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# FAX COVER SHEET

**Central Intelligence Agency**


**Office of General Counsel**
**Washington, DC 20505**

**22 April 2005**

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| **To:** | Steve Bradbury & |
| **Organization:** | DoJ/OLC |
| **Phone:** | [ ] (Bradbury) |
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| **From:** | |
| **Organization:** | |
| **Phone:** | |
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**Number of pages (including cover sheet): 4**

**Comments: Per your request...**

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Horizontal Sleep Deprivation

On three occasions early in the program, the interrogation team and the attendant medical officers identified the potential for unacceptable edema in the lower limbs of detainees undergoing interrogation. In order to permit the limbs to recover without impairing sleep deprivation requirements, the subjects underwent horizontal sleep deprivation. Horizontal sleep deprivation occurs when a detainee is placed prone on the floor on top of a thick towel or blanket, a precaution designed to prevent reduction of body temperature through direct contact with the cell floor. The detainee's hands are manacled together and the arms placed in outstretched position -- either extended beyond the head or extended to either side of the body -- and anchored to a far point on the floor in such a manner that the arms cannot be bent or used for balance or comfort. At the same time, the ankles are shackled together and the legs are extended in a straight line with the body, and anchored to a far point on the floor in such a manner that the legs cannot be bent or used for balance or comfort. The manacles and shackles are anchored without additional stress on any of the arm or leg joints that might force the limbs beyond natural extension or create tension on any joint. The position is sufficiently uncomfortable to detainees to deprive them of unbroken sleep, while allowing their lower limbs to recover from the effects of standing sleep deprivation. All standard precautions and procedures for shackling are observed for both hands and feet while in this position. Horizontal sleep deprivation has been used until the detainee's affected limbs have demonstrated sufficient recovery to return to sitting or standing sleep deprivation mode, as warranted by the requirements of the interrogation team, and subject to determination by medical officer that there is no contraindication to resuming other sleep deprivation modes.

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22 April 2005

Transmitted by Secure Facsimile

(TS/ NF,OC) The following is the Central Intelligence Agency's use of the "waterboard" in combination with two other techniques. The waterboard is an interrogation technique as described in our Background Paper on CIA'S Combined Use of Interrogation Techniques, provided to you previously.

(TS/ /NF,OC) We also previously provided the Department of Justice with our description of the waterboard. The following is our description of the two interrogation techniques we use in conjunction with the waterboard. These techniques are dietary manipulation and sleep deprivation. While an individual is physically on the waterboard, we do not use the insult slap, belly slap, attention grasp, facial hold, walling, water dousing, stress positions, or cramped confinement. Many or all of those techniques almost certainly will have been used before the Agency needs to resort to the waterboard (and, indeed, since March 2003, the Agency has not had to resort to use of the waterboard to transition an individual from resistance to cooperation). Further, it is possible that one or more of these interrogation techniques might be used the same day as a waterboard session.

(TS// /NF,OC) As you are aware, the Central Intelligence Agency has established specific guidelines for the use of each of these two interrogation techniques and the waterboard. These guidelines incorporate the guidelines established by the CIA Office of Medical Services (OMS).

(TS/ /NF,OC) As we briefed you previously, an individual is always placed on a fluid diet before he may be subjected to the waterboard in order to avoid aspiration of regurgitated food. The individual is kept on the fluid diet throughout the period the waterboard is used.

(TS) //NF,OC) Sleep deprivation may be used prior to and during the waterboard session. As has been previously noted, the time limitation on application of sleep deprivation is strictly monitored. In addition, the detainee's physical and mental state is also monitored to ensure they are not harmed. There is no evidence in literature or experience that sleep deprivation exacerbates any harmful effects of the waterboard, but it does reduce the detainee's will to resist, contributing to the effectiveness of the waterboard as an interrogation technique. In the event a detainee were to be perceived as unable to withstand the affects of the waterboard for any reason, any member of the interrogation team has obligation to voice concern, and if necessary to halt the proceedings.

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- The CIA interrogation program, which is conducted outside the special maritime and territorial jurisdiction of the United States, is not subject to the requirements of Article 16 of the CAT.
    - Article 16(1) requires that the United States "undertake to prevent . . . cruel, inhuman or degrading treatment or punishment" only in "*any territory under its jurisdiction.*"
        - The CAT uses the phrase "any territory under its jurisdiction" to refer to territory over which a state may "take . . . legislative, administrative, judicial or other measures." Art. 2(1); *see also* Art. 5(1).
        - Article 16's limited territorial reach is confirmed by a reservation under which the United States is bound only with respect to "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments," provisions that do not apply to aliens outside of the United States.
- The CIA interrogation program would not violate U.S. obligations under Article 16 if it applied.
    - Article 16 would prohibit the United States from treating detainees in a manner that "shocks the conscience."
        - Whether government conduct shocks the conscience turns primarily on two factors.

            (1) Whether the conduct is "arbitrary in the constitutional sense."

            (2) Whether, considered in light of traditional and contemporary executive practice, the conduct is sufficiently "egregious" to "shock the contemporary conscience."
        - The CIA interrogation program, which furthers the government's interest in national security and in which techniques are authorized *only as necessary* to protect that interest, cannot be said to be constitutionally arbitrary.
        - The techniques do not "shock the contemporary conscience," although their use in other contexts (such as ordinary criminal investigations or traditional armed conflicts) might.
            - Importantly, the CIA interrogation techniques are all adapted from the military Survival, Evasion, Resistance, Escape ("SERE") training. The fact that the United States uses these techniques on its own troops strongly suggests that these techniques are not categorically beyond the pale.
- Given the vague nature of the shocks-the-conscience test and the lack of precedent in this context, we cannot predict with confidence whether a court would agree with our analysis. But because of the territorial limitation in Article 16 and the fact that it is non-self-executing, we think the question should not reach the courts.

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Documents

1). Letter to Judge Gonzales from John Yoo, Aug. 1, 2002 addresses international legal obligations under CAT

2) Opinion addressed to Judge Gonzales, signed by Jay Bybee, Aug. 1, 2002.
This unclassified opinion addresses standards generally under 18 U.S.C. §§ 2340 - 2340A

(TS) 3). Opinion addressed to John Rizzo, Acting GC at CIA, signed by Jay Bybee, August 1, 2002. Addresses specifically proposed techniques with respect to Zubaydah. Top Secret.

(S) 4). Opinion addressed to William J. Haynes, II signed by John Yoo, March 14, 2003. Generally addresses standards for interrogations. Secret.

5) Bullet Points created by CIA OGC in collaboration w/ John Yoo — not signed by OLC.

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**FOR ATTORNEY GENERAL ONLY**

## LEGAL BACKGROUND

- The Geneva Conventions "apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties" and "to all cases of partial or total occupation of the territory of a High Contracting Party."
    - **The Conventions do not apply to our worldwide conflict with al Qaeda**, which is not a "High Contracting Party." *See also Hamdan v. Rumsfeld* (D.C. Cir. July 15, 2005).
    - The President has determined that **the Conventions apply to our conflict with the Taliban** because Afghanistan is a "High Contracting Party."
    - **The Conventions apply to our conflict with the former regime in Iraq** because that conflict is between "High Contracting Parties" and, prior to June 28, 2004, because the United States occupied Iraq.
- **The Third Geneva Convention ("GPW") requires that notice be given of detentions of persons who qualify for prisoner of war status** under GPW art. 4 ("POWs").
    - Notice is **not required for al Qaeda detainees** because al Qaeda is not a party to the Conventions.
    - Notice is **not required for Taliban detainees** because the Taliban, as a group, do not meet the criteria set forth in GPW art. 4 for POW status.
    - Notice **is required for detainees associated with the armed forces of the former Iraqi regime** who satisfy the requirements set forth in GPW art. 4.
- The **Fourth Geneva Convention** ("GC") **requires that notice be given of detentions of persons** located **in the territory of the detaining State or in occupied territory who satisfy the nationality and other requirements** set forth in GC art. 4 ("protected persons").
    - **In United States territory, nationals of Afghanistan, Iraq, and countries that do not have normal diplomatic representation in the United States** (*e.g.*, Iran) may qualify for protected person status. Although the better view is that GTMO is not United States territory, litigation developments could call that conclusion into question.
    - **Persons captured in Iraq before the end of occupation (June 28, 2004)** who remain in detention retain protected person status if they satisfy the requirements of GC art. 4.
- **United Nations Security Council Resolution 1546**, which authorizes the multinational force ("MNF") to detain where "necessary for imperative reasons of security" and incorporates a commitment "to act in accordance with" the Geneva Conventions, **does not impose any notification obligation when the Geneva Conventions do not**.

## GENERAL FRAMEWORK

- **In most circumstances involving captures and detentions today, the Geneva Conventions do not impose notification requirements on the United States.**
- The **Third Geneva Convention** ("GPW"), which would require notice for POWs, does not impose notification requirements in most circumstances relevant here.
  - Notice is **not required for al Qaeda** detainees because al Qaeda is not a party to GPW.
  - Notice is **not required for Taliban** detainees because they do not qualify for POW status.
  - Though probably not operationally significant, notice **would be required for persons associated with the armed forces of the former Iraqi regime** who qualify for POW status.
- The **Fourth Geneva Convention** ("GC") does not impose notification requirements in most circumstances because the occupation of Iraq ended on June 28, 2004.
  - Notice **would be required for persons captured in Iraq before the end of occupation (June 28, 2004)** who qualify for protected person status.
  - **In U.S. territory, notice may be required for detainees who are nationals of Afghanistan, Iraq, or countries lacking normal diplomatic representation in the U.S.**
- **United Nations Security Council Resolution 1546 does not impose any notification obligation when the Geneva Conventions do not.**

## CONCLUSIONS

- **Except for some unusual situations, detention operations conducted pursuant to the Department of Defense's proposed policy would not require notification** under the Conventions.
- **For certain unusual categories of detainees, additional fact-dependent analysis would be necessary** to determine whether notification is required:
  - **Persons associated with the armed forces of the former Iraqi regime**
  - **Persons captured in Iraq before the end of occupation** (June 28, 2004)
- If GC's restrictions for occupied territory still applied in Iraq, they would prohibit some conduct authorized under the proposed policy, such as forcible transfers or deportations of protected persons from Iraq.
- **It is therefore important to review statements of senior Administration officials that may suggest that U.S. policy is to apply the substantive requirements of the Geneva Conventions.** Adherence to such a policy might require notification and might place other substantive limitations on treatment of detainees.

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## PROPOSED ENHANCED INTERROGATION TECHNIQUES

- The CIA has proposed using a set of "enhanced interrogation techniques" in the interrogation of high-value al Qaeda detainees. The techniques at issue fall into two categories (all subject to medical and psychological assessments and close medical and other monitoring):
  - **"Conditioning techniques"**
    - nudity
    - dietary manipulation (with minimum caloric intake requirements)
    - extended sleep deprivation (more than 48 hours but in no event exceeding 180 hours) (primarily relying on shackling to keep the detainee in a standing position, or alternatively in a sitting or lying position)
  - **"Corrective techniques"**
    - facial slap (not done with sufficient force or repetition to cause severe pain)
    - abdominal slap (not done with sufficient force or repetition to cause severe pain)
    - facial hold
    - attention grasp

## OUTLINE OF PRELIMINARY ANALYSIS

- **The proposed enhanced interrogation techniques are consistent with the McCain Amendment.**
- **The McCain Amendment prohibits any individual in U.S. custody or control, "regardless of nationality or physical location," from being subjected to "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States."** The Amendment is intended to extend, without regard for nationality or physical location, the substantive constitutional standards applicable to the United States under Article 16 of the Convention Against Torture ("CAT").
- **The relevant constitutional standard** is the **"shocks the conscience"** standard of substantive due process under the Fifth Amendment, which entails a ***context-specific and fact-dependent inquiry*** into whether:
    - (1) the government conduct at issue is **"arbitrary in the constitutional sense,"** meaning that it involves an "exercise of power without any reasonable justification in the service of a legitimate governmental objective" or is "intended to injure in some way unjustifiable by any government interest," *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 849 (1998); and
    - (2) in light of "traditional executive behavior, of contemporary practice, and the standards of blame generally applied to them," the conduct "is so egregious, so outrageous, **that it may fairly be said to shock the contemporary conscience**." *Id.* at 847 n.8.
        - **The CIA's interrogation program is not "arbitrary in the constitutional sense"** because it is limited to what is reasonably necessary to acquire actionable intelligence to avoid terrorist attack on the U.S. (a vital government interest), is limited to a small number of the most high value detainees, and is carefully designed and administered to avoid injury to the detainees and any suffering that is unnecessary or lasting.
        - **The CIA's interrogation program cannot "fairly be said to shock the contemporary conscience,"** although this inquiry is much more subjective and difficult because of the lack of relevant executive practice either condemning or condoning the sorts of interrogation practices used by the CIA.
            - Although the use of certain interrogation practices has been condemned in other contexts—including ordinary domestic law enforcement; military interrogations of POWs under the Third Geneva Convention (as reflected in the *Army Field Manual*); and the State Department's Country Reports on Human Rights Practices of other nations—none of these other contexts is particularly relevant or useful in judging the unique context of the CIA program.
            - SERE training practice, from which all of the CIA interrogation techniques have been adapted, is also different from the present context in important respects; however, the use in SERE of similar and far more coercive techniques on our own U.S. troops for purposes of training strongly indicates that the use by the Government of techniques like these is not entirely beyond the pale of what is permissible executive practice.

**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 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 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.

Summary of Advice on Interrogations

Advice to the Counsel to the President

In a letter opinion dated August 1, 2002, OLC advised Judge Gonzales that the use of an interrogation technique in the war against terrorism, if it did not violate the United States criminal statute forbidding torture, 18 U.S.C. §§ 2340-2340A, would neither violate the international Convention Against Torture nor create a basis for prosecution under the Rome Statute establishing the International Criminal Court. The opinion set out the elements of the criminal statute as follows: "(1) the torture occurred outside the United States; (2) the defendant acted under color of law; (3) the victim was within the defendant's custody or physical control; (4) the defendant specifically intended to cause severe physical or mental pain or suffering; and (5) . . . the act inflicted severe physical or mental pain or suffering." The opinion then concluded that, in view of the understandings about the Convention that attended its ratification by the United States, the international law obligations under the Convention could not exceed those under the criminal statute. It further concluded that the United States is not bound by the ICC Treaty, which it has not ratified, and that, in any event, the interrogation of al Qaeda operatives and Taliban soldiers could not be a crime that would come within the ICC's jurisdiction, because the interrogation would not be part of a systematic attack against a civilian population and because neither al Qaeda operatives nor Taliban soldiers are prisoners of war under the Geneva Convention. The opinion did not examine specific interrogation techniques.

In a lengthier opinion of the same date, OLC expanded on the explanation of the scope of the criminal statute. It concluded that, to constitute torture, an act must inflict pain equivalent to that of serious physical injury, such as organ failure, impairment of bodily function, or death. Purely mental pain could amount to torture only if it resulted from one of the predicate acts named in the statute – threats of death or torture, infliction of physical pain amounting to torture, use of drugs that alter personality, or threats to do any of these things to a third party – and only if it lasted for a significant duration (months or years). A defendant would violate the statute only if he specifically intended to inflict such suffering. The Convention on Torture, the opinion stated, similarly designates as torture only such extreme measures. The opinion did not review and approve specific techniques. Instead, it observed that, in other contexts, courts have tended to examine the totality of the circumstances and to find torture where the acts in question are shocking. Finally, the opinion found that the criminal statute would be unconstitutional if applied in a manner that interfered with the President's authority as Commander-in-Chief to conduct a military campaign.

Advice to CIA

In an opinion also issued August 1, 2002, OLC advised the CIA that specific interrogation

techniques, if used against Abu Zubaydah, would not violate the criminal statute against torture. The specific techniques were: a facial slap or insult slap not designed to inflict pain, forms of cramped confinement (including confinement in a space with an insect, of which Abu Zubaydah is particularly afraid), wall standing that induces muscle fatigue, a variety of stress positions inducing discomfort similar to muscle fatigue, sleep deprivation, "walling" (in which the subject is pushed against a wall in a manner that causes a loud noise but no injury), and the "waterboard" (in which water is dripped onto a cloth over the subject's mouth and nose, creating the perception of drowning). These techniques (except for the use of the insect) have been employed on United States military personnel as part of training and have been found not to cause prolonged mental or physical harm. Furthermore, an assessment of Abu Zubaydah by the CIA showed that he had no conditions that would make it likely for him to suffer prolonged mental harm as a result of the interrogation. With this background, the opinion concluded that none of the techniques would cause him the severe physical pain that would amount to torture under the statute, particularly because medical personnel would be monitoring the interrogation. Nor would the techniques cause the severe mental harm that might amount to torture – a prolonged mental harm resulting from one of the predicate acts in the statute. The only technique that might involve such an act was the use of the waterboard, which could convey a threat of severe pain or suffering, but research indicated that the technique would not cause prolonged mental harm and so would not come within the statute. In any event, the statute would be violated only if the defendant had a specific intent to cause severe pain or suffering. No such intent could be found here, in part because of the careful restrictions under which the interrogation would take place.

Advice to Department of Defense

On March 14, 2003, OLC issued an opinion to the Department of Defense about military interrogation of alien unlawful combatants held outside the United States. The opinion specifically addressed al Qaeda and Taliban detainees. It considered a wider range of legal authorities than the opinions for Judge Gonzales and the CIA but did not assess the legality of particular techniques, except by way of examples divorced from the specific facts of any particular interrogation. The opinion concluded that the Fifth and Eighth Amendments do not apply to the interrogation of enemy combatants outside the United States. It then turned to several criminal laws. It determined that interrogation methods not involving physical contact would not constitute assault, and techniques involving minimal physical contact (poking, slapping;, or shoving) are unlikely to produce the injury necessary to establish assault. 18 U.S.C. § 113. It also dismissed the likelihood that statutes on maiming, 18 U.S.C. § 114, or interstate stalking, 18 U.S.C. § 2261A, could apply. It found that the War Crimes Act, 18 U.S.C. § 2441, could not reach the interrogation of al Qaeda and Taliban detainees because, as illegal belligerents, they do not qualify for protection under the Geneva or Hague Conventions. The torture statute, the opinion concluded, would not apply to interrogations within the territorial United States or on permanent military bases outside the territory of the United States. It nonetheless repeated the analysis of the statutory elements as laid out in the earlier opinions, as well as the analysis of the Convention Against Torture. The opinion went beyond the earlier

ones, however, by discussing the Convention's prohibition against cruel, inhuman, or degrading treatment. It found that the United States' obligations in this regard extended only to preventing conduct that would be "cruel and unusual" under the Eighth Amendment or would "shock the conscience" under the Due Process Clause of the Fifth Amendment. As to the Eighth Amendment, it observed that the analysis turns on whether the official acts in good faith or, instead, maliciously or sadistically. Whether any pain inflicted during an interrogation is proportional to the necessity for its use, for example, would inform that analysis. Cases on conditions of confinement also provide analogues. There, a violation can be shown only if there is deprivation of a basic human need, combined with a deliberate indifference to the prisoner's health and safety. The opinion specifically stated that a brief stay in solitary confinement would not amount to a violation, nor would insults or ridicule. The "shock the conscience" test, the opinion stated, is an evolving one, but it noted that rape or beating during an interrogation could constitute behavior so disproportionate to a legitimate need so inspired by malice or sadism as to meet the standard. Methods chosen solely to produce mental suffering might also shock the conscience. But some physical contact – a shove or slap – would not be sufficient. The detainee would have to suffer some physical injury or severe mental distress resulting from the interrogator's conscious disregard of a known risk to the detainee. Finally, the opinion discussed the defenses of necessity and self-defense that an interrogator might assert if charged with a crime and found that these defenses might be available under some circumstances.

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- As a matter of law, the CIA interrogation program, which is conducted outside the special maritime and territorial jurisdiction of the United States, is not subject to the requirements of Article 16 of the Convention Against Torture ("CAT").

    - By its terms, Article 16(1) requires that the United States "undertake to prevent . . . cruel, inhuman or degrading treatment or punishment" only in "*any territory under its jurisdiction.*"

    - The phrase "any territory under its jurisdiction" cannot be read to reach territory outside the special maritime and territorial jurisdiction. Indeed, it likely does not extend that far.

        - The CAT uses the phrase "any territory under its jurisdiction" to refer to territory over which a state may "take . . . legislative, administrative, judicial or other measures." Art. 2(1). *See also* S. Treaty Doc. No. 100-20, at 5 (Secretary Shultz) (explaining that the phrase "refers to all places that the State Party controls *as government authority*").

        - The CAT uses the phrase "any territory under its jurisdiction" to refer to areas where a state exercises jurisdiction based on territorial control, as opposed to jurisdiction based on other grounds, such as nationality, or registration of ships and aircraft. *See* Art. 5(1).

    - Article 16's limited territorial reach is confirmed by a reservation required by the Senate as a condition of its advice and consent to the ratification of the CAT, under which the United States is "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." This reservation, which was deposited with the United States instrument of ratification, defines the scope of United States obligations under the CAT.

        - The enumerated constitutional amendments do not apply to aliens outside of the United States. *See, e.g., Johnson v. Eisentrager* (1950); *United States v. Curtiss-Wright* (1936) ("[T]he Constitution [has no] force in foreign territory unless in respect to our own citizens.").

        - The ratification history confirms that the reservation was intended to "limit our obligations under [Article 16] to the proscriptions already covered in our Constitution." *CAT Hearing*, 101st Cong. 11 (1990) (prepared statement of Abraham Sofaer, Legal Adviser, Department of State).

- Although it is a close question, we conclude that the CIA interrogation program, subject to its careful screening criteria and medical safeguards, would not violate United States obligations under Article 16 even if that provision applied.

- As noted, United States obligations under Article 16 extend only to "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments." With respect to treatment of detainees by the United States Government, as opposed to punishment for crimes (which is governed by the Eighth Amendment) or treatment by state governments (which is governed by the Fourteenth Amendment), the apposite Amendment is the Fifth Amendment. As relevant here, that Amendment prohibits treatment that "shocks the conscience."

    - Although it is a close question, we conclude that the CIA interrogation program, subject to its careful screening criteria and medical safeguards, does not "shock the conscience."

        - Under Supreme Court precedent, whether government conduct shocks the conscience turns primarily on two factors: (1) Whether the conduct is arbitrary in the constitutional sense—i.e., "without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). "[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. (2) Whether, considered in light of "traditional executive behavior, of contemporary practice, and the standards of blame generally applied to them," the conduct "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 847 n.8.

        - The CIA interrogation program, subject to its careful screening criteria and medical safeguards, cannot be said to be "arbitrary" or "intended to injure in some way unjustifiable by any government interest."

            - The interrogation program furthers the government's interest in national security. As the Court has emphasized: "It is 'obvious and unarguable' that no government interest is more compelling than the security of the Nation." *Haig v. Agee* (1981). The CIA believes that information obtained through its interrogation program has "been a key reason why al-Qa'ida has failed to launch a spectacular attack in the West since 11 September 2001."

            - The techniques are authorized *only as necessary* to protect that interest.

                - The techniques have been carefully designed to avoid inflicting serious physical or mental pain or suffering, as well any serious or lasting harm. Medical screening, monitoring, and ongoing evaluation further lower any such risk.

                - Enhanced techniques are used only on individuals who are believed to be senior members of al Qaeda, to have knowledge of imminent terrorist threats against the United States, and to pose a clear threat to the United States if released. The "waterboard" is used only if the CIA has credible intelligence that a terrorist attack is imminent, that

the subject has actionable intelligence, and that other techniques have failed or are unlikely to yield intelligence quickly.

- Whether, when considered in light of "traditional executive behavior, of contemporary practice, and the standards of blame generally applied to them," the interrogation techniques are "so egregious, so outrageous, that [they] may fairly be said to shock the contemporary conscience" is a much more difficult question. Although the interrogation techniques would not be appropriate if applied indiscriminately or in other contexts, we conclude that the CIA's interrogation techniques, when carefully limited to those persons who satisfy the screening criteria and conducted in conformity to the medical safeguards, do not shock the conscience.

  - Whether conduct shocks the conscience is an inherently fact-specific question on which existing precedent provides little guidance. *See id.* "'Asserted denial [of due process] 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." *Lewis*, 523 U.S. at 850 (quoting *Betts v. Brady* (1942)).

  - Use of the interrogation techniques in the context of ordinary criminal investigations might "shock the conscience." *See, e.g, Rochin v. California* (1952) (holding that convicting a defendant based on evidence obtained by pumping his stomach shocked the conscience); *Chavez v. Martinez* (2003) (remanding for consideration of whether repeated police questioning of a gunshot wound victim suffering from severe pain might shock the conscience). The government interest in law enforcement, however, is different from the government interest in national security and is subject to various special constitutional limitations including, for example, the privilege against self-incrimination.

  - The techniques at issue appear to be inconsistent with traditional United States military doctrine. That doctrine, however, was developed for traditional armed conflict and is premised on the applicability of various treaties (such as the Geneva Conventions) that do not apply to the conflict with al Qaeda.

  - Each year, in the State Department's "Country Reports on Human Rights Practices," the United States condemns coercive conduct employed by other countries. Although some of the condemned conduct resembles some of the CIA techniques, the condemned conduct usually goes far beyond the CIA techniques and would constitute torture under U.S. law (for example, rape, severe beatings, and electric shocks). Further, the condemned conduct is

often applied indiscriminately or in very different contexts (for example, for law enforcement or against political opponents).

- By contrast, the CIA interrogation techniques are all adapted from the military Survival, Evasion, Resistance, Escape ("SERE") training. Although there are obvious differences between military training and actual interrogation, the fact that the United States uses these techniques on its own troops strongly suggests that these techniques are not categorically beyond the pale, regardless of context.

- Given the vague nature of the shocks-the-conscience test and the lack of precedent in this context, we cannot predict with confidence whether a court would agree with our analysis. But because of the territorial limitation in Article 16 and the fact that it is non-self-executing, we think the question should not reach the courts.

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## OUTLINE OF THREE OLC OPINIONS

- **OLC has issued three recent opinions for the CIA on the legality of its interrogation practices.**
  - The first opinion concluded that the CIA's interrogation techniques, considered individually, are consistent with the federal anti-torture statute, 18 U.S.C. §§ 2340-2340A, as interpreted in OLC's Dec. 30, 2004 published opinion. ***Interrogation Techniques Opinion*** **(May 10, 2005).**
  - The second concluded that the combined use of the techniques is also consistent with 18 U.S.C. §§ 2340-2340A. ***Combined Use Opinion*** **(May 10, 2005).**
  - The third concluded that the CIA's interrogation practices are consistent with U.S. obligations under Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). ***Article 16 Opinion*** **(May 30, 2005).**

- **The CIA interrogation techniques at issue fall into three categories (all subject to medical and psychological assessments and close medical and other monitoring):**
  - **"Conditioning techniques"**—nudity, dietary manipulation (with minimum caloric intake requirements), and extended sleep deprivation (more than 48 hours but in no event exceeding 180 hours) (primarily relying on shackling to keep the detainee in a standing position, or alternatively in a sitting or lying position).
  - **"Corrective techniques"**—facial slap (not done with sufficient force or repetition to cause severe pain), abdominal slap (ditto), facial hold, and attention grasp.
  - **"Coercive techniques"**—walling (using a false, flexible wall and a collar to protect against whiplash), water dousing (with limits on duration and minimum warmth requirements for water temperature and ambient air temperature), stress positions (relying on temporary muscle fatigue), wall standing (ditto), cramped confinement (with time limits of 8 hrs for large box and 2 hrs for small box), and the waterboard (which is subject to strict time limits and close physician supervision, and which may only be used with HQ approval when the detainee is believed to have actionable intelligence about an imminent terrorist attack and other techniques have failed).

- **OLC interprets the anti-torture statute to incorporate three legal standards—i.e., the statute prohibits conduct *specifically intended* to cause one of three types of harm, as follows:**
  - **"severe physical pain"**—which OLC concluded means "physical pain that is extreme in intensity and difficult to endure";
  - **"severe physical suffering"**—which OLC concluded means "a state or condition of physical distress, . . . usually involving physical pain, that is both extreme in intensity and significantly protracted in duration or persistent over time"; or
  - **"severe mental pain or suffering"**—which is specially defined in the statute to mean "the prolonged mental harm caused by" one or more of four predicate acts, including (1) the threat of imminent death; (2) the intentional infliction or threatened infliction of severe physical pain or suffering; (3) the administration or threatened administration of mind-altering substances or

other procedures calculated to disrupt profoundly the senses or the personality; or (4) such conduct or threats directed at another person.

- OLC concluded that an intent to cause "prolonged mental harm" is a separate element of "severe mental pain or suffering" under the statute, although, depending on the circumstances of a particular case, the occurrence of a predicate act may give rise to an inference of intent to cause prolonged mental harm.

- **As used by the CIA, none of the interrogation techniques, including the shackling used with sleep deprivation, can be expected to cause, and none could reasonably be considered intended to cause, "severe physical pain" within the meaning of 18 U.S.C. §§ 2340-2340A.**

- **With respect to "severe physical suffering" and "severe mental pain or suffering," two of the CIA techniques—the waterboard and extended sleep deprivation (particularly in combination with other techniques, such as walling and water dousing)—raise substantial issues, with the waterboard raising the most difficult issues; OLC concluded, however, that, subject to all of the CIA limitations and safeguards, including careful medical monitoring and intervention if necessary, none of the techniques used by the CIA violates the statute.**
  - The waterboard involves substantial physical distress, but because this distress is experienced for only a short period of time, it is not expected to cause, and cannot reasonably be considered intended to cause, severe physical suffering.
  - The waterboard also involves a sensation of drowning, and this sensation may entail a "threat of imminent death" for purposes of the statute; however, based on experience with many thousands of applications of the waterboard in SERE training (albeit in a somewhat different form and under different circumstances), this technique is not expected to cause "prolonged mental harm" and thus cannot reasonably be considered specifically intended to cause such harm.
  - Extended sleep deprivation of up to 180 hours, particularly in the standing position, may, depending on the individual detainee, involve substantial physical distress and a risk of minor hallucinations, although these effects dissipate rapidly and an individual is expected to recover with a single night's sleep; the fatigue and physical effects of extended sleep deprivation, however, may also exacerbate the combined effects of interrogation when used in combination with other techniques, including slaps, walling, stress positions, and water dousing.
    - For these reasons, OLC stressed that it is especially important that each detainee subject to extended sleep deprivation be carefully monitored for any signs of extreme physical distress or hallucinations, and that the use of the technique be altered or stopped to avoid any such result.
    - OLC's opinion was also subject to the understanding that other techniques, which might involve some degree of physical pain, such as walling, slaps, stress positions, and water dousing, "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." *Combined Use Opinion* at 16.

- **In its May 30 *Article 16 Opinion*, OLC concluded that Article 16 of the CAT, which obligates the U.S. to take steps to prevent "cruel, inhuman or degrading treatment or punishment" in "any territory under its jurisdiction," is inapplicable as a matter of law to the CIA's interrogation program.**
    - By its own terms, Article 16 applies only in "territory under [United States] jurisdiction," and such territory includes, at most, land areas over which the U.S. exercises dominion and control—i.e., areas where the U.S. exercises at least de facto *authority as the government*; the CIA's interrogation program is conducted outside any such territory, and therefore it cannot violate Article 16.
    - Moreover, because of concerns about the ill-defined nature of Article 16, the United States ratified the CAT subject to a Senate reservation, which binds the U.S. 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 [in relevant part here] by the Fifth . . . Amendment[] to the Constitution."
        - There is a strong argument that the Senate and the Executive Branch intended U.S. obligations under Article 16 to be co-extensive with the scope of U.S. obligations under the relevant Amendments to the Constitution, and the Fifth Amendment has been held not to create obligations on the U.S. with respect to aliens outside U.S. territory.
        - In light of the geographic limitation that appears in the text of Article 16, however, we need not decide here the precise effect, if any, that the Senate reservation has on the geographic scope of Article 16.

- **Even if we assume, for the sake of policy and contrary to the legal determination above, that Article 16 does apply, OLC concluded that the CIA's interrogation program would be consistent with the substantive requirements of Article 16, although there is very little relevant judicial guidance on this question.**
    - The relevant constitutional standard is the "shocks the conscience" standard of substantive due process under the Fifth Amendment, which entails a ***context-specific and fact-dependent inquiry*** into whether:
        - (1) the government conduct at issue is "arbitrary in the constitutional sense," meaning that it involves an "exercise of power without any reasonable justification in the service of a legitimate governmental objective" or is "intended to injure in some way unjustifiable by any government interest," *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 849 (1998); and
        - (2) in light of "traditional executive behavior, of contemporary practice, and the standards of blame generally applied to them," the conduct "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 847 n.8.
    - OLC concluded that the CIA's interrogation program is not "arbitrary in the constitutional sense" because it is limited to what is reasonably necessary to acquire actionable intelligence to avoid terrorist attack on the U.S. (a vital government interest), is limited to a small number of the most high value detainees, and is carefully designed and administered to avoid injury to the detainees and any suffering that is unnecessary or lasting.

- OLC also concluded that the CIA's interrogation program cannot "fairly be said to shock the contemporary conscience," although this inquiry is much more subjective and difficult because of the lack of relevant executive practice either condemning or condoning the sorts of interrogation practices used by the CIA.
    - Although the use of coercive interrogation practices has been condemned in other contexts—including ordinary domestic law enforcement; military interrogations of POWs under the Third Geneva Convention (as reflected in the *Army Field Manual*); and the State Department's Country Reports on Human Rights Practices of other nations—none of these other contexts is particularly relevant or useful in judging the unique context of the CIA program.
    - SERE training practice, from which all of the CIA interrogation techniques have been adapted, is also different from the present context in important respects; however, the use in SERE of similar techniques on our own U.S. troops for purposes of training does strongly indicate that the use by the Government of techniques like these is not entirely beyond the pale of what is permissible executive practice.

Interrogations of Detainees

- OLC issued three opinions in August 2002 and another in March 2003 that discussed the legal standards for interrogations of detainees. One other opinion, issued in March 2002, considered a related topic. (TS [redacted]

  - In a letter opinion dated August 1, 2002, OLC advised Judge Gonzales that the use of an interrogation technique in the war against terrorism, if it did not violate the United States criminal statute forbidding torture, 18 U.S.C. §§ 2340-2340A, would neither violate the international Convention Against Torture ("CAT") nor create a basis for prosecution under the Rome Statute establishing the International Criminal Court. (U)

  - In a lengthier opinion of the same date, OLC expanded on the explanation of the scope of the criminal statute. It concluded that, to constitute torture, an act must inflict pain equivalent to that of serious physical injury, such as organ failure, impairment of bodily function, or death. Purely mental pain could amount to torture only if it resulted from one of the predicate acts named in the statute -- threats of death or torture, infliction of physical pain amounting to torture, use of drugs that alter personality, or threats to do any of these things to a third party -- and only if it lasted for a significant duration (months or years). The opinion found that the criminal statute would be unconstitutional if applied in a manner that interfered with the President's authority as Commander-in-Chief to conduct a military campaign. (U)

  - In an opinion also issued August 1, 2002, OLC advised the CIA that specific interrogation techniques, if used against Abu Zubaydah, would not violate the criminal statute against torture. The specific techniques were: a facial slap or insult slap not designed to inflict pain, forms of cramped confinement (including confinement in a space with an insect, of which Abu Zubaydah is particularly afraid), wall standing that induces muscle fatigue, a variety of stress positions inducing discomfort similar to muscle fatigue, sleep deprivation, "walling" (in which the subject is pushed against a wall in a manner that causes a loud noise but no injury), and the "waterboard" (in which water is dripped onto a cloth over the subject's mouth and nose, creating the perception of drowning). (TS [redacted]

  - On March 14, 2003, OLC issued an opinion to the Department of Defense about military interrogation of alien unlawful combatants held outside the United States. The opinion specifically addressed al Qaeda and Taliban detainees. It considered a wider range of legal authorities than the opinions for Judge Gonzales and the CIA but did not assess the legality of particular techniques, except by way of examples divorced from the specific facts of any particular interrogation. In addition to repeating much of the analysis from earlier opinions, this opinion concluded that the Fifth Amendment does not apply to the interrogation of enemy combatants outside the United States, and Eighth Amendment does not apply outside the context

of punishment; that the torture statute would not apply to interrogations within the territorial United States or on permanent military bases outside the territory of the United States; and that the obligations of the United States under the CAT, with regard to the prohibition against cruel, inhuman, or degrading treatment, extend only to preventing conduct that would be "cruel and unusual" under the Eighth Amendment or would "shock the conscience" under the Due Process Clause of the Fifth Amendment. (S)

- In addition, on March 13, 2002, OLC issued an opinion to the Department of Defense, concluding that the President has plenary authority, as Commander in Chief, to transfer to other countries any members of the Taliban militia, al Qaeda, or other terrorist organizations that the United States armed forces have captured and are holding outside the United States. (U)

- The lengthy opinion of August 1, 2002, about the scope of the criminal statute is now posted on the *Washington Post's* web site. A draft memorandum that a Department of Defense working group prepared in March 2003 and that, we believe, reflects familiarity with a draft of the OLC opinion of March 2003 is available on the web site of National Public Radio. In addition, a draft memorandum of OLC from January 2002, dealing with the application of the Geneva Conventions to failed states, appears to have been provided to *Newsweek*, as has a December 28, 2001 opinion about the availability of habeas corpus to detainees at Guantanamo. (U)

- The Inspector General of the CIA has written a report about the CIA's program using "enhanced interrogation techniques." We have two basic disagreements with the report. First, we disagree with the IG – and with the CIA's Office of General Counsel ("OGC") – about whether OLC endorsed a set of bullet points that OGC produced in the spring of 2003, summarizing legal principles that were said to apply to interrogations of detained terrorists outside the United States. OLC attorneys reviewed and commented upon drafts of these bullet points. The General Counsel believes that this procedure amounted to OLC's concurrence. As was made clear to OGC at a meeting on June 17, 2003, OLC does not view these unsigned, undated bullet points as a opinion of OLC or a statement of its views. Second, the IG's report states that, at a meeting of the NSC principals on July 29, 2003, the Attorney General approved "expanded use of the techniques." The Attorney General did approve the use of approved techniques on detainees other than Abu Zubaydah, but the techniques were not otherwise "expanded" in any way. (TS/[redacted]

- We expect demands for the release of the OLC opinions that have not become public. The Department believes that these opinions should remain confidential. [redacted] (U)

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Addendum: Summary of Advice

Advice to the Counsel to the President

In a letter opinion dated August 1, 2002, OLC advised Judge Gonzales that the use of an interrogation technique in the war against terrorism, if it did not violate the United States criminal statute forbidding torture, 18 U.S.C. §§ 2340-2340A, would neither violate the international Convention Against Torture nor create a basis for prosecution under the Rome Statute establishing the International Criminal Court. The opinion set out the elements of the criminal statute as follows: "(1) the torture occurred outside the United States; (2) the defendant acted under color of law; (3) the victim was within the defendant's custody or physical control; (4) the defendant specifically intended to cause severe physical or mental pain or suffering; and (5) . . . the act inflicted severe physical or mental pain or suffering." The opinion then concluded that, in view of the understandings about the Convention that attended its ratification by the United States, the international law obligations under the Convention could not exceed those under the criminal statute. It further concluded that the United States is not bound by the ICC Treaty, which it has not ratified, and that, in any event, the interrogation of al Qaeda operatives and Taliban soldiers could not be a crime that would come within the ICC's jurisdiction, because the interrogation would not be part of a systematic attack against a civilian population and because neither al Qaeda operatives nor Taliban soldiers are prisoners of war under the Geneva Convention. The opinion did not examine specific interrogation techniques.

In a lengthier opinion of the same date, OLC expanded on the explanation of the scope of the criminal statute. It concluded that, to constitute torture, an act must inflict pain equivalent to that of serious physical injury, such as organ failure, impairment of bodily function, or death. Purely mental pain could amount to torture only if it resulted from one of the predicate acts named in the statute -- threats of death or torture, infliction of physical pain amounting to torture, use of drugs that alter personality, or threats to do any of these things to a third party -- and only if it lasted for a significant duration (months or years). A defendant would violate the statute only if he specifically intended to inflict such suffering. The Convention on Torture, the opinion stated, similarly designates as torture only such extreme measures. The opinion did not review and approve specific techniques. Instead, it observed that, in other contexts, courts have tended to examine the totality of the circumstances and to find torture where the acts in question are shocking. The opinion found that the criminal statute would be unconstitutional if applied in a manner that interfered with the President's authority as Commander-in-Chief to conduct a military campaign. It argued, finally, that an interrogator might be able to assert defenses of necessity and self-defense if charged with violating the torture statute.

Advice to CIA

In an opinion also issued August 1, 2002, OLC advised the CIA that specific interrogation techniques, if used against Abu Zubaydah, would not violate the criminal statute against torture. The specific techniques were: a facial slap or insult slap not designed to inflict pain, forms of cramped confinement (including confinement in a space with an insect, of which Abu Zubaydah is particularly afraid), wall standing that induces muscle fatigue, a variety of stress positions inducing discomfort similar to muscle fatigue, sleep deprivation, "walling" (in which the subject is pushed against a wall in a manner that causes a loud noise but no injury), and the "waterboard" (in which water is dripped onto a cloth over the subject's mouth and nose, creating the perception of drowning). These techniques (except for the use of the insect) have been employed on United States military personnel as part of training and have been found not to cause prolonged mental or physical harm. Furthermore, an assessment of Abu Zubaydah by the CIA showed that he had no conditions that would make it likely for him to suffer prolonged mental harm as a result of the interrogation. With this background, the opinion concluded that none of the techniques would cause him the severe physical pain that would amount to torture under the statute, particularly because medical personnel would be monitoring the interrogation. Nor would the techniques cause the severe mental harm that might amount to torture -- a prolonged mental harm resulting from one of the predicate acts in the statute. The only technique that might involve such an act was the use of the waterboard, which could convey a threat of severe pain or suffering, but research indicated that the technique would not cause prolonged mental harm and so would not come within the statute. In any event, the statute would be violated only if the defendant had a specific intent to cause severe pain or suffering. No such intent could be found here, in part because of the careful restrictions under which the interrogation would take place.

Advice to Department of Defense

On March 14, 2003, OLC issued an opinion to the Department of Defense about military interrogation of alien unlawful combatants held outside the United States. The opinion specifically addressed al Qaeda and Taliban detainees. It considered a wider range of legal authorities than the opinions for Judge Gonzales and the CIA but did not assess the legality of particular techniques, except by way of examples divorced from the specific facts of any particular interrogation. The opinion concluded that the Fifth Amendment does do not apply to the interrogation of enemy combatants outside the United States, and Eighth Amendment does not apply outside the context of punishment. It then turned to several criminal laws. It determined that interrogation methods not involving physical contact would not constitute assault, and techniques involving minimal physical contact (poking, slapping;, or shoving) are unlikely to produce the injury necessary to establish assault. 18 U.S.C. § 113. It also found it unlikely that statutes on maiming, 18 U.S.C. § 114, or interstate stalking, 18 U.S.C. § 2261A, could apply. It found that the War Crimes Act, 18 U.S.C. § 2441, could not reach the interrogation of al Qaeda and Taliban detainees because, as illegal belligerents, they do not

qualify for protection under the Geneva or Hague Conventions. The torture statute, the opinion concluded, would not apply to interrogations within the territorial United States or on permanent military bases outside the territory of the United States. It nonetheless repeated the analysis of the statutory elements as laid out in the earlier opinions, as well as the analysis of the Convention Against Torture. The opinion went beyond the earlier ones, however, by discussing the Convention's prohibition against cruel, inhuman, or degrading treatment. It found that the United States' obligations in this regard extended only to preventing conduct that would be "cruel and unusual" under the Eighth Amendment or would "shock the conscience" under the Due Process Clause of the Fifth Amendment. As to the Eighth Amendment, it observed that the analysis turns on whether the official acts in good faith or, instead, maliciously or sadistically. Whether any pain inflicted during an interrogation is proportional to the necessity for its use, for example, would inform that analysis. Cases on conditions of confinement also provide analogues. There, a violation can be shown only if there is deprivation of a basic human need, combined with a deliberate indifference to the prisoner's health and safety. The opinion specifically stated that a brief stay in solitary confinement would not amount to a violation, nor would insults or ridicule. The "shock the conscience" test, the opinion stated, is an evolving one, but it noted that rape or beating during an interrogation could constitute behavior so disproportionate to a legitimate need so inspired by malice or sadism as to meet the standard. Methods chosen solely to produce mental suffering might also shock the conscience. But some physical contact -- a shove or slap -- would not be sufficient. The detainee would have to suffer some physical injury or severe mental distress resulting from the interrogator's conscious disregard of a known risk to the detainee. Finally, the opinion discussed the defenses of necessity and self-defense that an interrogator might assert if charged with a crime and found that these defenses might be available under some circumstances.

MEMORANDUM

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

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

Date: June 18, 2004

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

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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

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.

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:

[ ]

"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:

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."