

Bush Administration Policy and Legal Directives on Interrogating Al-Qa'ida Detainees

Overview

Newly-declassified documents show that the Central Intelligence Agency's interrogation program was carried out with the full backing of the United States government and with the explicit legal approval of the Attorney General. Key leaders in the White House and on the National Security Council repeatedly affirmed the program, and the Justice Department consistently instructed the CIA that its program was lawful. Notably, the Justice Department told the CIA that the techniques were lawful not just because they were applied to aliens overseas, but also because they complied with constitutional standards that bar conduct that "shocks the conscience" or imposes "cruel and unusual punishment." The CIA relied on that guidance. After the military's Abu Ghraib scandal, the Justice Department began to back away from its past guidance, and the CIA immediately suspended the program. Later, the Justice Department would again conclude, in a formal written opinion, that all of the authorized interrogation techniques complied with the Constitution.

The Justice Department and White House were involved from the very beginning of the interrogation program. Soon after Abu Zubaydah was captured in late March of 2002, CIA lawyers began to discuss interrogation techniques with the Justice Department Office of Legal Counsel (OLC), with the active participation of White House lawyers. On July 17, 2002, National Security Advisor Condoleezza Rice approved the CIA's use of enhanced interrogation techniques (EITs), subject to Justice Department approval. In late July 2002, OLC attorneys advised the CIA orally that the techniques were lawful. On August 1, 2002, OLC provided a written opinion stating that the proposed use of EITs on Zubaydah would not violate the legal prohibition on torture. Several Justice Department and White House lawyers contributed to these memoranda, including Attorney General John Ashcroft, White House Counsel Alberto Gonzales, Counsel to the Vice President David Addington, and Assistant Attorney General for the Criminal Division Michael Chertoff.

The White House and Justice Department continued to affirm the interrogation program. In December 2002, the Legal Advisor to the National Security Council, John Bellinger, twice told the CIA's new General Counsel, Scott Muller, that the enhanced interrogation techniques had been "extensively discussed" and were consistent with Administration policy. On January 13, 2003, White House Counsel Gonzales and Counsel to the Vice President Addington confirmed that the EITs were consistent with Administration legal policy. Three days later, at a meeting that included National Security Advisor Rice, Vice President Cheney, Secretary of State Colin Powell, and Secretary of Defense Don Rumsfeld, among others, during a discussion initiated by Muller of the "arguable inconsistency between what the CIA was authorized to do" and what others might understand from the Administration's public statements regarding "humane treatment" of detainees, "[e]veryone in the room evinced understanding of the issue." The CIA's "past and ongoing use of enhanced techniques was reaffirmed and in no way drawn into question" as a result of this discussion.

With the use of EITs settled administration policy, OLC attorneys worked with the CIA to distill OLC's past guidance into legal principles that could guide the CIA on an ongoing basis and be provided to the CIA's Inspector General. That document was finalized by June 16, 2003.

It explained that the use of EITs “would not constitute conduct of the type that would be prohibited by the Fifth, Eighth or Fourteenth Amendments even were they to be applicable.” That same month, CIA attorneys met with White House Counsel Gonzales, Counsel to the Vice President David Addington, NSC Legal Advisor Bellinger, and Deputy Assistant Attorney General Philbin, who again affirmed the legality of the EITs.

Later that summer, after Administration public statements regarding the humane treatment of detainees, the CIA sought reaffirmation of the program. Director of Central Intelligence George J. Tenet explained in a memorandum to National Security Advisor Rice that “[o]ur officers are relying on the guidance that they are implementing US policy” and stated that the “CIA requests that the Administration reaffirm its commitments to the use of enhanced techniques.”

The Administration reaffirmed the interrogation program following a July 29, 2003 White House meeting that included Vice President Cheney, National Security Advisor Rice, White House Counsel Gonzales, NSC Legal Advisor Bellinger, and Attorney General John Ashcroft. In the meeting, CIA General Counsel Muller presented slides that had been cleared with Justice Department and White House lawyers. The slides explained that the EITs “[d]o not violate the Constitution,” “do not ‘shock the conscience’ under the 5th and 14th Amendments,” and do not violate the 8th Amendment prohibition on cruel and unusual punishment. In the meeting, Attorney General Ashcroft “forcefully reiterated the view of the Department of Justice that the techniques being employed by the CIA were and remain lawful.” The participants in the meeting discussed the use of the waterboard, including the number of times it had been used on Khalid Sheikh Mohammed. Ashcroft then explained “that he was fully aware of the facts and that CIA was ‘well within’ the scope of the [DOJ] opinion and the authority given to the CIA by that opinion.” Finally, Vice President Cheney, National Security Advisor Rice, and Attorney General Ashcroft all agreed that the CIA was “executing Administration policy.”

The military’s Abu Ghraib scandal broke eight months later in April of 2004. The very next month, OLC told the CIA that it had never formally opined that the use of EITs conformed with the “shock the conscience” standard. Director of Central Intelligence Tenet promptly suspended the use of all EITs on May 24, 2004. He spoke with Attorney General Ashcroft four days later regarding the “shock the conscience” standard. The Attorney General repeated that there was no formal OLC opinion and raised concerns regarding the use of the waterboard on Khalid Sheikh Mohammed. DCI Tenet reminded the Attorney General that he had been fully informed of those facts the prior summer and at that time had no concerns regarding the legality of the techniques.

Then, on June 4, 2004, DCI Tenet wrote National Security Advisor Rice to request that the National Security Council reach a decision on the use of EITs. Director Tenet explained that the “CIA has relied in good faith on the understanding that [DOJ] had concluded that properly authorized and conducted interrogations utilizing the [EITs] could be applied . . . consistent with the ‘shock the conscience’ standards of the Fifth Amendment to the Constitution.” Director Tenet noted DOJ’s newfound uncertainty on the issue and sought an Administration decision on continuing the program.

Meanwhile, the Justice Department continued to back away from its prior legal advice under mounting pressure. On June 7, the Washington Post reported on the existence of an August 2002 memorandum from OLC to White House Counsel Gonzales regarding the use of EITs under federal law. Three days later, Assistant Attorney General for OLC Jack Goldsmith informed CIA General Counsel Muller that the “legal principles” document created by the CIA in collaboration with OLC in 2003 did not reflect OLC’s views. On June 13, the Washington Post published the full OLC memorandum to Gonzales. Approximately a week later, Assistant Attorney General Goldsmith withdrew that memorandum. Later that month, Director Tenet notified the leadership of congressional intelligence committees of DOJ’s change in views and the CIA’s resulting suspension of the program.

The National Security Council Principals met in response to Director Tenet’s memo on July 2, 2004. National Security Advisor Rice, White House Counsel Gonzales, NSC Legal Advisor Bellinger, Attorney General Ashcroft, and Deputy Attorney General Jim Comey were present, among others. At the meeting, the Attorney General “repeatedly said that the enhanced techniques employed by CIA, other than the waterboard, are legal.” He explained that there was need for further review of the waterboard technique and that there was “little precedent applying the ‘shock the conscience’ test in the kind of circumstances involved here.”

Shortly after Director Tenet’s tenure as DCI had concluded on July 11, 2004, the Justice Department authorized the resumption of the full interrogation program. On July 22, 2004, Attorney General John Ashcroft confirmed in writing that the use of the previously-approved techniques (except the waterboard) would not violate the Constitution or any statute or treaty of the United States. On August 6, 2004, Daniel Levin, Acting Assistant Attorney General for OLC, authorized the use of the waterboard for a particular detainee under certain conditions. (The CIA ultimately did not see a need to utilize the waterboard for that detainee, or any who followed.) More broadly, in an OLC opinion dated December 30, 2004, Levin explained that OLC “ha[s] reviewed [its] prior opinions addressing issues involving treatment of detainees and do[es] not believe that any of their conclusions would be different under the [revised] standards set forth in this memorandum.” Finally, on May 30, 2005, Stephen Bradbury, the Principal Deputy Assistant Attorney General for OLC, issued an OLC opinion that concluded that the use of the previously approved techniques, including the waterboard, would not violate the constitutional “shock the conscience” standard.

Bush Administration Policy and Legal Directives on Interrogating Al-Qa'ida Detainees

Timeline

- February 7, 2002 President Bush issues a memorandum titled “Humane Treatment of al Qaeda and Taliban Detainees.” [\[Exhibit A\]](#) The memorandum directs, “[a]s a matter of policy, the Armed Forces [to] continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.” [\[Exhibit A at 2\]](#) Administration officials later explained that the memorandum was crafted to exclude the CIA from this commitment. [\[Exhibit B at 3\]](#)
- March 27, 2002 Abu Zubaydeh (AZ) is captured, badly wounded.
- April 2002 CIA Office of General Counsel (OGC) lawyers begin to discuss interrogation techniques with lawyers from the Office of Legal Counsel (OLC) at DOJ. NSC Legal Advisor John Bellinger arranges the first meeting on the issue and tells OLC that the State Department should not be informed of the project. [Office of Professional Responsibility Report: Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists at [37-38](#) (July 29, 2009) (“[OPR Report](#)”)]
- April 16, 2002 National Security Council (NSC) meeting on interrogation techniques attended by OLC and CIA OGC attorneys. [\[OPR Report at 40-41\]](#)
- July 11, 2002 OLC Deputy Assistant Attorney General John Yoo and an OLC line attorney brief Assistant Attorney General for the Criminal Division Michael Chertoff on their research on the interrogation issue, sharing a draft OLC opinion. [\[OPR Report at 45\]](#)
- July 12, 2002 Yoo and the OLC line attorney brief White House Counsel Alberto Gonzales on their research on the interrogation issue, sharing a draft OLC opinion. [\[OPR Report at 45\]](#)
- July 13, 2002 Meeting on interrogation techniques attended by executive branch officials, including Assistant Attorney General Chertoff and representatives from OLC, CIA, and NSC staff. [\[OPR Report at 45\]](#)
- July 16, 2002 Yoo and the OLC line attorney meet again with Gonzales at the White House regarding interrogation techniques. [\[OPR Report at 50\]](#)

- July 17, 2002 National Security Advisor Condoleezza Rice conveys policy approval for use of Enhanced Interrogation Techniques (EITs), subject to DOJ legal approval. [Senate Intelligence Committee, Declassified Narrative Describing The Department of Justice Office of Legal Counsel's Opinions on the CIA's Detention and Interrogation Program at [3-4](#) (Apr. 22, 2009) ("[Rockefeller Report](#)")]
- July 24 & 26, 2002 OLC orally advises CIA OGC that the EITs, including the waterboard, are lawful. [[Exhibit C at 1](#)]
- August 1, 2002 Classified OLC Memorandum for John Rizzo "memorializes our previous oral advice, given on July 24, 2002 and July 26, 2002," that the proposed conduct regarding the interrogation of Abu Zubaydah, would not violate the legal prohibition on torture. Ten enhanced interrogation techniques, including the waterboard, were authorized. [[Exhibit C at 18](#)] OLC also issues an unclassified opinion addressing the applicability of a federal criminal prohibition on torture to the interrogation of detainees. The memoranda reflected input from many Administration lawyers, including White House Counsel Gonzales, Counsel to the Vice President David Addington, Attorney General John Ashcroft, Assistant Attorney General Chertoff, Assistant Attorney General for OLC Jay Bybee (who signed the memoranda), Deputy Assistant Attorney General Philbin, Deputy Assistant Attorney General Yoo, and Counsel to the Attorney General Adam Ciongoli. [[OPR Report at 57-62](#)]
- October 23, 2002 Scott Muller starts as CIA General Counsel
- December 2002 NSC Legal Advisor Bellinger confirms for Muller on two occasions that the use of EITs "had been extensively discussed and was consistent with the President's direction as reflected in the February Memo [on humane treatment]." [[Exhibit B at 2](#)]
- December 13, 2002 In one of several conversations on the issue, Deputy Assistant Attorney General for OLC John Yoo informs Muller that the February memo is not applicable to CIA and that DOJ had considered the issue in preparing its opinions on the use of EITs. [[Exhibit B at 2-3](#)]
- January 13, 2003 Muller meets with White House Counsel Alberto Gonzales, Counsel to the Vice President David Addington, Yoo, and DOD General Counsel Jim Haynes. Addington and Gonzales confirm that the February memo on humane treatment only applies to the Armed Forces. [[Exhibit B at 3-4](#)]

January 16, 2003 Tenet and Muller attend a meeting with Rice, Secretary of Defense Rumsfeld, Haynes, Secretary of State Colin Powell, and Vice President Cheney. According to a memorandum from Muller that describes the meeting:

“[Muller] pointed out to the National Security Advisor . . . and the others that there was an arguable inconsistency between what CIA was authorized to do and what at least some in the international community might expect in light of the Administration’s public statements about ‘humane treatment’ of detainees on and after the February Memo. Everyone in the room evinced understanding of the issue. CIA’s past and ongoing use of enhanced techniques was reaffirmed and in no way drawn into question. Questions were instead directed at DOD . . . Rice clearly distinguished between the issues to be addressed by the military and CIA.”

[\[Exhibit B at 4\]](#)

April - June 2003 CIA OGC collaborates with OLC to produce a document: “Legal Principles Applicable to CIA Detention and Interrogation of Captured Al-Qa’ida Personnel.” (“Legal Principles”).

June 16, 2003 CIA personnel fax the final version of the Legal Principles to Deputy Assistant Attorney General for OLC Patrick Philbin. [\[Exhibit D\]](#) This document states, among much else, that the use of EITs in the interrogation of Al-Qa’ida personnel would not violate the Constitution for two independent reasons.

First, the relevant provisions (the Fifth and Fourteenth Amendments’ guarantees of due process, which protects against government conduct that “shocks the conscience,”¹ and the Eighth Amendment’s prohibition of cruel and unusual punishment) would not apply to this conduct overseas.

Second, the techniques **“would not constitute conduct of the type that would be prohibited by the Fifth, Eighth or Fourteenth Amendments even were they to be applicable.”**

[\[Exhibit D at 4-5\]](#) Muller specifically recalls discussing this language with Yoo and another OLC attorney while they worked on the Legal Principles document.

¹ The “shock-the-conscience” standard derives from a United States Supreme Court case, *Rochin v. California*, 342 U.S. 165 (1952), in which Justice Frankfurter wrote that the Fifth Amendment’s protection against deprivation of liberty without due process includes a protection against government (in that case police) conduct that is so brutal that it “shocks the conscience.”

- June 20, 2003 Muller and CIA OGC attorney Jonathan Fredman meet with Gonzales, Addington, Philbin, and Bellinger, who reaffirm the lawfulness of the EITs and discuss the Administration response to an inquiry from Senator Leahy.
- June 25-27, 2003 Administration statements raise questions about the policy of the Administration. Specifically: (1) DOD General Counsel Jim Haynes told Senator Leahy that “United States policy is to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with this commitment [to prevent the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States].” [\[Exhibit E at 1\]](#) (2) The White House issues a statement in honor of United Nations International Day in Support of Victims of Torture that raised similar questions. (6/26) (3) A Deputy White House Press Secretary states in an interview that currently U.S. government detainees are being treated “humanely.” (6/27)
- July 3, 2003 Director of Central Intelligence George Tenet sends a memorandum to NSA Rice, requesting reaffirmation of the CIA’s interrogation program and the use of EITs. [\[Exhibit F\]](#) That memo notes that:
- “Last September and again recently the Department of Justice’s Office of Legal Counsel (OLC) has advised that CIA’s use of the enhanced techniques does not violate the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment, as ratified by the United States in 1994. . . . Moreover, CIA officers have held ongoing discussions with OLC personnel on the legal principles to ensure that changing facts, and the capture of other HVDs, still comply with the original OLC guidance.
- “Our officers are relying on the guidance they have been given that they are implementing US policy. . . . CIA requests that the Administration reaffirm its commitment to the use of enhanced techniques in this Program, as appropriate.”
- [\[Exhibit F at 2-3\]](#)
- July 29, 2003 Tenet and Muller meet with Attorney General John Ashcroft, now Associate Deputy Attorney General Philbin, NSA Rice, White House Counsel Alberto Gonzales, Legal Advisor to the NSC John Bellinger, and Vice President Dick Cheney for a review of the Interrogation Program. [\[Exhibit G at 1\]](#)

Muller reviewed briefing slides page by page, including a slide entitled “Legal Authorities” which stated that properly conducted and authorized interrogations: “Do not violate the Constitution. They do not ‘shock the conscience’ under the 5th and 14th Amendments. The 8th Amendment prohibition on cruel and unusual ‘punishment’ is inapplicable.” [\[Exhibit H at 4\]](#) It further stated that the Convention Against Torture was limited to U.S. constitutional requirements. [\[Exhibit H at 4\]](#)

In response, the Attorney General “forcefully reiterated the view of the Department of Justice that the techniques being employed by the CIA were and remain lawful and do not violate either the anti-torture statute or US obligations under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment. . . . In the course of the discussion, the Attorney General and [ADAG] Pat Philbin gave a lengthy explanation of the law and the applicable legal principles. Their explanation squares completely with the understanding under which the CIA has been operating.” [\[Exhibit G at 2\]](#)

The participants discussed the use of the waterboard, including that it had been applied 119 times to KSM, and Ashcroft said “that he was fully aware of the facts and that CIA was “well within” the scope of the [DOJ] opinion and the authority given to the CIA by that opinion.” [\[Exhibit G at 4-5\]](#)

Cheney, Rice, and Ashcroft all agreed that the CIA was “executing Administration policy.” [\[Exhibit G at 5\]](#) Cheney, Rice, and Gonzales advised that some combination of them would brief the President that the CIA was using techniques that could be controversial but had been determined to be lawful. Cheney, Rice, and Gonzales also decided, with Tenet’s concurrence, that it was unnecessary for the full NSC Principals Committee to review and reaffirm the program. [\[Exhibit G at 5\]](#) Rice would later decide that Powell and Rumsfeld should be formally briefed on the program. [\[Exhibit G at 6\]](#)

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|----------------|--|
| Sept. 16, 2003 | Secretaries Powell and Rumsfeld are formally briefed on the use of EITs. [Rockefeller Report at 7] |
| April 28, 2004 | 60 Minutes broadcasts graphic photos of detainee mistreatment at Abu Ghraib. |
| April 30, 2004 | Government publicly releases report by Major General Taguba regarding misconduct by military policy at Abu Ghraib. |

- May 2004 Philbin advises Muller that DOJ was taking the position that it had not formally opined that the CIA's use of EITs was consistent with the Fifth Amendment standard of not shocking the conscience, since the Amendment does not apply overseas. [\[Exhibit I at 1\]](#)
- May 24, 2004 Tenet orders the suspension of the interrogation techniques, pending written reaffirmation of the constitutional analysis from DOJ. [\[Exhibit I at 1\]](#)
- May 25, 2004 CIA issues a Lotus Note to the relevant overseas locations that suspends the use of EITs. [\[Exhibit J at 1\]](#)
- May 28, 2004 Tenet speaks with Ashcroft regarding the "shock the conscience" standard of the Fifth Amendment. Ashcroft reiterates that there was no formal OLC opinion, and raised concerns relating to the number of times the waterboard had been used. Tenet reminds Ashcroft that he had been informed of all that the previous summer and had not had any concerns regarding the lawfulness of the conduct. [\[Exhibit K\]](#) *See also* [\[Exhibit L\]](#)
- From CIA Chief of Staff John Moseman's note of the call: "The DCI discussed the 'shocking the conscience' standard. The AG indicated that there was no formal OLC opinion on the constitutional matter, and reiterated that the Constitution did not apply to foreign nationals overseas. ... The AG indicated that the Justice Department would have no concerns with the techniques, other than waterboarding." [\[Exhibit K\]](#)
- June 3, 2004 Tenet submits his resignation to President Bush, effective July 11, 2004.
- June 4, 2004 Tenet sends a formal memorandum to the Deputy Director, Operations telling him to stand down and not to use any interrogation techniques, other than question and answer, pending clarification from DOJ:
- "The General Counsel has advised that the Department of Justice (DOJ) has not formally opined in writing that CIA's use of interrogation techniques would meet the standards of the United States Constitution if those standards were applicable to aliens overseas. The absence of a formal DOJ opinion on this legal issue has possible implications for the use of interrogation techniques in future cases. Although the interrogation program remains authorized, out of an abundance of caution, I am directing the immediate suspension of any use of interrogation techniques,

enhanced or otherwise, until further notice. Only debriefings, i.e., questions and answers, may continue.”

[\[Exhibit M\]](#)

Tenet submits a memorandum to Rice requesting that the NSC Principals and Attorney General reaffirm continuing legal and policy support for the use of EITs on high value detainees (HVDs), noting that he had recently been informed by DOJ that it had not completed its analysis of the 5th Amendment “shock the conscience” issue:

“This memorandum requests that at the earliest opportunity the National Security Council Principals and the Attorney General in particular affirm, on behalf of the Administration, its continuing legal and policy support for the Central Intelligence Agency (CIA) to employ . . . “stress and duress” interrogation techniques as part of its interrogation program of High Value Detainees (HVD).

“To date, as reflected in contemporaneous documentation, CIA has relied in good faith on the understanding that the Department of Justice had concluded that properly authorized and conducted interrogations utilizing the techniques authorized for Abu Zubaydah could be applied to others consistent with the “shock the conscience” standards of the Fifth Amendment to the Constitution. In the past week, however, we have been informed by the Department of Justice that it has not completed its legal analysis of that issue and that all it is prepared to say at this point is that the requirements of the Constitution do not apply to aliens overseas. This position raises serious questions about the appropriateness of utilizing the Attorney General approved interrogation techniques in future cases. . . .

. . .

“Finally, I am concerned because in recent days the Office of Legal Counsel (OLC) of the Department of Justice has equivocated on one of the bedrock legal principles we understood to have been established up to now – that the Program is not at odds with the Administration’s policy, stated in a letter to Senator Leahy last year as well as in White House public statements, that it is US policy to ‘treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent’ with the US

Constitution. If the OLC is now willing only to say that the Constitution does not apply to aliens overseas, then I believe the Principals need to know that, especially since that was a key part if the Program briefing the Principals were given last year”

[\[Exhibit N at 1, 3\]](#)

- June 7, 2004 The Washington Post reports on the existence of the August 1, 2002 memorandum from OLC to White House Counsel Gonzales regarding the use of EITs under federal law.
- June 10, 2004 Assistant Attorney General, OLC, Jack Goldsmith sends Muller a letter saying that the 2003 Legal Principles document does not and did not reflect OLC opinion and views.
- June 13, 2004 The Washington Post publishes the August 1, 2002 OLC memorandum for Gonzales.
- June 14, 2004 Muller replied to Goldsmith’s letter of June 10:
- “Representatives of the Department of Justice’s Office of Legal Counsel (OLC) and CIA’s Office of General Counsel (OGC) jointly prepared the Legal Principles document during May and June 2003 based principally on legal research, opinions, and advice from OLC. . . . The Legal Principles document also served as a basis for the ‘Legal Authorities’ briefing slide used at a 29 July 2003 meeting attended by the Vice President, the National Security Advisor, the Attorney general, who was accompanied by Patrick Philbin, the Director of Central Intelligence, and others. The ‘Legal Authorities’ slide was independently coordinated by OGC with OLC and the White House Counsel’s office prior to the July meeting. That meeting and a follow-on briefing of the Secretaries of Defense and State using the same slide resulted in a reaffirmation of the policy and legal bases for the CIA’s detention and interrogation program.”

[\[Exhibit O at 1\]](#)

- June 18, 2004 In a memorandum to CIA Inspector General John Helgeson regarding his review of the CIA’s detention and interrogation activities, Goldsmith addresses the present disagreement over the status of the Legal Principles and states “There is no dispute that OLC attorneys reviewed and provided comments on several drafts of the [Legal Principles].” [\[Exhibit P at 1\]](#)

June 20, 2004 Around this date, Goldsmith withdraws the August 1, 2002 OLC opinion for Gonzales.

June 22, 2004 Tenet sends individual letters to the Chairs and Vice-Chairs of the House and Senate Intelligence Committee (Senators Roberts and Rockefeller and Representatives Goss and Harman) that notifies them of the suspension of the use of EITs and the related shift in DOJ's posture. Tenet also recounts the prior executive and legislative branch approvals of the interrogation program. [\[Exhibit Q at 2\]](#)

July 2, 2004 Tenet and Muller meet with Rice, Ashcroft, Deputy Attorney General Jim Comey, Gonzales, Bellinger and others seeking a decision from the NSC Principals that the use of EITs does not violate U.S. law or the standards of conduct enunciated by the courts under the Fifth, Eighth, and Fourteenth Amendments. Specifically, the talking points [\[Exhibit R\]](#) and slides [\[Exhibit S\]](#) prepared for that meeting requests clarification:

“[W]hether the AG’s opinions are based solely on the fact that aliens overseas have no rights under Article 16 [of the Convention Against Torture] and the US Constitution or whether he is prepared to state that these interrogation techniques do not violate the substantive standards of conduct enunciated by the courts under the Fifth, Eighth, and Fourteenth Amendments to the US Constitution”

[\[Exhibit R at 3\]](#)

and specifically asks NSC Principals, include DOJ, to opine: “on whether any of CIA’s specifically identified interrogation techniques violate the standards of conduct enunciated by courts under the Fifth, Eighth, and Fourteenth Amendments to the US Constitution.” [\[Exhibit S at 10\]](#) The slides also seek to confirm that the use of EITs is consistent with the Administration’s public statements and has the policy backing of the NSC Principals. [\[Exhibit S at 7-8\]](#)

According to the Memorandum for the Record of the meeting:

Muller provided “a summary of policy and legal issues that had led to the halt in CIA’s rendition and interrogation program. Among the issues Muller raised were the possible policy disconnect between public policy statements about prisoner treatment and the CIA program and constitutional (‘shock the conscience’) standards and other legal/policy questions about enhanced techniques.

“The Attorney General repeatedly said that the enhanced techniques employed by CIA, other than the waterboard, are legal. He and others discussed the need for a further review of the waterboard technique, primarily because of the view that the technique has been employed in a different fashion than that which DOJ initially approved.”

With respect to the policy and consistency issues, “[a]t varying points, Rice stated that any perceived disparity would be dealt with later, that there was no disparity, [and] that the techniques were humane in her view;” she also questioned the public significance of the letter from Haynes to Leahy.

The AG further stated that “There is little precedent applying the ‘shock the conscience’ test in the kind of circumstances involved here and that the case law was developed in the different context of law enforcement cases.”

[\[Exhibit T at 1-3\]](#)

July 11, 2004

Director Tenet’s last day as DCI.

July 22, 2004

Attorney General Ashcroft writes Acting Director of Central Intelligence John McLaughlin to confirm that the use of the previously-approved techniques (except the waterboard) would not violate the Constitution or any statute or treaty of the United States. [\[Exhibit U\]](#)

August 6, 2004

Acting Assistant Attorney General for OLC Daniel Levin writes Acting CIA General Counsel John Rizzo to authorize the use of the waterboard for a particular detainee under certain conditions and based on specific assumptions. (Ultimately, the CIA did not utilize the waterboard for the detainee.) [\[Exhibit V\]](#)

December 30, 2004

Acting Assistant Attorney General Levin issues an opinion addressing the legal standards applicable to the interrogation of detainees by the U.S. government. That opinion has a footnote explaining that OLC “ha[s] reviewed [its] prior opinions addressing issues involving treatment of detainees and do[es] not believe that any of their conclusions would be different under the [revised] standards set forth in this memorandum.”² [\[Exhibit W at 2\]](#)

May 30, 2005

Stephen Bradbury, the Principal Deputy Assistant Attorney General for OLC, issues an opinion that concludes that the use of the previously-approved techniques, including the waterboard, would not violate the constitutional “shock the conscience” standard. [\[Exhibit X at 25\]](#)

² The Justice Department OPR Report notes:

In describing his work on the issue of EITs, Levin said the CIA never pressured him. Rather, he said it only “made clear that they thought it was important,” but that “their view was you guys tell us what’s legal or not.” He stated, however, that the “White House pressed” him on these issues. He commented: “I mean, a part of their job is to push, you know, and push as far as you can. Hopefully, not in a ridiculous way, but they want to make sure you’re not leaving any executive power on the table.”

Exhibits

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Chronology — Pages [1](#), [2](#), [3](#), [4](#), [5](#), [6](#), [7](#), [8](#), [9](#), [10](#), [11](#)

Exhibit A

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THE WHITE HOUSE

WASHINGTON

February 7, 2002

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 11 JUN 2010 200900076

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
CHIEF OF STAFF TO THE PRESIDENT
DIRECTOR OF CENTRAL INTELLIGENCE
ASSISTANT TO THE PRESIDENT FOR NATIONAL
SECURITY AFFAIRS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of al Qaeda and Taliban Detainees

1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm -- ushered in not by us, but by terrorists -- requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.
2. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:
 - a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.
 - b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority, under the Constitution to suspend Geneva as here

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exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.

- c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."
 - d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.
3. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.
 4. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.
 5. I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.
 6. I hereby direct the Secretary of State to communicate my determinations in an appropriate manner to our allies, and other countries and international organizations cooperating in the war against terrorism of global reach.

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Exhibit B

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OGC-FO-2003-50015
12 February 2003

MEMORANDUM FOR THE RECORD

SUBJECT: ~~(S)~~ "Humane" Treatment of CIA Detainees

1. ~~(S)~~ This Memorandum for the Record pulls together in one place various conversations I have had over the past two months concerning the issue of CIA treatment of detainees and the issue of the meaning and applicability to CIA of the Memorandum for the Vice President et al from the President dated 7 February 2002 and titled *Humane Treatment of al Qaeda and Taliban Detainee*. That memorandum (the "February Memo") is addressed to, among others, the Secretary of Defense and the Director of Central Intelligence and states in paragraph 3 the following:

"Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." (Emphasis added).

1.4(c)

2. ~~(S)~~ [REDACTED] Based on a number of conversations starting in early December (a small portion of which are referred to in the Lotus Notes attached hereto), it is, and has been, the consistent understanding of CIA personnel that the foregoing language is not applicable to, was not intended to, and does not prohibit or limit CIA in the use of the type of interrogation techniques approved for use by CIA in the 1 August 2002 Memorandum for John Rizzo from the Assistant Attorney General, Office of Legal Counsel or impose a requirement of "humane" treatment.

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SUBJECT: ~~(S)~~ "Humane Treatment" of CIA Detainees

3. ~~(S)~~ Among other things, after the issuance of the February Memo, the use of enhanced interrogation techniques was approved by the Attorney General through the Office of Legal Counsel and carried on thereafter with the knowledge and concurrence of, among others, the Assistant Attorney General in charge of the Criminal Division, the National Security Adviser, Counsel to the President, Counsel to the National Security Adviser, and Counsel to the Vice President. As of November 2002, others, including the General Counsel to the Department of Defense, were aware generally of the fact that CIA was authorized to conduct interrogations using techniques beyond those permitted under the Geneva conventions. No one ever suggested that there was any inconsistency between the authorized CIA conduct and the February Memo.

1.4(c)

3.5(c)

4. ~~(S)~~ [REDACTED] Consistent with the foregoing, in conversations in early December, I confirmed that former Acting General Counsel and [REDACTED] understood, based on the foregoing and the care with which the issue had been analyzed and decided, that CIA use of interrogation techniques was authorized by the President and that they understood that the February Memo was intended not to be applicable to CIA and in any case predated the subsequent approval of the use of enhanced interrogation techniques. Director of Central Intelligence (DCI) Chief of Staff John Moseman similarly confirmed his clear understanding that the February Memo placed no limit on CIA's authorities.

5. ~~(S)~~ In two conversations before the holidays in December, Counsel to the National Security Counsel John Bellinger confirmed to me that the issue of use of the type of techniques authorized by the Attorney General had been extensively discussed and was consistent with the President's direction as reflected in the February Memo. Bellinger encouraged me to discuss the issue with Deputy Assistant Attorney General John Yoo.

6. ~~(S)~~ In several conversations with John Yoo including one on 13 December 2002, John Yoo informed me that the February Memo was not applicable to or binding on CIA and that the issue of its intent and effect had been considered by the Department of Justice in considering its opinions on enhanced

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SUBJECT: ~~(S)~~ "Humane Treatment" of CIA Detainees

interrogation. Yoo stated that the language of the memorandum had been deliberately limited to be binding only on "the Armed Forces" which did not include the CIA. He stated that he would be happy to write a written opinion to that effect. A draft of such an opinion was delivered to me on 9 January. I have provided informal comments to Yoo. The opinion has not yet been finalized. (In the same conversations, Yoo informed me that the Department of Justice had concluded that the use of enhanced interrogation techniques not only did not violate the US criminal torture statute but that it did not violate any other US criminal law. I have asked Yoo to write a formal opinion to that effect).

7. ~~(S)~~ On or about 26 November 2002, CIA received a memorandum from the Secretary of Defense dated 11 October 2002 regarding the transfer of an individual from the Department of Defense (DOD) control to the control of the CIA. The memorandum, addressed to the DCI, asked the DCI to confirm that the detainee would be returned to DOD control at an appropriate time and stated in its second paragraph:

"Please note that the President's 7 February 2002 determination requires that the United States Armed Forces 'shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.'"

8. ~~(S)~~ I discussed the Secretary of Defense's memorandum to the DCI with the DOD General Counsel on two occasions after we received it. On both occasions, DOD's General Counsel stated his understanding that the February Memo was limited in purpose and effect to the "Armed Forces" and that inclusion of the above quoted language was not intended in any way to reflect a different understanding of the scope, purpose, or effect of the February Memo.

9. ~~(S)~~ At a meeting in the Office of the White House Counsel on 13 January 2003, I discussed with Judge Gonzales, David Addington, John Yoo, and Jim Haynes the issues presented by a letter which had been received over the Holidays from a group called Human Rights Watch. At the meeting, David Addington and Judge Gonzales confirmed that the February Memo

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SUBJECT: ~~(S)~~ "Humane Treatment" of CIA Detainees

was applicable only to the Armed Forces. Addington further stated and Yoo agreed that the term "humane treatment" was intended to be no more restrictive than the Eight Amendment's prohibition on cruel and unusual punishment.

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10. ~~(TS)~~ [] At a meeting with National Security Adviser Condoleezza Rice, the Secretary of Defense, the General Counsel to the Department of Defense, the Secretary of State, the Vice President (by video conference), the DCI, and myself on 16 January, I pointed out to the National Security Advisor (as I had in the meeting described in paragraph 9 above) and the others that there was an arguable inconsistency between what CIA was authorized to do and what at least some in the international community might expect in light of the Administration's public statements about "humane treatment" of detainees on and after the February Memo. Everyone in the room evinced understanding of the issue. CIA's past and ongoing use of enhanced techniques was reaffirmed and in no way drawn into question. Questions instead were directed at DOD which, according to DOD General Counsel, was about to commence an internal legal review to determine what interrogation techniques the military would authorize in what circumstances. Rice clearly distinguished between the issues to be addressed by the military and CIA.

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11. ~~(S)~~ At a meeting with, among others Jim Haynes, [] and John Yoo at the Department of Defense on 22 January 2003, John Yoo repeated his statements that the February Memo is not applicable to CIA and that the word "humane" remains consistent with the Eight Amendment.

Scott W. Muller
General Counsel

Attachments:
As stated

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SUBJECT: (S) "Humane Treatment" of CIA Detainees

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Exhibit C



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U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

August 1, 2002

Memorandum for John Rizzo
Acting General Counsel of the Central Intelligence Agency

Interrogation of al Qaeda Operative

You have asked for this Office's views on whether certain proposed conduct would violate the prohibition against torture found at Section 2340A of title 18 of the United States Code. You have asked for this advice in the course of conducting interrogations of Abu Zubaydah. As we understand it, Zubaydah is one of the highest ranking members of the al Qaeda terrorist organization, with which the United States is currently engaged in an international armed conflict following the attacks on the World Trade Center and the Pentagon on September 11, 2001. This letter memorializes our previous oral advice, given on July 24, 2002 and July 26, 2002, that the proposed conduct would not violate this prohibition.

I.

Our advice is based upon the following facts, which you have provided to us. We also understand that you do not have any facts in your possession contrary to the facts outlined here, and this opinion is limited to these facts. If these facts were to change, this advice would not necessarily apply. Zubaydah is currently being held by the United States. The interrogation team is certain that he has additional information that he refuses to divulge. Specifically, he is withholding information regarding terrorist networks in the United States or in Saudi Arabia and information regarding plans to conduct attacks within the United States or against our interests overseas. Zubaydah has become accustomed to a certain level of treatment and displays no signs of willingness to disclose further information. Moreover, your intelligence indicates that there is currently a level of "chatter" equal to that which preceded the September 11 attacks. In light of the information you believe Zubaydah has and the high level of threat you believe now exists, you wish to move the interrogations into what you have described as an "increased pressure phase."

As part of this increased pressure phase, Zubaydah will have contact only with a new interrogation specialist, whom he has not met previously, and the Survival, Evasion, Resistance, Escape ("SERE") training psychologist who has been involved with the interrogations since they began. This phase will likely last no more than several days but could last up to thirty days. In this phase, you would like to employ ten techniques that you believe will dislocate his

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expectations regarding the treatment he believes he will receive and encourage him to disclose the crucial information mentioned above. These ten techniques are: (1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard. You have informed us that the use of these techniques would be on an as-needed basis and that not all of these techniques will necessarily be used. The interrogation team would use these techniques in some combination to convince Zubaydah that the only way he can influence his surrounding environment is through cooperation. You have, however, informed us that you expect these techniques to be used in some sort of escalating fashion, culminating with the waterboard, though not necessarily ending with this technique. Moreover, you have also orally informed us that although some of these techniques may be used with more than once, that repetition will not be substantial because the techniques generally lose their effectiveness after several repetitions. You have also informed us that Zubaydah sustained a wound during his capture, which is being treated.

Based on the facts you have given us, we understand each of these techniques to be as follows. 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.

For walling, a flexible false wall will be constructed. The individual is placed with his heels touching the 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 further reduce the probability of injury, the individual is allowed to rebound from the flexible wall. You have orally informed us that the false wall is in part constructed to create a loud sound when the individual hits it, which will further shock or surprise in the individual. In part, the idea is to create a sound that will make the impact seem far worse than it is and that will be far worse than any injury that might result from the action.

The facial hold is used to hold the head immobile. One open palm is placed on either side of the individual's face. The fingertips are kept well away from the individual's eyes.

With the facial slap or insult 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 invades the individual's personal space. 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, and/or humiliation.

Cramped confinement involves the placement of the individual in a confined space, the dimensions of which restrict the individual's movement. The confined space is usually dark.

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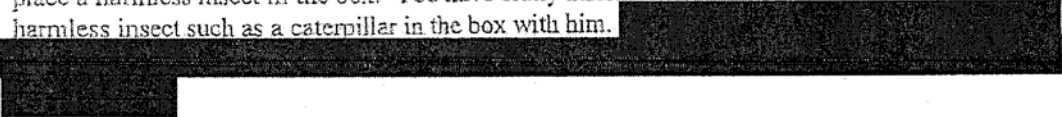
The duration of confinement varies based upon the size of the container. For the larger confined space, the individual can stand up or sit down; the smaller space is large enough for the subject to sit down. Confinement in the larger space can last up to eighteen hours; for the smaller space, confinement lasts for no more than two hours.

Wall standing is used to induce 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. His fingers support all of his body weight. The individual is not permitted to move or reposition his hands or feet.

A variety of stress positions 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, somewhat like walling, they are designed to produce the physical discomfort associated with muscle fatigue. Two particular stress positions are likely to be used on Zubaydah: (1) sitting on the floor with legs extended straight out in front of him with his arms raised above his head; and (2) kneeling on the floor while leaning back at a 45 degree angle. You have also orally informed us that through observing Zubaydah in captivity, you have noted that he appears to be quite flexible despite his wound.

Sleep deprivation may be used. You have indicated that your purpose in using this technique is to reduce the individual's ability to think on his feet and, through the discomfort associated with lack of sleep, to motivate him to cooperate. The effect of such sleep deprivation will generally remit after one or two nights of uninterrupted sleep. You have informed us that your research has revealed that, in rare instances, some individuals who are already predisposed to psychological problems may experience abnormal reactions to sleep deprivation. Even in those cases, however, reactions abate after the individual is permitted to sleep. Moreover, personnel with medical training are available to and will intervene in the unlikely event of an abnormal reaction. You have orally informed us that you would not deprive Zubaydah of sleep for more than eleven days at a time and that you have previously kept him awake for 72 hours, from which no mental or physical harm resulted.

You would like to place Zubaydah in a cramped confinement box with an insect. You have informed us that he appears to have a fear of insects. In particular, you would like to tell Zubaydah that you intend to place a stinging insect into the box with him. You would, however, place a harmless insect in the box. You have orally informed us that you would in fact place a harmless insect such as a caterpillar in the box with him.



Finally, you would like to use a technique called the "waterboard." In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water

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is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual's blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of "suffocation and incipient panic," i.e., the perception of drowning. The individual does not breathe any water into his lungs. During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated. The water is usually applied from a canteen cup or small watering can with a spout. You have orally informed us that this procedure triggers an automatic physiological sensation of drowning that the individual cannot control even though he may be aware that he is in fact not drowning. You have also orally informed us that it is likely that this procedure would not last more than 20 minutes in any one application.

We also understand that a medical expert with SERE experience will be present throughout this phase and that the procedures will be stopped if deemed medically necessary to prevent severe mental or physical harm to Zubaydah. As mentioned above, Zubaydah suffered an injury during his capture. You have informed us that steps will be taken to ensure that this injury is not in any way exacerbated by the use of these methods and that adequate medical attention will be given to ensure that it will heal properly.

II.

In this part, we review the context within which these procedures will be applied. You have informed us that you have taken various steps to ascertain what effect, if any, these techniques would have on Zubaydah's mental health. These same techniques, with the exception of the insect in the cramped confined space, have been used and continue to be used on some members of our military personnel during their SERE training. Because of the use of these procedures in training our own military personnel to resist interrogations, you have consulted with various individuals who have extensive experience in the use of these techniques. You have done so in order to ensure that no prolonged mental harm would result from the use of these proposed procedures.

Through your consultation with various individuals responsible for such training, you have learned that these techniques have been used as elements of a course of conduct without any reported incident of prolonged mental harm. [REDACTED] of the SERE school, [REDACTED] has reported that, during the seven-year period that he spent in those positions, there were two requests from Congress for information concerning alleged injuries resulting from the training. One of these inquiries was prompted by the temporary physical injury a trainee sustained as result of being placed in a

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confinement box. The other inquiry involved claims that the SERE training caused two individuals to engage in criminal behavior, namely, felony shoplifting and downloading child pornography onto a military computer. According to this official, these claims were found to be baseless. Moreover, he has indicated that during the three and a half years he spent as [REDACTED] of the SERE program, he trained 10,000 students. Of those students, only two dropped out of the training following the use of these techniques. Although on rare occasions some students temporarily postponed the remainder of their training and received psychological counseling, those students were able to finish the program without any indication of subsequent mental health effects.

You have informed us that you have consulted with [REDACTED] who has ten years of experience with SERE training [REDACTED]

[REDACTED] He stated that, during those ten years, insofar as he is aware, none of the individuals who completed the program suffered any adverse mental health effects. He informed you that there was one person who did not complete the training. That person experienced an adverse mental health reaction that lasted only two hours. After those two hours, the individual's symptoms spontaneously dissipated without requiring treatment or counseling and no other symptoms were ever reported by this individual. According to the information you have provided to us, this assessment of the use of these procedures includes the use of the waterboard.

Additionally, you received a memorandum from the [REDACTED] which you supplied to us. [REDACTED] has experience with the use of all of these procedures in a course of conduct, with the exception of the insect in the confinement box and the waterboard. This memorandum confirms 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. [REDACTED] reported that a small minority of students have had temporary adverse psychological reactions during training. Of the 26,829 students trained from 1992 through 2001 in the Air Force SERE training, 4.3 percent of those students had contact with psychology services. Of those 4.3 percent, only 3.2 percent were pulled from the program for psychological reasons. Thus, out of the students trained overall, only 0.14 percent were pulled from the program for psychological reasons. Furthermore, although [REDACTED] indicated that surveys of students having completed this training are not done, he expressed confidence that the training did not cause any long-term psychological impact. He based his conclusion on the debriefing of students that is done after the training. More importantly, he based this assessment on the fact that although training is required to be extremely stressful in order to be effective, very few complaints have been made regarding the training. During his tenure, in which 10,000 students were trained, no congressional complaints have been made. While there was one Inspector General complaint, it was not due to psychological concerns. Moreover, he was aware of only one letter inquiring about the long-term impact of these techniques from an individual trained

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over twenty years ago. He found that it was impossible to attribute this individual's symptoms to his training. ██████████ concluded that if there are any long-term psychological effects of the United States Air Force training using the procedures outlined above they "are certainly minimal."

With respect to the waterboard, you have also orally informed us that the Navy continues to use it in training. You have informed us that your on-site psychologists, who have extensive experience with the use of the waterboard in Navy training, have not encountered any significant long-term mental health consequences from its use. Your on-site psychologists have also indicated that JPRA has likewise not reported any significant long-term mental health consequences from the use of the waterboard. You have informed us that other services ceased use of the waterboard because it was so successful as an interrogation technique, but not because of any concerns over any harm, physical or mental, caused by it. It was also reported to be almost 100 percent effective in producing cooperation among the trainees. ██████████ also indicated that he had observed the use of the waterboard in Navy training some ten to twelve times. Each time it resulted in cooperation but it did not result in any physical harm to the student.

You have also reviewed the relevant literature and found no empirical data on the effect of these techniques, with the exception of sleep deprivation. With respect to sleep deprivation, you have informed us that is not uncommon for someone to be deprived of sleep for 72 hours and still perform excellently on visual-spatial motor tasks and short-term memory tests. Although some individuals may experience hallucinations, according to the literature you surveyed, those who experience such psychotic symptoms have almost always had such episodes prior to the sleep deprivation. You have indicated the studies of lengthy sleep deprivation showed no psychosis, loosening of thoughts, flattening of emotions, delusions, or paranoid ideas. In one case, even after eleven days of deprivation, no psychosis or permanent brain damage occurred. In fact the individual reported feeling almost back to normal after one night's sleep. Further, based on the experiences with its use in military training (where it is induced for up to 48 hours), you found that rarely, if ever, will the individual suffer harm after the sleep deprivation is discontinued. Instead, the effects remit after a few good nights of sleep.

You have taken the additional step of consulting with U.S. interrogations experts, and other individuals with oversight over the SERE training process. None of these individuals was aware of any prolonged psychological effect caused by the use of any of the above techniques either separately or as a course of conduct. Moreover, you consulted with outside psychologists who reported that they were unaware of any cases where long-term problems have occurred as a result of these techniques.

Moreover, in consulting with a number of mental health experts, you have learned that the effect of any of these procedures will be dependant on the individual's personal history, cultural history and psychological tendencies. To that end, you have informed us that you have

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completed a psychological assessment of Zubaydah. This assessment is based on interviews with Zubaydah, observations of him, and information collected from other sources such as intelligence and press reports. Our understanding of Zubaydah's psychological profile, which we set forth below, is based on that assessment.

According to this assessment, Zubaydah, though only 31, rose quickly from very low level mujahedin to third or fourth man in al Qaeda. He has served as Usama Bin Laden's senior lieutenant. In that capacity, he has managed a network of training camps. He has been instrumental in the training of operatives for al Qaeda, the Egyptian Islamic Jihad, and other terrorist elements inside Pakistan and Afghanistan. He acted as the Deputy Camp Commander for al Qaeda training camp in Afghanistan, personally approving entry and graduation of all trainees during 1999-2000. From 1996 until 1999, he approved all individuals going in and out of Afghanistan to the training camps. Further, no one went in and out of Peshawar, Pakistan without his knowledge and approval. He also acted as al Qaeda's coordinator of external contacts and foreign communications. Additionally, he has acted as al Qaeda's counter-intelligence officer and has been trusted to find spies within the organization.

Zubaydah has been involved in every major terrorist operation carried out by al Qaeda. He was a planner for the Millennium plot to attack U.S. and Israeli targets during the Millennium celebrations in Jordan. Two of the central figures in this plot who were arrested have identified Zubaydah as the supporter of their cell and the plot. He also served as a planner for the Paris Embassy plot in 2001. Moreover, he was one of the planners of the September 11 attacks. Prior to his capture, he was engaged in planning future terrorist attacks against U.S. interests.

Your psychological assessment indicates that it is believed Zubaydah wrote al Qaeda's manual on resistance techniques. You also believe that his experiences in al Qaeda make him well-acquainted with and well-versed in such techniques. As part of his role in al Qaeda, Zubaydah visited individuals in prison and helped them upon their release. Through this contact and activities with other al Qaeda mujahedin, you believe that he knows many stories of capture, interrogation, and resistance to such interrogation. Additionally, he has spoken with Aymari al-Zawahiri, and you believe it is likely that the two discussed Zawahiri's experiences as a prisoner of the Russians and the Egyptians.

Zubaydah stated during interviews that he thinks of any activity outside of jihad as "silly." He has indicated that his heart and mind are devoted to serving Allah and Islam through jihad and he has stated that he has no doubts or regrets about committing himself to jihad. Zubaydah believes that the global victory of Islam is inevitable. You have informed us that he continues to express his unabated desire to kill Americans and Jews.

Your psychological assessment describes his personality as follows. He is "a highly self-directed individual who prizes his independence." He has "narcissistic features," which are evidenced in the attention he pays to his personal appearance and his "obvious 'efforts' to

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demonstrate that he is really a rather 'humble and regular guy.'" He is "somewhat compulsive" in how he organizes his environment and business. He is confident, self-assured, and possesses an air of authority. While he admits to at times wrestling with how to determine who is an "innocent," he has acknowledged celebrating the destruction of the World Trade Center. He is intelligent and intellectually curious. He displays "excellent self-discipline." The assessment describes him as a perfectionist, persistent, private, and highly capable in his social interactions. He is very guarded about opening up to others and your assessment repeatedly emphasizes that he tends not to trust others easily. He is also "quick to recognize and assess the moods and motivations of others." Furthermore, he is proud of his ability to lie and deceive others successfully. Through his deception he has, among other things, prevented the location of al Qaeda safehouses and even acquired a United Nations refugee identification card.

According to your reports, Zubaydah does not have any pre-existing mental conditions or problems that would make him likely to suffer prolonged mental harm from your proposed interrogation methods. Through reading his diaries and interviewing him, you have found no history of "mood disturbance or other psychiatric pathology[.]" "thought disorder[.]" . . . enduring mood or mental health problems." He is in fact "remarkably resilient and confident that he can overcome adversity." When he encounters stress or low mood, this appears to last only for a short time. He deals with stress by assessing its source, evaluating the coping resources available to him, and then taking action. Your assessment notes that he is "generally self-sufficient and relies on his understanding and application of religious and psychological principles, intelligence and discipline to avoid and overcome problems." Moreover, you have found that he has a "reliable and durable support system" in his faith, "the blessings of religious leaders, and camaraderie of like-minded mujahedin brothers." During detention, Zubaydah has managed his mood, remaining at most points "circumspect, calm, controlled, and deliberate." He has maintained this demeanor during aggressive interrogations and reductions in sleep. You describe that in an initial confrontational incident, Zubaydah showed signs of sympathetic nervous system arousal, which you think was possibly fear. Although this incident led him to disclose intelligence information, he was able to quickly regain his composure, his air of confidence, and his "strong resolve" not to reveal any information.

Overall, you summarize his primary strengths as the following: ability to focus, goal-directed discipline, intelligence, emotional resilience, street savvy, ability to organize and manage people, keen observation skills, fluid adaptability (can anticipate and adapt under duress and with minimal resources), capacity to assess and exploit the needs of others, and ability to adjust goals to emerging opportunities.

You anticipate that he will draw upon his vast knowledge of interrogation techniques to cope with the interrogation. Your assessment indicates that Zubaydah may be willing to die to protect the most important information that he holds. Nonetheless, you are of the view that his belief that Islam will ultimately dominate the world and that this victory is inevitable may provide the chance that Zubaydah will give information and rationalize it solely as a temporary

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setback. Additionally, you believe he may be willing to disclose some information, particularly information he deems to not be critical, but which may ultimately be useful to us when pieced together with other intelligence information you have gained.

III.

Section 2340A makes it a criminal offense for any person “outside of the United States [10] commit[] or attempt[] to commit torture.” Section 2340(1) defines torture as:

an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody of physical control.

18 U.S.C. § 2340(1). As we outlined in our opinion on standards of conduct under Section 2340A, a violation of 2340A requires a showing that: (1) the torture occurred outside the United States; (2) the defendant acted under the color of law; (3) the victim was within the defendant’s custody or control; (4) the defendant specifically intended to inflict severe pain or suffering; and (5) that the act inflicted severe pain or suffering. *See* Memorandum for John Rizzo, Acting General Counsel for the Central Intelligence Agency, 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 3 (August 1, 2002) (“Section 2340A Memorandum”). You have asked us to assume that Zubayadah is being held outside the United States, Zubayadah is within U.S. custody, and the interrogators are acting under the color of law. At issue is whether the last two elements would be met by the use of the proposed procedures, namely, whether those using these procedures would have the requisite mental state and whether these procedures would inflict severe pain or suffering within the meaning of the statute.

Severe Pain or Suffering. In order for pain or suffering to rise to the level of torture, the statute requires that it be severe. As we have previously explained, this reaches only extreme acts. *See id.* at 13. Nonetheless, drawing upon cases under the Torture Victim Protection Act (TVPA), which has a definition of torture that is similar to Section 2340’s definition, we found that a single event of sufficiently intense pain may fall within this prohibition. *See id.* at 26. As a result, we have analyzed each of these techniques separately. In further drawing upon those cases, we also have found that courts tend to take a totality-of-the-circumstances approach and consider an entire course of conduct to determine whether torture has occurred. *See id.* at 27. Therefore, in addition to considering each technique separately, we consider them together as a course of conduct.

Section 2340 defines torture as the infliction of severe physical or mental pain or suffering. We will consider physical pain and mental pain separately. *See* 18 U.S.C. § 2340(1). With respect to *physical* pain, we previously concluded that “severe pain” within the meaning of

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Section 2340 is pain that is difficult for the individual to endure and is of an intensity akin to the pain accompanying serious physical injury. *See* Section 2340A Memorandum at 6. Drawing upon the TVPA precedent, we have noted that examples of acts inflicting severe pain that typify torture are, among other things, severe beatings with weapons such as clubs, and the burning of prisoners. *See id.* at 24. We conclude below that none of the proposed techniques inflicts such pain.

The facial hold and the attention grasp involve no physical pain. In the absence of such pain it is obvious that they cannot be said to inflict severe physical pain or suffering. The stress positions and wall standing both may result in muscle fatigue. Each involves the sustained holding of a position. In wall standing, it will be holding a position in which all of the individual's body weight is placed on his finger tips. The stress positions will likely include sitting on the floor with legs extended straight out in front and arms raised above the head, and kneeling on the floor and leaning back at a 45 degree angle. Any pain associated with muscle fatigue is not of the intensity sufficient to amount to "severe physical pain or suffering" under the statute, nor, despite its discomfort, can it be said to be difficult to endure. Moreover, you have orally informed us that no stress position will be used that could interfere with the healing of Zubaydah's wound. Therefore, we conclude that these techniques involve discomfort that falls far below the threshold of severe physical pain.

Similarly, although the confinement boxes (both small and large) are physically uncomfortable because their size restricts movement, they are not so small as to require the individual to contort his body to sit (small box) or stand (large box). You have also orally informed us that despite his wound, Zubaydah remains quite flexible, which would substantially reduce any pain associated with being placed in the box. We have no information from the medical experts you have consulted that the limited duration for which the individual is kept in the boxes causes any substantial physical pain. As a result, we do not think the use of these boxes can be said to cause pain that is of the intensity associated with serious physical injury.

The use of one of these boxes with the introduction of an insect does not alter this assessment. As we understand it, no actually harmful insect will be placed in the box. Thus, though the introduction of an insect may produce trepidation in Zubaydah (which we discuss below), it certainly does not cause physical pain.

As for sleep deprivation, it is clear that depriving someone of sleep does not involve severe physical pain within the meaning of the statute. While sleep deprivation may involve some physical discomfort, such as the fatigue or the discomfort experienced in the difficulty of keeping one's eyes open, these effects remit after the individual is permitted to sleep. Based on the facts you have provided us, we are not aware of any evidence that sleep deprivation results in severe physical pain or suffering. As a result, its use does not violate Section 2340A.

Even those techniques that involve physical contact between the interrogator and the

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individual do not result in severe pain. The facial slap and walling contain precautions to ensure that no pain even approaching this level results. The slap is delivered with fingers slightly spread, which you have explained to us is designed to be less painful than a closed-hand slap. The slap is also delivered to the fleshy part of the face, further reducing any risk of physical damage or serious pain. The facial slap does not produce pain that is difficult to endure. Likewise, walling involves quickly pulling the person forward and then thrusting him against a flexible false wall. You have informed us that the sound of hitting the wall will actually be far worse than any possible injury to the individual. The use of the rolled towel around the neck also reduces any risk of injury. While it may hurt to be pushed against the wall, any pain experienced is not of the intensity associated with serious physical injury.

As we understand it, when the waterboard is used, the subject's body responds as if the subject were drowning—even though the subject may be well aware that he is in fact not drowning. You have informed us that this procedure does not inflict actual physical harm. Thus, although the subject may experience the fear or panic associated with the feeling of drowning, the waterboard does not inflict physical pain. As we explained in the Section 2340A Memorandum, "pain and suffering" as used in Section 2340 is best understood as a single concept, not distinct concepts of "pain" as distinguished from "suffering." See Section 2340A Memorandum at 6 n.3. The waterboard, which inflicts no pain or actual harm whatsoever, does not, in our view inflict "severe pain or suffering." Even if one were to parse the statute more finely to attempt to treat "suffering" as a distinct concept, the waterboard could not be said to inflict severe suffering. The waterboard is simply a controlled acute episode, lacking the connotation of a protracted period of time generally given to suffering.

Finally, as we discussed above, you have informed us that in determining which procedures to use and how you will use them, you have selected techniques that will not harm Zubaydah's wound. You have also indicated that numerous steps will be taken to ensure that none of these procedures in any way interferes with the proper healing of Zubaydah's wound. You have also indicated that, should it appear at any time that Zubaydah is experiencing severe pain or suffering, the medical personnel on hand will stop the use of any technique.

Even when all of these methods are considered combined in an overall course of conduct, they still would not inflict severe physical pain or suffering. As discussed above, a number of these acts result in no physical pain, others produce only physical discomfort. You have indicated that these acts will not be used with substantial repetition, so that there is no possibility that severe physical pain could arise from such repetition. Accordingly, we conclude that these acts neither separately nor as part of a course of conduct would inflict severe physical pain or suffering within the meaning of the statute.

We next consider whether the use of these techniques would inflict severe *mental* pain or suffering within the meaning of Section 2340. Section 2340 defines severe mental pain or suffering as "the prolonged mental harm caused by or resulting from" one of several predicate

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acts. 18 U.S.C. § 2340(2). Those predicate acts are: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that any of the preceding acts will be done to another person. *See* 18 U.S.C. § 2340(2)(A)–(D). As we have explained, this list of predicate acts is exclusive. *See* Section 2340A Memorandum at 8. No other acts can support a charge under Section 2340A based on the infliction of severe mental pain or suffering. *See id.* Thus, if the methods that you have described do not either in and of themselves constitute one of these acts or as a course of conduct fulfill the predicate act requirement, the prohibition has not been violated. *See id.* Before addressing these techniques, we note that it is plain that none of these procedures involves a threat to any third party, the use of any kind of drugs, or for the reasons described above, the infliction of severe physical pain. Thus, the question is whether any of these acts, separately or as a course of conduct, constitutes a threat of severe physical pain or suffering, a procedure designed to disrupt profoundly the senses, or a threat of imminent death. As we previously explained, whether an action constitutes a threat must be assessed from the standpoint of a reasonable person in the subject's position. *See id.* at 9.

No argument can be made that the attention grasp or the facial hold constitute threats of imminent death or are procedures designed to disrupt profoundly the senses or personality. In general the grasp and the facial hold will startle the subject, produce fear, or even insult him. As you have informed us, the use of these techniques is not accompanied by a specific verbal threat of severe physical pain or suffering. To the extent that these techniques could be considered a threat of severe physical pain or suffering, such a threat would have to be inferred from the acts themselves. Because these actions themselves involve no pain, neither could be interpreted by a reasonable person in Zubaydah's position to constitute a threat of severe pain or suffering. Accordingly, these two techniques are not predicate acts within the meaning of Section 2340.

The facial slap likewise falls outside the set of predicate acts. It plainly is not a threat of imminent death, under Section 2340(2)(C), or a procedure designed to disrupt profoundly the senses or personality, under Section 2340(2)(B). Though it may hurt, as discussed above, the effect is one of smarting or stinging and surprise or humiliation, but not severe pain. Nor does it alone constitute a threat of severe pain or suffering, under Section 2340(2)(A). Like the facial hold and the attention grasp, the use of this slap is not accompanied by a specific verbal threat of further escalating violence. Additionally, you have informed us that in one use this technique will typically involve at most two slaps. Certainly, the use of this slap may dislodge any expectation that Zubaydah had that he would not be touched in a physically aggressive manner. Nonetheless, this alteration in his expectations could hardly be construed by a reasonable person in his situation to be tantamount to a threat of severe physical pain or suffering. At most, this technique suggests that the circumstances of his confinement and interrogation have changed. Therefore, the facial slap is not within the statute's exclusive list of predicate acts.

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Walling plainly is not a procedure calculated to disrupt profoundly the senses or personality. While walling involves what might be characterized as rough handling, it does not involve the threat of imminent death or, as discussed above, the infliction of severe physical pain. Moreover, once again we understand that use of this technique will not be accompanied by any specific verbal threat that violence will ensue absent cooperation. Thus, like the facial slap, walling can only constitute a threat of severe physical pain if a reasonable person would infer such a threat from the use of the technique itself. Walling does not in and of itself inflict severe pain or suffering. Like the facial slap, walling may alter the subject's expectation as to the treatment he believes he will receive. Nonetheless, the character of the action falls so far short of inflicting severe pain or suffering within the meaning of the statute that even if he inferred that greater aggressiveness was to follow, the type of actions that could be reasonably be anticipated would still fall below anything sufficient to inflict severe physical pain or suffering under the statute. Thus, we conclude that this technique falls outside the proscribed predicate acts.

Like walling, stress positions and wall-standing are not procedures calculated to disrupt profoundly the senses, nor are they threats of imminent death. These procedures, as discussed above, involve the use of muscle fatigue to encourage cooperation and do not themselves constitute the infliction of severe physical pain or suffering. Moreover, there is no aspect of violence to either technique that remotely suggests future severe pain or suffering from which such a threat of future harm could be inferred. They simply involve forcing the subject to remain in uncomfortable positions. While these acts may indicate to the subject that he may be placed in these positions again if he does not disclose information, the use of these techniques would not suggest to a reasonable person in the subject's position that he is being threatened with severe pain or suffering. Accordingly, we conclude that these two procedures do not constitute any of the predicate acts set forth in Section 2340(2).

As with the other techniques discussed so far, cramped confinement is not a threat of imminent death. It may be argued that, focusing in part on the fact that the boxes will be without light, placement in these boxes would constitute a procedure designed to disrupt profoundly the senses. As we explained in our recent opinion, however, to "disrupt profoundly the senses" a technique must produce an extreme effect in the subject. See Section 2340A Memorandum at 10-12. We have previously concluded that this requires that the procedure cause substantial interference with the individual's cognitive abilities or fundamentally alter his personality. See *id.* at 11. Moreover, the statute requires that such procedures must be calculated to produce this effect. See *id.* at 10; 18 U.S.C. § 2340(2)(B).

With respect to the small confinement box, you have informed us that he would spend at most two hours in this box. You have informed us that your purpose in using these boxes is not to interfere with his senses or his personality, but to cause him physical discomfort that will encourage him to disclose critical information. Moreover, your imposition of time limitations on the use of either of the boxes also indicates that the use of these boxes is not designed or calculated to disrupt profoundly the senses or personality. For the larger box, in which he can

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both stand and sit, he may be placed in this box for up to eighteen hours at a time, while you have informed us that he will never spend more than an hour at time in the smaller box. These time limits further ensure that no profound disruption of the senses or personality, were it even possible, would result. As such, the use of the confinement boxes does not constitute a procedure calculated to disrupt profoundly the senses or personality.

Nor does the use of the boxes threaten Zubaydah with severe physical pain or suffering. While additional time spent in the boxes may be threatened, their use is not accompanied by any express threats of severe physical pain or suffering. Like the stress positions and walling, placement in the boxes is physically uncomfortable but any such discomfort does not rise to the level of severe physical pain or suffering. Accordingly, a reasonable person in the subject's position would not infer from the use of this technique that severe physical pain is the next step in his interrogator's treatment of him. Therefore, we conclude that the use of the confinement boxes does not fall within the statute's required predicate acts.

In addition to using the confinement boxes alone, you also would like to introduce an insect into one of the boxes with Zubaydah. As we understand it, you plan to inform Zubaydah that you are going to place a stinging insect into the box, but you will actually place a harmless insect in the box, such as a caterpillar. If you do so, to ensure that you are outside the predicate act requirement, you must inform him that the insects will not have a sting that would produce death or severe pain. If, however, you were to place the insect in the box without informing him that you are doing so, then, in order to not commit a predicate act, you should not affirmatively lead him to believe that any insect is present which has a sting that could produce severe pain or suffering or even cause his death. [REDACTED] so long as you take either of the approaches we have described, the insect's placement in the box would not constitute a threat of severe physical pain or suffering to a reasonable person in his position. An individual placed in a box, even an individual with a fear of insects, would not reasonably feel threatened with severe physical pain or suffering if a caterpillar was placed in the box. Further, you have informed us that you are not aware that Zubaydah has any allergies to insects, and you have not informed us of any other factors that would cause a reasonable person in that same situation to believe that an unknown insect would cause him severe physical pain or death. Thus, we conclude that the placement of the insect in the confinement box with Zubaydah would not constitute a predicate act.

Sleep deprivation also clearly does not involve a threat of imminent death. Although it produces physical discomfort, it cannot be said to constitute a threat of severe physical pain or suffering from the perspective of a reasonable person in Zubaydah's position. Nor could sleep deprivation constitute a procedure calculated to disrupt profoundly the senses, so long as sleep deprivation (as you have informed us is your intent) is used for limited periods, before hallucinations or other profound disruptions of the senses would occur. To be sure, sleep deprivation may reduce the subject's ability to think on his feet. Indeed, you indicate that this is

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the intended result. His mere reduced ability to evade your questions and resist answering does not, however, rise to the level of disruption required by the statute. As we explained above, a disruption within the meaning of the statute is an extreme one, substantially interfering with an individual's cognitive abilities, for example, inducing hallucinations, or driving him to engage in uncharacteristic self-destructive behavior. *See infra* 13; Section 2340A Memorandum at 11. Therefore, the limited use of sleep deprivation does not constitute one of the required predicate acts.

We find that the use of the waterboard constitutes a threat of imminent death. As you have explained the waterboard procedure to us, it creates in the subject the uncontrollable physiological sensation that the subject is drowning. Although the procedure will be monitored by personnel with medical training and extensive SERE school experience with this procedure who will ensure the subject's mental and physical safety, the subject is not aware of any of these precautions. From the vantage point of any reasonable person undergoing this procedure in such circumstances, he would feel as if he is drowning at very moment of the procedure due to the uncontrollable physiological sensation he is experiencing. Thus, this procedure cannot be viewed as too uncertain to satisfy the imminence requirement. Accordingly, it constitutes a threat of imminent death and fulfills the predicate act requirement under the statute.

Although the waterboard constitutes a threat of imminent death, prolonged mental harm must nonetheless result to violate the statutory prohibition on infliction of severe mental pain or suffering. *See* Section 2340A Memorandum at 7. We have previously concluded that prolonged mental harm is mental harm of some lasting duration, e.g., mental harm lasting months or years. *See id.* Prolonged mental harm is not simply the stress experienced in, for example, an interrogation by state police. *See id.* Based on your research into the use of these methods at the SERE school and consultation with others with expertise in the field of psychology and interrogation, you do not anticipate that any prolonged mental harm would result from the use of the waterboard. Indeed, you have advised us that the relief is almost immediate when the cloth is removed from the nose and mouth. In the absence of prolonged mental harm, no severe mental pain or suffering would have been inflicted, and the use of these procedures would not constitute torture within the meaning of the statute.

When these acts are considered as a course of conduct, we are unsure whether these acts may constitute a threat of severe physical pain or suffering. You have indicated to us that you have not determined either the order or the precise timing for implementing these procedures. It is conceivable that these procedures could be used in a course of escalating conduct, moving incrementally and rapidly from least physically intrusive, e.g., facial hold, to the most physical contact, e.g., walling or the waterboard. As we understand it, based on his treatment so far, Zubaydah has come to expect that no physical harm will be done to him. By using these techniques in increasing intensity and in rapid succession, the goal would be to dislodge this expectation. Based on the facts you have provided to us, we cannot say definitively that the entire course of conduct would cause a reasonable person to believe that he is being threatened

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with severe pain or suffering within the meaning of section 2340. On the other hand, however, under certain circumstances—for example, rapid escalation in the use of these techniques culminating in the waterboard (which we acknowledge constitutes a threat of imminent death) accompanied by verbal or other suggestions that physical violence will follow—might cause a reasonable person to believe that they are faced with such a threat. Without more information, we are uncertain whether the course of conduct would constitute a predicate act under Section 2340(2).

Even if the course of conduct were thought to pose a threat of physical pain or suffering, it would nevertheless—on the facts before us—not constitute a violation of Section 2340A. Not only must the course of conduct be a predicate act, but also those who use the procedure must actually cause prolonged mental harm. Based on the information that you have provided to us, indicating that no evidence exists that this course of conduct produces any prolonged mental harm, we conclude that a course of conduct using these procedures and culminating in the waterboard would not violate Section 2340A.

Specific Intent. To violate the statute, an individual must have the specific intent to inflict severe pain or suffering. Because specific intent is an element of the offense, the absence of specific intent negates the charge of torture. As we previously opined, to have the required specific intent, an individual must expressly intend to cause such severe pain or suffering. *See* Section 2340A Memorandum at 3 *citing* *Carter v. United States*, 530 U.S. 255, 267 (2000). We have further found that if a defendant acts with the good faith belief that his actions will not cause such suffering, he has not acted with specific intent. *See id.* at 4 *citing* *South Atl. Lmtd. Ptrshp. of Tenn. v. Reise*, 218 F.3d 518, 531 (4th Cir. 2002). A defendant acts in good faith when he has an honest belief that his actions will not result in severe pain or suffering. *See id.* *citing* *Cheek v. United States*, 498 U.S. 192, 202 (1991). Although an honest belief need not be reasonable, such a belief is easier to establish where there is a reasonable basis for it. *See id.* at 5. Good faith may be established by, among other things, the reliance on the advice of experts. *See id.* at 8.

Based on the information you have provided us, we believe that those carrying out these procedures would not have the specific intent to inflict severe physical pain or suffering. The objective of these techniques is not to cause severe physical pain. First, the constant presence of personnel with medical training who have the authority to stop the interrogation should it appear it is medically necessary indicates that it is not your intent to cause severe physical pain. The personnel on site have extensive experience with these specific techniques as they are used in SERE school training. Second, you have informed us that you are taking steps to ensure that Zubaydah's injury is not worsened or his recovery impeded by the use of these techniques.

Third, as you have described them to us, the proposed techniques involving physical contact between the interrogator and Zubaydah actually contain precautions to prevent any serious physical harm to Zubaydah. In "walling," a rolled hood or towel will be used to prevent

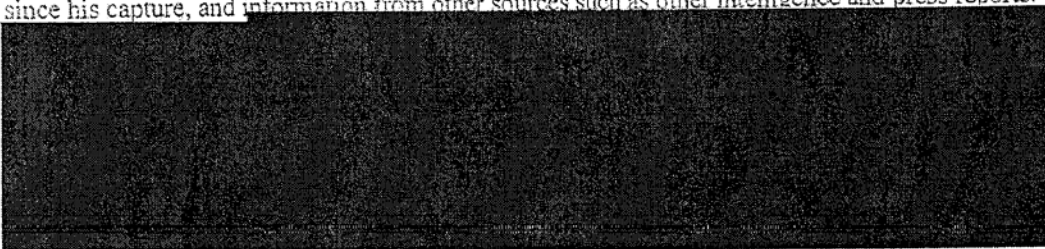
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whiplash and he will be permitted to rebound from the flexible wall to reduce the likelihood of injury. Similarly, in the "facial hold," the fingertips will be kept well away from the his eyes to ensure that there is no injury to them. The purpose of that facial hold is not injure him but to hold the head immobile. Additionally, while the stress positions and wall standing will undoubtedly result in physical discomfort by tiring the muscles, it is obvious that these positions are not intended to produce the kind of extreme pain required by the statute.

Furthermore, no specific intent to cause severe mental pain or suffering appears to be present. As we explained in our recent opinion, an individual must have the specific intent to cause prolonged mental harm in order to have the specific intent to inflict severe mental pain or suffering. See Section 2340A Memorandum at 8. Prolonged mental harm is substantial mental harm of a sustained duration, e.g., harm lasting months or even years after the acts were inflicted upon the prisoner. As we indicated above, a good faith belief can negate this element. Accordingly, if an individual conducting the interrogation has a good faith belief that the procedures he will apply, separately or together, would not result in prolonged mental harm, that individual lacks the requisite specific intent. This conclusion concerning specific intent is further bolstered by the due diligence that has been conducted concerning the effects of these interrogation procedures.

The mental health experts that you have consulted have indicated that the psychological impact of a course of conduct must be assessed with reference to the subject's psychological history and current mental health status. The healthier the individual, the less likely that the use of any one procedure or set of procedures as a course of conduct will result in prolonged mental harm. A comprehensive psychological profile of Zubaydah has been created. In creating this profile, your personnel drew on direct interviews, Zubaydah's diaries, observation of Zubaydah since his capture, and information from other sources such as other intelligence and press reports.



As we indicated above, you have informed us that your proposed interrogation methods have been used and continue to be used in SERE training. It is our understanding that these techniques are not used one by one in isolation, but as a full course of conduct to resemble a real interrogation. Thus, the information derived from SERE training bears both upon the impact of the use of the individual techniques and upon their use as a course of conduct. You have found that the use of these methods together or separately, including the use of the waterboard, has not resulted in any negative long-term mental health consequences. The continued use of these methods without mental health consequences to the trainees indicates that it is highly improbable

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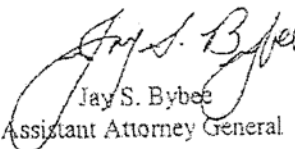
that such consequences would result here. Because you have conducted the due diligence to determine that these procedures, either alone or in combination, do not produce prolonged mental harm, we believe that you do not meet the specific intent requirement necessary to violate Section 2340A.

You have also informed us that you have reviewed the relevant literature on the subject, and consulted with outside psychologists. Your review of the literature uncovered no empirical data on the use of these procedures, with the exception of sleep deprivation for which no long-term health consequences resulted. The outside psychologists with whom you consulted indicated were unaware of any cases where long-term problems have occurred as a result of these techniques.

As described above, it appears you have conducted an extensive inquiry to ascertain what impact, if any, these procedures individually and as a course of conduct would have on Zubaydah. You have consulted with interrogation experts, including those with substantial SERE school experience, consulted with outside psychologists, completed a psychological assessment and reviewed the relevant literature on this topic. Based on this inquiry, you believe that the use of the procedures, including the waterboard, and as a course of conduct would not result in prolonged mental harm. Reliance on this information about Zubaydah and about the effect of the use of these techniques more generally demonstrates the presence of a good faith belief that no prolonged mental harm will result from using these methods in the interrogation of Zubaydah. Moreover, we think that this represents not only an honest belief but also a reasonable belief based on the information that you have supplied to us. Thus, we believe that the specific intent to inflict prolonged mental is not present, and consequently, there is no specific intent to inflict severe mental pain or suffering. Accordingly, we conclude that on the facts in this case the use of these methods separately or a course of conduct would not violate Section 2340A.

Based on the foregoing, and based on the facts that you have provided, we conclude that the interrogation procedures that you propose would not violate Section 2340A. We wish to emphasize that this is our best reading of the law; however, you should be aware that there are no cases construing this statute; just as there have been no prosecutions brought under it.

Please let us know if we can be of further assistance.


Jay S. Bybee
Assistant Attorney General

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Exhibit D

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**Legal Principles Applicable to CIA
Detention and Interrogation of Captured Al-Qa'ida Personnel**

- The Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment ("the Convention") applies to the United States only in accordance with the reservations, understandings, and declarations that the United States submitted with its instrument of ratification of the Convention.
 - The Convention's definition of torture, as interpreted by the U.S. understandings, is identical in all material ways to the definition of torture contained in 18 U.S.C. §2340-2340A. The standard for what constitutes torture under §2340-2340A and under the Convention is therefore identical.
 - The Convention also provides that state parties are to undertake to prevent other cruel, inhuman, or degrading treatment or punishment. Because of U.S. reservations to the Convention, the U.S. obligation to undertake to prevent such treatment or punishment extends only to conduct that would constitute cruel and inhuman treatment under the Eighth Amendment or would "shock the conscience" under the Fifth and Fourteenth Amendments. Additionally, the Convention permits the use of such treatment or punishment in exigent circumstances, such as a national emergency or war.
- Customary international law imposes no obligations regarding the treatment of al-Qa'ida detainees beyond that which the Convention, as interpreted and understood by the United States in its reservations, understandings, and declarations, imposes. The Convention therefore definitively establishes what constitutes torture and cruel, inhuman, or degrading treatment or punishment for the purposes of U.S. international law obligations.
- CIA interrogations of foreign nationals are not within the "special maritime and territorial jurisdiction" of the United States where the interrogation occurs on foreign territory in buildings that are not owned or leased by or under the legal jurisdiction of the U.S. government. The

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criminal laws applicable to the special maritime and territorial jurisdiction therefore do not apply to such interrogations. The only two federal criminal statutes that might apply to these interrogations are the War Crimes Statute, 18 U.S.C. §2441, and the prohibition against torture, 18 U.S.C. §2340-2340A.

- The federal War Crimes Statute, 18 U.S.C. §2441, does not apply to al-Qa'ida because the Geneva Conventions and the Hague Convention IV, the conventions that the conduct must violate in order to violate section 2441, do not apply to al-Qa'ida. Al-Qa'ida is a non-governmental international terrorist organization whose members cannot be considered POWs within the meaning of the Geneva Conventions or receive the protections of the Hague Convention IV. Because these conventions do not protect al-Qa'ida members, conduct toward those members cannot violate section 2441.
- The interrogation of al-Qa'ida detainees does not constitute torture within the meaning of section 2340 where the interrogators do not have the specific intent to cause "severe physical or mental pain or suffering." The absence of specific intent (i.e., good faith) can be established through, among other things, evidence of efforts to review relevant professional literature, consulting with experts, reviewing evidence gained from past experience where available (including experience gained in the course of U.S. interrogations of detainees), providing medical and psychological assessments of a detainee (including the ability of the detainee to withstand interrogation without experiencing severe physical or mental pain or suffering), providing medical and psychological personnel on site during the conduct of interrogations, or conducting legal and policy reviews of the interrogation process (such as the review of reports from the interrogation facilities and visits to those locations). A good faith belief need not be a reasonable belief; it need only be an honest belief.
- **The interrogation of members of al-Qa'ida, who are foreign nationals, does not violate the Fifth, Eighth, and Fourteenth Amendments because those amendments do not apply.** The Due Process Clauses of the Fifth and Fourteenth Amendments, which would be the only clauses in those amendments that could arguably apply to the conduct of interrogations, do not apply extraterritorially to aliens. The Eighth Amendment has no application because it applies solely to those persons upon whom criminal sanctions have been imposed. The detention of enemy combatants is in no

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sense the imposition of a criminal sanction and thus the Eighth Amendment does not apply.

- Taking all of the relevant circumstances into account (such as the Government's need for information to avert terrorist activities against the United States and its citizens, the good faith efforts to avoid producing severe physical or mental pain or suffering, and the absence of malicious or sadistic purpose by those conducting the interrogations), the use of the techniques described below and of comparable, approved techniques would not constitute conduct of the type that would be prohibited by the Fifth, Eighth, or Fourteenth Amendments even were they to be applicable.
- The use of the following techniques and of comparable, approved techniques in the interrogation of al-Qa'ida detainees by the CIA does not violate any Federal statute or other law, where the CIA interrogators do not specifically intend to cause the detainees to undergo severe physical or mental pain or suffering (i.e., they act with the good faith belief that their conduct will not cause such pain or suffering): isolation, reduced caloric intake (so long as the amount is calculated to maintain the general health of the detainees), deprivation of reading material, loud music or white noise (at a decibel level calculated to avoid damage to the detainees' hearing), the attention grasp, walling, the facial hold, the facial slap (insult slap), the abdominal slap, cramped confinement, wall standing, stress positions, sleep deprivation, the use of diapers, the use of harmless insects, and the water board.

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Exhibit E

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JUN-25-2003 21:28

DOD GENERAL COUNSEL

703 6937278 P.02



GENERAL COUNSEL

**GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600**

June 25, 2003

The Honorable Patrick J. Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

I am writing in response to your June 2, 2003, letter to Dr. Rice raising a number of legal questions regarding the treatment of detainees held by the United States in the wake of the September 11, 2001, attacks on the United States and in this Nation's war on terrorists of global reach. We appreciate and fully share your concern for ensuring that in the conduct of this war against a ruthless and unprincipled foe, the United States does not compromise its commitment to human rights in accordance with the law.

In response to your specific inquiries, we can assure you that it is the policy of the United States to comply with all of its legal obligations in its treatment of detainees, and in particular with legal obligations prohibiting torture. Its obligations include conducting interrogations in a manner that is consistent with the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT") as ratified by the United States in 1994. And it includes compliance with the Federal anti-torture statute, 18 U.S.C. §§ 2340-2340A, which Congress enacted to fulfill U.S. obligations under the CAT. The United States does not permit, tolerate or condone any such torture by its employees under any circumstances.

Under Article 16 of the CAT, the United States also has an obligation to "undertake . . . to prevent other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture." As you noted, because the terms in Article 16 are not defined, the United States ratified the CAT with a reservation to this provision. This reservation supplies an important definition for the term "cruel, inhuman, or degrading treatment or punishment." Specifically, this reservation provides that "the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only in so far as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." **United States policy is to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with this commitment.**



06/25/2003 09:29PM

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DOD GENERAL COUNSEL

703 6937278 P.03

As your letter stated, it would not be appropriate to catalogue the interrogation techniques used by U.S. personnel in fighting international terrorism, and thus we cannot comment on specific cases or practices. We can assure you, however, that credible allegations of illegal conduct by U.S. personnel will be investigated and, as appropriate, reported to proper authorities. In this connection, the Department of Defense investigation into the deaths at Bagram, Afghanistan, is still in progress. Should any investigation indicate that illegal conduct has occurred, the appropriate authorities would have a duty to take action to ensure that any individuals responsible are held accountable in accordance with the law.

With respect to Article 3 of the CAT, the United States does not "expel, return ('refouler') or extradite" individuals to other countries where the U.S. believes it is "more likely than not" that they will be tortured. Should an individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country. We can assure you that the United States would take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honored.

In closing, I want to express my appreciation for your thoughtful questions. We are committed to protecting the people of this Nation as well as to upholding its fundamental values under the law.

Sincerely,



William J. Haynes II

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Exhibit F

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THE DIRECTOR OF CENTRAL INTELLIGENCE
WASHINGTON, D.C. 20505

3 July 2003

MEMORANDUM FOR: National Security Advisor

SUBJECT: ~~TS~~ [redacted] Reaffirmation of the
Central Intelligence Agency's Interrogation
Program

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1. ~~TS~~ [redacted] This memorandum requests that within the next week, as a part of this year's annual review of [redacted] or otherwise, the National Security Council Principals affirm, on behalf of the Administration, its commitment and support for the Central Intelligence Agency's (CIA) use of enhanced interrogation techniques as a part of its Interrogation Program for High Value Detainees (HVD). As you know, in September 2002 the Justice Department (DoJ) authorized particular interrogation techniques, including what have been termed "stress and duress" techniques such as sleep deprivation and stress positions and physical contact with detainees such as facial and abdominal slaps and the waterboard. We request this reaffirmation because recent Administration responses to inquiries and resulting media reporting about the Administration's position have created the impression that these techniques are not used by US personnel and are no longer approved as a policy matter.

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2. ~~(U//NFU)~~ Background: Senator Leahy recently sent a letter to you raising several questions regarding the treatment of detainees. This inquiry came on the heels of repeated inquiries by non-governmental agencies and members of the press on the subject of US interrogation techniques. On 25 June 2003, Department of Defense General Counsel William J. Haynes II responded to Senator Leahy's letter in a response that was fully coordinated with CIA and DoJ. On 26 June 2003, the White House issued a press statement supporting International Day in Support of

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SUBJECT: ~~(TS)~~ [redacted] Reaffirmation of the Central Intelligence Agency's Interrogation Program

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Victims of Torture condemning "cruel" treatment of detainees. On 27 June 2003, the Washington Post ran a front-page article that relied heavily on the press statement and also reported the Deputy White House Press Secretary as saying that currently US Government detainees are being treated "humanely." While the Haynes letter to Senator Leahy was coordinated with CIA and DoJ, the press statement was not coordinated with CIA. In addition, CIA had previously objected to White House statements to the effect that all US Government detainees are treated "humanely."

3. ~~(TS)~~ [redacted] Discussion: As you know, the primary national interest in interrogating HVDs is to acquire critical intelligence that may be exploited by the United States to prevent future terrorist attacks. To accomplish that mission, CIA developed an Interrogation Program that includes the use of enhanced interrogation techniques to assist in obtaining that critical intelligence. From the outset, use of these techniques has been subject to rigorous oversight. The Vice President, National Security Advisor, Deputy National Security Advisor, Counsel to the President, Counsel to the National Security Advisor, and the Attorney General were consulted in August 2002 in advance of implementing use of the techniques with a particular detainee and concurred in its implementation as a matter of law and policy. There have been updates since that time on CIA's interrogation activities. In addition, last fall and again earlier this year, the Agency briefed, in detail, the leadership of the House and Senate Intelligence Committees of CIA's use of enhanced techniques.

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4. ~~(TS)~~ [redacted] Last September and again recently, the Department of Justice's Office of Legal Counsel (OLC) has advised that CIA's use of the enhanced techniques does not violate the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment, as ratified by the United States in 1994. In addition, OLC concluded that this Program complies with the Federal anti-torture statute (18 U.S.C. §§ 2340-2340A). Moreover, CIA officers have held ongoing discussions with OLC personnel on the legal

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SUBJECT: ~~TOP SECRET~~ [redacted] Reaffirmation of the Central Intelligence Agency's Interrogation Program

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principles to ensure that changing facts, and the capture of other HVDPs, still comply with the original OLC guidance.

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5. ~~TOP SECRET~~ [redacted] Action Requested: Our officers are relying on the guidance they have been given that they are implementing US policy. Because of the recent erroneous reports in the media characterizing the Administration's position regarding the interrogation of detainees, and also because of the passage of time since high-level Administration officials were briefed on the Interrogation Program, CIA requests that the Administration reaffirm its commitment to the use of enhanced techniques in this Program, as appropriate.


George J. Tenet

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SUBJECT: (TS) [redacted] Reaffirmation of the Central Intelligence Agency's Interrogation Program

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DCI/OGC/SWMuller: [redacted] (30 June 03)
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Distribution:

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Exhibit G

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OGC-FO-2003-50078
5 August 2003

MEMORANDUM FOR THE RECORD

SUBJECT: ~~(U//AUC)~~ Review of Interrogation Program on
29 July 2003

1. ~~(S)~~ On 29 July 2003, the DCI and CIA General Counsel attended a meeting in the office of National Security Adviser Condoleezza Rice to discuss current, past and future CIA policies and practices concerning the interrogation of certain detainees held by CIA in the wake of the 11 September 2001 attacks on the United States and in the Nation's war on terror. The meeting was an outgrowth of the DCI's 3 July 2003 memorandum to Dr. Rice requesting a reaffirmation of the CIA's policies and practices. The meeting was attended by the DCI, CIA General Counsel Scott W. Muller, the Attorney General, Acting Assistant Attorney General, Office of Legal Counsel, Patrick Philbin, Dr. Rice, White House Counsel Alberto Gonzales, Counsel to the National Security Council (NSC) John Bellinger and the Vice President.

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2. ~~(TS)~~ [REDACTED] The DCI started the meeting by stating that CIA wanted a reaffirmation of its policies and practices (1) in light of recent White House statements and the resulting media which had created the impression that certain previously authorized interrogation techniques are not used by US personnel and are no longer approved as a matter of US policy and (2) in light of the fact that the annual review of [REDACTED] was in process.

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3. ~~(S)~~ After the DCI's introduction, Mr. Muller distributed to each participant a set of briefing slides entitled CIA Interrogation Program, 29 July 2003. A copy is attached hereto as Attachment A. Mr. Muller walked through the slides with the group page by page, explaining orally the substance of what was shown on each page. Each page was reviewed with the exception of pages 16-17.

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SUBJECT: Review of Interrogation Program on 29 July 2003

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4. ~~(TS)~~ [] Near the outset of the discussion of "Legal Authorities" (page 2), the Attorney General forcefully reiterated the view of the Department of Justice that the techniques being employed by CIA were and remain lawful and do not violate either the anti-torture statute or US obligations under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment. He said that he had reviewed the 25 June 2003 letter to Senator Leahy from DoD General Counsel William J. Haynes II and had reviewed with Patrick Philbin the facts relating to actual CIA interrogations in the past year. Having done so, he said that CIA practices were entirely lawful and that he agreed with the statement that had been made with respect to those policies and practices in the Haynes letter. (In the week preceding the meeting, CIA had given Philbin, Bellinger and Gonzales a full briefing on the facts contained in the slides and, in advance of the meeting, Philbin had reviewed all the pertinent facts with the Attorney General). In the course of the discussion, the Attorney General and Pat Philbin gave a lengthy explanation of the law and the applicable legal principles. Their explanation squares completely with the understanding under which CIA has been operating. See previous Memoranda for the Record by Scott W. Muller, Acting General Counsel John A. Rizzo, and/or [] CTC/LGL [] and related materials.

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5. ~~(TS)~~ [] There was a discussion of the 27 June 2003 *Washington Post* article reporting that the Administration had pledged not to use "stress and duress" techniques in interrogating detainees. The Vice President asked how the press could have gotten such an impression and Muller mentioned both the President's statement in February 2002 concerning "humane" treatment of detainees and the various occasions including 26 June 2003 on which the White House press office had stated that US treatment of detainees was "humane." Judge Gonzales informed the Vice President that the President's February 2002 policy is applicable only to the Armed Forces. Referring to the statements from the Deputy White House press secretary in response to questions from the *Washington Post* on the occasion of the President's 26 June 2003 proclamation on United Nations International Day in Support of Victims of Torture, Bellinger explained that the press officer had "gone off script" and had mistakenly gone back to "old" talking points. The DCI stated

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SUBJECT: Review of Interrogation Program on 29 July 2003

that it was important for the White House to cease stating that US Government practices were "humane" as that term is easily susceptible to misinterpretation. Bellinger undertook to insure that the White House press office ceases to make statements on the subject other than that the US is complying with its obligations under US law. (In or about March, Bellinger had made a similar commitment and reported to the undersigned and to Judge Gonzales that he had informed Press Secretary Ari Fleischer that the White House press office should not state either that the US was complying with the Geneva Conventions--which are inapplicable--or was treating all detainees "humanely.")

6. ~~(TS)~~ There was a brief discussion of the recent letter to Dr. Rice from Senator Arlen Specter. The Attorney General strongly advised that the statements in the 25 June 2003 letter to Senator Leahy be reaffirmed. Addressing the purported misinterpretation of US policy reported in the *Washington Post* and CIA's concern that merely reaffirming the Leahy letter (in light of the other statements made on 26 June and the reporting) could be read as acknowledgement of the erroneous view of Administration policy reflected in that reporting, the Attorney General proposed that the response to Senator Specter emphasize that the statements in the Haynes response to the Leahy letter were responses to specific legal questions and had been carefully and narrowly crafted. There was agreement that this approach, properly implemented, was appropriate.

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7. ~~(TS)~~ [] In connection with the "Safeguards" discussion in the briefing slides (pages 6-7), Mr. Bellinger explained that CIA's intent and good faith were important elements of the legal analysis and that the safeguards were intended to reflect that good faith in spirit and reality. Mr. Philbin explained at this point that, under the Eighth Amendment, it was critical to look at the purpose of the acts. He said that certain Human Rights groups were citing Eighth Amendment cases (including Department of Justice briefs) and claiming that "stress and duress" techniques violated the Eighth Amendment per se. He explained that those cases, including one involving the shackling of a prisoner, were inapplicable

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SUBJECT: Review of Interrogation Program on 29 July 2003

because, among other things, they involved "wanton and malicious" punishment whereas the interrogations at issue were undertaken for very different and legitimate purposes.

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8. ~~(TS)~~ [REDACTED] Dr. Rice asked about the entry (page 7) "Infractions remedied (two incidents, no harm)." She asked if there had not been a death in connection with the interrogation program. Mr. Muller stated that there had been two deaths--both reported to the Inspector General, the Criminal Division and Congress--but that neither had involved the Interrogation Program (i.e., authorized interrogation personnel engaged in or authorized to engage in interrogations as part of the Interrogation Program or detainees who were the authorized subject of enhanced techniques).

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9. ~~(S)~~ Mr. Muller explained that the senior leadership of the Intelligence Committees had been briefed. The Vice President asked if this included the new leadership and Mr. Muller stated that it did. Mr. Muller also stated that CIA intended to do another briefing after the recess.

10. ~~(TS)~~ [REDACTED] In connection with page 8 ("Interrogation Methods"), Mr. Muller stated that the technique most likely to raise concerns was the waterboard. Dr. Rice asked for a description of the procedure which Mr. Muller gave, noting that the Attorney General opinion authorized administrations of up to 40 seconds.

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11. ~~(TS)~~ [REDACTED] Mr. Muller summarized the material on pages 9-12 of the briefing slides, stating that they showed that the detainees subject to the use of Enhanced Techniques of one kind or another had produced significant intelligence information that had, in the view of CIA professionals, saved lives.

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12. ~~(TS)~~ [REDACTED] Mr. Muller reviewed page 13 of the slides, noting in particular that three individuals had been the subject of the waterboard. The Vice President asked about the relationship between the column entitled "Sessions" and the column entitled "WB." Mr. Muller explained. Dr. Rice commented specifically on the number of times that KSM had been waterboarded (119). Mr. Muller stated his understanding that a number of the uses had been for less than the permitted

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SUBJECT: Review of Interrogation Program on 29 July 2003

40 seconds. Patrick Philbin stated that the Attorney General opinion authorized repetitions of the procedure and the Attorney General stated that he was fully aware of the facts and that CIA was "well within" the scope of the opinion and authority given to CIA by that opinion. The Vice President commented on the value of what KSM had provided and noted that KSM had obviously been a "tough customer".

1.4(c) 13. TTS [redacted] The DCI stated that it was important for CIA to know that it was executing Administration policy and not merely acting lawfully. The Vice President stated, and Dr. Rice and the Attorney General agreed, that this was the case.

1.4(c) Mr. Muller stated that this left the issue of how to deal with the annual [redacted] review process. There was a brief discussion of that process in which John Bellinger stated, in response to a question from the Vice President, that there was no requirement for a full meeting of the NSC Principals. (Judge Gonzales stated that he was certain that DoD General Counsel Haynes [and, by implication, the Secretary of Defense] was clearly aware of the substance of CIA's program based on, among other things, the DoD review of similar techniques and numerous discussions. Mr. Muller and Mr. Bellinger agreed. At an earlier meeting on this subject, Judge Gonzales had stated that, when the techniques were first authorized, Dr. Rice had discussed them with the Secretary of Defense.) After

1.4(c) discussion, the Vice President, Dr. Rice and the Attorney General agreed (with the DCI's concurrence) that it was not necessary or advisable to have a full Principals Committee meeting to review and reaffirm the Program. Instead, as part of the [redacted] process some combination of Dr. Rice, the Vice President and/or Judge Gonzales would inform the President that the CIA was conducting interrogations [redacted] using techniques that could be controversial but that the Attorney General had reviewed and approved them as lawful under US law.

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Scott W. Muller

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SUBJECT: Review of Interrogation Program on 29 July 2003

ADDENDUM (5 August 2003)

~~(S)~~ In a telephone conversation on 4 August, Mr. Bellinger informed Mr. Muller that Dr. Rice was now of the view that the Secretary of State and the Secretary of Defense should be briefed prior to [redacted] A specific plan will be proposed in the next few days. 1.4(c)

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Scott W. Muller

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SUBJECT: Review of Interrogation Program on 29 July 2003

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DCI/OGC/SWMuller: [redacted] (4 August 2003)
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CIA INTERROGATION PROGRAM

29 July 2003

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OBJECTIVES

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- To brief pursuant to the annual [REDACTED] review.
- To provide facts about the interrogation program, in light of recent erroneous press coverage and other inquiries.
- To affirm that the program is consistent with U.S. policy.

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3

OVERVIEW

- Certain "enhanced" techniques are employed in the interrogations of a limited number of detainees.
- The techniques are drawn from methods used in DOD interrogation resistance training at the Survival, Evasion, Resistance, and Escape ("SERE") schools.
- The techniques have been approved by the Attorney General and fully disclosed to the SSCI and HPSCI leadership.
- The use of the techniques has produced significant results.

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4

LEGAL AUTHORITIES

Properly conducted and authorized interrogations:

- Do not violate the federal anti-torture statute, 18 U.S.C. 2340-2340A
- Do not violate the Constitution. They do not “shock the conscience” under the 5th and 14th Amendments. The 8th Amendment prohibition on cruel and unusual “punishment” is inapplicable.
- Do not constitute “cruel, inhumane and degrading treatment or punishment” under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment because, under U.S. law, those terms are limited to U.S. constitutional requirements.

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5

PROGRAM BRIEFINGS TO POLICY MAKERS

- Executive Branch (White House, NSC, DOJ)
 - Spring and Summer 2002
 - Winter, Spring and Summer 2003
- Congress (Chair and Ranking Minority Members – HPSCI and SSCI)
 - Summer and Fall 2002 - HPSCI chairman Goss and Ranking minority member Pelosi; SSCI chairman Graham and Ranking minority member Shelby
 - Winter 2003 – HPSCI chairman Goss and Ranking minority member Harman; SSCI chairman Roberts and a representative of Ranking minority member Rockefeller

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6

SAFEGUARDS

- Psychological screening of interrogators.
- Interrogator training and "certification."
- Written guidelines and signed understandings of compliance.
- Headquarters approvals required.
 - Limited number of approvals (13 detainees).
 - Limited duration of approvals (60 days).
 - Approvals are detainee-specific, technique-specific, and interrogator-specific.
- Medical officer is present at all times.
- Psychologist is present at all times.

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SAFEGUARDS (continued)

- Team approach: multiple "eyes on" each detainee.
- Remote CCTV monitoring.
- Required daily reporting by cable.
- Chief of Base and Headquarters oversight.
- Ongoing legal review.
- Infractions remedied (two incidents, no harm).
- Inspector General review (January-April 2003).

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8

INTERROGATION METHODS

Non-Enhanced Measures

- Sleep deprivation up to 72 hours
- Modified diet
- Loud noise/music under 79 decibels
- Constant light, constant dark
- Water dousing

Enhanced Measures

- Slap (open-handed)
- Facial hold
- Attention grasp
- Abdominal slap (back-handed)
- Sleep deprivation over 72 hours
- Walling
- Stress positions
 - Kneeling
 - Forehead on wall
- Cramped confinement (boxes)
- Waterboard (up to 40 seconds)

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9

RESULTS: MAJOR THREAT INFO

- **KSM: Al-Qa'ida Chief of Operations**

- Attack plans against US Capitol, other US landmarks
- Attacks against Chicago, New York, Los Angeles; against towers, subways, trains, reservoirs, Hebrew centers, Nuclear power plants.
- Identification of Iyman Faris, Majid Khan Family, Saifullah Paracha.
- Heathrow and Canary Wharf Plot
- Africa-based plotters and their plans
- SE Asia structure, JI and targets
- Saudi-based attacks vs. Israel

- **NASHIRI: USS Cole Bomber**

- US Navy Ships in Straits of Hormuz, US Embassy, Sana
- Residential Compounds in Saudi Arabia
- Attacks in Gulf Region using SAM and Aircraft

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RESULTS: MAJOR THREAT INFO (continued)

- **BIN AL-SHIBH: 9/11 Facilitator**
 - Attacks against Nuclear Power Plants, Hebrew Centers
 - Identified Hawsawi
- **BIN ATTASH: KSM Deputy**
 - Attack against U.S. Consulate in Karachi
 - Karachi airport attack plans
- **ABU ZUBAYDAH: Senior Al-Qa'ida Lt**
 - Identification of Padilla, Richard Reid
 - Attacks on banks, subways, petroleum and aircraft industries
 - Info on AQ using toys as concealments for weapons, explosives

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11

HIGH VALUE DETAINEES (HVD)

- 24 HVDS interrogated at CIA controlled Sites:
 - 13 interrogated using enhanced measures
- Detainees produced 1500 disseminated Intel reports:
Circa 50% of all HUMINT CT reporting on Al-Qa'ida
Terrorist plans and intentions

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RESULTS: ADDITIONAL OPERATIONAL LEADS

- Financial Support/ [redacted] 1.4(c)

- [redacted] 1.4(c)
- [redacted]

- Photo Identifications of Active Terrorists and Detained Suicide Operatives

- [redacted] 1.4(c)
- [redacted]

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SUMMARY OF INTERROGATIONS

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SUBJECT	SESSIONS	DATES	WB
ABU ZUBAYDAH	42	4-23 AUG 02	42
AL-NASHIRI	24	NOV 02 to 9 JAN 03	2
KHALID SHAYKH MUHAMMAD	18	4-24 MAR 03	19
RAMZI BIN AL-SHIBH	13	8 FEB 03 - 7 MAR 03	0
MUSTAFA HAWSAWI	11	20 APR to 17 MAY 03	0

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SUMMARY OF INTERROGATIONS (continued)

SUBJECT	SESSIONS	DATES	WB	
				1.4(c)
AMMAR AL-BALUCHI	5	18-20 MAY 03	0	
BIN ATTASH AKA KHALLAD	3	17-19 MAY 03	0	
MOHD FARIK BIN AMIN AKA ZUBAIR	7	23-25 JUN 03	0	

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15

REAFFIRMATION OF CIA'S INTERROGATION PROGRAM

- Pro

- Termination of this program will result in loss of life, possibly extensive.
- Major threats were countered and attacks averted.
- 50% of intelligence reports issued this year were derived from the interrogation of these HVDs.

- Con

- Blowback due to public perception of "humane treatment."
- ICRC continues to attack USG policy on detainees.
- Congressional inquiries continue.

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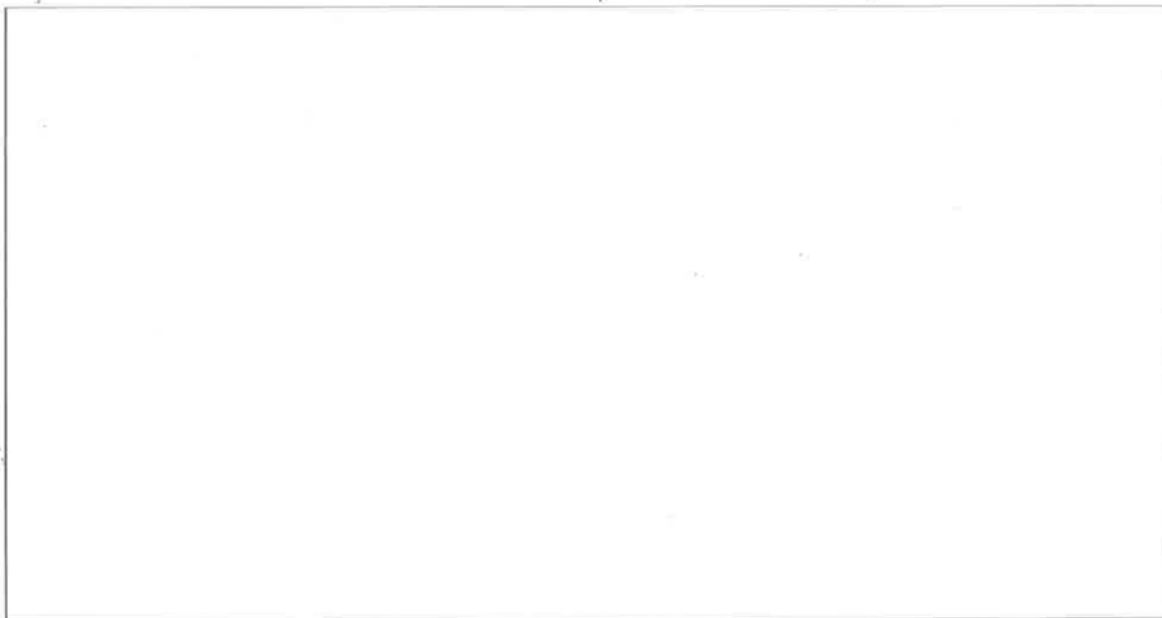
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WITHOUT THIS CAPABILITY,
THEN.....????

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17

Observations concerning “Enhanced Techniques” from AQ detainees Abu Zubaydah and Khallad Bin Attash

- Abu Zubaydah said that commitment to Islam could either help or hinder in obtaining information from HVDs. He said that providing information to enemies is a sin; however, [REDACTED] Islam allows brothers to provide information without sin, if they believe that they have reached the limit of their ability to withhold it. According to Abu Zubaydah, each brother is different. Some brothers will have to endure harsh treatment, even the water board, while others will not have to be pushed that far. 1.4(c)
- During the interrogation, Khallad said he knew he could not hold out against the interrogation, so he had no reason to try to hold back. [REDACTED] 1.4(c)
(Khallad has not been subjected to the waterboard. Since the most recent use of enhanced techniques against him, his resistance to interrogation has grown stronger.)

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ISSUES

- Public and NGO misinterpretations of Administration statements that all detainees are treated "humanely."
- Congressional inquiries.
 - Leahy letter (June 25)
 - Specter letter (June 25)
- ICRC and other NGO inquiries.

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3

LEGAL AUTHORITIES

Properly conducted and authorized interrogations:

- Do not violate the federal anti-torture statute, 18 U.S.C. 2340-2340A
- Do not violate the Constitution. They do not “shock the conscience” under the 5th and 14th Amendments. The 8th Amendment prohibition on cruel and unusual “punishment” is inapplicable.
- Do not constitute “cruel, inhumane and degrading treatment or punishment” under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment because, under U.S. law, those terms are limited to U.S. constitutional requirements.

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Exhibit I

SEP. 12. 2014 7:52AM
C06238951

NO. 070 P. 4

Approved for Release: 2014/09/09 C06238951

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1.4(c)
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24 May 2004

MEMORANDUM FOR THE RECORD

1.4(c)
3.5(c)

SUBJECT: ~~(S)~~ [redacted] ~~(NF)~~ Memorandum of Meeting With the DCI Regarding DOJ's Statement That DOJ Has Rendered No Legal Opinion on Whether CIA's Use of Interrogation Techniques Would Meet Constitutional Standards

1.4(c)
3.5(c)

1. ~~(S)~~ [redacted] ~~(NF)~~ This evening, after the 1700 meeting, I attended a meeting in the DCI's office with the DCI, DDCI, Director OCA, DCI Chief of Staff, and General Counsel to discuss several issues pertaining to detainees and interrogations. One such issue was a recent statement Patrick Philbin of DOJ made to the GC that DOJ's Office of Legal Counsel has not rendered a written opinion that CIA's use of its interrogation techniques would meet the Constitution's "Shock the Conscience" standards applicable within the United States. (The GC had previously informed DCI and DCI/COS, but not in detail.) The fact that DOJ had coordinated on the briefing slides the GC used to brief the Vice President, Attorney General, and others; that DOJ had approved language in a June 2003 DOD GC letter to Senator Leahy; nor the fact that DOJ had coordinated on bullets that CIA had drafted which specifically stated that CIA's use of interrogation techniques would meet constitutional standards were they applicable to aliens overseas, could not be taken as DOJ agreement that CIA's use of interrogation techniques would meet constitutional standards were they applicable overseas. Rather, he advised that DOJ had not opined on that, one way or the other.

1.4(c)
3.5(c)

2. ~~(S)~~ [redacted] ~~(NF)~~ In response to learning fully of this DOJ position, the DCI asked whether CIA was currently using interrogation techniques with anyone. Upon learning CIA was not, the DCI directed an immediate suspension of any use of its interrogation techniques unless and until CIA receives from DOJ a formal, written legal opinion on whether CIA's use of its interrogation techniques would meet U.S. Constitutional standards if those standards were applicable to aliens overseas. Should DOJ not provide an opinion, or should DOJ's opinion find to the

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SEP. 12. 2014 7:53AM

NO. 070 P. 5

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[Redacted] 3.5(c)

SUBJECT: (S) [Redacted] (NF) Memorandum of Meeting With the DCI Regarding DOJ's Statement That DOJ Has Rendered No Legal Opinion on Whether CIA's Use of Interrogation Techniques Would Meet Constitutional Standards

negative, the use of interrogation techniques would not resume without further consideration.

1.4(c)
3.5(c)

3. (S) [Redacted] (NF) The DCI further directed:

- a. A memo from him to the DDO directing the suspension (my action);
- b. Talking points for him to speak to the Attorney General about this matter (GC action);
- c. A paper from CTC informing him precisely which interrogation techniques (enhanced and standard) have been used on which HVTs, and when they were last used (my action to request from CTC).

[Redacted]

Legal Group
DCI Counterterrorist Center

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[Redacted]
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Exhibit J

SEP. 12. 2014 7:53AM

NO. 070 P. 6

Approved for Release: 2014/09/09 C06238952

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[redacted] 3.5(c)

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Sent by [redacted] 3.5(c)

05/25/04 03:44 PM

To: [redacted]
cc: [redacted]

Subject: Interim Guidance for Standard and Enhanced Interrogations

PLEASE PASS A COPY OF THIS NOTE TO [redacted] 3.5(c)

This note is being passed for information ONLY.

As Site is well aware there have been numerous press articles, domestically and internationally, concerning the treatment of detainees in U.S. control. We can happily report that from internal reviews conducted thus far we are well within the "box" pertaining to detainees under CTC [redacted] control. That said, the DCI believes it is prudent to suspend the use of STANDARD and ENHANCED measures until we have completed all necessary reviews. Senior managers within the Agency understand we are not currently performing standard or enhanced measures of interrogation, but wishes to highlight the fact there should be no submission of requests for standard/enhanced at this time pertaining to anyone of the detainees the [redacted] has under it's [redacted] control. Should we be fortunate and capture one of the truly High Value Terrorists we are still seeking, of course we'll seek necessary approvals to immediately initiate actions, which will allow us to gain the required information.

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Please pass our best to all at site and thank them for the hard work and commitment they have given to this most valuable program - it has truly prevented the loss of additional lives within our borders and afforded the same support to numerous allies.

A similar note is being sent to other [redacted]

1.4(c)

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3.5(c)

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Re: DCI & GC Meeting with the Attorney General

APPROVED FOR RELEASE 27 AUGUST 2014

From: John H. Moseman

To: [REDACTED]

Cc: John A. Rizzo, [REDACTED] Scott W. Muller, [REDACTED]

Bcc:

Subject: Re: DCI & GC Meeting with the Attorney General

Date: 5/28/2004 4:34:17 PM

[REDACTED] et al: Here's a quick note on the DCI's conversation today with the Attorney General:

1. The DCI walked through the prepared talking points.
2. The AG focused his discussion/concern on the waterboard, referencing the IG report.

-- the AG raised the issue of the number of times the technique was employed with KSM. The DCI reminded the AG that he, the AG, had been informed of this last summer.

-- the AG raised the issue of a possible disparity in training on the technique

3. The DCI discussed the "shocking the conscience" standard. The AG indicated there was no formal OLC opinion on the constitutional matter, and reiterated that the Constitution did not apply to foreign nationals overseas.

The DCI responded that OLC had coordinated on the Leahy letter, and quoted relevant passages to the AG (including the "where ever they occur" phrase). The AG appeared unaware of the Leahy letter.

4. The AG indicated that the Justice Department would have no concerns with the techniques, other than waterboarding.

5. The conversation, cordial in all respects, ended with an agreement that the DCI and AG would meet next week with CIA's GC and other relevant persons.

(The DCI called [REDACTED] to urge that the meeting be scheduled.)

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Exhibit L

C06238941

Approved for Release: 2014/09/11 C06238941

3.5(c)

New Memo

3.5(c)

[Redacted]

[Redacted]

3.5(c)

[Redacted]

OGC
25192
05/25/04 06 23 PM

To: Scott W. Muller [Redacted]

John A. Rizzo [Redacted]

cc
Subject: Talking Points

3.5(c)

I provided the attached talking points to John Moseman and copies of our 2 March 2004 request to OIG to reaffirm its legal analyses and the summary points [Redacted]



OIG talking points with AG re interrogations - alt

3.5(c)

New Memo

0080001

C06238941

Approved for Release: 2014/09/11 C06238941

~~TOP SECRET~~ [redacted] 1.4(c) ~~ORCON, NOFORN//MR~~

**(S//NF) Talking Points for DCI Telephone Conversation with Attorney General:
DOJ's Legal Opinion re CIA's Counterterrorist Program (CT) Interrogation**

~~(TS 1.4(c) NF)~~ Purpose. To ascertain whether DOJ believes CIA's Counterterrorist Program (CT) interrogation techniques would meet certain Constitutional standards were those standards to apply to aliens overseas.

~~(TS 1.4(c) NF)~~ Background. OLC's legal opinion of 1 August 2002 found that CIA's CT interrogation techniques, at least as intended to be applied to Abu Zubaydah, would not violate U.S. criminal statutes implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as ratified by the U.S. We also understood through subsequent conversations and the coordination of a written summary of legal principles regarding the program, that even though the relevant U.S. Constitutional provisions do not extend to aliens overseas, CIA's CT interrogation techniques would not violate the standards of those U.S. Constitutional provisions if they applied. We were recently informed by OLC attorneys that they have not formally opined on the Constitutional standards issue (i.e., DOJ has not issued a written, signed legal opinion) raising concerns that DOJ is distancing itself from this coordinated legal position.

It is imperative that the Attorney General either (a) confirm the legal principles set forth in the summary jointly created by CIA's OGC and DOJ's OLC or (b) identify those principles in the summary that are acceptable to DOJ and recommend what actions, if any, should CIA take with regard to the program.

~~(TS 1.4(c) NF)~~ We recommend you call the AG and make the following points in your conversation:

- I recently learned that OLC attorneys have emphasized to my General Counsel that they have not issued a signed written legal opinion on the question of whether the interrogation techniques used by CIA would be lawful under certain U.S. Constitutional provisions if they were to be applied to the CT interrogation program.
- Regardless of whether there is a signed DOJ opinion on this particular legal issue, that fact remains that the Vice President and other senior US government officials were briefed on the program. The recent OLC emphasis on the absence of a signed written DOJ opinion on this aspect of the program causes me to seek your assurance and guidance.

[redacted] 3.5(c)

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Approved for Release: 2014/09/11 C06238941

~~TOP SECRET~~ [redacted] 1.4(c) [redacted] ~~FORCON, NOFORN//MR~~

- Are you able to confirm all the legal principles set forth in the summary of legal principles jointly created by CIA's OGC and DOJ's OLC?
 - If not, can you identify those principles in the summary that you are able to confirm as of today?
- In light of this partial confirmation, I also would like your recommendation regarding what actions I should take regarding CIA's CT interrogation program.

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Exhibit M

C06238949

Approved for Release: 2014/09/11 C06238949

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1.4(c)

4 June 2004

MEMORANDUM FOR: Deputy Director for Operations
FROM: Director of Central Intelligence
SUBJECT: Suspension of Use of Interrogation Techniques.

The General Counsel has advised that the Department of Justice (DOJ) has not formally opined in writing that CIA's use of interrogation techniques would meet the standards of the United States Constitution if those standards were applicable to aliens overseas. The absence of a formal DOJ opinion on this legal issue has possible implications for the use of interrogation techniques in future cases. Although the interrogation program remains authorized, out of an abundance of caution, I am directing the immediate suspension of any use of interrogation techniques, enhanced or otherwise, until further notice. Only debriefings, i.e., questions and answers, may continue.


George J. [unclear]

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Exhibit N

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The Director of Central Intelligence

1.4(c)

Washington, D.C. 20505

4 June 2004

MEMORANDUM FOR: The National Security Advisor

1.4(c)

SUBJECT: ~~(TS)~~ [redacted] Review of CIA Interrogation Program

1.4(c)

1. ~~(TS)~~ [redacted] Action Requested. This memorandum requests that at the earliest opportunity the National Security Council Principals and the Attorney General in particular affirm, on behalf of the Administration, its continuing legal and policy support for the Central Intelligence Agency (CIA) to employ, pursuant to [redacted]

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[redacted] "stress and duress" interrogation techniques as part of its interrogation program of High Value Detainees (HVD).

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2. ~~(TS)~~ [redacted] To date, as reflected in contemporaneous documentation, CIA has relied in good faith on the understanding that the Department of Justice had concluded that properly authorized and conducted interrogations utilizing the techniques authorized for Abu Zubaydah could be applied to others consistent with the "shock the conscience" standards of the Fifth Amendment to the Constitution. In the past week however, we have been informed by the Department of Justice that it has not completed its legal analysis of that issue and that all it is prepared to say at this point is that the requirements of the Constitution do not apply to aliens overseas. This position raises serious questions about the appropriateness of utilizing the Attorney General approved interrogation techniques in future cases. In addition, it raises serious questions about the continued validity of the Administration's previous public statements including, in particular, the 25 June 2003 statement made on behalf of the Administration by Department of Defense General Counsel William J. Haynes III to Senator Patrick Leahy to the effect that it is United States policy to treat all detainees and conduct all interrogations, wherever they may

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SUBJECT: ~~(TS)~~ [REDACTED] Review of CIA Interrogation Program

occur, in a manner consistent with [the US] commitment to "prevent the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States." (Emphasis added).

1.4(c)

3. ~~(TS)~~ [REDACTED] Background. As you know, beginning in September 2002 the Justice Department authorized CIA in its discretion, to employ on selected HVDS what have been termed "stress and duress" techniques, including sleep deprivation, stress positions, and physical contact such as facial and abdominal slaps and the waterboard, which, for the purposes of brevity, this memo will hereafter refer to as the "Program." In carrying out the Program, CIA has reserved use of these and other such similar techniques to elicit ongoing threat information from the most hardcore, senior terrorist figures that have been captured--men such as Khalid Sheik Muhammad, Abu Zubaydeh, and Hambali. From the outset, the policy to employ these techniques against terrorist HVD has been reviewed and endorsed by senior Administration policymakers; in August 2002, the Vice President, the Counsel to the President, the Attorney General and you were briefed and approved CIA going forward with the Program, and in meetings convened in July and September of last year the members of the Principals Committee were briefed on the Program by the Agency and endorsed its continuation. In addition, key members of Congress have been briefed from the beginning--CIA informed the leadership of the Congressional Intelligence Committees of the existence and nature of the Program when it commenced in late 2002, in early 2003 when members of the leadership changed, and again in September 2003.

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4. ~~(TS)~~ [REDACTED] Reason for Seeking Principals' Review. I continue to believe that we can maintain the secrecy and compartmentation of our program. That said, it is obvious that the recent public revelations of mistreatment of Iraqi detainees at Abu Gharaib prison have generated intense scrutiny in the Congress and the media about the legal and policy standards the Administration has followed with respect to detainees it has held in Iraq growing out of the war and its aftermath. Perhaps inevitably, this focus is now expanding beyond detainees in Iraq to those detainees being held by the US elsewhere as part of its continuing worldwide counterterrorist efforts. In Congress, the intelligence committees have signaled their intention to review all existing Administration policies and practices in its

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1.4(c) SUBJECT: (TS) [REDACTED] Review of CIA Interrogation Program

treatment of detainees worldwide; indeed, Senator Leahy sent a letter to me some months ago seeking Administration clarification on this very issue that has to be responded to, and more such letters are sure to come now. Moreover, as you are well aware, in the wake of the Abu Gharaib revelations, the International Committee of the Red Cross (ICRC) is pressing for an Administration response to two letters it sent earlier this year asking specific and pointed questions about the treatment accorded particular detainees to whom the ICRC has not been granted access--including KSM and other HVDs who remain in CIA custody and who have been interrogated under the Program. At the same time,

1.4(c) [REDACTED] the media (beginning with [REDACTED] has begun to [REDACTED] report on the Administration's interrogation practices outside of the Iraq arena, to include [REDACTED] aspects of the Program.

1.4(c) 5. (TS) [REDACTED] Finally, I am concerned because in recent days the Office of Legal Counsel (OLC) of the Department of Justice has equivocated on one of the bedrock legal principles we understood to have been established up to now-- that the Program is not at odds with the Administration's policy, stated in a letter to Senator Leahy last year as well as in White House public statements, that it is US policy to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with the US Constitution. If the OLC is now willing only to say that the Constitution does not apply to aliens overseas, then I believe the Principals need to know that, especially since that was a key part of the Program briefing the Principals were given last year.

1.4(c) 6. (TS) [REDACTED] Given all of this increased scrutiny now upon us in the wake of the recent revelations about treatment of prisoners in Iraq and all of the questions the Administration is being asked, I strongly believe that the Administration needs to now review its previous legal and policy positions with respect to detainees to assure that we all speak in a united and unambiguous voice about the continued wisdom and efficacy of those positions in light of the current controversy. I believe just as strongly that I have an obligation to all of the CIA officers involved in the ongoing war against terrorism

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SUBJECT: (TS) [REDACTED] Review of CIA Interrogation Program

--including those giving their unstinting efforts towards locating, capturing, and interrogating terrorist leaders--to ensure that the activities that they are conducting continue to have the full legal and policy backing of their leaders in government. For all of these reasons, I respectfully request a Principals Meeting at the earliest opportunity to review and reaffirm the Program in all of its aspects.


George J. Tenet

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Exhibit O

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1.4(c)



CENTRAL INTELLIGENCE AGENCY
Washington, D.C. 20505

General Counsel

14 June 2004

The Honorable Jack L. Goldsmith, III
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D.C. 20530

Dear Mr. Goldsmith:

This is in response to your letter of 10 June 2004.

The document referenced in your letter entitled, "Legal Principles Applicable to CIA Detention and Interrogation of Capture Al-Qa'ida Personnel", contains what we have understood to be a shorthand summary of the legal principles applicable to the Central Intelligence Agency's (CIA) treatment of captured Al Qa'ida personnel. Representatives of the Department of Justice's Office of Legal Counsel (OLC) and CIA's Office of General Counsel (OGC) jointly prepared the Legal Principles document during May and June 2003 based principally on legal research, opinions, and advice from OLC. With OLC's knowledge, the document was created for use by the CIA's Inspector General in its review of CIA interrogations practices in the counterterrorism arena. The inter-office coordination of the document included substantial drafting efforts by then Deputy Assistant Attorney General John Yoo and other OLC staff. The Legal Principles document also served as a basis for the "Legal Authorities" briefing slide used at a 29 July 2003 meeting attended by the Vice President, the National Security Advisor, the Attorney General, who was accompanied by Patrick Philbin, the Director of Central Intelligence, and others. The "Legal Authorities" slide was independently coordinated by OGC with OLC and the White House Counsel's office prior to the July meeting. That meeting and a follow-on briefing of the Secretaries of Defense and State using the same slide resulted in a reaffirmation of the policy and legal bases of CIA's detention and interrogation program.

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The Honorable Jack L. Goldsmith, III

Given the provenance of the Legal Principles document, which is reflected in contemporaneous CIA documentation, the statement in your letter that the document's contents "did not and do not represent an opinion or a statement of the views of this Office" raises concerns. On its face the document itself is, of course, not in the form of an official opinion of the Department. Your current characterization, however, goes further and requires that I ask you to formally address the following question: If the Legal Principles document does not represent OLC's "views" and CIA cannot rely on its substance as representing authoritative legal guidance from OLC, for what purposes may the document and all or any of its principles be used? I would appreciate your promptly answering this question in a form upon which the CIA may rely.

Since, as you know, CIA often seeks Department of Justice guidance on a wide variety of activities, your answer to the question set forth above will have broader implications for the daily interactions between CIA and the Department. As a general matter, CIA's leaders need to fully understand the extent to which they may rely in good faith on guidance from Department of Justice representatives when that guidance is not contained within signed legal opinions. My attorneys in particular need to understand what significance, if any, they should attach to legal guidance provided to them by Department representatives when the guidance is provided orally or in documents that are not signed legal opinions.

You also asked that OGC provide OLC with our views in writing on the question of whether certain interrogation techniques could be applied to captured Al Qa'ida personnel consistent with the "shock the conscience" standards of the Fifth Amendment to the Constitution. Our understanding, which was consistent with the penultimate principle set forth in the Legal Principles document that was coordinated with OLC and briefed to the National Security Council Principals and others in July and September 2003, had been that the interrogation techniques described in OLC's 1 August 2002 signed legal opinion concerning the interrogation of Abu Zubaydah legally could be applied to other captured Al Qa'ida personnel consistent with a merits analysis of the "shock the conscience" standards of the Fifth Amendment to the Constitution. To the extent your office needs particular facts and descriptions of interrogation techniques to draft a formal legal opinion on this question, please use those provided in OLC's August 2002 opinion to CIA.

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The Honorable JACK L. Goldsmith, III

Finally, in connection with your description of OLC's preferred procedures for rendering signed legal opinions, it is worth emphasizing that CIA's detention and interrogation activities are part of a [redacted] program authorized by the President—a program as to which, in addition, senior White House personnel have sought Department of Justice advice. In late May 2004, CIA suspended the use of authorized interrogation techniques pending reaffirmation of the policy and legal bases for its interrogation program. Accordingly, there is now or likely soon will be, an "operational need" for a response to our written March 2004 request that OLC reaffirm its legal analyses contained in the documents identified in our request.

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Sincerely

[redacted signature]

Scott W. Muller

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~~MR~~

The Honorable John D. Rockefeller IV

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DCI/OGC/[redacted] (15 Jun 04)

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[redacted] Correspondence\Stuff for [redacted] -DCI
Transmittal of OIG Report with DOJ reference (Working) -
Rockefeller.doc

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- 1 - SDGC
- 1 - MAGC
- 1 - [redacted]
- 1 - CTC/LGL
- 1 - OGC/SCCT

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MEMORANDUM

To: Mr. John Helgeson,
Inspector General, Central Intelligence Agency

From: Jack Goldsmith III *JG*
Assistant Attorney General, Office of Legal Counsel

Date: June 18, 2004

Re: "Special Review: Counterterrorism Detention and Interrogation Activities"

As I mentioned in my letter of 25 May 2004, the Department of Justice has recently had its first opportunity to review your report concerning the CIA's program of enhanced interrogation techniques. As a result of our review, we have concerns with two areas of ambiguity or mistaken characterizations in the report. I am writing, therefore, to request that you make some modifications to the report to clarify ambiguities or correct what we believe to be mistaken characterizations.

The first area of concern relates to a meeting of select National Security Council Principals on July 29, 2003. The Report states that at this meeting the Attorney General approved of "expanded use" of enhanced interrogation techniques. The reference to "expanded use" of techniques is somewhat ambiguous. In context, it appears to mean simply the use of approved techniques on other detainees in addition to the particular detainee (Abu Zubaydah) expressly addressed in an OLC opinion to the Acting General Counsel, John Rizzo, on August 1, 2002. If that is the intended meaning, the statement in the Report is entirely correct. In the attached addendum, therefore, we suggest some minor revisions to clarify this point.

On the second issue, OLC disagrees with the CIA's Office of General Counsel (OGC). The disagreement revolves around the status of a document containing a set of bullet points outlining legal principles and entitled "Legal Principles Applicable to CIA Detention and Interrogation of Captured Al-Qa'ida Personnel." The bullet points were drafted by OGC in consultation with OLC attorneys in the Spring of 2003. **There is no dispute that OLC attorneys reviewed and provided comments on several drafts of the bullet points.** In OGC's view, OGC secured formal OLC concurrence in the bullet points and thus believed that the bullet points reflected a formal statement of OLC's views of the law. OLC's view, however, is that the bullet points – which, unlike OLC opinions, are not signed or dated – were not and are not an opinion from OLC or formal statement of views. OLC also believes that the status of the bullet points was made clear at a

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meeting on June 17, 2003 soon after the Deputy Assistant Attorney General with whom OGC had consulted on the bullet points had departed from the Department of Justice.

In any event, when OGC, pursuant to a recommendation from your Report, sought an opinion from OLC confirming the conclusions outlined in the bullet points, the disagreement concerning the status of the bullet points became clear. As a result, I am suggesting revised language for the Report that I believe would accurately reflect the misunderstanding that arose concerning the bullet points.

I understand that you have already forwarded the Report in final form to the DCI. Where, however, the actions of another Department are described in the Report; where no personnel from that Department were interviewed in the preparation of the Report; and where that Department had no opportunity to comment on the Report in draft form we believe that it would make sense for your office to consider making the proposed revisions.

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ADDENDUM

- p. 5, ¶ 10 After referring to the frequency of use of the waterboard, this paragraph states that “[t]he Agency, on 29 July 2003, secured oral DoJ concurrence that certain deviations are not significant for purposes of DoJ’s legal opinions.” To make clear that the “certain deviations” referred to here are the frequency of use of the waterboard, we recommend the following change. Strike the last sentence of the paragraph and replace with the following two sentences:

“In July 2003, selected Principals of the National Security Council, including the Attorney General, were briefed concerning the number of times the waterboard had been administered to certain detainees. The Attorney General expressed the view that, while appropriate caution should be exercised in the number of times the waterboard was administered, the repetitions described did not contravene the principles underlying DOJ’s August 2002 opinion.”

- p. 7, ¶ 17 Insert after the phrase “has been subject to DoJ legal review” the following: “, as described elsewhere in this Report,”.
- p. 20, ¶ 41 Insert the phrase, “the torture provisions of” between the word “violate” and the phrase “the Torture Convention.” It is clear from the context of this letter, which never discusses any provisions of the Convention except those addressing torture, that it is meant to address only the torture provisions.
- pp. 22-23, ¶ 44 This paragraph addresses the bullet points and we recommend two revisions.

1). Strike the sentence that reads, “According to OGC, this analysis was fully coordinated with and drafted in substantial part by OLC.” Replace it with the following: “This analysis was drafted by OGC in consultation with attorneys from OLC.”

2). The last sentence of the paragraph contains two points of concern. First, touching upon the point of disagreement between OGC and OLC, it suggests that the bullet points constitute formal views of the Department of Justice. Second, it has the potentially sweeping and unqualified statement that the meaning of the bullet points is that the reasoning of the 1 August 2002 OLC opinion “extends beyond . . . the conditions that were specified in that opinion.” We therefore recommend striking the last sentence of the paragraph and replacing it with the following:

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“OGC has explained that it believed that the document reflected a formal statement of views from OLC on the topics addressed. OLC, however, has stated that it does not consider that document, which (unlike OLC opinions) is not dated or signed, either to be an OLC opinion or to reflect formal OLC advice. OLC has also stated that it has not fully analyzed or evaluated some of the legal positions set forth in the document.”

- p. 24; ¶ 48 This paragraph contains the ambiguous statement that the Attorney General “approved of the expanded use of various EITs.” To clarify what we believe to be the intended meaning here, we recommend the following revisions:

- 1). Strike the phrase “to include the expanded use of EITs” from the end of the first sentence.

- 2). Insert the following sentence after the first sentence: “Specifically, the Principals were briefed concerning the number of times the waterboard had been administered to certain detainees and concerning the fact that the program had been expanded to detainees other than the individual (Abu Zubaydah) who had been the subject of specific DOJ advice in August 2002.”

- 3). After the sentence beginning “According to a Memorandum for the Record prepared by the General Counsel,” insert the following: “Specifically, the Attorney General expressed the view that the legal principles reflected in DOJ’s specific original advice could appropriately be extended to allow use of the same approved techniques (under the same conditions and subject to the same safeguards) to other individuals besides the subject of DOJ’s specific original advice. The Attorney General also expressed the view that, while appropriate caution should be exercised in the number of times the waterboard was administered, the repetitions described did not contravene the principles underlying DOJ’s August 2002 opinion.”

In addition, this paragraph states that “the senior officials were again briefed regarding the CTC Program on 16 September 2003.” That statement seems to suggest that the *same* officials who were present at the 29 July meeting were also present at the 16 September meeting. The Attorney General, however, was not present at the meeting on 16 September, nor was any official of the Department of Justice. We request that the sentence be modified to read: “senior officials, not including the Attorney General, were again briefed . . .”

- pp. 44-45, ¶ 99 For reasons already explained, we recommend the following change:

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1). Delete the second to last sentence. Insert at the start of the last sentence “In July 2003.” Finally, insert after the last sentence the following: “The Attorney General expressed the view that, while appropriate caution should be exercised in the number of times the waterboard was administered, the repetitions described did not contravene the principles underlying DOJ’s August 2002 opinion.”

- p. 95, ¶ 234 Insert the following before the last sentence: “The General Counsel’s statement is consistent with the 2003 document drafted by OGC in consultation with OLC. In the General Counsel’s view, he had understood, in good faith, that this document represented OLC’s opinion on the subjects it addressed. OLC has stated that it does not consider that document, which (unlike an OLC opinion) is not dated or signed, either to be an OLC opinion or to reflect formal OLC advice. OLC has also stated that it has not fully analyzed or evaluated some of the legal positions set forth in the document.”

- p. 101, ¶ 254

1). Insert the following after the third sentence: “Specifically, the officials were briefed concerning the number of times the waterboard had been administered to certain detainees and concerning the fact that the program had been expanded to detainees other than the individual (Abu Zubaydah) who had been the subject of specific DOJ advice in August 2002.”

2). Replace the final sentence with the following: “At that time, the Attorney General expressed the view that the legal principles reflected in DOJ’s specific original advice could appropriately be extended to allow use of the same approved techniques (under the same conditions and subject to the same safeguards) to other individuals besides the subject of DOJ’s specific original advice. The Attorney General also expressed the view that, while appropriate caution should be exercised in the number of times the waterboard was administered, the repetitions described did not contravene the principles underlying DOJ’s August 2002 opinion.”

- p. 101, ¶ 255: replace the phrase “has been subject to DoJ legal review” to “has been subject to the DoJ legal review described elsewhere in this Report.”
- Appendix B.
 - 2002 August: Change “would not violate US law” to “would not violate 18 U.S.C. §§ 2340 – 2340A or the prohibition on torture in the Convention Against Torture.”

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The Director of Central Intelligence

Washington, D.C. 20505

22 June 2004

The Honorable John D. Rockefeller IV
Vice Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Mr. Vice Chairman:

~~(TS)~~ [redacted] 1.4(c) I am forwarding the Inspector General's report on the Counterterrorism Detention and Interrogation Activities of the Central Intelligence Agency (CIA).

(U//FOUO) I generally concur with the report's conclusions and recommendations. The attachment provides a summary of my decisions regarding those recommendations.

~~(TS)~~ [redacted] 1.4(c) Policy and legal guidance for the operation of the Counterterrorist Detention and Interrogation Program ("the Program") began at the Program's inception and continued through January 2003 when I promulgated "Guidelines on Interrogations Conducted Pursuant to the [redacted]" and "Guidelines on Confinement Conditions for CIA Detainees." We actively monitor the Program's activities and continue to issue guidance to reflect changing conditions. The Interrogation Guidelines and the companion Confinement Guidelines established detailed procedures requiring specially designated "Responsible CIA Officers" for all CIA facilities, the maintenance of "minimums" for the health and safety of all detainees, formal training, documentation and advance approval requirements, requirements for medical and psychological evaluation and oversight as well as a formal requirement that interrogators (and all others participating in questioning at CIA facilities) certify their understanding of the Guidelines and their adherence to them. Although it is not always apparent without a close reading of the

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The Honorable John D. Rockefeller IV

report, virtually all of the activities described in the report as "unauthorized or undocumented" occurred in the fall of 2002 or were unrelated to the Program. As previously reported in briefings and notifications to you, we have backed up these Guidelines by taking immediate action as appropriate and, over time, we have strengthened the Guidelines and their implementation. We are in the process of a further review of our policies, practices and procedures.

~~(TS)~~ [] 1.4(c) [] As you know, the Program has been reviewed and endorsed by senior Administration policymakers, including the Attorney General, and briefed to you and your predecessors in detail on three occasions. The Department of Justice (DoJ) concluded at the outset of the Program that it was lawful, in appropriate circumstances, and I understand that remains DoJ's opinion.

~~(TS)~~ [] 1.4(c) [] As reflected in the report, CIA had understood that DoJ's opinion on the Program was based, in part, on the fact that aliens overseas do not enjoy the protections of the US Constitution. CIA also had understood that DoJ had concluded the Program did not violate the standards of conduct enunciated by courts under the Constitution's Fifth, Eighth, and Fourteenth Amendments. These same Constitutional standards are used by the US to define its obligations under Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the CAT"). The Department stands by its conclusion that the Program is lawful, but has recently informed us that it views as unnecessary an analysis of the substantive Constitutional issues. In the circumstances and to assure, again, that there is appropriate understanding and approval of the policy and legal bases for the Program, I have asked for a complete policy and legal review of the Program. Pending completion of this review, I have suspended the use of any interrogation techniques other than question and answer.

~~(TS)~~ [] 1.4(c) [] An original of this letter is also being sent to Chairman Roberts and the Chairman and Ranking Democratic Member of the Permanent Select Committee on Intelligence. Because of the sensitivity of the information, access to this letter and the report should be limited only to those members and committee staff personnel,

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1.4(c)

~~/MR~~

The Honorable John D. Rockefeller IV

3.5(c)

Sincerely,



George J. Tenet

Attachment:
As stated

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~~/MR~~

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**Summary of Decisions Regarding the OIG's Recommendations
Contained in the Special Review of Counterterrorism Detention
and Interrogation Activities (2003-7123-IG)***

3.5(c)



*The deadlines recommended by the Inspector General for recommendations 6 through 8 were accepted. The DCI and/or officers responsible for carrying out the assigned tasks will establish deadlines for the remaining recommendations.

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Exhibit R

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**DCI Talking Points: CIA Detainee Issues
2 July 2004**

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Principals Meeting: Detainee Issues

As mentioned in the pre-election threat portion, our takedown of [redacted] a key al-Qa'ida facilitator. We have followed [redacted] for some time. He has only grudgingly admitted his identity now after repeatedly being pressed, but he still claims he is only a poor rug merchant confused with a terrorist. 1.4(c)

- Our officers with access to [redacted] report that he is employing counter-interrogation techniques, including feigning illness, claiming an inability to comprehend questions, having difficulty recalling details, and denying established facts. 1.4(c)

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- [redacted] briefly lost his composure, but still refused to cooperate—when a fellow detainee who is a nephew of Khalid Shaykh Muhammad, positively identified [redacted] and said he was a member of al-Qa'ida. 1.4(c)

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As with other similar cases, [redacted] have indicated that they would hand over [redacted] to us on at least a temporary basis. 1.4(c)

1.4(c)

- Under other circumstances, earlier in this war, we would have immediately asked [redacted] to give [redacted] to us, and we would have rendered him to another site.

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- We are not rendering detainees now because we do not want to hold them without being able to use some of our most effective tools for extracting intelligence from them.

It has been some time since we discussed our program in detail. Before we go on, let me discuss the types of enhanced techniques we have used in the past.

- You should note that we do not use all of these techniques in all circumstances. Our interrogators and psychologists design debriefing packages; enhanced techniques are only a part of these packages, and we employ them only when we find that the detainee refuses to provide information.
- In addition, these techniques are used in a graduated fashion. The waterboard technique, for example, has been used in only three significant cases: Abu Zubaydah; KSM; and Nashiri. It was used in these cases because these were the hardest individuals we had to work with.
- I have a handout for you that lays out in detail exactly what techniques we employ.

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Our experience has repeatedly shown how important these techniques are to leading detainees to reveal information. In the case of KSM, for example, he initially refused to cooperate.

- Only after we initiated use of enhanced measures did he reveal actionable information. His information resulted in the discovery of operatives in the United States, including a truck driver (Faris) now serving time for his support to al-Qa'ida; an operative who was tasked with investigating how to blow up gas stations (Khan); and a mechanism for al-Qa'ida to smuggle explosives into the United States (Paracha).

Abu Zubaydah was similarly uncooperative prior to the initiation of enhanced interrogation techniques. He treated his debriefers with contempt in the early stages of debriefing.

- After the use of interrogation measures, he grew over time into perhaps our most cooperative detainee, passing information on individuals such as Jose Padilla and Ramzi bin al-Shibh that led to their capture.

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This will not be the last time in these coming weeks and months that we have this issue to deal with. [redacted] some of the key players in this plot who are operating out of the tribal areas. These are the individuals whom our sources say are actually integral to the plot's direction.

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- Senior al-Qa'ida planners, such as Abu Faraj al-Libi, Abd al-Hadi al-Iraqi, and Abu Layth al-Libi, continue to operate out of the tribal areas, and our information suggests that [redacted] disruption operations are not yet forcing them to stop plotting.

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- We expect to [redacted] for the purposes of locating and capturing individuals such as those I just mentioned.

I request the Principals review and provide direction, as a matter of law and policy, on the use of the full range of previously-approved counterterrorist techniques against [redacted]. To make a fully informed decision, the Principals should be apprised of the following issues:

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- That it continues to be the Attorney General's opinion that CIA's use of its current identified interrogation techniques do not violate US law prohibiting torture (i.e. the Torture Statute);
- That it continues to be the Attorney General's opinion that these interrogation techniques do not violate any other US laws or treaty obligations including Article 16 of the Convention Against Torture which prohibits cruel, inhuman, or degrading treatment or punishment short of torture;

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- Whether the AG's opinions are based solely fact that aliens overseas have no rights under Article 16 and the US Constitution or whether he is prepared to state that these interrogation techniques do not violate the substantive standards of conduct enunciated by courts under the Fifth, Eighth, and Fourteenth Amendments to the US Constitution. (These same standards are applied by the US under Article 16 of the Convention Against Torture.) [This later point is particularly important to the CIA officers who participate in the interrogation program. These officers may decline to participate further if the Attorney General refuses to provide them this legal advice.]

Once the Attorney General provides his legal conclusions, request the Principals to determine whether the Agency should continue to use its current interrogation techniques. If the Attorney General declines to address the third point, you should ask the Principals to assume CIA's interrogation methods, while not amounting to torture, would be found by the Attorney General to violate the substantive standards of the Constitution and, given that assumption, do they want CIA to use those techniques to interrogate

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Exhibit S: Slides for NSC meeting

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CIA Request for Guidance Regarding Interrogation of

[redacted]

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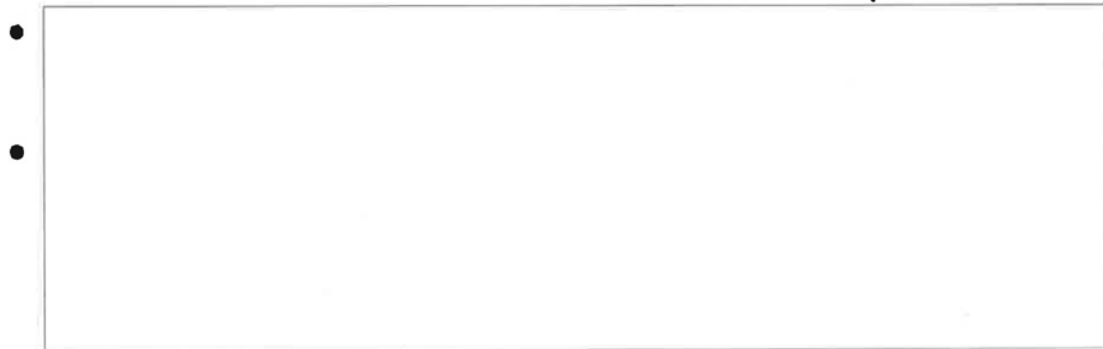


Importance of [redacted]

- Assessed by [redacted] source on pre-election plot to be involved in or have information on the plot

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- One of the most senior radical Islamic facilitators in Pakistan; ties to AQ, IMU, Taliban and Zarqawi

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Importance of [redacted] (con't)

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- Captured [redacted] in [redacted]
- [redacted] debriefings not working
- His information is perishable, the threat is imminent, and he is available for rendition and interrogation now

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Interrogation Techniques That Could be Used with [redacted]

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- Facial Slap (open-handed)
- Facial Hold
- Attention Grasp
- Sleep Deprivation
- Walling
- Stress positions
- Cramped confinement
- [Waterboard]
- These techniques would be used only after nonphysical interrogation techniques were used and determined to be inadequate. The nonphysical phase could include diapering for up to 72 hours, isolation, white noise or loud music, continuous light or darkness and restricted diet.

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Past Experience

- Interrogations have saved American lives
- Of the over 50 CIA detainees
 - 27 would not cooperate until they were interrogated
 - 16 of those would not cooperate until they were interrogated with enhanced techniques
- Use of these techniques against other key detainees have yielded significant threat information
- The detainees who have provided the most information are KSM and Abu Zubaydah, both of whom were interrogated with the aid of such techniques [, including the waterboard.]

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Why are We Here?

- Our people on the front line need clear, consistent, and reliable guidance
- Transparency
- Consistency with USG policy statements
- Withdrawal of DOJ's 1 August 2002 opinion to White House Counsel
- Impact of Hamdi and Rasul decisions

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Transparency

- Briefing of Principals to ensure renewed understanding of and Policy Support for Interrogation Program
- Briefings of Intelligence Oversight Committees to obtain renewed Political Support for the Interrogation Program

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Consistency

- President's 7 February 2002 Memorandum
 - “our values as a nation ... call for us to treat detainees humanely”
- DOD GC's June 2003 Letter to Senator Leahy
 - US policy to “treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent” with the US Constitution.
- Durbin Amendment to FY05 NDAA
 - “no person *in the custody or under the physical control of the United States* shall be subject to ... cruel, inhuman, or degrading treatment....” (emphasis added)

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Relevant Considerations

- Are CIA's use of interrogation techniques consistent with expressions of current and developing US Policy
 - President's 7 February 2002 memorandum
 - DoD GC Letter to Sen. Leahy of 25 June 2003
 - Durbin Amendment to the FY 2005 NDAA
- Will CIA's use of the interrogation techniques be found lawful
 - Torture Statute
 - Other US laws and treaty obligations, including the Convention Against Torture and its Article 16
 - If the Constitutional minimums applied (5th, 8th, 14th Amendments)
 - Impact of recent Supreme Court decisions on rights of detainees

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What Needs to be Done

- NSC Principals approval, including DOJ:
 - reaffirming that CIA's use of specifically identified interrogation techniques do not violate US law prohibiting torture (i.e. the Torture Statute);
 - reaffirming that CIA's interrogation techniques do not violate other US laws because the techniques were being used only against foreign nationals outside US jurisdiction;
 - Opining on whether any of CIA's specifically identified interrogation techniques violate the standards of conduct enunciated by courts under the Fifth, Eighth, and Fourteenth Amendments to the US Constitution. (These same standards are applied by the US under Article 16 of the Convention Against Torture ("the CAT"), and the Administration has so stated on a number of occasions.
- Congressional briefings

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Exhibit T

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CTC: [redacted] 3.5(c)
1.4(c) 2004

MEMORANDUM FOR THE RECORD

SUBJECT: (TS) Meeting with National Security Adviser Rice in the White House Situation Room, Friday, 1.4(c) 2004
re: Interrogations and Detainees 1.4(c)

1. (TS) National Security Adviser Rice chaired a meeting in the White House Situation Room on Friday, [redacted] from 1:00 - 2:30 p.m. to discuss al-Qa'ida facilitator [redacted] detained [redacted] and whether CIA should render him and, if necessary, interrogate him using methods including enhanced interrogation techniques. In attendance were: Attorney General Ashcroft; Deputy Attorney General Comey; DCI Tenet; CIA General Counsel Muller; CIA/CTC Deputy Director Mudd; CIA officers [redacted] NSC legal adviser Bellinger; NSC Senior Director Shedd; and White House Counsel Gonzalez. 1.4(c)

2. (TS) The meeting opened with a substantive brief by [redacted] on the importance of [redacted] and the type of information he is likely to know. [redacted] followed with a brief overview of CIA's interrogation program, including a summary of the successes of the program (revelations by KSM and Abu Zubaydah) and an explanation of the waterboard technique and its role in the overall interrogation process. 3.5(c) 1.4(c) 3.5(c)

3. (TS) Briefing slides on "CIA Request for Guidance Regarding Interrogation of [redacted]" were passed out to each participant and the substance was covered for each of them. A copy of the slides are attached. 1.4(c)

4. (TS) Muller followed with a summary of policy and legal issues that had led to the halt in CIA's rendition and interrogation program. Among the issues Muller raised were the possible policy disconnect between public policy statements about prisoner treatment and the CIA program and constitutional ("shock the conscience") standards and other legal/policy [redacted]

[redacted] 3.5(c)

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SUBJECT: (TS) Meeting with National Security Adviser Rice in the White House Situation Room, Friday, 1.4(c) 2004
re: Interrogations and Detainee 1.4(c)

questions about enhanced techniques. Muller's remarks were the backdrop for a lengthy discussion about what techniques are appropriate, the basis for approval and what further work DoJ needs to conduct.

5. (TS) During a lengthy back-and-forth among a handful of the attendees, several key points were addressed:

a. The Attorney General repeatedly said that the enhanced techniques employed by CIA, other than the waterboard, are legal. He and others discussed the need for a further review of the waterboard technique, primarily because of the view that the technique has been employed in a different fashion than that which DoJ initially approved. It was later clarified that the Attorney General was referring to the nine techniques (other than the waterboard) referred to in the DoJ memorandum to Acting General Counsel John Rizzo regarding Abu Zubaydah and, as of the time of the meeting, the 24 techniques approved by the Secretary of Defense on or about 16 April 2003.

b. The National Security Adviser and the Counsel to the President understood the issue of whether there is now a gap between public statements and the CIA interrogation program in light of the Department of Justice's current refusal to address the issue of whether the techniques proposed for use with [redacted] meet the Constitution's "shock the conscience" standard and the statements in the 25 June 2003 letter to Senator Leahy from DoD General Counsel Haynes. They nevertheless repeated support for use of enhanced techniques except the waterboard with respect to [redacted]. At varying points, Rice stated that any perceived disparity would be dealt with later, that there was no disparity, that the techniques were humane in her view and she questioned whether that "single sentence" in the Haynes letter (the last sentence in paragraph two) was likely to be viewed as significant by the public.

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c. In the course of the discussion of legal issues, the Attorney General stated, among other things:

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SUBJECT: (TS) Meeting with National Security Adviser Rice in
the White House Situation Room, Friday, [redacted] 1.4(c) 2004
re: Interrogations and Detainees [redacted] 1.4(c)

1. There is little precedent applying the "shock the conscience" test in the kind of circumstances involved here and that the case law was developed in the different context of law enforcement cases.

2. The standards developed under the Eighth Amendment are inapplicable because the conduct here is for a purpose other than the kind of punishment the Eighth Amendment addresses; and

3. The recent Supreme Court decisions did represent "some loosening of the ground" on the underpinnings of DOJ's analysis that the Constitution did not apply to aliens held overseas as enemy combatants. However, the Department's view remains that aliens overseas have no constitutional rights.

6. (TS) During the course of the discussion, the need to move quickly toward a decision was raised repeatedly, as a result of the assessment that [redacted] might have information that could disrupt the pre-election plot. In parallel, all agreed on the importance of ensuring that other principals, particularly the Secretaries of State and Defense, be briefed into the [redacted] case specifically and the policy and legal questions surrounding the CIA program more generally. 1.4(c)

7. (TS) The clear sense at the table among senior policymakers was that CIA had the requisite authority to use the Abu Zubaydah techniques (other than the waterboard) with [redacted] as well as other approved techniques, in light of the assessed likelihood that [redacted] has immediate threat information that could save American lives. 1.4(c)

3.5(c)

[redacted]
John P. Mudd
Deputy Director
DCI Counterterrorist Center

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SUBJECT: (TS) Meeting with National Security Adviser Rice in
the White House Situation Room, Friday, 1.4(c) 2004
re: Interrogations and Detainee 1.4(c)

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DATE: 2010-05-17 15:52

SUBJECT: MEETING WITH NATIONAL SECURITY ADVISER RICE IN THE WHITE HOUSE SITUATION ROOM,
FRIDAY, 1.4(c) 2004 RE: INTERROGATIONS AND DETAINEE 1.4(c)

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CTC: 1.4(c)

23 JULY 2004

MEMORANDUM FOR THE RECORD

SUBJECT: (TS) MEETING WITH NATIONAL SECURITY ADVISER RICE IN
THE WHITE HOUSE SITUATION ROOM, FRIDAY, 1.4(c) 2004
RE: INTERROGATIONS AND DETAINEE 1.4(c)

1. (TS) NATIONAL SECURITY ADVISER RICE CHAIRED A MEETING
IN THE WHITE HOUSE SITUATION ROOM ON FRIDAY, 1.4(c) FROM 1:00 -
2:30 P.M. TO DISCUSS AL-QA'IDA FACILITATOR 1.4(c)
DETAINEE 1.4(c) AND WHETHER CIA SHOULD RENDER HIM AND, IF
NECESSARY, INTERROGATE HIM USING METHODS INCLUDING ENHANCED
INTERROGATION TECHNIQUES. IN ATTENDANCE WERE: ATTORNEY GENERAL
ASHCROFT; DEPUTY ATTORNEY GENERAL COMEY; DCI TENET; CIA GENERAL
COUNSEL MULLER; CIA/CTC DEPUTY DIRECTOR MUDD; CIA OFFICERS
3.5(c) NSC LEGAL ADVISER BELLINGER; NSC SENIOR
DIRECTOR SHEDD; AND WHITE HOUSE COUNSEL GONZALEZ.

2. (TS) THE MEETING OPENED WITH A SUBSTANTIVE BRIEF BY
3.5(c) ON THE IMPORTANCE OF AND THE TYPE OF INFORMATION
HE IS LIKELY TO KNOW. 1.4(c) FOLLOWED WITH A BRIEF OVERVIEW OF
CIA'S INTERROGATION PROGRAM, INCLUDING A SUMMARY OF THE
SUCCESSSES OF THE PROGRAM (REVELATIONS BY KSM AND ABU ZUBAYDAH)
AND AN EXPLANATION OF THE WATERBOARD TECHNIQUE AND ITS ROLE IN
THE OVERALL INTERROGATION PROCESS.

3. (S) BRIEFING SLIDES ON "CIA REQUEST FOR GUIDANCE
REGARDING INTERROGATION OF 1.4(c) WERE PASSED OUT TO EACH
PARTICIPANT AND THE SUBSTANCE WAS COVERED FOR EACH OF THEM. A
COPY OF THE SLIDES ARE ATTACHED.

4. (TS) MULLER FOLLOWED WITH A SUMMARY OF POLICY AND
LEGAL ISSUES THAT HAD LED TO THE HALT IN CIA'S RENDITION AND
INTERROGATION PROGRAM. AMONG THE ISSUES MULLER RAISED WERE THE

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POSSIBLE POLICY DISCONNECT BETWEEN PUBLIC POLICY STATEMENTS ABOUT PRISONER TREATMENT AND THE CIA PROGRAM AND CONSTITUTIONAL ("SHOCK THE CONSCIENCE") STANDARDS AND OTHER LEGAL/POLICY

[PAGE 1]

QUESTIONS ABOUT ENHANCED TECHNIQUES. MULLER'S REMARKS WERE THE BACKDROP FOR A LENGTHY DISCUSSION ABOUT WHAT TECHNIQUES ARE APPROPRIATE, THE BASIS FOR APPROVAL AND WHAT FURTHER WORK DOJ NEEDS TO CONDUCT.

5. (TS) DURING A LENGTHY BACK-AND-FORTH AMONG A HANDFUL OF THE ATTENDEES, SEVERAL KEY POINTS WERE ADDRESSED:

A. THE ATTORNEY GENERAL REPEATEDLY SAID THAT THE ENHANCED TECHNIQUES EMPLOYED BY CIA, OTHER THAN THE WATERBOARD, ARE LEGAL. HE AND OTHERS DISCUSSED THE NEED FOR A FURTHER REVIEW OF THE WATERBOARD TECHNIQUE, PRIMARILY BECAUSE OF THE VIEW THAT THE TECHNIQUE HAS BEEN EMPLOYED IN A DIFFERENT FASHION THAN THAT WHICH DOJ INITIALLY APPROVED. IT WAS LATER CLARIFIED THAT THE ATTORNEY GENERAL WAS REFERRING TO THE NINE TECHNIQUES (OTHER THAN THE WATERBOARD) REFERRED TO IN THE DOJ MEMORANDUM TO ACTING GENERAL COUNSEL JOHN RIZZO REGARDING ABU ZUBAYDAH AND, AS OF THE TIME OF THE MEETING, THE 24 TECHNIQUES APPROVED BY THE SECRETARY OF DEFENSE ON OR ABOUT 16 APRIL 2003.

B. THE NATIONAL SECURITY ADVISER AND THE COUNSEL TO THE PRESIDENT UNDERSTOOD THE ISSUE OF WHETHER THERE IS NOW A GAP BETWEEN PUBLIC STATEMENTS AND THE CIA INTERROGATION PROGRAM IN LIGHT OF THE DEPARTMENT OF JUSTICE'S CURRENT REFUSAL TO ADDRESS THE ISSUE OF WHETHER THE TECHNIQUES PROPOSED FOR USE WITH [] MEET THE CONSTITUTION'S "SHOCK THE CONSCIENCE" STANDARD AND THE STATEMENTS IN THE 25 JUNE 2003 LETTER TO SENATOR LEAHY FROM DOD GENERAL COUNSEL HAYNES. THEY NEVERTHELESS REPEATED SUPPORT FOR USE OF ENHANCED TECHNIQUES EXCEPT THE WATERBOARD WITH RESPECT TO [] AT VARYING POINTS, RICE STATED THAT ANY PERCEIVED DISPARITY WOULD BE DEALT WITH LATER. THAT THERE WAS NO DISPARITY, THAT THE TECHNIQUES WERE HUMANE IN HER VIEW AND SHE QUESTIONED WHETHER THAT "SINGLE SENTENCE" IN THE HAYNES LETTER (THE LAST SENTENCE IN PARAGRAPH TWO) WAS LIKELY TO BE VIEWED AS SIGNIFICANT BY THE PUBLIC.

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C. IN THE COURSE OF THE DISCUSSION OF LEGAL ISSUES, THE ATTORNEY GENERAL STATED, AMONG OTHER THINGS:

[PAGE 2]

1. THERE IS LITTLE PRECEDENT APPLYING THE "SHOCK THE CONSCIENCE" TEST IN THE KIND OF CIRCUMSTANCES INVOLVED HERE AND THAT THE CASE LAW WAS DEVELOPED IN

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THE DIFFERENT CONTEXT OF LAW ENFORCEMENT CASES.

2. THE STANDARDS DEVELOPED UNDER THE EIGHTH AMENDMENT ARE INAPPLICABLE BECAUSE THE CONDUCT HERE IS FOR A PURPOSE OTHER THAN THE KIND OF PUNISHMENT THE EIGHTH AMENDMENT ADDRESSES; AND

3. THE RECENT SUPREME COURT DECISIONS DID REPRESENT "SOME LOOSENING OF THE GROUND" ON THE UNDERPINNINGS OF DOJ'S ANALYSIS THAT THE CONSTITUTION DID NOT APPLY TO ALIENS HELD OVERSEAS AS ENEMY COMBATANTS. HOWEVER, THE DEPARTMENT'S VIEW REMAINS THAT ALIENS OVERSEAS HAVE NO CONSTITUTIONAL RIGHTS.

6. (TS) DURING THE COURSE OF THE DISCUSSION, THE NEED TO MOVE QUICKLY TOWARD A DECISION WAS RAISED REPEATEDLY, AS A RESULT OF THE ASSESSMENT THAT [REDACTED] MIGHT HAVE INFORMATION THAT COULD DISRUPT THE PRE-ELECTION PLOT. IN PARALLEL, ALL AGREED ON THE IMPORTANCE OF ENSURING THAT OTHER PRINCIPALS, PARTICULARLY THE SECRETARIES OF STATE AND DEFENSE, BE BRIEFED INTO THE [REDACTED] CASE SPECIFICALLY AND THE POLICY AND LEGAL QUESTIONS SURROUNDING THE CIA PROGRAM MORE GENERALLY.

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7. (TS) THE CLEAR SENSE AT THE TABLE AMONG SENIOR POLICYMAKERS WAS THAT CIA HAD THE REQUISITE AUTHORITY TO USE THE ABU ZUBAYDAH TECHNIQUES (OTHER THAN THE WATERBOARD) WITH [REDACTED] AS WELL AS OTHER APPROVED TECHNIQUES, IN LIGHT OF THE ASSESSED LIKELIHOOD THAT [REDACTED] HAS IMMEDIATE THREAT INFORMATION THAT COULD SAVE AMERICAN LIVES.

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1.4(c)

JOHN P. MUDD
DEPUTY DIRECTOR
DCI COUNTERTERRORIST CENTER

[PAGE 3] SUBJECT: (TS) MEETING WITH NATIONAL SECURITY ADVISER RICE IN THE WHITE HOUSE SITUATION ROOM, FRIDAY, 1.4(c) 2004
RE: INTERROGATIONS AND DETAINEE 1.4(c)

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[PAGE 4]

Attachments:

Attach: [REDACTED] 3.5(c)

0150007

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Exhibit U

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Office of the Attorney General
Washington, D. C. 20530

~~TOP SECRET [REDACTED] NOFORN/MR~~

July 22, 2004

John E. McLaughlin
Acting Director of Central Intelligence
Central Intelligence Agency
Washington, D.C. 20505

Dear John:

This letter will confirm my advice that, in the contemplated interrogation of [REDACTED] the use of the following interrogation techniques outside territory subject to United States jurisdiction would not violate the United States Constitution or any statute or treaty obligation of the United States, including Article 16 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988) (entered into force June 26, 1987): the nine techniques (other than the waterboard) described in the Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, *Re: Interrogation of al Qaeda Operative* (Aug. 1, 2002), subject to the assumptions and limitations stated there.
(TS, [REDACTED] NF)

Sincerely,

A handwritten signature in black ink that reads "John D. Ashcroft".

John D. Ashcroft
Attorney General

~~TOP SECRET [REDACTED] NOFORN/MR~~

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Exhibit V: Levin to Rizzo

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U.S. Department of Justice

Office of Legal Counsel

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Office of the Assistant Attorney General

Washington, D.C. 20530

August 6, 2004

John A. Rizzo, Esq.
Acting General Counsel
Central Intelligence Agency
Washington, D.C. 20505

Dear John:

(TS [REDACTED] NF) This letter will confirm our advice that, although it is a close and difficult question, the use of the waterboard technique in the contemplated interrogation of [REDACTED] outside territory subject to United States jurisdiction would not violate any United States statute, including 18 U.S.C. § 2340A, nor would it violate the United States Constitution or any treaty obligation of the United States. We will supply, at a later date, an opinion that explains the basis for this conclusion. Our advice is based on, and limited by, the following conditions:

1. The use of the technique will conform to the description attached to your letter to me of August 2, 2004 ("Rizzo Letter").
2. A physician and psychologist will approve the use of the technique before each session, will be present throughout the session, and will have authority to stop the use of the technique at any time.
3. There is no material change in the medical and psychological facts and assessments set out in the attachment to your August 2 letter, including that there are no medical or psychological contraindications to the use of the technique as you plan to employ it on [REDACTED].
4. The technique will be used in no more than two sessions, of two hours each, per day. On each day, the total time of the applications of the technique will not exceed 20 minutes. The period over which the technique is used will not extend longer than 30 days, and the technique will not be used on more than 15 days in this period. These limits are consistent with the Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, *Re: Interrogation of al Qaeda Operative* (Aug. 1, 2002), and with the previous uses of the technique, as they have been described to us. As we understand the facts, the detainees previously subjected to the technique "are in good physiological and

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psychological health,” *see* Rizzo Letter at 2, and they have not described the technique as physically painful. This understanding of the facts is material to our conclusion that the technique, as limited in accordance with this letter, would not violate any statute of the United States.

(TS/ [REDACTED] /NF) We express no opinion on any other uses of the technique, nor do we address any techniques other than the waterboard or any conditions under which [REDACTED] or other detainees are held. Furthermore, this letter does not constitute the Department of Justice’s policy approval for use of the technique in this or any other case.

Sincerely,



Daniel B. Levin
Acting Assistant Attorney General

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Exhibit W



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

December 30, 2004

MEMORANDUM FOR JAMES B. COMEY
DEPUTY ATTORNEY GENERAL

Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A

Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law, for example, 18 U.S.C. §§ 2340-2340A; international agreements, exemplified by the United Nations Convention Against Torture (the "CAT")¹; customary international law²; centuries of Anglo-American law³; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.⁴

This Office interpreted the federal criminal prohibition against torture—codified at 18 U.S.C. §§ 2340-2340A—in *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002) ("August 2002 Memorandum"). The August 2002 Memorandum also addressed a number of issues beyond interpretation of those statutory provisions, including the President's Commander-in-Chief power, and various defenses that might be asserted to avoid potential liability under sections 2340-2340A. *See id.* at 31-46.

Questions have since been raised, both by this Office and by others, about the

¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. *See also, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

² It has been suggested that the prohibition against torture has achieved the status of *jus cogens* (i.e., a peremptory norm) under international law. *See, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); *Regina v. Bow Street Metro. Stipendiary Magistrate Ex Parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147, 198; *see also* Restatement (Third) of Foreign Relations Law of the United States § 702 reporters' note 5.

³ *See generally* John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (1977).

⁴ *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167 (July 5, 2004) ("Freedom from torture is an inalienable human right . . ."); Statement on United Nations International Day in Support of Victims of Torture, 39 Weekly Comp. Pres. Doc. 824 (June 30, 2003) ("Torture anywhere is an affront to human dignity everywhere."); *see also* Letter of Transmittal from President Ronald Reagan to the Senate (May 20, 1988), in *Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Treaty Doc. No. 100-20, at iii (1988) ("Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today.")

appropriateness and relevance of the non-statutory discussion in the August 2002 Memorandum, and also about various aspects of the statutory analysis, in particular the statement that “severe” pain under the statute was limited to pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” *Id.* at 1.⁵ We decided to withdraw the August 2002 Memorandum, a decision you announced in June 2004. At that time, you directed this Office to prepare a replacement memorandum. Because of the importance of—and public interest in—these issues, you asked that this memorandum be prepared in a form that could be released to the public so that interested parties could understand our analysis of the statute.

This memorandum supersedes the August 2002 Memorandum in its entirety.⁶ Because the discussion in that memorandum concerning the President’s Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President’s unequivocal directive that United States personnel not engage in torture.⁷

We have also modified in some important respects our analysis of the legal standards applicable under 18 U.S.C. §§ 2340-2340A. For example, we disagree with statements in the August 2002 Memorandum limiting “severe” pain under the statute to “excruciating and agonizing” pain, *id.* at 19, or to pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death,” *id.* at 1. There are additional areas where we disagree with or modify the analysis in the August 2002 Memorandum, as identified in the discussion below.⁸

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

⁵ See, e.g., Anthony Lewis, *Making Torture Legal*, N.Y. Rev. of Books, July 15, 2004; R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos*, Wash. Post, July 4, 2004, at A12; Kathleen Clark & Julie Mertus, *Torturing the Law: the Justice Department’s Legal Contortions on Interrogation*, Wash. Post, June 20, 2004, at B3; Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L. Rev. 97 (2004).

⁶ This memorandum necessarily discusses the prohibition against torture in sections 2340-2340A in somewhat abstract and general terms. In applying this criminal prohibition to particular circumstances, great care must be taken to avoid approving as lawful any conduct that might constitute torture. In addition, this memorandum does not address the many other sources of law that may apply, depending on the circumstances, to the detention or interrogation of detainees (for example, the Geneva Conventions; the Uniform Code of Military Justice, 10 U.S.C. § 801 et seq.; the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-3267; and the War Crimes Act, 18 U.S.C. § 2441, among others). Any analysis of particular facts must, of course, ensure that the United States complies with all applicable legal obligations.

⁷ See, e.g., Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167-68 (July 5, 2004) (“America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.”).

⁸ While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.

I.

Section 2340A provides that “[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.”⁹ Section 2340(1) defines “torture” as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”¹⁰

⁹ Section 2340A provides in full:

(a) Offense.—Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction.—There is jurisdiction over the activity prohibited in subsection (a) if—

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy.—A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

18 U.S.C. § 2340A (2000).

¹⁰ Section 2340 provides in full:

As used in this chapter—

(1) “torture” means an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

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

(3) “United States” means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

18 U.S.C. § 2340 (as amended by Pub. L. No. 108-375, 118 Stat. 1811 (2004)).

In interpreting these provisions, we note that Congress may have adopted a statutory definition of “torture” that differs from certain colloquial uses of the term. *Cf. Cadet v. Bulger*, 377 F.3d 1173, 1194 (11th Cir. 2004) (“[I]n other contexts and under other definitions [the conditions] might be described as torturous. The fact remains, however, that the only relevant definition of ‘torture’ is the definition contained in [the] CAT. . . .”). We must, of course, give effect to the statute as enacted by Congress.¹¹

Congress enacted sections 2340-2340A to carry out the United States’ obligations under the CAT. *See* H.R. Conf. Rep. No. 103-482, at 229 (1994). The CAT, among other things, obligates state parties to take effective measures to prevent acts of torture in any territory under their jurisdiction, and requires the United States, as a state party, to ensure that acts of torture, along with attempts and complicity to commit such acts, are crimes under U.S. law. *See* CAT arts. 2, 4-5. Sections 2340-2340A satisfy that requirement with respect to acts committed outside the United States.¹² Conduct constituting “torture” occurring within the United States was—and remains—prohibited by various other federal and state criminal statutes that we do not discuss here.

The CAT defines “torture” so as to require the intentional infliction of “severe pain or suffering, whether physical or mental.” Article 1(1) of the CAT provides:

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

The Senate attached the following understanding to its resolution of advice and consent to ratification of the CAT:

The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain

¹¹ Our task is only to offer guidance on the meaning of the statute, not to comment on policy. It is of course open to policymakers to determine that conduct that might not be prohibited by the statute is nevertheless contrary to the interests or policy of the United States.

¹² Congress limited the territorial reach of the federal torture statute, providing that the prohibition applies only to conduct occurring “outside the United States,” 18 U.S.C. § 2340A(a), which is currently defined in the statute to mean outside “the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.” *Id.* § 2340(3).

or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36 (1990). This understanding was deposited with the U.S. instrument of ratification, *see* 1830 U.N.T.S. 320 (Oct. 21, 1994), and thus defines the scope of the United States' obligations under the treaty. *See Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 32-33 (1987). The criminal prohibition against torture that Congress codified in 18 U.S.C. §§ 2340-2340A generally tracks the prohibition in the CAT, subject to the U.S. understanding.

II.

Under the language adopted by Congress in sections 2340-2340A, to constitute “torture,” the conduct in question must have been “specifically intended to inflict severe physical or mental pain or suffering.” In the discussion that follows, we will separately consider each of the principal components of this key phrase: (1) the meaning of “severe”; (2) the meaning of “severe physical pain or suffering”; (3) the meaning of “severe mental pain or suffering”; and (4) the meaning of “specifically intended.”

(1) *The meaning of “severe.”*

Because the statute does not define “severe,” “we construe [the] term in accordance with its ordinary or natural meaning.” *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The common understanding of the term “torture” and the context in which the statute was enacted also inform our analysis.

Dictionaries define “severe” (often conjoined with “pain”) to mean “extremely violent or intense: *severe pain*.” *American Heritage Dictionary of the English Language* 1653 (3d ed. 1992); *see also* XV *Oxford English Dictionary* 101 (2d ed. 1989) (“Of pain, suffering, loss, or the like: Grievous, extreme” and “Of circumstances . . . : Hard to sustain or endure”).¹³

¹³ Common dictionary definitions of “torture” further support the statutory concept that the pain or suffering must be severe. *See Black’s Law Dictionary* 1528 (8th ed. 2004) (defining “torture” as “[t]he infliction of *intense pain* to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure”) (emphasis added); *Webster’s Third New International Dictionary of the English Language Unabridged* 2414 (2002) (defining “torture” as “the infliction of *intense pain* (as from burning, crushing, wounding) to punish or coerce someone”) (emphasis added); *Oxford American Dictionary and Language Guide* 1064 (1999) (defining “torture” as “the infliction of *severe bodily pain*, esp. as a punishment or a means of persuasion”) (emphasis added).

This interpretation is also consistent with the history of torture. *See generally* the descriptions in Lord Hope’s lecture, *Torture*, University of Essex/Clifford Chance Lecture 7-8 (Jan. 28, 2004), and in Professor Langbein’s book, *Torture and the Law of Proof: Europe and England in the Ancien Régime*. We emphatically are not saying that only such historical techniques—or similar ones—can constitute “torture” under sections 2340-

The statute, moreover, was intended to implement the United States' obligations under the CAT, which, as quoted above, defines as "torture" acts that inflict "severe pain or suffering" on a person. CAT art. 1(1). As the Senate Foreign Relations Committee explained in its report recommending that the Senate consent to ratification of the CAT:

The [CAT] seeks to define "torture" in a relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned. . . .

. . . .
. . . The term "torture," in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.

S. Exec. Rep. No. 101-30 at 13-14. See also David P. Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 *Nova L. Rev.* 449, 455 (1991) ("By stressing the extreme nature of torture, . . . [the] definition [of torture in the CAT] describes a relatively limited set of circumstances likely to be illegal under most, if not all, domestic legal systems.").

Further, the CAT distinguishes between torture and "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1." CAT art. 16. The CAT thus treats torture as an "extreme form" of cruel, inhuman, or degrading treatment. See S. Exec. Rep. No. 101-30 at 6, 13; see also J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 80 (1988) ("*CAT Handbook*") (noting that Article 16 implies "that torture is the *gravest form* of [cruel, inhuman, or degrading] treatment [or] punishment") (emphasis added); Malcolm D. Evans, *Getting to Grips with Torture*, 51 *Int'l & Comp. L.Q.* 365, 369 (2002) (The CAT "formalises a distinction between torture on the one hand and inhuman and degrading treatment on the other by attributing different legal consequences to them."¹⁴ The Senate Foreign Relations Committee emphasized

2340A. But the historical understanding of "torture" is relevant to interpreting Congress's intent. Cf. *Morissette v. United States*, 342 U.S. 246, 263 (1952).

¹⁴ This approach—distinguishing torture from lesser forms of cruel, inhuman, or degrading treatment—is consistent with other international law sources. The CAT's predecessor, the U.N. Torture Declaration, defined torture as "an *aggravated* and deliberate form of cruel, inhuman or degrading treatment or punishment." Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Res. 3452, art. 1(2) (Dec. 9, 1975) (emphasis added); see also S. Treaty Doc. No. 100-20 at 2 (The U.N. Torture Declaration was "a point of departure for the drafting of the [CAT]."). Other treaties also distinguish torture from lesser forms of cruel, inhuman, or degrading treatment. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, 213 U.N.T.S. 221 (Nov. 4, 1950) ("European Convention") ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); Evans, *Getting to Grips with Torture*, 51 *Int'l & Comp. L.Q.* at 370 ("[T]he ECHR organs have adopted . . . a 'vertical' approach . . . , which is seen as comprising three separate elements, each representing a progression of seriousness, in which one moves progressively from forms of ill-treatment which are

this point in its report recommending that the Senate consent to ratification of the CAT. See S. Exec. Rep. No. 101-30 at 13 (“‘Torture’ is thus to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in the case of torture. . . . The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to ‘other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture’”). See also *Cadet*, 377 F.3d at 1194 (“The definition in CAT draws a critical distinction between ‘torture’ and ‘other acts of cruel, inhuman, or degrading punishment or treatment.’”).

Representations made to the Senate by Executive Branch officials when the Senate was considering the CAT are also relevant in interpreting the CAT’s torture prohibition—which sections 2340-2340A implement. Mark Richard, a Deputy Assistant Attorney General in the Criminal Division, testified that “[t]orture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct.” *Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 16 (1990) (“CAT Hearing”) (prepared statement). The Senate Foreign Relations Committee also understood torture to be limited in just this way. See S. Exec. Rep. No. 101-30 at 6 (noting that “[f]or an act to be ‘torture,’ it must be an extreme form of cruel and inhuman treatment, causing severe pain and suffering, and be intended to cause severe pain and suffering”). Both the Executive Branch and the Senate acknowledged the efforts of the United States during the negotiating process to strengthen the effectiveness of the treaty and to gain wide adherence thereto by focusing the Convention “on torture rather than on other relatively less abhorrent practices.” *Letter of Submittal from George P. Shultz, Secretary of State, to President Ronald Reagan* (May 10, 1988), in S. Treaty Doc. No. 100-20 at v; see also S. Exec. Rep. No. 101-30 at 2-3 (“The United States” helped to focus the Convention “on torture rather than other less abhorrent practices.”). Such statements are probative of a treaty’s meaning. See 11 Op. O.L.C. at 35-36.

‘degrading’ to those which are ‘inhuman’ and then to ‘torture’. The distinctions between them is [sic] based on the severity of suffering involved, with ‘torture’ at the apex.”); Debra Long, *Association for the Prevention of Torture, Guide to Jurisprudence on Torture and Ill-Treatment: Article 3 of the European Convention for the Protection of Human Rights* 13 (2002) (The approach of distinguishing between “torture,” “inhuman” acts, and “degrading” acts has “remained the standard approach taken by the European judicial bodies. Within this approach torture has been singled out as carrying a special stigma, which distinguishes it from other forms of ill-treatment.”). See also *CAT Handbook* at 115-17 (discussing the European Court of Human Rights (“ECHR”) decision in *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978) (concluding that the combined use of wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink constituted inhuman or degrading treatment but not torture under the European Convention)). Cases decided by the ECHR subsequent to *Ireland* have continued to view torture as an aggravated form of inhuman treatment. See, e.g., *Aktas v. Turkey*, No. 24351/94 ¶ 313 (E.C.H.R. 2003); *Akkoc v. Turkey*, Nos. 22947/93 & 22948/93 ¶ 115 (E.C.H.R. 2000); *Kaya v. Turkey*, No. 22535/93 ¶ 117 (E.C.H.R. 2000).

The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) likewise considers “torture” as a category of conduct more severe than “inhuman treatment.” See, e.g., *Prosecutor v. Delalic*, IT-96-21, Trial Chamber Judgment ¶ 542 (ICTY Nov. 16, 1998) (“[I]nhuman treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture.”).

Although Congress defined “torture” under sections 2340-2340A to require conduct specifically intended to cause “severe” pain or suffering, we do not believe Congress intended to reach only conduct involving “excruciating and agonizing” pain or suffering. Although there is some support for this formulation in the ratification history of the CAT,¹⁵ a proposed express understanding to that effect¹⁶ was “criticized for setting too high a threshold of pain,” S. Exec. Rep. No. 101-30 at 9, and was not adopted. We are not aware of any evidence suggesting that the standard was raised in the statute and we do not believe that it was.¹⁷

Drawing distinctions among gradations of pain (for example, severe, mild, moderate, substantial, extreme, intense, excruciating, or agonizing) is obviously not an easy task, especially given the lack of any precise, objective scientific criteria for measuring pain.¹⁸ We are, however,

¹⁵ Deputy Assistant Attorney General Mark Richard testified: “[T]he essence of torture” is treatment that inflicts “excruciating and agonizing physical pain.” *CAT Hearing* at 16 (prepared statement).

¹⁶ See S. Treaty Doc. No. 100-20 at 4-5 (“The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.”).

¹⁷ Thus, we do not agree with the statement in the August 2002 Memorandum that “[t]he Reagan administration’s understanding that the pain be ‘excruciating and agonizing’ is in substance not different from the Bush administration’s proposal that the pain must be severe.” August 2002 Memorandum at 19. Although the terms are concededly imprecise, and whatever the intent of the Reagan Administration’s understanding, we believe that in common usage “excruciating and agonizing” pain is understood to be more intense than “severe” pain.

The August 2002 Memorandum also looked to the use of “severe pain” in certain other statutes, and concluded that to satisfy the definition in section 2340, pain “must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” *Id.* at 1; see also *id.* at 5-6, 13, 46. We do not agree with those statements. Those other statutes define an “emergency medical condition,” for purposes of providing health benefits, as “a condition manifesting itself by acute symptoms of sufficient severity (including severe pain)” such that one could reasonably expect that the absence of immediate medical care might result in death, organ failure or impairment of bodily function. See, e.g., 8 U.S.C. § 1369 (2000); 42 U.S.C. § 1395w-22(d)(3)(B) (2000); *id.* § 1395dd(e) (2000). They do not define “severe pain” even in that very different context (rather, they use it as an indication of an “emergency medical condition”), and they do not state that death, organ failure, or impairment of bodily function cause “severe pain,” but rather that “severe pain” may indicate a condition that, if untreated, could cause one of those results. We do not believe that they provide a proper guide for interpreting “severe pain” in the very different context of the prohibition against torture in sections 2340-2340A. Cf. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (phrase “wages paid” has different meaning in different parts of Title 26); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997) (term “employee” has different meanings in different parts of Title VII).

¹⁸ Despite extensive efforts to develop objective criteria for measuring pain, there is no clear, objective, consistent measurement. As one publication explains:

Pain is a complex, subjective, perceptual phenomenon with a number of dimensions—intensity, quality, time course, impact, and personal meaning—that are uniquely experienced by each individual and, thus, can only be assessed indirectly. *Pain is a subjective experience and there is no way to objectively quantify it.* Consequently, assessment of a patient’s pain depends on the patient’s overt communications, both verbal and behavioral. Given pain’s complexity, one must assess not only its somatic (sensory) component but also patients’ moods, attitudes, coping efforts, resources, responses of family members, and the impact of pain on their lives.

aided in this task by judicial interpretations of the Torture Victims Protection Act (“TVPA”), 28 U.S.C. § 1350 note (2000). The TVPA, also enacted to implement the CAT, provides a civil remedy to victims of torture. The TVPA defines “torture” to include:

any act, directed against an individual in the offender’s custody or physical control, by which *severe pain or suffering* (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), *whether physical or mental*, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind

28 U.S.C. § 1350 note, § 3(b)(1) (emphases added). The emphasized language is similar to section 2340’s “severe physical or mental pain or suffering.”¹⁹ As the Court of Appeals for the District of Columbia Circuit has explained:

The severity requirement is crucial to ensuring that the conduct proscribed by the [CAT] and the TVPA is sufficiently extreme and outrageous to warrant the universal condemnation that the term “torture” both connotes and invokes. The drafters of the [CAT], as well as the Reagan Administration that signed it, the Bush Administration that submitted it to Congress, and the Senate that ultimately ratified it, therefore all sought to ensure that “only acts of a certain gravity shall be considered to constitute torture.”

The critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim. The more intense, lasting, or heinous the agony, the more likely it is to be torture.

Price v. Socialist People’s Libyan Arab Jamahiriya, 294 F.3d 82, 92-93 (D.C. Cir. 2002) (citations omitted). That court concluded that a complaint that alleged beatings at the hands of police but that did not provide details concerning “the severity of plaintiffs’ alleged beatings, including their frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out,” did not suffice “to ensure that [it] satisf[ie]d 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

Dennis C. Turk, *Assess the Person, Not Just the Pain*, Pain: Clinical Updates, Sept. 1993 (emphasis added). This lack of clarity further complicates the effort to define “severe” pain or suffering.

¹⁹ Section 3(b)(2) of the TVPA defines “mental pain or suffering” similarly to the way that section 2340(2) defines “severe mental pain or suffering.”

perpetrators,” but, reversing the district court, went on to hold that “they are not in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture within the meaning of the [TVPA].” *Id.* at 234. Cases in which courts have found torture suggest the nature of the extreme conduct that falls within the statutory definition. *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 789, 790-91, 795 (9th Cir. 1996) (concluding that a course of conduct that included, among other things, severe beatings of plaintiff, repeated threats of death and electric shock, sleep deprivation, extended shackling to a cot (at times with a towel over his nose and mouth and water poured down his nostrils), seven months of confinement in a “suffocatingly hot” and cramped cell, and eight years of solitary or near-solitary confinement, constituted torture); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1332-40, 1345-46 (N.D. Ga. 2002) (concluding that a course of conduct that included, among other things, severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat, and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim’s forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of “Russian roulette,” constituted torture); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22-23 (D.D.C. 2001) (entering default judgment against Iraq where plaintiffs alleged, among other things, threats of “physical torture, such as cutting off . . . fingers, pulling out . . . fingernails,” and electric shocks to the testicles); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64-66 (D.D.C. 1998) (concluding that a course of conduct that included frequent beatings, pistol whipping, threats of imminent death, electric shocks, and attempts to force confessions by playing Russian roulette and pulling the trigger at each denial, constituted torture).

(2) *The meaning of “severe physical pain or suffering.”*

The statute provides a specific definition of “severe mental pain or suffering,” *see* 18 U.S.C. § 2340(2), but does not define the term “severe physical pain or suffering.” Although we think the meaning of “severe physical pain” is relatively straightforward, the question remains whether Congress intended to prohibit a category of “severe physical suffering” distinct from “severe physical pain.” We conclude that under some circumstances “severe physical suffering” may constitute torture even if it does not involve “severe physical pain.” Accordingly, to the extent that the August 2002 Memorandum suggested that “severe physical suffering” under the statute could in no circumstances be distinct from “severe physical pain,” *id.* at 6 n.3, we do not agree.

We begin with the statutory language. The inclusion of the words “or suffering” in the phrase “severe physical pain or suffering” suggests that the statutory category of physical torture is not limited to “severe physical pain.” This is especially so in light of the general principle against interpreting a statute in such a manner as to render words surplusage. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Exactly what is included in the concept of “severe physical suffering,” however, is difficult to ascertain. We interpret the phrase in a statutory context where Congress expressly distinguished “physical pain or suffering” from “mental pain or suffering.” Consequently, a separate category of “physical suffering” must include something other than any type of “mental

pain or suffering.”²⁰ Moreover, given that Congress precisely defined “mental pain or suffering” in the statute, it is unlikely to have intended to undermine that careful definition by including a broad range of mental sensations in a “physical suffering” component of “physical pain or suffering.”²¹ Consequently, “physical suffering” must be limited to adverse “physical” rather than adverse “mental” sensations.

The text of the statute and the CAT, and their history, provide little concrete guidance as to what Congress intended separately to include as “severe physical suffering.” Indeed, the record consistently refers to “severe physical pain or suffering” (or, more often in the ratification record, “severe physical pain *and* suffering”), apparently without ever disaggregating the concepts of “severe physical pain” and “severe physical suffering” or discussing them as separate categories with separate content. Although there is virtually no legislative history for the statute, throughout the ratification of the CAT—which also uses the disjunctive “pain or suffering” and which the statutory prohibition implements—the references were generally to “pain *and* suffering,” with no indication of any difference in meaning. The *Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which appears in S. Treaty Doc. No. 100-20 at 3, for example, repeatedly refers to “pain *and* suffering.” See also S. Exec. Rep. No. 101-30 at 6 (three uses of “pain *and* suffering”); *id.* at 13 (eight uses of “pain *and* suffering”); *id.* at 14 (two uses of “pain *and* suffering”); *id.* at 35 (one use of “pain *and* suffering”). Conversely, the phrase “pain or suffering” is used less frequently in the Senate report in discussing (as opposed to quoting) the CAT and the understandings under consideration, e.g., *id.* at 5-6 (one use of “pain or suffering”), *id.* at 14 (two uses of “pain or suffering”); *id.* at 16 (two uses of “pain or suffering”), and, when used, it is with no suggestion that it has any different meaning.

Although we conclude that inclusion of the words “or suffering” in “severe physical pain or suffering” establishes that physical torture is not limited to “severe physical pain,” we also

²⁰ Common dictionary definitions of “physical” confirm that “physical suffering” does not include mental sensations. See, e.g., *American Heritage Dictionary of the English Language* at 1366 (“Of or relating to the body as distinguished from the mind or spirit”); *Oxford American Dictionary and Language Guide* at 748 (“of or concerning the body (*physical exercise; physical education*)”).

²¹ This is particularly so given that, as Administration witnesses explained, the limiting understanding defining mental pain or suffering was considered necessary to avoid problems of vagueness. See, e.g., *CAT Hearing* at 8, 10 (prepared statement of Abraham Sofaer, Legal Adviser, Department of State: “The Convention’s wording . . . is not in all respects as precise as we believe necessary. . . . [B]ecause [the Convention] requires establishment of criminal penalties under our domestic law, we must pay particular attention to the meaning and interpretation of its provisions, especially concerning the standards by which the Convention will be applied as a matter of U.S. law. . . . [W]e prepared a codified proposal which . . . clarifies the definition of mental pain and suffering.”); *id.* at 15-16 (prepared statement of Mark Richard: “The basic problem with the Torture Convention—one that permeates all our concerns—is its imprecise definition of torture, especially as that term is applied to actions which result solely in mental anguish. This definitional vagueness makes it very doubtful that the United States can, consistent with Constitutional due process constraints, fulfill its obligation under the Convention to adequately engraft the definition of torture into the domestic criminal law of the United States.”); *id.* at 17 (prepared statement of Mark Richard: “Accordingly, the Torture Convention’s vague definition concerning the mental suffering aspect of torture cannot be resolved by reference to established principles of international law. In an effort to overcome this unacceptable element of vagueness in Article I of the Convention, we have proposed an understanding which defines severe mental pain constituting torture with sufficient specificity to . . . meet Constitutional due process requirements.”).

conclude that Congress did not intend “severe physical pain or suffering” to include a category of “physical suffering” that would be so broad as to negate the limitations on the other categories of torture in the statute. Moreover, the “physical suffering” covered by the statute must be “severe” to be within the statutory prohibition. We conclude that under some circumstances “physical suffering” may be of sufficient intensity and duration to meet the statutory definition of torture even if it does not involve “severe physical pain.” To constitute such torture, “severe physical suffering” would have to be a condition of some extended duration or persistence as well as intensity. The need to define a category of “severe physical suffering” that is different from “severe physical pain,” and that also does not undermine the limited definition Congress provided for torture, along with the requirement that any such physical suffering be “severe,” calls for an interpretation under which “severe physical suffering” is reserved for physical distress that is “severe” considering its intensity and duration or persistence, rather than merely mild or transitory.²² Otherwise, the inclusion of such a category would lead to the kind of uncertainty in interpreting the statute that Congress sought to reduce both through its understanding to the CAT and in sections 2340-2340A.

(3) *The meaning of “severe mental pain or suffering.”*

Section 2340 defines “severe mental pain or suffering” to mean:

the prolonged mental harm caused by or resulting from—

- (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (C) the threat of imminent death; or
- (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality[.]

18 U.S.C. § 2340(2). Torture is defined under the statute to include an act specifically intended to inflict severe mental pain or suffering. *Id.* § 2340(1).

An important preliminary question with respect to this definition is whether the statutory

²² Support for concluding that there is an extended temporal element, or at least an element of persistence, in “severe physical suffering” as a category distinct from “severe physical pain” may also be found in the prevalence of concepts of “endurance” of suffering and of suffering as a “state” or “condition” in standard dictionary definitions. See, e.g., *Webster’s Third New International Dictionary* at 2284 (defining “suffering” as “the endurance of or submission to affliction, pain, loss”; “a pain endured”); *Random House Dictionary of the English Language* 1901 (2d ed. 1987) (“the state of a person or thing that suffers”); *Funk & Wagnalls New Standard Dictionary of the English Language* 2416 (1946) (“A state of anguish or pain”); *American Heritage Dictionary of the English Language* at 1795 (“The condition of one who suffers”).

list of the four “predicate acts” in section 2340(2)(A)-(D) is exclusive. We conclude that Congress intended the list of predicate acts to be exclusive—that is, to constitute the proscribed “severe mental pain or suffering” under the statute, the prolonged mental harm must be caused by acts falling within one of the four statutory categories of predicate acts. We reach this conclusion based on the clear language of the statute, which provides a detailed definition that includes four categories of predicate acts joined by the disjunctive and does not contain a catchall provision or any other language suggesting that additional acts might qualify (for example, language such as “including” or “such acts as”).²³ Congress plainly considered very specific predicate acts, and this definition tracks the Senate’s understanding concerning mental pain or suffering when giving its advice and consent to ratification of the CAT. The conclusion that the list of predicate acts is exclusive is consistent with both the text of the Senate’s understanding, and with the fact that it was adopted out of concern that the CAT’s definition of torture did not otherwise meet the requirement for clarity in defining crimes. *See supra* note 21. Adopting an interpretation of the statute that expands the list of predicate acts for “severe mental pain or suffering” would constitute an impermissible rewriting of the statute and would introduce the very imprecision that prompted the Senate to adopt its understanding when giving its advice and consent to ratification of the CAT.

Another question is whether the requirement of “prolonged mental harm” caused by or resulting from one of the enumerated predicate acts is a separate requirement, or whether such “prolonged mental harm” is to be presumed any time one of the predicate acts occurs. Although it is possible to read the statute’s reference to “*the* prolonged mental harm caused by or resulting from” the predicate acts as creating a statutory presumption that each of the predicate acts always causes prolonged mental harm, we do not believe that was Congress’s intent. As noted, this language closely tracks the understanding that the Senate adopted when it gave its advice and consent to ratification of the CAT:

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

S. Exec. Rep. No. 101-30 at 36. We do not believe that simply by adding the word “the” before “prolonged harm,” Congress intended a material change in the definition of mental pain or

²³ These four categories of predicate acts “are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). *See also, e.g.*, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.23 (6th ed. 2000). Nor do we see any “contrary indications” that would rebut this inference. *Vonn*, 535 U.S. at 65.

suffering as articulated in the Senate's understanding to the CAT. The legislative history, moreover, confirms that sections 2340-2340A were intended to fulfill—but not go beyond—the United States' obligations under the CAT: "This section provides the necessary legislation to implement the [CAT]. . . . The definition of torture emanates directly from article 1 of the [CAT]. The definition for 'severe mental pain and suffering' incorporates the [above mentioned] understanding." S. Rep. No. 103-107, at 58-59 (1993). This understanding, embodied in the statute, was meant to define the obligation undertaken by the United States. Given this understanding, the legislative history, and the fact that section 2340(2) defines "severe mental pain or suffering" carefully in language very similar to the understanding, we do not believe that Congress intended the definition to create a presumption that any time one of the predicate acts occurs, prolonged mental harm is deemed to result.

Turning to the question of what constitutes "prolonged mental harm caused by or resulting from" a predicate act, we believe that Congress intended this phrase to require mental "harm" that is caused by or that results from a predicate act, and that has some lasting duration. There is little guidance to draw upon in interpreting this phrase.²⁴ Nevertheless, our interpretation is consistent with the ordinary meaning of the statutory terms. First, the use of the word "harm"—as opposed to simply repeating "pain or suffering"—suggests some mental damage or injury. Ordinary dictionary definitions of "harm," such as "physical or mental damage: injury," *Webster's Third New International Dictionary* at 1034 (emphasis added), or "[p]hysical or psychological injury or damage," *American Heritage Dictionary of the English Language* at 825 (emphasis added), support this interpretation. Second, to "prolong" means to "lengthen in time" or to "extend in duration," or to "draw out," *Webster's Third New International Dictionary* at 1815, further suggesting that to be "prolonged," the mental damage must extend for some period of time. This damage need not be permanent, but it must continue for a "prolonged" period of time.²⁵ Finally, under section 2340(2), the "prolonged mental harm" must be "caused by" or "resulting from" one of the enumerated predicate acts.²⁶

²⁴ The phrase "prolonged mental harm" does not appear in the relevant medical literature or elsewhere in the United States Code. The August 2002 Memorandum concluded that to constitute "prolonged mental harm," there must be "significant psychological harm of significant duration, e.g., lasting for months or even years." *Id.* at 1; see also *id.* at 7. Although we believe that the mental harm must be of some lasting duration to be "prolonged," to the extent that that formulation was intended to suggest that the mental harm would have to last for at least "months or even years," we do not agree.

²⁵ For example, although we do not suggest that the statute is limited to such cases, development of a mental disorder—such as post-traumatic stress disorder or perhaps chronic depression—could constitute "prolonged mental harm." See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 369-76, 463-68 (4th ed. 2000) ("DSM-IV-TR"). See also, e.g., *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/59/324, at 14 (2004) ("The most common diagnosis of psychiatric symptoms among torture survivors is said to be post-traumatic stress disorder."); see also Metin Basoglu et al., *Torture and Mental Health: A Research Overview*, in Ellen Gerrity et al. eds., *The Mental Health Consequences of Torture* 48-49 (2001) (referring to findings of higher rates of post-traumatic stress disorder in studies involving torture survivors); Murat Parker et al., *Psychological Effects of Torture: An Empirical Study of Tortured and Non-Tortured Non-Political Prisoners*, in Metin Basoglu ed., *Torture and Its Consequences: Current Treatment Approaches* 77 (1992) (referring to findings of post-traumatic stress disorder in torture survivors).

²⁶ This is not meant to suggest that, if the predicate act or acts continue for an extended period, "prolonged mental harm" cannot occur until after they are completed. Early occurrences of the predicate act could cause mental

Although there are few judicial opinions discussing the question of “prolonged mental harm,” those cases that have addressed the issue are consistent with our view. For example, in the TVPA case of *Mehinovic*, the court explained that:

[The defendant] also caused or participated in the plaintiffs’ mental torture. Mental torture consists of “prolonged mental harm caused by or resulting from: the intentional infliction or threatened infliction of severe physical pain or suffering; . . . the threat of imminent death . . .” As set out above, plaintiffs noted in their testimony that they feared that they would be killed by [the defendant] during the beatings he inflicted or during games of “Russian roulette.” *Each plaintiff continues to suffer long-term psychological harm as a result of the ordeals they suffered at the hands of defendant and others.*

198 F. Supp. 2d at 1346 (emphasis added; first ellipsis in original). In reaching its conclusion, the court noted that the plaintiffs were continuing to suffer serious mental harm even ten years after the events in question: One plaintiff “suffers from anxiety, flashbacks, and nightmares and has difficulty sleeping. [He] continues to suffer thinking about what happened to him during this ordeal and has been unable to work as a result of the continuing effects of the torture he endured.” *Id.* at 1334. Another plaintiff “suffers from anxiety, sleeps very little, and has frequent nightmares. . . . [He] has found it impossible to return to work.” *Id.* at 1336. A third plaintiff “has frequent nightmares. He has had to use medication to help him sleep. His experience has made him feel depressed and reclusive, and he has not been able to work since he escaped from this ordeal.” *Id.* at 1337-38. And the fourth plaintiff “has flashbacks and nightmares, suffers from nervousness, angers easily, and has difficulty trusting people. These effects directly impact and interfere with his ability to work.” *Id.* at 1340. In each case, these mental effects were continuing years after the infliction of the predicate acts.

And in *Sackie v. Ashcroft*, 270 F. Supp. 2d 596 (E.D. Pa. 2003), the individual had been kidnapped and “forcibly recruited” as a child soldier at the age of 14, and over the next three to four years had been forced to take narcotics and threatened with imminent death. *Id.* at 597-98, 601-02. The court concluded that the resulting mental harm, which continued over this three-to-four-year period, qualified as “prolonged mental harm.” *Id.* at 602.

Conversely, in *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003), the court rejected a claim under the TVPA brought by individuals who had been held at gunpoint overnight and repeatedly threatened with death. While recognizing that the plaintiffs had experienced an “ordeal,” the court concluded that they had failed to show that their experience caused lasting damage, noting that “there is simply no allegation that Plaintiffs have suffered any prolonged mental harm or physical injury as a result of their alleged intimidation.” *Id.* at 1294-95.

harm that could continue—and become prolonged—during the extended period the predicate acts continued to occur. For example, in *Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601-02 (E.D. Pa. 2003), the predicate acts continued over a three-to-four-year period, and the court concluded that “prolonged mental harm” had occurred during that time.

(4) *The meaning of “specifically intended.”*

It is well recognized that the term “specific intent” is ambiguous and that the courts do not use it consistently. See 1 Wayne R. 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”). As one respected treatise explains:

With crimes which require that the defendant intentionally cause a specific result, what is meant by an “intention” to cause that result? Although the theorists have not always been in agreement . . . , the traditional view is that a person who acts . . . intends a result of his act . . . under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.

1 LaFare, *Substantive Criminal Law*, § 5.2(a), at 341 (footnote omitted).

As noted, the cases are inconsistent. Some suggest that only a conscious desire to produce the proscribed result constitutes specific intent; others suggest that even reasonable foreseeability suffices. In *United States v. Bailey*, 444 U.S. 394 (1980), for example, the Court suggested that, at least “[i]n a general sense,” *id.* at 405, “specific intent” requires that one consciously desire the result. *Id.* at 403-05. The Court compared the common law’s *mens rea* concepts of specific intent and general intent to the Model Penal Code’s *mens rea* concepts of acting purposefully and acting knowingly. *Id.* at 404-05. “[A] person who causes a particular result is said to act purposefully,” wrote the Court, “if ‘he consciously desires that result, whatever the likelihood of that result happening from his conduct.’” *Id.* at 404 (internal quotation marks omitted). A person “is said to act knowingly,” in contrast, “if he is aware ‘that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.’” *Id.* (internal quotation marks omitted). The Court then stated: “In a general sense, ‘purpose’ corresponds loosely with the common-law concept of specific intent, while ‘knowledge’ corresponds loosely with the concept of general intent.” *Id.* at 405.

In contrast, cases such as *United States v. Neiswender*, 590 F.2d 1269 (4th Cir. 1979), suggest that to prove specific intent it is enough that the defendant simply have “knowledge or notice” that his act “would have likely resulted in” the proscribed outcome. *Id.* at 1273. “Notice,” the court held, “is provided by the reasonable foreseeability of the natural and probable consequences of one’s acts.” *Id.*

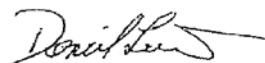
We do not believe it is useful to try to define the precise meaning of “specific intent” in section 2340.²⁷ In light of the President’s directive that the United States not engage in torture, it

²⁷ In the August 2002 Memorandum, this Office concluded that the specific intent element of the statute required that infliction of severe pain or suffering be the defendant’s “precise objective” and that it was not enough

would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture. Some observations, however, are appropriate. It is clear that the specific intent element of section 2340 would be met if a defendant performed an act and “consciously desire[d]” that act to inflict severe physical or mental pain or suffering. 1 LaFave, *Substantive Criminal Law* § 5.2(a), at 341. Conversely, if an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering, it appears unlikely that he would have the specific intent necessary to violate sections 2340-2340A. Such an individual could be said neither consciously to desire the proscribed result, *see, e.g., Bailey*, 444 U.S. at 405, nor to have “knowledge or notice” that his act “would likely have resulted in” the proscribed outcome, *Neiswender*, 590 F.2d at 1273.

Two final points on the issue of specific intent: First, specific intent must be distinguished from motive. There is no exception under the statute permitting torture to be used for a “good reason.” Thus, a defendant’s motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute. *See Cheek v. United States*, 498 U.S. 192, 200-01 (1991). Second, specific intent to take a given action can be found even if the defendant will take the action only conditionally. *Cf., e.g., Holloway v. United States*, 526 U.S. 1, 11 (1999) (“[A] defendant may not negate a proscribed intent by requiring the victim to comply with a condition the defendant has no right to impose.”). *See also id.* at 10-11 & nn. 9-12; Model Penal Code § 2.02(6). Thus, for example, the fact that a victim might have avoided being tortured by cooperating with the perpetrator would not make permissible actions otherwise constituting torture under the statute. Presumably that has frequently been the case with torture, but that fact does not make the practice of torture any less abhorrent or unlawful.²⁸

Please let us know if we can be of further assistance.



Daniel Levin

Acting Assistant Attorney General

that the defendant act with knowledge that such pain “was reasonably likely to result from his actions” (or even that that result “is certain to occur”). *Id.* at 3-4. We do not reiterate that test here.

²⁸ In the August 2002 Memorandum, this Office indicated that an element of the offense of torture was that the act in question actually result in the infliction of severe physical or mental pain or suffering. *See id.* at 3. That conclusion rested on a comparison of the statute with the CAT, which has a different definition of “torture” that requires the actual infliction of pain or suffering, and we do not believe that the statute requires that the defendant actually inflict (as opposed to act with the specific intent to inflict) severe physical or mental pain or suffering. Compare CAT art. 1(1) (“the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted”) (emphasis added) with 18 U.S.C. § 2340 (“‘torture’ means an act . . . specifically intended to inflict severe physical or mental pain or suffering”) (emphasis added). It is unlikely that any such requirement would make any practical difference, however, since the statute also criminalizes attempts to commit torture. *Id.* § 2340A(a).

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Chronology — Pages [1](#), [2](#), [3](#), [4](#), [5](#), [6](#), [7](#), [8](#), [9](#), [10](#), [11](#)

Exhibit X: Bradbury memo

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U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

May 30, 2005

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

*Re: Application of United States Obligations Under Article 16 of the
Convention Against Torture to Certain Techniques that May Be
Used in the Interrogation of High Value al Qaeda Detainees*

You have asked us to address whether certain “enhanced interrogation techniques” employed by the Central Intelligence Agency (“CIA”) in the interrogation of high value al Qaeda detainees are consistent with United States obligations under Article 16 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force for U.S. Nov. 20, 1994) (“CAT”). We conclude that use of these techniques, subject to the CIA’s careful screening criteria and limitations and its medical safeguards, is consistent with United States obligations under Article 16.¹

By its terms, Article 16 is limited to conduct within “territory under [United States] jurisdiction.” We conclude that territory under United States jurisdiction includes, at most, areas

¹ Our analysis and conclusions are limited to the specific legal issues we address in this memorandum. We note that we have previously concluded that use of these techniques, subject to the limits and safeguards required by the interrogation program, does not violate the federal prohibition on torture, codified at 18 U.S.C. §§ 2340-2340A. See Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques that May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005); see also Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005) (concluding that the anticipated combined use of these techniques would not violate the federal prohibition on torture). The legal advice provided in this memorandum does not represent the policy views of the Department of Justice concerning the use of any interrogation methods.

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over which the United States exercises at least de facto authority as the government. Based on CIA assurances, we understand that the interrogations do not take place in any such areas. We therefore conclude that Article 16 is inapplicable to the CIA's interrogation practices and that those practices thus cannot violate Article 16. Further, the United States undertook its obligations under Article 16 subject to a Senate reservation, which, as relevant here, explicitly limits those obligations to "the cruel, unusual and inhumane treatment . . . prohibited by the Fifth Amendment . . . to the Constitution of the United States."² There is a strong argument that through this reservation the Senate intended to limit the scope of United States obligations under Article 16 to those imposed by the relevant provisions of the Constitution. As construed by the courts, the Fifth Amendment does not apply to aliens outside the United States. The CIA has assured us that the interrogation techniques are not used within the United States or against United States persons, including both United States citizens and lawful permanent residents. Because the geographic limitation on the face of Article 16 renders it inapplicable to the CIA interrogation program in any event, we need not decide in this memorandum the precise effect, if any, of the Senate reservation on the geographic reach of United States obligations under Article 16. For these reasons, we conclude in Part II that the interrogation techniques where and as used by the CIA are not subject to, and therefore do not violate, Article 16.

Notwithstanding these conclusions, you have also asked whether the interrogation techniques at issue would violate the substantive standards applicable to the United States under Article 16 if, contrary to our conclusion in Part II, those standards did extend to the CIA interrogation program. As detailed below in Part III, the relevant constraint here, assuming Article 16 did apply, would be the Fifth Amendment's prohibition of executive conduct that "shocks the conscience." The Supreme Court has emphasized that whether conduct "shocks the conscience" is a highly context-specific and fact-dependent question. The Court, however, has not set forth with precision a specific test for ascertaining whether conduct can be said to "shock the conscience" and has disclaimed the ability to do so. Moreover, there are few Supreme Court cases addressing whether conduct "shocks the conscience," and the few cases there are have all arisen in very different contexts from that which we consider here.

For these reasons, we cannot set forth or apply a precise test for ascertaining whether conduct can be said to "shock the conscience." Nevertheless, the Court's "shocks the conscience" cases do provide some signposts that can guide our inquiry. In particular, on balance the cases are best read to require a determination whether the conduct is "arbitrary in the constitutional sense," *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (citation

² The reservation provides in full:

~~That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.~~

136 Cong. Rec. 36198 (1990). As we explain below, the Eighth and Fourteenth Amendments are not applicable in this context.

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omitted); that is, whether it involves the “exercise of power without any reasonable justification in the service of a legitimate governmental objective,” *id.* “[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.” *Id.* at 849. Far from being constitutionally arbitrary, the interrogation techniques at issue here are employed by the CIA only as reasonably deemed necessary to protect against grave threats to United States interests, a determination that is made at CIA Headquarters, with input from the on-scene interrogation team, pursuant to careful screening procedures that ensure that the techniques will be used as little as possible on as few detainees as possible. Moreover, the techniques have been carefully designed to minimize the risk of suffering or injury and to avoid inflicting any serious or lasting physical or psychological harm. Medical screening, monitoring, and ongoing evaluations further lower such risk. Significantly, you have informed us that the CIA believes that this program is largely responsible for preventing a subsequent attack within the United States. Because the CIA interrogation program is carefully limited to further a vital government interest and designed to avoid unnecessary or serious harm, we conclude that it cannot be said to be constitutionally arbitrary.

The Supreme Court’s decisions also suggest that it is appropriate to consider whether, in light of “traditional executive behavior, of contemporary practice, and the standards of blame generally applied to them,” use of the techniques in the CIA interrogation program “is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” *Id.* at 847 n.8. We have not found evidence of traditional executive behavior or contemporary practice either condemning or condoning an interrogation program carefully limited to further a vital government interest and designed to avoid unnecessary or serious harm. We recognize, however, that use of coercive interrogation techniques in other contexts—in different settings, for other purposes, or absent the CIA’s safeguards—might be thought to “shock the conscience.” *Cf., e.g., Rochin v. California*, 342 U.S. 165, 172 (1952) (finding that pumping the stomach of a criminal defendant to obtain evidence “shocks the conscience”); *U.S. Army Field Manual 34-52: Intelligence Interrogation* (1992) (“*Field Manual 34-52*”) (detailing guidelines for interrogations in the context of traditional warfare); Department of State, Country Reports on Human Rights Practices (describing human-rights abuses condemned by the United States). We believe, however, that each of these other contexts, which we describe more fully below, differs critically from the CIA interrogation program in ways that would be unreasonable to ignore in examining whether the conduct involved in the CIA program “shock[s] the contemporary conscience.” Ordinary criminal investigations within the United States, for example, involve fundamentally different government interests and implicate specific constitutional guarantees, such as the privilege against self-incrimination, that are not at issue here. Furthermore, the CIA interrogation techniques have all been adapted from military Survival, Evasion, Resistance, Escape (“SERE”) training. Although there are obvious differences between training exercises and actual interrogations, the fact that the United States uses similar techniques on its own troops for training purposes strongly suggests that these techniques are not categorically beyond the pale.

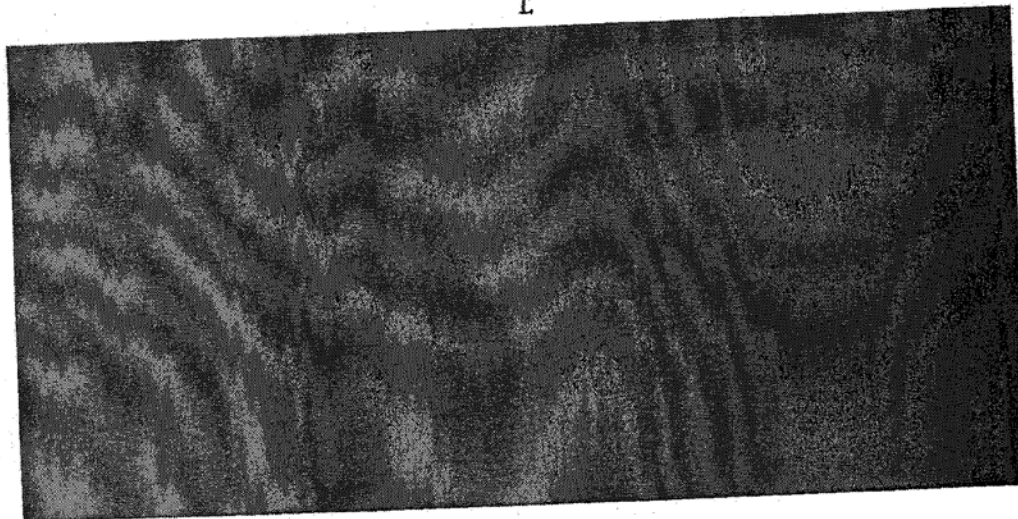
Given that the CIA interrogation program is carefully limited to further the Government’s paramount interest in protecting the Nation while avoiding unnecessary or serious harm, we conclude that the interrogation program cannot “be said to shock the contemporary conscience”

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when considered in light of “traditional executive behavior” and “contemporary practice.”
Lewis, 523 U.S. at 847 n.8.

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Elsewhere, we have described the CIA interrogation program in great detail. See Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques that May Be Used in the Interrogation of a High Value al Qaeda Detainee* at 4-15, 28-45 (May 10, 2005) (“*Techniques*”); Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* at 3-9 (May 10, 2005) (“*Combined Use*”). The descriptions of the techniques, including all limitations and safeguards applicable to their use, set forth in *Techniques* and *Combined Use* are incorporated by reference herein, and we assume familiarity with those descriptions. Here, we highlight those aspects of the program that are most important to the question under consideration. Where appropriate, throughout this opinion we also provide more detailed background information regarding specific high value detainees who are representative of the individuals on whom the techniques might be used.³

A.

Under the CIA’s guidelines, several conditions must be satisfied before the CIA considers employing enhanced techniques in the interrogation of any detainee. The CIA must,

³ The CIA has reviewed and confirmed the accuracy of our description of the interrogation program, including its purposes, methods, limitations, and results.

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based on available intelligence, conclude that the detainee is an important and dangerous member of an al Qaeda-affiliated group. The CIA must then determine, at the Headquarters level and on a case-by-case basis with input from the on-scene interrogation team, that enhanced interrogation methods are needed in a particular interrogation. Finally, the enhanced techniques, which have been designed and implemented to minimize the potential for serious or unnecessary harm to the detainees, may be used only if there are no medical or psychological contraindications.

I.

[REDACTED] the CIA uses enhanced interrogation techniques only if the CIA's Counterterrorist Center ("CTC") determines an individual to be a "High Value Detainee," which the CIA defines as:

a detainee who, until time of capture, we have reason to believe: (1) is a senior member of al-Qai'da or an al-Qai'da associated terrorist group (Jemaah Islamiyyah, Egyptian Islamic Jihad, al-Zarqawi Group, etc.); (2) has knowledge of imminent terrorist threats against the USA, its military forces, its citizens and organizations, or its allies; or that has/had direct involvement in planning and preparing terrorist actions against the USA or its allies, or assisting the al-Qai'da leadership in planning and preparing such terrorist actions; and (3) if released, constitutes a clear and continuing threat to the USA or its allies.

Fax for Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, from [REDACTED] Assistant General Counsel, Central Intelligence Agency at 4 (Jan. 4, 2005) ("January 4 [REDACTED] Fax"). The CIA, therefore, must have reason to believe that the detainee is a senior member (rather than a mere "foot soldier") of al Qaeda or an associated terrorist organization, who likely has actionable intelligence concerning terrorist threats, and who poses a significant threat to United States interests.

The "waterboard," which is the most intense of the CIA interrogation techniques, is subject to additional limits. It may be used on a High Value Detainee only if the CIA has "credible intelligence that a terrorist attack is imminent"; "substantial and credible indicators that the subject has actionable intelligence that can prevent, disrupt or delay this attack"; and "[o]ther interrogation methods have failed to elicit the information [or] CIA has clear indications that other . . . methods are unlikely to elicit this information *within the perceived time limit for preventing the attack*." Letter from John A. Rizzo, Acting General Counsel, Central Intelligence Agency, to Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel at 5 (Aug. 2, 2004) ("*August 2 Rizzo Letter*") (attachment).

To date, the CIA has taken custody of 94 detainees [REDACTED] and has employed enhanced techniques to varying degrees in the interrogations of 28 of these detainees. We understand that two individuals, [REDACTED]

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[REDACTED] are representative of the high value detainees on whom enhanced techniques have been, or might be, used. On [REDACTED] the CIA took custody of [REDACTED] whom the CIA believed had actionable intelligence concerning the pre-election threat to the United States. See Letter from [REDACTED] Associate General Counsel, Central Intelligence Agency, to Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel at 2 (Aug. 25, 2004) (“August 25 [REDACTED] Letter”). [REDACTED] extensive connections to various al Qaeda leaders, members of the Taliban, and the al-Zarqawi network, and intelligence indicated [REDACTED] arranged a . . . meeting between [REDACTED] and [REDACTED] [REDACTED] at which elements of the pre-election threat were discussed.” *Id.* at 2-3; see also Undated CIA Memo, [REDACTED]

Intelligence indicated that prior to his capture, [REDACTED] “perform[ed] critical facilitation and finance activities for al-Qa’ida,” including “transporting people, funds, and documents.” Fax for Jack L. Goldsmith, III, Assistant Attorney General, Office of Legal Counsel, from [REDACTED] Assistant General Counsel, Central Intelligence Agency (March 12, 2004). The CIA also suspected [REDACTED] played an active part in planning attacks against United States forces [REDACTED] had extensive contacts with key members of al Qaeda, including, prior to their captures, Khalid Shaykh Muhammad (“KSM”) and Abu Zubaydah. See *id.* [REDACTED] was captured while on a mission from [REDACTED] to establish contact” with al-Zarqawi. See CIA Directorate of Intelligence, *US Efforts Grinding Down al-Qa’ida 2* (Feb. 21, 2004).

Consistent with its heightened standard for use of the waterboard, the CIA has used this technique in the interrogations of only three detainees to date (KSM, Zubaydah, and ‘Abd Al-Rahim Al-Nashiri) and has not used it since the March 2003 interrogation of KSM. See Letter from Scott W. Muller, General Counsel, Central Intelligence Agency, to Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel at 1 (June 14, 2004).

We understand that Abu Zubaydah and KSM are representative of the types of detainees on whom the waterboard has been, or might be, used. Prior to his capture, Zubaydah was “one of Usama Bin Laden’s key lieutenants.” CIA, *Zayn al-Abidin Muhammad Husayn ABU ZUBAYDAH* at 1 (Jan. 7, 2002) (“Zubaydah Biography”). Indeed, Zubaydah was al Qaeda’s third or fourth highest ranking member and had been involved “in every major terrorist operation carried out by al Qaeda.” Memorandum for John Rizzo, Acting General Counsel, Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Interrogation of al Qaeda Operative* at 7 (Aug. 1, 2002) (“Interrogation Memorandum”); Zubaydah Biography (noting Zubaydah’s involvement in the September 11 attacks). Upon his capture on March 27, 2002, Zubaydah became the most senior member of al Qaeda in United States custody. See *JG Report* at 12.

KSM, “a mastermind” of the September 11, 2001, attacks, was regarded as “one of al-Qa’ida’s most dangerous and resourceful operatives.” CIA, *Khalid Shaykh Muhammad* at 1 (Nov. 1, 2002) (“CIA KSM Biography”).

[REDACTED] Prior to his capture, the CIA considered KSM to be one of al Qaeda’s “most important operational leaders . . . based on his

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close relationship with Usama Bin Laden and his reputation among the al-Qa'ida rank and file." *Id.* After the September 11 attacks, KSM assumed "the role of operations chief for al-Qa'ida around the world." CIA Directorate of Intelligence, *Khalid Shaykh Muhammad: Preeminent Source on Al-Qa'ida* 7 (July 13, 2004) ("Preeminent Source"). KSM also planned additional attacks within the United States both before and after September 11. *See id.* at 7-8; *see also The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 150 (official gov't ed. 2004) ("9/11 Commission Report").⁴

2.

Even with regard to detainees who satisfy these threshold requirements, enhanced techniques are considered only if the on-scene interrogation team determines that the detainee is withholding or manipulating information. In order to make this assessment, interrogators conduct an initial interview "in a relatively benign environment." Fax for Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, from [REDACTED] Associate General Counsel, Central Intelligence Agency, *Re: Background Paper on CIA's Combined Use of Interrogation Techniques* at 3 (Dec. 30, 2004) ("Background Paper"). At this stage, the detainee is "normally clothed but seated and shackled for security purposes," and the interrogators take "an open, non-threatening approach." *Id.* In order to be judged participatory, however, a high value detainee "would have to willingly provide information on actionable threats and location information on High-Value Targets at large—not lower level information." *Id.* If the detainee fails to meet this "very high" standard, the interrogation team develops an interrogation plan, which generally calls for the use of enhanced techniques only as necessary and in escalating fashion. *See id.* at 3-4; *Techniques* at 5.

Any interrogation plan that involves the use of enhanced techniques must be reviewed and approved by "the Director, DCI Counterterrorist Center, with the concurrence of the Chief, CTC Legal Group." George J. Tenet, Director of Central Intelligence, *Guidelines on Interrogations Conducted Pursuant to the [REDACTED]* at 3 (Jan. 28, 2003) ("Interrogation Guidelines").⁵ Each approval lasts for a period of at most 30 days, *see id.* at 1-2, although enhanced interrogation techniques are generally not used for more than seven days, *see Background Paper* at 17.

For example, after medical and psychological examinations found no contraindications, [REDACTED]'s interrogation team sought and obtained approval to use the following techniques: attention grasp, walling, facial hold, facial slap, wall standing, stress positions, and sleep deprivation. *See August 25 [REDACTED] Letter* at 2. The interrogation team "carefully analyzed Gul's responsiveness to different areas of inquiry" during this time and noted that his resistance increased as questioning moved to his "knowledge of operational terrorist activities." *Id.* at 3.

⁴ Al-Nashiri, the only other detainee to be subjected to the waterboard, planned the bombing of the U.S.S. Cole and was subsequently recognized as the chief of al Qaeda operations in and around the Arabian Peninsula. *9/11 Commission Report* at 153.

⁵ You have informed us that the current practice is for the Director of the Central Intelligence Agency to make this determination personally.

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[REDACTED] feigned memory problems (which CIA psychologists ruled out through intelligence and memory tests) in order to avoid answering questions. *Id.*

At that point, the interrogation team believed [REDACTED] “maintains a tough, Mujahidin fighter mentality and has conditioned himself for a physical interrogation.” *Id.* The team therefore concluded that “more subtle interrogation measures designed more to weaken [REDACTED] physical ability and mental desire to resist interrogation over the long run are likely to be more effective.” *Id.* For these reasons, the team sought authorization to use dietary manipulation, nudity, water dousing, and abdominal slap. *Id.* at 4-5. In the team’s view, adding these techniques would be especially helpful [REDACTED] because he appeared to have a particular weakness for food and also seemed especially modest. *See id.* at 4.

The CIA used the waterboard extensively in the interrogations of KSM and Zubaydah, but did so only after it became clear that standard interrogation techniques were not working. Interrogators used enhanced techniques in the interrogation of al-Nashiri with notable results as early as the first day. *See IG Report* at 35-36. Twelve days into the interrogation, the CIA subjected al-Nashiri to one session of the waterboard during which water was applied two times. *See id.* at 36.

3.

Medical and psychological professionals from the CIA’s Office of Medical Services (“OMS”) carefully evaluate detainees before any enhanced technique is authorized in order to ensure that the detainee “is not likely to suffer any severe physical or mental pain or suffering as a result of interrogation.” *Techniques* at 4; *see OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation and Detention* at 9 (Dec. 2004) (“*OMS Guidelines*”). In addition, OMS officials continuously monitor the detainee’s condition throughout any interrogation using enhanced techniques, and the interrogation team will stop the use of particular techniques or the interrogation altogether if the detainee’s medical or psychological condition indicates that the detainee might suffer significant physical or mental harm. *See Techniques* at 5-6. OMS has, in fact, prohibited the use of certain techniques in the interrogations of certain detainees. *See id.* at 5. Thus, no technique is used in the interrogation of any detainee—no matter how valuable the information the CIA believes the detainee has—if the medical and psychological evaluations or ongoing monitoring suggest that the detainee is likely to suffer serious harm. Careful records are kept of each interrogation, which ensures accountability and allows for ongoing evaluation of the efficacy of each technique and its potential for any unintended or inappropriate results. *See id.*

B.

Your office has informed us that the CIA believes that “the intelligence acquired from these interrogations has been a key reason why al-Qa’ida has failed to launch a spectacular attack in the West since 11 September 2001.” Memorandum for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from [REDACTED] DCI Counterterrorist Center, *Re: Effectiveness of the CIA Counterintelligence Interrogation Techniques* at 2 (Mar. 2, 2005) (“*Effectiveness Memo*”). In particular, the CIA

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believes that it would have been unable to obtain critical information from numerous detainees, including KSM and Abu Zubaydah, without these enhanced techniques. Both KSM and Zubaydah had “expressed their belief that the general US population was ‘weak,’ lacked resilience, and would be unable to ‘do what was necessary’ to prevent the terrorists from succeeding in their goals.” *Id.* at 1. Indeed, before the CIA used enhanced techniques in its interrogation of KSM, KSM resisted giving any answers to questions about future attacks, simply noting, “Soon, you will know.” *Id.* We understand that the use of enhanced techniques in the interrogations of KSM, Zubaydah, and others, by contrast, has yielded critical information. See *IG Report* at 86, 90-91 (describing increase in intelligence reports attributable to use of enhanced techniques). As Zubaydah himself explained with respect to enhanced techniques, “brothers who are captured and interrogated are permitted by Allah to provide information when they believe they have ‘reached the limit of their ability to withhold it’ in the face of psychological and physical hardships.” *Effectiveness Memo* at 2. And, indeed, we understand that since the use of enhanced techniques, “KSM and Abu Zubaydah have been pivotal sources because of their ability and willingness to provide their analysis and speculation about the capabilities, methodologies, and mindsets of terrorists.” *Preeminent Source* at 4.

Nevertheless, current CIA threat reporting indicates that, despite substantial setbacks over the last year, al Qaeda continues to pose a grave threat to the United States and its interests. See CIA [REDACTED]

[REDACTED] You have informed us that the CIA believes that enhanced interrogation techniques remain essential to obtaining vital intelligence necessary to detect and disrupt such emerging threats.

In understanding the effectiveness of the interrogation program, it is important to keep two related points in mind. First, the total value of the program cannot be appreciated solely by focusing on individual pieces of information. According to the CIA Inspector General:


CTC frequently uses the information from one detainee, as well as other sources, to vet the information of another detainee. Although lower-level detainees provide less information than the high value detainees, information from these detainees has, on many occasions, supplied the information needed to probe the high value detainees further. . . . [T]he triangulation of intelligence provides a fuller knowledge of Al-Qa’ida activities than would be possible from a single detainee.



IG Report at 86. As illustrated below, we understand that even interrogations of comparatively lower-tier high value detainees supply information that the CIA uses to validate and assess information elicited in other interrogations and through other methods. Intelligence acquired


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from the interrogation program also enhances other intelligence methods and has helped to build the CIA's overall understanding of al Qaeda and its affiliates. Second, it is difficult to quantify with confidence and precision the effectiveness of the program. As the *IG Report* notes, it is difficult to determine conclusively whether interrogations have provided information critical to interdicting specific imminent attacks. *See id.* at 88. And, because the CIA has used enhanced techniques sparingly, "there is limited data on which to assess their individual effectiveness." *Id.* at 89. As discussed below, however, we understand that interrogations have led to specific, actionable intelligence as well as a general increase in the amount of intelligence regarding al Qaeda and its affiliates. *See id.* at 85-91.

With these caveats, we turn to specific examples that you have provided to us. You have informed us that the interrogation of KSM—once enhanced techniques were employed—led to the discovery of a KSM plot, the "Second Wave," "to use East Asian operatives to crash a hijacked airliner into" a building in Los Angeles. *Effectiveness Memo* at 3. You have informed us that information obtained from KSM also led to the capture of Riduan bin Isonuddin, better known as Hambali, and the discovery of the Guraba Cell, a 17-member Jemaah Islamiyah cell tasked with executing the "Second Wave." *See id.* at 3-4; CIA Directorate of Intelligence, *Al-Qa'ida's Ties to Other Key Terror Groups: Terrorists Links in a Chain 2* (Aug. 28, 2003). More specifically, we understand that KSM admitted that he had tasked Mauid Khan with delivering a large sum of money to an al Qaeda associate. *See Fax from*  DCI Counterterrorist Center, *Briefing Notes on the Value of Detainee Reporting* at 1 (Apr. 15, 2005) ("*Briefing Notes*"). Khan subsequently identified the associate (Zubair), who was then captured. Zubair, in turn, provided information that led to the arrest of Hambali. *See id.* The information acquired from these captures allowed CIA interrogators to pose more specific questions to KSM, which led the CIA to Hambali's brother, al-Hadi. Using information obtained from multiple sources, al-Hadi was captured, and he subsequently identified the Guraba cell. *See id.* at 1-2. With the aid of this additional information, interrogations of Hambali confirmed much of what was learned from KSM.⁶

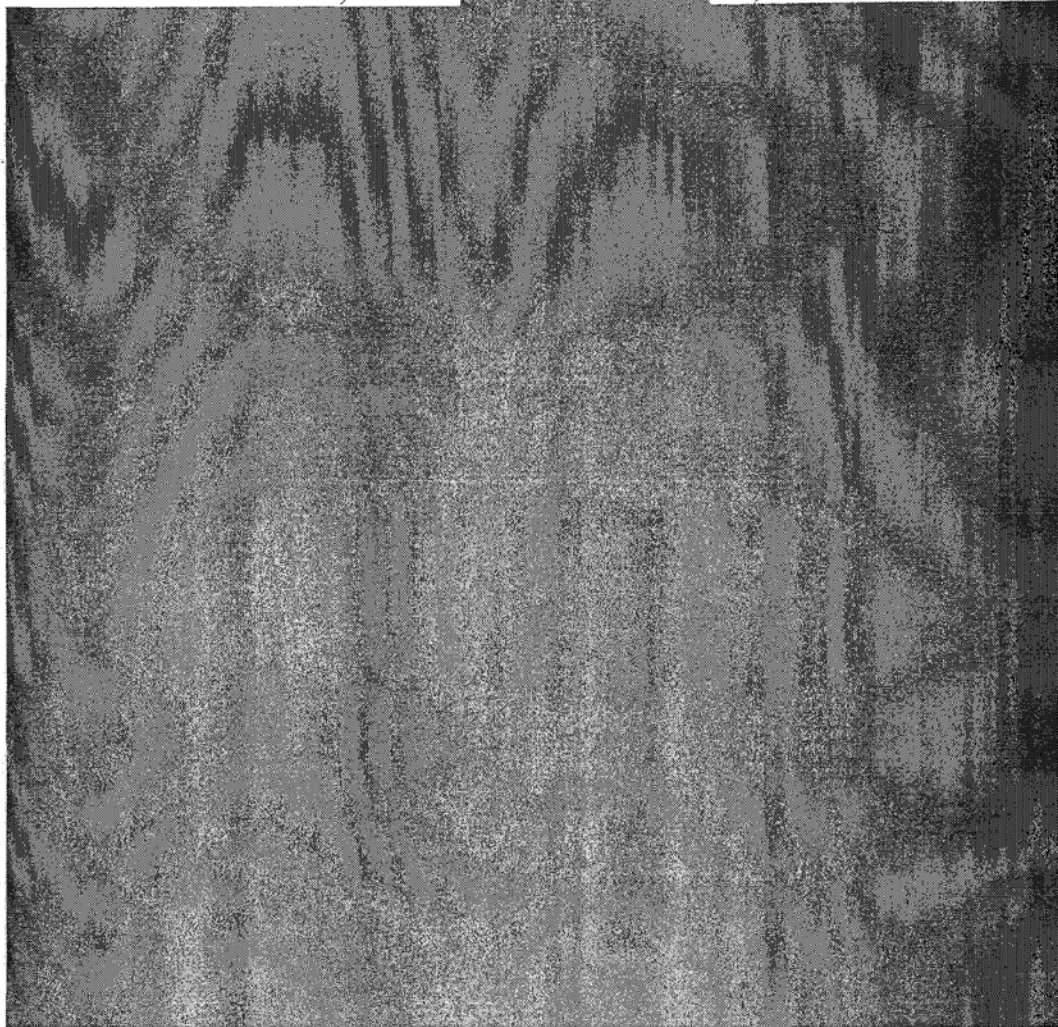
Interrogations of Zubaydah—again, once enhanced techniques were employed—furnished detailed information regarding al Qaeda's "organizational structure, key operatives, and modus operandi" and identified KSM as the mastermind of the September 11 attacks. *See Briefing Notes* at 4. You have informed us that Zubaydah also "provided significant information on two operatives, [including] Jose Padilla[,] who planned to build and detonate a 'dirty bomb' in the Washington DC area." *Effectiveness Memo* at 4. Zubaydah and KSM have also supplied important information about al-Zarqawi and his network. *See Fax for Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, from*  Office of General Counsel, CIA, 

⁶ We discuss only a small fraction of the important intelligence CIA interrogators have obtained from KSM. 

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More generally, the CIA has informed us that, since March 2002, the intelligence derived from CIA detainees has resulted in more than 6,000 intelligence reports and, in 2004, accounted for approximately half of CTC's reporting on al Qaeda. See *Briefing Notes* at 1; see also *IG Report* at 86 (noting that from September 11, 2001, through April 2003, the CIA "produced over 3,000 intelligence reports from" a few high value detainees). You have informed us that the substantial majority of this intelligence has come from detainees subjected to enhanced interrogation techniques. In addition, the CIA advises us that the program has been virtually indispensable to the task of deriving actionable intelligence from other forms of collection

⁷ As with KSM, we discuss only a portion of the intelligence obtained through interrogations of Zubaydah.

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C.

There are three categories of enhanced interrogation techniques: conditioning techniques, corrective techniques, and coercive techniques. See *Background Paper* at 4. As noted above, each of the specific enhanced techniques has been adapted from SERE training, where similar techniques have been used, in some form, for years on United States military personnel. See *Techniques* at 6; *IG Report* at 13-14.

1. *Conditioning techniques*

Conditioning techniques are used to put the detainee in a “baseline” state, and to “demonstrate to the [detainee] that he has no control over basic human needs.” *Background Paper* at 4. This “creates . . . a mindset in which [the detainee] learns to perceive and value his personal welfare, comfort, and immediate needs more than the information he is protecting.” *Id.* Conditioning techniques are not designed to bring about immediate results. Rather, these techniques are useful in view of their “cumulative effect . . . , used over time and in combination with other interrogation techniques and intelligence exploitation methods.” *Id.* at 5. The specific conditioning techniques are nudity, dietary manipulation, and sleep deprivation.

Nudity is used to induce psychological discomfort and because it allows interrogators to reward detainees instantly with clothing for cooperation. See *Techniques* at 7. Although this technique might cause embarrassment, it does not involve any sexual abuse or threats of sexual abuse. See *id.* at 7-8. Because ambient air temperatures are kept above 68°F, the technique is at most mildly physically uncomfortable and poses no threat to the detainee’s health. *Id.* at 7.

Dietary manipulation involves substituting a bland, commercial liquid meal for a detainee’s normal diet. We understand that its use can increase the effectiveness of other techniques, such as sleep deprivation. As a guideline, the CIA uses a formula for caloric intake that depends on a detainee’s body weight and expected level of activity and that ensures that caloric intake will always be set at or above 1,000 kcal/day. See *id.* at 7 & n.10.⁶ By comparison, commercial weight-loss programs used within the United States not uncommonly limit intake to 1000 kcal/day regardless of body weight. Detainees are monitored at all times to ensure that they do not lose more than 10% of their starting body weight. See *id.* at 7. The CIA also sets a minimum fluid intake, but a detainee undergoing dietary manipulation may drink as much water as he pleases. See *id.*

Sleep deprivation involves subjecting a detainee to an extended period of sleeplessness. Interrogators employ sleep deprivation in order to weaken a detainee’s resistance. Although up to 180 hours may be authorized, the CIA has in fact subjected only three detainees to more than

⁶ As we explained in *Techniques*: “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 caloric intake is 1500 kcal/day, and in no event is the detainee allowed to receive less than 1000 kcal/day.” *Id.* at 7 (footnote omitted). The guideline caloric intake for a detainee who weighs 150 pounds (approximately 68 kilograms) would therefore be nearly 1,900 kcal/day for sedentary activity and would be more than 2,200 kcal/day for moderate activity.

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96 hours of sleep deprivation. Generally, a detainee undergoing this technique is shackled in a standing position with his hands in front of his body, which prevents him from falling asleep but also allows him to move around within a two- to three-foot diameter. The detainee's hands are generally positioned below his chin, although they may be raised above the head for a period not to exceed two hours. *See id.* at 11-13 (explaining the procedures at length). As we have previously noted, sleep deprivation itself generally has few negative effects (beyond temporary cognitive impairment and transient hallucinations), though some detainees might experience transient "unpleasant physical sensations from prolonged fatigue, including such symptoms as impairment to coordinated body movement, difficulty with speech, nausea, and blurred vision." *Id.* at 37; *see also id.* 37-38. Subjects deprived of sleep in scientific studies for longer than the 180-hour limit imposed by the CIA generally return to normal neurological functioning with as little as one night of normal sleep. *See id.* at 40. In light of the ongoing and careful medical monitoring undertaken by OMS and the authority and obligation of all members of the interrogation team, and of OMS personnel and other facility staff, to stop the procedure if necessary, this technique is not be expected to result in any detainee experiencing extreme physical distress. *See id.* at 38-39.⁹

With respect to the shackling, the procedures in place (which include constant monitoring by detention personnel, via closed-circuit television, and intervention if necessary) minimize the risk that a detainee will hang by his wrists or otherwise suffer injury from the shackling. *See id.* at 11. Indeed, these procedures appear to have been effective, as no detainee has suffered any lasting harm from the shackling. *See id.*

Because releasing a detainee from the shackles would present a security problem and would interfere with the effectiveness of the technique, a detainee undergoing sleep deprivation frequently wears an adult diaper. *See* Letter from [REDACTED] Associate General Counsel, Central Intelligence Agency, to Dan Levin, Acting Assistant Attorney General, Office of Legal Counsel at 4 (Oct. 12, 2004) ("*October 12 [REDACTED] Letter*"). Diapers are checked and changed as needed so that no detainee would be allowed to remain in a soiled diaper, and the detainee's skin condition is monitored. *See Techniques* at 12. You have informed us that diapers are used solely for sanitary and health reasons and not in order to humiliate the detainee.

2. Corrective techniques

Corrective techniques entail some degree of physical interaction with the detainee and are used "to correct, startle, or to achieve another enabling objective with the detainee." *Background Paper* at 5. These techniques "condition a detainee to pay attention to the interrogator's questions and . . . dislodge expectations that the detainee will not be touched." *Techniques* at 9.

⁹ In addition, as we observed in *Techniques*, certain studies indicate that sleep deprivation might lower pain thresholds in some detainees. *See Techniques* at 36 n.44. The ongoing medical monitoring is therefore especially important when interrogators employ this technique in conjunction with other techniques. *See Combined Use* at 13-14 & n.9, 16. In this regard, we note once again that the CIA has "informed us that the interrogation techniques at issue would not be used during a course of extended sleep deprivation with such frequency and intensity as to induce in the detainee a persistent condition of extreme physical distress such as may constitute 'severe physical suffering.'" *Id.* at 16.

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This category comprises the following techniques: insult (facial) slap, abdominal slap, facial hold, and attention grasp. See *Background Paper* at 5; see also *Techniques* at 8-9 (describing these techniques).¹⁰ In the facial hold technique, for example, the interrogator uses his hands to immobilize the detainee's head. The interrogator's fingers are kept closely together and away from the detainee's eyes. See Pre-Academic Laboratory (PREAL) Operating Instructions at 19 ("*PREAL Manual*"). The technique instills fear and apprehension with minimal physical force. Indeed, each of these techniques entails only mild uses of force and does not cause any significant pain or any lasting harm. See *Background Paper* at 5-7.

3. Coercive techniques

Coercive techniques "place the detainee in more physical and psychological stress" than the other techniques and are generally "considered to be more effective tools in persuading a resistant [detainee] to participate with CIA interrogators." *Background Paper* at 7. These techniques are typically not used simultaneously. The *Background Paper* lists walling, water dousing, stress positions, wall standing, and cramped confinement in this category. We will also treat the waterboard as a coercive technique.

Walling is performed by placing the detainee against what seems to be a normal wall but is in fact a flexible false wall. See *Techniques* at 8. The interrogator pulls the detainee towards him and then quickly slams the detainee against the false wall. The false wall is designed, and a c-collar or similar device is used, to help avoid whiplash or similar injury. See *id.* The technique is designed to create a loud sound and to shock the detainee without causing significant pain. The CIA regards walling as "one of the most effective interrogation techniques because it wears down the [detainee] physically, heightens uncertainty in the detainee about what the interrogator may do to him, and creates a sense of dread when the [detainee] knows he is about to be walled again." *Background Paper* at 7. A detainee "may be walled one time (one impact with the wall) to make a point or twenty to thirty times consecutively when the interrogator requires a more significant response to a question," and "will be walled multiple times" during a session designed to be intense. *Id.* At no time, however, is the technique employed in such a way that could cause severe physical pain. See *Techniques* at 32 n.38.¹¹

In the water dousing technique, potable cold water is poured on the detainee either from a container or a hose without a nozzle. Ambient air temperatures are kept above 64°F. The

¹⁰ As noted in our previous opinions, the slap techniques are not used in a way that could cause severe pain. See, e.g., *Techniques* at 8-9, 33 & n.39; *Combined Use* at 11.

¹¹ Although walling "wears down the [detainee] physically," *Background Paper* at 7, and undoubtedly may ~~startle him, we understand that it is not significantly painful. The detainee hits a flexible false wall designed to create a loud sound when the individual hits it and thus to cause shock and surprise. See *Combined Use* at 6 n.4. But the detainee's head and neck are supported with a rolled hood or towel that provides a C-collar effect to help prevent whiplash; it is the detainee's shoulder blades that hit the wall; and the detainee is allowed to rebound from the flexible wall in order to reduce the chances of any injury. See *id.* You have informed us that a detainee is expected to feel "dread" at the prospect of walling because of the shock and surprise caused by the technique and because of the sense of powerlessness that comes from being roughly handled by the interrogators, not because the technique causes significant pain. See *id.*~~

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maximum permissible duration of water exposure depends on the water temperature, which may be no lower than 41°F and is usually no lower than 50°F. *See id.* at 10. Maximum exposure durations have been “set at two-thirds the time at which, based on extensive medical literature and experience, hypothermia could be expected to develop in healthy individuals who are submerged in water of the same temperature” in order to provide adequate safety margins against hypothermia. *Id.* This technique can easily be used in combination with other techniques and “is intended to weaken the detainee’s resistance and persuade him to cooperate with interrogators.” *Id.* at 9.

Stress positions and wall standing are used to induce muscle fatigue and the attendant discomfort. *See Techniques* at 9 (describing techniques); *see also PREAL Manual* at 20 (explaining that stress positions are used “to create a distracting pressure” and “to humiliate or insult”). The use of these techniques is “usually self-limiting in that temporary muscle fatigue usually leads to the [detainee’s] being unable to maintain the stress position after a period of time.” *Background Paper* at 8. We understand that these techniques are used only to induce temporary muscle fatigue; neither of these techniques is designed or expected to cause severe physical pain. *See Techniques* at 33-34.

Cramped confinement involves placing the detainee in an uncomfortably small container. Such confinement may last up to eight hours in a relatively large container or up to two hours in a smaller container. *See Background Paper* at 8; *Techniques* at 9. The technique “accelerate[s] the physical and psychological stresses of captivity.” *PREAL Manual* at 22. In OMS’s view, however, cramped confinement “ha[s] not proved particularly effective” because it provides “a safehaven offering respite from interrogation.” *OMS Guidelines* at 16.

The waterboard is generally considered to be “the most traumatic of the enhanced interrogation techniques,” *id.* at 17, a conclusion with which we have readily agreed, *see Techniques* at 41. In this technique, the detainee is placed face-up on a gurney with his head inclined downward. A cloth is placed over his face on which cold water is then poured for periods of at most 40 seconds. This creates a barrier through which it is either difficult or impossible to breathe. The technique thereby “induce[s] a sensation of drowning.” *Id.* at 13. The waterboard may be authorized for, at most, one 30-day period, during which the technique can actually be applied on no more than five days. *See id.* at 14 (describing, in detail, these and additional limitations); *see also* Letter from [REDACTED] Associate General Counsel, Central Intelligence Agency, to Dan Levin, Acting Assistant Attorney General, Office of Legal Counsel at 1 (Aug. 19, 2004) (“August 19, [REDACTED] Letter”). Further, there can be no more than two sessions in any 24-hour period. Each session—the time during which the detainee is strapped to the waterboard—lasts no more than two hours. There may be at most six applications of water lasting 10 seconds or longer during any session, and water may be applied for a total of no more than 12 minutes during any 24-hour period. *See Techniques* at 14.

As we have explained, these limitations have been established with extensive input from OMS, based on experience to date with this technique and OMS’s professional judgment that the health risks associated with use of the waterboard on a healthy individual subject to these limitations would be “medically acceptable.” *Id.* at 14 (citing *OMS Guidelines* at 18-19). In addition, although the waterboard induces fear and panic, it is not painful. *See id.* at 13.

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II.

We conclude, first, that the CIA interrogation program does not implicate United States obligations under Article 16 of the CAT because Article 16 has limited geographic scope. By its terms, Article 16 places no obligations on a State Party outside “territory under its jurisdiction.” The ordinary meaning of the phrase, the use of the phrase elsewhere in the CAT, and the negotiating history of the CAT demonstrate that the phrase “territory under its jurisdiction” is best understood as including, at most, areas where a State exercises territory-based jurisdiction; that is, areas over which the State exercises at least de facto authority as the government. As we explain below, based on CIA assurances, we understand that the interrogations conducted by the CIA do not take place in any “territory under [United States] jurisdiction” within the meaning of Article 16. We therefore conclude that the CIA interrogation program does not violate the obligations set forth in Article 16.

Apart from the terms of Article 16 as stated in the CAT, the United States undertook its obligations under the CAT subject to a Senate reservation that provides: “[T]he United States considers itself bound by the obligation under Article 16 . . . only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” There is a strong argument that in requiring this reservation, the Senate intended to limit United States obligations under Article 16 to the existing obligations already imposed by these Amendments. These Amendments have been construed by the courts not to extend protections to aliens outside the United States. The CIA has also assured us that the interrogation techniques are not used within the United States or against United States persons, including both U.S. citizens and lawful permanent resident aliens.

A.

“[W]e begin with the text of the treaty and the context in which the written words are used.” *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991) (quotation marks omitted). See also Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340 (1980) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”).¹² Article 16 states that “[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.” CAT Art. 16(1) (emphasis added).¹³ This territorial limitation is confirmed

¹² The United States is not a party to the Vienna Convention and is therefore not bound by it. Nevertheless, Article 31(1)'s emphasis on textual analysis reflects international interpretive practice. See e.g., Rudolf Bernhardt, “Interpretation in International Law,” in 2 *Encyclopedia of Public International Law* 1416, 1420 (1995) (“According to the prevailing opinion, the starting point in any treaty interpretation is the treaty text and the normal or ordinary meaning of its terms.”).

¹³ Article 16(1) provides in full:

Each State Party undertakes to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in

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by Article 16's explication of this basic obligation: "In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment." *Id.* Articles 11 through 13 impose on each State Party certain specific obligations, each of which is expressly limited to "territory under its jurisdiction." *See infra* pp. 18-19 (describing requirements). Although Article 10, which as incorporated in Article 16 requires each State Party to "ensure that education and information regarding the prohibition" against cruel, inhuman, or degrading treatment or punishment is given to specified government personnel, does not expressly limit its obligation to "territory under [each State's] jurisdiction," Article 10's reference to the "prohibition" against such treatment or punishment can only be understood to refer to the territorially limited obligation set forth in Article 16.

The obligations imposed by the CAT are thus more limited with respect to cruel, inhuman, or degrading treatment or punishment than with respect to torture. To be sure, Article 2, like Article 16, imposes an obligation on each State Party to prevent torture "in any territory under its jurisdiction." Article 4(1), however, separately requires each State Party to "ensure that all acts of torture are offenses under its criminal law." (Emphasis added.) The CAT imposes no analogous requirement with respect to cruel, inhuman, or degrading treatment or punishment.¹⁴

Because the CAT does not define the phrase "territory under its jurisdiction," we turn to the dictionary definitions of the relevant terms. *See Olympic Airways v. Husain*, 540 U.S. 644, 654-55 (2004) (drawing on dictionary definitions in interpreting a treaty); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 180-81 (1993) (same). Common dictionary definitions of "jurisdiction" include "[t]he right and power to interpret and apply the law[; a]uthority or control[; and t]he territorial range of authority or control." *American Heritage Dictionary* 711 (1973); *American Heritage Dictionary* 978 (3d ed. 1992) (same definitions); *see also Black's Law Dictionary* 766 (5th ed. 1979) ("[a]reas of authority"). Common dictionary definitions of "territory" include "[a]n area of land[; or t]he land and waters under the jurisdiction of a state, nation, or sovereign." *American Heritage Dictionary* at 1329 (1973); *American Heritage Dictionary* at 1854 (3d ed. 1992) (same); *see also Black's Law Dictionary* at 1321 ("A part of a country separated from the rest, and subject to a particular jurisdiction. Geographical area under the jurisdiction of another country or sovereign power."); *Black's Law Dictionary* at 1512 (8th ed. 2004) ("[a] geographical area included within a particular government's jurisdiction; the portion of the earth's surface that is in a state's exclusive possession and control"). Taking these

article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

¹⁴ In addition, although Article 2(2) emphasizes that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture," the CAT has no analogous provision with respect to cruel, inhuman, or degrading treatment or punishment. Because we conclude that the CIA interrogation program does not implicate United States obligations under Article 16 and that the program would conform to United States obligations under Article 16 even if that provision did apply, we need not consider whether the absence of a provision analogous to Article 2(2) implies that State Parties could derogate from their obligations under Article 16 in extraordinary circumstances.

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definitions together, we conclude that the most plausible meaning of the term “territory under its jurisdiction” is the land over which a State exercises authority and control as the government. *Cf. Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004) (concluding that “the territorial jurisdiction of the United States” subsumes areas over which “the United States exercises complete jurisdiction and control”) (internal quotation marks omitted); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123 (1923) (“It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control[.]”).

This understanding of the phrase “territory under its jurisdiction” is confirmed by the way the phrase is used in various provisions throughout the CAT. *See Air France v. Saks*, 470 U.S. 392, 398 (1985) (treaty drafters “logically would . . . use[] the same word in each article” when they intend to convey the same meaning throughout); J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 53 (1988) (“CAT Handbook”) (noting that “it was agreed that the phrase ‘territory under its jurisdiction’ had the same meaning” in different articles of the CAT).

For example, Article 5 provides:

Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 [requiring each State Party to criminalize all acts of torture] in the following cases:

- (a) When the offences are committed in any *territory under its jurisdiction* or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is a national of that State;
- (c) When the victim is a national of that State if that State considers it appropriate.

CAT art. 5(1) (emphasis added). The CAT thereby distinguishes jurisdiction based on territory from jurisdiction based on the nationality of either the victim or the perpetrator. Paragraph (a) also distinguishes jurisdiction based on territory from jurisdiction based on registry of ships and aircraft. To read the phrase “territory under its jurisdiction” to subsume these other types of jurisdiction would eliminate these distinctions and render most of Article 5 surplusage. Each of Article 5’s provisions, however, “like all the other words of the treaty, is to be given a meaning, if reasonably possible, and rules of construction may not be resorted to to render it meaningless or inoperative.” *Factor v. Laubenheimer*, 290 U.S. 276, 303-04 (1933).

Articles 11 through 13, moreover, use the phrase “territory under its jurisdiction” in ways that presuppose that the relevant State exercises the traditional authorities of the government in such areas. Article 11 requires each State to “keep under systematic review . . . arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction.” Article 12 mandates that “[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is

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reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” Similarly, Article 13 requires “[e]ach State Party [to] ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.” These provisions assume that the relevant State exercises traditional governmental authority—including the authority to arrest, detain, imprison, and investigate crime—within any “territory under its jurisdiction.”

Three other provisions underscore this point. Article 2(1) requires each State Party to “take effective legislative, administrative, judicial or other measures to prevent such acts of torture in any territory under its jurisdiction.” “Territory under its jurisdiction,” therefore, is most reasonably read to refer to areas over which States exercise broad governmental authority—the areas over which States could take legislative, administrative, or judicial action. Article 5(2), moreover, enjoins “[e]ach State Party . . . to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.” Article 7(1) similarly requires State Parties to extradite suspects or refer them to “competent authorities for the purpose of prosecution.” These provisions evidently contemplate that each State Party has authority to extradite and prosecute those suspected of torture in any “territory under its jurisdiction.” That is, each State Party is expected to operate as the government in “territory under its jurisdiction.”¹⁵

This understanding is supported by the negotiating record. See *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (“Because a treaty ratified by the United States is not only the law of this land, see U.S. Const., Art. II, § 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history”); Vienna Convention on the Law of Treaties, art. 32 (permitting recourse to “the preparatory work of the treaty and the circumstances of its conclusion” *inter alia* “to confirm” the ordinary meaning of the text). The original Swedish proposal, which was the basis for the first draft of the CAT, contained a predecessor to Article 16 that would have required that “[e]ach State Party undertake[] to ensure that [a proscribed act] does not take place *within its jurisdiction*.” Draft International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, submitted by Sweden on January 18, 1978, arts. 2-3, E/CN.4/1285, in *CAT Handbook* app. 6, at 203 (emphasis added); *CAT Handbook* at 47. France objected that the phrase “within its jurisdiction” was too broad. For example, it was concerned that the phrase might extend to signatories’ citizens located in territory belonging to other nations. See Report of the Pre-Sessional Working Group, E/CN.4/L.1470 (1979), reprinted in

¹⁵ Article 6 may suggest an interpretation of the phrase “territory under its jurisdiction” that is potentially broader than the traditional notion of “territory.” Article 6(1) directs a State Party “*in whose territory a person alleged to have committed [certain offenses] is present*” to take the suspected offender into custody. (Emphases added.) The use of the word “territory” in Article 6 rather than the phrase “territory under its jurisdiction” suggests that the terms have distinct meanings. See *Factor*, 290 U.S. at 303-04 (stating that treaty language should not be construed to render certain phrases “meaningless or inoperative”). Article 6 may thus support the position, discussed below, that “territory under its jurisdiction” may extend beyond sovereign territory to encompass areas where a State exercises de facto authority as the government, such as occupied territory. See *infra* p. 20. Article 20, which refers to “the territory of a State Party” may support the same inference.

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Report of the United Nations Commission on Human Rights, E/CN.4/1347 35, 40 (1979); *CAT Handbook* at 48. Although France suggested replacing “within its jurisdiction” with “in its territory,” the phrase “any territory under its jurisdiction” was chosen instead. See *CAT Handbook* at 48.

There is some evidence that the United States understood these phrases to mean essentially the same thing. See, e.g., Exec. Report 101-30, 101st Cong., 2d Sess., 23-24 (Aug. 30, 1990) (Senate Foreign Relations Committee Report) (suggesting that the phrase “in any territory under its jurisdiction” would impose obligations on a State Party with respect to conduct committed “in its territory” but not with respect to conduct “occurring abroad”); *Convention Against Torture: Hearing Before the Committee on Foreign Relations, United States Senate*, S. Hrg. 101-718 at 7 (Jan. 30, 1990) (prepared statement of Hon. Abraham D. Sofaer, Legal Adviser, Department of State) (stating that under Article 2, State Parties would be obligated “to take administrative, judicial or other measures to prevent torture *within their territory*”) (emphasis added). Other evidence, however, suggests that the phrase “territory under its jurisdiction” has a somewhat broader meaning than “in its territory.” According to the record of the negotiation relating to Articles 12 and 13 of the CAT, “[i]n response to the question on the scope of the phrase ‘territory under its jurisdiction’ as contained in these articles, it was said that it was intended to cover, *inter alia*, territories still under colonial rule and occupied territory.” U.N. Doc. E/CN.4/1367, Mar. 5, 1980, at 13. And one commentator has stated that the negotiating record suggests that the phrase “territory under its jurisdiction” “is not limited to a State’s land territory, its territorial sea and the airspace over its land and sea territory, but it also applies to territories under military occupation, to colonial territories and to any other territories over which a State has factual control.” *Id.* at 131. Others have suggested that the phrase would also reach conduct occurring on ships and aircraft registered in a State. See *CAT Handbook* at 48; Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20, at 5 (1988) (Secretary of State Schultz) (asserting that “territory under its jurisdiction” “refers to all places that the State Party controls as a governmental authority, including ships and aircraft registered in that State”).¹⁶

Thus, although portions of the negotiating record of the CAT may support reading the phrase “any territory under its jurisdiction” to include not only sovereign territory but also areas subject to de facto government authority (and perhaps registered ships and aircraft), the negotiating record as a whole tends to confirm that the phrase does not extend to places where a State Party does not exercise authority as the government.

The CIA has assured us that the interrogations at issue here do not take place within the sovereign territory or special maritime and territorial jurisdiction (“SMTJ”) of the United States. See 18 U.S.C. § 5 (defining “United States”); *id.* § 7 (defining SMTJ). As relevant here, we

¹⁶ This suggestion is in tension with the text of Article 5(1)(a), which seems to distinguish “territory under [a State’s] jurisdiction” from “ship[s] or aircraft registered in that State.” See *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 n.5 (1989) (noting that where treaty text is not perfectly clear, the “natural meaning” of the text “could properly be contradicted only by clear drafting history”). Because the CIA has assured us that its interrogations do not take place on ships or aircraft registered in the United States, we need not resolve this issue here.

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believe that the phrase “any territory under its jurisdiction” certainly reaches no further than the sovereign territory and the SMTJ of the United States.¹⁷ Indeed, in many respects, it probably does not reach this far. Although many provisions of the SMTJ invoke territorial bases of jurisdiction, other provisions assert jurisdiction on other grounds, including, for example, sections 7(5) through 7(9), which assert jurisdiction over certain offenses committed by or against United States citizens. Accordingly, we conclude that the interrogation program does not take place within “territory under [United States] jurisdiction” and therefore does not violate Article 16—even absent the Senate’s reservation limiting United States obligations under Article 16, which we discuss in the next section.

B.

As a condition to its advice and consent to the ratification of the CAT, the Senate required a reservation that provides that the United States is

bound by the obligation under Article 16 to prevent “cruel, inhuman or degrading treatment or punishment,” only insofar as the term “cruel, inhuman or degrading treatment or punishment” means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

Cong. Rec. 36,198 (1990). This reservation, which the United States deposited with its instrument of ratification, is legally binding and defines the scope of United States obligations under Article 16 of the CAT. See *Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 33 (1987) (Reservations deposited with the instrument of ratification “are generally binding . . . both internationally and domestically . . . in . . . subsequent interpretation of the treaty.”)¹⁸

Under the terms of the reservation, the United States is obligated to prevent “cruel, inhuman or degrading treatment” only to the extent that such treatment amounts to “the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments.” Giving force to the terms of this reservation, treatment that is not

¹⁷ As we have explained, there is an argument that “territory under [a State’s] jurisdiction” might also include occupied territory. Accordingly, at least absent the Senate’s reservation, Article 16’s obligations might extend to occupied territory. Because the United States is not currently an occupying power within the meaning of the laws of war anywhere in the world, we need not decide whether occupied territory is “territory under [United States] jurisdiction.”

¹⁸ “The Senate’s right to qualify its consent to ratification by reservations, amendments and interpretations was established through a reservation to the Jay treaty of 1794,” Quincy Wright, *The Control of American Foreign Relations* 253 (1922), and has been frequently exercised since then. The Supreme Court has indicated its acceptance of this practice. See *Haver v. Yaker*, 76 U.S. (9 Wall.) 32, 35 (1869); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 107 (1801). See also *Constitutionality of Proposed Conditions to Senate Consent to the Interim Convention on the Conservation of North Pacific Fur Seals*, 10 Op. O.L.C. 12, 16 (1986) (“[T]he Senate’s practice of conditioning its consent to particular treaties is well-established.”).

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“prohibited by” these amendments would not violate United States obligations as limited by the reservation.

Conceivably, one might read the text of the reservation as limiting only the substantive (as opposed to the territorial) reach of United States obligations under Article 16. That would not be an unreasonable reading of the text. Under this view, the reservation replaced only the phrase “cruel, inhuman or degrading treatment or punishment” and left untouched the phrase “in any territory under its jurisdiction,” which defines the geographic scope of the Article. The text of the reservation, however, is susceptible to another reasonable reading—one suggesting that the Senate intended to ensure that the United States would, with respect to Article 16, undertake no obligations not already imposed by the Constitution itself. Under this reading, the reference to the treatment or punishment prohibited by the constitutional provisions does not distinguish between the substantive scope of the constitutional prohibitions and their geographic scope. As we discuss below, this second reading is strongly supported by the Senate’s ratification history of the CAT.

The Summary and Analysis of the CAT submitted by the President to the Senate in 1988 expressed concern that “Article 16 is arguably broader than existing U.S. law.” Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in S. Treaty Doc. No. 100-20, at 15. “In view of the ambiguity of the terms,” the Executive Branch suggested “that U.S. obligations under this article [Article 16] should be limited to *conduct prohibited by the U.S. Constitution*.” S. Exec. Rep. No. 101-30, at 8 (1990) (emphasis added), see also *id.* at 25-26. Accordingly, it proposed what became the Senate’s reservation in order “[t]o make clear that the United States construes the phrase [“cruel, inhuman or degrading treatment or punishment”] to be coextensive with its constitutional guarantees against cruel, unusual, and inhumane treatment.” *Id.* at 25-26; S. Treaty Doc. No. 100-20, at 15 (same). As State Department Legal Adviser Abraham D. Sofaer explained, “because the Constitution of the United States directly addresses this area of the law . . . [the reservation] would limit our obligations under this Convention to the proscriptions already covered in our Constitution.” *Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 11 (1990) (prepared statement). The Senate Foreign Relations Committee expressed the same concern about the potential scope of Article 16 and recommended the same reservation to the Senate. See S. Exec. Rep. No. 101-30, at 8, 25-26.

Furthermore, the Senate declared that Articles 1 through 16 of the CAT are not self-executing, see Cong. Rec. 36,198 (1990), and the discussions surrounding this declaration in the ratification history also indicate that the United States did not intend to undertake any obligations under Article 16 that extended beyond those already imposed by the Constitution. The Administration expressed the view that “as indicated in the original Presidential transmittal, existing Federal and State law appears sufficient to implement the Convention,” except that “new Federal legislation would be required *only to establish criminal jurisdiction under Article 5*” Letter for Senator Pressler, from Janet Mullins, Assistant Secretary, Legislative Affairs, Department of State (April 4, 1990), in S. Exec. Rep. No. 101-30, at 41 (emphasis added). It was understood that “the majority of the obligations to be undertaken by the United States pursuant to the Convention [were] already covered by existing law” and that “additional implementing legislation [would] be needed *only with respect to article 5*.” S. Exec. Rep. No. 101-30, at 10

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(emphasis added). Congress then enacted 18 U.S.C. §§ 2340-2349A, the only “necessary legislation to implement” United States obligations under the CAT, noting that the United States would “not become a party to the Convention until the necessary implementing legislation is enacted.” S. Rep. No. 103-107, at 366 (1993). Reading Article 16 to extend the substantive standards of the Constitution in contexts where they did not already apply would be difficult to square with the evident understanding of the United States that existing law would satisfy its obligations under the CAT except with respect to Article 5. The ratification history thus strongly supports the view that United States obligations under Article 16 were intended to reach no further—substantively, territorially, or in any other respect—than its obligations under the Fifth, Eighth, and Fourteenth Amendments.

The Supreme Court has repeatedly suggested in various contexts that the Constitution does not apply to aliens outside the United States. See, e.g., *United States v. Belmont*, 301 U.S. 324, 332 (1937) (“[O]ur Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens.”); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (“Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens”); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (noting that cases relied upon by an alien asserting constitutional rights “establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country”). Federal courts of appeals, in turn, have held that “[t]he Constitution does not extend its guarantees to nonresident aliens living outside the United States,” *Vancouver Women’s Health Collective Soc’y v. A.H. Robins Co.*, 820 F.2d 1359, 1363 (4th Cir. 1987); that “non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States,” *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) (per curiam); and that a “foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise,” *32 County Sovereignty Comm. v. Dep’t of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (quoting *People’s Mojahedin Org. of Iran v. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)).¹⁹

As we explain below, it is the Fifth Amendment that is potentially relevant in the present context. With respect to that Amendment, the Supreme Court has “rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.” *Verdugo-Urquidez*, 494 U.S. at 269. In *Verdugo-Urquidez*, 494 U.S. at 269, the Court noted its “emphatic” “rejection of extraterritorial application of the Fifth Amendment” in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which rejected “[t]he doctrine that the term ‘any person’ in the Fifth Amendment spreads its protection over alien enemies anywhere in the world engaged in hostilities against us,” *id.* at 782. *Accord Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Verdugo-Urquidez* and *Eisentrager* and noting that “[i]t is well established that” Fifth Amendment protections “are unavailable to aliens outside of our geographic borders”). Federal

¹⁹ The Restatement (Third) of Foreign Relations Law asserts that “[a]lthough the matter has not been authoritatively adjudicated, at least some actions by the United States in respect to foreign nationals outside the country are also subject to constitutional limitations.” *Id.* § 722, cmt. m. This statement is contrary to the authorities cited in the text.

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courts of appeals have similarly held that “non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections.” *Jifry v. F.A.A.*, 370 F.3d 1174, 1182 (D.C. Cir. 2004); see also *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000) (relying on *Eisentrager* and *Verdugo-Urquidez* to conclude that an alien could not state a due process claim for torture allegedly inflicted by United States agents abroad), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002); *Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1428-29 (11th Cir. 1995) (relying on *Eisentrager* and *Verdugo-Urquidez* to conclude that aliens held at Guantanamo Bay lack Fifth Amendment rights).²⁰

The reservation required by the Senate as a condition of its advice and consent to the ratification of the CAT thus tends to confirm the territorially limited reach of U.S. obligations under Article 16. Indeed, there is a strong argument that, by limiting United States obligations under Article 16 to those that certain provisions of the Constitution already impose, the Senate's reservation limits the territorial reach of Article 16 even more sharply than does the text of Article 16 standing alone. Under this view, Article 16 would impose no obligations with respect

²⁰ The Court's decision in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), is not to the contrary. To be sure, the Court stated in a footnote that:

Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe “custody in violation of the Constitution or laws or treaties of the United States.”

Id. at 2698 n.15. We believe this footnote is best understood to leave intact the Court's settled understanding of the Fifth Amendment. First, the Court limited its holding to the issue before it: whether the federal courts have statutory jurisdiction over habeas petitions brought by such aliens held at Guantanamo as enemy combatants. See *id.* at 2699 (“Whether and what further proceedings may become necessary . . . are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.”). Indeed, the Court granted the petition for writ of certiorari “limited to the following Question: Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.” *Rasul v. Bush*, 540 U.S. 1003 (2003).

Second, the footnote relies on a portion of Justice Kennedy's concurrence in *Verdugo-Urquidez* “and the cases cited therein,” *Rasul*, 124 S. Ct. at 2698 n.15. In this portion of Justice Kennedy's *Verdugo-Urquidez* concurrence, Justice Kennedy discusses the *Insular Cases*. These cases stand for the proposition that although not every provision of the Constitution applies in United States territory overseas, certain core constitutional protections may apply in certain insular territories of the United States. See also, e.g., *Reid v. Covert*, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring in judgment) (discussing *Insular Cases*); *Baltac v. Porto Rico*, 258 U.S. 298 (1922). Given that the Court in *Rasul* stressed GTMO's unique status as “territory subject to the long-term, exclusive jurisdiction and control of the United States,” *Rasul*, 124 S. Ct. at 2698 n.15, in the very sentence that cited Justice Kennedy's concurrence, it is conceivable that footnote 15 might reflect, at most, a willingness to consider whether GTMO is similar in significant respects to the territories at issue in the *Insular Cases*. See also *id.* at 2696 (noting that under the agreement with Cuba “the United States exercises complete jurisdiction and control over the Guantanamo Bay Naval Base”) (internal quotation marks omitted); *id.* at 2700 (Kennedy, J., concurring) (asserting that “Guantanamo Bay is in every practical respect a United States territory” and explaining that “[w]hat matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay”).

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to aliens outside the United States.²¹ And because the CIA has informed us that these techniques are not authorized for use against United States persons, or within the United States, they would not, under this view, violate Article 16. Even if the reservation is read only to confirm the territorial limits explicit in Article 16, however, or even if it is read not to bear on this question at all, the program would still not violate Article 16 for the reasons discussed in Part II.A. Accordingly, we need not decide here the precise effect, if any, of the Senate reservation on the geographic scope of U.S. obligations under Article 16.²²

III.

You have also asked us to consider whether the CIA interrogation program would violate the substantive standards applicable to the United States under Article 16 if, contrary to the conclusions reached in Part II above, those standards did extend to the CIA interrogation program. Pursuant to the Senate's reservation, the United States is bound by Article 16 to prevent "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." As we explain, the relevant test is whether use of the CIA's enhanced interrogation techniques constitutes government conduct that "shocks the conscience." Based on our understanding of the relevant case law and the CIA's descriptions of the interrogation program, we conclude that use of the enhanced interrogation techniques, subject to all applicable conditions, limitations, and safeguards, does not "shock the conscience." We emphasize, however, that this analysis calls for the application of a somewhat subjective test with only limited guidance from the Court. We therefore cannot predict with confidence whether a court would agree with our conclusions, though, as discussed more fully below, we believe the interpretation of Article 16's substantive standard is unlikely to be subject to judicial inquiry.

²¹ Additional analysis may be required in the case of aliens entitled to lawful permanent resident status. Compare *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), with *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). You have informed us that the CIA does not use these techniques on any United States persons, including lawful permanent residents, and we do not here address United States obligations under Article 16 with respect to such aliens.

²² Our analysis is not affected by the recent enactment of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005). Section 1031(a)(1) of that law provides that

[n]one of the funds appropriated or otherwise made available by this Act shall be obligated or expended to subject any person in the custody or under the physical control of the United States to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.

119 Stat. at 256. Because the Senate reservation, as deposited with the United States instrument of ratification, defines United States obligations under Article 16 of the CAT, this statute does not prohibit the expenditure of funds for conduct that does not violate United States obligations under Article 16, as limited by the Senate reservation. Furthermore, this statute itself defines "cruel, inhuman, or degrading treatment or punishment" as "the cruel, unusual, and inhumane treatment or punishment prohibited by the fifth amendment, eighth amendment, or fourteenth amendment to the Constitution of the United States." *Id.* § 1031(b)(2).

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A.

Although, pursuant to the Senate's reservation, United States obligations under Article 16 extend to "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States," only the Fifth Amendment is potentially relevant here. The Fourteenth Amendment provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." (Emphasis added.) This Amendment does not apply to actions taken by the federal Government. See, e.g., *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (explaining that the Fourteenth Amendment "does not apply" to the federal Government); *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954) (noting that the Fifth Amendment rather than the Fourteenth Amendment applies to actions taken by the District of Columbia). The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." (Emphasis added.) As the Supreme Court has repeatedly held, the Eighth Amendment does not apply until there has been a formal adjudication of guilt. E.g., *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979); *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977). See also *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480 (D.D.C. 2005) (dismissing detainees' claims based on Eighth Amendment because "the Eighth Amendment applies only after an individual is convicted of a crime") (stayed pending appeal). The same conclusion concerning the limited applicability of the Eighth Amendment under Article 16 was expressly recognized by the Senate and the Executive Branch during the CAT ratification deliberations:

The Eighth Amendment prohibition of cruel and unusual punishment is, of the three [constitutional provisions cited in the Senate reservation], the most limited in scope, as this amendment has consistently been interpreted as protecting only "those convicted of crimes." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). The Eighth Amendment does, however, afford protection against torture and ill-treatment of persons in prison and similar situations of *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). Because the high value detainees on whom the CIA might use enhanced interrogation techniques have not been convicted of any crime, the substantive requirements of the Eighth Amendment would not be relevant here, even if we assume that Article 16 has application to the CIA's interrogation program.²³

The Fifth Amendment, however, is not subject to these same limitations. As potentially relevant here, the substantive due process component of the Fifth Amendment protects against executive action that "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952); see also *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("To this end, for half a

²³ To be sure, treatment amounting to punishment (let alone, cruel and unusual punishment) generally cannot be imposed on individuals who have not been convicted of crimes. But this prohibition flows from the Fifth Amendment rather than the Eighth. See *Wolfish*, 441 U.S. at 535 n.16; *United States v. Salerno*, 481 U.S. 739, 746-47 (1987). See also *infra* note 26.

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century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience.”²⁴

B.

We must therefore determine whether the CIA interrogation program involves conduct that “shocks the conscience.” The Court has indicated that whether government conduct can be said to “shock the conscience” depends primarily on whether the conduct is “arbitrary in the constitutional sense,” *Lewis*, 523 U.S. at 846 (internal quotation marks omitted); that is, whether it amounts to the “exercise of power without any reasonable justification in the service of a legitimate governmental objective,” *id.* “[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level,” *id.* at 849, although, in some cases, deliberate indifference to the risk of inflicting such unjustifiable injury might also “shock the conscience,” *id.* at 850-51. The Court has also suggested that it is appropriate to consider whether, in light of “traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them,” conduct “is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” *Id.* at 847 n.8.²⁵

Several considerations complicate our analysis. First, there are relatively few cases in which the Court has analyzed whether conduct “shocks the conscience,” and these cases involve contexts that differ dramatically from the CIA interrogation program. Further, the Court has emphasized that there is “no calibrated yard stick” with which to determine whether conduct “shocks the conscience.” *Id.* at 847. To the contrary: “Rules of due process are not . . . subject to mechanical application in unfamiliar territory.” *Id.* at 850. A claim that government conduct “shocks the conscience,” therefore, requires “an exact analysis of circumstances.” *Id.* The Court has explained:

²⁴ Because what is at issue under the text of the Senate reservation is the subset of “cruel, inhuman or degrading treatment” that is “the cruel, unusual and inhumane treatment . . . prohibited by the Fifth . . . Amendment[],” we do not believe that the procedural aspects of the Fifth Amendment are relevant, at least in the context of interrogation techniques unrelated to the criminal justice system. Nor, given the language of Article 16 and the reservation, do we believe that United States obligations under this Article include other aspects of the Fifth Amendment, such as the Takings Clause or the various privacy rights that the Supreme Court has found to be protected by the Due Process Clause.

²⁵ It appears that conscience-shocking conduct is a necessary but perhaps not sufficient condition to establishing that executive conduct violates substantive due process. *See Lewis*, 523 U.S. at 847 n.8 (“Only if the necessary condition of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action, and only then might there be a debate about the sufficiency of historical examples of enforcement of the right claimed, or its recognition in other ways.”) (emphases added); *see also, e.g., Terrell v. Larson*, 396 F.3d 975, 978 n.1 (8th Cir. 2005) (“To violate substantive due process, the conduct of an executive official must be conscience shocking and must violate a fundamental right.”); *Shusarchuck v. Hoff*, 346 F.3d 1178, 1181 (8th Cir. 2003). It is therefore arguable that conscience-shocking behavior would not violate the Constitution if it did not violate a fundamental right or if it were narrowly tailored to serve a compelling state interest. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Because we conclude that the CIA interrogation program does not “shock the conscience,” we need not address these issues here.

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The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other considerations, fall short of such a denial.

Id. at 850 (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)) (alteration in *Lewis*). Our task, therefore, is to apply in a novel context a highly fact-dependent test with little guidance from the Supreme Court.

I.

We first consider whether the CIA interrogation program involves conduct that is “constitutionally arbitrary.” We conclude that it does not. Indeed, we find no evidence of “conduct intended to injure in some way unjustifiable by any government interest,” *id.* at 849, or of deliberate indifference to the possibility of such unjustifiable injury, *see id.* at 853.

As an initial matter, the Court has made clear that whether conduct can be considered to be constitutionally arbitrary depends vitally on whether it furthers a government interest, and, if it does, the nature and importance of that interest. The test is not merely whether the conduct is “intended to injure,” but rather whether it is “intended to injure in some way unjustifiable by any government interest.” *Id.* at 849 (emphasis added). It is the “exercise of power without any reasonable justification in the service of a legitimate governmental objective” that can be said to “shock the conscience.” *Id.* at 846 (emphasis added). In *United States v. Salerno*, 481 U.S. 739, 748 (1987), for example, the Court explained that the Due Process Clause “lays down [no] . . . categorical imperative,” and emphasized that the Court has “repeatedly held that the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest.” *See also Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2646 (2004) (plurality opinion) (explaining that the individual’s interests must be weighed against the government’s). The government’s interest is thus an important part of the context that must be carefully considered in evaluating an asserted violation of due process.²⁶

²⁶ The pretrial detention context is informative. Analysis of the government’s interest and purpose in imposing a condition of confinement is essential to determining whether there is a violation of due process in this context. *See Salerno*, 481 U.S. at 747-50. The government has a legitimate interest in “effectuat[ing] th[e] detention,” *Wolfish*, 441 U.S. at 537, which supports government action that “may rationally be connected” to the detention. *Salerno*, 481 U.S. at 747 (internal quotation marks omitted). By contrast, inflicting cruel and unusual punishment on such detainees would violate due process because the government has no legitimate interest in inflicting punishment prior to conviction. *See Wolfish*, 441 U.S. at 535 & n.16.

In addition, *Lewis* suggests that the Court’s Eighth Amendment jurisprudence sheds at least some light on the due process inquiry. *See* 523 U.S. at 852-53 (analogizing the due process inquiry to the Eighth Amendment context and noting that in both cases “liability should turn on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm”) (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). The interrogation program we consider does not involve or allow

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Al Qaeda's demonstrated ability to launch sophisticated attacks causing mass casualties within the United States and against United States interests worldwide, as well as its continuing efforts to plan and to execute such attacks, *see supra* p. 9, indisputably pose a grave and continuing threat. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citations omitted); *see also Salerno*, 481 U.S. at 748 (noting that "society's interest is at its peak" "in times of war or insurrection"). It is this paramount interest that the Government seeks to vindicate through the interrogation program. Indeed, the program, which the CIA believes "has been a key reason why al-Qa'ida has failed to launch a spectacular attack in the West since 11 September 2001," *Effectiveness Memo* at 2, directly furthers that interest, producing substantial quantities of otherwise unavailable actionable intelligence. As detailed above, ordinary interrogation techniques had little effect on either KSM or Zubaydah. Use of enhanced techniques, however, led to critical, actionable intelligence such as the discovery of the Guraba Cell, which was tasked with executing KSM's planned Second Wave attacks against Los Angeles. Interrogations of these most valuable detainees and comparatively lower-tier high value detainees [REDACTED] have also greatly increased the CIA's understanding of our enemy and its plans.

As evidenced by our discussion in Part I, the CIA goes to great lengths to ensure that the techniques are applied only as reasonably necessary to protect this paramount interest in "the security of the Nation." Various aspects of the program ensure that enhanced techniques will be used only in the interrogations of the detainees who are most likely to have critical, actionable intelligence. The CIA screening procedures, which the CIA imposes in addition to the standards applicable to activities conducted pursuant to paragraph four of the Memorandum of Notification, ensure that the techniques are not used unless the CIA reasonably believes that the detainee is a "senior member of al-Qa'ida or [its affiliates]," and the detainee has "knowledge of imminent terrorist threats against the USA" or has been directly involved in the planning of attacks. *January 4 [REDACTED] Fax* at 5; *supra* p. 5. The fact that enhanced techniques have been used to date in the interrogations of only 28 high value detainees out of the 94 detainees in CIA custody demonstrates this selectivity.

Use of the waterboard is limited still further, requiring "credible intelligence that a terrorist attack is imminent; . . . substantial and credible indicators that the subject has actionable intelligence that can prevent, disrupt or delay this attack; and [a determination that o]ther interrogation methods have failed to elicit the information [and that] . . . other . . . methods are unlikely to elicit this information *within the perceived time limit for preventing the attack.*" *August 2 Rizzo Letter* (attachment). Once again, the CIA's practice confirms the program's selectivity. CIA interrogators have used the waterboard on only three detainees to date—KSM, Zubaydah, and Al-Nashiri—and have not used it at all since March 2003.

the malicious or sadistic infliction of harm. Rather, as discussed in the text, interrogation techniques are used only as reasonably deemed necessary to further a government interest of the highest order, and have been carefully designed to avoid inflicting severe pain or suffering or any other lasting or significant harm and to minimize the risk of any harm that does not further this government interest. *See infra* pp. 29-31.

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Moreover, enhanced techniques are considered only when the on-scene interrogation team considers them necessary because a detainee is withholding or manipulating important, actionable intelligence or there is insufficient time to try other techniques. For example, as recounted above, the CIA used enhanced techniques in the interrogations of KSM and Zubaydah only after ordinary interrogation tactics had failed. Even then, CIA Headquarters must make the decision whether to use enhanced techniques in any interrogation. Officials at CIA Headquarters can assess the situation based on the interrogation team's reports and intelligence from a variety of other sources and are therefore well positioned to assess the importance of the information sought.

Once approved, techniques are used only in escalating fashion so that it is unlikely that a detainee would be subjected to more duress than is reasonably necessary to elicit the information sought. Thus, no technique is used on a detainee unless use of that technique at that time appears necessary to obtaining the intelligence. And use of enhanced techniques ceases "if the detainee is judged to be consistently providing accurate intelligence or if he is no longer believed to have actionable intelligence." *Techniques* at 5. Indeed, use of the techniques usually ends after just a few days when the detainee begins participating. Enhanced techniques, therefore, would not be used on a detainee not reasonably thought to possess important, actionable intelligence that could not be obtained otherwise.

Not only is the interrogation program closely tied to a government interest of the highest order, it is also designed, through its careful limitations and screening criteria, to avoid causing any severe pain or suffering or inflicting significant or lasting harm. As the *OMS Guidelines* explain, "[i]n all instances the general goal of these techniques is a psychological impact, and not some physical effect, with a specific goal of 'dislocate[ing] [the detainee's] expectations regarding the treatment he believes he will receive.'" *OMS Guidelines* at 8-9 (second alteration in original). Furthermore, techniques can be used only if there are no medical or psychological contraindications. Thus, no technique is ever used if there is reason to believe it will cause the detainee significant mental or physical harm. When enhanced techniques are used, OMS closely monitors the detainee's condition to ensure that he does not, in fact, experience severe pain or suffering or sustain any significant or lasting harm.

This facet of our analysis bears emphasis. We do not conclude that any conduct, no matter how extreme, could be justified by a sufficiently weighty government interest coupled with appropriate tailoring. Rather, our inquiry is limited to the program under consideration, in which the techniques do not amount to torture considered independently or in combination. See *Techniques* at 28-45; *Combined Use* at 9-19. Torture is categorically prohibited both by the CAT, see art. 2(2) ("No exceptional circumstances whatsoever . . . may be invoked as a justification of torture."), and by implementing legislation, see 18 U.S.C. §§ 2340-2340A.

The program, moreover, is designed to minimize the risk of injury or any suffering that is unintended or does not advance the purpose of the program. For example, in dietary manipulation, the minimum caloric intake is set at or above levels used in commercial weight-loss programs, thereby avoiding the possibility of significant weight loss. In nudity and water dousing, interrogators set ambient air temperatures high enough to guard against hypothermia. The walling technique employs a false wall and a C-collar (or similar device) to help avoid

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whiplash. *See Techniques* at 8. With respect to sleep deprivation, constant monitoring protects against the possibility that detainees might injure themselves by hanging from their wrists, suffer from acute edema, or even experience non-transient hallucinations. *See Techniques* at 11-13. With the waterboard, interrogators use potable saline rather than plain water so that detainees will not suffer from hyponatremia and to minimize the risk of pneumonia. *See id.* at 13-14. The board is also designed to allow interrogators to place the detainee in a head-up position so that water may be cleared very quickly, and medical personnel and equipment are on hand should any unlikely problems actually develop. *See id.* 14. All enhanced techniques are conducted only as authorized and pursuant to medical guidelines and supervision.²⁷

As is clear from these descriptions and the discussion above, the CIA uses enhanced techniques only as necessary to obtain information that it reasonably views as vital to protecting the United States and its interests from further terrorist attacks. The techniques are used only in the interrogation of those who are reasonably believed to be closely associated with al Qaeda and senior enough to have actionable intelligence concerning terrorist threats. Even then, the techniques are used only to the extent reasonably believed to be necessary to obtain otherwise unavailable intelligence. In addition, the techniques are designed to avoid inflicting severe pain or suffering, and no technique will be used if there is reason to believe it will cause significant harm. Indeed, the techniques have been designed to minimize the risk of injury or any suffering that does not further the Government's interest in obtaining actionable intelligence. The program is clearly not intended "to injure in some way unjustifiable by any government interest." *Lewis*, 523 U.S. at 849. Nor can it be said to reflect "deliberate indifference" to a substantial risk of such unjustifiable injury. *Id.* at 851.²⁸

²⁷ The CIA's CTC generally consults with the CIA's Office of General Counsel (which in turn may consult with this Office) when presented with novel circumstances. This consultation further reduces any possibility that CIA interrogators could be thought to be "abusing [their] power, or employing it as an instrument of oppression," *Lewis*, 523 U.S. at 840 (citation and quotation marks omitted; alteration in *Lewis*); *see also Chavez*, 538 U.S. at 774 (opinion of Thomas, J.), so as to render their conduct constitutionally arbitrary.

²⁸ This is not to say that the interrogation program has worked perfectly. According to the *JG Report*, the CIA, at least initially, could not always distinguish detainees who had information but were successfully resisting interrogation from those who did not actually have the information. *See JG Report* at 83-85. On at least one occasion, this may have resulted in what might be deemed in retrospect to have been the unnecessary use of enhanced techniques. On that occasion, although the on-scene interrogation team judged Zubaydah to be compliant elements within CIA Headquarters still believed he was withholding information. [REDACTED] *See id.* at 84. At the direction of CIA Headquarters, interrogators therefore used the waterboard one more time on Zubaydah. [REDACTED] *See id.* at 84-85.

This example, however, does not show CIA "conduct (that is) intended to injure in some way unjustifiable by any government interest," or "deliberate indifference" to the possibility of such unjustifiable injury. *Lewis*, 523 U.S. at 849. As long as the CIA reasonably believed that Zubaydah continued to withhold sufficiently important information, use of the waterboard was supported by the Government's interest in protecting the Nation from subsequent terrorist attacks. The existence of a reasonable, good faith belief is not negated because the factual predicates for that belief are subsequently determined to be false. Moreover, in the Zubaydah example, CIA Headquarters dispatched officials to observe the last waterboard session. These officials reported that enhanced techniques were no longer needed. *See JG Report* at 85. Thus, the CIA did not simply rely on what appeared to be credible intelligence but rather ceased using enhanced techniques despite this intelligence.

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2.

We next address whether, considered in light of “an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them,” use of the enhanced interrogation techniques constitutes government behavior that “is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” *Id.* at 847 n.8. We have not found evidence of traditional executive behavior or contemporary practice either condemning or condoning an interrogation program carefully limited to further a vital government interest and designed to avoid unnecessary or serious harm.²⁹ However, in many contexts, there is a strong tradition against the use of coercive interrogation techniques. Accordingly, this aspect of the analysis poses a more difficult question. We examine the traditions surrounding ordinary criminal investigations within the United States, the military’s tradition of not employing coercive techniques in intelligence interrogations, and the fact that the United States regularly condemns conduct undertaken by other countries that bears at least some resemblance to the techniques at issue.

These traditions provide significant evidence that the use of enhanced interrogation techniques might “shock the contemporary conscience” in at least some contexts. *Id.* As we have explained, however, the due process inquiry depends critically on setting and circumstance, *see, e.g., id.* at 847, 850, and each of these contexts differs in important ways from the one we consider here. Careful consideration of the underpinnings of the standards of conduct expected in these other contexts, moreover, demonstrates that those standards are not controlling here. Further, as explained below, the enhanced techniques are all adapted from techniques used by the United States on its own troops, albeit under significantly different conditions. At a minimum, this confirms that use of these techniques cannot be considered to be categorically impermissible; that is, in some circumstances, use of these techniques is consistent with “traditional executive behavior” and “contemporary practice.” *Id.* at 847 n.8. As explained below, we believe such circumstances are present here.

Domestic Criminal Investigations. Use of interrogation practices like those we consider here in ordinary criminal investigations might well “shock the conscience.” In *Rochin v.*

²⁹ CIA interrogation practice appears to have varied over time. The *IG Report* explains that the CIA “has had intermittent involvement in the interrogation of individuals whose interests are opposed to those of the United States.” *IG Report* at 9. In the early 1980s, for example, the CIA initiated the Human Resource Exploitation (“HRE”) training program, “designed to train foreign liaison services on interrogation techniques.” *Id.* The CIA terminated the HRE program in 1986 because of allegations of human rights abuses in Latin America. *See id.* at 10.

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California, 342 U.S. 165 (1952), the Supreme Court reversed a criminal conviction where the prosecution introduced evidence against the defendant that had been obtained by the forcible pumping of the defendant's stomach. The Court concluded that the conduct at issue "shocks the conscience" and was "too close to the rack and the screw." *Id.* at 172. Likewise, in *Williams v. United States*, 341 U.S. 97 (1951), the Court considered a conviction under a statute that criminalized depriving an individual of a constitutional right under color of law. The defendant suspected several persons of committing a particular crime. He then

over a period of three days took four men to a paint shack . . . and used brutal methods to obtain a confession from each of them. A rubber hose, a pistol, a blunt instrument, a sash cord and other implement were used in the project. . . . Each was beaten, threatened, and unmercifully punished for several hours until he confessed.

Id. at 98-99. The Court characterized this as "the classic use of force to make a man testify against himself," which would render the confessions inadmissible. *Id.* at 101. The Court concluded:

But where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court.

Id. at 101.

More recently, in *Chavez v. Martinez*, 538 U.S. 760 (2003), the police had questioned the plaintiff, a gunshot wound victim who was in severe pain and believed he was dying. At issue was whether a section 1983 suit could be maintained by the plaintiff against the police despite the fact that no charges had ever been brought against the plaintiff. The Court rejected the plaintiff's Fifth Amendment Self-Incrimination Clause claim, *see id.* at 773 (opinion of Thomas, J.); *id.* at 778-79 (Souter, J., concurring in judgment), but remanded for consideration of whether the questioning violated the plaintiff's substantive due process rights, *see id.* at 779-80. Some of the justices expressed the view that the Constitution categorically prohibits such coercive interrogations. *See id.* at 783, 788 (Stevens, J., concurring in part and dissenting in part) (describing the interrogation at issue as "torturous" and asserting that such interrogation "is a classic example of a violation of a constitutional right implicit in the concept of ordered liberty") (internal quotation marks omitted); *id.* at 796 (Kennedy, J., concurring in part and dissenting in part) ("The Constitution does not countenance the official imposition of severe pain or pressure for purposes of interrogation. This is true whether the protection is found in the Self-Incrimination Clause, the broader guarantees of the Due Process Clause, or both.").

The CIA program is considerably less invasive or extreme than much of the conduct at issue in these cases. In addition, the government interest at issue in each of these cases was the general interest in ordinary law enforcement (and, in *Williams*, even that was doubtful). That government interest is strikingly different from what is at stake here: the national security—in particular, the protection of the United States and its interests against attacks that may result in

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massive civilian casualties. Specific constitutional constraints, such as the Fifth Amendment's Self-Incrimination Clause, which provides that "[n]o person . . . shall be compelled *in any criminal case* to be a witness against himself," (emphasis added), apply when the government acts to further its general interest in law enforcement and reflect explicit fundamental limitations on how the government may further that interest. Indeed, most of the Court's police interrogation cases appear to be rooted in the policies behind the Self-Incrimination Clause and concern for the fairness and integrity of the trial process. In *Rochin*, for example, the Court was concerned with the use of evidence obtained by coercion to bring about a criminal conviction. See, e.g., 342 U.S. at 173 ("Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'") (citation omitted); *id.* (refusing to hold that "in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach"). See also *Jackson v. Denno*, 378 U.S. 368, 377 (1964) (characterizing the interest at stake in police interrogation cases as the "right to be free of a conviction based upon a coerced confession"); *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944) (explaining that "[a] coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt"). Even *Chavez*, which might indicate the Court's receptiveness to a substantive due process claim based on coercive police interrogation practices irrespective of whether the evidence obtained was ever used against the individual interrogated, involved an interrogation implicating ordinary law enforcement interests.

Courts have long distinguished the government's interest in ordinary law enforcement from other government interests such as national security. The Foreign Intelligence Surveillance Court of Review recently explained that, with respect to the Fourth Amendment, "the [Supreme] Court 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) (discussing the Court's "special needs" cases and distinguishing "FISA's general programmatic purpose" of "protect[ing] the nation against terrorists and espionage threats directed by foreign powers" from general crime control). Under the "special needs" doctrine, the Supreme Court has approved of warrantless and even suspicionless searches that serve "special needs, beyond the normal need for law enforcement." *Vernonia Schol. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (quotation marks and citation omitted). Thus, although the Court has explained that it "cannot sanction [automobile] stops justified only by the" "general interest in crime control," *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (quotation marks and citation omitted), it suggested that it might approve of a "roadblock set up to thwart an imminent terrorist attack," *id.* See also Memorandum for James B. Comey, Deputy Attorney General, from Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Whether OFAC May Without Obtaining a Judicial Warrant Enter the Commercial Premises of a Designated Entity To Secure Property That Has Been Blocked Pursuant to IEEPA* (April 11, 2005). Notably, in the due process context, the Court has distinguished the Government's interest in detaining illegal aliens generally from its interest in detaining suspected terrorists. See *Zadvydas*, 533 U.S. at 691. Although the Court concluded that a statute permitting the indefinite detention of aliens subject to a final order of removal but who could not be removed to other countries would raise

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substantial constitutional questions, it suggested that its reasoning might not apply to a statute that “appl[ie]d narrowly to a small segment of particularly dangerous individuals, say, suspected terrorists.” *Id.* at 691 (quotation marks and citation omitted).

Accordingly, for these reasons, we do not believe that the tradition that emerges from the police interrogation context provides controlling evidence of a relevant executive tradition prohibiting use of these techniques in the quite different context of interrogations undertaken solely to prevent foreign terrorist attacks against the United States and its interests.

United States Military Doctrine. *Army Field Manual 34-52* sets forth the military’s basic approach to intelligence interrogations. It lists a variety of interrogation techniques that generally involve only verbal and emotional tactics. In the “emotional love approach,” for example, the interrogator might exploit the love a detainee feels for his fellow soldiers, and use this to motivate the detainee to cooperate. *Id.* at 3-15. In the “fear-up (harsh) approach,” “the interrogator behaves in an overpowering manner with a loud and threatening voice [and] may even feel the need to throw objects across the room to heighten the [detainee’s] implanted feelings of fear.” *Id.* at 3-16. The *Field Manual* counsels that “[g]reat care must be taken when [using this technique] so any actions would not violate the prohibition on coercion and threats contained in the GPW, Article 17.” *Id.* Indeed, from the outset, the *Field Manual* explains that the Geneva Conventions “and US policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation.” *Id.* at 1-8. As prohibited acts of physical and mental torture, the *Field Manual* lists “[f]ood deprivation” and “[a]bnormal sleep deprivation” respectively. *Id.*

The *Field Manual* provides evidence “of traditional executive behavior[and] of contemporary practice,” *Lewis*, 523 U.S. at 847 n.8, but we do not find it dispositive for several reasons. Most obviously, as the *Field Manual* makes clear, the approach it embodies is designed for traditional armed conflicts, in particular, conflicts governed by the Geneva Conventions. See *Field Manual 34-52* at 1-7 to 1-8; see also *id.* at iv-v (noting that interrogations must comply with the Geneva Conventions and the Uniform Code of Military Justice). The United States, however, has long resisted efforts to extend the protections of the Geneva Conventions to terrorists and other unlawful combatants. As President Reagan stated when the United States rejected Protocol I to the Geneva Conventions, the position of the United States is that it “must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.” President Ronald Reagan, Letter of Transmittal to the Senate of Protocol II additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977 (Jan. 29, 1987). President Bush, moreover, has expressly determined that the Geneva Convention Relative to the Treatment of Prisoners of War (“GPW”) does not apply to the conflict with al Qaeda. See Memorandum from the President, *Re: Humane Treatment of al Qaeda and Taliban Detainees* at 1 (Feb. 7, 2002); see also Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 9-10 (Jan. 22, 2002) (explaining that GPW does not apply to non-state actors such as al Qaeda).

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We think that a policy premised on the applicability of the Geneva Conventions and not purporting to bind the CIA does not constitute controlling evidence of executive tradition and contemporary practice with respect to untraditional armed conflict where those treaties do not apply, where the enemy flagrantly violates the laws of war by secretly attacking civilians, and where the United States cannot identify the enemy or prevent its attacks absent accurate intelligence.

State Department Reports. Each year, in the State Department's Country Reports on Human Rights Practices, the United States condemns coercive interrogation techniques and other practices employed by other countries. Certain of the techniques the United States has condemned appear to bear some resemblance to some of the CIA interrogation techniques. In their discussion of Indonesia, for example, the reports list as "[p]sychological torture" conduct that involves "food and sleep deprivation," but give no specific information as to what these techniques involve. In their discussion of Egypt, the reports list as "methods of torture" "stripping and blindfolding victims; suspending victims from a ceiling or doorframe with feet just touching the floor; beating victims [with various objects]; . . . and dousing victims with cold water." *See also, e.g.,* Algeria (describing the "chiffon" method, which involves "placing a rag drenched in dirty water in someone's mouth"); Iran (counting sleep deprivation as either torture or severe prisoner abuse); Syria (discussing sleep deprivation and "having cold water thrown on" detainees as either torture or "ill-treatment"). The State Department's inclusion of nudity, water dousing, sleep deprivation, and food deprivation among the conduct it condemns is significant and provides some indication of an executive foreign relations tradition condemning the use of these techniques.³⁰

To the extent they may be relevant, however, we do not believe that the reports provide evidence that the CIA interrogation program "shocks the contemporary conscience." The reports do not generally focus on or provide precise descriptions of individual interrogation techniques. Nor do the reports discuss in any detail the contexts in which the techniques are used. From what we glean from the reports, however, it appears that the condemned techniques are often part of a course of conduct that involves techniques and is undertaken in ways that bear no resemblance to the CIA interrogation program. Much of the condemned conduct goes far beyond the CIA techniques and would almost certainly constitute torture under United States law. *See, e.g.,* Egypt (discussing "suspending victims from a ceiling or doorframe with feet just touching the floor" and "beating victims [with various objects]"); Syria (discussing finger crushing and severe beatings); Pakistan (beatings, burning with cigarettes, electric shock); Uzbekistan (electric shock, rape, sexual abuse, beatings). The condemned conduct, moreover, is often undertaken for reasons totally unlike the CIA's. For example, Indonesia security forces apparently use their techniques in order to obtain confessions, to punish, and to extort money. Egypt "employ[s] torture to extract information, coerce opposition figures to cease their political activities, and to deter others from similar activities." There is no indication that techniques are

³⁰ We recognize that as a matter of diplomacy, the United States may for various reasons in various circumstances call another nation to account for practices that may in some respects resemble conduct in which the United States might in some circumstances engage, covertly or otherwise. Diplomatic relations with regard to foreign countries are not reliable evidence of United States executive practice and thus may be of only limited relevance here.

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used only as necessary to protect against grave terrorist threats or for any similarly vital government interests (or indeed for any legitimate government interest). On the contrary, much of the alleged abuses discussed in the reports appears to involve either the indiscriminate use of force, *see, e.g.*, Kenya, or the targeting of critics of the government, *see, e.g.*, Liberia, Rwanda. And there is certainly no indication that these countries apply careful screening procedures, medical monitoring, or any of the other safeguards required by the CIA interrogation program.

A United States foreign relations tradition of condemning torture, the indiscriminate use of force, the use of force against the government's political opponents, or the use of force to obtain confessions in ordinary criminal cases says little about the propriety of the CIA's interrogation practices. The CIA's careful screening procedures are designed to ensure that enhanced techniques are used in the relatively few interrogations of terrorists who are believed to possess vital, actionable intelligence that might avert an attack against the United States or its interests. The CIA uses enhanced techniques only to the extent reasonably believed necessary to obtain the information and takes great care to avoid inflicting severe pain or suffering or any lasting or unnecessary harm. In short, the CIA program is designed to subject detainees to no more duress than is justified by the Government's interest in protecting the United States from further terrorist attacks. In these essential respects, it differs from the conduct condemned in the State Department reports.

SERE Training. There is also evidence that use of these techniques is in some circumstances consistent with executive tradition and practice. Each of the CIA's enhanced interrogation techniques has been adapted from military SERE training, where the techniques have long been used on our own troops. *See Techniques* at 6; *IG Report* at 13-14. In some instances, the CIA uses a milder form of the technique than SERE. Water dousing, as done in SERE training, involves complete immersion in water that may be below 40°F. *See Techniques* at 10. This aspect of SERE training is done outside with ambient air temperatures as low as 10°F. *See id.* In the CIA technique, by contrast, the detainee is splashed with water that is never below 41°F and is usually warmer. *See id.* Further, ambient air temperatures are never below 64°F. *See id.* Other techniques, however, are undeniably more extreme as applied in the CIA interrogation program. Most notably, the waterboard is used quite sparingly in SERE training—at most two times on a trainee for at most 40 seconds each time. *See id.* at 13, 42. Although the CIA program authorizes waterboard use only in narrow circumstances (to date, the CIA has used the waterboard on only three detainees), where authorized, it may be used for two "sessions" per day of up to two hours. During a session, water may be applied up to six times for ten seconds or longer (but never more than 40 seconds). In a 24-hour period, a detainee may be subjected to up to twelve minutes of water application. *See id.* at 42. Additionally, the waterboard may be used on as many as five days during a 30-day approval period. *See August 19 [REDACTED] Letter* at 1-2. The CIA used the waterboard "at least 83 times during August 2002" in the interrogation of Zubaydah, *IG Report* at 90, and 183 times during March 2003 in the interrogation of KSM, *see id.* at 91.

In addition, as we have explained before:

Individuals undergoing SERE training are obviously in a very different situation from detainees undergoing interrogation; SERE trainees know it is part of a

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training program, not a real-life interrogation regime, they presumably know it will last only a short time, and they presumably have assurances that they will not be significantly harmed by the training.

Techniques at 6. On the other hand, the interrogation program we consider here furthers the paramount interest of the United States in the security of the Nation more immediately and directly than SERE training, which seeks to reduce the possibility that United States military personnel might reveal information that could harm the national security in the event they are captured. Again, analysis of the due process question must pay careful attention to these differences. But we can draw at least one conclusion from the existence of SERE training. Use of the techniques involved in the CIA's interrogation program (or at least the similar techniques from which these have been adapted) cannot be considered to be *categorically* inconsistent with "traditional executive behavior" and "contemporary practice" regardless of context.³¹ It follows that use of these techniques will not shock the conscience in at least some circumstances. We believe that such circumstances exist here, where the techniques are used against unlawful combatants who deliberately and secretly attack civilians in an untraditional armed conflict in which intelligence is difficult or impossible to collect by other means and is essential to the protection of the United States and its interests, where the techniques are used only when necessary and only in the interrogations of key terrorist leaders reasonably thought to have actionable intelligence, and where every effort is made to minimize unnecessary suffering and to avoid inflicting significant or lasting harm.

Accordingly, we conclude that, in light of "an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them," the use of the enhanced interrogation techniques in the CIA interrogation program as we understand it, does not constitute government behavior that "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 847 n.8.

C.

For the reasons stated, we conclude that the CIA interrogation techniques, with their careful screening procedures and medical monitoring, do not "shock the conscience." Given the relative paucity of Supreme Court precedent applying this test at all, let alone in anything resembling this setting, as well as the context-specific, fact-dependent, and somewhat subjective nature of the inquiry, however, we cannot predict with confidence that a court would agree with our conclusion. We believe, however, that the question whether the CIA's enhanced interrogation techniques violate the substantive standard of United States obligations under Article 16 is unlikely to be subject to judicial inquiry.

As discussed above, Article 16 imposes no legal obligations on the United States that implicate the CIA interrogation program in view of the language of Article 16 itself and.

³¹ In addition, the fact that individuals voluntarily undergo the techniques in SERE training is probative. See *Breithaupt v. Abram*, 352 U.S. 432, 436-37 (1957) (noting that people regularly voluntarily allow their blood to be drawn and concluding that involuntary blood testing does not "shock the conscience").

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independently, the Senate's reservation. But even if this were less clear (indeed, even if it were false), Article 16 itself has no domestic legal effect because the Senate attached a non-self-execution declaration to its resolution of ratification. See Cong. Rec. 36,198 (1990) ("the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing"). It is well settled that non-self-executing treaty provisions "can only be enforced pursuant to legislation to carry them into effect." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); see also *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) ("A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, . . . but is carried into execution by the sovereign power of the respective parties to the instrument."). One implication of the fact that Article 16 is non-self-executing is that, with respect to Article 16, "the courts have nothing to do and can give no redress." *Head Money Cases*, 112 U.S. 580, 598 (1884). As one court recently explained in the context of the CAT itself, "Treaties that are not self-executing do not create judicially-enforceable rights unless they are first given effect by implementing legislation." *Auguste v. Ridge*, 395 F.3d 123, 132 n.7 (3d Cir. 2005) (citations omitted). Because (with perhaps one narrow exception³²) Article 16 has not been legislatively implemented, the interpretation of its substantive standard is unlikely to be subject to judicial inquiry.³³

* * *

Based on CIA assurances, we understand that the CIA interrogation program is not conducted in the United States or "territory under [United States] jurisdiction," and that it is not authorized for use against United States persons. Accordingly, we conclude that the program does not implicate Article 16. We also conclude that the CIA interrogation program, subject to its careful screening, limits, and medical monitoring, would not violate the substantive standards

³² As noted above, Section 1031 of Public Law 109-13 provides that "[n]one of the funds appropriated or otherwise made available by this Act shall be obligated or expended to subject any person in the custody or under the physical control of the United States to . . . cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States." To the extent this appropriations rider implements Article 16, it creates a narrow domestic law obligation not to expend funds appropriated under Public Law 109-13 for conduct that violates Article 16. This appropriations rider, however, is unlikely to result in judicial interpretation of Article 16's substantive standards since it does not create a private right of action. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."); *Resident Council of Allen Parkway Vill. v. Dep't of Hous. & Urban Dev.*, 980 F.2d 1043, 1052 (5th Cir. 1993) ("courts have been reluctant to infer congressional intent to create private rights under appropriations measures") (citing *California v. Sierra Club*, 451 U.S. 287 (1981)).

It is possible that a court could address the scope of Article 16 if a prosecution were brought under the Antideficiency Act, 31 U.S.C. § 1341 (2000), for a violation of section 1031's spending restriction. Section 1341(a)(1)(A) of title 31 provides that officers or employees of the United States may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." "[K]nowing[] and willful[] violat[ions]" of section 1341(a) are subject to criminal penalties. *Id.* § 1350.

³³ Although the interpretation of Article 16 is unlikely to be subject to judicial inquiry, it is conceivable that a court might attempt to address substantive questions under the Fifth Amendment if, for example, the United States sought a criminal conviction of a high value detainee in an Article III court in the United States using evidence that had been obtained from the detainee through the use of enhanced interrogation techniques.

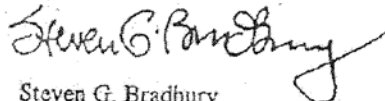
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applicable to the United States under Article 16 even if those standards extended to the CIA interrogation program. Given the paucity of relevant precedent and the subjective nature of the inquiry, however, we cannot predict with confidence whether a court would agree with this conclusion, though, for the reasons explained, the question is unlikely to be subject to judicial inquiry.

Please let us know if we may be of further assistance.



Steven G. Bradbury
Principal Deputy Assistant Attorney General

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