those opinions.

Senator SULLIVAN. Yes, that's important to clarify.

Mr. BRADBURY. From my perspective, one of the significant initiatives that I took during my time in the Office was to go back and review all of those opinions, identify where they were flawed, where the invocation of executive power was overly expansive and we felt not well supported, and we pulled back. So we withdrew those opinions. What I actually was working on, including with respect to all the interrogation-related opinions I did, was to replace and supersede those earlier very expansive opinions, which were much more narrow-focused opinions where I tried to explain very clearly all the factors and focus only on the statutory provisions, never relied on the Commander in Chief authority, et cetera.

Senator SULLIVAN. That's helpful, and obviously you mentioned about Senator McCain and other Members voted on amendments within the last couple years. It clarified this under U.S. law. And you obviously agree with that because that's the law, correct?

Mr. BRADBURY. Oh, absolutely. The law has changed. I think it's a welcomed development for the branches to come together, make clear standards that apply across the government, and so the proposals and policies that we had to grapple with back then—

Senator SULLIVAN. Are clarified now.

Mr. BRADBURY.—would not be permitted, many of them would not be permitted, today, and I would not anticipate that it would require a change in the law. That would require Congress to make that happen.

Senator SULLIVAN. Right.

Mr. BRADBURY. So it's completely different.

Senator SULLIVAN. Let me ask another quick question really of both of you, Ms. Walsh as well. A lot of us are focused on infrastructure. I think hopefully we're going to see an infrastructure bill. I've also been very focused on the importance of permitting reform, right? The President might want to do a trillion dollar infrastructure, but our permitting system is so broken that it takes 8 years to permit an airport runway or 6 years to permit a bridge, 20 years to permit a gold mine in Alaska. I mean, it's a broken system.

I've gotten commitments from both Secretary Ross and Secretary Chao to work with this Committee, where I think you'll see bipartisan support, on looking at ways that we have to, have to, reform a Federal permitting system that doesn't put people to work. A trillion dollars, half of that will be blown by red tape and lawyers fees if we don't reform our permitting system.

I'll be introducing a bill here soon. I'm hoping to get some of my Democratic colleagues on a Rebuild America Now Act that reforms our Federal permitting system. I just want to get your commitment in both of your agencies, in both of your positions, where it's very important that you work with us on trying to address the dysfunctional permitting system that undermines our infrastructure and keeps so many hardworking Americans and their families from actually working.

Can I get both your commitments on that?

Mr. BRADBURY. Absolutely. I'll speak for myself, yes.

Senator SULLIVAN. Ms. Walsh?

Ms. WALSH. Senator, absolutely. It's a top priority for the Department of Commerce, and I will definitely commit to working with your teams and yourself.

Senator SULLIVAN. Great. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Sullivan.

I would agree that if we can get an infrastructure bill going this year that one of the key priorities has to be making sure the dollars that are put into infrastructure are actually going into infrastructure and not into legal fees and a long permitting process.

So next up is Senator Hassan.

**STATEMENT OF HON. MAGGIE HASSAN,
U.S. SENATOR FROM NEW HAMPSHIRE**

Senator HASSAN. Well, thank you, Mr. Chair and Ranking Member Nelson.

And good morning to our witnesses. Thank you both for being here, and congratulations on your nominations.

Mr. Bradbury, I also have concerns about your role in developing the justification for enhanced interrogation techniques and what many people call torture. I just did hear some of the exchange with Senator Sullivan, and what I'll plan to do is have my office follow up with you.

I want to turn now to the Department of Transportation General Counsel's responsibility for agency regulatory reform. We've spent some time this year in this committee and in the Committee on Homeland Security and Government Affairs on regulatory issues. And one of the things that's come up repeatedly is the issue of how to incorporate quantitative factors into a cost-benefit analysis. For example, the Department of Transportation's 2014 rule on backup cameras in motor vehicles explicitly takes into account, and this is a quote, values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

The 2014 rule takes into account the idea that the pain of harming or killing one's own small child by backing up over them with a car cannot, and this is another quote, fully or adequately be captured in the traditional measure of the value of a statistical life.

So, Mr. Bradbury, do you agree with that qualitative analysis? And as General Counsel, would you continue to take these kinds of important qualitative values into account when conducting cost-benefit analyses of proposed regulatory changes, including actions to change or repeal current rules?

Mr. BRADBURY. Well, thank you, Senator Hassan. I appreciate your focus on these issues. In approaching any regulatory question, including whether to reform existing regulations, the number one priority from the Department of Transportation perspective is safety. So safety and the effect of the rule on safety and the goal of promoting safety has to take precedence, and I think Secretary Chao has stressed that.

In tandem with that is it has to be made clear that we have to comply with the law, and any statutory requirements that Congress has provided under the laws that the Department of Transportation enforces, those are mandates that we have to comply

with. So just because we're going through an exercise of regulatory reform and reviewing regulations doesn't mean that that process trumps a clear requirement of the law.

So safety and complying with all legal requirements, those are the top priorities, and then you can get to the question of, how are the costs and benefits balanced? How do they weigh and how do you measure them? And I think, you know, I can't speak for the administration, I'm not in the administration yet, I haven't worked on these issues for the Department or the administration. Those quantifications, those analyses, there's a long set of protocols and traditions that apply to that that have been brought to bear by administrations of different parties. So there's consistency in that approach. The Office of Management and Budget and OIRA in particular oversees that.

Senator HASSAN. Right.

Mr. BRADBURY. So they review how you calculate things. There are hundreds of analysts who are career analysts there who perform that function. Similarly, at a big department like the Department of Transportation there are many analysts and career lawyers and economists who are involved in reviewing that.

So I would not be in a position to simply come in and say, "Oh, you've got to do it completely differently."

Senator HASSAN. Right.

Mr. BRADBURY. So I would look to those traditions. I would work closely with OMB and obviously I would love to hear your perspective and the perspective of others on this Committee on how to approach those issues.

Regulatory reform, though, is very important, you know, as—

Senator HASSAN. Sure. And I thank you. I'm going to cut you off here just because I want to get to one question to Ms. Walsh, but I thank you for the answer, and I look forward, if you are confirmed, to continuing this discussion.

Ms. Walsh, in the month of May, the Export-Import Bank financed almost \$750,000 in exports from my home state of New Hampshire. I'm sure that many of my colleagues get similar monthly reports for the positive ways in which EXIM is helping their constituents. However, the lack of quorum on the bank's board of directors is holding it back from fully supporting our Nation's businesses.

Members of this administration, in particular, Secretary Ross, have spoken about wanting to dramatically reduce the U.S. trade deficit in the world, but one of the administration's nominees to fill out the quorum on the bank's board, and, in fact, to be its president, has been a strong and outspoken opponent of the bank's very existence.

Can you explain this contradiction? And if your job will be to promote trade investment and increased market access for U.S. exporters, how will this hinder your ability to do your job, and what will you do to fix it? And we're just about out of time, so we can follow up. But if you have a short answer, I would ask for the Chair's indulgence for just a second.

Ms. WALSH. Thank you, Senator, for that question. Indeed, our mission is to focus on exports and FDI. The discussion regarding EX-IM Bank is not something at this point that I am able to par-

ticipate in, but if confirmed, it's certainly something that we would look at because, as I mentioned before, we're looking at the whole cycle of success and what it takes to help our companies export overseas and really begin to gain more market share.

Senator HASSAN. Thank you very much.

The CHAIRMAN. Thank you, Senator Hassan.

Senator Klobuchar.

**STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA**

Senator KLOBUCHAR. Thank you. Thank you to both of you.

Ms. Walsh, I enjoyed our meeting. I told you how important the U.S. Commercial Service is in my state helping tremendously with exports. What ideas do you have to increase the number of companies served, and particularly with a focus on rural companies?

Ms. WALSH. Thank you, Senator, and thank you for the opportunity to meet with you and your staff yesterday. It was very encouraging meeting, to hear all of the wonderful things going on in the State. The Department is focused on really again the exports.

One of the ways, if confirmed, that we would begin to look at how do we help companies better is to look at the way that we're using technology. The Department began to really integrate that into the program and training at the Commercial Services on the ground, and that also impacts rural companies as well. I think looking at the rural companies is a hugely important area that, if confirmed, that we would take a closer look at.

Additionally, I think it's important, if confirmed, to look at what we're doing for small-and medium-sized enterprises that are women-owned as well as minority-owned and veteran-owned; and the Department is taking a much closer look at that, and that will definitely impact rural companies as well.

Senator KLOBUCHAR. And that was your background. You've done a lot of work in that area promoting women and assist them.

Ms. WALSH. That's right.

Senator KLOBUCHAR. What role do you believe overseas offices play? We talked about this in promoting U.S. products and getting more contracts. I've seen other embassies from other countries more focused on that, and then oftentimes we can lose out if we don't have that as a major focus in our embassies.

Ms. WALSH. Thank you, Senator, for that question. From what I have heard, if confirmed, I would definitely be looking closer into that, but Secretary Ross has made it very clear to the potential Ambassador nominees that this is one of the top priorities of the administration, and the Commercial Service officers are the person on point in the country. They're there to help pick up the businesses from the United States when they're export-ready and ensure that they get what they need to gain the market share in the country.

Senator KLOBUCHAR. And as we look at the budget coming up, we also discussed this, just the concern that if we make any major cuts to Foreign Commercial Service and to the people that are stationed overseas, I think it will have the opposite effect despite, I believe, the good work that you want to do. So—

Ms. WALSH. Yes, Senator, on that, I have not had access to the budget discussions. I have not seen any list, but definitely I would work, if confirmed, with the Secretary and the Under Secretary to take a close look and analyze not only the numbers, but the success and what the posts are able to do at this point.

Senator KLOBUCHAR. Thank you very much for that answer.

Mr. Bradbury, welcome. We do a lot of work with transportation out of my state, and we've had, of course, the bridge collapse and other things, and many visits from the various Secretaries. I share my colleagues' concern on the torture issue. We're actually in Minnesota, we're the home of the Center for Victims of Torture, and I carry the Torture Victims Relief Reauthorization Act every year. So I think I'm going to focus on those because some of my other colleagues did with some questions on the record for you.

But I did want to ask you about one issue, Open Skies. You know, Open Skies agreements are an important part of our transportation policies under both Democrat and Republican administrations. These agreements provide consumers, carriers, and airports with more choice. And I'm concerned, of course, with recent actions like Norwegian Air and some of the other countries, UAE, Qatar, and how their airlines are undermining our U.S. carriers. And it just feels like the opposite of what the President has been talking about, but this has been going on before this administration came in. So I'm just hoping that this administration will work with us to take some action. What can the Department do to ensure American airline workers are not harmed by unfair competition where, of course, you have subsidized airlines? And I would suggest you look at the recent report that came out on the Qatar airline, which shows that they've been given the license for the alcohol in the country and other things, which are subsidies that would never to come to weight on American airlines.

Mr. BRADBURY. Well, thank you, Senator Klobuchar. And I just want to say as an aside I very much appreciate the work you've done on the antitrust issues in the Judiciary Committee, on the Subcommittee on Antitrust, where I think you've been very effective.

Senator KLOBUCHAR. You're welcome. Thank you.

Mr. BRADBURY. Just two quick points. One, I certainly appreciate and understand the critical importance of Open Skies bilateral agreements, the freedom they create for U.S. airlines to compete and to gain access to new markets, and the economic engine that that is for the United States.

I have to sound a note of caution. This is another area where I have represented clients in private practice and will have recusal issues with respect to aviation issues that may affect—in particular, my client has been American Airlines.

Senator KLOBUCHAR. OK.

Mr. BRADBURY. So I will certainly look—

Senator KLOBUCHAR. That's better than another client, so—

Mr. BRADBURY. Yes. I will certainly look to the advice of the ethics officers, the senior ethics officer, career ethics officer, at the Department of Transportation and follow that advice with respect to those issues.

Senator KLOBUCHAR. All right.

Mr. BRADBURY. But I appreciate your interest in this. And I know it's a big important issue for the Department.

Senator KLOBUCHAR. Well, and Secretary Chao told me when she was last here that she would be looking into it.

I know I've run out of time, but I did want to note there were some families out there in red shirts that are with the families of people who died in the Colgan Air crash, and they have been working with me and Captain Sullenberger and others to try to pass a bill on hours for freight air. And so I hope that you will look at that as well. I'll put a question and submit it later.

Mr. BRADBURY. Thank you for your interest in that. I definitely will and will enjoy hearing from you on that.

Senator KLOBUCHAR. Thank you.

Mr. BRADBURY. I look forward to that.

Senator KLOBUCHAR. Thank you.

The CHAIRMAN. Thank you, Senator Klobuchar.

Senator Duckworth.

**STATEMENT OF HON. TAMMY DUCKWORTH,
U.S. SENATOR FROM ILLINOIS**

Senator DUCKWORTH. Thank you, Mr. Chairman.

Mr. Bradbury, I want to discuss your experience at the Department of Justice during the Bush administration and why your authorship of the torture memos not only sunk your nomination to be Assistant Attorney General during the prior decade, but made you so unacceptable that the then Majority Leader offered to confirm 84 stalled Bush administration nominees, 84, in exchange for the withdrawal of just one nominee, you. That is quite the ransom you commanded from your work with the torture memos, that you could actually get 84 people nominated just to have your one nomination withdrawn.

I think it's clear what the Senators objected to then also remains the reason I am strongly opposed to your nomination now, your role in crafting the torture memos. You were an architect of the legal justification for detainee abuse in the form of waterboarding and other forms of torture. In my opinion, that alone should disqualify you for future government service. And while you are nominated to serve at DOT and not at Justice, your willingness to aid and abet torture demonstrates a failure of moral and professional character that makes you dangerous regardless of which agency you serve in.

If confirmed, it's your sworn duty and obligation to serve the interests of the American public by providing honest and objective legal analysis to the Department and the administration. We would rely on your counsel to make sure that DOT employees do not subvert the law, the intent of Congress, or the United States Constitution. And unfortunately, as someone who defended the Constitution of the United States for 23 years in uniform, I have no confidence that you are capable of carrying out that critical role.

In fact, based on your work on the torture memo, we know that you are more than willing to use torture legal maneuvers very much to get around the laws and the Constitution of the United States. The public should be alarmed by your history of dem-

onstrating complete deference to a President's policy goals and the likelihood of continuing this in the Trump administration.

Mr. Bradbury, let me just make it clear what you justified. In one of the programs you justified, detainees were sleep deprived for up to 180 hours, that's 7-1/2 days; forced into stress positions; sometimes shackled to the ceiling; subject to rectal hydration and feeding; confined in boxes the size of a small dog crate. CIA personnel conducted mock executions. One man was waterboarded to the point that he became completely unresponsive with bubbles rising through his open full mouth. Another man was frozen to death. Some of these abuses were authorized; others were not. But brutality, once sanctioned by the likes of you, by the likes of you, is not easily contained.

In 2005, the Senate voted 90 to 9 to enact the Detainee Treatment Act to prohibit cruel, inhuman, or degrading treatment or punishment after the Supreme Court decided that terrorism detainees in the U.S. custody were protected by the Geneva Conventions that you found legal loopholes to allow torture to continue. Even the DOJ Office of Professional Responsibility criticized you, in particular, for uncritical acceptance of the CIA's representations about the torture program.

In testimony before the Senate Judiciary Committee in 2007, you defended the President's questionable interpretation of the Hamdan case where the Supreme Court ruled that President Bush did not have the authority to set up military tribunals at Guantánamo by famously, and I quote, your words, "The President is always right," unquote. This rubberstamp mentality is extremely dangerous, especially in the Trump administration regardless of where you might serve.

Let me be clear, Mr. Bradbury, you didn't make America any safer, and you certainly didn't make the men and women who wore the uniform of this great nation any safer; quite the opposite. The actions you helped justify put our troops in harm's way, put our diplomats deployed overseas in harm's way, and you compromised our Nation's very values.

As a soldier, I was taught the laws of armed conflict, how to handle and treat detainees and prisoners, and the importance of acting in accordance with American values. Your actions at DOJ undermined that education. And let me tell you, until you have sat bleeding in a helicopter behind enemy lines like I did, hoping and praying there was an American who came for you, and not the enemy, what you did put our men and women who are behind enemy lines right today in danger.

And I don't care that you say that now you think the laws that were passed in response to your actions are great and that you support them, the fact is you lacked the judgment to stand up and say what is morally right when pressured by the President of the United States, and I'm afraid that you would do again.

Mr. Chairman, I can't oppose this nomination strongly enough. I yield back.

The CHAIRMAN. Thank you, Senator Duckworth.

Mr. Bradbury, do you want to respond?

Mr. BRADBURY. Can I say a few words?

The CHAIRMAN. Yes.

Mr. BRADBURY. I would just like to say a couple of words.

First, Senator Duckworth, I truly do appreciate the strong feelings that you hold. I share the feelings about the military and the potential for actions that may happen to our military personnel overseas, and that is a critically important set of issues, and that's one of the reasons why I think Congress made the judgment to make the standards the same for the military and for intelligence officers in the 2015 NDAA, National Defense Authorization Act. That's sensible, I understand that, and it's a sea change in the laws that we had to grapple with.

I want to stress that many of the practices that you described were not ones that I addressed or had to review in terms of legality, and I never approached the project in terms of attempting to justify anything or achieve any policy result. I viewed them as very hard questions. If I had my druthers, I wouldn't have been engaged in having to address those issues, but when you serve in an office where you're asked to provide legal advice on the very hardest questions, that's the job, and that is what I did.

I want to say one thing very important because this has been repeated, and it's repeated in a couple of the letters, and, Senator, you referenced it. The testimony I gave was in 2006. It was before the Senate Judiciary Committee when I made the statement, "The President is always right," and unfortunately, it was an ill-considered attempt at humor at the time. I realize it doesn't look that way objectively when you look at the record. It was an attempt to be ironic. It was unfortunate.

I can tell you it's the last time I will ever testify before Congress and try to be funny in that kind of inappropriate way. I testified the next day before the House Armed Services Committee, and I made that very clear, that I've never met anybody who's always right, and this was just probably a thoughtless attempt on my part to be jocular and to be humorous.

I also wrote a letter to Chairman Specter and Ranking Member Leahy just two days later after that hearing in July, and that's part of the record for that hearing. There is a copy of the letter, which I provided to the Chairman, and I would hope it becomes part of the record here because I made it clear there that I did not ascribe to the sentiment of that unfortunate statement that I made attempting to be funny. What I said was, "I hope this clarification is helpful to the Committee, and I am sorry if my ill-considered attempt at humor caused any concern." And then I stressed—this was on July 14, 2006, to Senator Leahy and Specter—"Certainly I well understand that an actual belief that the President can never be wrong would be wholly inconsistent with my responsibilities as a legal advisor to the Executive Branch." It was an unfortunate attempt in response to questions to be funny, and that's why I sent that clarification to try to be clear.

I viewed so much of the work we did on these fraught national security issues during my time in OLC as an attempt really to pull back and narrow advice that had been given previously by the Office by predecessors before my time. Even with respect to some of the most difficult issues that I think you have addressed, we really took an effort to do it in a different way. We didn't rely on the President's authority under the Constitution, we focused on specific

statutes. There weren't a lot of precedents. We used what we thought was relevant. We explained all the factors. I put everything in there, so there is nothing left out in terms of what I considered. I truly realize and respect that there are differences of views, that these are issues that reasonable people will disagree about, and I respect your position on these issues, and I understand it.

Thank you.

Senator DUCKWORTH. Mr. Chairman, may I ask your indulgence to submit a few items in the record since the witness is doing the same?

The CHAIRMAN. Sure.

And your letter to Senators Leahy and Specter will be included without objection.

[The information referred to follows:]

U.S. DEPARTMENT OF JUSTICE
Washington, DC, July 14, 2006

Hon. ARLEN SPECTER,
Chairman,
Committee on the Judiciary,
United States Senate,
Washington, DC.

Hon. PATRICK J. LEAHY,
Ranking Minority Member,
Committee on the Judiciary,
United States Senate,
Washington, DC.

Dear Chairman Specter and Senator Leahy:

I write to clarify one aspect of the testimony I gave before the Committee on Tuesday, July 11, in the hearing addressing the implications of the Supreme Court's decision in *Hamdan v. Rumsfeld*.

Lest there be any doubt or confusion, I wish to make clear to the Committee that my statement, "The president is always right," made in response to a question from Senator Leahy, was intended only to be humorous. I clarified this point in my testimony the next day before the House Armed Services Committee, in response to a question from Congressman Cooper:

REP. COOPER: Mr. Bradbury, . . . [y]ou were quoted in the newspaper yesterday as saying that the president is always right. And I hope that's a misquote because I've never met an infallible human being yet—

MR. BRADBURY: Neither have I, Congressman.

REP. COOPER:—with the possible exception of the Pope.

MR. BRADBURY: Neither have I, Congressman. I'm glad you brought that up. I guess that just shows I shouldn't try to be humorous when I'm testifying. That was a tongue-in-cheek comment. Nobody is always right, and I certainly didn't mean to say that, other than as in humor.

I hope this clarification is helpful to the Committee, and I am sorry if my ill-considered attempt at humor caused any concern. Certainly, I well understand that an actual belief that the President can never be wrong would be wholly inconsistent with my responsibilities as a legal adviser to the Executive Branch.

Sincerely,

STEVEN. G. BRADBURY,
Acting Assistant Attorney General.

Mr. BRADBURY. Thank you, Mr. Chairman.

Senator DUCKWORTH. Thank you, Mr. Chairman. I would like to submit the following documents for the record: the Senate Intelligence Committee's exhaustive report, which outlines and details the CIA's detention and interrogation program; three separate memos from May 2005 that Mr. Bradbury wrote, which provide detailed and explicit legal justifications for 13 specific interrogation tactics, including waterboarding, sleep deprivation, cramped confinement, as well as providing new justification for combining

harsh physical and mental interrogation techniques; a July 2007 memo from Mr. Bradbury providing legal justification for certain enhanced interrogation techniques even after Congress passed the Detainee Treatment Act; the Department of Justice Office of Professional Responsibility report examining whether Mr. Bradbury and others provided poor legal advice and violated professional standards; a letter addressed to members of this committee from Retired Marine Corps General Charles Krulak expressing his opposition to this nominee; a letter from 14 other leading human rights groups opposing this nominee.

Thank you, Mr. Chairman.

The CHAIRMAN. Without objection.

[The information referred to follows:]

SENATE SELECT COMMITTEE ON INTELLIGENCE COMMITTEE, STUDY OF THE CENTRAL
INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM

The report "Senate Select Committee on Intelligence Committee, Study of the Central Intelligence Agency's Detention and Interrogation Program" is available at <http://www.humanrightsfirst.org/uploads/pdfs/torture/sscistudy1.pdf#page=461>

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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

¹ 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 ii (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 (2000)). 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.³ 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 detainees 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.⁴ 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.⁵

³ 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(e) 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.

⁴ 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.

⁵ 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. 2003-7123-3G (May 7, 2004) ("IG Report"). 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* (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 techniques] 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 28-29.⁴ 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.

⁴ 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 *OIS Guidelines* explain, "[m]edical officers must remain cognizant at all times of their obligation to prevent 'severe physical or mental pain or suffering.'" *OIS 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 *OIS 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. 14, 2004) ("October 14 [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 espouse 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 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 caloric 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 caloric 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 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 letter # 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.¹⁶

undergoing standing sleep deprivation, and in order to permit the limbs to recover without impairing interrogation requirements, the subjects underwent horizontal sleep deprivation. Fax to 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 joints. *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.*

¹⁶ 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 detainees 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

farther 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

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 comatose 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 there 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

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 ██████████ 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 cheek 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.

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(b) (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, leg screws—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).²³

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.²⁴ 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

²³ 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).

²⁴ 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[ies] 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)(1) 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 submission 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."²¹ 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

²¹ 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. Vanu*, 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

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. *Vann*, 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.²¹ 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. Puckovic*, the district court explained that:

²¹ 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/59/124, 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 Gettly 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); Mirak 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 1344-40. 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. LaFare, *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 LaRave, *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 17.²³

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

²³ 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 standpoint), 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.²³ Medical personnel have been involved in imposing limitations on—and requiring changes to—certain procedures, particularly the use of the waterboard.²⁴ We have had extensive

²³ 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 requiring treatment and with no further symptoms reported). In addition, [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 26,889 students in Air Force SERE training from 1992 through 2001, only 0.144% 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 [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."

²⁴ 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.²⁸

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

²⁸ 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 maintained 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/39/150 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

⁴³As 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.

⁴⁴Although 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. Kunderman, 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.⁴³ 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. Puckovic*, 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.⁴⁴ The team, we

⁴³ 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.

⁴⁴ 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 participle 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

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 on Israel*, U.N. Doc. A/52/44, at ¶ 259 (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 practiced 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.³¹

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

³¹ The *JG Report* noted that in some cases the waterboard was used with far greater frequency than initially indicated, see *JG 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/interviewers acknowledged that the Agency’s use of the technique is different from that used in SERE training because it is ‘for fear’ and is more painful and convincing.”); see also *id.* at 14 n.14 (“The Inspector General further reported that ‘OMS contends that the expertise of the SERE psychologists/interviewers on the waterboard was probably misrepresented at the time, as the SERE waterboard experience is 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/interviewers was either efficacious or medically safe.’” *Id.* at 21 n.26. We have carefully considered the *JG 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 5 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.²²

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.²³ 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

²² 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.

²³ 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 trainees believe that detainees 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.³⁴ 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."³⁵ 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.³⁶ 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

³⁴ 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.

³⁵ 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.

³⁶ 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.³⁷ 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.

³⁷ 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 stuffy 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 shackles were often so tight that the slightest movement . . . made them cut into his flesh. During this period, he felt "extreme pain, almost indescribable, 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.⁵⁴

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

⁵⁴ As noted, medical personnel are instructed to exercise special care in monitoring and reporting on use of the waterboard. See *OMS 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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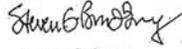
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or intended to cause severe physical or mental pain or suffering, and that they must cooperate with OMS personnel in the exercise of their important duties.

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

July 20, 2007

MEMORANDUM FOR JOHN A. RIZZO
ACTING GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY

Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees

You have asked whether the Central Intelligence Agency may lawfully employ six "enhanced interrogation techniques" in the interrogation of high value detainees who are members of al Qaeda and associated groups. Addressing this question requires us to determine whether the proposed techniques are consistent with (1) the War Crimes Act, as amended by the Military Commissions Act of 2006; (2) the Detainee Treatment Act of 2005; and (3) the requirements of Common Article 3 of the Geneva Conventions.

As the President announced on September 6, 2006, the CIA has operated a detention and interrogation program since the months after the attacks of September 11, 2001. The CIA has detained in this program several dozen high value terrorists who were believed to possess critical information that could assist in preventing future terrorist attacks, including by leading to the capture of other senior al Qaeda operatives. In interrogating a small number of these terrorists, the CIA applied what the President described as an "alternative set of procedures"—and what the Executive Branch internally has referred to as "enhanced interrogation techniques." These techniques were developed by professionals in the CIA, were approved by the Director of the CIA, and were employed under strict conditions, including careful supervision and monitoring, in a manner that was determined to be safe, effective, and lawful. The President has stated that the use of such techniques has saved American lives by revealing information about planned terrorist plots. They have been recommended for approval by the Principals Committee of the National Security Council and briefed to the full membership of the congressional intelligence committees.

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Prior to the President's announcement on September 6, 2006, fourteen detainees in CIA custody were moved from the secret location or locations where they had been held and were transferred to the custody of the Department of Defense at the U.S. Naval Base at Guantanamo Bay, Cuba; no detainees then remained in CIA custody under this program. Now, however, the CIA expects to detain further high value detainees who meet the requirements for the program, and it proposes to have six interrogation techniques available for use, as appropriate. The CIA has determined that these six techniques are the minimum necessary to maintain an effective program designed to obtain critical intelligence.

The past eighteen months have witnessed significant changes in the legal framework applicable to the armed conflict with al Qaeda. The Detainee Treatment Act ("DTA"), which the President signed on December 30, 2005, bars the imposition of "the cruel, unusual, [or] inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution" on anyone in the custody of the United States Government, regardless of location or nationality. The President had required United States personnel to follow that standard throughout the world *as a matter of policy* prior to the enactment of the DTA; the DTA requires compliance as a matter of law.¹

On June 29, 2006, the Supreme Court decided *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), holding that the military commissions established by the President to try unlawful enemy combatants were not consistent with the law of war, which at the time was a general requirement of the Uniform Code of Military Justice. Common Article 3 of the Geneva Conventions was a part of the applicable law of war, the Court stated, because the armed conflict with al Qaeda constituted a "conflict not of an international character." The Court's ruling was contrary to the President's prior determination that Common Article 3 does not apply to an armed conflict across national boundaries with an international terrorist organization such as al Qaeda. See Memorandum of the President for the National Security Council, *Re: Humane Treatment of al Qaeda and Taliban Detainees* at 2 (Feb. 7, 2002).

The Supreme Court's decision concerning the applicability of Common Article 3 introduced a legal standard that had not previously applied to this conflict and had only rarely been interpreted in past conflicts. While directed at conduct that is egregious and universally condemned, Common Article 3 contains several vague and ill-defined terms that some could have interpreted in a manner that might subject United States intelligence personnel to unexpected, *post hoc* standards for their conduct. The War Crimes Act magnified the significance of any disagreement over the meaning of these terms by making a violation of Common Article 3 a federal crime.

¹ Reflecting this policy, this Office concluded seven months before enactment of the DTA that the six enhanced interrogation techniques discussed herein complied with the substance of U.S. obligations under Article 16 of the Convention Against Torture and Other Inhuman or Degrading Treatment, 1465 U.N.T.S. 85 ("CAT"). 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 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).

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The President worked with Congress in the wake of the *Hamdan* decision to provide clear legal standards for U.S. personnel detaining and interrogating terrorists in the armed conflict with al Qaeda, an objective that was achieved in the enactment of the Military Commissions Act of 2006 ("MCA"). Of most relevance here, the MCA amended the War Crimes Act, 18 U.S.C. § 2441, to specify nine discrete offenses that would constitute grave breaches of Common Article 3. See MCA § 6(b). The MCA further implemented Common Article 3 by stating that the prohibition on cruel, inhuman, and degrading treatment in the DTA reaches conduct, outside of the grave breaches detailed in the War Crimes Act, barred by Common Article 3. See *id.* § 6(c). The MCA left responsibility for interpreting the meaning and application of Common Article 3, except for the grave breaches defined in the amended War Crimes Act, to the President. To this end, the MCA declared the Geneva Conventions judicially unenforceable, see *id.* § 5(a), and expressly provided that the President may issue an interpretation of the Geneva Conventions by executive order that is "authoritative . . . as a matter of United States law, in the same manner as other administrative regulations." *Id.* § 6(a).

This memorandum applies these new legal developments to the six interrogation techniques that the CIA proposes to use with high value al Qaeda detainees.³ Part I provides a brief history of the CIA detention program as well as a description of the program's procedures, safeguards, and the six enhanced techniques now proposed for use by the CIA. Part II addresses the newly amended War Crimes Act and concludes that none of its nine specific criminal

³ This memorandum addresses the compliance of the six proposed interrogation techniques with the two statutes and one treaty provision at issue. We previously have concluded that these techniques do 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) ("*Section 2340 Opinion*"), 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) ("*Combined Use*") (concluding that the combined use of these techniques would not violate the federal prohibition on torture). In addition, we have determined that the conditions of confinement in the CIA program fully comply with the DTA and Common Article 3, and we do not address those conditions again here. See Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Detainee Treatment Act to Conditions of Confinement of Central Intelligence Agency Facilities* (Aug. 31, 2006); Letter to John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Application of Common Article 3 to Conditions of Confinement at CIA Facilities* (Aug. 31, 2006).

Together with our prior opinions, the questions we discuss in this memorandum fully address the potentially relevant sources of United States law that are applicable to the lawfulness of the CIA detention and interrogation program. We understand that the CIA proposes to detain these persons at sites outside the territory of the United States and outside the Special Maritime and Territorial Jurisdiction of the United States ("SMTJ"), as defined in 18 U.S.C. § 7, and therefore other provisions in title 18 are not applicable. In addition, we understand that the CIA will not detain in this program any person who is a prisoner of war under Article 4 of the Third Geneva Convention Relative to the Protection of Prisoners of War, 6 U.S.T. 3316 (Aug. 12, 1945) ("GPW") or a person covered by Article 4 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516 (Aug. 12, 1949) ("GCV"), and thus the provisions of the Geneva Conventions other than Common Article 3 also do not apply here.

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offenses prohibits the six techniques as proposed to be employed by the CIA. In Part III, we consider the DTA and conclude that the six techniques as proposed to be employed would satisfy its requirements. The War Crimes Act and the DTA cover a substantial measure of the conduct prohibited by Common Article 3; with the assistance of our conclusions in Parts II and III, Part IV explains that the proper interpretation of Common Article 3 does not prohibit the United States from employing the CIA's proposed interrogation techniques.

To make that determination conclusive under United States law, the President may exercise his authority under the Constitution and the Military Commissions Act to issue an executive order adopting this interpretation of Common Article 3. We understand that the President intends to exercise this authority. We have reviewed his proposed executive order. The executive order is wholly consistent with the interpretation of Common Article 3 provided herein, and the six proposed interrogation techniques comply with each of the executive order's terms.

I.

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The CIA's authority to operate its proposed detention and interrogation program is contained in the President's September 17, 2001, *Memorandum of Notification*.

Although the CIA's detention program was temporarily emptied in early September 2006, that *Memorandum of Notification* has not been suspended by the President and continues to authorize the CIA to operate a detention program in accordance with the terms of the memorandum.

A.

The CIA now proposes to operate a limited detention and interrogation program pursuant to the authority granted by the President in the *Memorandum of Notification*. The CIA does not intend for this program to involve long-term detention, or to serve a purpose similar to that of the U.S. Naval Base at Guantanamo Bay, Cuba, which is in part to detain dangerous enemy combatants, who continue to pose a threat to the United States, until the end of the armed conflict with al Qaeda or until other satisfactory arrangements can be made. To the contrary, the CIA currently intends for persons introduced into the program to be detained only so long as is necessary to obtain the vital intelligence they may possess. Once that end is accomplished, the CIA intends to transfer the detainee to the custody of other entities, including in some cases the United States Department of Defense.³

³ This formula has been followed with regard to one person held in CIA custody since the President's September 6, 2006 remarks during which he announced that the program was empty at that time. The CIA took

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The group of persons to whom the CIA may apply interrogation techniques is also limited. Under the terms of the *Memorandum of Notification*, only those whom the CIA has a reasonable basis to believe "pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities" may be detained. [REDACTED] Even as to [REDACTED] detainees who meet that standard, however, the CIA does not propose to use enhanced interrogation techniques unless the CIA has made three additional determinations. First, the CIA must conclude that the detainee is a member or agent of al Qaeda or its affiliates *and* is likely to possess critical intelligence of high value to the United States in the Global War on Terror, as further described below. Second, the Director of the CIA must determine that enhanced interrogation methods are needed to obtain this crucial information because the detainee is withholding or manipulating intelligence or the threat of imminent attack leaves insufficient time for the use of standard questioning. Third, the enhanced techniques may be used with a particular detainee only if, in the professional judgment of qualified medical personnel, there are no significant medical or psychological contraindications for their use with that detainee.

I.

The program is limited to persons whom the Director of the CIA determines to be a member of or a part of or supporting al Qaeda, the Taliban, or associated terrorist organizations and likely to possess information that could prevent terrorist attacks against the United States or its interests or that could help locate the senior leadership of al Qaeda who are conducting its campaign of terror against the United States.⁴ Over the history of its detention and interrogation program, from March 2002 until today, the CIA has had custody of a total of 98 detainees in the program. Of those 98 detainees, the CIA has only used enhanced techniques with a total of 30. The CIA has told us that it believes many, if not all, of those 30 detainees had received training in the resistance of interrogation methods and that al Qaeda actively seeks information regarding U.S. interrogation methods in order to enhance that training.

2.

The CIA has informed us that, even with regard to detainees who are believed to possess high value information, enhanced techniques would not be used unless normal debriefing methods have been ineffective or unless the imminence of a potential attack is believed not to allow sufficient time for the use of other methods. Even under the latter circumstance, the detainee will be afforded the opportunity to answer questions before the use of any enhanced techniques. In either case, the on-scene interrogation team must determine that the detainee is withholding or manipulating information. The interrogation team then develops a written interrogation plan. Any interrogation plan that would involve the use of enhanced techniques

custody of 'abd al-Hadi al Iraqi in December 2006. CIA officials questioned him—and based on an individualized assessment of need—did not employ any enhanced interrogation techniques during his questioning. On April 26, 2007, the CIA placed al-Hadi in the custody of the Department of Defense.

⁴The CIA informs us that it currently views possession of information regarding the location of Osama bin Laden or Ayman al-Zawahiri as warranting application of enhanced techniques, if other conditions are met.

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must be personally reviewed and approved by the Director of the Central Intelligence Agency. Each approval would last for no more than 30 days.

3.

The third significant precondition for use of any of the enhanced techniques is a careful evaluation of the detainee by medical and psychological professionals from the CIA's Office of Medical Services ("OMS"). The purpose of these evaluations is to ensure the detainee's safety at all times and to protect him from physical or mental harm. OMS personnel are not involved in the work of the interrogation itself and are present solely to ensure the health and the safety of the detainee. The intake evaluation includes "a thorough initial medical assessment . . . with a complete, documented history and a physical [examination] addressing in depth any chronic or previous medical problems." *OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation and Detention* at 9 (Dec. 2004) ("*OMS Guidelines*"). In addition, OMS personnel monitor the detainee's condition throughout the application of enhanced techniques, and the interrogation team would stop the use of particular techniques or halt the interrogation altogether if the detainee's medical or psychological condition were to indicate that the detainee might suffer significant physical or mental harm. See *Section 2340 Opinion* at 5-6. Every CIA officer present at an interrogation, including OMS personnel, has the authority and responsibility to stop a technique if such harm is observed.

B.

The proposed interrogation techniques are only one part of an integrated detention and interrogation program operated by the CIA. The foundation of the program is the CIA's knowledge of the beliefs and psychological traits of al Qaeda members. Specifically, members of al Qaeda expect that they will be subject to no more than verbal questioning in the hands of the United States, and thus are trained patiently to wait out U.S. interrogators, confident that they can withstand U.S. interrogation techniques. At the same time, al Qaeda operatives believe that they are morally permitted to reveal information once they have reached a certain limit of discomfort. The program is designed to dislodge the detainee's expectations about how he will be treated in U.S. custody, to create a situation in which he feels that he is not in control, and to establish a relationship of dependence on the part of the detainee. Accordingly, the program's intended effect is psychological; it is not intended to extract information through the imposition of physical pain.

In this regard, the CIA generally does not ask questions during the administration of the techniques to which the CIA does not already know the answers. To the extent the CIA questions detainees during the administration of the techniques, the CIA asks for already known information to gauge whether the detainee has reached the point at which he believes that he is no longer required to resist the disclosure of accurate information. When CIA personnel, in their professional judgment, believe the detainee has reached that point, the CIA would discontinue use of the techniques and debrief the detainee regarding matters on which the CIA is not definitively informed. This approach highlights the intended psychological effects of the techniques and reduces the ability of the detainee to provide false information solely as a means to discontinue their application.

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The CIA has designed the techniques to be safe. Importantly, the CIA did not create the proposed interrogation techniques from whole cloth. Instead, the CIA adapted each of the techniques from those used in the United States military's Survival, Evasion, Resistance, and Escape ("SERE") training. The SERE program is designed to familiarize U.S. troops with interrogation techniques they might experience in enemy custody and to train these troops to resist such techniques. The SERE program provided empirical evidence that the techniques as used in the SERE program were safe. As a result of subjecting hundreds of thousands of military personnel to variations of the six techniques at issue here over decades, the military has a long experience with the medical and psychological effects of such techniques. The CIA reviewed the military's extensive reports concerning SERE training. Recognizing that a detainee in CIA custody will be in a very different situation from U.S. military personnel who experienced SERE training, the CIA nonetheless found it important that no significant or lasting medical or psychological harm had resulted from the use of these techniques on U.S. military personnel over many years in SERE training.

All of the techniques we discuss below would be applied only by CIA personnel who are highly trained in carrying out the techniques within the limits set by the CIA and described in this memorandum. This training is crucial—the proposed techniques are not for wide application, or for use by young and untrained personnel who might be more likely to misuse or abuse them. The average age of a CIA interrogator authorized to apply these techniques is 43, and many possess advanced degrees in psychology. Every interrogator who would apply these enhanced techniques is trained and certified in a course that lasts approximately four weeks, which includes mandatory knowledge of the detailed interrogation guidelines that the CIA has developed for this program. This course entails for each interrogator more than 250 hours of training in the techniques and their limits. An interrogator works under the direct supervision of experienced personnel before he is permitted principally to direct an interrogation. Each interrogator has been psychologically screened to minimize the risk that an interrogator might misuse any technique. We understand from you that these procedures ensure that all interrogators understand the design and purpose of the interrogation techniques, and that they will apply the techniques in accordance with their authorized and intended use.

The CIA proposes to use two categories of enhanced interrogation techniques: conditioning techniques and corrective techniques. The CIA has determined that the six techniques we describe below are the minimum necessary to maintain an effective program for obtaining the type of critical intelligence from a high value detainee that the program is designed to elicit.

⁵ In describing and evaluating the proposed techniques in this Memorandum, we are assisted by the experience that CIA interrogators and medical personnel have gained through the past administration of enhanced interrogation techniques prior to the enactment of the DTA. At that time, those techniques were designed by CIA personnel to be safe, and this Office found them to be lawful under the then-applicable legal regimes (*i.e.*, before the enactment of the DTA and the MCA and the Supreme Court's decision in *Hamdan*). See *supra* at n.2. You have informed us that the CIA's subsequent experience in conducting the program has confirmed that judgment.

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1. Conditioning techniques

You have informed us that the proposed conditioning techniques are integral to the program's foundational objective—to convince the detainee that he does not have control over his basic human needs and to bring the detainee to the point where he finds it permissible, consistent with his beliefs and values, to disclose the information he is protecting. You have also told us that this approach is grounded in the CIA's knowledge of al Qaeda training, which authorizes the disclosure of information at such a point. The specific conditioning techniques at issue here are dietary manipulation and extended sleep deprivation.

Dietary manipulation would involve substituting a bland, commercial liquid meal for a detainee's normal diet. As a guideline, the CIA would use a formula for calorie intake that depends on a detainee's body weight and expected level of activity. This formula would ensure that calorie intake will always be at least 1,000 kcal/day, and that it usually would be significantly higher.⁶ By comparison, commercial weight-loss programs used within the United States commonly limit intake to 1,000 kcal/day regardless of body weight. CIA medical officers ensure that the detainee is provided and accepts adequate fluid and nutrition, and frequent monitoring by medical personnel takes place while any detainee is undergoing dietary manipulation. Detainees would be monitored at all times to ensure that they do not lose more than ten percent of their starting body weight, and if such weight loss were to occur, application of the technique would be discontinued. The CIA also would ensure that detainees, at a minimum, drink 35 ml/kg/day of fluids, but a detainee undergoing dietary manipulation may drink as much water as he reasonably pleases.

Extended sleep deprivation would involve keeping the detainee awake continuously for up to 96 hours. Although the application of this technique may be reinitiated after the detainee is allowed an opportunity for at least eight uninterrupted hours of sleep, CIA guidelines provide that a detainee would not be subjected to more than 180 hours of total sleep deprivation during one 30-day period.⁷ Interrogators would employ extended sleep deprivation primarily to weaken a detainee's resistance to interrogation. The CIA knows from statements made by al Qaeda members who have been interrogated that al Qaeda operatives are taught in training that it is consistent with their beliefs and values to cooperate with interrogators and to disclose information once they have met the limits of their ability to resist. Sleep deprivation is effective in safely inducing fatigue as one means to bring such operatives to that point.

⁶ 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 1,900 kcal/day, and in no event is the detainee allowed to receive less than 1,000 kcal/day. 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.

⁷ In this memorandum we address only the lawfulness of a period of continuous sleep deprivation of no more than 96 hours. Should the CIA determine that it would be necessary for the Director of the CIA to approve an extension of that period with respect to a particular detainee, this Office would provide additional guidance on the application of the applicable legal standards to the facts of that particular case.

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The CIA uses physical restraints to prevent the detainee from falling asleep. The detainee is shackled in a standing position with his hands in front of his body, which prevents him from falling asleep but allows him to move around within a two- to three-foot diameter area. The detainee's hands are generally positioned below his chin and above his heart.⁸ Standing for such an extended period of time can cause the physical effects that we describe below. We are told, and we understand that medical studies confirm, that clinically significant edema (an excessive swelling of the legs and feet due to the building up of excess fluid) may occur after an extended period of standing. Due to the swelling, this condition is easily diagnosed, and medical personnel would stop the forced standing when clinically significant symptoms of edema were recognized. In addition, standing for extended periods of time produces muscle stress. Though this condition can be uncomfortable, CIA medical personnel report that the muscle stress associated with the extended sleep deprivation technique is not harmful to the detainee and that detainees in the past have not reported pain.

The detainee would not be allowed to hang by his wrists from the chains during the administration of the technique. If the detainee were no longer able to stand, the standing component of the technique would be immediately discontinued. The detainee would be monitored *at all times* through closed circuit television. Also, medical personnel will conduct frequent physical and psychological examinations of the detainee during application of the technique.⁹

We understand that detainees undergoing extended sleep deprivation might experience "unpleasant physical sensations from prolonged fatigue, including a slight drop in body temperature, difficulty with coordinated body movement and with speech, nausea, and blurred vision." *Section 2340 Opinion* at 37; *see also id.* at 37-38; *Why We Sleep: The Functions of Sleep in Humans and Other Mammals* 23-24 (1998). Extended sleep deprivation may cause diminished cognitive functioning and, in a few isolated cases, has caused the detainee to experience hallucinations. Medical personnel, and indeed all interrogation team members, are instructed to stop the use of this technique if the detainee is observed to suffer from significant impairment of his mental functions, including hallucinations. We understand that subjects deprived of sleep in scientific studies for significantly longer than the CIA's 96-hour limit on continuous sleep deprivation generally return to normal neurological functioning with one night of normal sleep. *See Section 2340 Opinion* at 40.

Because releasing a detainee from the shackles to utilize toilet facilities would present a significant security risk and would interfere with the effectiveness of the technique, a detainee

⁸ The CIA regards this shackling procedure as starting the clock on the 96-hour limit for the proposed sleep deprivation technique. Similarly, with regard to the overall sleep deprivation limit of 180 hours, the CIA does not apply the shackling procedures for more than a total of 180 hours in one 30-day period.

⁹ If medical personnel determine, based on their professional judgment, that the detainee's physical condition does not permit him to stand for an extended period, or if a detainee develops physical complications from extended standing, such as clinically significant edema or muscle stress, then interrogators may use an alternative method of sleep deprivation. Under that method, the detainee would be shackled to a small stool, effective for supporting his weight, but of insufficient width for him to keep his balance during rest.

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undergoing extended sleep deprivation frequently wears a disposable undergarment designed for adults with incontinence or enuresis. The undergarments are checked and changed regularly, and the detainee's skin condition is monitored. You have informed us that undergarments are used solely for sanitary and health reasons and not to humiliate the detainee, and that the detainee will wear clothing, such as a pair of shorts, over the under-garment during application of the technique.

2. Corrective techniques

Corrective techniques entail some degree of physical contact with the detainee. Importantly, these techniques are not designed to inflict pain on the detainee, or to use pain to obtain information. Rather, they are used "to correct [or] startle." *Background Paper* at 5. This category of techniques, as well, is premised on an observed feature of al Qaeda training and mentality—the belief that they will not be touched in U.S. custody. Accordingly, these techniques "condition a detainee to pay attention to the interrogator's questions and . . . dislodge expectations that the detainee will not be touched" or that a detainee can frustrate the interrogation by simply outlasting or ignoring the questioner. *Section 2340 Opinion* at 9. There are four techniques in this category.

The "facial hold" is used to hold a detainee's head temporarily 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. The facial hold is typically applied for a period of only a few seconds.

The "attention grasp" 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. The interrogator uses a towel or other collaring device around the back of the detainee's neck to prevent any whiplash from the sudden motion. Like the facial hold, the attention grasp is typically applied for a period of only a few seconds.

The "abdominal slap" involves the interrogator's striking the abdomen of the detainee with the back of his open hand. The interrogator must have no rings or other jewelry on his hand or wrist. The interrogator is positioned directly in front of the detainee, no more than 18 inches from the detainee. With his fingers held tightly together and fully extended, and with his palm toward his 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.

With the "insult (or facial) slap," 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 purpose of the facial slap is to induce shock or surprise. Neither the abdominal slap nor the facial slap is used with an intensity or frequency that would cause significant pain or harm to the detainee.

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Medical and psychological personnel are physically present or otherwise observing whenever these techniques are applied, and either they or any other member of the interrogation team will intervene if the use of any of these techniques has an unexpectedly painful or harmful psychological effect on the detainee.

In the analysis to follow, we consider the lawfulness of these six techniques both individually and in combination. You have informed us, however, that one of the techniques—sleep deprivation—has proven to be the most indispensable to the effectiveness of the interrogation program, and its absence would, in all likelihood, render the remaining techniques of little value. The effectiveness of the program depends upon persuading the detainee, early in the application of the techniques, that he is dependent on the interrogators and that he lacks control over his situation. Sleep deprivation, you have explained, is crucial to reinforcing that the detainee can improve his situation only by cooperating and providing accurate information. The four corrective techniques are employed for their shock effect; because they are so carefully limited, these corrective techniques startle but cause no significant pain. When used alone, they quickly lose their value. If the detainee does not immediately cooperate in response to these techniques, the detainee will quickly learn their limits and know that he can resist them. The CIA informs us that the corrective techniques are effective only when the detainee is first placed in a baseline state, in which he does not believe that he is in control of his surroundings. The conditioning technique of sleep deprivation, the CIA informs us, is the least intrusive means available to this end and therefore critical to the effectiveness of the interrogation program.

II.

The War Crimes Act proscribes nine criminal offenses in an armed conflict covered by Common Article 3 of the Geneva Conventions.¹⁰ See 18 U.S.C. § 2441(c)(3). To list the prohibited practices is to underscore their gravity: torture, cruel and inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and the taking of hostages.

We need not undertake in the present memorandum to interpret all of the offenses set forth in the War Crimes Act. The CIA's proposed techniques do not even arguably implicate six of these offenses—performing biological experiments, murder, mutilation or maiming, rape, sexual assault or abuse, and the taking of hostages. See 18 U.S.C. §§ 2441(d)(1)(C), (D), (E), (G), (H), and (I). Those six offenses borrow from existing federal criminal law; they have well-defined meanings, and we will not explore them in depth here.¹¹

¹⁰ The Assistant Attorneys General for National Security and for the Criminal Division have reviewed and concur with Part II's interpretation of the general legal standards applicable to the relevant War Crimes Act offenses.

¹¹ Although the War Crimes Act defines offenses under the Geneva Conventions, it is our domestic law that guides the interpretation of the Act's statutory terms. Congress has provided that "no 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

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Some features of the three remaining offenses—torture, cruel and inhuman treatment, and intentionally causing serious bodily injury—may be implicated by the proposed techniques and so it is necessary for us to examine them. Even with respect to these offenses, however, we conclude that only one technique—extended sleep deprivation—requires significant discussion, although we briefly address the other five techniques as appropriate.¹²

First, the War Crimes Act prohibits torture, in a manner virtually identical to the previously existing federal prohibition on torture in 18 U.S.C. §§ 2340-2340A. See 18 U.S.C. § 2441(d)(1)(A). This Office previously concluded that each of the currently proposed six techniques, including extended sleep deprivation—subject to the strict conditions, safeguards, and monitoring applied by the CIA—does not violate the federal torture statute. 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, *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* (“Section 2340 Opinion”) (May 10, 2005). As we explain below, our prior interpretation of the torture statute resolves not only the proper interpretation of the torture prohibition in the War Crimes Act, but also several of the issues presented by the two other War Crimes Act offenses at issue.

Second, Congress created a new offense of “cruel and inhuman treatment” in the War Crimes Act (the “CIT offense”). This offense is directed at proscribing the “cruel treatment” and “inhumane treatment prohibited by Common Article 3 of the Geneva Conventions. See GPW Art. 3 ¶¶ 1, 1(a). In addition to the “severe physical or mental pain or suffering” prohibited by the torture statute, the CIT offense reaches the new category of “serious physical or mental pain or suffering.” The offense’s separate definitions of mental and physical pain or suffering extend to a wider scope of conduct than the torture statute and raise two previously unresolved questions when applied to the CIA’s proposed techniques. The first issue is whether, under the definition of “serious physical pain or suffering,” the sleep deprivation technique intentionally inflicts a “bodily injury that involves . . . a significant impairment of the function of a bodily member . . . or mental faculty,” 18 U.S.C. § 2441(d)(2)(D), due to the mental and physical conditions that can be expected to accompany the CIA’s proposed technique. The second question is whether, under the definition of “serious mental pain or suffering,” the likely mental effects of the sleep deprivation technique constitute “serious and non-transitory mental harm.” Under the procedures and safeguards proposed to be applied, we answer both questions in the negative.

enumerating grave breaches of Common Article 3 in the War Crimes Act. MCA § 6(a)(2). In the context of construing Common Article 3, however, we do find that Congress has set forth definitions under the War Crimes Act that are fully consistent with the understanding of the same terms reflected in such international sources. See *infra* at 51-52, 61-64.

¹² For example, because the corrective techniques involve some physical contact with the detainee, the extent to which those techniques implicate the War Crimes Act merits some consideration. As we explain at various points below, however, the mildness of these techniques and the procedures under which they are used leave them outside the scope of the War Crimes Act.

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Third, the War Crimes Act prohibits intentionally causing "serious bodily injury" (the "SBI offense"). The SBI offense raises only one additional question with regard to the sleep deprivation technique—whether the mental and physical conditions that may arise during that technique, even if not "significant impairment[s]" under the CIT offense, are "protracted impairments" under the SBI offense. Compare 18 U.S.C. § 2441(d)(2)(iv), with *id.* § 1365(h)(3)(D). Consistent with our prior analysis of the similar requirement of "prolonged mental harm" in the torture statute, we conclude that these conditions would not trigger the applicability of the SBI offense.¹³

¹³ In the debate over the Military Commissions Act, Members of Congress expressed widely differing views as to how the terms of the War Crimes Act would apply to interrogation techniques. In light of these divergent views, we do not regard the legislative history of the War Crimes Act amendments as particularly illuminating, although we note that several of those most closely involved in drafting the Act stated that the terms did not address any particular techniques. As Rep. Duncan Hunter, the Chairman of the House Armed Services Committee and the Act's leading sponsor in the House, explained:

Let me be clear: The bill defines the specific conduct that is prohibited under Common Article 3, but it does not purport to identify interrogation practices to the enemy or to take any particular means of interrogation off the table. Rather, this legislation properly leaves the decisions as to the methods of interrogation to the President and to the intelligence professionals at the CIA, so that they may carry forward this vital program that, as the President explained, serves to gather the critical intelligence necessary to protect the country from another catastrophic terrorist attack.

152 Cong. Rec. H7938 (Sept. 29, 2006). Senator McCain, who led Senate negotiations over the Act's text, similarly stated that "it is unreasonable to suggest that any legislation could provide an explicit and all-inclusive list of what specific activities are illegal and which are permitted," although he did state that the Act "will criminalize certain interrogation techniques, like waterboarding and other techniques that cause serious pain or suffering that need not be prolonged." *Id.* at S10,413 (Sept. 28, 2006). Other Members, who both supported and opposed the Act, agreed that the statute itself established general standards, rather than proscribing specific techniques. See, e.g., *id.* at S10,416 (statement of Sen. Leahy) (the bill "saddles the War Crimes Act with a definition of cruel and inhuman treatment so oblique that it appears to permit all manner of cruel and extreme interrogation techniques"); *id.* at S10,260 (Sept. 27, 2006) (statement of Sen. Bingaman) (stating that the bill "retroactively revises the War Crimes Act so that criminal liability does not result from techniques that the United States may have employed, such as simulated drowning, exposure to hypothermia, and prolonged sleep deprivation"); *id.* at S10,381-82 (Sept. 28, 2006) (statement of Sen. Clinton) (recognizing that the ambiguity of the text "suggests that those who employ techniques such as waterboarding, long-time standing and hypothermia on Americans cannot be charged for war crimes").

At the same time, other Members, including Senator Warner, the Chairman of the Senate Armed Services Committee who also was closely involved in negotiations over the bill's text, suggested that the bill might criminalize certain interrogation techniques, including variations of certain of those proposed by the CIA (although these Members did not discuss the detailed safeguards within the CIA program). See, e.g., *id.* at S10,378 (statement of Sen. Warner) (stating that the conduct in the Kennedy Amendment, which would have prohibited "waterboarding techniques, stress positions, including prolonged standing . . . sleep deprivation, and other similar acts," is "in my opinion . . . clearly prohibited by the bill"). But see *id.* at S10,390 (statement of Sen. Warner) (opposing the Kennedy Amendment on the ground that "Congress should not try to provide a specific list of techniques" because "[w]e don't know what the future holds."). See also *id.* at S10,384 (statement of Sen. Levin) (agreeing with Sen. Warner as to the prohibited techniques); *id.* at S10,235-36 (Sept. 27, 2006); *id.* at S10,235-36 (statement of Sen. Durbin) ("[T]he bill would make it a crime to use abusive interrogation techniques like waterboarding, induced hypothermia, painful stress positions, and prolonged sleep deprivation"); *id.* at H7553 (Sept. 27, 2006) (statement of Rep. Shays) (stating that "any reasonable person would conclude" that "the so-called enhanced or harsh techniques that have been implemented in the past by the CIA" "would still be criminal offenses under the War Crimes Act because they clearly cause 'serious mental and physical suffering'").

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offenses prohibits the six techniques as proposed to be employed by the CIA. In Part III, we consider the DTA and conclude that the six techniques as proposed to be employed would satisfy its requirements. The War Crimes Act and the DTA cover a substantial measure of the conduct prohibited by Common Article 3; with the assistance of our conclusions in Parts II and III, Part IV explains that the proper interpretation of Common Article 3 does not prohibit the United States from employing the CIA's proposed interrogation techniques.

To make that determination conclusive under United States law, the President may exercise his authority under the Constitution and the Military Commissions Act to issue an executive order adopting this interpretation of Common Article 3. We understand that the President intends to exercise this authority. We have reviewed his proposed executive order. The executive order is wholly consistent with the interpretation of Common Article 3 provided herein, and the six proposed interrogation techniques comply with each of the executive order's terms.

I.

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The CIA's authority to operate its proposed detention and interrogation program is contained in the President's September 17, 2001, *Memorandum of Notification*.

Although the CIA's detention program was temporarily emptied in early September 2006, that *Memorandum of Notification* has not been suspended by the President and continues to authorize the CIA to operate a detention program in accordance with the terms of the memorandum.

A.

The CIA now proposes to operate a limited detention and interrogation program pursuant to the authority granted by the President in the *Memorandum of Notification*. The CIA does not intend for this program to involve long-term detention, or to serve a purpose similar to that of the U.S. Naval Base at Guantanamo Bay, Cuba, which is in part to detain dangerous enemy combatants, who continue to pose a threat to the United States, until the end of the armed conflict with al Qaeda or until other satisfactory arrangements can be made. To the contrary, the CIA currently intends for persons introduced into the program to be detained only so long as is necessary to obtain the vital intelligence they may possess. Once that end is accomplished, the CIA intends to transfer the detainee to the custody of other entities, including in some cases the United States Department of Defense.³

³ This formula has been followed with regard to one person held in CIA custody since the President's September 6, 2006 remarks during which he announced that the program was empty at that time. The CIA took

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The group of persons to whom the CIA may apply interrogation techniques is also limited. Under the terms of the *Memorandum of Notification*, only those whom the CIA has a reasonable basis to believe "pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities" may be detained. [REDACTED] Even as to detainees who meet that standard, however, the CIA does not propose to use enhanced interrogation techniques unless the CIA has made three additional determinations. First, the CIA must conclude that the detainee is a member or agent of al Qaeda or its affiliates *and* is likely to possess critical intelligence of high value to the United States in the Global War on Terror, as further described below. Second, the Director of the CIA must determine that enhanced interrogation methods are needed to obtain this crucial information because the detainee is withholding or manipulating intelligence or the threat of imminent attack leaves insufficient time for the use of standard questioning. Third, the enhanced techniques may be used with a particular detainee only if, in the professional judgment of qualified medical personnel, there are no significant medical or psychological contraindications for their use with that detainee.

I.

The program is limited to persons whom the Director of the CIA determines to be a member of or a part of or supporting al Qaeda, the Taliban, or associated terrorist organizations and likely to possess information that could prevent terrorist attacks against the United States or its interests or that could help locate the senior leadership of al Qaeda who are conducting its campaign of terror against the United States.⁴ Over the history of its detention and interrogation program, from March 2002 until today, the CIA has had custody of a total of 98 detainees in the program. Of those 98 detainees, the CIA has only used enhanced techniques with a total of 30. The CIA has told us that it believes many, if not all, of those 30 detainees had received training in the resistance of interrogation methods and that al Qaeda actively seeks information regarding U.S. interrogation methods in order to enhance that training.

2.

The CIA has informed us that, even with regard to detainees who are believed to possess high value information, enhanced techniques would not be used unless normal debriefing methods have been ineffective or unless the imminence of a potential attack is believed not to allow sufficient time for the use of other methods. Even under the latter circumstance, the detainee will be afforded the opportunity to answer questions before the use of any enhanced techniques. In either case, the on-scene interrogation team must determine that the detainee is withholding or manipulating information. The interrogation team then develops a written interrogation plan. Any interrogation plan that would involve the use of enhanced techniques

custody of 'abd al-Hadi al Iraqi in December 2006. CIA officials questioned him—and based on an individualized assessment of need—did not employ any enhanced interrogation techniques during his questioning. On April 26, 2007, the CIA placed al-Hadi in the custody of the Department of Defense.

⁴The CIA informs us that it currently views possession of information regarding the location of Osama bin Laden or Ayman al-Zawahiri as warranting application of enhanced techniques, if other conditions are met.

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must be personally reviewed and approved by the Director of the Central Intelligence Agency. Each approval would last for no more than 30 days.

3.

The third significant precondition for use of any of the enhanced techniques is a careful evaluation of the detainee by medical and psychological professionals from the CIA's Office of Medical Services ("OMS"). The purpose of these evaluations is to ensure the detainee's safety at all times and to protect him from physical or mental harm. OMS personnel are not involved in the work of the interrogation itself and are present solely to ensure the health and the safety of the detainee. The intake evaluation includes "a thorough initial medical assessment . . . with a complete, documented history and a physical [examination] addressing in depth any chronic or previous medical problems." *OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation and Detention* at 9 (Dec. 2004) ("*OMS Guidelines*"). In addition, OMS personnel monitor the detainee's condition throughout the application of enhanced techniques, and the interrogation team would stop the use of particular techniques or halt the interrogation altogether if the detainee's medical or psychological condition were to indicate that the detainee might suffer significant physical or mental harm. See *Section 2340 Opinion* at 5-6. Every CIA officer present at an interrogation, including OMS personnel, has the authority and responsibility to stop a technique if such harm is observed.

B.

The proposed interrogation techniques are only one part of an integrated detention and interrogation program operated by the CIA. The foundation of the program is the CIA's knowledge of the beliefs and psychological traits of al Qaeda members. Specifically, members of al Qaeda expect that they will be subject to no more than verbal questioning in the hands of the United States, and thus are trained patiently to wait out U.S. interrogators, confident that they can withstand U.S. interrogation techniques. At the same time, al Qaeda operatives believe that they are morally permitted to reveal information once they have reached a certain limit of discomfort. The program is designed to dislodge the detainee's expectations about how he will be treated in U.S. custody, to create a situation in which he feels that he is not in control, and to establish a relationship of dependence on the part of the detainee. Accordingly, the program's intended effect is psychological; it is not intended to extract information through the imposition of physical pain.

In this regard, the CIA generally does not ask questions during the administration of the techniques to which the CIA does not already know the answers. To the extent the CIA questions detainees during the administration of the techniques, the CIA asks for already known information to gauge whether the detainee has reached the point at which he believes that he is no longer required to resist the disclosure of accurate information. When CIA personnel, in their professional judgment, believe the detainee has reached that point, the CIA would discontinue use of the techniques and debrief the detainee regarding matters on which the CIA is not definitively informed. This approach highlights the intended psychological effects of the techniques and reduces the ability of the detainee to provide false information solely as a means to discontinue their application.

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The CIA has designed the techniques to be safe. Importantly, the CIA did not create the proposed interrogation techniques from whole cloth. Instead, the CIA adapted each of the techniques from those used in the United States military's Survival, Evasion, Resistance, and Escape ("SERE") training. The SERE program is designed to familiarize U.S. troops with interrogation techniques they might experience in enemy custody and to train these troops to resist such techniques. The SERE program provided empirical evidence that the techniques as used in the SERE program were safe. As a result of subjecting hundreds of thousands of military personnel to variations of the six techniques at issue here over decades, the military has a long experience with the medical and psychological effects of such techniques. The CIA reviewed the military's extensive reports concerning SERE training. Recognizing that a detainee in CIA custody will be in a very different situation from U.S. military personnel who experienced SERE training, the CIA nonetheless found it important that no significant or lasting medical or psychological harm had resulted from the use of these techniques on U.S. military personnel over many years in SERE training.

All of the techniques we discuss below would be applied only by CIA personnel who are highly trained in carrying out the techniques within the limits set by the CIA and described in this memorandum. This training is crucial—the proposed techniques are not for wide application, or for use by young and untrained personnel who might be more likely to misuse or abuse them. The average age of a CIA interrogator authorized to apply these techniques is 43, and many possess advanced degrees in psychology. Every interrogator who would apply these enhanced techniques is trained and certified in a course that lasts approximately four weeks, which includes mandatory knowledge of the detailed interrogation guidelines that the CIA has developed for this program. This course entails for each interrogator more than 250 hours of training in the techniques and their limits. An interrogator works under the direct supervision of experienced personnel before he is permitted principally to direct an interrogation. Each interrogator has been psychologically screened to minimize the risk that an interrogator might misuse any technique. We understand from you that these procedures ensure that all interrogators understand the design and purpose of the interrogation techniques, and that they will apply the techniques in accordance with their authorized and intended use.

The CIA proposes to use two categories of enhanced interrogation techniques: conditioning techniques and corrective techniques. The CIA has determined that the six techniques we describe below are the minimum necessary to maintain an effective program for obtaining the type of critical intelligence from a high value detainee that the program is designed to elicit.

⁵ In describing and evaluating the proposed techniques in this Memorandum, we are assisted by the experience that CIA interrogators and medical personnel have gained through the past administration of enhanced interrogation techniques prior to the enactment of the DTA. At that time, those techniques were designed by CIA personnel to be safe, and this Office found them to be lawful under the then-applicable legal regimes (*i.e.*, before the enactment of the DTA and the MCA and the Supreme Court's decision in *Hamdan*). See *supra* at n.2. You have informed us that the CIA's subsequent experience in conducting the program has confirmed that judgment.

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1. Conditioning techniques

You have informed us that the proposed conditioning techniques are integral to the program's foundational objective—to convince the detainee that he does not have control over his basic human needs and to bring the detainee to the point where he finds it permissible, consistent with his beliefs and values, to disclose the information he is protecting. You have also told us that this approach is grounded in the CIA's knowledge of al Qaeda training, which authorizes the disclosure of information at such a point. The specific conditioning techniques at issue here are dietary manipulation and extended sleep deprivation.

Dietary manipulation would involve substituting a bland, commercial liquid meal for a detainee's normal diet. As a guideline, the CIA would use a formula for calorie intake that depends on a detainee's body weight and expected level of activity. This formula would ensure that calorie intake will always be at least 1,000 kcal/day, and that it usually would be significantly higher.⁶ By comparison, commercial weight-loss programs used within the United States commonly limit intake to 1,000 kcal/day regardless of body weight. CIA medical officers ensure that the detainee is provided and accepts adequate fluid and nutrition, and frequent monitoring by medical personnel takes place while any detainee is undergoing dietary manipulation. Detainees would be monitored at all times to ensure that they do not lose more than ten percent of their starting body weight, and if such weight loss were to occur, application of the technique would be discontinued. The CIA also would ensure that detainees, at a minimum, drink 35 ml/kg/day of fluids, but a detainee undergoing dietary manipulation may drink as much water as he reasonably pleases.

Extended sleep deprivation would involve keeping the detainee awake continuously for up to 96 hours. Although the application of this technique may be reinitiated after the detainee is allowed an opportunity for at least eight uninterrupted hours of sleep, CIA guidelines provide that a detainee would not be subjected to more than 180 hours of total sleep deprivation during one 30-day period.⁷ Interrogators would employ extended sleep deprivation primarily to weaken a detainee's resistance to interrogation. The CIA knows from statements made by al Qaeda members who have been interrogated that al Qaeda operatives are taught in training that it is consistent with their beliefs and values to cooperate with interrogators and to disclose information once they have met the limits of their ability to resist. Sleep deprivation is effective in safely inducing fatigue as one means to bring such operatives to that point.

⁶ 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. 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.

⁷ In this memorandum we address only the lawfulness of a period of continuous sleep deprivation of no more than 96 hours. Should the CIA determine that it would be necessary for the Director of the CIA to approve an extension of that period with respect to a particular detainee, this Office would provide additional guidance on the application of the applicable legal standards to the facts of that particular case.

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The CIA uses physical restraints to prevent the detainee from falling asleep. The detainee is shackled in a standing position with his hands in front of his body, which prevents him from falling asleep but allows him to move around within a two- to three-foot diameter area. The detainee's hands are generally positioned below his chin and above his heart.⁸ Standing for such an extended period of time can cause the physical effects that we describe below. We are told, and we understand that medical studies confirm, that clinically significant edema (an excessive swelling of the legs and feet due to the building up of excess fluid) may occur after an extended period of standing. Due to the swelling, this condition is easily diagnosed, and medical personnel would stop the forced standing when clinically significant symptoms of edema were recognized. In addition, standing for extended periods of time produces muscle stress. Though this condition can be uncomfortable, CIA medical personnel report that the muscle stress associated with the extended sleep deprivation technique is not harmful to the detainee and that detainees in the past have not reported pain.

The detainee would not be allowed to hang by his wrists from the chains during the administration of the technique. If the detainee were no longer able to stand, the standing component of the technique would be immediately discontinued. The detainee would be monitored *at all times* through closed circuit television. Also, medical personnel will conduct frequent physical and psychological examinations of the detainee during application of the technique.⁹

We understand that detainees undergoing extended sleep deprivation might experience "unpleasant physical sensations from prolonged fatigue, including a slight drop in body temperature, difficulty with coordinated body movement and with speech, nausea, and blurred vision." *Section 2340 Opinion* at 37; *see also id.* at 37-38; *Why We Sleep: The Functions of Sleep in Humans and Other Mammals* 23-24 (1998). Extended sleep deprivation may cause diminished cognitive functioning and, in a few isolated cases, has caused the detainee to experience hallucinations. Medical personnel, and indeed all interrogation team members, are instructed to stop the use of this technique if the detainee is observed to suffer from significant impairment of his mental functions, including hallucinations. We understand that subjects deprived of sleep in scientific studies for significantly longer than the CIA's 96-hour limit on continuous sleep deprivation generally return to normal neurological functioning with one night of normal sleep. *See Section 2340 Opinion* at 40.

Because releasing a detainee from the shackles to utilize toilet facilities would present a significant security risk and would interfere with the effectiveness of the technique, a detainee

⁸ The CIA regards this shackling procedure as starting the clock on the 96-hour limit for the proposed sleep deprivation technique. Similarly, with regard to the overall sleep deprivation limit of 180 hours, the CIA does not apply the shackling procedures for more than a total of 180 hours in one 30-day period.

⁹ If medical personnel determine, based on their professional judgment, that the detainee's physical condition does not permit him to stand for an extended period, or if a detainee develops physical complications from extended standing, such as clinically significant edema or muscle stress, then interrogators may use an alternative method of sleep deprivation. Under that method, the detainee would be shackled to a small stool, effective for supporting his weight, but of insufficient width for him to keep his balance during rest.

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undergoing extended sleep deprivation frequently wears a disposable undergarment designed for adults with incontinence or enuresis. The undergarments are checked and changed regularly, and the detainee's skin condition is monitored. You have informed us that undergarments are used solely for sanitary and health reasons and not to humiliate the detainee, and that the detainee will wear clothing, such as a pair of shorts, over the under-garment during application of the technique.

2. Corrective techniques

Corrective techniques entail some degree of physical contact with the detainee. Importantly, these techniques are not designed to inflict pain on the detainee, or to use pain to obtain information. Rather, they are used "to correct [or] startle." *Background Paper* at 5. This category of techniques, as well, is premised on an observed feature of al Qaeda training and mentality—the belief that they will not be touched in U.S. custody. Accordingly, these techniques "condition a detainee to pay attention to the interrogator's questions and . . . dislodge expectations that the detainee will not be touched" or that a detainee can frustrate the interrogation by simply outlasting or ignoring the questioner. *Section 2340 Opinion* at 9. There are four techniques in this category.

The "facial hold" is used to hold a detainee's head temporarily 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. The facial hold is typically applied for a period of only a few seconds.

The "attention grasp" 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. The interrogator uses a towel or other collaring device around the back of the detainee's neck to prevent any whiplash from the sudden motion. Like the facial hold, the attention grasp is typically applied for a period of only a few seconds.

The "abdominal slap" involves the interrogator's striking the abdomen of the detainee with the back of his open hand. The interrogator must have no rings or other jewelry on his hand or wrist. The interrogator is positioned directly in front of the detainee, no more than 18 inches from the detainee. With his fingers held tightly together and fully extended, and with his palm toward his 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.

With the "insult (or facial) slap," 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 purpose of the facial slap is to induce shock or surprise. Neither the abdominal slap nor the facial slap is used with an intensity or frequency that would cause significant pain or harm to the detainee.

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Medical and psychological personnel are physically present or otherwise observing whenever these techniques are applied, and either they or any other member of the interrogation team will intervene if the use of any of these techniques has an unexpectedly painful or harmful psychological effect on the detainee.

In the analysis to follow, we consider the lawfulness of these six techniques both individually and in combination. You have informed us, however, that one of the techniques—sleep deprivation—has proven to be the most indispensable to the effectiveness of the interrogation program, and its absence would, in all likelihood, render the remaining techniques of little value. The effectiveness of the program depends upon persuading the detainee, early in the application of the techniques, that he is dependent on the interrogators and that he lacks control over his situation. Sleep deprivation, you have explained, is crucial to reinforcing that the detainee can improve his situation only by cooperating and providing accurate information. The four corrective techniques are employed for their shock effect; because they are so carefully limited, these corrective techniques startle but cause no significant pain. When used alone, they quickly lose their value. If the detainee does not immediately cooperate in response to these techniques, the detainee will quickly learn their limits and know that he can resist them. The CIA informs us that the corrective techniques are effective only when the detainee is first placed in a baseline state, in which he does not believe that he is in control of his surroundings. The conditioning technique of sleep deprivation, the CIA informs us, is the least intrusive means available to this end and therefore critical to the effectiveness of the interrogation program.

II.

The War Crimes Act proscribes nine criminal offenses in an armed conflict covered by Common Article 3 of the Geneva Conventions.¹⁰ See 18 U.S.C. § 2441(c)(3). To list the prohibited practices is to underscore their gravity: torture, cruel and inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and the taking of hostages.

We need not undertake in the present memorandum to interpret all of the offenses set forth in the War Crimes Act. The CIA's proposed techniques do not even arguably implicate six of these offenses—performing biological experiments, murder, mutilation or maiming, rape, sexual assault or abuse, and the taking of hostages. See 18 U.S.C. §§ 2441(d)(1)(C), (D), (E), (G), (H), and (I). Those six offenses borrow from existing federal criminal law; they have well-defined meanings, and we will not explore them in depth here.¹¹

¹⁰ The Assistant Attorneys General for National Security and for the Criminal Division have reviewed and concur with Part II's interpretation of the general legal standards applicable to the relevant War Crimes Act offenses.

¹¹ Although the War Crimes Act defines offenses under the Geneva Conventions, it is our domestic law that guides the interpretation of the Act's statutory terms. Congress has provided that "no 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

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Some features of the three remaining offenses—torture, cruel and inhuman treatment, and intentionally causing serious bodily injury—may be implicated by the proposed techniques and so it is necessary for us to examine them. Even with respect to these offenses, however, we conclude that only one technique—extended sleep deprivation—requires significant discussion, although we briefly address the other five techniques as appropriate.¹²

First, the War Crimes Act prohibits torture, in a manner virtually identical to the previously existing federal prohibition on torture in 18 U.S.C. §§ 2340-2340A. *See* 18 U.S.C. § 2441(d)(1)(A). This Office previously concluded that each of the currently proposed six techniques, including extended sleep deprivation—subject to the strict conditions, safeguards, and monitoring applied by the CIA—does not violate the federal torture statute. *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, *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* (“Section 2340 Opinion”) (May 10, 2005). As we explain below, our prior interpretation of the torture statute resolves not only the proper interpretation of the torture prohibition in the War Crimes Act, but also several of the issues presented by the two other War Crimes Act offenses at issue.

Second, Congress created a new offense of “cruel and inhuman treatment” in the War Crimes Act (the “CIT offense”). This offense is directed at proscribing the “cruel treatment” and “inhumane treatment prohibited by Common Article 3 of the Geneva Conventions.” *See* GPW Art. 3 ¶¶ 1, 1(a). In addition to the “severe physical or mental pain or suffering” prohibited by the torture statute, the CIT offense reaches the new category of “serious physical or mental pain or suffering.” The offense’s separate definitions of mental and physical pain or suffering extend to a wider scope of conduct than the torture statute and raise two previously unresolved questions when applied to the CIA’s proposed techniques. The first issue is whether, under the definition of “serious physical pain or suffering,” the sleep deprivation technique intentionally inflicts a “bodily injury that involves . . . a significant impairment of the function of a bodily member . . . or mental faculty,” 18 U.S.C. § 2441(d)(2)(D), due to the mental and physical conditions that can be expected to accompany the CIA’s proposed technique. The second question is whether, under the definition of “serious mental pain or suffering,” the likely mental effects of the sleep deprivation technique constitute “serious and non-transitory mental harm.” Under the procedures and safeguards proposed to be applied, we answer both questions in the negative.

enumerating grave breaches of Common Article 3 in the War Crimes Act, MCA § 6(a)(2). In the context of construing Common Article 3, however, we do find that Congress has set forth definitions under the War Crimes Act that are fully consistent with the understanding of the same terms reflected in such international sources. *See infra* at 51-52, 61-64.

¹² For example, because the corrective techniques involve some physical contact with the detainee, the extent to which those techniques implicate the War Crimes Act merits some consideration. As we explain at various points below, however, the mildness of these techniques and the procedures under which they are used leave them outside the scope of the War Crimes Act.

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Third, the War Crimes Act prohibits intentionally causing "serious bodily injury" (the "SBI offense"). The SBI offense raises only one additional question with regard to the sleep deprivation technique—whether the mental and physical conditions that may arise during that technique, even if not "significant impairment[s]" under the CIT offense, are "protracted impairments" under the SBI offense. Compare 18 U.S.C. § 2441(d)(2)(iv), with *id.* § 1365(h)(3)(D). Consistent with our prior analysis of the similar requirement of "prolonged mental harm" in the torture statute, we conclude that these conditions would not trigger the applicability of the SBI offense.¹³

¹³ In the debate over the Military Commissions Act, Members of Congress expressed widely differing views as to how the terms of the War Crimes Act would apply to interrogation techniques. In light of these divergent views, we do not regard the legislative history of the War Crimes Act amendments as particularly illuminating, although we note that several of those most closely involved in drafting the Act stated that the terms did not address any particular techniques. As Rep. Duncan Hunter, the Chairman of the House Armed Services Committee and the Act's leading sponsor in the House, explained:

Let me be clear: The bill defines the specific conduct that is prohibited under Common Article 3, but it does not purport to identify interrogation practices to the enemy or to take any particular means of interrogation off the table. Rather, this legislation properly leaves the decisions as to the methods of interrogation to the President and to the intelligence professionals at the CIA, so that they may carry forward this vital program that, as the President explained, serves to gather the critical intelligence necessary to protect the country from another catastrophic terrorist attack.

152 Cong. Rec. H7938 (Sept. 29, 2006). Senator McCain, who led Senate negotiations over the Act's text, similarly stated that "it is unreasonable to suggest that any legislation could provide an explicit and all-inclusive list of what specific activities are illegal and which are permitted," although he did state that the Act "will criminalize certain interrogation techniques, like waterboarding and other techniques that cause serious pain or suffering that need not be prolonged." *Id.* at S10,413 (Sept. 28, 2006). Other Members, who both supported and opposed the Act, agreed that the statute itself established general standards, rather than proscribing specific techniques. See, e.g., *id.* at S10,416 (statement of Sen. Leahy) (the bill "saddles the War Crimes Act with a definition of cruel and inhuman treatment so oblique that it appears to permit all manner of cruel and extreme interrogation techniques"); *id.* at S10,260 (Sept. 27, 2006) (statement of Sen. Bingaman) (stating that the bill "retroactively revises the War Crimes Act so that criminal liability does not result from techniques that the United States may have employed, such as simulated drowning, exposure to hypothermia, and prolonged sleep deprivation"); *id.* at S10,381-82 (Sept. 28, 2006) (statement of Sen. Clinton) (recognizing that the ambiguity of the text "suggests that those who employ techniques such as waterboarding, long-time standing and hypothermia on Americans cannot be charged for war crimes").

At the same time, other Members, including Senator Warner, the Chairman of the Senate Armed Services Committee who also was closely involved in negotiations over the bill's text, suggested that the bill might criminalize certain interrogation techniques, including variations of certain of those proposed by the CIA (although these Members did not discuss the detailed safeguards within the CIA program). See, e.g., *id.* at S10,378 (statement of Sen. Warner) (stating that the conduct in the Kennedy Amendment, which would have prohibited "waterboarding techniques, stress positions, including prolonged standing . . . sleep deprivation, and other similar acts," is "in my opinion . . . clearly prohibited by the bill"). But see *id.* at S10,390 (statement of Sen. Warner) (opposing the Kennedy Amendment on the ground that "Congress should not try to provide a specific list of techniques" because "[w]e don't know what the future holds."). See also *id.* at S10,384 (statement of Sen. Levin) (agreeing with Sen. Warner as to the prohibited techniques); *id.* at S10,235-36 (Sept. 27, 2006); *id.* at S10,235-36 (statement of Sen. Durbin) ("[T]he bill would make it a crime to use abusive interrogation techniques like waterboarding, induced hypothermia, painful stress positions, and prolonged sleep deprivation"); *id.* at H7553 (Sept. 27, 2006) (statement of Rep. Shays) (stating that "any reasonable person would conclude" that "the so-called enhanced or harsh techniques that have been implemented in the past by the CIA" "would still be criminal offenses under the War Crimes Act because they clearly cause 'serious mental and physical suffering'").

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A.

The War Crimes Act prohibits torture in a manner virtually identical to the general federal anti-torture statute, 18 U.S.C. §§ 2340-2340A:

The act of a person who commits, or conspires or attempts to commit, an act 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 for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.

18 U.S.C. § 2441(d)(1)(A) (emphasis added). The War Crimes Act incorporates by reference the definition of the term "severe mental pain or suffering" in 18 U.S.C. § 2340(2). See 18 U.S.C. § 2441(d)(2)(A).¹⁴ This Office previously concluded that the CIA's six proposed interrogation techniques would not constitute torture under 18 U.S.C. §§ 2340-2340A. See *Section 2340 Opinion*. On the basis of new information obtained regarding the techniques in question, we have reevaluated that analysis, stand by its conclusion, and incorporate it herein. Therefore, we conclude that none of the techniques in question, as proposed to be used by the CIA, constitutes torture under the War Crimes Act.

B.

The War Crimes Act defines the offense of "cruel or inhuman treatment" as follows:

The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another person within his custody or control.

18 U.S.C. § 2441(d)(1)(B). Although this offense extends to more conduct than the torture offense, we conclude for the reasons that follow that it does not prohibit the six proposed techniques as they are designed to be used by the CIA.

The CIT offense, in addition to prohibiting the "severe physical or mental pain or suffering" covered by the torture offense, also reaches "serious physical or mental pain or

¹⁴ The torture offense in the War Crimes Act differs from section 2340 in two ways immaterial here. First, section 2340 applies only outside the territorial boundaries of the United States. The prohibition on torture in the War Crimes Act, by contrast, would apply to activities, regardless of location, that occur in "the context of or association with" an armed conflict "not of an international character." Second, to constitute torture under the War Crimes Act, an activity must be "for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind." See 18 U.S.C. § 2441(d)(1)(A); see also CAT Art. 1 (imposing a similar requirement for the treaty's definition of torture). The activities that we describe herein are "for the purpose of obtaining information" and are undertaken "in the context of or association with a Common Article 3 conflict," so these new requirements would be satisfied here.

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suffering." In contrast to the torture offense, the CIT offense explicitly defines both of the two key terms—"serious physical pain or suffering" and "serious mental pain or suffering." Before turning to those specific definitions, we consider the general structure of the offense, as that structure informs the interpretation of those specific terms.

First, the context of the CIT offense in the War Crimes Act indicates that the term "serious" in the statute is generally directed at a less grave category of conditions than falls within the scope of the torture offense. The terms are used sequentially, and cruel and inhuman treatment is generally understood to constitute a lesser evil than torture. See, e.g., CAT Art. 16 (prohibiting "other cruel, inhuman, or degrading treatment or punishment which do not amount to torture") (emphases added). Accordingly, as a general matter, a condition would not constitute "severe physical or mental pain or suffering" if it were not also to constitute "serious physical or mental pain or suffering."

Although it implies something less extreme than the term "severe," the term "serious" still refers to grave conduct. As with the term "severe," dictionary definitions of the term "serious" underscore that it refers to a condition "of a great degree or an undesirable or harmful element." *Webster's Third Int'l Dictionary* at 2081. When specifically describing physical pain, "serious" has been defined as "inflicting a pain or distress [that is] grievous." *Id.* (explaining that, with regard to pain, "serious" is the opposite of "mild").

That the term "serious" limits the CIT offense to grave conduct is reinforced by the purpose of the War Crimes Act. The International Committee of the Red Cross ("ICRC") *Commentaries* describe the conduct prohibited by Common Article 3 as "acts which world public opinion finds particularly revolting." Pictet, gen. ed., III *Commentaries on the Geneva Conventions* 39 (1960); see also *infra* at 50 (explaining the significance of the ICRC *Commentaries* in interpreting Common Article 3). Of the minimum standards of treatment consistent with humanity that Common Article 3 seeks to sustain, the War Crimes Act is directed only at "grave breaches" of Common Article 3. See 18 U.S.C. § 2441(c)(3). Grave breaches of the Conventions represent conduct of such severity that the Conventions oblige signatories to "provide effective penal sanctions" for, and to search for and to prosecute persons committing, such violations of the Conventions. See, e.g., "GPW" Article 129. The Conventions themselves in defining "grave breaches" set forth unambiguously serious offenses: "willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health." GPW Art. 130. In this context, the term "serious" must not be read lightly. Accordingly, the "serious physical or mental pain or suffering" prohibited by the CIT offense does not include trivial or mild conditions; rather, the offense refers to the grave conduct at which the term "serious" and the grave breach provision of the Geneva Conventions are directed.

Second, the CIT offense's structure shapes our interpretation of its separate prohibitions against the infliction of "physical pain or suffering" and "mental pain or suffering." The CIT offense, like the anti-torture statute, envisions two separate categories of harm and, indeed, separately defines each term. As we discuss below, this separation is reflected in the requirement that "serious physical pain or suffering" involve the infliction of a "bodily injury." To permit purely mental conditions to qualify as "physical pain or suffering" would render the

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carefully considered definition of "serious mental pain or suffering" surplusage. Consistent with the statutory definitions provided by Congress, we therefore understand the structure of the CIT offense to involve two distinct categories of harm.

The CIT offense largely borrows the anti-torture statute's definition of mental pain or suffering. Although the CIT offense makes two important adjustments to the definition, these revisions preserve the fundamental purpose of providing clearly defined circumstances under which mental conditions would trigger the coverage of the statute. Extending the offense's coverage to solely mental conditions outside of this careful definition would be inconsistent with this structure. *Cf. Section 2340 Opinion* at 23-24 (concluding that mere mental distress is not enough to cause "physical suffering" within the meaning of the anti-torture statute). We therefore conclude that, consistent with the anti-torture statute, the CIT offense separately proscribes physical and mental harm. We consider each in turn.

I.

The CIT offense proscribes an act "intended to inflict . . . serious physical . . . pain or suffering." 18 U.S.C. § 2441(d)(1)(B). Unlike the torture offense, which does not provide an explicit definition of "severe physical pain or suffering," the CIT offense includes a detailed definition of "serious physical pain or suffering," as follows:

- [B]odily injury that involves—
- (i) a substantial risk of death;
 - (ii) extreme physical pain;
 - (iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or
 - (iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty."

Id. § 2441(d)(2)(D).

In light of that definition, the physical component of the CIT offense has two core features. First, it requires that the defendant act with the intent to inflict a "bodily injury." Second, it requires that the intended "bodily injury" "involve" one of four effects or resulting conditions.

a.

As an initial matter, the CIT offense requires that the defendant's conduct be intended to inflict a "bodily injury." The term "injury," depending on context, can refer to a wide range of "harm" or discomfort. *See VII Oxford English Dictionary* at 291. This is a term that draws substantial meaning from the words that surround it. The injury must be "bodily," which requires the injury to be "of the body." *Id. Oxford English Dictionary* at 353. The term "bodily" distinguishes the "physical structure" of the human body from the mind. Dictionaries most closely relate the term "bodily" to the term "physical" and explain that the word "contrasts with

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mental or spiritual." *Webster's Third Int'l Dictionary* at 245. Therefore, the term "bodily injury" is most reasonably read to mean a physical injury to the body.¹⁵

As explained above, the structure of the CIT offense reinforces the interpretation of "bodily injury" to mean "physical injury to the body." The term "bodily injury" is defining "serious physical pain or suffering." To permit wholly mental distress to qualify would be to circumvent the careful and separate definition of the "serious mental pain or suffering" that could implicate the statute. In furtherance of this structure, Congress chose not to import definitions of "bodily injury" from other parts of title 18 (even while, as explained below, it expressly did so for the SBI offense). This choice reflects the fact that those other definitions serve different purposes in other statutory schemes—particularly as sentencing enhancements—and they potentially could include purely mental conditions. The CIT offense differs from these other criminal offenses, which provide "bodily injury" as an element but do not have separate definitions of physical and mental harm.¹⁶ For example, the anti-tampering statute defines "bodily injury" to include conditions with no physical component, such as the "impairment of the function of a . . . mental faculty." 18 U.S.C. § 1365(h)(4). If the definition in the anti-tampering statute were to control here, however, the bodily injury requirement would be indistinct from the required resulting condition of a significant impairment of the function of a mental faculty. See 18 U.S.C. § 1365(h)(4)(D). Thus, "bodily injury" must be construed in a manner consistent with its plain meaning and the structure of the CIT offense. Accordingly, we must look to whether the circumstances indicate an intent to inflict a physical injury to the body when determining whether the conduct in question is intended to cause "serious physical pain or suffering."

b.

Second, to qualify as serious physical pain or suffering, the intended physical injury to the body must "involve" one of four resulting conditions. Only one of the enumerated conditions merits discussion in connection with sleep deprivation, or any of the CIA's other proposed

¹⁵ At the close of the debate over the Military Commissions Act, Senator Warner introduced a written colloquy between Senator McCain and himself, wherein they stated that they "do not believe that the term 'bodily injury' adds a separate requirement which must be met for an act to constitute serious physical pain or suffering." 152 Cong. Rec. S10,400 (Sept. 28, 2006). We cannot rely on this exchange (which was not voiced on the Senate floor) as it would render the term "bodily injury" in the statute wholly superfluous. See, e.g., *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."); *Platt v. Union Pacific Ry. Co.*, 99 U.S. 48, 58 (1879) ("[L]egislation is presumed to use no superfluous words. Courts are to accord meaning, if possible, to every word in a statute.")

¹⁶ Many of those other criminal statutes expressly define "bodily injury" through cross-references to 18 U.S.C. § 1365(h). See, e.g., 18 U.S.C. §§ 37(a)(1), 43(d)(4), 113(b)(2), 1111(c)(5), 1153(a), 1347, 2119(2). A provision under the United States Sentencing Guidelines, though similarly worded to the CIT offense in other respects, separately provides a specific definition of "bodily injury" and thus our interpretation of the term "bodily injury" in the CIT offense does not extend to the construction of the term in the Guidelines. See U.S.S.G. § 1B1.1 Application Note M.

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techniques: "the significant loss or impairment of the function of a bodily member, organ, or mental faculty."¹⁷

The condition requires a "loss or impairment." Standing alone, the term "loss" requires a "deprivation," and the term "impairment" a "deterioration," here of three specified objects. See *Webster's Third Int'l Dictionary* at 1338, 1131. Both of these terms, of their own force and without modification, carry an implication of duration; the terms do not refer to merely momentary conditions. Reinforcing this condition, Congress required that the "loss" or "impairment" be "significant." The term "significant" implies that the intended loss or impairment must be characterized by a substantial gravity or seriousness. And the term draws additional meaning from its context. The phrase "significant loss or impairment" is employed to define "serious physical pain or suffering" and, more generally, the extreme conduct that would constitute a "grave breach" of Common Article 3. In reaching the level of seriousness called for in this context, it is reasonable to conclude that both duration and gravity are relevant. An extreme mental condition, even if it does not last for a long time, may be deemed a "significant impairment" of a mental faculty. A less severe condition may become significant only if it has a longer duration.

The text also makes clear that not all impairments of bodily "functions" are sufficient to implicate the CIT offense. Instead, Congress specified that conditions affecting three important types of functions could constitute a qualifying impairment: the functioning of a "bodily member," an "organ," or a "mental faculty." The meanings of "bodily member" and "organ" are straightforward. For example, the use of the arms and the legs, including the ability to walk, would clearly constitute a "function" of a "bodily member." "Mental faculty" is a term of art in cognitive psychology: In that field, "mental faculty" refers to "one of the powers or agencies into which psychologists have divided the mind—such as will, reason, or intellect—and through the interaction of which they have endeavored to explain all mental phenomenon." *Webster's Third Int'l Dictionary* at 844. As we explain below, the sleep deprivation technique can cause a temporary diminishment in general mental acuity, but the text of the statute requires more than an unspecified or amorphous impairment of mental functioning. The use of the term "mental faculty" requires that we identify an important aspect of mental functioning that has been

¹⁷ The "substantial risk of death" condition clearly does not apply to sleep deprivation or any of the CIA's other proposed techniques. None of the six techniques would involve an appreciably elevated risk of death. Medical personnel would determine for each detainee subject to interrogation that no contraindications exist for the application of the techniques to that detainee. Moreover, CIA procedures require termination of a technique when it leads to conditions that increase the risk of death, even slightly.

Our *Section 2340 Opinion* makes clear that the "extreme physical pain" condition also does not apply here. See 18 U.S.C. § 2441(d)(2)(D)(i). There, we interpreted the term "severe physical pain" in the torture statute to mean "extreme physical pain." *Id.* at 19 ("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."); *id.* (torture involves activities "designed to inflict intense or *extreme* pain"). On the basis of our determination that the six techniques do not involve the imposition of "severe physical pain," see *id.* at 22-24, 31-33, 35-39, we conclude that they also do not involve "extreme physical pain." And, because no technique involves a visible physical alteration or burn of any kind, the condition of "a burn or disfigurement of a serious nature (other than cuts, abrasions, or bruises)" is also not implicated.

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impaired, as opposed to permitting a general sense of haziness, fatigue, or discomfort to provide one of the required conditions for "serious physical pain or suffering."

Read together, we can give discernable content to how mental symptoms would come to constitute "serious physical pain or suffering" through the fourth resulting condition. The "bodily injury" provision requires the intent to inflict *physical injury to the body* that would be expected to result in a significant loss or impairment of a mental faculty.¹⁸ To constitute a "significant loss or impairment," that mental condition must display the combination of duration and gravity consistent with a "grave breach" of the law of war. Finally, we must identify a discrete and important mental function that is lost or impaired.

The physical conditions that we understand are likely to be associated with the CIA's proposed extended sleep deprivation technique would not satisfy these requirements. As an initial matter, the extended sleep deprivation technique is designed to involve minimal physical contact with the detainee. The CIA designed the method for keeping the detainee awake—primarily by shackling the individual in a standing position—in order to avoid invasive physical contact or confrontation between the detainee and CIA personnel. CIA medical personnel have informed us that two physical conditions are likely to result from the application of this technique: Significant muscle fatigue associated with extended standing, and edema, that is, the swelling of the tissues of the lower legs. CIA medical personnel, including those who have observed the effects of extended sleep deprivation as employed in past interrogations, have informed us that such conditions do not weaken the legs to the point that the detainee could no longer stand or walk. Detainees subjected to extended sleep deprivation remain able to walk after the application of the technique. Moreover, if the detainee were to stop using his legs and to try to support his weight with the shackles suspended from the ceiling, the application of the technique would be adjusted or terminated. The detainee would not be left to hang from the shackles. By definition, therefore, the function of the detainee's legs would not be significantly impaired—they would be expected to continue to sustain the detainee's weight and enable him to walk.

Nor is simple edema alone a qualifying impairment. It is possible that clinically significant edema in the lower legs may occur during later stages of the technique, and medical personnel would terminate application of the technique if the edema were judged to be significant, i.e., if it posed a risk to health. For example, if edema becomes sufficiently serious, it can increase the risk of a blood clot and stroke. CIA medical personnel would monitor the detainee and terminate the technique before the edema reached that level of severity. Edema subsides with only a few hours of sitting or reclining, and even persons with severe edema can walk. The limitations set by the CIA to avoid clinically significant edema, and the continued

¹⁸ To be sure, the CIT offense requires "bodily injury that involves" a significant impairment; it does not require a showing that the bodily injury necessarily cause the impairment. The term "involves," however, requires more than a showing of mere correlation. Rather, the "bodily injury" either must cause the impairment or have been necessarily associated with the impairment. This reading of the statute is necessary to preserve the statute's fundamental distinction between physical and mental harm. A bodily injury will not "involve" an impairment merely on a showing of coincidence between the individual's impairment and an unrelated physical condition.

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ability of the detainee to use his legs, demonstrate that the mild edema that can be expected to occur during sleep deprivation would not constitute a "significant impairment" of the legs.

The mental conditions associated with sleep deprivation also are not "serious *physical* pain or suffering." To satisfy the "bodily injury" requirement, the mental condition must be traceable to some physical injury to the body. We understand from the CIA's medical experts and medical literature that the mild hallucinations and diminished cognitive functioning that may be associated with extended sleep deprivation arise largely from the general mental fatigue that accompanies the absence of sleep, not from any physical phenomenon that would be associated with the CIA's procedure for preventing sleep. These mental symptoms develop in far less demanding forms of sleep deprivation, even where subjects are at liberty to do what they please but are nonetheless kept awake. We understand that there is no evidence that the onset of these mental effects would be accelerated, or their severity aggravated, by physical conditions that may accompany the means used by the CIA to prevent sleep.

Even if such diminished cognitive functioning or mild hallucinations were attributable to a physical injury to the body, they would not be *significant* impairments of the function of a mental faculty within the meaning of the statute. The CIA will ensure, through monitoring and regular examinations, that the detainee does not suffer a significant reduction in cognitive functioning throughout the application of the technique. If the detainee were observed to suffer any hallucinations, the technique would be immediately discontinued. For evaluating other aspects of cognitive functioning, at a minimum, CIA medical personnel would monitor the detainee to determine that he is able to answer questions, describe his surroundings accurately, and recall basic facts about the world. Under these circumstances, the diminishment of cognitive functioning would not be "significant."¹⁹

In addition, CIA observations and other medical studies tend to confirm that whatever effect on cognitive function may occur would be short-lived. Application of the proposed sleep deprivation technique will be limited to 96 hours, and hallucinations or other appreciable cognitive effects are unlikely to occur until after the midpoint of that period. Moreover, we understand that cognitive functioning is fully restored with one night of normal sleep, which detainees would be permitted after application of the technique. Given the relative mildness of the diminished cognitive functioning that the CIA would permit to occur before the technique is discontinued, such mental effects would not be expected to persist for a sufficient duration to be "significant."²⁰

¹⁹ The techniques that we discuss herein are of course designed to persuade the detainee to disclose information, which he would not otherwise wish to do. These techniques are not thereby directed, however, at causing significant impairment of the detainee's will, arguably a "mental faculty." Instead, the techniques are designed to alter assumptions that lead the detainee to exercise his will in a particular manner. In this way, the techniques are based on the presumption that the detainee's will is functioning properly and that he will react to the techniques, and the changed conditions, in a rational manner.

²⁰ A final feature of "serious physical pain or suffering" in the CIT offense is the addition of the phrase "including serious physical abuse." See 18 U.S.C. § 2441(d)(2)(iv) (prohibiting the infliction of "severe or serious physical or mental pain or suffering . . . including serious physical abuse"). Congress provided "serious physical

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2.

The CIT offense also prohibits the infliction of "serious mental pain or suffering," under which purely mental conditions are appropriately considered. In the *Section 2340 Opinion*, we concluded that none of the techniques at issue here involves the intentional imposition of "severe mental pain or suffering," as that term is defined in 18 U.S.C. § 2340. The CIT offense adopts that definition with two modifications. With the differences from section 2340 italicized, "serious mental pain or suffering" is defined as follows:

The *serious and non-transitory* mental harm (*which need not be prolonged*) caused by or resulting from—

- (A) the intentional infliction or threatened infliction of *serious* 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, *serious* physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

See 18 U.S.C. § 2441(d)(2)(E) (specifying adjustments to 18 U.S.C. § 2340(2)).

None of these modifications expands the scope of the definition to cover sleep deprivation as employed by the CIA or any of the other proposed techniques. The CIT offense replaces the term "severe" with the term "serious" throughout the text of 18 U.S.C. § 2340(2). The CIT offense also alters the requirement of "*prolonged* mental harm" in 18 U.S.C. § 2340(2), replacing it with a requirement of "*serious and non-transitory* mental harm (*which need not be prolonged*)." Nevertheless, just as with the definition in the anti-torture statute, the definition in

abuse" as an example of a category of harm that falls within the otherwise defined term of "serious physical pain or suffering." "Serious physical abuse" therefore may be helpful in construing any ambiguity as to whether a particular category of physical harm falls within the definition of "serious physical pain or suffering." We do not find it relevant here, however, as the term "serious physical abuse" is directed at a category of conduct that does not occur in the CIA's interrogation program. The word "abuse" implies a pattern of conduct or some sustained activity, although when the intended injury is particularly severe, the term "abuse" may be satisfied without such a pattern. It also suggests an element of wrongfulness, *see, e.g., Webster's Third Int'l Dictionary* at 8 (defining abuse as an "improper or incorrect use, an application to a wrong or bad purpose"), and would not tend to cover justified physical contact. While the CIA uses some "corrective techniques" that involve physical contact with the detainee, the CIA has stated that they are used to upset the detainee's expectations and to regain his attention, and they would not be used with an intensity or frequency to cause significant physical pain, much less to constitute the type of beating implied by the term "serious physical abuse."

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the CIT offense requires one of four predicate acts or conditions to result in or cause mental harm, and only then is it appropriate to evaluate whether that harm is "serious and non-transitory." See *Section 2340 Opinion* at 24-26. Three of those predicate acts or conditions are not implicated here. Above, we have concluded that none of the techniques involves the imposition of "serious physical pain or suffering." The techniques at issue here also do not involve the "threat of imminent death," see *supra* at n.17, the threatened infliction of serious physical pain or suffering, or threats of any kind to persons other than the detainee.²¹

The only predicate act that requires a more extended analysis here is "the administration or application . . . of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality." The text of this predicate act is the same as in 18 U.S.C. § 2340(2)(B).

In our *Section 2340 Opinion*, we placed substantial weight on the requirement that the procedure "disrupt *profoundly* the senses," explaining how the requirement limits the scope of the predicate act to particularly extreme mental conditions. We acknowledged, however, that a hallucination could constitute a profound disruption of the senses, if of sufficient duration. *Id.* at 39. Nevertheless, it is not enough that a profound disruption of the senses *may* occur during the application of a procedure. Instead, the statute requires that the procedure be "*calculated*" to cause a profound disruption of the senses. See *Webster's Third Int'l Dictionary* at 315 (defining "calculated" as "planned or contrived *so as to accomplish a purpose or to achieve an effect*, thought out in advance") (emphasis added). This requirement does not license indifference to conditions that are very likely to materialize. But we can rely on the CIA's reactions to conditions that may occur to discern that a procedure was not "calculated" to bring about a proscribed result. CIA medical personnel would regularly monitor the detainee according to accepted medical practice and would discontinue the technique should any hallucinations be

²¹ It is true that the detainees are unlikely to be aware of the limitations imposed upon CIA interrogators under their interrogation plan. A detainee thus conceivably could fear that if he does not cooperate, the CIA may escalate the severity of its interrogation methods or adopt techniques that would amount to "serious physical pain or suffering." That the detainee may harbor such fears, however, does not mean that the CIA interrogators have issued a legal "threat." The federal courts have made clear that an individual issues a "threat" only if the reasonable observer would regard his words or deeds as a "serious expression of an intention to inflict bodily harm." *United States v. Mitchell*, 812 F.2d 1250, 1255 (9th Cir. 1987); see also *United States v. Zavrel*, 384 F.3d 130, 136 (3d Cir. 2004) (same); *United States v. Sovie*, 122 F.3d 122, 125 (2d Cir. 1997) (further requiring a showing that, "on [the threat's] face and in the circumstances to which it is made, it is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution") (internal quotation omitted); see generally 4 *Wharton's Criminal Law* § 462 (15th ed. 1996) (to constitute a threat, "the test is not whether the victim feared for his life or believed he was in danger, but whether he was actually in danger," presumably due to the intention of the defendant to carry out the proscribed acts). CIA interrogators do not tell the detainee that, absent cooperation, they will inflict conduct that would rise to the level of "serious physical pain or suffering." Nor do they engage in suggestive physical acts that indicate that "serious physical pain or suffering" will ensue. Prosser and Keeton, *The Law of Torts*, § 10, at 44 (5th ed. 1984) (actionable non-verbal threats occur "when the defendant presents a weapon in such a condition or manner as to indicate that it may immediately be made ready for use"). Absent any such affirmative conduct by the CIA, the detainee's general uncertainty over what might come next would not satisfy the legal definition of "threat."

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diagnosed. Such precautions demonstrate that the technique would not be "calculated" to produce hallucinations.²²

Whether or not a hallucination of the duration at issue here were to constitute a profound disruption of the senses, we have concluded that the hallucination would not be long enough to constitute "prolonged mental harm" under the definition of "severe mental pain or suffering" in the anti-torture statute. *Section 2340 Opinion* at 39-40. The adjustment to this definition in the CIT offense—replacing "prolonged mental harm" with "serious and non-transitory mental harm (which need not be prolonged)"—does not reach the sleep deprivation technique. The modification is a refocusing of the definition on severity—some combination of duration and intensity—instead of its prior reliance on duration alone. The new test still excludes mental harm that is "transitory." Thus, mental harm that is "marked by the quality of passing away," is "of brief duration," or "last[s] for minutes or seconds," *see Webster's Third Int'l Dictionary* at 2448-49, cannot qualify as "serious mental pain or suffering." Also relevant is the text's negation of a requirement that the mental harm be "prolonged." 18 U.S.C. § 2441(d)(2)(E) (providing that the mental harm that would constitute "serious physical pain or suffering" "need not be prolonged").

These adjustments, however, do not eliminate the inquiry into the duration of mental harm. Instead, the CIT offense separately requires that the mental harm be "serious." As we explained above, the term "serious" does considerable work in this context, as it seeks to describe conduct that constitutes a grave breach of Common Article 3—conduct that is universally condemned. The requirement that the mental harm be "serious" directs us to appraise the totality of the circumstances. Mental harm that is particularly intense need not be long-lasting to be serious. Conversely, mental harm that, once meeting a minimum level of intensity, is not as extreme would be considered "serious" only if it continued for a long period of time. Read together, mental harm certainly "need not be prolonged" in all circumstances to constitute "serious mental pain or suffering," but certain milder forms of mental effects would need to be of a significant duration to be considered "serious." For the same reasons that the short-lived hallucinations and other forms of diminished cognitive functioning that may occur with extended lack of sleep would not be "significant impairments of a mental faculty," such mental conditions also would not be expected to result in "serious mental harm." Again, crucial to our analysis is that CIA personnel will intervene should any hallucinations or significant declines in cognitive functioning be observed and that any potential hallucinations or other forms of diminished cognitive functioning subside quickly when rest is permitted.

²² In determining that sleep deprivation would not be "calculated to disrupt profoundly the senses," we also find it relevant that the CIA would not employ this technique to confuse and to disorient the detainee so that he might inadvertently disclose information. Indeed, seeking to cause the detainee to hallucinate or otherwise to become disoriented would be counter to CIA's goal, which is to gather accurate intelligence. Rather, CIA interrogators would employ sleep deprivation to wear down the detainee's resistance and to secure his agreement to talk in return for permitting him to sleep. Fatigue also reduces the detainee's confidence in his ability to lie convincingly and thus suggests to the detainee that the only way of obtaining sleep is to agree to provide accurate information. Once they have secured that agreement, interrogators generally would stop the technique, permit the detainee to rest, and then continue the questioning when he is rested and in a better position to provide more accurate and complete information.

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The third offense at issue is "intentionally causing serious bodily injury." 18 U.S.C. § 2441(d)(1)(F). The Act defines the SBI offense as follows: "The act of a person who intentionally causes, or conspires or attempts to cause, serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war."²³ The War Crimes Act borrows the definition of "serious bodily injury" directly from the federal assault statute, 18 U.S.C. § 113. See 18 U.S.C. § 2441(d)(2)(B). The federal assault statute, in turn, incorporates by reference the definition of "serious bodily injury" in the federal anti-tampering statute. See 18 U.S.C. § 113(b)(2). The anti-tampering statute states that:

[T]he term "serious bodily injury" means bodily injury which involves—
 (A) a substantial risk of death;
 (B) extreme physical pain;
 (C) protracted and obvious disfigurement; or
 (D) protracted loss or impairment of the functions of a bodily member, organ, or mental faculty.

18 U.S.C. § 1365(b)(3). Three of these resulting effects are plainly not applicable to the techniques under consideration here. As explained above, the techniques involve neither an appreciably elevated risk of death, much less a substantial risk, nor the imposition of extreme physical pain, nor a disfigurement of any kind. Indeed, no technique is administered until medical personnel have determined that there is no medical contraindication to the use of the technique with that particular detainee. For reasons we explain below, sleep deprivation also does not lead to "the protracted loss or impairment of the functions of a bodily member, organ, or mental faculty."

This Office has analyzed a similar term in the context of the sleep deprivation technique before. For example, we determined that the mild hallucinations that may occur during extended sleep deprivation are not "prolonged." *Section 2340 Opinion* at 40. Both the term "prolonged" and the term "protracted" require that the condition persist for a significant duration. We were reluctant to pinpoint the amount of time a condition must last to be "prolonged." Nevertheless, judicial determinations that mental harm had been "prolonged" under a similar definition of torture in the Torture Victim Protection Act, 28 U.S.C. § 1350 note, involved mental effects, including post-traumatic stress syndrome, that had persisted for *months or years* after the events in question. See *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1346 (N.D. Ga. 2002) (relying on the fact that "each plaintiff continues to suffer long-term psychological harm as a result of the ordeals they suffered" years after the alleged torture in determining that the plaintiff experienced "prolonged mental harm"); *Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601-02 (E.D. Pa. 2003).

²³ The SBI offense requires as an element that the conduct be "in violation of the law of war." There are certain matters that this requirement places beyond the reach of the SBI offense. If, for example, a member of an armed force enjoying combatant immunity were to cause serious bodily injury on the battlefield pursuant to legitimate military operations, the SBI offense would not apply. The imposition of "serious bodily injury" on those in custody in certain circumstances, such as to prevent escape, would also not violate the law of war. See, e.g., GPW Art. 42.

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(holding that victim suffered "prolonged mental harm" when he was forcibly drugged and threatened with death over a period of four years).²⁴ By contrast, at least one court has held that the mental trauma that occurs over the course of one day does not constitute "prolonged mental harm." *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1294-95 (S.D. Fla. 2003) (holding that persons who were held at gunpoint overnight and were threatened with death throughout, but who did not allege mental harm extending beyond that period of time, had not suffered "prolonged mental harm" under the TVPA). Decisions interpreting "serious bodily injury" under 18 U.S.C. § 1365(h)(3) embrace this interpretation. See *United States v. Spinelli*, 352 F.3d 48, 59 (2d Cir. 2003) (explaining that courts have looked to whether victims "have suffered from lasting psychological debilitation" persisting long after a traumatic physical injury in determining whether a "protracted impairment" has occurred); *United States v. Guy*, 340 F.3d 655 (8th Cir. 2003) (holding that persistence of post-traumatic stress syndrome more than one year after rape constituted a "protracted impairment of the function of a . . . mental faculty"); *United States v. Lowe*, 145 F.3d 45, 53 (1st Cir. 1998) (looking to psychological care ten months after an incident as evidence of a "protracted impairment"). In the absence of professional psychological care in the months and years after an incident causing bodily injury, courts have on occasion turned away claims that even extremely violent acts caused a "protracted impairment of the function of a . . . mental faculty." See, e.g., *United States v. Rivera*, 83 F.3d 542, 548 (1st Cir. 1996) (overturning sentencing enhancement based on a "protracted impairment" when victim had not sought counseling in the year following incident). Thus, whether medical professionals have diagnosed and treated such a condition, after these techniques have been applied, is certainly relevant to determining whether a protracted impairment of a mental faculty has occurred.²⁵

Given the CIA's 96-hour time limit on continuous sleep deprivation, the hours between when these mental conditions could be expected to develop and when they could become of a severity that CIA personnel terminate the technique would not be of sufficient duration to satisfy the requirement that the impairment be "protracted." This conclusion is reinforced by the medical evidence indicating that such conditions subside with one night of normal sleep.

²⁴ We have no occasion in this opinion to determine whether the intentional infliction of post-traumatic stress syndrome would violate the SBI offense. CIA's experiences with the thirty detainees with whom enhanced techniques have been used in the past, as well as information from military SERE training, suggest that neither the sleep deprivation technique, nor any of the other six enhanced techniques, is likely to cause post-traumatic stress syndrome. CIA medical personnel have examined these detainees for signs of post-traumatic stress syndrome, and none of the detainees has been diagnosed to suffer from it.

²⁵ There is also a question about the meaning of "bodily injury" in the SBI offense. As explained above, the broader anti-tampering statute defines the term "bodily injury" such that any "impairment of the function of a . . . mental faculty" would qualify as a bodily injury. 18 U.S.C. § 1365(h)(4). If this were the governing definition, no physical injury to the body would be required for one of the specified conditions to constitute "serious bodily injury." There are reasons to believe that incorporating this definition of "bodily injury" into the SBI offense is not warranted. Nevertheless, whether a "bodily injury" involving a physical condition is required for the SBI offense is not a matter we must address here because none of the techniques at issue would implicate any of the four conditions required under the definition of "serious bodily injury," even in the absence of any separate physical injury requirement.

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D.

Our analysis of the War Crimes Act thus far has focused on whether the application of a proposed interrogation technique—in particular, extended sleep deprivation—creates physical or mental conditions that cross the specific thresholds established in the Act. We have addressed questions of combined use before in the context of the anti-torture statute, and concluded there that the combined use of the six techniques at issue here did not result in the imposition of “extreme physical pain.” 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). This conclusion is important here because “extreme physical pain” is the specified pain threshold for the CIT offense and the SBI offense, in addition to the torture offense. See 18 U.S.C. §§ 2441(d)(2)(D)(2), 113(b)(2)(B). With regard to elements of the War Crimes Act concerning “impairments,” CIA observations of the combined use of these techniques do not suggest that the addition of other techniques during the application of extended sleep deprivation would accelerate or aggravate the cognitive diminishment associated with the technique so as to reach the specified thresholds in the CIT and SBI offenses. Given the particularized elements set forth in the War Crimes Act, the combined use of the six techniques now proposed by the CIA would not violate the Act.

E.

The War Crimes Act addresses conduct that is universally condemned and that constitutes grave breaches of Common Article 3. Congress enacted the statute to declare our Nation’s commitment to those Conventions and to provide our personnel with clarity as to the boundaries of the criminal conduct proscribed under Common Article 3 of the Geneva Conventions. For the reasons discussed above, we conclude that the six techniques proposed for use by the CIA, when used in accordance with their accompanying limitations and safeguards, do not violate the specific offenses established by the War Crimes Act.

III.

For the reasons discussed in this Part, the proposed interrogation techniques also are consistent with the Detainee Treatment Act.

A.

The DTA requires the United States to comply with certain constitutional standards in the treatment of all persons in the custody or control of the United States, regardless of the nationality of the person or the physical location of the detention. The DTA provides that “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.” DTA § 1403(a). The Act defines “cruel, inhuman, or degrading treatment or punishment” as follows:

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In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

DTA § 1403(d).²⁶ Taken as a whole, the DTA imposes a statutory requirement that the United States abide by the substantive constitutional standards applicable to the United States under its reservation to Article 16 of the CAT in the treatment of detainees, regardless of location or citizenship.

The change in law brought about by the DTA is significant. By its own terms, Article 16 of the CAT applies only in "territory under [the] jurisdiction" of the signatory party. In addition, the constitutional provisions invoked in the Senate reservation to Article 16 generally do not apply of their own force to aliens outside the territory of the United States. See *Johnson v. Eisentrager*, 339 U.S. 763, 782 (1950); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); see also *United States v. Belmont*, 301 U.S. 324, 332 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). Thus, before the enactment of the DTA, United States personnel were not legally required to follow these constitutional standards outside the territory of the United States as to aliens. Nevertheless, even before the DTA, it was the policy of the United States to avoid cruel, inhuman, or degrading treatment, within the meaning of the U.S. reservation to Article 16 of the CAT, of any detainee in U.S. custody, regardless of location or nationality. See *supra* at n.1. The purpose of the DTA was to codify this policy into statute.

B.

Although 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 directly 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*

²⁶ The purpose of the U.S. reservation to Article 16 of the Convention Against Torture was to provide clear meaning to the definition of "cruel, inhuman, or degrading" treatment or punishment based on United States law, particularly to guard against any expansive interpretation of "degrading" under Article 16. See 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 15-16 ("Executive Branch Summary and Analysis of the CAT"); S. Exec. Rep. 101-30, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at 25-26 (Aug. 30, 1990). The reservation "construes the phrase to be coextensive with the constitutional guarantees against cruel, unusual, and inhumane treatment." *Executive Branch Summary and Analysis of the CAT* at 15; S. Exec. Rep. 101-30 at 25; Accordingly, the DTA does not prohibit all "degrading" behavior in the ordinary sense of the term; instead, the prohibition extends "only insofar as" the specified constitutional standards. 136 Cong. Rec. 36,198 (1990).

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Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 542 n.21 (1987); *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." As the Supreme Court repeatedly has held, the Eighth Amendment does not apply until there has been a "formal adjudication of guilt." See *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' Eighth Amendment claims because "the Eighth Amendment applies only after an individual is convicted of a crime"). The limited applicability of the Eighth Amendment under the reservation to 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 *criminal 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) ("*Executive Branch Summary and Analysis of the CAT*"). Because none of the high value detainees on whom the CIA might use enhanced interrogation techniques has been convicted of any crime in the United States, the substantive requirements of the Eighth Amendment are not directly relevant here.²⁷

The Due Process Clause of the Fifth Amendment forbids the deprivation of "life, liberty, or property without due process of law." Because the prohibitions of the DTA are directed at "treatment or punishment," the Act does not require application of the procedural aspects of the Fifth Amendment. The DTA provides for compliance with the *substantive* prohibition against "cruel, inhuman, or degrading treatment or punishment" as defined by the United States reservation to Article 16 of the CAT. The CAT recognizes such a prohibition to refer to serious abusive acts that approach, but fall short of, the torture elsewhere prohibited by the CAT. See CAT Art. 16 (prohibiting "other cruel, inhuman, or degrading treatment or punishment which do not amount to torture"). The term "treatment" therefore refers to this prohibition on substantive conduct, not to the process by which the Government decides to impose such an outcome. The addition of the term "punishment" likewise suggests a focus on what actions or omissions are

²⁷ This is not to say that Eighth Amendment standards are of no importance in applying the DTA to pre-conviction interrogation practices. The Supreme Court has made clear that treatment amounting to punishment without a trial would violate the Due Process Clause. See *United States v. Salerno*, 481 U.S. 739, 746-47 (1987); *City of Revere v. Mass. General Hosp.*, 463 U.S. 239, 244 (1983); *Wolfish*, 441 U.S. at 535-36 & nn.16-17. Treatment amounting to "cruel and unusual punishment" under the Eighth Amendment also may constitute prohibited "punishment" under the Fifth Amendment. Of course, the Constitution does not prohibit the imposition of certain sanctions on detainees who violate administrative rules while lawfully detained. See, e.g., *Sandin v. Connor*, 515 U.S. 472, 484-85 (1995).

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ultimately effected on a detainee—not upon the process for deciding to impose those outcomes. *Cf. Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (observing that the interpretation of a statutory term “that is capable of many meanings” is often influenced by the words that surround it). Moreover, the DTA itself includes extensive and detailed provisions dictating the process to be afforded certain detainees in military custody. See DTA § 1405. Congress’s decision to specify detailed procedures applicable to particular detainees cannot be reconciled with the notion that the DTA was intended simultaneously to extend the procedural protections of the Due Process Clause generally to all detainees held by the United States.

Rather, the substantive component of the Due Process Clause governs what types of treatment, including what forms of interrogation, are permissible without trial and conviction. This proposition is one that the Supreme Court confirmed as recently as 2003 in *Chavez v. Martinez*, 538 U.S. 760 (2003). See *id.* at 779-80, *id.* at 773 (plurality opinion); *id.* at 787 (Stevens, J., concurring in part and dissenting in part). Further reinforcing this principle, a majority of the Justices recognized that the Self-Incrimination Clause—instead of proscribing particular means of interrogating suspects—only prohibits coerced confessions from being used to secure a *criminal conviction*. See *Chavez*, 538 U.S. at 769 (plurality opinion, joined by four Justices) (“[M]ere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statement in a criminal case against the witness.”); *id.* at 778 (Souter, J., concurring in the judgment) (rejecting the notion of a “stand-alone violation of the privilege subject to compensation” whenever “the police obtain any involuntary self-incriminating statement”).

In this regard, substantive due process protects against interrogation practices that “shock[] 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 century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience.”)²⁸ The shocks-the-conscience inquiry does not focus on whether the interrogation was coercive, which is the relevant standard for whether a statement would be admissible in court. See *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (“Under [the Self-Incrimination Clause], the constitutional inquiry is not whether the conduct of the state officers in obtaining the confession was shocking, but whether the confession was free and voluntary.”). Instead, the “relevant liberty is not freedom from unlawful interrogations but freedom from severe bodily or mental harm inflicted in the course of an interrogation.” *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (Posner, J.). In order to cross that “high” threshold in the law enforcement context, there must be “misconduct that a reasonable person would find so beyond the norm of proper police

²⁸ It has been widely and publicly recognized that the Fifth Amendment’s “shocks the conscience” test supplies the legal standard applicable to the interrogation of suspected terrorists regarding future terrorist attacks, pursuant to the U.S. reservation to Article 16 of the CAT and thus the DTA. This conclusion was reached, for example, by a bipartisan group of legal scholars and policymakers, chaired by Phillip Heymann, Deputy Attorney General during the Clinton Administration. See *Long Term Legal Strategy Project for Preserving Security and Democratic Freedoms in War on Terrorism* 23 (Harvard 2004). The Department of Justice also publicly announced this part of its interpretation of Article 16 in congressional testimony, prior to the enactment of the DTA. See Prepared Statement of Patrick F. Philbin, Associate Deputy Attorney General, before the Permanent House Select Committee on Intelligence, *Treatment of Detainees in the Global War on Terror* (July 14, 2004).

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procedure as to shock the conscience, and that is calculated to induce not merely momentary fear or anxiety, but severe mental suffering." *Id.*

As we discuss in more detail below, the "shocks the conscience" test requires a balancing of interests that leads to a more flexible standard than the inquiry into coercion and voluntariness that accompanies the introduction of statements at a criminal trial, and the governmental interests at stake may vary with the context. The Supreme Court has long distinguished the government interest in ordinary law enforcement from the more compelling interest in safeguarding national security. In 2001, the Supreme Court made this distinction clear in the due process context. The government interest in detaining illegal aliens is different, the Court explained, when "appl[ie]d narrowly to a small segment of particularly dangerous individuals, say, suspected terrorists." *Zachrydas v. Davis*, 533 U.S. 678, 691 (2001). This proposition is echoed in Fourth Amendment jurisprudence as well, where "special needs, beyond the normal need for law enforcement," can justify warrantless or even suspicionless searches. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). In this way, "the [Supreme] Court distinguish[es] 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). Indeed, in one Fourth Amendment case, the Court observed that while it would not "sanction [automobile] stops justified only by the general interest in crime control," a "roadblock set up to thwart an imminent terrorist attack" would present an entirely different constitutional question. *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

C.

Application of the "shocks the conscience" test is complicated by the fact that there are relatively few cases in which courts have applied that test, and these cases involve contexts and interests that differ significantly from those of the CIA interrogation program. The Court in *County of Sacramento v. Lewis* emphasized that there is "no calibrated yard stick" with which to determine whether conduct "shocks the conscience." 523 U.S. at 847. To the contrary, "[r]ules 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:

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)); *Robertson v. City of Plano*, 70 F.3d 21, 24 (5th Cir. 1995) ("It goes without saying that, in determining whether the constitutional line has been crossed, the claimed wrong must be viewed in the context in which it occurred."). In evaluating the techniques in question, Supreme Court precedent therefore requires us to analyze the circumstances underlying the CIA interrogation program—limited to

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high value terrorist detainees who possess intelligence critical to the Global War on Terror—and this clearly is not a context that has arisen under existing federal court precedent.

In any context, however, two general principles are relevant for determining whether executive conduct “shocks the conscience.” The test requires first an inquiry into whether the conduct is “arbitrary in the constitutional sense,” that is, whether the conduct is proportionate to the government interest involved. *See Lewis*, 523 U.S. at 846. Next, the test requires consideration of whether the conduct is objectively “egregious” or “outrageous” in light of traditional executive behavior and contemporary practices. *See id.* at 847 n.8. We consider each element in turn.

I.

Whether government conduct “shocks the conscience” depends primarily on whether the conduct is “arbitrary in the constitutional sense,” that is, whether it amounts to the “exercise of power without any reasonable justification in the service of a legitimate governmental objective.” *Id.*, 523 U.S. at 846 (internal quotation marks omitted). “[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,” although deliberate indifference to the risk of inflicting such unjustifiable injury might also “shock the conscience.” *Id.* at 849-51. The “shocks the conscience” test therefore requires consideration of the justifications underlying such conduct in determining its propriety.

Thus, we must look to whether the relevant conduct furthers a government interest, and to the nature and importance of that interest. Because the Due Process Clause “lays down [no] . . . categorical imperative,” the Court has “repeatedly held that the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest.” *United States v. Salerno*, 481 U.S. 739, 748 (1987).

Al Qaeda’s demonstrated ability to launch sophisticated attacks causing mass casualties within the United States and against United States interests worldwide and the threat to the United States posed by al Qaeda’s continuing efforts to plan and to execute such attacks indisputably implicate a compelling governmental interest of the highest order. “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”). The CIA interrogation program—and, in particular, its use of enhanced interrogation techniques—is intended to serve this paramount interest by producing substantial quantities of otherwise unavailable intelligence. The CIA believes that this program “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 _____ Chief, Legal Group, DCI Counterterrorist Center, *Re: Effectiveness of the CIA Counterintelligence Interrogation Techniques* at 2 (Mar. 2, 2005) (“*Effectiveness Memo*”). We understand that use of enhanced techniques has produced significant intelligence that the Government has used to keep the Nation safe. As the President explained, “by giving us information about terrorist plans we could not get anywhere else, the

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program has saved innocent lives." Address of the President, East Room, White House, September 6, 2006.

For example, we understand that enhanced interrogation techniques proved particularly crucial in the interrogations of Khalid Shaykh Muhammad and Abu Zubaydah. Before the CIA used enhanced techniques in interrogating Muhammad, he resisted giving any information about future attacks, simply warning, "soon, you will know." As the President informed the Nation in his September 6th address, once enhanced techniques were employed, Muhammad provided information revealing the "Second Wave," a plot to crash a hijacked airliner into the Library Tower in Los Angeles—the tallest building on the West Coast. Information obtained from Muhammad led to the capture of many of the al Qaeda operatives planning the attack. Interrogations of Zubaydah—again, once enhanced techniques were employed—revealed two al Qaeda operatives already in the United States and planning to destroy a high rise apartment building and to detonate a radiological bomb in Washington, D.C. The techniques have revealed plots to blow up the Brooklyn Bridge and to release mass biological agents in our Nation's largest cities.

United States military and intelligence operations may have degraded the capabilities of al Qaeda operatives to launch terrorist attacks, but intelligence indicates that al Qaeda remains a grave threat. In a speech last year, Osama bin Laden boasted of the deadly bombings in London and Madrid and warned Americans of his plans to launch terrorist attacks in the United States:

The delay in similar operations happening in America has not been because of failure to break through your security measures. The operations are under preparation and *you will see them in your homes* the minute they are through with preparations, Allah willing.

Quoted at <http://www.breitbart.com/2006/19/D8F7SMRH5.html> (Jan. 19, 2006). In August 2006, British authorities foiled a terrorist plot—planned by al Qaeda—that intended simultaneously to detonate more than 14 wide-body jets traveling across the Atlantic and that threatened to kill more civilians than al Qaeda's attacks on September 11, 2001.

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Intelligence indicates a recent surge of organized terrorist training activities among al Qaeda operatives [redacted] suggest that the officials are aware of an impending "major attack" against the West. There is some indication that these major attacks will originate, as the recent airliner plot had, from terrorists based in the United Kingdom.

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This intelligence reinforces that the threat of terrorist attacks posed by al Qaeda continues.

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In addition to demonstrating a compelling government interest of the highest order underlying the use of the techniques, the CIA will apply several measures that will tailor the program to that interest. The CIA in the past has taken and will continue to take specific precautions to narrow the class of individuals subject to enhanced techniques. As described above, careful screening procedures are in place to ensure that enhanced techniques will be used *only* in the interrogations of agents or members of al Qaeda or its affiliates who are reasonably believed to possess critical intelligence that can be used to prevent future terrorist attacks against the United States and its interests. The fact that enhanced techniques have been used to date in the interrogations of only 30 high value detainees out of the 98 detainees who, at various times, have been in CIA custody demonstrates this selectivity. This interrogation program is not a dragnet for suspected terrorists who might possess helpful information.

Before enhanced techniques are used, the CIA will attempt simple questioning. Thus, enhanced techniques would be used only when the Director of the CIA considers them necessary because a high value terrorist is withholding or manipulating critical intelligence, or there is insufficient time to try other techniques to obtain such intelligence. Once approved, enhanced techniques would be used only as less harsh techniques fail or as interrogators run out of time in the face of an imminent threat, so that it would be unlikely that a detainee would be subjected to more duress than is reasonably necessary to elicit the information sought. The enhanced techniques, in other words, are not the first option for CIA interrogators confronted even with a high value detainee. These procedures target the techniques on situations where the potential for saving the lives of innocent persons is the greatest.

As important as carefully restricting the number and scope of interrogations are the safeguards the CIA will employ to mitigate their impact on the detainees and the care with which the CIA chose these techniques. The CIA has determined that the six techniques we discuss herein are the minimum necessary to maintain an effective program designed to obtain the most valuable intelligence possessed by al Qaeda operatives. The CIA interrogation team and medical personnel would review the detainee's condition both before and during interrogation, ensuring that techniques will not be used if there is any reason to believe their use would cause the detainee significant mental or physical harm. Moreover, because these techniques were adapted from the military's SERE training, the impact of techniques closely resembling those proposed by the CIA has been the subject of extensive medical studies. Each of these techniques also has been employed earlier in the CIA program, and the CIA now has its experience with those detainees, including long-term medical and psychological observations, as an additional empirical basis for tailoring this narrowly drawn program. These detailed procedures, and reliance on historical evidence, reflect a limited and direct focus to further a critical governmental interest, while at the same time eliminating any unnecessary harm to detainees. In this context, the techniques are not "arbitrary in the constitutional sense."

2.

The substantive due process inquiry requires consideration of not only whether the conduct is proportionate to the government interest involved, but also whether the conduct is consistent with objective standards of conduct, as measured by traditional executive behavior and contemporary practice. In this regard, the inquiry has a historical element: Whether,

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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." *Lewis*, 523 U.S. at 847 n.8; see also *Rochin*, 342 U.S. at 169 ("Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content."). In this section, we consider examples in six potentially relevant areas to determine the extent to which those other areas may inform what kinds of actions would shock the conscience in the context of the CIA program.

In conducting the inquiry into whether the proposed interrogation techniques are consistent with established standards of executive conduct, we are assisted by our prior conclusion that the techniques do not violate the anti-torture statute and the War Crimes Act. Congress has, through the federal criminal law, prohibited certain "egregious" and "outrageous" acts, and the CIA does not propose to use techniques that would contravene those standards. Certain methods of interrogating even high-ranking terrorists—such as torture—may well violate the Due Process Clause, no matter how valuable the information sought. Yet none of the techniques at issue here, considered individually or in combination, constitutes torture, cruel or inhuman treatment, or the intentional infliction of serious bodily injury under United States law. See 18 U.S.C. §§ 2340, 2441. In considering whether the proposed techniques are consistent with traditional executive behavior and contemporary practice, we therefore begin from the premise that the proposed techniques are neither "arbitrary" as a constitutional matter nor violations of these federal criminal laws.

We have not found examples of traditional executive behavior or contemporary practice that would condemn an interrogation program that furthers a vital government interest—in particular, the interest in protecting United States citizens from catastrophic terrorist attacks—and that is carefully designed to avoid unnecessary or significant harm. To the contrary, we conclude from these examples that there is support within contemporary community standards for the CIA interrogation program, as it has been proposed. Indeed, the Military Commissions Act itself was proposed, debated, and enacted in no small part on the assumption that it would allow the CIA program to go forward.

Ordinary Criminal Investigations. The Supreme Court has addressed the question whether various police interrogation practices "shock the conscience" and thus violate the Fifth Amendment in the context of traditional criminal law enforcement. In *Rochin v. California*, 342 U.S. 165 (1952), the 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's analysis focused on the brutality of the police conduct at issue, especially the intrusion into the defendant's body:

Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of the government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

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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. After identifying four suspects, the defendant used "brutal methods to obtain a confession from each of them." *Id.* at 98.

A rubber hose, a pistol, a blunt instrument, a sash cord and other implements were used in the project. One man was forced to look at a bright light for fifteen minutes; when he was blinded, he was repeatedly hit with a rubber hose and a sash cord and finally knocked to the floor. Another was knocked from a chair and hit in the stomach again and again. He was put back in the chair and the procedure was repeated. One was backed against the wall and jammed in the chest with a club. Each was beaten, threatened, and unmercifully punished for several hours until he confessed.

Id. at 98-99. The Court characterized this brutal conduct as "the classic use of force to make a man testify against himself" and had little difficulty concluding that the victim had been deprived of his rights under the Due Process Clause. *Id.* at 101-02 ("[W]here 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."). *Williams* is significant because it appears to be the only Supreme Court case to declare an interrogation unconstitutional where its fruits were never used as evidence in a criminal trial.

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. The plaintiff was not charged, however, and his confession thus was never introduced against him in a criminal case. The Supreme Court rejected the plaintiff's Self-Incrimination Clause claim but remanded for consideration of the legality of the questioning under the substantive due process standard. *See id.* at 773 (opinion of Thomas, J.); *id.* at 778-79 (Souter, J., concurring in judgment). Importantly, the Court considered applying a potentially more restrictive standard than "shocks the conscience"—a standard that would have categorically barred all "unusually coercive" interrogations. *See id.* at 783, 788 (Stevens, J., concurring in part and dissenting in part) (describing the interrogation at issue as "torturous" and "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."). At least five Justices, however, rejected that proposition; the context-specific nature of the due process inquiry required that the standard remain whether an interrogation is conscience-shocking. *See id.* at 774-76 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J.); *id.* at 779 (Souter, J., concurring in the judgment, joined by Breyer, J.).

The CIA program is much less invasive and extreme than much of the conduct that the Supreme Court has held to raise substantive due process concerns, conduct that has generally involved significant bodily intrusion (as in *Rochin*) or the infliction of, or indifference to, extreme pain and suffering (as in *Williams* and *Chavez*). As Judge Posner of the Seventh Circuit

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has observed, the threshold defining police interrogations that exceed the bounds of substantive due process is a "high" one, which requires "misconduct that a reasonable person would find so beyond the norm of proper police procedure as to shock the conscience, and that is calculated to induce not merely momentary fear or anxiety, but severe mental suffering." *Williams*, 872 F.2d at 195. In contrast, and as discussed in detail below, the enhanced interrogation techniques at issue here, if applied by the CIA in the manner described in this memorandum, do not rise to that level of brutal and severe conduct. The interrogators in *Williams* chose weapons—clubs, butts of guns, sash cords—designed to inflict severe pain. While some of the techniques discussed herein involve physical contact, none of them will involve the use of such weapons or the purposeful infliction of extreme pain. As proposed by the CIA, none of these techniques involves the indiscriminate infliction of pain and suffering, or amounts to efforts to "wring confessions from the accused by force and violence." *Williams*, 341 U.S. at 101-02.

Moreover, the government interest at issue in each of the cases discussed above was the general interest in law enforcement.²⁹ That government interest is strikingly different from what is at stake in the context of the CIA program: The protection of the United States and its interests against terrorist attacks that, as experience proves, may result in massive civilian casualties. Deriving an absolute standard of conduct divorced from context, as *Chavez* demonstrates, is not the established application of the "shocks the conscience" test. Although none of the above cases expressly condones the techniques that we consider herein, neither does any of them arise in the special context of protecting the Nation from armed attack by a foreign enemy, and thus collectively they do not provide evidence of an executive tradition directly applicable to the techniques we consider here.³⁰

United States Military Doctrine. The United States Army has codified procedures for military intelligence interrogations in the *Army Field Manual*. On September 6, 2006, the

²⁹ *Williams* was an example of a prosecution under what is now codified as 18 U.S.C. § 242, which makes it a criminal offense to violate the constitutional rights of another while acting under color of law. Prosecutions have been brought under section 242 for police beatings and interrogations involving the excessive use of force, but courts applying section 242 consistently have focused on whether the violent actions were justified. To this end, federal pattern jury instructions for section 242 prosecutions ask the jury to decide whether the victim was "physically assaulted, intimidated, or otherwise abused intentionally and without justification." Eleventh Circuit Pattern Jury Instruction 8 (2003). Courts of appeals, particularly after the Supreme Court's clarification of the "shocks the conscience" standard in *Lewis*, have repeatedly turned to whether the conduct could be justified by a legitimate government interest. *Rogers v. City of Little Rock*, 152 F.3d 790, 797-98 (8th Cir. 1998).

³⁰ In the context of detention for ordinary criminal law enforcement purposes, as well as pursuant to civil commitment, the Supreme Court has held that substantive due process standards require "safe conditions," including "adequate food, shelter, clothing, and medical care." *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982). The failure to provide such minimum treatment, in most circumstances, would presumably "shock the conscience." The Court has not considered whether the government could depart from this general requirement in a limited manner, targeted at protecting the Nation from prospective terrorist attack. Nevertheless, it is informative that both the conditions of confinement at CIA facilities, see Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, *Application of the Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Detention Facilities* at 8 (Aug. 31, 2006), and the interrogation techniques considered herein, see *infra* at 70-72, comply with the "safe conditions" standard.

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Department of Defense issued a revised *Army Field Manual 2-22.3* on Human Intelligence Collection Operations. This revised version, like its predecessor *Army Field Manual 34-52*, 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 emotion to motivate the detainee to cooperate. *Army Field Manual 2-22.3*, at 8-9. The interrogator is advised to be "extremely careful that he does not threaten or coerce a source," as "conveying a threat might be a violation of the [Uniform Code of Military Justice]." The *Army Field Manual* limits interrogations to expressly approved techniques and, as a matter of Department of Defense policy, also explicitly prohibits eight techniques: "(1) Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner; (2) Placing hoods or sacks over the head of a detainee, using duct tape over the eyes; (3) Applying beatings, electric shock, burns, or other forms of physical pain; (4) "Waterboarding;" (5) Using military working dogs; (6) Inducing hypothermia or heat injury; (7) Conducting mock executions; (8) Depriving the detainee of necessary food, water or medical care." *Id.* at 5-20. The prior *Army Field Manual* also prohibited other techniques such as "food deprivation" and "abnormal sleep deprivation."

The eighteen approved techniques listed in the *Army Field Manual* are different from and less stressful than those under consideration here. The techniques proposed by the CIA are not strictly verbal or exploitative of feelings. They do involve physical contact and the imposition of physical sensations such as fatigue. The revised *Army Field Manual*, and the prior manual, thus would appear to provide some evidence of contrary executive practice for military interrogations. While none of the six enhanced techniques proposed by the CIA is expressly prohibited under the current Manual, two of the proposed techniques—"dietary manipulation" and "sleep deprivation"—were prohibited in an unspecified form by the prior Manual.

Nevertheless, we do not believe that the prior *Army Field Manual* is dispositive evidence "of traditional executive behavior [and] of contemporary practice" in the context of the CIA program for several reasons. The prior manual was designed for traditional armed conflicts, particularly conflicts governed by the Third Geneva Convention, which provides extensive protections for prisoners of war, including an express prohibition of all forms of coercion. See *Army Field Manual 34-52*, at 1-7 to 1-8; see also *id.* at iv-v (requiring interrogations to comply with the Geneva Conventions and the Uniform Code of Military Justice); GPW Art. 17. With respect to these traditional conflicts, the prior manual provided standards to be administered generally by military personnel without regard to the identity, value, or status of the detainee. By contrast, al Qaeda terrorists subject to the CIA program will be unlawful enemy combatants, not prisoners of war. Even within this class of unlawful combatants, the program will be administered only by trained and experienced interrogators who in turn will apply the techniques only to a subset of high value detainees. Thus, the prior manual directed at executing general obligations of all military personnel that would arise in traditional armed conflicts between uniformed armies is not controlling evidence of how high value, unlawful enemy combatants should be treated.

In contrast, the revised *Army Field Manual* was written with an explicit understanding that it would govern how our Armed Forces would treat unlawful enemy combatants captured in the present conflict, as the DTA required before the Manual's publication. The revised *Army*

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Field Manual authorizes an additional interrogation technique for persons who are unlawful combatants and who are "likely to possess important intelligence." See *Army Field Manual 2-22.3*, Appendix M. This appendix reinforces the traditional executive understanding that certain interrogation techniques are appropriate for unlawful enemy combatants that should not be used with prisoners of war.

The revised *Army Field Manual* cannot be described as a firmly rooted tradition, having been published only in September 2006. More significantly, the revised *Army Field Manual* was approved by knowledgeable high level Executive Branch officials on the basis of another understanding as well—that there has been a CIA interrogation program for high value terrorists who possess information that could help protect the Nation from another catastrophic terrorist attack.³¹ Accordingly, policymakers could prohibit certain interrogation techniques from general use on those in military custody because they had the option of transferring a high value detainee to CIA custody. That understanding—that the military operates in a different tradition of executive action, and more broadly—is established by the text of the DTA itself. The DTA requires that those in the "custody or effective control" of the Department of Defense not be "subject to any treatment or technique of interrogation not authorized by or listed in the U.S. Army Field Manual on Intelligence Interrogation." DTA § 1402(a); see also *id.* § 1406. By contrast, the DTA does not apply this Field Manual requirement to those in the custody of the CIA, and requires only that the CIA treat its detainees in a manner consistent with the constitutional standards we have discussed herein. DTA § 1403. Accordingly, neither the revised *Army Field Manual* nor its prior iterations provide controlling evidence of executive practice for the CIA in interrogating unlawful enemy combatants who possess high value information that would prevent terrorist attacks on American civilians.

State Department Reports. Each year, in the State Department's Country Reports on Human Rights Practices, the United States condemns torture and other coercive interrogation techniques employed by other countries. In discussing 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 discussing 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, [and] beating victims [with various objects]." See also, e.g., Iran (classifying sleep deprivation as either torture or severe prisoner abuse); Syria (discussing sleep deprivation as either torture or "ill-treatment").

These reports, however, do not provide controlling evidence that the CIA interrogation program "shocks the contemporary conscience." As an initial matter, the State Department has informed us that these reports are not meant to be legal conclusions; but instead they are public diplomatic statements designed to encourage foreign governments to alter their policies in a manner that would serve United States interests. In any event, the condemned techniques are often part of a course of conduct that involves other, more severe techniques, and appears to be

³¹ We do not mean to suggest that every military officer who participated in the composition of the revised *Army Field Manual* was aware of the CIA program. The senior Department of Defense officials who approved the manual, however, had the proper clearances and were aware of the CIA program's existence.

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undertaken in ways that bear no resemblance to the CIA interrogation program. The reasons for the condemned conduct as described by the State Department, for example, have no relationship with the CIA's efforts to prevent catastrophic terrorist attacks. In Liberia and Rwanda, these tactics were used to target critics of the government; Indonesian security forces used their techniques to obtain confessions for criminal law enforcement, to punish, and to extort money; Egypt "employ[ed] torture to extract information, coerce opposition figures to cease their political activities, and to deter others from similar activities."

The commitment of the United States to condemning torture, the indiscriminate use of force, physical retaliation against political opponents, and coercion of confessions in ordinary criminal cases is not inconsistent with the CIA's proposed interrogation practices. The CIA's screening procedures seek to ensure that enhanced techniques are used in the very few interrogations of terrorists who are believed to possess intelligence of critical value to the United States. The CIA will use enhanced techniques only to the extent needed to obtain this exceptionally important information and will take care to avoid inflicting severe pain or suffering or any lasting or unnecessary harm. The CIA program is designed to subject detainees to no more duress than is justified by the Government's paramount interest in protecting the United States and its interests from further terrorist attacks. In these essential respects, it fundamentally differs from the conduct condemned in the State Department reports.

Decisions by Foreign Tribunals. Two foreign tribunals have addressed interrogation practices that arguably resemble some at issue here. In one of the cases, the question in fact was whether certain interrogation practices met a standard that is linguistically similar to the "cruel, inhuman, or degrading treatment" standard in Article 16 of the CAT. These tribunals, of course, did *not* apply a standard with any direct relationship to that of the DTA, for the DTA specifically defines "cruel, inhuman, or degrading treatment or punishment" by reference to the established standards of United States law. The Senate's reservation to Article 16, incorporated into the DTA, was specifically designed to adopt a discernable standard based on the United States Constitution, in marked contrast to Article 16's treaty standard, which could have been subject to the decisions of foreign governments or international tribunals applying otherwise open-ended terms such as "cruel, inhuman or degrading treatment or punishment." The essence of the Senate's reservation is that Article 16's standard *simpliciter*—as opposed to the meaning given it by the Senate reservation—is not controlling under United States law.

The threshold question, therefore, is whether these cases have any relevance to the interpretation of the Fifth Amendment. The Supreme Court has not looked to foreign or international court decisions in determining whether conduct shocks the conscience within the meaning of the Fifth Amendment. More broadly, using foreign law to interpret the United States Constitution remains a subject of intense debate. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *id.* at 622-28 (Scalia, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *id.* at 322 (Rehnquist, C.J., dissenting). When interpreting the Constitution, we believe that we must look first and foremost to United States sources. See, e.g., Address of the Attorney General at the University of Chicago Law School (Nov. 9, 2005) ("Those who seek to enshrine foreign law in our Constitution through the courts therefore bear a heavy burden."). This focus is particularly important here because the Senate's reservation to Article 16 was designed to

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provide a discernable and familiar *domestic* legal standard that would be insulated from the impressions of foreign tribunals or governments on the meaning of Article 16's vague language.

We recognize, however, the possibility that members of a court might look to foreign decisions in the Fifth Amendment context, given the increasing incidence of such legal reasoning in decisions of the Supreme Court. Some judges might regard the decisions of foreign or international courts, under arguably analogous circumstances, to provide evidence of contemporary standards under the Fifth Amendment. While we do not endorse this practice, we find it nonetheless appropriate to consider whether the two decisions in question shed any light upon whether the interrogation techniques at issue here would shock the conscience.

We conclude that the relevant decisions of foreign and international tribunals are appropriately distinguished on their face from the legal issue presented by the CIA's proposed techniques. In *Ireland v. United Kingdom*, 2 EHRR 25 (1980), the European Court of Human Rights ("ECHR") addressed five methods used by the United Kingdom to interrogate members of the Irish Republican Army: requiring detainees to remain for several hours "spreadeagled against the wall, with their fingers put high above the 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"; covering the detainee's head with a dark hood throughout the interrogation; exposing the detainee to a continuous loud and hissing noise for a prolonged period; depriving the detainee of sleep; and "subjecting the detainee[] to a reduced diet during their stay" at the detention facility. *Id.* at ¶ 96. The ECHR did not indicate the length of the periods of sleep deprivation or the extent to which the detainee's diets were modified. *Id.* at ¶ 104. The ECHR held that, "in combination," these techniques were "inhuman and degrading treatment," in part because they "arous[ed in the detainees] feelings of fear, anguish, and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance." *Id.* at ¶ 167.

The CIA does not propose to use all of the techniques that the ECHR addressed. With regard to the two techniques potentially in common—extended sleep deprivation and dietary manipulation—the ECHR did not expressly consider or make any findings as to any safeguards that accompanied the United Kingdom's interrogation techniques. A United Kingdom report, released separately from the ECHR litigation, indicated that British officials in 1972 had recommended additional safeguards for the sleep deprivation techniques such as the presence of and monitoring by a physician similar to procedures that are now part of the CIA program. *See infra* at 72-75. The ECHR decision, however, reviewed those interrogation techniques before such recommendations were implemented, and therefore, there is some evidence that the techniques considered by the ECHR were not accompanied by procedures and safeguards similar to those that will be applied in the CIA program.

More importantly, the ECHR made no inquiry into whether any governmental interest might have reasonably justified the conduct at issue in that case—which is the legal standard that the DTA requires in evaluating the CIA's proposed interrogation techniques. The lack of such an inquiry reflects the fact that the ECHR's definition of "inhuman and degrading treatment" bears little resemblance to the U.S. constitutional principles incorporated under the DTA. The ECHR has demonstrated this gulf not only in the *Ireland* case itself, but also in other ECHR decisions that reveal an expansive understanding of the concept that goes far beyond how courts in the

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United States have interpreted our Constitution. For example, the ECHR has held that the so-called "death row effect"—the years of delay between the imposition of a death sentence and its execution arising from the petitioner's pursuit of his judicial remedies—itsself constitutes "inhuman or degrading treatment or punishment." See *Soering v. United States*, 11 Eur. Ct. H.R. 439 (1989). The Supreme Court, by contrast, has routinely refused to entertain such claims, and lower federal courts have not found them to have merit. See, e.g., *Lackey v. Texas*, 514 U.S. 1045 (1995) (denying certiorari to review a decision rejecting such a claim over a dissent by Justice Stevens); *Allen v. Ornoski*, 435 F.3d 946, 959 (9th Cir. 2006) (The petitioner "cannot credibly argue that the evolving standards of decency that mark the progress of a maturing society, as evidenced by the decisions of state and federal courts, are moving toward recognition of the validity of *Lackey* claims."). The ECHR also has read the European Convention to grant that court authority to scrutinize prison conditions. For example, the ECHR has concluded that it is inhuman and degrading to confine two persons to one cell with only one exposed toilet between them. *Melnik v. Ukraine*, ECHR 722286/01 (2006). Amid such expansive decisions, the ECHR might well regard the proposed enhanced interrogation techniques, or even the existence of the CIA interrogation program itself, to constitute "cruel, inhuman, or degrading" treatment under the standards incorporated in the European Convention. Yet we do not regard the ECHR's interpretation of its own European Convention human rights standards to constitute persuasive evidence as to whether the CIA techniques in question here would violate the Fifth Amendment, and thus the DTA.

The Supreme Court of Israel's review of interrogation techniques in *Public Committee Against Torture v. Israel*, HCJ 5100/94 (1999), similarly turned upon foreign legal issues not relevant here. There, the Israeli court held that Israel's General Security Service ("GSS") was not legally authorized to employ certain interrogation methods with persons suspected of terrorist activity—including shaking the torso of the detainee, depriving the detainee of sleep, and forcing the detainee to remain in a variety of stress positions. The court reached that conclusion, however, because it found that the GSS only had the authority to engage in interrogations specifically authorized by Israeli domestic statute and that, under the then "existing state of law," *id.* at 36, the GSS was "subject to the same restrictions applicable" to "the ordinary police investigator," *id.* at 29. See *id.* ("There is no statute that grants GSS investigators special interrogating powers that are different or more significant than those granted the police investigator."). Under that law, the GSS was permitted only to "examine orally any persons supposed to be acquainted with the facts and circumstances of any offense" and to reduce their responses to writing, and thus the statute did not permit the "physical means" of interrogation undertaken by the GSS. *Id.* at 19 (citing the Israeli Criminal Procedure Statute Art. 2(1)) (emphasis added). At the same time, the Israeli court specifically held open whether the legislature could authorize such techniques by statute, *id.* at 35-36, and determined that it was not appropriate in that case to consider special interrogation methods that might be authorized when necessary to save human life, *id.* at 32.²²

²² The Israeli court recognized that Israel had undertaken a treaty obligation to refrain from cruel, inhuman, or degrading treatment, *Public Committee Against Torture*, HCJ 5100/94 at 23, but the court specifically grounded its holding not in its interpretation of any treaty, but in Israeli statutory law. Indeed, the court recognized that the legislature could "grant[] GSS investigators the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities," *id.* at 35, provided only that the law "befit[s] the values of

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As we have explained above in finding particular U.S. Supreme Court decisions to be distinguishable, it is not the law in the United States that interrogations performed by intelligence officers for the purpose proposed by the CIA are subject to the same rules as "regular police interrogation[s]." *Id.* at 29. Thus, the Israeli court addressed a fundamentally different question that sheds little light on the inquiry before us. Where the Israeli GSS lacked any special statutory authority with respect to interrogations, the CIA is expressly authorized by statute to "collect intelligence through human sources and any other appropriate means" and is expressly distinguished from domestic law enforcement authorities. 50 U.S.C. § 403-4a(d)(1). Indeed, beyond the CIA's general statutory authority to collect human intelligence, the Military Commissions Act itself was enacted specifically to permit the CIA interrogation program to go forward. *See infra* at 43-44. Thus, while the Israeli court rested its 1999 decision on the legislature's failure to grant the GSS anything other than ordinary police authority, we face a CIA interrogation program clearly authorized and justified by legislative authority separate from and beyond those applicable to ordinary law enforcement investigations. And the Israeli Supreme Court itself subsequently recognized the profound differences between the legal standards that govern domestic law enforcement and those that govern armed conflict with terrorist organizations. *Compare Public Committee Against Torture v. Israel (1999)* (stating that "there is no room for balancing" under Israeli domestic law), with *Public Committee Against Torture in Israel v. The Government of Israel*, HCI 769/02 (Dec. 11, 2005), ¶ 22 (holding that under the law of armed conflict applicable to a conflict against a terrorist organization, "human rights are protected . . . but not to their full scope" and emphasizing that such rights must be "balance[d]" against "military needs").

Survival, Evasion, Resistance, and Escape ("SERE") Training. As we noted at the outset, variations of each of the proposed techniques have been used before by the United States, providing some evidence that they are, 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 techniques very much like these have long been used on our own troops. Individuals undergoing SERE training are obviously in a very different situation from detainees undergoing interrogation; SERE trainees know that the treatment they are experiencing is part of a training program, that it will last only a short time, and that they will not be significantly harmed by the training.

We do not wish to understate the importance of these differences, or the gravity of the psychological traumas that may accompany the relative uncertainty faced by the CIA's detainees. On the other hand, the interrogation program we consider here relies on techniques that have been deemed safe enough to use in the training of our own troops. 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.

the State of Israel, is enacted for a proper purpose, and [infringes the suspect's liberty] to an extent no greater than required," *id.* at 37.

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The Enactment of the Military Commissions Act. Finally, in considering "contemporary practice" and the "standards of blame generally applied to them," we consider the context of the recent debate over the Military Commissions Act, including the views of legislators who have been briefed on the CIA program. In *Public Committee Against Torture*, HCJ 5100/94, the Israeli Supreme Court observed that in a democracy, it was for the political branches, and not the courts, to strike the appropriate balance between security imperatives and humanitarian standards, and it invited the Israeli legislature to enact a statute specifically delimiting the security service's authority "to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities." *Id.* at 35. In the United States, Congress in fact enacted such a statute, responding to the President's invitation by passing the Military Commissions Act to allow the CIA interrogation program to go forward. While the isolated statements of particular legislators are not dispositive as to whether specific interrogation techniques would shock the conscience under the DTA, we properly may consider the Military Commissions Act, taken as a whole, in coming to an understanding of "contemporary practice, and of the standards of blame generally applied to them," and what Americans, through their representatives in Congress, generally deem to be acceptable conduct by the executive officials charged with ensuring the national security. *Lewis*, 523 U.S. at 847 n.8; *cf. Roper*, 543 U.S. 551 (2005) (finding the passage and repeal of state laws to be relevant to contemporary standards under the Eighth Amendment); *Atkins*, 536 U.S. 304 (same).

The President inaugurated the political debate over what would become the Military Commissions Act in his speech on September 6, 2006, wherein he announced to the American people the existence of the CIA program, the nature of the al Qaeda detainees who had been interrogated, and the need for new legislation to allow the program to "go forward" in the wake of *Hamdan*. As the President later explained: "When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to continue? This bill meets that test." Remarks of the President Upon Signing the Military Commission Act of 2006, East Room, White House (Oct. 17, 2006). Senators crucial to its passage agreed that the statute must be structured to permit the CIA's program to continue. See 152 Cong. Rec. S10354-02, S10393 (Sept. 28, 2006) (statement of Sen. Graham) ("Should we have a CIA program classified in nature that would allow techniques not in the Army Field Manual to get good intelligence from high value targets? The answer from my point of view is yes, we should."); *id.* at S 10414 (statement of Sen. McCain) ("[M]y colleagues, have no doubt—this legislation will allow the CIA to continue interrogating prisoners within the boundaries established in the bill."). Representative Duncan Hunter, the leading sponsor of the bill in the House, similarly described the legislation as "leav[ing] the decisions as to the methods of interrogation to the President and to the intelligence professionals at the CIA, so that they may carry forward this vital program that, as the President explained, serves to gather the critical intelligence necessary to protect the country from another catastrophic terrorist attack." 152 Cong. Rec. H7938 (Sept. 29, 2006). The Act clarified the War Crimes Act and provided a comprehensive framework for interpreting the Geneva Conventions so that the CIA program might go forward after *Hamdan*.

The Military Commissions Act, to be sure, did not prohibit or license specific interrogation techniques. As discussed above, Members of Congress on both sides of the debate expressed widely different views as to the specific interrogation techniques that might or might

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not be permitted under the statute. *See supra* at n.13. Nonetheless, you have informed us that prior to passage of the Military Commissions Act, several Members of Congress, including the full memberships of the House and Senate Intelligence Committees and Senator McCain, were briefed by General Michael Hayden, Director of the CIA, on the six techniques that we discuss herein and that, General Hayden explained, would likely be necessary to the CIA detention and interrogation program should the legislation be enacted. In those classified and private conversations, none of the Members expressed the view that the CIA interrogation program should be stopped, or that the techniques at issue were inappropriate. Many of those Members thereafter were critical in ensuring the passage of the legislation, making clear through their public statements and through their votes that they believed that a CIA program along the lines General Hayden described could and should continue.

Beyond those with specific knowledge of the classified details of the program, all of the Members who engaged in the legislative debate were aware of media reports—some accurate, some not—describing the CIA interrogation program. Those media reports suggested that the United States had used techniques including, and in some cases exceeding, the coerciveness of the six techniques proposed here. The President's request that Congress permit the CIA program to "go forward," and the carefully negotiated provisions of the bill, clearly presented Congress with the question whether the United States should operate a classified interrogation program, limited to high value detainees, employing techniques that exceeded those employed by ordinary law enforcement officers and the United States military, but that remained lawful under the anti-torture statute and the War Crimes Act. There can be little doubt that the subsequent passage of the statute reflected an endorsement by both the President and Congress of the political branches' shared view that the CIA interrogation program was consistent with contemporary practice, and therefore did not shock the conscience. We do not regard this political endorsement of the CIA interrogation program to be conclusive on the constitutional question, but we do find that the passage of this legislation provides a relevant measure of contemporary standards.

* * *

The substantive due process analysis, as always, must remain highly sensitive to context. We do not regard any one of the contexts discussed here, on its own, to answer the critical question: What interrogation techniques are permissible for use by trained professionals of the CIA in seeking to protect the Nation from foreign terrorists who operate through a diffuse and secret international network of cells dedicated to launching catastrophic terrorist attacks on the United States and its citizens and allies? Nonetheless, we read the constitutional tradition reflected in the DTA to permit the United States to employ a narrowly drawn, extensively monitored, and carefully safeguarded interrogation program for high value terrorists that uses enhanced techniques that do not inflict significant or lasting physical or mental harm.

D.

Applying these legal standards to the six proposed techniques used individually and in combination, we conclude that these techniques are consistent with the DTA.

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Dietary Manipulation. The CIA limits the use of dietary manipulation to ensure that detainees subject to it suffer no adverse health effects. The CIA's rules ensure that the detainee receives 1000 kCal per day as an absolute minimum, a level that is equivalent to a wide range of commercial weight loss programs. Medical personnel closely monitor the detainee during the application of this technique, and the technique is terminated at the prompting of medical personnel or if the detainee loses more than ten percent of his body weight. While the diet may be unappealing, it exposes the detainee to no appreciable risk of physical harm. We understand from the CIA that this technique has proven effective, especially with detainees who have a particular appreciation for food. In light of these safeguards and the technique's effectiveness, the CIA's use of this technique does not violate the DTA.

Corrective Techniques. Each of the four proposed "corrective techniques" involves some physical contact between the interrogator and the detainee. These corrective techniques are of two types. First, there are two "holds." With the facial hold, the interrogator places his palms on either side of the detainee's face in a manner careful to avoid any contact with eyes. With the attention grasp, the interrogator grasps the detainee by the collar and draws him to the interrogator in order to regain the detainee's attention, while using a collar or towel around the back of the detainee's neck to avoid whiplash. These two techniques inflict no appreciable pain on the detainee and are directed wholly at refocusing the detainee on the interrogation and frustrating a detainee's efforts to ignore the interrogation. Thus, the described techniques do not violate the requirements of substantive due process.

Second, the CIA proposes to use two "slaps." In the abdominal slap, the interrogator may begin with his hands no farther than 18 inches away from the detainee's abdomen and may strike the detainee in an area of comparatively little sensitivity between the waist and the sternum. The facial slap involves a trained interrogator's striking the detainee's cheek with his hand. Like the holds, the slaps are primarily *psychological* techniques to make the detainee uncomfortable; they are not intended, and may not be used, to extract information from detainees by force or physical coercion.

There is no question, however, that the slaps may momentarily inflict some pain. But careful safeguards ensure that no significant pain would occur. With the facial slap, the interrogator must not wear any rings, and must strike the detainee in the area between the tip of the chin and the corresponding earlobe to avoid any contact with sensitive areas. The interrogator may not use a fist, but instead must use an open hand and strike the detainee only with his open fingers, not with his palm. With the abdominal slap, the interrogator also may not use a fist, may not wear jewelry, and may strike only between the sternum and the navel. The interrogator is required to maintain a short distance between himself and the detainee to prevent a blow of significant force. Undoubtedly, a single application of either of these techniques presents a question different from their repeated use. We understand, however, that interrogators will not apply these slaps with an intensity, or a frequency, that will cause significant physical pain or injury. Our conclusion that these techniques do not shock the conscience does not mean that interrogators may punch, beat, or otherwise physically abuse detainees in an effort to extract information. To the contrary, the result that we reach here is expressly limited to the use of far more limited slap techniques that have carefully been designed to affect detainees

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psychologically, without harming them physically. Slaps or other forms of physical contact that go beyond those described may raise different and serious questions under the DTA.

Monitoring by medical personnel is also important. Medical personnel observe the administration of any slap, and should a detainee suffer significant or unexpected pain or harm, the technique would be discontinued. In this context, the very limited risk of harm associated with this technique does not shock the conscience.

Extended Sleep Deprivation. Of the techniques addressed in this memorandum, extended sleep deprivation again, as under the War Crimes Act, requires the most extended analysis. Nonetheless, after reviewing medical literature, the observations of CIA medical staff in the application of the technique, and the detailed procedures and safeguards that CIA interrogators and medical staff must follow in applying the technique and monitoring its application, we conclude that the CIA's proposed use of extended sleep deprivation would not impose harm unjustifiable by a governmental interest and thus would not shock the conscience.

The scope of this technique is limited: The detainee would be subjected to no more than 96 hours of continuous sleep deprivation, absent specific additional approval, including legal approval from this Office and approval from the Director of the CIA; the detainee would be allowed an opportunity for eight hours of uninterrupted sleep following the application of the technique; and he would be subjected to no more than a total of 180 hours of the sleep deprivation technique in one 30-day period. Notably, humans have been kept continuously awake in excess of 250 hours in medical studies. There are medical studies suggesting that sleep deprivation has few measurable physical effects. See, e.g., *Why We Sleep: The Functions of Sleep in Humans and Other Mammals* 23-24 (1998). To be sure, the relevance of these medical studies is limited. These studies have been conducted under circumstances very dissimilar to those at issue here. Medical subjects are in a relaxed environment and at relative liberty to do whatever keeps their interest. The CIA detainees, by contrast, are undoubtedly under duress, and their freedom of movement and activities are extremely limited. CIA medical personnel, however, have confirmed that these limited physical effects are not significantly aggravated in the unique environment of a CIA interrogation.

As described above, the CIA's method of keeping detainees awake—continuous standing—can cause edema, or swelling in the lower legs and feet. Maintaining the standing position for as many as four days would be extremely unpleasant, and under some circumstances, painful, although edema and muscle fatigue subside quickly when the detainee is permitted to sit or to recline.³³

³³ We understand that during the use of the proposed extended sleep deprivation technique, the detainee would often wear a disposable undergarment designed for adults suffering from incontinence. The undergarment would be used to avoid the need regularly to unshackle the detainee for use of the toilet, and would be regularly checked to avoid skin irritation or unnecessary discomfort. The proposed use of the undergarment is justified not just for sanitary reasons, but also to protect both the detainee and the interrogators from unnecessary and potentially dangerous physical contact. We also understand that the detainee would wear additional clothing, such as a pair of shorts, over the undergarment during application of this technique.

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At the same time, however, the CIA employs many safeguards to ensure that the detainee does not endure significant pain or suffering. The detainee is not permitted to support his weight by hanging from his wrists and thereby risking injury to himself. This precaution ensures that the detainee's legs are capable of functioning normally at all times—if the detainee cannot support his own weight, administration of the technique ends. In addition, the CIA's medical personnel monitor the detainee throughout the period of extended sleep deprivation. They will halt use of the technique should they diagnose the detainee as experiencing hallucinations, other abnormal psychological reactions, or clinically significant diminishment in cognitive functioning. Medical personnel also will monitor the detainee's vital signs to ensure that they stay within normal parameters. If medical personnel determine that the detainee develops clinically significant edema or is experiencing significant physical pain for any reason, the technique either is discontinued or other methods of keeping the detainee awake are used. These accommodations are significant, because they highlight that the CIA uses extended sleep deprivation merely to weaken a detainee's psychological resistance to interrogation by keeping him awake for longer than normal periods of time.

Combined Effects. We do not evaluate these techniques in isolation. To determine whether a course of interrogation "shocks the conscience," it is important to evaluate the effect of the potential combined use of these techniques. See, e.g., *Williams v. United States*, 341 U.S. 97, 103 (1951) (evaluating a three-day course of interrogation techniques to determine whether a constitutional violation occurred). Previously, this Office has been particularly concerned about techniques that may have a mutually reinforcing effect such that the combination of techniques might increase the effect that each would impose on the detainee. *Combined Use* at 9-11. Specifically, medical studies provide some evidence that sleep deprivation may reduce 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). Moreover, subjects in these medical studies have been observed to increase their consumption of food during a period of sleep deprivation. See *Why We Sleep* at 38. A separate issue therefore could arise as the sleep deprivation technique may be used during a period of dietary manipulation.

Nonetheless, we are satisfied that there are safeguards in place to protect against any significant enhancement of the effects of the techniques at issue when used in combination with sleep deprivation. Detainees subject to dietary manipulation are closely monitored, and any statistically significant weight loss would result in cessation of, at a minimum, the dietary manipulation technique. With regard to pain sensitivity, none of the techniques at issue here involves such substantial physical contact, or would be used with such frequency, that sleep deprivation would aggravate the pain associated with these techniques to a level that shocks the conscience. More generally, we have been assured by the CIA that they will adjust and monitor the frequency and intensity of the use of other techniques during a period of sleep deprivation. *Combined Use* at 16.

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In evaluating these techniques, we also recognize the emotional stress that they may impose upon the detainee. While we know the careful procedures, safeguards, and limitations under the CIA's interrogation plan, the detainee would not. In the course of undergoing these techniques, the detainee might fear that more severe treatment might follow, or that, for example, the sleep deprivation technique may be continued indefinitely (even though, pursuant to CIA procedures, the technique would end within 96 hours). To the extent such fear and uncertainty may occur, however, they would bear a close relationship to the important government purpose of obtaining information crucial to preventing a future terrorist attack. According to the CIA, the belief of al Qaeda leaders that they will not be harshly treated by the United States is the primary obstacle to encouraging them to disclose critical intelligence. Creating uncertainty over whether that assumption holds—while at the same time avoiding the infliction (or even the threatened infliction, *see supra* at n.21) of any significant harm—is a necessary part of the effectiveness of these techniques and thus in this context does not amount to the arbitrary or egregious conduct that the Due Process Clause would forbid. When used in combination and with the safeguards described above, the techniques at issue here would not impose harm that constitutes "cruel, inhuman, or degrading treatment or punishment" within the meaning of the DTA.

IV.

The final issue you have asked us to address is whether the CIA's use of the proposed interrogation techniques would be consistent with United States treaty obligations under Common Article 3 of the Geneva Conventions, to the extent those obligations are not encompassed by the War Crimes Act.³⁴ As we explain below, Common Article 3 does not disable the United States from employing the CIA's proposed interrogation techniques.

³⁴ Through operation of the Military Commissions Act, the Geneva Conventions, outside the requirements of the War Crimes Act, constitute a judicially unenforceable treaty obligation of the United States. Under the National Security Act of 1947, properly authorized covert action programs need only comply with the Constitution and the statutes of the United States. See 50 U.S.C. § 413b(a)(5) (prohibiting the authorization of covert actions "that would violate the Constitution or any statute of the United States," without mentioning treaties). Nevertheless, we understand that the CIA intends for the program to comply with Common Article 3, and our analysis below is premised on that policy determination.

In addition, we note that the MCA provides another mechanism whereby the President could ensure that the CIA interrogation program fully complies with Common Article 3—by reasserting his pre-*Hamidan* conclusion that Common Article 3 does not apply to the armed conflict against al Qaeda. Section 6(a)(3) of the MCA provides the President with the authority to "interpret the meaning and application of the Geneva Conventions" through executive orders that "shall be authoritative in the same manner as other administrative regulations" (emphasis added). By specifically invoking administrative law, the MCA provides the President with at least the same authority to interpret the treaty as an administrative agency would have to interpret a federal statute. The Supreme Court has held that an administrative agency's reasonable interpretation of a federal statute is to be "given controlling weight" even if a court has held in a prior case that another interpretation was *better* than the one contained in the agency regulation. See *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 980-986 (2005). As the Court explained, the "prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982. *Hamdan* did not hold that Common Article 3 was unambiguous. Rather, the Court held only that the *best* interpretation of Common Article 3 was that it applied to any conflict that was not a conflict between states. The Court did not address the fact that the President had reached the opposite conclusion in his February 7, 2002 order, and reduced that view to the

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A.

Common Article 3 has been described as a "Convention in miniature." International Committee of the Red Cross, Jean Pictet, gen. ed., III *Commentaries on the Geneva Conventions* at 34 (1960). It was intended to establish a set of minimum standards applicable to the treatment of all detainees held in non-international armed conflicts.

I.

Our interpretation must begin "with the text of the treaty and the context in which the written words are used." *Société Nationale Industrielle Aéropostale v. United States District Court*, 482 U.S. 522, 534 (1987); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991); see also Vienna Convention on the Law of Treaties, May 23, 1969, 1144 U.N.T.S. Article 31(1) ("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."); see also Ian Brownlie, *Principles of Public International Law* 629 (1990) ("The language of the treaty must be interpreted in light of the rules of general international law in force at the time of its conclusion, and also in light of the contemporaneous meaning of the terms.")³⁵ The foundation of Common Article 3 is its overarching requirement that detainees "shall in all circumstances be treated humanely, without any adverse distinction based on race, color, religion or faith, sex, birth or wealth, or any other similar criteria." This requirement of humane treatment is supplemented and focused by the enumeration of four more specific categories of acts that "are and shall remain prohibited at any time and in any place whatsoever." Those forbidden acts are:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;

"erroneous" litigating position of the Solicitor General. See 126 S. Ct. at 2795; *id.* at 2845-46 (Thomas, J., dissenting) (recognizing that the majority did not address whether the treaty was ambiguous or deference was appropriate).

Because the MCA expressly allows the President to interpret the "application" of Common Article 3 by executive order, he lawfully could reassert his *pre-Hamdan* interpretation of the treaty. While we need not fully explore the issue here, we have little doubt that as a matter of text and history, the President could reasonably find that an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties" does not include an armed conflict with an international terrorist organization occurring across territorial boundaries. See, e.g., Pictet, III *Commentaries*, at 34 ("Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities, in short, which are in many respects similar to an international war, but take place within the confines of a single country.") (emphasis added). Therefore, although we assume in light of *Hamdan* that Common Article 3 applies to the present conflict, we note that the President permissibly could interpret Common Article 3 not to apply by an executive order issued under the MCA.

³⁵ Although the United States has not ratified the Vienna Convention on the Law of Treaties, we have often looked to Articles 31 and 32 of the Convention as a resource for rules of treaty interpretation widely recognized in international law.

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(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.

Of these provisions, two have no application here. The proposed CIA interrogation methods will involve neither the "taking of hostages" nor the "passing of sentences [or] the carrying out of executions." Thus, our analysis will focus on paragraphs 1(a) and 1(c), as well as Common Article 3's introductory text.

Where the text does not firmly resolve the application of Common Article 3 to the CIA's proposed interrogation practices, Supreme Court precedent and the practices of this Office direct us to several other interpretive aids. As with any treaty, the negotiating record—also known as the *travaux préparatoires*—of the Geneva Conventions is relevant. See, e.g., *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, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the post-ratification understanding of the contracting parties."); see also Vienna Convention on the Law of Treaties Art. 32(a) (stating that "supplementary means of interpretation, including the preparatory work of the treaty," may be appropriate where the meaning of the text is "ambiguous or obscure"). With regard to the Geneva Conventions, an additional, related tool is available: In 1960, staff members of the International Committee of the Red Cross, many of whom had assisted in drafting the Conventions, published *Commentaries* on each of the Geneva Conventions, under the general editorship of Jean Pictet. See Jean Pictet, gen. ed., *Commentaries on the Geneva Conventions* (ICRC 1960) (hereinafter, "*Commentaries*"). These *Commentaries* provide some insight into the negotiating history, as well as a fairly contemporaneous effort to explain the ICRC's views on the Conventions' proper interpretation. The Supreme Court has found the *Commentaries* persuasive in interpreting the Geneva Conventions. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796-98 & n.48 (2006) (citing the *Commentaries* ten times in interpreting Common Article 3 to apply to the armed conflict with al Qaeda and explaining that "[t]hrough not binding law, the [ICRC Commentary] is, as the parties recognize, relevant in interpreting the Geneva Conventions").

In addition, certain international tribunals have in recent years applied Common Article 3 in war crimes prosecutions—the International Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). Their decisions may have relevance as persuasive authority. See Vienna Convention on the Law of Treaties Art. 31(3)(b) (stating that "subsequent practice in application of the treaty" may be relevant to its interpretation). The Supreme Court recently explained that the interpretation of a treaty by an international tribunal charged with adjudicating disputes between signatories should receive "respectful consideration." *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2683 (2006); see also *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam). The Geneva Conventions themselves do not charge either ICTY or ICTR with this duty, leaving their views with somewhat less weight than

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such a tribunal otherwise might have. We do, however, find several decisions of the ICTY of use, and that our analysis aligns in many areas with the decisions of these tribunals provides some comfort that we have accurately interpreted the treaty's terms.

Finally, we also recognize that the *practices* of other state parties in implementing Common Article 3 (as opposed to the statements of officials from other nations, unsupported by any concrete circumstances and conduct) may serve as "a supplementary means of interpretation." See Vienna Convention on the Law of Treaties Art. 31(3)(b). We have found only one country, the United Kingdom, to have engaged in a sustained effort to interpret Common Article 3 in a similar context, and we discuss the relevance of that example below.³⁶

In addition, the Preparatory Committee for the International Criminal Court established under the Rome Statute has developed elements for crimes under Common Article 3 that may be tried before that court, and an accompanying commentary. See Knut Dörmann, *Elements of Crimes under the Rome Statute of International Criminal Court: Sources and Commentary* (Cambridge 2002). The United States is not a party to the Rome Statute, see Letter from John R. Bolton, Undersecretary of State, to U.N Secretary General Kofi Anan (May 6, 2002) (announcing intention of the United States not to become a party to the Rome Statute), but several parties to the Geneva Conventions are. Thus, while the Rome Statute does not constitute a legal obligation of the United States, and its interpretation of the offenses is not binding as a matter of law, the Statute provides evidence of how other state parties view these offenses. Like the decisions of international tribunals, the general correspondence between the Rome Statute and our interpretation of Common Article 3 provides some confirmation of the correctness of the interpretation herein.

2.

In addition to the guidance provided by these traditional tools of treaty interpretation, the Military Commissions Act substantially assists our inquiry.

The MCA amends the War Crimes Act to include nine specific criminal offenses defining the grave breaches of the Geneva Conventions, which we have discussed above. These amendments constitute authoritative statutory implementation of a treaty.³⁷ As important, by

³⁶ The practice of many other state parties in response to civil conflicts appears to have been simply to violate Common Article 3 without conducting any interpretation. The Government of France, for instance, reportedly instituted torture as an official practice in seeking to suppress insurrection in the then-French territory of Algeria between 1954 and 1962. See, e.g., Shiva Eltekhai, *France and the Algerian War: From a Policy of 'Forgetting' to a Framework of Accountability*, 34 Colum. Hum. Rts. L. Rev. 413, 421-22 (2003). More recently, Russia reportedly engaged in sustained violations of Common Article 3 in dealing with the internal conflict in Chechnya. We do not take such actions as a guide to the meaning of Common Article 3, and indeed many of the reported actions of these nations are condemnable. But these examples do reinforce the need to distinguish what states say from what they in fact do when confronted with their own national security challenges.

³⁷ Congress provided a comprehensive framework for discharging the obligations of the United States under the Geneva Conventions, and such legislation properly influences our construction of the Geneva Conventions. Congress regularly enacts legislation implementing our treaty obligations, and that legislation provides definitions for undefined treaty terms or otherwise specifies the domestic legal effect of such treaties. See,

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statutorily prohibiting certain specific acts, the amendments allow our interpretation of Common Article 3 to focus on the margins of relatively less serious conduct (i.e., conduct that falls short of a grave breach). Accordingly, we need not decide the outer limits of conduct permitted by certain provisions of Common Article 3, so long as we determine that the CIA's practices, limited as they are by clear statutory prohibitions and by the conditions and safeguards applied by the CIA, do not implicate the prohibitions of Common Article 3. For that interpretive task, the War Crimes Act addresses five specific terms of Common Article 3 by name—"torture," "cruel treatment," "murder," "mutilation," and the "taking of hostages." Although the War Crimes Act does not by name mention the three remaining relevant terms—"violence to life and person," "outrages upon personal dignity, in particular, humiliating and degrading treatment," and the overarching requirement of "humane[]" treatment—the Act does address them in part by identifying and prohibiting four other "grave breaches" under Common Article 3. Three of these offenses—performing biological experiments, rape, and sexual assault or abuse, see 18 U.S.C. §§ 2441(d)(1)(C), (G), (H)—involve reprehensible conduct that Common Article 3 surely prohibits. The Act includes another offense—intentionally causing serious bodily injury—which may have been intended to address the grave breach of "willfully causing great suffering or serious injury to body or health," specified in Article 130. This grave breach is not directly linked to Common Article 3 by either its text, its drafting history, or the ICRIC Commentaries; nevertheless, the "serious bodily injury" offense in the War Crimes Act may substantially overlap with Common Article 3's prohibitions on "violence to life and person" and "outrages upon personal dignity."

Congress also stated in the MCA that the amended "provisions of [the War Crimes Act] fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character." MCA § 6(a)(2). This statutory conclusion suggests the view of Congress that the terms "murder," "mutilation," "cruel treatment," "torture," and the "taking of hostages" in Common Article 3 are properly interpreted to be coterminous with the identically named offenses in the War Crimes Act. Article 130 of the Third Geneva Convention expressly states that two of these offenses—torture and murder ("willful killing" in Article 130)—are grave breaches. As explained below, international commentators and tribunals believe that a third offense—cruel treatment—is identical to the grave breach of "inhuman treatment" in Article 130. To criminalize only a subset of those acts would not be consistent with the obligation of the United States under Article 129 of GPW, and Congress believed it "fully satisf[ie]d" that obligation in the MCA.³⁸ In any event, no legislative history indicates that Congress believed the War Crimes Act left a gap in coverage

e.g., 9 U.S.C. §§ 201-208 (addressing the scope of the Convention on the Recognition of Foreign Arbitral Awards); 18 U.S.C. § 1093 (implementing and defining terms of the Convention on the Prevention and Punishment of the Crime of Genocide); 17 U.S.C. § 116(a) (defining terms of the Convention for the Protection of Literary and Artistic Works); 18 U.S.C. § 2339C (defining terms of the International Convention for the Suppression of the Financing of Terrorism); 26 U.S.C. § 894(c) (interpreting the United States-Canada Income Treaty of 1980).

³⁸ We need not definitely resolve the question of Congress's intention as to the two other terms of Common Article 3 defined in the War Crimes Act—"mutilation" and the "taking of hostages"—neither of which appears expressly in Article 130 of GPW. These offenses are not implicated by the proposed CIA interrogation methods.

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with respect to any of its offenses that expressly address by name specific prohibitions in Common Article 3. Combining Congress's view in its implementing legislation with our own analysis of Common Article 3's relevant terms, including the alignment of Congress's definitions with interpretations of international tribunals, we conclude below that Congress's view is correct and that it has in the War Crimes Act fully and correctly defined the terms at issue, namely "torture" and "cruel treatment."

3.

Congress in the MCA also made clear, however, its view that the grave breaches defined in the War Crimes Act do not exhaust the obligations of the United States under Common Article 3. The War Crimes Act, as amended, states that "the definitions [in the War Crimes Act] are intended only to define the grave breaches of Common Article 3 and not the full scope of the United States obligations under that Article." 18 U.S.C. § 2441(d)(5). As to the rest, the Act states that the President may "promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions." MCA § 6(a)(3)(A).

Our inquiry with respect to the residual meaning of Common Article 3 is therefore confined to the three terms not expressly defined in the War Crimes Act—"violence to life or person," "outrages upon personal dignity," and "humane" treatment—to the extent those terms have meaning beyond what is covered by the four additional offenses under the War Crimes Act described above.³⁹ The President, Members of Congress, and even Justices of the Supreme Court in *Hamdan* have recognized that these provisions are troublingly vague and that *post hoc* interpretations by courts, international tribunals, or other state parties would be difficult to predict with an acceptable degree of certainty. See, e.g., Address of the President, East Room, White House (Sept. 6, 2006) ("The problem is that these [e.g., 'outrages upon personal dignity, in particular, humiliating and degrading treatment'] and other provisions of Common Article Three are vague and undefined, and each could be interpreted in different ways by American and foreign judges."); 152 Cong. Rec. S10354-02, S10412 (Sept. 15, 2006) (Statement of Sen. McCain) ("Observers have commented that, though such 'outrages [upon personal dignity]' are difficult to define precisely, we all know them when we see them. However, neither I nor any other responsible member of this body should want to prosecute and potentially sentence to death any individual for violating such a vague standard."); *Hamdan*, 126 S. Ct. at 2798 ("Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones."); *id.* at 2848 (Thomas, J., dissenting) (characterizing provisions in Common Article 3 as "vague" and "nebulous").

They were not the first to remark on this uncertainty, nor is the uncertainty an accident. The *Commentaries* explain that the Conventions' negotiators found it "dangerous to try to go into too much detail" and thus sought "flexible" language that would keep up with unforeseen circumstances. Pictet, III *Commentaries*, at 39; see IV *Commentaries*, at 204-05 ("It seems

³⁹ As we explain below, Congress correctly defined the content of Common Article 3's prohibitions on cruel treatment in the War Crimes Act's "cruel and inhuman treatment" offense. See *infra* at part IV.B.1.b.

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useless or even dangerous to attempt to make a list of all the factors which make treatment "humane."); see also *2A Final Record of Diplomatic Conferences of Geneva of 1949*, at 248 ("Mr. Maresca (Italy) thought that it gave greater force to a rule if he merely stated its fundamental principle without any comments; to enter into too many details could only limit its scope.").

The difficult task of applying these remaining terms is substantially assisted by two interpretive tools established in United States practice as well as international law. The first of these turns to more developed United States legal standards—similar to those set forth in Common Article 3—to provide content to Common Article 3's otherwise general terms. This approach is expressly recommended by Congress in the Military Commissions Act, which reaffirms the constitutional standards of treatment extended abroad and to aliens by the Detainee Treatment Act. The MCA further provides that any violation of the constitutional standards in the Detainee Treatment Act in connection with a Common Article 3 armed conflict constitutes a violation of Common Article 3. See MCA § 6(a)(1). The MCA thus both points us to particular domestic law in applying Common Article 3 and leaves open the possibility—advanced by many during the debate over the MCA—that compliance with the DTA as well as the specific criminal prohibitions in the War Crimes Act would fully satisfy the obligations of the United States under Common Article 3.

During the legislative debate over the Military Commissions Act, Secretary of State Condoleezza Rice explained why the State Department believed that Congress reasonably could declare that compliance with the DTA would satisfy United States obligations under Common Article 3:

In a case where the treaty's terms are inherently vague, it is appropriate for a state to look to its own legal framework, precedents, concepts and norms in interpreting these terms and carrying out its international obligations. . . . The proposed legislation would strengthen U.S. adherence to Common Article 3 of the Geneva Conventions because it would add meaningful definition and clarification to vague terms in the treaties.

In the department's view, there is not, and should not be, any inconsistency with respect to the substantive behavior that is prohibited in paragraphs (a) and (c) of Section 1 of Common Article 3 and the behavior that is prohibited as "cruel, inhuman, or degrading treatment or punishment," as that phrase is defined in the U.S. reservation to the Convention Against Torture. That substantive standard was also utilized by Congress in the Detainee Treatment Act. Thus it is a reasonable, good faith interpretation of Common Article 3 to state . . . that the prohibitions found in the Detainee Treatment Act of 2005 fully satisfy the obligations of the United States with respect to the standards for detention and treatment established in those paragraphs of Common Article 3.

Letter from Secretary of State Condoleezza Rice to the Honorable John Warner, Chairman of the Senate Armed Services Committee (Sept. 14, 2006) ("Rice Letter"). In enacting the MCA, Congress did not specifically declare that the satisfaction of the DTA would satisfy United States

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obligations under Common Article 3, but Congress took measures to leave open such an interpretive decision. In particular, section 6(a)(3) of the MCA expressly delegates to the President the authority to adopt such a "reasonable, good faith interpretation of Common Article 3," and section 6(a)(1) provides that the prohibition under the DTA is directly relevant in interpreting the scope of United States obligations under Common Article 3.

It is striking that Congress expressly provided that every violation of the DTA "constitutes [a] violation[] of common Article 3 of the Geneva Conventions prohibited by United States law." MCA § 6(a)(1). Especially in the context of the legislative debate that accompanied the passage of the Military Commissions Act, this statement suggests a belief that the traditional constitutional standards incorporated into the DTA very closely track the humanitarian standards of Common Article 3. If the fit were loose, it would be difficult to foreclose the possibility that some violations of the DTA would not also be violations of Common Article 3, unless Congress were of the view that Common Article 3 is in all cases more protective than the domestic constitutional provisions applicable to our own citizens.

The manner in which Congress reaffirmed the President's authority to interpret the Geneva Conventions, outside of grave breaches, is consistent with the suggestion that the Detainee Treatment and War Crimes Acts are substantially congruent with the requirements of Common Article 3. The Military Commissions Act, after identifying both the grave breaches set out in the War Crimes Act and transgressions of the DTA as violations of Common Article 3, states that the President may "promulgate higher standards and administrative regulations for violations of treaty obligations which *are not grave breaches* of the Geneva Conventions." MCA § 6(a)(3)(A) (emphasis added). The provision does not mention the DTA. While the provision indicates that there are violations of Common Article 3 that are not grave breaches covered by the War Crimes Act, it also implies that the DTA may address those additional violations. See also 18 U.S.C. § 2441(d)(5), as amended by MCA § 6 (stating that "the definitions [in the War Crimes Act] are intended only to define the grave breaches of Common Article 3 and not the full scope of the United States obligations under that Article").

In applying the DTA's standard of humane treatment to Common Article 3, Congress was acting in accordance with a practice grounded in the text and history of the Geneva Conventions. The Conventions themselves recognize that, apart from "grave breaches," the state parties have some flexibility to consult their own legal traditions in implementing and discharging their treaty obligations. Although parties are obligated to prohibit grave breaches, with "penal sanctions," see GPW Art. 129 ¶¶ 1-2, the Conventions require parties "to take measures necessary for the suppression of other breaches of the Convention[s]," *id.* ¶ 3. The *Commentaries* also suggest such an approach when they explain that Common Article 3 was drafted with reference to the then-existing domestic laws of state parties: It "merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the national legislation of the States in question." Pictet, III *Commentaries*, at 36. Not only was the United States among the Conventions' leading drafters, but it was then (as it is now) among the leading constitutional democracies of the world. It is therefore manifestly appropriate for the United States to consider its own constitutional traditions—those rules "embodied in the national legislation" of the United States—in determining the meaning of the

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general standards embodied in Common Article 3. The DTA incorporated constitutional standards from our Nation's legal tradition that predate the adoption of the Geneva Conventions.

Indeed, the United States previously has looked to its own law to clarify ambiguous treaty terms in similar treaties. A leading example is now embodied in the DTA itself. Faced with an otherwise undefined and difficult-to-apply obligation to refrain from "cruel, inhuman, or degrading treatment" in Article 16 of the CAT, the Senate turned to our Nation's constitutional standards and made clear in its advice and consent that the obligation of the United States under this provision would be determined by reference to the Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution. See *Executive Branch Summary and Analysis of the CAT* at 15-16; S. Exec. Rep. 101-30, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at 25-26 (Aug. 30, 1990); see also *Samann v. Commissioner*, 313 F.2d 461, 463 (4th Cir. 1963) (looking to a more detailed definition of a term in a domestic U.S. tax statute to interpret a comparatively general treaty term). As with the Geneva Conventions, this approach was at least suggested by the treaty itself, which required state parties to "undertake to prevent . . . cruel, inhuman, or degrading treatment or punishment." CAT Art. 16 (emphasis added); see *Executive Branch Summary and Analysis of the CAT*, S. Treaty Doc. 100-20 at 15 (explaining that this language is "more limited" than a "stringent prohibition" and "embodies an undertaking to take measures to prevent" violations within the rubric of existing domestic legal structures).⁴⁰

The second interpretive tool applicable here attempts to reconcile the residual imprecision in Common Article 3 with its application to the novel conflict against al Qaeda. When treaty drafters purposely employ vague and ill-defined language, such language can reflect a conscious decision to allow state parties to elaborate on the meaning of those terms as they confront circumstances unforeseen at the time of the treaty's drafting.

Like our first interpretive principle, this approach shares the support of Congress through the framework established in the Military Commissions Act. In that Act, Congress chose to keep the Geneva Conventions out of the courts, and recognized that the Executive Branch has discretion in interpreting Common Article 3 (outside the grave breaches) to provide good faith applications of its vague terms to evolving circumstances. The explicit premise behind the Act's comprehensive framework for interpreting the Geneva Conventions is that our Government needed, and the Conventions permitted, a range of discretion for addressing the threat against the United States presented by al Qaeda. As we discussed in the context of the DTA, Congress knew that a CIA interrogation program had to be part of that discretion, and thus a guiding objective behind the MCA's enactment was that the CIA's program could "go forward" in the wake of *Hamdan*. See *supra* at 43-44. This is not to say that the MCA declares that any conduct

⁴⁰ As a formal matter, the United States undertook a reservation to the CAT, altering United States obligations, rather than invoking domestic law as a means of interpreting the treaty. The United States made clear, however, that it understood the constitutional traditions of the United States to be more than adequate to satisfy the "cruel, inhuman or degrading treatment or punishment" standard required by the treaty, and therefore, it undertook the reservation out of an abundance of caution and not because it believed that United States law would fall short of the obligations under Article 16, properly understood. S. Exec. Rep. 101-30, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at 25-26 (Aug. 30, 1990).

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falling under the auspices of a CIA interrogation program must be consistent with Common Article 3. To the contrary, Congress recognized that Common Article 3 establishes some clear limits on such a program. Nevertheless, the result of lingering imprecision in Common Article 3's terms should not be institutional paralysis, but rather discretion for the Executive Branch in developing an effective CIA program within those clear limits.

Common Article 3 certainly places clear limits on how a state party may address such challenges and absolutely bars certain conduct offensive to "all civilized nations." Pictet, III *Commentaries*, at 39. For instance, the provision prohibits "murder of all kinds," "mutilation," and "the taking of hostages"—terms that are susceptible to precise definition and that "are and shall remain prohibited at any time and in any place whatsoever." When it comes, however, to Common Article 3's more general prohibitions upon "violence to life or person" and "outrages upon personal dignity," it may become necessary for states to define the meaning of those prohibitions, not in the abstract, but in their application to the specific circumstances that arise.

Indeed, the ICRC *Commentaries* themselves contemplate that "what constitutes humane treatment" would require a sensitive balancing of both security and humanitarian concerns. Depending on the circumstances and the purposes served, detainees may well be "the object of strict measures since the dictates of humanity, and measures of security or repression, *even when they are severe*, are not necessarily incompatible." *Id.* at 205 (emphasis added). Thus, Common Article 3 recognizes that state parties may act to define the meaning of humane treatment, and its related prohibitions, in light of the specific security challenges at issue.

The conflict with al Qaeda reflects precisely such a novel circumstance: The application of Common Article 3 to a war against international terrorists targeting civilians was not one contemplated by the drafters and negotiators of the Geneva Conventions. As Common Article 3 was drafted in 1949, the focus was on wars between uniformed armies, as well as on the atrocities that had been committed during World War II. A common feature of the conflicts that served as the historical backdrop for the Geneva Conventions was the objective of the parties to engage the other's military forces. As the ICRC described the matter, "Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with *armed forces* on either side engaged in *hostilities*—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country." Pictet, III *Commentaries*, at 37 (emphases in original).⁴¹

Al Qaeda in its war against the United States and its allies is not organized into battalions, under responsible command, or dressed in uniforms, although we need not decide whether these hallmarks of unlawful combatancy set al Qaeda into a class by itself. What is undoubtedly novel from the standpoint of the Geneva Conventions is that al Qaeda's primary

⁴¹ Thus, although the Supreme Court rejected the President's determination that Common Article 3 did not apply to the conflict against al Qaeda, there can be little doubt that the paradigmatic case for the drafters of Common Article 3 was an internal civil war. 2B *Final Record of the Diplomatic Conference of Geneva of 1949*, at 121; see also Pictet, III *Commentaries*, at 29. A thorough interpretation of Common Article 3 must reflect that Common Article 3, at a minimum, is detached from its historical moorings when applied to the present context of armed conflict with al Qaeda.

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means of warfare is not to vanquish other uniformed armies but rather to kill innocent civilians. In this way, al Qaeda does not resemble the insurgent forces of the domestic rebellions to which the drafters and negotiators of Common Article 3 intended to apply long-standing principles of the law of war developed for national armies. Early explanations of the persons protected from action by a state party under Common Article 3 referred to the "party in revolt *against the de jure Government.*" 2B *Final Record of the Diplomatic Conference of Geneva of 1949*, at 121 (emphasis added); see also Pictet, III *Commentaries*, at 29 (explaining that the historical impetus of Common Article 3 was bloody "civil wars or social or revolutionary disturbances" in which the Red Cross had trouble intervening because they were entirely within the territory of a sovereign state); *id.* at 32 (discussing the paradigm model of "patriots struggling for the independence and dignity of their country"). Al Qaeda's general means of engagement, on the other hand, is to avoid direct hostilities against the military forces of the United States and instead to commit acts of terrorism against civilian targets.

Further supporting a cautious approach in applying Common Article 3 in the present novel context, the negotiators and signatories of Common Article 3 were not under the impression that Common Article 3 was breaking new ground regarding the substantive rules that govern state parties, apart from applying those rules to a new category of persons.⁴² They sought to formalize "principles [that had] developed as the result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognised humanitarian principles." *Prosecutor v. Delalic*, Case No. IT-96-21-A (ICTY Appellate Chamber 2001); see also Pictet, III *Commentaries*, at 36 (explaining that Common Article 3 establishes rules "which were *already recognized* as essential in all civilized countries") (emphasis added). Of course, the application of Common Article 3's general standards to a conflict with terrorists who are focused on the destruction of civilian targets, a type of conflict not clearly anticipated by the Conventions' drafters, would not merely utilize the axiomatic principles that had "developed as the result of centuries of warfare." Thus, we must be cautious before we construe these precepts to bind a state's hands in addressing such a threat to its civilians.

That a treaty should not be lightly construed to take away such a fundamental sovereign responsibility—to protect its homeland, civilians, and allies from catastrophic attack—is an interpretive principle recognized in international law. See *Oppenheim's International Law* § 633, at 1276 (9th ed. 1992) (explaining that the *in dubio mitius* canon provides that treaties should not be construed to limit a sovereign right of states in the absence of an express agreement); cf. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) ("sovereign power" cannot be relinquished "unless surrendered in unmistakable terms").⁴³ The right to protect its

⁴² As explained above, the innovation of Common Article 3 was not to impose wholly novel standards on states, but to apply the law of war to civil wars that largely shared the characteristics of international armed conflicts, while lacking a state party on the opposing side that could be a participant in a fully reciprocal treaty arrangement. See Pictet, III *Commentaries*, at 37. Although the drafters were innovating by binding states to law of war standards absent an assurance that the enemy would do the same, they believed that the general baseline standards that would apply under Common Article 3 were uncontroversial and well established.

⁴³ The canon of *in dubio mitius* (literally, "when in doubt, bring calm") has been applied by numerous international tribunals to construe ambiguous treaty terms against the relinquishment of fundamental sovereign

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citizens from foreign attack is an essential attribute of a state's sovereignty. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 266. To be sure, the states negotiating Common Article 3 clearly understood that they were disabling themselves from undertaking certain measures to defend their governments against insurgents seeking to overthrow those governments, which inarguably is an important part of sovereignty. We would, however, expect clarity, in the text or at least in the Conventions' negotiating history, before we would interpret the treaty provision to prohibit the United States from taking actions deemed critical to the sovereign function of protecting its citizens from catastrophic foreign terrorist attack. Crucial here is that the CIA's program is determined to be necessary to obtain critical intelligence to ward off catastrophic foreign terrorist attacks, and that it is carefully designed to be safe and to impose no more discomfort than is necessary to achieve that crucial objective, fundamental to state sovereignty. Just as the "Constitution [of the United States] is not a suicide pact," *Kennedy v. Mendoza-Martinez*, 374 U.S. 144, 159 (1963), so also the vague and general terms of Common Article 3 should not be lightly interpreted to deprive the United States of the means to protect its citizens from terrorist attack.

This insight informs passages in the ICRC *Commentaries* that some have cited to suggest that the provisions of Common Article 3—to the extent they are not precise and specific—should be read to restrict state party discretion whenever possible. The *Commentaries* indeed recognize that, in some respects, adopting more detailed prohibitions in Common Article 3 would have been undesirable because the drafters of the Conventions could not anticipate the measures that men of ill will would develop to avoid the terms of a more precise Common Article 3: "However great the care undertaken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes." Pictet, III *Commentaries*, at 39. It is no doubt true therefore that Common Article 3's general prohibitions do establish *principles* that preclude a range of conduct, and that they should not be subject to a technical reading that parses among conduct. To the contrary, the principles in Common Article 3 are generally worded in a way that is "flexible, and at the same time precise," *id.*, and they call upon state parties to evaluate proposed conduct in a good faith manner, in an effort to make compatible both "the dictates of humanity" towards combatants and the "measures of security and repression" appropriate to defending one's people from inhumane attacks in the armed conflict at issue, *id.* at 205. We, therefore, undertake such an inquiry below.

B.

These interpretive tools inform our analysis of the three relevant terms under Common Article 3: paragraph 1(a)'s prohibition on "violence to life and person, in particular murder of all

powers. See W.T.O. Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R/¶ 165, n. 154, 1998 WL 25520, at *46 (Jan. 16, 1998) (explaining that the "interpretive principle of *in dubio mitius* is widely recognized in international law as a supplementary means of interpretation."). For example, the International Court of Justice refused to construe an ambiguous treaty term to cede sovereignty over disputed territory without a clear statement. See *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan*, 2002 I.C.J. 625, 648.

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kinds, mutilation, cruel treatment and torture"; paragraph 1(c)'s prohibition on "outrages upon personal dignity, in particular, humiliating and degrading treatment"; and Common Article 3's overarching requirement that covered persons "be treated humanely." Although it is first in the syntax of Common Article 3, we address the general humane treatment requirement last, as the question becomes the extent of any residual obligations imposed by this requirement that are not addressed by the four specific examples of inhumane treatment prohibited in paragraphs 1(a)-(d).

I.

Against those persons protected by Common Article 3, the United States is obligated not to undertake "violence to life and person, in particular murder of all kinds, cruel treatment and torture." GPW Art. ¶ 1(a). Paragraph 1(a) raises two relevant questions: Will the CIA program's use of the six proposed techniques meet Common Article 3's general requirement to avoid "violence to life and person," and will their use involve either of the potentially relevant examples of "violence to life and person" denoted in paragraph 1(a)—torture and cruel treatment?

a.

The proposed techniques do not implicate Common Article 3's general prohibition on "violence to life and person." Dictionaries define the term "violence" as "the exertion of physical force so as to injure or abuse." *Webster's Third Int'l Dictionary* at 2554. The surrounding text and structure of paragraph 1(a) make clear that "violence to life and person" does not encompass every use of force or every physical injury. Instead, Common Article 3 provides specific examples of severe conduct covered by that term—murder, mutilation, torture, and cruel treatment. As indicated by the words "in particular," this list is not exhaustive. Nevertheless, these surrounding terms strongly suggest that paragraph 1(a) is directed at only serious acts of physical violence. *Cf. Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1999) ("The traditional canon of construction, *noscitur a sociis*, dictates that words grouped in a list should be given related meaning.")

This reading is supported by the ICRC *Commentaries*, which explain that the prohibitions in paragraph 1(a) "concern acts which world public opinion finds particularly revolting—acts which were committed frequently during the Second World War." Pictet, III *Commentaries*, at 39. International tribunals and other bodies similarly have focused on serious and intentional instances of physical force. At the same time, these bodies have had difficulty identifying any residual content to the term "violence to life and person" beyond the four specific examples of prohibited violence that Common Article 3 enumerates. The ICC's *Elements of Crimes* does not define "violence to life or person" as an offense separate from the four specific examples. The ICTY similarly has suggested that the term may not have discernable content apart from its four specified components. The tribunal initially held that "violence to life or person" is "defined by the accumulation of the elements of the specific offenses of 'murder, mutilation, cruel treatment, and torture,'" and declined to define other sufficient conditions for the offense. *Prosecutor v. Blaskic*, IT-95-14-T, ¶ 182 (Trial Chamber). In later cases, the tribunal put a finer point on the matter, at least for purposes of imposing criminal sanctions, the court could not identify a residual content to the term "violence to life and person" and dismissed charges that the

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defendant had engaged in "violence to life or person" that did not constitute torture, cruel treatment, murder, or mutilation. See *Prosecutor v. Vasiljevic*, Trial Chamber, ¶¶ 194-205 (2003). Even when prosecutors attempted to proffer elements of the "violence to life and person" violation as a freestanding offense, they argued that the offense required the imposition of "serious physical pain or suffering," which would make it duplicative of the prohibition on "cruel treatment." *Id.*

We conclude that the proposed CIA techniques are consistent with Common Article 3's prohibition on "violence to life and person." As we explained above, Congress strictly prohibited several serious forms of violence to life and person, and the techniques do not involve any of these. The ICRC *Commentaries* have suggested that "performing biological experiments" would be a type of "violence to life and person" that, although not explicitly listed as an example, is also prohibited by paragraph 1(a). See, e.g., Pictet, III *Commentaries*, at 39. The CIA techniques do not involve biological experiments, and indeed the War Crimes Act absolutely prohibits them. See 18 U.S.C. § 2441(d)(1)(C). Whether or not those grave breach offenses exhaust the scope of "violence to life and person" prohibited by Common Article 3, we are confident that "violence to life and person" refers to acts of violence serious enough to be considered comparable to the four examples listed in Common Article 3—murder, mutilation, torture, and cruel treatment. The CIA techniques do not involve the application of physical force rising to this standard. While the CIA does on occasion employ limited physical contact, the "slaps" and "holds" that comprise the CIA's proposed corrective techniques are carefully limited in frequency and intensity and subject to important safeguards to avoid the imposition of significant pain. They are designed to gain the attention of the detainee; they do not constitute the type of serious physical force that is implicated by paragraph 1(a).

b.

The CIA interrogation practices also do not involve any of the four more specific forms of "violence to life or person" expressly prohibited by paragraph 1(a). They obviously do not involve murder or mutilation. Nor, as we have explained, do they involve torture. See *Section 2340 Opinion and supra* at 14.⁴⁴

⁴⁴ In this opinion and the *Section 2340 Opinion*, we have concluded that the enhanced interrogation techniques in question would not violate the federal prohibition on torture in 18 U.S.C. § 2340-2340A or the prohibition on torture in the War Crimes Act, see 18 U.S.C. § 2441(d)(1)(A). Both of those offenses require as an element the imposition of severe physical or mental pain or suffering, which is consistent with international practice as reflected in Article 1 of the Convention Against Torture and the ICC's definition of Common Article 3's prohibition on torture. See Dörmann, *Elements of Crimes* at 401 (requiring the element of inflicting "severe physical or mental pain or suffering" for torture under Common Article 3). The War Crimes Act and the federal prohibition on torture further define "severe mental pain or suffering," and this more specific definition does not appear in the text of the CAT or in the Rome Statute. Instead, the source of this definition is an understanding of the United States to its ratification of the CAT. See 136 Cong. Rec. 36,198 (1990). Torture is not further defined in Common Article 3, and the United States did not enter an understanding to that instrument. That the more detailed explanation of "severe mental pain or suffering" is cast as an "understanding" of the widely accepted definition of torture, rather than as a reservation, reflects the position of the United States that this more detailed definition of torture is consistent with international practice, as reflected in Article 1 of the CAT, and need not have been entered as a reservation. *Auguste v. Ridge*, 395 F.3d 123, 143 n.20 (3d Cir. 2005); see also Vienna Convention on the Law

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The remaining specifically prohibited form of "violence to life or person" in Common Article 3 is "cruel treatment." Dictionaries define "cruel" primarily by reference to conduct that imposes pain wantonly, that is, for the sake of imposing pain. *Webster's Third Int'l Dictionary* at 546 ("disposed to inflict pain, especially in a wanton, insensate, or vindictive manner"). If the purpose behind treatment described as "cruel" is put aside, common usage would at least require the treatment to be "severe" or "extremely painful." *Id.* Of course, we are not called upon here to evaluate the term "cruel treatment" standing alone. In Common Article 3, the prohibition on "cruel treatment" is placed between bans on extremely severe and depraved acts of violence—murder, mutilation, and torture. The serious nature of this list underscores that these terms, including cruel treatment, share a common bond in referring to conduct that is particularly aggravated and depraved. See *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 126 S. Ct. 1843, 1849-50 (2006) (the *noscitur a sociis* canon "is no help absent some sort of gathering with a common feature to extrapolate"). In addition, Common Article 3 lists "cruel treatment" as a form of "violence to life and person," suggesting that the term involves some element of physical force.

International tribunals and other bodies have addressed Common Article 3's prohibition on "cruel treatment" at length. For purposes of the Rome Statute establishing the International Criminal Court, the U.N. preparatory commission defined "cruel treatment" under Common Article 3 to require "severe physical or mental pain or suffering." Dörmann, *Elements of Crimes* at 397. The committee explained that it viewed "cruel treatment" as indistinguishable from the "inhuman treatment" that constitutes a grave breach of the Geneva Conventions. See *id.* at 398; see also GPW Art. 130 (listing "torture or inhuman treatment" as a grave breach of the Geneva Conventions). This view apparently also was embraced by Congress when it established the offense of "cruel and inhuman treatment" in the War Crimes Act as part of its effort to criminalize the grave breaches of Common Article 3. See 18 U.S.C. § 2441(d)(1)(B); see also MCA § 6(a)(2). Construing "cruel treatment" to be coterminous with the grave breach of "inhuman treatment" further underscores the severity of the conduct prohibited by paragraph 1(a).

Aligning Common Article 3's prohibition on "cruel treatment" with the grave breach of "inhuman treatment" also demonstrates its close linkage to "torture." See GPW Art. 130 (stating that "torture or inhuman treatment, including biological experiments," is a grave breach of the Conventions) (emphasis added). This relationship was crucial for the ICTY in defining the elements of "cruel treatment" under Common Article 3. The tribunal explained that cruel treatment "is equivalent to the offense of inhuman treatment in the framework of the grave breaches provision of the Geneva Conventions" and that both terms perform the task of barring "treatment that does not meet the purposive requirement for the offense of torture in common article 3." *Prosecutor v. Delalic*, Case No. IT-96-21-T, ¶ 542 (Trial Chamber I, 1998). The International Criminal Court stopped at achieving this end, defining the offense of "cruel

of Treaties Art. 2.1(d) (a reservation "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State"). There is no reason to revisit that long-standing position here; with regard to torture, Common Article 3 imposes no greater obligation on the United States than does the CAT, and this conduct consistent with the two federal statutory prohibitions on torture also satisfies Common Article 3's prohibition on torture in armed conflicts not of an international character.

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treatment" under Common Article 3 *identically* to that of torture, except removing the requirement that "severe physical or mental pain or suffering" be imposed for the purpose of "obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind." Dörmann, *Elements of Crimes*, at 397, 401. The ICTY went further, suggesting that there may be another difference from torture—that cruel treatment is directed at "treatment which deliberately causes serious mental or physical suffering that falls short of the severe mental or physical suffering required for the offence of torture." *Delalic*, ¶ 542.

In the War Crimes Act, Congress, like the ICTY, adopted a somewhat broader definition of "cruel treatment," prohibiting the relevant conduct no matter the purpose and defining a level of "serious physical or mental pain or suffering" that is less extreme than the "severe physical or mental pain or suffering" required for torture. In this way, Congress's approach to prohibiting the "cruel treatment" barred by Common Article 3 is consistent with the broader of the interpretations applied by international tribunals.⁴⁵ Congress, however, provided a specific definition of both "serious physical pain or suffering" and "serious mental pain or suffering." The ICTY found it impossible to define further "serious physical or mental pain or suffering" in advance and instead adopted a case-by-case approach for evaluating whether the pain or suffering imposed by past conduct was sufficiently serious to satisfy the elements of "cruel treatment." *Delalic*, ¶ 533. This approach, however, was tailored to the ICTY's task of applying Common Article 3 to wholly past conduct. Congress in amending the War Crimes Act, by contrast, was seeking to provide clear rules for the conduct of future operations. Congress's more detailed definition of "serious physical pain or suffering" and "serious mental pain or suffering" cannot be said to contradict the requirements of Common Article 3.

We conclude, with Congress, that the "cruel treatment" term in Common Article 3 is satisfied by compliance with the War Crimes Act. As we have explained above, the CIA techniques are consistent with Congress's prohibition on "cruel and inhuman treatment" in the War Crimes Act, *see supra* at 14-24, and thus do not violate Common Article 3's prohibition on "cruel treatment."

2.

Paragraph 1(c) of Common Article 3 prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment." Of the terms in Common Article 3 with uncertain meaning, the imprecision inherent in paragraph 1(c) was the cause of greatest concern among leaders of the Executive and Legislative Branches. *See supra* at 53-54 (citing statements by the President and Senator McCain).

⁴⁵ The ICTY defines "cruel treatment" as "treatment that causes serious mental pain or suffering or constitutes a serious attack on human dignity." *Delalic*, at ¶ 544 (emphasis added). The tribunal never has explained its reference to a "serious attack on human dignity." Common Article 3 has an express provision addressing certain types of affronts to personal dignity in its prohibition of "outrages upon personal dignity, in particular, humiliating and degrading treatment." GPW Art. 3 ¶ 1(c). The structure of the Geneva Conventions suggests that attacks on personal dignity should be analyzed under paragraph 1(c), the requirements of which we analyze below.

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Despite the general nature of its language, there are several indications that paragraph 1(c) was intended to refer to particularly serious conduct. The term "humiliating and degrading treatment" does not stand alone. Instead, the term is a specific type or subset of the somewhat clearer prohibition on "outrages upon personal dignity." This structure distinguishes Common Article 3 from other international treaties that include freestanding prohibitions on "degrading treatment," untethered to any requirement that such treatment constitute an "outrage upon personal dignity." Compare CAT Art. 16 (prohibiting "cruel, inhuman or degrading treatment or punishment which does not amount to torture") with European Convention on Human Rights Article 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."). Thus, paragraph 1(c) does not bar "humiliating and degrading treatment" in the abstract, instead, it prohibits "humiliating and degrading treatment" that rises to the level of an "outrage upon personal dignity." This interpretation has been broadly accepted by international tribunals and committees, as it has been adopted both by the ICC Preparatory Committee and the ICTY. See Dörmann, *Elements of Crimes*, at 314 (stating, as an element of the ICC offense corresponding to paragraph 1(c) of Common Article 3, that "the severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity"); *Prosecutor v. Aleksovski*, Case No. IT-95-14/1 at ¶ 56 (Trial Chamber I 1999) (requiring that the conduct rise to the level of an outrage upon personal dignity).

The term "outrage" implies a relatively flagrant or heinous form of ill-treatment. Dictionaries define "outrage" as "describ[ing] whatever is so flagrantly bad that one's sense of decency or one's power to suffer or tolerate is violated" and list "monstrous, heinous, [and] atrocious" as synonyms of "outrageous." *Webster's Third Int'l Dictionary* at 1603. In this way, the term "outrage" appeals to the common sense standard of a reasonable person's assessing conduct under all the circumstances. And the judgment that term seeks is not a mere opinion that the behavior should have been different—to be an outrage, a reasonable person must assess the conduct as beyond all reasonable bounds of decency. This reaction is not to leave room for debate, as the term is directed at "the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances and as being above and outside war itself." Pictet, III *Commentaries*, at 32 (emphases added). Accordingly, in applying the "outrage upon personal dignity" term, the ICTY has recognized that it does not provide many clear standards in advance, but that it is confined to extremely serious misconduct: "An outrage upon personal dignity within Article 3 . . . is a species of inhuman treatment that is deplorable, occasioning more serious suffering than most prohibited acts within the genus." *Aleksovski*, at ¶ 54 (emphasis added).

The ICRC *Commentaries* on the Geneva Conventions underscore the severity of the misconduct paragraph 1(c) addresses. See Pictet, III *Commentaries*, at 39 (linking paragraph 1(c) to the prohibitions on torture, cruel treatment, murder, and mutilation in paragraph 1(a) and explaining that both paragraphs "concern acts which world opinion finds particularly revolting—acts which were committed frequently during the Second World War"). The ICTY similarly looks to a severe reaction from a reasonable person examining the totality of the circumstances. See *Aleksovski*, at ¶ 55-56 (to violate paragraph 1(c), the humiliation and degradation must be "so intense that the reasonable person would be outraged"). An examination of purpose also informs paragraph 1(c)'s focus on "humiliating and degrading treatment" that rises to the level of

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an "outrage upon personal dignity." The same international tribunal has explained that paragraph 1(c) requires an inquiry not only into whether the conduct is objectively outrageous, but also into whether the purpose of the conduct is purely to humiliate and degrade in a contemptuous and outrageous manner. Thus, the ICTY has looked to the *intent* of the accused—it is not enough that a person feel "humiliated," rather the conduct must be "animated by contempt for the human dignity of another person." *Id.* at ¶ 56 (emphasis added). For the Yugoslavia tribunal, paragraph 1(c) captures a concept of wanton disregard for humanity, of recklessness, or of a wish to humiliate or to degrade for its own sake.

This inquiry into a reasonable person's evaluation of context, purpose, and intent with regard to the treatment of detainees is familiar to United States law. In the context of persons not convicted of any crime, but nonetheless detained by the Government, this same inquiry is demanded by the DTA, and the Fifth Amendment standard that it incorporates. As we have explained above, the DTA prohibits treatment, and interrogation techniques, that "shock 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 century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience."). Much like the test contemplated by the term "outrage," the "shocks the conscience" test looks to how a reasonable person would view the conduct "within the full context in which it occurred." *Lewis*, 523 U.S. at 849 (emphasis added); see *id.* (requiring "an exact analysis of circumstance"); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (With regard to pre-conviction treatment, the test is whether there was "misconduct that a reasonable person would find so beyond the norm of proper police procedure as to shock the conscience."). Indeed, our courts in applying the substantive due process standard have asked "whether the behavior of the government officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 848 n.8 (emphasis added). Because a reasonable person would look to the *reason or justification* for the conduct, the "shocks the conscience" test under the DTA also contemplates such an inquiry. *Id.* at 846 (asking whether the conduct amounts to the "exercise of power without any reasonable justification in the service of a legitimate governmental objective").

For these reasons, we conclude that the term "outrages upon personal dignity" invites, not forbids, an inquiry into the justification for governmental conduct, as the term calls for the outrageousness of the conduct to be evaluated in the manner a reasonable person would. To be sure, the text of Common Article 3 introduces its specific prohibitions, including its reference to "outrages upon personal dignity," by mandating that such acts "are and shall remain prohibited at any time and in any place whatsoever." This text could be read to disapprove any evaluation of circumstance, or the considerations behind or justifications for specifically prohibited conduct. See, e.g., Pictet, *IV Commentaries*, at 39 ("That is the method followed in the Convention when it proclaims four absolute prohibitions. The wording adopted could not be more definite. . . . No possible loophole is left; there can be no excuse, no attenuating circumstance.")

Nevertheless, this introductory text does not foreclose consideration of justifications and context in determining whether a particular act itself would constitute an outrage under the treaty. This conclusion is supported by other terms in Common Article 3. For example, Common Article 3 prohibits "murder," but murder by definition is not simply any homicide, but

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killing without lawful justification. Common Article 3 may not permit a "murder" to be justified, but committing a homicide in self-defense simply would not constitute a "murder." Similarly, the term "outrage" seeks to identify conduct that would be universally considered beyond the bounds of decency, as transcending "the few essential rules of humanity which all civilized nations consider as valid everywhere and under all circumstances." Pictet, III *Commentaries*, at 32. An approach that foreclosed consideration of purpose throughout Common Article 3 cannot be squared with the ICRC *Commentaries* in evaluating whether conduct is humane—a requirement of Common Article 3 that the "outrage upon personal dignity" term is expressly stated to advance. The humane treatment requirement is said to prohibit "any act of violence or intimidation, *inspired not by military requirements or a legitimate desire for security, but by a systematic scorn for human values.*" Pictet, IV *Commentaries*, at 204 (emphasis added).

An evaluation of circumstance therefore is inherent in the plain meaning of the term "outrage." It is a concept, following relatively clear prohibitions on particularly grave acts, that turns to the objective judgment of reasonable people and proscribes conduct that is so vile as to be universally condemned under any standard of decency. Because it relies on such common judgment, the term "outrage" must evaluate conduct as reasonable people do, by weighing the justifications for that conduct. As the Supreme Court of Israel recently explained in applying the "rules of international law" to Israel's "fight against international terrorism," the principles of the law of war in this context "are not 'all or nothing.'" *Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02, at 34 (Sup. Ct. Israel, Dec. 13, 2006).

That the prohibition of "outrages upon personal dignity" looks behind conduct for its justifications illuminates the decisions of the ICTY interpreting this term. For example, in *Prosecutor v. Kovac*, IT-96-238 (Appeals Chamber, June 12, 2002), the tribunal held that forcing a teenage girl in detention to dance naked on a table was an "outrage upon personal dignity." *Id.* ¶ 160. These facts involved clearly outrageous conduct undertaken for no purpose other than the prurient gratification of the defendant. None of the CIA's proposed techniques bears a passing resemblance to the prurient and outrageous conduct at issue in *Kovac*.

The proposed techniques also contrast sharply with the outrageous conduct documented at the Abu Ghraib prison in Iraq. As General Antonio Taguba's official investigation reported, the detainees at Abu Ghraib were subjected to "sadistic, blatant, and wanton criminal abuses." See General Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade 16* (May 4, 2004) ("Taguba Report"). The report charged the offending military personnel with "forcibly arranging detainees in various sexually explicit positions for photographing"; "forcing naked male detainees to wear women's underwear"; "forcing groups of male detainees to masturbate themselves while being photographed and videotaped"; "arranging naked male detainees in a pile and then jumping on them"; "positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture"; "placing a dog chain or strap around a detainee's neck and having a female soldier pose for a picture"; and "sodomizing a detainee with a chemical light and perhaps a broom stick." *Id.* at 16-17. These wanton acts were undertaken for abusive and lewd purposes. They bear no resemblance, either in purpose or effect, to any of the techniques proposed for use by the CIA, whether employed individually or in combination.

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The contrast with *Kovac* and the acts at abu Ghraib goes some way to highlighting the conduct that paragraph 1(c) does reach. As the ICRC *Commentaries* have explained, paragraph 1(c) is directed at "acts which world public opinion finds revolting—acts which were committed frequently during the Second World War." Pictet, III *Commentaries*, at 39. World War II was typified by senseless acts of hatred, and humiliation or degradation, for no reason other than to reinforce that the victims had been vanquished or that they were viewed as inferior because of their nationality or their religion. Needless to say, exposing prisoners to public curiosity is part of this dark history, see GPW Art. 13, and commentators cite as a paradigmatic example of such conduct the parading of prisoners in public. See Dörmann, *Elements of Crimes*, at 323 (referring to the post-World War II prosecution of Maelzer for marching prisoners through the streets of Rome in a parade emulating the tradition of ancient triumphal celebrations). In another case, Australian authorities prosecuted Japanese officers who tied Sikh prisoners of war "to a post and beat them with sticks until they lost consciousness." *Trial of Tanaka Chuichi and Two Others* (1946), XI Law Reports of Trials of War Criminals: United Nations War Crimes Commissions 62. In addition, they shaved the prisoners' beards and forced them to smoke cigarettes, in deliberate denigration of the Sikhs' religious practices requiring facial hair and forbidding the handling of tobacco, all as *post hoc* punishment for minor infractions of the rules of the prison camp. *Id.*⁴⁶

These acts were *intended to humiliate*, and nothing more—there was no security justification, no carefully drawn plan to protect civilian lives. These were part of a panoply of atrocities in World War II meant to "reduce men to the state of animals," merely because of who they were. See Pictet, III *Commentaries*, at 627. These acts were undertaken for wholly prurient, humiliating, or bigoted ends, and that feature was an inextricable part of what made them "outrageous."⁴⁷

⁴⁶ In this way, acts intended to denigrate the religion of detainees implicate Common Article 3. Although pursuant to a different standard applicable to prisoners of war under the 1929 Geneva Convention, the Australian war crimes prosecution suggests that some consideration of the cultural sensitivities of detainees may be relevant when determining whether there has been a subjective intent to humiliate. There, the Japanese defendants sought out the features of the Sikh religion and sought to exploit those in particular, with no purpose other than to humiliate the detainees. This is not what occurs in the CIA program. It should be noted that, upon intake into custody, the CIA does trim the hair and shave the beards of detainees to prevent the introduction of disease and weapons into the facility. After this initial shaving, detainees are permitted to grow their hair to any desired length. We have already concluded that such limited use of involuntary grooming by the CIA is consistent with Common Article 3. See Letter to John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, at 12-13 (Aug. 31, 2006). Again, the difference here is that the purpose is not to humiliate the detainee, or to exploit any particular sensitivity, but to serve legitimate security and hygiene purposes.

⁴⁷ Our interpretation here is also consistent with the fact that paragraph 1(c) is not a prohibition on "outrages" *simpliciter*, but instead proscribes "outrages upon personal dignity." (Emphasis added.) The words "upon personal dignity" may be read to specify the injury that must occur before we evaluate whether the causing conduct constitutes an "outrage." Put differently, paragraph 1(c) is not a free-floating inquiry into the justifications for state party conduct during an armed conflict not of an international character. Instead, there must be some affront to "personal dignity" before that inquiry is triggered. The words "upon personal dignity" may also be read to constrain the considerations that may be brought to bear in determining whether an "outrage" has occurred. In this regard, the term may be designed to focus paragraph 1(c) on the person subjected to state party conduct, and his

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With these principles in mind, we turn to whether the proposed CIA techniques are consistent with Common Article 3's prohibition on "outrages upon personal dignity, in particular, humiliating and degrading treatment." We already have determined that the CIA program does not "shock the conscience," or thereby violate long-standing principles of United States law founded in the Fifth Amendment to our Constitution and incorporated into the DTA. Especially regarding a term that, in many ways, provides a protective buffer around the comparatively specific prohibitions in Common Article 3, it is appropriate for the United States to turn to its domestic legal tradition to provide a familiar, discernable standard for the inquiry that paragraph 1(c) requires. As we explained above, the MCA reflects a considered judgment by Congress that the DTA tightly fits the requirements of Common Article 3, and this congressional judgment is important in determining the proper interpretation of Common Article 3 for the United States. The DTA asks whether conduct "shocks the contemporary conscience," it evaluates the judgment of the reasonable person, and it tracks the inquiry that the plain meaning of the term "outrages" invites. Thus, our conclusion that the program is consistent with the DTA is a substantial factor in determining that the program does not involve "outrages upon personal dignity" under Common Article 3.⁴⁸

But consistency with the DTA is not the only basis for our conclusion. In the limited context at issue here, the CIA program's narrow focus, and its compliance with the careful safeguards and limitations incorporated into the program, provide adequate protection against the "outrages upon personal dignity" prohibited by Common Article 3. Of particular importance is that the interrogation techniques in the CIA program are *not* a standard for treating our enemies wherever we find them, including those in military custody. Instead, the CIA program is narrowly targeted at a small number of the most dangerous and knowledgeable of terrorists, those whom the CIA has reason to believe harbor imminent plans to kill civilians throughout the world or otherwise possess information of critical intelligence value concerning the leadership or activities of al Qaeda. For those few, the United States takes measures to obtain what they know,

dignity, rather than the intention of the state actor or the reasons for the actor's conduct. This latter interpretation would constitute a point of departure from international practice, which has looked to the intention and purpose of the state actor, as well as the context of and justifications for the conduct. In any event, the foregoing historical examples demonstrate that we need to know *why* the conduct is undertaken to determine whether it is an "outrage upon personal dignity." Marching captured prisoners as a means of transport does not evoke the same reaction, rising to the level of an "outrage," as the senseless parading of prisoners to humiliate them. In this way, the words "upon personal dignity" cannot be read to confine paragraph 1(c) to demarcating an absolute level of hardship that will not be tolerated. Instead, whether an affront to "personal dignity" occurs depends to some degree on the reason why a hardship is being imposed. The term is best read as a prohibition on the arbitrary, the wanton, or the prurient discomforting of persons protected by Common Article 3, as well as, in some cases, unnecessary or careless mistreatment, even when the overarching justification is legitimate. As we explain below, these principles do not describe the carefully drawn and limited CIA interrogation techniques.

⁴⁸ As we did with the DTA, we believe it appropriate to evaluate not just each technique in isolation, but the effects of the techniques in combination. See, e.g., *Aleksovski*, ¶ 57 ("Indeed, the seriousness of an act and its consequences may arise either from the nature of the act *per se* or from the repetition of the act or from a combination of different acts which, taken individually, would not constitute a crime within the meaning of Article 3 of the Geneva Conventions."). We have concluded that the techniques in combination would not violate the constitutional standards incorporated in the DTA, see *supra* at 47-48, and we again conclude that paragraph 1(c) would not be violated by the techniques, used either individually or in combination.

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but each technique is limited to keep the detainee safe and its application is circumscribed by extensive procedures and oversight. Those who implement these techniques are a small number of CIA professionals trained in the techniques' careful limits, and every interrogation plan is approved by the Director of the CIA.

In addition, as we have emphasized throughout this opinion, the CIA's detailed procedures and safeguards provide important protections ensuring that none of the techniques would rise to the level of an outrage upon personal dignity. With regard to the corrective techniques, the CIA has assured us that they would not be used with an intensity, or a frequency, that would cause significant physical pain or injury. See *Aleksovski*, ¶ 57. With all the techniques, the CIA would determine in advance their suitability and their safety with respect to each individual detainee, with the assistance of professional medical and psychological examinations. Medical personnel further would monitor their application: CIA personnel, including medical professionals, would discontinue, for example, the sleep deprivation technique if they determined that the detainee was or might be suffering from extreme physical distress. Each detainee may react differently to the combination of enhanced interrogation techniques to which he is subjected. These safeguards and individualized attention are crucial to our conclusion that the combined use of the techniques would not violate Common Article 3. See *supra* n.50.

As such, the techniques do not implicate the core principles of the prohibition on "outrages upon personal dignity." A reasonable person, considering all the circumstances, would not consider the conduct so serious as to be beyond the bounds of human decency. The techniques are not intended to humiliate or to degrade; rather, they are carefully limited to the purpose of obtaining critical intelligence. They do not manifest the "scorn for human values" or reflect conduct done for the purpose of humiliating and degrading the detainee—the dark past of World War II, against which paragraph 1(c) was set. As we explain above, a reasonable person would consider the justification for the conduct and the full context of the protective measures put in place by the CIA. Accordingly, the careful limits on the CIA program, the narrow focus of the program, and the critical purpose that the program serves are important to the conclusion that the six techniques do not constitute conduct so serious as to be beyond the bounds of human decency.

The CIA has determined that the interrogation techniques proposed here are the minimum necessary to maintain an effective program for this small number of al Qaeda operatives. That the CIA has confined itself to such a minimum, along with the other limitations the CIA has placed on the program, does not reflect the type of wanton contempt for humanity—the atrocities animated by hatred for others that "were committed frequently during the Second World War" and that "public opinion finds particularly revolting"—at which the prohibition on "outrages upon personal dignity" is aimed. See *Pictet, III Commentaries*, at 39.

3.

Overarching the four specific prohibitions in Common Article 3 is a general requirement that persons protected by Common Article 3 "shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or

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any other similar criteria."⁴⁹ The text makes clear that its four specific prohibitions are directed at implementing the humane treatment requirement. See GPW Art. 3 ¶ 1 (following the humane treatment requirement with "[t]o this end the following acts are and shall remain prohibited"). As we have discussed above, those specific provisions describe serious conduct, and the structure of Common Article 3 suggests that conduct of a similar gravity would be required to constitute inhumane treatment.

The question becomes what, if anything, is required by "humane treatment" under Common Article 3 that is not captured by the specific prohibitions in subparagraphs (a)-(d). We can discern some content from references to "humane treatment" in other parts of the Geneva Conventions. For example, other provisions closely link humane treatment with the provision of the basic necessities essential to life. Article 20 of GPW mandates that the "evacuation of prisoners of war shall always be effected humanely The Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and potable water, and with the necessary clothing and medical attention." See also GPW Art. 46. This theme runs throughout the Conventions, and indeed Common Article 3 itself requires a subset of such basic necessities, by mandating that the "wounded and sick shall be collected and cared for." GPW Art. 3 ¶ 2. Given these references throughout the Conventions, humane treatment under Common Article 3 is reasonably read to require that detainees in the CIA program be provided with the basic necessities of life—food and water, shelter from the elements, protection from extremes of heat and cold, necessary clothing, and essential medical care, absent emergency circumstances beyond the control of the United States.

We understand that the CIA takes care to ensure that the detainees receive those basic necessities. You have informed us that detainees in CIA custody are subject to regular physical and psychological monitoring by medical personnel and receive appropriate medical and dental care. They are given adequate food and as much water as they reasonably please. CIA detention facilities are sanitary. The detainees receive necessary clothes and are sheltered from the elements.

For certain detainees determined to be withholding high value intelligence, however, the CIA proposes to engage in one interrogation technique—dietary manipulation—that would adjust the provision of these resources. The detainee's meals are temporarily substituted for a bland liquid diet that, while less appetizing than normal meals, exceeds nutrition requirements

⁴⁹ This language does not create an equal treatment requirement; instead, it provides that the suspect classifications in question may not justify any deviation from Common Article 3's baseline standard of humane treatment. The Geneva Conventions elsewhere impose equal treatment requirements. See GPW Art. 16 ("[A]ll prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.") (emphasis added). Article 16 also provides specific exceptions to its equal treatment requirement with regard to prisoners of war, which we would expect to find in Common Article 3 if it were also an equal treatment requirement. The contrast with the text of Article 16 demonstrates the linkage of Common Article 3's anti-discrimination principle to the provision of humane treatment. The Commentaries further explain that distinctions, even among the listed criteria, may be made under Common Article 3, so long as the treatment of no covered person falls below the minimum standard of humane treatment. Pictet, III Commentaries, at 40-41. Thus, we turn to determining the basic content of Common Article 3's humane treatment requirement.

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for safe and healthy medically approved diet programs in the United States. During application of the technique, the detainee's weight is monitored, and the technique would be discontinued should the detainee lose more than 10 percent of his starting body weight. The element of humane treatment that we can glean from the structure of the Geneva Conventions is one of "sufficient food." GPW Art. 46. Because the food provided during the temporary application of the dietary manipulation technique is sufficient for health, we conclude that it does comply with the "sufficient food" element of Common Article 3's humane treatment requirement. Cf. *Aleksovski*, Case No. IT-95-14/1, ¶ 108 (dismissing Common Article 3 charges against prison warden who provided only two meals a day to all detainees over a period of months and where some detainees lost over thirty pounds).

We also find it relevant that the CIA's interrogation and detention program complies with the substantive due process requirements of the Fifth Amendment, which under most circumstances require "safe conditions," including "adequate food, shelter, clothing, and medical care" and which are incorporated into the DTA. *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982). Requiring the provision of basic necessities is another example of how the constitutional standards incorporated in the DTA themselves provide a "humane treatment" principle that can guide compliance with Common Article 3. Congress recognized as much in the DTA, given the statute's explicit premise that the Fifth, Eighth, and Fourteenth Amendments are directed against a concept of "inhumane treatment or punishment." MCA § 6(c)(2).

The CIA program—under the restrictions that we have outlined—complies with each of the specific prohibitions in Common Article 3 that implement its overarching humane treatment requirement. Outside those four prohibitions, and the additional concept of basic necessities that we have discerned from the structure of the Conventions, we confront another situation where the content of the requirement is underspecified by the treaty. See Pictet, *IV Commentaries*, at 38-39 ("The definition [of humane treatment] is not a very precise one, as we shall see. On the other hand, there is less difficulty in enumerating things which are incompatible with humane treatment. That is the method followed in the Convention when it proclaims four absolute prohibitions."). Again, this is a situation where the generality was intentional: To the negotiators, "it seem[ed] useless and even dangerous to attempt to make a list of all the factors that would make treatment humane." *Id.* at 204. The *Commentaries* emphasize that "what constitutes humane treatment" requires a balancing of security and humanitarian concerns. The detainees may well be "the object of strict measures," as the "measures of security or repression, even when they are severe," may nonetheless be compatible with basic humanitarian standards. *Id.* at 205 (emphasis added). Given the deliberate generality of the humane treatment standard, it is reasonable to turn to our own law, which establishes a standard of humane treatment that similarly requires a balance between security and humanitarian concerns, to provide content to otherwise unspecified terms in the Conventions. Because the CIA program complies with the standard of humane treatment provided in the Detainee Treatment Act, and the U.S. constitutional standards that it incorporates, and because it provides detainees with the necessary food, shelter, clothing, and medical care, the CIA program satisfies Common Article 3's humane treatment requirement.

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We also recognize that the *practices* of other state parties in implementing Common Article 3—as opposed to the statements of other states unsupported by concrete circumstances and conduct—can serve as “a supplementary means of interpretation.” See Vienna Convention on the Law of Treaties Art. 31(3)(b). We have searched for evidence of state parties, seeking to implement Common Article 3 in a context similar to that addressed herein. The one example that we have found supports the interpretation of Common Article 3 that we have set forth above. In particular, the United Kingdom from the time of the adoption of Common Article 3 until the early 1970s applied an interrogation program in a dozen counter-insurgency operations that resembles in several ways the one proposed to be employed by the CIA.

Following World War II and the adoption of Common Article 3, the United Kingdom developed and applied five “in depth interrogation” techniques “to deal with a number of situations involving internal security.” *Report of the Committee of Privy Counsellors Appointed to Consider Authorized Procedures for the Interrogation of Persons Suspected of Terrorism*, 1972, Cmnd. 4901, ¶ 10 (HSMO 1972) (“Parker Committee Report”). The five techniques involved (i) covering a detainee’s head at all times, except when the detainee was under interrogation or in a room by himself; (ii) subjecting the detainee “to continuous and monotonous noise of a volume calculated to isolate [him] from communication”; (iii) depriving the detainee of sleep “during the early days” of the interrogation; (iv) restricting a detainee’s diet to “one round of bread and one pint of water at six-hourly intervals”; and (v) forcing a detainee to face—but not touch—a wall with his hands raised and his legs spread apart for hours at a time, with only “periodical lowering of the arms to restore circulation.” Lord Gardiner, *Minority Report*, Parker Committee Report, ¶ 5 (“Gardiner Minority Report”); see also Parker Committee Report ¶ 10. Broadly speaking, the techniques were designed to make the detainee “feel that he is in a hostile atmosphere, subject to strict discipline, . . . and completely isolated so that he fears what may happen next.” *Id.* ¶ 11. From the 1950s through the early 1970s, the British employed some or all of the five techniques in a dozen “counter insurgency operations” around the world, including operations in Palestine, Kenya, Cyprus, the British Cameroons, Brunei, British Guiana, Aden, Malaysia, the Persian Gulf, and Northern Ireland. See *id.*

In 1971, after the public learned that British security forces had employed these techniques against Irish nationals suspected of supporting Irish Republican Army terrorist activities, the British Government appointed a three-person Committee of Privy Counsellors, chaired by Lord Parker of Waddington, the Lord Chief Justice of England, to examine the legality of using the five interrogation techniques against suspected terrorists. See Parker Committee Report ¶¶ 1-2. Among other things, the committee considered whether the techniques violated a 1965 directive requiring that all military interrogations comply with “Article 3 of the Geneva Convention Relative to the Treatment of Prisoners of War (1949).” See *id.* ¶¶ 4-6 & Appx. A majority of the committee, including the Lord Chief Justice, concluded that the “application of these techniques, subject to proper safeguards, limiting the occasion on which and the degree to which they can be applied, would be in conformity with the Directive [and thus with Common Article 3].” *Id.* ¶ 31.

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In reaching this conclusion, the Parker Committee rejected the notion that "the end justifies the means." *Id.* ¶ 27. It repeatedly stressed that aggressive interrogation techniques "should only be used in cases where it is considered vitally necessary to obtain information." *Id.* ¶ 35. It also emphasized that interrogators should be properly trained and that clear guidelines should exist "to assist Service personnel [in deciding] the degree to which in any particular circumstances the techniques can be applied." *Id.* Similarly, it recognized the importance of obtaining approval from senior government officials before employing the five techniques, *id.* ¶ 37, and it recommended that aggressive interrogations occur only in the presence of a "senior officer" with "overall control and . . . personal responsibility for the operation." *Id.* ¶ 38. The committee also concluded "that a doctor with some psychiatric training should be present at all times at the interrogation centre, and should be in the position to observe the course of oral interrogation," so that he could "warn the controller if he felt that the interrogation was being pressed too far" (although, in contrast with the CIA program, the doctor would not have the actual authority to stop the interrogations). *Id.* ¶ 41.

The Parker Committee emphasized, however, that its rejection of a pure "ends-means" analysis did not mean that Common Article 3 barred countries from giving some weight to the need to protect their citizens against the harm threatened by terrorist or insurgent operations. The committee, for example, emphasized that, when properly administered, the five interrogation techniques posed a "negligible" "risk of physical injury" and "no real risk" of "long-term mental effects." *Id.* ¶¶ 14-17. Yet they had "produced very valuable results in revealing rebel organization, training and 'Battle Orders.'" *Id.* ¶ 18. In Northern Ireland, the Committee observed, use of the techniques after "ordinary police interrogation had failed," led to, among other things, the identification of more than 700 I.R.A. members, details about "possible I.R.A. operations" and "future plans," and the discovery of large quantities of arms and explosives. *Id.* ¶¶ 21-22. The Committee emphasized that the techniques were "directly and indirectly . . . responsible for the saving of lives of innocent citizens." *Id.* ¶ 24.

More broadly, the Parker Committee explained that the meaning of Common Article 3's restrictions must be interpreted based on the *nature* of the conflict. *See id.* ¶ 30 (explaining that terms such as "humane," "inhuman," "humiliating," and "degrading" fall to be judged by [a dispassionate] observer in the light of the circumstances in which the techniques are applied"). Accordingly, the committee concluded that Common Article 3 must be interpreted in light of the unique threats posed by terrorism. Although "short of war in its ordinary sense," terrorism is "in many ways worse than war." *Id.* ¶ 32. It occurs "within the country; friend and foe will not be identifiable; the rebels may be ruthless men determined to achieve their ends by indiscriminate attacks on innocent persons. If information is to be obtained, time must be of the essence of the operation." *Id.* Moreover, factors that might facilitate interrogation in traditional war—such as "ample information" to assist interrogators and "a number of prisoners who dislike the current enemy regime and are only too willing to talk"—are often absent "in counter-revolutionary operations." *Id.* ¶¶ 25-26. *See also id.* (noting difficulty in obtaining information "quickly"). Consequently, the Parker Committee concluded that in light of the nature of the terrorist threat, the interrogation techniques employed by the United Kingdom were consistent with Common Article 3.

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Shortly after the Parker Committee issued its report, Prime Minister Edward Heath announced that, as a matter of policy, Britain would not use the five techniques in future interrogations. See Debate on Interrogation Techniques (Parker Committee Report), 832 Parl. Deb., H.C. (5th Ser.) 743-50 (1972); see also Roger Myers, *A Remedy for Northern Ireland: The Case for United Nations Peacekeeping Intervention In An Internal Conflict*, 11 N.Y.L. Sch. J. Int'l & Comp. L. 1, 52 n.220 (1990). The Prime Minister did not, to our knowledge, take issue with the Lord Chief Justice's interpretation of the United Kingdom's treaty obligations under Common Article 3, however. Indeed, in announcing what he stated was a change in policy, the Prime Minister emphasized that the majority of the Committee "conclude[d] that use of the methods could be justified in exceptional circumstances," subject to safeguards. *Id.* at 743.

That for more than two decades following the enactment of Common Article 3, one of the world's leading advocates for and practitioners of the rule of law and human rights employed techniques similar to those in the CIA program and determined that they complied with Common Article 3 provides strong support for our conclusion that the CIA's proposed techniques are also consistent with Common Article 3. The CIA's proposed techniques are not more grave than those employed by the United Kingdom. To the contrary, the United Kingdom found stress positions to be consistent with Common Article 3, but the CIA currently does not propose to include such a technique. Consistent with recommendations in the Parker Committee's legal opinion, the CIA has developed extensive safeguards, including written guidelines, training, close monitoring by medical and psychological personnel, and the approval of high level officials to ensure that the program is confined to safe and necessary applications of the techniques in a controlled, professional environment. While the United Kingdom employed these techniques in a dozen colonial and related conflicts, the United States proposes to use these techniques only with a small number of high value terrorists engaged in a worldwide armed conflict whose primary objective is to inflict mass civilian casualties in the United States and throughout the free world.

The United Kingdom's determination under Common Article 3 also sheds substantial light on the decisions of other international tribunals applying legal standards that fundamentally differ from Common Article 3. As discussed above, the European Court of Human Rights later found that two of the interrogation techniques approved by the Committee—diet manipulation and sleep deprivation—violated the stand-alone prohibition on "degrading treatment" in the European Convention on Human Rights, to which the United States is not a party. *Ireland v. United Kingdom*, 2 EHRR 25 (1980). The court explained that "degrading treatment" under the ECHR included actions directed at "breaking [the] physical or moral resistance" of detainees. *Id.* ¶ 167. The court's capacious interpretation of the European Convention's prohibition on "degrading treatment" is not well-suited for Common Article 3.⁵⁰ Indeed, the European Court

⁵⁰ The Israeli Supreme Court in *Public Committee Against Torture v. Israel*, HCJ 5100/94 (1999), also cited the ECHR decision and observed that a combination of interrogation techniques might constitute "inhuman and degrading" treatment. See *id.* at 27-28. As discussed above, see *supra* at 41-42, the Israeli decision turned primarily upon that nation's statutory law and did not specifically purport to define what constitutes "inhuman and degrading" treatment under any particular treaty, much less what rises to an "outrage upon personal dignity" or other violation of Common Article 3. Six years later, the same court recognized that the international law applicable to domestic criminal law enforcement and that applicable to an armed conflict fundamentally differ: While the former places "absolute" restrictions on degrading treatment generally, the law of armed conflict requires a balancing against

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has interpreted that provision not only to impose detailed requirements on prison conditions, but also to prohibit any action that drives an individual "to act against his will or conscience," a standard that might well rule out any significant interrogation at all. See *Greek Case*, 12 Y.B. ECHR 186. Those decisions reflect that the European Convention is a peacetime treaty that prohibits any form of "degrading treatment," while Common Article 3 prohibits only "humiliating and degrading treatment" that rises to the level of an "outrage upon personal dignity." Common Article 3 is a provision designed for times of war, where the gathering of intelligence, often by requiring a captured enemy "to act against his will or conscience" or by undermining his "physical or moral resistance," is to be expected. Furthermore, it is unclear that the ECHR in *Ireland v. U.K.* was confronted with techniques that provided adequate food and that were carefully designed to be safe, such as those proposed by the CIA.

It is the United Kingdom's interpretation of Common Article 3 in practice that is relevant to our determination, not the ECHR's subsequent interpretation of the legality of the United Kingdom's techniques under a different treaty. The practice of the United Kingdom in implementing the interpretation of Common Article 3 supports the interpretation set forth above.

D.

For these reasons, we interpret Common Article 3 to permit the CIA's interrogation and detention program to go forward. Part of the foundation of this interpretation is that Congress has largely addressed the requirements of Common Article 3 through the War Crimes and Detainee Treatment Acts. These provisions include detailed prohibitions on particularly serious conduct, in addition to extending the protection of the Nation's own constitutional standards to aliens detained abroad in the course of fighting against America, persons whom the Constitution would not otherwise reach. And the CIA's interrogation program, both in its conditions of confinement and with regard to the six proposed interrogation techniques, is consistent with the War Crimes and Detainee Treatment Acts. To the extent that Common Article 3 prohibits additional conduct, unaddressed by the War Crimes and Detainee Treatment Acts, the CIA program is consistent with those restrictions as well.

Just as important is the limited nature of this program. This program is narrowly targeted to advance a humanitarian objective of the highest order—preventing catastrophic terrorist attacks—and indeed the CIA has determined that the six proposed techniques are the minimum necessary for a program that would be effective in obtaining intelligence critical to serving this end. It is limited to a small number of high value terrorists who, after careful consideration, professional intelligence officers of the CIA believe to possess crucial intelligence. The program is conducted under careful procedures and is designed to impose no pain that is unnecessary for the obtaining of crucial intelligence. At the same time, it operates within strict limits on conduct, including those mandated by the War Crimes Act and the prohibition on torture regardless of the motivation of the conduct. Common Article 3 was not drafted with the threat posed by al Qaeda in mind; it contains certain specific prohibitions, but it also contains some general principles with

legitimate military needs: *Public Committee Against Torture in Israel v. The Government of Israel*, HCI 769/K2, ¶ 22 (Dec. 11, 2005).

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less definition. The general principles leave state parties to address the new eventualities of war, to mold the interpretation of the Geneva Conventions by their conduct. We will not lightly construe the Geneva Conventions to disable a sovereign state from defending against the new types of terrorist attacks carried out by al Qaeda.

The interpretation in this memorandum reflects what we believe to be the correct interpretation of Common Article 3. Because certain general provisions in Common Article 3 were designed to provide state parties with flexibility to address new threats, however, the nature of such flexibility is that other state parties may exercise their discretion in ways that do not perfectly align with the policies of the United States. We recognize Common Article 3 may lend itself to other interpretations, and international bodies or our treaty partners may disagree in some respects with this interpretation.⁵¹

Just as we have relied on the War Crimes and Detainee Treatment Acts, other states may turn to treaties with similar language, but drafted for dissimilar purposes, as a source of disagreement. As discussed above, for example, the European Court of Human Rights determined that certain of the interrogation techniques proposed for use by the CIA—diet manipulation and sleep deprivation—violated the European Convention's stand-alone prohibition on "degrading treatment." *Ireland v. United Kingdom*, 2 EHRR 25 (1980). For reasons we have explained, the ECHR decision does not constitute the basis for a correct reading of Common Article 3 in our view, but the openness of "humiliating and degrading treatment" might not prevent others from, incorrectly, advocating such an interpretation, and the State Department informs us that given the past statements of our European treaty partners about United States actions in the War on Terror, and notwithstanding some of their own past practices, *see supra* at n.36, the United States could reasonably expect some of our European treaty partners to take precisely such an expansive reading of the open terms in Common Article 3.

Recognizing the generality of some of Common Article 3's provisions, Congress provided a mechanism through which the President could authoritatively determine how the United States would apply its terms in specific contexts. The Military Commissions Act ensures that the President's interpretation of the meaning and applicability of the Geneva Conventions would control as a matter of United States law. Section 6(a) of the MCA is squarely directed at the risk that the interpretations that would guide our military and intelligence personnel could be cast aside after the fact by our own courts or international tribunals, armed with flexible and general language in Common Article 3 that could bear the weight of a wide range of policy preferences or subjective interpretations. To reduce this risk, Congress rendered the Geneva Conventions judicially unenforceable. *See* MCA § 5(a). The role of the courts in enforcing the Geneva Conventions is limited to adjudicating prosecutions under the War Crimes Act initiated by the Executive Branch and, even then, courts may not rely on "a foreign or international source

⁵¹ This flexibility extends only to *reasonable* interpretations of unclear terms of Common Article 3. Where Common Article 3 is clear, state parties are obliged as a matter of international law (though not necessarily their own domestic laws) to follow it, and states have no discretion under international law to adopt unreasonable interpretations at odds with the language of the provision.

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of law" to decide the content of the statutory elements in the War Crimes Act. *See id.* § 6(a)(2). Congress also expressly reaffirmed that the President has authority for the United States to interpret the meaning and applicability of the Geneva Conventions. *See id.* § 6(a)(3)(A). Should he issue interpretations by executive order, they will be "authoritative . . . as a matter of United States law in the same manner as other administrative regulations." *Id.* § 6(a)(3)(C).³²

We understand that the President intends to utilize this mechanism and to sign an executive order setting forth an interpretation of Common Article 3. That action would conclusively determine the application of Common Article 3 to the CIA program as a matter of United States law. We have reviewed the proposed executive order and have determined that it is wholly consistent with the analysis of Common Article 3 set forth above. *See Proposed Order Entitled Interpretation of the Geneva Conventions Common Article 3 As Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency* (Executive Clerk final draft, presented to the President for signature, July 20, 2007) ("Draft Order"). Because the executive order would be public, it cannot engage in the detailed application of Common Article 3 to the six proposed techniques embodied in this opinion. Instead, the executive order sets forth an interpretation of Common Article 3 at a higher level of generality that tracks the analysis in this opinion and, thereby, conclusively determines that the CIA's proposed program of interrogation and detention, including the six proposed interrogation techniques, complies with Common Article 3.

The executive order would prohibit any technique or condition of confinement that constitutes torture, as defined in 18 U.S.C. § 2340, or any act prohibited by section 2441(d) of the War Crimes Act. *See Draft Order* § 3(b)(1)(A)-(B). This Office has concluded that the six proposed techniques, when applied in compliance with the procedures and safeguards put in place by the CIA, comply with both the federal anti-torture statute and the War Crimes Act. *See Section 2340 Opinion* and Part II, *supra*.

To ensure full implementation of paragraph 1(a) of Common Article 3, the executive order also would prohibit "other acts of violence serious enough to be considered comparable to murder, torture, mutilation, and cruel or inhuman treatment, as defined in" the War Crimes Act. *Draft Order* § 3(b)(1)(C). As explained above (*see part IV.B.1.a, supra*), the six proposed techniques do not involve violence on a level comparable to the four enumerated forms of violence in paragraph 1(a) of Common Article 3—murder, mutilation, torture, and cruel

³² The Constitution grants the President great authority—as our Nation's chief organ in foreign affairs and as Commander in Chief—to interpret treaties, particularly treaties regulating wartime operations. Those interpretations are ordinarily entitled to "great weight" by the courts. *See, e.g., Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2685 (2006). Congress, however, determined in the MCA that it was appropriate to affirm that the President's interpretations of the Geneva Conventions are entitled to protection. It is apparent that Congress was reacting to the Supreme Court's decision in *Hamdan*, which adopted an interpretation of the applicability of the Geneva Conventions contrary to that of the President, without taking account of the President's interpretation. *See Hamdan*, 126 S. Ct. at 2795-98; *id.* at 2847 (Thomas, J., dissenting). The MCA therefore reflects a congressional effort to restore the principal role that the President has traditionally played in defining our Nation's international obligations. In this regard, presidential orders under the MCA would not be subject to judicial review. *See Franklin v. Massachusetts*, 305 U.S. 788; 800-01 (1992) (holding that presidential action is not subject to judicial review under the Administrative Procedure Act, or any other statute, absent "an express statement by Congress").

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treatment. The limitations on the administration, frequency, and intensity of the techniques—in particular, the corrective techniques—ensure that they will not involve physical force that rises to the level of the serious violence prohibited by the executive order.

The executive order would prohibit any interrogation technique or condition of confinement that would constitute the "cruel, inhuman, or degrading treatment or punishment" prohibited by the Detainee Treatment Act and section 6(c) of the Military Commissions Act. Draft Order § 3(b)(i)(D). We have concluded that the six proposed techniques, when used as authorized in the context of this program, comply with the standard in the DTA and the MCA. See Part III, *supra*.

To address paragraph 1(c) of Common Article 3 further, the executive order would bar interrogation techniques or conditions of confinement constituting "willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield." Draft Order § 3(b)(i)(E). This provision reinforces crucial features of the interpretation of paragraph 1(c) of Common Article 3 set forth in this opinion: To trigger the paragraph, humiliation and degradation must rise to the level of an outrage, and the term "outrage" looks to the evaluation of a reasonable person that the conduct is beyond the bounds of human decency, taking into consideration the purpose and context of the conduct.⁵³ As explained above, the six proposed techniques do not constitute "outrages upon personal dignity" under these principles; thus, the techniques also satisfy section 3(b)(i)(E) of the executive order.

Also implementing paragraph 1(c) of Common Article 3, the executive order would prohibit "acts intended to denigrate the religion, religious practices, or religious objects" of the detainees. Draft Order § 3(b)(i)(F). The six techniques proposed by the CIA are not directed at the religion, religious practices, or religious objects of the detainees.

The techniques and conditions of confinement approved in the order may be used only with certain alien detainees believed to possess high value intelligence (see Draft Order § 3(b)(ii)), and the program is so limited (see Part I.A, *supra*). The CIA program must be conducted pursuant to written policies issued by the Director of the CIA (see Draft Order § 3(e)), and the CIA will have such policies in place (see Part I.A.1, *supra*). In addition, the executive order would require the Director, based on professional advice, to determine that the techniques are "safe for use with each detainee" (see Draft Order at § 3(b)(iii)), and the CIA intends to do so (see Parts I.A.3 and I.B, *supra*).

Under the proposed executive order, detainees must "receive the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection

⁵³ Nor do the techniques involve any sexual or sexually indecent acts, much less those referenced in section 4(b)(i)(E) of the executive order. The techniques also do not involve the use of detainees as human shields.

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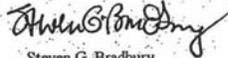
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from extremes of heat and cold, and essential medical care." See Draft Order § 3(b)(iv). This requirement is based on the interpretation of Common Article 3's overarching humane treatment requirement set forth above, and we have concluded that the proposed techniques comply with this basic necessities standard. See Part IV.B.3, *supra*. Should the President sign the executive order, the six proposed techniques would thereby comply with the authoritative and controlling interpretation of Common Article 3, as the MCA makes clear.

V.

The armed conflict against al Qaeda—an enemy dedicated to carrying out catastrophic attacks on the United States, its citizens, and its allies—is unlike any the United States has confronted. The tactics necessary to defend against this unconventional enemy thus present a series of new questions under the law of armed conflict. The conclusions we have reached herein, however, are as focused as the narrow CIA program we address. Not intended to be used with all detainees or by all U.S. personnel who interrogate captured terrorists, the CIA program would be restricted to the most knowledgeable and dangerous of terrorists and is designed to obtain information crucial to defending the Nation. Common Article 3 permits the CIA to go forward with the proposed interrogation program, and the President may determine that issue conclusively by issuing an executive order to that effect pursuant to his authority under the Constitution and the MCA. As explained above, the proposed executive order accomplishes precisely that end. We also have concluded that the CIA's six proposed interrogation techniques, subject to all of the conditions and safeguards described herein, would comply with the Detainee Treatment Act and the War Crimes Act.

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
 Washington, DC, October 6, 2008

MEMORANDUM FOR THE FILES

Re: October 23, 2001 OLC Opinion Addressing the Domestic Use of Military Force to Combat Terrorist Activities

The purpose of this memorandum is to advise that caution should be exercised before relying in any respect on the 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* (Oct. 23, 2001) (“10/23/01 Memorandum”) as a precedent of the Office of Legal Counsel, and that certain propositions stated in the 10/23/01 Memorandum, as described below, should not be treated as authoritative for any purpose.

It is important to understand the context of the 10/23/01 Memorandum. It was the product of an extraordinary—indeed, we hope, a unique—period in the history of the Nation: the immediate aftermath of the attacks of 9/11. Perhaps reflective of this context, the 10/23/01 Memorandum did not address specific and concrete policy proposals; rather it addressed in general terms the broad contours of hypothetical scenarios involving possible domestic military contingencies that senior policymakers feared might become a reality in the uncertain wake of the catastrophic terrorist attacks of 9/11. Thus, the 10/23/01 Memorandum represents a departure, although perhaps for understandable reasons, from the preferred practice of OLC to render formal opinions only with respect to specific and concrete policy proposals and not to undertake a general survey of a broad area of the law or to address general or amorphous hypothetical scenarios that implicate difficult questions of law.

We also judge it necessary to point out that the 10/23/01 Memorandum states several specific propositions that are either incorrect or highly questionable. The memorandum’s treatment of the following propositions is not satisfactory and should not be treated as authoritative for any purpose:

- The memorandum concludes in part V, pages 25–34, that the Fourth Amendment would not apply to domestic military operations designed to deter and prevent further terrorist attacks. This conclusion does not reflect the current views of this Office. The Fourth Amendment is fully applicable to domestic military operations, though the application of the Fourth Amendment’s essential “reasonableness” requirement to particular circumstances will be sensitive to the exigencies of military actions. The 10/23/01 Memorandum itself concludes in part VI, pages 34–37, that domestic military operations necessary to prevent or address further catastrophic terrorist attacks within the United States likely would satisfy the Fourth Amendment’s reasonableness requirement, if the Fourth Amendment were held to apply; thus, the erroneous conclusion in part V was not necessary to the opinion.
- Part V of the memorandum also contains certain broad statements on page 24 suggesting that First Amendment speech and press rights and other guarantees of individual liberty under the Constitution would potentially be subordinated to overriding military necessities. These statements, too, were unnecessary to the opinion, are overbroad and general, and are not sufficiently grounded in the particular circumstances of a concrete scenario, and therefore cannot be viewed as authoritative.
- The memorandum concludes in part IV(A), pages 16–20, that the domestic deployment of the Armed Forces by the President to prevent and deter terrorism would fundamentally serve a military purpose, rather than a law enforcement purpose, and therefore the Posse Comitatus Act, 18 U.S.C. § 1385 (2000), would not apply to such operations. Although the “military purpose” doctrine is a well-established limitation on the applicability of the Posse Comitatus Act, the broad conclusion reached in part IV(A) of the 10/23/01 Memorandum is far too general and divorced from specific facts and circumstances to be useful as an authoritative precedent of OLC.
- The memorandum, on pages 20–21, treats the Authorization for Use of Military Force (“AUMF”), enacted by Congress in the immediate wake of 9/11, Pub. L. No. 107–40, 115 Stat. 224 (Sept. 18, 2001), as a statutory exception to the Posse Comitatus Act’s restriction on the use of the military for domestic law enforcement. The better view, however, is that a reasonable and necessary use of military force taken under the authority of the AUMF would be a military action,

potentially subject to the established “military purpose” doctrine, rather than a law enforcement action.

- The memorandum reasons, on pages 21–22, that in the aftermath of the 9/11 attacks, the Insurrection Act, 10 U.S.C. § 333 (2000), would provide general authority for the President to deploy the military domestically to prevent and deter future terrorist attacks; whereas, consistent with the longstanding interpretation of the executive branch, any particular application of the Insurrection Act to authorize the use of the military for law enforcement purposes would require the presence of an actual obstruction of the execution of Federal law or a breakdown in the ability of state authorities to protect Federal rights.

For all of the foregoing reasons, we have concluded that appropriate caution should be exercised before relying in any respect on the 10/23/01 Memorandum as a precedent of OLC, and that the particular propositions identified above should not be treated as authoritative. We have advised the Counsel to the President, the Acting General Counsel of the Department of Defense, and appropriate offices within the Department of Justice of these conclusions.

STEVEN G. BRADBURY,
Principal Deputy Assistant Attorney General.

U.S. DEPARTMENT OF JUSTICE
Washington, DC, January 15, 2009

MEMORANDUM FOR THE FILES

Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001

The purpose of this memorandum is to confirm that certain propositions stated in several opinions issued by the Office of Legal Counsel in 2001–2003 respecting the allocation of authorities between the President and Congress in matters of war and national security do not reflect the current views of this Office. We have previously withdrawn or superseded a number of opinions that depended upon one or more of these propositions. For reasons discussed herein, today we explain why these propositions are not consistent with the current views of OLC, and we advise that caution should be exercised before relying in other respects on the remaining opinions identified below.¹

The opinions addressed herein were issued in the wake of the atrocities of 9/11, when policymakers, fearing that additional catastrophic terrorist attacks were imminent, strived to employ all lawful means to protect the Nation. In the months following 9/11, attorneys in the Office of Legal Counsel and in the Intelligence Community confronted novel and complex legal questions in a time of great danger and under extraordinary time pressure. Perhaps reflecting this context, several of the opinions identified below do not address specific and concrete policy proposals, but rather address in general terms the broad contours of legal issues potentially raised in the uncertain aftermath of the 9/11 attacks. Thus, several of these opinions represent a departure from this Office’s preferred practice of rendering formal opinions addressed to particular policy proposals and not undertaking a general survey of a broad area of the law or addressing general or amorphous hypothetical scenarios involving difficult questions of law.

Mindful of this extraordinary historical context, we nevertheless believe it appropriate and necessary to confirm that the following propositions contained in the opinions identified below do not currently reflect, and have not for some years reflected, the views of OLC. This Office has not relied upon the propositions addressed herein in providing legal advice since 2003, and on several occasions we have already acknowledged the doubtful nature of these propositions.

Congressional Authority over Captured Enemy Combatants

A number of OLC opinions issued in 2002–2003 advanced a broad assertion of the President’s Commander in Chief power that would deny Congress any role in regulating the detention, interrogation, prosecution, and transfer of enemy combatants

¹This memorandum supplements the Memorandum for the Files from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel. *Re: October 23, 2001 OLC Opinion Addressing the Domestic Use of Military Force to Combat Terrorist Activities* (Oct. 6, 2008). Neither memorandum is intended to suggest in any way that the attorneys involved in the preparation of the opinions in question did not satisfy all applicable standards of professional responsibility.

captured in the global War on Terror. The President certainly has significant constitutional powers in this area, but the assertion in these opinions that Congress has no authority under the Constitution to address these matters by statute does not reflect the current views of OLC and has been overtaken by subsequent decisions of the Supreme Court and by legislation passed by Congress and supported by the President. The following opinions contain variations of this proposition:

1. *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 4-5 (Mar. 13, 2002) ("3/13/02 Transfer Opinion")* (asserting that "the power to dispose of the liberty of individuals captured and brought under the control of United States armed forces during military operations remains in the hands of the President alone" because the Constitution does not "specifically commit[] the power to Congress") ("The treatment of captured enemy soldiers is but one of the many facets of the conduct of war, entrusted by the Constitution in plenary fashion to the President by virtue of the Commander-in-Chief Clause. Moreover, it is an area in which the President appears to enjoy exclusive authority, as the power to handle captured enemy soldiers is not reserved by the Constitution in whole or in part to any other branch of the government.").
2. *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 2, 12 (Apr. 8, 2002) ("4/8/02 Swift Justice Opinion")* ("Indeed, Congress may no more regulate the President's ability to convene military commissions or to seize enemy belligerents than it may regulate his ability to direct troop movements on the battlefield.") ("Precisely because [military] commissions are an instrument used as part and parcel of the conduct of a military campaign, congressional attempts to dictate their precise modes of operation interfere with the means of conducting warfare no less than if Congress were to attempt to dictate the tactics to be used in an engagement against hostile forces.").
3. *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 Citizen at 10 (June 27, 2002) ("6/27/02 Section 4001 Opinion")* ("Congress may no more regulate the President's ability to detain enemy combatants than it may regulate his ability to direct troop movements on the battlefield.").
4. *Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A at 35, 39 (Aug. 1, 2002) ("8/1/02 Interrogation Opinion")* ("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.") ("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.") (previously withdrawn).
5. *Memorandum for William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Military Interrogation of Unlawful Enemy Combatants Held Outside the United States at 13, 19 (Mar. 14, 2003) (declassified by DoD Mar. 31, 2008) ("3/14/03 Military Interrogation Opinion")* ("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.") ("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.") (previously withdrawn).

OLC has already withdrawn the last two opinions listed above, the 8/1/02 Interrogation Opinion and the 3/14/03 Military Interrogation Opinion. See Memorandum for the Deputy Attorney General from Daniel B. Levin, Acting Assistant Attorney General, Office of Legal Counsel, Re: Legal Standards Applicable under 18 U.S.C. § 2340-2340A (Dec. 30, 2004), available at www.usdoj.gov/olc/2004opinions.htm; Letter for William J. Haynes II, General Counsel, Department of Defense, from Daniel B. Levin, Acting Assistant Attorney General, Office of Legal Counsel (Feb. 4, 2005). We have also previously expressed our disagreement with the specific assertions excerpted from the 8/1/02 Interrogation Opinion:

The August 1, 2002, memorandum reasoned that “[a]ny 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.” I disagree with that view.

Responses of Steven G. Bradbury, Nominee to be Assistant Attorney General for the Office of Legal Counsel, to Questions for the Record from Senator Edward M. Kennedy, at 2 (Oct. 24, 2005).

The Federal prohibition on torture, 18 U.S.C. §§ 2340–2340A, is constitutional, and I believe it does apply as a general matter to the subject of detention and interrogation of detainees conducted pursuant to the President’s Commander in Chief authority. The statement to the contrary from the August 1, 2002, memorandum, quoted above, has been withdrawn and superseded, along with the entirety of the memorandum, and in any event I do not find that statement persuasive. The President, like all officers of the Government, is not above the law. He has a sworn duty to preserve, protect, and defend the Constitution and faithfully to execute the laws of the United States, in accordance with the Constitution.

Responses of Steven G. Bradbury, Nominee to be Assistant Attorney General for the Office of Legal Counsel, to Questions for the Record from Senator Richard J. Durbin, at 1 (Oct. 24, 2005).

Here, we record our conclusion that the assertions excerpted above are not the position of OLC.

It is well established that the President has broad authority as Commander in Chief to take military actions in defense of the country. *See, e.g., Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 187 (1980) (“The power to deploy troops abroad without the initiation of hostilities is the most clearly established exercise of the President’s general power as a matter of historical practice.”); *Training of British Flying Students in the United States*, 40 Op. Att’y Gen. 58, 62 (1941) (recognizing the President’s authority to “dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country”). Furthermore, this Office has recognized that Congress may not unduly constrain or inhibit the President’s exercise of his constitutional authority in these areas. *See, e.g., Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 185 (1996) (Congress “may not unduly constrain or inhibit the President’s authority to make and to implement the decisions that he deems necessary or advisable for the successful conduct of military missions in the field”). We have no doubt that the President’s constitutional authority to deploy military and intelligence capabilities to protect the interests of the United States in time of armed conflict necessarily includes authority to effectuate the capture, detention, interrogation, and, where appropriate, trial of enemy forces, as well as their transfer to other nations. *Cf., e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality) (describing important incidents of war).

At the same time, Article I, Section 8 of the Constitution also grants significant war powers to Congress. We recognize that a law that is constitutional in general may still raise serious constitutional issues if applied in particular circumstances to frustrate the President’s ability to fulfill his essential responsibilities under Article II. Nevertheless, the sweeping assertions in the opinions above 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 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. This grant of authority also provides a basis for Congress to establish a statutory framework, such as that set forth in the Military Commissions Act of 2006 (“MCA”), for trying and punishing unlawful enemy combatants for violations of the law of war and other hostile acts in support of terrorism. Without suggesting that congressional enactment was necessary to authorize the establishment of military commissions, the President’s support for enactment of the MCA following the Supreme Court’s decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), confirms this view. The prior opinion of this Office suggesting that Congress has no role to play concerning the prosecution of enemy combatants is incorrect. *See* 4/8/02 Swift Justice Opinion at 17–19. 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. We disagree with the suggestion in the 3/13/02 Transfer Opinion that this Clause does not permit Congress to establish standards of conduct for the military's handling of detainees, but rather "is limited to the discipline of U.S. troops." *Id.* at 5.

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. Two of the opinions identified above reasoned that the Captures Clause grants authority to Congress only with respect to captured enemy property, such as enemy vessels seized on the high seas or materiel taken on the battlefield, and not captured persons, such as the fighters or supporters of al Qaeda and its affiliates who are detained by the United States in the global War on Terror. *See* 4/8/02 Swift Justice Opinion at 16–17; 3/13/02 Transfer Opinion at 5. This Office has substantial doubts about that view.

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., Lawbook Exchange 2004) (1801) (addressing the treatment by various nations of prisoners of war as part of the law of captures).

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.²

For all these reasons, the identified assertions in the five opinions excerpted above do not reflect the current views of OLC and should not be treated as authoritative. This Office previously has withdrawn two of those opinions in their entirety. Appropriate caution should be exercised before relying in other respects on the remaining three opinions.

Interpreting FISA and its Applicability to Presidential Authority

A number of classified OLC opinions issued in 2001–2002 relied upon a doubtful interpretation of the Foreign Intelligence Surveillance Act (“FISA”). As the Department has previously acknowledged, these opinions reasoned that unless Congress had made clear in FISA that it sought to restrict Presidential authority to conduct warrantless surveillance activities in the national security area, FISA must be construed to avoid such a reading, and these opinions asserted that Congress had not included such a clear statement in FISA. See Letter for Senator Dianne Feinstein and Senator Sheldon Whitehouse, from Brian A. Benzckowski, Principal Deputy Assistant Attorney General, Office of Legislative Affairs (May 13, 2008). All but one of these opinions have been withdrawn or superseded by later opinions of this Office. The remaining opinion containing this questionable proposition is:

6. *Memorandum for William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Re: [Classified Matter] at 13 (Feb. 8, 2002) (“2/8/02 Classified Opinion”).*

The proposition paraphrased above interpreting FISA and its applicability to Presidential authority does not reflect the current analysis of the Department of Justice and should not be relied upon or treated as authoritative for any purpose. The general rule of construction that statutes will not be interpreted to conflict with the President’s constitutional authorities absent a clear statement that Congress intended to do so is unremarkable and fully consistent with longstanding precedents of this Office. See, e.g., 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. section 502 to Certain Broadcast Activities* at 3 (Oct. 15, 1993) (“The President’s authority in these areas is very broad indeed, in accordance with his paramount constitutional responsibilities for foreign relations and national security. Nothing in the text or context of [the statute] suggests that it was Congress’s intent to circumscribe this authority. In the absence of a clear statement of such an intent, we do not believe that a statutory provision of this generality should be interpreted to restrict the President’s] constitutional powers” to conduct the Nation’s foreign affairs and to protect the national security). The courts apply the same canon of statutory interpretation. See, e.g., *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988) (“[U]nless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”) However, the application of this canon of construction to conclude that FISA does not contain a clear statement that Congress intended the statute to apply to the President’s exercise of his constitutional authority is problematic and questionable, given FISA’s express references to the President’s authority. The statements to this effect in earlier opinions of OLC were not supported by convincing reasoning.

As set forth in the Justice Department’s white paper of January 19, 2006, addressing the legal basis for the surveillance activities of the National Security Agency publicly described by the President in December 2005, the Department’s more recent analysis is different: Congress, through the Authorization for Use of Military Force of September 18, 2001, Pub. L. No. 107–40, 115 Stat. 224 (2001) (“AUMF”), confirmed and supplemented the President’s Article II authority to conduct warrantless surveillance to prevent further catastrophic attacks on the United States, and such authority confirmed by the AUMF could reasonably be, and therefore had to be, read consistently with FISA, which explicitly contemplated that Congress could authorize electronic surveillance by a statute other than FISA. See U.S.

²The survey of early historical examples in the 3/13/02 Transfer Opinion similarly does not support that opinion’s assertion that an “unbroken historical chain” recognizes “exclusive Presidential control over enemy soldiers.” 3/13/02 Transfer Opinion at 19. To the contrary, that history very usefully demonstrates a number of examples (such as the statute cited in *Brown*) where Congress passed legislation addressing the circumstances of captured soldiers. Although many of those measures simply authorized Presidential action, and were careful to preserve broad discretion for the President, they reflect an early understanding that Congress, as well as the President, has relevant authority in this area.

Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) (“NSA Legal Authorities White Paper”). As the January 2006 white paper pointed out, “[i]n the specific context of the current armed conflict with al Qaeda and related terrorist organizations, Congress by statute [in the AUMF] had confirmed and supplemented the President’s recognized authority under Article II of the Constitution to conduct such surveillance to prevent further catastrophic attacks on the homeland.” *Id.* at 2. The white paper further explained the particular relevance of the canon of constitutional avoidance to the NSA activities: “Even if there were ambiguity about whether FISA, read together with the AUMF, permits the President to authorize the NSA activities, the canon of constitutional avoidance requires reading these statutes to overcome any restrictions in FISA and Title III, at least as they might otherwise apply to the congressionally authorized armed conflict with al Qaeda.” *Id.* at 3.³

Accordingly, because the proposition highlighted above does not reflect the current views of this Office, appropriate caution should be exercised before relying in any respect on the 2/8/02 Classified Opinion as a precedent of OLC.

Presidential Authority to Suspend Treaties

Two opinions of OLC from 2001 and 2002 asserted that the President, under our domestic law, has unconstrained discretion to suspend treaty obligations of the United States at any time and for any reason as an aspect of the “executive Power” vested in him by the Constitution:

7. *Memorandum for John B. Bellinger III, 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 at 12, 13 (Nov. 15, 2001) (“11/15/01 ABM Suspension Opinion”)* (“The President’s power to suspend treaties is wholly discretionary, and may be exercised whenever he determines that it is in the national interest to do so. While the President will ordinarily take international law into account when deciding whether to suspend a treaty in whole or in part, his constitutional authority to suspend a treaty provision does not hinge on whether such suspension is or is not consistent with international law.”) (footnote omitted) (“The power unilaterally to suspend a treaty subsumes complete and partial suspension: both kinds of suspension authority are comprehended within the ‘executive Power,’ U.S. Const. art. II, § 1, cl. 1. . . .”).
8. *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 11–13 (Jan. 22, 2002) (“1/22/02 Treaties Opinion”)* (reasoning that the President has “unrestricted discretion, as a matter of domestic law, in suspending treaties”).

The highlighted assertions were based on generalizations from historical examples in which Presidents have acted in certain limited circumstances to terminate or suspend treaties. See, e.g., 11/15/01 ABM Suspension Opinion at 14–18.

We have previously concluded in a file memorandum that the reasoning supporting these assertions is unconvincing. See Memorandum to File from C. Kevin Marshall, Deputy Assistant Attorney General, and Bradley T. Smith, Attorney-Adviser, Office of Legal Counsel, *Re: Legal Issues Regarding Proposed Broadcasts into Cuba* at 2, 11–13 (May 23, 2007) (“Cuba Broadcasting File Memorandum”). We observed that Presidents have traditionally suspended treaties where authorized by Congress or where suspension was authorized by the terms of the treaty or under recognized principles of international law, such as where another party has materially breached the treaty or where there has been a fundamental change in circumstances. See *id.* at 6–13. We found the two opinions’ treatment of this history to be unpersuasive, their analysis equating treaty termination with treaty suspension to be doubtful, and their consideration of the Take Care Clause to be insufficient. See *id.* at 11–13. For those reasons, in 2006 we advised the Legal Adviser to

³We recognize that the Supreme Court in *Hamdan v. Rumsfeld* refused to read the AUMF to authorize the President to convene military commissions in contravention of the Court’s interpretation of the Uniform Code of Military Justice. See 548 U.S. at 557–58. The Department’s 2006 white paper, however, was based on the view that FISA, which expressly contemplated that Congress may authorize warrantless surveillance in a separate statute, such as the AUMF, was more like the statute at issue in *Hamdi*, 18 U.S.C. § 4001(a), which prohibits detention of a U.S. citizen, “except pursuant to an act of Congress.” See *NSA Legal Authorities White Paper* at 20–23.

the National Security Council and the Deputy Counsel to the President not to rely on the two opinions identified above to the extent they suggested that the President has unlimited authority to suspend a treaty beyond the circumstances traditionally recognized. *Id.* at 13. We noted that the President, in fact, had not relied upon the broad assertions of authority to suspend treaties contained in the 11/15/01 ABM Suspension Opinion and the 1/22/02 Treaties Opinion; the President decided not to suspend the Third Geneva Convention as to Afghanistan, and he did not suspend the ABM treaty (instead, the United States gave formal notice of withdrawal from the treaty pursuant to its terms). *Cuba Broadcasting File Memorandum* at 13. In summarizing the advice given in 2006 concerning the reliability of the 2001 and 2002 opinions, our file memorandum emphasized that although we questioned the reasoning in these opinions, we had no occasion to make a determination about the extent of the President's authority to suspend treaties:

The above critique is not meant to be a determination that under the Constitution the President lacks authority to suspend treaties absent authorization from Congress, the text, or background law. The White House did not directly ask that question [in 2006], and we did not purport to resolve it. There are arguments to be made based on the Vesting Clause and other provisions of Article II, as well as history. Other prior opinions have suggested that the President could have plenary authority to terminate treaties, and one can find scholars supporting such a view. The issue, however, is not nearly as simple or clear as the [11/15/01 ABM Suspension Opinion] and [the 1/22/02 Treaties Opinion] indicated, and we therefore are no longer willing to advise the President to act in reliance upon those memoranda's more sweeping claims.

Id. (citation omitted).

We adhere to the 2007 *Cuba Broadcasting File Memorandum*, and, accordingly, we confirm that the highlighted propositions from the 11/15/01 ABM Suspension Opinion and the 1/22/02 Treaties Opinion do not reflect the current views of this Office and should not be treated as authoritative, and that appropriate caution should be exercised before relying upon these opinions in other respects.

“National Self-Defense” as a Justification for Warrantless Searches

A 2001 OLC opinion addressing The constitutionality of proposed FISA amendments asserted the view that judicial precedents approving the use of deadly force in self-defense or to protect others justified the conclusion that warrantless searches conducted to defend the Nation from attack would be consistent with the Fourth Amendment:

9. *Memorandum for David S. Kris, Associate Deputy Attorney General, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the “Purpose” Standard for Searches at 8 (Sept. 25, 2001) (“9/25/01 FISA Opinion”)* (reasoning that because the Government's post-9/11 interest in “preventing terrorist attacks against American citizens and property within the continental United States” implicated the “right to self-defense . . . of the Nation and of its citizens,” and because the courts had recognized that “deadly force is reasonable under the Fourth Amendment if used in self-defense or to protect others,” it was appropriate to conclude that “[i]f the government's heightened interest in self-defense justifies the use of deadly force, then it certainly would also justify warrantless searches”).

We believe that this reasoning inappropriately conflates the Fourth Amendment analysis for government searches with that for the use of deadly force.

We do not doubt that the existence of a government interest in preventing catastrophic terrorist attacks is highly relevant in determining whether a particular search would be “reasonable” under the Fourth Amendment. Although warrants are often required in the criminal law context, the Supreme Court has recognized warrantless searches to be “reasonable” in a variety of situations involving “special needs” that go beyond the routine interest in law enforcement. *E.g.*, *Board of Educ. v. Earls*, 536 U.S. 822, 828 (2002). Foreign intelligence collection may fit squarely within the area of “special needs, beyond the normal need for law enforcement,” particularly where it occurs in the midst of an ongoing armed conflict and for the purpose of preventing a future terrorist attack. *See NSA Legal Authorities White Paper* at 37. Accordingly, as explained at length in the Department's January 2006 white paper, warrantless searches for such purposes may well be “reasonable” and consistent with the Fourth Amendment. *Id.* To the extent that the 9/25/01 FISA Opinion advances that straightforward proposition, we have no disagreement.

However, the 9/25/01 FISA Opinion's reliance on court decisions involving the use of deadly force suggests a "self-defense" rationale whereby the purpose behind a search would, standing alone, justify the search for purposes of the Fourth Amendment. The Supreme Court has recognized that the use of deadly force may be "reasonable" under the Fourth Amendment where the "officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 12 (1985); *see also Graham v. Connor*, 490 U.S. 386, 392 (1989). Under this rule, the circumstances in which deadly force may be employed are highly fact-dependent and require a showing that the officer believed that the suspect posed an imminent threat of harm. The 9/25/01 FISA Opinion's assertion that "[i]f the government's heightened interest in self-defense justifies the use of deadly force, then it certainly would also justify warrantless searches" does not adequately account for the fact-dependent nature of the Fourth Amendment's "reasonableness" review, and does not expressly recognize that the circumstantial factors relevant to the *Tennessee v. Garner* self-defense analysis are not necessarily the same as those that may determine the constitutional reasonableness of a particular search, both in its inception and in its scope.

Accordingly, the highlighted reasoning in the 9/25/01 FISA Opinion does not reflect the current views of OLC.

* * *

For all the foregoing reasons, the propositions highlighted in the nine opinions identified above do not reflect the current views of the Office of Legal Counsel and should not be treated as authoritative for any purpose. A number of the opinions that contained these propositions have been withdrawn or superseded and do not constitute precedents of this Office; caution should be exercised before relying in other respects on the remaining opinions.

We have advised the Attorney General, the Counsel to the President, the Legal Adviser to the National Security Council, the Principal Deputy General Counsel of the Department of Defense, and appropriate offices within the Department of Justice of these conclusions.

STEVEN G. BRADBURY,
Principal Deputy Assistant Attorney General.

DEPARTMENT OF JUSTICE'S OFFICE OF PROFESSIONAL RESPONSIBILITY REPORT ON THE INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF 'ENHANCED INTERROGATION TECHNIQUES' ON SUSPECTED TERRORISTS

The report "Department of Justice's Office of Professional Responsibility Report on the Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists" is available at https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf

UNITED STATES MARINE CORPS
June 26, 2017

Senator JOHN THUNE,
Chairman,
Senate Committee on Commerce,
Science, and Transportation,
Washington, DC.

Senator BILL NELSON,
Ranking Member,
Senate Committee on Commerce,
Science, and Transportation,
Washington, DC.

Dear Chairman Thune and Ranking Member Nelson,

For over a decade, I have been part of a group of retired generals and admirals of the U.S. Armed Forces who have voiced our opposition to torture. I write to urge you to oppose the nomination of Steven G. Bradbury for the position of Department of Transportation general counsel.

In his role as acting head of the Department of Justice's Office of Legal Counsel (OLC), Mr. Bradbury displayed a disregard for both U.S. and international law when authorizing the use of so-called "enhanced interrogation techniques" to interrogate terrorism suspects. These interrogation techniques, which Mr. Bradbury re-

peatedly approved, included methods that the United States has acknowledged and even prosecuted as torture and cruel, inhuman, and degrading treatment.

The use of these techniques not only violated well-established law and military doctrine, but also endangered U.S. troops and personnel, hindered the war effort, and betrayed the country's values, damaging the United States' stature around the world as a beacon for human rights and the rule of law. We know that the United States is strongest when it remains faithful to its core values. The use of torture and cruel, inhuman, and degrading treatment undermines those values, and Mr. Bradbury continually represented their use as legal and advisable during his time serving in the Bush Administration.

In recommending these techniques, Mr. Bradbury also displayed a discomfiting deference to the executive branch's wishes, tailoring his legal recommendations to fit the White House's preferred outcome, and even testified in a Senate Judiciary Committee hearing that "the President is always right." Mr. Bradbury's recommendations also contradicted the intent of Congress. In 2005, Congress passed the Detainee Treatment Act with a vote of 90–9. The law prohibited abuse of detainees by the U.S. military and agencies, but Mr. Bradbury authored a legal memo specifically designed to undermine the will of Congress and to provide the Bush Administration with authorization to continue using interrogation methods that constituted torture and cruel, inhuman, and degrading treatment.

I believe that this is more important than political affiliation. Mr. Bradbury has time and again shown his willingness to contravene established law and the intent of Congress in service to the will of the executive branch. Though the position to which he is nominated likely will not involve decisions on national security issues, I believe that based on his past governmental service, Mr. Bradbury is not fit for this political office. I ask you respectfully to oppose his nomination.

Semper Fidelis,

CHARLES C. KRULAK
General, USMC (Ret.)

31st Commandant of the Marine Corps

June 22, 2017

To:
Chairman John Thune
Ranking Member Bill Nelson
Committee on Commerce, Science, and Transportation
CC: All Other Senators

We write to express our serious concerns regarding the nomination of Steven G. Bradbury for general counsel of the Department of Transportation (DOT). Mr. Bradbury's role in justifying torture and cruel, inhuman, or degrading treatment of individuals held in U.S. custody marked him as an architect of the torture program. Not only should the Senate be concerned about confirming a nominee who had a central role in the criminal violation of human rights, but his work during that period calls into question his ability to provide the kind of rigorous, independent legal analysis that is required of any top government lawyer.

Mr. Bradbury was acting head of the Department of Justice's (DOJ) Office of Legal Counsel (OLC) from 2005 to 2009. During that time, Mr. Bradbury wrote several legal memoranda that authorized waterboarding and other forms of torture and cruel, inhuman, or degrading treatment. As such, he is most prominently—and correctly—known as one of the authors of the "torture memos."¹ His analysis directly contradicted relevant domestic and international law regarding the treatment of prisoners, and helped establish an official policy of torture and detainee abuse that has caused incalculable damage to both the United States and the prisoners it has held.²

Mr. Bradbury's role in the torture program, even then, was notorious—so much so that the Senate refused to confirm him as assistant attorney general for the Of-

¹See "The Torture Documents," The Rendition Project, available at: <https://www.therenditionproject.org.uk/documents/torture-docs.html>.

²See Torture Act 18 U.S.C. § 2340 (1994); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, art. 7, The U.S. ratified Convention against Torture in 1994. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>; International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), entered into force March 23, 1976, art. 2. The U.S. ratified the ICCPR in 1992.

fice of Legal Counsel during the Bush Administration. The Senate now knows even more about Mr. Bradbury's record, and the harm caused by his opinions, based on oversight by the Senate Select Committee on Intelligence and its report on the Central Intelligence Agency's (CIA) use of torture and abuse.

In Mr. Bradbury's time as acting head of the OLC, he demonstrated an unwavering willingness to defer to the authority and wishes of the president and his team instead of providing objective and independent counsel. During congressional testimony in 2007, Mr. Bradbury responded to questions about the president's interpretation of the law of war by declaring, "The President is always right"—a statement that is as outrageous as it is inaccurate.³ The DOJ Office of Professional Responsibility (OPR) reviewed Mr. Bradbury's "torture memos" and determined that they raised questions about

the objectivity and reasonableness of Mr. Bradbury's analyses; that Mr. Bradbury relied on uncritical acceptance of Executive Branch assertions; and that in some cases Mr. Bradbury's legal conclusions were inconsistent with the plain meaning and commonly held understandings of the law.⁴ Senior government officials from the Bush Administration who worked with Mr. Bradbury have said that they had "grave reservations" about conclusions drawn in the Bradbury torture memos and have described Mr. Bradbury's analysis as flawed, saying the memos could be "considered a work of advocacy to achieve a desired outcome."⁵

Moreover, Mr. Bradbury's 2007 torture memo was written with the purpose of evading congressional intent and duly enacted Federal law. The Detainee Treatment Act of 2005 (DTA), legislation that passed the Senate with a vote of 90–9, stated, "No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment." However, Mr. Bradbury's memo explicitly allowed the continuation of many of the abusive interrogation techniques that Congress intended to prohibit in the DTA.⁶

Perhaps most concerning from a congressional oversight perspective, Mr. Bradbury affirmatively misrepresented the views of members of Congress to support his legal conclusions. Specifically, in his 2007 memo he relied on a false claim that when the CIA briefed "the full memberships of the House and Senate Intelligence Committees and Senator McCain . . . none of the Members expressed the view that the CIA detention and interrogation program should be stopped, or that the techniques at issue were inappropriate."⁷ In fact, Senator McCain had characterized the CIA's practice of sleep deprivation as torture both publicly and privately, and at least four other senators raised objections to the program.⁸

As a senior government lawyer, Mr. Bradbury authorized torture and cruel treatment of detainees in violation of U.S. and international law. Mr. Bradbury demonstrated either an inability or an unwillingness to display objectivity and reasonableness in evaluating the president's policy proposals. We ask that in reviewing Mr. Bradbury's nomination for general counsel of the Department of Transportation, another profoundly important position of public trust, you take these serious and disturbing factors into consideration.

Sincerely,

American Civil Liberties Union
Appeal for Justice
Center for Constitutional Rights
Center for Victims of Torture

The Constitution Project
Council on American-Islamic Relations
Defending Rights & Dissent
Human Rights First

³Amanda Terkel, "Justice Department Lawyer to Congress: 'The President is Always Right,'" *Think Progress*, July 12, 2006, available at: <https://thinkprogress.org/justice-department-lawyer-to-congress-the-president-is-always-right-1ce40cf3ab61>.

⁴"Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists," U.S. Department of Justice Office of Professional Responsibility, July 29, 2009, available at: https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf.

⁵*Id.*

⁶Jane Mayer, *The Dark Side* (New York: Doubleday, 2008): 321–322.

⁷Steven Bradbury, "Memorandum for John A. Rizzo Acting General Counsel, Central Intelligence Agency," U.S. Department of Justice Office of Legal Counsel, July 20, 2007, available at: <https://www.justice.gov/olc/file/886296/download>

⁸"Committee Study of the Central Intelligence Agency's Detention and Interrogation Program," Executive Summary, Senate Select Committee on Intelligence, December 13, 2012, 435–436, available at: https://www.feinstein.senate.gov/public/_cache/files/7/c/7c85429a-ec38-4bb5-968f-289799b6d0e/D87288C34A6D9FF736F9459ABCF83210.sscistudy1.pdf

Human Rights Watch	Open Society Policy Center
The Leadership Conference on Civil and Human Rights	Physicians for Human Rights
National Religious Campaign Against Torture	Win Without War

The CHAIRMAN. Senator Blumenthal is up next.

**STATEMENT OF HON. RICHARD BLUMENTHAL,
U.S. SENATOR FROM CONNECTICUT**

Senator BLUMENTHAL. Thanks, Mr. Chairman.

Thank you both for your willingness to serve.

Mr. BRADBURY, in your questionnaire for this Committee, I think you were asked whether you have been the subject of a complaint to any, quote, professional association. How did you answer that question?

Mr. BRADBURY. I don't believe I've been subject of a complaint.

Senator BLUMENTHAL. You answered the question no, correct? Is that answer correct?

Mr. BRADBURY. Yes.

Senator BLUMENTHAL. I have, and I would like it to be admitted into the record, Mr. Chairman, if there's no objection, a *New York Times* article of May 19, 2009, reporting a complaint to the Bar associations of four states and the District of Columbia regarding you and a number of other attorneys relating to legal opinions that you provided as a member of the Bush administration. Are you familiar with that set of complaints?

Mr. BRADBURY. I haven't seen them. I heard the report of it, and we checked with the Bar on that, and they don't have a record of a complaint. I think what happens, Senator, as I understand it, is someone files something, and there's a period of time, and then there has to be some procedure taken at the Bar office, and then I would have been notified, and I was not notified that I needed to do anything. So—

Senator BLUMENTHAL. Were you aware of those complaints when you answered your questionnaire?

Mr. BRADBURY. I was aware that there had been reports in the media of it. I was aware at the time of the reports in the media. And that's why I said I checked with the D.C. Bar to see if there was a record of a formal complaint. And there must be some process that happens before it becomes a formal complaint proceeding.

Senator BLUMENTHAL. Did you check with the Bars of the four states where those complaints were filed?

Mr. BRADBURY. Well, I'm only a member of the D.C. Bar. That would have been the only one that would pertain to me. I believe some of the other people who were discussed in the media reports included Attorney General Mukasey and several others.

Senator BLUMENTHAL. But the questionnaire asks whether you have, quote, been the subject of a complaint to any professional association?

Mr. BRADBURY. Yes.

Senator BLUMENTHAL. Wouldn't the correct answer to that have been yes?

Mr. BRADBURY. Well, my understanding would be we asked the Bar and the Bar said there was not a complaint that they had a record of. So that's—I think I was——

Senator BLUMENTHAL. Well, whether or not there was a record, there was a complaint.

Mr. BRADBURY. I haven't seen this document, and I—so I——

Senator BLUMENTHAL. In your questionnaire, you reported things as minuscule as having been a sandwich maker in college.

Mr. BRADBURY. Well, that was a job that fell within the time period that I was required to——

Senator BLUMENTHAL. Well, I would suggest respectfully that perhaps you may want to reconsider that response and amend your questionnaire. And I would like this article entered into the record. And with your permission, Mr. Chairman, I would like to suggest that the D.C. Bar be asked to respond as to where the complaint is or was, whether it was ever formally filed, and whether the procedure was started for pursuing it.

The CHAIRMAN. Mr. Bradbury, you indicated that you don't have any knowledge of that?

Mr. BRADBURY. I don't know internally within the bar what the procedure is as I sit here. And so——

Senator BLUMENTHAL. Let me move on for the moment, and I'll follow up in written questions.

You indicated that you would recuse yourself with respect to Takata. Will you recuse yourself as to any of the successor companies or interests that purchase any of the assets of Takata, since it's now in bankruptcy? And will you also recuse yourself as to any of the issues concerning liability that might pertain to other airbag manufacturers or automobile manufacturers that use those airbags, since the same legal and factual issues will be involved in all of the potential liability?

Mr. BRADBURY. Well, as I've indicated to Senator Nelson, I certainly will recuse myself from all aspects of those recall issues relating to the Takata airbag issues. So——

Senator BLUMENTHAL. I'm not asking about recall issues, I'm asking about liability for severe injuries and deaths caused by airbags that may use, among other substances, ammonium nitrate——

Mr. BRADBURY. Yes.

Senator BLUMENTHAL.—which has been found in Takata to be very relevant, and with respect to those other airbag manufacturers or automobile manufacturers be relevant as well. Will you recuse yourself from all of those issues relating to the automobile and airbag manufacturers?

Mr. BRADBURY. Everything related to the airbag issues. So the liability aspects that you describe would certainly be related to that. And with respect to successor entities, that was another question I think Senator Nelson asked, and I did make it clear that I viewed the successor companies or successor entities as part of that.

Senator BLUMENTHAL. And while we're on the subject of recusal, since you represented a number of airlines, I believe, American Airlines, Delta Airlines—which others have you——

Mr. BRADBURY. American Airlines is the one in recent years that I've represented.

Senator BLUMENTHAL. How about in previous years?

Mr. BRADBURY. Well, many years ago, at my other firm, I represented another airline with respect to competition issues.

Senator BLUMENTHAL. Will you recuse yourself as to those airlines?

Mr. BRADBURY. As I've indicated, I certainly will recuse myself with respect to American Airlines. Any particular matter that has a direct or substantial effect on American Airlines, I'm recused under the statute for one year, under the ethics pledge for two years, if I were to be confirmed. And then, of course, any—Senator Blumenthal, any, as you know, any matter that I actually handled for American Airlines, where I was involved, I would be recused from completely permanently.

So the answer to that is yes. American is the one that I have been active on in recent years before the Department of Transportation.

Senator BLUMENTHAL. Well, I appreciate your response to my questions. And I have a number of additional questions with respect to competition in the airline industry, practices of airlines, the need for more competition, the excessive consolidation that's taken place in the industry, the need for passenger bill of rights, which I have introduced to protect against some of these abuses, and I will submit those questions for the record because my time has expired.

[The article referred to follows:]

The New York Times

ADVOCACY GROUPS SEEK DISBARMENT OF EX-BUSH ADMINISTRATION LAWYERS

By Scott Shane—May 18, 2009

WASHINGTON—A coalition of left-wing advocacy groups filed legal ethics complaints on Monday against 12 former Bush administration lawyers, including three United States attorneys general, whom the groups accuse of helping to justify torture.

The coalition, called Velvet Revolution, asked the bar associations in four states and the District of Columbia to disbar the lawyers, saying their actions violated the rules of professional responsibility by approving interrogation methods, including waterboarding, that constituted illegal torture.

By writing or approving legal opinions justifying such methods, the advocates say, the Bush administration lawyers violated the Geneva Conventions, the Convention Against Torture and American law.

Kevin Zeese, a longtime activist and lawyer who signed the complaints on behalf of Velvet Revolution, said the groups were acting because the Obama administration had resisted calls for a criminal investigation of abuse of prisoners under the Bush administration.

The Obama administration has not ruled out the possibility of professional disciplinary action being taken against some of those involved.

"The torture issue needs to be taken out of the hands of politicians if it is going to be dealt with as the war crimes that it is," Mr. Zeese said.



John C. Yoo wrote some of the legal opinions in dispute. Credit Mandel Ngan/Agence France-Presse—Getty Images

The complaints are available online at the group's website, www.velvetrevolution.us/torture_lawyers/index.php.

The filings come as the Justice Department's ethics office, the Office of Professional Responsibility, completes a report on the department lawyers who wrote opinions authorizing harsh interrogations.

The report, in the works for nearly five years and expected to be released in the next few weeks, is said to be highly critical of some authors of the opinions, including John C. Yoo, a senior official at the department's Office of Legal Counsel in 2002, and his boss, Jay S. Bybee.

The Velvet Revolution complaint also names Steven G. Bradbury, who headed the legal counsel office from 2005 to 2009; the three attorneys general, John Ashcroft, Alberto R. Gonzales and Michael B. Mukasey; Michael Chertoff and Alice S. Fisher, who headed the Justice Department's criminal division; two former Pentagon officials, Douglas J. Feith and William J. Haynes II; and two former White House lawyers, Timothy E. Flanigan and David S. Addington.

Legal experts are divided over the likely effect of such complaints.

A complaint filed last year against Mr. Yoo, a Berkeley law professor who remains a member of the Pennsylvania bar, was rejected by that state's bar association, in part because the Justice Department was already investigating Mr. Yoo's role in the interrogation memorandums.

Mr. Yoo has often defended his role in writing the legal opinions, noting that they were written in the anxious months after the terrorist attacks of Sept. 11, 2001, and were intended only to outline the limits of the law, not to advise policy makers on what methods to use.

But one interrogation opinion written primarily by Mr. Yoo was later withdrawn by the Justice Department, which considered it overly broad and poorly reasoned.

The CHAIRMAN. Thank you, Senator Blumenthal.
Senator Young.

**STATEMENT OF HON. TODD YOUNG,
U.S. SENATOR FROM INDIANA**

Senator YOUNG. Thank you, Chairman.

Mr. Bradbury, I really enjoyed our visit, as I did with Ms. Walsh, in my office.

Ms. WALSH. Thank you.

Senator YOUNG. So it's good to see you. I really appreciate, as I said, when we visited your interest in serving, Mr. Bradbury, the sacrifices associated with that, and I appreciate your enduring the scrutiny we've come to associate with these hearings.

In the aftermath of the Takata incident, which has been invoked numerous times, you were hired as a part of an eminently qualified team of lawyers to bring swift resolution to the Takata airbag recall effort and the related investigation. As the legal representative of TK Holdings, the parent company of Takata, you played an important role in constructing a solution to one of the largest automotive safety recalls in the history of this country. As somebody who just practiced law for a couple of years, I want to commend you for your exemplary legal work as you collaborated with NHTSA to construct a model for addressing safety recalls of this magnitude.

Could you please speak to the complexity of this recall and how it might lay the groundwork for future automotive safety recalls of this size?

Mr. BRADBURY. Yes, thank you, Senator. It really is unique. It's, I think, the largest, at this point, set of related automotive safety recalls in history, hugely complex because of all of the different automakers involved. And that's why there's a coordinated remedy program with a coordinated remedy order that NHTSA crafted. And there's an independent monitor at the center of that to orchestrate this because I think there are 13 automakers involved and, as was said by Senator Nelson, tens of millions of devices that will need to be replaced in cars, so hugely complicated.

And moreover, as Senator Nelson said, it's staged because it's a problem that occurs over time. And all of this needed to be worked out by the career lawyers and the engineers at NHTSA. And really what I was doing as an attorney in this case for the company was not really litigating against NHTSA and trying to resist and stop this from happening, we were very proactive from the beginning in terms of bringing the information together, disclosing irregularities and issues that were problems, producing millions of pages of documents, and then working with NHTSA to craft these consent orders that create these recalls and make them go forward and expand, obviously, a long, long way to go. And there needs to be a lot of work done.

Senator YOUNG. Sure.

Mr. BRADBURY. But that's the kind of work that we did. I think it demonstrates the kind of power and effectiveness that NHTSA can have if it uses the tools that Congress has given it to address these sorts of problems. So I think it's groundbreaking.

Senator YOUNG. I would presume over the course of preparing for this legal work and the course of the work itself, you acquired extensive knowledge about automotive safety, the automobile sector, about the legal issues surrounding auto safety. You no doubt acquired skills about related to the structure that you put in place and knowledge of it, right? In fact, you're the foremost expert arguably on that. Do you think in your future role, all these things would help you serve effectively in that role, this background?

Mr. BRADBURY. Well, thank you, Senator. I do. I certainly gained a familiarity with NHTSA and with its authorities and with the people who work there. So I look forward to collaborating closely with the Chief Counsel and with NHTSA to address safety issues certainly in other areas. I won't be involved at all with Takata and the recalls of the airbag issues, but I have great respect for the people, for the process, and for the focus on the safety mission.

Senator YOUNG. Well, thank you again for your appearance here today.

And I'm actually going to yield back the balance of my time.

The CHAIRMAN. Thank you, Senator Young.

Senator Nelson, anything else for the good of the record?

Senator NELSON. Yes, please, Mr. Chairman.

I want to ask, Mr. Bradbury, since you were Counsel for Takata, you argued with my belief, and that was your job as the lawyer for Takata—that Takata put profits over safety. And now we have seen the hundreds and hundreds of e-mails that went on among executives in the company. And that has led to this sad tale and ultimately Takata has filed for bankruptcy.

So with everything that you know now, do you still believe that Takata was a good and moral actor?

Mr. BRADBURY. Well, Senator, I certainly have high regard for people at the company I came to know. I do think they care greatly about the product, but I'm not here to defend any client. I'm certainly not here to defend Takata. These are matters I will not be working on for the Department of Transportation. I appreciate your strong view on the issue. I respect it greatly. I came to have strong views, too. And I know that there are a lot of people both in NHTSA and in industry who are working overtime to try to address the problems that were created by the issues with the airbag inflators. It is a serious, serious set of problems.

Senator NELSON. The point of my question, Mr. Bradbury, because it looks like you're going to be confirmed with only 50 votes by the full Senate, is the moral frame of mind. I happen to be talking about Takata, which I think was morally bankrupt because they allowed this to happen, but you can look at the other things. Take, for example, the General Motors ignition switch and look at how many people have been killed or maimed as a result of that.

And so there has to be some moral underpinning about what is right and wrong and the willingness to speak out, as government officials, against that kind of thinking.

Mr. BRADBURY. I agree, absolutely. And there is a strong moral component to the safety mission of NHTSA and the Department of Transportation, and that has to be out front, forward leaning, the mission, the action, what shapes and directs the action of NHTSA and these issues.

I know NHTSA has been criticized in connection with some of the matters that you mentioned, but I do think they're stronger today at NHTSA by virtue of some of the authorities they've exercised and the steps they've taken to resolve these complicated issues, like the airbag issues.

And they, I think, have broken some new ground in terms of the framework they've got in place, the way they're using their authority. And I think at least there's a positive message in that in terms of the willingness and the ability of the agency to address those issues, which are moral issues, of public safety, which has really got to be the uppermost priority.

Senator NELSON. Well, I'm talking to you because you, when General Counsel, one of the chief positions at the Department of Transportation, are going to have an influence over the administration's appointees at NHTSA. So what is our philosophy going forward? Is it to protect the company or to protect the people?

Mr. BRADBURY. It's to protect the people. It's public safety. At NHTSA, it's public safety.

Senator NELSON. That's got to be asserted aggressively—

Mr. BRADBURY. I agree.

Senator NELSON.—by the administration's appointees.

Mr. BRADBURY. I agree.

Senator NELSON. All right. Ms. Walsh, I don't want you to feel left out.

[Laughter.]

Senator NELSON. For some time, Florida fruit and vegetable growers have had to deal with an onslaught of subsidized agricultural imports from Mexico. This is a result of dumping by Mexican companies—bell peppers, tomatoes, strawberries, cucumbers—and Florida growers have been harmed by this anti-competitive practice, and they took advantage of NAFTA to be able to do this.

One of the reasons why Florida growers haven't been able to file a trade case with the Department of Commerce is the process doesn't account for seasonal differences in the market place. Growers have to show the harm Mexican imports are causing to the industry nationwide, even though northern growers are not producing these types of crops in the winter. So by the Department's regulations, the southern growers are penalized.

So what do you think you can do to help improve the process for our growers?

Ms. WALSH. Thank you, Senator, for that important question. And I think that that is certainly a concern and probably one of the most important concerns of Secretary Ross. And I think, as you mentioned on NAFTA, Congress has received the letter for renegotiation. That's a critical issue for this administration. When the President said, "America First," these are just the types of issues that he was referring to, and it's my understanding that this will continue to be a top priority in Florida, and the orange growers are obviously a critical market.

So if confirmed, the Commercial Service is not involved on the enforcement side, but on the export side and on the FDI side, but definitely as a team, we will be working closely with you and your staff to ensure that Florida growers get what they deserve.

Senator NELSON. This isn't orange growers. This is vegetable growers, this is—

Ms. WALSH. Agriculture.

Senator NELSON.—this is peppers and tomatoes. This is vegetables, not oranges. Now, we've got our own problem with oranges, but it is in the form of a little insect that brings a bacteria that is killing the citrus tree in 5 years. That's a whole different problem. But in this particular case, I want to know if you will be concerned about this inequity that is devastating the fresh fruit and vegetable market, particularly the winter vegetables.

Ms. WALSH. Certainly, if confirmed, Senator, I will look with our team at that issue at the Department of Commerce.

Senator NELSON. So you'll look at it. That doesn't mean that you're concerned about it.

Ms. WALSH. I'm absolutely concerned about it. If confirmed, we will look at that.

Senator NELSON. Thank you.

The CHAIRMAN. Thank you, Senator Nelson.

And we would like to see more of those winter vegetables in South Dakota in the winter.

[Laughter.]

Senator BLUMENTHAL. Mr. Chairman, can I ask a couple more questions if I promise not to ask about vegetables?

[Laughter.]

Senator BLUMENTHAL. Just one?

The CHAIRMAN. If we let you ask a second round, then—and we don't have anybody else that's coming back. Do we know?

All right. Be brief.

Senator BLUMENTHAL. I'll be brief. Thank you.

Ms. Walsh, I would like to ask you, I know you've been asked about the Export-Import Bank.

Ms. WALSH. Mm-hmm.

Senator BLUMENTHAL. I come from a state that really depends on this bank. Many of our large manufacturers, like General Electric and United Technologies, but many of our small manufacturers as well. Senator Cantwell asked you about the Export-Import Bank earlier. I would like to give you another chance to express a commitment to this bank because it is so tremendously important to American manufacturing and to our whole economy. Will you support the Export-Import Bank? And how will you assure that our trade policies through the Export-Import Bank favor small as well as large manufacturers?

Ms. WALSH. Thank you, Senator, for that question. As I mentioned before, if confirmed, I personally would not be in a position to have impact on that particular decision. That is not within the Department of Commerce decisionmaking.

Senator BLUMENTHAL. Well, what will you do to support the Export-Import Bank insofar as it does affect manufacturing, which is within the purview and jurisdiction of the Commerce Department?

Ms. WALSH. Senator, if confirmed, I would take an opportunity to discuss with the Secretary and the Under Secretary what role we could play in that issue, but it's my understanding that we are not directly involved in that.

Senator BLUMENTHAL. Do you support American manufacturing?

Ms. WALSH. Absolutely.

Senator BLUMENTHAL. Thank you.

Thanks, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Blumenthal.

Again, we appreciate it very much. Thank you for taking our questions. A special thank you to the families that are represented here today. Thank you for your willingness to serve and to work with your loved ones through the rigors of public service. We are grateful for that and appreciate you being here as well.

We're going to leave the hearing record open for a couple of weeks, during which time Senators are asked to submit any questions for the record. And I would ask our panelists upon receipt that if they would submit their written answers to the Committee as soon as possible, we will try and process these nominations as quickly as we can. So thank you again.

And with that, this hearing is adjourned.

Mr. BRADBURY. Thank you.

[Whereupon, at 11:48 a.m., the hearing was adjourned.]

A P P E N D I X

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHN THUNE TO STEVEN GILL BRADBURY

Question. In your testimony before the Committee, you discussed your tenure as Principal Deputy Assistant Attorney General and Acting Assistant Attorney General at the Justice Department's Office of Legal Counsel (OLC) from 2005-2009. Between 2001 and 2003, in the aftermath of the 9/11 terrorist attacks, OLC issued several opinions regarding enhanced interrogation techniques and the President's war powers. In 2008 and 2009, you authored two separate documents, each entitled "Memorandum for the Files." These memoranda asserted that certain opinions issued between 2001 and 2003 no longer reflected the then-current views of OLC.

Please explain the scope and purpose of the aforementioned memoranda you authored.

Answer. After I became Principal Deputy Assistant Attorney General ("Principal Deputy AAG") for the Office of Legal Counsel ("OLC" or the "Office") in 2004, I participated in decisions to withdraw and supersede previous legal opinions addressing interrogation policies that had been issued by our predecessors in OLC in 2002 and 2003. We determined that the earlier opinions were flawed, in part because they relied on overly broad interpretations of the President's constitutional authorities in war time vis-à-vis the powers of Congress. I was involved in preparing replacement opinions that focused much more narrowly on the specific statutory and treaty provisions necessary to provide the advice needed by senior policy makers and that did not rely on broad assertions of presidential power.

After I became Acting AAG for OLC in 2005 and while I served as the senior appointed official in charge of the Office, I undertook a broader initiative to conduct a comprehensive review of all the post-9/11 legal opinions issued by the Office from 2001 to 2003 relating to war powers. The two memos to files that I prepared at the end of the Bush administration in October 2008 and January 2009 memorialized for senior government officials and for the new incoming Obama team the results of that comprehensive review of the earlier war-power-related opinions of the Office.

These memos to files set forth with specificity my conclusions for OLC about the flawed reasoning of the 2001-2003 opinions and advised policy makers across the government as to which opinions and which specific propositions of law had been withdrawn or superseded by OLC and no longer represented the views of the Office. I believe these memos to files were helpful to the new OLC leadership at the beginning of the Obama administration. Among other things, the Obama team decided to post my memos to files on the OLC Website, where they remain publicly available today.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BILL NELSON TO STEVEN GILL BRADBURY

Question 1. A priority for me in last year's Federal Aviation Administration extension law was to include consumer protections pertaining to refunds for delayed baggage and family seating.

Specifically, the Department of Transportation (DOT) is statutorily mandated to issue final regulations by July 15, 2017 that will require airlines to promptly refund fees paid for checked baggage that is delayed. Unfortunately, I have not seen much progress on this.

The law also required DOT to review and, if appropriate, establish policies to ensure that children 13 years old and under can sit with an adult in their party. Similarly, DOT does not appear to have taken any action on this provision.

If confirmed, will you commit to addressing the statutory mandates set by Congress for these and other consumer protection rules?

Answer. If confirmed, I do commit that, consistent with ethics requirements on matters where I may be recused, I will address relevant statutory mandates con-

cerning DOT rules and other actions and will assist in advising DOT leadership and policy makers on compliance with applicable mandates. Please note that certain aviation matters pending before DOT are one area where I may have recusals because of my recent work representing an airline client.

Question 2. Developing autonomous vehicle technology could mean that driverless trucks are regularly on our roads in the near future. This raises both safety concerns and employment questions for the millions of truck drivers in the U.S.

How do you plan to balance the industry's push for autonomous vehicles with the potentially significant safety and employment impacts?

Answer. It is a top priority that the autonomous vehicles developed for use on America's highways will be safe for operation. Therefore, the number one question in approaching the regulation of autonomous vehicles must be whether the regulation is necessary and appropriate to ensure the safe operation of the vehicles. At the same time, the development of autonomous vehicle technology has the promise to be transformational, including in advancing the overall goal of motor vehicle and motor carrier safety, since the vast majority of motor vehicle accidents today are caused by human error. For that reason, we must take care to ensure that regulatory mandates do not unnecessarily stifle incentives for investment and innovation in this new technology. I believe these competing objectives can be harmonized, consistent with the requirements of law.

Question 3. The Southeastern Legal Foundation is not listed among significant representations as part of the resume submitted in response to Question A.9 of the Commerce Committee Questionnaire.

Please explain this omission and detail the nature and extent of all work you have performed for the Southeastern Legal Foundation.

Answer. I did not list the work I did for Southeastern Legal Foundation ("SLF") on my resume because, in my judgment, it was not among my most significant client work within the usual focus areas of my private practice. I have represented SLF in three projects, as follows: (1) In 2012, I prepared an amicus brief for SLF and two other public interest organizations in a Supreme Court case involving an interpretation of the U.S. Tax Code (*PPL Corp. v. IRS*, No. 12-43 (U.S.)); (2) in 2013-2014, I assisted SLF with its cert. petition and merits briefs in the Supreme Court in cases brought by several industry petitioners and organizations, including SLF, challenging the EPA's greenhouse gas rules for stationary-source permits under the Clean Air Act (grouped together as *Utility Air Regulatory Group v. EPA*, No. 12-1146 (U.S.)); and (3) in 2016, I prepared an amicus brief for SLF in the U.S. Court of Appeals for the D.C. Circuit in a case challenging the EPA's Clean Power Plan under the Clean Air Act (*State of West Virginia v. EPA*, No. 15-1363 (D.C. Cir.)).

Question 4. Please identify all persons, organizations, and entities that provided the funding in support of the work you performed for the Southeastern Legal Foundation.

Answer. The only persons, organizations, or entities that provided funding in support of my work for SLF were SLF and my law firm Dechert LLP. SLF was a *pro bono* client of Dechert, and Dechert did not receive payment for my services in connection with the first two projects listed in response to Question 1. In reviewing records in response to this Question, I was reminded that in connection with the third project listed in response to Question 1 (the amicus brief filed in the D.C. Circuit in case No. 15-1363), SLF offered to and did pay Dechert a modest flat fee exceeding \$5,000. I had forgotten about this payment, and because SLF had been a *pro bono* client, I inadvertently omitted reference to SLF in part 4 of my initial OGE-278e nominee financial disclosure report, submitted to this Committee on June 8, 2017. I have now corrected my OGE-278e report by adding Southeastern Legal Foundation to the clients listed in part 4 of the report (those clients from which my law firm received at least \$5,000 for my services during the reporting period). I thank the Senator for raising this question, which led me to identify and correct this error in my disclosure report.

Question 5. Pursuant to your association with the Southeastern Legal Foundation, the following questions relate to the Petition for Certiorari, *Southeastern Legal Foundation, Inc. v. United States Environmental Protection Agency* (online at <https://www.edf.org/sites/default/files/SLF%20Petition%20for%20Cert.pdf>).

Please explain the following statement:

In making the Endangerment Finding, EPA simply adopted the conclusions of the Intergovernmental Panel on Climate Change ("IPCC") that not only were human GHG emissions a cause of atmospheric warming in the second half of the twentieth century, but that it is "90-99 percent certain" that humans caused "most" of that warming. The legal deficiency in this conclusion is that, given the current state of

science, it is irrational (and therefore reversible) to make this conclusion with such certitude. (p. 10)

Answer. The quoted statement reflected the position of the client, SLF. This position was developed and supported in submissions filed by SLF and other parties in the underlying proceedings before the EPA and the D.C. Circuit. The cert. petition cited to the record evidence that supported this position and briefly summarized that support in the discussion following the quoted language. I did not participate in the underlying proceedings and was not involved in developing support for this argument. The position reflected in the quoted statement was not among the issues addressed on the merits in this case by the Supreme Court, which limited its grant of cert. review to a narrower question of statutory interpretation.

Question 6. Please explain the following statement:

As to the first line of evidence, EPA claimed that the twentieth century had witnessed an “unusual” rise in average global temperature, one that supposedly could not be explained by natural variability, and one that therefore demanded an anthropogenic explanation. The scientific evidence, however, shows otherwise. (p. 11)

Answer. The quoted statement reflected the position of the client, SLF. This position was developed and supported in submissions filed by SLF and other parties in the underlying proceedings before the EPA and the D.C. Circuit. The cert. petition cited to the record evidence that supported this position and briefly summarized that support in the discussion following the quoted language. I did not participate in the underlying proceedings and was not involved in developing support for this argument. The position reflected in the quoted statement was not among the issues addressed on the merits in this case by the Supreme Court, which limited its grant of cert. review to a narrower question of statutory interpretation.

Question 7. Please explain the following statement:

[T]he regional warming that did occur in various areas of the globe during the last documented warming period was not anomalous in climate history and was well within the normal range of historical variability. (p. 12)

Answer. The quoted statement reflected the position of the client, SLF. This position was developed and supported in submissions filed by SLF and other parties in the underlying proceedings before the EPA and the D.C. Circuit. The cert. petition cited to the record evidence that supported this position and briefly summarized that support in the discussion following the quoted language. I did not participate in the underlying proceedings and was not involved in developing support for this argument. The position reflected in the quoted statement was not among the issues addressed on the merits in this case by the Supreme Court, which limited its grant of cert. review to a narrower question of statutory interpretation.

Question 8. Please explain the following statement:

There was no consistent trend of “global” warming in the second half of the twentieth century, nor any global warming in the last 16 years, and the regional warming that did occur was not anomalous. EPA’s supposed physical understanding of GHG effects in the atmosphere is contradicted by copious empirical evidence, and the models on which EPA relies have proven to be wrong in many of their most important predictions, including current temperatures. (p. 15)

Answer. The quoted statement reflected the position of the client, SLF. This position was developed and supported in submissions filed by SLF and other parties in the underlying proceedings before the EPA and the D.C. Circuit. The cert. petition cited to the record evidence that supported this position and briefly summarized that support in the discussion following the quoted language. I did not participate in the underlying proceedings and was not involved in developing support for this argument. The position reflected in the quoted statement was not among the issues addressed on the merits in this case by the Supreme Court, which limited its grant of cert. review to a narrower question of statutory interpretation.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. AMY KLOBUCHAR TO
STEVEN GILL BRADBURY

Question 1. Last Congress, I introduced the Torture Victims Relief Reauthorization Act to authorize increased funding for the Office of Refugee Resettlement to support treatment centers and services for torture victims. In the House, Representative Chris Smith has introduced a companion bill. The Center for Victims of Torture, based in St. Paul, has been a pioneer in providing support to victims of torture who are resettled in the United States.

I am pleased that the issue of prohibiting torture, and providing services for its victims, has largely been a bipartisan one.

Mr. Bradbury, I understand that during the Bush administration, you were one of the principal authors of the legal opinions that later became known as the “torture memos.” Knowing what we know now, do you still agree with the views expressed in those memos?

Answer. As I testified in my nomination hearing, I support the McCain-Feinstein Amendment, enacted by Congress in 2015, which mandates that all agencies of the U.S. Government are limited to use of the Army Field Manual in the interrogation of detainees and which prohibits the use of physical coercion. I believe the McCain-Feinstein Amendment represents a historic policy decision and a moral judgment for the United States, and it reaffirms America’s leadership on interrogation policy and practice. The clear mandate of the McCain-Feinstein Amendment appropriately elevates and vindicates the compelling principle of reciprocity in the treatment of captured U.S. service men and women.

Twelve years ago, when I was called upon to advise on the legality of proposed interrogation policies for use by intelligence officers, the McCain-Feinstein Amendment had not been enacted, and it was understood at that time that intelligence agencies operated under a different, less well defined, legal regime from the U.S. Armed Services. I did my best to pull back previous OLC opinions that were overly broad or otherwise flawed; to limit OLC’s advice to the narrowest grounds necessary and avoid reliance on expansive interpretations of presidential power; to spell out very clearly the specific factual assumptions on which the advice depended, including the particular conditions, limitations, and safeguards that were required as part of the policies; and to describe in detail the specifics of those policies so that the senior decision makers on the Principals Committee of the National Security Council would be fully apprised of precisely what they were being asked to approve. The OLC opinions I prepared on these issues are no longer operative, and the law has changed. I welcome the statutory changes enacted by Congress.

Question 2. Mr. Bradbury, I also understand that the Justice Department’s Office of Professional Responsibility raised questions about the objectivity and reasonableness of your analyses in these memos. How would you respond to those statements?

Answer. While the Office of Professional Responsibility (“OPR”) at the Justice Department later took issue with aspects of my opinions, OPR *did not conclude* that my work failed in any way to meet professional standards—in contrast to the earlier, superseded opinions issued by my predecessors. On page 259 of its final report dated July 29, 2009, OPR found that my opinions were “careful, thorough, lawyerly” and “fell within the professional standards that apply to Department attorneys.” Moreover, OPR noted that I “explicitly qualified [my] conclusions and explained the assumptions and limitations that underlay [my] analysis,” and that I had properly “distributed drafts of the memoranda widely, within and without the Department [of Justice], for comments.” And on page 260 of its report, OPR stated, “We commend the Best Practices [for OLC opinions] as laid out [in a memo to the attorneys of OLC authored] by Bradbury and urge the OLC to adhere to them.”

The final OPR report was rejected by the Justice Department in a January 5, 2010 opinion by Associate Deputy Attorney General David Margolis, DOJ’s most senior career official. By tradition and DOJ protocol, all OPR recommendations were presented to Mr. Margolis as the senior career Associate in the Deputy Attorney General’s Office. As a result of the Margolis decision, the OPR report has no continuing force or effect.

Question 3. The National Transportation Safety Board includes reducing fatigue-related accidents on its 2017 Most Wanted List of Transportation Safety Improvements. I recently introduced the Safe Skies Act, which I worked on with Senator Boxer for many years. This commonsense bill would take the rest requirements put into place for passenger pilots after the tragic crash of Colgan Flight 3407 and apply them to cargo pilots who—despite using the same runways and airspace as passenger pilots—currently have looser rest requirements.

Mr. Bradbury, if confirmed, would dealing with pilot fatigue be a priority for you at the Department of Transportation?

Answer. If confirmed, I look forward to working with the Secretary and the FAA to make all aviation safety issues, including issues of pilot fatigue, a top priority, consistent with ethics requirements on matters where I may be recused. As I noted in my nomination hearing, certain aviation matters pending before DOT are one area where I may have recusals because of my recent work representing one of the major U.S. passenger airlines.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RICHARD BLUMENTHAL TO
STEVEN GILL BRADBURY

Question 1. Forthrightness and honesty are extremely important qualities for lawyers, especially those who work for the public in government service. Do you agree that, especially for government lawyers, forthrightness and transparency are extremely valuable qualities?

Answer. Yes.

Question 2. Did you receive the Senate Committee's questionnaire?

Answer. Yes.

Question 3. Did you answer that questionnaire?

Answer. Yes.

Question 4. Did you read question C(1) on page 25, which asks: "Have you ever been . . . the subject of a complaint to, any . . . professional association . . . or other professional group?"

Answer. Yes.

Question 5. How did you answer this question?

Answer. I answered "No."

Question 6. Are you aware that this question does not concern the merits of any complaint filed concerning you, but rather the fact that a complaint had been filed?

Answer. I am aware that the question does not turn on whether a bar complaint proceeding, once initiated, has resulted in any disciplinary action.

Question 7. At the time you answered this question, were you aware of a *New York Times* article on May 19, 2009 with the headline "Ethics Complaint Is Filed Against Lawyers for Bush Over Torture Policy," which reported that a coalition of advocacy groups filed legal ethics complaints about you with the D.C. Bar?

Answer. I recall being aware of news articles in the spring of 2009 reporting that certain persons had announced the intention to submit information or allegations concerning my work at the Department of Justice, along with the work of other senior Justice Department officials, including former Attorney General Mukasey, to relevant state bars in an effort to initiate disciplinary proceedings. I did recall those news reports when I prepared my responses to the Committee's questionnaire.

Question 8. Did anyone inform you of the existence of this article?

Answer. I was aware of the news articles.

Question 9. Did you ever receive, read, or view the complaint discussed in the above-referenced article?

Answer. No, not that I recall.

Question 10. Does your testimony to the Committee contradict this article?

Answer. I believe my testimony is accurate.

Question 11. What steps did you take to make yourself aware of whether this complaint had been filed concerning you?

Answer. In preparing my responses to the Committee's questionnaire, I contacted the Office of Disciplinary Counsel of the D.C. Bar to inquire if any disciplinary complaints had ever been filed against me, and I was advised that the Bar had no record of any complaints.

Question 12. Did you ever contact the D.C. Bar as to whether a complaint had been filed concerning you?

Answer. Yes, three times.

Question 13. When and how did you contact the D.C. Bar as to whether a complaint had been filed concerning you?

Answer. Once by phone when preparing my responses to the Committee's questionnaire; a second time by phone following my nomination hearing; and a third time, in response to the Senator's question, by submitting by mail a sworn affidavit seeking a Certificate from the D.C. Bar's Office of Disciplinary Counsel.

Question 14. What response did the DC Bar give you in response to any inquiry you made as to the presence of a complaint?

Answer. Twice by phone the D.C. Bar's Office of Disciplinary Counsel advised me that it had no record of a bar complaint against me. In response to my written request, the D.C. Bar's Office of Disciplinary Counsel mailed me a Certificate Concerning Discipline and/or Administrative Suspension, a copy of which has been provided to the Committee to be included as part of the record of my nomination hearing. The Certificate, dated July 6, 2017, states in relevant part: "No discipline has been imposed upon this attorney nor has Disciplinary Counsel filed a petition seeking discipline against this attorney. No complaint has been filed, upon which basis,

this attorney has been required to respond to a formal investigation by Disciplinary Counsel.”

Question 15. Do you stand by your response to the Committee?

Answer. Yes.

Question 16. Is your answer to the Committee’s questionnaire regarding past complaints an accurate statement?

Answer. Yes, I believe it is accurate. Section 6 of Rule XI of the D.C. Bar provides that the Disciplinary Counsel shall have the power and duty “[t]o investigate all matters involving alleged misconduct by an attorney subject to the disciplinary jurisdiction of this Court which may come to the attention of Disciplinary Counsel or the Board [on Professional Responsibility of the D.C. Bar] from any source whatsoever, where the apparent facts, if true, may warrant discipline,” and it further provides that “[e]xcept in matters requiring dismissal because the complaint is clearly unfounded on its face or falls outside the disciplinary jurisdiction of the Court, no disposition shall be recommended or undertaken by Disciplinary Counsel [including both formal disciplinary petitions and informal admonitions] until the accused attorney shall have been afforded an opportunity to respond to the allegations.” I never received notice from the Bar’s Disciplinary Counsel that allegations had been received against me, and the Disciplinary Counsel never sought a response from me as to any allegations that may have been submitted to the Bar by any person. Therefore, if any allegations concerning me were submitted to the D.C. Bar, it appears evident that the Office of Disciplinary Counsel must have concluded that such allegations were “clearly unfounded on [their] face” or that they fell “outside the disciplinary jurisdiction” of the Bar. Moreover, the confidentiality requirements of Section 17 of Rule XI of the D.C. Bar prohibit the Disciplinary Counsel from disclosing to me any allegations or materials that did not result in a docketed complaint.

Question 17. What plans do you have to amend your answer to the questionnaire?

Answer. For the reasons described above, I do not plan to amend my answer to the questionnaire.

Question 18. In your public testimony before the Senate Commerce Committee on June 28, 2017, did I ask you about your work representing airlines?

Answer. I believe the question may have come up.

Question 19. What airlines did you mention as clients?

Answer. If asked, I would have mentioned American Airlines.

Question 20. Did you mention United Air Lines?

Answer. I would not have mentioned United Air Lines.

Question 21. I note this representation is mentioned in your written disclosures, but why did you fail to mention your representation of United at the hearing?

Answer. Although listed on my resume as a former client, United Air Lines is not a current client of mine, and I have not represented United Air Lines since approximately 2002. Moreover, the matters I handled for United at that time are no longer active; they involved a potential merger that was abandoned in 2001 and a codeshare alliance that has since been terminated. Since the time I represented it, United Air Lines has passed through bankruptcy, had several changes in management, and underwent a merger with Continental Airlines; in short, United Continental is not the same entity I last represented 15 years ago.

Question 22. What message should the Committee take from a witness’ failure to mention a client as notable and pertinent to the question as United Air Lines?

Answer. I believe my representation of a different United Air Lines so many years ago is highly unlikely to raise (indeed, practically certain not to raise) any conflict-of-interest issue with my potential work for the United States, in the event I am confirmed as General Counsel of DOT.

Question 23. Are there any clients that you forgot to include or chose to exclude from your responses to any inquiries from the Committee?

Answer. Yes. I inadvertently omitted reference to Southeastern Legal Foundation in part 4 of my OGE–278e nominee financial disclosure report, which was submitted to the Committee on June 8, 2016, as explained above in response to Question 2 from Senator Nelson.

Question 24. Please list any clients you have failed to disclose.

Answer. Southeastern Legal Foundation.

Question 25. Will you recuse yourself from all issues affecting your current and former clients during your tenure at the U.S. Department of Transportation?

Answer. If confirmed, I will follow the requirements of the ethics laws and the ethics pledge in the President’s executive order with regard to potential recusals from matters at DOT stemming from my recent work on behalf of clients in private

practice. These will include my recusal from Takata-related matters, as I confirmed to Senator Nelson. In considering recusal questions and the requirements of the ethics laws and regulations, I will consult with the senior career ethics officer at DOT.

Question 26. Lawyers must verify the information on which they rely to make legal distinctions. Law schools teach their first-year students the importance of facts when putting together a legal argument. Without the correct facts and evidence, even incredibly intelligent legal theories will fall apart. My reading of the Justice Department's Office of Professional Responsibility's report on the Office of Legal Counsel's torture memos leads me to conclude you did not attempt to verify or question the information the CIA gave you regarding torture techniques because you did not consider that to be your role.

Should a lawyer rely entirely on representations of fact made by clients or other parties?

Answer. In providing legal advice in some instances, attorneys must rely on the factual representations provided by clients.

Question 27. Do you agree that lawyers are expected to practice at least a minimum amount of factual due diligence?

Answer. Yes, attorneys should ask questions and gain an understanding of the relevant factual basis on which they are providing a legal opinion.

Question 28. Do you agree that scientific research is important to support regulations, especially at the Department of Transportation, which considers extremely complicated technical innovations?

Answer. Yes.

Question 29. Did you rely on a study by Professor James Horne in a memo that justified extended sleep deprivation because it did not cause physical pain or even severe physical pain?

Answer. Our opinion did cite this study in analyzing the application of the specific provisions of the anti-torture statute to sleep deprivation. The opinion did not purport to "justify" sleep deprivation and did not cite this study for the purpose of "justifying" any interrogation policy.

Question 30. Did you read that study in its entirety?

Answer. I don't recall; I know that attorneys in our Office did review the book.

Question 31. Are you aware that Professor Horne responded to your memo by saying that: "I thought it was totally inappropriate to cite my book as being evidence that you can do this and there's not much harm. With additional stress, these people are suffering. I just find it absurd. [The memo] distorts what I really meant.?"

Answer. I have read these statements.

Question 32. What is your response to Professor Horne's statement?

Answer. I understand and accept that the professor's study involved very different circumstances.

Question 33. If you are confirmed as General Counsel, who will you ask for assistance when making legal determinations that depend on important, complex scientific findings?

Answer. If confirmed, I will seek input on complex scientific matters from the engineers and other subject-matter experts within DOT (or elsewhere in government, if necessary) who have the best knowledge regarding those matters.

Question 34. How can the Committee rest assured you won't let others dictate your conclusions?

Answer. I have never let anyone dictate my conclusions as a legal adviser.

Question 35. I take the issue of "regulatory capture" quite seriously. This occurs when an industry "takes over" or "captures" its regulator, exercising undue influence on the regulator's efforts. It has been demonstrated throughout the transportation sector and the U.S. Department of Transportation in recent years.

Are you familiar with the concept of "regulatory capture"?

Answer. Yes.

Question 36. What does this concept mean to you?

Answer. In my understanding, the concept refers to a situation where government regulators allow their regulatory actions to be directed by the interests and objectives of the private industry they are responsible for regulating, rather than by the public interest and the terms and policy goals of the laws they are charged with implementing.

Question 37. Do you think that regulatory capture is a problem in the Department of Transportation?

Answer. In my experience with attorneys and engineers at DOT, I have not observed examples of what I would consider regulatory capture.

Question 38. How would you combat regulatory capture as General Counsel for the Department of Transportation?

Answer. By serving only one client, the United States; by upholding the objective requirements of the law and remaining faithful to the legal mandates enacted by Congress and the requirements of the rules and regulations governing the actions of DOT; by acting in all matters according to the public interest and in accordance with the highest standards and principles of public service; by collaborating closely with experienced career attorneys and other career employees of DOT; and by keeping an open door policy and an atmosphere of relaxed collegiality, so that career staff feel free to be candid and to bring to my attention (or the attention of the Department's Inspector General) any instance where it is perceived that actions are being taken for improper reasons.

Question 39. How would you help protect the Department of Transportation from regulatory capture?

Answer. By staying true to the commitments laid out in response to Question 4.

Question 40. What are your views about the lack of competition in the airline industry?

Answer. Competition in the airline industry is the policy adopted by Congress in the Airline Deregulation Act. Competition in airline services benefits consumers, and I believe the regulatory actions of DOT should preserve and promote competition. If confirmed as DOT General Counsel, I would expect to be guided by that objective, consistent with ethics requirements on matters where I may be recused. As noted, certain aviation matters pending before DOT are one area where I may have recusals because of my recent work representing American Airlines.

Question 41. How can government help support a competitive marketplace?

Answer. Government can help support a competitive marketplace by pursuing regulatory actions that preserve competition and the incentives to invest in innovation and in new facilities and increased capacity when supported by consumer demand, while addressing demonstrated instances of unfair or deceptive practices in the airline industry.

Question 42. Would you support a Government Accountability Office investigation into airlines' anti-competitive practices?

Answer. I understand that DOT is or will be assessing competition in the airline industry. The Government Accountability Office ("GAO") is an arm of Congress, and it is not for me to opine on whether GAO should undertake an investigation. If confirmed, I would expect to cooperate with GAO's investigations and audits.

Question 43. You've advised airlines [on] ways of achieving antitrust immunity for joint ventures with foreign carriers. This immunity exists in perpetuity. Should these grants ever expire?

Answer. It is my understanding that DOT monitors and reviews all grants of antitrust immunity and reserves the right to amend or revoke these grants as circumstances warrant. Again, this area is one where I may have recusals because of my recent representation of American Airlines.

Question 44. Would you support increasing the DOT's enforcement power against the rail, aviation and auto industries?

Answer. I understand that DOT has broad authority across these various transportation modes. If confirmed, I would intend to study whether DOT requires additional authority in any area, to hear from interested Members of Congress and stakeholders on that question, and to work with the Secretary and the modal administrators accordingly.

Question 45. Do you support President Trump's budget proposal, which massively funds an impractical, ego-driven border wall, but provides no real funding for transportation issues like upgrading real infrastructure?

Answer. I did not participate in formulating the President's budget proposal, and I have not studied the details of the proposal. If confirmed to be General Counsel of DOT, my primary concern regarding the budget would be to help ensure adequate resources for regulatory and enforcement activities and the fulfillment of all statutory requirements.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MAGGIE HASSAN TO
STEVEN GILL BRADBURY

Question 1. During your confirmation hearing, you stated that every opinion you gave for the Office of Legal Counsel "represented [your] best judgment of what the laws in effect at the time required." The American Bar Association's Model Rules

of Professional Conduct begin by noting that lawyers are officers of the legal system and public citizens with “special responsibility for the quality of justice.”

Do you believe that you fulfilled this special responsibility as an attorney in the legal opinions you wrote signing off on the use of tactics such as waterboarding?

Question 2. Do you believe that those tactics are in accordance with our shared American values?

Question 3. Was that a factor in your legal analysis?

Question 4. Do you think it should have been?

Answer. As I testified in my nomination hearing, I support the McCain-Feinstein Amendment, enacted by Congress in 2015, which mandates that all agencies of the U.S. Government are limited to use of the Army Field Manual in the interrogation of detainees and which prohibits the use of physical coercion. I believe the McCain-Feinstein Amendment represents a historic policy decision and a moral judgment for the United States, and it reaffirms America’s leadership on interrogation policy and practice. The clear mandate of the McCain-Feinstein Amendment appropriately elevates and vindicates the compelling principle of reciprocity in the treatment of captured U.S. service men and women.

Twelve years ago, when I was called upon to advise on the legality of proposed interrogation policies for use by intelligence officers, the McCain-Feinstein Amendment had not been enacted, and it was understood at that time that intelligence agencies operated under a different, less well defined, legal regime from the U.S. Armed Services. As my opinions acknowledged, I realize that reasonable people may disagree with the legal conclusions I reached on these difficult questions, but I did my best to limit OLC’s advice to the narrowest grounds necessary; to avoid reliance on broad interpretations of presidential power; to spell out very clearly the specific factual assumptions on which the advice depended, including the particular conditions, limitations, and safeguards that were required as part of the policies; and to describe in detail the specifics of those policies so that the senior decision makers on the Principals Committee of the National Security Council would be fully apprised of precisely what they were being asked to approve. As noted above, however, the legal landscape has changed since I authored these opinions, and I welcome those changes. The OLC opinions I prepared on interrogation matters are no longer operative, and the policies I addressed in the past would be prohibited under current law.

Question 5. During your confirmation hearing, when referring to your memoranda on enhanced interrogation techniques, which many people have called torture, you stated, “If I had my druthers, I wouldn’t have engaged in having to address those issues.”

Why did you seek to be the head of the Office of Legal Counsel if you did not want to engage in addressing those difficult legal questions?

Question 6. Why are you now seeking another government legal position where you will be called on to engage in addressing difficult legal questions?

Answer. My comment at the hearing related specifically to the uniquely difficult issues I was called upon to address concerning interrogation. These were not the only challenging issues I dealt with at OLC, but they were the most difficult. If confirmed as General Counsel of DOT, I would appreciate the challenge of addressing interesting and difficult legal issues, particularly in areas of regulation and complex statutory provisions touching on industries of critical national importance, like drones, self-driving vehicles, and other new technologies that are making their way into our transportation systems. It would be a privilege and an honor to serve in this position.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DAN SULLIVAN TO
ELIZABETH ERIN WALSH

Question 1. Alaska’s seafood exports represent 55 percent of total U.S. seafood exports, and make up roughly two-thirds of the value of Alaska’s seafood—over \$3 billion annually. In 2015, Alaska exported to 102 different countries. In recent years, we’ve experienced challenges as seafood consumption in Asian markets change, and U.S. exports face pressure from farmed and other low-priced alternatives sourced internationally.

What specific steps will you take to promote the export of Alaskan seafood in global markets? What improvements can be made in our discussions and strategies with the markets in which the Foreign Commercial Service operates?

Answer. If confirmed, I look forward to finding ways to address the current trade imbalance in fisheries so that our fishery resources create more jobs here in Amer-

ica. In light of the fact that Trade Promotion Authority now includes fish and fishery products, I look forward to collaborating with colleagues throughout government—including NOAA and USTR—on a range of export issues such as this one where the International Trade Administration (ITA) and specifically the U.S. and Foreign Commercial Service can add value. To ensure efficiency and effectiveness, it is critical we work together and leverage each other's capabilities to ensure the competitiveness of U.S. industries.

Question 2. One of the core missions of the Commerce Department is to promote U.S. companies and exports. How will you improve upon the existing efforts to promote opportunities for American companies abroad?

Answer. U.S. exports face significant challenges in many markets. The causes of market obstruction and closure are numerous including: high tariffs; subsidies provided to foreign producers giving them unfair advantage over their U.S. competitors; blocking or unreasonably restricting the flow of digital data and services; theft of trade secrets; as well as non-tariff barriers—such as unnecessary regulations on particular items—to limit competition, including in the services sector.

If confirmed, I will work tirelessly to increase exports by breaking down long-standing trade barriers and fostering increased access for American goods in foreign markets. I intend to work closely with my colleagues within ITA and the Secretary to use all possible tools to encourage other countries to give U.S. producers fair, reciprocal access to their markets.

Question 3. There have been widely reported examples of China denying access to U.S. industry and investment when Chinese companies are granted access to the U.S. market in similar situations. Specifically, how will you improve opportunities for American business in China?

Answer. China has pursued policies that has disadvantaged American companies and workers. If confirmed, I will use every available tool to counter restrictive and unfair trade policies of those who pledge allegiance to free trade while violating its core principles. I believe in free and fair trade and I pledge to work with my colleagues in the Trump Administration and the U.S. Congress to restore a level playing field.

Question 4. What specific changes or improvements will you implement in the mission of the Foreign Commercial Service that will create better conditions for the promotion of U.S. enterprise abroad?

Answer. I support the International Trade Administration's mission of promoting trade and investment, advancing the competitiveness of U.S. industries, and ensuring fair trade through the rigorous enforcement of our trade laws and agreements. Furthermore, I will assist with the critical role the U.S. and Foreign Commercial Service plays in executing our trade laws, particularly for U.S. small and medium-sized businesses.

Question 5. Would you support an expansion of the CFIUS mandate to include market access and reciprocity as factors considered by the Committee?

Answer. CFIUS is an important statute that provides a valuable tool that allows us to advance U.S. national security, foreign policy, and economic objectives. If confirmed, I will work within the Department of Commerce, with the Treasury Department—which leads CFIUS—and the rest of the interagency as appropriate, to support a vigorous and thorough CFIUS review process which must include consideration of market access and reciprocity as important analytics in our national security calculus.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BILL NELSON TO
ELIZABETH ERIN WALSH

Question 1. Florida acts as a central hub for trade with Latin America. In fact, Latin America makes up three of the top five export market fins for Florida. However, the value of goods exported to our top South American trading partners declined from 2015 to 2016.

Given all the anxiety and rhetoric about trade recently, how do you intend to ease tensions with our trade partners in Latin America and increase opportunities for American exports in that part of the world?

Answer. Trade with Latin America remains vital to the prosperity of American businesses, farmers, ranchers, workers and service providers. The United States maintains comprehensive trade agreements with 11 trading partners in the region and is actively engaged in constructive dialogue with the rest of the region on trade through trade and investment framework agreements, bilateral trade councils, and other initiatives. The Administration's commitment to maintaining and expanding

our commercial relationships with our Latin American trading partners is evident in these expansive activities. Through these efforts, the Administration seeks to build a trading system that holds our trading partners to a higher standard of fairness, ensures a level playing field, reduces impediments to free and fair trade, and creates opportunities for American businesses, farmers, ranchers, workers and service providers. I understand that the International Trade Administration's Global Markets unit provides extensive support for U.S. small and medium-sized businesses through the U.S. and Foreign Commercial Service. These services are conducted through a large network of experts and offices across America and in Latin America. The services include cutting edge market intelligence, export counseling, business matchmaking and advocacy. If confirmed, I look forward to supporting Global Markets work in this important region.

Question 2. Do you see statements by the President and others in the administration as counterproductive to that effort?

Answer. The United States recognizes how critical Latin America is to the health and growth of the U.S. economy and maintains strong trade relations with our Latin American trading partners. President Trump had already met with many of his counterparts to discuss how the United States hopes to grow our trading relationship in ways that are fairer and more effective for both the United States and our Latin American trading partners.

Question 3. The Obama Administration had a goal of doubling exports in five years. What sort of goal would you set for exports in the next five years?

Answer. If confirmed, I would welcome the support of the Congress for the International Trade Administration's mission of promoting trade and investment, advancing the competitiveness of U.S. industries, and ensuring fair trade through the rigorous enforcement of our trade laws and agreements.

Question 4. What do you believe is the most important thing Congress could do to increase exports?

Answer. If confirmed, I would welcome the support of the Congress for the International Trade Administration's mission of promoting trade and investment, advancing the competitiveness of U.S. industries, and ensuring fair trade through the rigorous enforcement of our trade laws and agreements. In addition to Congress' support of ITA's mission, I would welcome the support of Congress for the Administration's overall vision for creating a more vibrant, and more competitive, economy, including through tax reform, increased funding for infrastructure, and other legislative steps to stimulate U.S. economic growth.

Question 5. The United States is the global leader in producing phosphate-based fertilizer, with Florida leading the way for the country. Florida produces 50 percent of the Nation's phosphate-based fertilizer, including blended mixtures such as monoammonium phosphate and diammonium phosphate. Given a level playing field, U.S. fertilizer producers can compete with anyone, but they currently face unfair trade barriers in places like the European Union.

Will you commit to working with our producers to find ways to open the E.U. to U.S. fertilizer?

Answer. I share your concerns about the tariff and non-tariff trade barriers that inhibit our U.S. fertilizer producers' ability to export. If confirmed, I commit to working with industry to ensure a level playing field in foreign markets.