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DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09360

JTF 170-CG

11 October 2002

MEMORANDUM FOR Commander, United States Southern Command, 3511 NW 91st Avenue, Miami, Florida 33172-1217

SUBJECT: Counter-Resistance Strategies

1. Request that you approve the interrogation techniques delineated in the enclosed Counter-Resistance Strategies memorandum. I have reviewed this memorandum and the legal review provided to me by the JTF-170 Staff Judge Advocate and concur with the legal analysis provided.

2. I am fully aware of the techniques currently employed to gain valuable intelligence in support of the Global War on Terrorism. Although these techniques have resulted in significant exploitable intelligence, the same methods have become less effective over time. I believe the methods and techniques delineated in the accompanying J-2 memorandum will enhance our efforts to extract additional information. Based on the analysis provided by the JTF-170 SJA, I have concluded that these techniques do not violate U.S. or international laws.

3. My point of contact for this issue is LTC Jerald Phifer at DSN 660-3476.

MICHAEL E. DUNLAVEY
Major General, USA
Commanding

2 Encls
1. JTF 170-J2 Memo, 11 Oct 02
2. JTF 170-SJA Memo, 11 Oct 02

DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09360

JTF 170-SJA

11 October 2002

MEMORANDUM FOR Commander, Joint Task Force 170

SUBJ: Legal Review of Aggressive Interrogation Techniques

1. I have reviewed the memorandum on Counter-Resistance Strategies, dated 11 Oct 02, and agree that the proposed strategies do not violate applicable federal law. Attached is a more detailed legal analysis that addresses the proposal.

2. I recommend that interrogators be properly trained in the use of the approved methods of interrogation, and that interrogations involving category II and III methods undergo a legal review prior to their commencement.

3. This matter is forwarded to you for your recommendation and action.

DIANE E. BEAVER
LTC, USA
Staff Judge Advocate

2 Encls
1. JTF 170-J2 Memo, 11 Oct 02
2. JTF 170-SJA Memo, 11 Oct 02

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DEPARTMENT OF DEFENSE
UNITED STATES SOUTHERN COMMAND
OFFICE OF THE COMMANDER
3511 NW 91ST AVENUE
MIAMI, FL 33172-1217

REPLY TO ATTENTION OF

SCCDR

25 October 2002

MEMORANDUM FOR Chairman of the Joint Chiefs of Staff, Washington, DC 20318-9999

SUBJECT: Counter-Resistance Techniques

1. The activities of Joint Task Force 170 have yielded critical intelligence support for forces in combat, combatant commanders, and other intelligence/law enforcement entities prosecuting the War on Terrorism. However, despite our best efforts, some detainees have tenaciously resisted our current interrogation methods. Our respective staffs, the Office of the Secretary of Defense, and Joint Task Force 170 have been trying to identify counter-resistant techniques that we can lawfully employ.

2. I am forwarding Joint Task Force 170's proposed counter-resistance techniques. I believe the first two categories of techniques are legal and humane. I am uncertain whether all the techniques in the third category are legal under US law, given the absence of judicial interpretation of the US torture statute. I am particularly troubled by the use of implied or expressed threats of death of the detainee or his family. However, I desire to have as many options as possible at my disposal and therefore request that Department of Defense and Department of Justice lawyers review the third category of techniques.

3. As part of any review of Joint Task Force 170's proposed strategy, I welcome any suggested interrogation methods that others may propose. I believe we should provide our interrogators with as many legally permissible tools as possible.

4. Although I am cognizant of the important policy ramifications of some of these proposed techniques, I firmly believe that we must quickly provide Joint Task Force 170 counter-resistance techniques to maximize the value of our intelligence collection mission.

James T. Hill
General, US Army
Commander

Encls

1. JTF 170 CDR Memo dtd 11 October, 2002
2. JTF 170 SJA Memo dtd 11 October, 2002
3. JTF 170 J-2 Memo dtd 11 October, 2002

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C

Office of the Attorney General
Washington, D. C. 20530

February 1, 2002

The President
The White House
Washington, DC

Dear Mr. President:

With your permission, I would like to comment on the National Security Council's discussion concerning the status of Taliban detainees. It is my understanding that the determination that al Qaeda and Taliban detainees are not prisoners of war remains firm. However, reconsideration is being given to whether the Geneva Convention III on prisoners of war applies to the conflict in Afghanistan.

There are two basic theories supporting the conclusion that Taliban combatants are not legally entitled to Geneva Convention protections as prisoners of war:

1. During relevant times of the combat, Afghanistan was a failed state. As such it was not a party to the treaty, and the treaty's protections do not apply;

2. During relevant times, Afghanistan *was* a party to the treaty, but Taliban combatants are not entitled to Geneva Convention III prisoner of war status because they acted as unlawful combatants.

If a determination is made that Afghanistan was a failed state (Option 1 above) and not a party to the treaty, various legal risks of liability, litigation, and criminal prosecution are minimized. This is a result of the Supreme Court's opinion in *Clark v. Allen* providing that when a President determines that a treaty does not apply, his determination is fully discretionary and will not be reviewed by the federal courts.

Thus, a Presidential determination against treaty applicability would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees. The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States.

In contrast, if a determination is made under Option 2 that the Geneva Convention applies but the Taliban are interpreted to be unlawful combatants not subject to the treaty's protections, *Clark v. Allen* does not accord American officials the same protection from legal consequences. In cases of Presidential interpretation of treaties which are confessed to apply, courts occasionally refuse to defer to Presidential interpretation. *Perkins v. Elg* is an example of such a case. If a

court chose to review for itself the facts underlying a Presidential interpretation that detainees were unlawful combatants, it could involve substantial criminal liability for involved U. S. officials.

We expect substantial and ongoing legal challenges to follow the Presidential resolution of these issues. These challenges will be resolved more quickly and easily if they are foreclosed from judicial review under the *Clark* case by a Presidential determination that the Geneva Convention III on prisoners of war does not apply based on the failed state theory outlined as Option 1 above.

In sum, Option 1, a determination that the Geneva Convention does not apply, will provide the United States with the highest level of legal certainty available under American law.

It may be argued that adopting Option 1 would encourage other states to allege that U.S. forces are ineligible for Geneva Convention III protections in future conflicts. From my perspective, it would be far more difficult for a nation to argue falsely that America was a "failed state" than to argue falsely that American forces had, in some way, forfeited their right to protections by becoming unlawful combatants. In fact, the North Vietnamese did exactly that to justify mistreatment of our troops in Vietnam. Therefore, it is my view that Option 2, a determination that the Geneva Convention III applies to the conflict in Afghanistan and that Taliban combatants are not protected because they were unlawful, could well expose our personnel to a greater risk of being treated improperly in the event of detention by a foreign power.

Option 1 is a legal option. It does not foreclose policy and operational considerations regarding actual treatment of Taliban detainees. Option 2, as described above, is also a legal option, but its legal implications carry higher risk of liability, criminal prosecution, and judicially-imposed conditions of detainment -- including mandated release of a detainee.

Clearly, considerations beyond the legal ones mentioned in this letter will shape and perhaps control ultimate decision making in the best interests of the United States of America.

Sincerely,

John Ashcroft
Attorney General

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6 February 2002

INFORMATION PAPER

Subject: Background Information on Taliban Forces

1. Purpose. To provide information on the organization/command structure, uniforms and weapons of Taliban forces.

2. Key Points.

- Organization/Command Structure
  - The Taliban never claimed to be the armed forces of Afghanistan.
  - Taliban armed groups regularly referred to themselves as a religious movement. The "Taliban" is better conceived of as a militia. As a militia, they did not fight for their country; they fought for their tribe or group.
  - Even as a militia, they were never organized in military units as we understand them. They are best conceived of as loosely-structured groups who fought for their own local and personal interests.
  - Taliban "commanders" were similar to feudal lords. Areas under "Taliban control" were characterized by a pre-modern governance based on Islamic law.
  - There was no permanent, centralized communications infrastructure as would be expected in a military organization.
  - Al Qaida fighters formed the core of some Taliban groups. After 7 Oct, the al Qaida/Taliban distinction became even more blurred when al Qaida played the leading role in organizing defenses in certain areas of the country. Al Qaida forces were generally considered to be more disciplined, better trained and more professional than the Taliban militia.
  - The Taliban militia was not structured as a military unit. They often recruited members from other militias through defections and bribery. They would maintain forces through threats of violence.
- Uniforms and Insignia :
  - Taliban militia wore no distinctive signs, insignia, symbols or uniforms. Militia members fought in the same clothes they wore doing any other daily function.

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- Some have stated that Taliban militia wore "black turbans." As a factual matter, this may have been true, but there is no indication these were intended to be an identifying feature.

- The closest analog to an insignia is the fact that some tribes carried a tribal flag. However, there is no indication individual fighters distinguished themselves as combatants.

- Carrying of Arms:

  - Most males in Afghanistan carry arms openly. Taliban made no attempt to distinguish themselves from other individuals carrying arms.

- Compliance with the Law of War:

  - The Taliban has never claimed to be bound by the Geneva Conventions. They did not recognize or demonstrate any awareness of relevant Hague or Geneva norms regarding the laws and customs of armed conflict.

  - Taliban militias followed Sharia law (Islamic law). In this respect, prisoners who had stolen might receive summary amputations of a limb.

  - Taliban militias made no attempt to distinguish between combatants and non-combatants when fighting. They killed for racial or religious purposes.

  - There are widespread reports of massacres of civilians, rape, pillage and other atrocities.

- As a matter of convention, US intelligence used the terms "corps" and "corps commanders" to describe personnel assigned militia responsibilities. These terms were not used by the Taliban.

Prepared by: L. E. Jacoby, RADM, U.S. Navy, J-2, 695-3764

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E

U.S. Department of Justice

Office of Legal Counsel

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

February 7, 2002

Memorandum for Alberto R. Gonzales
Counsel to the President

Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949

You have asked for our Office's views concerning the status of members of the Taliban militia under Article 4 of the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War ("GPW"). Assuming the accuracy of various facts provided to us by the Department of Defense ("DoD"), we conclude that the President has reasonable factual grounds to determine that no members of the Taliban militia are entitled to prisoner of war ("POW") status under GPW. First, we explain that the Taliban militia cannot meet the requirements of Article 4(A)(2), because it fails to satisfy at least three of the four conditions of lawful combat articulated in Article 1 of the Annex to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land ("Hague Convention"), which are expressly incorporated into Article 4(A)(2). Second, we note that neither Article 4(A)(1) nor Article 4(A)(3) apply to militia, and that the four conditions of lawful combat contained in the Hague Convention also govern Article 4(A)(1) and (3) determinations in any case. Finally, we explain why there is no need to convene a tribunal under Article 5 to determine the status of the Taliban detainees.

I.

Article 4(A) of GPW defines the types of persons who, once they have fallen under the control of the enemy, are entitled to the legal status of POWs. The first three categories are the only ones relevant to the Taliban. Under Article 4(A)(1), individuals who are "members of the armed forces of a Party to the conflict," are entitled to POW status upon capture. Article 4(A)(3) includes as POWs members of "regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."

Article 4(A)(2) includes as POWs members of "other militias" and "volunteer corps," including "organized resistance movements" that belong to a Party to the conflict. In addition, members of militias and volunteer corps must "fulfill" four conditions: (a) "being commanded by a person responsible for his subordinates"; (b) "having a fixed distinctive sign recognizable at a distance"; (c) "carrying arms openly"; and (d) "conducting their operations in accordance with the laws and customs of war." Those four conditions reflect those required in the 1907 Hague Convention IV. *See Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* 49 (Red Cross 1952) ("Red Cross Commentary") ("during the 1949 Diplomatic

Conference . . . there was unanimous agreement that the categories of persons to whom the Convention is applicable must be defined, in harmony with the Hague Regulations").

Should "any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy," GPW Article 5 requires that these individuals "enjoy the protections of" the Convention until a tribunal has determined their status.

Thus, in deciding whether members of the Taliban militia qualify for POW status, the President must determine whether they fall within any of these three categories. Under Article II of the Constitution, the President possesses the power to interpret treaties on behalf of the Nation. Memorandum for John Bellinger, III, Senior Associate Counsel and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001). This includes, of course, the power to apply treaties to the facts of a given situation. Thus, the President may interpret GPW, in light of the known facts concerning the operation of Taliban forces during the Afghanistan conflict, to find that all of the Taliban forces do not fall within the legal definition of POW. A presidential determination of this nature would eliminate any legal "doubt" as to the prisoners' status, as a matter of domestic law, and would therefore obviate the need for article 5 tribunals.

We believe that, based on the facts provided by the Department of Defense, see Rear Admiral L.E. Jacoby, U.S. Navy, J-2, *Information Paper, Subject: Background Information on Taliban Forces* (Feb. 6, 2002), the President has reasonable grounds to conclude that the Taliban, as a whole, is not legally entitled to POW status under Articles 4(A)(1) through (3).

II.

As the Taliban have described themselves as a militia, rather than the armed forces of Afghanistan, we begin with GPW's requirements for militia and volunteer corps under Article 4(A)(2). Based on the facts presented to us by DoD, we believe that the President has the factual basis on which to conclude that the Taliban militia, as a group, fails to meet three of the four GPW requirements, and hence are not legally entitled to POW status.

First, there is no organized command structure whereby members of the Taliban militia report to a military commander who takes responsibility for the actions of his subordinates. The Taliban lacks a permanent, centralized communications infrastructure. Periodically, individuals declared themselves to be "commanders" and organized groups of armed men, but these "commanders" were more akin to feudal lords than military officers. According to DoD, the Taliban militia functioned more as many different armed groups that fought for their own tribal, local, or personal interests.

Moreover, when the armed groups organized, the core of the organization was often al Qaeda, a multinational terrorist organization, whose existence was not in any way accountable to or dependent upon the sovereign state of Afghanistan. We have previously concluded, as a matter of law, that al Qaeda members are not covered by GPW. See Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes II, General Counsel of the

Department of Defense, from Jay S. Bybee, Assistant Attorney General, Re: Applications of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002). After October 7, when the United States armed forces began aerial bombing of al Qaeda and Taliban targets in Afghanistan, the distinction between Taliban and al Qaeda became even more blurred as al Qaeda assumed the lead in organizing the defense.

DoD's facts suggest that to the extent the Taliban militia was organized at all, it consisted of a loose array of individuals who had shifting loyalties among various Taliban and al Qaeda figures. According to DoD, the Taliban lacked the kind of organization characteristic of the military. The fact that at any given time during the conflict the Taliban were organized into some structured organization does not answer whether the Taliban leaders were responsible for their subordinates within the meaning of GPW. Armed men who can be recruited from other units, as DoD states, through defections and bribery are not subject to a commander who can discipline his troops and enforce the laws of war.

Second, there is no indication that the Taliban militia wore any distinctive uniform or other insignia that served as a "fixed distinctive sign recognizable at a distance." DoD has advised us that the Taliban wore the same clothes they wore to perform other daily functions, and hence they would have been indistinguishable from civilians. Some have alleged that members of the Taliban would wear black turbans, but apparently this was done by coincidence rather than design. Indeed, there is no indication that black turbans were systematically worn to serve as an identifying feature of the armed group.

Some of the Taliban militia carried a tribal flag. DoD has stated that there is no indication that any individual members of the Taliban wore a distinctive sign or insignia that would identify them if they were not carrying or otherwise immediately identified with a tribal flag. Moreover, DoD has not indicated that tribal flags marked only military, as opposed to civilian, groups.

Third, the Taliban militia carried arms openly. This fact, however, is of little significance because many people in Afghanistan carry arms openly. Although Taliban forces did not generally conceal their weapons, they also never attempted to distinguish themselves from other individuals through the arms they carried or the manner in which they carried them. Thus, the Taliban carried their arms openly, as GPW requires military groups to do, but this did not serve to distinguish the Taliban from the rest of the population. This fact reinforces the idea that the Taliban could neither be distinguished by their uniforms and insignia nor by the arms they carried from Afghani civilians.

Finally, there is no indication that the Taliban militia understood, considered themselves bound by, or indeed were even aware of, the Geneva Conventions or any other body of law. Indeed, it is fundamental that the Taliban followed their own version of Islamic law and regularly engaged in practices that flouted fundamental international legal principles. Taliban militia groups have made little attempt to distinguish between combatants and non-combatants when engaging in hostilities. They have killed for racial or religious purposes. Furthermore, DoD informs us of widespread reports of Taliban massacres of civilians, raping of women, pillaging of villages, and various other atrocities that plainly violate the laws of war.

Based on the above facts, apparently well known to all persons living in Afghanistan and joining the Taliban, we conclude that the President can find that the Taliban militia is categorically incapable of meeting the Hague conditions expressly spelled out in Article 4(A)(2) of GPW.

III.

One might argue that the Taliban is not a "militia" under Article 4(A)(2), but instead constitutes the "armed forces" of Afghanistan. Neither Article 4(A)(1), which grants POW status to members of the armed forces of a state party, nor Article 4(A)(3), which grants POW status to the armed forces of an unrecognized power, defines the term "armed forces." Unlike the definition of militia in Article 4(A)(2), these two other categories contain no conditions that these groups must fulfill to achieve POW status. Moreover, because GPW does not expressly incorporate Article 4(A)(2)'s four conditions into either Article 4(A)(1) or (3), some might question whether members of regular armed forces need to meet the Hague conditions in order to qualify for POW status under GPW.

We conclude, however, that the four basic conditions that apply to militias must also apply, at a minimum, to members of armed forces who would be legally entitled to POW status. In other words, an individual cannot be a POW, even if a member of an armed force, unless forces also are: (a) "commanded by a person responsible for his subordinates"; (b) "hav[e] a fixed distinctive sign recognizable at a distance"; (c) "carry[] arms openly"; and (d) "conduct[] their operations in accordance with the laws and customs of war." Thus, if the President has the factual basis to determine that Taliban prisoners are not entitled to POW status under Article 4(A)(2) as members of a militia, he therefore has the grounds to also find that they are not entitled to POW status as members of an armed force under either Article 4(A)(1) or Article 4(A)(3).

Article 4(A)'s use of the phrase "armed force," we believe, incorporated by reference the four conditions for militia, which originally derived from the Hague Convention IV. There was no need to list the four Hague conditions in Article 4(A)(1) because it was well understood under preexisting international law that all armed forces were already required to meet those conditions. As would have been understood by the GPW's drafters, use of the term "armed forces" incorporated the four criteria, repeated in the definition of militia, that were first used in the Hague Convention IV.

The view that the definition of an armed force includes the four criteria outlined in Hague Convention IV and repeated in GPW is amply supported by commentators. As explained in a recently-issued Department of the Army pamphlet, the four Hague conditions are "arguably part and parcel of the definition of a regular armed force. It is unreasonable to believe that a member of a regular armed force could conduct military operations in civilian clothing, while a member of the militia or resistance groups cannot. Should a member of the regular armed forces do so, it is likely that he would lose his claim to immunity and be charged as a spy or as an illegal combatant." Major Geoffrey S. Corn & Major Michael L. Smidt, *"To Be Or Not To Be, That Is The Question": Contemporary Military Operations and the Status of Captured Personnel*,

Department of the Army Pamphlet 27-50-319, 1999-Jun. Army Law. 1, 14 n.127 (1999). One scholar has similarly concluded that "[u]nder the Hague Convention, a person is a member of the armed forces of a state only if he satisfies the [four enumerated] criteria." Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 Wis. Int'l L.J. 145, 184 n.140 (2000). *See also* Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications For the Law of Armed Conflict*, 19 Mich. J. Int'l L. 1051, 1078 (1998) ("[U]nder the Regulations annexed to Hague Convention IV, combatants were those who were members of the regular armed forces (or formal militia), were commanded by a person responsible for their conduct, wore a fixed distinctive emblem (or uniform), carried their weapons openly, and conducted operations in accordance with the law of war. The 1949 Geneva Convention on Prisoners of War extended this status to members of an organized resistance movement which otherwise complied with the Hague IV requirements.").

Further, it would be utterly illogical to read "armed forces" in Article 4(A)(1) and (3) as somehow relieving members of armed forces from the same POW requirements imposed on members of a militia. There is no evidence that any of the GPW's drafters or ratifiers believed that members of the regular armed forces ought to be governed by *lower standards* in their conduct of warfare than those applicable to militia and volunteer forces. Otherwise, a sovereign could evade the Hague requirements altogether simply by designating all combatants as members of the sovereign's regular armed forces. A sovereign, for example, could evade the status of spies as unlawful combatants simply by declaring all spies to be members of the regular armed forces, regardless of whether they wore uniforms or not. Further, it would make little sense to construe GPW to deny some members of militias or volunteer corps POW protection for failure to satisfy the Hague conditions (under Article 4(A)(2)), while conferring such status upon other members simply because they have become part of the regular armed forces of a party (under Article 4(A)(1)).

This interpretation of "armed force" in GPW finds direct support in the International Committee of the Red Cross, the non-governmental organization primarily responsible for, and most closely associated with, the drafting and successful completion of GPW. After the Conventions were established, the Committee started work on a Commentary on all of the Geneva Conventions. In its discussion of Article 4(A)(3) of GPW, the ICRC construed both Article 4(A)(1) and (3) to require all regular armed forces to satisfy the four Hague IV (and Article 4(A)(2)) conditions:

> [t]he expression "members of regular armed forces" denotes armed forces which differ from those referred to in sub-paragraph (1) of this paragraph in one respect only: the authority to which they profess allegiance is not recognized by the adversary as a Party to the conflict. These "regular armed forces" have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1): they wear uniform, they have an organized hierarchy and they know and respect the laws and customs of war. The delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in sub-paragraph (2) (a), (b), (c) and (d).

Red Cross Commentary at 62-63 (emphasis added).

Numerous scholars have similarly interpreted GPW as applying the four conditions to Article 4(A)(1) and (3) as well as to Article 4(A)(2). As Professor Howard S. Levie, a leading expert on the laws of war and the Geneva Conventions in particular, has explained in his authoritative treatise:

> This enumeration [of the four conditions] does not appear in subparagraph 1, dealing with the regular armed forces. This does not mean that mere membership in the regular armed forces will automatically entitle an individual who is captured to prisoner-of-war status if his activities prior to and at the time of capture have not met these requirements. The member of the regular armed forces wearing civilian clothes who is captured while in enemy territory engaged in an espionage or sabotage mission is entitled to no different treatment than that which would be received by a civilian captured under the same circumstances. Any other interpretation would be unrealistic as it would mean that the dangers inherent in serving as a spy or saboteur could be immunized merely by making the individual a member of the armed forces; and that members of the armed forces could act in a manner prohibited by other areas of the law of armed conflict and escape the penalties therefore, still being entitled to prisoner-of-war status.

Howard S. Levie, 59 International Law Studies: Prisoners of War in International Armed Conflict 36-37 (Naval War College 1977). Oxford Professor Ingrid Detter has similarly concluded that, under the 1949 Geneva Conventions,

> to be a combatant, a person would have to be:
>
> (a) commanded by a person responsible for his subordinates;
> (b) having a fixed distinctive sign recognizable at a distance;
> (c) carrying arms openly;
> (d) conducting their operations in accordance with the laws and customs of war.
>
> The same requirements as apply to irregular forces are presumably also valid for members of regular units. However, this is not clearly spelt out: there is no textual support for the idea that members of regular armed forces should wear uniform. On the other hand, there is ample evidence that this is a rule of law which has been applied to a number of situations to ascertain the status of a person. Any regular soldier who commits acts pertaining to belligerence in civilian clothes loses his privileges and is no longer a lawful combatant. 'Unlawful' combatants may thus be either members of the regular forces or members of resistance or guerilla movements who do not fulfil the conditions of lawful combatants.

Ingrid Detter, The Law of War 136-37 (Cambridge 2d ed. 2000). See also Christopher C. Burris, *The Prisoner of War Status of PLO Fedayeen*, 22 N.C. J. Int'l L. & Com. Reg. 943, 987

n.308 (1997) ("I am using Article 4A(2)'s four criteria because the armed forces of the Palestinian Authority, over 30,000 men under arms organized into roughly ten or more separate para-military units, are more characteristic of militia units than the regular armed forces of a state. This is because these units are organized as police/security units, not exclusive combat units. See Graham Usher, Palestinian Authority, Israeli Rule, The Nation, Feb. 5, 1996, at 15, 16. Whether the Palestinian Authority's forces are considered militia or members of the armed forces, they still must fulfill Article 4A(2)'s four criteria.").[1]

Therefore, it is clear that the term "armed force" includes the four conditions first identified by Hague Convention IV and expressly applied by GPW to militia groups. In other words, in order to be entitled to POW status, a member of an armed force must (a) be "commanded by a person responsible for his subordinates"; (b) "hav[e] a fixed distinctive sign recognizable at a distance"; (c) "carry[] arms openly"; and (d) "conduct[] their operations in accordance with the laws and customs of war." We believe that the President, based on the facts supplied by DoD, has ample grounds upon which to find that members of the Taliban have failed to meet three of these four criteria, regardless of whether they are characterized as members of a "militia" or of an "armed force." The President, therefore, may determine that the Taliban, as a group, are not entitled to POW status under GPW.

IV.

Under Article 5 of GPW, "[s]hould any doubt arise as to whether persons . . . belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." As we understand it, DoD in the past has presumed prisoners to be entitled to POW status until a

[1] The only federal court we are aware of that has addressed this issue denied Article 4(A)(3) status to defendants because they could not satisfy the Hague conditions. In *United States v. Buck*, 690 F. Supp. 1291 (S.D.N.Y. 1988), the defendants claimed that they were entitled to POW status as military officers of the Republic of New Afrika, "a sovereign nation engaged in a war of liberation against the colonial forces of the United States government." *Id.* at 1293. That nation, it was contended, included "all people of African ancestry living in the United States." *Id.* at 1296. The court refused to extend POW status to the defendants. After determining that GPW did not apply at all due to the absence of an armed conflict as understood under Article 2, the court alternatively reasoned that the defendants could not satisfy any of the requirements of Article 4. *See id.* at 1298 (stating that, even if GPW applied, "it is entirely clear that these defendants would not fall within Article 4, upon which they initially relied"). The court first concluded that the defendants failed to meet the four Hague conditions expressly spelled out in Article 4(A)(2). The court then rejected POW status under Article 4(A)(3) "[f]or comparable reasons":

> Article 4(A)(2) requires that to qualify as prisoners of war, members of 'organized resistance movements' must fulfill the conditions of command by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting their operations in accordance with the laws and customs of war. The defendants at bar and their associates cannot pretend to have fulfilled those conditions. *For comparable reasons*, Article 4(3)'s reference to members of 'regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power', also relied upon by defendants, does not apply to the circumstances of this case.

Id. (emphasis added). The court reached this conclusion even though the Hague conditions are not explicitly spelled out in Article 4(A)(3). Nothing in the court's discussion suggests that it would have construed Article 4(A)(1) any differently.

tribunal determines otherwise. The presumption and tribunal requirement are triggered, however, only if there is "any doubt" as to a prisoner's Article 4 status.

Under Article II of the Constitution, the President possesses the power to interpret treaties on behalf of the Nation.[2] We conclude, in light of the facts submitted to us by the Department of Defense and as discussed in Parts II and III of this memorandum, that the President could reasonably interpret GPW in such a manner that none of the Taliban forces fall within the legal definition of POWs as defined by Article 4. A presidential determination of this nature would eliminate any legal "doubt" as to the prisoners' status, as a matter of domestic law, and would therefore obviate the need for Article 5 tribunals.

This approach is also consistent with the terms of Article 5. As the International Committee of the Red Cross has explained, the "competent tribunal" requirement of Article 5 applies "to cases of doubt as to whether persons having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories enumerated in Article 4." *Red Cross Commentary* at 77. Tribunals are thus designed to determine whether a particular set of facts falls within one of the Article 4 categories; they are not intended to be used to resolve the proper interpretation of those categories. The President, in other words, may use his constitutional power to interpret treaties and apply them to the facts, to make the determination that the Taliban are unlawful combatants. This would remove any "doubt" concerning whether members of the Taliban are entitled to POW status.

We therefore conclude that there is no need to establish tribunals to determine POW status under Article 5.

Please let us know if we can provide further assistance.

Jay S. Bybee
Assistant Attorney General

[2] *See* Memorandum for John Bellinger, III, Senior Associate Counsel and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001).

TAB

F

UNCLASSIFIED

- C.
- PD.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

GENERAL COUNSEL

2002 DEC -2 AM 11:03

OFFICE OF THE SECRETARY OF DEFENSE

ACTION MEMO

November 27, 2002 (1:00 PM)

DEPSEC_____

FOR: SECRETARY OF DEFENSE

FROM: William J. Haynes II, General Counsel

SUBJECT: Counter-Resistance Techniques

- The Commander of USSOUTHCOM has forwarded a request by the Commander of Joint Task Force 170 (now JTF GTMO) for approval of counter-resistance techniques to aid in the interrogation of detainees at Guantanamo Bay (Tab A).
- The request contains three categories of counter-resistance techniques, with the first category the least aggressive and the third category the most aggressive (Tab B).
- I have discussed this with the Deputy, Doug Feith and General Myers. I believe that all join in my recommendation that, as a matter of policy, you authorize the Commander of USSOUTHCOM to employ, in his discretion, only Categories I and II and the fourth technique listed in Category III ("Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing").
- While all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint.

RECOMMENDATION: That SECDEF approve the USSOUTHCOM Commander's use of those counter-resistance techniques listed in Categories I and II and the fourth technique listed in Category III during the interrogation of detainees at Guantanamo Bay.

SECDEF DECISION

Approved D.A. Disapproved _____ Other _____

Attachments
As stated

However, I stand for 8-10 hours A day. Why is standard limited to 4 hours?

cc: CJCS, USD(P)

D.A. DEC 0 2 2002

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~~SECRET//NOFORN~~

DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09360

JTF 170-SJA

11 October 2002

MEMORANDUM FOR Commander, Joint Task Force 170

SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

1. (~~S//NF~~) ISSUE: To ensure the security of the United States and its Allies, more aggressive interrogation techniques than the ones presently used, such as the methods proposed in the attached recommendation, may be required in order to obtain information from detainees that are resisting interrogation efforts and are suspected of having significant information essential to national security. This legal brief references the recommendations outlined in the JTF-170-J2 memorandum, dated 11 October 2002.

2. (~~S//NF~~) FACTS: The detainees currently held at Guantanamo Bay, Cuba (GTMO), are not protected by the Geneva Conventions (GC). Nonetheless, DoD interrogators trained to apply the Geneva Conventions have been using commonly approved methods of interrogation such as rapport building through the direct approach, rewards, the multiple interrogator approach, and the use of deception. However, because detainees have been able to communicate among themselves and debrief each other about their respective interrogations, their interrogation resistance strategies have become more sophisticated. Compounding this problem is the fact that there is no established clear policy for interrogation limits and operations at GTMO, and many interrogators have felt in the past that they could not do anything that could be considered "controversial." In accordance with President Bush's 7 February 2002 directive, the detainees are not Enemy Prisoners of War (EPW). They must be treated humanely and, subject to military necessity, in accordance with the principles of GC.

3. (~~S//NF~~) DISCUSSION: The Office of the Secretary of Defense (OSD) has not adopted specific guidelines regarding interrogation techniques for detainee operations at GTMO. While the procedures outlined in, Army FM 34-52 Intelligence Interrogation (28 September 1992), are utilized, they are constrained by, and conform to the GC and applicable international law, and therefore are not binding. Since the detainees are not EPWs, the Geneva Conventions limitations that ordinarily would govern captured enemy personnel interrogations are not binding on U.S. personnel conducting detainee interrogations at GTMO. Consequently, in the absence of specific binding guidance, and in accordance with the President's directive to treat the detainees humanely, we must look to applicable international and domestic law in order to determine the legality of the more aggressive interrogation techniques recommended in the J2 proposal.

a. (U) International Law: Although no international body of law directly applies, the more notable international treaties and relevant law are listed below.

JTF170-SJA
SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

(1) (U) In November of 1994, the United States ratified The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. However, the United States took a reservation to Article 16, which defined cruel, inhumane and degrading treatment or punishment, by instead deferring to the current standard articulated in the 8th Amendment to the United States Constitution. Therefore, the United States is only prohibited from committing those acts that would otherwise be prohibited under the United States Constitutional Amendment against cruel and unusual punishment. The United States ratified the treaty with the understanding that the convention would not be self-executing, that is, that it would not create a private cause of action in U.S. Courts. This convention is the principal U.N. treaty regarding torture and other cruel, inhumane, or degrading treatment.

(2) (U) The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, prohibits inhumane treatment in Article 7, and arbitrary arrest and detention in Article 9. The United States ratified it on the condition that it would not be self-executing, and it took a reservation to Article 7 that we would only be bound to the extent that the United States Constitution prohibits cruel and unusual punishment.

(3) (U) The American Convention on Human Rights forbids inhumane treatment, arbitrary imprisonment, and requires the state to promptly inform detainees of the charges against them, to review their pretrial confinement, and to conduct a trial within a reasonable time. The United States signed the convention on 1 June 1977, but never ratified it.

(4) (U) The Rome Statute established the International Criminal Court and criminalized inhumane treatment, unlawful deportation, and imprisonment. The United States not only failed to ratify the Rome Statute, but also later withdrew from it.

(5) (U) The United Nations' Universal Declaration of Human Rights, prohibits inhumane or degrading punishment, arbitrary arrest, detention, or exile. Although international declarations may provide evidence of customary international law (which is considered binding on all nations even without a treaty), they are not enforceable by themselves.

(6) (U) There is some European case law stemming from the European Court of Human Rights on the issue of torture. The Court ruled on allegations of torture and other forms of inhumane treatment by the British in the Northern Ireland conflict. The British authorities developed practices of interrogation such as forcing detainees to stand for long hours, placing black hoods over their heads, holding the detainees prior to interrogation in a room with continuing loud noise, and depriving them of sleep, food, and water. The European Court concluded that these acts did not rise to the level of torture as defined in the Convention Against Torture, because torture was defined as an aggravated form of cruel, inhuman, or degrading treatment or punishment. However, the Court did find that these techniques constituted cruel, inhumane, and degrading treatment. Nonetheless, and as previously mentioned, not only is the United States not a part of the European Human Rights Court, but as previously stated, it only ratified the definition of cruel, inhuman, and degrading treatment consistent with the U.S. Constitution. See also Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Geor. 2002); Committee Against Torture v. Israel, Supreme Court of Israel, 6 Sep 99, 7 BHRC 31; Ireland v. UK (1978), 2 EHRR 25.

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SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

b. (U) Domestic Law: Although the detainee interrogations are not occurring in the continental United States, U.S. personnel conducting said interrogations are still bound by applicable Federal Law, specifically, the Eighth Amendment of the United States Constitution, 18 U.S.C. § 2340, and for military interrogators, the Uniform Code of Military Justice (UCMJ).

(1) (U) The Eighth Amendment of the United States Constitution provides that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. There is a lack of Eighth Amendment case law relating to the content of interrogations, as most of the Eighth Amendment litigation in federal court involves either the death penalty, or 42 U.S.C. § 1983 actions from inmates based on prison conditions. The Eighth Amendment applies as to whether or not torture or inhumane treatment has occurred under the federal torture statute.[1]

(a) (U) A principal case in the confinement context that is instructive regarding Eighth Amendment analysis (which is relevant because the United States adopted the Convention Against Torture, Cruel, Inhumane and Degrading Treatment, it did so deferring to the Eighth Amendment of the United States Constitution) and conditions of confinement if a U.S. court were to examine the issue is Hudson v. McMillian, 503 U.S. 1 (1992). The issue in Hudson stemmed from a 42 U.S.C. § 1983 action alleging that a prison inmate suffered minor bruises, facial swelling, loosened teeth, and a cracked dental plate resulting from a beating by prison guards while he was cuffed and shackled. In this case the Court held that there was no governmental interest in beating an inmate in such a manner. The Court further ruled that the use of excessive physical force against a prisoner might constitute cruel and unusual punishment, even though the inmate does not suffer serious injury.

(b) (U) In Hudson, the Court relied on Whitley v. Albers, 475 U.S. 312 (1986), as the seminal case that establishes whether a constitutional violation has occurred. The Court stated that the extent of the injury suffered by an inmate is only one of the factors to be considered, but that there is no significant injury requirement in order to establish an Eighth Amendment violation, and that the absence of serious injury is relevant to, but does not end, the Eighth Amendment inquiry. The Court based its decision on the "...settled rule that the unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment." Whitley at 319, *quoting* Ingraham v. Wright, 430 U.S. 651, 670 (1977). The Hudson Court then held that in the excessive force or conditions of confinement context, the Eighth Amendment violation test delineated by the Supreme Court in Hudson is that when prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated, whether or not significant injury is evident. The extent of injury suffered by an inmate is one factor that may suggest whether the use of force could plausibly have been thought necessary in a particular situation, but the question of whether the measure taken inflicted unnecessary and wanton pain and suffering, ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very (emphasis added) purpose of causing harm. If so, the Eighth Amendment claim will prevail.

[1] Notwithstanding the argument that U.S. personnel are bound by the Constitution, the detainees confined at GTMO have no jurisdictional standing to bring a section 1983 action alleging an Eighth Amendment violation in U.S. Federal Court.

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SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

(c) (U) At the District Court level, the typical conditions-of-confinement claims involve a disturbance of the inmate's physical comfort, such as sleep deprivation or loud noise. The Eighth Circuit ruled in Singh v. Holcomb, 1992 U.S. App. LEXIS 24790, that an allegation by an inmate that he was constantly deprived of sleep which resulted in emotional distress, loss of memory, headaches, and poor concentration, did not show either the extreme deprivation level, or the officials' culpable state of mind required to fulfill the objective component of an Eighth Amendment conditions-of-confinement claim.

(d) (U) In another sleep deprivation case alleging an Eighth Amendment violation, the Eighth Circuit established a totality of the circumstances test, and stated that if a particular condition of detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. In Ferguson v. Cape Girardeau County, 88 F.3d 647 (8th Cir. 1996), the complainant was confined to a 5-1/2 by 5-1/2 foot cell without a toilet or sink, and was forced to sleep on a mat on the floor under bright lights that were on twenty-four hours a day. His Eighth Amendment claim was not successful because he was able to sleep at some point, and because he was kept under these conditions due to a concern for his health, as well as the perceived danger that he presented. This totality of the circumstances test has also been adopted by the Ninth Circuit. In Green v. CSO Strack, 1995 U.S. App. LEXIS 14451, the Court held that threats of bodily injury are insufficient to state a claim under the Eighth Amendment, and that sleep deprivation did not rise to a constitutional violation where the prisoner failed to present evidence that he either lost sleep or was otherwise harmed.

(e) (U) Ultimately, an Eighth Amendment analysis is based primarily on whether the government had a good faith legitimate governmental interest, and did not act maliciously and sadistically for the very purpose of causing harm.

(2) (U) The torture statute (18 U.S.C. § 2340) is the United States' codification of the signed and ratified provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and pursuant to subsection 2340B, does not create any substantive or procedural rights enforceable by law by any party in any civil proceeding.

(a) (U) The statute provides that "whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life."

(b) (U) Torture is defined as "an act committed by a person acting under color of law *specifically intended* (emphasis added) to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person within his custody or physical control." The statute defines "severe mental pain or suffering" as "*the prolonged mental harm caused by or resulting* (emphasis added) from the intentional infliction or threatened infliction of severe physical pain or suffering; or the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses of the personality; or the threat of imminent death; or the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality."

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(c) (U) Case law in the context of the federal torture statute and interrogations is also lacking, as the majority of the case law involving torture relates to either the illegality of brutal tactics used by the police to obtain confessions (in which the Court simply states that these confessions will be deemed as involuntary for the purposes of admissibility and due process, but does not actually address torture or the Eighth Amendment), or the Alien Torts Claim Act, in which federal courts have defined that certain uses of force (such as kidnapping, beating and raping of a man with the consent or acquiescence of a public official. See Ortiz v. Gramajo, 886 F.Supp. 162 (D. Mass. 1995)) constituted torture. However, no case law on point within the context of 18 USC 2340.

(3) (U) Finally, U.S. military personnel are subject to the Uniform Code of Military Justice. The punitive articles that could potentially be violated depending on the circumstances and results of an interrogation are: Article 93 (cruelty and maltreatment), Article 118 (murder), Article 119 (manslaughter), Article 124 (maiming), Article 128 (assault), Article 134 (communicating a threat, and negligent homicide), and the inchoate offenses of attempt (Article 80), conspiracy (Article 81), accessory after the fact (Article 78), and solicitation (Article 82). Article 128 is the article most likely to be violated because a simple assault can be consummated by an unlawful demonstration of violence which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm, and a specific intent to actually inflict bodily harm is not required.

4. ~~(S//NF)~~ ANALYSIS: The counter-resistance techniques proposed in the JTF-170-J2 memorandum are lawful because they do not violate the Eighth Amendment to the United States Constitution or the federal torture statute as explained below. An international law analysis is not required for the current proposal because the Geneva Conventions do not apply to these detainees since they are not EPWs.

(a) ~~(S//NF)~~ Based on the Supreme Court framework utilized to assess whether a public official has violated the Eighth Amendment, so long as the force used could plausibly have been thought necessary in a particular situation to achieve a legitimate governmental objective, and it was applied in a good faith effort and not maliciously or sadistically for the very purpose of causing harm, the proposed techniques are likely to pass constitutional muster. The federal torture statute will not be violated so long as any of the proposed strategies are not specifically intended to cause severe physical pain or suffering or prolonged mental harm. Assuming that severe physical pain is not inflicted, absent any evidence that any of these strategies will in fact cause prolonged and long lasting mental harm, the proposed methods will not violate the statute.

(b) ~~(S//NF)~~ Regarding the Uniform Code of Military Justice, the proposal to grab, poke in the chest, push lightly, and place a wet towel or hood over the detainee's head would constitute a per se violation of Article 128 (Assault). Threatening a detainee with death may also constitute a violation of Article 128, or also Article 134 (communicating a threat). It would be advisable to have permission or immunity in advance from the convening authority, for military members utilizing these methods.

(c) ~~(S//NF)~~ Specifically, with regard to Category I techniques, the use of mild and fear related approaches such as yelling at the detainee is not illegal because in order to communicate a threat, there must also exist an intent to injure. Yelling at the detainee is legal so long as the yelling is not done with the intent to cause severe physical damage or prolonged mental harm. Techniques of deception such as multiple interrogator techniques, and deception regarding interrogator identity are all permissible methods of interrogation, since there is no legal requirement to be truthful while conducting an interrogation.

JTF170-SJA
SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

(d) (U) With regard to Category II methods, the use of stress positions such as the proposed standing for four hours, the use of isolation for up to thirty days, and interrogating the detainee in an environment other than the standard interrogation booth are all legally permissible so long as no severe physical pain is inflicted and prolonged mental harm intended, and because there is a legitimate governmental objective in obtaining the information necessary that the high value detainees on which these methods would be utilized possess, for the protection of the national security of the United States, its citizens, and allies. Furthermore, these methods would not be utilized for the "very malicious and sadistic purpose of causing harm," and absent medical evidence to the contrary, there is no evidence that prolonged mental harm would result from the use of these strategies. The use of falsified documents is legally permissible because interrogators may use deception to achieve their purpose.

(e) (U) The deprivation of light and auditory stimuli, the placement of a hood over the detainee's head during transportation and questioning, and the use of 20 hour interrogations are all legally permissible so long as there is an important governmental objective, and it is not done for the purpose of causing harm or with the intent to cause prolonged mental suffering. There is no legal requirement that detainees must receive four hours of sleep per night, but if a U.S. Court ever had to rule on this procedure, in order to pass Eighth Amendment scrutiny, and as a cautionary measure, they should receive some amount of sleep so that no severe physical or mental harm will result. Removal of comfort items is permissible because there is no legal requirement to provide comfort items. The requirement is to provide adequate food, water, shelter, and medical care. The issue of removing published religious items or materials would be relevant if these were United States citizens with a First Amendment right. Such is not the case with the detainees. Forced grooming and removal of clothing are not illegal, so long as it is not done to punish or cause harm, as there is a legitimate governmental objective to obtain information, maintain health standards in the camp and protect both the detainees and the guards. There is no illegality in removing hot meals because there is no specific requirement to provide hot meals, only adequate food. The use of the detainee's phobias is equally permissible.

(f) (U) With respect to the Category III advanced counter-resistance strategies, the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent is not illegal for the same aforementioned reasons that there is a compelling governmental interest and it is not done intentionally to cause prolonged harm. However, caution should be utilized with this technique because the torture statute specifically mentions making death threats as an example of inflicting mental pain and suffering. Exposure to cold weather or water is permissible with appropriate medical monitoring. The use of a wet towel to induce the misperception of suffocation would also be permissible if not done with the specific intent to cause prolonged mental harm, and absent medical evidence that it would. Caution should be exercised with this method, as foreign courts have already advised about the potential mental harm that this method may cause. The use of physical contact with the detainee, such as pushing and poking will technically constitute an assault under Article 128, UCMJ.

JTF170-SJA
SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

5. ~~(S//NF)~~ RECOMMENDATION: I recommend that the proposed methods of interrogation be approved, and that the interrogators be properly trained in the use of the approved methods of interrogation. Since the law requires examination of all facts under a totality of circumstances test, I further recommend that all proposed interrogations involving category II and III methods must undergo a legal, medical, behavioral science, and intelligence review prior to their commencement.

6. (U) POC: Captain Michael Borders, x3596.

DIANE E. REAVER
LTC, USA
Staff Judge Advocate

TAB

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UNCLASSIFIED

[redacted]

THE WHITE HOUSE

WASHINGTON

February 7, 2002

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
CHIEF OF STAFF TO THE PRESIDENT
DIRECTOR OF CENTRAL INTELLIGENCE
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of al Qaeda and Taliban Detainees

1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm -- ushered in not by us, but by terrorists -- requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

2. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:

a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.

b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to

[redacted]
Reason: 1.5 (d)
Declassify on: 02/07/12

[redacted]

exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.

c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."

d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

3. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

4. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.

5. I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

6. I hereby direct the Secretary of State to communicate my determinations in an appropriate manner to our allies, and other countries and international organizations cooperating in the war against terrorism of global reach.

[redacted]

TAB

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SECRET//NOFORN

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

3 & 5, 6

MEMORANDUM FOR COMMANDER USSOUTHCOM JAN 15 2003

SUBJECT: Counter-Resistance Techniques (U)

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

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

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

15 Jan 03

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

UNCLASSIFIED

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

SECRET//NOFORN X00176 /03

UNCLASSIFIED
~~SECRET~~

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

JAN 15 2003

MEMORANDUM FOR THE GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Detainee Interrogations (U)

(U) Establish a working group within the Department of Defense to assess the legal, policy, and operational issues relating to the interrogations of detainees held by the U.S. Armed Forces in the war on terrorism.

(U) The working group should consist of experts from your Office, the Office of the Under Secretary of Defense for Policy, the Military Departments, and the Joint Staff. The working group should address and make recommendations as warranted on the following issues:

- (S) Legal considerations raised by interrogation of detainees held by U.S. Armed Forces.
- (S) Policy considerations with respect to the choice of interrogation techniques, including:
  - (S) contribution to intelligence collection
  - (S) effect on treatment of captured US military personnel
  - (S) effect on detainee prosecutions
  - (S) historical role of US armed forces in conducting interrogations
- (S) Recommendations for employment of particular interrogation techniques by DoD interrogators.

(U) You should report your assessment and recommendations to me within 15 days.

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

UNCLASSIFIED

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

[redacted] Unclassified When Attachment is Removed

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

GENERAL COUNSEL

JAN 1 7 2003

MEMORANDUM FOR THE GENERAL COUNSEL OF THE DEPARTMENT OF THE AIR FORCE

SUBJECT: Working Group to Assess Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (U)

(U) You are hereby designated as the Chair of an intradepartmental working group and my executive agent to prepare an assessment and recommendations for me that are responsive to the attached memorandum of the Secretary of Defense, "Detainee Interrogations," dated January 15, 2003. In carrying out these responsibilities, you should call upon the resources of the offices of those indicated as recipients of copies of this memorandum, including requesting their participation, or that of members of their staffs, in this working group.

(U) Please provide me with periodic updates as available. I expect your effort to address and provide recommendations, as warranted, pertaining to the issues set out in the Secretary's memorandum. Your analysis should take into account the various potential geographic locations where U.S. Armed Forces may hold detainees.

(U) You should provide your assessment and recommendations to me by January 29, 2003. I appreciate your willingness to assume this important responsibility.

William J. Haynes II

Attachment:
As stated.

cc:
Under Secretary of Defense (Policy)
Acting Assistant Secretary of Defense (SO/LIC)
General Counsel of the Department of the Army
General Counsel of the Department of the Navy
Director of the Joint Staff
Director, Defense Intelligence Agency
Counsel for the Commandant of the Marine Corps
The Judge Advocate General of the Army
The Judge Advocate General of the Navy
The Judge Advocate General of the Air Force
Staff Judge Advocate for the Commandant of the Marine Corps