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U.S. Department of Justice

Office of Legal Counsel

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

July 20, 2007

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

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

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

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

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

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

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

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

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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

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[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.

I. (b)(1) (b)(3) NatSecAct

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 judgment of qualified medical personnel, there are no significant medical or psychological contraindications for their use with that detainee.

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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.

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[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]

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[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]

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[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 cognitive functioning be observed and that any potential hallucinations or other forms of diminished cognitive functioning subside quickly when rest is permitted.

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

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

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

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

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

United States have interpreted our Constitution. For example, the ECHR has held that the so-called "death row effect"—the years of delay between the imposition of a death sentence and its execution arising from the petitioner's pursuit of his judicial remedies—itself constitutes "inhuman or degrading treatment or punishment." *See Soering v. United States*, 11 Eur. Ct. H.R. 439 (1989). The Supreme Court, by contrast, has routinely refused to entertain such claims, and lower federal courts have not found them to have merit. *See, e.g., Lackey v. Texas*, 514 U.S. 1045 (1995) (denying certiorari to review a decision rejecting such a claim over a dissent by Justice Stevens); *Allen v. Ornoski*, 435 F.3d 946, 959 (9th Cir. 2006) (The petitioner "cannot credibly argue that the evolving standards of decency that mark the progress of a maturing society, as evidenced by the decisions of state and federal courts, are moving toward recognition of the validity of *Lackey* claims."). The ECHR also has read the European Convention to grant that court authority to scrutinize prison conditions. For example, the ECHR has concluded that it is inhuman and degrading to confine two persons to one cell with only one exposed toilet between them. *Melnik v. Ukraine*, ECHR 722286/01 (2006). Amid such expansive decisions, the ECHR might well regard the proposed enhanced interrogation techniques, or even the existence of the CIA interrogation program itself, to constitute "cruel, inhuman, or degrading" treatment under the standards incorporated in the European Convention. Yet we do not regard the ECHR's interpretation of its own European Convention human rights standards to constitute persuasive evidence as to whether the CIA techniques in question here would violate the Fifth Amendment, and thus the DTA.

The Supreme Court of Israel's review of interrogation techniques in *Public Committee Against Torture v. Israel*, HCJ 5100/94 (1999), similarly turned upon foreign legal issues not relevant here. There, the Israeli court held that Israel's General Security Service ("GSS") was not legally authorized to employ certain interrogation methods with persons suspected of terrorist activity—including shaking the torso of the detainee, depriving the detainee of sleep, and forcing the detainee to remain in a variety of stress positions. The court reached that conclusion, however, because it found that the GSS only had the authority to engage in interrogations specifically authorized by Israeli domestic statute and that, under the then "existing state of law," *id.* at 36, the GSS was "subject to the same restrictions applicable" to "the ordinary police investigator," *id.* at 29. *See id.* ("There is no statute that grants GSS investigators special interrogating powers that are different or more significant than those granted the police investigator."). Under that law, the GSS was permitted only to "'examine *orally* any persons supposed to be acquainted with the facts and circumstances of any offense'" and to reduce their responses to writing, and thus the statute did not permit the "physical means" of interrogation undertaken by the GSS. *Id.* at 19 (citing the Israeli Criminal Procedure Statute Art. 2(1)) (emphasis added). At the same time, the Israeli court specifically held open whether the legislature could authorize such techniques by statute, *id.* at 35-36, and determined that it was not appropriate in that case to consider special interrogation methods that might be authorized when necessary to save human life, *id.* at 32.[32]

[32] The Israeli court recognized that Israel had undertaken a treaty obligation to refrain from cruel, inhuman, or degrading treatment, *Public Committee Against Torture*, HCJ 5100/94 at 23, but the court specifically grounded its holding not in its interpretation of any treaty, but in Israeli statutory law. Indeed, the court recognized that the legislature *could* "grant[] GSS investigators the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities," *id.* at 35, provided only that the law "befit[s] the values of

As we have explained above in finding particular U.S. Supreme Court decisions to be distinguishable, it is not the law in the United States that interrogations performed by intelligence officers for the purpose proposed by the CIA are subject to the same rules as "regular police interrogation[s]." *Id.* at 29. Thus, the Israeli court addressed a fundamentally different question that sheds little light on the inquiry before us. Where the Israeli GSS lacked any special statutory authority with respect to interrogations, the CIA is expressly authorized by statute to "collect intelligence through human sources and any other appropriate means" and is expressly distinguished from domestic law enforcement authorities. 50 U.S.C. § 403-4a(d)(1). Indeed, beyond the CIA's general statutory authority to collect human intelligence, the Military Commissions Act itself was enacted specifically to permit the CIA interrogation program to go forward. *See infra* at 43-44. Thus, while the Israeli court rested its 1999 decision on the legislature's failure to grant the GSS anything other than ordinary police authority, we face a CIA interrogation program clearly authorized and justified by legislative authority separate from and beyond those applicable to ordinary law enforcement investigations. And the Israeli Supreme Court itself subsequently recognized the profound differences between the legal standards that govern domestic law enforcement and those that govern armed conflict with terrorist organizations. *Compare Public Committee Against Torture v. Israel (1999)* (stating that "there is no room for balancing" under Israeli domestic law), *with Public Committee Against Torture in Israel v. The Government of Israel*, HCJ 769/02 (Dec. 11, 2005), ¶ 22 (holding that under the law of armed conflict applicable to a conflict against a terrorist organization, "human rights are protected . . . but not to their full scope" and emphasizing that such rights must be "balance[d]" against "military needs").

Survival, Evasion, Resistance, and Escape ("SERE") Training. As we noted at the outset, variations of each of the proposed techniques have been used before by the United States, providing some evidence that they are, in some circumstances, consistent with executive tradition and practice. Each of the CIA's enhanced interrogation techniques has been adapted from military SERE training, where techniques very much like these have long been used on our own troops. Individuals undergoing SERE training are obviously in a very different situation from detainees undergoing interrogation; SERE trainees know that the treatment they are experiencing is part of a training program, that it will last only a short time, and that they will not be significantly harmed by the training.

We do not wish to understate the importance of these differences, or the gravity of the psychological trauma that may accompany the relative uncertainty faced by the CIA's detainees. On the other hand, the interrogation program we consider here relies on techniques that have been deemed safe enough to use in the training of our own troops. We can draw at least one conclusion from the existence of SERE training—use of the techniques involved in the CIA's interrogation program (or at least the similar techniques from which these have been adapted) cannot be considered to be *categorically* inconsistent with "traditional executive behavior" and "contemporary practice" regardless of context.

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the State of Israel, is enacted for a proper purpose, and [infringes the suspect's liberty] to an extent no greater than required," *id.* at 37.

The Enactment of the Military Commissions Act. Finally, in considering "contemporary practice" and the "standards of blame generally applied to them," we consider the context of the recent debate over the Military Commissions Act, including the views of legislators who have been briefed on the CIA program. In *Public Committee Against Torture*, HCJ 5100/94, the Israeli Supreme Court observed that in a democracy, it was for the political branches, and not the courts, to strike the appropriate balance between security imperatives and humanitarian standards, and it invited the Israeli legislature to enact a statute specifically delimiting the security service's authority "to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities." *Id.* at 35. In the United States, Congress in fact enacted such a statute, responding to the President's invitation by passing the Military Commissions Act to allow the CIA interrogation program to go forward. While the isolated statements of particular legislators are not dispositive as to whether specific interrogation techniques would shock the conscience under the DTA, we properly may consider the Military Commissions Act, taken as a whole, in coming to an understanding of "contemporary practice, and of the standards of blame generally applied to them," and what Americans, through their representatives in Congress, generally deem to be acceptable conduct by the executive officials charged with ensuring the national security. *Lewis*, 523 U.S. at 847 n.8; *cf. Roper*, 543 U.S. 551 (2005) (finding the passage and repeal of state laws to be relevant to contemporary standards under the Eighth Amendment); *Atkins*, 536 U.S. 304 (same).

The President inaugurated the political debate over what would become the Military Commissions Act in his speech on September 6, 2006, wherein he announced to the American people the existence of the CIA program, the nature of the al Qaeda detainees who had been interrogated, and the need for new legislation to allow the program to "go forward" in the wake of *Hamdan*. As the President later explained: "When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to continue? This bill meets that test." Remarks of the President Upon Signing the Military Commission Act of 2006, East Room, White House (Oct. 17, 2006). Senators crucial to its passage agreed that the statute must be structured to permit the CIA's program to continue. *See* 152 Cong. Rec. S10354-02, S10393 (Sept. 28, 2006) (statement of Sen. Graham) ("Should we have a CIA program classified in nature that would allow techniques not in the Army Field Manual to get good intelligence from high value targets? The answer from my point of view is yes, we should."); *id.* at S 10414 (statement of Sen. McCain) ("[M]y colleagues, have no doubt—this legislation will allow the CIA to continue interrogating prisoners within the boundaries established in the bill."). Representative Duncan Hunter, the leading sponsor of the bill in the House, similarly described the legislation as "leav[ing] the decisions as to the methods of interrogation to the President and to the intelligence professionals at the CIA, so that they may carry forward this vital program that, as the President explained, serves to gather the critical intelligence necessary to protect the country from another catastrophic terrorist attack." 152 Cong. Rec. H7938 (Sept. 29, 2006). The Act clarified the War Crimes Act and provided a comprehensive framework for interpreting the Geneva Conventions so that the CIA program might go forward after *Hamdan*.

The Military Commissions Act, to be sure, did not prohibit or license specific interrogation techniques. As discussed above, Members of Congress on both sides of the debate expressed widely different views as to the specific interrogation techniques that might or might

not be permitted under the statute. *See supra* at n.13. Nonetheless, you have informed us that prior to passage of the Military Commissions Act, several Members of Congress, including the full memberships of the House and Senate Intelligence Committees and Senator McCain, were briefed by General Michael Hayden, Director of the CIA, on the six techniques that we discuss herein and that, General Hayden explained, would likely be necessary to the CIA detention and interrogation program should the legislation be enacted. In those classified and private conversations, none of the Members expressed the view that the CIA interrogation program should be stopped, or that the techniques at issue were inappropriate. Many of those Members thereafter were critical in ensuring the passage of the legislation, making clear through their public statements and through their votes that they believed that a CIA program along the lines General Hayden described could and should continue.

Beyond those with specific knowledge of the classified details of the program, all of the Members who engaged in the legislative debate were aware of media reports—some accurate, some not—describing the CIA interrogation program. Those media reports suggested that the United States had used techniques including, and in some cases exceeding, the coerciveness of the six techniques proposed here. The President's request that Congress permit the CIA program to "go forward," and the carefully negotiated provisions of the bill, clearly presented Congress with the question whether the United States should operate a classified interrogation program, limited to high value detainees, employing techniques that exceeded those employed by ordinary law enforcement officers and the United States military, but that remained lawful under the anti-torture statute and the War Crimes Act. There can be little doubt that the subsequent passage of the statute reflected an endorsement by both the President and Congress of the political branches' shared view that the CIA interrogation program was consistent with contemporary practice, and therefore did not shock the conscience. We do not regard this political endorsement of the CIA interrogation program to be conclusive on the constitutional question, but we do find that the passage of this legislation provides a relevant measure of contemporary standards.

* * *

The substantive due process analysis, as always, must remain highly sensitive to context. We do not regard any one of the contexts discussed here, on its own, to answer the critical question: What interrogation techniques are permissible for use by trained professionals of the CIA in seeking to protect the Nation from foreign terrorists who operate through a diffuse and secret international network of cells dedicated to launching catastrophic terrorist attacks on the United States and its citizens and allies? Nonetheless, we read the constitutional tradition reflected in the DTA to permit the United States to employ a narrowly drawn, extensively monitored, and carefully safeguarded interrogation program for high value terrorists that uses enhanced techniques that do not inflict significant or lasting physical or mental harm.

D.

Applying these legal standards to the six proposed techniques used individually and in combination, we conclude that these techniques are consistent with the DTA.

Dietary Manipulation. The CIA limits the use of dietary manipulation to ensure that detainees subject to it suffer no adverse health effects. The CIA's rules ensure that the detainee receives 1000 kCal per day as an absolute minimum, a level that is equivalent to a wide range of commercial weight loss programs. Medical personnel closely monitor the detainee during the application of this technique, and the technique is terminated at the prompting of medical personnel or if the detainee loses more than ten percent of his body weight. While the diet may be unappealing, it exposes the detainee to no appreciable risk of physical harm. We understand from the CIA that this technique has proven effective, especially with detainees who have a particular appreciation for food. In light of these safeguards and the technique's effectiveness, the CIA's use of this technique does not violate the DTA.

Corrective Techniques. Each of the four proposed "corrective techniques" involves some physical contact between the interrogator and the detainee. These corrective techniques are of two types. First, there are two "holds." With the facial hold, the interrogator places his palms on either side of the detainee's face in a manner careful to avoid any contact with eyes. With the attention grasp, the interrogator grasps the detainee by the collar and draws him to the interrogator in order to regain the detainee's attention, while using a collar or towel around the back of the detainee's neck to avoid whiplash. These two techniques inflict no appreciable pain on the detainee and are directed wholly at refocusing the detainee on the interrogation and frustrating a detainee's efforts to ignore the interrogation. Thus, the described techniques do not violate the requirements of substantive due process.

Second, the CIA proposes to use two "slaps." In the abdominal slap, the interrogator may begin with his hands no farther than 18 inches away from the detainee's abdomen and may strike the detainee in an area of comparatively little sensitivity between the waist and the sternum. The facial slap involves a trained interrogator's striking the detainee's cheek with his hand. Like the holds, the slaps are primarily *psychological* techniques to make the detainee uncomfortable; they are not intended, and may not be used, to extract information from detainees by force or physical coercion.

There is no question, however, that the slaps may momentarily inflict some pain. But careful safeguards ensure that no significant pain would occur. With the facial slap, the interrogator must not wear any rings, and must strike the detainee in the area between the tip of the chin and the corresponding earlobe to avoid any contact with sensitive areas. The interrogator may not use a fist, but instead must use an open hand and strike the detainee only with his open fingers, not with his palm. With the abdominal slap, the interrogator also may not use a fist, may not wear jewelry, and may strike only between the sternum and the navel. The interrogator is required to maintain a short distance between himself and the detainee to prevent a blow of significant force. Undoubtedly, a single application of either of these techniques presents a question different from their repeated use. We understand, however, that interrogators will not apply these slaps with an intensity, or a frequency, that will cause significant physical pain or injury. Our conclusion that these techniques do not shock the conscience does not mean that interrogators may punch, beat, or otherwise physically abuse detainees in an effort to extract information. To the contrary, the result that we reach here is expressly limited to the use of far more limited slap techniques that have carefully been designed to affect detainees

psychologically, without harming them physically. Slaps or other forms of physical contact that go beyond those described may raise different and serious questions under the DTA.

Monitoring by medical personnel is also important. Medical personnel observe the administration of any slap, and should a detainee suffer significant or unexpected pain or harm, the technique would be discontinued. In this context, the very limited risk of harm associated with this technique does not shock the conscience.

Extended Sleep Deprivation. Of the techniques addressed in this memorandum, extended sleep deprivation again, as under the War Crimes Act, requires the most extended analysis. Nonetheless, after reviewing medical literature, the observations of CIA medical staff in the application of the technique, and the detailed procedures and safeguards that CIA interrogators and medical staff must follow in applying the technique and monitoring its application, we conclude that the CIA's proposed use of extended sleep deprivation would not impose harm unjustifiable by a governmental interest and thus would not shock the conscience.

The scope of this technique is limited: The detainee would be subjected to no more than 96 hours of continuous sleep deprivation, absent specific additional approval, including legal approval from this Office and approval from the Director of the CIA; the detainee would be allowed an opportunity for eight hours of uninterrupted sleep following the application of the technique; and he would be subjected to no more than a total of 180 hours of the sleep deprivation technique in one 30-day period. Notably, humans have been kept continuously awake in excess of 250 hours in medical studies. There are medical studies suggesting that sleep deprivation has few measurable physical effects. *See, e.g., Why We Sleep: The Functions of Sleep in Humans and Other Mammals* 23-24 (1998). To be sure, the relevance of these medical studies is limited. These studies have been conducted under circumstances very dissimilar to those at issue here. Medical subjects are in a relaxed environment and at relative liberty to do whatever keeps their interest. The CIA detainees, by contrast, are undoubtedly under duress, and their freedom of movement and activities are extremely limited. CIA medical personnel, however, have confirmed that these limited physical effects are not significantly aggravated in the unique environment of a CIA interrogation.

As described above, the CIA's method of keeping detainees awake—continuous standing—can cause edema, or swelling in the lower legs and feet. Maintaining the standing position for as many as four days would be extremely unpleasant, and under some circumstances, painful, although edema and muscle fatigue subside quickly when the detainee is permitted to sit or to recline.[33]

[33] We understand that during the use of the proposed extended sleep deprivation technique, the detainee would often wear a disposable undergarment designed for adults suffering from incontinence. The undergarment would be used to avoid the need regularly to unshackle the detainee for use of the toilet, and would be regularly checked to avoid skin irritation or unnecessary discomfort. The proposed use of the undergarment is justified not just for sanitary reasons, but also to protect both the detainee and the interrogators from unnecessary and potentially dangerous physical contact. We also understand that the detainee would wear additional clothing, such as a pair of shorts, over the undergarment during application of this technique.

At the same time, however, the CIA employs many safeguards to ensure that the detainee does not endure significant pain or suffering. The detainee is not permitted to support his weight by hanging from his wrists and thereby risking injury to himself. This precaution ensures that the detainee's legs are capable of functioning normally at all times—if the detainee cannot support his own weight, administration of the technique ends. In addition, the CIA's medical personnel monitor the detainee throughout the period of extended sleep deprivation. They will halt use of the technique should they diagnose the detainee as experiencing hallucinations, other abnormal psychological reactions, or clinically significant diminishment in cognitive functioning. Medical personnel also will monitor the detainee's vital signs to ensure that they stay within normal parameters. If medical personnel determine that the detainee develops clinically significant edema or is experiencing significant physical pain for any reason, the technique either is discontinued or other methods of keeping the detainee awake are used. These accommodations are significant, because they highlight that the CIA uses extended sleep deprivation merely to weaken a detainee's psychological resistance to interrogation by keeping him awake for longer than normal periods of time.

Combined Effects. We do not evaluate these techniques in isolation. To determine whether a course of interrogation "shocks the conscience," it is important to evaluate the effect of the potential combined use of these techniques. *See, e.g., Williams v. United States*, 341 U.S. 97, 103 (1951) (evaluating a three-day course of interrogation techniques to determine whether a constitutional violation occurred). Previously, this Office has been particularly concerned about techniques that may have a mutually reinforcing effect such that the combination of techniques might increase the effect that each would impose on the detainee. *Combined Use* at 9-11. Specifically, medical studies provide some evidence that sleep deprivation may reduce tolerance to some forms of pain in some subjects. *See, e.g.*, B. Kundermann *et al.*, *Sleep Deprivation Affects Thermal Pain Thresholds but not Somatosensory Thresholds in Healthy Volunteers*, 66 Psychosomatic Med. 932 (2004) (finding a significant decrease in heat pain thresholds and some decrease in cold pain thresholds after one night without sleep); S. Hakki Onen *et al.*, *The Effects of Total Sleep Deprivation, Selective Sleep Interruption and Sleep Recovery on Pain Tolerance Thresholds in Healthy Subjects*, 10 J. Sleep Research 35, 41 (2001) (finding a statistically significant drop of 8-9% in tolerance thresholds for mechanical or pressure pain after 40 hours); *id.* at 35-36 (discussing other studies). Moreover, subjects in these medical studies have been observed to increase their consumption of food during a period of sleep deprivation. *See Why We Sleep* at 38. A separate issue therefore could arise as the sleep deprivation technique may be used during a period of dietary manipulation.

Nonetheless, we are satisfied that there are safeguards in place to protect against any significant enhancement of the effects of the techniques at issue when used in combination with sleep deprivation. Detainees subject to dietary manipulation are closely monitored, and any statistically significant weight loss would result in cessation of, at a minimum, the dietary manipulation technique. With regard to pain sensitivity, none of the techniques at issue here involves such substantial physical contact, or would be used with such frequency, that sleep deprivation would aggravate the pain associated with these techniques to a level that shocks the conscience. More generally, we have been assured by the CIA that they will adjust and monitor the frequency and intensity of the use of other techniques during a period of sleep deprivation. *Combined Use* at 16.

In evaluating these techniques, we also recognize the emotional stress that they may impose upon the detainee. While we know the careful procedures, safeguards, and limitations under the CIA's interrogation plan, the detainee would not. In the course of undergoing these techniques, the detainee might fear that more severe treatment might follow, or that, for example, the sleep deprivation technique may be continued indefinitely (even though, pursuant to CIA procedures, the technique would end within 96 hours). To the extent such fear and uncertainty may occur, however, they would bear a close relationship to the important government purpose of obtaining information crucial to preventing a future terrorist attack. According to the CIA, the belief of al Qaeda leaders that they will not be harshly treated by the United States is the primary obstacle to encouraging them to disclose critical intelligence. Creating uncertainty over whether that assumption holds—while at the same time avoiding the infliction (or even the threatened infliction, *see supra* at n.21) of any significant harm—is a necessary part of the effectiveness of these techniques and thus in this context does not amount to the arbitrary or egregious conduct that the Due Process Clause would forbid. When used in combination and with the safeguards described above, the techniques at issue here would not impose harm that constitutes "cruel, inhuman, or degrading treatment or punishment" within the meaning of the DTA.

IV.

The final issue you have asked us to address is whether the CIA's use of the proposed interrogation techniques would be consistent with United States treaty obligations under Common Article 3 of the Geneva Conventions, to the extent those obligations are not encompassed by the War Crimes Act.[34] As we explain below, Common Article 3 does not disable the United States from employing the CIA's proposed interrogation techniques.

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[34] Through operation of the Military Commissions Act, the Geneva Conventions, outside the requirements of the War Crimes Act, constitute a judicially unenforceable treaty obligation of the United States. Under the National Security Act of 1947, properly authorized covert action programs need only comply with the Constitution and the statutes of the United States. *See* 50 U.S.C. § 413b(a)(5) (prohibiting the authorization of covert actions "that would violate the Constitution or any statute of the United States," without mentioning treaties). Nevertheless, we understand that the CIA intends for the program to comply with Common Article 3, and our analysis below is premised on that policy determination.

In addition, we note that the MCA provides another mechanism whereby the President could ensure that the CIA interrogation program fully complies with Common Article 3—by reasserting his pre-*Hamdan* conclusion that Common Article 3 does not apply to the armed conflict against al Qaeda. Section 6(a)(3) of the MCA provides the President with the authority to "interpret the meaning and *application* of the Geneva Conventions" through executive orders that "shall be authoritative in the same manner as other administrative regulations" (emphasis added). By specifically invoking administrative law, the MCA provides the President with at least the same authority to interpret the treaty as an administrative agency would have to interpret a federal statute. The Supreme Court has held that an administrative agency's reasonable interpretation of a federal statute is to be "given controlling weight" *even if* a court has held in a prior case that another interpretation was *better* than the one contained in the agency regulation. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 980-986 (2005). As the Court explained, the "prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982. *Hamdan* did not hold that Common Article 3 was unambiguous. Rather, the Court held only that the *best* interpretation of Common Article 3 was that it applied to any conflict that was not a conflict between states. The Court did not address the fact that the President had reached the opposite conclusion in his February 7, 2002 order, and reduced that view to the

A.

Common Article 3 has been described as a "Convention in miniature." International Committee of the Red Cross, Jean Pictet, gen. ed., III *Commentaries on the Geneva Conventions* at 34 (1960). It was intended to establish a set of minimum standards applicable to the treatment of all detainees held in non-international armed conflicts.

1.

Our interpretation must begin "with the text of the treaty and the context in which the written words are used." *Société Nationale Industrielle Aéropostiale v. United States District Court*, 482 U.S. 522, 534 (1987); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991); *see also* Vienna Convention on the Law of Treaties, May 23, 1969, 1144 U.N.T.S. Article 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."); *see also* Ian Brownlie, *Principles of Public International Law* 629 (1990) ("The language of the treaty must be interpreted in light of the rules of general international law in force at the time of its conclusion, and also in light of the contemporaneous meaning of the terms.").[35] The foundation of Common Article 3 is its overarching requirement that detainees "shall in all circumstances be treated humanely, without any adverse distinction based on race, color, religion or faith, sex, birth or wealth, or any other similar criteria." This requirement of humane treatment is supplemented and focused by the enumeration of four more specific categories of acts that "are and shall remain prohibited at any time and in any place whatsoever." Those forbidden acts are:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

"erroneous" litigating position of the Solicitor General. *See* 126 S. Ct. at 2795; *id.* at 2845-46 (Thomas, J., dissenting) (recognizing that the majority did not address whether the treaty was ambiguous or deference was appropriate).

Because the MCA expressly allows the President to interpret the "application" of Common Article 3 by executive order, he lawfully could reassert his pre-*Hamdan* interpretation of the treaty. While we need not fully explore the issue here, we have little doubt that as a matter of text and history, the President could reasonably find that an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties" does not include an armed conflict with an international terrorist organization occurring across territorial boundaries. *See, e.g.*, Pictet, III *Commentaries*, at 34 ("Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities, in short, which are in many respects similar to an international war, but *take place within the confines of a single country.*") (emphasis added). Therefore, although we assume in light of *Hamdan* that Common Article 3 applies to the present conflict, we note that the President permissibly could interpret Common Article 3 not to apply by an executive order issued under the MCA.

[35] Although the United States has not ratified the Vienna Convention on the Law of Treaties, we have often looked to Articles 31 and 32 of the Convention as a resource for rules of treaty interpretation widely recognized in international law.

(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Of these provisions, two have no application here. The proposed CIA interrogation methods will involve neither the "taking of hostages" nor the "passing of sentences [or] the carrying out of executions." Thus, our analysis will focus on paragraphs 1(a) and 1(c), as well as Common Article 3's introductory text.

Where the text does not firmly resolve the application of Common Article 3 to the CIA's proposed interrogation practices, Supreme Court precedent and the practices of this Office direct us to several other interpretive aids. As with any treaty, the negotiating record—also known as the *travaux préparatoires*—of the Geneva Conventions is relevant. *See, e.g., Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) ("Because a treaty ratified by the United States is not only the law of this land, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the post-ratification understanding of the contracting parties."); *see also* Vienna Convention on the Law of Treaties Art. 32(a) (stating that "supplementary means of interpretation, including the preparatory work of the treaty," may be appropriate where the meaning of the text is "ambiguous or obscure"). With regard to the Geneva Conventions, an additional, related tool is available: In 1960, staff members of the International Committee of the Red Cross, many of whom had assisted in drafting the Conventions, published *Commentaries* on each of the Geneva Conventions, under the general editorship of Jean Pictet. *See* Jean Pictet, gen. ed., *Commentaries on the Geneva Conventions* (ICRC 1960) (hereinafter, "*Commentaries*"). These *Commentaries* provide some insight into the negotiating history, as well as a fairly contemporaneous effort to explain the ICRC's views on the Conventions' proper interpretation. The Supreme Court has found the *Commentaries* persuasive in interpreting the Geneva Conventions. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796-98 & n.48 (2006) (citing the *Commentaries* ten times in interpreting Common Article 3 to apply to the armed conflict with al Qaeda and explaining that "[t]hough not binding law, the [ICRC Commentary] is, as the parties recognize, relevant in interpreting the Geneva Conventions").

In addition, certain international tribunals have in recent years applied Common Article 3 in war crimes prosecutions—the International Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). Their decisions may have relevance as persuasive authority. *See* Vienna Convention on the Law of Treaties Art. 31(3)(b) (stating that "subsequent practice in application of the treaty" may be relevant to its interpretation). The Supreme Court recently explained that the interpretation of a treaty by an international tribunal charged with adjudicating disputes between signatories should receive "respectful consideration." *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2683 (2006); *see also Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam). The Geneva Conventions themselves do not charge either ICTY or ICTR with this duty, leaving their views with somewhat less weight than

such a tribunal otherwise might have. We do, however, find several decisions of the ICTY of use, and that our analysis aligns in many areas with the decisions of these tribunals provides some comfort that we have accurately interpreted the treaty's terms.

Finally, we also recognize that the *practices* of other state parties in implementing Common Article 3 (as opposed to the statements of officials from other nations, unsupported by any concrete circumstances and conduct) may serve as "a supplementary means of interpretation." *See* Vienna Convention on the Law of Treaties Art. 31(3)(b). We have found only one country, the United Kingdom, to have engaged in a sustained effort to interpret Common Article 3 in a similar context, and we discuss the relevance of that example below.[36]

In addition, the Preparatory Committee for the International Criminal Court established under the Rome Statute has developed elements for crimes under Common Article 3 that may be tried before that court, and an accompanying commentary. *See* Knut Dörmann, *Elements of Crimes under the Rome Statute of International Criminal Court: Sources and Commentary* (Cambridge 2002). The United States is not a party to the Rome Statute, *see* Letter from John R. Bolton, Undersecretary of State, to U.N Secretary General Kofi Anan (May 6, 2002) (announcing intention of the United States not to become a party to the Rome Statute), but several parties to the Geneva Conventions are. Thus, while the Rome Statute does not constitute a legal obligation of the United States, and its interpretation of the offenses is not binding as a matter of law, the Statute provides evidence of how other state parties view these offenses. Like the decisions of international tribunals, the general correspondence between the Rome Statute and our interpretation of Common Article 3 provides some confirmation of the correctness of the interpretation herein.

2.

In addition to the guidance provided by these traditional tools of treaty interpretation, the Military Commissions Act substantially assists our inquiry.

The MCA amends the War Crimes Act to include nine specific criminal offenses defining the grave breaches of the Geneva Conventions, which we have discussed above. These amendments constitute authoritative statutory implementation of a treaty.[37] As important, by

[36] The practice of many other state parties in response to civil conflicts appears to have been simply to violate Common Article 3 without conducting any interpretation. The Government of France, for instance, reportedly instituted torture as an official practice in seeking to suppress insurrection in the then-French territory of Algeria between 1954 and 1962. *See, e.g.*, Shiva Eftekhari, *France and the Algerian War: From a Policy of 'Forgetting' to a Framework of Accountability*, 34 Colum. Hum. Rts. L. Rev. 413, 421-22 (2003). More recently, Russia reportedly engaged in sustained violations of Common Article 3 in dealing with the internal conflict in Chechnya. We do not take such actions as a guide to the meaning of Common Article 3, and indeed many of the reported actions of these nations are condemnable. But these examples do reinforce the need to distinguish what states say from what they in fact do when confronted with their own national security challenges.

[37] Congress provided a comprehensive framework for discharging the obligations of the United States under the Geneva Conventions, and such legislation properly influences our construction of the Geneva Conventions. Congress regularly enacts legislation implementing our treaty obligations, and that legislation provides definitions for undefined treaty terms or otherwise specifies the domestic legal effect of such treaties. *See,*

statutorily prohibiting certain specific acts, the amendments allow our interpretation of Common Article 3 to focus on the margins of relatively less serious conduct (i.e., conduct that falls short of a grave breach). Accordingly, we need not decide the outer limits of conduct permitted by certain provisions of Common Article 3, so long as we determine that the CIA's practices, limited as they are by clear statutory prohibitions and by the conditions and safeguards applied by the CIA, do not implicate the prohibitions of Common Article 3. For that interpretive task, the War Crimes Act addresses five specific terms of Common Article 3 by name—"torture," "cruel treatment," "murder," "mutilation," and the "taking of hostages." Although the War Crimes Act does not by name mention the three remaining relevant terms—"violence to life and person," "outrages upon personal dignity, in particular, humiliating and degrading treatment," and the overarching requirement of "humane[]" treatment—the Act does address them in part by identifying and prohibiting four other "grave breaches" under Common Article 3. Three of these offenses—performing biological experiments, rape, and sexual assault or abuse, *see* 18 U.S.C. §§ 2441(d)(1)(C), (G), (H)—involve reprehensible conduct that Common Article 3 surely prohibits. The Act includes another offense—intentionally causing serious bodily injury—which may have been intended to address the grave breach of "willfully causing great suffering or serious injury to body or health," specified in Article 130. This grave breach is not directly linked to Common Article 3 by either its text, its drafting history, or the ICRC *Commentaries*; nevertheless, the "serious bodily injury" offense in the War Crimes Act may substantially overlap with Common Article 3's prohibitions on "violence to life and person" and "outrages upon personal dignity."

Congress also stated in the MCA that the amended "provisions of [the War Crimes Act] fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character." MCA § 6(a)(2). This statutory conclusion suggests the view of Congress that the terms "murder," "mutilation," "cruel treatment," "torture," and the "taking of hostages" in Common Article 3 are properly interpreted to be coterminous with the identically named offenses in the War Crimes Act. Article 130 of the Third Geneva Convention expressly states that two of these offenses—torture and murder ("willful killing" in Article 130)—are grave breaches. As explained below, international commentators and tribunals believe that a third offense—cruel treatment—is identical to the grave breach of "inhuman treatment" in Article 130. To criminalize only a subset of those acts would not be consistent with the obligation of the United States under Article 129 of GPW, and Congress believed it "fully satisf[ied]" that obligation in the MCA.[38] In any event, no legislative history indicates that Congress believed the War Crimes Act left a gap in coverage

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e.g., 9 U.S.C. §§ 201-208 (addressing the scope of the Convention on the Recognition of Foreign Arbitral Awards); 18 U.S.C. § 1093 (implementing and defining terms of the Convention on the Prevention and Punishment of the Crime of Genocide); 17 U.S.C. § 116(a) (defining terms of the Convention for the Protection of Literary and Artistic Works); 18 U.S.C. § 2339C (defining terms of the International Convention for the Suppression of the Financing of Terrorism); 26 U.S.C. § 894(c) (interpreting the United States-Canada Income Treaty of 1980).

[38] We need not definitely resolve the question of Congress's intention as to the two other terms of Common Article 3 defined in the War Crimes Act—"mutilation" and the "taking of hostages"—neither of which appears expressly in Article 130 of GPW. These offenses are not implicated by the proposed CIA interrogation methods.

with respect to any of its offenses that expressly address by name specific prohibitions in Common Article 3. Combining Congress's view in its implementing legislation with our own analysis of Common Article 3's relevant terms, including the alignment of Congress's definitions with interpretations of international tribunals, we conclude below that Congress's view is correct and that it has in the War Crimes Act fully and correctly defined the terms at issue, namely "torture" and "cruel treatment."

3.

Congress in the MCA also made clear, however, its view that the grave breaches defined in the War Crimes Act do not exhaust the obligations of the United States under Common Article 3. The War Crimes Act, as amended, states that "the definitions [in the War Crimes Act] are intended only to define the grave breaches of Common Article 3 and not the full scope of the United States obligations under that Article." 18 U.S.C. § 2441(d)(5). As to the rest, the Act states that the President may "promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions." MCA § 6(a)(3)(A).

Our inquiry with respect to the residual meaning of Common Article 3 is therefore confined to the three terms not expressly defined in the War Crimes Act—"violence to life or person," "outrages upon personal dignity," and "humane" treatment—to the extent those terms have meaning beyond what is covered by the four additional offenses under the War Crimes Act described above.[39] The President, Members of Congress, and even Justices of the Supreme Court in *Hamdan* have recognized that these provisions are troublingly vague and that *post hoc* interpretations by courts, international tribunals, or other state parties would be difficult to predict with an acceptable degree of certainty. *See, e.g.*, Address of the President, East Room, White House (Sept. 6, 2006) ("The problem is that these [e.g., 'outrages upon personal dignity, in particular, humiliating and degrading treatment'] and other provisions of Common Article Three are vague and undefined, and each could be interpreted in different ways by American and foreign judges."); 152 Cong. Rec. S10354-02, S10412 (Sept. 15, 2006) (Statement of Sen. McCain) ("Observers have commented that, though such 'outrages [upon personal dignity]' are difficult to define precisely, we all know them when we see them. However, neither I nor any other responsible member of this body should want to prosecute and potentially sentence to death any individual for violating such a vague standard."); *Hamdan*, 126 S. Ct. at 2798 ("Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones."); *id.* at 2848 (Thomas, J., dissenting) (characterizing provisions in Common Article 3 as "vague" and "nebulous").

They were not the first to remark on this uncertainty, nor is the uncertainty an accident. The *Commentaries* explain that the Conventions' negotiators found it "dangerous to try to go into too much detail" and thus sought "flexible" language that would keep up with unforeseen circumstances. Pictet, III *Commentaries*, at 39; *see* IV *Commentaries*, at 204-05 ("It seems

[39] As we explain below, Congress correctly defined the content of Common Article 3's prohibitions on cruel treatment in the War Crimes Act's "cruel and inhuman treatment" offense. *See infra* at part IV.B.1.b.

useless or even dangerous to attempt to make a list of all the factors which make treatment 'humane.'"); *see also* 2A *Final Record of Diplomatic Conferences of Geneva of 1949*, at 248 ("Mr. Maresca (Italy) thought that it gave greater force to a rule if he merely stated its fundamental principle without any comments; to enter into too many details could only limit its scope.").

The difficult task of applying these remaining terms is substantially assisted by two interpretive tools established in United States practice as well as international law. The first of these turns to more developed United States legal standards—similar to those set forth in Common Article 3—to provide content to Common Article 3's otherwise general terms. This approach is expressly recommended by Congress in the Military Commissions Act, which reaffirms the constitutional standards of treatment extended abroad and to aliens by the Detainee Treatment Act. The MCA further provides that any violation of the constitutional standards in the Detainee Treatment Act in connection with a Common Article 3 armed conflict constitutes a violation of Common Article 3. *See* MCA § 6(a)(1). The MCA thus both points us to particular domestic law in applying Common Article 3 and leaves open the possibility—advanced by many during the debate over the MCA—that compliance with the DTA as well as the specific criminal prohibitions in the War Crimes Act would fully satisfy the obligations of the United States under Common Article 3.

During the legislative debate over the Military Commissions Act, Secretary of State Condoleezza Rice explained why the State Department believed that Congress reasonably could declare that compliance with the DTA would satisfy United States obligations under Common Article 3:

> In a case where the treaty's terms are inherently vague, it is appropriate for a state to look to its own legal framework, precedents, concepts and norms in interpreting these terms and carrying out its international obligations. . . . The proposed legislation would strengthen U.S. adherence to Common Article 3 of the Geneva Conventions because it would add meaningful definition and clarification to vague terms in the treaties.
>
> In the department's view, there is not, and should not be, any inconsistency with respect to the substantive behavior that is prohibited in paragraphs (a) and (c) of Section 1 of Common Article 3 and the behavior that is prohibited as "cruel, inhuman, or degrading treatment or punishment," as that phrase is defined in the U.S. reservation to the Convention Against Torture. That substantive standard was also utilized by Congress in the Detainee Treatment Act. Thus it is a reasonable, good faith interpretation of Common Article 3 to state . . . that the prohibitions found in the Detainee Treatment Act of 2005 fully satisfy the obligations of the United States with respect to the standards for detention and treatment established in those paragraphs of Common Article 3.

Letter from Secretary of State Condoleezza Rice to the Honorable John Warner, Chairman of the Senate Armed Services Committee (Sept. 14, 2006) ("Rice Letter"). In enacting the MCA, Congress did not specifically declare that the satisfaction of the DTA would satisfy United States

obligations under Common Article 3, but Congress took measures to leave open such an interpretive decision. In particular, section 6(a)(3) of the MCA expressly delegates to the President the authority to adopt such a "reasonable, good faith interpretation of Common Article 3," and section 6(a)(1) provides that the prohibition under the DTA is directly relevant in interpreting the scope of United States obligations under Common Article 3.

It is striking that Congress expressly provided that *every* violation of the DTA "constitutes [a] violation[] of common Article 3 of the Geneva Conventions prohibited by United States law." MCA § 6(a)(1). Especially in the context of the legislative debate that accompanied the passage of the Military Commissions Act, this statement suggests a belief that the traditional constitutional standards incorporated into the DTA very closely track the humanitarian standards of Common Article 3. If the fit were loose, it would be difficult to foreclose the possibility that some violations of the DTA would not also be violations of Common Article 3, unless Congress were of the view that Common Article 3 is in all cases more protective than the domestic constitutional provisions applicable to our own citizens.

The manner in which Congress reaffirmed the President's authority to interpret the Geneva Conventions, outside of grave breaches, is consistent with the suggestion that the Detainee Treatment and War Crimes Acts are substantially congruent with the requirements of Common Article 3. The Military Commissions Act, after identifying both the grave breaches set out in the War Crimes Act and transgressions of the DTA as violations of Common Article 3, states that the President may "promulgate higher standards and administrative regulations for violations of treaty obligations which *are not grave breaches* of the Geneva Conventions." MCA § 6(a)(3)(A) (emphasis added). The provision does not mention the DTA: While the provision indicates that there are violations of Common Article 3 that are not grave breaches covered by the War Crimes Act, it also implies that the DTA may address those additional violations. *See also* 18 U.S.C. § 2441(d)(5), as amended by MCA § 6 (stating that "the definitions [in the War Crimes Act] are intended only to define the grave breaches of Common Article 3 and not the full scope of the United States obligations under that Article").

In applying the DTA's standard of humane treatment to Common Article 3, Congress was acting in accordance with a practice grounded in the text and history of the Geneva Conventions. The Conventions themselves recognize that, apart from "grave breaches," the state parties have some flexibility to consult their own legal traditions in implementing and discharging their treaty obligations. Although parties are obligated to prohibit grave breaches, with "penal sanctions," *see* GPW Art. 129 ¶¶ 1-2, the Conventions require parties "to take measures necessary for the suppression of other breaches of the Convention[s]," *id.* ¶ 3. The *Commentaries* also suggest such an approach when they explain that Common Article 3 was drafted with reference to the then-existing domestic laws of state parties: It "merely demands respect for certain rules, which were already recognized as essential in all civilized countries; and embodied in the national legislation of the States in question." Pictet, III *Commentaries*, at 36. Not only was the United States among the Conventions' leading drafters, but it was then (as it is now) among the leading constitutional democracies of the world. It is therefore manifestly appropriate for the United States to consider its own constitutional traditions—those rules "embodied in the national legislation" of the United States—in determining the meaning of the

general standards embodied in Common Article 3. The DTA incorporated constitutional standards from our Nation's legal tradition that predate the adoption of the Geneva Conventions.

Indeed, the United States previously has looked to its own law to clarify ambiguous treaty terms in similar treaties. A leading example is now embodied in the DTA itself. Faced with an otherwise undefined and difficult-to-apply obligation to refrain from "cruel, inhuman, or degrading treatment" in Article 16 of the CAT, the Senate turned to our Nation's constitutional standards and made clear in its advice and consent that the obligation of the United States under this provision would be determined by reference to the Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution. *See Executive Branch Summary and Analysis of the CAT* at 15-16; S. Exec. Rep. 101-30, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at 25-26 (Aug. 30, 1990); *see also Samann v. Commissioner*, 313 F.2d 461, 463 (4th Cir. 1963) (looking to a more detailed definition of a term in a domestic U.S. tax statute to interpret a comparatively general treaty term). As with the Geneva Conventions, this approach was at least suggested by the treaty itself, which required state parties to "*undertake to prevent* . . . cruel, inhuman, or degrading treatment or punishment." CAT Art. 16 (emphasis added); *see Executive Branch Summary and Analysis of the CAT*, S. Treaty Doc. 100-20 at 15 (explaining that this language is "more limited" than a "stringent prohibition" and "embodies an undertaking to take measures to prevent" violations within the rubric of existing domestic legal structures).[40]

The second interpretive tool applicable here attempts to reconcile the residual imprecision in Common Article 3 with its application to the novel conflict against al Qaeda. When treaty drafters purposely employ vague and ill-defined language, such language can reflect a conscious decision to allow state parties to elaborate on the meaning of those terms as they confront circumstances unforeseen at the time of the treaty's drafting.

Like our first interpretive principle, this approach shares the support of Congress through the framework established in the Military Commissions Act. In that Act, Congress chose to keep the Geneva Conventions out of the courts, and recognized that the Executive Branch has discretion in interpreting Common Article 3 (outside the grave breaches) to provide good faith applications of its vague terms to evolving circumstances. The explicit premise behind the Act's comprehensive framework for interpreting the Geneva Conventions is that our Government needed, and the Conventions permitted, a range of discretion for addressing the threat against the United States presented by al Qaeda. As we discussed in the context of the DTA, Congress knew that a CIA interrogation program had to be part of that discretion, and thus a guiding objective behind the MCA's enactment was that the CIA's program could "go forward" in the wake of *Hamdan*. *See supra* at 43-44. This is not to say that the MCA declares that any conduct

[40] As a formal matter, the United States undertook a reservation to the CAT, altering United States obligations, rather than invoking domestic law as a means of interpreting the treaty. The United States made clear, however, that it understood the constitutional traditions of the United States to be more than adequate to satisfy the "cruel, inhuman or degrading treatment or punishment" standard required by the treaty, and therefore, it undertook the reservation out of an abundance of caution and not because it believed that United States law would fall short of the obligations under Article 16, properly understood. S. Exec. Rep. 101-30, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at 25-26 (Aug. 30, 1990).

falling under the auspices of a CIA interrogation program must be consistent with Common Article 3. To the contrary, Congress recognized that Common Article 3 establishes some clear limits on such a program. Nevertheless, the result of lingering imprecision in Common Article 3's terms should not be institutional paralysis, but rather discretion for the Executive Branch in developing an effective CIA program within those clear limits.

Common Article 3 certainly places clear limits on how a state party may address such challenges and absolutely bars certain conduct offensive to "all civilized nations." Pictet, III *Commentaries*, at 39. For instance, the provision prohibits "murder of all kinds," "mutilation," and "the taking of hostages"—terms that are susceptible to precise definition and that "are and shall remain prohibited at any time and in any place whatsoever." When it comes, however, to Common Article 3's more general prohibitions upon "violence to life or person" and "outrages upon personal dignity," it may become necessary for states to define the meaning of those prohibitions, not in the abstract, but in their application to the specific circumstances that arise.

Indeed, the ICRC *Commentaries* themselves contemplate that "what constitutes humane treatment" would require a sensitive balancing of both security and humanitarian concerns. Depending on the circumstances and the purposes served, detainees may well be "the object of strict measures since the dictates of humanity, and measures of security or repression, *even when they are severe*, are not necessarily incompatible." *Id.* at 205 (emphasis added). Thus, Common Article 3 recognizes that state parties may act to define the meaning of humane treatment, and its related prohibitions, in light of the specific security challenges at issue.

The conflict with al Qaeda reflects precisely such a novel circumstance: The application of Common Article 3 to a war against international terrorists targeting civilians was not one contemplated by the drafters and negotiators of the Geneva Conventions. As Common Article 3 was drafted in 1949, the focus was on wars between uniformed armies, as well as on the atrocities that had been committed during World War II. A common feature of the conflicts that served as the historical backdrop for the Geneva Conventions was the objective of the parties to engage the other's military forces. As the ICRC described the matter, "Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with *armed forces* on either side engaged in *hostilities*—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country." Pictet, III *Commentaries*, at 37 (emphases in original).[41]

Al Qaeda in its war against the United States and its allies is not organized into battalions, under responsible command, or dressed in uniforms, although we need not decide whether these hallmarks of unlawful combatancy set al Qaeda into a class by itself. What is undoubtedly novel from the standpoint of the Geneva Conventions is that al Qaeda's primary

[41] Thus, although the Supreme Court rejected the President's determination that Common Article 3 did not apply to the conflict against al Qaeda, there can be little doubt that the paradigmatic case for the drafters of Common Article 3 was an internal civil war. 2B *Final Record of the Diplomatic Conference of Geneva of 1949*, at 121; *see also* Pictet, III *Commentaries*, at 29. A thorough interpretation of Common Article 3 must reflect that Common Article 3, at a minimum, is detached from its historical moorings when applied to the present context of armed conflict with al Qaeda.

means of warfare is not to vanquish other uniformed armies but rather to kill innocent civilians. In this way, al Qaeda does not resemble the insurgent forces of the domestic rebellions to which the drafters and negotiators of Common Article 3 intended to apply long-standing principles of the law of war developed for national armies. Early explanations of the persons protected from action by a state party under Common Article 3 referred to the "party in revolt *against the de jure Government*." 2B *Final Record of the Diplomatic Conference of Geneva of 1949*, at 121 (emphasis added); *see also* Pictet, III *Commentaries*, at 29 (explaining that the historical impetus of Common Article 3 was bloody "civil wars or social or revolutionary disturbances" in which the Red Cross had trouble intervening because they were entirely within the territory of a sovereign state); *id.* at 32 (discussing the paradigm model of "patriots struggling for the independence and dignity of their country"). Al Qaeda's general means of engagement, on the other hand, is to avoid direct hostilities against the military forces of the United States and instead to commit acts of terrorism against civilian targets.

Further supporting a cautious approach in applying Common Article 3 in the present novel context, the negotiators and signatories of Common Article 3 were not under the impression that Common Article 3 was breaking new ground regarding the substantive rules that govern state parties, apart from applying those rules to a new category of persons.[42] They sought to formalize "principles [that had] developed as the result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognised humanitarian principles." *Prosecutor v. Delalic*, Case No. IT-96-21-A (ICTY Appellate Chamber 2001); *see also* Pictet, III *Commentaries*, at 36 (explaining that Common Article 3 establishes rules "which were *already recognized* as essential in all civilized countries") (emphasis added). Of course, the application of Common Article 3's general standards to a conflict with terrorists who are focused on the destruction of civilian targets, a type of conflict not clearly anticipated by the Conventions' drafters, would not merely utilize the axiomatic principles that had "developed as the result of centuries of warfare." Thus, we must be cautious before we construe these precepts to bind a state's hands in addressing such a threat to its civilians.

That a treaty should not be lightly construed to take away such a fundamental sovereign responsibility—to protect its homeland, civilians, and allies from catastrophic attack—is an interpretive principle recognized in international law. *See Oppenheim's International Law* § 633, at 1276 (9th ed. 1992) (explaining that the *in dubio mitius* canon provides that treaties should not be construed to limit a sovereign right of states in the absence of an express agreement); *cf. Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) ("sovereign power" cannot be relinquished "unless surrendered in unmistakable terms").[43] The right to protect its

[42] As explained above, the innovation of Common Article 3 was not to impose wholly novel standards on states, but to apply the law of war to civil wars that largely shared the characteristics of international armed conflicts, while lacking a state party on the opposing side that could be a participant in a fully reciprocal treaty arrangement. *See* Pictet, III *Commentaries*, at 37. Although the drafters were innovating by binding states to law of war standards absent an assurance that the enemy would do the same, they believed that the general baseline standards that would apply under Common Article 3 were uncontroversial and well established.

[43] The canon of *in dubio mitius* (literally, "when in doubt, bring calm") has been applied by numerous international tribunals to construe ambiguous treaty terms against the relinquishment of fundamental sovereign

citizens from foreign attack is an essential attribute of a state's sovereignty. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 266. To be sure, the states negotiating Common Article 3 clearly understood that they were disabling themselves from undertaking certain measures to defend their governments against insurgents seeking to overthrow those governments, which inarguably is an important part of sovereignty. We would, however, expect clarity, in the text or at least in the Conventions' negotiating history, before we would interpret the treaty provision to prohibit the United States from taking actions deemed critical to the sovereign function of protecting its citizens from catastrophic foreign terrorist attack. Crucial here is that the CIA's program is determined to be necessary to obtain critical intelligence to ward off catastrophic foreign terrorist attacks, and that it is carefully designed to be safe and to impose no more discomfort than is necessary to achieve that crucial objective, fundamental to state sovereignty. Just as the "Constitution [of the United States] is not a suicide pact," *Kennedy v. Mendoza-Martinez*, 374 U.S. 144, 159 (1963), so also the vague and general terms of Common Article 3 should not be lightly interpreted to deprive the United States of the means to protect its citizens from terrorist attack.

This insight informs passages in the ICRC *Commentaries* that some have cited to suggest that the provisions of Common Article 3—to the extent they are not precise and specific—should be read to restrict state party discretion whenever possible. The *Commentaries* indeed recognize that, in some respects, adopting more detailed prohibitions in Common Article 3 would have been undesirable because the drafters of the Conventions could not anticipate the measures that men of ill will would develop to avoid the terms of a more precise Common Article 3: "However great the care undertaken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes." Pictet, III *Commentaries*, at 39. It is no doubt true therefore that Common Article 3's general prohibitions do establish *principles* that preclude a range of conduct, and that they should not be subject to a technical reading that parses among conduct. To the contrary, the principles in Common Article 3 are generally worded in a way that is "flexible, and at the same time precise," *id.*, and they call upon state parties to evaluate proposed conduct in a good faith manner, in an effort to make compatible both "the dictates of humanity" towards combatants and the "measures of security and repression" appropriate to defending one's people from inhumane attacks in the armed conflict at issue, *id.* at 205. We, therefore, undertake such an inquiry below.

B.

These interpretive tools inform our analysis of the three relevant terms under Common Article 3: paragraph 1(a)'s prohibition on "violence to life and person, in particular murder of all

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powers. *See* W.T.O. Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R/ ¶ 165, n. 154, 1998 WL 25520, at *46 (Jan. 16, 1998) (explaining that the "interpretive principle of *in dubio mitius* is widely recognized in international law as a supplementary means of interpretation."). For example, the International Court of Justice refused to construe an ambiguous treaty term to cede sovereignty over disputed territory without a clear statement. *See Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan*, 2002 I.C.J. 625, 648.

kinds, mutilation, cruel treatment and torture"; paragraph 1(c)'s prohibition on "outrages upon personal dignity, in particular, humiliating and degrading treatment"; and Common Article 3's overarching requirement that covered persons "be treated humanely." Although it is first in the syntax of Common Article 3, we address the general humane treatment requirement last, as the question becomes the extent of any residual obligations imposed by this requirement that are not addressed by the four specific examples of inhumane treatment prohibited in paragraphs 1(a)-(d).

1.

Against those persons protected by Common Article 3, the United States is obligated not to undertake "violence to life and person, in particular murder of all kinds, cruel treatment and torture." GPW Art. ¶ 1(a). Paragraph 1(a) raises two relevant questions: Will the CIA program's use of the six proposed techniques meet Common Article 3's general requirement to avoid "violence to life and person," and will their use involve either of the potentially relevant examples of "violence to life and person" denoted in paragraph 1(a)—torture and cruel treatment?

a.

The proposed techniques do not implicate Common Article 3's general prohibition on "violence to life and person." Dictionaries define the term "violence" as "the exertion of physical force so as to injure or abuse." *Webster's Third Int'l Dictionary* at 2554. The surrounding text and structure of paragraph 1(a) make clear that "violence to life and person" does not encompass every use of force or every physical injury. Instead, Common Article 3 provides specific examples of severe conduct covered by that term—murder, mutilation, torture, and cruel treatment. As indicated by the words "in particular," this list is not exhaustive. Nevertheless, these surrounding terms strongly suggest that paragraph 1(a) is directed at only serious acts of physical violence. *Cf. Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1999) ("The traditional canon of construction, *noscitur a sociis*, dictates that words grouped in a list should be given related meaning.").

This reading is supported by the ICRC *Commentaries*, which explain that the prohibitions in paragraph 1(a) "concern acts which world public opinion finds particularly revolting—acts which were committed frequently during the Second World War." Pictet, III *Commentaries*, at 39. International tribunals and other bodies similarly have focused on serious and intentional instances of physical force. At the same time, these bodies have had difficulty identifying any residual content to the term "violence to life and person" beyond the four specific examples of prohibited violence that Common Article 3 enumerates. The ICC's Elements of Crimes does not define "violence to life or person" as an offense separate from the four specific examples. The ICTY similarly has suggested that the term may not have discernable content apart from its four specified components. The tribunal initially held that "violence to life or person" is "defined by the accumulation of the elements of the specific offenses of 'murder, mutilation, cruel treatment, and torture,'" and declined to define other sufficient conditions for the offense. *Prosecutor v. Blaskic*, IT-95-14-T, ¶ 182 (Trial Chamber). In later cases, the tribunal put a finer point on the matter; at least for purposes of imposing criminal sanctions, the court could not identify a residual content to the term "violence to life and person" and dismissed charges that the

defendant had engaged in "violence to life or person" that did not constitute torture, cruel treatment, murder, or mutilation. *See Prosecutor v. Vasiljevic*, Trial Chamber, ¶¶ 194-205 (2003). Even when prosecutors attempted to proffer elements of the "violence to life and person" violation as a freestanding offense, they argued that the offense required the imposition of "serious physical pain or suffering," which would make it duplicative of the prohibition on "cruel treatment." *Id.*

We conclude that the proposed CIA techniques are consistent with Common Article 3's prohibition on "violence to life and person." As we explained above, Congress strictly prohibited several serious forms of violence to life and person, and the techniques do not involve any of these. The ICRC *Commentaries* have suggested that "performing biological experiments" would be a type of "violence to life and person" that, although not explicitly listed as an example, is also prohibited by paragraph 1(a). *See, e.g.*, Pictet, III *Commentaries*, at 39. The CIA techniques do not involve biological experiments, and indeed the War Crimes Act absolutely prohibits them. *See* 18 U.S.C. § 2441(d)(1)(C). Whether or not those grave breach offenses exhaust the scope of "violence to life and person" prohibited by Common Article 3, we are confident that "violence to life and person" refers to acts of violence serious enough to be considered comparable to the four examples listed in Common Article 3—murder, mutilation, torture, and cruel treatment. The CIA techniques do not involve the application of physical force rising to this standard. While the CIA does on occasion employ limited physical contact, the "slaps" and "holds" that comprise the CIA's proposed corrective techniques are carefully limited in frequency and intensity and subject to important safeguards to avoid the imposition of significant pain. They are designed to gain the attention of the detainee; they do not constitute the type of serious physical force that is implicated by paragraph 1(a).

b.

The CIA interrogation practices also do not involve any of the four more specific forms of "violence to life or person" expressly prohibited by paragraph 1(a). They obviously do not involve murder or mutilation. Nor, as we have explained, do they involve torture. *See Section 2340 Opinion* and *supra* at 14.[44]

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[44] In this opinion and the *Section 2340 Opinion*, we have concluded that the enhanced interrogation techniques in question would not violate the federal prohibition on torture in 18 U.S.C. § 2340-2340A or the prohibition on torture in the War Crimes Act, *see* 18 U.S.C. § 2441(d)(1)(A). Both of those offenses require as an element the imposition of severe physical or mental pain or suffering, which is consistent with international practice as reflected in Article 1 of the Convention Against Torture and the ICC's definition of Common Article 3's prohibition on torture. *See* Dörmann, *Elements of Crimes* at 401 (requiring the element of inflicting "severe physical or mental pain or suffering" for torture under Common Article 3). The War Crimes Act and the federal prohibition on torture further define "severe mental pain or suffering," and this more specific definition does not appear in the text of the CAT or in the Rome Statute. Instead, the source of this definition is an understanding of the United States to its ratification of the CAT. *See* 136 Cong. Rec. 36,198 (1990). Torture is not further defined in Common Article 3, and the United States did not enter an understanding to that instrument. That the more detailed explanation of "severe mental pain or suffering" is cast as an "understanding" of the widely accepted definition of torture, rather than as a reservation, reflects the position of the United States that this more detailed definition of torture is consistent with international practice, as reflected in Article 1 of the CAT, and need not have been entered as a reservation. *Auguste v. Ridge*, 395 F.3d 123, 143 n.20 (3d Cir. 2005); *see also* Vienna Convention on the Law

The remaining specifically prohibited form of "violence to life or person" in Common Article 3 is "cruel treatment." Dictionaries define "cruel" primarily by reference to conduct that imposes pain wantonly, that is, for the sake of imposing pain. *Webster's Third Int'l Dictionary* at 546 ("disposed to inflict pain, *especially* in a wanton, insensate, or vindictive manner"). If the purpose behind treatment described as "cruel" is put aside, common usage would at least require the treatment to be "severe" or "extremely painful." *Id.* Of course, we are not called upon here to evaluate the term "cruel treatment" standing alone. In Common Article 3, the prohibition on "cruel treatment" is placed between bans on extremely severe and depraved acts of violence—murder, mutilation, and torture. The serious nature of this list underscores that these terms, including cruel treatment, share a common bond in referring to conduct that is particularly aggravated and depraved. *See S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 126 S. Ct. 1843, 1849-50 (2006) (the *noscitur a sociis* canon "is no help absent some sort of gathering with a common feature to extrapolate"). In addition, Common Article 3 lists "cruel treatment" as a form of "violence to life and person," suggesting that the term involves some element of physical force.

International tribunals and other bodies have addressed Common Article 3's prohibition on "cruel treatment" at length. For purposes of the Rome Statute establishing the International Criminal Court, the U.N. preparatory commission defined "cruel treatment" under Common Article 3 to require "severe physical or mental pain or suffering." Dörmann, *Elements of Crimes* at 397. The committee explained that it viewed "cruel treatment" as indistinguishable from the "inhuman treatment" that constitutes a grave breach of the Geneva Conventions. *See id.* at 398; *see also* GPW Art. 130 (listing "torture or inhuman treatment" as a grave breach of the Geneva Conventions). This view apparently also was embraced by Congress when it established the offense of "cruel and inhuman treatment" in the War Crimes Act as part of its effort to criminalize the grave breaches of Common Article 3. *See* 18 U.S.C. § 2441(d)(1)(B); *see also* MCA § 6(a)(2). Construing "cruel treatment" to be coterminous with the grave breach of "inhuman treatment" further underscores the severity of the conduct prohibited by paragraph 1(a).

Aligning Common Article 3's prohibition on "cruel treatment" with the grave breach of "inhuman treatment" also demonstrates its close linkage to "torture." *See* GPW Art. 130 (stating that "*torture or inhuman treatment*, including biological experiments," is a grave breach of the Conventions) (emphasis added). This relationship was crucial for the ICTY in defining the elements of "cruel treatment" under Common Article 3. The tribunal explained that cruel treatment "is equivalent to the offense of inhuman treatment in the framework of the grave breaches provision of the Geneva Conventions" and that both terms perform the task of barring "treatment that does not meet the purposive requirement for the offense of torture in common article 3." *Prosecutor v. Delalic*, Case No. IT-96-21-T, ¶ 542 (Trial Chamber I, 1998). The International Criminal Court stopped at achieving this end, defining the offense of "cruel

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of Treaties Art. 2.1(d) (a reservation "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State"). There is no reason to revisit that long-standing position here; with regard to torture, Common Article 3 imposes no greater obligation on the United States than does the CAT, and thus conduct consistent with the two federal statutory prohibitions on torture also satisfies Common Article 3's prohibition on torture in armed conflicts not of an international character.

treatment" under Common Article 3 *identically* to that of torture, except removing the requirement that "severe physical or mental pain or suffering" be imposed for the purpose of "obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind." Dörmann, *Elements of Crimes*, at 397, 401. The ICTY went further, suggesting that there may be another difference from torture—that cruel treatment is directed at "treatment which deliberately causes serious mental or physical suffering that falls short of the severe mental or physical suffering required for the offence of torture." *Delalic*, ¶ 542.

In the War Crimes Act, Congress, like the ICTY, adopted a somewhat broader definition of "cruel treatment," prohibiting the relevant conduct no matter the purpose and defining a level of "serious physical or mental pain or suffering" that is less extreme than the "severe physical or mental pain or suffering" required for torture. In this way, Congress's approach to prohibiting the "cruel treatment" barred by Common Article 3 is consistent with the broader of the interpretations applied by international tribunals.[45] Congress, however, provided a specific definition of both "serious physical pain or suffering" and "serious mental pain or suffering." The ICTY found it impossible to define further "serious physical or mental pain or suffering" in advance and instead adopted a case-by-case approach for evaluating whether the pain or suffering imposed by past conduct was sufficiently serious to satisfy the elements of "cruel treatment." *Delalic*, ¶ 533. This approach, however, was tailored to the ICTY's task of applying Common Article 3 to wholly past conduct. Congress in amending the War Crimes Act, by contrast, was seeking to provide clear rules for the conduct of future operations. Congress's more detailed definition of "serious physical pain or suffering" and "serious mental pain or suffering" cannot be said to contradict the requirements of Common Article 3.

We conclude, with Congress, that the "cruel treatment" term in Common Article 3 is satisfied by compliance with the War Crimes Act. As we have explained above, the CIA techniques are consistent with Congress's prohibition on "cruel and inhuman treatment" in the War Crimes Act, *see supra* at 14-24, and thus do not violate Common Article 3's prohibition on "cruel treatment."

2.

Paragraph 1(c) of Common Article 3 prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment." Of the terms in Common Article 3 with uncertain meaning, the imprecision inherent in paragraph 1(c) was the cause of greatest concern among leaders of the Executive and Legislative Branches. *See supra* at 53-54 (citing statements by the President and Senator McCain).

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[45] The ICTY defines "cruel treatment" as "treatment that causes serious mental pain or suffering *or constitutes a serious attack on human dignity.*" *Delalic*, at ¶ 544 (emphasis added). The tribunal never has explained its reference to a "serious attack on human dignity." Common Article 3 has an express provision addressing certain types of affronts to personal dignity in its prohibition of "outrages upon personal dignity, in particular, humiliating and degrading treatment." GPW Art. 3 ¶ 1(c). The structure of the Geneva Conventions suggests that attacks on personal dignity should be analyzed under paragraph 1(c), the requirements of which we analyze below.

Despite the general nature of its language, there are several indications that paragraph 1(c) was intended to refer to particularly serious conduct. The term "humiliating and degrading treatment" does not stand alone. Instead, the term is a specific type or subset of the somewhat clearer prohibition on "outrages upon personal dignity." This structure distinguishes Common Article 3 from other international treaties that include freestanding prohibitions on "degrading treatment," untethered to any requirement that such treatment constitute an "outrage upon personal dignity." *Compare* CAT Art. 16 (prohibiting "cruel, inhuman or degrading treatment or punishment which does not amount to torture") *with* European Convention on Human Rights Article 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."). Thus, paragraph 1(c) does not bar "humiliating and degrading treatment" in the abstract; instead, it prohibits "humiliating and degrading treatment" that rises to the level of an "outrage upon personal dignity." This interpretation has been broadly accepted by international tribunals and committees, as it has been adopted both by the ICC Preparatory Committee and the ICTY. *See* Dörmann, *Elements of Crimes*, at 314 (stating, as an element of the ICC offense corresponding to paragraph 1(c) of Common Article 3, that "the severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity"); *Prosecutor v. Aleksovski*, Case No. IT-95-14/1 at ¶ 56 (Trial Chamber I 1999) (requiring that the conduct rise to the level of an outrage upon personal dignity).

The term "outrage" implies a relatively flagrant or heinous form of ill-treatment. Dictionaries define "outrage" as "describ[ing] whatever is so flagrantly bad that one's sense of decency or one's power to suffer or tolerate is violated" and list "monstrous, heinous, [and] atrocious" as synonyms of "outrageous." *Webster's Third Int'l Dictionary* at 1603. In this way, the term "outrage" appeals to the common sense standard of a reasonable person's assessing conduct under all the circumstances. And the judgment that term seeks is not a mere opinion that the behavior should have been different—to be an outrage, a reasonable person must assess the conduct as beyond all reasonable bounds of decency. This reaction is not to leave room for debate, as the term is directed at "the few essential rules of humanity which *all civilised* nations consider as valid *everywhere and under all circumstances and as being above and outside war itself*." Pictet, III *Commentaries*, at 32 (emphases added). Accordingly, in applying the "outrage upon personal dignity" term, the ICTY has recognized that it does not provide many clear standards in advance, but that it is confined to extremely serious misconduct: "An outrage upon personal dignity within Article 3 . . . is a species of inhuman treatment that is *deplorable, occasioning more serious suffering than most prohibited acts within the genus*." *Aleksovski*, at ¶ 54 (emphasis added).

The ICRC *Commentaries* on the Geneva Conventions underscore the severity of the misconduct paragraph 1(c) addresses. *See* Pictet, III *Commentaries*, at 39 (linking paragraph 1(c) to the prohibitions on torture, cruel treatment, murder, and mutilation in paragraph 1(a) and explaining that both paragraphs "concern acts which world opinion finds particularly revolting—acts which were committed frequently during the Second World War"). The ICTY similarly looks to a severe reaction from a reasonable person examining the totality of the circumstances. *See Aleksovski*, at ¶ 55-56 (to violate paragraph 1(c), the humiliation and degradation must be "so intense that the reasonable person would be outraged"). An examination of purpose also informs paragraph 1(c)'s focus on "humiliating and degrading treatment" that rises to the level of

an "outrage upon personal dignity." The same international tribunal has explained that paragraph 1(c) requires an inquiry not only into whether the conduct is objectively outrageous, but also into whether the purpose of the conduct is purely to humiliate and degrade in a contemptuous and outrageous manner. Thus, the ICTY has looked to the *intent* of the accused—it is not enough that a person feel "humiliated," rather the conduct must be "animated by contempt for the human dignity of another person." *Id.* at ¶ 56 (emphasis added). For the Yugoslavia tribunal, paragraph 1(c) captures a concept of wanton disregard for humanity, of recklessness, or of a wish to humiliate or to degrade for its own sake.

This inquiry into a reasonable person's evaluation of context, purpose, and intent with regard to the treatment of detainees is familiar to United States law. In the context of persons not convicted of any crime, but nonetheless detained by the Government, this same inquiry is demanded by the DTA, and the Fifth Amendment standard that it incorporates. As we have explained above, the DTA prohibits treatment, and interrogation techniques, that "shock the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience."). Much like the test contemplated by the term "outrage," the "shocks the conscience" test looks to how a reasonable person would view the conduct "*within the full context in which it occurred.*" *Lewis*, 523 U.S at 849 (emphasis added); *see id.* (requiring "an exact analysis of circumstance"); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (With regard to pre-conviction treatment, the test is whether there was "misconduct that a reasonable person would find so beyond the norm of proper police procedure as to shock the conscience."). Indeed, our courts in applying the substantive due process standard have asked "whether the behavior of the government officer is so egregious, so *outrageous*, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 848 n.8 (emphasis added). Because a reasonable person would look to the *reason* or *justification* for the conduct, the "shocks the conscience" test under the DTA also contemplates such an inquiry. *Id.* at 846 (asking whether the conduct amounts to the "exercise of power without any reasonable justification in the service of a legitimate governmental objective").

For these reasons, we conclude that the term "outrages upon personal dignity" invites, not forbids, an inquiry into the justification for governmental conduct, as the term calls for the outrageousness of the conduct to be evaluated in the manner a reasonable person would. To be sure, the text of Common Article 3 introduces its specific prohibitions, including its reference to "outrages upon personal dignity," by mandating that such acts "are and shall remain prohibited *at any time and in any place whatsoever.*" This text could be read to disapprove any evaluation of circumstance, or the considerations behind or justifications for specifically prohibited conduct. *See, e.g.*, Pictet, IV *Commentaries*, at 39 ("That is the method followed in the Convention when it proclaims four absolute prohibitions. The wording adopted could not be more definite. . . . No possible loophole is left; there can be no excuse, no attenuating circumstance.").

Nevertheless, this introductory text does not foreclose consideration of justifications and context in determining whether a particular act itself would constitute an outrage under the treaty. This conclusion is supported by other terms in Common Article 3. For example, Common Article 3 prohibits "murder," but murder by definition is not simply any homicide, but

killing without lawful justification. Common Article 3 may not permit a "murder" to be justified, but committing a homicide in self-defense simply would not constitute a "murder." Similarly, the term "outrage" seeks to identify conduct that would be universally considered beyond the bounds of decency, as transcending "the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances." Pictet, III *Commentaries*, at 32. An approach that foreclosed consideration of purpose throughout Common Article 3 cannot be squared with the ICRC *Commentaries* in evaluating whether conduct is humane—a requirement of Common Article 3 that the "outrage upon personal dignity" term is expressly stated to advance. The humane treatment requirement is said to prohibit "any act of violence or intimidation, *inspired not by military requirements or a legitimate desire for security, but by a systematic scorn for human values.*" Pictet, IV *Commentaries*, at 204 (emphasis added).

An evaluation of circumstance therefore is inherent in the plain meaning of the term "outrage." It is a concept, following relatively clear prohibitions on particularly grave acts, that turns to the objective judgment of reasonable people and proscribes conduct that is so vile as to be universally condemned under any standard of decency. Because it relies on such common judgment, the term "outrage" must evaluate conduct as reasonable people do, by weighing the justifications for that conduct. As the Supreme Court of Israel recently explained in applying the "rules of international law" to Israel's "fight against international terrorism," the principles of the law of war in this context "are not 'all or nothing.'" *Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02, at 34 (Sup. Ct. Israel, Dec. 13, 2006).

That the prohibition of "outrages upon personal dignity" looks behind conduct for its justifications illuminates the decisions of the ICTY interpreting this term. For example, in *Prosecutor v. Kovac*, IT-96-238 (Appeals Chamber, June 12, 2002), the tribunal held that forcing a teenage girl in detention to dance naked on a table was an "outrage upon personal dignity." *Id.* ¶ 160. These facts involved clearly outrageous conduct undertaken for no purpose other than the prurient gratification of the defendant. None of the CIA's proposed techniques bears a passing resemblance to the prurient and outrageous conduct at issue in *Kovac*.

The proposed techniques also contrast sharply with the outrageous conduct documented at the Abu Ghraib prison in Iraq. As General Antonio Taguba's official investigation reported, the detainees at Abu Ghraib were subjected to "sadistic, blatant, and wanton criminal abuses." *See* General Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Policy Brigade* 16 (May 4, 2004) ("Taguba Report"). The report charged the offending military personnel with "forcibly arranging detainees in various sexually explicit positions for photographing"; "forcing naked male detainees to wear women's underwear"; "forcing groups of male detainees to masturbate themselves while being photographed and videotaped"; "arranging naked male detainees in a pile and then jumping on them"; "positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture"; "placing a dog chain or strap around a detainee's neck and having a female soldier pose for a picture"; and "sodomizing a detainee with a chemical light and perhaps a broom stick." *Id.* at 16-17. These wanton acts were undertaken for abusive and lewd purposes. They bear no resemblance, either in purpose or effect, to any of the techniques proposed for use by the CIA, whether employed individually or in combination.

The contrast with *Kovac* and the acts at abu Ghraib goes some way to highlighting the conduct that paragraph 1(c) does reach. As the ICRC *Commentaries* have explained, paragraph 1(c) is directed at "acts which world public opinion finds revolting—acts which were committed frequently during the Second World War." Pictet, III *Commentaries*, at 39. World War II was typified by senseless acts of hatred, and humiliation or degradation, for no reason other than to reinforce that the victims had been vanquished or that they were viewed as inferior because of their nationality or their religion. Needlessly exposing prisoners to public curiosity is part of this dark history, *see* GPW Art. 13, and commentators cite as a paradigmatic example of such conduct the parading of prisoners in public. *See* Dörmann, *Elements of Crimes*, at 323 (referring to the post-World War II prosecution of Maezler for marching prisoners through the streets of Rome in a parade emulating the tradition of ancient triumphal celebrations). In another case, Australian authorities prosecuted Japanese officers who tied Sikh prisoners of war "to a post and beat them with sticks until they lost consciousness." *Trial of Tanaka Chuichi and Two Others (1946)*, XI Law Reports of Trials of War Criminals: United Nations War Crimes Commissions 62. In addition, they shaved the prisoners' beards and forced them to smoke cigarettes, in deliberate denigration of the Sikhs' religious practices requiring facial hair and forbidding the handling of tobacco, all as *post hoc* punishment for minor infractions of the rules of the prison camp. *Id.*[46]

These acts were *intended to humiliate*, and nothing more—there was no security justification, no carefully drawn plan to protect civilian lives. These were part of a panoply of atrocities in World War II meant to "reduce men to the state of animals," merely because of who they were. *See* Pictet, III *Commentaries*, at 627. These acts were undertaken for wholly prurient, humiliating, or bigoted ends, and that feature was an inextricable part of what made them "outrageous."[47]

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[46] In this way, acts intended to denigrate the religion of detainees implicate Common Article 3. Although pursuant to a different standard applicable to prisoners of war under the 1929 Geneva Convention, the Australian war crimes prosecution suggests that some consideration of the cultural sensitivities of detainees may be relevant when determining whether there has been a subjective intent to humiliate. There, the Japanese defendants sought out the features of the Sikh religion and sought to exploit those in particular, with no purpose other than to humiliate the detainees. This is not what occurs in the CIA program. It should be noted that, upon intake into custody, the CIA does trim the hair and shave the beards of detainees to prevent the introduction of disease and weapons into the facility. After this initial shaving, detainees are permitted to grow their hair to any desired length. We have already concluded that such limited use of involuntary grooming by the CIA is consistent with Common Article 3. *See* Letter to John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, at 12-13 (Aug. 31, 2006). Again, the difference here is that the purpose is not to humiliate the detainee, or to exploit any particular sensitivity, but to serve legitimate security and hygiene purposes.

[47] Our interpretation here is also consistent with the fact that paragraph 1(c) is not a prohibition on "outrages" *simpliciter*, but instead proscribes "outrages *upon personal dignity*." (Emphasis added.) The words "upon personal dignity" may be read to specify the injury that must occur before we evaluate whether the causing conduct constitutes an "outrage." Put differently, paragraph 1(c) is not a free-floating inquiry into the justifications for state party conduct during an armed conflict not of an international character. Instead, there must be some affront to "personal dignity" before that inquiry is triggered. The words "upon personal dignity" may also be read to constrain the considerations that may be brought to bear in determining whether an "outrage" has occurred. In this regard, the term may be designed to focus paragraph 1(c) on the person subjected to state party conduct, and his

With these principles in mind, we turn to whether the proposed CIA techniques are consistent with Common Article 3's prohibition on "outrages upon personal dignity, in particular, humiliating and degrading treatment." We already have determined that the CIA program does not "shock the conscience," or thereby violate long-standing principles of United States law founded in the Fifth Amendment to our Constitution and incorporated into the DTA. Especially regarding a term that, in many ways, provides a protective buffer around the comparatively specific prohibitions in Common Article 3, it is appropriate for the United States to turn to its domestic legal tradition to provide a familiar, discernable standard for the inquiry that paragraph 1(c) requires. As we explained above, the MCA reflects a considered judgment by Congress that the DTA tightly fits the requirements of Common Article 3, and this congressional judgment is important in determining the proper interpretation of Common Article 3 for the United States. The DTA asks whether conduct "shocks the contemporary conscience," it evaluates the judgment of the reasonable person, and it tracks the inquiry that the plain meaning of the term "outrages" invites. Thus, our conclusion that the program is consistent with the DTA is a substantial factor in determining that the program does not involve "outrages upon personal dignity" under Common Article 3.[48]

But consistency with the DTA is not the only basis for our conclusion. In the limited context at issue here, the CIA program's narrow focus, and its compliance with the careful safeguards and limitations incorporated into the program, provide adequate protection against the "outrages upon personal dignity" prohibited by Common Article 3. Of particular importance is that the interrogation techniques in the CIA program are *not* a standard for treating our enemies wherever we find them, including those in military custody. Instead, the CIA program is narrowly targeted at a small number of the most dangerous and knowledgeable of terrorists, those whom the CIA has reason to believe harbor imminent plans to kill civilians throughout the world or otherwise possess information of critical intelligence value concerning the leadership or activities of al Qaeda. For those few, the United States takes measures to obtain what they know,

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dignity, rather than the intention of the state actor or the reasons for the actor's conduct. This latter interpretation would constitute a point of departure from international practice, which has looked to the intention and purpose of the state actor, as well as the context of and justifications for the conduct. In any event, the foregoing historical examples demonstrate that we need to know *why* the conduct is undertaken to determine whether it is an "outrage upon personal dignity." Marching captured prisoners as a means of transport does not evoke the same reaction, rising to the level of an "outrage," as the senseless parading of prisoners to humiliate them. In this way, the words "upon personal dignity" cannot be read to confine paragraph 1(c) to demarcating an absolute level of hardship that will not be tolerated. Instead, whether an affront to "personal dignity" occurs depends to some degree on the reason why a hardship is being imposed. The term is best read as a prohibition on the arbitrary, the wanton, or the prurient discomforting of persons protected by Common Article 3, as well as, in some cases, unnecessary or careless mistreatment, even when the overarching justification is legitimate. As we explain below, these principles do not describe the carefully drawn and limited CIA interrogation techniques.

[48] As we did with the DTA, we believe it appropriate to evaluate not just each technique in isolation, but the effects of the techniques in combination. *See, e.g., Aleksovski*, ¶ 57 ("Indeed, the seriousness of an act and its consequences may arise either from the nature of the act *per se* or from the repetition of the act or from a combination of different acts which, taken individually, would not constitute a crime within the meaning of Article 3 of the" Geneva Conventions.). We have concluded that the techniques in combination would not violate the constitutional standards incorporated in the DTA, *see supra* at 47-48, and we again conclude that paragraph 1(c) would not be violated by the techniques, used either individually or in combination.

but each technique is limited to keep the detainee safe and its application is circumscribed by extensive procedures and oversight. Those who implement these techniques are a small number of CIA professionals trained in the techniques' careful limits, and every interrogation plan is approved by the Director of the CIA.

In addition, as we have emphasized throughout this opinion, the CIA's detailed procedures and safeguards provide important protections ensuring that none of the techniques would rise to the level of an outrage upon personal dignity. With regard to the corrective techniques, the CIA has assured us that they would not be used with an intensity, or a frequency, that would cause significant physical pain or injury. *See Aleksovski*, ¶ 57. With all the techniques, the CIA would determine in advance their suitability and their safety with respect to each individual detainee, with the assistance of professional medical and psychological examinations. Medical personnel further would monitor their application: CIA personnel, including medical professionals, would discontinue, for example, the sleep deprivation technique if they determined that the detainee was or might be suffering from extreme physical distress. Each detainee may react differently to the combination of enhanced interrogation techniques to which he is subjected. These safeguards and individualized attention are crucial to our conclusion that the combined use of the techniques would not violate Common Article 3. *See supra* n.50.

As such, the techniques do not implicate the core principles of the prohibition on "outrages upon personal dignity." A reasonable person, considering all the circumstances, would not consider the conduct so serious as to be beyond the bounds of human decency. The techniques are not intended to humiliate or to degrade; rather, they are carefully limited to the purpose of obtaining critical intelligence. They do not manifest the "scorn for human values" or reflect conduct done for the purpose of humiliating and degrading the detainee—the dark past of World War II, against which paragraph 1(c) was set. As we explain above, a reasonable person would consider the justification for the conduct and the full context of the protective measures put in place by the CIA. Accordingly, the careful limits on the CIA program, the narrow focus of the program, and the critical purpose that the program serves are important to the conclusion that the six techniques do not constitute conduct so serious as to be beyond the bounds of human decency.

The CIA has determined that the interrogation techniques proposed here are the minimum necessary to maintain an effective program for this small number of al Qaeda operatives. That the CIA has confined itself to such a minimum, along with the other limitations the CIA has placed on the program, does not reflect the type of wanton contempt for humanity—the atrocities animated by hatred for others that "were committed frequently during the Second World War" and that "public opinion finds particularly revolting"—at which the prohibition on "outrages upon personal dignity" is aimed. *See* Pictet, III *Commentaries*, at 39.

3.

Overarching the four specific prohibitions in Common Article 3 is a general requirement that persons protected by Common Article 3 "shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or

any other similar criteria."[49] The text makes clear that its four specific prohibitions are directed at implementing the humane treatment requirement. *See* GPW Art. 3 ¶ 1 (following the humane treatment requirement with "[t]o this end the following acts are and shall remain prohibited"). As we have discussed above, those specific provisions describe serious conduct, and the structure of Common Article 3 suggests that conduct of a similar gravity would be required to constitute inhumane treatment.

The question becomes what, if anything, is required by "humane treatment" under Common Article 3 that is not captured by the specific prohibitions in subparagraphs (a)-(d). We can discern some content from references to "humane treatment" in other parts of the Geneva Conventions. For example, other provisions closely link humane treatment with the provision of the basic necessities essential to life. Article 20 of GPW mandates that the "evacuation of prisoners of war shall always be *effected humanely* . . . . The Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and potable water, and with the necessary clothing and medical attention." *See also* GPW Art. 46. This theme runs throughout the Conventions, and indeed Common Article 3 itself requires a subset of such basic necessities, by mandating that the "wounded and sick shall be collected and cared for." GPW Art. 3 ¶ 2. Given these references throughout the Conventions, humane treatment under Common Article 3 is reasonably read to require that detainees in the CIA program be provided with the basic necessities of life—food and water, shelter from the elements, protection from extremes of heat and cold, necessary clothing, and essential medical care, absent emergency circumstances beyond the control of the United States.

We understand that the CIA takes care to ensure that the detainees receive those basic necessities. You have informed us that detainees in CIA custody are subject to regular physical and psychological monitoring by medical personnel and receive appropriate medical and dental care. They are given adequate food and as much water as they reasonably please. CIA detention facilities are sanitary. The detainees receive necessary clothes and are sheltered from the elements.

For certain detainees determined to be withholding high value intelligence, however, the CIA proposes to engage in one interrogation technique—dietary manipulation—that would adjust the provision of these resources. The detainee's meals are temporarily substituted for a bland liquid diet that, while less appetizing than normal meals, exceeds nutrition requirements

[49] This language does not create an equal treatment requirement; instead, it provides that the suspect classifications in question may not justify any deviation from Common Article 3's baseline standard of humane treatment. The Geneva Conventions elsewhere impose equal treatment requirements. *See* GPW Art. 16 ("[A]ll prisoners of war shall be *treated alike* by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.") (emphasis added). Article 16 also provides specific exceptions to its equal treatment requirement with regard to prisoners of war, which we would expect to find in Common Article 3 if it were also an equal treatment requirement. The contrast with the text of Article 16 demonstrates the linkage of Common Article 3's anti-discrimination principle to the provision of humane treatment. The *Commentaries* further explain that distinctions, even among the listed criteria, may be made under Common Article 3, so long as the treatment of no covered person falls below the minimum standard of humane treatment. Pictet, III *Commentaries*, at 40-41. Thus, we turn to determining the basic content of Common Article 3's humane treatment requirement.

for safe and healthy medically approved diet programs in the United States. During application of the technique, the detainee's weight is monitored, and the technique would be discontinued should the detainee lose more than 10 percent of his starting body weight. The element of humane treatment that we can glean from the structure of the Geneva Conventions is one of "sufficient food." GPW Art. 46. Because the food provided during the temporary application of the dietary manipulation technique is sufficient for health, we conclude that it does comply with the "sufficient food" element of Common Article 3's humane treatment requirement. *Cf. Aleksovski*, Case No. IT-95-14/1, ¶ 108 (dismissing Common Article 3 charges against prison warden who provided only two meals a day to all detainees over a period of months and where some detainees lost over thirty pounds).

We also find it relevant that the CIA's interrogation and detention program complies with the substantive due process requirements of the Fifth Amendment, which under most circumstances require "safe conditions," including "adequate food, shelter, clothing, and medical care" and which are incorporated into the DTA. *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982). Requiring the provision of basic necessities is another example of how the constitutional standards incorporated in the DTA themselves provide a "humane treatment" principle that can guide compliance with Common Article 3. Congress recognized as much in the DTA, given the statute's explicit premise that the Fifth, Eighth, and Fourteenth Amendments are directed against a concept of "inhumane treatment or punishment." MCA § 6(c)(2).

The CIA program—under the restrictions that we have outlined—complies with each of the specific prohibitions in Common Article 3 that implement its overarching humane treatment requirement. Outside those four prohibitions, and the additional concept of basic necessities that we have discerned from the structure of the Conventions, we confront another situation where the content of the requirement is underspecified by the treaty. *See* Pictet, IV *Commentaries*, at 38-39 ("The definition [of humane treatment] is not a very precise one, as we shall see. On the other hand, there is less difficulty in enumerating things which are incompatible with humane treatment. That is the method followed in the Convention when it proclaims four absolute prohibitions."). Again, this is a situation where the generality was intentional. To the negotiators, "it seem[ed] useless and even dangerous to attempt to make a list of all the factors that would make treatment 'humane.'" *Id.* at 204. The *Commentaries* emphasize that "what constitutes humane treatment" requires a balancing of security and humanitarian concerns. The detainees may well be "the object of *strict* measures," as the "measures of security or repression, even when they are severe," may nonetheless be compatible with basic humanitarian standards. *Id.* at 205 (emphasis added). Given the deliberate generality of the humane treatment standard, it is reasonable to turn to our own law, which establishes a standard of humane treatment that similarly requires a balance between security and humanitarian concerns, to provide content to otherwise unspecified terms in the Conventions. Because the CIA program complies with the standard of humane treatment provided in the Detainee Treatment Act, and the U.S. constitutional standards that it incorporates, and because it provides detainees with the necessary food, shelter, clothing, and medical care, the CIA program satisfies Common Article 3's humane treatment requirement.

C.

We also recognize that the *practices* of other state parties in implementing Common Article 3—as opposed to the statements of other states unsupported by concrete circumstances and conduct—can serve as "a supplementary means of interpretation." *See* Vienna Convention on the Law of Treaties Art. 31(3)(b). We have searched for evidence of state parties, seeking to implement Common Article 3 in a context similar to that addressed herein. The one example that we have found supports the interpretation of Common Article 3 that we have set forth above. In particular, the United Kingdom from the time of the adoption of Common Article 3 until the early 1970s applied an interrogation program in a dozen counter-insurgency operations that resembles in several ways the one proposed to be employed by the CIA.

Following World War II and the adoption of Common Article 3, the United Kingdom developed and applied five "in depth interrogation" techniques "to deal with a number of situations involving internal security." *Report of the Committee of Privy Counsellors Appointed to Consider Authorized Procedures for the Interrogation of Persons Suspected of Terrorism*, 1972, Cmnd. 4901, ¶ 10 (HSMO 1972) ("Parker Committee Report"). The five techniques involved (i) covering a detainee's head at all times, except when the detainee was under interrogation or in an room by himself; (ii) subjecting the detainee "to continuous and monotonous noise of a volume calculated to isolate [him] from communication"; (iii) depriving the detainee of sleep "during the early days" of the interrogation; (iv) restricting a detainee's diet to "one round of bread and one pint of water at six-hourly intervals"; and (v) forcing a detainee to face—but not touch—a wall with his hands raised and his legs spread apart for hours at a time, with only "periodical lowering of the arms to restore circulation." Lord Gardiner, Minority Report, Parker Committee Report, ¶ 5 ("Gardiner Minority Report"); *see also* Parker Committee Report ¶ 10. Broadly speaking, the techniques were designed to make the detainee "feel that he is in a hostile atmosphere, subject to strict discipline, . . . and completely isolated so that he fears what may happen next." *Id.* ¶ 11. From the 1950s through the early 1970s, the British employed some or all of the five techniques in a dozen "counter insurgency operations" around the world, including operations in Palestine, Kenya, Cyprus, the British Cameroons, Brunei, British Guiana, Aden, Malaysia, the Persian Gulf, and Northern Ireland. *See id.*

In 1971, after the public learned that British security forces had employed these techniques against Irish nationals suspected of supporting Irish Republican Army terrorist activities, the British Government appointed a three-person Committee of Privy Counselors, chaired by Lord Parker of Waddington, the Lord Chief Justice of England, to examine the legality of using the five interrogation techniques against suspected terrorists. *See* Parker Committee Report ¶¶ 1-2. Among other things, the committee considered whether the techniques violated a 1965 directive requiring that all military interrogations comply with "Article 3 of the Geneva Convention Relative to the Treatment of Prisoners of War (1949)." *See id.* ¶¶ 4-6 & Appx. A majority of the committee, including the Lord Chief Justice, concluded that the "application of these techniques, subject to proper safeguards, limiting the occasion on which and the degree to which they can be applied, would be in conformity with the Directive [and thus with Common Article 3]." *Id.* ¶ 31.

In reaching this conclusion, the Parker Committee rejected the notion that "the end justifies the means." *Id.* ¶ 27. It repeatedly stressed that aggressive interrogation techniques "should only be used in cases where it is considered vitally necessary to obtain information." *Id.* ¶ 35. It also emphasized that interrogators should be properly trained and that clear guidelines should exist "to assist Service personnel [in deciding] the degree to which in any particular circumstances the techniques can be applied." *Id.* Similarly, it recognized the importance of obtaining approval from senior government officials before employing the five techniques, *id.* ¶ 37, and it recommended that aggressive interrogations occur only in the presence of a "senior officer" with "overall control and . . . personal responsibility for the operation." *Id.* ¶ 38. The committee also concluded "that a doctor with some psychiatric training should be present at all times at the interrogation centre, and should be in the position to observe the course of oral interrogation," so that he could "warn the controller if he felt that the interrogation was being pressed too far" (although, in contrast with the CIA program, the doctor would not have the actual authority to stop the interrogations). *Id.* ¶ 41.

The Parker Committee emphasized, however, that its rejection of a pure "ends-means" analysis did not mean that Common Article 3 barred countries from giving some weight to the need to protect their citizens against the harm threatened by terrorist or insurgent operations. The committee, for example, emphasized that, when properly administered, the five interrogation techniques posed a "negligible" "risk of physical injury" and "no real risk" of "long-term mental effects." *Id.* ¶¶ 14-17. Yet they had "produced very valuable results in revealing rebel organization, training and 'Battle Orders.'" *Id.* ¶ 18. In Northern Ireland, the Committee observed, use of the techniques after "ordinary police interrogation had failed," led to, among other things, the identification of more than 700 I.R.A. members, details about "possible I.R.A. operations" and "future plans," and the discovery of large quantities of arms and explosives. *Id.* ¶¶ 21-22. The Committee emphasized that the techniques were "directly and indirectly . . . responsible for the saving of lives of innocent citizens." *Id.* ¶ 24.

More broadly, the Parker Committee explained that the meaning of Common Article 3's restrictions must be interpreted based on the *nature* of the conflict. *See id.* ¶ 30 (explaining that terms such as "'humane,' 'inhuman,' 'humiliating,' and 'degrading' fall to be judged by [a dispassionate] observer in the light of the circumstances in which the techniques are applied"). Accordingly, the committee concluded that Common Article 3 must be interpreted in light of the unique threats posed by terrorism. Although "short of war in its ordinary sense," terrorism is "in many ways worse than war." *Id.* ¶ 32. It occurs "within the country, friend and foe will not be identifiable, the rebels may be ruthless men determined to achieve their ends by indiscriminate attacks on innocent persons. If information is to be obtained, time must be of the essence of the operation." *Id.* Moreover, factors that might facilitate interrogation in traditional war—such as "ample information" to assist interrogators and "a number of prisoners who dislike the current enemy regime and are only too willing to talk"—are often absent "in counter-revolutionary operations." *Id.* ¶¶ 25-26. *See also id.* (noting difficulty in obtaining information "quickly"). Consequently, the Parker Committee concluded that in light of the nature of the terrorist threat, the interrogation techniques employed by the United Kingdom were consistent with Common Article 3.

Shortly after the Parker Committee issued its report, Prime Minister Edward Heath announced that, as a matter of policy, Britain would not use the five techniques in future interrogations. *See* Debate on Interrogation Techniques (Parker Committee Report), 832 Parl. Deb., H.C. (5th Ser.) 743-50 (1972); *see also* Roger Myers, *A Remedy for Northern Ireland: The Case for United Nations Peacekeeping Intervention In An Internal Conflict*, 11 N.Y.L. Sch. J. Int'l & Comp. L. 1, 52 n.220 (1990). The Prime Minister did not, to our knowledge, take issue with the Lord Chief Justice's interpretation of the United Kingdom's treaty obligations under Common Article 3, however. Indeed, in announcing what he stated was a change in policy, the Prime Minister emphasized that the majority of the Committee "conclude[d] that use of the methods could be justified in exceptional circumstances," subject to safeguards. *Id.* at 743.

That for more than two decades following the enactment of Common Article 3, one of the world's leading advocates for and practitioners of the rule of law and human rights employed techniques similar to those in the CIA program and determined that they complied with Common Article 3 provides strong support for our conclusion that the CIA's proposed techniques are also consistent with Common Article 3. The CIA's proposed techniques are not more grave than those employed by the United Kingdom. To the contrary, the United Kingdom found stress positions to be consistent with Common Article 3, but the CIA currently does not propose to include such a technique. Consistent with recommendations in the Parker Committee's legal opinion, the CIA has developed extensive safeguards, including written guidelines, training, close monitoring by medical and psychological personnel, and the approval of high level officials to ensure that the program is confined to safe and necessary applications of the techniques in a controlled, professional environment. While the United Kingdom employed these techniques in a dozen colonial and related conflicts, the United States proposes to use these techniques only with a small number of high value terrorists engaged in a worldwide armed conflict whose primary objective is to inflict mass civilian casualties in the United States and throughout the free world.

The United Kingdom's determination under Common Article 3 also sheds substantial light on the decisions of other international tribunals applying legal standards that fundamentally differ from Common Article 3. As discussed above, the European Court of Human Rights later found that two of the interrogation techniques approved by the Committee—diet manipulation and sleep deprivation—violated the stand-alone prohibition on "degrading treatment" in the European Convention on Human Rights, to which the United States is not a party. *Ireland v. United Kingdom*, 2 EHRR 25 (1980). The court explained that "degrading treatment" under the ECHR included actions directed at "breaking [the] physical or moral resistance" of detainees. *Id.* ¶ 167. The court's capacious interpretation of the European Convention's prohibition on "degrading treatment" is not well-suited for Common Article 3.[50] Indeed, the European Court

[50] The Israeli Supreme Court in *Public Committee Against Torture v. Israel*, HCJ 5100/94 (1999), also cited the ECHR decision and observed that a combination of interrogation techniques might constitute "inhuman and degrading" treatment. *See id.* at 27-28. As discussed above, *see supra* at 41-42, the Israeli decision turned primarily upon that nation's statutory law and did not specifically purport to define what constitutes "inhuman and degrading" treatment under any particular treaty, much less what rises to an "outrage upon personal dignity" or other violation of Common Article 3. Six years later, the same court recognized that the international law applicable to domestic criminal law enforcement and that applicable to an armed conflict fundamentally differ. While the former places "absolute" restrictions on degrading treatment generally, the law of armed conflict requires a balancing against

has interpreted that provision not only to impose detailed requirements on prison conditions, but also to prohibit any action that drives an individual "to act against his will or conscience," a standard that might well rule out any significant interrogation at all. *See Greek Case*, 12 Y.B. ECHR 186. Those decisions reflect that the European Convention is a peacetime treaty that prohibits any form of "degrading treatment," while Common Article 3 prohibits only "humiliating and degrading treatment" that rises to the level of an "outrage upon personal dignity." Common Article 3 is a provision designed for times of war, where the gathering of intelligence, often by requiring a captured enemy "to act against his will or conscience" or by undermining his "physical or moral resistance," is to be expected. Furthermore, it is unclear that the ECHR in *Ireland v. U.K.* was confronted with techniques that provided adequate food and that were carefully designed to be safe, such as those proposed by the CIA.

It is the United Kingdom's interpretation of Common Article 3 in practice that is relevant to our determination, not the ECHR's subsequent interpretation of the legality of the United Kingdom's techniques under a different treaty. The practice of the United Kingdom in implementing the interpretation of Common Article 3 supports the interpretation set forth above.

D.

For these reasons, we interpret Common Article 3 to permit the CIA's interrogation and detention program to go forward. Part of the foundation of this interpretation is that Congress has largely addressed the requirements of Common Article 3 through the War Crimes and Detainee Treatment Acts. These provisions include detailed prohibitions on particularly serious conduct, in addition to extending the protection of the Nation's own constitutional standards to aliens detained abroad in the course of fighting against America, persons whom the Constitution would not otherwise reach. And the CIA's interrogation program, both in its conditions of confinement and with regard to the six proposed interrogation techniques, is consistent with the War Crimes and Detainee Treatment Acts. To the extent that Common Article 3 prohibits additional conduct, unaddressed by the War Crimes and Detainee Treatment Acts, the CIA program is consistent with those restrictions as well.

Just as important is the limited nature of this program. This program is narrowly targeted to advance a humanitarian objective of the highest order—preventing catastrophic terrorist attacks—and indeed the CIA has determined that the six proposed techniques are the minimum necessary for a program that would be effective in obtaining intelligence critical to serving this end. It is limited to a small number of high value terrorists who, after careful consideration, professional intelligence officers of the CIA believe to possess crucial intelligence. The program is conducted under careful procedures and is designed to impose no pain that is unnecessary for the obtaining of crucial intelligence. At the same time, it operates within strict limits on conduct, including those mandated by the War Crimes Act and the prohibition on torture regardless of the motivation of the conduct. Common Article 3 was not drafted with the threat posed by al Qaeda in mind; it contains certain specific prohibitions, but it also contains some general principles with

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legitimate military needs. *Public Committee Against Torture in Israel v. The Government of Israel*, HCJ 769/02, ¶ 22 (Dec. 11, 2005).

less definition. The general principles leave state parties to address the new eventualities of war, to mold the interpretation of the Geneva Conventions by their conduct. We will not lightly construe the Geneva Conventions to disable a sovereign state from defending against the new types of terrorist attacks carried out by al Qaeda.

The interpretation in this memorandum reflects what we believe to be the correct interpretation of Common Article 3. Because certain general provisions in Common Article 3 were designed to provide state parties with flexibility to address new threats, however, the nature of such flexibility is that other state parties may exercise their discretion in ways that do not perfectly align with the policies of the United States. We recognize Common Article 3 may lend itself to other interpretations, and international bodies or our treaty partners may disagree in some respects with this interpretation.[51]

Just as we have relied on the War Crimes and Detainee Treatment Acts, other states may turn to treaties with similar language, but drafted for dissimilar purposes, as a source of disagreement. As discussed above, for example, the European Court of Human Rights determined that certain of the interrogation techniques proposed for use by the CIA—diet manipulation and sleep deprivation—violated the European Convention's stand-alone prohibition on "degrading treatment." *Ireland v. United Kingdom*, 2 EHRR 25 (1980). For reasons we have explained, the ECHR decision does not constitute the basis for a correct reading of Common Article 3 in our view, but the openness of "humiliating and degrading treatment" might not prevent others from, incorrectly, advocating such an interpretation, and the State Department informs us that given the past statements of our European treaty partners about United States actions in the War on Terror, and notwithstanding some of their own past practices, *see supra* at n.36, the United States could reasonably expect some of our European treaty partners to take precisely such an expansive reading of the open terms in Common Article 3.

Recognizing the generality of some of Common Article 3's provisions, Congress provided a mechanism through which the President could authoritatively determine how the United States would apply its terms in specific contexts. The Military Commissions Act ensures that the President's interpretation of the meaning and applicability of the Geneva Conventions would control as a matter of United States law. Section 6(a) of the MCA is squarely directed at the risk that the interpretations that would guide our military and intelligence personnel could be cast aside after the fact by our own courts or international tribunals, armed with flexible and general language in Common Article 3 that could bear the weight of a wide range of policy preferences or subjective interpretations. To reduce this risk, Congress rendered the Geneva Conventions judicially unenforceable. *See* MCA § 5(a). The role of the courts in enforcing the Geneva Conventions is limited to adjudicating prosecutions under the War Crimes Act initiated by the Executive Branch and, even then, courts may not rely on "a foreign or international source

[51] This flexibility extends only to *reasonable* interpretations of unclear terms of Common Article 3. Where Common Article 3 is clear, state parties are obliged as a matter of international law (though not necessarily their own domestic laws) to follow it, and states have no discretion under international law to adopt unreasonable interpretations at odds with the language of the provision.

of law" to decide the content of the statutory elements in the War Crimes Act. *See id.* § 6(a)(2). Congress also expressly reaffirmed that the President has authority for the United States to interpret the meaning and applicability of the Geneva Conventions. *See id.* § 6(a)(3)(A). Should he issue interpretations by executive order, they will be "authoritative . . . as a matter of United States law in the same manner as other administrative regulations." *Id.* § 6(a)(3)(C).[52]

We understand that the President intends to utilize this mechanism and to sign an executive order setting forth an interpretation of Common Article 3. That action would conclusively determine the application of Common Article 3 to the CIA program as a matter of United States law. We have reviewed the proposed executive order and have determined that it is wholly consistent with the analysis of Common Article 3 set forth above. *See* Proposed Order Entitled *Interpretation of the Geneva Conventions Common Article 3 As Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency* (Executive Clerk final draft, presented to the President for signature, July 20, 2007) ("Draft Order"). Because the executive order would be public, it cannot engage in the detailed application of Common Article 3 to the six proposed techniques embodied in this opinion. Instead, the executive order sets forth an interpretation of Common Article 3 at a higher level of generality that tracks the analysis in this opinion and, thereby, conclusively determines that the CIA's proposed program of interrogation and detention, including the six proposed interrogation techniques, complies with Common Article 3.

The executive order would prohibit any technique or condition of confinement that constitutes torture, as defined in 18 U.S.C. § 2340, or any act prohibited by section 2441(d) of the War Crimes Act. *See* Draft Order § 3(b)(i)(A)-(B). This Office has concluded that the six proposed techniques, when applied in compliance with the procedures and safeguards put in place by the CIA, comply with both the federal anti-torture statute and the War Crimes Act. *See Section 2340 Opinion* and Part II, *supra*.

To ensure full implementation of paragraph 1(a) of Common Article 3, the executive order also would prohibit "other acts of violence serious enough to be considered comparable to murder, torture, mutilation, and cruel or inhuman treatment, as defined in" the War Crimes Act. Draft Order § 3(b)(i)(C). As explained above (*see* part IV.B.1.a, *supra*), the six proposed techniques do not involve violence on a level comparable to the four enumerated forms of violence in paragraph 1(a) of Common Article 3—murder, mutilation, torture, and cruel

[52] The Constitution grants the President great authority—as our Nation's chief organ in foreign affairs and as Commander in Chief—to interpret treaties, particularly treaties regulating wartime operations. Those interpretations are ordinarily entitled to "great weight" by the courts. *See, e.g., Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2685 (2006). Congress, however, determined in the MCA that it was appropriate to affirm that the President's interpretations of the Geneva Conventions are entitled to protection. It is apparent that Congress was reacting to the Supreme Court's decision in *Hamdan*, which adopted an interpretation of the applicability of the Geneva Conventions contrary to that of the President, without taking account of the President's interpretation. *See Hamdan*, 126 S. Ct. at 2795-98; *id.* at 2847 (Thomas, J., dissenting). The MCA therefore reflects a congressional effort to restore the principal role that the President has traditionally played in defining our Nation's international obligations. In this regard, presidential orders under the MCA would not be subject to judicial review. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (holding that presidential action is not subject to judicial review under the Administrative Procedure Act, or any other statute, absent "an express statement by Congress").

treatment. The limitations on the administration, frequency, and intensity of the techniques—in particular, the corrective techniques—ensure that they will not involve physical force that rises to the level of the serious violence prohibited by the executive order.

The executive order would prohibit any interrogation technique or condition of confinement that would constitute the "cruel, inhuman, or degrading treatment or punishment" prohibited by the Detainee Treatment Act and section 6(c) of the Military Commissions Act. Draft Order § 3(b)(i)(D). We have concluded that the six proposed techniques, when used as authorized in the context of this program, comply with the standard in the DTA and the MCA. *See* Part III, *supra*.

To address paragraph 1(c) of Common Article 3 further, the executive order would bar interrogation techniques or conditions of confinement constituting "willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield." Draft Order § 3(b)(i)(E). This provision reinforces crucial features of the interpretation of paragraph 1(c) of Common Article 3 set forth in this opinion: To trigger the paragraph, humiliation and degradation must rise to the level of an outrage, and the term "outrage" looks to the evaluation of a reasonable person that the conduct is beyond the bounds of human decency, taking into consideration the purpose and context of the conduct.[53] As explained above, the six proposed techniques do not constitute "outrages upon personal dignity" under these principles; thus, the techniques also satisfy section 3(b)(i)(E) of the executive order.

Also implementing paragraph 1(c) of Common Article 3, the executive order would prohibit "acts intended to denigrate the religion, religious practices, or religious objects" of the detainees. Draft Order § 3(b)(i)(F). The six techniques proposed by the CIA are not directed at the religion, religious practices, or religious objects of the detainees.

The techniques and conditions of confinement approved in the order may be used only with certain alien detainees believed to possess high value intelligence (*see* Draft Order § 3(b)(ii)), and the program is so limited (*see* Part I.A, *supra*). The CIA program must be conducted pursuant to written policies issued by the Director of the CIA (*see* Draft Order § 3(c)), and the CIA will have such policies in place (*see* Part I.A.1, *supra*). In addition, the executive order would require the Director, based on professional advice, to determine that the techniques are "safe for use with each detainee" (*see* Draft Order at § 3(b)(iii)), and the CIA intends to do so (*see* Parts I.A.3 and I.B, *supra*).

Under the proposed executive order, detainees must "receive the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection

[53] Nor do the techniques involve any sexual or sexually indecent acts, much less those referenced in section 4(b)(i)(E) of the executive order. The techniques also do not involve the use of detainees as human shields.

from extremes of heat and cold, and essential medical care." *See* Draft Order § 3(b)(iv). This requirement is based on the interpretation of Common Article 3's overarching humane treatment requirement set forth above, and we have concluded that the proposed techniques comply with this basic necessities standard. *See* Part IV.B.3, *supra*. Should the President sign the executive order, the six proposed techniques would thereby comply with the authoritative and controlling interpretation of Common Article 3, as the MCA makes clear.

V.

The armed conflict against al Qaeda—an enemy dedicated to carrying out catastrophic attacks on the United States, its citizens, and its allies—is unlike any the United States has confronted. The tactics necessary to defend against this unconventional enemy thus present a series of new questions under the law of armed conflict. The conclusions we have reached herein, however, are as focused as the narrow CIA program we address. Not intended to be used with all detainees or by all U.S. personnel who interrogate captured terrorists, the CIA program would be restricted to the most knowledgeable and dangerous of terrorists and is designed to obtain information crucial to defending the Nation. Common Article 3 permits the CIA to go forward with the proposed interrogation program, and the President may determine that issue conclusively by issuing an executive order to that effect pursuant to his authority under the Constitution and the MCA. As explained above, the proposed executive order accomplishes precisely that end. We also have concluded that the CIA's six proposed interrogation techniques, subject to all of the conditions and safeguards described herein, would comply with the Detainee Treatment Act and the War Crimes Act.

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

Steven G. Bradbury
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