

~~TOP SECRET~~ [REDACTED] ~~NOFORN~~

0000013



U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

May 10, 2005

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

*Re: Application of 18 U.S.C. §§ 2340-2340A to ~~Certain Techniques~~  
That May Be Used in the Interrogation of a High Value al Qaeda Detainee*

You have asked us to address whether certain specified interrogation techniques designed to be used on a high value al Qaeda detainee in the War on Terror comply with the federal prohibition on torture, codified at 18 U.S.C. §§ 2340-2340A. Our analysis of this question is controlled by this Office's recently published opinion interpreting the anti-torture statute. See Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* (Dec. 30, 2004) ("*2004 Legal Standards Opinion*"), available at [www.usdoj.gov](http://www.usdoj.gov). (We provided a copy of that opinion to you at the time it was issued.) Much of the analysis from our *2004 Legal Standards Opinion* is reproduced below; all of it is incorporated by reference herein. Because you have asked us to address the application of sections 2340-2340A to specific interrogation techniques, the present memorandum necessarily includes additional discussion of the applicable legal standards and their application to particular facts. We stress, however, that the legal standards we apply in this memorandum are fully consistent with the interpretation of the statute set forth in our *2004 Legal Standards Opinion* and constitute our authoritative view of the legal standards applicable under sections 2340-2340A. Our task is to explicate those standards in order to assist you in complying with the law.

A paramount recognition emphasized in our *2004 Legal Standards Opinion* merits re-emphasis at the outset and guides our analysis: Torture is abhorrent both to American law and values and to international norms. The universal repudiation of torture is reflected not only in our criminal law, see, e.g., 18 U.S.C. §§ 2340-2340A, but also in international agreements,<sup>1</sup> in

<sup>1</sup> See, e.g., United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force for U.S. Nov. 20,

~~TOP SECRET~~ [REDACTED] ~~NOFORN~~

[REDACTED]

TOP SECRET/ [REDACTED] NOFORN

centuries of Anglo-American law, *see, e.g.*, John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (1977) ("*Torture and the Law of Proof*"), and in the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.<sup>2</sup> Consistent with these norms, the President has directed unequivocally that the United States is not to engage in torture.<sup>3</sup>

The task of interpreting and applying sections 2340-2340A is complicated by the lack of precision in the statutory terms and the lack of relevant case law. In defining the federal crime of torture, Congress required that a defendant "*specifically intend*[ ] to inflict *severe* physical or mental pain or suffering," and Congress narrowly defined "severe mental pain or suffering" to mean "the *prolonged* mental harm caused by" enumerated predicate acts, including "the threat of *imminent* death" and "procedures *calculated* to disrupt *profoundly* the senses or personality." 18 U.S.C. § 2340 (emphases added). These statutory requirements are consistent with U.S. obligations under the United Nations Convention Against Torture, the treaty that obligates the United States to ensure that torture is a crime under U.S. law and that is implemented by sections 2340-2340A. The requirements in sections 2340-2340A closely track the understandings and reservations required by the Senate when it gave its advice and consent to ratification of the Convention Against Torture. They reflect a clear intent by Congress to limit the scope of the prohibition on torture under U.S. law. However, many of the key terms used in the statute (for example, "severe," "prolonged," "suffering") are imprecise and necessarily bring a degree of uncertainty to addressing the reach of sections 2340-2340A. Moreover, relevant judicial decisions in this area provide only limited guidance.<sup>4</sup> This imprecision and lack of judicial guidance, coupled with the President's clear directive that the United States does not condone or engage in torture, counsel great care in applying the statute to specific conduct. We have attempted to exercise such care throughout this memorandum.

With these considerations in mind, we turn to the particular question before us: whether certain specified interrogation techniques may be used by the Central Intelligence Agency ("CIA") on a high value al Qaeda detainee consistent with the federal statutory prohibition on

---

1994) ("Convention Against Torture" or "CAT"); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 7, 999 U.N.T.S. 171.

<sup>2</sup> *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167 (July 5, 2004) ("Freedom from torture is an inalienable human right . . ."); Statement on United Nations International Day in Support of Victims of Torture, 39 Weekly Comp. Pres. Doc. 824 (June 30, 2003) ("Torture anywhere is an affront to human dignity everywhere."); *see also* Letter of Transmittal from President Ronald Reagan to the Senate (May 20, 1988), in *Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Treaty Doc. No. 100-20, at ii (1988) ("Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice still prevalent in the world today.");

<sup>3</sup> *See, e.g.*, 40 Weekly Comp. Pres. Doc. at 1167-68 ("America stands against and will not tolerate torture. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.");

<sup>4</sup> What judicial guidance there is comes from decisions that apply a related but separate statute (the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note (2000)). These judicial opinions generally contain little if any analysis of specific conduct or of the relevant statutory standards.

TOP SECRET/ [REDACTED] NOFORN

TOP SECRET [REDACTED] NOFORN

torture, 18 U.S.C. §§ 2340-2340A.<sup>5</sup> For the reasons discussed below, and based on the representations we have received from you (or officials of your Agency) about the particular techniques in question, the circumstances in which they are authorized for use, and the physical and psychological assessments made of the detainee to be interrogated, we conclude that the separate authorized use of each of the specific techniques at issue, subject to the limitations and safeguards described herein, would not violate sections 2340-2340A.<sup>6</sup> Our conclusion is straightforward with respect to all but two of the techniques discussed herein. As discussed below, use of sleep deprivation as an enhanced technique and use of the waterboard involve more substantial questions, with the waterboard presenting the most substantial question.

We base our conclusions on the statutory language enacted by Congress in sections 2340-2340A. We do not rely on any consideration of the President's authority as Commander in Chief under the Constitution, any application of the principle of constitutional avoidance (or any conclusion about constitutional issues), or any arguments based on possible defenses of "necessity" or self-defense.<sup>7</sup>

<sup>5</sup> We have previously advised you that the use by the CIA of the techniques of interrogation discussed herein is consistent with the Constitution and applicable statutes and treaties. In the present memorandum, you have asked us to address only the requirements of 18 U.S.C. §§ 2340-2340A. Nothing in this memorandum or in our prior advice to the CIA should be read to suggest that the use of these techniques would conform to the requirements of the Uniform Code of Military Justice that governs members of the Armed Forces or to United States obligations under the Geneva Conventions in circumstances where those Conventions would apply. We do not address the possible application of article 16 of the CAT, nor do we address any question relating to conditions of confinement or detention, as distinct from the interrogation of detainees. We stress that our advice on the application of sections 2340-2340A does not represent the policy views of the Department of Justice concerning interrogation practices. Finally, we note that section 6057(a) of H.R. 1268 (109th Cong. 1st Sess.), if it becomes law, would forbid expending or obligating funds made available by that bill "to subject any person in the custody or under the physical control of the United States to torture," but because the bill would define "torture" to have "the meaning given that term in section 2340(1) of title 18, United States Code," § 6057(b)(1), the provision (to the extent it might apply here at all) would merely reaffirm the preexisting prohibitions on torture in sections 2340-2340A.

<sup>6</sup> The present memorandum addresses only the separate use of each individual technique, not the combined use of techniques as part of an integrated regimen of interrogation. You have informed us that most of the CIA's authorized techniques are designed to be used with particular detainees in an interrelated or combined manner as part of an overall interrogation program, and you have provided us with a description of a typical scenario for the CIA's combined use of techniques. See *Background Paper on CIA's Combined Use of Interrogation Techniques* (Dec. 30, 2004) ("Background Paper"). A full assessment of whether the use of interrogation techniques is consistent with sections 2340-2340A should take into account the potential combined effects of using multiple techniques on a given detainee, either simultaneously or sequentially within a short time. We will address in a separate memorandum whether the combined use of certain techniques, as reflected in the *Background Paper*, is consistent with the legal requirements of sections 2340-2340A.

<sup>7</sup> In preparing the present memorandum, we have reviewed and carefully considered the report prepared by the CIA Inspector General, *Counterterrorism Detention and Interrogation Activities (September 2001-October 2003)*, No. 2003-7123-IG (May 7, 2004) ("IG Report"). Various aspects of the IG Report are addressed below.

TOP SECRET [REDACTED] NOFORN

TOP SECRET/ [REDACTED] /NOFORN

I.

A.

In asking us to consider certain specific techniques to be used in the interrogation of a particular al Qaeda operative, you have provided background information common to the use of all of the techniques. You have advised that these techniques would be used only on an individual who is determined to be a "High Value Detainee," defined as:

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

Fax for Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, from [REDACTED] Assistant General Counsel, CIA, at 3 (Jan. 4, 2005) ("January 4 [REDACTED] Fax"). For convenience, below we will generally refer to such individuals simply as detainees.

You have also explained that, prior to interrogation, each detainee is evaluated by medical and psychological professionals from the CIA's Office of Medical Services ("OMS") to ensure that he is not likely to suffer any severe physical or mental pain or suffering as a result of interrogation.

[T]echnique-specific advanced approval is required for all "enhanced" measures and is conditional on on-site medical and psychological personnel confirming from direct detainee examination that the enhanced technique(s) is not expected to produce "severe physical or mental pain or suffering." As a practical matter, the detainee's physical condition must be such that these interventions will not have lasting effect, and his psychological state strong enough that no severe psychological harm will result.

*OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation and Detention* at 9 (Dec. 2004) ("*OMS Guidelines*") (footnote omitted). New detainees are also subject to a general intake examination, which includes "a thorough initial medical assessment . . . with a complete, documented history and physical addressing in depth any chronic or previous medical problems. This assessment should especially attend to cardio-vascular, pulmonary, neurological and musculoskeletal findings. . . . Vital signs and weight should be recorded, and blood work drawn. . . ." *Id.* at 6. In addition, "subsequent medical rechecks during the interrogation period should be performed on a regular basis." *Id.* As an additional precaution, and to ensure the objectivity of their medical and psychological assessments, OMS personnel do not participate in administering interrogation techniques; their function is to monitor interrogations and the health of the detainee.

TOP SECRET/ [REDACTED] /NOFORN

TOP SECRET// [REDACTED] NOFORN

The detainee is then interviewed by trained and certified interrogators to determine whether he is actively attempting to withhold or distort information. If so, the on-scene interrogation team develops an interrogation plan, which may include only those techniques for which there is no medical or psychological contraindication. You have informed us that the initial OMS assessments have ruled out the use of some—or all—of the interrogation techniques as to certain detainees. If the plan calls for the use of any of the interrogation techniques discussed herein, it is submitted to CIA Headquarters, which must review the plan and approve the use of any of these interrogation techniques before they may be applied. See George J. Tenet, Director of Central Intelligence, *Guidelines on Interrogations Conducted Pursuant to the [REDACTED]* (Jan. 28, 2003) ("*Interrogation Guidelines*"). Prior written approval "from the Director, DCI Counterterrorist Center, with the concurrence of the Chief, CTC Legal Group," is required for the use of any enhanced interrogation techniques. *Id.* We understand that, as to the detainee here, this written approval has been given for each of the techniques we discuss, except the waterboard.

We understand that, when approved, interrogation techniques are generally used in an escalating fashion, with milder techniques used first. Use of the techniques is not continuous. Rather, one or more techniques may be applied—during or between interrogation sessions—based on the judgment of the interrogators and other team members and subject always to the monitoring of the on-scene medical and psychological personnel. Use of the techniques may be continued if the detainee is still believed to have and to be withholding actionable intelligence. The use of these techniques may not be continued for more than 30 days without additional approval from CIA Headquarters. See generally *Interrogation Guidelines* at 1-2 (describing approval procedures required for use of enhanced interrogation techniques). Moreover, even within that 30-day period, any further use of these interrogation techniques is discontinued if the detainee is judged to be consistently providing accurate intelligence or if he is no longer believed to have actionable intelligence. This memorandum addresses the use of these techniques during no more than one 30-day period. We do not address whether the use of these techniques beyond the initial 30-day period would violate the statute.

Medical and psychological personnel are on-scene throughout (and, as detailed below, physically present or otherwise observing during the application of many techniques, including all techniques involving physical contact with detainees), and "[d]aily physical and psychological evaluations are continued throughout the period of [enhanced interrogation technique] use." *IG Report* at 30 n.35; see also George J. Tenet, Director of Central Intelligence, *Guidelines on Confinement Conditions for CIA Detainees*, at 1 (Jan. 28, 2003) ("*Confinement Guidelines*") ("Medical and, as appropriate, psychological personnel shall be physically present at, or reasonably available to, each Detention Facility. Medical personnel shall check the physical condition of each detainee at intervals appropriate to the circumstances and shall keep appropriate records."); *IG Report* at 28-29.<sup>5</sup> In addition, "[i]n each interrogation session in which an Enhanced Technique is employed, a contemporaneous record shall be created setting forth the nature and duration of each such technique employed." *Interrogation Guidelines* at 3.

<sup>5</sup> In addition to monitoring the application and effects of enhanced interrogation techniques, OMS personnel are instructed more generally to ensure that "[a]dequate medical care shall be provided to detainees, even those undergoing enhanced interrogation." *OMS Guidelines* at 10.

TOP SECRET// [REDACTED] NOFORN

TOP SECRET ██████████ NOFORN

At any time, any on-scene personnel (including the medical or psychological personnel, the chief of base, substantive experts, security officers, and other interrogators) can intervene to stop the use of any technique if it appears that the technique is being used improperly, and on-scene medical personnel can intervene if the detainee has developed a condition making the use of the technique unsafe. More generally, medical personnel watch for signs of physical distress or mental harm so significant as possibly to amount to the "severe physical or mental pain or suffering" that is prohibited by sections 2340-2340A. As the *OMS Guidelines* explain, "[m]edical officers must remain cognizant at all times of their obligation to prevent 'severe physical or mental pain or suffering.'" *OMS Guidelines* at 10. Additional restrictions on certain techniques are described below.

These techniques have all been imported from military Survival, Evasion, Resistance, Escape ("SERE") training, where they have been used for years on U.S. military personnel, although with some significant differences described below. See *IG Report* at 13-14. Although we refer to the SERE experience below, we note at the outset an important limitation on reliance on that experience. Individuals undergoing SERE training are obviously in a very different situation from detainees undergoing interrogation; SERE trainees know it is part of a training program, not a real-life interrogation regime, they presumably know it will last only a short time, and they presumably have assurances that they will not be significantly harmed by the training.

## B.

You have described the specific techniques at issue as follows:<sup>9</sup>

<sup>9</sup> The descriptions of these techniques are set out in a number of documents including: the *OMS Guidelines*; *Interrogations Guidelines*; *Confinement Guidelines*; *Background Paper*; Letter from ██████████ Associate General Counsel, CIA, to Dan Levin, Acting Assistant Attorney General, Office of Legal Counsel ("OLC") (July 30, 2004) ("July 30 ██████████ Letter"); Letter from John A. Rizzo, Acting General Counsel, CIA, to Daniel Levin, Acting Assistant Attorney General, OLC (Aug. 2, 2004) ("August 2 Rizzo Letter"); Letter from ██████████ Associate General Counsel, CIA, to Dan Levin, Acting Assistant Attorney General, OLC (Aug. 19, 2004) ("August 19 ██████████ Letter"); Letter from ██████████ Associate General Counsel, CIA, to Dan Levin, Acting Assistant Attorney General, OLC (Aug. 25, 2004) ("August 25 ██████████ Letter"); Letter from ██████████ Associate General Counsel, CIA, to Dan Levin, Acting Assistant Attorney General, OLC (Oct. 2, 2004) ("October 2 ██████████ Letter"); Letter from ██████████ Associate General Counsel, CIA, to Dan Levin, Acting Assistant Attorney General, OLC (Oct. 22, 2004) ("October 22 ██████████ Letter"). Several of the techniques are described and discussed in an earlier memorandum to you. See Memorandum for John Rizzo, Acting General Counsel, Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Interrogation of al Qaeda Operative* (Aug. 1, 2002) ("Interrogation Memorandum") (TS). We have separately reanalyzed all techniques in the present memorandum, and we will note below where aspects of particular techniques differ from those addressed in the *Interrogation Memorandum*. In order to avoid any confusion in this extremely sensitive and important area, the discussions of the statute in the *2004 Legal Standards Opinion* and this memorandum supersede that in the *Interrogation Memorandum*; however, this memorandum confirms the conclusion of *Interrogation Memorandum* that the use of these techniques on a particular high value al Qaeda detainee, subject to the limitations imposed herein, would not violate sections 2340-2340A. In some cases additional facts set forth below have been provided to us in communications with CIA personnel. The CIA has reviewed this memorandum and confirmed the accuracy of the descriptions and limitations. Our analysis assumes adherence to these descriptions and limitations.

TOP SECRET ██████████ NOFORN

TOP SECRET// [REDACTED] NOFORN

1. *Dietary manipulation.* This technique involves the substitution of commercial liquid meal replacements for normal food, presenting detainees with a bland, unappetizing, but nutritionally complete diet. You have informed us that the CIA believes dietary manipulation makes other techniques, such as sleep deprivation, more effective. See August 25 [REDACTED] Letter at 4. Detainees on dietary manipulation are permitted as much water as they want. In general, minimum daily fluid and nutritional requirements are estimated using the following formula:

- Fluid requirement: 35 ml/kg/day. This may be increased depending on ambient temperature, body temperature, and level of activity. Medical officers must monitor fluid intake, and although detainees are allowed as much water as they want, monitoring of urine output may be necessary in the unlikely event that the officers suspect that the detainee is becoming dehydrated.
- Calorie requirement: The CIA generally follows as a guideline a calorie requirement of 900 kcal/day + 10 kcal/kg/day. This quantity is multiplied by 1.2 for a sedentary activity level or 1.4 for a moderate activity level. Regardless of this formula, the recommended minimum calorie intake is 1500 kcal/day, and in no event is the detainee allowed to receive less than 1000 kcal/day.<sup>10</sup> Calories are provided using commercial liquid diets (such as Ensure Plus), which also supply other essential nutrients and make for nutritionally complete meals.<sup>11</sup>

Medical officers are required to ensure adequate fluid and nutritional intake, and frequent medical monitoring takes place while any detainee is undergoing dietary manipulation. All detainees are weighed weekly, and in the unlikely event that a detainee were to lose more than 10 percent of his body weight, the restricted diet would be discontinued.

2. *Nudity.* This technique is used to cause psychological discomfort, particularly if a detainee, for cultural or other reasons, is especially modest. When the technique is employed, clothing can be provided as an instant reward for cooperation. During and between interrogation sessions, a detainee may be kept nude, provided that ambient temperatures and the health of the detainee permit. For this technique to be employed, ambient temperature must be at least 68°F.<sup>12</sup> No sexual abuse or threats of sexual abuse are permitted. Although each detention cell has full-time closed-circuit video monitoring, the detainee is not intentionally exposed to other detainees or unduly exposed to the detention facility staff. We understand that interrogators "are trained to

<sup>10</sup> This is the calorie requirement for males; the CIA presently has no female detainees.

<sup>11</sup> While detainees subject to dietary manipulation are obviously situated differently from individuals who voluntarily engage in commercial weight-loss programs, we note that widely available commercial weight-loss programs in the United States employ diets of 1000 kcal/day for sustained periods of weeks or longer without requiring medical supervision. While we do not equate commercial weight loss programs and this interrogation technique, the fact that these calorie levels are used in the weight-loss programs, in our view, is instructive in evaluating the medical safety of the interrogation technique.

<sup>12</sup> You have informed us that it is very unlikely that nudity would be employed at ambient temperatures below 75°F. See October 12 [REDACTED] Letter at 1. For purposes of our analysis, however, we will assume that ambient temperatures may be as low as 68°F.

TOP SECRET// [REDACTED] NOFORN

~~TOP SECRET//~~ [REDACTED] ~~NOFORN~~

avoid sexual innuendo or any acts of implicit or explicit sexual degradation." *October 12 Letter at 2.* Nevertheless, interrogators can exploit the detainee's fear of being seen naked. In addition, female officers involved in the interrogation process may see the detainees naked; and for purposes of our analysis, we will assume that detainees subjected to nudity as an interrogation technique are aware that they may be seen naked by females.

3. *Attention grasp.* This technique consists of grasping the individual with both hands, one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the individual is drawn toward the interrogator.

4. *Walling.* This technique involves the use of a flexible, false wall. The individual is placed with his heels touching the flexible wall. The interrogator pulls the individual forward and then quickly and firmly pushes the individual into the wall. It is the individual's shoulder blades that hit the wall. During this motion, the head and neck are supported with a rolled hood or towel that provides a C-collar effect to help prevent whiplash. To reduce further the risk of injury, the individual is allowed to rebound from the flexible wall. You have informed us that the false wall is also constructed to create a loud noise when the individual hits it in order to increase the shock or surprise of the technique. We understand that walling may be used when the detainee is uncooperative or unresponsive to questions from interrogators. Depending on the extent of the detainee's lack of cooperation, he may be walled one time during an interrogation session (one impact with the wall) or many times (perhaps 20 or 30 times) consecutively. We understand that this technique is not designed to, and does not, cause severe pain, even when used repeatedly as you have described. Rather, it is designed to wear down the detainee and to shock or surprise the detainee and alter his expectations about the treatment he believes he will receive. In particular, we specifically understand that the repetitive use of the walling technique is intended to contribute to the shock and drama of the experience, to dispel a detainee's expectations that interrogators will not use increasing levels of force, and to wear down his resistance. It is not intended to—and based on experience you have informed us that it does not—inflict any injury or cause severe pain. Medical and psychological personnel are physically present or otherwise observing whenever this technique is applied (as they are with any interrogation technique involving physical contact with the detainee).

5. *Facial hold.* This technique is used to hold the head immobile during interrogation. One open palm is placed on either side of the individual's face. The fingertips are kept well away from the individual's eyes.

6. *Facial slap or insult slap.* With this technique, the interrogator slaps the individual's face with fingers slightly spread. The hand makes contact with the area directly between the tip of the individual's chin and the bottom of the corresponding earlobe. The interrogator thus "invades" the individual's "personal space." We understand that the goal of the facial slap is not to inflict physical pain that is severe or lasting. Instead, the purpose of the facial slap is to induce shock, surprise, or humiliation. Medical and psychological personnel are physically present or otherwise observing whenever this technique is applied.

7. *Abdominal slap.* In this technique, the interrogator strikes the abdomen of the detainee with the back of his open hand. The interrogator must have no rings or other jewelry on

~~TOP SECRET//~~ [REDACTED] ~~NOFORN~~

~~TOP SECRET~~ [REDACTED] ~~NOFORN~~

his hand. The interrogator is positioned directly in front of the detainee, generally no more than 18 inches from the detainee. With his fingers held tightly together and fully extended, and with his palm toward the interrogator's own body, using his elbow as a fixed pivot point, the interrogator slaps the detainee in the detainee's abdomen. The interrogator may not use a fist, and the slap must be delivered above the navel and below the sternum. This technique is used to condition a detainee to pay attention to the interrogator's questions and to dislodge expectations that the detainee will not be touched. It is not intended to—and based on experience you have informed us that it does not—inflict any injury or cause any significant pain. Medical and psychological personnel are physically present or otherwise observing whenever this technique is applied.

8. *Cramped confinement.* This technique involves placing the individual in a confined space, the dimensions of which restrict the individual's movement. The confined space is usually dark. The duration of confinement varies based upon the size of the container. For the larger confined space, the individual can stand up or sit down; the smaller space is large enough for the subject to sit down. Confinement in the larger space may last no more than 8 hours at a time for no more than 18 hours a day; for the smaller space, confinement may last no more than two hours. Limits on the duration of cramped confinement are based on considerations of the detainee's size and weight, how he responds to the technique, and continuing consultation between the interrogators and OMS officers.<sup>13</sup>

9. *Wall standing.* This technique is used only to induce temporary muscle fatigue. The individual stands about four to five feet from a wall, with his feet spread approximately to shoulder width. His arms are stretched out in front of him, with his fingers resting on the wall and supporting his body weight. The individual is not permitted to move or reposition his hands or feet.

10. *Stress positions.* There are three stress positions that may be used. You have informed us that these positions are not designed to produce the pain associated with contortions or twisting of the body. Rather, like wall standing, they are designed to produce the physical discomfort associated with temporary muscle fatigue. The three stress positions are (1) sitting on the floor with legs extended straight out in front and arms raised above the head, (2) kneeling on the floor while leaning back at a 45 degree angle, and (3) leaning against a wall generally about three feet away from the detainee's feet, with only the detainee's head touching the wall, while his wrists are handcuffed in front of him or behind his back, and while an interrogator stands next to him to prevent injury if he loses his balance. As with wall standing, we understand that these positions are used only to induce temporary muscle fatigue.

11. *Water dousing.* Cold water is poured on the detainee either from a container or from a hose without a nozzle. This technique is intended to weaken the detainee's resistance and persuade him to cooperate with interrogators. The water poured on the detainee must be potable,

<sup>13</sup> In *Interrogation Memorandum*, we also addressed the use of harmless insects placed in a confinement box and concluded that it did not violate the statute. We understand that—for reasons unrelated to any concern that it might violate the statute—the CIA never used that technique and has removed it from the list of authorized interrogation techniques; accordingly, we do not address it again here.

~~TOP SECRET~~ [REDACTED] ~~NOFORN~~

TOP SECRET [REDACTED] NOFORN

and the interrogators must ensure that water does not enter the detainee's nose, mouth, or eyes. A medical officer must observe and monitor the detainee throughout application of this technique, including for signs of hypothermia. Ambient temperatures must remain above 64°F. If the detainee is lying on the floor, his head is to remain vertical, and a poncho, mat, or other material must be placed between him and the floor to minimize the loss of body heat. At the conclusion of the water dousing session, the detainee must be moved to a heated room if necessary to permit his body temperature to return to normal in a safe manner. To ensure an adequate margin of safety, the maximum period of time that a detainee may be permitted to remain wet has been set at two-thirds the time at which, based on extensive medical literature and experience, hypothermia could be expected to develop in healthy individuals who are submerged in water of the same temperature. For example, in employing this technique:

- For water temperature of 41°F, total duration of exposure may not exceed 20 minutes without drying and rewarming.
- For water temperature of 50°F, total duration of exposure may not exceed 40 minutes without drying and rewarming.
- For water temperature of 59°F, total duration of exposure may not exceed 60 minutes without drying and rewarming.

The minimum permissible temperature of the water used in water dousing is 41°F, though you have informed us that in practice the water temperature is generally not below 50°F, since tap water rather than refrigerated water is generally used. We understand that a version of water dousing routinely used in SERE training is much more extreme in that it involves complete immersion of the individual in cold water (where water temperatures may be below 40°F) and is usually performed outdoors where ambient air temperatures may be as low as 10°F. Thus, the SERE training version involves a far greater impact on body temperature; SERE training also involves a situation where the water may enter the trainee's nose and mouth.<sup>14</sup>

You have also described a variation of water dousing involving much smaller quantities of water; this variation is known as "flicking." Flicking of water is achieved by the interrogator wetting his fingers and then flicking them at the detainee, propelling droplets at the detainee. Flicking of water is done "in an effort to create a distracting effect, to awaken, to startle, to irritate, to instill humiliation, or to cause temporary insult." *October 22 [REDACTED] Letter at 2.* The water used in the "flicking" variation of water dousing also must be potable and within the water and ambient air temperature ranges for water dousing described above. Although water may be flicked into the detainee's face with this variation, the flicking of water at all times is done in such a manner as to avoid the inhalation or ingestion of water by the detainee. *See id.*

<sup>14</sup> See *October 12 [REDACTED] Letter at 2-3.* Comparison of the time limits for water dousing with those used in SERE training is somewhat difficult as we understand that the SERE training time limits are based on the ambient air temperature rather than water temperature.

TOP SECRET [REDACTED] NOFORN

~~TOP SECRET~~ [REDACTED] ~~NOFORN~~

12. *Sleep deprivation (more than 48 hours)*. This technique subjects a detainee to an extended period without sleep. You have informed us that the primary purpose of this technique is to weaken the subject and wear down his resistance.

The primary method of sleep deprivation involves the use of shackling to keep the detainee awake. In this method, the detainee is standing and is handcuffed, and the handcuffs are attached by a length of chain to the ceiling. The detainee's hands are shackled in front of his body, so that the detainee has approximately a two- to three-foot diameter of movement. The detainee's feet are shackled to a bolt in the floor. Due care is taken to ensure that the shackles are neither too loose nor too tight for physical safety. We understand from discussions with OMS that the shackling does not result in any significant physical pain for the subject. The detainee's hands are generally between the level of his heart and his chin. In some cases, the detainee's hands may be raised above the level of his head, but only for a period of up to two hours. All of the detainee's weight is borne by his legs and feet during standing sleep deprivation. You have informed us that the detainee is not allowed to hang from or support his body weight with the shackles. Rather, we understand that the shackles are only used as a passive means to keep the detainee standing and thus to prevent him from falling asleep; should the detainee begin to fall asleep, he will lose his balance and awaken, either because of the sensation of losing his balance or because of the restraining tension of the shackles. The use of this passive means for keeping the detainee awake avoids the need for using means that would require interaction with the detainee and might pose a danger of physical harm.

We understand from you that no detainee subjected to this technique by the CIA has suffered any harm or injury, either by falling down and forcing the handcuffs to bear his weight or in any other way. You have assured us that detainees are continuously monitored by closed-circuit television, so that if a detainee were unable to stand, he would immediately be removed from the standing position and would not be permitted to dangle by his wrists. We understand that standing sleep deprivation may cause edema, or swelling, in the lower extremities because it forces detainees to stand for an extended period of time. OMS has advised us that this condition is not painful, and that the condition disappears quickly once the detainee is permitted to lie down. Medical personnel carefully monitor any detainee being subjected to standing sleep deprivation for indications of edema or other physical or psychological conditions. The *OMS Guidelines* include extensive discussion on medical monitoring of detainees being subjected to shackling and sleep deprivation, and they include specific instructions for medical personnel to require alternative, non-standing positions or to take other actions, including ordering the cessation of sleep deprivation, in order to relieve or avoid serious edema or other significant medical conditions. See *OMS Guidelines* at 14-16.

---

In lieu of standing sleep deprivation, a detainee may instead be seated on and shackled to a small stool. The stool supports the detainee's weight, but is too small to permit the subject to balance himself sufficiently to be able to go to sleep. On rare occasions, a detainee may also be restrained in a horizontal position when necessary to enable recovery from edema without interrupting the course of sleep deprivation.<sup>15</sup> We understand that these alternative restraints,

---

<sup>15</sup> Specifically, you have informed us that on three occasions early in the program, the interrogation team and the attendant medical officers identified the potential for unacceptable edema in the lower limbs of detainees

~~TOP SECRET~~ [REDACTED] ~~NOFORN~~

TOP SECRET [REDACTED] NOFORN

although uncomfortable, are not significantly painful, according to the experience and professional judgment of OMS and other personnel.

We understand that a detainee undergoing sleep deprivation is generally fed by hand by CIA personnel so that he need not be unshackled; however, "[i]f progress is made during interrogation, the interrogators may unshackle the detainee and let him feed himself as a positive incentive." *October 12 [REDACTED] Letter* at 4. If the detainee is clothed, he wears an adult diaper under his pants. Detainees subject to sleep deprivation who are also subject to nudity as a separate interrogation technique will at times be nude and wearing a diaper. If the detainee is wearing a diaper, it is checked regularly and changed as necessary. The use of the diaper is for sanitary and health purposes of the detainee; it is not used for the purpose of humiliating the detainee, and it is not considered to be an interrogation technique. The detainee's skin condition is monitored, and diapers are changed as needed so that the detainee does not remain in a soiled diaper. You have informed us that to date no detainee has experienced any skin problems resulting from use of diapers.

The maximum allowable duration for sleep deprivation authorized by the CIA is 180 hours, after which the detainee must be permitted to sleep without interruption for at least eight hours. You have informed us that to date, more than a dozen detainees have been subjected to sleep deprivation of more than 48 hours, and three detainees have been subjected to sleep deprivation of more than 96 hours; the longest period of time for which any detainee has been deprived of sleep by the CIA is 180 hours. Under the CIA's guidelines, sleep deprivation could be resumed after a period of eight hours of uninterrupted sleep, but only if OMS personnel specifically determined that there are no medical or psychological contraindications based on the detainee's condition at that time. As discussed below, however, in this memorandum we will evaluate only one application of up to 180 hours of sleep deprivation.<sup>16</sup>

---

undergoing standing sleep deprivation, and in order to permit the limbs to recover without impairing interrogation requirements, the subjects underwent horizontal sleep deprivation. Fax for Steven G. Bradbury, Principal Deputy Assistant Attorney General, OLC, from [REDACTED] Assistant General Counsel, CIA, at 2 (Apr. 22, 2005) ("*April 22 [REDACTED] Fax*"). In horizontal sleep deprivation, the detainee is placed prone on the floor on top of a thick towel or blanket (a precaution designed to prevent reduction of body temperature through direct contact with the cell floor). The detainee's hands are manacled together and the arms placed in an outstretched position—either extended beyond the head or extended to either side of the body—and anchored to a far point on the floor in such a manner that the arms cannot be bent or used for balance or comfort. At the same time, the ankles are shackled together and the legs are extended in a straight line with the body and also anchored to a far point on the floor in such a manner that the legs cannot be bent or used for balance or comfort. *Id.* You have specifically informed us that the manacles and shackles are anchored without additional stress on any of the arm or leg joints that might force the limbs beyond natural extension or create tension on any joint. *Id.* The position is sufficiently uncomfortable to detainees to deprive them of unbroken sleep, while allowing their lower limbs to recover from the effects of standing sleep deprivation. We understand that all standard precautions and procedures for shackling are observed for both hands and feet while in this position. *Id.* You have informed us that horizontal sleep deprivation has been used until the detainee's affected limbs have demonstrated sufficient recovery to return to sitting or standing sleep deprivation mode, as warranted by the requirements of the interrogation team, and subject to a determination by the medical officer that there is no contraindication to resuming other sleep deprivation modes. *Id.*

<sup>16</sup> We express no view on whether any further use of sleep deprivation following a 180-hour application of the technique and 8 hours of sleep would violate sections 2340-2340A.

TOP SECRET [REDACTED] NOFORN

TOP SECRET [REDACTED] NOFORN

You have informed us that detainees are closely monitored by the interrogation team at all times (either directly or by closed-circuit video camera) while being subjected to sleep deprivation, and that these personnel will intervene and the technique will be discontinued if there are medical or psychological contraindications. Furthermore, as with all interrogation techniques used by the CIA, sleep deprivation will not be used on any detainee if the prior medical and psychological assessment reveals any contraindications.

13. *The "waterboard."* In this technique, the detainee is lying on a gurney that is inclined at an angle of 10 to 15 degrees to the horizontal, with the detainee on his back and his head toward the lower end of the gurney. A cloth is placed over the detainee's face, and cold water is poured on the cloth from a height of approximately 6 to 18 inches. The wet cloth creates a barrier through which it is difficult—or in some cases not possible—to breathe. A single "application" of water may not last for more than 40 seconds, with the duration of an "application" measured from the moment when water—of whatever quantity—is first poured onto the cloth until the moment the cloth is removed from the subject's face. See August 19 [REDACTED] Letter at 1. When the time limit is reached, the pouring of water is immediately discontinued and the cloth is removed. We understand that if the detainee makes an effort to defeat the technique (e.g., by twisting his head to the side and breathing out of the corner of his mouth), the interrogator may cup his hands around the detainee's nose and mouth to dam the runoff, in which case it would not be possible for the detainee to breathe during the application of the water. In addition, you have informed us that the technique may be applied in a manner to defeat efforts by the detainee to hold his breath by, for example, beginning an application of water as the detainee is exhaling. Either in the normal application, or where countermeasures are used, we understand that water may enter—and may accumulate in—the detainee's mouth and nasal cavity, preventing him from breathing.<sup>17</sup> In addition, you have indicated that the detainee as a countermeasure may swallow water, possibly in significant quantities. For that reason, based on advice of medical personnel, the CIA requires that saline solution be used instead of plain water to reduce the possibility of hyponatremia (i.e., reduced concentration of sodium in the blood) if the detainee drinks the water.

We understand that the effect of the waterboard is to induce a sensation of drowning. This sensation is based on a deeply rooted physiological response. Thus, the detainee experiences this sensation even if he is aware that he is not actually drowning. We are informed that, based on extensive experience, the process is not physically painful, but that it usually does cause fear and panic. The waterboard has been used many thousands of times in SERE training provided to American military personnel, though in that context it is usually limited to one or two applications of no more than 40 seconds each.<sup>18</sup>

<sup>17</sup> In most applications of this technique, including as it is used in SERE training, it appears that the individual undergoing the technique is not in fact completely prevented from breathing, but his airflow is restricted by the wet cloth, creating a sensation of drowning. See *IG Report* at 15 ("Airflow is restricted . . . and the technique produces the sensation of drowning and suffocation."). For purposes of our analysis, however, we will assume that the individual is unable to breathe during the entire period of any application of water during the waterboard technique.

<sup>18</sup> The Inspector General was critical of the reliance on the SERE experience with the waterboard in light of these and other differences in the application of the technique. We discuss the Inspector General's criticisms

TOP SECRET [REDACTED] NOFORN

TOP SECRET// [REDACTED] NOFORN

You have explained that the waterboard technique is used only if: (1) the CIA has credible intelligence that a terrorist attack is imminent; (2) there are "substantial and credible indicators the subject has actionable intelligence that can prevent, disrupt or delay this attack"; and (3) other interrogation methods have failed or are unlikely to yield actionable intelligence in time to prevent the attack. See Attachment to August 2 Rizzo Letter. You have also informed us that the waterboard may be approved for use with a given detainee only during, at most, one single 30-day period, and that during that period, the waterboard technique may be used on no more than five days. We further understand that in any 24-hour period, interrogators may use no more than two "sessions" of the waterboard on a subject—with a "session" defined to mean the time that the detainee is strapped to the waterboard—and that no session may last more than two hours. Moreover, during any session, the number of individual applications of water lasting 10 seconds or longer may not exceed six. As noted above, the maximum length of any application of water is 40 seconds (you have informed us that this maximum has rarely been reached). Finally, the total cumulative time of all applications of whatever length in a 24-hour period may not exceed 12 minutes. See August 19 [REDACTED] Letter at 1-2. We understand that these limitations have been established with extensive input from OMS, based on experience to date with this technique and OMS's professional judgment that use of the waterboard on a healthy individual subject to these limitations would be "medically acceptable." See OMS Guidelines at 18-19.

During the use of the waterboard, a physician and a psychologist are present at all times. The detainee is monitored to ensure that he does not develop respiratory distress. If the detainee is not breathing freely after the cloth is removed from his face, he is immediately moved to a vertical position in order to clear the water from his mouth, nose, and nasopharynx. The gurney used for administering this technique is specially designed so that this can be accomplished very quickly if necessary. Your medical personnel have explained that the use of the waterboard does pose a small risk of certain potentially significant medical problems and that certain measures are taken to avoid or address such problems. First, a detainee might vomit and then aspirate the emesis. To reduce this risk, any detainee on whom this technique will be used is first placed on a liquid diet. Second, the detainee might aspirate some of the water, and the resulting water in the lungs might lead to pneumonia. To mitigate this risk, a potable saline solution is used in the procedure. Third, it is conceivable (though, we understand from OMS, highly unlikely) that a detainee could suffer spasms of the larynx that would prevent him from breathing even when the application of water is stopped and the detainee is returned to an upright position. In the event of such spasms, a qualified physician would immediately intervene to address the problem, and, if necessary, the intervening physician would perform a tracheotomy. Although the risk of such spasms is considered remote (it apparently has never occurred in thousands of instances of SERE training), we are informed that the necessary emergency medical equipment is always present—although not visible to the detainee—during any application of the waterboard. See generally *id.* at 17-20.<sup>19</sup>

further below. Moreover, as noted above, the very different situations of detainees undergoing interrogation and military personnel undergoing training counsels against undue reliance on the experience in SERE training. That experience is nevertheless of some value in evaluating the technique.

<sup>19</sup> OMS identified other potential risks:

TOP SECRET// [REDACTED] NOFORN

We understand that in many years of use on thousands of participants in SERE training, the waterboard technique (although used in a substantially more limited way) has not resulted in any cases of serious physical pain or prolonged mental harm. In addition, we understand that the waterboard has been used by the CIA on three high level al Qaeda detainees, two of whom were subjected to the technique numerous times, and, according to OMS, none of these three individuals has shown any evidence of physical pain or suffering or mental harm in the more than 25 months since the technique was used on them. As noted, we understand that OMS has been involved in imposing strict limits on the use of the waterboard, limits that, when combined with careful monitoring, in their professional judgment should prevent physical pain or suffering or mental harm to a detainee. In addition, we understand that any detainee is closely monitored by medical and psychological personnel whenever the waterboard is applied, and that there are additional reporting requirements beyond the normal reporting requirements in place when other interrogation techniques are used. See *OMS Guidelines* at 20.

\* \* \*

As noted, all of the interrogation techniques described above are subject to numerous restrictions, many based on input from OMS. Our advice in this memorandum is based on our understanding that there will be careful adherence to all of these guidelines, restrictions, and safeguards, and that there will be ongoing monitoring and reporting by the team, including OMS medical and psychological personnel, as well as prompt intervention by a team member, as necessary, to prevent physical distress or mental harm so significant as possibly to amount to the "severe physical or mental pain or suffering" that is prohibited by sections 2340-2340A. Our advice is also based on our understanding that all interrogators who will use these techniques are adequately trained to understand that the authorized use of the techniques is not designed or intended to cause severe physical or mental pain or suffering, and also to understand and respect the medical judgment of OMS and the important role that OMS personnel play in the program.

C.

You asked for our advice concerning these interrogation techniques in connection with their use on a specific high value al Qaeda detainee named [REDACTED]. You informed us that the

---

In our limited experience, extensive sustained use of the waterboard can introduce new risks. Most seriously, for reasons of physical fatigue or psychological resignation, the subject may simply give up, allowing excessive filling of the airways and loss of consciousness. An unresponsive subject should be righted immediately, and the interrogator should deliver a sub-xyphoid thrust to expel the water. If this fails to restore normal breathing, aggressive medical intervention is required. Any subject who has reached this degree of compromise is not considered an appropriate candidate for the waterboard, and the physician on the scene can not concur in the further use of the waterboard without specific [Chief, OMS] consultation and approval.

---

*OMS Guidelines* at 18. OMS has also stated that "[b]y days 3-5 of an aggressive program, cumulative effects become a potential concern. Without any hard data to quantify either this risk or the advantages of this technique, we believe that beyond this point continued intense waterboard applications may not be medically appropriate." *Id.* at 19. As noted above, based on OMS input, the CIA has adopted and imposed a number of strict limitations on the frequency and duration of use of the waterboard.

TOP SECRET/ [REDACTED] NOFORN

[REDACTED] had information about al Qaeda's plans to launch an attack within the United States. According to [REDACTED] had extensive connections to various al Qaeda leaders, members of the Taliban, and the al-Zarqawi network, and had arranged meetings between an associate and [REDACTED] to discuss such an attack. *August 25 Letter* at 2-3. You advised us that medical and psychological assessments [REDACTED] were completed by a CIA physician and psychologist, and that based on this examination, the physician concluded "[REDACTED] medically stable and has no medical contraindications to interrogation, including the use of interrogation techniques" addressed in this memorandum.<sup>20</sup> *Medical and Psychological Assessment of [REDACTED]* attached to *August 2 Rizzo Letter* at 1.<sup>21</sup> The psychological assessment found [REDACTED] was alert and oriented and his concentration and attention were appropriate." *Id.* at 2. The psychologist further found [REDACTED] "thought processes were clear and logical; there was no evidence of a thought disorder, delusions, or hallucinations[, and t]here were not significant signs of depression, anxiety or other mental disturbance." *Id.* The psychologist evaluated [REDACTED] "psychologically stable, reserved and defensive," and "opined that there was no evidence that the use of the approved interrogation methods would cause any severe or prolonged psychological disturbance." *Id.* at 2. Our conclusions depend on these assessments. Before using the techniques on other detainees, the CIA would need to ensure, in each case, that all medical and psychological assessments indicate that the detainee is fit to undergo the use of the interrogation techniques.

## II.

## A.

Section 2340A provides that "[w]hoever 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."<sup>22</sup> Section 2340(1) defines "torture" as "an

<sup>20</sup> You have advised us that the waterboard has not been used [REDACTED]. We understand that there may have been medical reasons against using that technique in his case. Of course, our advice assumes that the waterboard could be used only in the absence of medical contraindications.

<sup>21</sup> The medical examination reported [REDACTED] was obese, and that he reported a "5-6 year history of non-exertional chest pressures, which are intermittent, at times accompanied by nausea and depression and shortness of breath." *Medical and Psychological Assessment of [REDACTED]* at 1, attached to *August 2 Rizzo Letter*. [REDACTED] he has never consulted a physician for this problem," and was "unable or unwilling to be more specific about the frequency or intensity of the aforementioned symptoms." *Id.* He also reported suffering "long-term medical and mental problems" from a motor vehicle accident "many years ago," and stated that he took medication as a result of that accident until ten years ago. *Id.* He stated that he was not currently taking any medication. He also reported seeing a physician for kidney problems that caused him to urinate frequently and complained of a toothache. *Id.* The medical examination [REDACTED] showed a rash on his chest and shoulders and that "his nose and chest were clear, [and] his heart sounds were normal with no murmurs or gallops." *Id.* The physician opined [REDACTED] "likely has some reflux esophagitis and mild cheek folliculitis, but doubt[ed] that he has any coronary pathology." *Id.*

<sup>22</sup> Section 2340A provides in full:

(a) Offense.—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

TOP SECRET/ [REDACTED] NOFORN

TOP SECRET/ [REDACTED] NOFORN

act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”<sup>23</sup>

Congress enacted sections 2340-2340A to carry out the obligations of the United States under the CAT. See H.R. Conf. Rep. No. 103-482, at 229 (1994). The CAT, among other things, requires the United States, as a state party, to ensure that acts of torture, along with attempts and complicity to commit such acts, are crimes under U.S. law. See CAT arts. 2, 4-5. Sections 2340-2340A satisfy that requirement with respect to acts committed outside the United States.<sup>24</sup> Conduct constituting “torture” within the United States already was—and remains—prohibited by various other federal and state criminal statutes.

---

person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction.—There is jurisdiction over the activity prohibited in subsection (a) if—

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy.—A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

18 U.S.C. § 2340A.

<sup>23</sup> Section 2340 provides in full:

As used in this chapter—

(1) “torture” means an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, 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; and

(3) “United States” means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

18 U.S.C. § 2340 (as amended by Pub. L. No. 108-375, 118 Stat. 1811 (2004)).

<sup>24</sup> Congress limited the territorial reach of the federal torture statute by providing that the prohibition applies only to conduct occurring “outside the United States,” 18 U.S.C. § 2340A(a), which is currently defined in the statute to mean outside “the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.” *Id.* § 2340(3) (as amended by Pub. L. No. 108-375, 118 Stat. 1811

TOP SECRET/ [REDACTED] NOFORN

TOP SECRET// [REDACTED] NOFORN

The CAT defines "torture" so as to require the intentional infliction of "severe pain or suffering, whether physical or mental." Article 1(1) of the CAT provides:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Senate included the following understanding in its resolution of advice and consent to ratification of the CAT:

The United States understands that, in order to constitute torture, an act must be 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 administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the 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 of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36 (1990). This understanding was deposited with the U.S. instrument of ratification, *see* 1830 U.N.T.S. 320 (Oct. 21, 1994), and thus defines the scope of United States obligations under the treaty. *See Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 32-33 (1987). The criminal prohibition against torture that Congress codified in 18 U.S.C. §§ 2340-2340A generally tracks the CAT's definition of torture, subject to the U.S. understanding.

---

B.

Under the language adopted by Congress in sections 2340-2340A, to constitute "torture," conduct must be "specifically intended to inflict severe physical or mental pain or suffering." In the discussion that follows, we will separately consider each of the principal components of this key phrase: (1) the meaning of "severe"; (2) the meaning of "severe physical pain or suffering";

---

(2004)). You have advised us that the CIA's use of the techniques addressed in this memorandum would occur "outside the United States" as defined in sections 2340-2340A.

TOP SECRET// [REDACTED] NOFORN

TOP SECRET [REDACTED] NOFORN

(3) the meaning of "severe mental pain or suffering"; and (4) the meaning of "specifically intended."

(1) *The meaning of "severe."*

Because the statute does not define "severe," "we construe [the] term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The common understanding of the term "torture" and the context in which the statute was enacted also inform our analysis. Dictionaries define "severe" (often conjoined with "pain") to mean "extremely violent or intense: *severe pain*." *American Heritage Dictionary of the English Language* 1653 (3d ed. 1992); see also *XV Oxford English Dictionary* 101 (2d ed. 1989) ("Of pain, suffering, loss, or the like: Grievous, extreme" and "Of circumstances . . . : Hard to sustain or endure."). The common understanding of "torture" further supports the statutory concept that the pain or suffering must be severe. See *Black's Law Dictionary* 1528 (8th ed. 2004) (defining "torture" as "[t]he infliction of *intense pain* to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure") (emphasis added); *Webster's Third New International Dictionary of the English Language Unabridged* 2414 (2002) (defining "torture" as "the infliction of *intense pain* (as from burning, crushing, wounding) to punish or coerce someone") (emphasis added); *Oxford American Dictionary and Language Guide* 1064 (1999) (defining "torture" as "the infliction of *severe bodily pain*, esp. as a punishment or a means of persuasion") (emphasis added). Thus, the use of the word "severe" in the statutory prohibition on torture clearly denotes a sensation or condition that is extreme in intensity and difficult to endure.

This interpretation is also consistent with the historical understanding of torture, which has generally involved the use of procedures and devices designed to inflict intense or extreme pain. The devices and procedures historically used were generally intended to cause extreme pain while not killing the person being questioned (or at least not doing so quickly) so that questioning could continue. Descriptions in Lord Hope's lecture, "Torture," University of Essex/Clifford Chance Lecture at 7-8 (Jan. 28, 2004) (describing the "boot," which involved crushing of the victim's legs and feet; repeated pricking with long needles; and thumbscrews), and in Professor Langbein's book, *Torture and the Law of Proof*, cited *supra* p. 2, make this clear. As Professor Langbein summarized:

The commonest torture devices—strappado, rack, thumbscrews, legscrews—worked upon the extremities of the body, either by distending or compressing them. We may suppose that these modes of torture were preferred because they were somewhat less likely to maim or kill than coercion directed to the trunk of the body, and because they would be quickly adjusted to take account of the victim's responses during the examination.

TOP SECRET [REDACTED] NOFORN

*Torture and the Law of Proof* at 15 (footnote omitted).<sup>25</sup>

The statute, moreover, was intended to implement United States obligations under the CAT, which, as quoted above, defines "torture" as acts that intentionally inflict "severe pain or suffering." CAT art. 1(1). As the Senate Foreign Relations Committee explained in its report recommending that the Senate consent to ratification of the CAT:

The [CAT] seeks to define "torture" in a relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned. . . .

. . . The term "torture," in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.

S. Exec. Rep. No. 101-30 at 13-14. See also David P. Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 *Nova L. Rev.* 449, 455 (1991) ("By stressing the extreme nature of torture, . . . [the] definition [of torture in the CAT] describes a relatively limited set of circumstances likely to be illegal under most, if not all, domestic legal systems.").

Drawing distinctions among gradations of pain is obviously not an easy task, especially given the lack of any precise, objective scientific criteria for measuring pain.<sup>26</sup> We are given some aid in this task by judicial interpretations of the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note (2000). The TVPA, also enacted to implement the CAT, provides a civil remedy to victims of torture. The TVPA defines "torture" to include:

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

<sup>25</sup> We emphatically are not saying that only such historical techniques—or similar ones—can constitute "torture" under sections 2340-2340A. But the historical understanding of torture is relevant in interpreting Congress's intent in prohibiting the crime of "torture." Cf. *Morissette v. United States*, 342 U.S. 246, 263 (1952).

<sup>26</sup> Despite extensive efforts to develop objective criteria for measuring pain, there is no clear, objective, consistent measurement. As one publication explains:

Pain is a complex, subjective, perceptual phenomenon with a number of dimensions—intensity, quality, time course, impact, and personal meaning—that are uniquely experienced by each individual and, thus, can only be assessed indirectly. *Pain is a subjective experience and there is no way to objectively quantify it.* Consequently, assessment of a patient's pain depends on the patient's overt communications, both verbal and behavioral. Given pain's complexity, one must assess not only its somatic (sensory) component but also patients' moods, attitudes, coping efforts, resources, responses of family members, and the impact of pain on their lives.

Dennis C. Turk, *Assess the Person, Not Just the Pain*, *Pain: Clinical Updates*, Sept. 1993 (emphasis added). This lack of clarity further complicates the effort to define "severe" pain or suffering.

TOP SECRET [REDACTED] NOFORN

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 . . . .

28 U.S.C. § 1350 note, § 3(b)(1) (emphases added). The emphasized language is similar to section 2340's phrase "severe physical or mental pain or suffering."<sup>27</sup> As the Court of Appeals for the District of Columbia Circuit has explained:

The severity requirement is crucial to ensuring that the conduct proscribed by the [CAT] and the TVPA is sufficiently extreme and outrageous to warrant the universal condemnation that the term "torture" both connotes and invokes. The drafters of the [CAT], as well as the Reagan Administration that signed it, the Bush Administration that submitted it to Congress, and the Senate that ultimately ratified it, therefore all sought to ensure that "only acts of a certain gravity shall be considered to constitute torture."

The critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim. The more intense, lasting, or heinous the agony, the more likely it is to be torture.

*Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92-93 (D.C. Cir. 2002) (citations omitted). The D.C. Circuit in *Price* concluded that a complaint that alleged beatings at the hands of police but that did not provide details concerning "the severity of plaintiffs' alleged beatings, including their frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out," did not suffice "to ensure that [it] satisf[ie]d the TVPA's rigorous definition of torture." *Id.* at 93.

In *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C. Cir. 2003), the D.C. Circuit again considered the types of acts that constitute torture under the TVPA definition. The plaintiff alleged, among other things, that Libyan authorities had held her incommunicado and threatened to kill her if she tried to leave. *See id.* at 232, 234. The court acknowledged that "these alleged acts certainly reflect a bent toward cruelty on the part of their perpetrators," but, reversing the district court, went on to hold that "they are not in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture within the meaning of the [TVPA]." *Id.* at 234. Cases in which courts have found torture illustrate the extreme nature of conduct that falls within the statutory definition. *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 789, 790-91, 795 (9th Cir. 1996) (concluding that a course of conduct that included, among other things, severe beatings of plaintiff, repeated threats of death and electric shock, sleep deprivation, extended shackling to a cot (at times with a towel over his nose and mouth and water poured down his nostrils), seven months of confinement in a "suffocatingly hot" and

<sup>27</sup> Section 3(b)(2) of the TVPA defines "mental pain or suffering" using substantially identical language to section 2340(2)'s definition of "severe mental pain or suffering."

TOP SECRET [REDACTED] NOFORN

cramped cell, and eight years of solitary or near-solitary confinement, constituted torture); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1332-40, 1345-46 (N.D. Ga. 2002) (concluding that a course of conduct that included, among other things, severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat, and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim's forehead; hanging the victim and beating him; extreme limitations of food and water, and subjection to games of "Russian roulette," constituted torture); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22-23 (D.D.C. 2001) (entering default judgment against Iraq where plaintiffs alleged, among other things, threats of "physical torture, such as cutting off . . . fingers, pulling out . . . fingernails," and electric shocks to the testicles); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64-66 (D.D.C. 1998) (concluding that a course of conduct that included frequent beatings, pistol whipping, threats of imminent death, electric shocks, and attempts to force confessions by playing Russian roulette and pulling the trigger at each denial, constituted torture).

(2) *The meaning of "severe physical pain or suffering."*

The statute provides a specific definition of "severe mental pain or suffering," see 18 U.S.C. § 2340(2), but does not define the term "severe physical pain or suffering." The meaning of "severe physical pain" is relatively straightforward; it denotes physical pain that is extreme in intensity and difficult to endure. In our *2004 Legal Standards Opinion*, we concluded that under some circumstances, conduct intended to inflict "severe physical suffering" may constitute torture even if it is not intended to inflict "severe physical pain." *Id.* at 10. That conclusion follows from the plain language of sections 2340-2340A. The inclusion of the words "or suffering" in the phrase "severe physical pain or suffering" suggests that the statutory category of physical torture is not limited to "severe physical pain." See, e.g., *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (explaining presumption against surplusage).

"Severe physical suffering," however, is difficult to define with precision. As we have previously noted, the text of the statute and the CAT, and their history, provide little concrete guidance as to what Congress intended by the concept of "severe physical suffering." See *2004 Legal Standards Opinion* at 11. We interpret the phrase in a statutory context where Congress expressly distinguished "severe physical pain or suffering" from "severe mental pain or suffering." Consequently, we believe it a reasonable inference that "physical suffering" was intended by Congress to mean something distinct from "mental pain or suffering."<sup>28</sup> We presume that where Congress uses different words in a statute, those words are intended to have different meanings. See, e.g., *Barnes v. United States*, 199 F.3d 386, 389 (7th Cir. 1999) ("Different language in separate clauses in a statute indicates Congress intended distinct meanings."). Moreover, given that Congress precisely defined "mental pain or suffering" in sections 2340-2340A, it is unlikely to have intended to undermine that careful definition by

<sup>28</sup> Common dictionary definitions of "physical" support reading "physical suffering" to mean something different from mental pain or suffering. See, e.g., *American Heritage Dictionary of the English Language* at 1366 ("Of or relating to the body as distinguished from the mind or spirit"); *Oxford American Dictionary and Language Guide* at 748 ("of or concerning the body (physical exercise; physical education)").

TOP SECRET// [REDACTED] NOFORN

including essentially mental distress within the separate category of "physical suffering."<sup>29</sup>

In our *2004 Legal Standards Opinion*, we concluded, based on the understanding that "suffering" denotes a "state" or "condition" that must be "endured" over time, that there is "an extended temporal element, or at least an element of persistence" to the concept of physical suffering in sections 2340-2340A. *Id.* at 12 & n.22. Consistent with this analysis in our *2004 Legal Standards Opinion*, and in light of standard dictionary definitions, we read the word "suffering," when used in reference to physical or bodily sensations, to mean a state or condition of physical distress, misery, affliction, or torment (usually associated with physical pain) that persists for a significant period of time. *See, e.g., Webster's Third New International Dictionary* at 2284 (defining "suffering" as "the state or experience of one who suffers: the endurance of or submission to affliction, pain, loss"; "a pain endured or a distress, loss, or injury incurred"); *Random House Dictionary of the English Language* 572, 1229, 1998 (2d ed. unabridged 1987) (giving "distress," "misery," and "torment" as synonyms of "suffering"). Physical distress or discomfort that is merely transitory and that does not persist over time does not constitute "physical suffering" within the meaning of the statute. Furthermore, in our *2004 Legal Standards Opinion*, we concluded that "severe physical suffering" for purposes of sections 2340-2340A requires "a condition of some extended duration or persistence as well as intensity" and "is reserved for physical distress that is 'severe' considering its intensity and duration or persistence, rather than merely mild or transitory." *Id.* at 12.

We therefore believe that "severe physical suffering" under the statute means a state or condition of physical distress, misery, affliction, or torment, usually involving physical pain, that is both extreme in intensity and significantly protracted in duration or persistent over time. Accordingly, judging whether a particular state or condition may amount to "severe physical suffering" requires a weighing of both its intensity and its duration. The more painful or intense is the physical distress involved—i.e., the closer it approaches the level of severe physical pain separately proscribed by the statute—the less significant would be the element of duration or persistence over time. On the other hand, depending on the circumstances, a level of physical

<sup>29</sup> This conclusion is reinforced by the expressions of concern at the time the Senate gave its advice and consent to the CAT about the potential for vagueness in including the concept of mental pain or suffering as a definitional element in any criminal prohibition on torture. *See, e.g., Convention Against Torture: Hearing Before the Senate Comm. On Foreign Relations, 101st Cong. 8, 10 (1990)* (prepared statement of Abraham Sofaer, Legal Adviser, Department of State: "The Convention's wording . . . is not in all respects as precise as we believe necessary . . . [B]ecause [the Convention] requires establishment of criminal penalties under our domestic law, we must pay particular attention to the meaning and interpretation of its provisions, especially concerning the standards by which the Convention will be applied as a matter of U.S. law. . . . [W]e prepared a codified proposal which . . . clarifies the definition of mental pain and suffering."); *id.* at 15-16 (prepared statement of Mark Richard: "The basic problem with the Torture Convention—one that permeates all our concerns—is its imprecise definition of torture, especially as that term is applied to actions which result solely in mental anguish. This definitional vagueness makes it very doubtful that the United States can, consistent with Constitutional due process constraints, fulfill its obligation under the Convention to adequately engraft the definition of torture into the domestic criminal law of the United States."); *id.* at 17 (prepared statement of Mark Richard: "Accordingly, the Torture Convention's vague definition concerning the mental suffering aspect of torture cannot be resolved by reference to established principles of international law. In an effort to overcome this unacceptable element of vagueness in Article I of the Convention, we have proposed an understanding which defines severe mental pain constituting torture with sufficient specificity to . . . meet Constitutional due process requirements.").

TOP SECRET// [REDACTED] NOFORN