U.S. Department of Justice

Office of Legal Counsel

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

May 30, 2005

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

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

You have asked us to address whether certain "enhanced interrogation techniques" employed by the Central Intelligence Agency ("CIA") in the interrogation of high value al Qaeda detainees are consistent with United States obligations under Article 16 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force for U.S. Nov. 20, 1994) ("CAT"). We conclude that use of these techniques, subject to the CIA's careful screening criteria and limitations and its medical safeguards, is consistent with United States obligations under Article 16.[1]

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

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

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

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

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

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[2] The reservation provides in full:

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

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

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

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

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

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

I.

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

A.

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

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

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

*1.*

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

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

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

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

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

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

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

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

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

KSM, "a mastermind" of the September 11, 2001, attacks, was regarded as "one of al-Qa'ida's most dangerous and resourceful operatives." CIA, *Khalid Shaykh Muhammad* at 1 (Nov. 1, 2002) ("*CIA KSM Biography*"). Prior to his capture, the CIA considered KSM to be one of al Qaeda's "most important operational leaders . . . based on his

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

2.

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

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

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

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

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

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

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

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

*3.*

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

**B.**

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

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

Nevertheless, current CIA threat reporting indicates that, despite substantial setbacks over the last year, al Qaeda continues to pose a grave threat to the United States and its interests. *See* CIA [redacted] You have informed us that the CIA believes that enhanced interrogation techniques remain essential to obtaining vital intelligence necessary to detect and disrupt such emerging threats.

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

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

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

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

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

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

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

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

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

C.

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

***1. Conditioning techniques***

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

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

Dietary manipulation involves substituting a bland, commercial liquid meal for a detainee's normal diet. We understand that its use can increase the effectiveness of other techniques, such as sleep deprivation. As a guideline, the CIA uses a formula for caloric intake that depends on a detainee's body weight and expected level of activity and that ensures that caloric intake will always be set at or above 1,000 kcal/day. *See id.* at 7 & n.10.[8] By comparison, commercial weight-loss programs used within the United States not uncommonly limit intake to 1000 kcal/day regardless of body weight. Detainees are monitored at all times to ensure that they do not lose more than 10% of their starting body weight. *See id.* at 7. The CIA also sets a minimum fluid intake, but a detainee undergoing dietary manipulation may drink as much water as he pleases. *See id.*

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

[8] As we explained in *Techniques*: "The CIA generally follows as a guideline a calorie requirement of 900 kcal/day + 10 kcal/kg/day. This quantity is multiplied by 1.2 for a sedentary activity level or 1.4 for a moderate activity level. Regardless of this formula, the recommended minimum calorie intake is 1500 kcal/day, and in no event is the detainee allowed to receive less than 1000 kcal/day." *Id.* at 7 (footnote omitted). The guideline caloric intake for a detainee who weighs 150 pounds (approximately 68 kilograms) would therefore be nearly 1,900 kcal/day for sedentary activity and would be more than 2,200 kcal/day for moderate activity.

96 hours of sleep deprivation. Generally, a detainee undergoing this technique is shackled in a standing position with his hands in front of his body, which prevents him from falling asleep but also allows him to move around within a two- to three-foot diameter. The detainee's hands are generally positioned below his chin, although they may be raised above the head for a period not to exceed two hours. *See id.* at 11-13 (explaining the procedures at length). As we have previously noted, sleep deprivation itself generally has few negative effects (beyond temporary cognitive impairment and transient hallucinations), though some detainees might experience transient "unpleasant physical sensations from prolonged fatigue, including such symptoms as impairment to coordinated body movement, difficulty with speech, nausea, and blurred vision." *Id.* at 37; *see also id.* 37-38. Subjects deprived of sleep in scientific studies for longer than the 180-hour limit imposed by the CIA generally return to normal neurological functioning with as little as one night of normal sleep. *See id.* at 40. In light of the ongoing and careful medical monitoring undertaken by OMS and the authority and obligation of all members of the interrogation team, and of OMS personnel and other facility staff, to stop the procedure if necessary, this technique is not be expected to result in any detainee experiencing extreme physical distress. *See id.* at 38-39.[9]

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

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

### *2. Corrective techniques*

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

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

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

### *3. Coercive techniques*

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

Walling is performed by placing the detainee against what seems to be a normal wall but is in fact a flexible false wall. *See Techniques* at 8. The interrogator pulls the detainee towards him and then quickly slams the detainee against the false wall. The false wall is designed, and a c-collar or similar device is used, to help avoid whiplash or similar injury. *See id.* The technique is designed to create a loud sound and to shock the detainee without causing significant pain. The CIA regards walling as "one of the most effective interrogation techniques because it wears down the [detainee] physically, heightens uncertainty in the detainee about what the interrogator may do to him, and creates a sense of dread when the [detainee] knows he is about to be walled again." *Background Paper* at 7. A detainee "may be walled one time (one impact with the wall) to make a point or twenty to thirty times consecutively when the interrogator requires a more significant response to a question," and "will be walled multiple times" during a session designed to be intense. *Id.* At no time, however, is the technique employed in such a way that could cause severe physical pain. *See Techniques* at 32 n.38.[11]

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

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

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

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

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

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

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

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

## II.

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

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

### A.

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

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

[13] Article 16(1) provides in full:

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

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

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

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

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

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

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

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

For example, Article 5 provides:

> Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 [requiring each State Party to criminalize all acts of torture] in the following cases:
>
> (a) When the offences are committed in any *territory under its jurisdiction* or on board a ship or aircraft registered in that State;
>
> (b) When the alleged offender is a national of that State;
>
> (c) When the victim is a national of that State if that State considers it appropriate.

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

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

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

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

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

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

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

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

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

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

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

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

B.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

to aliens outside the United States.[21] And because the CIA has informed us that these techniques are not authorized for use against United States persons, or within the United States, they would not, under this view, violate Article 16. Even if the reservation is read only to confirm the territorial limits explicit in Article 16, however, or even if it is read not to bear on this question at all, the program would still not violate Article 16 for the reasons discussed in Part II.A. Accordingly, we need not decide here the precise effect, if any, of the Senate reservation on the geographic scope of U.S. obligations under Article 16.[22]

## III.

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

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

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

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

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

A.

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

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

Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *in* S. Treaty Doc. No. 100-20, at 9 (emphasis added). Because the high value detainees on whom the CIA might use enhanced interrogation techniques have not been convicted of any crime, the substantive requirements of the Eighth Amendment would not be relevant here, even if we assume that Article 16 has application to the CIA's interrogation program.[23]

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

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

century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience.").[24]

**B.**

We must therefore determine whether the CIA interrogation program involves conduct that "shocks the conscience." The Court has indicated that whether government conduct can be said to "shock the conscience" depends primarily on whether the conduct is "arbitrary in the constitutional sense," *Lewis*, 523 U.S. at 846 (internal quotation marks omitted); that is, whether it amounts to the "exercise of power without any reasonable justification in the service of a legitimate governmental objective," *id.* "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level," *id.* at 849, although, in some cases, deliberate indifference to the risk of inflicting such unjustifiable injury might also "shock the conscience," *id.* at 850-51. The Court has also suggested that it is appropriate to consider whether, in light of "traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them," conduct "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 847 n.8.[25]

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

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

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

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

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

*1.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As is clear from these descriptions and the discussion above, the CIA uses enhanced techniques only as necessary to obtain information that it reasonably views as vital to protecting the United States and its interests from further terrorist attacks. The techniques are used only in the interrogation of those who are reasonably believed to be closely associated with al Qaeda and senior enough to have actionable intelligence concerning terrorist threats. Even then, the techniques are used only to the extent reasonably believed to be necessary to obtain otherwise unavailable intelligence. In addition, the techniques are designed to avoid inflicting severe pain or suffering, and no technique will be used if there is reason to believe it will cause significant harm. Indeed, the techniques have been designed to minimize the risk of injury or any suffering that does not further the Government's interest in obtaining actionable intelligence. The program is clearly not intended "to injure in some way unjustifiable by any government interest." *Lewis*, 523 U.S. at 849. Nor can it be said to reflect "deliberate indifference" to a substantial risk of such unjustifiable injury. *Id.* at 851.[28]

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

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

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

*2.*

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

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

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

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

[redacted]

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

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

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

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

*Id.* at 101.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In addition, as we have explained before:

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

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

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

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

C.

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

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

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

independently, the Senate's reservation. But even if this were less clear (indeed, even if it were false), Article 16 itself has no domestic legal effect because the Senate attached a non-self-execution declaration to its resolution of ratification. *See* Cong. Rec. 36,198 (1990) ("the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing"). It is well settled that non-self-executing treaty provisions "can only be enforced pursuant to legislation to carry them into effect." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *see also Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) ("A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, . . . but is carried into execution by the sovereign power of the respective parties to the instrument."). One implication of the fact that Article 16 is non-self-executing is that, with respect to Article 16, "the courts have nothing to do and can give no redress." *Head Money Cases*, 112 U.S. 580, 598 (1884). As one court recently explained in the context of the CAT itself, "Treaties that are not self-executing do not create judicially-enforceable rights unless they are first given effect by implementing legislation." *Auguste v. Ridge*, 395 F.3d 123, 132 n.7 (3d Cir. 2005) (citations omitted). Because (with perhaps one narrow exception[32]) Article 16 has not been legislatively implemented, the interpretation of its substantive standard is unlikely to be subject to judicial inquiry.[33]

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

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

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

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

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

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

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