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DEPARTMENT OF DEFENSE  
JOINT TASK FORCE 170  
GUANTANAMO BAY, CUBA  
APO AE 09380



JTF-J2

11 October 2002

MEMORANDUM FOR Commander, Joint Task Force 170

SUBJECT: Request for Approval of Counter-Resistance Strategies

1. ~~SECRET~~ PROBLEM: The current guidelines for interrogation procedures at GTMO limit the ability of interrogators to counter advanced resistance.

2. ~~SECRET~~ Request approval for use of the following interrogation plan.

a. Category I techniques. During the initial category of interrogation the detainee should be provided a chair and the environment should be generally comfortable. The format of the interrogation is the direct approach. The use of rewards like cookies or cigarettes may be helpful. If the detainee is determined by the interrogator to be uncooperative, the interrogator may use the following techniques.

(1) Yelling at the detainee (not directly in his ear or to the level that it would cause physical pain or hearing problems)

(2) Techniques of deception:

(a) Multiple-interrogator techniques.

(b) Interrogator identity. The interviewer may identify himself as a citizen of a foreign nation or as an interrogator from a country with a reputation for harsh treatment of detainees.

b. Category II techniques. With the permission of the GIC, Interrogation Section, the interrogator may use the following techniques.

(1) The use of stress positions (like standing), for a maximum of four hours.

(2) The use of falsified documents or reports.

(3) Use of the isolation facility for up to 30 days. Request must be made to through the OIC, Interrogation Section, to the Director, Joint Interrogation Group (JIG). Extensions beyond the initial 30 days must be approved by the Commanding General. For selected

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detainees, the OIC, Interrogation Section, will approve all contacts with the detainee, to include medical visits of a non-emergent nature.

(4) Interrogating the detainee in an environment other than the standard interrogation booth:

(5) ~~Deprivation of light and auditory stimuli~~

(6) The detainee may also have a hood placed over his head during transportation and questioning. The hood should not restrict breathing in any way and the detainee should be under direct observation when hooded.

(7) The use of 20-hour interrogations:

(8) ~~Removal of all comfort items (including religious items):~~

(9) ~~Switching the detainee from hot rations to MREs.~~

(10) ~~Removal of clothing~~

(11) ~~Forced grooming (shaving of facial hair etc...)~~

(12) ~~Using detainees individual phobias (such as fear of dogs) to induce stress.~~

c. Category III techniques. Techniques in this category may be used only by submitting a request through the Director, JIG, for approval by the Commanding General with appropriate legal review and information to Commander, USSOUTHCOM. These techniques are required for a very small percentage of the most uncooperative detainees (less than 3%). The following techniques and other aversive techniques, such as those used in U.S. military interrogation resistance training or by other U.S. government agencies, may be utilized in a carefully coordinated manner to help interrogate exceptionally resistant detainees. Any or these techniques that require more than light grabbing, poking, or pushing, will be administered only by individuals specifically trained in their safe application.

(1) The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family.

(2) Exposure to cold weather or water (with appropriate medical monitoring).

(3) Use of a wet towel and dripping water to induce the misperception of suffocation.

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(4) Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.

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3. (U) The POC for this memorandum is the undersigned at 13476.

  
GERALD PHIFER  
LTC, USA  
Director, J2

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

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

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

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above, the President has authorized the use of military force with the support of Congress.<sup>24</sup>

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

d. **Military Law Enforcement Actions**

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

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

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e. **Superior Orders**

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

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

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

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

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

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

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

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

<sup>25</sup> (U) See Section 6.1.4, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (NWP 1-14M 1997)

<sup>26</sup> *Id.*

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

<sup>28</sup> *Id.*, at §6.2.5.5.1.

<sup>29</sup> See U.S. Naval War College, International Law Documents, at 1944-45, 255 (1946).

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

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

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

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

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

*Inference of lawfulness.* An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate.<sup>31</sup>

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

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

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

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

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

#### B. Federal Civil Statutes

##### 1. 28 U.S.C. §1350

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

##### 2. Torture Victims Protection Act (TVPA)

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

<sup>32</sup> (U) 28 CFR § 50.15 (a)(4)

<sup>33</sup> (U) 28 U.S.C. §1350, the Alien Tort Claim Act (ATCA).

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

<sup>35</sup> (U) *Al Odah v. United States*, (D.D.C., 2002)

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

<sup>37</sup> (U) Pub. L. No. 102-256, 106 Stat. 73, 28 U.S.C. § 1350 (note).

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

### C. Applicability of the United States Constitution

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

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

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

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

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

<sup>38</sup> (U) The definition of torture used in PL 102-256 is: "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to lawful sanctions) whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind." This definition is substantially similar (with no meaningful difference) to the definition in the Torture Statute. The definition of mental pain and suffering is the same as in the Torture Statute.

<sup>39</sup> (U) *Eisentrager* at 764.

<sup>40</sup> (U) *Al Odah v. United States*, (D.D.C., 2002).

<sup>41</sup> (U) Articles of ratification, 21 Oct 1994: "I. The Senate's advice and consent is subject to the following reservations: (1) That the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman, or degrading treatment or punishment', only insofar as the term 'cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." Available at the UN documents site: [http://193.194.138.190/html/menu3/treaty12\\_asp.htm](http://193.194.138.190/html/menu3/treaty12_asp.htm).

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

a. Eighth Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>44</sup> (U) *Hudson v. McMillian*, 503 U.S. 1, 9 (1992)

<sup>45</sup> (U) *Whitley* at 321.

<sup>46</sup> (U) *Whitley v. Albers*, 475 U.S. (1986).

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

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

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

b. Fifth Amendment and Fourteenth Amendment<sup>48</sup>

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

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

<sup>48</sup> (U) Because the Due Process considerations under the 5th and 14th amendments are the same for our purposes, this analysis considers them together.

<sup>49</sup> (U) *Johnson v. Eisenrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946).

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

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

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

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

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

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

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

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

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

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

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

#### D. Jurisdiction of Federal Courts

##### 1. Jurisdiction to Consider Constitutional Claims

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

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

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

<sup>51</sup> (U) *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

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

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

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

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

## 2. Other Bases for Federal Jurisdiction

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

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

## 3. The Military Extraterritorial Jurisdiction Act

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

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

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

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## E. The Uniform Code of Military Justice

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

### 1. Offenses

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

#### a. Cruelty, Oppression or Maltreatment, Art 93

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

#### b. Reckless Endangerment, Art 134

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

#### c. Assault, Art 128

(U) This article encompasses the following offenses:

<sup>56</sup> (U) Article 2 UCMJ; Rules for Courts-Martial, Rule 202, and Discussion.

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

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

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

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

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

d. **Involuntary Manslaughter, Art 119**

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

e. **Unpremeditated Murder, Art 118**

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

f. **Disobedience of Orders, Art 92**

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

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

g. Dereliction of Duty, Art 92

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

h. Maiming, Art 124

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

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

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

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

a. Self-Defense

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

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

**b. Defense of Another**

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

**c. Accident**

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

**d. Mistake of Fact**

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

**e. Coercion or duress**

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

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

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

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

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

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

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

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

g. **Necessity**

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

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

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

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

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

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#### IV. Considerations Affecting Policy

##### A. Historical Role of U.S. Armed Forces

###### 1. Background

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

###### 2. Interrogation Historical Overview

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

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

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

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

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

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

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

### 3. Current Doctrine

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

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

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

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

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

## B. Presidential and Secretary of Defense Directives

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

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

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

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

~~(S)~~ <sup>U</sup> The President has directed that "[a]s a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."<sup>60</sup>

### C. DOD-Specific Policy Considerations

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

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

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

<sup>59</sup> ~~(S//NF)~~ Department of Defense Memorandum - Status of Taliban and Al Qaida, Secretary of Defense, January 19, 2002.

<sup>60</sup> ~~(S)~~ White House Memorandum - Humane Treatment of al Qaida and Taliban Detainees, President of the United States, February 7, 2002.

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

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

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

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

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

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

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

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

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<sup>U</sup>  
~~(S//NF)~~ All interrogations involving exceptional methods approved by the appropriate authority must be applied in the context of a comprehensive plan for their use, singly or in combination with other techniques. At a minimum, the plan should include:

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

<sup>U</sup>  
~~(S//NF)~~ Implementation of approved exceptional techniques must be approved at the command authority level specified for the particular method.

#### D. Potential Effects on Prosecutions

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

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

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

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

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

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

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

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

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

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## E. International Considerations That May Affect Policy Determinations

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

### 1. Geneva Conventions

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

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

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

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

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

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## 2. Convention Against Torture

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

## 3. Customary International Law/Views of Other Nations

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

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

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

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

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

<sup>66</sup> (U) The Restatement (Third) of the Foreign Relations Law of the U.S., § 102(2).

<sup>67</sup> (U) See, e.g., McDougal, Lasswell, and Chen, *Human Rights and World Public Order* (1980).

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

(U) The American Convention on Human Rights<sup>58</sup> was signed by the United States in 1977 but the United States never ratified it. It states in Article 5 that "no one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment," and that "all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

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

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

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

<sup>58</sup> (U) 1144 U.N.T.S. 123 (Nov. 22, 1969).

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

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

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

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

#### 4. International Criminal Court

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

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

#### V. Techniques

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

<sup>72</sup> (U) Other nations, which, unlike the United States, have accepted Article 75, may argue that since the Taliban and al-Qaida detainees are not entitled to POW status under the Geneva Conventions, Article 75 should be applicable as customary international law, notwithstanding their status as unlawful combatants.

<sup>73</sup> (U) Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998).

<sup>74</sup> (U) Parties to the Rome Statute are obligated to surrender individuals at the request of the ICC for prosecution, unless such surrender would be inconsistent with the requested state's obligations "under an international agreement pursuant to which the consent of the sending state is required to surrender a person of that state to the ICC." (Rome Statute, Article 98 (2)). While the U.S. is not a party to the Rome Statute, Article 98 agreements would provide an exception to an ICC party's general obligation to surrender persons.

<sup>75</sup> (U) Article 25(3) of the Rome Statute provides individual criminal responsibility for a person who, *inter alia*, "orders, solicits, or induces" or otherwise facilitates through aiding, abetting, or assisting in the commission of a crime.

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

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

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

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

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

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

<sup>U</sup>  
1. (~~SECRET~~) Direct: Asking straightforward questions.

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2. <sup>U</sup>(~~S/NF~~) **Incentive/Removal of Incentive:** Providing a reward or removing a privilege, above and beyond those that are required by the Geneva Convention, from detainees, (Privileges above and beyond POW-required privileges).
3. <sup>U</sup>(~~S/NF~~) **Emotional Love:** Playing on the love a detainee has for an individual or group.
4. <sup>U</sup>(~~S/NF~~) **Emotional Hate:** Playing on the hatred a detainee has for an individual or group.
5. <sup>U</sup>(~~S/NF~~) **Fear Up Harsh:** Significantly increasing the fear level in a detainee.
6. <sup>U</sup>(~~S/NF~~) **Fear Up Mild:** Moderately increasing the fear level in a detainee.
7. <sup>U</sup>(~~S/NF~~) **Reduced Fear:** Reducing the fear level in a detainee.
8. <sup>U</sup>(~~S/NF~~) **Pride and Ego Up:** Boosting the ego of a detainee.
9. <sup>U</sup>(~~S/NF~~) **Pride and Ego Down:** Attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW.
10. <sup>U</sup>(~~S/NF~~) **Futility:** Invoking the feeling of futility of a detainee.
11. <sup>U</sup>(~~S/NF~~) **We Know All:** Convincing the detainee that the interrogator knows the answer to questions he asks the detainee.
12. <sup>U</sup>(~~S/NF~~) **Establish Your Identity:** Convincing the detainee that the interrogator has mistaken the detainee for someone else.
13. <sup>U</sup>(~~S/NF~~) **Repetition Approach:** Continuously repeating the same question to the detainee within interrogation periods of normal duration.
14. <sup>U</sup>(~~S/NF~~) **File and Dossier:** Convincing detainee that the interrogator has a damning and inaccurate file, which must be fixed.
15. <sup>U</sup>(~~S/NF~~) **Mutt and Jeff:** A team consisting of a friendly and harsh interrogator. The harsh interrogator might employ the Pride and Ego Down technique.
16. <sup>U</sup>(~~S/NF~~) **Rapid Fire:** Questioning in rapid succession without allowing detainee to answer.
17. <sup>U</sup>(~~S/NF~~) **Silence:** Staring at the detainee to encourage discomfort.
18. <sup>U</sup>(~~S/NF~~) **Change of Scenery Up:** Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## VI. Evaluation of Useful Techniques

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

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

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

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

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

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

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

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

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

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

<sup>U</sup>  
~~(S/NF)~~ Under the Torture Convention, no person may be subjected to torture. Torture is defined as an act specifically *intended* to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to *prolonged* mental harm caused by or resulting from (1) the *intentional* infliction or *threatened* infliction of *severe physical pain or suffering*; (2) the administration or application, or threatened application, of mind altering substances or other procedures *calculated* to disrupt profoundly the senses or personality; (3) the threat of imminent death; or (4) the threat that another person will *imminently* be subjected to death, severe physical pain or suffering, or the administration or application, or threatened application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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## VIII. Recommendations

(U) We recommend:

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

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

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

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

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

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

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

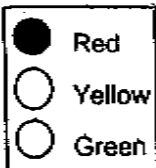
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U  
(S/NF) 8. DOD establish specific understandings with other agencies using DOD detailed interrogators regarding the permissible scope of the DOD interrogator's activities.

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Reason: 1.5(C)  
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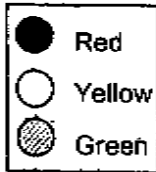
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War on Terrorism  
 Detainee Interrogation Working Group  
 Summary of Analysis and Recommendations  
 Pertaining to Unlawful Combatants Outside of the U.S.<sup>1</sup>

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

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

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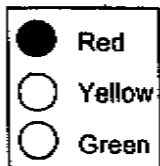
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 War on Terrorism  
 Detainee Interrogation Working Group  
 Summary of Analysis and Recommendations  
 Pertaining to Unlawful Combatants Outside of the U.S.<sup>1</sup>

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

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

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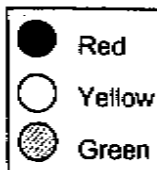
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Proposed Interrogation Techniques <sup>2</sup> (see attached description/limitations)	Utility	Law IAW U.S. Interpretation		
	Contribution to Intelligence Collection (Useful)	Torture Convention [Torture]	Torture Convention [Cruel, Inhuman Degrading]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

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards.  
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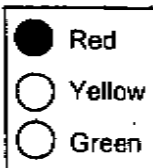
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Proposed Interrogation Techniques <sup>2</sup> (see attached description/limitations)	Policy							Recommendation
	Consistency with Historical U.S. Forces Interrogation Role	Consistency with Prior U.S. Public Statements	Consistency with Major Partner Nation Views	Effect on Captured U.S. Forces	Potential Adverse Effect for Participants/ Supervisors/COC	Potential Effect on Detainee Prosecutions	Other	Re Unlawful Combatants
13. Repetition Approach	Green	Green	Green	Green	Green	Green	Yellow	Green
14. File and Dossier	Green	Green	Green	Green	Green	Green	Yellow	Green
15. Mutt and Jeff	Green	Green	Yellow <sup>6</sup>	Green	Green	Green	Yellow	Green
16. Rapid Fire	Green	Green	Green	Green	Green	Green	Yellow	Green
17. Silence	Green	Green	Green	Green	Green	Green	Yellow	Green
18. Change of Scenery Up	Green	Green	Green	Green	Green	Green	Yellow	Green
19. Change of Scenery Down	Green	Green	Green	Green	Green	Green	Yellow	Green
20. Hooding	Green	Green	Green	Green	Green	Green	Yellow	Green
21. Mild Physical Contact	Green	Green	Green	Green <sup>7</sup>	Green	Green	Yellow	Green
22. Dietary Manipulation	Green	Green	Green	Green	Green	Green	Yellow	Green
23. Environmental Manipulation	Green	Green	Green <sup>8</sup>	Green	Green	Green	Yellow	Green
24. Sleep Adjustment	Green	Green	Green	Green	Green	Green <sup>9</sup>	Yellow	Green
25. False Flag	Green	Green	Green	Green	Green	Green	Yellow	Green

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards.  
Yellow indicates area of consideration does not preclude use but there are problematic aspects that cannot be eliminated by procedural safeguards (see footnote).  
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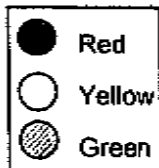
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Proposed Interrogation Techniques <sup>2</sup> (see attached description/limitations)	Utility	Law IAW U.S. Interpretation		
	Contribution to Intelligence Collection (Useful)	Torture Convention (Torture)	Torture Convention [Cruel, Inhuman Degrading]	U.S. Domestic Law
26. Threaten to transfer to a 3 <sup>rd</sup> country	Medium			
27. Isolation	High	11	12	13
28. Use of Prolonged interrogations	High <sup>17</sup>			
29. Forced Grooming	High		19	20
30. Prolonged Standing	High			
31. Sleep Deprivation	High			
32. Physical Training	High			
33. Face or Stomach Slap	High			
34. Removal of Clothing	High		34	35
35. Increasing Anxiety by Use of Aversions	High		38	39

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards.  
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 Red indicates major issue in area of consideration that cannot be eliminated.

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

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

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## General Comments on Techniques Chart

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

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

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

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

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

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards.  
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Red indicates major issue in area of consideration that cannot be eliminated.

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1. These recommendations assume that procedures and safeguards substantially similar to those set forth in the "Policy" Section of the Legal and Policy Analysis are followed. **The analysis relates to each individual technique; use of techniques in combination could significantly affect the legality and wisdom of their application.**
2. Techniques 1-19, 22-26, 30 and 35, applied singly, are purely verbal and/or involve no physical contact that could produce pain or harm; no threat of pain or harm.
3. *As a matter of policy, for countries that assert that POW protections should apply to detainees:* Other nations may consider that provision and retention of religious items (e.g., the Koran) are protected under international law (see, Geneva III, Article 34).
4. May affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).
5. *For countries that assert that POW protections apply to detainees:* Article 17 of Geneva III provides, "Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."
6. *As a matter of policy, for countries that assert that POW protections should apply to detainees:* Would be inconsistent with Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation.
7. *As a matter of policy, for countries that assert that POW protections should apply to detainees:* Possible that other nations would disregard "mild" aspect and use as justification for abuse of U.S. POWs.
8. International case law suggests that technique might in some circumstances be viewed by other countries as inhumane.
9. May affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).
10. May significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

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**Footnotes (cont'd)**

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11. The use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command.
12. To avoid implementation that could transgress, the use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command.
13. To avoid implementation that could transgress, the use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command.
14. Not known to have been generally used for interrogation purposes for longer than 30 days.
15. *As a matter of policy, for countries that assert that POW protections should apply to detainees:* Would be inconsistent with the requirements of Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation; Article 14 which provides that POWs are entitled to respect for their person; Article 34 which prohibits coercion (see commentary to paragraph 4), and Article 126 which ensures access and basic standards of treatment.
16. May affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).
17. Utility is "high" for the first four to five days, "medium" for the following four to six days, and "low" thereafter.
18. May significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).
19. Where there are religious or cultural sensitivities, this technique could raise issue of "degrading" if not applied in accordance with general limitations.
20. At practical level, may raise issues whether excessive force was used.

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**Footnotes (cont'd)**

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21. This technique has not been used historically by U.S. forces. As such, no color code was assigned.
22. This technique could be viewed by major partner nations as degrading in some circumstances.
23. May affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).
24. As a matter of policy, for consideration of other nations' views, the Committee against Torture, established under Article 17 of the Convention Against Torture (CAT), has interpreted "sleep deprivation for prolonged periods" to be a violation of both Article 16 of the CAT as cruel, inhuman, or degrading treatment as well as constituting torture under Article 1 of the CAT. Concluding Observations of the Committee against Torture, U.N. Doc. A/52/44, paragraphs 253-260. See also, Judgment on the Interrogation Methods Applied by the GSS, Nos HC 5100/94, HC 4054/95, HC 5188/96, HC 7563/97, HC 7628/97, HC 1043/99 (Sup Ct of Israel, sitting as the High Court of Justice, Sep 6, 1999). Finally, the European Court of Human Rights (ECHR) has held that sleep deprivation, in conjunction with four other problematic techniques (wall standing, hooding, subjection to noise, and deprivation of food and drink), did constitute "inhuman and degrading treatment". Ireland v. United Kingdom, 25 Eur. Ct. H.R. (Ser. A) (1978).
25. May significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).
26. Knowledge of this technique may have a significant adverse effect on public opinion.
27. May affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).
28. Technique used historically until the Vietnam war, however not officially sanctioned.
29. As a matter of policy, for consideration of other nations' views, the Committee against Torture has generally denounced the use of "moderate physical pressure" as a permissible interrogation technique. See also, Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (Ser. A) (1978) (spanking of student with 3 lashes of a birch rod violated European Convention on Human Rights). See also, Article 5 of the American Convention on Human Rights prohibits not only "torture" and "cruel, inhuman or degrading punishment or treatment" but it also provides that: "Every person has the right to have his physical, mental, and moral integrity respected."

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**Footnotes**

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30. As a matter of policy, other nations could interpret this as condoning assault on the detainee and encourage the use against U.S. POWs.
31. Potential to be subject to charge of assault in international jurisdictions.
32. May significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).
33. Knowledge of this technique may have significant adverse effect on public opinion.
34. Depending on application of technique, could be construed as degrading.
35. At practical level, may raise issues whether excessive force was used as force may be required to remove clothing.
36. Other nations may use as excuse to apply to U.S. POWs.
37. Knowledge of this technique may have a significant adverse effect on public opinion.
38. Legal exposure would be dependant on specific technique employed. Depending on technique used and subject response, potential exists that technique could be viewed as violating 5<sup>th</sup>/8<sup>th</sup>/14<sup>th</sup> Amendment standards, and therefore violate U.S. interpretation of Torture Convention.
39. Legal exposure would be dependant on specific technique employed. Depending on technique used and subject response, potential exists that technique could be viewed as violating 5<sup>th</sup>/8<sup>th</sup>/14<sup>th</sup> Amendment standards, and therefore violate U.S. interpretation of Torture Convention.
40. Could provide basis for other nations to justify use of more aggravated mental techniques on U.S. POWs.
41. May significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

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## Description of Interrogation Techniques

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

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## Description of Interrogation Techniques (cont'd)

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16. **Rapid Fire:** Questioning in rapid succession without allowing detainee to answer.
17. **Silence:** Staring at the detainee to encourage discomfort.
18. **Change of Scenery Up:** Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse).
19. **Change of Scenery Down:** Removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality.
20. **Hooding:** This technique is questioning the detainee with a blindfold in place. For interrogation purposes, the blindfold is not on other than during interrogation.
21. **Mild Physical Contact:** Lightly touching a detainee or lightly poking the detainee in a completely non-injurious manner. This also includes softly grabbing of shoulders to get the detainee's attention or to comfort the detainee.
22. **Dietary Manipulation:** Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water, e.g., hot rations to MREs.
23. **Environmental Manipulation:** Altering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times.
24. **Sleep Adjustment:** Adjusting the sleeping times of the detainee (e.g., reversing sleep cycles from night to day.) This technique is NOT sleep deprivation.
25. **False Flag:** Convincing the detainee that individuals from a country other than the United States are interrogating him.
26. **Threat of Transfer:** Threatening to transfer the subject to a 3rd country that subject is likely to fear would subject him to torture or death. (The threat would not be acted upon, nor would the threat include any information beyond the naming of the receiving country.)

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## Description of Interrogation Techniques (cont'd)

27. **Isolation:** Isolating the detainee from other detainees while still complying with basic standards of treatment.
28. **Use of Prolonged Interrogations:** The continued use of a series of approaches that extend over a long period of time (e.g., 20 hours per day per interrogation).
29. **Forced Grooming:** Forcing a detainee to shave hair or beard. (Force applied with intention to avoid injury. Would not use force that would cause serious injury.)
30. **Prolonged Standing:** Lengthy standing in a "normal" position (non-stress). This has been successful, but should never make the detainee exhausted to the point of weakness or collapse. Not enforced by physical restraints. Not to exceed four hours in a 24-hour period.
31. **Sleep Deprivation:** Keeping the detainee awake for an extended period of time. (Allowing individual to rest briefly and then awakening him, repeatedly.) Not to exceed 4 days in succession.
32. **Physical Training:** Requiring detainees to exercise (perform ordinary physical exercises actions) (e.g., running, jumping jacks); not to exceed 15 minutes in a two hour period; not more than two cycles per 24 hour period. Assists in generating compliance and fatiguing the detainees. No enforced compliance.
33. **Face slap/ Stomach slap:** A quick glancing slap to the fleshy part of the cheek or stomach. These techniques are used strictly as shock measures and do not cause pain or injury. They are only effective if used once or twice together. After the second time on a detainee, it will lose the shock effect. Limited to two slaps per application; no more than two applications per interrogation.
34. **Removal of Clothing:** Potential removal of all clothing; removal to be done by military police if not agreed to by the subject. Creating a feeling of helplessness and dependence. This technique must be monitored to ensure the environmental conditions are such that this technique does not injure the detainee.
35. **Increasing Anxiety by Use of Aversions:** Introducing factors that of themselves create anxiety but do not create terror or mental trauma (e.g., simple presence of dog without directly threatening action). This technique requires the commander to develop specific and detailed safeguards to insure detainee's safety.