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U.S. Department of Justice

Office of Legal Counsel

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

July 20, 2007

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

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

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

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

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

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

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

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

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[1] Reflecting this policy, this Office concluded seven months before enactment of the DTA that the six enhanced interrogation techniques discussed herein complied with the substance of U.S. obligations under Article 16 of the Convention Against Torture and Other Inhuman or Degrading Treatment, 1465 U.N.T.S. 85 ("CAT"). *See* Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees* (May 30, 2005).

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

This memorandum applies these new legal developments to the six interrogation techniques that the CIA proposes to use with high value al Qaeda detainees.[2] Part I provides a brief history of the CIA detention program as well as a description of the program's procedures, safeguards, and the six enhanced techniques now proposed for use by the CIA. Part II addresses the newly amended War Crimes Act and concludes that none of its nine specific criminal

[2] This memorandum addresses the compliance of the six proposed interrogation techniques with the two statutes and one treaty provision at issue. We previously have concluded that these techniques do not violate the federal prohibition on torture, codified at 18 U.S.C. §§ 2340-2340A. *See* Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques that May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005) ("*Section 2340 Opinion*"); *see also* Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005) ("*Combined Use*") (concluding that the combined use of these techniques would not violate the federal prohibition on torture). In addition, we have determined that the *conditions of confinement* in the CIA program fully comply with the DTA and Common Article 3, and we do not address those conditions again here. *See* Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Detainee Treatment Act to Conditions of Confinement of Central Intelligence Agency Facilities* (Aug. 31, 2006); Letter to John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Application of Common Article 3 to Conditions of Confinement at CIA Facilities* (Aug. 31, 2006).

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

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

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

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I.

The CIA's authority to operate its proposed detention and interrogation program is contained in the President's September 17, 2001, *Memorandum of Notification*, [redacted] Although the CIA's detention program was temporarily emptied in early September 2006, that *Memorandum of Notification* has not been suspended by the President and continues to authorize the CIA to operate a detention program in accordance with the terms of the memorandum.

A.

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

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

The group of persons to whom the CIA may apply interrogation techniques is also limited. Under the terms of the *Memorandum of Notification*, only those whom the CIA has a reasonable basis to believe "pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities" may be detained. [redacted] Even as to detainees who meet that standard, however, the CIA does not propose to use enhanced interrogation techniques unless the CIA has made three additional determinations. First, the CIA must conclude that the detainee is a member or agent of al Qaeda or its affiliates *and* is likely to possess critical intelligence of high value to the United States in the Global War on Terror, as further described below. Second, the Director of the CIA must determine that enhanced interrogation methods are needed to obtain this crucial information because the detainee is withholding or manipulating intelligence or the threat of imminent attack leaves insufficient time for the use of standard questioning. Third, the enhanced techniques may be used with a particular detainee only if, in the professional jud ment of qualified medical personnel, there are no significant medical or psychological contraindications for their use with that detainee. (b)(3) NatSecAct

1.

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

2.

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

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

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

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

3.

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

B.

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

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

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

All of the techniques we discuss below would be applied only by CIA personnel who are highly trained in carrying out the techniques within the limits set by the CIA and described in this memorandum. This training is crucial—the proposed techniques are not for wide application, or for use by young and untrained personnel who might be more likely to misuse or abuse them. The average age of a CIA interrogator authorized to apply these techniques is 43, and many possess advanced degrees in psychology. Every interrogator who would apply these enhanced techniques is trained and certified in a course that lasts approximately four weeks, which includes mandatory knowledge of the detailed interrogation guidelines that the CIA has developed for this program. This course entails for each interrogator more than 250 hours of training in the techniques and their limits. An interrogator works under the direct supervision of experienced personnel before he is permitted principally to direct an interrogation. Each interrogator has been psychologically screened to minimize the risk that an interrogator might misuse any technique. We understand from you that these procedures ensure that all interrogators understand the design and purpose of the interrogation techniques, and that they will apply the techniques in accordance with their authorized and intended use.[5]

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

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

1. Conditioning techniques

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

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

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

[6] The CIA generally follows as a guideline a calorie requirement of 900 kcal/day + 10 kcal/kg/day. This quantity is multiplied by 1.2 for a sedentary activity level or 1.4 for a moderate activity level. Regardless of this formula, the recommended minimum calorie intake is 1500 kcal/day, and in no event is the detainee allowed to receive less than 1000 kcal/day. The guideline caloric intake for a detainee who weighs 150 pounds (approximately 68 kilograms) would therefore be nearly 1,900 kcal/day for sedentary activity and would be more than 2,200 kcal/day for moderate activity.

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

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

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

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

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

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

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

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

2. Corrective techniques

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

The "facial hold" is used to hold a detainee's head temporarily immobile during interrogation. One open palm is placed on either side of the individual's face. The fingertips are kept well away from the individual's eyes. The facial hold is typically applied for a period of only a few seconds.

The "attention grasp" consists of grasping the individual with both hands, one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the individual is drawn toward the interrogator. The interrogator uses a towel or other collaring device around the back of the detainee's neck to prevent any whiplash from the sudden motion. Like the facial hold, the attention grasp is typically applied for a period of only a few seconds.

The "abdominal slap" involves the interrogator's striking the abdomen of the detainee with the back of his open hand. The interrogator must have no rings or other jewelry on his hand or wrist. The interrogator is positioned directly in front of the detainee, no more than 18 inches from the detainee. With his fingers held tightly together and fully extended, and with his palm toward his own body, using his elbow as a fixed pivot point, the interrogator slaps the detainee in the detainee's abdomen. The interrogator may not use a fist, and the slap must be delivered above the navel and below the sternum.

With the "insult (or facial) slap," the interrogator slaps the individual's face with fingers slightly spread. The hand makes contact with the area directly between the tip of the individual's chin and the bottom of the corresponding earlobe. The interrogator thus "invades" the individual's "personal space." We understand that the purpose of the facial slap is to induce shock or surprise. Neither the abdominal slap nor the facial slap is used with an intensity or frequency that would cause significant pain or harm to the detainee.

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

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

II.

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

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

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

[11] Although the War Crimes Act defines offenses under the Geneva Conventions, it is our domestic law that guides the interpretation of the Act's statutory terms. Congress has provided that "no foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the" prohibitions

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

First, the War Crimes Act prohibits torture, in a manner virtually identical to the previously existing federal prohibition on torture in 18 U.S.C. §§ 2340-2340A. *See* 18 U.S.C. § 2441(d)(1)(A). This Office previously concluded that each of the currently proposed six techniques, including extended sleep deprivation—subject to the strict conditions, safeguards, and monitoring applied by the CIA—does not violate the federal torture statute. *See* Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee* ("*Section 2340 Opinion*") (May 10, 2005). As we explain below, our prior interpretation of the torture statute resolves not only the proper interpretation of the torture prohibition in the War Crimes Act, but also several of the issues presented by the two other War Crimes Act offenses at issue.

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

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

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

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

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

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

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

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

A.

The War Crimes Act prohibits torture in a manner virtually identical to the general federal anti-torture statute, 18 U.S.C. §§ 2340-2340A:

> The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict *severe physical or mental pain or suffering* (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.

18 U.S.C. § 2441(d)(1)(A) (emphasis added). The War Crimes Act incorporates by reference the definition of the term "severe mental pain or suffering" in 18 U.S.C. § 2340(2). *See* 18 U.S.C. § 2441(d)(2)(A).[14] This Office previously concluded that the CIA's six proposed interrogation techniques would not constitute torture under 18 U.S.C. §§ 2340-2340A. *See Section 2340 Opinion*. On the basis of new information obtained regarding the techniques in question, we have reevaluated that analysis, stand by its conclusion, and incorporate it herein. Therefore, we conclude that none of the techniques in question, as proposed to be used by the CIA, constitutes torture under the War Crimes Act.

B.

The War Crimes Act defines the offense of "cruel or inhuman treatment" as follows:

> The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another person within his custody or control.

18 U.S.C. § 2441(d)(1)(B). Although this offense extends to more conduct than the torture offense, we conclude for the reasons that follow that it does not prohibit the six proposed techniques as they are designed to be used by the CIA.

The CIT offense, in addition to prohibiting the "*severe* physical or mental pain or suffering" covered by the torture offense, also reaches "*serious* physical or mental pain or

[14] The torture offense in the War Crimes Act differs from section 2340 in two ways immaterial here. First, section 2340 applies only outside the territorial boundaries of the United States. The prohibition on torture in the War Crimes Act, by contrast, would apply to activities, regardless of location, that occur in "the context of or association with" an armed conflict "not of an international character." Second, to constitute torture under the War Crimes Act, an activity must be "for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind." *See* 18 U.S.C. § 2441(d)(1)(A); *see also* CAT Art. 1 (imposing a similar requirement for the treaty's definition of torture). The activities that we describe herein are "for the purpose of obtaining information" and are undertaken "in the context of or association with a Common Article 3 conflict," so these new requirements would be satisfied here.

suffering." In contrast to the torture offense, the CIT offense explicitly defines both of the two key terms—"serious *physical* pain or suffering" and "serious *mental* pain or suffering." Before turning to those specific definitions, we consider the general structure of the offense, as that structure informs the interpretation of those specific terms.

First, the context of the CIT offense in the War Crimes Act indicates that the term "serious" in the statute is generally directed at a less grave category of conditions than falls within the scope of the torture offense. The terms are used sequentially, and cruel and inhuman treatment is generally understood to constitute a lesser evil than torture. *See, e.g.*, CAT Art. 16 (prohibiting "other *cruel, inhuman*, or degrading treatment or punishment *which do not amount to torture*") (emphases added). Accordingly, as a general matter, a condition would not constitute "severe physical or mental pain or suffering" if it were not also to constitute "serious physical or mental pain or suffering."

Although it implies something less extreme than the term "severe," the term "serious" still refers to grave conduct. As with the term "severe," dictionary definitions of the term "serious" underscore that it refers to a condition "of a great degree or an undesirable or harmful element." *Webster's Third Int'l Dictionary* at 2081. When specifically describing physical pain, "serious" has been defined as "inflicting a pain or distress [that is] grievous." *Id.* (explaining that, with regard to pain, "serious" is the opposite of "mild").

That the term "serious" limits the CIT offense to grave conduct is reinforced by the purpose of the War Crimes Act. The International Committee of the Red Cross ("ICRC") *Commentaries* describe the conduct prohibited by Common Article 3 as "acts which world public opinion finds particularly revolting." Pictet, gen. ed., III *Commentaries on the Geneva Conventions* 39 (1960); *see also infra* at 50 (explaining the significance of the ICRC *Commentaries* in interpreting Common Article 3). Of the minimum standards of treatment consistent with humanity that Common Article 3 seeks to sustain, the War Crimes Act is directed only at "grave breaches" of Common Article 3. *See* 18 U.S.C. § 2441(c)(3). Grave breaches of the Conventions represent conduct of such severity that the Conventions oblige signatories to "provide effective penal sanctions" for, and to search for and to prosecute persons committing, such violations of the Conventions. *See, e.g.*, "GPW" Article 129. The Conventions themselves in defining "grave breaches" set forth unambiguously serious offenses: "willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health." GPW Art. 130. In this context, the term "serious" must not be read lightly. Accordingly, the "serious physical or mental pain or suffering" prohibited by the CIT offense does not include trivial or mild conditions; rather, the offense refers to the grave conduct at which the term "serious" and the grave breach provision of the Geneva Conventions are directed.

Second, the CIT offense's structure shapes our interpretation of its separate prohibitions against the infliction of "physical pain or suffering" and "mental pain or suffering." The CIT offense, like the anti-torture statute, envisions two separate categories of harm and, indeed, separately defines each term. As we discuss below, this separation is reflected in the requirement that "serious physical pain or suffering" involve the infliction of a "bodily injury." To permit purely mental conditions to qualify as "physical pain or suffering" would render the

carefully considered definition of "serious mental pain or suffering" surplusage. Consistent with the statutory definitions provided by Congress, we therefore understand the structure of the CIT offense to involve two distinct categories of harm.

The CIT offense largely borrows the anti-torture statute's definition of mental pain or suffering. Although the CIT offense makes two important adjustments to the definition, these revisions preserve the fundamental purpose of providing clearly defined circumstances under which mental conditions would trigger the coverage of the statute. Extending the offense's coverage to solely mental conditions outside of this careful definition would be inconsistent with this structure. *Cf. Section 2340 Opinion* at 23-24 (concluding that mere mental distress is not enough to cause "*physical* suffering" within the meaning of the anti-torture statute). We therefore conclude that, consistent with the anti-torture statute, the CIT offense separately proscribes physical and mental harm. We consider each in turn.

1.

The CIT offense proscribes an act "intended to inflict . . . serious physical . . . pain or suffering." 18 U.S.C. § 2441(d)(1)(B). Unlike the torture offense, which does not provide an explicit definition of "severe physical pain or suffering," the CIT offense includes a detailed definition of "serious physical pain or suffering," as follows:

> [B]odily injury that involves—
> (i) a substantial risk of death;
> (ii) extreme physical pain;
> (iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or
> (iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty."

Id. § 2441(d)(2)(D).

In light of that definition, the physical component of the CIT offense has two core features. First, it requires that the defendant act with the intent to inflict a "bodily injury." Second, it requires that the intended "bodily injury" "involve" one of four effects or resulting conditions.

a.

As an initial matter, the CIT offense requires that the defendant's conduct be intended to inflict a "bodily injury." The term "injury," depending on context, can refer to a wide range of "harm" or discomfort. *See* VII *Oxford English Dictionary* at 291. This is a term that draws substantial meaning from the words that surround it. The injury must be "bodily," which requires the injury to be "of the body." II *Oxford English Dictionary* at 353. The term "bodily" distinguishes the "*physical* structure" of the human body from the mind. Dictionaries most closely relate the term "bodily" to the term "physical" and explain that the word "contrasts with

mental or *spiritual*." *Webster's Third Int'l Dictionary* at 245. Therefore, the term "bodily injury" is most reasonably read to mean a physical injury to the body.[15]

As explained above, the structure of the CIT offense reinforces the interpretation of "bodily injury" to mean "physical injury to the body." The term "bodily injury" is defining "serious *physical* pain or suffering." To permit wholly mental distress to qualify would be to circumvent the careful and separate definition of the "serious mental pain or suffering" that could implicate the statute. In furtherance of this structure, Congress chose not to import definitions of "bodily injury" from other parts of title 18 (even while, as explained below, it expressly did so for the SBI offense). This choice reflects the fact that those other definitions serve different purposes in other statutory schemes—particularly as sentencing enhancements—and they potentially could include purely mental conditions. The CIT offense differs from these other criminal offenses, which provide "bodily injury" as an element but do not have separate definitions of physical and mental harm.[16] For example, the anti-tampering statute defines "bodily injury" to include conditions with no physical component, such as the "impairment of the function of a . . . mental faculty." 18 U.S.C. § 1365(h)(4). If the definition in the anti-tampering statute were to control here, however, the bodily injury requirement would be indistinct from the required resulting condition of a significant impairment of the function of a mental faculty. *See* 18 U.S.C. § 1365(h)(4)(D). Thus, "bodily injury" must be construed in a manner consistent with its plain meaning and the structure of the CIT offense. Accordingly, we must look to whether the circumstances indicate an intent to inflict a physical injury to the body when determining whether the conduct in question is intended to cause "serious physical pain or suffering."

b.

Second, to qualify as serious physical pain or suffering, the intended physical injury to the body must "involve" one of four resulting conditions. Only one of the enumerated conditions merits discussion in connection with sleep deprivation, or any of the CIA's other proposed

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[15] At the close of the debate over the Military Commissions Act, Senator Warner introduced a written colloquy between Senator McCain and himself, wherein they stated that they "do not believe that the term 'bodily injury' adds a separate requirement which must be met for an act to constitute serious physical pain or suffering." 152 Cong. Rec. S10,400 (Sept. 28, 2006). We cannot rely on this exchange (which was not voiced on the Senate floor) as it would render the term "bodily injury" in the statute wholly superfluous. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant"); *Platt v. Union Pacific Ry. Co.*, 99 U.S. 48, 58 (1879) ("[L]egislation is presumed to use no superfluous words. Courts are to accord meaning, if possible, to every word in a statute.").

[16] Many of those other criminal statutes expressly define "bodily injury" through cross-references to 18 U.S.C. § 1365(h). *See, e.g.*, 18 U.S.C. §§ 37(a)(1), 43(d)(4), 113(b)(2), 1111(c)(5), 1153(a), 1347, 2119(2). A provision under the United States Sentencing Guidelines, though similarly worded to the CIT offense in other respects, separately provides a specific definition of "bodily injury" and thus our interpretation of the term "bodily injury" in the CIT offense does not extend to the construction of the term in the Guidelines. *See* U.S.S.G. § 1B1.1 Application Note M.

techniques: "the significant loss or impairment of the function of a bodily member, organ, or mental faculty."[17]

The condition requires a "loss or impairment." Standing alone, the term "loss" requires a "deprivation," and the term "impairment" a "deterioration," here of three specified objects. *See Webster's Third Int'l Dictionary* at 1338, 1131. Both of these terms, of their own force and without modification, carry an implication of duration; the terms do not refer to merely momentary conditions. Reinforcing this condition, Congress required that the "loss" or "impairment" be "significant." The term "significant" implies that the intended loss or impairment must be characterized by a substantial gravity or seriousness. And the term draws additional meaning from its context. The phrase "significant loss or impairment" is employed to define "*serious* physical pain or suffering" and, more generally, the extreme conduct that would constitute a "grave breach" of Common Article 3. In reaching the level of seriousness called for in this context, it is reasonable to conclude that both duration and gravity are relevant. An extreme mental condition, even if it does not last for a long time, may be deemed a "significant impairment" of a mental faculty. A less severe condition may become significant only if it has a longer duration.

The text also makes clear that not all impairments of bodily "functions" are sufficient to implicate the CIT offense. Instead, Congress specified that conditions affecting three important types of functions could constitute a qualifying impairment: the functioning of a "bodily member," an "organ," or a "mental faculty." The meanings of "bodily member" and "organ" are straightforward. For example, the use of the arms and the legs, including the ability to walk, would clearly constitute a "function" of a "bodily member." "Mental faculty" is a term of art in cognitive psychology. In that field, "mental faculty" refers to "one of the powers or agencies into which psychologists have divided the mind—such as will, reason, or intellect—and through the interaction of which they have endeavored to explain all mental phenomenon." *Webster's Third Int'l Dictionary* at 844. As we explain below, the sleep deprivation technique can cause a temporary diminishment in general mental acuity, but the text of the statute requires more than an unspecified or amorphous impairment of mental functioning. The use of the term "mental faculty" requires that we identify an important aspect of mental functioning that has been

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[17] The "substantial risk of death" condition clearly does not apply to sleep deprivation or any of the CIA's other proposed techniques. None of the six techniques would involve an appreciably elevated risk of death. Medical personnel would determine for each detainee subject to interrogation that no contraindications exist for the application of the techniques to that detainee. Moreover, CIA procedures require termination of a technique when it leads to conditions that increase the risk of death, even slightly.

Our *Section 2340 Opinion* makes clear that the "extreme physical pain" condition also does not apply here. *See* 18 U.S.C. § 2441(d)(2)(D)(ii). There, we interpreted the term "severe physical pain" in the torture statute to mean "extreme physical pain." *Id.* at 19 ("The use of the word 'severe' in the statutory prohibition on torture clearly denotes a sensation or condition that is *extreme* in intensity and difficult to endure."); *id.* (torture involves activities "designed to inflict intense or *extreme* pain"). On the basis of our determination that the six techniques do not involve the imposition of "severe physical pain," *see id.* at 22-24, 31-33, 35-39, we conclude that they also do not involve "extreme physical pain." And, because no technique involves a visible physical alteration or burn of any kind, the condition of "a burn or disfigurement of a serious nature (other than cuts, abrasions, or bruises)" is also not implicated.

impaired, as opposed to permitting a general sense of haziness, fatigue, or discomfort to provide one of the required conditions for "serious physical pain or suffering."

Read together, we can give discernable content to how mental symptoms would come to constitute "serious physical pain or suffering" through the fourth resulting condition. The "bodily injury" provision requires the intent to inflict *physical injury to the body* that would be expected to result in a significant loss or impairment of a mental faculty.[18] To constitute a "significant loss or impairment," that mental condition must display the combination of duration and gravity consistent with a "grave breach" of the law of war. Finally, we must identify a discrete and important mental function that is lost or impaired.

The physical conditions that we understand are likely to be associated with the CIA's proposed extended sleep deprivation technique would not satisfy these requirements. As an initial matter, the extended sleep deprivation technique is designed to involve minimal physical contact with the detainee. The CIA designed the method for keeping the detainee awake—primarily by shackling the individual in a standing position—in order to avoid invasive physical contact or confrontation between the detainee and CIA personnel. CIA medical personnel have informed us that two physical conditions are likely to result from the application of this technique: Significant muscle fatigue associated with extended standing, and edema, that is, the swelling of the tissues of the lower legs. CIA medical personnel, including those who have observed the effects of extended sleep deprivation as employed in past interrogations, have informed us that such conditions do not weaken the legs to the point that the detainee could no longer stand or walk. Detainees subjected to extended sleep deprivation remain able to walk after the application of the technique. Moreover, if the detainee were to stop using his legs and to try to support his weight with the shackles suspended from the ceiling, the application of the technique would be adjusted or terminated. The detainee would not be left to hang from the shackles. By definition, therefore, the function of the detainee's legs would not be significantly impaired—they would be expected to continue to sustain the detainee's weight and enable him to walk.

Nor is simple edema alone a qualifying impairment. It is possible that clinically significant edema in the lower legs may occur during later stages of the technique, and medical personnel would terminate application of the technique if the edema were judged to be significant, i.e., if it posed a risk to health. For example, if edema becomes sufficiently serious, it can increase the risk of a blood clot and stroke. CIA medical personnel would monitor the detainee and terminate the technique before the edema reached that level of severity. Edema subsides with only a few hours of sitting or reclining, and even persons with severe edema can walk. The limitations set by the CIA to avoid clinically significant edema, and the continued

[18] To be sure, the CIT offense requires "bodily injury that *involves*" a significant impairment; it does not require a showing that the bodily injury necessarily *cause* the impairment. The term "involves," however, requires more than a showing of mere correlation. Rather, the "bodily injury" either must cause the impairment or have been necessarily associated with the impairment. This reading of the statute is necessary to preserve the statute's fundamental distinction between physical and mental harm. A bodily injury will not "involve" an impairment merely on a showing of coincidence between the individual's impairment and an unrelated physical condition.

ability of the detainee to use his legs, demonstrate that the mild edema that can be expected to occur during sleep deprivation would not constitute a "significant impairment" of the legs.

The mental conditions associated with sleep deprivation also are not "serious *physical* pain or suffering." To satisfy the "bodily injury" requirement, the mental condition must be traceable to some physical injury to the body. We understand from the CIA's medical experts and medical literature that the mild hallucinations and diminished cognitive functioning that may be associated with extended sleep deprivation arise largely from the general mental fatigue that accompanies the absence of sleep, not from any physical phenomenon that would be associated with the CIA's procedure for preventing sleep. These mental symptoms develop in far less demanding forms of sleep deprivation, even where subjects are at liberty to do what they please but are nonetheless kept awake. We understand that there is no evidence that the onset of these mental effects would be accelerated, or their severity aggravated, by physical conditions that may accompany the means used by the CIA to prevent sleep.

Even if such diminished cognitive functioning or mild hallucinations were attributable to a physical injury to the body, they would not be *significant* impairments of the function of a mental faculty within the meaning of the statute. The CIA will ensure, through monitoring and regular examinations, that the detainee does not suffer a significant reduction in cognitive functioning throughout the application of the technique. If the detainee were observed to suffer any hallucinations, the technique would be immediately discontinued. For evaluating other aspects of cognitive functioning, at a minimum, CIA medical personnel would monitor the detainee to determine that he is able to answer questions, describe his surroundings accurately, and recall basic facts about the world. Under these circumstances, the diminishment of cognitive functioning would not be "significant."[19]

In addition, CIA observations and other medical studies tend to confirm that whatever effect on cognitive function may occur would be short-lived. Application of the proposed sleep deprivation technique will be limited to 96 hours, and hallucinations or other appreciable cognitive effects are unlikely to occur until after the midpoint of that period. Moreover, we understand that cognitive functioning is fully restored with one night of normal sleep, which detainees would be permitted after application of the technique. Given the relative mildness of the diminished cognitive functioning that the CIA would permit to occur before the technique is discontinued, such mental effects would not be expected to persist for a sufficient duration to be "significant."[20]

[19] The techniques that we discuss herein are of course designed to persuade the detainee to disclose information, which he would not otherwise wish to do. These techniques are not thereby directed, however, at causing significant impairment of the detainee's will, arguably a "mental faculty." Instead, the techniques are designed to alter assumptions that lead the detainee to exercise his will in a particular manner. In this way, the techniques are based on the presumption that the detainee's will is functioning properly and that he will react to the techniques, and the changed conditions, in a rational manner.

[20] A final feature of "serious physical pain or suffering" in the CIT offense is the addition of the phrase "including serious physical abuse." *See* 18 U.S.C. § 2441(d)(2)(iv) (prohibiting the infliction of "severe or serious physical or mental pain or suffering . . . including serious physical abuse"). Congress provided "serious physical

The CIT offense also prohibits the infliction of "serious mental pain or suffering," under which purely mental conditions are appropriately considered. In the *Section 2340 Opinion*, we concluded that none of the techniques at issue here involves the intentional imposition of "severe mental pain or suffering," as that term is defined in 18 U.S.C. § 2340. The CIT offense adopts that definition with two modifications. With the differences from section 2340 italicized, "serious mental pain or suffering" is defined as follows:

> The *serious and non-transitory* mental harm *(which need not be prolonged)* caused by or resulting from—
>
> (A) the intentional infliction or threatened infliction of *serious* physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or
>
> (D) the threat that another person will imminently be subjected to death, *serious* physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

See 18 U.S.C. § 2441(d)(2)(E) (specifying adjustments to 18 U.S.C. § 2340(2)).

None of these modifications expands the scope of the definition to cover sleep deprivation as employed by the CIA or any of the other proposed techniques. The CIT offense replaces the term "severe" with the term "serious" throughout the text of 18 U.S.C. § 2340(2). The CIT offense also alters the requirement of "*prolonged* mental harm" in 18 U.S.C. § 2340(2), replacing it with a requirement of "serious and non-transitory mental harm (which need not be prolonged)." Nevertheless, just as with the definition in the anti-torture statute, the definition in

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abuse" as an example of a category of harm that falls within the otherwise defined term of "serious physical pain or suffering." "Serious physical abuse" therefore may be helpful in construing any ambiguity as to whether a particular category of physical harm falls within the definition of "serious physical pain or suffering." We do not find it relevant here, however, as the term "serious physical abuse" is directed at a category of conduct that does not occur in the CIA's interrogation program. The word "abuse" implies a pattern of conduct or some sustained activity, although when the intended injury is particularly severe, the term "abuse" may be satisfied without such a pattern. It also suggests an element of wrongfulness, *see, e.g.*, *Webster's Third Int'l Dictionary* at 8 (defining abuse as an "improper or incorrect use, an application to a wrong or bad purpose"), and would not tend to cover justified physical contact. While the CIA uses some "corrective techniques" that involve physical contact with the detainee, the CIA has stated that they are used to upset the detainee's expectations and to regain his attention, and they would not be used with an intensity or frequency to cause significant physical pain, much less to constitute the type of beating implied by the term "serious physical abuse."

the CIT offense requires one of four predicate acts or conditions to result in or cause mental harm, and only then is it appropriate to evaluate whether that harm is "serious and non-transitory." *See Section 2340 Opinion* at 24-26. Three of those predicate acts or conditions are not implicated here. Above, we have concluded that none of the techniques involves the imposition of "serious physical pain or suffering." The techniques at issue here also do not involve the "threat of imminent death," *see supra* at n.17, the threatened infliction of serious physical pain or suffering, or threats of any kind to persons other than the detainee.[21]

The only predicate act that requires a more extended analysis here is "the administration or application . . . of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality." The text of this predicate act is the same as in 18 U.S.C. § 2340(2)(B).

In our *Section 2340 Opinion*, we placed substantial weight on the requirement that the procedure "disrupt *profoundly* the senses," explaining how the requirement limits the scope of the predicate act to particularly extreme mental conditions. We acknowledged, however, that a hallucination could constitute a profound disruption of the senses, if of sufficient duration. *Id.* at 39. Nevertheless, it is not enough that a profound disruption of the senses *may* occur during the application of a procedure. Instead, the statute requires that the procedure be "*calculated*" to cause a profound disruption of the senses. *See Webster's Third Int'l Dictionary* at 315 (defining "calculated" as "planned or contrived *so as to accomplish a purpose or to achieve an effect*: thought out in advance") (emphasis added). This requirement does not license indifference to conditions that are very likely to materialize. But we can rely on the CIA's reactions to conditions that may occur to discern that a procedure was not "calculated" to bring about a proscribed result. CIA medical personnel would regularly monitor the detainee according to accepted medical practice and would discontinue the technique should any hallucinations be

[21] It is true that the detainees are unlikely to be aware of the limitations imposed upon CIA interrogators under their interrogation plan. A detainee thus conceivably could fear that if he does not cooperate, the CIA may escalate the severity of its interrogation methods or adopt techniques that would amount to "serious physical pain or suffering." That the detainee may harbor such fears, however, does not mean that the CIA interrogators have issued a legal "threat." The federal courts have made clear that an individual issues a "threat" only if the reasonable observer would regard his words or deeds as a "serious expression of an intention to inflict bodily harm." *United States v. Mitchell*, 812 F.2d 1250, 1255 (9th Cir. 1987); *see also United States v. Zavrel*, 384 F.3d 130, 136 (3d Cir. 2004) (same); *United States v. Sovie*, 122 F.3d 122, 125 (2d Cir. 1997) (further requiring a showing that, "on [the threat's] face and in the circumstances to which it is made, it is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution") (internal quotation omitted); *see generally* 4 *Wharton's Criminal Law* § 462 (15th ed. 1996) (to constitute a threat, "the test is not whether the victim feared for his life or believed he was in danger, but whether he was actually in danger," presumably due to the intention of the defendant to carry out the proscribed acts). CIA interrogators do not tell the detainee that, absent cooperation, they will inflict conduct that would rise to the level of "serious physical pain or suffering." Nor do they engage in suggestive physical acts that indicate that "serious physical pain or suffering" will ensue. Prosser and Keeton, *The Law of Torts*, § 10, at 44 (5th ed. 1984) (actionable non-verbal threats occur "when the defendant presents a weapon in such a condition or manner as to indicate that it may immediately be made ready for use"). Absent any such affirmative conduct by the CIA, the detainee's general uncertainty over what might come next would not satisfy the legal definition of "threat."

diagnosed. Such precautions demonstrate that the technique would not be "calculated" to produce hallucinations.[22]

Whether or not a hallucination of the duration at issue here were to constitute a profound disruption of the senses, we have concluded that the hallucination would not be long enough to constitute "prolonged mental harm" under the definition of "severe mental pain or suffering" in the anti-torture statute. *Section 2340 Opinion* at 39-40. The adjustment to this definition in the CIT offense—replacing "prolonged mental harm" with "serious and non-transitory mental harm (which need not be prolonged)"—does not reach the sleep deprivation technique. The modification is a refocusing of the definition on severity—some combination of duration and intensity—instead of its prior reliance on duration alone. The new test still excludes mental harm that is "transitory." Thus, mental harm that is "marked by the quality of passing away," is "of brief duration," or "last[s] for minutes or seconds," *see Webster's Third Int'l Dictionary* at 2448-49, cannot qualify as "serious mental pain or suffering." Also relevant is the text's negation of a *requirement* that the mental harm be "prolonged." 18 U.S.C. § 2441(d)(2)(E) (providing that the mental harm that would constitute "serious physical pain or suffering" "need not be prolonged").

These adjustments, however, do not eliminate the inquiry into the duration of mental harm. Instead, the CIT offense separately requires that the mental harm be "serious." As we explained above, the term "serious" does considerable work in this context, as it seeks to describe conduct that constitutes a grave breach of Common Article 3—conduct that is universally condemned. The requirement that the mental harm be "serious" directs us to appraise the totality of the circumstances. Mental harm that is particularly intense need not be long-lasting to be serious. Conversely, mental harm that, once meeting a minimum level of intensity, is not as extreme would be considered "serious" only if it continued for a long period of time. Read together, mental harm certainly "need not be prolonged" in all circumstances to constitute "serious mental pain or suffering," but certain milder forms of mental effects would need to be of a significant duration to be considered "serious." For the same reasons that the short-lived hallucinations and other forms of diminished cognitive functioning that may occur with extended lack of sleep would not be "significant impairments of a mental faculty," such mental conditions also would not be expected to result in "serious mental harm." Again, crucial to our analysis is that CIA personnel will intervene should any hallucinations or significant declines in cogn tive functioning be observed and that any potential hallucinations or other forms of diminished cognitive functioning subside quickly when rest is permitted.

[22] In determining that sleep deprivation would not be "calculated to disrupt profoundly the senses," we also find it relevant that the CIA would not employ this technique to confuse and to disorient the detainee so that he might inadvertently disclose information. Indeed, seeking to cause the detainee to hallucinate or otherwise to become disoriented would be counter to CIA's goal, which is to gather accurate intelligence. Rather, CIA interrogators would employ sleep deprivation to wear down the detainee's resistance and to secure his agreement to talk in return for permitting him to sleep. Fatigue also reduces the detainee's confidence in his ability to lie convincingly and thus suggests to the detainee that the only way of obtaining sleep is to agree to provide accurate information. Once they have secured that agreement, interrogators generally would stop the technique, permit the detainee to rest, and then continue the questioning when he is rested and in a better position to provide more accurate and complete information.

C.

The third offense at issue is "intentionally causing serious bodily injury." 18 U.S.C. § 2441(d)(1)(F). The Act defines the SBI offense as follows: "The act of a person who intentionally causes, or conspires or attempts to cause, serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war."[23] The War Crimes Act borrows the definition of "serious bodily injury" directly from the federal assault statute, 18 U.S.C. § 113. *See* 18 U.S.C. § 2441(d)(2)(B). The federal assault statute, in turn, incorporates by reference the definition of "serious bodily injury" in the federal anti-tampering statute. *See* 18 U.S.C. § 113(b)(2). The anti-tampering statute states that:

> [T]he term "serious bodily injury" means bodily injury which involves—
> (A) a substantial risk of death;
> (B) extreme physical pain;
> (C) protracted and obvious disfigurement; or
> (D) protracted loss or impairment of the functions of a bodily member, organ, or mental faculty.

18 U.S.C. § 1365(h)(3). Three of these resulting effects are plainly not applicable to the techniques under consideration here. As explained above, the techniques involve neither an appreciably elevated risk of death, much less a substantial risk, nor the imposition of extreme physical pain, nor a disfigurement of any kind. Indeed, no technique is administered until medical personnel have determined that there is no medical contraindication to the use of the technique with that particular detainee. For reasons we explain below, sleep deprivation also does not lead to "the protracted loss or impairment of the functions of a bodily member, organ, or mental faculty."

This Office has analyzed a similar term in the context of the sleep deprivation technique before. For example, we determined that the mild hallucinations that may occur during extended sleep deprivation are not "prolonged." *Section 2340 Opinion* at 40. Both the term "prolonged" and the term "protracted" require that the condition persist for a significant duration. We were reluctant to pinpoint the amount of time a condition must last to be "prolonged." Nevertheless, judicial determinations that mental harm had been "prolonged" under a similar definition of torture in the Torture Victim Protection Act, 28 U.S.C. § 1350 note, involved mental effects, including post-traumatic stress syndrome, that had persisted for *months or years* after the events in question. *See Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1346 (N.D. Ga. 2002) (relying on the fact that "each plaintiff continues to suffer long-term psychological harm as a result of the ordeals they suffered" years after the alleged torture in determining that the plaintiff experienced "prolonged mental harm"); *Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601-02 (E.D. Pa. 2003)

[23] The SBI offense requires as an element that the conduct be "in violation of the law of war." There are certain matters that this requirement places beyond the reach of the SBI offense. If, for example, a member of an armed force enjoying combatant immunity were to cause serious bodily injury on the battlefield pursuant to legitimate military operations, the SBI offense would not apply. The imposition of "serious bodily injury" on those in custody in certain circumstances, such as to prevent escape, would also not violate the law of war. *See, e.g.*, GPW Art. 42.

(holding that victim suffered "prolonged mental harm" when he was forcibly drugged and threatened with death over a period of four years).[24] By contrast, at least one court has held that the mental trauma that occurs over the course of one day does not constitute "prolonged mental harm." *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1294-95 (S.D. Fla. 2003) (holding that persons who were held at gunpoint overnight and were threatened with death throughout, but who did not allege mental harm extending beyond that period of time, had not suffered "prolonged mental harm" under the TVPA). Decisions interpreting "serious bodily injury" under 18 U.S.C. § 1365(h)(3) embrace this interpretation. *See United States v. Spinelli*, 352 F.3d 48, 59 (2d Cir. 2003) (explaining that courts have looked to whether victims "have suffered from lasting psychological debilitation" persisting long after a traumatic physical injury in determining whether a "protracted impairment" has occurred); *United States v. Guy*, 340 F.3d 655 (8th Cir. 2003) (holding that persistence of post-traumatic stress syndrome more than one year after rape constituted a "protracted impairment of the function of a . . . mental faculty"); *United States v. Lowe*, 145 F.3d 45, 53 (1st Cir. 1998) (looking to psychological care ten months after an incident as evidence of a "protracted impairment"). In the absence of professional psychological care in the months and years after an incident causing bodily injury, courts have on occasion turned away claims that even extremely violent acts caused a "protracted impairment of the function of a . . . mental faculty." *See, e.g., United States v. Rivera*, 83 F.3d 542, 548 (1st Cir. 1996) (overturning sentencing enhancement based on a "protracted impairment" when victim had not sought counseling in the year following incident). Thus, whether medical professionals have diagnosed and treated such a condition, after these techniques have been applied, is certainly relevant to determining whether a protracted impairment of a mental faculty has occurred.[25]

Given the CIA's 96-hour time limit on continuous sleep deprivation, the hours between when these mental conditions could be expected to develop and when they could become of a severity that CIA personnel terminate the technique would not be of sufficient duration to satisfy the requirement that the impairment be "protracted." This conclusion is reinforced by the medical evidence indicating that such conditions subside with one night of normal sleep.

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[24] We have no occasion in this opinion to determine whether the intentional infliction of post-traumatic stress syndrome would violate the SBI offense. CIA's experiences with the thirty detainees with whom enhanced techniques have been used in the past, as well as information from military SERE training, suggest that neither the sleep deprivation technique, nor any of the other six enhanced techniques, is likely to cause post-traumatic stress syndrome. CIA medical personnel have examined these detainees for signs of post-traumatic stress syndrome, and none of the detainees has been diagnosed to suffer from it.

[25] There is also a question about the meaning of "bodily injury" in the SBI offense. As explained above, the broader anti-tampering statute defines the term "bodily injury" such that any "impairment of the function of a . . . mental faculty" would qualify as a bodily injury. 18 U.S.C. § 1365(h)(4). If this were the governing definition, no physical injury to the body would be required for one of the specified conditions to constitute "serious bodily injury." There are reasons to believe that incorporating this definition of "bodily injury" into the SBI offense is not warranted. Nevertheless, whether a "bodily injury" involving a physical condition is required for the SBI offense is not a matter we must address here because none of the techniques at issue would implicate any of the four conditions required under the definition of "serious bodily injury," even in the absence of any separate physical injury requirement.

D.

Our analysis of the War Crimes Act thus far has focused on whether the application of a proposed interrogation technique—in particular, extended sleep deprivation—creates physical or mental conditions that cross the specific thresholds established in the Act. We have addressed questions of combined use before in the context of the anti-torture statute, and concluded there that the combined use of the six techniques at issue here did not result in the imposition of "extreme physical pain." Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005). This conclusion is important here because "extreme physical pain" is the specified pain threshold for the CIT offense and the SBI offense, in addition to the torture offense. *See* 18 U.S.C. §§ 2441(d)(2)(D)(2), 113(b)(2)(B). With regard to elements of the War Crimes Act concerning "impairments," CIA observations of the combined use of these techniques do not suggest that the addition of other techniques during the application of extended sleep deprivation would accelerate or aggravate the cognitive diminishment associated with the technique so as to reach the specified thresholds in the CIT and SBI offenses. Given the particularized elements set forth in the War Crimes Act, the combined use of the six techniques now proposed by the CIA would not violate the Act.

E.

The War Crimes Act addresses conduct that is universally condemned and that constitutes grave breaches of Common Article 3. Congress enacted the statute to declare our Nation's commitment to those Conventions and to provide our personnel with clarity as to the boundaries of the criminal conduct proscribed under Common Article 3 of the Geneva Conventions. For the reasons discussed above, we conclude that the six techniques proposed for use by the CIA, when used in accordance with their accompanying limitations and safeguards, do not violate the specific offenses established by the War Crimes Act.

III.

For the reasons discussed in this Part, the proposed interrogation techniques also are consistent with the Detainee Treatment Act.

A.

The DTA requires the United States to comply with certain constitutional standards in the treatment of all persons in the custody or control of the United States, regardless of the nationality of the person or the physical location of the detention. The DTA provides that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." DTA § 1403(a). The Act defines "cruel, inhuman, or degrading treatment or punishment" as follows:

> In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

DTA § 1403(d).[26] Taken as a whole, the DTA imposes a statutory requirement that the United States abide by the substantive constitutional standards applicable to the United States under its reservation to Article 16 of the CAT in the treatment of detainees, regardless of location or citizenship.

The change in law brought about by the DTA is significant. By its own terms, Article 16 of the CAT applies only in "territory under [the] jurisdiction" of the signatory party. In addition, the constitutional provisions invoked in the Senate reservation to Article 16 generally do not apply of their own force to aliens outside the territory of the United States. *See Johnson v. Eisentrager*, 339 U.S. 763, 782 (1950); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); *see also United States v. Belmont*, 301 U.S. 324, 332 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). Thus, before the enactment of the DTA, United States personnel were not legally required to follow these constitutional standards outside the territory of the United States as to aliens. Nevertheless, even before the DTA, it was the policy of the United States to avoid cruel, inhuman, or degrading treatment, within the meaning of the U.S. reservation to Article 16 of the CAT, of any detainee in U.S. custody, regardless of location or nationality. *See supra* at n.1. The purpose of the DTA was to codify this policy into statute.

B.

Although United States obligations under Article 16 extend to "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States," only the Fifth Amendment is directly relevant here. The Fourteenth Amendment provides, in relevant part: "No *State* shall . . . deprive any person of life, liberty, or property, without due process of law." (Emphasis added.) This Amendment does not apply to actions taken by the federal Government. *See, e.g., San*

[26] The purpose of the U.S. reservation to Article 16 of the Convention Against Torture was to provide clear meaning to the definition of "cruel, inhuman, or degrading" treatment or punishment based on United States law, particularly to guard against any expansive interpretation of "degrading" under Article 16. *See* Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *in* S. Treaty Doc. No. 100-20, at 15-16 ("Executive Branch Summary and Analysis of the CAT"); S. Exec. Rep. 101-30, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at 25-26 (Aug. 30, 1990). The reservation "construes the phrase to be coextensive with the constitutional guarantees against cruel, unusual, and inhumane treatment." *Executive Branch Summary and Analysis of the CAT* at 15; S. Exec. Rep. 101-30 at 25. Accordingly, the DTA does not prohibit all "degrading" behavior in the ordinary sense of the term; instead, the prohibition extends "only insofar as" the specified constitutional standards. 136 Cong. Rec. 36,198 (1990).

Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 542 n.21 (1987); *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." As the Supreme Court repeatedly has held, the Eighth Amendment does not apply until there has been a "formal adjudication of guilt." *See Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979); *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977); *see also In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480 (D.D.C. 2005) (dismissing detainees' Eighth Amendment claims because "the Eighth Amendment applies only after an individual is convicted of a crime"). The limited applicability of the Eighth Amendment under the reservation to Article 16 was expressly recognized by the Senate and the Executive Branch during the CAT ratification deliberations:

> The Eighth Amendment prohibition of cruel and unusual punishment is, of the three [constitutional provisions cited in the Senate reservation], the most limited in scope, as this amendment has consistently been interpreted as protecting only "those convicted of crimes." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). The Eighth Amendment does, however, afford protection against torture and ill-treatment of persons in prison and similar situations of *criminal punishment*.

Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *in* S. Treaty Doc. No. 100-20, at 9 (emphasis added) ("*Executive Branch Summary and Analysis of the CAT*"). Because none of the high value detainees on whom the CIA might use enhanced interrogation techniques has been convicted of any crime in the United States, the substantive requirements of the Eighth Amendment are not directly relevant here.[27]

The Due Process Clause of the Fifth Amendment forbids the deprivation of "life, liberty, or property without due process of law." Because the prohibitions of the DTA are directed at "treatment or punishment," the Act does not require application of the procedural aspects of the Fifth Amendment. The DTA provides for compliance with the ***substantive*** prohibition against "cruel, inhuman, or degrading treatment or punishment" as defined by the United States reservation to Article 16 of the CAT. The CAT recognizes such a prohibition to refer to serious abusive acts that approach, but fall short of, the torture elsewhere prohibited by the CAT. *See* CAT Art. 16 (prohibiting "other cruel, inhuman, or degrading treatment or punishment which do not amount to torture"). The term "treatment" therefore refers to this prohibition on substantive conduct, not to the process by which the Government decides to impose such an outcome. The addition of the term "punishment" likewise suggests a focus on what actions or omissions are

[27] This is not to say that Eighth Amendment standards are of no importance in applying the DTA to pre-conviction interrogation practices. The Supreme Court has made clear that treatment amounting to punishment without a trial would violate the Due Process Clause. *See United States v. Salerno*, 481 U.S. 739, 746-47 (1987); *City of Revere v. Mass. General Hosp.*, 463 U.S. 239, 244 (1983); *Wolfish*, 441 U.S. at 535-36 & nn.16-17. Treatment amounting to "cruel and unusual punishment" under the Eighth Amendment also may constitute prohibited "punishment" under the Fifth Amendment. Of course, the Constitution does not prohibit the imposition of certain sanctions on detainees who violate administrative rules while lawfully detained. *See, e.g., Sandin v. Connor*, 515 U.S. 472, 484-85 (1995).

ultimately effected on a detainee—not upon the process for deciding to impose those outcomes. *Cf. Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (observing that the interpretation of a statutory term "that is capable of many meanings" is often influenced by the words that surround it). Moreover, the DTA itself includes extensive and detailed provisions dictating the process to be afforded certain detainees in military custody. *See* DTA § 1405. Congress's decision to specify detailed procedures applicable to particular detainees cannot be reconciled with the notion that the DTA was intended simultaneously to extend the procedural protections of the Due Process Clause generally to all detainees held by the United States.

Rather, the substantive component of the Due Process Clause governs what types of treatment, including what forms of interrogation, are permissible without trial and conviction. This proposition is one that the Supreme Court confirmed as recently as 2003 in *Chavez v. Martinez*, 538 U.S. 760 (2003). *See id.* at 779-80, *id.* at 773 (plurality opinion); *id.* at 787 (Stevens, J., concurring in part and dissenting in part). Further reinforcing this principle, a majority of the Justices recognized that the Self-Incrimination Clause—instead of proscribing particular means of interrogating suspects—only prohibits coerced confessions from being used to secure a *criminal conviction*. *See Chavez*, 538 U.S. at 769 (plurality opinion, joined by four Justices) ("[M]ere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statement in a criminal case against the witness."); *id.* at 778 (Souter, J., concurring in the judgment) (rejecting the notion of a "stand-alone violation of the privilege subject to compensation" whenever "the police obtain any involuntary self-incriminating statement").

In this regard, substantive due process protects against interrogation practices that "shock[] the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience."). [28] The shocks-the-conscience inquiry does not focus on whether the interrogation was coercive, which is the relevant standard for whether a statement would be admissible in court. *See Malloy v. Hogan*, 378 U.S. 1, 7 (1964) ("Under [the Self-Incrimination Clause], the constitutional inquiry is not whether the conduct of the state officers in obtaining the confession was shocking, but whether the confession was free and voluntary."). Instead, the "relevant liberty is not freedom from unlawful interrogations but freedom from severe bodily or mental harm inflicted in the course of an interrogation." *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (Posner, J.). In order to cross that "high" threshold in the law enforcement context, there must be "misconduct that a reasonable person would find so beyond the norm of proper police

[28] It has been widely and publicly recognized that the Fifth Amendment's "shocks the conscience" test supplies the legal standard applicable to the interrogation of suspected terrorists regarding future terrorist attacks, pursuant to the U.S. reservation to Article 16 of the CAT and thus the DTA. This conclusion was reached, for example, by a bipartisan group of legal scholars and policymakers, chaired by Phillip Heymann, Deputy Attorney General during the Clinton Administration. *See Long Term Legal Strategy Project for Preserving Security and Democratic Freedoms in War on Terrorism* 23 (Harvard 2004). The Department of Justice also publicly announced this part of its interpretation of Article 16 in congressional testimony, prior to the enactment of the DTA. *See* Prepared Statement of Patrick F. Philbin, Associate Deputy Attorney General, before the Permanent House Select Committee on Intelligence, *Treatment of Detainees in the Global War on Terror* (July 14, 2004).

procedure as to shock the conscience, and that is calculated to induce not merely momentary fear or anxiety, but severe mental suffering." *Id.*

As we discuss in more detail below, the "shocks the conscience" test requires a balancing of interests that leads to a more flexible standard than the inquiry into coercion and voluntariness that accompanies the introduction of statements at a criminal trial, and the governmental interests at stake may vary with the context. The Supreme Court has long distinguished the government interest in ordinary law enforcement from the more compelling interest in safeguarding national security. In 2001, the Supreme Court made this distinction clear in the due process context: The government interest in detaining illegal aliens is different, the Court explained, when "appl[ied] narrowly to a small segment of particularly dangerous individuals, say, suspected terrorists." *Zadvydas v. Davis*, 533 U.S. 678, 691 (2001). This proposition is echoed in Fourth Amendment jurisprudence as well, where "special needs, beyond the normal need for law enforcement," can justify warrantless or even suspicionless searches. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). In this way, "the [Supreme] Court distinguishe[s] general crime control programs and those that have another particular purpose, such as protection of citizens against special hazards or protection of our borders." *In re Sealed Case*, 310 F.3d 717, 745-46 (For. Intel. Surv. Ct. Rev. 2002). Indeed, in one Fourth Amendment case, the Court observed that while it would not "sanction [automobile] stops justified only by the general interest in crime control," a "roadblock set up to thwart an imminent terrorist attack" would present an entirely different constitutional question. *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

C.

Application of the "shocks the conscience" test is complicated by the fact that there are relatively few cases in which courts have applied that test, and these cases involve contexts and interests that differ significantly from those of the CIA interrogation program. The Court in *County of Sacramento v. Lewis* emphasized that there is "no calibrated yard stick" with which to determine whether conduct "shocks the conscience." 523 U.S. at 847. To the contrary, "[r]ules of due process are not . . . subject to mechanical application in unfamiliar territory." *Id.* at 850. A claim that government conduct "shocks the conscience," therefore, requires "an exact analysis of circumstances." *Id.* The Court has explained:

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

Id. at 850 (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)); *Robertson v. City of Plano*, 70 F.3d 21, 24 (5th Cir. 1995) ("It goes without saying that, in determining whether the constitutional line has been crossed, the claimed wrong must be viewed in the context in which it occurred."). In evaluating the techniques in question, Supreme Court precedent therefore requires us to analyze the circumstances underlying the CIA interrogation program—limited to

high value terrorist detainees who possess intelligence critical to the Global War on Terror—and this clearly is not a context that has arisen under existing federal court precedent.

In any context, however, two general principles are relevant for determining whether executive conduct "shocks the conscience." The test requires first an inquiry into whether the conduct is "arbitrary in the constitutional sense," that is, whether the conduct is proportionate to the government interest involved. *See Lewis*, 523 U.S. at 846. Next, the test requires consideration of whether the conduct is objectively "egregious" or "outrageous" in light of traditional executive behavior and contemporary practices. *See id.* at 847 n.8. We consider each element in turn.

I.

Whether government conduct "shocks the conscience" depends primarily on whether the conduct is "arbitrary in the constitutional sense," that is, whether it amounts to the "exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Id.*, 523 U.S. at 846 (internal quotation marks omitted). "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level," although deliberate indifference to the risk of inflicting such unjustifiable injury might also "shock the conscience." *Id.* at 849-51. The "shocks the conscience" test therefore requires consideration of the justifications underlying such conduct in determining its propriety.

Thus, we must look to whether the relevant conduct furthers a government interest, and to the nature and importance of that interest. Because the Due Process Clause "lays down [no] . . . categorical imperative," the Court has "repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *United States v. Salerno*, 481 U.S. 739, 748 (1987).

Al Qaeda's demonstrated ability to launch sophisticated attacks causing mass casualties within the United States and against United States interests worldwide and the threat to the United States posed by al Qaeda's continuing efforts to plan and to execute such attacks indisputably implicate a compelling governmental interest of the highest order. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citations omitted); *see also Salerno*, 481 U.S. at 748 (noting that "society's interest is at its peak" "in times of war or insurrection"). The CIA interrogation program—and, in particular, its use of enhanced interrogation techniques—is intended to serve this paramount interest by producing substantial quantities of otherwise unavailable intelligence. The CIA believes that this program "has been a key reason why al-Qa'ida has failed to launch a spectacular attack in the West since 11 September 2001." Memorandum for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from [redacted] Chief, Legal Group, DCI Counterterrorist Center, *Re: Effectiveness of the CIA Counterintelligence Interrogation Techniques* at 2 (Mar. 2, 2005) ("*Effectiveness Memo*"). We understand that use of enhanced techniques has produced significant intelligence that the Government has used to keep the Nation safe. As the President explained, "by giving us information about terrorist plans we could not get anywhere else, the

program has saved innocent lives." Address of the President, East Room, White House, September 6, 2006.

For example, we understand that enhanced interrogation techniques proved particularly crucial in the interrogations of Khalid Shaykh Muhammad and Abu Zubaydah. Before the CIA used enhanced techniques in interrogating Muhammad, he resisted giving any information about future attacks, simply warning, "soon, you will know." As the President informed the Nation in his September 6th address, once enhanced techniques were employed, Muhammad provided information revealing the "Second Wave," a plot to crash a hijacked airliner into the Library Tower in Los Angeles—the tallest building on the West Coast. Information obtained from Muhammad led to the capture of many of the al Qaeda operatives planning the attack. Interrogations of Zubaydah—again, once enhanced techniques were employed—revealed two al Qaeda operatives already in the United States and planning to destroy a high rise apartment building and to detonate a radiological bomb in Washington, D.C. The techniques have revealed plots to blow up the Brooklyn Bridge and to release mass biological agents in our Nation's largest cities.

United States military and intelligence operations may have degraded the capabilities of al Qaeda operatives to launch terrorist attacks, but intelligence indicates that al Qaeda remains a grave threat. In a speech last year, Osama bin Laden boasted of the deadly bombings in London and Madrid and warned Americans of his plans to launch terrorist attacks in the United States:

> The delay in similar operations happening in America has not been because of failure to break through your security measures. The operations are under preparation and *you will see them in your homes* the minute they are through with preparations, Allah willing.

Quoted at http://www.breitbart.com/2006/19/D8F7SMRH5.html (Jan. 19, 2006). In August 2006, British authorities foiled a terrorist plot—planned by al Qaeda—that intended simultaneously to detonate more than 14 wide-body jets traveling across the Atlantic and that threatened to kill more civilians than al Qaeda's attacks on September 11, 2001.

(b)(1) (b)(3) NatSecAct

Intelligence indicates a recent surge of organized terrorist training activities among al Qaeda operatives [redacted] suggest that the officials are aware of an impending "major attack" against the West. There is some indication that these major attacks will originate, as the recent airliner plot had, from terrorists based in the United Kingdom. [redacted] This intelligence reinforces that the threat of terrorist attacks posed by al Qaeda continues.

(b)(1) (b)(3) NatSecAct

In addition to demonstrating a compelling government interest of the highest order underlying the use of the techniques, the CIA will apply several measures that will tailor the program to that interest. The CIA in the past has taken and will continue to take specific precautions to narrow the class of individuals subject to enhanced techniques. As described above, careful screening procedures are in place to ensure that enhanced techniques will be used *only* in the interrogations of agents or members of al Qaeda or its affiliates who are reasonably believed to possess critical intelligence that can be used to prevent future terrorist attacks against the United States and its interests. The fact that enhanced techniques have been used to date in the interrogations of only 30 high value detainees out of the 98 detainees who, at various times, have been in CIA custody demonstrates this selectivity. This interrogation program is not a dragnet for suspected terrorists who might possess helpful information.

Before enhanced techniques are used, the CIA will attempt simple questioning. Thus, enhanced techniques would be used only when the Director of the CIA considers them necessary because a high value terrorist is withholding or manipulating critical intelligence, or there is insufficient time to try other techniques to obtain such intelligence. Once approved, enhanced techniques would be used only as less harsh techniques fail or as interrogators run out of time in the face of an imminent threat, so that it would be unlikely that a detainee would be subjected to more duress than is reasonably necessary to elicit the information sought. The enhanced techniques, in other words, are not the first option for CIA interrogators confronted even with a high value detainee. These procedures target the techniques on situations where the potential for saving the lives of innocent persons is the greatest.

As important as carefully restricting the number and scope of interrogations are the safeguards the CIA will employ to mitigate their impact on the detainees and the care with which the CIA chose these techniques. The CIA has determined that the six techniques we discuss herein are the minimum necessary to maintain an effective program designed to obtain the most valuable intelligence possessed by al Qaeda operatives. The CIA interrogation team and medical personnel would review the detainee's condition both before and during interrogation, ensuring that techniques will not be used if there is any reason to believe their use would cause the detainee significant mental or physical harm. Moreover, because these techniques were adapted from the military's SERE training, the impact of techniques closely resembling those proposed by the CIA has been the subject of extensive medical studies. Each of these techniques also has been employed earlier in the CIA program, and the CIA now has its experience with those detainees, including long-term medical and psychological observations, as an additional empirical basis for tailoring this narrowly drawn program. These detailed procedures, and reliance on historical evidence, reflect a limited and direct focus to further a critical governmental interest, while at the same time eliminating any unnecessary harm to detainees. In this context, the techniques are not "arbitrary in the constitutional sense."

2.

The substantive due process inquiry requires consideration of not only whether the conduct is proportionate to the government interest involved, but also whether the conduct is consistent with objective standards of conduct, as measured by traditional executive behavior and contemporary practice. In this regard, the inquiry has a historical element: Whether,

considered in light of "an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them," use of the enhanced interrogation techniques constitutes government behavior that "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 847 n.8; *see also Rochin*, 342 U.S. at 169 ("Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content."). In this section, we consider examples in six potentially relevant areas to determine the extent to which those other areas may inform what kinds of actions would shock the conscience in the context of the CIA program.

In conducting the inquiry into whether the proposed interrogation techniques are consistent with established standards of executive conduct, we are assisted by our prior conclusion that the techniques do not violate the anti-torture statute and the War Crimes Act. Congress has, through the federal criminal law, prohibited certain "egregious" and "outrageous" acts, and the CIA does not propose to use techniques that would contravene those standards. Certain methods of interrogating even high-ranking terrorists—such as torture—may well violate the Due Process Clause, no matter how valuable the information sought. Yet none of the techniques at issue here, considered individually or in combination, constitutes torture, cruel or inhuman treatment, or the intentional infliction of serious bodily injury under United States law. *See* 18 U.S.C. §§ 2340, 2441. In considering whether the proposed techniques are consistent with traditional executive behavior and contemporary practice, we therefore begin from the premise that the proposed techniques are neither "arbitrary" as a constitutional matter nor violations of these federal criminal laws.

We have not found examples of traditional executive behavior or contemporary practice that would condemn an interrogation program that furthers a vital government interest—in particular, the interest in protecting United States citizens from catastrophic terrorist attacks—and that is carefully designed to avoid unnecessary or significant harm. To the contrary, we conclude from these examples that there is support within contemporary community standards for the CIA interrogation program, as it has been proposed. Indeed, the Military Commissions Act itself was proposed, debated, and enacted in no small part on the assumption that it would allow the CIA program to go forward.

Ordinary Criminal Investigations. The Supreme Court has addressed the question whether various police interrogation practices "shock the conscience" and thus violate the Fifth Amendment in the context of traditional criminal law enforcement. In *Rochin v. California*, 342 U.S. 165 (1952), the Court reversed a criminal conviction where the prosecution introduced evidence against the defendant that had been obtained by the forcible pumping of the defendant's stomach. The Court's analysis focused on the brutality of the police conduct at issue, especially the intrusion into the defendant's body:

> Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of the government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Id. at 172. Likewise, in *Williams v. United States*, 341 U.S. 97 (1951), the Court considered a conviction under a statute that criminalized depriving an individual of a constitutional right under color of law. After identifying four suspects, the defendant used "brutal methods to obtain a confession from each of them." *Id.* at 98.

> A rubber hose, a pistol, a blunt instrument, a sash cord and other implements were used in the proje t. One man was forced to look at a bright light for fifteen minutes; when he was blinded, he was repeatedly hit with a rubber hose and a sash cord and finally knocked to the floor. Another was knocked from a chair and hit in the stomach again and again. He was put back in the chair and the procedure was repeated. One was backed against the wall and jammed in the chest with a club. Each was beaten, threatened, and unmercifully punished for several hours until he confessed.

Id. at 98-99. The Court characterized this brutal conduct as "the classic use of force to make a man testify against himself" and had little difficulty concluding that the victim had been deprived of his rights under the Due Process Clause. *Id.* at 101-02 ("[W]here police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution."). *Williams* is significant because it appears to be the only Supreme Court case to declare an interrogation unconstitutional where its fruits were never used as evidence in a criminal trial.

In *Chavez v. Martinez*, 538 U.S. 760 (2003), the police had questioned the plaintiff, a gunshot wound victim who was in severe pain and believed he was dying. The plaintiff was not charged, however, and his confession thus was never introduced against him in a criminal case. The Supreme Court rejected the plaintiff's Self-Incrimination Clause claim but remanded for consideration of the legality of the questioning under the substantive due process standard. *See id.* at 773 (opinion of Thomas, J.); *id.* at 778-79 (Souter, J., concurring in judgment). Importantly, the Court considered applying a potentially more restrictive standard than "shocks the conscience"—a standard that would have categorically barred all "unusually coercive" interrogations. *See id.* at 783, 788 (Stevens, J., concurring in part and dissenting in part) (describing the interrogation at issue as "torturous" and "a classic example of a violation of a constitutional right implicit in the concept of ordered liberty") (internal quotation marks omitted); *id.* at 796 (Kennedy, J., concurring in part and dissenting in part) ("The Constitution does not countenance the official imposition of severe pain or pressure for purposes of interrogation. This is true whether the protection is found in the Self-Incrimination Clause, the broader guarantees of the Due Process Clause, or both."). At least five Justices, however, rejected that proposition; the context-specific nature of the due process inquiry required that the standard remain whether an interrogation is conscience-shocking. *See id.* at 774-76 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J.); *id.* at 779 (Souter, J., concurring in the judgment, joined by Breyer, J.).

The CIA program is much less invasive and extreme than much of the conduct that the Supreme Court has held to raise substantive due process concerns, conduct that has generally involved significant bodily intrusion (as in *Rochin*) or the infliction of, or indifference to, extreme pain and suffering (as in *Williams* and *Chavez*). As Judge Posner of the Seventh Circuit

has observed, the threshold defining police interrogations that exceed the bounds of substantive due process is a "high" one, which requires "misconduct that a reasonable person would find so beyond the norm of proper police procedure as to shock the conscience, and that is calculated to induce not merely momentary fear or anxiety, but severe mental suffering." *Wilkins*, 872 F.2d at 195. In contrast, and as discussed in detail below, the enhanced interrogation techniques at issue here, if applied by the CIA in the manner described in this memorandum, do not rise to that level of brutal and severe conduct. The interrogators in *Williams* chose weapons—clubs, butts of guns, sash cords—designed to inflict severe pain. While some of the techniques discussed herein involve physical contact, none of them will involve the use of such weapons or the purposeful infliction of extreme pain. As proposed by the CIA, none of these techniques involves the indiscriminate infliction of pain and suffering, or amounts to efforts to "wring confessions from the accused by force and violence." *Williams*, 341 U.S. at 101-02.

Moreover, the government interest at issue in each of the cases discussed above was the general interest in law enforcement.[29] That government interest is strikingly different from what is at stake in the context of the CIA program: The protection of the United States and its interests against terrorist attacks that, as experience proves, may result in massive civilian casualties. Deriving an absolute standard of conduct divorced from context, as *Chavez* demonstrates, is not the established application of the "shocks the conscience" test. Although none of the above cases expressly condones the techniques that we consider herein, neither does any of them arise in the special context of protecting the Nation from armed attack by a foreign enemy, and thus collectively they do not provide evidence of an executive tradition directly applicable to the techniques we consider here.[30]

United States Military Doctrine. The United States Army has codified procedures for military intelligence interrogations in the *Army Field Manual*. On September 6, 2006, the

[29] *Williams* was an example of a prosecution under what is now codified as 18 U.S.C. § 242, which makes it a criminal offense to violate the constitutional rights of another while acting under color of law. Prosecutions have been brought under section 242 for police beatings and interrogations involving the excessive use of force, but courts applying section 242 consistently have focused on whether the violent actions were justified. To this end, federal pattern jury instructions for section 242 prosecutions ask the jury to decide whether the victim was "physically assaulted, intimidated, or otherwise abused intentionally and *without justification*." Eleventh Circuit Pattern Jury Instruction 8 (2003). Courts of appeals, particularly after the Supreme Court's clarification of the "shocks the conscience" standard in *Lewis*, have repeatedly turned to whether the conduct could be justified by a legitimate government interest. *Rogers v. City of Little Rock*, 152 F.3d 790, 797-98 (8th Cir. 1998).

[30] In the context of detention for ordinary criminal law enforcement purposes, as well as pursuant to civil commitment, the Supreme Court has held that substantive due process standards require "safe conditions," including "adequate food, shelter, clothing, and medical care." *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982). The failure to provide such minimum treatment, in most circumstances, would presumably "shock the conscience." The Court has not considered whether the government could depart from this general requirement in a limited manner, targeted at protecting the Nation from prospective terrorist attack. Nevertheless, it is informative that both the conditions of confinement at CIA facilities, *see* Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, *Application of the Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Detention Facilities* at 8 (Aug. 31, 2006), and the interrogation techniques considered herein, *see infra* at 70-72, comply with the "safe conditions" standard.

Department of Defense issued a revised *Army Field Manual* 2-22.3 on Human Intelligence Collection Operations. This revised version, like its predecessor *Army Field Manual* 34-52, lists a variety of interrogation techniques that generally involve only verbal and emotional tactics. In the "emotional love approach," for example, the interrogator might exploit the love a detainee feels for his fellow soldiers, and use this emotion to motivate the detainee to cooperate. *Army Field Manual* 2-22.3, at 8-9. The interrogator is advised to be "extremely careful that he does not threaten or coerce a source," as "conveying a threat might be a violation of the [Uniform Code of Military Justice]." The *Army Field Manual* limits interrogations to expressly approved techniques and, as a matter of Department of Defense policy, also explicitly prohibits eight techniques: "(1) Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner; (2) Placing hoods or sacks over the head of a detainee, using duct tape over the eyes; (3) Applying beatings, electric shock, burns, or other forms of physical pain; (4) 'Waterboarding;' (5) Using military working dogs; (6) Inducing hypothermia or heat injury; (7) Conducting mock executions; (8) Depriving the detainee of necessary food, water or medical care." *Id.* at 5-20. The prior *Army Field Manual* also prohibited other techniques such as "food deprivation" and "abnormal sleep deprivation."

The eighteen approved techniques listed in the *Army Field Manual* are different from and less stressful than those under consideration here. The techniques proposed by the CIA are not strictly verbal or exploitative of feelings. They do involve physical contact and the imposition of physical sensations such as fatigue. The revised *Army Field Manual*, and the prior manual, thus would appear to provide some evidence of contrary executive practice for military interrogations. While none of the six enhanced techniques proposed by the CIA is expressly prohibited under the current Manual, two of the proposed techniques— "dietary manipulation" and "sleep deprivation"—were prohibited in an unspecified form by the prior Manual.

Nevertheless, we do not believe that the prior *Army Field Manual* is dispositive evidence "of traditional executive behavior [and] of contemporary practice" in the context of the CIA program for several reasons. The prior manual was designed for traditional armed conflicts, particularly conflicts governed by the Third Geneva Convention, which provides extensive protections for prisoners of war, including an express prohibition of all forms of coercion. *See Army Field Manual* 34-52, at 1-7 to 1-8; *see also id.* at iv-v (requiring interrogations to comply with the Geneva Conventions and the Uniform Code of Military Justice); GPW Art. 17. With respect to these traditional conflicts, the prior manual provided standards to be administered generally by military personnel without regard to the identity, value, or status of the detainee. By contrast, al Qaeda terrorists subject to the CIA program will be unlawful enemy combatants, *not* prisoners of war. Even within this class of unlawful combatants, the program will be administered only by trained and experienced interrogators who in turn will apply the techniques only to a subset of high value detainees. Thus, the prior manual directed at executing general obligations of all military personnel that would arise in traditional armed conflicts between uniformed armies is not controlling evidence of how high value, unlawful enemy combatants should be treated.

In contrast, the revised *Army Field Manual* was written with an explicit understanding that it would govern how our Armed Forces would treat unlawful enemy combatants captured in the present conflict, as the DTA required before the Manual's publication. The revised *Army*

Field Manual authorizes an additional interrogation technique for persons who are unlawful combatants and who are "likely to possess important intelligence." *See Army Field Manual* 2-22.3, Appendix M. This appendix reinforces the traditional executive understanding that certain interrogation techniques are appropriate for unlawful enemy combatants that should not be used with prisoners of war.

The revised *Army Field Manual* cannot be described as a firmly rooted tradition, having been published only in September 2006. More significantly, the revised *Army Field Manual* was approved by knowledgeable high level Executive Branch officials on the basis of another understanding as well—that there has been a CIA interrogation program for high value terrorists who possess information that could help protect the Nation from another catastrophic terrorist attack.[31] Accordingly, policymakers could prohibit certain interrogation techniques from general use on those in military custody *because* they had the option of transferring a high value detainee to CIA custody. That understanding—that the military operates in a different tradition of executive action, and more broadly—is established by the text of the DTA itself. The DTA requires that those in the "custody or effective control" of the Department of Defense not be "subject to any treatment or technique of interrogation not authorized by or listed in the U.S. Army Field Manual on Intelligence Interrogation." DTA § 1402(a); *see also id.* § 1406. By contrast, the DTA does not apply this Field Manual requirement to those in the custody of the CIA, and requires only that the CIA treat its detainees in a manner consistent with the constitutional standards we have discussed herein. DTA § 1403. Accordingly, neither the revised *Army Field Manual* nor its prior iterations provide controlling evidence of executive practice for the CIA in interrogating unlawful enemy combatants who possess high value information that would prevent terrorist attacks on American civilians.

State Department Reports. Each year, in the State Department's Country Reports on Human Rights Practices, the United States condemns torture and other coercive interrogation techniques employed by other countries. In discussing Indonesia, for example, the reports list as "[p]sychological torture" conduct that involves "food and sleep deprivation," but give no specific information as to what these techniques involve. In discussing Egypt, the reports list, as "methods of torture," "stripping and blindfolding victims; suspending victims from a ceiling or doorframe with feet just touching the floor; [and] beating victims [with various objects]." *See also, e.g.*, Iran (classifying sleep deprivation as either torture or severe prisoner abuse); Syria (discussing sleep deprivation as either torture or "ill-treatment").

These reports, however, do not provide controlling evidence that the CIA interrogation program "shocks the contemporary conscience." As an initial matter, the State Department has informed us that these reports are not meant to be legal conclusions, but instead they are public diplomatic statements designed to encourage foreign governments to alter their policies in a manner that would serve United States interests. In any event, the condemned techniques are often part of a course of conduct that involves other, more severe techniques, and appears to be

[31] We do not mean to suggest that every military officer who participated in the composition of the revised *Army Field Manual* was aware of the CIA program. The senior Department of Defense officials who approved the manual, however, had the proper clearances and were aware of the CIA program's existence.

undertaken in ways that bear no resemblance to the CIA interrogation program. The reasons for the condemned conduct as described by the State Department, for example, have no relationship with the CIA's efforts to prevent catastrophic terrorist attacks. In Liberia and Rwanda, these tactics were used to target critics of the government; Indonesian security forces used their techniques to obtain confessions for criminal law enforcement, to punish, and to extort money; Egypt "employ[ed] torture to extract information, coerce opposition figures to cease their political activities, and to deter others from similar activities."

The commitment of the United States to condemning torture, the indiscriminate use of force, physical retaliation against political opponents, and coercion of confessions in ordinary criminal cases is not inconsistent with the CIA's proposed interrogation practices. The CIA's screening procedures seek to ensure that enhanced techniques are used in the very few interrogations of terrorists who are believed to possess intelligence of critical value to the United States. The CIA will use enhanced techniques only to the extent needed to obtain this exceptionally important information and will take care to avoid inflicting severe pain or suffering or any lasting or unnecessary harm. The CIA program is designed to subject detainees to no more duress than is justified by the Government's paramount interest in protecting the United States and its interests from further terrorist attacks. In these essential respects, it fundamentally differs from the conduct condemned in the State Department reports.

Decisions by Foreign Tribunals. Two foreign tribunals have addressed interrogation practices that arguably resemble some at issue here. In one of the cases, the question in fact was whether certain interrogation practices met a standard that is linguistically similar to the "cruel, inhuman, or degrading treatment" standard in Article 16 of the CAT. These tribunals, of course, did *not* apply a standard with any direct relationship to that of the DTA, for the DTA specifically defines "cruel, inhuman, or degrading treatment or punishment" by reference to the established standards of United States law. The Senate's reservation to Article 16, incorporated into the DTA, was specifically designed to adopt a discernable standard based on the United States Constitution, in marked contrast to Article 16's treaty standard, which could have been subject to the decisions of foreign governments or international tribunals applying otherwise open-ended terms such as "cruel, inhuman or degrading treatment or punishment." The essence of the Senate's reservation is that Article 16's standard *simpliciter*—as opposed to the meaning given it by the Senate reservation—is not controlling under United States law.

The threshold question, therefore, is whether these cases have any relevance to the interpretation of the Fifth Amendment. The Supreme Court has not looked to foreign or international court decisions in determining whether conduct shocks the conscience within the meaning of the Fifth Amendment. More broadly, using foreign law to interpret the United States Constitution remains a subject of intense debate. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005); *id.* at 622-28 (Scalia, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *id.* at 322 (Rehnquist, C.J., dissenting). When interpreting the Constitution, we believe that we must look first and foremost to United States sources. *See, e.g.*, Address of the Attorney General at the University of Chicago Law School (Nov. 9, 2005) ("Those who seek to enshrine foreign law in our Constitution through the courts therefore bear a heavy burden."). This focus is particularly important here because the Senate's reservation to Article 16 was designed to

provide a discernable and familiar *domestic* legal standard that would be insulated from the impressions of foreign tribunals or governments on the meaning of Article 16's vague language.

We recognize, however, the possibility that members of a court might look to foreign decisions in the Fifth Amendment context, given the increasing incidence of such legal reasoning in decisions of the Supreme Court. Some judges might regard the decisions of foreign or international courts, under arguably analogous circumstances, to provide evidence of contemporary standards under the Fifth Amendment. While we do not endorse this practice, we find it nonetheless appropriate to consider whether the two decisions in question shed any light upon whether the interrogation techniques at issue here would shock the conscience.

We conclude that the relevant decisions of foreign and international tribunals are appropriately distinguished on their face from the legal issue presented by the CIA's proposed techniques. In *Ireland v. United Kingdom*, 2 EHRR 25 (1980), the European Court of Human Rights ("ECHR") addressed five methods used by the United Kingdom to interrogate members of the Irish Republican Army: requiring detainees to remain for several hours "spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers"; covering the detainee's head with a dark hood throughout the interrogation; exposing the detainee to a continuous loud and hissing noise for a prolonged period; depriving the detainee of sleep; and "subjecting the detainee[] to a reduced diet during their stay" at the detention facility. *Id.* at ¶ 96. The ECHR did not indicate the length of the periods of sleep deprivation or the extent to which the detainee's diets were modified. *Id.* at ¶ 104. The ECHR held that, "in combination," these techniques were "inhuman and degrading treatment," in part because they "arous[ed in the detainees] feelings of fear, anguish, and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance." *Id.* at ¶ 167.

The CIA does not propose to use all of the techniques that the ECHR addressed. With regard to the two techniques potentially in common—extended sleep deprivation and dietary manipulation—the ECHR did not expressly consider or make any findings as to any safeguards that accompanied the United Kingdom's interrogation techniques. A United Kingdom report, released separately from the ECHR litigation, indicated that British officials in 1972 had recommended additional safeguards for the sleep deprivation techniques such as the presence of and monitoring by a physician similar to procedures that are now part of the CIA program. *See infra* at 72-75. The ECHR decision, however, reviewed those interrogation techniques before such recommendations were implemented, and therefore, there is some evidence that the techniques considered by the ECHR were not accompanied by procedures and safeguards similar to those that will be applied in the CIA program.

More importantly, the ECHR made no inquiry into whether any governmental interest might have reasonably justified the conduct at issue in that case—which is the legal standard that the DTA requires in evaluating the CIA's proposed interrogation techniques. The lack of such an inquiry reflects the fact that the ECHR's definition of "inhuman and degrading treatment" bears little resemblance to the U.S. constitutional principles incorporated under the DTA. The ECHR has demonstrated this gulf not only in the *Ireland* case itself, but also in other ECHR decisions that reveal an expansive understanding of the concept that goes far beyond how courts in the