UNITED STATES OF AMERICA v. Mohammed Jawad	**Defense Motion to Dismiss Based on Torture of Detainee Pursuant to R.M.C. 907** May 28, 2008

1. Timeliness: This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court and this Court's orders dated 20 December 2007 and 15 February 2008 and within the specific deadline established for a motion addressing conditions of confinement by COL Brownback on 7 May 2008. The motion is filed pursuant to R.M.C. 907.

2. Relief Sought: Defendant seeks dismissal of all charges and specification with prejudice.

3. Overview: Mr. Jawad was subjected to an intentional program of sleep deprivation known as the frequent flyer program for 14 days in May 2004, in violation of the international law of war, U.S. law, and Department of Defense regulations and policy. Even under the narrow view of torture adopted by the Executive Branch under the current administration, this inhumane treatment constitutes torture. The appropriate remedy for illegal abusive treatment of a detainee is dismissal under RMC 907.

4. Burden and Standard of Proof: Under R.C.M. 905(c) the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence. However, the defense is prepared to prove beyond a reasonable doubt the facts alleged.

5. Facts:

i. On 7 Feb 2002, President Bush ordered that the Geneva Conventions would not apply to Taliban or al Qaida and persons captured in Afghanistan would not be treated as POWs.[1] However, he ordered "that the detainees be treated humanely and, to the extent appropriate and

[1] The defense disputes the correctness of this decision. However, a determination of the validity of this decision is not necessary to a resolution of this motion.

consistent with military necessity, in a manner consistent with the principles of Geneva." (Attachment 1) In June 2005, President Bush publicly stated his opinion that terror suspects are "being detained -- in humane conditions" at Guantanamo and that the U.S. was meeting its obligations in "a humane way."[2]

ii. Mohammad Jawad was arrested by Afghan police on or about December 17, 2002. At the time of his arrest Mr. Jawad was either 16 or 17 years of age.[3] Mr. Jawad was transferred to U.S. custody the following day and held in detention in Afghanistan prior to transfer to GTMO.

iii. Mr. Jawad was not a member of or affiliated with the Taliban or al Qaida. Nevertheless, he was denied POW status and was not given any hearing to determine his status as required by the Geneva Conventions.

iv. Mr. Jawad was transferred to GTMO on or about 6 February 2003. Pursuant to protocols in place at Guantanamo at the time, Mr. Jawad began his detention with a 30 day "isolation period," after which he was moved into a "regular" detention cell in March 2003.[4]

v. According to interrogation records provided by the government, from December 2002 to May 2004, Mr. Jawad was subjected to at least twenty-one different interrogations sessions by U.S. officials.[5] (Attachment 10) The last session prior to being subjected to the frequent flyer program was 26 April 2004. There have been at least eighteen additional interrogation sessions since.

vi. From 8 September 2003 to 24 December 2003, Mr. Jawad's mental health began to deteriorate significantly and he became increasingly anxious and desperate about his situation. He repeatedly requested to speak to a camp official identified by code name in Attachment C1. He repeatedly asked to be moved to a block with other Afghanis. He repeatedly indicated he was tired of isolation. He repeatedly complained there was no one with whom he could converse in

---

[2] White House Press Release Transcript of Press Conference June 20, 2005, available at http://www.whitehouse.gov/news/releases/2005/06/20050620-19.html (Attachment 2).

[3] The U.S. State Department has acknowledged to the UN Committee on the Rights of Children that Mr. Jawad was under 18 at the time he was captured.

[4] The defense believes this isolation period is in violation of international law, particularly as applied to juvenile detainees, and may explore this issue further in a subsequent motion. See generally, Peter Scharff Smith, The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature, 34 Crime & Just. 441 (2006).

[5] The defense has no way of knowing if we have been provided with the complete interrogation records.

Pashto. On 21 December 2003, Mr. Jawad was disciplined with a loss of comfort item for attempting to talk to other prisoners in another block. (Attachment C1)

vii. On 25 December 2003, Mr. Jawad attempted to commit suicide. Prison records provide two different accounts of this suicide attempt. One entry states: that at 2307 hours "Detainee attempted self harm by banging his head off metal structures inside his cell." Another entry states that at "approximately 2307 detainee attempted self harm by using the collar of his shirt to hang himself from the mesh inside his cell." (Attachment C1)

viii. Mr. Jawad was taken out of his cell for medical care and observation for five days. On 30 December 2003, he was returned to a "regular" cell. (Attachment C1)

ix. On 11 January 04, according to prison logs, Mr. Jawad asked to see a "Psych doctor." (Attachment C1)

x. On 13 Mar 2004, Mr. Jawad was disciplined again by loss of comfort items for "unauthorized communication" or "cross block talking," i.e., attempting to talk to other prisoners in other parts of the prison who spoke his native language. (Attachment C1)

xi. Camp records establish that from 7 May 2004 to 20 May 2004, Jawad was subjected to an intentional program of sleep deprivation and disorientation. During this 14 day period, Mr. Jawad was moved from cell to cell 112 times, an average of every 2 hours and 50 minutes. There were eight extra moves of very short duration between the hours of midnight and 0200 to ensure maximum disruption of sleep. (Attachment C1) (Attachment 3) Each move involved the shackling and unshackling of Mr. Jawad as he was moved from cell to cell.[6] The defense has not been provided any records indicating that Mr. Jawad was subject to interrogation during the

---

[6] This program is not to be confused with "sleep adjustment," an approved interrogation technique defined in DoD policy documents as: "Sleep Adjustment: Adjusting the sleeping times of the detainee (e.g. reversing sleep cycles from night to day.)" As the attached spreadsheet attests, the disruption of Mr. Jawad's was constant, around-the-clock for 14 days. He was not left alone to sleep during the day. In any event, with five daily prayer calls, and three meal services during the day, extended sleep during the day in the detention camps is not feasible. Bright fluorescent lights are on in the detainee's cells 24 hours a day year-round, making it difficult to sleep even without constant disturbances.

administration of the frequent flyer program. The next recorded interrogation session of which the defense has a record occurred 18 August 2004. (Attachment 10)

xii. The official name of the sleep deprivation program, as entered into prison records, may be classified.[7] However, prison guards have colloquially referred to the program as the detainee "frequent flyer" program.[8] This illegal program was reportedly ordered discontinued in March 2004 by the Commander of JTF-GTMO, but was utilized against Mr. Jawad in May 2004. One entry in prison records associated with the move of Mr. Jawad on 8 May 2004 includes the comment "Frequent Flyer" instead of the official name for the program. Three other entries, on 12 May 2004, include the letters "FF," an apparent abbreviation for Frequent Flyer. A two letter abbreviation for the official name of the program appears next to most of the entries. (Attachment C1)

xiii. Prison records indicate that during the program of sleep deprivation, Mr. Jawad attempted to communicate with other prisoners on 11 May 2004 and 14 May 2004. For these attempts, Mr. Jawad was disciplined for attempted cross-block communication. Prison records indicate Mr. Jawad was disciplined with losses of comfort items from 10-14 May, 14-19 May and 19-24 May 2004,[9] further compounding his suffering. (Attachment C1).

xiv. On January 15, 2003, the Secretary of Defense (SECDEF), directed the General Counsel of the Department of Defense (DOD GC) to establish a working group (WG) within the Department of Defense (DOD) to assess the legal, policy, and operational issues relating to the interrogations of detainees held by the United States Armed Forces in the war on terrorism. (Attachment 4)

xv. The WG report was issued on 4 April 2003. (Attachment 5) This WG report is generally viewed as the definitive legal statement of the DoD view of torture under the current

---

[7] The official name of the program is referenced only in the Classified Attachment C1, until the defense receives further guidance from security officials on its classification.

[8] The term "frequent flyer" was used both in the Schmidt report and in the recently released Department of Justice Inspector General's Report "A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq May 2008."

[9] It is not known what comfort item was removed, but it is possible that it was Mr. Jawad's blanket. If so, sleep would have been even more difficult, as the temperature inside the detention facility is intentionally kept very cold. The defense intends to explore this issue at the requested evidentiary hearing.

administration.[10] The WG defined its work as follows: "Our review is limited to the legal and policy considerations applicable to interrogation techniques applied to unlawful combatants in the Global War on Terrorism interrogated outside the sovereign territory of the United States by DOD personnel in DOD interrogation facilities." The WG divided interrogations into two categories, strategic and tactical. Their report addressed only "strategic interrogations" (as opposed to battlefield interrogations), defined as "those conducted: (i) at a fixed location created for that purpose; (ii) by a task force or higher level component; and (iii) other than in direct and immediate support of on-going military operations."

xvi. In considering interrogation techniques for possible application to unlawful combatants in the "strategic" category, the WG divided techniques into three types: "(i) routine (those that have been ordinarily used by interrogators for routine interrogations), (ii) techniques comparable to the first type but not formally recognized, and (iii) more aggressive counter-resistance techniques than would be used in routine interrogations." According to the WG, the "third type would only be appropriate when presented with a resistant detainee who there is good reason to believe possesses critical intelligence." The WG's conclusions regarding these three types of techniques, including recommendations for appropriate safeguards, were presented in their report. Sleep Deprivation was deemed to be of the third type, and included in a list of "more aggressive counter-resistance techniques that may be appropriate for detainees who are extremely resistant to the above techniques, and who the interrogators strongly believe have vital information." The WG found that the use of such techniques "indicate the need for technique-specialized training and written procedures to insure the safety of all persons, along with appropriate, specified levels of approval and notification for each technique." (Attachment 5)

xvii. The WG defined the technique of Sleep Deprivation as "Keeping the detainee awake for an extended period of time. (Allowing individual to rest briefly and then awakening him repeatedly.) Not to exceed 4 days in succession." The group recommended that this technique be authorized under very limited circumstances. (Attachment 5)

---

[10] The defense does not necessarily endorse the views expressed in the WG report, believing them to be too permissive of harsh interrogation techniques, but offers the report as representative of the views of the Executive Branch.

xviii. The WG found that "[u]se of exceptional interrogation techniques should be limited to specified strategic interrogation facilities; when there is a good basis to believe that the detainee possesses critical intelligence; when the detainee is medically and operationally evaluated as suitable (considering all techniques in combination); when interrogators are specifically trained for the technique(s); a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel); when there is appropriate supervision; and, after obtaining appropriate specified senior approval level for use with any specific detainee (after considering the foregoing and receiving legal advice)." (Attachment 5)

xix. The WG recommended that a procedure be established for requesting approval of additional interrogation techniques such as Sleep Deprivation. Their recommended process would "require the requestor to describe the technique in detail, justify its utility, describe the potential effects on subjects, known hazards and proposed safeguards, provide a legal analysis, and recommend an appropriate decision level regarding use on specific subjects." Their recommended procedure would "ensure that SECDEF is the approval authority for the addition of any technique that could be considered equivalent in degree to any of the 'exceptional techniques' addressed in this report, and "that he establish the specific decision level required for application of such techniques." (Attachment 5)

xx. In analyzing the legality of sleep deprivation, the WG found that use of this technique would "indicate a major issue that. . . cannot be eliminated" with regard to the U.S. interpretation of the Torture Convention, the U.S. definition of torture, and the term "cruel, inhuman and degrading." In a stoplight chart prepared by the WG, Sleep Deprivation was deemed to be in the "yellow light" category in several respects. "Yellow indicates area of consideration does not preclude use but there are problematic aspects that cannot be eliminated by procedural safeguards." Yellow areas included "Consistency with Major Partner Nation Views," "Effect on Captured U.S. Forces," "Potential Adverse Effect for Participants/Supervisors/COC," and "Potential Effect on Detainee Prosecutions." The WG specifically noted that the "Committee against Torture, established under Article 17 of the Convention Against Torture (CAT), has interpreted, 'sleep

deprivation for prolonged periods' to be a violation of both Article 16 of the CAT as cruel, inhuman, or degrading treatment as well as constituting torture under Article 1 of the CAT." The WG cited Supreme Court of Israel and European Court of Human Rights decisions holding sleep deprivation, in conjunction with other techniques, to be "inhuman and degrading treatment."[11] The WG also noted that sleep deprivation "May significantly affect admissibility of statements provided based on voluntary considerations" but noted parenthetically this would be a "lesser issue for military commissions." (Attachment 5) Another concern raised by the WG was that "Knowledge of this technique may have a significant adverse effect on public opinion."

xxi. On 16 April 2003, then Secretary of Defense Donald Rumsfeld issued a memorandum to the Commander of US Southern Command, authorizing certain interrogation techniques to be used at Guantanamo. (Attachment 6) Sleep deprivation was not among them. However, the memo referenced the WG report and stated that additional measures could be approved under special circumstances, specifically "If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee."[12] The memo required all of the safeguards proposed by the WG for "exceptional techniques" for all approved techniques.

xxii. CDR USSOUTHCOM issued a memo dated 2 June 2003 (Attachment 7) which provided further guidance on the SECDEF's 16 Apr 03 memorandum to officials responsible for interrogation at JTF-GTMO. In the memo, he defined sleep deprivation virtually identically to the WG:

> I define "sleep deprivation", referenced in Technique V, as keeping a detainee awake for more than 16 hrs, or allowing a detainee to rest briefly and then repeatedly awakening him, not to exceed four days in succession;

---

[11] Judgment on the Interrogation Methods Applied by the GSS (nos HC 5100/94, HC4054/95,HC5188/96, HC7563/97, HC 7628/97, HC 1043/99 (Sup Ct of Israel, sitting as the High Court of Justice, Sep.6, 1999); Ireland v. United Kingdom, 25, Eur.Ct. H.R.(Ser.A)(1978).

[12] The defense speculates that a separate classified memo accompanied this memo describing the additional techniques that could be requested.

xxiii. On 28 Feb 05 date, Lt Gen Randall Schmidt was appointed by CDR USSOUTHCOM to take over an ongoing AR 15-6 investigation led by Brig Gen John Furlow investigating allegations of detainee abuse at Guantanamo. The investigation took place from Dec 2004 to June 2005. The team was specifically tasked to investigate allegations by FBI agents of detainee abuse, including that "military interrogators improperly used sleep deprivation against detainees."

xxiv. The Schmidt Report (Attachment 8) was issued on 1 April 05 and then amended on 9 Jun 05 after additional matters were investigated. The report made the following finding with regard to the allegation of improper use of sleep deprivation:

> **Finding #6:** During 2003 and 2004 some detainees were subjected to cell moves every few hours to disrupt sleep patterns and lower the ability to resist interrogation. Each case differed as to length and frequency of the cell moves.
>
> **Technique: Unauthorized prior to 2 Dec 02 and between 15 Jan 03 and 16 Apr 03**: Neither sleep disruption or deprivation is an authorized FM 34-52 technique
>
> **Technique: Authorized between 2 Dec 02 and 15 Jan 03 and after 16 Apr 03:** The exact parameters of this technique remained undefined until 2 Jun 03 when CDR USSOUTHCOM established clear guidance on the use of sleep adjustment. His guidance prohibited the practice of keeping a detainee awake for "more than 16 hours or allowing a detainee to rest briefly and then repeatedly awakening him, not to exceed four days in succession."
>
> **Discussion:** Only one FBI agent alleged sleep deprivation; his complaint was that an individual was subjected to 16 hours of interrogation followed by four-hour breaks. He says he was told about these sessions by DoD interrogators and they implied that these 16 hour interrogations were repeated on a 20 hour cycle, but he did not know for certain what in fact occurred. The FBI agent was at GTMO from 2 Jun 03 to 17 Jul 03. Under CDR USSOUTHCOM's 2 Jun 03 guidance, 16 hour interrogations were permitted and do not constitute sleep deprivation if done on a 24 hour cycle. During the course of the investigation of the FBI allegation, the AR 15-6 did conduct a review of the interrogation records to see if there was any evidence that corroborated this allegation. While not directly supporting the FBI's allegation, records indicated that some interrogators recommended detainees for the "frequent flyer program." A current GTMO interrogation analyst indicated that this was a program in effect throughout 2003 and until March 2004 to move detainees every few hours from one cell to another to disrupt their sleep. Documentation on one detainee indicated that he was subjected to this practice as recently as March 2004.
>
> **Organizational response**: None. *Current JTF-GTMO Commander terminated the frequent flyer cell movement program upon his arrival in March 04.* [Emphasis added]

xxv. The JTF-GTMO Commander that assumed command of detention facilities in March 04 was Major General Jay W. Hood, USA.

xxvi. From 7 May to 20 May 2004, Mr. Jawad was subjected to the "frequent flyer" cell movement program at JTF-GTMO. JTF-GTMO personnel were well aware of Mr. Jawad's extremely fragile mental health and poor physical condition at the time the program was administered.

xxvii. In May 2004, there was no good basis to believe Mr. Jawad possessed critical intelligence. Well before May 2004, intelligence personnel had or should have concluded Mr. Jawad had little, if any, intelligence value. All conceivably useful or "actionable" intelligence possessed by Mr. Jawad, if indeed he ever had any, had already been extracted from him after at least twenty-one interrogations and more than sixteen months in U.S. custody. Mr. Jawad had told prison officials that he would tell interrogators "anything they want" in Sept 2003. (Attachment C1)

xxviii. Another investigation into detainee abuse and interrogation methods at Guantanamo was conducted by Vice Admiral Albert T. Church, III. He was appointed by Secretary of Defense Rumsfeld to conduct the investigation on May 25, 2004, just five days after the illegal torture of Mr. Jawad had concluded. The investigation, entitled "Review of Department of Defense Detention Operations and Detainee Interrogation Techniques" (the "Church Report") was released on March 7, 2005. The unclassified version of the report contained one short passage on page 175 of a paragraph or two with the heading Sleep Deprivation (Attachment 9); the passage was blacked out by government censors and labeled Secret.[13] The Church Report "Found no evidence that detainee abuse was related to any interrogation policies."

6. **Law and Argument:**

THE FREQUENT FLYER PROGRAM AS APPLIED TO MR. JAWAD IS A VIOLATION OF THE INTERNATIONAL LAW OF ARMED CONFLICT, DOMESTIC LAW AND POLICY AND LAWFUL MILITARY REGULATION

---

[13] I have requested the unredacted classified version in discovery, but it has not yet been provided.

As previously indicated, President Bush directed that all detainees be treated humanely. The treatment of Mr. Jawad is inhumane and constitutes torture, cruel and inhuman treatment, and cruel and unusual punishment. The Frequent Flyer program, as applied to Mr. Jawad, was specifically intended to cause severe mental pain and suffering and did disrupt profoundly the senses or personality of Mr. Jawad.

Because the Military Commissions Act had not been enacted at the time Mr. Jawad was subjected to the frequent flyer program, we must look to the state of the law as it existed in 2004.[14] The WG report is a good place to start. The WG report was the most comprehensive review undertaken by the Department of Defense to define the legal parameters of acceptable interrogation techniques.[15] The WG was "asked specifically to recommend techniques that comply with all applicable law and are believed consistent with policy considerations not only of the United States but which may be unique to DOD." The WG "undertook that analysis and conducted a technique-specific review" with detailed discussion of what would constitute torture under U.S. law. The WG concluded that sleep deprivation for more than four days would not be legally justifiable under any circumstances.

---

[14] The Military Commissions Act reaffirms that Geneva Convention Common Article 3 prohibits the torture or cruel of inhuman treatment of detainees. The MCA revised the War Crimes Offense under the Federal Criminal Code (18 U.S.C. § 2441) The MCA defines torture as "The act of a person who commits an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person within his custody of physical control for the purposes of obtaining information or a confession, punishment, intimidation, coercion or any reason based on any discrimination of any kind." The MCA defines "Cruel or Inhuman Treatment as "the act of a person who commits. . .an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions), including serious physical abuse, upon another within his custody or control. The MCA restates that both torture and cruel or inhuman treatment are grave breaches of the Geneva Conventions. The term "severe mental pain or suffering" is defined in 18 U.S.C. § 2340(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;

[15] The defense notes that there is no indication that Mr. Jawad was interrogated during or immediately after the frequent flyer program was administered, which may indicate that the program was done for some reason other than interrogation. However, the defense is unaware of any other conceivably valid reason for subjecting Mr. Jawad to sleep deprivation. If not done for intelligence gathering purposes, then it is even clearer that the program was done intentionally to inflict suffering.

Because President Bush had unilaterally declared that the Geneva Convention on POWs would not be applied to detainees captured in Afghanistan,[16] the WG focused on other sources of law which unquestionably applied to detainees. According to the WG:

> The United States' primary obligation concerning torture and related practices derives from the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (commonly referred to as "the Torture Convention"). The United States ratified the Convention in 1994, but did so with a variety of Reservations and Understandings. Article 1 of the Convention defines the term "torture" for purpose of the treaty. The United States conditioned its ratification of the treaty on an understanding that: ... in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) *the intentional infliction* or threatened infliction *of severe* physical pain or *suffering*; (2) *the administration or application*, or threatened administration or application, *of* mind altering substances or other *procedures calculated to disrupt profoundly the senses or the personality*, (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality. [Emphasis added]

The sleep deprivation program inflicted on Mr. Jawad was both an "intentional infliction of severe suffering" and "the application of procedures calculated to disrupt profoundly the senses or personality." According to a study by the Nobel prize-winning NGO, Physicians for Human Rights:

> The most pronounced impact of total sleep deprivation is cognitive impairment, which can include "impairments in memory, learning, logical reasoning, arithmetic skills, complex verbal processing, and decision making." Sleep-deprived individuals take longer to respond to stimuli, and sleep loss causes "attention deficits, decreases in short-term memory, speech impairments, perseveration, and inflexible thinking." These symptoms may appear after one night of total sleep deprivation, after only a few nights of sleep restriction (5 hours of sleep per night). Sleep restriction also can result in hypertension and other cardiovascular disease. One study correlates sleep deprivation with decreased pain tolerance, which has significant implications for torture and other situations in which sleep restrictions are implemented in tandem with other torture techniques.

---

[16] Some commentators have suggested that the Commander-in-Chiefs decision not to apply the Convention on POWs set the tone for the subsequent unlawful treatment of the detainees at Guantanamo and elsewhere.

> Two detainees held at Bagram Air Force Base, Afghanistan in March 2002 said that the sleep deprivation to which they were subjected lasted for several weeks and left them terrified and disoriented.[17]

Ironically, the Bush Administration State Department has specifically singled out the practice of sleep deprivation in other countries, including Burma, Jordan, Pakistan, Saudi Arabia and Tunisia, as an example of human rights abuses.[18]

The WG provided specific examples of the meaning of the phrase "disrupts profoundly the senses of the personality." They stated "we think that pushing someone to the brink of suicide (which could be evidenced by acts of self-mutilation), would be a sufficient disruption of the personality to constitute a 'profound disruption.'" The WG apparently did not contemplate the possibility that such extreme techniques would be applied to a teenage detainee who had already been pushed to the brink of suicide, and had attempted self harm just a few months earlier. The WG specifically recommended detainees be medically evaluated before the infliction of techniques such as sleep deprivation. Presumably, this was not done, as no medical professional would have cleared Mr. Jawad for such treatment.[19]

According to the WG, "the obligations under the Torture Convention apply to the interrogation of unlawful combatant detainees" but because of a U.S. Reservation to the Convention, further understanding of the word torture is derived from U.S. case law on cruel and unusual punishment. According to the WG "the Torture Convention prohibits torture only as defined in the U.S. Understanding, and prohibits 'cruel, inhuman, and degrading treatment and punishment' only to the extent of the U.S. Reservation relating to the U.S. Constitution." The WG indicated that "conditions of confinement" would violate the Eighth Amendment ban on cruel and unusual punishment, and by extension, the Convention Against Torture, if a prisoner could show he has suffered a "serious deprivation of basic human needs" such as "essential food, medical care, or

---

[17] Break Them Down: Systematic Use of Psychological Torture by US Force, Physicians for Human Rights (2005) available at http://physiciansforhumanrights.org/library/documents/reports/break-them-down-the.pdf (internal citations omitted) (Attachment 11).

[18] U.S. State Department Criticism of "Stress and Duress" Interrogation Around the World (Attachment 12)

[19] If Mr. Jawad was medically cleared for the Frequent Flyer program, then the medical personnel involved should be reported to the appropriate licensing authorities for appropriate action, in addition to any criminal charges they may face.

sanitation." Sleep is just such a basic human need. In recognition of this obvious fact, the WG devoted considerable discussion to the subject of sleep deprivation as an interrogation technique. Given the fact that prolonged periods of sleep deprivation had already been conclusively declared by the official U.N. Committee on the Convention Against Torture to be torture, the WG concluded that this technique was highly problematic legally; nevertheless, the WG concluded sleep deprivation could be employed, with stringent safeguards in place, under rare circumstances. The WG made it clear that any regimen of sleep deprivation must be strictly limited to a four day period, clearly suggesting that anything beyond that would constitute torture *per se*. This view was apparently endorsed by the Secretary of Defense and the Commander of Southern Command and transmitted to JTF-GTMO. Given the extraordinarily and notoriously permissive views of the current Administration on torture and treatment of detainees, the guidance of the WG limiting sleep deprivation to a maximum of four days must be viewed as the absolute outermost parameter of what could be considered legally permissible before crossing the boundary into torture.

The defense does not know how, given the crystal clear guidance provided by SECDEF and CDRUSSOUTHCOM, Mr. Jawad came to be subjected to a sleep deprivation regime lasting 14 days, three and a half times longer than the outer limit imposed by binding military orders. The defense does not know how a sleep deprivation program that was alleged to have been terminated in March 2004 was utilized against Mr. Jawad in May 2004. But the indisputable fact remains that Mr. Jawad was subjected to a systematic two-week frequent flyer program by several, if not dozens, of different JTF-GTMO personnel. Somebody in a position of authority must have ordered this program. The defense intends to make every effort to find out who and why.

While it is undeniable that Mr. Jawad's suffered severe mental pain and that his senses and personality were profoundly disrupted by being tortured for two weeks, it is impossible to know at this point what long-term effect this torture regimen had on Mr. Jawad. However, it was clear to observers at his March arraignment and his May hearing before the commission that Mr.

Jawad was deeply affected by this trauma.[20] Absent a comprehensive mental health evaluation by a civilian Pashto speaking psychologist, it will be difficult to assess his mental health, and the causes thereof, with any precision.[21]

Nearly as disturbing as the use of torture against a suicidal teenager by U.S. authorities, is the fact that this clear and egregious case of detainee abuse was not discovered by two very high-level and allegedly comprehensive investigations tasked to investigate just such incidents (or even more disturbingly, was discovered, and then concealed). Assuming that they did not learn of this incident, one can only conclude either that the investigations were conducted in a grossly incompetent manner, or the investigators were intentionally misled, or both. Intentionally or otherwise, the U.S. government managed to cover up this outrageous abuse for just over four years.

RMC 907 PROVIDES THE AUTHORITY TO DISMISS THE CHARGES AND SPECIFICATIONS FOR ABUSE OF DETAINEES

While there is no specific language in the MCA or the MMC which states the remedy for torture of a detainee, the military commission does have the power to dismiss the charges. The procedures for military commissions in the MCA are "based upon the procedures for trial by general courts-martial" under the UCMJ. Although not binding, the judicial construction and interpretation of military courts are highly relevant persuasive authority for consideration by military commissions. Congress ordered the Secretary of Defense to devise rules and procedures for military commissions that "apply the principle of law . . . in trial by general courts-martial to the extent practicable or consistent with military or intelligence activities." The Secretary of Defense promulgated the Manual for Military Commissions, which includes the Rules for

---

[20] See, Stacy Sullivan, (Human Rights Watch observer) "The forgotten kid of Guantanamo" Salon.com May 27, 2008 available at http://www.salon.com/news/feature/2008/05/27/gitmo_jawad/index.html; Sahr Muhammad Ally, Military Commission Trial Observation, may 8, 2008, available at: http://www.humanrightsfirst.org/blog/gitmo/labels/Mohammed%20Jawad.html; Amrit Singh, ACLU Attorney observer, Is This the Justice of the United States of America? available at: http://www.dailykos.com/storyonly/2008/5/8/135147/0258/724/511846; Aisling Reidy, Human Rights Watch Senior Legal Adviser, "Watching Jawad," available at: http://www.hrw.org/english/docs/2008/03/21/usdom18329.htm

[21] In a separate motion, the defense has requested a mental health evaluation.

Military Commission. (R.M.C.s) R.M.C. 907 paragraphs (1) and (2) are identical to R.C.M. 907 (1) and (2). The most analogous concept to detainee abuse under the MCM is "illegal pretrial punishment." The concept of illegal pretrial punishment encompasses conditions of confinement and other allegations of mistreatment of pretrial confinees.

The Court of Appeals for the Armed Forces has interpreted R.C.M. 907(1) and (2) in the context of illegal pretrial punishment and specifically authorized dismissal as a remedy. According to CAAF,

> RCM 907(a) requires that a motion to dismiss be predicated on "grounds capable of resolution without trial of the general issue of guilt." Although illegal pretrial punishment is not listed under RCM 907(b) ("Grounds for dismissal include the following..."), that list is illustrative, not exclusive. Drafters' Analysis of RCM 907(b), Manual, supra at A21-54; see also 10 USC § 101(e)(4) ("includes" means "includes but is not limited to"); accord RCM 103(20). The court below concluded that "**where no other remedy is appropriate, a military judge may, in the interest of justice, dismiss charges because of unlawful pretrial punishment.**" 52 M.J. at 769 (citing *United States v. Nelson*, 18 U.S.C.M.A. 177, 181, 39 C.M.R. 177, 181 (1969), and *United States v. Suzuki*, 14 M.J. 491 (CMA 1983)). **We agree.**

U.S. v. Fulton, 55 M.J. 88 (CAAF 2001). [Emphasis added.]

No other remedy is appropriate here.[22] Under R.C,M, 305(k) the typical remedy for illegal pretrial punishment or pretrial confinement which involves "unusually harsh circumstances" is extra administrative pretrial confinement credit. The concept of pretrial confinement credit does not exist under the MCA. There is no R.M.C. 307. Even if the military judge were to invent the remedy of pretrial confinement credit for this abuse, such relief would be illusory and meaningless as applied to detainees at Guantanamo. The government has made it clear that detainees in general and Mr. Jawad in particular will not necessarily be released upon completion of any sentence adjudged by a military commission. In fact, even an acquittal will not result in release. In response to a question posed by the U.N. Committee on the Rights of the Child,

---

[22] The Military Commission Rules of Evidence do allow the commission judge to exclude evidence derived from torture. Should this motion be denied, the defense intends to submit a motion to suppress all statements of any kind made to U.S. authorities during or after the torture be categorically excluded from trial, pursuant to M.C.R.E. 304(a)(1). (Mr. Jawad has been interrogated at least eighteen more times since the frequent flyer program concluded.) But merely excluding statements obtained from Mr. Jawad after this episode would not begin to address this egregious breach of human rights.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, the U.S. submitted the following response to a question concerning "remedies available" to juveniles held at Guantanamo (Khadr and Jawad) "should they not be found guilty of any offense":

> As previously noted, the United States has chosen to prosecute two individuals [Omar Khadr and Mohammad Jawad] who are accused of committing war crimes when they were less than 18 years of age. In all instances, prosecution by Military Commission is not tied to the threat a detained enemy combatant poses on the battlefield. An individual who is not successfully prosecuted by Military Commission may still warrant detention under the law of armed conflict in order to mitigate the threat posed by the detainee. [23]

There is precedent for dismissal of charges based on detainee abuse at Guantanamo. The defense notes that the Convening Authority, the Honorable Judge Susan Crawford, recently dismissed all charges and specifications against the alleged 20th hijacker, Mohammed al Qahtani, after public disclosures that he had been subjected to torture and that his mental health had been seriously damaged.[24] In Spain, an ally in the war on terror, Judge Baltasar Garzon, recently dismissed charges against two former Guantanamo detainees because torture they had experienced at Guantanamo had severely damaged their physical and mental health.[25] These actions prove that all it takes for justice to be done is a judge with the courage to do the right thing.

CONCLUSION

In a press conference on 20 June 2005, in response to a question about whether the "rule of law" applies to terror suspects, President Bush answered, "In the long run, the best way to protect ourselves is to spread freedom and human rights and democracy." He continued "if you've got questions about Guantanamo, I seriously suggest you go down there and take a look. And -- seriously, take an objective look as to how these folks are treated, and what has happened to them in the past." I have taken the President up on his invitation and what I have found does not

---

[23] Supplemental US Report to the U.N. Committee on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, submitted for 22 May 2008 session of the Committee. Further information available at http://www2.ohchr.org/english/bodies/crc/crcs48.htm

[24] Like Mr. Jawad, Mr. al Qahtani also attempted to commit suicide in detention. The Convening Authority has not publicly stated that the treatment of Mr. al Qahtani or his mental health was the reason for her decision.

[25] Paul Hamilton and Vikram Dodd, "Spain drops extradition attempt against Guantanamo torture pair" The Guardian, March 7, 2008. (Attachment 13)

resemble the spread of freedom and human rights. What I found is that a suicidal teenager, brought to Guantanamo while still a minor, was subjected to a flagrant violation of international and domestic law -- tortured by U.S. officials while in U.S. custody as an enemy combatant. The torture of a detained person, whether accorded POW status or not, is a grave breach of the Geneva Conventions, a war crime. Such criminal conduct cannot go unremedied. The U.S. pushed this minor beyond the point of despair to the point where he was suicidal, and then tortured him for two weeks. Trying a juvenile offender as a war criminal is shameful; torturing a juvenile offender and *then* trying him as a war criminal would be unthinkable.

7. Request for Oral Argument and an Evidentiary Hearing: The defense requests an evidentiary hearing at the next scheduled hearing date of 19 June.

8. Request for Witnesses: The defense requests the government's and/or the commission's assistance in obtaining the following witnesses:

1. Lieutenant General Randall M. Schmidt, USAF, Ret. -- last known duty assignment: Commander, 12th Air Force and Air Forces Southern, Davis-Monthan Air Force Base, AZ

2. Vice Admiral Albert T. Church, III, USN, Ret. -- last known duty assignment: Director, Navy Staff

3. Maj. Gen. Jay W. Hood, USA, -- last known duty assignment: Commanding General First Army Division East, Fort Meade, MD.

4. Donald Rumsfeld, former Secretary of Defense.

5. A current JTF-GTMO official responsible for the JTF-GTMO official detainee record keeping system who can authenticate and explain the entries and information in Defense Classified Attachment 1.

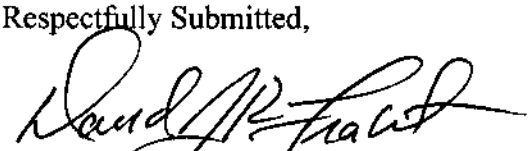
6. One or more JTF-GTMO personnel who carried out the frequent flyer cell moves of Mr. Jawad in May 2004.

The Defense understands and will comply with its obligations to submit formal witness requests pursuant to R.M.C. 703.

9. Conference with Opposing Counsel: The Defense has conferred with the Prosecution which opposes the relief sought.

10. Request for public release: The defense requests permission to publicly release the government response to this pleading and the court's ruling as soon as possible.

Respectfully Submitted,



By: DAVID J. R. FRAKT, Major, USAFR
Detailed Defense Counsel
Office of the Chief Defense Counsel
Office of Military Commissions
1099 14th Street NW, Ste 2000E
Washington, DC 20005
(202) 761-0133, ext. 106

11. Attachments:

1. Executive Order

2. Transcript of President Bush remarks

3. Frequent Flyer Chronology Spreadsheet

4. SECDEF Memo dated 15 Jan 03

5. Working Group Report

6. SECDEF Memo dated 16 Apr 03

7. CDRUSSOUTHCOM Memo dated 2 Jun 03[26]

8. Excerpts of Schmidt Report

9. Excerpts of Church Report

10. Interrogation Chronology Spreadsheet

11. Break Them Down: Systematic Use of Psychological Torture by US Force, Physicians for Human Rights (2005)

12. U.S. State Department Criticism of "Stress and Duress" Interrogation Around the World

13. Paul Hamilton and Vikram Dodd, "Spain drops extradition attempt against Guantanamo torture pair" The Guardian, May 7, 2008.

12. Classified Attachment: (submitted separately pursuant to Court Rules)

C1. DIMS report

---

[26] The defense has requested this document in discovery with the intent of attaching it to this motion. The defense will submit the document as soon as it is received.

Attachment 1

THE WHITE HOUSE

WASHINGTON

February 7, 2002

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 Taliban and al Qaeda Detainees

1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of 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 between the United States and Afghanistan, but I decline to 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 the 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.

/s/ George W. Bush

[CBG / AP & CNN – 2004.06.22]

Attachment 2

THE WHITE HOUSE
PRESIDENT
GEORGE W. BUSH

For Immediate Release
Office of the Press Secretary
June 20, 2005

President Hosts United States - European Union Summit

The East Room

In Focus: U.S.-E.U. Summit

VIDEO Multimedia

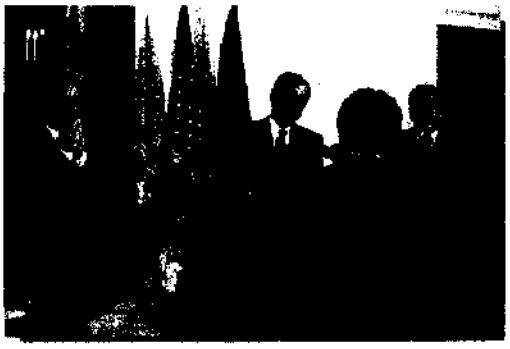
President's Remarks

view

1:11 P.M. EDT

PRESIDENT BUSH: Thank you all, please be seated. Thanks for coming. There will be opening statements from the three leaders and then we'll take two questions from the American side, two questions from the European side.

I want to appreciate Council President Juncker and Commission President Barroso, the High Representative Solana and the delegation for coming to the White House today. I've really enjoyed our conversation and enjoyed our lunch. We've covered a lot of topics, and they're important topics.



During the conversation our talks reminded me about the importance of our partnership and the fact that this partnership is based on common values and shared aspirations; a partnership that really has helped build a Europe that is whole, free and at peace. The United States continues to support a strong European Union as a partner in spreading freedom and democracy and security and prosperity throughout the world. My message to these leaders and these friends was that we want Europe strong so we can work together to achieve important objectives and important goals.

One of those important objectives and important goals is the advance of freedom in order to spread peace. We talked about the Middle East. We support the vision of two democratic states, Israel and Palestinian living side by side in peace. We talked about Iraq. This week in Brussels, the EU and the U.S. are co-hosting a conference of over 80 countries and international organizations to build support for a free and prosperous Iraq. And I want to thank the leaders for that important initiative. I think it's an important signal for people to hear loud and clear, that there may have been past differences over Iraq, but as we move forward there is a need for the world to work together so that Iraq's democracy will succeed.

We talked about Afghanistan, and I appreciate the contributions of EU member nations to efforts of -- within Afghanistan. After all, 23 members of the EU are contributing troops in Afghanistan, and 12 members of the EU are contributing troops in Iraq, and we appreciate those contributions.

We talked about the broader Middle East. We talked about the need for us to continually support democratic movements. We talked about the Ukraine and Georgia, as well as the Balkans. The point is, is that we understand that democratic nations are nations that are -- will answer to the hopes and aspirations of their people, and democratic nations are nations that will help us keep the peace.

We talked about terrorism. We talked about visas. We talked about the need to continue to share information to make sure that we cut off money flows to terrorist groups and prevent terrorist organizations from obtaining weapons of mass destruction. We talked about Iran, and I complimented the EU, complimented Mr. Solana, as well as the foreign ministers from Great Britain and Germany and France for sending a clear message to the leadership in Iran that we're not going to tolerate the development of a nuclear weapon.

We talked about our collaborative efforts in Darfur. The EU and

NATO are working together to help deploy AU peacekeepers in Darfur. And I want to thank the leadership here.

We talked about our economies. There's about a trillion dollars' worth of trade that takes place on an annual basis between the EU and the United States. And that's important. It's important for people working here in the United States, and people working in Europe to understand that trade helps keep -- people keep a job. And I recognize that – that when there's that much trade, there's going to be disputes. But we'll work those disputes out for the sake of our respective countries.

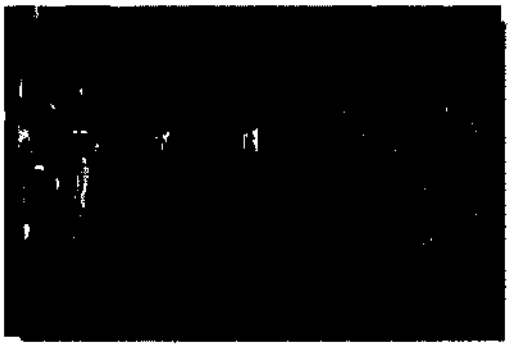
We're committed to the Doha round of the WTO. We're committed to trade that is fair and free. We spent a lot of time talking about China and how to make sure that China understands there are WTO rules that must be adhered to, and that China should work to do something with her currency so that the trade between our respective countries is fair. That's all we want. We just want there to be a level playing field. The people in Europe can compete, and the people in the United States can compete if we have fair rules and fair trade. And so we talked about how we can work together to make sure that the world trades more freely and more fairly for the sake of our – for the sake of our peoples.

All in all, we've had a great discussion. And I'm proud to welcome these two men here to the podium here in the East Room of the White House. I want to thank you for coming. I want to thank you for your friendship.

Which one wants to go first? The oldest guy. (Laughter.)

PRESIDENT JUNCKER: As the commission -- as the commission is slow in decisions, I'll take the floor immediately. (Laughter.)

President Barroso and myself, we were pleased with the meeting we had with President Bush, the Vice President and a certain number of Secretaries. We informed our strongest ally of recent developments and events in the European Union. We explained in detail what the real meaning of the French "no" and the Dutch "no" in the recent constitution referenda really are about. We were informing the President on the budgetary issue. As you know, we were unable during the recent European summit to agree on the so-called financial prospectus for the period 2007-2013.



We made clear in our frank and open and friendly talks with the President that the European is not at its knees, but that the European Union is playing the role it has on the international scene; that we feel strongly committed to the relations we have established with partners throughout the world, and mainly with the U.S. -- the U.S. being not only a strategic partner, but the most important partner we have, not only as far political strength relations are concerned, but also as far as heart relations are concerned; that the European Union will table its decisions after the next coming months and probably years on the Nice treaty, which is in place and which allows the European Union to function in a proper way and not as proper way as the constitution would have allowed us to do, but the European Union is there.

We were discussing, which was of quite huge importance, economic reform in the European Union. We adopted a few months ago, in March, the midterm review, the Lisbon strategy. This is a huge program of economic and social reforms. It's clearly paving the way for a more competitive Europe, for a Europe taking its part in the world's economic development. We were discussing a certain number of monetary issues concerning both the U.S. and the European Union, discussing our relations with other trade partners in the world and with other monetary players in the world.

In fact, the visit we paid to President Bush at the end of the Luxembourg's presidency of the Council is a happy conclusion of the six months Luxembourg's period. In Europe, we had the pleasure for having President Bush with us in Europe on the 22nd of February. This was a huge signal the President was sending to Europe. It was because of that meeting that, in fact, both the President and myself, we decided to call for this Iraq conference, which will take place the other day in Brussels.

Although some of us had some differences and divergences with U.S. when it came to Iraq, this -- the fact that we are co-organizing and co-sharing this very important Iraq conference is showing that when it comes to substance, when it comes to progress, when it comes to democracy, to freedom and to liberty, both U.S. and the European Union are cooperating closely together and working in the same direction.

So it was an excellent moment.

PRESIDENT BUSH: Thank you, sir. Mr. President.

PRESIDENT BARROSO: Thank you, thank you very much. It was indeed a pleasure for me, for President Juncker, for all the European Union team to be here. We remember the very successful visit of President Bush to Brussels recently, to the European institutions. We really believe the world is a better place when Europe and the United States work well together, and we can show results. We have been together promoting democracy, first in Ukraine, and in Lebanon. Co-hosting now the international conference on Iraq, we will continue our close cooperation on Iran and the Middle East, and we will make sure that the Doha round is a success.

Today we also adopted important decisions concerning, for instance, the economic cooperation. We have decided to go even further in our economic relations. Let me tell you that, per day, our trade is around $1.8 billion. It shows how important our relation is. We will act together decisively to enhance our economic integration, namely in the field of regulatory environment. We believe a regulatory environment, as much as close as possible, is good for the economy of our space.

The European Union is, and will remain, a very strong and reliable partner for the United States. It's true that we have complex systems in Europe. We are now 25 countries; very soon we will be 27, about 500 million of people. And we went through a very important enlargement, that it was, indeed, the reunification of Europe, 25, and very soon 27, countries that were very recently divided and now are together, sharing their sovereignty.

So it's no surprise that in this process, some problems may occur. But the opinion is there. We are on business. We are deciding. We are taking decisions every day, internally and externally, and we are committed to this very close relation with United States.

Let me just underline two points that are very important also in our relation that we will be going on discussing in Gleneagles in the next G8 summit in Scotland, is the cooperation in terms of environment. We are looking forward -- our dialogue in United States about climate change, new technologies to face those challenges, energy efficiency, energy security -- we adopted an important statement on that -- and also development, what we can do together for Africa and for the developing world. We also adopted a common statement on Africa that shows our commitment.

I think this is a real problem and this is a task of a generation. We are, together, promoting democracy and freedom, but every day, 25,000 people die because they don't have enough to eat or they don't have clean water to drink. This is really a shame for our generation. And you cannot accept it as a kind of natural order of things. It's not natural. Now nobody thinks that slavery is natural, but it was natural for centuries. We could live with slavery. How can we go on living with people dying because they don't have the basic needs? There are enough resources in the world. There are enough resources in the world. What we need is political will and good organization.

And when I say good organization, I say good organization on the donors community, but also on them, on the African leaders, on the third world leaders, that they can also work with us for better governance, for the rule of law, for accountability in their societies, and transparency in their societies. And I hope that this year we can take all advantage of this year with a high-level event in September in New York, with all -- the Gleneagles summit and other occasions so that the United States and Europe will be in front running this battle against absolute poverty, and also for freedom and democracy around the world.

Thank you.

PRESIDENT BUSH: Thank you, Jose.

Couple of questions. Tom.

Q Mr. President, by all accounts, the votes just aren't there to end the filibuster against your nomination of John Bolton to go to the U.N. Your Secretary of State, Condoleezza Rice, wouldn't rule out a recess appointment. There is a recess coming up. Where do you go from here? And would a recess appointment give Mr. Bolton enough time to do the kind of changes at the U.N. that you are looking for?

PRESIDENT BUSH: I think Mr. Bolton ought to get an up or down vote on the Senate floor. That's my call to the Senate. I nominated John Bolton to be the ambassador to the United Nations for a reason. I'm sharing this now with my friends here. The American people know why I nominated him, because the U.N. needs reform, and I thought it made sense to send a reformer to the United Nations. The U.N. is an important organization, and the American people, I think, will take -- will understand how important it is when the U.N. is reformed and is held to account. And so we want more accountability and transparency and less bureaucracy. And John Bolton will help achieve that mission. And so I think it's time for the Senate to give him an up or down vote, now. And I'm not sure if they've made the decision to have that vote. I think tomorrow there is going to be an up or down vote, if I'm not mistaken, Tom.

Q Tonight.

PRESIDENT BUSH: Tonight? Yes. Well, put him in. If they're interested in reforming the United Nations, they ought to approve John Bolton.

Do you want to call on somebody?

Q Mr. President, you spoke of common values were with Europe and the United States, and a strong Europe. Would you say that today, after the two summits between European Union and the United States, that the partnership has even become again a friendship between Europe and United States, and how you see the role of the Luxembourg presidency in that issue?

PRESIDENT BUSH: Well, I appreciate that. First, the relations with Europe are important relations, and they've -- because we do share values. And they're universal values -- they're not American values or European values, they're universal values. And those values, being universal, ought to be applied everywhere. And that's human rights, human dignity, rule of law, transparency when it comes to government, decency. And, obviously, if the EU and the U.S. speak with one voice on these issues, it's more likely to hear -- people will hear it.

I think the friendship between our respective countries in the EU are strong. Obviously, there's been a difference of opinion recently on certain issues, but that doesn't prevent the American people from holding the good folks of Luxembourg or Portugal in high esteem. There's a lot of traffic between our country, a lot of tourism, a lot of trade, a lot of commerce between individual countries within the EU and the United States. And that's because of mutual respect and the desire for people to get to know the world better.

In terms of your Prime Minister, he's an interesting guy. (Laughter.) He's a lot of fun to be around. He promotes serious business in a way that endears himself to people. And so I think his presidency has been an important presidency for the EU during difficult times, and he's handled it well. And I was going to say he's a piece of work, but that might not translate too well. Is that all right, if I call you a "piece of work"? (Laughter.)

PRESIDENT JUNCKER: Okay.

PRESIDENT BUSH: He's done a good job, and I value his friendship. I know it's really important for people at our -- when we sit down at the table, to have a friendship, so we can discuss things in a frank way, in an honest way, without fear of being able to tell people what's on our mind. That's the best way to get things done, and Jean-Claude certainly has been that way, as has Jose.

Adam.

Q Mr. President, we were told that you planned to sharpen your focus on Iraq. Why did this become necessary? And given the recent surge in violence, do you agree with Vice President Dick Cheney's assessment that the insurgency is in its last throes?

PRESIDENT BUSH: Adam, I think about Iraq every day -- every single day -- because I understand we have troops in harm's way, and I understand how dangerous it is there. And the reason it's dangerous is because there's these cold-blooded killers that will kill Americans or kill innocent Iraqis in order to try to drive us out of Iraq. I spoke to our commanders today -- Commander Abizaid today, and will be speaking to General Casey here this week, getting an assessment as to how we're proceeding. We're making progress toward the goal, which is, on the one hand, a political process moving forward in Iraq, and on the other hand, the Iraqis capable of defending themselves. And the report from the field is that while it's tough, more and more Iraqis are becoming battle-hardened and trained to defend themselves. And that's exactly the strategy that's going to work. And it is going to work. And we will -- we will complete this mission for the sake of world peace.

And you just heard the EU is willing to host this conference with the United States in order to help this new democracy move forward. And the reason why is many countries understand that freedom in the heart of the Middle East will make this world more peaceful.

And so, you know, I think about this every day, every single day, and will continue thinking about it, because I understand we've got kids in harm's way. And I worry about their families; and I obviously, any time there's a death, I grieve. But I want those families to know, one, we're not going to leave them -- not going to allow their mission to go in vain; and, two, we will complete the mission and the world will be better off for it.

Q Mr. President, many in Europe --

PRESIDENT BUSH: You're offending people here, we got two other --

Q Mr. President, many in Europe are worrying that with the fight against terrorism the commitment of the United States to human rights is not as big as it used to be -- that is not only to do with Guantanamo, but also with the secret prisons where the CIA holds terror suspects. My question is, what will happen to these people who are held in these secret prisons by the CIA? Will they ever see a judge? Or is your thinking that with some terror suspects, the rule of law should not apply or does not have to have applied.

PRESIDENT BUSH: First of all, I appreciate that question, and I understand we -- those of us who espouse freedom have an obligation, and those who espouse human rights have an obligation to live that to those -- live up to those words. And I believe we are, in Guantanamo. I mean, after all, there's 24 hour inspections by the International Red Cross. You're welcome to go down yourself -- maybe you have -- and taking a look at the conditions. I urge members of our press corps to go down to Guantanamo and see how they're treated and to see -- and to see -- and to look at the facts. That's all I ask people to do. There have been, I think, about 800 or so that have been detained there. These are people picked up off the battlefield in Afghanistan. They weren't wearing uniforms, they weren't state sponsored, but they were there to kill.

And so the fundamental question facing our government was, what do you do with these people? And so we said that they don't apply under the Geneva Convention, but they'll be treated in accord with the Geneva Convention.

And so I would urge you to go down and take a look at Guantanamo. About 200 or so have been released back to their countries. There needs to be a way forward on the other 500 that are there. We're now waiting for a federal court to decide whether or not they can be tried in a military court, where they'll have rights, of course, or in the civilian courts. We're just waiting for our judicial process to move -- to move the process along.

Make no mistake, however, that many of those folks being detained -- in humane conditions, I might add -- are dangerous people. Some have been released to their previous countries, and they got out and they went on to the battlefield again. And I have an obligation, as do all of us who are holding office, to protect our people. That's a solemn obligation we all have. And I believe we're meeting that obligation in a humane way.

As well, as we've got some in custody -- Khalid Shaykh Muhammad is a classic example, the mastermind of the September the 11th attack that killed over 3,000 of our citizens. And he is being detained because we think he could possibly give us information that might not only protect us, but protect citizens in Europe. And at some point in time, he'll be dealt with, but right now, we think it's best that he be -- he be kept in custody.

We want to learn as much as we can in this new kind of war about the intention, and about the methods, and about how these people operate. And they're dangerous, and they're still around, and they'll kill in a moment's notice.

In the long run, the best way to protect ourselves is to spread freedom and human rights and democracy. And -- but if you've got questions about Guantanamo, I seriously suggest you go down there and take a look. And -- seriously, take an objective look as to how these folks are treated, and what has happened to them in the past, and when the courts make the decision they make, we'll act accordingly.

Thank you. I appreciate that. Thank you all very much for coming.

END 1:35 P.M. EDT

Return to this article at:
http://www.whitehouse.gov/news/releases/2005/06/20050620-19.html

CLICK HERE TO PRINT

Attachment 3

Sleep Deprivation/Frequent Flyer Program Chronology for Mr. Jawad derived from prison logs

Date 2004	Local Time	From Cell	To Cell	Elapsed time	Comment
7-May	1847l	A26	L48	--	
7-May	2103l	L48	L40	3:16	
8-May	0002l	L40	L48	2:59	
8-May	0002l	L48	L40	0:00	
8-May	0004l	L40	L48	0:02	Extra short midnight move
8-May	0405l	L48	L40	3:01	
8-May	0712l	L40	L48	3:07	
8-May	1049l	L48	L40	3:37	
8-May	1332l	L40	L48	2:43	
8-May	1601l	L48	L40	3:29	
8-May	1901l	L40	L48	3:00	
8-May	2103l	L48	L40	3:02	Coded "Frequent Flyer"
8-May	2355l	L40	L48	2:52	
9-May	0401l	L48	L40	4:06	
9-May	0730l	L40	L48	3:29	
9-May	1008l	L48	L40	2:28	
9-May	1309l	L40	L48	3:01	
9-May	1559l	L48	L40	2:50	
9-May	1909l	L40	L48	3:10	
9-May	1913l	L48	L40	0:04	
9-May	2118l	L40	L48	2:05	
10-May	0104l	L48	L40	3:46	
10-May	0443l	L40	L48	3:39	
10-May	0704l	L48	L40	2:21	
10-May	1000l	L40	L48	2:56	
10-May	1258l	L48	L40	2:58	
10-May	1854l	L40	L48	5:56	
10-May	2141l	L48	L40	2:47	
11-May	0020l	L40	L48	2:39	
11-May	0113l	L48	L40	0:53	Extra short midnight move
11-May	0406l	L40	L48	2:53	
11-May	0703l	L48	L40	2:57	
11-May	1016l	L40	L48	3:13	
11-May	1305l	L48	L40	2:49	
11-May	1557l	L40	L48	2:52	
11-May	1908l	L48	L40	3:11	
11-May	2103l	L40	L48	2:55	
12-May	0002l	L48	L40	2:59	
12-May	0404l	L40	L48	3:02	
12-May	0701l	L48	L40	2:57	Coded "FF"
12-May	1008l	L40	L48	3:07	Coded "FF"
12-May	1305l	L48	L40	2:57	Coded "FF"
12-May	1553l	L40	L48	2:48	
12-May	1908l	L48	L40	3:15	
12-May	2105l	L40	L48	2:57	
13-May	0010l	L48	L40	3:05	
13-May	0408l	L40	L48	3:58	
13-May	1012l	L48	L40	6:04	
13-May	1408l	L40	L48	5:56	

13-May	1605I	L48	L40	1:57	
13-May	1917I	L40	L48	2:12	
13-May	2100I	L48	L40	2:43	
13-May	2355I	L40	L48	2:55	
14-May	0107I	L48	L40	1:12	Extra short midnight move
14-May	0354I	L40	L48	2:47	
14-May	0703I	L48	L40	3:09	
14-May	0952I	L40	L48	2:48	
14-May	1308I	L48	L40	3:16	
14-May	1606I	L40	L48	2:58	
14-May	1849I	L48	L40	2:43	
14-May	2055I	L40	L48	2:06	
14-May	2349I	L48	L40	2:54	
15-May	0100I	L40	L48	1:11	Extra short midnight move
15-May	0348I	L48	L40	2:48	
15-May	0657I	L40	L48	3:11	
15-May	1008I	L48	L40	3:11	
15-May	1258I	L40	L48	2:50	
15-May	1608I	L48	L40	3:10	
15-May	1917I	L40	L48	3:09	
15-May	2105I	L48	L40	1:48	
16-May	0008I	L40	L48	3:03	
16-May	0048I	L48	L40	0:45	Extra short midnight move
16-May	0401I	L40	L48	3:13	
16-May	0709I	L48	L40	3:08	
16-May	0959I	L40	L48	2:50	
16-May	1308I	L48	L40	3:09	
16-May	1557I	L40	L48	2:49	
16-May	1916I	L48	L40	3:19	
16-May	2102I	L40	L48	2:48	
17-May	0000I	L48	L40	2:58	
17-May	0057I	L40	L48	0:57	Extra short midnight move
17-May	0405I	L48	L40	3:08	
17-May	0700I	L40	L48	2:55	
17-May	1006I	L48	L40	3:06	
17-May	1256I	L40	L48	2:50	
17-May	1606I	L48	L40	3:10	
17-May	1905I	L40	L48	2:59	
17-May	2100I	L48	L40	1:55	
18-May	0005I	L40	L48	3:05	
18-May	0409I	L48	L40	3:54	
18-May	0714I	L40	L48	3:05	
18-May	0947I	L48	L40	2:33	
18-May	1259I	L40	L48	3:12	
18-May	1553I	L48	L40	2:54	
18-May	1922I	L40	L48	3:29	
18-May	2102I	L48	L40	2:40	
18-May	2347I	L40	L48	2:45	
19-May	0054I	L48	L40	1:07	Extra short midnight move
19-May	0352I	L40	L48	2:58	
19-May	0718I	L48	L40	3:26	
19-May	1012I	L40	L48	2:54	

19-May	1310I	L48	L40	2:58	
19-May	1610I	L40	L48	3:00	
19-May	1923I	L48	L40	3:13	
19-May	2101I	L40	L48	1:38	
20-May	0019I	L48	L40	3:18	
20-May	0057I	L40	L48	0:38	Extra short midnight move
20-May	0350I	L48	L40	2:53	
20-May	0705I	L40	L48	3:15	
20-May	1011L	L48	L40	3:06	
20-May	1609L	L40	L48	5:58	
				316hrs10min	Total Elapsed Time
				2hrs50min	Average Time Between Moves
23-May	1059L	L48	L5	Camp Reorg	Next Move
26-May	0217L	L5	B202	Move to Camp 5	Next Move

Attachment 4

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

3 X 5.0

MEMORANDUM FOR COMMANDER USSOUTHCOM JAN 15 2003

SUBJECT: Counter-Resistance Techniques (U)

(S) My December 2, 2002, approval of the use of all Category II techniques and one Category III technique during interrogations at Guantanamo is hereby rescinded. Should you determine that particular techniques in either of these categories are warranted in an individual case, you should forward that request to me. Such a request should include a thorough justification for the employment of those techniques and a detailed plan for the use of such techniques.

(U) In all interrogations, you should continue the humane treatment of detainees, regardless of the type of interrogation technique employed.

(U) Attached is a memo to the General Counsel setting in motion a study to be completed within 15 days. After my review, I will provide further guidance.

15 Jan 03

Classified by: Secretary Rumsfeld
Reason: 1.5(c)
Declassify on: 10 years

UNCLASSIFIED

Declassify Under the Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
By William P. Marriott, CAPT, USN
June 21, 2004

Attachment 5

Working Group Report
on
Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations

[redacted]

Classified by: Secretary Rumsfeld
Reason: 1.5(C)
Declassify on: 10 years

Declassify Under the Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
William P. Marriott, CAPT, USN
June 21, 2004

[redacted]
from Ilona Davis
DTF 50016-6

DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM:
Assessment of Legal, Historical, Policy and Operational Considerations

I. Introduction

U ~~(S/NF)~~ On January 15, 2003, the Secretary of Defense (SECDEF), directed the General Counsel of the Department of Defense (DOD GC) to establish a working group within the Department of Defense (DOD) to assess the legal, policy, and operational issues relating to the interrogations of detainees held by the United States Armed Forces in the war on terrorism. Attachment 1.

U ~~(S/NF)~~ On January 16, 2003, the DOD GC asked the General Counsel of the Department of the Air Force to convene this working group, comprised of representatives of the following entities: the Office of the Undersecretary of Defense (Policy), the Defense Intelligence Agency, the General Counsels of the Air Force, Army, and Navy and Counsel to the Commandant of the Marine Corps, the Judge Advocates General of the Air Force, Army, Navy, and Marines, and the Joint Staff Legal Counsel and J5. Attachment 2. The following assessment is the result of the collaborative efforts of those organizations, after consideration of diverse views, and was informed by a Department of Justice opinion.

U ~~(S/NF)~~ In preparing this assessment, it was understood that military members, civilian employees of the United States, and contractor employees currently participate in interrogations of detainees. Further, those who participate in the decision processes are comprised of military personnel and civilians.

(U) Our review is limited to the legal and policy considerations applicable to interrogation techniques applied to unlawful combatants in the Global War on Terrorism interrogated outside the sovereign territory of the United States by DOD personnel in DOD interrogation facilities. Interrogations can be broadly divided into two categories, strategic and tactical. This document addresses only strategic interrogations that are those conducted: (i) at a fixed location created for that purpose; (ii) by a task force or higher level component; and (iii) other than in direct and immediate support of on-going military operations. All tactical interrogations, including battlefield interrogations, remain governed by existing doctrine and procedures and are not directly affected by this review.

(U) In considering interrogation techniques for possible application to unlawful combatants in the "strategic" category, it became apparent that those techniques could be divided into three types: (i) routine (those that have been ordinarily used by interrogators for routine interrogations), (ii) techniques comparable to the first type but not formally recognized, and (iii) more aggressive counter-resistance techniques than would be used in routine interrogations. The third type would only be appropriate when presented with a resistant detainee who there is good reason to believe possesses critical intelligence.

Many of the techniques of the second and third types have been requested for approval by USSOUTHCOM and USCENTCOM. The working group's conclusions regarding these three types of techniques, including recommendations for appropriate safeguards, are presented at the end of this report.

(U) This assessment comes in the context of a major threat to the security of the United States by terrorist forces who have demonstrated a ruthless disregard for even minimal standards of civilized behavior, with a focused intent to inflict maximum casualties on the United States and its people, including its civilian population. In this context, intelligence regarding their capabilities and intentions is of vital interest to the United States and its friends and allies. Effective interrogations of those unlawful combatants who are under the control of the United States have proven to be and will remain a critical source of this information necessary to national security.

(U) Pursuant to the Confidential Presidential Determination, dated February 7, 2002 (Humane Treatment of al Qaida and Taliban Detainees), the President determined that members of al-Qaida and the Taliban are unlawful combatants and therefore are not entitled to the protections of the Geneva Conventions as prisoners of war or otherwise. However, as a matter of policy, the President has directed U.S. Armed Forces to treat al-Qaida and Taliban detainees "humanely" and "to the extent appropriate and consistent with military necessity, in a manner consistent with the principles" of the Geneva Conventions. Due to the unique nature of the war on terrorism in which the enemy covertly attacks innocent civilian populations without warning, and further due to the critical nature of the information believed to be known by certain of the al-Qaida and Taliban detainees regarding future terrorist attacks, it may be appropriate for the appropriate approval authority to authorize as a military necessity the interrogation of such unlawful combatants in a manner beyond that which may be applied to a prisoner of war who is subject to the protections of the Geneva Conventions.

(U) In considering this issue, it became apparent that any recommendations and decisions must take into account the international and domestic law, past practices and pronouncements of the United States, DOD policy considerations, practical interrogation considerations, the views of other nations, and the potential impacts on the United States, its Armed Forces generally, individual interrogators, and those responsible for authorizing and directing specific interrogation techniques.

(U) We were asked specifically to recommend techniques that comply with all applicable law and are believed consistent with policy considerations not only of the United States but which may be unique to DOD. Accordingly, we undertook that analysis and conducted a technique-specific review that has produced a summary chart (Attachment 3) for use in identifying the recommended techniques.

II. International Law

(U) The following discussion addresses the requirements of international law, as it pertains to the Armed Forces of the United States, as interpreted by the United States. As will be apparent in other sections of this analysis, other nations and international

bodies may take a more restrictive view, which may affect our policy analysis. These views are addressed in the "Considerations Affecting Policy" section below.

A. The Geneva Conventions

(U) The laws of war contain obligations relevant to the issue of interrogation techniques and methods. It should be noted, however, that it is the position of the U.S. Government that none of the provisions of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Third Geneva Convention) apply to al Qaida detainees because, *inter alia*, al Qaida is not a High Contracting Party to the Convention.[1] As to the Taliban, the U.S. position is that the provisions of Geneva apply to our present conflict with the Taliban, but that Taliban detainees do not qualify as prisoners of war under Article 4 of the Geneva Convention.[2] The Department of Justice has advised that the Geneva Convention Relative to the Protection of Civilian Personnel in time of War (Fourth Geneva Convention) does not apply to unlawful combatants.

B. The 1994 Convention Against Torture

(U) The United States' primary obligation concerning torture and related practices derives from the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (commonly referred to as "the Torture Convention"). The United States ratified the Convention in 1994, but did so with a variety of Reservations and Understandings.

(U) Article 1 of the Convention defines the term "torture" for purpose of the treaty.[3] The United States conditioned its ratification of the treaty on an understanding that:

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

---

[1] The President determined that "none of the provisions of Geneva apply to our conflict with al-Qaida in Afghanistan or elsewhere throughout the world because, among other reasons, al-Qaida is not a High Contracting Party to Geneva." Confidential Presidential Determination, subject: Humane Treatment of al Qaida and Taliban Detainees, dated Feb. 7, 2002.

[2] The President determined that "the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva." *Id.*

[3] (U) Article I 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 acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.[4]

(U) Article 2 of the Convention requires the Parties to "take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under its jurisdiction." The U. S. Government believed existing state and federal criminal law was adequate to fulfill this obligation, and did not enact implementing legislation. Article 2 also provides that acts of torture cannot be justified on the grounds of exigent circumstances, such as a state of war or public emergency, or on orders from a superior officer or public authority.[5] The United States did not have an Understanding or Reservation relating to this provision (however the U.S. issued a Declaration stating that Article 2 is not self-executing).

(U) Article 3 of the Convention contains an obligation not to expel, return, or extradite a person to another state where there are "substantial grounds" for believing that the person would be in danger of being subjected to torture. The U. S. understanding relating to this article is that it only applies "if it is more likely than not" that the person would be tortured.

(U) Under Article 5, the Parties are obligated to establish jurisdiction over acts of torture when committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state, or by its nationals wherever committed. The U.S. has criminal jurisdiction over territories under U.S. jurisdiction and onboard U.S. registered ships and aircraft by virtue of the special maritime and territorial jurisdiction of the United States (the "SMTJ") established under 18 U.S.C. § 7. Acts that would constitute torture are likely to be criminal acts under the SMTJ as discussed in Section III.A.2 below. Accordingly, the U. S. has satisfied its obligation to establish jurisdiction over such acts in territories under U.S. jurisdiction or on board a U.S. registered ship or aircraft. However, the additional requirement of Article 5 concerning jurisdiction over acts of torture by U.S. nationals "wherever committed" needed legislative implementation. Chapter 113C of Title 18 of the U.S. Code provides federal criminal jurisdiction over an extraterritorial act or attempted act of torture if the offender is a U.S. national. The statute defines "torture" consistent with the U.S. Understanding on Article 1 of the Torture Convention.

(U) The United States is obligated under Article 10 of the Convention to ensure that law enforcement and military personnel involved in interrogations are educated and informed regarding the prohibition against torture. Under Article 11, systematic reviews of interrogation rules, methods, and practices are also required.

(U) In addition to torture, the Convention prohibits cruel, inhuman and degrading treatment or punishment within territories under a Party's jurisdiction (Art 16). Primarily because the meaning of the term "cruel, inhuman and degrading treatment or

---

[4] (U) 18 U.S.C. § 2340 tracks this language. For a further discussion of the U.S. understandings and reservations, see the Initial Report of the U.S. to the U.N. Committee Against Torture, dated October 15, 1999.

[5] (U) See discussion in the Domestic Law section on the necessity defense.

punishment" was vague and ambiguous, the United States imposed a Reservation on this article to the effect that it is bound only to the extent that such treatment or punishment means the cruel, unusual and inhumane treatment or punishment prohibited by the 5th, 8th, and 14th Amendments to the U.S. Constitution (see discussion *infra*, in the Domestic Law section).

(U) In sum, the obligations under the Torture Convention apply to the interrogation of unlawful combatant detainees, but the Torture Convention prohibits torture only as defined in the U.S. Understanding, and prohibits "cruel, inhuman, and degrading treatment and punishment" only to the extent of the U.S. Reservation relating to the U.S. Constitution.

(U) An additional treaty to which the United States is a party is the International Covenant on Political and Civil Rights, ratified by the United States in 1992. Article 7 of this treaty provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The United States' ratification of the Covenant was subject to a Reservation that "the United States considers itself bound by Article 7 only to the extent that cruel, inhuman, or degrading treatment or punishment means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." Under this treaty, a "Human Rights Committee" may, with the consent of the Party in question, consider allegations that such Party is not fulfilling its obligations under the Covenant. The United States has maintained consistently that the Covenant does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict.

C. Customary International Law

(U) The Department of Justice has concluded that customary international law cannot bind the Executive Branch under the Constitution because it is not federal law.[6] In particular, the Department of Justice has opined that "under clear Supreme Court precedent, any presidential decision in the current conflict concerning the detention and trial of al-Qaida or Taliban militia prisoners would constitute a "controlling" Executive act that would immediately and completely override any customary international law."[7]

---

[6] (U) Memorandum dated January 22, 2002, *Re: Application of Treaties and Laws to al-Qaida and Taliban Detainees* at 32.

[7] (U) Memorandum dated January 22, 2002, *Re: Application of Treaties and Laws to al-Qaida and Taliban Detainees* at 35.

III. Domestic Law

A. Federal Criminal Law

1. Torture Statute

(U) 18 U.S.C. § 2340 defines as torture any "*act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain....*" The intent required is the intent to inflict severe physical or mental pain. 18 U.S.C. § 2340A requires that the offense occur "outside the United States." Jurisdiction over the offense extends to any national of the United States or any alleged offender present in the United States, and could, therefore, reach military members, civilian employees of the United States, or contractor employees.[8] The "United States" is defined to include all areas under the jurisdiction of the United States, including the special maritime and territorial jurisdiction (SMTJ) of the United States. SMTJ is a statutory creation[9] that extends the criminal jurisdiction of the United States for designated crimes to defined areas.[10] The effect is to grant federal court criminal jurisdiction for the specifically identified crimes.

(U) The USA Patriot Act (2001) amended the definition of the SMTJ to add subsection 9, which provides:

> "With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act –
>
> (A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of maintaining those missions or entities, irrespective of ownership; and
>
> (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

---

[8] (U) Section 2340A provides, "*Whoever outside* the United States commits or attempts to commit torture shall be fined or imprisoned..." (emphasis added).

[9] (U) 18 USC § 7, "Special maritime and territorial jurisdiction of the United States" includes any lands under the exclusive or concurrent jurisdiction of the United States.

[10] (U) Several paragraphs of 18 USC §7 are relevant to the issue at hand. Paragraph 7(3) provides: [SMTJ includes:] "Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place...." Paragraph 7(7) provides: [SMTJ includes:] "Any place outside the jurisdiction of any nation to an offense by or against a national of the United States." Similarly, paragraphs 7(1) and 7(5) extend SMTJ jurisdiction to, "the high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, and any vessel belonging in whole or in part to the United States..." and to "any aircraft belonging in whole or in part to the United States ... while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State."

Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title.

(U) By its terms, the plain language of new subsection 9 includes Guantanamo Bay Naval Station (GTMO) within the definition of the SMTJ, and accordingly makes GTMO within the United States for purposes of § 2340. As such, the Torture Statute does not apply to the conduct of U.S. personnel at GTMO. Prior to passage of the Patriot Act in 2001, GTMO was still considered within the SMTJ as manifested by (i) the prosecution of civilian dependents and employees living in GTMO in Federal District Courts based on SMTJ jurisdiction, and (ii) a Department of Justice opinion[11] to that effect.

(U) Any person who commits an enumerated offense in a location that is considered within the special maritime and territorial jurisdiction is subject to the jurisdiction of the United States.

(U) For the purposes of this discussion, it is assumed that an interrogation done for official purposes is under "color of law" and that detainees are in DOD's custody or control.

(U) Although Section 2340 does not apply to interrogations at GTMO, it could apply to U.S. operations outside U.S. jurisdiction, depending on the facts and circumstances of each case involved. The following analysis is relevant to such activities.

(U) To convict a defendant of torture, the prosecution must establish that: (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) that the act inflicted severe physical or mental pain or suffering. *See also* S. Exec. Rep. No. 101-30, at 6 (1990). ("For an act to be 'torture,' it must...cause severe pain and suffering, and be intended to cause severe pain and suffering.")

a. **"Specifically Intended"**

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

[11] (U) 6 Op. OLC 236 (1982). The issue was the status of GTMO for purposes of a statute banning slot-machines on "any land where the United States government exercises exclusive or concurrent jurisdiction."

defendant act with the "specific intent to commit the crime." (Internal quotation marks and citation omitted). As a result, the defendant had to act with the express "purpose to disobey the law" in order for the *mens rea* element to be satisfied. *Ibid.* (Internal quotation marks and citation omitted.)

(U) Here, because Section 2340 requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective. If the statute had required only general intent, it would be sufficient to establish guilt by showing that the defendant "possessed knowledge with respect to the *actus reus* of the crime." *Carter*, 530 U.S. at 268. If the defendant acted knowing that severe pain or suffering was reasonably likely to result from his actions, but no more, he would have acted only with general intent. *See id* at 269; Black's Law Dictionary: 813 (7th ed. 1999) (explaining that general intent "usu[ally] takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence)"). The Supreme Court has used the following example to illustrate the difference between these two mental states:

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

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

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

(U) Further, a showing that an individual acted with a good faith belief that his conduct would not produce the result that the law prohibits negates specific intent. *See, e.g., South Atl. Lmtd. Ptrshp. of Tenn v. Reise*, 218 F.3d 518, 531 (4th Cir. 2002). Where a defendant acts in good faith, he acts with an honest belief that he has not engaged in the proscribed conduct. *See Cheek v. United States*, 498 U.S. 192, 202 (1991); *United States v. Mancuso*, 42 F.3d 836, 837 (4th Cir. 1994). For example, in the context of mail fraud, if an individual honestly believes that the material transmitted is truthful, he has not acted with the required intent to deceive or mislead. *See, e.g., United States v. Sayakhom*, 186 F.3d 928, 939-40 (9th Cir. 1999). A good faith belief need not be a reasonable one. *See Cheek*, 498 U.S. at 202.

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

b. "Severe Pain or Suffering"

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

c. "Severe mental pain or suffering"

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

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

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

i. "Prolonged Mental Harm"

(U) As an initial matter, Section 2340(2) requires that the severe mental pain must be evidenced by "prolonged mental harm." To prolong is to "lengthen in time" or to "extend the duration of, to draw out." Webster's Third New International Dictionary 1815 (1988); Webster's New International Dictionary 1980 (2d ed. 1935). Accordingly, "prolong" adds a temporal dimension to the harm to the individual, namely, that the harm must be one that is endured over some period of time. Put another way, the acts giving rise to the harm must cause some lasting, though not necessarily permanent, damage. For example, the mental strain experienced by an individual during a lengthy and intense interrogation, such as one that state or local police might conduct upon a criminal suspect, would not violate Section 2340(2). On the other hand, the development of a mental disorder such as posttraumatic stress disorder, which can last months or even years, or even chronic depression, which also can last for a considerable period of time if untreated, might satisfy the prolonged harm requirement. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 426, 439-45 (4th ed. 1994) ("DSM-IV"). *See also* Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477, 509 (1997) (noting that posttraumatic stress disorder is frequently found in torture victims); *cf* Sana Loue, *Immigration Law and Health* § 10:46 (2001) (recommending evaluating for post-traumatic stress disorder immigrant-client

who has experienced torture).[12] By contrast to "severe pain" the phrase "prolonged mental harm" appears nowhere else in the U.S. Code nor does it appear in relevant medical literature or international human rights reports.

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

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

(U) A defendant could negate a showing of specific intent to cause severe mental pain or suffering by showing that he had acted in good faith that his conduct would not

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

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

ii. Harm Caused By Or Resulting From Predicate Acts

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

(U) Additionally, the threat of inflicting such pain is a predicate act under the statute. A threat may be implicit or explicit. *See, e.g., United States* v. *Sachdev*, 279 F.3d 25, 29 (1st Cir. 2002). In criminal law, courts generally determine whether an individual's words or actions constitute a threat by examining whether a reasonable person in the same circumstances would conclude that a threat had been made. *See, e.g., Watts* v. *United States*, 394 *U.S.* 70S, 708 (1969) (holding that whether a statement constituted a threat against the president's life had to be determined in light of all the surrounding circumstances); *Sachdev*, 279 F.3d at 29 ("a reasonable person in defendant's position would perceive there to be a threat, explicit or implicit, of physical injury"); *United States v. Khorrami*, 895 F.2d 1186, 1190 (7th Cir. 1990) (to establish that a threat was made, the statement must be made "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates a statement as a serious expression of an intention to inflict bodily harm upon [another individual]") (citation and internal quotation marks omitted); *United States v. Peterson*, 483 F.2d 1222, 1230 (D.C. Cir. 1973) (perception of threat of imminent harm necessary to establish self-defense had to be "objectively reasonable in light of the surrounding circumstances"). Based on this common approach,

we believe that the existence of a threat of severe pain or suffering should be assessed from the standpoint of a reasonable person in the same circumstances.

(U) Second, Section 2340(2)(B) provides that prolonged mental harm, constituting torture, can be caused by "the administration or application or threatened administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality." The statute provides no further definition of what constitutes a mind-altering substance. The phrase "mind-altering substances" is found nowhere else in the U.S. Code, nor is it found in dictionaries. It is, however, a commonly use synonym for drugs. *See, e.g., United States v. Kingsley*, 241 F.3d 828, 834 (6th Cir.) (referring to controlled substances as "mind-altering substance[s]") *cert. denied*, 122 S. Ct. 137 (2001); *Hogue v. Johnson*, 131 F. 3rd 466, 501 (5th Cir. 1997) (referring to drugs and alcohol as "mind altering substance[s]"), *cert. denied*, 523 U.S. 1014 (1998). In addition, the phrase appears in a number of state statutes, and the context in which it appears confirms this understanding of the phrase. *See, e.g.*, Cal. Penal Code § 3500 (c) (West Supp. 2000) ("Psychotropic drugs also include mind-altering... drugs..."); Minn. Stat. Ann. § 260B.201(b) (West Supp. 2002) ("'chemical dependency treatment'" define as programs designed to "reduc[e] the risk of the use of alcohol, drugs, or other mind-altering substances").

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

(U) For drugs or procedures to rise to the level of "disrupt[ing] profoundly the sense or personality," they must produce an extreme effect. And by requiring that they be "calculated" to produce such an effect, the statute requires that the defendant has consciously designed the acts to produce such an effect. 28 U.S.C. § 2340(2)(B). The word "disrupt" is defined as "to break asunder; to part forcibly; rend," imbuing the verb

with a connotation of violence. Webster's New International Dictionary 753 (2d ed. 1935); *see* Webster's Third New International Dictionary 656 (1986) (defining disrupt as "to break apart: Rupture" or "destroy the unity or wholeness of"); IV the Oxford English Dictionary 832 (1989) (defining disrupt as "[t]o break or burst asunder; to break in pieces; to separate forcibly"). Moreover, disruption of the senses or personality alone is insufficient to fall within the scope of this subsection; instead, that disruption must be profound. The word "profound" has a number of meanings, all of which convey a significant depth. Webster's New International Dictionary 1977 (2d ed. 1935 defines profound as: "Of very great depth; extending far below the surface or top; unfathomable [;]...[c]oming from, reaching to, or situated at a depth or more than ordinary depth; not superficial; deep-seated; chiefly with reference to the body; as a *profound* sigh, wounded, or pain[;] . . .[c]haracterized by intensity, as of feeling or quality; deeply felt or realized; as, *profound* respect, fear, or melancholy; hence, encompassing; thoroughgoing; complete; as, *profound* sleep, silence, or ignorance." *See* Webster's Third New International Dictionary 1812 (1986) ("having very great depth: extending far below the surface. . .not superficial"). Random House Webster's Unabridged Dictionary 1545 (2d ed. 1999) also defines profound as "originating in or penetrating to the depths of one's being" or "pervasive or intense; thorough; complete" or "extending, situated, or originating far down, or far beneath the surface." By requiring that the procedures and the drugs create a *profound* disruption, the statute requires more than the acts "forcibility separate" or "rend" the senses or personality. Those acts must penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality.

(U) The phrase "disrupt profoundly the senses or personality" is not used in mental health literature nor is it derived from elsewhere in U.S. law. Nonetheless, we think the following examples would constitute a profound disruption of the senses or personality. Such an effect might be seen in a drug-induced dementia. In such a state, the individual suffers from significant memory impairment, such as the inability to retain any new information or recall information about things previously of interest to the individual. *See* DSM-IV at 134.[13] This impairment is accompanied by one or more of the following: deterioration of language function, e.g., repeating sounds or words over and over again; impaired ability to execute simple motor activities, e.g., inability to dress or wave goodbye; "[in]ability to recognize [and identify] objects such as chairs or pencils" despite normal visual functioning; or "[d]isturbances in executive level functioning", i.e., serious impairment of abstract thinking. *Id.* At 134-35. Similarly, we think that the onset of "brief psychotic disorder" would satisfy this standard. *See id.* at 302-03. In this disorder, the individual suffers psychotic symptoms, including among other things, delusions, hallucinations, or even a catatonic state. This can last for one day

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

or even one month. *See id.* We likewise think that the onset of obsessive-compulsive disorder behaviors would rise to this level. Obsessions are intrusive thoughts unrelated to reality. They are not simple worries, but are repeated doubts or even "aggressive or horrific impulses." *See id.* at 418. The DSM-IV further explains that compulsions include "repetitive behaviors (e.g., hand washing, ordering, checking)" and that "[b]y definition, [they] are either clearly excessive or are not connected in a realistic way with what they are designed to neutralize or prevent." *See id.* Such compulsions or obsessions must be "time-consuming." *See id* at 419. Moreover, we think that pushing someone to the brink of suicide (which could be evidenced by acts of self-mutilation), would be a sufficient disruption of the personality to constitute a "profound disruption." These examples, of course, are in no way intended to be an exhaustive list. Instead, they are merely intended to illustrate the sort of mental health effects that we believe would accompany an action severe enough to amount to one that "disrupt[s] profoundly the sense or the personality."

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

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

2. Other Federal Crimes that Could Relate to Interrogation Techniques

(U) The following are federal crimes in the special maritime and territorial jurisdiction of the United States: murder (18 U.S.C. § 1111), manslaughter (18 U.S.C. § 1112), assault (18 U.S.C. § 113), maiming (18 U.S.C. § 114), kidnapping (18 U.S.C. § 1201). These, as well as war crimes (18 U.S.C. § 2441)[14] and conspiracy (18 U.S.C. § 371), are discussed below.

a. Assaults within maritime and territorial jurisdiction, 18 U.S.C. § 113

(U) 18 U.S.C. § 113 proscribes assault within the special maritime and territorial jurisdiction. Although section 113 does not define assault, courts have construed the term "assault" in accordance with that term's common law meaning. *See, e.g., United States v. Estrada-Fernandez*, 150 F.3d 491, 494 n.1 (5th Cir. 1998); *United States v. Juvenile-Male*, 930 F.2d 727, 728 (9th Cir. 1991). At common law an assault is an attempted battery or an act that puts another person in reasonable apprehension of bodily harm. *See e.g., United States v. Bayes*, 210 F.3d 64, 68 (1st Cir. 2000). Section 113 reaches more than simple assault, sweeping within its ambit acts that would at common law constitute battery.

(U) 18 U.S.C. § 113 proscribes several specific forms of assault. Certain variations require specific intent, to wit: simple assault (fine and/or imprisonment for not more than six months); assault with intent to commit murder (imprisonment for not more than twenty years); assault with intent to commit any felony (except murder and certain sexual abuse offenses) (fine and/or imprisonment for not more than ten years); assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse (fine and/imprisonment for not more than ten years, or both). Other defined crimes require only general intent, to wit: assault by striking, beating, or wounding (fine and/or imprisonment for not more than six months); assault where the victim is an individual who has not attained the age of 16 years (fine and/or imprisonment for not more than 1 year); assault resulting in serious bodily injury (fine and/or imprisonment for not more than ten years); assault resulting in substantial bodily injury to an individual who has not attained the age of 16 years (fine and/or imprisonment for not more than 5 years). "Substantial bodily injury" means bodily injury which involves (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty. "Serious bodily injury" means bodily injury which involves (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty. "Bodily injury" means (A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of

[14] (U) 18 U.S.C. § 2441 criminalizes the commission of war crimes by U.S. nationals and members of the U.S. Armed Forces. Subsection (c) defines war crimes as (1) grave breaches of any of the Geneva Conventions; (2) conduct prohibited by the Hague Convention IV, Respecting the Law and Customs of War on Land, signed 18 October 1907; or (3) conduct that constitutes a violation of common Article 3 of the Geneva Conventions. The Department of Justice has opined that this statute does not apply to conduct toward al-Qaida or Taliban operatives because the President has determined that they are not entitled to the protections of Geneva and the Hague Regulations.

the function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary.

b. Maiming, 18 U.S.C. § 114

(U) Whoever with the intent to torture (as defined in section 2340), maims, or disfigures, cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person; or whoever, and with like intent, throws or pours upon another person, any scalding water, corrosive acid, or caustic substance shall be fined and/or imprisoned not more than twenty years. This is a specific intent crime.

c. Murder, 18 U.S.C. § 1111

(U) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree. If within the SMTJ, whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life; whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life. Murder is a specific intent crime.

d. Manslaughter, 18 U.S.C. § 1112

(U) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: (A) voluntary, upon a sudden quarrel or heat of passion and (B) involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

(U) If within the SMTJ whoever is guilty of voluntary manslaughter, shall be fined and/or imprisoned not more than ten years; whoever is guilty of involuntary manslaughter, shall be fined and/or imprisoned not more than six years. Manslaughter is a general intent crime. A death resulting from the exceptional interrogation techniques may subject the interrogator to a charge of manslaughter, most likely of the involuntary sort.

e. Interstate Stalking, 18 U.S.C. § 2261A

(U) 18 U.S.C. § 2261A provides that "[w]hoever...travels...within the special maritime and territorial jurisdiction of the United States...with the intent to kill, injure, harass, or intimidate another person, and in the course of or as a result of, such travel

places that person in reasonable fear of the death of, or serious bodily injury of that person." Thus there are three elements to a violation of 2261A: (1) defendant traveled in interstate commerce; (2) he did so with the intent to injure, harass, intimidate another person; (3) the person he intended to harass or injure was reasonably placed in fear of death or serious bodily injury as a result of that travel. *See United States v. Al-Zubaidy*, 283 F.3d 804, 808 (6th Cir. 2002).

(U) The travel itself must have been undertaken with the specific intent to harass or intimidate another. Or put another way, at the time of the travel itself, the defendant must have engaged in that travel for the precise purpose of harassing another person. *See Al-Zubaidy*, 283 F.3d at 809 (the defendant "must have intended to harass or injure [the victim] at the time he crossed the state line").

(U) The third element is not fulfilled by the mere act of travel itself. *See United States v. Crawford*, No. 00-CR-59-B-S, 2001 WL 185140 (D. Me. Jan. 26, 2001) ("A plain reading of the statute makes clear that the statute requires the actor to place the victim in reasonable fear, rather than, as Defendant would have it, that his travel place the victim in reasonable fear.").

f. Conspiracy, 18 U.S.C. § 2 and 18 U.S.C. § 371[15]

(U) Conspiracy to commit crime is a separate offense from crime that is the object of the conspiracy.[16] Therefore, where someone is charged with conspiracy, a conviction cannot be sustained unless the Government establishes beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute.[17]

(U) As the Supreme Court most recently stated, "the essence of a conspiracy is 'an agreement to commit an unlawful act.'" *United States* v. *Jimenez Recio*, --S.Ct. -, 2003 WL 139612 at *-- (Jan. 12, 2003) (quoting *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975). Moreover, "[t]hat agreement is a 'distinct evil,' which 'may exist and be punished whether or not the substantive crime ensues.", *Id* at * (quoting *Salinas* v. *United States*, 522 U.S. 52. 65 (1997).

---

[15] (U) 18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[16] (U) *United States v Rabinowich*, 238 US 78, 59, 35 S.Ct 682, L Ed 1211 (1915).

[17] (U) *United States v. Cangiano*, 491 F.2d 906 (2nd Cir. 1974), cert denied 419 U.S. 904 (1974).

3. Legal doctrines under the Federal Criminal Law that could render specific conduct, otherwise criminal, *not* unlawful

(U) Generally, the following discussion identifies legal doctrines and defenses applicable to the interrogation of unlawful combatants, and the decision process related to them. In practice, their efficacy as to any person or circumstance will be fact-dependent.

a. Commander-in-Chief Authority

(U) As the Supreme Court has recognized, and as we will explain further below, the President enjoys complete discretion in the exercise of his Commander-in-Chief authority including in conducting operations against hostile forces. Because both "[t]he executive power and the command of the military and naval forces is vested in the President," the Supreme Court has unanimously stated that it is *"the President alone* who is constitutionally invested with the *entire charge of hostile operations." Hamilton v. Dillin,* 88 U.S. (21 Wall.) 73, 87 (1874) (emphasis added).

(U) In light of the President's complete authority over the conduct of war, without a clear statement otherwise, criminal statutes are not read as infringing on the President's ultimate authority in these areas. The Supreme Court has established a canon of statutory construction that statutes are to be construed in a manner that avoids constitutional difficulties so long as a reasonable alternative construction is available. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 499-501, 504 (1979)) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe [a] statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.") This canon of construction applies especially where an act of Congress could be read to encroach upon powers constitutionally committed to a coordinate branch of government. *See, e.g., Franklin* v. *Massachusetts,* 505 U.S. 788, 800-1 (1992) (citation omitted) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the [Administrative Procedure Act]. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion."); *Public Citizen V. United States Dep't of Justice,* 491 U.S. 440, 465-67 (1989) (construing Federal Advisory Committee Act not to apply to advice given by American Bar Association to the President on judicial nominations, to avoid potential constitutional question regarding encroachment on Presidential power to appoint judges).

(U) In the area of foreign affairs, and war powers in particular, the avoidance canon has special force. *See, e.g., Dept of Navy* v. *Egan,* 484 U.S. 518, 530 (1988) ("unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); *Japan Whaling Ass 'n* v. *American Cetacean Socy,* 478 U.S. 221, 232-33 (1986) (construing federal statutes to avoid curtailment of traditional presidential

prerogatives in foreign affairs). It should not be lightly assumed that Congress has acted to interfere with the President's constitutionally superior position as Chief Executive and Commander-in-Chief in the area of military operations. *See Egan*, 484 U.S. at 529 (quoting *Haig* v. *Agee*, 1453 U.S. 280, 293-94 (1981). *See also Agee*, 453 U.S. at 291 (deference to Executive Branch is "especially" appropriate "in the area of national security").

(U) In order to respect the President's inherent constitutional authority to manage a military campaign, 18 U.S.C. § 2340A (the prohibition against torture) as well as any other potentially applicable statute must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority. Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander-in-Chief to control the conduct of operations during a war. The President's power to detain and interrogate enemy combatants arises out of his constitutional authority as Commander-in-Chief. A construction of Section 2340A that applied the provision to regulate the President's authority as Commander-in-Chief to determine the interrogation and treatment of enemy combatants would raise serious constitutional questions. Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. Accordingly, we would construe Section 2340A to avoid this constitutional difficulty, and conclude that it does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority.

(U) This approach is consistent with previous decisions of the DOJ involving the application of federal criminal law. For example, DOJ has previously construed the congressional contempt statute as inapplicable to executive branch officials who refuse to comply with congressional subpoenas because of an assertion of executive privilege. In a 1984 opinion, DOJ concluded that

> if executive officials were subject to prosecution for criminal contempt whenever they carried out the President's claim of executive privilege, it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties. Therefore, the separation of powers principles that underlie the doctrine of executive privilege also would preclude an application of the contempt of Congress statute to punish officials for aiding the President in asserting his constitutional privilege.

Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted A Claim of Executive Privilege, 8 Op. O.L.C. 101, 134 (May 30, 1984). Likewise, if executive officials were subject to prosecution for conducting interrogations when they were carrying out the President's Commander-in-Chief powers, "it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties." These constitutional principles preclude an application of Section 2340A to punish officials for aiding the President in exercising his exclusive constitutional authorities. *Id.*

(U) It could be argued that Congress enacted 18 U.S.C. § 2340A with full knowledge and consideration of the President's Commander-in-Chief power, and that Congress intended to restrict his discretion; however, the Department of Justice could not enforce Section 2340A against federal officials acting pursuant to the President's constitutional authority to wage a military campaign. Indeed, in a different context, DOJ has concluded that both courts and prosecutors should reject prosecutions that apply federal criminal laws to activity that is authorized pursuant to one of the President's constitutional powers. DOJ, for example, has previously concluded that Congress could not constitutionally extend the congressional contempt statute to executive branch officials who refuse to comply with congressional subpoenas because of an assertion of executive privilege. They opined that "courts...would surely conclude that a criminal prosecution for the exercise of a presumptively valid, constitutionally based privilege is not consistent with the Constitution." 8 Op. O.L.C. at 141. Further, DOJ concluded that it could not bring a criminal prosecution against a defendant who had acted pursuant to an exercise of the President's constitutional power. "The President, through a United States Attorney, need not, indeed may not, prosecute criminally a subordinate for asserting on his behalf a claim of executive privilege. Nor could the Legislative Branch or the courts require or implement the prosecution of such an individual." *Id.* Although Congress may define federal crimes that the President, through the Take Care Clause, should prosecute, Congress cannot compel the President to prosecute outcomes taken pursuant to the President's own constitutional authority. If Congress could do so, it could control the President's authority through the manipulation of federal criminal law.

(U) There are even greater concerns with respect to prosecutions arising out of the exercise of the President's express authority as Commander-in-Chief than with prosecutions arising out of the assertion of executive privilege. In a series of opinions examining various legal questions arising after September 11, 2001, DOJ explained the scope of the President's Commander-in-Chief power. We briefly summarize the findings of those opinions here. The President's constitutional power to protect the security of the United States and the lives and safety of its people must be understood in light of the Founders' intention to create a federal government "cloathed with all the powers requisite to the complete execution of its trust." *The Federalist* No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961). Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As Hamilton explained in arguing for the Constitution's adoption, because "the circumstances which may affect the public safety" are not reducible within certain determinate limits,

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

Id. at 147-48. Within the limits that the Constitution itself imposes, the scope and distribution of the powers to protect national security must be construed to authorize the most efficacious defense of the nation and its interests in accordance "with the realistic purposes of the entire instrument." *Lichter v. United States*, 334 U.S. 742, 782 (1948).

(U) The text, structure, and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of United States in situations of grave and unforeseen emergencies. The decision to deploy military force in the defense of United States interests is expressly placed under Presidential Authority by the Vesting Clause, U.S. Const. Art. I, § 1, cl. 1, and by the Commander-in-Chief Clause, *id.*, § 2, cl. 1.[18] DOJ has long understood the Commander-in-Chief Clause in particular as an affirmative grant of authority to the President. The Framers understood the Clause as investing the President with the fullest range of power understood at the time of the ratification of the Constitution as belonging to the military commander. In addition, the Structure of the Constitution demonstrates that any power traditionally understood as pertaining to the executive which includes the conduct of warfare and the defense of the nation unless expressly assigned in the Constitution to Congress, is vested in the President. Article II, Section 1 makes this clear by stating that the "executive Power shall be vested in a President of the United States of America." That sweeping grant vests in the President an unenumerated "executive power" and contrasts with the specific enumeration of the powers-those "herein" granted to Congress in Article I. The implications of constitutional text and structure are confirmed by the practical consideration that national security decisions require the unity in purpose and energy in action that characterize the Presidency rather than Congress.[19]

(U) As the Supreme Court has recognized, the Commander-in-Chief power and the President's obligation to protect the nation imply the ancillary powers necessary to

---

[18] (U) *See Johnson* v. *Eisentrager*, 339 U.S. 763, 789 (1950) (President has authority to deploy United States armed forces "abroad or to any particular region"); *Fleming v. Page*, 50 U.S. (9 How) 603, 614-15 (1950) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual") *Loving* v. *United States*, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in judgment) (The inherent powers of the Commander-in-Chief "are clearly extensive."); *Maul* v. *United States*, 274 U.S. 501, 515-16 (1927) (Brandeis & Holmes, JJ., concurring) (President "may direct any revenue cutter to cruise in any water in order to perform any duty of the service"); *Commonwealth Massachusetts* v. *Laird*, 451 F.2d 26, 32 (1st Cir. 1971) (the President has "power as Commander-in-Chief to station forces abroad"); *Ex parte Vallandigham*, 28 F.Cas. 874, 922 (C.C.S.D. Ohio (1863) (No. 16,816) (in acting "under this power where there is no express legislative declaration, the president is guided solely by his own judgment land discretion"); *Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6,6 (Dec. 4,1992) (Barr, Attorney General).*

[19] (U) Judicial decisions since the beginning of the Republic confirm the President's constitutional power and duty to repel military action against the United States and to take measures to prevent the recurrence of an attack. As Justice Joseph Story said long ago, "[I]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found iii the text of the laws." *The Apollon*, 22 U.S. (9 Wheat) 362, 366-67 (1824). If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat with whatever means are necessary. *See e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion or a foreign nation, the President is not only authorized but bound to resist force by force...without waiting for any special legislative authority."); *United States* v. *Smith*, 27 F.Cas; 1192,1229-30 (C.C.D.N.Y, 1.–06) (No. 16,342) (Paterson, Circuit Justice) (regardless of statutory authorization. it is "the duty ...of the executive magistrate ...to repel an invading foe") *see also 3* Story, *Commentaries* § 1485 ("[t]he command and application of the public force...to maintain peace, and to resist foreign invasion" are executive powers).

their successful exercise. "The first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And of course, the grant of war power includes all that is necessary and proper for carrying those powers into execution." *Johnson* v. *Eisentrager*, 339 U.S. 763, 788 (1950). In wartime, it is for the President alone to decide what methods to use to best prevail against the enemy. The President's complete discretion in exercising the Commander-in-Chief power has been recognized by the courts. In the *Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862), for example, the Court explained that whether the President, "in fulfilling his duties as Commander in Chief", had appropriately responded to the rebellion of the southern states was a question "to be *decided by him*" and which the Court could not question, but must leave to "the political department of the Government to which this power was entrusted."

(U) One of the core functions of the Commander-in-Chief is that of capturing, detaining, and interrogating members of the enemy. It is well settled that the President may seize and detain enemy combatants, at least for the duration of the conflict, and the laws of war make clear that prisoners may be interrogated for information concerning the enemy, its strength, and its plans. Numerous Presidents have ordered the capture, detention, and questioning of enemy combatants during virtually every major conflict in the Nation's history, including recent conflicts in Korea, Vietnam, and the Persian Gulf. Recognizing this authority, Congress has never attempted to restrict or interfere with the President's authority on this score.

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

(U) As this authority is inherent in the President, it would be appropriate within the context of the war on terrorism for this authority to be stated expressly in a Presidential directive or other writing.[20]

[20] (U) Although application of the Commander-in-Chief authority does not require a specific written directive, as an evidentiary matter a written Presidential directive or other document would serve to memorialize the authority.

b. Necessity

(U) The defense of necessity could be raised, under the current circumstances, to an allegation of a violation of a criminal statute. Often referred to as the "choice of evils" defense, necessity has been defined as follows:

> Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
>
> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Model Penal Code § 3.02. *See also* Wayne R. LaFave & Austin W. Scott, 1 Substantive Criminal Law § 5.4 at 627 (1986 & 2002 supp.) ("LaFave & Scott"). Although there is no federal statute that generally establishes necessity or other justifications as defenses to federal criminal laws, the Supreme Court has recognized the defense. *See United States v. Bailey*, 444 U.S. 394, 410 (1980) (relying on LaFave & Scott and Model Penal Code definitions of necessity defense).

(U) The necessity defense may prove especially relevant in the current circumstances. As it has been described in the case law and literature, the purpose behind necessity is one of public policy. According to LaFave & Scott, "the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." LaFave & Scott, at 629. In particular, the necessity defense can justify the intentional killing of one person to save two others because "it is better that two lives be saved and one lost than that two be lost and one saved." *Id.* Or, put in the language of a choice of evils, "the evil involved in violating the terms of the criminal law (...even taking another's life) may be less than that which would result from literal compliance with the law (...two lives lost)." *Id.*

(U) Additional elements of the necessity defense are worth noting here. First, the defense is not limited to certain types of harms. Therefore, the harm inflicted by necessity may include intentional homicide, so long as the harm avoided is greater (i.e., preventing more deaths) *Id.* at 634. Second, it must actually be the defendant's intention to avoid the greater harm; intending to commit murder and then learning only later that the death had the fortuitous result of saving other lives will not support a necessity defense. *Id.* at 635. Third, if the defendant reasonably believes that the lesser harm as necessary, even if, unknown to him, it was not, he may still avail himself of the defense. As LaFave and Scott explain, "if A kills B reasonably believing it to be necessary to save C and D, he is not guilty of murder even though, unknown to A, C and D could have been

rescued without the necessity of killing B." *Id.* Fourth, it is for the court, and not the defendant to judge whether the harm avoided outweighed the harm done. *Id.* at 636. Fifth, the defendant cannot rely upon the necessity defense if a third alternative that will cause less harm is open and known to him.

U (~~S//NF~~) Although not every interrogation that could violate the provisions of Section 2340A or other potentially applicable statutes would trigger a necessity defense, it appears that under the current circumstances there may be support for such defense. On September 11, 2001, al Qaida launched a surprise covert attack on civilian targets in the United States that led to the deaths of thousands and financial losses in the billions of dollars. According to public and governmental reports, al Qaida has other sleeper cells within the United States that may be planning similar attacks. Indeed, al Qaida's plans apparently include efforts to develop and deploy chemical, biological, and nuclear weapons of mass destruction. Under these circumstances, a detainee may possess information that could enable the United States to prevent attacks that potentially could equal or surpass the September 11 attacks in their magnitude. Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives.

U (~~S//NF~~) Under this rationale, two factors will help indicate when the necessity defense could appropriately be invoked. First, the more certain that government officials are that a particular individual has information needed to prevent an attack, the more necessary interrogation will be. Second, the more likely it appears that a terrorist attack is likely to occur, and the greater the amount of damage expected from such an attack, the more that an interrogation to get information would become necessary. Of course, the strength of the necessity defense depends on the circumstances that prevail, and the knowledge of the government actors involved, when the interrogation is conducted. While every interrogation that might violate Section 2340A or other potentially applicable statutes does not trigger a necessity defense, we can say that certain circumstances could support such a defense.

(U) Legal authorities identify an important exception to the necessity defense. The defense is available "only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values." *Id.* at 629. Thus, if Congress explicitly has made clear that violation of a statute cannot be outweighed by the harm avoided, courts cannot recognize the necessity defense. LaFave and Israel provide as an example an abortion statute that made clear that abortions even to save the life of the mother would still be a crime; in such cases the necessity defense would be unavailable. *Id.* at 630. Here, however, Congress has not explicitly made a determination of values vis-a-vis torture. In fact, Congress explicitly removed efforts to remove torture from the weighing of values permitted by the necessity defense.[21]

---

[21] In the CAT, torture is defined as the intentional infliction of severe pain or suffering "for such purposes as obtaining from him or a third person information or a confession." CAT art 1.1. One could argue that such a definition represented an attempt to indicate that the good of obtaining information--no matter what the circumstances--could not justify an act of torture. In other words, necessity would not be a defense. In

c. **Self-Defense**

(U) Even if a court were to find that necessity did not justify the violation of a criminal statute, a defendant could still appropriately raise a claim of self-defense. The right to self-defense, even when it involves deadly force, is deeply embedded in our law, both as to individuals and as to the nation as a whole. As the Court of Appeals for the D.C. Circuit has explained:

> More than two centuries ago, Blackstone, best known of the expositors of the English common law taught that "all homicide is malicious, and of course amounts to murder, unless...excused on the account of accident or self-preservation." Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone's time.

United States v. *Peterson*, 483 F.2d 1222, 1228-29 (D.C. Cir. 1973). Self-defense is a common-law defense to federal criminal law offenses, and nothing in the text, structure or history of Section 2340A precludes its application to a charge of torture. In the absence of any textual provision to the contrary, we assume self-defense can be an appropriate defense to an allegation of torture.

(U) The doctrine of self-defense permits the use of force to prevent harm to another person. As LaFave and Scott explain, one is justified in using reasonable force in defense of another person, even a stranger, when he reasonably believes that the other is in immediate danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger." *Id.* at 663-64. Ultimately, even deadly force is permissible, but "only when the attack of the adversary upon the other, person reasonably appears to the defender to be a deadly attack." *Id.* at 664. As with our discussion of necessity, we will review the significant elements of this defense.[22] According to LaFave and Scott, the elements of the defense of others are the same as those that apply to individual self-defense.

---

enacting Section 2340, however, Congress removed the purpose element in the definition of torture, evidencing an intention to remove any fixing of values by statute. By leaving Section 2340 silent as to the harm done by torture in comparison to other harms, Congress allowed the necessity defense to apply when appropriate.

Further, the CAT contains an additional provision that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture," CAT art. 2.2. Aware of this provision of the treaty and of the definition of the necessity defense that allows the legislature to provide *for* an exception to the defense, See Model Penal Code § 3.02(b), Congress did not incorporate CAT article 2.2 into Section 2-4. Given that Congress omitted CAT's effort to bar a necessity or wartime defense, Section 2340 could be read as permitting the defense.

[22] (U) Early cases had suggested that in order to be eligible for defense of another, one should have some personal relationship with the one in need of protection. That view has been discarded. LaFave & Scott at 664.

(U) First, self-defense requires that the use of force be *necessary* to avoid the danger of unlawful bodily harm. *Id.* at 649. A defender may justifiably use deadly force if he reasonably believes that the other person is about to inflict unlawful death or serious bodily harm upon another, and that it is necessary to use such force to prevent it. *Id.* at 652. Looked at from the opposite perspective, the defender may not use force when the force would be as equally effective at a later time and the defender suffers no harm or risk by waiting. *See* Paul H.Robinson, 2 Criminal Law Defenses § 131(c) at 77 (1984). If, however, other options permit the defender to retreat safely from confrontation without having to resort to deadly force, the use of force may not be necessary in the first place. LaFave and Scott, at 659-60.

(U) Second, self-defense requires that the defendant's belief in the necessity of using force be reasonable. If a defendant honestly but unreasonably believed force was necessary, he will not be able to make out a successful claim of self-defense. *Id.* at 654. Conversely, if a defendant reasonably believed an attack was to occur, but the facts subsequently showed no attack was threatened, he may still raise self-defense. As LaFave and Scott explain, "one may be justified in shooting to death an adversary who, having threatened to kill him, reaches for his pocket as if for a gun, though it later appears that he had no gun and that he was only reaching for his handkerchief." *Id.* Some authorities such as the Model Penal Code, even eliminate the reasonability element, and require only that the defender honestly believed regardless of its reasonableness--that the use of force was necessary.

(U) Third, many legal authorities include the requirement that a defender must reasonably believe that the unlawful violence is "imminent" before he can use force in his defense. It would be a mistake, however, to equate imminence necessarily with timing--that an attack is immediately about to occur. Rather, as the Model Penal Code explains, what is essential is that the defensive *response* must be "immediately necessary." Model Penal Code § 3.04(1). Indeed, imminence must be merely another way of expressing the requirement of necessity. Robinson at 78. LaFave and Scott, for example, believe that the imminence requirement makes sense as part of a necessity defense because if an attack is not immediately upon the defender, the defender may have other options available to avoid the attack that do not involve the use of force. LaFave and Scott at 656. If, however, the fact of the attack becomes certain and no other options remain the use of force may be justified. To use a well-known hypothetical, if A were to kidnap and confine B, and then tell B he would kill B one week later, B would be justified in using force in self-defense, even if the opportunity arose before the week had passed. *Id.* at 656; *see also* Robinson at § 131(c)(1) at 78. In this hypothetical, while the attack itself is not imminent, B's use of force becomes immediately necessary whenever he has an opportunity to save himself from A.

(U) Fourth, the amount of force should be proportional to the threat. As LaFave and Scott explain, "the amount of force which [the defender] may justifiably use must be reasonably related to the threatened harm which he seeks to avoid." LaFave and Scott at 651. Thus, one may not use deadly force in response to a threat that does not rise to death or serious bodily harm. If such harm may result however, deadly force is appropriate.

As the Model Penal Code § 3.04(2)(b) states, "[t]he use of deadly force is not justifiable unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat."

U ~~(S/NF)~~ Under the current circumstances, a defendant accused of violating the criminal prohibitions described above could have, in certain circumstances, grounds to properly claim the defense of another. The threat of an impending terrorist attack threatens the lives of hundreds if not thousands of American citizens. Whether such a defense will be upheld depends on the specific context within which the interrogation decision is made. If an attack appears increasingly likely, but our intelligence services and Armed Forces cannot prevent it without the information from the interrogation of a specific individual, then the more likely it will appear that the conduct in question will be seen as necessary. If intelligence and other information support the conclusion that attack is increasingly certain, then the necessity for the interrogation will be reasonable. The increasing certainty of an attack will also satisfy the imminence requirement. Finally, the fact that previous al Qaida attacks have had as their aim the deaths of American citizens, and that evidence of other plots have had a similar goal in mind, would justify proportionality of interrogation methods designed to elicit information to prevent them.

U ~~(S/NF)~~ To be sure, this situation is different from the usual self-defense justification, and indeed, it overlaps with elements of the necessity defense. Self-defense as usually discussed involves using force against an individual who is about to conduct the attack. In the current circumstances, however, an enemy combatant in detention does not himself present a threat of harm. He is not actually carrying out the attack, rather he has participated in the planning and preparation for the attack, or merely has knowledge of the attack through his membership in the terrorist organization. Nonetheless, leading scholarly commentators believe that interrogation of such individuals using methods that might violate Section 2340A would be justified under the doctrine of self-defense, because the combatant by aiding and promoting the terrorist plot "has culpably caused the situation here someone might get hurt. If hurting him is the only means to prevent the death or injury of others put at risk by his actions, such torture should be permissible, and on the same basis that self-defense is permissible." Michael S. Moore, *Torture and the Balance of Evils*, 23 Israel L. Rev. 280, 323 (1989) (symposium on Israel's Landau Commission Report).[23] *See* also Alan M. Dershowitz, *Is It Necessary to Apply "Physical Pressure" to Terrorists—and to Lie About It?*, 23 Israel L. Rev. 192, 199-200 (1989). Thus, some commentators believe that by helping to create the threat of loss of life, terrorists become culpable for the threat even though they do not actually carry out the attack itself. If necessary, they may be hurt in an interrogation because they are part of the mechanism that has set the attack in motion, just as is someone who feeds ammunition or targeting information to an attacker. *Moore*, at 323.

[23] (U) Moore distinguishes that case from one in which a person has information that could stop a terrorist attack, but who does not take a hand in the terrorist activity itself, such as an innocent person who learns of the attack from her spouse. Moore, 23 Israel L. Rev. at 324. Such individuals, Moore finds, would not be subject to the use of force in self-defense, although they might under the doctrine of necessity.

(U) A claim by an individual of the defense of another would be further supported by the fact that in this case, the nation itself is under attack and has the right to self-defense. This fact can bolster and support an individual claim of self-defense in a prosecution, according to the Supreme Court in *In re Neagle*, 135 U.S. 1 (1890). In that case, the State of California arrested and held deputy U.S. Marshal Neagle for shooting and killing the assailant of Supreme Court Justice Field. In granting the writ of habeas corpus for Neagle's release, the Supreme Court did not rely alone upon the marshal's right to defend another or his right to self-defense. Rather, the Court found that Neagle, as an agent of the United States and of the executive branch, was justified in the killing because in protecting Justice Field, he was acting pursuant to the executive branch's inherent constitutional authority to protect the United States government. *Id.* at 67 ("We cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death.") That authority derives, according to the Court, from the President's power under Article II to take care that the laws are faithfully executed. In other words, Neagle as a federal officer not only could raise self-defense or defense of another, but also could defend his actions on the ground that he was implementing the Executive Branch's authority to protect the United States government.

(U) If the right to defend the national government can be raised as a defense in an individual prosecution as *Neagle* suggests, then a government defendant, acting in his official capacity, should be able to argue that any conduct that arguably violated a criminal prohibition was undertaken pursuant to more than just individual self-defense or defense of another. In addition, the defendant could claim that he was fulfilling the Executive Branch's authority to protect the federal government, and the nation, from attack. The September 11 attacks have already triggered that authority, as recognized both under domestic and international law. Following the example of *In re Neagle*, we conclude that a government defendant may also argue that his conduct of an interrogation properly authorized, is justified on the basis of protecting the nation from attack.

(U) There can be little doubt that the nation's right to self-defense has been triggered under our law. The Constitution announces that one of its purposes is "to provide for the common defense." U.S. Const., Preamble. Article I, § 8 declares that Congress is to exercise its powers to "provide for the common defense." *See also* 2 Pub. Papers of Ronald Reagan 920, 921 1988-89) (right to self-defense recognized by Article 51 of the U.N. Charter). The President has particular responsibility and power to take steps to defend the nation and its people. *In re Neagle*, 135 U.S at 64. *See also* U.S. Const., art. IV, § 4 ("The United States shall. . .protect [each of the States] against Invasion"). As Commander-in-Chief and Chief Executive, he may use the Armed Forces to protect the nation and its people. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). And he may employ secret agents to aid in his work as Commander-in-Chief. *Totten v. United States*, 92 U.S. 105, 106 (1876). As the Supreme Court observed in *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), in response to an armed attack on the United States "the President is not only authorized but bound to resist force by force ...without waiting for any special legislative authority." *Id.* at 668. The September 11 events were a direct attack on the United States, and as we have explained

above, the President has authorized the use of military force with the support of Congress.[24]

(U) As DOJ has made clear in opinions involving the war on al Qaida, the nation's right to self-defense has been triggered by the events of September 11. If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate criminal prohibition, he would be doing so in order to prevent further attacks on the United States by the al Qaida terrorist network. In that case, DOJ believes that he could argue that the executive branch's constitutional authority to protect the nation from attack justified his actions. This national and international version of the right to self-defense could supplement and bolster the government defendant's individual right.

d. Military Law Enforcement Actions

(U) Use of force in military law enforcement is authorized for (1) self-defense and defense of others against a hostile person when in imminent danger of death or serious bodily harm *by the hostile person*; (2) to prevent the actual theft or sabotage of assets vital to national security; (3) to prevent the actual theft or sabotage of resources that are inherently dangerous to others; (4) to prevent the commission of a serious crime that involves imminent danger of death or serious bodily harm; (5) to prevent the destruction of vital public utilities or similar critical infrastructure; (6) for apprehension; and (7) to prevent escape. (DODD 5210.56, 1 Nov 2001). These justifications contemplate the use of force against a person who has committed, is committing, or is about to commit, a serious offense. Although we are not aware of any authority that applies these concepts in the interrogation context, the justified use of force in military law enforcement may provide useful comparisons to the use of force against a detainee to extract intelligence for the specific purpose of preventing a serious and imminent terrorist incident.

---

[24] (U) While the President's constitutional determination alone is sufficient to justify the nation's resort to self-defense, it also bears noting that the right to self-defense is further recognized under international law. Article 51 of the U.N. Charter declares that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security." The attacks of September 11, 2001, clearly constitute an armed attack against the United States, and indeed were the latest in a long history of al Qaida sponsored attacks against the United States. This conclusion was acknowledged by he United Nations Security Council on September 29, 2001, when it unanimously adopted Resolution 1373 explicitly "reaffirming the inherent right of individual and collective defense as recognized by the charter of the United Nations. This right of self-defense is a right to effective self-defense. In other words, the victim state has the right to use force against the aggressor who has initiated an "armed attack" until the threat has abated. The United States, through its military and intelligence personnel, has a right recognized by Article 51 to continue using force until such time as the threat posed by al Qaida and other terrorist groups connected to the September 11th attack is completely ended." Other treaties re-affirm the right of the United States to use force in its self-defense. See, e.g., Inter-American Treaty of Reciprocal Assistance, art. 3, Sept. 2, 1947, T.I.A.S. No. 1838, 21 U.N.T.S. 77 (Rio Treaty); North Atlantic Treaty, art. 5, Apr. 4,1949, 3 Stat. 2241, 34 U.N.T.S. 243.

e. **Superior Orders**

(U) Under both international law and U.S. law, an order to commit an obviously criminal act, such as the wanton killing of a noncombatant or the torture of a prisoner, is an *unlawful* order and will not relieve a subordinate of his responsibility to comply with the law of armed conflict.[25] Only if the individual did not know of the unlawfulness of an order, and he could not reasonably be expected under the circumstances to recognize the order as unlawful, will the defense of obedience of a superior order protect a subordinate from the consequences of violation of the law of armed conflict.[26]

(U) Under international law, the fact that a war crime is committed pursuant to the orders of a military or civilian superior does not by itself relieve the subordinate committing it from criminal responsibility under international law.[27] It may, however, be considered in mitigation of punishment.[28]

(U) For instance, the Charter of the International Military Tribunal at Nuremberg, art. 8, stated:

> The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[29]

(U) Similarly, the Statute for the International Tribunal for Yugoslavia, and the Statute for the International Criminal Tribunal for Rwanda provide (in articles 7(4) & 6(4), respectively) provide:

> The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in anticipation of punishment if the Tribunal determines that justice so requires.

(U) As to the general attitude taken by military tribunals toward the plea of superior orders, the following statement is representative:

> It cannot be questioned that acts done in time of war under the military authority of an enemy cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war. Implicit obedience to orders of superior officers

---

[25] (U) *See* Section 6.1.4, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (NWP 1-14M 1997)

[26] *Id*

[27] The International Criminal Court also takes this view. Article 33 of the Rome Statute, recognizes that: "1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

[28] *Id.*, at §6.2.5.5.1.

[29] *See* U.S. Naval War College, International Law Documents, at 1944-45, 255 (1946).

> is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a superior's orders be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the interior [*sic*] will be protected. But the general rule is the members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice.

The Hostage Case (*United States v. Wilhelm List et al.*), 11 TWC 1236.

(U) The International Military Tribunal at Nuremberg declared in its judgment that the test of responsibility for superior orders "is not the existence of the order, but whether moral choice was in fact possible."[30]

(U) Domestically, the UCMJ discusses the defense of superior order in The Manual Courts-Martial, which provides in R.C.M. 916(d), MCM 2002:

> It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful. An act performed pursuant to a lawful order is justified. An act performed pursuant to an unlawful order is excused unless the accused knew it to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.

Inference of lawfulness. An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate.[31]

(U) In sum, the defense of superior orders will generally be available for U.S. Armed Forces personnel engaged in exceptional interrogations except where the conduct goes so far as to be patently unlawful.

---

[30] (U) 1 Trial of Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945- 1 October 1946, at 224 (1947), *excerpted in* U.S. Naval War College, International Law Documents, 1946-1947, at 260 (1948).

[31] (U) This inference does not apply to a patently illegal order, such as one that directs the commission of a crime. (Article 90, UCMJ).

4. Lack of DOJ Representation for DOD Personnel Charged with a Criminal Offense

(U) DOJ representation of a defendant is generally not available in federal criminal proceedings, even when the defendant's actions occur within the scope of federal employment.[32]

B. Federal Civil Statutes

1. 28 U.S.C. §1350

(U) 28 U.S.C. §1350 extends the jurisdiction of the U.S. District Courts to "*any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.*"[33] Section 1350 is a vehicle by which victims of torture and other human rights violations by their native government and its agents have sought judicial remedy for the wrongs they've suffered. However, all the decided cases we have found involve foreign nationals suing in U.S. District Courts for conduct by foreign actors/governments.[34] The District Court for the District of Columbia has determined that Section 1350 actions, by the GTMO detainees, against the United States or its agents acting within the scope of employment fail. This is because (1) the United States has not waived sovereign immunity to such suits like those brought by the detainees, and (2) the *Eisentrager* doctrine barring habeas access also precludes other potential avenues of jurisdiction.[35] This of course leaves interrogators vulnerable in their individual capacity for conduct a court might find to constitute torture. Assuming a court would take jurisdiction over the matter and grant standing to the detainee[36], it is possible that this statute would provide an avenue of relief for actions of the United States or its agents found to violate customary international law. The Department of Justice has argued that Section 1350 does not provide a cause of action and is merely jurisdictional in nature. The Department of Justice is currently studying whether to participate in ongoing Section 1350 litigation.

2. Torture Victims Protection Act (TVPA)

(U) In 1992, President Bush signed into law the Torture Victims Protection Act of 1991.[37] Appended to the U.S. Code as a note to section 1350, the TVPA specifically creates a cause of action for individuals (or their successors) who have been subjected to

---

[32] (U) 28 CFR § 50.15 (a)(4)

[33] (U) 28 U.S.C. §1350, the Alien Tort Claim Act (ATCA).

[34] (U) See, for example, *Abebe-Jira v. Negewo*, No. 93-9133, United States Court of Appeals, Eleventh Circuit, Jan 10, 1996. In this case the 11th Circuit concluded, "the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law."

[35] (U) *Al Odah v. United States*, (D.D.C., 2002)

[36] (U) *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980) 885, note 18, "conduct of the type alleged here [torture] would be actionable under 42 U.S.C. § 1983, or undoubtedly the Constitution, if performed by a government official."

[37] (U) Pub. L. No. 102-256, 106 Stat. 73, 28 U.S.C § 1350 (note).

torture or extra-judicial killing by "an individual who, under actual or apparent authority, or color of law, *of any foreign nation* - (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extra-judicial killing shall, in a civil action, be liable for damages ...." (emphasis added)[38] Thus, the TVPA does not apply to the conduct of U.S. agents acting under the color of law.

C. Applicability of the United States Constitution

1. Applicability of the Constitution to Aliens Outside the United States

(U) Nonresident enemy aliens do not enjoy constitutional rights outside the sovereign territory of the United States.[39] The courts have held that unlawful combatants do not gain constitutional rights upon transfer to GTMO as unlawful combatants merely because the U.S. exercises extensive dominion and control over GTMO.[40] Moreover, because the courts have rejected the concept of "de facto sovereignty," constitutional rights apply to aliens only on sovereign U.S. territory. (See discussion under "Jurisdiction of Federal Courts", *infra.*)

(U) Although U.S. constitutional rights do not apply to aliens at GTMO, the U.S. criminal laws do apply to acts committed there by virtue of GTMO's status as within the special maritime and territorial jurisdiction.

2. The Constitution Defining U.S. Obligations Under International Law

(U) In the course of taking reservations to the Convention Against Torture and Other Cruel, and Inhuman or Degrading Treatment or Punishment, the United States determined that the Convention's prohibitions against cruel, inhuman or degrading treatment or punishment applied only to the extent that such conduct was prohibited by the Fifth, Eighth and Fourteenth Amendments to our Constitution.[41] Consequently, analysis of these amendments is significant in determining the extent to which the United

---

[38] (U) The definition of torture used in PL 102-256 is: "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." This definition is substantially similar (with no meaningful difference) to the definition in the Torture Statute. The definition of mental pain and suffering is the same as in the Torture Statute.

[39] (U) *Eisentrager* at 764.

[40] (U) *Al Odah v. United States*, (D.D.C., 2002).

[41] (U) Articles of ratification, 21 Oct 1994: "I. The Senate's advice and consent is subject to the following reservations: (1) 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." Available at the UN documents site: http://193.194.138.190/html/menu3/treaty12_asp.htm.

States is bound by the Convention. It should be clear, however, that aliens held at GTMO do not have constitutional rights under the 5th Amendment's Due Process clause or the 8th Amendment. *See Johnson v. Eisentrager*, 339 U.S. 763 (1950); *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

a. Eighth Amendment

(U) "An examination of the history of the Amendment and the decisions of this [Supreme] Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes."[42] The import of this holding is that, assuming a court would mistakenly hold that it had jurisdiction to hear a detainee's claim, the claim would not lie under the 8th Amendment. Accordingly, detainees could not pursue a claim regarding their pre-conviction treatment under the Eight Amendment.

(U) The standards of the Eighth Amendment are relevant, however, due to the U.S. Reservation to the Torture Convention's definition of cruel, inhuman, and degrading treatment. Under "cruel and unusual punishment" jurisprudence, there are two lines of analysis that are relevant to the conduct of interrogations: (1) conditions of confinement, and (2) excessive force. As a general matter, the excessive force analysis applies to the official use of physical force, often in situations in which an inmate has attacked another inmate or a guard whereas the conditions of confinement analysis applies to such things as administrative segregation. Under the excessive force analysis, "a prisoner alleging excessive force must demonstrate that the defendant acted 'maliciously and sadistically'" for the very purpose of causing harm. *Porter* v. *Nussle*, 534 U.S. 516, 528 (2002) (quoting *Hudson* v. *McMillan*, 503 U.S.1, at 7). Excessive force requires the unnecessary and wanton infliction of pain. *Whitney v. Albers*, 475 U.S. 312, 319 (1986).

(U) A condition of confinement is not "cruel and unusual" unless it (1) is "sufficiently serious" to implicate constitutional protection, *id.* at 347, and (2) reflects "deliberate indifference" to the prisoner's health or safety, *Farmer v. Brennan* 511 U.S. 825, 834 (1994). The first element is objective, and inquires whether the challenged condition is cruel and unusual. The second, so-called "subjective" element requires examination of the actor's intent and inquires whether the challenged condition is imposed as punishment. *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) ("The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.").

(U) The Supreme Court has noted that "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the

[42] (U) *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). In *Ingraham*, a case about corporal punishment in a public junior high school, the Court analyzed the claim under the 14th amendment's Due Process clause, concluding that the conduct did not violate the 14th amendment, even though it involved up to 10 whacks with a wooden paddle.

progress of a maturing society." *Rhodes*, 452 U.S. at 146 (citation omitted). *See also Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (stating that the Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency"). Nevertheless, certain guidelines emerge from the Supreme Court's jurisprudence.

(U) The Court has established that "only those deprivations denying 'the minimal civilized measures of life's necessities' sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson*, 501 U.S. at 298, *quoting Rhodes*, 452 U.S. at 347. It is not enough *for* a prisoner to show that he has been subjected to conditions that are merely "restrictive and even harsh," as such conditions are simply "part of the penalty that criminal offenders pay *for* their offenses against society." *Rhodes*, 452 U.S. at 347. *See also Wilson* at 349 ("the Constitution does not mandate comfortable prisons"). Rather, a prisoner must show that he has suffered a "serious deprivation of basic human needs," *id.* at 347, such as "essential food, medical care, or sanitation," *Id.* at 348. *See also Wilson*, 501 U.S. at 304 (requiring "the deprivation of a single, identifiable human need such as food, warmth, or exercise"). "The Amendment also imposes [the duty on officials to] provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates." *Farmer*, 511 U.S. at 832 (citations omitted). The Court has also articulated an alternative test inquiring whether an inmate was exposed to "a substantial risk or serious harm." *Id.* at 837. *See also DeSpain v. Uphoff*, 264 F.3d 965, 971 (10th Cir. 2001) ("In order to satisfy the [objective] requirement, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.").

(U) The various conditions of confinement are not to be assessed under a totality of the circumstances approach. In *Wilson* v. *Seiter*, 501 U.S. 294 (1991), the Supreme Court expressly rejected the contention that "each condition must be considered as part of the overall conditions challenged." *Id.* at 304 (internal quotation marks and citation omitted). Instead the Court concluded that "Some conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets." *Id.* at 304. As the Court further explained, "Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." *Id.* at 305.

(U) To demonstrate deliberate indifference, a prisoner must demonstrate "that the official was subjectively aware of that risk." *Farmer* v. *Brennan* 511 U.S. 125 (1994). As the Supreme Court further explained:

> We hold... that a prison official cannot be found liable under the Eighth Amendment for denying any inmate humane conditions of confinement unless the official knows of and regards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference can be drawn that a substantial risk of serious harm exists and he must also draw the inference.

Farmer v. *Brennan* 511 U.S. 825, 837 (1994). This standard requires greater culpability than mere negligence. *See Farmer* v. *Brennan*, 511 U.S. 825, 837 (1994); *Wilson v. Seiter*, 501 U.S. 294, 302 (1991) ("mere negligence would satisfy neither [the *Whitley* standard of malicious and sadistic infliction] nor the more lenient deliberate indifference standard") (internal quotation marks omitted).

(U) The second line of cases considers the use of force against prisoners. The situation often arises in cases addressing the use of force while quelling prison disturbances. In cases involving the excessive use of force the central question is whether the force was applied in good faith in an attempt to maintain or restore discipline or maliciously and sadistically with the very purpose of causing harm.[43] Malicious and sadistic use of force always violates contemporary standards of decency and would constitute cruel and unusual punishment.[44] The courts apply a subjective test when examining intent of the official. In determining whether a correctional officer has used excessive force in violation of the Eighth Amendment, courts look to several factors including: (1) "the need for the application of force"; (2) "the relationship between the need and the amount of force that was used"; (3) "the extent of injury inflicted"; (4) "the extent of the threat to the safety of staff and inmates, as reasonably perceived by responsible officials on the basis of the facts known to them"; and (5) "any efforts made to temper the severity of a forceful response."[45] Great deference is given to the prison official in the carrying out of his duties.[46]

(U) One of the Supreme Court's most recent opinions on conditions of confinement – *Hope v. Pelzer*, 122 S.Ct. 2508 (2002) – illustrates the Court's focus on the necessity of the actions undertaken in response to a disturbance in determining the officer's subjective state of mind.[47] In *Hope*, following an "exchange of vulgar remarks" between the inmate Hope and an officer, the two got into a "wrestling match." *Id.* at 2512. Additional officers intervened and restrained Hope. *See id.* These officers then took Hope back to prison. Once there, they required him to take off his shirt and then attached him to the hitching post, where he remained in the sun for the next seven hours. See *id.* at 2512-13. During this time, Hope received no bathroom breaks. He was given water only once or twice and at least one guard taunted him about being thirsty. See *id.* at 2513. The Supreme Court concluded that the facts Hope alleged stated an "obvious" Eighth Amendment violation. *Id* at 2514. The obviousness of this violation stemmed from the utter lack of necessity for the actions the guards undertook. The Court emphasized that "any safety concerns" arising from the scuffle between Hope and the officer "had long since abated by the time [Hope] was attached to the hitching post" and

[43] (U) Actions taken in "good-faith. . .to maintain or restore discipline" do not constitute excessive force. *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)

[44] (U) *Hudson v. McMillian*, 503 U.S. 1, 9 (1992)

[45] (U) *Whitley* at 321.

[46] (U) *Whitley v. Albers*, 475 U.S. (1986).

[47] (U) Although the officers' actions in Hope were undertaken in response to a scuffle between an inmate and a guard, the case is more properly thought of a "conditions of confinement" case rather than an "excessive force" case. By examining the officers' actions through the "deliberate indifference standard" the Court analyzed it as a "conditions of confinement" case. The deliberate indifference standard is inapplicable to claims of excessive force.

that there was a "clear lack of an emergency situation." *Id.* As a result, the Court found that "[t]his punitive treatment amount[ed] to [the] gratuitous infliction of 'wanton and unnecessary' pain that our precedent clearly prohibits." *Id.* at 2515. Thus, the necessity of the governmental action bears upon both the conditions of confinement analysis as well as the excessive force analysis.

(U) In determining whether the government's actions are "wanton and unnecessary," consideration must be given to the government's legitimate interests. In the context of the war on terrorism and the collection of intelligence from detainees regarding future attacks, the legitimate government interest is of the highest magnitude. In the typical conditions of confinement case, the protection of other inmates or officers, the protection of the inmate alleged to have suffered the cruel and unusual punishment, or even the maintenance of order in the prison, provide valid government interests for various deprivations. *See, e.g., Anderson v. Nosser*, 438 F.2d 183, 193 (5th Cir. 1971) ("protect[ing] inmates from self-inflicted injury, protect[ing] the general prison population and personnel from violate acts on his part, [and] prevent[ing] escape" are all legitimate penological interests that would permit the imposition of solitary confinement); *McMahon* v. *Beard*, 583 F.2d 172, 175 (5th Cir. 1978) (prevention of inmate suicide is a legitimate interest). As with excessive force, no court has encountered the precise circumstances here under conditions of confinement jurisprudence. Nonetheless, there can be no more compelling government interest than that which is presented here and, depending upon the precise factual circumstances of an interrogation, e.g., where there is credible information that the detainee had information that could avert a threat, deprivations that may be caused would not be wanton or unnecessary.

b. Fifth Amendment and Fourteenth Amendment[48]

(U) All persons within the territory of the United States are entitled to the protections of Due Process as provided by the 5th and 14th Amendments, including corporations, aliens, and presumptively citizens seeking readmission to the United States. However, the Due Process Clause does not apply to enemy alien belligerents engaged in hostilities against the United States and/or tried by military tribunals outside the territorial jurisdiction of the United States.[49] The *Eisentrager* doctrine works to prevent access by enemy belligerents, captured and held abroad, to U.S. courts. Further, in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Supreme Court held that aliens outside the United States did not have Fourth Amendment rights against the U.S. government. Indeed, in that case, the Court observed that extension of constitutional rights to aliens outside of the United States would interfere with the military operations against the nation's enemies.

(U) In the detainee context, the standards of the Due Process Clauses are relevant due to the U.S. Reservation to the Torture Convention's definition of cruel, inhuman, and

[48] (U) Because the Due Process considerations under the 5th and 14th amendments are the same for our purposes, this analysis considers them together.
[49] (U) *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946).

degrading treatment, which the United States has defined to mean conduct prohibited under the Due Process Clause of the 5th and 14th Amendments (in addition to the standards under the 8th Amendment discussed above). The Due Process jurisprudence is divided into two distinct categories—procedural due process and substantive due process. Procedural due process is manifest in issues pertaining to the provision of adequate administrative and/or judicial process, including notice and an opportunity to be heard. Substantive due process involves questions of force being excessive in light of the government interest being addressed. In the detainee context, the limits of substantive due process define the scope of permissible interrogation techniques that may be applied to unlawful combatants held outside the United States.

(U) Under the Fifth Amendment right to Due Process, substantive due process protects an individual from "the exercise of power without any reasonable justification in the service of any legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Under substantive due process "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id* at 846 (internal quotation marks omitted). That conduct must "shock[] the conscience." *See generally id; Rochin v. California*, 342 U.S. 165 (1952).[50] By contrast to deprivations in procedural due process, which cannot occur so long as the government affords adequate processes, government actions that "shock the conscience" are prohibited irrespective of the procedures the government may employ in undertaking those actions. *See generally Rochin v. California*, 342 U.S. 164 (1952).

(U) To shock the conscience, the conduct at issue must involve more than mere negligence by the government official. *See County of Sacramento*, 523 U.S. at 849. *See also Daniel v. Williams*, 474 U.S. 327 (1986) ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property.") (collecting cases). Instead, "[I]t is...behavior on the other end of the culpability spectrum that would most probably support a substantive due process claim: conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *See County of Sacramento*, 523 U.S. at 849. In some circumstances, however, recklessness or gross negligence may suffice. *See id.* The requisite level of culpability is ultimately "not. . .subject to mechanical application in unfamiliar territory." *Id.* at 850. As the Court explained: "Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Id.* As a general

[50] (U) In the seminal case of *Rochin v California*, 342 U.S. 165 (1952), the police had some information that the defendant was selling drugs. Three officers went to and entered the defendant's home without a warrant and forced open the door to defendant's bedroom. Upon opening the door, the officers saw two pills and asked the defendant about them. The defendant promptly put them in his mouth. The officers "jumped upon him and attempted to extract the capsules." *Id.* at 166. The police tried to pull the pills out of his mouth but despite considerable struggle the defendant swallowed them. The police then took the defendant to a hospital where a doctor forced an emetic solution into the defendant's stomach by sticking a tube down his throat and into his stomach, which cause the defendant to vomit up the pills. The pills did in fact contain morphine. *See id.* The Court found that the actions of the police officers "shocked the conscience" and therefore violated Rochin's due process rights. *Id* at 170.

matter, deliberate indifference would be an appropriate standard where there is a real possibility for actual deliberation. In other circumstances, however, where quick decisions must be made (such as responding to a prison riot), a heightened level of culpability is more appropriate. *See id.* at 851- 52.

(U) The shock-the-conscience standard appears to be an evolving one as the Court's most recent opinion regarding this standard emphasized that the conscience shocked was the "*contemporary* conscience." *Id.* at 847 n.8 (emphasis added). The court explained that while a judgment of what shocks the conscience "may be informed by a history of liberty protection, [] it necessarily reflects a traditional understanding of executive behavior, of contemporary practice, and of the standards of blame generally applied to them." *Id.* Despite the evolving nature of the standard, the standard is objective rather than subjective. The Supreme Court has cautioned that although "the gloss has ... has not been fixed" as to what substantive due process is, judges "may not drawn on [their] merely personal and private notions and disregard the limits that bind judges in their judicial function... [T]hese limits are derived from considerations that are fused in the whole nature of our judicial process." *Rochin*, 342 U.S. at 170. *See also, United States v. Lovasco*, 431 U.S. 783 (1973) (reaffirming that the test is objective rather than subjective). As the Court further explained, the conduct at issue must "do more than offend some fastidious squeamishness or private sentimentalism' in order to violate due process. *Rochin*, 342 U.S. at 172.

(U) The Supreme Court also clarified in *Ingraham v. Wright*, 430 U.S. 651 (1977), that under substantive due process, "[t]there is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." *Id.* at 674. And as Fourth Circuit has noted, it is a "principle...inherent in the Eighth [Amendment] and [substantive due process" that "[n]ot ...every malevolent touch by a prison guard gives rise to a federal cause of action. *See Johnson v. Glick*, 481 F.2d at 1033 ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights")." *Riley v. Dorton*, 115 F.3d 1159, 1167 (4th Cir. 1997) (quoting *Hudson*, 503 U.S. at 9). Instead, "the [shock-the-conscience]... inquiry....[is] whether the force applied caused injury so severe, and was so disproportionate to the need presented and so inspired by malice or sadism...that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987). Examples of physical brutality that "shock the conscience" include: the rape of a plaintiff by uniformed officer, see *Jones v. Wellham*, 104 F.3d 620 (4th Cir. 1997); a police officer striking a plaintiff in retaliation for the plaintiff photographing the police officer, see *Shillinford v. Holmes*, 634 F.2d 263 (5th Cir. 1981); police officer shot a fleeing suspect's legs without any probable cause other than the suspect's running and failing to stop, see *Aldridge v. Mullins*, 377 F. Supp. 850 (M.D. Tenn. 1972) *aff'd*, 474 1189 (6th Cir. 1973). Moreover, beating or sufficiently threatening someone during the course of an interrogation can constitute conscience-shocking behavior. See *Gray v. Spillman*, 925 F.2d 90, 91 (4th Cir. 1991) (plaintiff was beaten and threatened with further beating if he did not confess). By contrast, for example, actions such as verbal insults and an angry slap of "medium force" did not constitute behavior that "shocked the conscience." *See*

Riley v. Dorton, 115 F.3d 1159, 1168 n.4 (4th Cir. 1997) (finding claims that such behavior shocked the conscience "meritless").

(U) Physical brutality is not the only conduct that may meet the shock-the-conscience standard. In *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (en banc), the Ninth Circuit held that certain psychologically-coercive interrogation techniques could constitute a violation of substantive due process. The interrogators techniques were "designed to instill stress, hopelessness, and fear, and to break [the suspect's] resistance." *Id.* at 1229. The officers planned to ignore any request for a lawyer and to ignore the suspect's right to remain silent, with the express purpose that any statements he might offer would help keep him from testifying in his own defense. *See id.* at 1249. It was this express purpose that the court found to be the "aggravating factor" that lead it to conclude that the conduct of the police "shocked the conscience." *Id.* at 1249. The court reasoned that while "it is a legitimate purpose of police investigation to gather evidence and muster information that will surround a guilty defendant and make it difficult if not impossible for him to escape justice[,]" "when the methods chosen to gather evidence and information are deliberately unlawful and flout the Constitution, the legitimacy is lost." *Id.* at 1250. In *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989), the Seventh Circuit found that severe mental distress inflicted on a suspect could be a basis for a substantive due process claim. *See id.* at 195. *See also Rhrodes v. Robinson*, 612 F.2d 766, 771 (3d Cir. 1979) (claim of emotional harm could be the basis of a substantive due process claim). The *Wilkins* court found that under certain circumstances interrogating a suspect with gun at his head could violate those rights. *See* 872 F.2d at 195. Whether it would rise to the level of violation depended upon whether the plaintiff was able to show "misconduct that a reasonable person would find so beyond the norm of proper police procedure as to shock the conscience, and that it is calculated to induce not merely momentary fear or anxiety, but severe mental suffering, in the plaintiff." *Id.* On the other hand, we note that merely deceiving the suspect does not shock the conscience, see, e.g., *United States v. Byram*, 145 F.3d 405 (1st Cir. 1998) (assuring defendant he was not in danger of prosecution did not shock the conscience) nor does the use of sympathy or friends as intermediaries, see, e.g., *United States v. Simtob*, 901 F.2d 799, 809 (9th Cir. 1990).

(U) Although substantive due process jurisprudence is not necessarily uniform in all applications, several principles emerge. First, whether conduct is conscience-shocking turns in part on whether it is without any justification, i.e., it is "inspired by malice or sadism." *Webb*, 828 F .2d at 1158. Although unlawful combatants may not pose a threat to others in the classic sense seen in substantive due process cases, the detainees here may be able to prevent great physical injury to countless others through their knowledge of future attacks. By contrast, if the interrogation methods were undertaken solely to produce severe mental suffering, they might shock the conscience. Second, the official must have acted with more than mere negligence. Because, generally speaking, there will be time for deliberation as to the methods of interrogation that will be employed, it is likely that the culpability requirement here is deliberate indifference. *See County of Sacramento*, 523 U.S. at 851-52. Thus, an official must know of a serious risk to the health or safety of a detainee and he must act in conscious disregard for that risk in order to violate due process standards. Third, this standard permits some physical

contact. Employing a shove or slap as part of an interrogation would not run afoul of this standard. Fourth, the detainee must sustain some sort of injury as a result of the conduct, e.g., physical injury or severe mental distress, in order for the constraints of substantive due process to be applicable.

D. Jurisdiction of Federal Courts

1. Jurisdiction to Consider Constitutional Claims

(U) The federal habeas statute provides that courts may only grant the writ "within their respective jurisdictions." This has been interpreted to limit a court's subject matter jurisdiction over habeas cases to those in which a custodian lies within the jurisdiction. For U.S. citizens, habeas jurisdiction lies regardless of where the detention occurs. The habeas action must be brought in the district in which a custodian resides or, if all custodians are outside the United States, in the District of Columbia. For aliens, there is no habeas jurisdiction outside the sovereign territory of the United States.[51]

(U) As construed by the courts, habeas jurisdiction is coterminous with the reach of constitutional rights, although that result is a matter of statutory construction. Congress has the power to extend habeas jurisdiction beyond the reach of constitutional rights but may not place greater restrictions on it.

(U) In *Johnson v. Eisentrager*, the Supreme Court ruled that enemy aliens, captured on the field of battle abroad by the U.S. Armed Forces, tried abroad for war crimes, and incarcerated abroad do not have access to the U.S. courts[52] over a habeas petition filed by German nationals seized by U.S. soldiers in China. *Eisentrager* considered habeas corpus petitions by German soldiers captured during WWII in China supporting the Japanese, convicted by Military Commission sitting in China, and incarcerated in Germany and concluded that United States courts lacked jurisdiction.[53]

---

[51] (U) *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[52] (U) *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950). "We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." With those words, the Supreme Court held that: "a nonresident enemy alien has no access to our courts in wartime."

[53] (U) For a fuller discussion of Habeas Corpus law as it applies to Naval Base, Guantanamo Bay, *see* memorandum, LCDR F. Greg Bowman of 29 Jan 02, subj: CRIMINAL JURISDICTION AND ITS EFFECTS OF AVAILABILITY OF THE WRIT OF HABEAS CORPUS AT U.S. NAVAL BASE, GUANTANAMO BAY, CUBA (on file).

(U) Recently, unlawful combatants detained at Guantanamo Bay, Cuba (GTMO) have sought review in U.S. district court through the writ of habeas corpus, 28 U.S.C. § 2241.[54]

(U) Two courts have examined, and rejected, petitioners' claims that U.S. exclusive jurisdiction over GTMO results in a form of "de facto sovereignty" and, therefore, vests habeas jurisdiction in the federal courts.

2. Other Bases for Federal Jurisdiction

(U) In addition, one group of GTMO detainees has challenged conditions of confinement through the Alien Tort Claims Act (ATCA) and the Administrative Procedures Act (APA). The courts have declined to exercise jurisdiction on those theories in each case to date. Petitioners in *Al Odah* attempted to circumvent the territorial limitations of habeas by bringing their action under the APA and ATCA, however the U.S. Court of Appeals for the District of Columbia held that the courts did not have jurisdiction with respect to the petitioners' claims under any theory, finding that their status as aliens unconnected to the United States makes them beyond the jurisdiction of the federal courts. *See Odah v. United States*, 321 F.3rd 1134 (DC Cir. 2003).[55]

(U) The court also held, in the alternative, that it lacked jurisdiction even if petitioners were not barred by the exclusive nature of habeas actions. The ATCA provides the "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 18 U.S.C. § 1350. The ATCA, although it provides federal jurisdiction over private suits, does not waive sovereign immunity for a suit against the United States. The courts have held that the APA's waiver of sovereign immunity for nonmonetary damages can theoretically be used to maintain an ATCA action against the United States. The *Al Odah* Court, however, found that the APA's exemption for "military authority exercised in the field in time of war or in occupied territory" precluded the ATCA.

3. The Military Extraterritorial Jurisdiction Act

(U) The Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. § 3261 *et seq*, extends Federal criminal jurisdiction for serious Federal offenses committed outside the United States to civilian persons accompanying the Armed Forces (e.g., civilian employees and contractor employees), and to members of the Armed Forces who committed a criminal act while subject to the UCMJ but who are no longer are subject to the UCMJ or who committed the offense with a defendant not subject to the UCMJ. The standard is that if the conduct by the individual would "constitute an offense punishable by imprisonment for more than one year *if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States*." (emphasis added).

---

[54] (U) *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal.), affirmed in part and vacated in part, 310 F.3d 1153 (9th Cir. 2002); *Rasul v. Bush*, 215 F.2d 55 (D.D.C. 2002).

[55] (U) The concurring opinion in *Odah* argued that, in addition to not providing a means of jurisdiction, the ACTA also did not provide an independent cause of action.

E. The Uniform Code of Military Justice

(U) The Uniform Code of Military Justice (UCMJ) applies to United States Forces on active duty, at all times and in all places throughout the world. Members of the Reserve component and retired regular officers can, under certain circumstances, also be subject to the UCMJ, as can civilians accompanying the Armed Forces in time of war under certain circumstances.[56]

1. Offenses

(U) A number of UCMJ provisions potentially apply to service members involved in the interrogation and supervision of the interrogation of detainees. Most significant are the following:[57]

a. Cruelty, Oppression or Maltreatment, Art 93

(U) The elements of the offense are that the alleged victim was subject to the orders of the accused and that the accused was cruel toward, oppressed, or maltreated the victim. The cruelty, etc. need not be physical. Subject to the orders of, includes persons, subject to the UCMJ or not, who are by some reason of some duty are required to obey the lawful orders of the accused, even if not in the direct chain of command of the accused. "Cruel," "oppressed," and "maltreated" refer to unwarranted, harmful, abusive, rough or other unjustifiable treatment that, under all the circumstances, results in physical or mental pain or suffering and is unwarranted, unjustified and unnecessary for any lawful purpose. It is measured by an objective standard. MCM IV-25; MJB, Section 3-17-1.

b. Reckless Endangerment, Art 134

(U) The elements of the offense are that the accused engaged in wrongful conduct that was reckless or wanton and that the conduct was likely to produce death or grievous bodily harm. "[L]ikely to produce" means the natural or probable consequences of particular conduct. "[G]rievous bodily harm" includes injuries comparable to fractured or dislocated bones, serious damage to internal organs. MCM IV-119; MJB, Section 3-100A-1.

c. Assault, Art 128

(U) This article encompasses the following offenses:

---

[56] (U) Article 2 UCMJ; Rules for Courts-Martial, Rule 202, and Discussion.

[57] (U) The following are extracted from the Department of the Army Pamphlet 27-9, Military Judges' Benchbook (MJB), which summarizes the requirements of the Manual For Courts-Martial (MCM) and case law applicable to trials by courts martial.

(U) Simple assault – The elements are that the accused attempted or offered to do bodily harm to an individual and that such attempt or offer was done with unlawful force and violence. An act of force or violence is unlawful if done without legal justification or excuse and without the consent of the victim. The use of threatening words accompanied by a menacing act or gesture may constitute an assault. MCM IV-81; MJB, Section 3-54-1.

(U) Assault consummated by a battery – An assault resulting in actual infliction of bodily harm is a battery. Bodily harm means any physical injury to or offensive touching, however slight. MCM IV-83; MJB, Section 3-54-1A

(U) Aggravated assault (use of a dangerous weapon, means or force) – In addition to the elements of an assault, this offense requires that the means or force attempted or offered was used in a manner likely to produce death or grievous bodily harm. Any object, regardless of its normal use, could become a means likely to inflict grievous bodily harm depending on the manner in which it is actually used. MCM IV-84; MJB, Section 3-54-8

(U) There are multiple instances in which authority and context permit touching – by police officers, prison guards, training NCOs, etc. – that would not be lawful under other circumstances. A central issue would be how clearly the limits of authority were defined and whether under the circumstances the individual exceeded the scope of that authority.

d. Involuntary Manslaughter, Art 119

(U) The elements of this offense are that acts or omissions constituting culpable negligence resulted in an unlawful killing. Culpable negligence contemplates a level of heedlessness in circumstances in which, when viewed in the light of human experience, might foreseeably result in death. MCM IV-64. Failure to develop and follow reasonable protocols providing for the health and safety of detainees during interrogations of detainees could amount to such culpable negligence. MJB, Section 3-44-2.

e. Unpremeditated Murder, Art 118

(U) The relevant elements of the offense are that the person is dead, his death resulted from the act or failure to act of the accused, that the killing was unlawful, without legal justification, and at that time the accused had the intent to inflict great bodily harm upon the person. MCM IV-118, MJB, Section 3-43-2.

f. Disobedience of Orders, Art 92

(U) This offense is committed when the accused, having a duty to do so, fails to obey lawful orders or regulations. MCM IV-23; MJB, Section 3-16. The duty to obey may extend to treaties and statutes as well as regulations. The Convention against

Torture and the general case law regarding cruel and unusual punishment may be relevant here as it is for Article 93. *See generally, Wilson v. Seiter*, 501 U.S. 294 (1991).

g. Dereliction of Duty, Art 92

(U) A dereliction occurs when an individual knew or should have known of certain prescribed duties and either willfully or through neglect was derelict in the performance of those duties. MCM IV-24; MJB, Section 3-16-4. Customs of the service as well as statutes and treaties that have become the law of the land may create duties for purposes of this article.

h. Maiming, Art 124

(U) The elements of this offense are that the accused intentionally inflicted an injury on a person, and whether intended or not, that the injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished the person's physical vigor. MCM IV-77; MJB, Section 3-50-1.

2. Affirmative Defenses under the UCMJ (R.C.M. 916)

(U) In order for any use of force to be lawful, it must either be justified under the circumstances or an accepted affirmative defense is present to excuse the otherwise unlawful conduct. No case law was found that defines at what point force or violence becomes either lawful or unlawful during war. Each case is by its nature, dependent upon the factual circumstances surrounding the incident.

(U) Applying accepted rules for the law of armed conflict, the use of force is only authorized when there is a military purpose and the force used is no greater than necessary to achieve the objective. The existence of war does not in and of itself justify all forms of assault. For instance, in *United States v. Calley*, 22 U.S.C.M.A. 534, 48 C.M.R.19 (1973), the court recognized that "while it is lawful to kill an enemy in the heat and exercise of war, to kill such an enemy after he has laid down his arms . . . is murder." Further, the fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment. The thrust of these holdings is that even in war, limits to the use and extent of force apply.

a. Self-Defense

(U) For the right of self-defense to exist, the accused must have had a reasonable apprehension that death or grievous bodily harm was about to be inflicted on himself. The test is whether, under the same facts and circumstances, an ordinary prudent adult

person faced with the same situation would have believed that there were grounds to fear immediate death or serious bodily harm (an objective test) and the person must have actually believed that the amount of force used was required to protect against death or serious bodily harm (a subjective test). Grievous bodily harm means serious bodily injury. It does not mean minor injuries such as a black eye or a bloody nose, but does mean fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries. MJB, Section 5-2. (See also the discussion of "Self-Defense" under the discussion of Federal law, *supra*.)

b. Defense of Another

(U) For this defense, the accused must have had a reasonable belief that harm was about to be inflicted and that the accused actually believed that force was necessary to protect that person. The accused must actually believe that the amount of force used was necessary to protect against the degree of harm threatened. MJB, Section 5-3-1.

c. Accident

(U) This defense arises when an accused is doing a lawful act in a lawful manner, free of any negligence, and unforeseeable or unintentional death or bodily harm occurs. MJB, Section 5-4.

d. Mistake of Fact

(U) If ignorance or mistake of a fact concerns an element of an offense involving specific intent, the ignorance or mistake need only exist in the mind of the accused, i.e., if the circumstances of an event were as the accused believed, there would be no offense. For crimes not involving specific intent, the ignorance or mistake must be both honest (actual) and reasonable. The majority of the crimes discussed above do not require specific intent. For instance, in the case of violations of general orders, knowledge is presumed. Most of the "mistakes" would likely be mistakes of law in that the accused would not believe that the conduct was unlawful. While mistakes of law are generally not a defense, unawareness of a law may be a defense to show the absence of a criminal state of mind when actual knowledge is not necessary to establish the offense. MJB, Section 5-11.

e. Coercion or duress

(U) It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. This apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply. R.C.M. 916(h), MJB, Section 5-5.

(U) To establish a duress defense it must be shown that an accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily harm if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply. The Court of Appeals stated in *United States v. Fleming*, 23 C.M.R. 7 (1957), that the defense of duress is available to an accused only if his commission of the crime charged resulted from reasonable fear of imminent death or grievous bodily harm to himself or his family. The risk of injury must continue throughout the criminal venture.

f. Obedience to Orders (MJB, Sections 5-8-1 and 5-8-2)

(U) The viability of obedience to orders as a defense turns on the directives and policy of the service member's Chain of Command. For example, when the interrogator at the direction of the command employs the use of physical force as an interrogation method, he/she would certainly raise the defense of obedience to orders. The question then becomes one of degree. While this may be a successful defense to simple assaults or batteries, it would unlikely be as successful to more serious charges such as maiming and manslaughter. Within the middle of the spectrum lay those offenses for which the effectiveness of this defense becomes less clear. Those offenses would include conduct unbecoming an officer, reckless endangerment, cruelty, and negligent homicide.

(U) Obedience to orders provides a viable defense only to the extent that the accused acted under orders, and did not know (nor would a person of ordinary sense have known), the orders were unlawful. Thus, the viability of this defense is keyed to the accused's (or a reasonable person's) knowledge of the lawfulness of the order. Common sense suggests that the more aggressive and physical the technique authorized (ordered) by the command, the more unlikely the reasonable belief that the order to employ such methods is lawful.

(U) In order for any use of force to be lawful, it must either (i) be justified under the circumstances or (ii) an accepted affirmative defense is present to excuse the otherwise unlawful conduct. No case law was found that defines at what point force or violence becomes either lawful or unlawful during war. Each case is by its nature, dependent upon the factual circumstances surrounding the incident.

(U) Applying accepted rules for the law of armed conflict, the use of force is only authorized when there is a military purpose and the force used is no greater than necessary to achieve the objective. The existence of war does not in and of itself justify all forms of assault. For instance, in *US v. Calley*, the court recognized that "while it is lawful to kill an enemy "in the heat and exercise of war, to kill such an enemy after he has laid down his arms . . . is murder." Further, the fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense

in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment." The thrust of these holdings is that even in war, limits to the use and extent of force apply.

g. Necessity

(U) Another common law affirmative defense is one of necessity. This defense is recognized by a number of states and is applicable when: 1) the harm must be committed under the pressure of physical or natural force, rather than human force; 2) the harm sought to be avoided is greater than (or at least equal to) that harm sought to be prevented by the law defining the offense charged; 3) the actor reasonably believes at the moment that his act is necessary and is designed to avoid the greater harm; 4) the actor must be without fault in bringing about the situation; and 5) the harm threatened must be imminent, leaving no alternative by which to avoid the greater harm.

(U) However, military courts have treated the necessity defense with disfavor, and in fact, some have refused to accept necessity as a permissible defense (the MCM does not list necessity as an affirmative defense under RCM 916). "The problem with the necessity defense is that it involves a weighing of evil inflicted against evil avoided and is, thereby, difficult to legislate." The courts also have been reluctant to embrace the defense due to a "fear that private moral codes will be substituted for legislative determination, resulting in a necessity exception that swallows the rule of law." *United States v. Rankins*, 34 MJ 326 (CMA 1992).

(U) The effect of these cases is that the MCM recognizes that an accused may commit an illegal act in order to avoid the serious injury or death of the accused or an innocent person. However, military law limits this defense only when there is an imminent and continuing harm that requires immediate action to prevent. Once the immediacy is gone, the defense will no longer apply. Ostensibly, the use of force to acquire information from an unlawful combatant, absent immediate and compelling circumstances, will not meet the elements established by the MCM and case law. (But see the necessity defense in the discussion of Federal law, *supra*.)

3. **Legal doctrines could render specific conduct, otherwise criminal, *not* unlawful**

See discussion of Commander-in-Chief Authority, *supra*.

IV. Considerations Affecting Policy

A. Historical Role of U.S. Armed Forces

1. Background

(U) The basic principles of interrogation doctrine, procedures, and techniques applicable to Army intelligence interrogations from June 1945 through May 1987 were contained in Field Manual (FM) 30-15, Examination of Personnel and Documents. FM 30-15 set forth Army doctrine pertaining to the basic principles of intelligence interrogations and established the procedures and techniques applicable to Army intelligence interrogations of non-U.S. personnel. The other Services report that they too apply the provisions of this Field Manual.

2. Interrogation Historical Overview

(U) FM 30-15 stated that the principles and techniques of interrogation discussed within the manual are to be used within the constraints established by humanitarian international law and the Uniform Code of Military Justice ("UCMJ"). The fundamental principle underlying Army doctrine concerning intelligence interrogations between 1945 and the issuance of current doctrine in 1987 (FM 34-52), is that the commander may utilize all available resources and lawful means in the accomplishment of his mission and for the protection and security of his unit. However, a strong caveat to this principle noted, "treaty commitments and policy of the United States, international agreements, international law, and the UCMJ require the conduct of military to conform with the law of war." FM 30-15 also recognized that Army intelligence interrogations must conform to the "specific prohibitions, limitations, and restrictions established by the Geneva Conventions of 12 August 1949 for the handling and treatment of personnel captured or detained by military forces" (citing FM 27-10, The Law of Land Warfare).

(U) FM 30-15 also stated that "violations of the customary and treaty law applicable to the conduct of war normally constitute a concurrent violation of the Uniform Code of Military Justice and will be prosecuted under that code." The manual advised Army personnel that it was "the direct responsibility of the Commander to insure that the law of war is respected in the conduct of warfare by forces in his command." Thus, the intelligence interrogation techniques outlined in FM 30-15 were based upon conduct sanctioned under international law and domestic U.S. law and as constrained within the UCMJ.

(U) Historically, the intelligence staff officer (G2/S2) was the primary Army staff officer responsible for all intelligence functions within the command structure. This responsibility included interrogation of enemy prisoners of war (EPW), civilian internees, and other captured or detained persons. In conducting interrogations, the intelligence staff officer was responsible for insuring that these activities were executed in accordance with international and domestic U.S. law, United States Government policy, and the applicable regulations and field manuals regarding the treatment and handling of EPWs,

civilian internees, and other captured or detained persons. In the maintenance of interrogation collection, the intelligence staff officer was required to provide guidance and training to interrogators, assign collection requirements, promulgate regulations, directives, and field manuals regarding intelligence interrogation, and insure that interrogators were trained in international and domestic U.S. law and the applicable Army publications.

(U) FM 30-15 stated that intelligence interrogations are an art involving the questioning and examination of a source in order to obtain the maximum amount of usable information. Interrogations are of many types, such as the interview, a debriefing, and an elicitation. However, the FM made clear that the principles of objective, initiative, accuracy, prohibitions against the use of force, and security apply to all types of interrogations. The manual indicated that the goal is to collect usable and reliable information, in a lawful manner, promptly, while meeting the intelligence requirements of the command.

(U) FM 30-15 emphasized a prohibition on the use of force during interrogations. This prohibition included the actual use of force, mental torture, threats, and exposure to inhumane treatment of any kind. Interrogation doctrine, procedures, and techniques concerning the use of force are based upon prohibitions in international and domestic U.S. law. FM 30-15 stated that experience revealed that the use of force was unnecessary to gain cooperation and was a poor interrogation technique, given that its use produced unreliable information, damaged future interrogations, and induced those being interrogated to offer information viewed as expected in order to prevent the use of force. However, FM 30-15 stated that the prohibition on the use of force, mental or physical, must not be confused with the use of psychological tools and deception techniques designed to induce a source into providing intelligence information.

(U) The Center for Military History has been requested to conduct a search of government databases, to include the Investigative Records Repository, for documentation concerning the historical participation of the U.S. Armed Forces in interrogations and any archival materials related to interrogation techniques. As of the writing of this analysis, no reply has been received.

3. Current Doctrine

(U) In May 1987, the basic principles of current doctrine, procedures, and techniques applicable to Army intelligence interrogations were promulgated in Field Manual (FM) 34-52, Intelligence Interrogation. FM 34-52 provides general guidance for commanders, staff officers, and other personnel in the use of interrogation elements in Army intelligence units. It also outlines procedures for handling sources of interrogations, the exploitation and processing of documents, and the reporting of intelligence gained through interrogation. Finally, FM 34-52 covers directing and supervising interrogation operations, conflict scenarios, and their impact on interrogation operations, to include peacetime interrogation operations.

(U) Army interrogation doctrine today, and since 1945, places particular emphasis on the humane handling of captured personnel. Interrogators receive specific instruction by Army Judge Advocates on the requirements of international and domestic US law, to include constraints established by the Uniform Code of Military Justice (e.g. assault, cruelty and maltreatment, and communicating a threat).

(U) FM 34-52 adopted the principles and framework for conducting intelligence interrogations as stated in FM 30-15. FM 34-52 maintained the established Army doctrine that intelligence interrogations involved the art of questioning and examining a source in order to obtain the maximum amount of useable information. FM 34-52 also reiterated Army doctrine that the principles of objective, initiative, accuracy, prohibition on the use of force, and security apply to all types of interrogations. The goal of intelligence interrogation under current doctrine is the same, the collection of usable and reliable information promptly and in a lawful manner, while meeting the intelligence requirements of the command.

(U) FM 34-52 and the curriculum at U.S. Army Intelligence Center, Fort Huachuca, continue to emphasize a prohibition on the use of force. As stated in its predecessor, FM 34-52 defines the use of force to include actual force, mental torture, threats, and exposure to inhumane treatment of any kind. The underlying basis for this prohibition is the proscriptions contained in international and domestic U.S. law. Current Army intelligence interrogation doctrine continues to view the use of force as unnecessary to gain the cooperation of captured personnel. Army interrogation experts view the use of force as an inferior technique that yields information of questionable quality. The primary concerns, in addition to the effect on information quality, are the adverse effect on future interrogations and the behavioral change on those being interrogated (offering particular information to avoid the use of force). However, the Army's doctrinal prohibition on the use of force does not proscribe legitimate psychological tools and deception techniques.

(U) FM 34-52 outlines procedures and approach techniques for conducting Army interrogations. While the approach techniques are varied, there are three common purposes: establish and maintain control over the source and the interrogation, establish and maintain rapport between the interrogator and the source, and manipulate the source's emotions and weaknesses to gain willing cooperation. Approved techniques include: Direct, Incentive; Emotional (Love & Hate); Increased Fear Up (Harsh & Mild); Decreased Fear Down; Pride and Ego (Up & Down); Futility Technique; We Know All; Establish Your Identity; Repetition; File and Dossier; and Mutt and Jeff (Friend & Foe). These techniques are discussed at greater length in Section V, *infra*.

B. Presidential and Secretary of Defense Directives

(U) The President's Military Order that addresses the detention, treatment, and trial of certain non-citizens in the war against terrorism,[58] provides, *inter alia*, that any

[58] (U) *Military Order - Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, President of the United States, November 13, 2001.

individual subject to the order be "treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria; afforded adequate food, drinking water, shelter, clothing, and medical treatment; and allowed the free exercise of religion consistent with the requirements of the detention."

U ~~(S/NF)~~ A Department of Defense memorandum[59] to the Chairman of the Joint Chiefs of Staff, with instructions to forward it to the Combatant Commanders, stated that "the United States has determined that Al Qaida and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of war status for the purposes of the Geneva Conventions of 1949." The memorandum further directed that "[t]he Combatant Commanders shall in detaining Al Qaida and Taliban individuals under the control of the Department of Defense treat them humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions of 1949."

U ~~(C)~~ The President has directed that "[a]s 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."[60]

C. DOD-Specific Policy Considerations

(U) (The information in this section was derived from guidance provided by the Office of the Assistant Secretary of Defense (Special Operations and Low-Intensity Conflict)).

U ~~(S/NF)~~ The first priority of any detainee interrogation is to obtain intelligence on imminent or planned terrorist attacks against the United States and its citizens or interests. A clearly related priority is to obtain intelligence to enable the United States to conduct the ongoing war on terrorism effectively. Detainee interrogations have proven instrumental to United States efforts to uncover terrorist cells and thwart planned attacks.

U ~~(S/NF)~~ The Secretary of the Army (DoD lead for criminal investigations) will continue to assess, concurrently, the value of information on detainee activities for prosecution considerations. See *War Crimes and Related Investigations Within the US Central Command Area of Operations*, Secretary of Defense, January 19, 2002.

---

[59] U ~~(S/NF)~~ Department of Defense Memorandum – Status of Taliban and Al Qaida, Secretary of Defense, January 19, 2002.

[60] U ~~(C)~~ White House Memorandum – Humane Treatment of al Qaida and Taliban Detainees, President of the United States, February 7, 2002.

U ~~(S/NF)~~ In the event of a request to shift the priority of interrogations from intelligence gathering to prosecution considerations, the following factors, among others, should be considered before such a request is approved:

- the nature of the impending threat to national security and to individuals;
- the imminence of the threat;
- the ability of the detainee to provide useful information to eliminate the threat; and
- potential benefit derived from an effective interrogation compared to the potential benefit from a better opportunity for effective prosecution.

U ~~(S/NF)~~ For routine interrogations, standard U.S. Armed Forces doctrine will be utilized.

U ~~(S/NF)~~ For interrogations involving exceptional techniques[61] approved by the Secretary of Defense, standard doctrine may be used as well as the specifically authorized exceptional techniques. However, such interrogations may be applied only in limited, designated settings approved by SECDEF or his designee, staffed by personnel specifically trained in their use and subject to a command/decision authority at a level specifically designated by the SECDEF for this purpose.

U ~~(S/NF)~~ Choice of interrogation techniques involves a risk benefit analysis in each case, bounded by the limits of DOD policy and U.S. law. When assessing whether to use exceptional interrogations techniques, consideration should be given to the possible adverse effects on U.S. Armed Forces culture and self-image, which at times in the past may have suffered due to perceived law of war violations. DOD policy, reflected in the DOD Law of War Program implemented in 1979 and in subsequent directives, greatly restored the culture and self-image of U.S. Armed Forces by establishing high benchmarks of compliance with the principles and spirit of the law of war, and thereby humane treatment of all persons in U.S. Armed Forces' custody.[62] In addition, consideration should be given to whether implementation of such exceptional techniques is likely to result in adverse effects on DOD personnel who become POWs, including possible perceptions by other nations that the United States is lowering standards related to the treatment of prisoners, generally.

U ~~(S/NF)~~ All interrogation techniques should be implemented deliberately following a documented strategy designed to gain the willing cooperation of the detainee using the least intrusive interrogation techniques and methods.

---

[61] U ~~(S/NF)~~ In this context, an "exceptional" technique is one that is more aggressive than routine techniques and is designated an exceptional technique by the SECDEF, requiring special procedures and levels of approval for use.

[62] *See* DODD 5100.77 DoD Law of War Program, para 5.3.1 (9 Dec 98, canceling DODD 5100.77 of 10 Jul 79); DODD 2310.1 DoD Program for EPOW and Other Detainees, para 3.1 (18 Aug 94); CJCSI 5819.01B Implementation of the DoD LOW Program, para 4a (25 Mar 02).

U ([redacted]) All interrogations involving exceptional methods approved by the appropriate authority must be applied in the context of a comprehensive plan for their use, singly or in combination with other techniques. At a minimum, the plan should include:

- Appropriate approval authority;
- Supervisory requirements to insure appropriate application of methods;
- Specifics on the application of technique(s) including appropriate duration, intervals between applications and events that would require termination of the technique; and
- Requirements for the presence or availability (as appropriate) of qualified medical personnel.

U ([redacted]) Implementation of approved exceptional techniques must be approved at the command authority level specified for the particular method.

D. Potential Effects on Prosecutions

U ([redacted]) Although the primary purpose of detainee interrogations is obtaining intelligence on imminent or planned terrorist attacks against the United States and its citizens or interests, the United States may later decide to prosecute detainees. This section will discuss whether evidence obtained in interrogations will be admissible in either military commissions or U.S. court proceedings.

U ([redacted]) The stated objective of detainee interrogations is to obtain information of intelligence value. Information obtained as a result of interrogations may later be used in criminal prosecutions. Depending on the techniques employed, the admissibility of any information may depend on the forum considering the evidence. In addition, the admissibility of an admission or confession necessarily will be fact-specific, in that the exact techniques used with a specific detainee will determine whether the information will be admissible. Although the goal of intelligence interrogation is to produce a willingly cooperative and compliant subject, a successful interrogation nevertheless may produce a statement that might be argued to be involuntary for purposes of criminal proceedings.

(U) Prosecution by the United States is possible in a military commission, court-martial, or in an Article III court.

U ([redacted]) The standard of admissibility for military commissions is simply whether the evidence has probative value to a reasonable person. *(Military Commissions Order No 1, para 6(D)(1))*. Although this is a fairly low threshold, many of the techniques may place a burden on the prosecution's ability to convince commission members that the evidence meets even that lower standard. As the interrogation methods increase in intensity, the likelihood that the information will be deemed coerced and involuntary and thus held inadmissible increases. Although voluntariness of the confession is not a specific threshold question on admissibility, it can reasonably be expected that the

defense will raise voluntariness, challenging the probative value of the information and hence, its admissibility. If the statement is admitted, voluntariness will undoubtedly be a factor considered by the members in determining the weight to be given the information.

U ~~(S/NF)~~ Any trials taking place in either U.S. federal courts or by courts-martial will be conducted pursuant to statutory and constitutional standards and limitations. To be admissible, statements made during interrogation must be determined to be voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The judge must first determine whether the statements were the product of free will, i.e., the defendant's will was not overborne by the interrogators. *Mincey v. Arizona*, 437 U.S. 385 (1978) (the defendant's will was simply overborne and due process of law requires that statements obtained as these were cannot be used in any way against the defendant at his trial). This issue can also be raised before the trier of fact. If the actions taken to secure a statement constitute torture, the statement would be inadmissible. *Brown v. Mississippi*, 297 U.S. 278 (1936) (confessions procured by means "revolting to the sense of justice" could not be used to secure a conviction). It should be noted that conduct does not need to rise to the level of "torture" or "cruel, inhuman and degrading treatment or punishment" for it to cause a statement to be considered involuntary, and therefore inadmissible. As such, the more aggressive the interrogation technique used, the greater the likelihood it could adversely affect the admissibility of any acquired statements or confessions.

(U) Mechanism for Challenge. The defense can be expected to challenge detainee statements through a motion to suppress the detainee statement or to challenge the entire proceeding through a motion to dismiss for egregious prosecutorial misconduct.

U ~~(S/NF)~~ Other Considerations. One of the Department of Defense's stated objectives is to use the detainees' statements in support of ongoing and future prosecutions. The method of obtaining these statements and its effect on voluntariness may also affect the usability of these statements against other accused in any criminal forum. Statements produced where the will of the detainee has been overborne will in all likelihood be viewed as inherently suspect and of questionable value.

U ~~(S/NF)~~ Consideration must be given to the public's reaction to methods of interrogation that may affect the military commission process. The more coercive the method, the greater the likelihood that the method will be met with significant domestic and international resistance. This in turn may lower international and domestic acceptance of the military commission process as a whole. In addition, the military commission will be faced with balancing the stated objective of open proceedings with the need not to publicize interrogation techniques. Consequently, having these techniques become public or substantially closing the proceedings in order to protect the techniques from disclosure could be counterproductive and could undermine confidence in the outcome. Finally, the timing of the prosecutions must be considered. Revelation of the techniques presumably will reduce their effectiveness against current and future detainees.

E. International Considerations That May Affect Policy Determinations

(U) This section provides a discussion of international law that, although not binding on the United States, could be cited to by other countries to support the proposition that the interrogation techniques used by the U.S. contravene international legal standards. The purpose of providing this international law discussion is to inform the Department of Defense's policy considerations when deciding if, when and how to employ the interrogation techniques against unlawful combatants held outside the United States.

1. Geneva Conventions

U ~~(S/NF)~~ To the extent that other nation states do not concede the U.S. position that the Geneva Conventions do not apply to the detainees, there are several provisions of the Third Geneva Convention that may be relevant considerations regarding interrogation techniques.[63] Article 13 requires that POWs must at all times be treated humanely, and that any unlawful act or omission by the detaining power that causes death or seriously endangers the health of a POW will be regarded as a serious breach of the Convention. In addition, POWs must be protected against acts of violence or intimidation. Under Article 14 of the Convention, POWs are entitled to respect for their person and their honor. Article 17 prohibits physical or mental torture and any other form of coercion of POWs in order to secure information. POWs who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment. Article 130 provides that torture or inhuman treatment, or willfully causing great suffering or serious injury to body or health of a POW are considered "grave breaches" of the Convention. Article 129 of the Convention requires Parties to search for, extradite or prosecute those persons alleged to have committed, or have ordered to be committed, grave breaches.

U ~~(S/NF)~~ These articles of the Third Geneva Convention may provide an opportunity for other States Parties to allege that they consider the United States to be in violation of the Convention through its treatment of detainees. To the extent any such treatment could be considered by them to be torture or inhuman treatment, such acts could be considered "grave breaches" and punishable as war crimes.

U ~~(S/NF)~~ In addition, even if they argue that the Taliban and al Qaida detainees are not entitled to POW status, they may consider that the guarantees contained in Article 75 of the First Additional Protocol to the Geneva Conventions are measures by which the United States' actions could be evaluated. See, *infra*, this Section, paragraph 3. Additional arguments may be made by other nations that the protections of the Geneva Conventions are comprehensive and apply to unlawful combatants.[64]

---

[63] (U) Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[64] (U) For example, other countries may argue as follows: The central theme of the Geneva Conventions is humanity. With regard to persons affected by armed conflict, Pictet's *Commentary* states: "In short, all the particular cases we have just been considering confirm a general principle which is embodied in all four Geneva Conventions of 1949. Every person in enemy hands must have some status under international

2. Convention Against Torture

U

~~(S/NF)~~ Article 7 of the Torture Convention requires that a State Party either extradite or prosecute a person found within its territory who has been alleged to have committed acts of torture.[65] As discussed, *supra*, the United States implemented this provision in Chapter 113C of Title 18, United States Code, which provides for federal criminal jurisdiction over an extraterritorial act or attempted act of torture, if the alleged offender is present in the United States, regardless of the nationality of the victim or the alleged offender. All States Parties to the Convention are required to establish this same jurisdiction in their countries. Accordingly, governments could potentially assert jurisdiction over U.S. personnel found in their territory, and attempt to prosecute them for conduct they consider to be violations of the Torture Convention.

3. Customary International Law/Views of Other Nations

(U) "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."[66]

(U) The United States' primary obligation concerning torture and other related practices derives from the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment and Punishment. Although not consistent with U.S. views, some international commentators maintain that various human rights conventions and declarations (including the Geneva Conventions) represent "customary international law" binding on the United States.[67]

(U) Although not binding on the United States, the following international human rights instruments may inform the views of other nations as they assess the actions of the United States relative to detainees.

---

law; he is either a prisoner of war, and as such covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law." Pictet, Commentary to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV), Article 4, Paragraph 4, ICRC, Geneva, 1958. Other nations may disagree with the U.S. government view that GC IV is not applicable to those individuals detained in the war on terrorism and argue that GC IV protects those persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war. GC IV, Article 4; *see generally* Army Field Manual 27-10, *The Laws of Land Warfare* (1956), paragraphs 246-248. In fact, Pictet's *Commentary* on Article 4, paragraph 4 of GC IV states: "if, for some reason, prisoner of war status – to take one example – were denied to them [persons who find themselves in the hands of a party to the conflict], they would become protected persons under the present Convention." Further GC IV, Article 32 specifically prohibits the torture, corporal punishment, or physical suffering of protected persons. Accordingly, the United States may face the argument from other nations that the President may not place these detainees in an intermediate status, outside the law, and then arguably subject them to torture.

[65] (U) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force for the United States on Nov. 20, 1994, 1465 U.N.T.S. 85.

[66] (U) The Restatement (Third) of the Foreign Relations Law of the U.S, § 102(2).

[67] (U) See, e.g., McDougal, Lasswell, and Chen, Human Rights and World Public Order (1980).

(U) One of the first major international declarations on human rights protections was the 1948 Universal Declaration of Human Rights (adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810). This Declaration, which is not itself binding or enforceable against the United States, states at Article 5 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Although there is a specific definition for "torture" in the subsequent 1994 Convention Against Torture, there is no commonly accepted definition in the international community of the terms "cruel, inhuman, and degrading punishment or treatment."

(U) The American Convention on Human Rights[68] was signed by the United States in 1977 but the United States never ratified it. It states in Article 5 that "no one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment," and that "all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

(U) In 1975, the U. N. General Assembly adopted the Declaration on Protection of All Persons from Being Subjected to Torture and other Cruel, Inhumane or Degrading Punishment (G.A. Res 34/52, U.N. Doc. A/10034). As with previous U. N. declarations, the Declaration itself is not binding on nations. This Declaration provides (Article 2) that the proscribed activities are "an offense to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights."

(U) Article 75 of the First Additional Protocol to the Geneva Conventions, to which the U. S. is not a party, prohibits physical and mental torture, outrages upon personal dignity (in particular humiliating and degrading treatment), or threats to commit any of the foregoing against detainees "who do not benefit from more favorable treatment under the [Geneva] Conventions."[69] (The First Additional Protocol does not define any of these terms.) According to International Committee of the Red Cross (ICRC) Commentaries, where the status of a prisoner of war or of a protected person is denied to an individual, the protection of Article 75 must be provided to them at a minimum.[70]

(U) The Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides, *inter alia*, that persons protected by the Civilians Convention are those who, at a given moment and in any manner whatsoever, find themselves in the hands of a Party to the conflict that is a country of which they are not nationals.[71] Such persons are at all times to be treated humanely and protected against all acts of violence

---

[68] (U) 1144 U.N.T.S. 123 (Nov. 22, 1969).

[69] (U) Protocal Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

[70] (U) Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC, at 863-65 (1987).

[71] (U) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3365, 75 U.N.T.S 287, see Articles 4 and 27.

or threats thereof. The Department of Justice has determined that this Convention applies only to civilians but does not apply to unlawful combatants.[72]

4. International Criminal Court

U
~~(S/NF)~~ The Rome Statute of the International Criminal Court (ICC),[73] which the U. S. has made clear it opposes and to which it has no intention of becoming a party, contains provisions prohibiting the infliction of severe physical or mental pain or suffering (including for such purposes as obtaining information). These violations are considered by the signatories to be war crimes of torture and of inhuman treatment (Article 8) and crimes against humanity (Article 7). The affected persons must be protected under one or more of the Geneva Conventions in order for the prohibition to be applicable. Other governments could take a position contrary to the U.S. position on this point. For those State Parties to the ICC that take the position that the ICC grants universal jurisdiction to detain individuals suspected of committing prohibited acts, if these countries obtain control over U.S. personnel, they may view it as within their jurisdiction to surrender such personnel to the ICC. In an effort to preclude this possibility, the United States is currently negotiating "Article 98" agreements with as many countries as possible to provide for protection of U.S. personnel from surrender to the ICC.[74]

U
~~(S/NF)~~ States with whom the United States has not concluded Article 98 agreements, and that perceive certain interrogation techniques to constitute torture or inhuman treatment, may attempt to use the Rome Statute to prosecute individuals found in their territory responsible for such interrogations.[75] In such cases, the U.S. Government will reject as illegitimate any attempt by the ICC, or a state on its behalf, to assert the jurisdiction of the Rome Statute over U.S. nationals without the prior express consent of the United States.

V. Techniques

(U) The purpose of all interviews and interrogations is to get the most information from a detainee with the least intrusive method, always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators.

---

[72] (U) Other nations, which, unlike the United States, have accepted Article 75, may argue that since the Taliban and al-Qaida detainees are not entitled to POW status under the Geneva Conventions, Article 75 should be applicable as customary international law, notwithstanding their status as unlawful combatants.
[73] (U) Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998).
[74] (U) Parties to the Rome Statute are obligated to surrender individuals at the request of the ICC for prosecution, unless such surrender would be inconsistent with the requested state's obligations "under an international agreement pursuant to which the consent of the sending state is required to surrender a person of that state to the ICC." (Rome Statute, Article 98 (2)). While the U.S. is not a party to the Rome Statute, Article 98 agreements would provide an exception to an ICC party's general obligation to surrender persons.
[75] (U) Article 25(3) of the Rome Statute provides individual criminal responsibility for a person who, *inter alia*, "orders, solicits, or induces" or otherwise facilitates through aiding, abetting, or assisting in the commission of a crime.

Operating instructions must be developed based on command policies to insure uniform, careful, and safe application of any interrogations of detainees.

U ~~(S/NF)~~ Interrogations must always be planned, deliberate actions that take into account numerous, often interlocking factors such as a detainee's current and past performance in both detention and interrogation, a detainee's emotional and physical strengths and weaknesses, an assessment of possible approaches that may work on a certain detainee in an effort to gain the trust of the detainee, strengths and weaknesses of interrogators, and augmentation by other personnel for a certain detainee based on other factors.

U ~~(S/NF)~~ Interrogation approaches are designed to manipulate the detainee's emotions and weaknesses to gain his willing cooperation. Interrogation operations are never conducted in a vacuum; they are conducted in close cooperation with the units detaining the individuals. The policies established by the detaining units that pertain to searching, silencing, and segregating also play a role in the interrogation of a detainee. Detainee interrogation involves developing a plan tailored to an individual and approved by senior interrogators. Strict adherence to policies/standard operating procedures governing the administration of interrogation techniques and oversight is essential.

U ~~(S/NF)~~ Listed below are interrogation techniques all believed to be effective but with varying degrees of utility. Techniques 1-19, 22-26 and 30, applied singly, are purely verbal and/or involve no physical contact that could produce pain or harm and no threat of pain or harm. It is important that interrogators be provided reasonable latitude to vary techniques depending on the detainee's culture, strengths, weaknesses, environment, extent of training in resistance techniques as well as the urgency of obtaining information that the detainee is known to have. Each of the techniques requested or suggested for possible use for detainees by USSOUTHCOM and USCENTCOM is included. Some descriptions include certain limiting parameters; these have been judged appropriate by senior interrogators as to effectiveness.

U ~~(S/NF)~~ *While techniques are considered individually within this analysis, it must be understood that in practice, techniques are usually used in combination; the cumulative effect of all techniques to be employed must be considered before any decisions are made regarding approval for particular situations.* The title of a particular technique is not always fully descriptive of a particular technique. With respect to the employment of any techniques involving physical contact, stress or that could produce physical pain or harm, a detailed explanation of that technique must be provided to the decision authority prior to any decision.

Note: Techniques 1-17 are further explained in Field Manual 34-52.

1. U ~~(S/NF)~~ Direct: Asking straightforward questions.

2. U ~~(S/NF)~~ **Incentive/Removal of Incentive:** Providing a reward or removing a privilege, above and beyond those that are required by the Geneva Convention, from detainees, (Privileges above and beyond POW-required privileges).

3. U ~~(S/NF)~~ **Emotional Love:** Playing on the love a detainee has for an individual or group.

4. U ~~(S/NF)~~ **Emotional Hate:** Playing on the hatred a detainee has for an individual or group.

5. U ~~(S/NF)~~ **Fear Up Harsh:** Significantly increasing the fear level in a detainee.

6. U ~~(S/NF)~~ **Fear Up Mild:** Moderately increasing the fear level in a detainee.

7. U ~~(S/NF)~~ **Reduced Fear:** Reducing the fear level in a detainee.

8. U ~~(S/NF)~~ **Pride and Ego Up:** Boosting the ego of a detainee.

9. U ~~(S/NF)~~ **Pride and Ego Down:** Attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW.

10. U ~~(S/NF)~~ **Futility:** Invoking the feeling of futility of a detainee.

11. U ~~(S/NF)~~ **We Know All:** Convincing the detainee that the interrogator knows the answer to questions he asks the detainee.

12. U ~~(S/NF)~~ **Establish Your Identity:** Convincing the detainee that the interrogator has mistaken the detainee for someone else.

13. U ~~(S/NF)~~ **Repetition Approach:** Continuously repeating the same question to the detainee within interrogation periods of normal duration.

14. U ~~(S/NF)~~ **File and Dossier:** Convincing detainee that the interrogator has a damning and inaccurate file, which must be fixed.

15. U ~~(S/NF)~~ **Mutt and Jeff:** A team consisting of a friendly and harsh interrogator. The harsh interrogator might employ the Pride and Ego Down technique.

16. U ~~(S/NF)~~ **Rapid Fire:** Questioning in rapid succession without allowing detainee to answer.

17. U ~~(S/NF)~~ **Silence:** Staring at the detainee to encourage discomfort.

18. U ~~(S/NF)~~ **Change of Scenery Up:** Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse).

19. U ~~(S/NF)~~ **Change of Scenery Down:** Removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality.

20. U ~~(S/NF)~~ **Hooding:** This technique is questioning the detainee with a blindfold in place. For interrogation purposes, the blindfold is not on other than during interrogation.

21. U ~~(S/NF)~~ **Mild Physical Contact:** Lightly touching a detainee or lightly poking the detainee in a completely non-injurious manner. This also includes softly grabbing of shoulders to get the detainee's attention or to comfort the detainee.

22. U ~~(S/NF)~~ **Dietary Manipulation:** Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water, e.g., hot rations to MREs.

23. U ~~(S/NF)~~ **Environmental Manipulation:** Altering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times.

24. U ~~(S/NF)~~ **Sleep Adjustment:** Adjusting the sleeping times of the detainee (e.g., reversing sleep cycles from night to day.) This technique is NOT sleep deprivation.

25. U ~~(S/NF)~~ **False Flag:** Convincing the detainee that individuals from a country other than the United States are interrogating him.

26. U ~~(S/NF)~~ **Threat of Transfer:** Threatening to transfer the subject to a 3rd country that subject is likely to fear would subject him to torture or death. (The threat would not be acted upon nor would the threat include any information beyond the naming of the receiving country.)

U ~~(S/NF)~~ The following list includes additional techniques that are considered effective by interrogators, some of which have been requested by USCENTCOM and USSOUTHCOM. They are more aggressive counter-resistance techniques that may be appropriate for detainees who are extremely resistant to the above techniques, and who the interrogators strongly believe have vital information. All of the following techniques indicate the need for technique-specialized training and written procedures to insure the safety of all persons, along with appropriate, specified levels of approval and notification for each technique.

27. U ~~(S/NF)~~ **Isolation:** Isolating the detainee from other detainees while still complying with basic standards of treatment.

28. U ~~(S/NF)~~ **Use of Prolonged Interrogations:** The continued use of a series of approaches that extend over a long period of time (e.g., 20 hours per day per interrogation).

29. (U ~~S/NF~~) **Forced Grooming**: Forcing a detainee to shave hair or beard. (Force applied with intention to avoid injury. Would not use force that would cause serious injury.)

30. (U ~~S/NF~~) **Prolonged Standing:** Lengthy standing in a "normal" position (non-stress). This has been successful, but should never make the detainee exhausted to the point of weakness or collapse. Not enforced by physical restraints. Not to exceed four hours in a 24-hour period.

31. (U ~~S/NF~~) **Sleep Deprivation**: Keeping the detainee awake for an extended period of time. (Allowing individual to rest briefly and then awakening him, repeatedly.) Not to exceed 4 days in succession.

32. (U ~~S/NF~~) **Physical Training**: Requiring detainees to exercise (perform ordinary physical exercises actions) (e.g., running, jumping jacks); not to exceed 15 minutes in a two-hour period; not more than two cycles, per 24-hour periods) Assists in generating compliance and fatiguing the detainees. No enforced compliance.

33. (U ~~S/NF~~) **Face slap/ Stomach slap**: A quick glancing slap to the fleshy part of the cheek or stomach. These techniques are used strictly as shock measures and do not cause pain or injury. They are only effective if used once or twice together. After the second time on a detainee, it will lose the shock effect. Limited to two slaps per application; no more than two applications per interrogation.

34. (U ~~S/NF~~) **Removal of Clothing**: Potential removal of all clothing; removal to be done by military police if not agreed to by the subject. Creating a feeling of helplessness and dependence. This technique must be monitored to ensure the environmental conditions are such that this technique does not injure the detainee.

35. (U ~~S/NF~~) **Increasing Anxiety by Use of Aversions**: Introducing factors that of themselves create anxiety but do not create terror or mental trauma (e.g., simple presence of dog without directly threatening action). This technique requires the commander to develop specific and detailed safeguards to insure detainee's safety.

VI. Evaluation of Useful Techniques

(U ~~S/NF~~) The working group considered each of the techniques enumerated in Section V, *supra*, in light of the legal, historical, policy and operational considerations discussed in this paper. In the course of that examination it became apparent that any decision whether to authorize a technique is essentially a risk benefit analysis that generally takes into account the expected utility of the technique, the likelihood that any technique will be in violation of domestic or international law, and various policy considerations. Generally, the legal analysis that was applied is that understood to comport with the views of the Department of Justice. Although the United States, as a practical matter, may be the arbiter of international law in deciding its application to our national activities, the views of other nations are relevant in considering their reactions,

potential effects on our captured personnel in future conflicts, and possible liability to prosecution in other countries and international forums for interrogators, supervisors and commanders involved in interrogation processes and decisions.

U

~~(S/NF)~~ The Conclusions section of this analysis, *infra*, summarizes salient conclusions that were applied to our analysis of individual techniques. As it suggests, the lawfulness and the effectiveness of individual techniques will, in practice, depend on the specific facts. The lawfulness will depend in significant part on procedural protections that demonstrate a legitimate purpose and that there was no *intent* to inflict significant mental or physical pain – and, in fact, avoid that. Because of this, the assessment of each technique presumed that the safeguards and procedures described in the "DOD-Specific Policy Considerations" section of this paper would be in place. The importance of this is underscored by the fact that, in practice, techniques are usually applied in combination, and as the legal analysis of this paper indicates, the significance and effect on an individual detainee of the specific combination of techniques employed, and their manner of application will determine the lawfulness of any particular interrogation.

U

~~(S/NF)~~ In addition, the lawfulness of the application of any particular technique, or combination of techniques, may depend on the practical necessity for imposition of the more exceptional techniques. As the analysis explains, legal justification for action that could otherwise be unlawful (e.g., relying upon national necessity and self-defense) depends in large part on whether the specific circumstances would justify the imposition of more aggressive techniques. Interrogation of an individual known to have facts essential to prevent an immediate threat of catastrophic harm to large populations may support use of "exceptional" techniques, particularly when milder techniques have been unavailing. But this is a determination that will always be case-specific. Consequently, use of each technique should be a decision level appropriate to the gravity of the particular case (both for the nation and for the detainee).

U

~~(S/NF)~~ The chart at Attachment 3 reflects the result of the risk/ benefit assessment for each technique considered, "scored" for each technique, relevant considerations and given an overall recommendation. In addition, it notes specific techniques that, based on this evaluation, should be considered "exceptional techniques" (marked with an "E") subject to particular limitations described in the "DOD-Specific Policy Considerations" section (generally, not routinely available to interrogators, use limited to specifically designated locations and specifically trained interrogators, special safeguards, and appropriately senior employment decision levels specified). For each "exceptional" technique, a recommendation for employment decision level is indicated as well.

VII. Conclusions Relevant to Interrogation of Unlawful Combatants Under DOD Control Outside the United States

U ~~(S/NF)~~ As a result of the foregoing analysis of legal, policy, historical, and operational considerations, the following general conclusions can be drawn relevant to interrogation of unlawful combatants captured in the war on terrorism under DOD control outside the United States:

U ~~(S/NF)~~ Under the Third Geneva Convention, U.S. forces are required to treat captured personnel as POWs until an official determination is made as to their status. Once a determination has been made that captured personnel are unlawful combatants, as is currently the case with captured Taliban and Al Qaida operatives, they do not have a right to the protections of the Third Geneva Convention.

(U) Customary international law does not provide legally-enforceable restrictions on the interrogation of unlawful combatants under DOD control outside the United States.

(U) The United States Constitution does not protect those individuals who are not United States citizens and who are outside the sovereign territory of the United States.

U ~~(S/NF)~~ Under the Torture Convention, no person may be subjected to torture. Torture is defined as an act 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 application, of mind altering substances or other procedures *calculated* to disrupt profoundly the senses or 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, or threatened application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

U ~~(S/NF)~~ Under the Torture Convention, no person may be subjected to cruel, inhuman or degrading treatment. The United States has defined its obligations under the Torture Convention as conduct prohibited by the 5th, 8th, and 14th Amendments to the Constitution of the United States. These terms, as defined by U.S. courts, could be understood to mean: to inflict pain or harm without a legitimate purpose; to inflict pain or injury for malicious or sadistic reasons; to deny the minimal civilized measures of life's necessities and such denial reflects a deliberate indifference to health and safety; and to apply force and cause injury so severe and so disproportionate to the legitimate government interest being served that it amounts to a brutal and inhumane abuse of official power literally shocking the conscience.

(U) For actions outside the United States and the special maritime and territorial jurisdiction of the United States, 18 U.S.C. § 2340 applies. For actions occurring within the United States and the special maritime and territorial jurisdiction of the United States, various Federal statutes would apply.

U (~~S/NF~~) The President has directed, pursuant to his Military Order dated November 13, 2001, that the U.S. Armed Forces treat detainees humanely and that the detainees be afforded adequate food, drinking water, shelter, clothing and medical treatment.

U (~~S/NF~~) Pursuant to the Confidential Presidential Determination, dated February 7, 2002, the U.S Armed Forces are to treat detainees in a manner consistent with the *principles* of Geneva, to the extent *appropriate* and consistent with *military necessity*.

(U) Under Article 10 of the Torture Convention, the United States is obligated to ensure that law enforcement and military personnel involved in interrogations are educated and informed regarding the prohibition against torture, and under Article 11, systematic reviews of interrogation rules, methods, and practices are also required.

(U) Members of the U.S. Armed Forces are, at all times and all places, subject to prosecution under the UCMJ for, among other offenses, acts which constitute assault, assault consummated by a battery, assault with the intent to inflict grievous bodily harm, manslaughter, unpremeditated murder, and maltreatment of those subject to their orders. Under certain circumstances, civilians accompanying the Armed Forces may be subject to the UCMJ.

(U) Civilian employees and employees of DOD contractors may be subject to prosecution under the Federal Criminal Code for, among other offenses, acts which constitute assault (in various degrees), maiming, manslaughter, and murder.

U (~~S/NF~~) Defenses relating to Commander-in-Chief authority, necessity and self-defense or defense of others may be available to individuals whose actions would otherwise constitute these crimes, and the extent of availability of those defenses will be fact-specific. Certain relevant offenses require specific intent to inflict particular degrees of harm or pain, which could be refuted by evidence to the contrary (e.g., procedural safeguards). Where the Commander-in-Chief authority is being relied upon, a Presidential written directive would serve to memorialize this authority.

U (~~S/NF~~) The lawfulness and appropriateness of the use of many of the interrogation techniques we examined can only be determined by reference to specific details of their application, such as appropriateness and safety for the particular detainee, adequacy of supervision, specifics of the application including their duration, intervals between applications, combination with other techniques, and safeguards to avoid harm (including termination criteria and the presence or availability of qualified medical personnel.) (We have recommended appropriate guidance and protections.)

U (~~S/NF~~) Other nations, including major partner nations, may consider use of techniques more aggressive than those appropriate for POWs violative of international law or their own domestic law, potentially making U.S. personnel involved in the use of such techniques subject to prosecution for perceived human rights violations in other

nations or to being surrendered to international fora, such as the ICC; this has the potential to impact future operations and overseas travel of such personnel.

U ~~(S/NF)~~ Some nations may assert that the U.S. use of techniques more aggressive than those appropriate for POWs justifies similar treatment for captured U.S. personnel.

U ~~(S/NF)~~ Should information regarding the use of more aggressive interrogation techniques than have been used traditionally by U.S. forces become public, it is likely to be exaggerated or distorted in the U.S. and international media accounts, and may produce an adverse effect on support for the war on terrorism.

U ~~(S/NF)~~ The more aggressive the interrogation technique used, the greater the likelihood that it will affect adversely the admissibility of any acquired statements or confessions in prosecutions against the person interrogated, including in military commissions (to a lesser extent than in other U.S. courts).

U ~~(S/NF)~~ Carefully drawn procedures intended to prevent unlawful levels of pain or harm not only serve to avoid unlawful results but should provide evidence helpful to demonstrate that the specific intent required for certain offenses did not exist.

U ~~(S/NF)~~ General use of exceptional techniques (generally, having substantially greater risk than those currently, routinely used by U.S. Armed Forces interrogators), even though lawful, may create uncertainty among interrogators regarding the appropriate limits of interrogations. They should therefore be employed with careful procedures and only when fully justified.

U ~~(S/NF)~~ Participation by U.S. military personnel in interrogations which use techniques that are more aggressive than those appropriate for POWs would constitute a significant departure from traditional U.S. military norms and could have an adverse impact on the cultural self-image of U.S. military forces.[76]

U ~~(S/NF)~~ The use of exceptional interrogation techniques should be limited to specified strategic interrogation facilities; when there is a good basis to believe that the detainee possesses critical intelligence; when the detainee is medically and operationally evaluated as suitable (considering all techniques in combination); when interrogators are specifically trained for the technique(s); a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel); when there is appropriate supervision; and, after obtaining appropriate specified senior approval level for use with any specific detainee (after considering the foregoing and receiving legal advice).

[76] Those techniques considered in this review that raise this concern are relatively few in number and generally indicated by yellow or red (or green with a significant footnote) under major partner views in Attachment 3.

VIII. Recommendations

(U) We recommend:

(U ~~S/NF~~) 1. The working group recommends that techniques 1-26 on the attached chart be approved for use with unlawful combatants outside the United States, subject to the general limitations set forth in this Legal and Policy Analysis; and that techniques 27-35 be approved for use with unlawful combatants outside the United States subject to the general limitations as well as the specific limitations regarding "exceptional" techniques as follows: conducted at strategic interrogation facilities; where there is a good basis to believe that the detainee possesses critical intelligence; the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination); interrogators are specifically trained for the technique(s); a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel) is developed; appropriate supervision is provided; and, appropriate specified senior level approval is given for use with any specific detainee (after considering the foregoing and receiving legal advice).

(U ~~S/NF~~) 2. SECDEF approve the strategic interrogation facilities that are authorized to use the "exceptional techniques" (such facilities at this time include Guantanamo, Cuba; additional strategic interrogation facilities will be approved on a case-by-case basis).

(U ~~S/NF~~) 3. As the Commander-in-Chief authority is vested in the President, we recommend that any exercise of that authority by DOD personnel be confirmed in writing through Presidential directive or other document.

(U ~~S/NF~~) 4. That DOD policy directives and implementing guidance be amended as necessary to reflect the determinations in paragraph one and subsequent determinations concerning additional possible techniques.

(U ~~S/NF~~) 5. That commanders and supervisors, and their legal advisers, involved with the decisions related to employment of "exceptional techniques" receive specialized training regarding the legal and policy considerations relevant to interrogations that make use of such techniques.

(U ~~S/NF~~) 6. That OASD (PA) prepare a press plan to anticipate and address potential public inquiries and misunderstandings regarding appropriate interrogation techniques.

(U ~~S/NF~~) 7. That a procedure be established for requesting approval of additional interrogation techniques similar to that for requesting "supplementals" for ROEs; the process should require the requestor to describe the technique in detail, justify its utility, describe the potential effects on subjects, known hazards and proposed safeguards, provide a legal analysis, and recommend an appropriate decision level regarding use on specific subjects. This procedure should ensure that SECDEF is the approval authority for the addition of any technique that could be considered equivalent in degree to any of the "exceptional techniques" addressed in this report (in the chart numbers 27-35, labeled with an "E"), and that he establish the specific decision level required for application of such techniques.

U
~~(S/NF)~~ 8. DOD establish specific understandings with other agencies using DOD detailed interrogators regarding the permissible scope of the DOD interrogator's activities.

Classified by: Secretary Rumsfeld
Reason: 1.5(C)
Declassify on: 10 years

UNCLASSIFIED

War on Terrorism
Detainee Interrogation Working Group
Summary of Analysis and Recommendations
Pertaining to Unlawful Combatants Outside of the U.S.[1]

● Red
○ Yellow
○ Green

	Utility	Law IAW U.S. Interpretation		
Proposed Interrogation Techniques [2] (see attached description/limitations)	Contribution to Intelligence Collection (Useful)	Torture Convention [Torture]	Torture Convention [Cruel, Inhuman Degrading]	U.S. Domestic Law
1. Direct	High	●	●	●
2. Incentive or Removal	High	●	●	●
3. Emotional Love	High	●	●	●
4. Emotional Hate	High	●	●	●
5. Fear Up Harsh	High	●	●	●
6. Fear Up Mild	High	●	●	●
7. Reduced Fear	High	●	●	●
8. Pride and ego up	High	●	●	●
9. Pride and ego down	High	●	●	●
10. Futility	High	●	●	●
11. We Know All	High	●	●	●
12. Establish Your Identity	High	●	●	●

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards.
Yellow indicates area of consideration does not preclude use but there are problematic aspects that cannot be eliminated by procedural safeguards (see footnote).
Red indicates major issue in area of consideration that cannot be eliminated.

UNCLASSIFIED

UNCLASSIFIED

War on Terrorism
Detainee Interrogation Working Group
Summary of Analysis and Recommendations
Pertaining to Unlawful Combatants Outside of the U.S.[1]

● Red
○ Yellow
◍ Green

Proposed Interrogation Techniques [2] (see attached description/limitations)	Policy							Recommendation
	Consistency with Historical U.S. Forces Interrogation Role	Consistency with Prior U.S. Public Statements	Consistency with Major Partner Nation Views	Effect on Captured U.S. Forces	Potential Adverse Effect for Participants/ Supervisors/COC	Potential Effect on Detainee Prosecutions	Other	Re Unlawful Combatants
1. Direct	◍	◍	◍	◍	◍	◍	○	◍
2. Incentive or Removal	◍	◍	○ [3]	◍	◍	● [4]	○	◍
3. Emotional Love	◍	◍	◍	◍	◍	◍	○	◍
4. Emotional Hate	◍	◍	◍	◍	◍	◍	○	◍
5. Fear Up Harsh	◍	◍	◍	◍	◍	◍	○	◍
6. Fear Up Mild	◍	◍	◍	◍	◍	◍	○	◍
7. Reduced Fear	◍	◍	◍	◍	◍	◍	○	◍
8. Pride and ego up	◍	◍	◍	◍	◍	◍	○	◍
9. Pride and ego down	◍	◍	○ [5]	◍	◍	◍	○	◍
10. Futility	◍	◍	◍	◍	◍	◍	○	◍
11. We Know All	◍	◍	◍	◍	◍	◍	○	◍
12. Establish Your Identity	◍	◍	◍	◍	◍	◍	○	◍

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards.
Yellow indicates area of consideration does not preclude use but there are problematic aspects that cannot be eliminated by procedural safeguards (see footnote).
Red indicates major issue in area of consideration that cannot be eliminated.

UNCLASSIFIED

● Red
○ Yellow
○ Green

Proposed Interrogation Techniques [2] (see attached description/limitations)	Utility	Law IAW U.S. Interpretation		
	Contribution to Intelligence Collection (Useful)	Torture Convention [Torture]	Torture Convention [Cruel, Inhuman Degrading]	U.S. Domestic Law
13. Repetition Approach	Low	●	●	●
14. File and Dossier	High	●	●	●
15. Mutt and Jeff	High	●	●	●
16. Rapid Fire	High	●	●	●
17. Silence	Medium	●	●	●
18. Change of Scenery Up	High	●	●	●
19. Change of Scenery Down	High	●	●	●
20. Hooding	High	●	●	●
21. Mild Physical Contact	High	●	●	●
22. Dietary Manipulation	High	●	●	●
23. Environmental manipulation	High	●	●	●
24. Sleep Adjustment	High	●	●	●
25. False Flag	High	●	●	●

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards.
Yellow indicates area of consideration does not preclude use but there are problematic aspects that cannot be eliminated by procedural safeguards (see footnote).
Red indicates major issue in area of consideration that cannot be eliminated.

● Red
○ Yellow
◍ Green

Proposed Interrogation Techniques [2] (see attached description/limitations)	Policy							Recommendation
	Consistency with Historical U.S. Forces Interrogation Role	Consistency with Prior U.S. Public Statements	Consistency with Major Partner Nation Views	Effect on Captured U.S. Forces	Potential Adverse Effect for Participants/ Supervisors/COC	Potential Effect on Detainee Prosecutions	Other	Re Unlawful Combatants
13. Repetition Approach	◍	◍	◍	◍	◍	◍	○	◍
14. File and Dossier	◍	◍	◍	◍	◍	◍	○	◍
15. Mutt and Jeff	◍	◍	○ [6]	◍	◍	◍	○	◍
16. Rapid Fire	◍	◍	◍	◍	◍	◍	○	◍
17. Silence	◍	◍	◍	◍	◍	◍	○	◍
18. Change of Scenery Up	◍	◍	◍	◍	◍	◍	○	◍
19. Change of Scenery Down	◍	◍	◍	◍	◍	◍	○	◍
20. Hooding	◍	◍	◍	◍	◍	◍	○	◍
21. Mild Physical Contact	◍	◍	◍	◍ [7]	◍	◍	○	◍
22. Dietary Manipulation	◍	◍	◍	◍	◍	◍	○	◍
23. Environmental Manipulation	◍	◍	◍ [8]	◍	◍	◍	○	◍
24. Sleep Adjustment	◍	◍	◍	◍	◍	◍ [9]	○	◍
25. False Flag	◍	◍	◍	◍	◍	◍	○	◍

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards.
Yellow indicates area of consideration does not preclude use but there are problematic aspects that cannot be eliminated by procedural safeguards (see footnote).
Red indicates major issue in area of consideration that cannot be eliminated.

● Red
○ Yellow
○ Green

Proposed Interrogation Techniques [2] (see attached description/limitations)	Utility: Contribution to Intelligence Collection (Useful)	Law IAW U.S. Interpretation: Torture Convention [Torture]	Torture Convention [Cruel, Inhuman Degrading]	U.S. Domestic Law
26. Threaten to transfer to a 3rd country	Medium	●	●	●
27. Isolation	High	● 11	● 12	● 13
28. Use of Prolonged Interrogations	High [17]	●	●	●
29. Forced Grooming	High	●	● 19	○ 20
30. Prolonged Standing	High	●	●	●
31. Sleep Deprivation	High	●	●	●
32. Physical Training	High	●	●	●
33. Face or Stomach Slap	High	●	●	●
34. Removal of Clothing	High	●	○ 34	○ 35
35. Increasing Anxiety by Use of Aversions	High	●	○ 38	○ 39

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards. Yellow indicates area of consideration does not preclude use but there are problematic aspects that cannot be eliminated by procedural safeguards (see footnote). Red indicates major issue in area of consideration that cannot be eliminated.

Red
Yellow
Green

Proposed Interrogation Techniques [2] (see attached description/limitations)	Policy							Recommendation
	Consistency with Historical U.S. Forces Interrogation Role	Consistency with Prior U.S. Public Statements	Consistency with Major Partner Nation Views	Effect on Captured U.S. Forces	Potential Adverse Effect for Participants/ Supervisors/COC	Potential Effect on Detainee Prosecutions	Other	Re Unlawful Combatants
26. Threaten to transfer to a 3rd country	Green	Green	Green	Green	Green	Green [10]	Yellow	Green
27. Isolation	Green [14]	Green	Yellow [15]	Green	Green	Green [16]	Yellow	Green E (Cbt.C)
28. Use of Prolonged interrogations	Green	Green	Green	Green	Green	Yellow [18]	Yellow	Green E (GO/FO)
29. Forced Grooming	Yellow [21]	Green	Yellow [22]	Green	Green	Yellow	Yellow	Green E (GO/FO)
30. Prolonged Standing	Green	Green	Green	Green	Green	Green [23]	Yellow	Green E (GO/FO)
31. Sleep Deprivation	Green	Green	Yellow [24]	Yellow	Yellow	Yellow [25]	Yellow [26]	Green E (Cbt.C)
32. Physical Training	Green	Green	Green	Green	Green	Yellow [27]	Yellow	Green E (GO/FO)
33. Face or Stomach Slap	Yellow [28]	Green	Green [29]	Yellow [30]	Yellow [31]	Yellow [32]	Yellow [33]	Green E (GO/FO)
34. Removal of Clothing	Green	Green	Yellow	Green [36]	Green	Yellow	Yellow [37]	Yellow E (Cbt.C)
35. Increasing Anxiety by Use of Aversions	Green	Green	Yellow	Green [40]	Green	Yellow [41]	Yellow	Yellow E (Cbt.C)

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards. Yellow indicates area of consideration does not preclude use but there are problematic aspects that cannot be eliminated by procedural safeguards (see footnote). Red indicates major issue in area of consideration that cannot be eliminated.

General Comments on Techniques Chart

"E" denotes recommendation that technique be considered "exceptional" and subject to the following limitations: (i) limited to use only at strategic interrogation facilities; (ii) there is a good basis to believe that the detainee possesses critical intelligence; (iii) the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination); (iv) interrogators are specifically trained for the technique(s); (v) a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel) has been developed; (vi) there is appropriate supervision; and, (vii) there is appropriate specified senior approval for use with any specific detainee (after considering the foregoing and receiving legal advice).

"(Cbt.C)" denotes recommendation that approval level for use of technique for a specific detainee be no lower than the Combatant Commander.

"(GO/FO)" denotes recommendation that approval level for use of technique for a specific detainee be no lower than a General Officer or Flag Officer.

The title of a particular technique is not always fully descriptive of a particular technique. With respect to the employment of any techniques involving physical contact or stress or that could produce physical pain or harm, a detailed explanation of that technique must be provided to the decision authority prior to any decision.

Recommendation: The working group recommends that techniques 1-26 be approved for use with unlawful combatants outside the U.S. subject to the general limitations set forth in the Legal and Policy Analysis; and that techniques 27-35 be approved for use with unlawful combatants outside the U.S. subject to the general limitations as well as the specific limitations regarding "exceptional" techniques set forth above and in the Legal and Policy Analysis. If additional techniques are requested for use in the future, sufficient information regarding the technique must be provided to the appropriate command authority so that a legal/policy analysis can be conducted and recommendations for use made.

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards. Yellow indicates area of consideration does not preclude use but there are problematic aspects that cannot be eliminated by procedural safeguards (see footnote). Red indicates major issue in area of consideration that cannot be eliminated.

Footnotes

1. These recommendations assume that procedures and safeguards substantially similar to those set forth in the "Policy" Section of the Legal and Policy Analysis are followed. **The analysis relates to each individual technique; use of techniques in combination could significantly affect the legality and wisdom of their application.**

2. Techniques 1-19, 22-26, 30 and 35, applied singly, are purely verbal and/or involve no physical contact that could produce pain or harm; no threat of pain or harm.

3. *As a matter of policy, for countries that assert that POW protections should apply to detainees*: Other nations may consider that provision and retention of religious items (e.g., the Koran) are protected under international law (see, Geneva III, Article 34).

4. May affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

5. *For countries that assert that POW protections apply to detainees*: Article 17 of Geneva III provides, "Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."

6. *As a matter of policy, for countries that assert that POW protections should apply to detainees*: Would be inconsistent with Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation.

7. *As a matter of policy, for countries that assert that POW protections should apply to detainees*: Possible that other nations would disregard "mild" aspect and use as justification for abuse of U.S. POWs.

8. International case law suggests that technique might in some circumstances be viewed by other countries as inhumane.

9. May affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

10. May significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

Footnotes (cont'd)

11. The use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command.

12. To avoid implementation that could transgress, the use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command.

13. To avoid implementation that could transgress, the use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command.

14. Not known to have been generally used for interrogation purposes for longer than 30 days.

15. *As a matter of policy, for countries that assert that POW protections should apply to detainees*: Would be inconsistent with the requirements of Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation; Article 14 which provides that POWs are entitled to respect for their person; Article 34 which prohibits coercion (see commentary to paragraph 4), and Article 126 which ensures access and basic standards of treatment.

16. May affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

17. Utility is "high" for the first four to five days, "medium" for the following four to six days, and "low" thereafter.

18. May significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

19. Where there are religious or cultural sensitivities, this technique could raise issue of "degrading" if not applied in accordance with general limitations.

20. At practical level, may raise issues whether excessive force was used.

Footnotes (cont'd)

21. This technique has not been used historically by U.S. forces. As such, no color code was assigned.

22. This technique could be viewed by major partner nations as degrading in some circumstances.

23. May affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

24. As a matter of policy, for consideration of other nations' views, the Committee against Torture, established under Article 17 of the Convention Against Torture (CAT), has interpreted "sleep deprivation for prolonged periods" to be a violation of both Article 16 of the CAT as cruel, inhuman, or degrading treatment as well as constituting torture under Article 1 of the CAT. Concluding Observations of the Committee against Torture, U.N. Doc. A/52/44, paragraphs 253-260. See also, Judgment on the Interrogation Methods Applied by the GSS, Nos HC 5100/94, HC 4054/95, HC 5188/96, HC 7563/97, HC 7628/97, HC 1043/99 (Sup Ct of Israel, sitting as the High Court of Justice, Sep 6, 1999). Finally, the European Court of Human Rights (ECHR) has held that sleep deprivation, in conjunction with four other problematic techniques (wall standing, hooding, subjection to noise, and deprivation of food and drink), did constitute "inhuman and degrading treatment". Ireland v. United Kingdom, 25 Eur. Ct. H.R. (Ser. A) (1978).

25. May significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

26. Knowledge of this technique may have a significant adverse effect on public opinion.

27. May affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

28. Technique used historically until the Vietnam war, however not officially sanctioned.

29. As a matter of policy, for consideration of other nations' views, the Committee against Torture has generally denounced the use of "moderate physical pressure" as a permissible interrogation technique. See also, Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (Ser. A) (1978) (spanking of student with 3 lashes of a birch rod violated European Convention on Human Rights). See also, Article 5 of the American Convention on Human Rights prohibits not only "torture" and "cruel, inhuman or degrading punishment or treatment" but it also provides that: "Every person has the right to have his physical, mental, and moral integrity respected."

Footnotes

30. As a matter of policy, other nations could interpret this as condoning assault on the detainee and encourage the use against U.S. POWs.

31. Potential to be subject to charge of assault in international jurisdictions.

32. May significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

33. Knowledge of this technique may have significant adverse effect on public opinion.

34. Depending on application of technique, could be construed as degrading.

35. At practical level, may raise issues whether excessive force was used as force may be required to remove clothing.

36. Other nations may use as excuse to apply to U.S. POWs.

37. Knowledge of this technique may have a significant adverse effect on public opinion.

38. Legal exposure would be dependant on specific technique employed. Depending on technique used and subject response, potential exists that technique could be viewed as violating 5th/8th/14th Amendment standards, and therefore violate U.S. interpretation of Torture Convention.

39. Legal exposure would be dependant on specific technique employed. Depending on technique used and subject response, potential exists that technique could be viewed as violating 5th/8th/14th Amendment standards, and therefore violate U.S. interpretation of Torture Convention.

40. Could provide basis for other nations to justify use of more aggravated mental techniques on U.S. POWs.

41. May significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

Description of Interrogation Techniques

1. **Direct**: Asking straightforward questions.
2. **Incentive/Removal of Incentive**: Providing a reward or removing a privilege, above and beyond those that are required by the Geneva Convention, from detainees.
3. **Emotional Love**: Playing on the love a detainee has for an individual or group.
4. **Emotional Hate**: Playing on the hatred a detainee has for an individual or group.
5. **Fear Up Harsh**: Significantly increasing the fear level in a detainee.
6. **Fear Up Mild**: Moderately increasing the fear level in a detainee.
7. **Reduced Fear**: Reducing the fear level in a detainee.
8. **Pride and Ego Up**: Boosting the ego of a detainee.
9. **Pride and Ego Down**: Attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW.
10. **Futility**: Invoking the feeling of futility of a detainee.
11. **We Know All**: Convincing the detainee that the interrogator knows the answer to questions he asks the detainee.
12. **Establish Your Identity**: Convincing the detainee that the interrogator has mistaken the detainee for someone else.
13. **Repetition Approach**: Continuously repeating the same question to the detainee within interrogation periods of normal duration.
14. **File and Dossier**: Convincing detainee that the interrogator has a damning and inaccurate file, which must be fixed.
15. **Mutt and Jeff**: A team consisting of a friendly and harsh interrogator. The harsh interrogator might employ the Pride and Ego Down technique.

Description of Interrogation Techniques (cont'd)

16. **Rapid Fire**: Questioning in rapid succession without allowing detainee to answer.

17. **Silence**: Staring at the detainee to encourage discomfort.

18. **Change of Scenery Up**: Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse).

19. **Change of Scenery Down**: Removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality.

20. **Hooding**: This technique is questioning the detainee with a blindfold in place. For interrogation purposes, the blindfold is not on other than during interrogation.

21. **Mild Physical Contact**: Lightly touching a detainee or lightly poking the detainee in a completely non-injurious manner. This also includes softly grabbing of shoulders to get the detainee's attention or to comfort the detainee.

22. **Dietary Manipulation**: Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water, e.g., hot rations to MREs.

23. **Environmental Manipulation**: Altering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times.

24. **Sleep Adjustment**: Adjusting the sleeping times of the detainee (e.g., reversing sleep cycles from night to day.) This technique is NOT sleep deprivation.

25. **False Flag**: Convincing the detainee that individuals from a country other than the United States are interrogating him.

26. **Threat of Transfer**: Threatening to transfer the subject to a 3rd country that subject is likely to fear would subject him to torture or death. (The threat would not be acted upon, nor would the threat include any information beyond the naming of the receiving country.)

Description of Interrogation Techniques (cont'd)

27. **Isolation**: Isolating the detainee from other detainees while still complying with basic standards of treatment.

28. **Use of Prolonged Interrogations**: The continued use of a series of approaches that extend over a long period of time (e.g., 20 hours per day per interrogation).

29. **Forced Grooming**: Forcing a detainee to shave hair or beard. (Force applied with intention to avoid injury. Would not use force that would cause serious injury.)

30. **Prolonged Standing:** Lengthy standing in a "normal" position (non-stress). This has been successful, but should never make the detainee exhausted to the point of weakness or collapse. Not enforced by physical restraints. Not to exceed four hours in a 24-hour period.

31. **Sleep Deprivation**: Keeping the detainee awake for an extended period of time. (Allowing individual to rest briefly and then awakening him, repeatedly.) Not to exceed 4 days in succession.

32. **Physical Training**: Requiring detainees to exercise (perform ordinary physical exercises actions) (e.g., running, jumping jacks); not to exceed 15 minutes in a two hour period; not more than two cycles per 24 hour period. Assists in generating compliance and fatiguing the detainees. No enforced compliance.

33. **Face slap/ Stomach slap**: A quick glancing slap to the fleshy part of the cheek or stomach. These techniques are used strictly as shock measures and do not cause pain or injury. They are only effective if used once or twice together. After the second time on a detainee, it will lose the shock effect. Limited to two slaps per application; no more than two applications per interrogation.

34. **Removal of Clothing:** Potential removal of all clothing; removal to be done by military police if not agreed to by the subject. Creating a feeling of helplessness and dependence. This technique must be monitored to ensure the environmental conditions are such that this technique does not injure the detainee.

35. **Increasing Anxiety by Use of Aversions**: Introducing factors that of themselves create anxiety but do not create terror or mental trauma (e.g., simple presence of dog without directly threatening action). This technique requires the commander to develop specific and detailed safeguards to insure detainee's safety.

Attachment 6

UNCLASSIFIED

~~SECRET/NOFORN~~

THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

APR 16 2003

MEMORANDUM FOR THE COMMANDER, US SOUTHERN COMMAND

SUBJECT: Counter-Resistance Techniques in the War on Terrorism (S)

(U) ~~(S/NF)~~ I have considered the report of the Working Group that I directed be established on January 15, 2003.

(U) ~~(S/NF)~~ I approve the use of specified counter-resistance techniques, subject to the following:

(U) a. The techniques I authorize are those lettered A-X, set out at Tab A.

(U) b. These techniques must be used with all the safeguards described at Tab B.

(U) ~~(S)~~ c. Use of these techniques is limited to interrogations of unlawful combatants held at Guantanamo Bay, Cuba.

(U) ~~(S)~~ d. Prior to the use of these techniques, the Chairman of the Working Group on Detainee Interrogations in the Global War on Terrorism must brief you and your staff.

(U) ~~(S/NF)~~ I reiterate that US 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 the Geneva Conventions. In addition, if you intend to use techniques B, I, O, or X, you must specifically determine that military necessity requires its use and notify me in advance.

(U) ~~(S/NF)~~ If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee.

(U) ~~(S)~~ Nothing in this memorandum in any way restricts your existing authority to maintain good order and discipline among detainees.

Attachments:
As stated

classified Under Authority of Executive Order 12958
Executive Secretary, Office of the Secretary of Defense
lliam P. Marriott, CAPT, USN
e 18, 2004

NOT RELEASABLE TO
FOREIGN NATIONALS

UNCLASSIFIED

Classified By: Secretary of Defense
Reason: 1.5(a)
Declassify On: 2 April 2013

~~SECRET/NOFORN~~

TAB A

INTERROGATION TECHNIQUES

(U) ~~(S//NF)~~ The use of techniques A - X is subject to the general safeguards as provided below as well as specific implementation guidelines to be provided by the appropriate authority. Specific implementation guidance with respect to techniques A - Q is provided in Army Field Manual 34-52. Further implementation guidance with respect to techniques R - X will need to be developed by the appropriate authority.

(U) ~~(S//NF)~~ Of the techniques set forth below, the policy aspects of certain techniques should be considered to the extent those policy aspects reflect the views of other major U.S. partner nations. Where applicable, the description of the technique is annotated to include a summary of the policy issues that should be considered before application of the technique.

A. (U) ~~(S//NF)~~ Direct: Asking straightforward questions.

B. (U) ~~(S//NF)~~ Incentive/Removal of Incentive: Providing a reward or removing a privilege, above and beyond those that are required by the Geneva Convention, from detainees. [Caution: Other nations that believe that detainees are entitled to POW protections may consider that provision and retention of religious items (e.g., the Koran) are protected under international law (see, Geneva III, Article 34). Although the provisions of the Geneva Convention are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

C. (U) ~~(S//NF)~~ Emotional Love: Playing on the love a detainee has for an individual or group.

D. (U) ~~(S//NF)~~ Emotional Hate: Playing on the hatred a detainee has for an individual or group.

E. (U) ~~(S//NF)~~ Fear Up Harsh: Significantly increasing the fear level in a detainee.

F. (U) ~~(S//NF)~~ Fear Up Mild: Moderately increasing the fear level in a detainee.

G. (U) ~~(S//NF)~~ Reduced Fear: Reducing the fear level in a detainee.

H. (U) ~~(S//NF)~~ Pride and Ego Up: Boosting the ego of a detainee.

Classified By:	Secretary of Defense
Reason:	1.5(a)
Declassify On:	2 April 2013

I. (U) ~~(S//NF)~~ Pride and Ego Down: Attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW. [Caution: Article 17 of Geneva III provides, "Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." *Other nations that believe that detainees are entitled to* POW protections may consider this technique inconsistent with the provisions of Geneva. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

J. (U) ~~(S//NF)~~ Futility: Invoking the feeling of futility of a detainee.

K. (U) ~~(S//NF)~~ We Know All: Convincing the detainee that the interrogator knows the answer to questions he asks the detainee.

L. (U) ~~(S//NF)~~ Establish Your Identity: Convincing the detainee that the interrogator has mistaken the detainee for someone else.

M. (U) ~~(S//NF)~~ Repetition Approach: Continuously repeating the same question to the detainee within interrogation periods of normal duration.

N. (U) ~~(S//NF)~~ File and Dossier: Convincing detainee that the interrogator has a damning and inaccurate file, which must be fixed.

O. (U) ~~(S//NF)~~ *Mutt and Jeff: A team consisting of a friendly and harsh* interrogator. The harsh interrogator might employ the Pride and Ego Down technique. [Caution: Other nations that believe that POW protections apply to detainees may view this technique as inconsistent with Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

P. (U) ~~(S//NF)~~ Rapid Fire: Questioning in rapid succession without allowing detainee to answer.

Q. (U) ~~(S//NF)~~ Silence: Staring at the detainee to encourage discomfort.

R. (U) ~~(S//NF)~~ Change of Scenery Up: Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse).

S. (U) ~~(S//NF)~~ Change of Scenery Down: Removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality.

T. (U) ~~(S//NF)~~ Dietary Manipulation: Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water, e.g., hot rations to MREs.

(U)
U. ~~(S//NF)~~ Environmental Manipulation: Altering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times. [Caution: Based on court cases in other countries, some nations may view application of this technique in certain circumstances to be inhumane. Consideration of these views should be given prior to use of this technique.]

(U)
V. ~~(S//NF)~~ Sleep Adjustment: Adjusting the sleeping times of the detainee (e.g., reversing sleep cycles from night to day.) This technique is NOT sleep deprivation.

(U)
W. ~~(S//NF)~~ False Flag: Convincing the detainee that individuals from a country other than the United States are interrogating him.

(U)
X. ~~(S//NF)~~ Isolation: Isolating the detainee from other detainees while still complying with basic standards of treatment. [Caution: The use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command. This technique is not known to have been generally used for interrogation purposes for longer than 30 days. Those nations that believe detainees are subject to POW protections may view use of this technique as inconsistent with the requirements of Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation; Article 14 which provides that POWs are entitled to respect for their person; Article 34 which prohibits coercion and Article 126 which ensures access and basic standards of treatment. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

TAB B

GENERAL SAFEGUARDS

(U) ~~(S//NF)~~ Application of these interrogation techniques is subject to the following general safeguards: (i) limited to use only at strategic interrogation facilities; (ii) there is a good basis to believe that the detainee possesses critical intelligence; (iii) the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination); (iv) interrogators are specifically trained for the technique(s); (v) a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel) has been developed; (vi) there is appropriate supervision; and, (vii) there is appropriate specified senior approval for use with any specific detainee (after considering the foregoing and receiving legal advice).

(U) The purpose of all interviews and interrogations is to get the most information from a detainee with the least intrusive method, always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators. Operating instructions must be developed based on command policies to insure uniform, careful, and safe application of any interrogations of detainees.

(U) ~~(S//NF)~~ Interrogations must always be planned, deliberate actions that take into account numerous, often interlocking factors such as a detainee's current and past performance in both detention and interrogation, a detainee's emotional and physical strengths and weaknesses, an assessment of possible approaches that may work on a certain detainee in an effort to gain the trust of the detainee, strengths and weaknesses of interrogators, and augmentation by other personnel for a certain detainee based on other factors.

(U) ~~(S//NF)~~ Interrogation approaches are designed to manipulate the detainee's emotions and weaknesses to gain his willing cooperation. Interrogation operations are never conducted in a vacuum; they are conducted in close cooperation with the units detaining the individuals. The policies established by the detaining units that pertain to searching, silencing, and segregating also play a role in the interrogation of a detainee. Detainee interrogation involves developing a plan tailored to an individual and approved by senior interrogators. Strict adherence to policies/standard operating procedures governing the administration of interrogation techniques and oversight is essential.

Classified By: Secretary of Defense
Reason: 1.5(a)
Declassify On: 2 April 2013

(U) ~~(S//NF)~~ It is important that interrogators be provided reasonable latitude to vary techniques depending on the detainee's culture, strengths, weaknesses, environment, extent of training in resistance techniques as well as the urgency of obtaining information that the detainee is known to have.

(U) ~~(S//NF)~~ While techniques are considered individually within this analysis, it must be understood that in practice, techniques are usually used in combination; the cumulative effect of all techniques to be employed must be considered before any decisions are made regarding approval for particular situations. The title of a particular technique is not always fully descriptive of a particular technique. With respect to the employment of any techniques involving physical contact, stress or that could produce physical pain or harm, a detailed explanation of that technique must be provided to the decision authority prior to any decision.

Attachment 6

UNCLASSIFIED

~~SECRET/NOFORN~~

THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

APR 16 2003

MEMORANDUM FOR THE COMMANDER, US SOUTHERN COMMAND

SUBJECT: Counter-Resistance Techniques in the War on Terrorism (S)

(U) ~~(S/NF)~~ I have considered the report of the Working Group that I directed be established on January 15, 2003.

(U) ~~(S/NF)~~ I approve the use of specified counter-resistance techniques, subject to the following:

(U) a. The techniques I authorize are those lettered A-X, set out at Tab A.

(U) b. These techniques must be used with all the safeguards described at Tab B.

(U) ~~(S)~~ c. Use of these techniques is limited to interrogations of unlawful combatants held at Guantanamo Bay, Cuba.

(U) ~~(S)~~ d. Prior to the use of these techniques, the Chairman of the Working Group on Detainee Interrogations in the Global War on Terrorism must brief you and your staff.

(U) ~~(S/NF)~~ I reiterate that US 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 the Geneva Conventions. In addition, if you intend to use techniques B, I, O, or X, you must specifically determine that military necessity requires its use and notify me in advance.

(U) ~~(S/NF)~~ If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee.

(U) ~~(S)~~ Nothing in this memorandum in any way restricts your existing authority to maintain good order and discipline among detainees.

Attachments:
As stated

classified Under Authority of Executive Order 12958
Executive Secretary, Office of the Secretary of Defense
lliam P. Marriott, CAPT, USN
e 18, 2004

NOT RELEASABLE TO
FOREIGN NATIONALS

UNCLASSIFIED

Classified By: Secretary of Defense
Reason: 1.5(a)
Declassify On: 2 April 2013

TAB A

INTERROGATION TECHNIQUES

(U) ~~(S//NF)~~ The use of techniques A - X is subject to the general safeguards as provided below as well as specific implementation guidelines to be provided by the appropriate authority. Specific implementation guidance with respect to techniques A - Q is provided in Army Field Manual 34-52. Further implementation guidance with respect to techniques R - X will need to be developed by the appropriate authority.

(U) ~~(S//NF)~~ Of the techniques set forth below, the policy aspects of certain techniques should be considered to the extent those policy aspects reflect the views of other major U.S. partner nations. Where applicable, the description of the technique is annotated to include a summary of the policy issues that should be considered before application of the technique.

A. (U) ~~(S//NF)~~ Direct: Asking straightforward questions.

B. (U) ~~(S//NF)~~ Incentive/Removal of Incentive: Providing a reward or removing a privilege, above and beyond those that are required by the Geneva Convention, from detainees. [Caution: Other nations that believe that detainees are entitled to POW protections may consider that provision and retention of religious items (e.g., the Koran) are protected under international law (see, Geneva III, Article 34). Although the provisions of the Geneva Convention are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

C. (U) ~~(S//NF)~~ Emotional Love: Playing on the love a detainee has for an individual or group.

D. (U) ~~(S//NF)~~ Emotional Hate: Playing on the hatred a detainee has for an individual or group.

E. (U) ~~(S//NF)~~ Fear Up Harsh: Significantly increasing the fear level in a detainee.

F. (U) ~~(S//NF)~~ Fear Up Mild: Moderately increasing the fear level in a detainee.

G. (U) ~~(S//NF)~~ Reduced Fear: Reducing the fear level in a detainee.

H. (U) ~~(S//NF)~~ Pride and Ego Up: Boosting the ego of a detainee.

Classified By:	Secretary of Defense
Reason:	1.5(a)
Declassify On:	2 April 2013

I. (U) ~~(S//NF)~~ Pride and Ego Down: Attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW. [Caution: Article 17 of Geneva III provides, "Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." *Other nations that believe that detainees are entitled to* POW protections may consider this technique inconsistent with the provisions of Geneva. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

J. (U) ~~(S//NF)~~ Futility: Invoking the feeling of futility of a detainee.

K. (U) ~~(S//NF)~~ We Know All: Convincing the detainee that the interrogator knows the answer to questions he asks the detainee.

L. (U) ~~(S//NF)~~ Establish Your Identity: Convincing the detainee that the interrogator has mistaken the detainee for someone else.

M. (U) ~~(S//NF)~~ Repetition Approach: Continuously repeating the same question to the detainee within interrogation periods of normal duration.

N. (U) ~~(S//NF)~~ File and Dossier: Convincing detainee that the interrogator has a damning and inaccurate file, which must be fixed.

O. (U) ~~(S//NF)~~ *Mutt and Jeff: A team consisting of a friendly and harsh* interrogator. The harsh interrogator might employ the Pride and Ego Down technique. [Caution: Other nations that believe that POW protections apply to detainees may view this technique as inconsistent with Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

P. (U) ~~(S//NF)~~ Rapid Fire: Questioning in rapid succession without allowing detainee to answer.

Q. (U) ~~(S//NF)~~ Silence: Staring at the detainee to encourage discomfort.

R. (U) ~~(S//NF)~~ Change of Scenery Up: Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse).

S. (U) ~~(S//NF)~~ Change of Scenery Down: Removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality.

T. (U) ~~(S//NF)~~ Dietary Manipulation: Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water, e.g., hot rations to MREs.

(u)
U. ~~(S//NF)~~ Environmental Manipulation: Altering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times. [Caution: Based on court cases in other countries, some nations may view application of this technique in certain circumstances to be inhumane. Consideration of these views should be given prior to use of this technique.]

(u)
V. ~~(S//NF)~~ Sleep Adjustment: Adjusting the sleeping times of the detainee (e.g., reversing sleep cycles from night to day.) This technique is NOT sleep deprivation.

(u)
W. ~~(S//NF)~~ False Flag: Convincing the detainee that individuals from a country other than the United States are interrogating him.

(u)
X. ~~(S//NF)~~ Isolation: Isolating the detainee from other detainees while still complying with basic standards of treatment. [Caution: The use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command. This technique is not known to have been generally used for interrogation purposes for longer than 30 days. Those nations that believe detainees are subject to POW protections may view use of this technique as inconsistent with the requirements of Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation; Article 14 which provides that POWs are entitled to respect for their person; Article 34 which prohibits coercion and Article 126 which ensures access and basic standards of treatment. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

TAB B

GENERAL SAFEGUARDS

(U) ~~(S//NF)~~ Application of these interrogation techniques is subject to the following general safeguards: (i) limited to use only at strategic interrogation facilities; (ii) there is a good basis to believe that the detainee possesses critical intelligence; (iii) the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination); (iv) interrogators are specifically trained for the technique(s); (v) a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel) has been developed; (vi) there is appropriate supervision; and, (vii) there is appropriate specified senior approval for use with any specific detainee (after considering the foregoing and receiving legal advice).

(U) The purpose of all interviews and interrogations is to get the most information from a detainee with the least intrusive method, always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators. Operating instructions must be developed based on command policies to insure uniform, careful, and safe application of any interrogations of detainees.

(U) ~~(S//NF)~~ Interrogations must always be planned, deliberate actions that take into account numerous, often interlocking factors such as a detainee's current and past performance in both detention and interrogation, a detainee's emotional and physical strengths and weaknesses, an assessment of possible approaches that may work on a certain detainee in an effort to gain the trust of the detainee, strengths and weaknesses of interrogators, and augmentation by other personnel for a certain detainee based on other factors.

(U) ~~(S//NF)~~ Interrogation approaches are designed to manipulate the detainee's emotions and weaknesses to gain his willing cooperation. Interrogation operations are never conducted in a vacuum; they are conducted in close cooperation with the units detaining the individuals. The policies established by the detaining units that pertain to searching, silencing, and segregating also play a role in the interrogation of a detainee. Detainee interrogation involves developing a plan tailored to an individual and approved by senior interrogators. Strict adherence to policies/standard operating procedures governing the administration of interrogation techniques and oversight is essential.

Classified By: Secretary of Defense
Reason: 1.5(a)
Declassify On: 2 April 2013

(U) ~~(S//NF)~~ It is important that interrogators be provided reasonable latitude to vary techniques depending on the detainee's culture, strengths, weaknesses, environment, extent of training in resistance techniques as well as the urgency of obtaining information that the detainee is known to have.

(U) ~~(S//NF)~~ While techniques are considered individually within this analysis, it must be understood that in practice, techniques are usually used in combination; the cumulative effect of all techniques to be employed must be considered before any decisions are made regarding approval for particular situations. The title of a particular technique is not always fully descriptive of a particular technique. With respect to the employment of any techniques involving physical contact, stress or that could produce physical pain or harm, a detailed explanation of that technique must be provided to the decision authority prior to any decision.

Attachment 7

Attachment 7

Intentionally left blank and will be submitted upon receipt

Attachment 8

Army Regulation 15-6: Final Report

Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility

EXECUTIVE SUMMARY

Detention and interrogation operations at Joint Task Force Guantanamo (JTF-GTMO) cover a three-year period and over 24,000 interrogations. This AR 15-6 investigation found only three interrogation acts in violation of interrogation techniques authorized by Army Field Manual 34-52 and DoD guidance. The AR 15-6 also found that the Commander of JTF-GTMO failed to monitor the interrogation of one high value detainee in late 2002. The AR 15-6 found that the interrogation of this same high value detainee resulted in degrading and abusive treatment but did not rise to the level of being inhumane treatment. Finally, the AR 15-6 found that the communication of a threat to another high value detainee was in violation of SECDEF guidance and the UCMJ. The AR 15-6 found no evidence of torture or inhumane treatment at JTF-GTMO.

INTRODUCTION

In June 2004, the Federal Bureau of Investigation (FBI) began an internal investigation to determine if any of its personnel had observed mistreatment or aggressive behavior towards detainees at Guantanamo Bay, Cuba (GTMO). On 9 Jul 04, the FBI – Inspection Division (INSD), sent an e-mail message to all FBI personnel who had served in any capacity at GTMO. The e-mail stated in relevant part:

"You have been identified as having conducted an assignment at GTMO, Cuba since 9/11/2001. The Inspection Division has been tasked with contacting those employees who have served in any capacity at GTMO and obtain information regarding the treatment of detainees. Employees should immediately respond to the following:

1) Employees who observed aggressive treatment, which was not consistent with Bureau interview policy guidelines, should respond via e-mail for purposes of a follow-up interview.

2) Employees who worked at GTMO and observed no aggressive treatment of detainees should respond via an EC documenting a negative response..."

The above e-mail message was sent by INSD to 493 FBI personnel who had served in GTMO between 9 Sep 01 and 9 Jul 04. INSD received 434 total

responses, and 26 agents stated that they had observed aggressive treatment of detainees at GTMO.

In response to FBI agent allegations of aggressive interrogation techniques at Joint Task Force Guantanamo Bay (JTF-GTMO) Cuba, that were disclosed in Dec 04 as a result of FOIA releases, General (GEN) Bantz J. Craddock, Commander United States Southern Command (USSOUTHCOM), ordered an AR 15-6 investigation and appointed Brigadier General (BG) John T. Furlow, United States Army South Deputy Commander for Support, as the investigating officer. BG Furlow was directed to address the following allegations:

a. That military interrogators improperly used military working dogs during interrogation sessions to threaten detainees, or for some other purpose;

b. That military interrogators improperly used duct tape to cover a detainee's mouth and head;

c. That DoD interrogators improperly impersonated FBI agents and Department of State officers during the interrogation of detainees;

d. That, on several occasions, DoD interrogators improperly played loud music and yelled loudly at detainees;

e. That military personnel improperly interfered with FBI interrogators in the performance of their FBI duties;

f. That military interrogators improperly used sleep deprivation against detainees;

g. That military interrogators improperly chained detainees and placed them in a fetal position on the floor, and denied them food and water for long periods of time;

h. That military interrogators improperly used extremes of heat and cold during their interrogation of detainees.

Subsequent to the initial appointment, GEN Craddock directed BG Furlow to investigate two additional allegations concerning a female military interrogator performing a "lap dance" on a detainee and the use of faux "menstrual blood" during an interrogation. Finally, the appointment letter directed BG Furlow to not limit himself to the listed allegations.

On 28 Feb 05, after two months of investigation, BG Furlow advised GEN Craddock that he needed to interview officers senior in grade to himself. On 28 Feb 05 GEN Craddock appointed Lieutenant General (Lt Gen) Randall M. Schmidt, United States Southern Command Air Forces Commander, Davis-

Monthan AFB, AZ, as the senior investigating officer. This report reflects the combined findings and conclusions of the initial investigative efforts and the combined investigative efforts of both BG Furlow and Lt Gen Schmidt.

After submission of the AR15-6 Report of Investigation on 1 Apr 05, CDR USSOUTHCOM directed on 5 May 2005 that the investigation be reopened to consider memos dated 11 Dec 04 and 24 Dec 04, that had recently been discovered, regarding the subject of the second Special Interrogation Plan. Prior to completion of the follow-up, CDR USSOUTHCOM directed on 2 Jun 05 that the investigation should also address new allegations made by the subject of the first Special Interrogation Plan.

SCOPE OF REVIEW

This investigation was directed and accomplished under the "informal procedures" provisions of Army Regulation 15-6, Procedures for Investigating Officers and Boards of Officers, dated 30 Sep 96, (AR 15-6). This AR 15-6 investigation centered on alleged abuses occurring during interrogation operations. This AR 15-6 found incidents of abuse during detention operations; all of which were appropriately addressed by the command. The investigation team conducted a comprehensive review of thousands of documents and statements pertaining to any allegations of abuse occurring at GTMO, to include the complete medical records of the subjects of the first and second Special Interrogation Plan. The team interviewed 30 FBI agents, conducted interviews of over 100 personnel from 6 Jan 05 to 24 Mar 05 and had access to hundreds of interviews conducted by several recent investigations. These interviews included personnel assigned to GTMO, USSOUTHCOM, and OSD during the tenure of JTFs 160, 170, and GTMO. It included nine DIA personnel, including every Joint Intelligence Group Chief and every Intelligence Control Element Chief. It included 76 DoD personnel, to include every General Officer who commanded Joint Task Force 160, Joint Task Force 170 and Joint Task Force GTMO. DoD personnel interviewed also included personnel who served as interrogators at GTMO and instructors at the US Army Intelligence School and Center. During the course of the investigation, the team visited Birmingham, AL; Chicago, IL; Ft Bragg, NC; Ft Devens, MA; Ft Huachuca, AZ; GTMO (twice); Los Angeles, CA; Miami, FL; and Washington D.C. (five times).

The investigation team attempted to determine if the allegations alleged by the FBI, in fact, occurred. During the course of the follow up investigation the AR15-6 also considered allegations raised specifically by detainees the subject of the first and second Special Interrogation Plans. The investigating team applied a preponderance standard of proof consistent with the guidance contained in AR15-6. The team also applied guidance contained in FM 34-52, CDR USSOUTHCOM, and SECDEF memorandums authorizing special interrogation techniques in deciding if a particular interrogation approach fell properly within an authorized technique. In those cases in which the team concluded that the

allegation had in fact occurred, the team then considered whether the incident was in compliance with interrogation techniques that were approved either at the time of the incident or subsequent to the incident. In those cases where it was determined the allegation occurred and to have not been an authorized technique, the team then reviewed whether disciplinary action had already been taken and the propriety of that action. On 28 Mar 05, GEN Craddock, as the investigation appointing authority, asked Lt Gen Schmidt to determine accountability for those substantiated violations that had no command action taken.

The team did not review the legal validity of the various interrogation techniques outlined in Army Field Manual 34-52, or those approved by the Secretary of Defense.

BACKGROUND

On 7 Mar 05 Vice Admiral A.T. Church, III submitted his final report of detention operations and detainee interrogation techniques in the Global War on Terror to the Secretary of Defense. (hereinafter "Church Report") That report included a thorough background discussion of detainee operations at GTMO. Our investigation independently researched the genesis and adjustments to policy and interrogation techniques from the origination of GTMO to the present. Our independently derived findings regarding the development and adjustments to policy and interrogation techniques are identical to the Church report. Therefore, I have adopted relevant portions of the Church report to show the development of permissible interrogation techniques.

Interrogation operations at GTMO began in January 2002. Initially interrogators relied upon the interrogation techniques contained in FM 34-52. These techniques were ineffective against detainees who had received interrogation resistance training. On 11 Oct 2002, Major General Michael E. Dunlavey, the Commander of Joint Task Force (JTF) 170, the intelligence task force at GTMO, requested that the CDR USSOUTHCOM, GEN James T. Hill, approve 19 counter resistance techniques that were not specifically listed in FM 34-52. The techniques were broken down into Categories I, II, and III, with the third category containing the most aggressive techniques. On 25 Oct 02 CDR USSOUTHCOM forwarded the request to the Chairman of the Joint Chiefs of Staff, General Richard B. Myers. On 2 Dec 02, the Secretary of Defense approved the use of all Category I and II techniques, but only one of the Category III techniques (which authorized mild, non-injurious physical contact such as grabbing, poking in the chest with a finger, and light pushing). In the approval memorandum, the SECDEF approved the techniques for use by CDR USSOUTHCOM, who subsequently verbally delegated the authority to approve and apply these techniques to CDR JTF-GTMO.

On 15 Jan 03, SECDEF rescinded his approval of all Category II techniques and the one Category III technique leaving only Category I techniques in effect. The SECDEF memo permitted use of Category II and III techniques only with SECDEF approval. No approval was requested or granted.

On 16 Apr 03, the Secretary of Defense issued a new policy accepting 24 techniques, most of which were taken directly from or closely resembled those in FM 34-52. The Secretary's guidance remains in effect today. This policy memorandum placed several requirements on CDR USSOUTHCOM. First, it required all detainees to continue to be treated humanely. Second, it required SECDEF notification prior to the implementation of any of the following aggressive Interrogation techniques: Incentive/Removal of Incentive; Pride and Ego Down; Mutt and Jeff; and Isolation. Third, it specifically limited the use of these aggressive techniques to circumstances required by "military necessity." The memorandum did not attempt to define the parameters of "humane treatment" or "military necessity."

The CDR USSOUTHCOM issued a memorandum on 2 Jun 03 providing further guidance on the implementation of the 16 Apr 03 SECDEF approved techniques. This guidance provided that prior to the use of any of the specified aggressive techniques, the JTF Commander would submit the request in writing to CDR USSOUTHCOM for submission to SECDEF. The guidance also stated that "specific implementation guidance with respect to techniques A-Q is provided in Army Field Manual 34-52. Further implementation guidance with respect to techniques R-X will need to be developed by the appropriate authority." GTMO standard operating procedure on interrogations provides guidance for interrogations.

In addition, the CDR USSOUTHCOM guidance provided the following clarification to the SECDEF's 16 Apr 03 memorandum: **(quoting)**

(a) Reference Technique B, the Working Group was most concerned about removal of the Koran from a detainee—something we no longer do. Because providing incentives (e.g., McDonald's Fish Sandwiches or cigarettes) is an integral part of interrogations, you will notify me in writing when the provided incentive would exceed that contemplated by interrogation doctrine contained in Army FM 34-52, or when the interrogators intend to remove an incentive from a detainee;

(b) Reference Techniques I and O, you will notify me in writing when.use of these standard interrogation techniques goes beyond the doctrinal application described in Army FM 34-52. When use of the technique is consistent with FM 34-52, you do not need to notify me;

(c) I define "sleep deprivation", referenced in Technique V, as keeping a detainee awake for more that 16 hrs, or allowing a detainee to rest

briefly and then repeatedly awakening him, not to exceed four days in succession;

(d) Reference Technique X, I do not consider the use of maximum-security units as isolation. A detainee placed in a maximum-security unit is segregated, but not truly isolated;

(e) I define the "least intrusive method" as the technique that has the least impact on a detainee's standard of treatment, while evoking the desired response from the detainee during interrogations;

(f) Except in the case of Techniques B, I, O, and X, I have determined that the first 0-6/GG-15 in the chain of command or supervision, is the "appropriate specified senior approval authority," unless approval authority is withheld from that individual by higher authority.

Lastly, I have told the Secretary of Defense his 16 April guidance applies to all interagency elements assigned or attached to JTF GTMO. **(end quote)**

There have been over 24,000 interrogation sessions at GTMO since the beginning of interrogation operations.

FINDINGS

GENERAL DETAINEE POPULATION

Allegation: That DoD interrogators improperly impersonated FBI agents or Department of State officers during the interrogation of detainees.

Finding #1: On several occasions in 2003 various DoD interrogators impersonated agents of the FBI and the Department of State.

Technique: Authorized: FM 34-52 (p. 3-13); Category I technique approved by SECDEF – Deceiving interrogator identity

Discussion: The Chief of the Special Interrogation Team directed two interrogators to pose as US State Department representatives during an interrogation. In addition another interrogator posed as an FBI agent on one occasion. This impersonation came to the attention of the Senior Supervisory Agent (SSA) of the FBI at Guantanamo Bay when several other agents advised him that detainees were complaining during interviews that the FBI had already asked them the same questions. The SSA approached the Joint Interrogation Group (JIG) Chief, with his agents' concerns. According to the SSA, the JIG Chief did not contest the FBI agents' accusations. In fact, the JIG Chief knew of at least one military interrogator who had impersonated an FBI agent. After the

regarding the use of the air conditioning units in the interrogation booths. There were several individuals who were interviewed who acknowledged that certain military interrogators would adjust the air conditioning down (cool) in an attempt to make the detainee uncomfortable for the interrogation. Several witnesses indicated that the practice of adjusting the temperature ceased when CDR JTF-GTMO directed that the practice no longer be employed. The current GTMO SOP still permits interrogators to adjust the temperature. In addition, one interrogator supervisor stated that detainees were interrogated at Camp X-Ray, where the "booths" were not air-conditioned, to make the detainees uncomfortable.

Organizational response: No disciplinary action required.

Recommendation #5: The allegation should be closed.

Allegation: That military interrogators improperly used sleep deprivation against detainees.

Finding #6: During 2003 and 2004 some detainees were subjected to cell moves every few hours to disrupt sleep patterns and lower the ability to resist interrogation. Each case differed as to length and frequency of the cell moves.

Technique: Unauthorized prior to 2 Dec 02 and between 15 Jan 03 and 16 Apr 03: Neither sleep disruption or deprivation is an authorized FM 34-52 technique

Technique: Authorized between 2 Dec 02 and 15 Jan 03 and after 16 Apr 03: The exact parameters of this technique remained undefined until 2 Jun 03 when CDR USSOUTHCOM established clear guidance on the use of sleep adjustment. His guidance prohibited the practice of keeping a detainee awake for "more than 16 hours or allowing a detainee to rest briefly and then repeatedly awakening him, not to exceed four days in succession."

Discussion: Only one FBI agent alleged sleep deprivation; his complaint was that an individual was subjected to 16 hours of interrogation followed by four-hour breaks. He says he was told about these sessions by DoD interrogators and they implied that these 16 hour interrogations were repeated on a 20 hour cycle, but he did not know for certain what in fact occurred. The FBI agent was at GTMO from 2 Jun 03 to 17 Jul 03. Under CDR USSOUTHCOM's 2 Jun 03 guidance, 16 hour interrogations were permitted and do not constitute sleep deprivation if done on a 24 hour cycle. During the course of the investigation of the FBI allegation, the AR 15-6 did conduct a review of the interrogation records to see if there was any evidence that corroborated this allegation. While not directly supporting the FBI's allegation, records indicated that some interrogators recommended detainees for the "frequent flyer program." A current GTMO interrogation analyst indicated that this was a program in effect throughout 2003

and until March 2004 to move detainees every few hours from one cell to another to disrupt their sleep. Documentation on one detainee indicated that he was subjected to this practice as recently as March 2004.

Organizational response: None. Current JTF-GTMO Commander terminated the frequent flyer cell movement program upon his arrival in March 04.

Recommendation #6: The allegation should be closed. Recommend USSOUTHCOM clarify policy on sleep deprivation.

Allegation: That military interrogators improperly used duct tape to cover a detainee's mouth and head.

Finding #7: Sometime in October 2002 duct tape was used to "quiet" a detainee.

Technique: Unauthorized

Discussion: In his testimony, the ICE Chief testified that he had a situation in which a detainee was screaming resistance messages and potentially provoking a riot. At the time of the incident there were 10 detainees in the interrogation section and the ICE Chief was concerned about losing control of the situation. He directed the MPs to quiet the detainee down. The MP mentioned that he had duct tape. The ICE Chief says he ultimately approved the use of duct tape to quiet the detainee. The MP then placed a single strand of duct tape around the detainee's mouth. The single strand proved ineffective because the detainee was soon yelling again. This time the MPs wrapped a single strand of duct tape around the mouth and head of the detainee. The detainee removed the duct tape again. Fed up and concerned that the detainee's yelling might cause a riot in the interrogation trailer, The ICE Chief ordered the MPs to wrap the duct tape twice around the head and mouth and three times under the chin and around the top of the detainee's head. According to an FBI agent, he and another FBI agent were approached by the ICE Chief who was laughing and told the agents that they needed to see something. When the first agent went to the interrogation room he saw that the detainee's head had been wrapped in duct tape over his beard and his hair. An interrogator testified that another interrogator admitted to him that he had duct taped the head of a detainee. According to the first agent, the ICE Chief said the interrogator wrapped the detainee's head with duct tape because the detainee refused to stop "chanting" passages from the Koran.

Organizational response: The JTF-170 JAG testified that she became aware of the incident and personally counseled the ICE Chief. The counseling session consisted of a verbal admonishment.[2] The ICE Chief did not receive any formal

[2] While the ICE Chief testified that he was counseled by the JTF-GTMO Commander this is not possible. The Commander in question did not arrive until the month following the event. The previous Commander has no recollection of the event.

Discussion: See above discussion for Finding #4.

Organizational response: No disciplinary action required; technique authorized.

Recommendation #13: The allegation should be closed. Recommend JTF-GTMO develop specific guidance on the length of time that a detainee may be subjected to futility music. Placement of a detainee in the interrogation booth and subjecting him to loud music and strobe lights should be limited and conducted within clearly prescribed limits.

Allegation: That military interrogators improperly used extremes of heat and cold during their interrogation of detainees.

Finding #14: On several occasions between November 2002 and January 2003 interrogators would adjust the air conditioner to make the subject of the first Special Interrogation Plan uncomfortable.

Technique: Unauthorized prior to 16 Apr 03: SECDEF did not approve exposure to cold in his 2 Dec 02 list of approved techniques

Discussion. There are no medical entries indicating the subject of the first Special Interrogation Plan ever experienced medical problems related to low body temperature. The subject of the first Special Interrogation Plan's medical records do indicate that he did have a body temperature between 95 and 97 degrees twice. The subject of the first Special Interrogation Plan's medical records do indicate that from 7-9 Dec 02 he was hospitalized for observation after an episode of bradycardia. He was released within forty-eight hours, after the bradycardia resolved without intervention and he maintained stable hemodynamics.[4] He experienced a second episode of bradycardia in Feb 03.

Organizational response: None

Recommendation #14: The allegation should be closed.

Allegation: That military interrogators improperly used sleep deprivation against detainees.

Finding #15: From 23 Nov 02 to 16 Jan 03, the subject of the first Special Interrogation Plan was interrogated for 18-20 hours per day for 48 of the 54 days, with the opportunity for a minimum of four hours rest per day.

Technique: Authorized: SECDEF approved technique. This technique was officially permitted under 2 Dec 02 SECDEF Memorandum – The use of 20-hour interrogations

[4] Bradycardia is a relatively slow heart; hemodynamics are mechanics of blood circulation.

Discussion: SECDEF approved 20 hour interrogations for every 24-hour cycle for the subject of the first Special Interrogation Plan on 12 Nov 02. Later, CDR USSOUTHCOM formalized the definition of sleep deprivation in his 02 Jun 03 memorandum "promulgating" SECDEF's interrogation techniques of 16 Apr 03. He defined sleep deprivation as keeping a detainee awake for more than 16 hours, or allowing a detainee to rest briefly and then repeatedly awakening him, not to exceed four days in succession.

Organizational response: None. This was an authorized interrogation technique approved by SECDEF.

Recommendation #15: The allegation should be closed. Recommend USSOUTHCOM clarify policy on sleep deprivation.

Additional Allegations, Re: The subject of the first Special Interrogation Plan: In addition to the FBI allegations addressed above, the following additional interrogation techniques (not all inclusive) were used in the interrogation of the subject of the first Special Interrogation Plan. Each act is documented in the interrogation MFRs maintained on the subject of the first Special Interrogation Plan.

Finding #16a: That the subject of the first Special Interrogation Plan was separated from the general population from 8 Aug 02 to 15 Jan 03.

Technique: Unauthorized prior to 12 Nov 02: SECDEF did not approve movement of detainee to an "isolation facility" for interrogation purposes prior to approval of Category II techniques for the subject of the first Special Interrogation Plan on 12 Nov 02.

Technique: Authorized after 12 Nov 02:

Discussion: The subject of the first Special Interrogation Plan was never isolated from human contact. The subject of the first Special Interrogation Plan was however placed in an "isolation facility" where he was separated from the general detainee population from 8 Aug 02 to 15 Jan 03. The subject of the first Special Interrogation Plan routinely had contact with interrogators and MPs while in the "isolation facility." The SECDEF did not define "isolation facility" when he approved the use of an "isolation facility" for up to 30 days with additional isolation beyond 30 days requiring CDR JTF-GTMO approval on 12 Nov 02. Prior to the SECDEF's approval, placement in an "isolation facility" was not an authorized interrogation technique.

Organizational response to Additional Allegations, Re: The subject of the first Special Interrogation Plan: None taken.

Attachment 9

~~SECRET//NOFORN~~
(This page is UNCLASSIFIED)

Review of Department of Defense Detention Operations and Detainee Interrogation Techniques (U)

VADM A.T. Church, III, USN

~~SECRET//NOFORN~~
(This page is UNCLASSIFIED)

OSD 75667-05

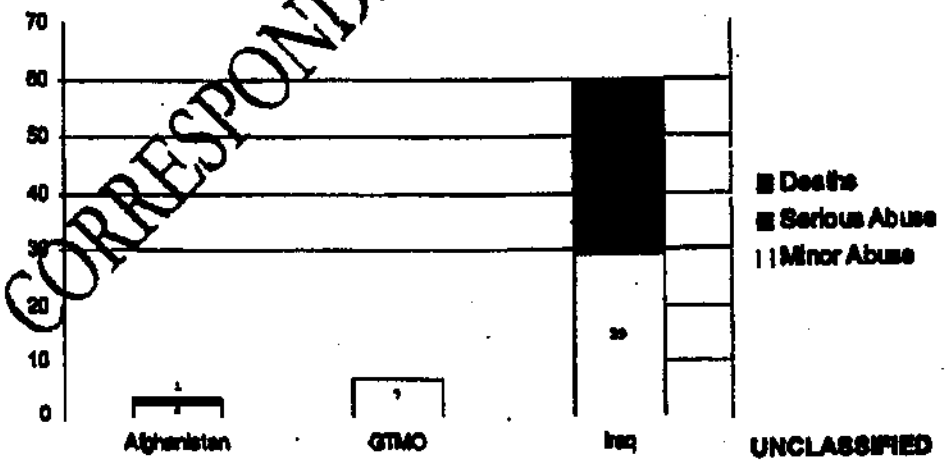
deaths, serious abuse, or minor abuse. We considered serious abuse to be misconduct resulting or having the potential to result in death, or in grievous bodily harm (as defined in the Manual for Courts-Martial, 2002 edition.) In addition, we considered all sexual assaults, threats to inflict death or grievous bodily harm, and maltreatment likely to result in death or grievous bodily harm to be serious abuse. Finally, as noted above, we concluded that one of the 71 cases did not constitute abuse for our purposes: this case involved a soldier at GTMO who dared a detainee to throw a cup of water on him, and after the detainee complied, reciprocated by throwing a cup of water on the detainee. (The soldier was removed from his assignment as a consequence of inappropriate interaction with a detainee.) We discarded this investigation, leaving us 70 substantiated detainee abuse cases to analyze. The chart below reflects the breakdown of these 70 abuse cases.

(U) There are approximately 121 abuse victims in these 70 cases of detainee abuse. As of September 30, 2004, disciplinary action had been taken against 115 service members for this misconduct, including numerous nonjudicial punishments, 15 summary courts-martial, 12 special courts-martial and nine general courts-martial.

(U) No Connection Between Interrogation Policies and Abuse

(U) We found no link between approved interrogation techniques and detainee abuse. Of

Closed Substantiated Abuse Cases (U)



CORRESPONDENCE & DOCUMENTS

~~SECRET/NOFORN~~

(b)(1)

[redacted]

(U) *Sleep Deprivation*

(b)(1)

(S) [redacted]

(U) *Sexual Acts or Mock Sexual Acts*

(b)(1)

(S) [redacted]

(U) *Use of Threatening Scenarios and Threats Against Others*

(U) Finally, on April 17, 2003, a female interrogator made inappropriate contact with a detainee by running her fingers through the detainee's hair and making sexually suggestive comments and body movements, including sitting on the detainee's lap. As mentioned in the abuse section of our report, we used the Manual for Courts-Martial definition of sexual assault, referred therein as "Indecent Assault," to characterize any potential sexual assault case. Consequently, we did not consider this case to be a sexual assault because the interrogator did not perpetrate the act with the intent to gratify her own sexual desires. The female interrogator was given a written admonishment for her actions. This incident was identified and summarized in the May 2004 Church Review.

Attachment 10

Interrogations of Mr. Jawad by US Authorities derived from records provided in discovery by the government

Date	Start Time	End Time	Location
12/26/2002	1400	1530	Bagram, AF
12/27/2002	1400	1515	Bagram, AF
12/28/2002	0900	1020	Bagram, AF
1/4/2003	0930	0940	Bagram, AF
1/7/2003	0700	0815	Bagram, AF
2/7/2003	Unknown	Unknown	GTMO
2/10/2003	Unknown	Total duration of 2 1/2 hrs	GTMO
2/11/2003	Unknown	Unknown	GTMO
2/19/2003	Unknown	Total duration of 2 1/2 hrs	GTMO
4/9/2003	Unknown	Unknown	GTMO
7/21/2003	Unknown	Unknown	GTMO
9/3/2003	Unknown	Unknown	GTMO
9/11/2003	Unknown	Unknown	GTMO
9/26/2003	Unknown	Unknown	GTMO
10/1/2003	Unknown	Unknown	GTMO
11/1/2003	Unknown	Unknown	GTMO
12/3/2003	Unknown	Unknown	GTMO
12/5/2003	Unknown	Unknown	GTMO
1/6/2004	Unknown	Unknown	GTMO
2/10/2004	Unknown	Unknown	GTMO
3/29/2004	Unknown	Unknown	GTMO
4/26/2004	Unknown	Unknown	GTMO
8/18/2004	Unknown	Unknown	GTMO
8/27/2004	Unknown	Unknown	GTMO
11/8/2004	Unknown	Unknown	GTMO
7/15/2005	Unknown	Unknown	GTMO
7/18/2005	Unknown	Unknown	GTMO
7/19/2005	Unknown	Unknown	GTMO
7/20/2005	Unknown	Unknown	GTMO
7/21/2005	Unknown	Unknown	GTMO
7/22/2005	Unknown	Unknown	GTMO
7/25/2005	Unknown	Unknown	GTMO
7/26/2005	Unknown	Unknown	GTMO
7/28/2005	Unknown	Unknown	GTMO

7/29/2005	Unknown	Unknown	GTMO
8/1/2005	Unknown	Unknown	GTMO
8/2/2005	Unknown	Unknown	GTMO
8/15/2005	Unknown	Unknown	GTMO
9/20/2005	Unknown	Unknown	GTMO
5/28/2006	Unknown	Unknown	GTMO

Attachment 12

U.S. State Department Criticism of "Stress and Duress" Interrogation Around the World

On December 26, the Washington Post reported that persons held at a CIA interrogation center in Bagram air base in Afghanistan were being subjected to "stress and duress" techniques such as standing or kneeling for hours, being held in awkward, painful positions, sleep deprivation through use of blinding lights, and hooding. In response to a Human Rights Watch letter, the Bush administration stated that "U.S. policy condemns and prohibits torture," but it failed to address the specific reports of mistreatment at Bagram. However, the U.S. State Department has itself condemned as torture or other inhuman treatment many of the "stress and duress" techniques now allegedly being used by U.S. intelligence agencies. Listed below are some of the countries criticized for using these interrogation methods during 2000, 2001, and 2002 in the State Department's annual "Country Reports on Human Rights Practices."

Country	Methods Used:
Burma	According to the State Department country reports, the Burmese military government "routinely subjected detainees to hard interrogation techniques designed to intimidate and disorient." The techniques listed include being forced to squat or remain in uncomfortable periods for long periods of time, and, according to the 2000 and 2001 country reports, sleep and food deprivation and prolonged questioning under bright lights have also been used. The United States has imposed economic sanctions on Burma mainly due to its human rights practices, and continues to condemn its acts of repression and abuse.
Egypt	The country reports cite the stripping and blindfolding of prisoners among the principal methods of torture used by Egyptian authorities. Female prisoners and family members of detainees have also been forced to strip.
Eritrea	In its country reports, the State Department says that the Eritrean government "committed serious human rights abuses." Some of the torture techniques cited include being subjected to prolonged sun exposure in high temperatures and the tying of hands and feet for extended periods of time.
Iran	According to country reports, common methods of torture used against political opponents in Iran are sleep deprivation and "suspension for long periods in contorted positions."
Iraq	Iraqi security services regularly use food and water deprivation as a form of torture, according to the country reports.
Jordan	The State Department reports that Jordanian police and security forces have been alleged to engage in acts of torture. Some of the methods used include sleep deprivation and solitary confinement.

Israel	In the country reports, the State Department writes that Israeli human rights groups report that Israeli defense forces continue to use methods of interrogation prohibited by a 1999 decision by Israel's High Court. Prior to this decision, security officers were permitted to use "moderate and physical and psychological pressure" during questioning. One example of the "pressure" used was violent shaking. The State Department also states that these practices "often led to excesses."
Libya	According to the State Department, Libyan authorities commonly chain detainees to a wall for hours and deprive them of food and water.
Pakistan	In the country reports, the State Department notes that prolonged isolation and denial of food or sleep are common torture methods.
Saudi Arabia	The State Department has noted that Saudi Arabian officials, primarily from the Ministry of the Interior, use sleep deprivation as an interrogation tactic.
Tunisia	In the country reports, the State Department says that tactics such as food and sleep deprivation or confinement to a tiny, unlit cell are commonly used in Tunisia.
Turkey	The State Department describes Turkey as a country "where serious human rights problems remain[ed]" and torture is a regular practice. According to the 2001 country report, some of the many methods of torture employed by Turkish security forces include prolonged standing, isolation, and spreading rumors about incidents of torture.

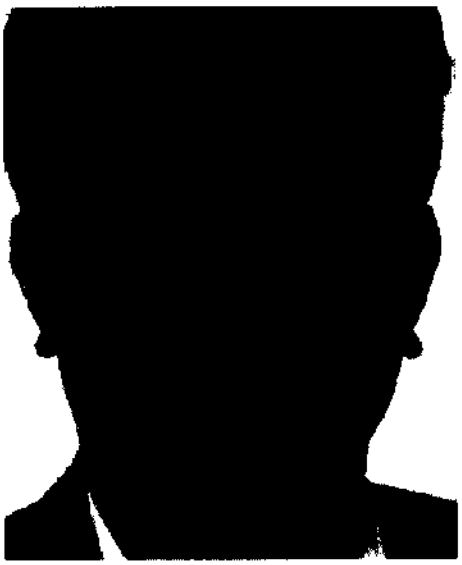
Attachment 13

The Guardian

guardian.co.uk

Spain drops extradition attempt against Guantánamo torture pair

Paul Hamilos in Madrid and **Vikram Dodd**
The Guardian, Friday March 7 2008



Jamil el-Banna and Omar Deghayes

Spain yesterday dropped its attempt to extradite two British residents who had been freed from Guantánamo Bay, after accepting that torture they suffered during five years of American custody had left them too weak to stand trial.

Jamil el-Banna, 45, and Omar Deghayes, 38, who were accused of being members of an al-Qaida cell in Madrid, were detained on their return to Britain in December on a European arrest warrant issued by Spain.The Madrid judge who issued the warrant, Baltasar Garzon, accepted British medical reports which found the men were suffering from post traumatic stress disorder (PTSD) and other serious medical conditions.

Banna is said to be severely depressed, suffering from PTSD, and to have diabetes, hypertension and back pain, as well as damage to the back of his left knee. Deghayes is also suffering from PTSD, and depression, is blind in his right eye, and has fractures in his nasal bone and his right index finger. Both men are said to be at high risk of suicide.

The report on Deghayes concludes: "Given all these factors, I don't see how Mr Deghayes would be able to give instructions to his lawyers, listen to evidence and give his own accurate testimony". A similar conclusion was drawn in the case of Banna, adding that were he to be separated from his wife and children again, he risked a deterioration of his fragile mental health.

Deghayes, a Libyan national whose family fled the Gadafy regime, said from his home in Brighton: "It's good - it's happy news. I always knew they would realise their mistake and give up the case. I still have problems with immigration as the authorities have taken away my resident status, but this is a relief."

The Home Office refused to guarantee to let the pair stay with their families in Britain and said: "Their immigration status is under review."

Deghayes and Banna arrived back in Britain with a third British resident, Abdennour Samuer. Banna, from north-west London, was arrested in the Gambia in 2002 after he did not accept an MI5 request to become an informant.

Irene Nembhard, a lawyer for the men, said it was time for them to be allowed to rebuild their lives.

guardian.co.uk © Guardian News and Media Limited 2008

UNITED STATES OF AMERICA v. Mohammed Jawad	**Government Response to Defense Motion to Dismiss Based on Torture of Detainee Pursuant to R.M.C. 907** 4 June 2008

1. Timeliness: This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court.

2. Relief Sought: The Accused seeks dismissal of all charges and specification with prejudice; the Government asks the Military Judge to deny the motion as a matter of law.

3. Overview: The Government asks the Military Judge to deny the instant motion as a matter of law. Assuming for the purposes of the motion that the allegations regarding Mr. Jawad's treatment during the period 7 May 2004 through 20 May 2004 to be true,[1] neither the Military Commissions Act of 2006, 10 U.S.C. § 948a et seq. (MCA) – the sole and controlling law applicable to the resolution of the motion – nor any other analogous or persuasive case law, military or federal, authorizes or warrants the relief sought.[2] On the contrary, the MCA specifically contemplates that detainees may have been subjected to "torture"[3] or coercive techniques in the past, and provides *not* for the dismissal of charges, but rather that statements obtained by torture are inadmissible, and that even statements obtained through coercion may nonetheless be admitted into evidence if the Military Judge makes certain findings about the

---

[1] The motion as a whole seems to imply that counsel and those military personnel now assigned to Joint Task Force – Guantanamo (JTF – GTMO) have some personal, moral or ethical responsibility for actions allegedly committed by others over four years ago. The tone of the motion also seems to imply that those now involved in the Military Commissions or assigned to JTF-GTMO support, condone, or defend detainee abuse. These defense suppositions are untrue. While counsel must, as a matter of professional responsibility and military obligation, address the allegations in the defense motion, declining to accede to the defense motion and its requested relief, which Government counsel in good faith and reasonably disputes, cannot be interpreted as defending the underlying conduct itself.

[2] Again, the MCA specifically states that the Uniform Code of Military Justice, 10 U.S.C. § 801 et seq., (UCMJ) does not apply to the MCA, and any decisions interpreting the UCMJ, are not binding on Military Commissions. MCA, § 948b(c).

[3] The defense motion uses the incendiary word "torture," which, as the defense acknowledges, is a legal term with a particularized definition under the MCA and United States law (18 U.S.C. § 2340(2)). Def. Mot. at fn. 14. Even under the most expansive interpretation of these definitions, the conduct Mr. Jawad complains of cannot, as a matter of law, be considered torture. The Government asks the Military Judge to make this finding based the instant record and as a matter of law.

statements, set forth in the MCA. MCA, § 948r; see also Military Commission Rule of Evidence (MCRE) 304. Thus the Military Judge lacks the authority to grant the defense's requested relief under the applicable law.

If the Military Judge determines, notwithstanding the MCA's clear provisions, that it possesses some inherent or unstated equitable power to dismiss otherwise proper charges based upon alleged coercion, the Military Judge should decline to do so based upon the facts of this case. As described below, Mr. Jawad is accused of attempting to murder three individuals by tossing a grenade into his victims' passing vehicle. His victims suffered serious bodily harm, blinding one of them in his left eye, and forcing all three victims to undergo dozens of surgeries and prolonged periods of physical rehabilitation. Balanced against two weeks of sleep deprivation occurring four years ago, the request that the charges in this case be dismissed is without any legal or equitable support.

4. Burden and Standard of Proof: Under RMC 905(c), the defense bears the burden of proof by a preponderance of the evidence.

5. Facts:

A. On 17 December 2002, Mohammed Jawad threw a Soviet-manufactured hand grenade into a vehicle in which two U.S. Special Forces sergeants and their Afghan interpreter were riding. The victims had been driving through the streets of Kabul on a humanitarian mission. Jawad was dressed as an Afghan civilian, and he was approximately 18 years old at the time.[4]

B. Before throwing the grenade through the rear window of the vehicle in which the victims were riding, Jawad permitted other Coalition soldiers (including Turks and Germans) to pass by so that he could target Americans. During his subsequent interviews by Afghan and Coalition forces, Jawad admitted that he threw the grenade and boasted that, if given the chance, he would do so again.

---

[4] Jawad has given conflicting accounts of his true age in December 2002—sometimes claiming to be 19 years old, at other times, 17; recently, he has taken to claiming to have been 16 years old at the time of the attack. A bone scan study later determined his age at the time of the attacks to be approximately eighteen.

C. The two Special Forces soldiers—one of whom almost bled to death—have endured dozens of surgeries and continue to suffer the effects of their wounds today. Their Afghan interpreter is now blind in his left eye, and underwent four surgeries at Walter Reed Army Medical Center. By contrast, photographs and medical examinations taken and conducted within hours after Jawad's apprehension establish that he suffered no physical injuries before or after his capture.

D. The Special Forces unit appointed its battalion chaplain as a "human rights observer" to ensure that U.S. service members respected Jawad's rights at all times during his subsequent interview by US forces, during which Jawad again confessed to having thrown the grenade.

E. Jawad himself claimed to be affiliated with Hezbollah – e Islami Gulbuddin, or "HIG," a terrorist organization specially-designated as such by the US Department of State in February, 2003, presumably as a result of terrorist attacks carried out by its members in the Kabul area, of which Jawad's may been among the first.

6. **Law and Argument:**

The resolution of the defense motion requires little discussion. The defense itself admits that there is nothing in the MCA or the Manual for Military Commissions authorizing dismissal based upon the post-apprehension coercion or even "torture" of a detainee. (Def. Mot. at 14.) Indeed, it is almost axiomatic that the MCA resulted from the recognition of the unique obstacles in bringing war criminals to justice, e.g., the difficulties collecting evidence on the battlefield, the necessity for fluid, ongoing intelligence collection,[5] and the like. The MCA, passed by wide margins in both houses of Congress in 2006, recognized, as did the Detainee Treatment Act of 2005, also recognizes the harsh reality that an ongoing war sometimes necessitates (or results in) questioning of detainees using techniques that would not be permissible or appropriate had the

---

[5] The defense avers that in May 2004 "there was no good basis to believe Mr. Jawad possessed critical intelligence," as though Mr. Jawad's affiliation with HIG, his admitted training at a HIG camp, and other factors, should have been ignored or that our military should have merely divined that Mr. Jawad had been entirely forthcoming about these terrorist affiliations in earlier questioning. Def. Mot. at 9. In fact, HIG has been declared a specially-designated terrorist organization by the US Department of State, and its founder, Hekmaktyar Gulbuddin, remains at large, four years after Mr. Jawad's treatment in May 2004. To believe that there was no basis for continuing to question Mr. Jawad is unsupported.

subject of the questioning been a US citizen with Constitutional protections.[6] The provisions in the MCA and the MCRE permitting the admissibility of statements obtained through coercive techniques are products of this recognition, as unsavory or regrettable as a realistic view of war and its consequences may seem. MCA, § 948r; MCRE 304.

The only rational conclusion from MCA's direction to the Commissions regarding the use of coerced statements is that dismissal of Commissions charges is not authorized; the only authorized remedy remains suppression of the statements utilizing the procedures and standards set forth in the MCA and the MCRE.

The defense implicitly concedes this conclusion by its remarkable assertion that its selective reading of what it calls the "Working Group report" (WG) – a broad report of investigation with which the defense candidly but ironically admits it does not fully endorse because the WG, in the defense's view, expresses support for interrogation techniques that are "too harsh" (Def. Mot. at fn. 9) – establishes the standards applicable to the defense motion. Def. Mot. at 10. However, "[t]he military, like the Federal and state systems, has hierarchical sources of rights. These sources are the Constitution of the United States; Federal Statutes, including the Uniform Code of Military Justice; Executive Orders containing the Military Rules of Evidence; Department of Defense Directives; service directives; and Federal common law." *United States v. Lopez*, 35 M.J. 35, 39 (CMA 1992). The WG report, a policy document at best, cannot serve as a basis for deciding the defense's motion.

The defense's reliance on RMC 907 is similarly misplaced. RMC 907 enumerates the bases for dismissal of Military Commissions charges; allegations of coercive treatment are not among them. Further, the defense cannot cite a *single* case where a dismissal of charges under the UCMJ for post-apprehension government misconduct has been upheld. *See* Def. Mot. pp. 14-16. Although dismissal under *RCM* 907 for unlawful pre-trial confinement is theoretically possible, as the defense notes in citing *United States v. Fulton*, 55 M.J. 88 (CAAF 2001) (Def. Mot. at 15), a diligent search of the case law has disclosed no appellate opinion upholding any such dismissal.

---

[6] Again, this is not to imply that Government counsel supports Mr. Jawad's treatment or detainee abuse under any circumstances.

Even under US Constitutional jurisprudence,[7] dismissal as a remedy for harsh post-arrest treatment is a rarity, even in instances where the post-arrest treatment vastly exceeded the conditions alleged by the accused in this case.

In *Chavez v. Martinez*, 538 U.S. 760 (2003), for example, the Court rejected the Ninth Circuit's ruling that "the mere use of compulsive questioning, without more, violates the Constitution." Id. at 767. Furthermore, there is no Fifth Amendment violation when coerced statements are not used later in criminal proceeding. "[M]ere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness." Id. at 769.

In *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966), the government used a rectal probe in an effort to uncover narcotics thought to be concealed there. When this proved unsuccessful, a physician placed saline solutions in tube forced down the suspect's throat. The trial court suppressed the evidence on the ground that use of the evidence would "shock the conscience." Id. at 876.

The Ninth Circuit rejected this view, explaining, "[i]t would shock the conscience of law abiding citizens if the officers, with the knowledge these officers had, were frustrated in the recovery and use of this evidence. It is shocking to know that these appellants swallowed narcotics to smuggle it into and through the United States for sale for profit, and chose to run the risk of the lethal substance being freed in their stomachs. To paraphrase Judge Kaufman in *United States v. Guerra*, 334 F.2d 138, 147 (2 Cir. 1964):

> "If we were mechanically to invoke *Massiah (Rochin)* to reverse this conviction, we would transform a meaningful expression of concern for the rights of the individual into a meaningless mechanism for the obstruction of justice."

Id. (Internal citation omitted.)

Other federal cases are in accord:

---

[7] Of course, no court has yet held that the US Constitution applies to the aliens held at Guantanamo.

In *Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984), the court held that force and physical abuse to locate kidnap victim did not violate due process:

> We do not by our decision sanction the use of force and coercion by police officers. Yet this case does not represent the typical case of unjustified force. 6 We did not have an act of brutal law enforcement agents trying to obtain a confession in total disregard of the law. This was instead a group of concerned officers acting in a reasonable manner to obtain information they needed in order to protect another individual from bodily harm or death. This record provides overwhelming evidence to support the conclusion that appellant understood his rights, had a clear and free mind not dominated by the earlier physical abuse and voluntarily made his confession to the police.

Id. at 773.

Thus the remedy the defense requests lacks any precedent, in military or federal law, even applying the greater protections afforded US citizens under the Constitution.

Moreover, the defense's assertion that there is no remedy for coercive treatment of a detainee before trial by Military Commission, is simply wrong. Again, the "remedy" is expressed in the MCA and MCRE themselves: suppression of statements derived as a result of such treatment.

Finally, Mr. Jawad's treatment from 7 May 2004 through 20 May 2004 – for whatever reason, and however it proceeded – may be unjustifiable coercion that resulted in inadmissible statements or other adverse consequences.[8] The remedy sought, however, is unauthorized and/or inappropriate. US forces did not snatch Mr. Jawad, who resided in Pakistan until he joined HIG, from the streets of Kabul. Afghan police arrested Mr. Jawad at gunpoint after Mr. Jawad threw his grenade in an attempt to kill three human beings. The Prosecution will prove beyond a reasonable doubt that Mr. Jawad did so in violation of the MCA, and that he left his victims maimed, suffering unimaginable pain, and consigned them to a lifetime of suffering. Mr. Jawad and should be tried for those alleged crimes before a Military Commission.

---

[8] Even the defense does not know the present state of Mr. Jawad's mental health; a motion for a mental examination – which the Government has not opposed in relevant part – is pending. Def. Mot. at 14.

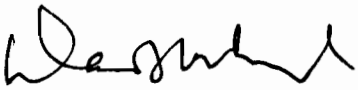
7. Request for Oral Argument: Because the Government concedes the essential facts upon which the defense motion is premised, there is no need for an evidentiary hearing. Oral argument is appropriate unless the Military Judge is prepared to rule based on the pleadings.

8. Request for Witnesses: The prosecution opposes, obviously, the defense's request for witnesses. Conditions and events at Guantanamo are among the most investigated in the entire Global War on Terror. There is no showing at all that the high-ranking officers and former Secretary of Defense Rumsfeld are material or necessary.

9. Conference with Opposing Counsel: We have conferred, and respectfully disagree with each other.

10. Request for public release: The prosecution opposes the premature release of any of the pleadings before the Commission.

Respectfully Submitted,



Darrel J. Vandeveld

LTC, JA, USAR

Trial Counsel

UNITED STATES OF AMERICA v. Mohammed Jawad	**Defense Reply** to Government Response to D-008 Motion to Dismiss (Torture of Detainee) **June 5, 2008**

1. **Timeliness:** The reply is timely. The Government Response was filed 4 June 08.

2. Reply to Government Paragraphs:

5A. First sentence agreed. Second sentence unsupported by proof and irrelevant. Third sentence. Mr. Jawad was under 18. The U.S. Government has officially conceded this fact to the United Nations. (See Attachment 4 to D-004.[1])

5b. Irrelevant to this motion. No source provided.

5c. Irrelevant to this motion.

5d. Irrelevant to this motion. No source provided.

5e. Irrelevant to this motion. No source provided.

Footnote 1: The defense in no way meant to imply that any JTF-GTMO or OMC-P personnel currently assigned have any complicity in the mistreatment of Mr. Jawad in 2004. The defense does not know who was responsible for the mistreatment, but is making all efforts humanly possible to find out.

[1] Supplemental US Report to the U.N. Committee on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, submitted for 22 May 2008 session of the Committee. Also available at http://www2.ohchr.org/english/bodies/crc/crcs48.htm

Footnote 3: The word torture may be incendiary, but it is an apt description for the treatment of Mr. Jawad and the defense has a good faith basis to use it. Sleep deprivation has been specifically found to be torture under the Convention Against Torture as outlined in the defense motion.

Footnote 5: The defense contention that Mr. Jawad possessed no critical intelligence is based on the review of over 40 summaries on interrogation prepared by intelligence agents/interrogators and defense counsel's knowledge of the defendant's age, level of education and personal history gleaned from the defendant and from discovery provided by the government. The defense assertion that Mr. Jawad possessed no critical intelligence is also based on the fact that Mr. Jawad was apparently not interviewed for many weeks after his frequent flyer treatment, suggesting there was some reason for his mistreatment other than a desire to pry information out of him by weakening his resistance.

3. **Law and argument:**

THE GOVERNMENT HAS FAILED TO COMPLY WITH MILITARY COMMISSIONS TRIAL JUDICIARY RULES OF COURT

As is the government's practice in response to all motions thus far filed by the defense, the government refuses to follow the Military Commission Trial Judiciary Rules of Court (Change 2, 2 Nov 2007), Rule 3, Motions Practice Rule 6(b)(2) which directs, the government to follow the format in Form 3-2 for responses.

This rule requires the government to list:

> 4. Those facts cited in the motion that the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief that the fact will be stipulated to for purposes of resolving a motion. The agreed upon facts will correspond to the subparagraph in the motion containing the facts involved.

> 5. The responding party's statement of the facts, and the source of those facts (witness, document, physical exhibit, etc.), insofar as they may differ from the motion. As much as possible, each factual assertion should be in a separate, lettered subparagraph. If the facts or identity of the source is protected or classified, that status will be noted. These factual assertions will correspond to the subparagraph in the motion containing the facts involved.

As usual, the government did not respond paragraph by paragraph to the defense motion, admitting or denying the factual assertions made by the defense. Rather, the government provided additional irrelevant facts using a different numbering system. The government does state in its paragraph 7 "Request for Oral Argument" that the "Government concedes the essential facts upon which the defense motion is premised." The defense does not know how to interpret this statement. The government and defense have not entered into any stipulation of facts, nor has the government officially conceded anything or offered to stipulate. However, if this is an offer to stipulate to all the facts contained in the defense motion, the defense accepts.

The Chief Judge of the Military Commissions Trial Judiciary, Col Kohlmann, issued a letter dated 2 November 2007, which is attached to the court rules and includes the following language:

> **3. <u>Action</u>:**
> a. The judges of the Military Commissions Trial Judiciary shall ensure enforcement of these Rules of Court.
> b. All counsel practicing before Military Commissions shall become familiar with these Rules and shall comply with them.

The defense respectfully requests that the government be ordered to comply with this rule and be appropriately sanctioned for its routine and flagrant disregard of commission rules.

DISMISSAL IS AN APPROPRIATE REMEDY FOR OUTRAGEOUS GOVERNMENT CONDUCT WHICH SHOCKS THE CONSCIENCE

The government argues that exclusion of coerced statements pursuant to the MCRE is the only potential remedy for detainee abuse. The government fails to address the possibility that the abuse may have been unrelated to intelligence collection efforts and/or failed to produce any incriminating statements. If the abuse was merely gratuitous, the government would offer no remedy at all. Abuse of a detainee, unrelated to interrogation, is even more outrageous than abusive interrogation practices designed to elicit intelligence which might save lives. There must be a remedy.

The defense acknowledges that there are no military precedents for actually dismissing charges for "post-apprehension government misconduct" involving the mistreatment of a detainee or pretrial confineee. However, CAAF made clear in *U.S. v. Fulton* that dismissal was well within the authority of the trial court in an appropriate case. The fact that no U.S. servicemember has ever been subjected to remotely comparable mistreatment is the reason that no charges have ever before been dismissed on this basis. Undoubtedly, if a servicemember were subjected to a similar program while in pretrial confinement, a military judge would not hesitate to dismiss charges.

The government is incorrect in its assertion that dismissal of charges has never occurred based on "post-apprehension government misconduct." CAAF has set aside a conviction based on unlawful influence, another form of government misconduct. (See *United States v. Lewis*, 63 M.J. 405 (CAAF 2006). *See generally*, D-004 Defense Motion to Dismiss for Unlawful Influence). CAAF has also set aside a conviction based on prosecutorial misconduct, *United States v. Fletcher*, 62 M.J. 175 (CAAF 2005). The doctrine of outrageous government conduct also is recognized by military courts as a basis for dismissal: "A violation of general due process can be the basis to overturn a conviction, however it should be applied only in those rare instances where the law enforcement involvement reaches a demonstrable level of outrageousness." *United States v. Patterson*, 25 M.J. 650 (AFCMR 1987). That level of outrageousness is present here.

The government also showed a distinct lack of research skill (I would not want to accuse the prosecution of intentionally failing to cite adverse precedent) when they asserted that the "defense lacks any precedent, in military or federal law" for the dismissal of charges based on improper government conduct and when they asserted that all "federal cases are in accord" with the government's view. There are over 50 years worth of federal precedents to support the defense motion.

In *Rochin v. California*, 342 U.S. 165 (1952), the Court reversed a conviction due to government activity that so "shocked the conscience" that it violated due process. In *Rochin*, police officers broke into the defendant's bedroom and unsuccessfully attempted to prevent the defendant from swallowing contraband drug capsules. The police took the defendant to the hospital where doctors forcibly pumped his stomach to retrieve the capsules. 342 U.S. at 166. The Supreme Court held:

> [W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents. As this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

The spontaneous, isolated and temporary physical discomfort experienced by Rochin at the hands of government agents pales in comparison with the intentional, planned and prolonged abuse of Mr. Jawad.

Of course, reversal of a conviction and exclusion of evidence as occurred in *Rochin* is not identical to dismissal of charges (although exclusion of evidence may preclude the government from successfully prosecuting someone). But the Supreme Court has indicated that dismissal of charges would be appropriate in an appropriate case. In 1973, then Associate Justice Rehnquist stated "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes

to obtain a conviction." *United States v. Russell*, 411 U.S. 423, 431-32 (1973). The same rationale would apply to the conduct of official government agents, military or civilian at Guantanamo.

There have been several cases where federal indictments have been dismissed because of governmental misconduct. Two infamous examples involve the Pentagon Papers case and the notorious standoff at Wounded Knee involving Dennis Banks and Russell Means of the American Indian Movement and U.S. Government and military forces. These cases illustrate that even very serious indictments have been dismissed due to egregious governmental conduct. The charges at issue in *U.S. v. Banks*, 383 F. Supp. 389 (Dist. So. Dak. 1974) included obstructing a law enforcement officer under 18 U.S.C.S. § 231(a)(3), setting fire to buildings or machinery under 18 U.S.C.S. § 81, and violating the ban on molotov cocktails under 26 U.S.C.S. § 5861. Nevertheless, due to prosecutorial misconduct, the court stated: "The waters of justice have been polluted, and dismissal, I believe, is the appropriate cure for the pollution in this case." In the Pentagon Papers case, there were eight charges of espionage, six of theft, and one of conspiracy dismissed against Daniel Ellsberg and Anthony J. Russo, Jr. on the basis of a burglary of the office of Mr. Ellsberg's psychiatrist by government agents. *United States v. Russo*, Crim. No. 9373 (C.D. Cal. 1973). (See Attachment 1) In neither of the case were the defendants physically or mentally harmed by the intentional, planned and coordinated acts of the government, as in the case of Mr. Jawad.

The Supreme Court has consistently held that due process is offended when government conduct is so egregious that it "shocks the conscience" and violates the "decencies of civilized conduct." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) quoting *Rochin*, 342 U.S. at 172-73. The government's intentional torture of a suicidal teenager should shock even the most calloused conscience. Numerous courts have held interrogation by torture "shocks the conscience." *Harbury v. Deutch*, 233 F.3d 596, 602 (D.C. Cir. 2000) (citing *Rochin*, 342 U.S. at 172); see also *Palko v. Connecticut*, 302 U.S. 319, 326 (1937), overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784 (1969) (noting that the Due Process Clause must at least "give protection against torture,

physical or mental"). See also, *United States v. Havens*, 446 U.S. 620, 633 (1980) (Brennan, J. dissenting) (equating torture with conscience shocking behavior: "I still hope that the Court would not be prepared to acquiesce in torture or other police conduct that 'shocks the conscience' even if it demonstrably advanced the factfinding process."); cf. *United States v. Mitchell*, 957 F.2d 465, 470 n. 6 (7th Cir. 1992) (court's conscience not shocked because "the conduct of the government. . . clearly. . .not comparable to official acts of torture, brutality or similar outrageous conduct present in cases where conduct was found to shock the conscience"); *United States v. Chin*, 934 F.2d 393, 399 (2d Cir. 1991) (sort of harm present in case can hardly be said to "shock the conscience" as would physical coercion or torture).

According to the Supreme Court, the due process guarantees of the Constitution were intended to prevent government officials "from abusing [their] power, or employing it as an instrument of oppression." *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992). The Eleventh Circuit recognized in *United States v. Edenfield*, 995 F.2d 197 (11th Cir. 1993), that even in the investigative or pre-indictment stage of a case, government misconduct could violate "that fundamental fairness, shocking to the universal sense of justice mandated by the due process clause of the fifth amendment." Id. at 200 (quoting *United States v. Tobias*, 662 F.2d 381, 386-87 (5th Cir. Unit B 1981) and *Russell*, 411 U.S. at 432). "In order to completely bar prosecution, government misconduct must be outrageous." *Edenfield*, 995 F.2d at 200. In evaluating the outrageousness of government misconduct, a court must look at the totality of the circumstances, with no single factor controlling. See *Tobias*, 662 F.2d at 387.

Other federal courts, although declining to dismiss charges in specific cases, have confirmed that dismissal is an available remedy: "serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial, without regard to prejudice to the accused" *United States v. McCord*, 166 U.S. App. D.C. 1 (DC.Cir 1974)

The extreme sanction of dismissal of an indictment may be proper "to deter a pattern of demonstrated and longstanding or continuous official misconduct." *United States v. Broward*, 594 F.2d 345, 351 (2d Cir.), cert. denied, 442 U.S. 941, 61 L. Ed. 2d 310, 99 S. Ct. 2882 (1979). The defense intends to introduce evidence that the frequent flyer program was a long-standing and continuous practice of officially sanctioned abuse. In fact, the defense has recently acquired evidence that the frequent flyer program, under a new, innocuous sounding name, continued until at least July 2004.[2]

An example of outrageous government conduct found to potentially merit dismissal is found in *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). In *Toscanino*, the defendant was wanted on a narcotics warrant out of the Eastern District of New York. *Id.* at 268. The defendant was an Italian national living in Uruguay. He was abducted and forcibly brought to the United States to face prosecution. *Id.* The defendant maintained, both pretrial and after his conviction, that the entire prosecution against him was void due to the fact that the United States illegally kidnapped him from his home in Uruguay and tortured him during his transport to the United States. *Id.* at 269-70. The defendant's motions to vacate his conviction and dismiss the indictment were denied without a hearing, and those denials were the sole issue on appeal. *Id.* at 271. The court remanded the case for an evidentiary hearing to determine whether the defendant's claims of forcible abduction and torture could be sustained. *Id.* at 281.

The court concluded "due process now requir[es] a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." *Id.* at 275. See also, *United States v. Orsini*, 402 F. Supp. 1218 (E.D.N.Y. 1975) (holding that defendant had met his burden of offering credible evidence of gross government misconduct in his seizure). In ruling that the defendant's allegations of outrageous government conduct, if sustained on remand, should result in the dismissal of the indictment, the court in *Toscanino* noted that in many cases involving due process violations center on unlawful government acquisition of evidence and that, in those

[2] As this evidence may be classified, the defense will introduce it through classified means.

instances, the proper remedy would be the exclusion of the tainted evidence. *Id.* However, it noted that where suppression of the evidence would not suffice, the indictment should be dismissed. There is no evidence that the government gained any evidence through their abuse of Mr. Jawad, so exclusion is not a sufficient remedy.

In short, contrary to the government's claim, there is ample authority for the relief requested by the defense. Military and other federal courts have dismissed charges and reversed convictions based on far less egregious government misconduct than grave breaches of the Geneva Convention. Dismissal is the only appropriate remedy in this case.

CONCLUSION

Judge Lee of the Eastern District of Virginia recently summed up the prevailing view of torture in the federal courts in eloquent fashion:

> [T]he Court would like to make a very clear statement that torture of any kind is legally and morally unacceptable, and that the judicial system of the United States will not permit the taint of torture in its judiciary proceedings. This Court takes very seriously its solemn duty and unwavering responsibility to ensure that the human rights guarantees of the United States Constitution and of those international documents on human rights to which the United States is a signatory. . . are upheld in word, deed, and spirit.

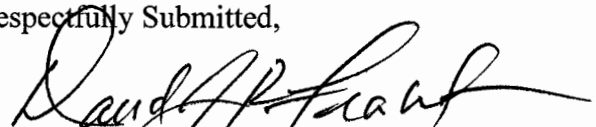
United States v. Abu Ali, 395 F.Supp. 2d 338, 379 (E.D.Va. 2005).

The military commissions should adopt a similar approach and refuse to permit the prosecution of those detainees who have been tortured by the government that was bound to ensure their safety and well-being. The very legitimacy of the military commissions is at stake.

5. **Oral Argument**: The defense requests oral argument, unless the military judge is prepared to order the requested relief based on the written submissions.

6. **Request for Immediate Public Release**: The defense requests immediate public release of this and all motions filed by the defense and the government responses thereto.

Respectfully Submitted,



By: DAVID J. R. FRAKT, Major, USAFR
Detailed Defense Counsel
Office of the Chief Defense Counsel
Office of Military Commissions
1099 14th Street NW, Ste 2000E
Washington, DC 20005
(202) 761-0133, ext. 106

Attachment:
1. Time Magazine Article dated May 21, 1973.

TIME
IN PARTNERSHIP WITH CNN

Monday, May. 21, 1973

Pentagon Papers: Case Dismissed

I HAVE decided to declare a mistrial and grant the motion to dismiss." With these 13 terse words, Judge William Matthew Byrne Jr. ended one of the most extraordinary legal—and in many ways, illegal—proceedings in the history of American justice.

By his ruling, the judge cleared Daniel Ellsberg and Anthony J. Russo Jr., both of whom freely admitted that they had secretly copied and leaked the Pentagon papers, of eight charges of espionage, six of theft and one of conspiracy. But since the case had never reached the jury, the two were not declared innocent by acquittal, nor had they been vindicated by their defense based on the assertion of the people's right to know. Even so, the victory was so signal that as Byrne rose to leave the bench in U.S. district court in Los Angeles, the assemblage in the crowded courtroom rose, applauded and cheered him. Patricia Ellsberg rushed over to her stunned husband and asked plaintively: "Haven't you got a kiss for your girl?" (He had.) Defense Counsel Charles Nessen ostentatiously broke out a big cigar and lit it. The prosecution team filed out in tight-lipped silence. Later, a majority of the jurors said that they would have voted for acquittal if they had been given the chance.

Judge Byrne, 42, a blond and sporty bachelor who once directed President Nixon's Commission on Campus Unrest, came to his decision after 4½ long months of trial. Not until its final weeks were the murky beginnings of the case disclosed. Perhaps as early as 1969, and certainly by early 1970, the FBI knew that Ellsberg, then a consultant with the Rand Corp. "think tank" in Santa Monica, Calif., was copying parts of the Pentagon papers at night on a Xerox machine in an advertising-agency office.

At about the same time, President Nixon became incensed by various news leaks and ordered the FBI to stop them. As the bureau's just-appointed director, William D. Ruckelshaus, now admits, the FBI failed in that mission; it did, however, set up a number of wiretaps without any court authorization. One of them was on the home phone of Morton Halperin, then a consultant for the National Security Council, and on that tap, the FBI heard some conversations by Ellsberg. Fully a year ago. Judge Byrne had demanded an account of all Government eavesdropping on Ellsberg, but Ruckelshaus disclosed the tap on Halperin only last week—and added the incredible news that all the tapes and logs of the overheard conversations had mysteriously disappeared from the files of both the FBI and the Department of Justice.

Valid Changes? All of these sensations—following the disclosures that the CIA had helped the Watergate raiders to break in to the offices of Ellsberg's former psychiatrist—took the trial far from its original purpose. The Government had been determined to prosecute Ellsberg and Russo as criminals. The defense was equally determined to raise the broadest legal and constitutional issues. Was a charge of espionage valid when the defendants had given no information to a foreign power? (Ellsberg had returned the actual papers to the Rand Corp. files.) Could theft be alleged when the culprits had stolen nothing but information? Could conspiracy be proved if, as many lawyers believe, the statute defining it is so loosely drawn as to be unconstitutional?

All these matters weighed heavily on Judge Byrne. Then, three weeks ago, the prospect that the case would end in a dismissal surfaced with Byrne's own disclosure that he had visited John D. Ehrlichman, who had offered him the directorship of the FBI, and that he had met President Nixon at the Western White House. The defense immediately demanded dismissal of the case. The judge refused, saying that he had declined to discuss the FBI offer with Ehrlichman and had done nothing improper.

As disclosure followed disclosure, the courtroom air became filled with defense cries of "taint" and motions for mistrial and dismissal, but Byrne hesitated. He was troubled because there were no very direct precedents to guide him. Indeed there could hardly be any, since both the charges and the revelations of the Government's interference and misconduct were unprecedented. Defense Counsel Leonard Boudin tried to cajole Byrne with the coy suggestion: "I'm hopeful that in future when I'm asked to cite a precedent, I'll be able to cite one made by Your Honor in this case."

Byrne had three basic alternatives: 1) declare a mistrial, which would expose the defendants to retrial before a new jury; 2) dismiss the indictments in such a way that the government could never again prosecute these defendants for the same alleged offenses (these two might be combined); or 3) send the case to the jury and decide later whether to throw out a possible guilty verdict if further investigation incriminated the Government still more deeply.

Only a Glimpse. When Byrne mounted the bench to announce his ruling, the courtroom was packed. The corridors were filled with pass holders who had been unable to squeeze in. With the jurors absent during procedural arguments, the jury box was crammed with newsmen. Byrne began briskly: "I am prepared to rule on the motion for dismissal."

First Byrne offered the defense a choice: Did it want to press for dismissal or take the risk of letting the case go to the jury for a final verdict? It took Boudin & Co. only a one-minute huddle to answer: "Dismissal." Byrne had obviously anticipated this and had the appropriate ruling prepared. He read it quickly but clearly. The Government, he noted dryly, had made an "extraordinary series of disclosures" regarding the activities of several agencies. He had tried to

develop "all relevant information" about these activities, but "new information has produced new questions, and there remain more questions than answers."

Of the special investigative unit that White House officials had set up, and which burglarized Psychiatrist Lewis Fielding's office, Byrne said: "We may have been given only a glimpse of what this special unit did, but what we know is more than disquieting." As for the CIA's assistance, he said that the agency was "presumably acting beyond its statutory authority and at the request of the White House."

"No investigation is likely to provide satisfactory answers," he said, "where improper Government conduct has been shielded so long from public view"—and where the files are missing or have been destroyed. "It is the defendants' rights and the effects on this case that are paramount," Byrne declared, "and each passing day indicates that the investigation is further from completion as the jury waits."

The charges against Ellsberg and Russo raised "serious factual and legal issues," and Byrne said he would have liked these to go the full course—meaning a jury verdict and possibly appeals to higher courts. But, he concluded, "the conduct of the Government precludes the fair, dispassionate resolution of these issues by a jury. The totality of the circumstances of this case offends a 'sense of justice.' " Hence he ordered a mistrial and dismissed the indictments.

One of the few precedent cases that Byrne could cite was one that reached the Supreme Court in 1952, in which Justice Felix Frankfurter established the doctrine of dismissal if Government action "shocks the conscience of civilized men." Byrne, a civilized man, was plainly shocked.

When the courtroom applause died, there remained the unresolved questions about the legality of the Government's charges—and of Ellsberg's actions in taking and releasing the documents. In the corridors, an ugly suspicion was voiced by defense counsel: perhaps the Administration had deliberately flunked its last assignment from Byrne, about the Halperin wiretap, because it was being increasingly embarrassed by the disclosures that Byrne was forcing. By failing to meet Byrne's demands, the Administration had given him good reason for dismissing the case and had thus forestalled any further investigation that he might order. It had thereby plugged the leaks of Watergate West.

Ellsberg and Russo plan to sue Government officials for $2,000,000 in damages and expenses (their legal costs already total $900,000). For this process, they threaten to subpoena the President himself. In that, they are not likely to succeed, but the Pentagon papers trial, in another guise, may be in the courts and the headlines for months or years to come.