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INTERROGATION
TECHNIQUES
AND THE
RISK OF
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PHYSICIANS FOR HUMAN RIGHTS AND HUMAN RIGHTS FIRST

This report is the product of collaboration between Physicians for Human Rights (PHR) and Human Rights First (HRF), two non-governmental organizations with extensive experience in research, analysis, and advocacy directed toward ending torture and defending human dignity.

Physicians for Human Rights draws on the expertise of health professionals and analysts who are experts on the physical and psychological effects of torture and medical ethics.

Human Rights First marshals the legal expertise of specialists familiar with the relevant case law and legal history.

Both Human Rights First and Physicians for Human Rights have been on the forefront of the fight against torture for decades.

Physicians for Human Rights has a 20-year track record of documenting torture around the world, including in Turkey, Chile, Chechnya, Kosovo, Israel, Chiapas, and Mexico. PHR was one of the lead authors of the Istanbul Protocol on documenting torture, adopted by the United Nations in 1999. In 2005, PHR produced a report titled *Break Them Down*, the first comprehensive review of the systematic use of psychological torture by U.S. forces.

PHR has extensive expertise in evaluating survivors of torture as well as experience with prisoner health issues. PHR has successfully organized and mobilized thousands of health professionals and helped to secure the leadership of the major health professional associations to develop ethical guidelines related to interrogation that protect against the misuse of medicine and science in the abuse of prisoners. PHR's work, including the US Health Professionals' Call to Prevent Torture and Abuse of Detainees in U.S. Custody that was signed by more than 1200 health professionals nationwide, contributed to the adoption of ethical standards by the American Medical Association, the World Medical Association, and the American Psychiatric Association prohibiting direct participation of physicians in interrogations. PHR has also provided support and guidance to a growing movement of concerned psychologists for similar standards for the American Psychological Association.

For nearly 30 years, Human Rights First has been a leader in the fight against torture and other forms of official cruelty. HRF was instrumental in proposing, drafting and campaigning for the Torture Victims Protection Act (TVPA) and played an active role in pressing for U.S. ratification of the Convention Against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment, and for the adoption of a 1994 federal statute that makes torture a felony. As part of its End Torture Now Campaign, HRF led a successful effort to support passage of the McCain Amendment in 2005 banning cruel, inhuman, or degrading treatment by U.S. personnel of all detainees in U.S. custody anywhere. In response to the Administration's proposal on the Military Commissions Act of 2006, HRF organized retired military leaders who urged the U.S. Senate to reject a provision of the Act that would have downgraded the Geneva Conventions' standards for humane treatment.

Human Rights First has published a number of reports on U.S. detention and interrogation policies and practices, including *Behind the Wire* (2005), an update of HRF's 2004 report *Ending Secret Detentions*, which assessed the nature and scope of the United States' worldwide detention system and how this system facilitated abuse of detainees, and *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan*, a study of the gaps in U.S. government investigations into, and accountability for torture and abuse.

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GLOSSARY AND LIST OF ACRONYMS

Document Glossary

U.S. Army Field Manual: U.S. Army Field Manuals are published by the U.S. Army Publishing Directorate. They contain detailed information and how-tos for procedures important to U.S. military personnel serving in the field. For example, FM 34-52 (superseded by FM 2-22.3) provides doctrinal guidance, techniques, and procedures that govern collection of human intelligence according to the army's needs. Under current law, the Army Field Manual on Intelligence Interrogation (FM 2-22.3) governs all interrogations by military personnel and all interrogations by any U.S. personnel in a military facility.

Common Article 3 of the Geneva Conventions: An article found in all four Geneva Conventions, Common Article 3 defines core obligations to be respected in all armed conflicts and not just in wars between countries. It prohibits violence to life and person including murder, mutilation, cruel treatment and torture, outrages upon personal dignity, and in particular humiliating and degrading treatment. From 1997-2006, the War Crimes Act (WCA) criminalized all violations of Common Article 3. However, Congress passed the Military Commissions Act (MCA) in 2006 which narrowed the WCA so that it now criminalizes only specific "grave breaches" of Common Article 3, including "torture" and "cruel or inhuman treatment."

The Detainee Treatment Act of 2005 (DTA): Part of the Department of Defense Appropriations Act of 2006 (Title X, H.R. 2863), the Act prohibits the "cruel, inhuman, or degrading treatment or punishment" (acts that violate the Fifth, Eighth, and Fourteenth Amendments) of detainees and provides for "uniform standards" for interrogation (it limits the military to interrogation techniques authorized by the Army Field Manual). The Act also removed the federal courts' jurisdiction over detainees seeking to challenge the legality of their detention, stating that "no court, justice or judge shall have jurisdiction to hear or consider" applications on behalf of Guantanamo detainees.

Military Commissions Act of 2006 (MCA): Enacted after the Supreme Court's 2006 decision in *Hamdan v. Rumsfeld*, the MCA gave military commissions jurisdiction over "any alien unlawful enemy combatants," a broadly defined

category applicable to non-U.S. citizens. The MCA narrows the War Crimes Act so that it criminalizes only specifically enumerated war crimes referred to as "grave breaches" of Common Article 3, such as "torture" and "cruel or inhuman treatment." "Torture" is defined in the MCA as "an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind." "Cruel or inhuman treatment" is defined in the MCA as "an act intended to inflict severe or serious physical or mental pain or suffering including serious physical abuse, upon another within his custody or control."

Torture Victims Protection Act of 1991 (TVPA): The TVPA permits civil actions for damages to be brought against individuals who engage in torture or extrajudicial killing. Both the TVPA and U.S. immigration regulations use definitions of torture similar to that in the War Crimes Act and Torture Act. Court opinions interpreting the TVPA and immigration regulations provide guidance on the type of treatment U.S. federal courts have found to constitute torture.

The Foreign Sovereign Immunities Act of 1976 (FSIA): The FSIA limits how foreign governments and governmental entities can be sued in U.S. courts. Generally, a State or State instrumentality is immune from suit, unless one of the exceptions laid out in the FSIA applies. The FSIA uses the TVPA definition of torture to define an exception to the general sovereign immunity provided by the Act.

The Torture Act: (18 U.S.C. §§ 2340 and 2340A) Also known by its longer form title, the Torture Convention Implementation Act of 1994, the Torture Act implements the United States' obligation under the UNCAT to criminalize acts of torture, subject to the United States' reservation that it interprets its obligations in accordance with U.S. Constitutional standards. The Torture Act's definition of "torture" requires that an individual *specifically intend* that his act inflict severe physical or mental pain and criminalizes conduct by U.S. nationals that occurs outside the United States.

United Nations Convention Against Torture (UNCAT):

The convention was adopted and opened for signature and ratification by the General Assembly on December 10, 1984, and it came into force on June 26, 1987. UNCAT prohibits torture, as well as cruel, inhuman or degrading treatment, committed by state actors or those acting with the consent or acquiescence of the state, “for the purpose of obtaining information or a confession, or to punish on suspicion of a crime, or to intimidate or coerce.” UNCAT does not permit the use of torture in any “exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency.”

War Crimes Act (WCA): The WCA criminalizes “torture” and “cruel or inhuman treatment.” Amended by the MCA to criminalize defined “grave breaches” of Common Article 3, the WCA applies to acts committed “inside or outside the United States” in any circumstance “where the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States.” To date, no individual has been prosecuted under the WCA

KUBARK Manual: Produced by the CIA in 1963 (and declassified in 1997), the KUBARK Counterintelligence Interrogation Manual served as a comprehensive guide for training interrogators in exploitation techniques including, among other things, “coercive counterintelligence interrogation of resistant sources.” The manual describes the qualifications of a successful interrogator, and reviews the theory of non-coercive and coercive techniques for “breaking” a prisoner. Using modern behavioral psychology, the manual goes step-by-step through the entire process of counter-intelligence interrogation operations, from legal considerations to selecting the right interrogator.

Survival, Evasion, Resistance, Escape Training (SERE):

SERE is a U.S. military training program in survival skills, evading capture, recovery and surviving captivity. The training is reported to provide a realistic simulation of harsh and abusive coercive techniques. It has been alleged from multiple sources that psychologists who help direct the SERE curriculum advised the military at Guantanamo Bay, Abu Ghraib and other sites on interrogation techniques and that SERE training methods were “reverse-engineered” into military and CIA interrogation techniques. Several SERE techniques are identical to the CIA’s “enhanced” interrogation methods employed by the military at Guantánamo and in Iraq.

Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States of America:

The Supreme Court has stated that the protection of human dignity is a primary function of the Fifth, Eighth and Fourteenth Amendments, and that violations of “human dignity” can be unconstitutional even absent any pain or injury. The Supreme Court has long considered prisoner treatment to violate the Fifth and Fourteenth Amendments if the treatment “shocks the conscience.” The Eighth Amendment standards have been incorporated into the Fifth and Fourteenth Amendment due process analysis by the Court, which determined that individuals detained by the state who have not been convicted by a court enjoy at least the same level of rights as convicted criminals do.

Medical Glossary

Depression: Depression is a serious medical illness where the person experiences intense sadness, melancholia or despair that has advanced to the point of being disruptive to an individual's social functioning and/or activities of daily living. Symptoms can include sadness, loss of interest or pleasure in activities previously enjoyed, weight change, difficulty sleeping or oversleeping, energy loss, feelings of worthlessness, and thoughts of death or suicide. Extreme depression can culminate in its sufferers attempting or committing suicide.

Peritraumatic Dissociation (i.e. amnesia, depersonalization, and derealization): Peritraumatic dissociation is characterized by disassociative responses that occur at the time of trauma, such as depersonalization, derealization, amnesia, or fugue states. Theorists suggest that it is a defensive process in which an individual develops the capacity to separate himself from the psychic and physical pain associated with exposure to trauma. This disassociative capacity is thought to be later used by the individual in future painful circumstances such as activated trauma memories to down-regulate the experience of acute psychological stress.

Psychosis: is a generic psychiatric term for a mental state involving a loss of contact with reality. It is a mental disorder, with or without organic damage, characterized by derangement of personality and loss of contact with reality and causing deterioration of normal social functioning. People experiencing a psychotic episode may report hallucinations or delusional beliefs (e.g., grandiose or paranoid delusions), and may exhibit personality changes and disorganized thinking. Psychosis is a loss of contact with reality, typically including delusions (false ideas about what is taking place or who one is) and hallucinations (seeing or hearing things which aren't there), an impairment in the ability to carry out daily activities.

Posttraumatic Stress Disorder (PTSD): PTSD is a term for certain severe psychological consequences of exposure to stressful, highly traumatic events. Clinically, such events involve actual or threatened death, serious physical injury, or a threat to physical and/or psychological integrity, to a degree that usual psychological defenses are incapable of coping with the impact. PTSD symptoms can include the following: nightmares, flashbacks, emotional detachment or numbing of feelings (dissociation), insomnia, avoidance of triggers, loss of appetite,

irritability, hypervigilance, memory loss, excessive startle response, depression, and anxiety. It is also possible for a person suffering from PTSD to exhibit clinical depression (or bipolar disorder), general anxiety disorder, and a variety of addictions. PTSD may be triggered by violent personal assaults, natural or human-caused disasters, accidents, or military combat.

Somatization: Somatization disorder is a chronic condition where physical symptoms are caused by psychological problems, and no underlying physical problem can be identified. The disorder is marked by multiple physical complaints that persist for years, involving any body system. Most frequently, the complaints involve chronic pain and problems with the digestive system, the nervous system, and the reproductive system. The symptoms often are severe enough to interfere with work and relationships.

List of Acronyms

CIA: Central Intelligence Agency

CIDT: Cruel, Inhuman, or Degrading Treatment

DoD: Department of Defense

DTA: Detainee Treatment Act of 2005

FBI: Federal Bureau of Investigation

FSIA: Foreign Sovereign Immunities Act of 1976

HRF: Human Rights First

ICRC: International Committee of the Red Cross

KGB: Komitet Gosudarstvennoy Bezopasnosti

MCA: Military Commissions Act of 2006

OIG: Pentagon's Office of the Inspector General

OLC: Office of Legal Counsel, Department of Justice

PHR: Physicians for Human Rights

POW: Prisoner of War

PTSD: Posttraumatic Stress Disorder

SERE: Survival, Evasion, Resistance, and Escape training

SOP: Standard Operating Procedure

TVPA: Torture Victims Protection Act of 1991

WCA: War Crimes Act

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“The absence of physical evidence should not be construed to suggest that torture did not occur, since such acts of violence against persons frequently leave no marks or permanent scars.”

Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 48, U.N. Doc HR/P/PT/8/Rev.1 (Aug. 9, 1999)

I. EXECUTIVE SUMMARY

All U.S. personnel who engage in the CIA's so-called "enhanced" interrogation techniques and similarly abusive techniques are at serious risk of violating U.S. law. As detailed below, under U.S. law the severity of physical pain or mental harm caused by an interrogation technique is key to determining whether the technique can be considered torture or cruel, inhuman or degrading treatment. An extensive body of medical literature, derived from the treatment and study of torture survivors worldwide, demonstrates that the "enhanced" techniques are likely to cause significant physical and mental harm to detainees. As a result, officials and interrogators who authorize and participate in interrogations using these techniques face a substantial risk of criminal liability under the provisions prohibiting "torture" and "cruel or inhuman treatment" in the U.S. War Crimes Act (WCA), as amended by the Military Commissions Act of 2006 (MCA),¹ and under The Torture Convention Implementation Act of 1994 (the Torture Act).² Many of these interrogation techniques may also be prohibited by the Detainee Treatment Act of 2005 (DTA).³ To protect U.S. officials and personnel from potential criminal liability and to ensure that all U.S. personnel adhere to U.S. law, these techniques should not be authorized.

The CIA "Enhanced" Interrogation Methods

On July 20, 2007, President George W. Bush issued an executive order interpreting the application of Common Article 3 of the Geneva Conventions to a program of detention and interrogation by the CIA.⁴ The order does not clarify what techniques the CIA can and cannot lawfully engage in. Press accounts, citing anonymous Administration offi-

cial, suggest that at least one of the "enhanced" techniques, waterboarding, may no longer be used. The fact that the Administration officials may have ruled out some "enhanced" techniques, though, raises serious questions about whether the CIA guidelines implementing the Executive Order will permit Agency interrogators to resume the other techniques previously authorized.⁵

While the details of the CIA's "enhanced" interrogation program remain classified, credible reports have disclosed several of the techniques that were authorized in March 2002 for use in the program, including waterboarding (mock drowning), exposure to extreme cold (including induced hypothermia), stress positions, extreme sensory deprivation and overload, shaking, striking, prolonged sleep deprivation, and isolation, among others.⁶ Without identifying specifically approved techniques, the President has, in the past, publicly endorsed "alternative interrogation methods" and declared that the MCA, which he signed into law in October 2006, allows the CIA "program" to continue.⁷ The new executive order fails explicitly to rule out the use of the "enhanced" techniques that the CIA authorized in March 2002.

The executive order does state clearly that any program of detention and interrogation approved by the Director of

¹ Military Commissions Act of 2006, 18 U.S.C. § 2441 (2006).

² Torture Act, 18 U.S.C.A. § 2340 (2004) [prohibits the infliction of "severe physical or mental pain and suffering," including "prolonged mental harm," in terms virtually identical to the MCA's provision prohibiting "torture."].

³ Detainee Treatment Act of 2005, 42 U.S.C.S § 2000dd (2006).

⁴ Executive Order, July 20, 2007, available at <http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html>.

⁵ Editorial, *A Return to Abuse: President Bush authorizes secret — and harsh — interrogation methods for the CIA.*, WASH. POST, July 25, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/24/AR2007072401965.html>.

⁶ See, e.g., Dana Priest, *CIA Puts Harsh Tactics On Hold; Memo on Methods Of Interrogation Had Wide Review*, WASH. POST, June 27, 2004, available at <http://www.washingtonpost.com/ac2/wp-dyn/A8534-2004Jun26?language=printer> [According to the Washington Post article, the enhanced interrogation techniques were approved by Justice Department and National Security Council lawyers in 2002, briefed to key congressional leaders, and required the authorization of CIA Director George J. Tenet for use]; Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS ONLINE, Nov. 18, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866>.

⁷ Press Release, White House, George Bush, President of the United States, President Bush Signs Military Commissions Act of 2006 (October 17, 2006), available at <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html> [The methods and techniques reportedly used in the CIA program have also been referred to as "enhanced interrogation methods" by anonymous senior CIA officials]; See Priest, *supra* note 6.

Central Intelligence may not include any acts prohibited by the War Crimes Act or the Torture Act. Yet a close analysis of the War Crimes Act and other U.S. law, informed by medical and psychological expertise, reveals that these “enhanced” interrogation techniques, may constitute “torture” and/or “cruel or inhuman treatment” and, consequently, authorization of their use under the executive order would place interrogators at serious legal risk of prosecution for war crimes or other violations.

A recently declassified report by the Pentagon’s Office of the Inspector General (OIG) revealed that these techniques were based in large part on techniques of torture and cruelty used by the U.S. military in its Survival, Evasion, Resistance, and Escape (SERE) program. The SERE program was intended to train personnel to resist interrogation under such abuse if captured.⁸ According to the OIG, these techniques were transformed, with the assistance of military psychologists, into “standard operating procedure” (SOP) for interrogations at the Guantánamo Bay detention facility. This Guantánamo SOP, the OIG reports, also was brought to Afghanistan and Iraq and, according to media reports, provided a basis for techniques used by CIA personnel, also with assistance from psychologists.⁹ The origin of these techniques is directly related to the focus of this report. They were designed to inflict physical and psychological harm for the purpose of breaking down interrogation subjects. This report describes the nature and extent of that harm and the legal consequences to interrogators of employing techniques that cause it.

Violations of the War Crimes Act, the Torture Act and the Detainee Treatment Act

The recent amendments to the War Crimes Act establish as war crimes “grave breaches” of Common Article 3 of the Geneva Conventions,¹⁰ including “torture” and “cruel or inhuman treatment.”¹¹ “Torture” is characterized, in pertinent part, as “an act specifically intended to

inflict *severe physical or mental pain or suffering*.”¹² The separate war crime of “cruel or inhuman treatment,” is defined as “an act intended to inflict *severe or serious physical or mental pain or suffering*.”¹³

For the crime of torture under the WCA¹⁴ and the Torture Act,¹⁵ severe mental pain or suffering is defined as “the *prolonged* mental harm caused by or resulting from” several specified actions, including “the intentional infliction or threatened infliction of severe physical pain or suffering” and “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.”¹⁶

For the WCA crime of “cruel or inhuman treatment,” *serious* mental pain or suffering is defined as “the *serious and non-transitory* mental harm (which need not be prolonged) caused by or resulting from” the same specified actions.¹⁷

The Detainee Treatment Act requires that “no person in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to torture or cruel, inhuman, or degrading treatment or punishment (CIDT).”¹⁸ The DTA defines CIDT as conduct prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

Adverse Physical and Mental Consequences

Medical literature clearly establishes that tactics such as the CIA’s reported “enhanced” interrogation techniques cause the types of physical and mental anguish that are criminalized under the WCA and other laws. In a letter sent to Senator John McCain during the height of the MCA debate, several leading medical and psychological experts, including current and past presidents of the American Psychiatric Association and the American Psychological Association, conveyed this collective knowledge:

¹² *Id.* (emphasis added).

¹³ *Id.* (emphasis added).

¹⁴ Military Commissions Act of 2006, §5(b)(2)(A) (“the term ‘severe mental pain or suffering’ shall be applied ... in accordance with the meaning given that term in section 2340(2) of this title”).

¹⁵ Torture Act, 18 U.S.C.A. § 2340(2) (2004) (defining the term “severe mental pain or suffering”).

¹⁶ Torture Act, 18 U.S.C.A. § 2340 (2004), *amended by* Military Commissions Act, 18 U.S.C.A. § 2441(d)(2)(E)(ii) (2006).

¹⁷ *Id.*

¹⁸ Detainee Treatment Act of 2005, 42 U.S.C.A. § 2000dd (2006).

⁸ Office of the Inspector Gen. of the Dept. of Def. Report No. 06-INTEL-10, Review of DoD-Directed Investigations of Detainee Abuse (U) (August 25, 2006) [declassified May 18th, 2007], *available at* <http://www.fas.org/irp/agency/dod/abuse.pdf>.

⁹ Mark Benjamin, *The CIA’s Torture Teachers*, Salon.com, June 21, 2007, http://www.salon.com/news/feature/2007/06/21/cia_sere/index_np.html.

¹⁰ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (holding that Common Article 3 applies to alleged members of Al Qaeda and the Taliban).

¹¹ Military Commissions Act of 2006, 18 U.S.C.A. §2441 (2006).

*There must be no mistake about the brutality of the “enhanced interrogation methods” reportedly used by the CIA. Prolonged sleep deprivation, induced hypothermia, stress positions, shaking, sensory deprivation and overload, and water-boarding (which may still be authorized), among other reported techniques, can have a devastating impact on the victim’s physical and mental health.*¹⁹

The pain and suffering arising from the individual and combined use of waterboarding, hitting, induced hypothermia, prolonged bombardment with loud music and flashing lights, stress positions, total and long-term isolation, and other “enhanced” interrogation techniques is directly related to the purpose of these techniques: to “break” detainees, mentally and physically.²⁰ The medical consequences of such abuse have been well-documented through years of research and treatment of survivors of violence and severe trauma.

Some of the enhanced techniques, particularly waterboarding, hitting, induced hypothermia, and stress positions are capable of causing “severe” or “serious” physical pain and suffering, the intentional infliction of which violates the “torture” and “cruel or inhuman treatment” provisions of the WCA. Each of the techniques can also cause significant psychological harm. According to one recent study, in fact, the significance of the harm caused by non-physical, psychological abuse is virtually identical to the significance of the harm caused by physical abuse.²¹

This mental harm can take many different forms, including:

- *Posttraumatic stress disorder* (PTSD), manifested in: prolonged, recurring flashbacks and nightmares; significant impairment and instability in life functions; suicidal ideation; and weakened physical health, among

other consequences.²² Rates of PTSD range from 45% to 92% of torture survivors, subjected to both physical and mental torture.²³

- *Depressive disorder*, manifested in self-destructive and suicidal thoughts and behavior, and other characteristics.²⁴
- *Psychosis*, in the form of delusions, bizarre ideations and behaviors, perceptual distortions, and paranoia, among other manifestations.²⁵

These techniques, moreover, are generally used in combination²⁶ — prolonged isolation, for example, combined with sleep deprivation, light and sound bombardment, and exposure to cold — compounding their devastating psychological impact.

¹⁹ Letter from Allen S. Keller, Program Dir., Bellevue/NYU Program for Survivors of Torture, Gerald P. Koocher, President, American Psychological Association, Burton J. Lee, Physician to the President for George H.W. Bush, Bradley D. Olson, Chair, Divisions for Social Justice, American Psychological Association, Pedro Ruiz, President of the American Psychiatric Association, Steven S. Sharfstein, Immediate Past President, American Psychiatric Association, Brigadier General Stephen N. Xenakis, (Ret. U.S.A) and Philip G. Zimbardo, Prof. Emeritus, Stanford & past President, American Psychological Association, to Sen. John McCain (Sept. 21, 2006), available at <http://physiciansforhumanrights.org/library/news-2006-09-22.html>.

²⁰ PHYSICIANS FOR HUMAN RIGHTS, *BREAK THEM DOWN: THE SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY U.S. FORCES 48-72* (2005), available at <http://physiciansforhumanrights.org/library/report-2005-may.html> [hereinafter *PHR BREAK THEM DOWN*].

²¹ See generally M. Basoglu, et al., *Torture vs Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?* 64 *ARCHIVES GEN. PSYCHIATRY* 277 (2007).

²² See generally AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS* (4th ed. 2000) [hereinafter *APA MANUAL*] (serves as the main diagnostic reference of mental health professionals in the United States of America); Office of the U.N. High Comm’r for Human Rights, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 48, U.N. Doc HR/P/PT/8/REV.1 (Aug. 9, 1999), available at <http://www.ohchr.org/english/about/publications/docs/8rev1.pdf> [hereinafter *ISTANBUL PROTOCOL*] (The UN Commission on Human Rights in April, 2000, and the General Assembly in December, 2000, adopted resolution 55/89, the “Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment”, commonly known as the Istanbul Protocol. The Istanbul Protocol is intended to provide international guidelines for the assessment of victims who allege torture and ill-treatment and describes the fundamental principles of any viable investigation into incidents of torture. The manual was the result of three years of work of more than 75 experts in law, health and human rights, representing 40 organizations or institutions from 15 countries); Ronald C. Kessler, *Posttraumatic Stress Disorder: The Burden to the Individual and to Society*, 61 *J. CLIN. PSYCHIATRY* 4 (2000), available at <http://www.lawandpsychiatry.com/html/Costs%20of%20PTSD.pdf>.

²³ Pia A. Moisaner & Erik Edston, *Torture and its sequel — a comparison between victims from six countries*, *FORENSIC SCI. INT’L*, Nov. 26, 2003, at 133, 133-140.

²⁴ Richard F. Mollica, *Surviving Torture*, 351 *NEW ENG. J. MED.* 5 (2004).

²⁵ *ISTANBUL PROTOCOL*, *supra* note 22, at 48.

²⁶ MAJ. GEN. GEORGE R. FAY, AR 15-6 *INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB*, Aug. 2004, at 9-10, available at <http://www4.army.mil/ocpa/reports/ar15-6/AR15-6.pdf> [hereinafter *FAY REPORT*]; see also *PHR BREAK THEM DOWN*, *supra* note 20, at 7.

The Legal Risk Under U.S. Law²⁷

Given this body of medical and psychological knowledge, officials who authorize these techniques place themselves and those who engage in them at significant risk: namely, that in future trials involving the War Crimes Act and other legal prohibition described in this report, courts will be presented with credible and compelling evidence of harm, provided by medical and psychological experts skilled in the documentation of physical and psychological consequences of torture and ill-treatment, in accordance with internationally accepted protocols.²⁸

It is the responsibility of the Executive Branch to ensure that its agents abide by the law. If instead it purports to authorize acts that violate the law, agents who carry out those acts will be put at risk of prosecution for serious crimes.

Conclusion and Recommendations

This report demonstrates that “enhanced” techniques of interrogation, whether practiced alone or in combination, may cause severe physical and mental pain. In fact, the use of multiple techniques of “enhanced” interrogation virtually assures the infliction of severe physical and mental pain upon detainees. Given this knowledge, U.S. policy makers and interrogation personnel should understand that if such methods are practiced, it would be reasonable for courts to conclude that the resulting harm was inflicted intentionally.

The interrogation techniques analyzed above — and other techniques that have comparable medical consequences — implicate legal prohibitions and could result in

felony criminal prosecutions. It is therefore inappropriate for any such techniques to be used by U.S. personnel in interrogations, and it is the responsibility of U.S. policy makers to ensure that the use of such techniques is effectively precluded.

In issuing interrogation policy, the United States should refrain from repeating the mistake of allowing euphemistic descriptions of interrogation techniques to stretch the line between permissible and impermissible treatment. Instead, all U.S. agencies should firmly adhere to a single standard of humane treatment that protects the lives and health of individuals in U.S. custody.

Recommendations to the Executive Branch

1. Prohibit the “enhanced” interrogation techniques, in order to protect U.S. officials and personnel from potential criminal liability and to ensure that all U.S. personnel adhere to U.S. law.
2. Prohibit the use of any other method that, alone or in combination with other interrogation methods, presents a significant risk of causing serious or severe physical and/or mental pain or suffering.
3. Instruct all U.S. interrogators in effective, legal, non-harmful methods of interrogation.
4. Declassify and release all documents, from all relevant U.S. agencies, which contain information on U.S. interrogation policy and practice, including but not limited to the “enhanced” interrogation methods.

Recommendations to the U.S. Congress

1. Clarify existing language in the MCA, which under a reasonable interpretation currently prohibits the use of the “enhanced” techniques, by explicitly listing the techniques, forbidding them, and making clear that they remain criminal.
2. Establish a single standard for detainee treatment and interrogation practices to be followed by all U.S. personnel, including CIA personnel.

²⁷This report focuses on the legality of “enhanced” interrogation techniques under U.S. law. But it is important to note that even if the use of techniques that cause serious or severe physical or mental pain or suffering is found not to violate U.S. law or if there are found to be valid defenses to such violations under domestic law, their use may nonetheless subject interrogators to criminal prosecution internationally by countries with universal jurisdiction over the commission of war crimes.

²⁸See generally *ISTANBUL PROTOCOL*, *supra* note 22.

II. INTRODUCTION

Defenders of the use of severely coercive treatment in interrogation settings argue that such techniques are “aggressive” and “tough” but not particularly harmful. Secretary of Defense Donald Rumsfeld was reported to dismiss concerns about the use of prolonged standing by noting that he himself spent most of the day standing at a desk.²⁹ Others have compared some permitted sexualized techniques to those used by college fraternities in hazing practices.³⁰ Some have even “tested” techniques such as waterboarding under controlled conditions and falsely concluded that the technique is not that harmful.³¹ Such arguments fail to acknowledge the actual context in which abuse takes place and the cumulative effects associated with the use of multiple techniques of interrogation. Moreover, they ignore the fact that these techniques have been historically designed and used by the CIA and other U.S. personnel to cause states of debility, dependency and dread in the detainee.

²⁹ Douglas Jehl, *Files Show Rumsfeld Rejected Some Efforts to Toughen Prison Rules*, N.Y. TIMES, June 23, 2004 (In a memorandum presented to the defense secretary on Nov. 27, 2002, Secretary Rumsfeld recommended the approval of a number of interrogation techniques for use at Guantanamo, including “the use of stress positions (like standing), for a maximum of four hours.” He further added a handwritten post-script to the memo: “I stand for 8-10 hours a day. Why is standing limited to 4 hours?” Mr. Rumsfeld did not distinguish the difference in his working style and the experience of prisoners who are forced to maintain a painful standing position for prolonged periods of time. Prolonged standing can increase the risk of blood clots forming in the leg veins with the consequent possibility of pulmonary emboli, which can be fatal. However in Mr. Rumsfeld’s case he is able to walk around, creating a “muscle pump” in the legs which moves the blood around actively, thus preventing clots.).

³⁰ See *The Rush Limbaugh Show: “It’s Not About Us; This Is War!”* (WABC radio broadcast May 4, 2004), available at <http://mediamatters.org/items/200405050003> (Rush Limbaugh describes the torture of Iraqis: U.S. guards were “having a good time,” “blow[ing] some steam off.”).

³¹ Steve Harrigan, a Fox News correspondent, underwent what he described as three “phase[s]” of “waterboarding,” on camera and concluded that the technique is “a pretty efficient mechanism to get someone to talk and then still have them alive and healthy within minutes.” *On the Record with Greta Van Susteren*: (FOX News television broadcast Nov. 3, 2006); see also mediamatters.org, Fox News correspondent on his on-air “waterboarding” (Nov. 6, 2006), available at <http://mediamatters.org/items/200611060004> (describing Harrigan’s conclusion and adding that psychologists have asserted that “such forms of near-asphyxiation” can lead to long-term psychological damage.”)

In fact, an extensive body of medical and psychological literature and experience with victims of torture and abuse show that although “enhanced” interrogation techniques may not result in visible scars, they often cause severe and long-lasting physical and mental harm. This is directly related to the purpose of these techniques: to “break” detainees, mentally and physically.³² The medical consequences of such abuse have been well-documented through years of research and treatment of survivors of violence and severe trauma.³³ According to a recent study, abuse during captivity that does not emphasize physical pain — such as psychological manipulation, forms of deprivation, humiliation and stress positions — causes as much mental pain and traumatic stress as does torture designed to inflict physical pain.³⁴

³² See generally PHR BREAK THEM DOWN, *supra* note 20; P. Perera, *Physical methods of torture and their sequelae: a Sri Lankan perspective*, 14 J. FORENSIC LEGAL MED. 146 (2007), *Medical records of 100 victims of torture were examined between 1998 and 2001. The objective of this study was to describe in a medico-legal perspective the physical techniques of torture seen in Sri Lanka. Altogether 68 techniques of torture had been used on these victims. They included assault with blunt and sharp weapons, burns with lighted cigarettes, ‘dry submarino’, kicking, ‘wet submarino’, ‘hanging’, electric torture, ‘falaka’ and many more. Fifty-two percent of the victims had only a single physical complaint whereas 48% had multiple complaints. Most frequent complaints were chest pain (25 victims), headache (16), impaired hearing (7), backache (5), impaired vision (5), pain in the soles (4). However, only 18% of victims had any physical residual effects, highlighting the typical objective of torture, which is inflicting maximum pain without causing serious injury or death.*

³³ Similar to research of victims of organized violence, epidemiological studies of torture survivors are difficult to conduct and have limitations such as small sample size and lack of control groups.

³⁴ See generally M. Basoglu et al., *supra* note 21; Metin Basoglu and colleagues interviewed 279 survivors of torture from Sarajevo, Luka, Rijeka, and Belgrade between 2000 and 2002. The survivors (average age 44.4, 86.4 percent men) were asked which of 54 war-related stressors and 46 different forms of torture they had experienced. Distress and loss of control for each event, and overall during the torture was measured. Clinicians also assessed the survivors for PTSD and other psychiatric conditions. The participants reported an average of 19.3 types of torture. Seventy five percent of the survivors had PTSD related to their torture at some point in their lives, 55.7% had current PTSD, 17% were currently depressed and 17.4% had a past episode of major depression. In order to examine the relative cumulative impact of physical vs nonphysical torture stressors in mental health outcome, the researchers divided events into 3 broad categories of non-physical torture only, non-physical torture and beating, and non-physical plus physical torture. The study found that the severity of long-term adverse mental effects is unrelated to whether the

A study of healthy well-trained military men participating in Prisoner of War survivor school training reveals that even a five hour experience of simulated ill treatment of a Prisoner of War (POW) (including mock interrogations and dilemmas designed to test the soldier's ability to avoid exploitation by captors) leads to symptoms of peritraumatic dissociation (i.e. amnesia, depersonalization, and derealization symptoms experienced during and for a short time immediately after exposure to a traumatic event.) Further, exposure to a highly stressful experience of being placed in a mock POW environment was associated with an increase in such symptoms in nearly all participants.³⁵ These findings are consistent with experiences of other healthy American soldiers who participated in Army Survival Training.³⁶

torture or degrading treatment is physical or psychological and it could be determined by perceived uncontrollability and distress associated with the stressor. The authors concluded that aggressive interrogation techniques or detention procedures that are considered "psychological" manipulations do not appear to be substantially different from physical torture in terms of the extent of mental suffering they cause, the underlying mechanisms of traumatic stress and their long-term traumatic effects.

³⁵ See generally Jarle Eid & Charles A. Morgan, III., *Dissociation, Hardiness, and Performance in Military Cadets Participating in Survival Training*, 171 MIL. MED. 436 (2006), *Experiencing peritraumatic dissociation has been associated with subsequent development of posttraumatic stress disorder. This study examined the relationship between peritraumatic dissociation, hardiness, and military performance in 80 Norwegian Navy officer cadets after a simulated prisoner of war (POW) exercise. The POW exercise is conducted in two phases: in phase one - "mild stress" survival training which lasts for 5 hours- subjects are exposed to an educational program and a personal experience with a POW situation such as being detained, blindfolded, going through a brief registration, and 5-10 minute simulated interrogation. Phase 2 - a 1-week field exercise - includes a simulated operation during which soldiers are given little food, are sleep deprived, and experience a "high stress" 24-hour POW simulation component. In the "high stress" session, the soldiers experience the shock of capture, confinement, are blindfolded, deprived from food and sleep, and go through a stress-intense interrogation questioning by trained interrogators. The Study found that the cadets reported symptoms of peritraumatic amnesia, depersonalization, and derealization in response to a mild stress experience and exhibited a significant increase in such symptoms when subsequently exposed to a highly stressful experience of being placed in a mock POW camp.*

³⁶ Charles A. Morgan, III et al., *Symptoms of Dissociation in Humans Experiencing Acute, Uncontrollable Stress: A prospective investigation*, 158 AM. J. PSYCHIATRY 1239 (2001), *This study was designed to assess the nature and prevalence of dissociative symptoms (disruptions of integrated functions of consciousness such as memory, identity and perception of the environment - which is termed emotional numbing, one of the hallmarks of PTSD disorder) in healthy soldiers experiencing acute, uncontrollable stress during U.S. Army survival training. The survival course is 19 days long and includes a low-stress classroom phase and a highly stressful experiential phase. During the experiential phase, soldiers are confronted with a variety of stressors, including semistarvation, sleep deprivation, lack of control over personal hygiene, and external control over movement, social contact, and communication. Symptoms of dissociation were prevalent among healthy subjects as 96% of subjects reported dissociative symptoms in response to acute stress.*

"Enhanced" techniques must be evaluated in the context in which they are used, including the highly controlled detention and interrogation environment used to exploit helplessness and vulnerability, and may have individualized consequences. A highly controlled and threatening environment, prolonged intense fear, denial of autonomy, and dependency on interrogators that precede interrogation, exacerbates the adverse psychological impact of harsh interrogation and detention practices on detainees.

The techniques of establishing control over another person are based upon systematic, repetitive infliction of psychological trauma. By design, the aggressive interrogation techniques are intended to instill fear and helplessness and to inflict pain without leaving physical marks. The level of fear experienced by an individual subjected to threatening and aggressive techniques is related to the conditions of detention.

Detainees held in U.S. detention facilities in the war on terror may perceive a real threat to their lives. (In contrast, there is not credible fear of death among military personnel who are exposed to simulated interrogation experiences.) The perception of fear for one's life and bodily integrity in this setting is not without basis: over 100 detainees have died while in U.S. custody.³⁷ From 2002 to 2005, as many as 12 detainees are believed to have died as a consequence of abuse sustained while in confinement.³⁸ Other aggressive techniques, such as forced nakedness, aim to humiliate, intimidate, and destabilize the detainee and carry the threat of rape and injury. Medical evidence demonstrates that forced nudity may be experienced as comparable to rape since it often carries an implicit threat of rape and mutilation.³⁹

³⁷ See generally Scott A. Allen et al., *Deaths of Detainees in the Custody of U.S. Forces in Iraq and Afghanistan from 2002 to 2005*, 8 MEDSCAPE GEN. MED. 46 (2006), http://www.medscape.com/viewarticle/547787_1, *Researchers reviewed all known detainee deaths between 2002 and early 2005 based on reports obtained from the Department of Defense (DoD) through a Freedom of Information Act (FOIA) request and media accounts. Cases of death of detainees in U.S. custody (105 in Iraq, 7 in Afghanistan) were identified. Causes of death included homicide (43), enemy mortar attacks (36), natural causes (20), unknown (9), accidental or natural (4). Combination of blunt trauma and use of restraint has been implicated in the deaths of several detainees held by U.S. forces in the war on terror.*

³⁸ HINA SHAMSI, *HUMAN RIGHT'S FIRST, COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN* 5 (Deborah Pearlstein ed. 2006).

³⁹ JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE - FROM DOMESTIC ABUSE TO POLITICAL TERROR* 33-95 (1992), *The author introduces the severe psychological harm that occurs with prolonged, repeated trauma and compares and finds similarities by survivors of captivity, rape, and battle. She discusses in details the use of violence and terror as means of social control. She notes that survivors of*

Traumatic experiences can also be highly culture-bound, both in what is perceived as a trauma and how the individual responds. Different individuals from different cultures can react differently to the same stressor.⁴⁰ Research indicates that the meaning of torture and trauma is shaped by social support and religious, cultural and political beliefs.⁴¹ For example, it was known that Muslim Arabs would be particularly vulnerable to gender-based and sexualized coercive techniques such as forced nakedness for cultural and religious reasons.⁴² Although the physical response to extreme stress manifests in an adrenaline response, the particular psychological reactions to trauma are influenced by cultural norms and the individual meanings assigned to trauma, injury and loss.⁴³

chronic victimization who experience a prolonged period of total control by another person such as being in captivity; experience alterations in emotional regulation and self-perception; alterations in the perception of the perpetrator; alterations in consciousness, such as forgetting traumatic events, reliving traumatic events, or having episodes in which one feels detached from one's mental processes or body; and alterations in relations with others, including isolation, distrust, or a repeated search for a rescuer and finally alterations in one's system of meanings.

⁴⁰ See generally J.D. Kinzie et al., *A cross-cultural study of reactivation of posttraumatic stress disorder symptoms: American and Cambodian psychophysiological response to viewing traumatic video scenes*, 186 *J. Nervous & Mental Disease* 670 (1998), *The objectives of this study were a) to determine whether physiological hyperarousal (measured by increased heart rate) to standard traumatic videotapes occurs in patients with PTSD cross-culturally, and b) to determine whether an increased heart rate is a specific response to the patient's own traumatic event or a more generalized hyperarousal state. Five brief videotape scenes of traumatic events (hurricane, auto accident, Cambodian refugee camp, domestic violence, and Vietnam War) were shown to two patient groups with PTSD (Vietnam veterans and Cambodian refugees) and three control groups (Vietnam veterans, Cambodian refugees, and non-patient Americans). Observations of subjects' behavior, subjective ratings of distress, and heart rate change were recorded and evaluated. The results indicated that Cambodians with PTSD had the most reactions as measured by behavior and heart rate changes. The authors concluded that the response in PTSD patients to reactivation scenes is complex and probably relates to type and degree of trauma, as well as to culture.*

⁴¹ See generally T.H. Holtz, *Refugee trauma versus torture trauma: a retrospective controlled cohort study of Tibetan refugees*, 186 *J. Nervous & Mental Disease* 24 (1998), *A retrospective cohort study of 35 Tibetan refugees arrested and tortured in Tibet matched with 35 controls was carried out in India. The prevalence of symptom scores in the clinical range for both cohorts was 41.4% for anxiety symptoms and 14.3% for depressive symptoms. The torture survivors had a statistically significant higher proportion of elevated anxiety scores than did the nontortured cohort (54.3% vs. 28.6%, p = .05). The researchers found that political commitment, Buddhist spirituality, social support in exile, and prior knowledge of and preparedness for confinement and torture in the imprisoned cohort served to foster resilience against psychological sequelae.*

⁴² Seymour M. Hersh, *The Gray Zone: How a secret Pentagon program came to Abu Ghraib*, *NEW YORKER*, May 24, 2004, available at http://www.newyorker.com/archive/2004/05/24/040524fa_fact.

⁴³ Jerome Kroll, *Posttraumatic Symptoms and the Complexity of Responses to Trauma*, 290 *J. AM. MED. ASS'N* 667 (2003).

Furthermore, harmful, or potentially harmful, techniques are almost always used in combination and are prolonged, amplifying the risk of physical and psychological harm.⁴⁴ Sleep deprivation, for example, may be combined with isolation and/or temperature manipulation. Prolonged standing may follow striking or slapping. Being subjected to prolonged repeated trauma and terror during detention increases the risk of physical and long-term psychological harm. For example, prolonged standing (immobility) when it follows blunt trauma can increase the risk of blood clot formation in the legs, a condition that can result in fatal pulmonary emboli.

Pre-existing medical and psychiatric conditions can also increase the risk of harm from techniques that may appear at first to be relatively benign. Individual factors render some people more susceptible to PTSD than others. Researchers have identified several specific psychosocial risk factors for PTSD, including a history of exposure to traumatic events, exposure to multiple traumatic events, exposure to childhood sexual or physical trauma, and the subjective experience of fear for one's life.⁴⁵ A threat of harm to a detainee who suffers from depression and posttraumatic stress disorder from earlier traumas — often found in populations at time of

⁴⁴ See generally FAY REPORT, *supra* note 26; See also PHR *BREAK THEM DOWN*, *supra* note 20, at 48-72.

⁴⁵ See generally N. Breslau et al., *Previous Exposure to Trauma and PTSD Effects of Subsequent Trauma: Results from the Detroit Area Survey of Trauma*, 156 *AM. J. PSYCHIATRY* 902 (1999), *A representative sample of 2,181 individuals were interviewed by telephone to record lifetime history of traumatic events. PTSD was assessed with respect to a randomly selected index trauma from the list of events reported by each respondent. History of any previous exposure to traumatic events was associated with a greater risk of PTSD from the index trauma. Multiple previous events had a stronger effect than a single previous event. The authors concluded that previous exposure to trauma signals a greater risk of PTSD from subsequent trauma.* E. B. Foa et al., *Symptomatology and psychopathology of mental health problems after disaster*, 67 *J. Clinical Psychiatry* 15 (2006), *This article reviews the symptomatology and psychopathology of major trauma experienced by disaster victims.* John R. Freedy et al., *The Psychological Adjustment of Recent Crime Victims in the Criminal Justice System*, 9 *J. INTERPERSONAL VIOLENCE* 450 (1994), *The authors examined PTSD and victim service utilization among 251 crime victims and family members recently involved in the criminal justice system. About one half of the participants met PTSD diagnostic criteria during their lifetime. Victims of more violent crimes—who sustained physical injuries, who perceived that they would be seriously injured, and who perceived their lives were threatened—were more likely to suffer from PTSD than victims who did not have these characteristics.* F. H. Norris et al., *60,000 disaster victims speak: Part I. An empirical review of the empirical literature 1981-2001*, 65 *PSYCHIATRY* 207 (2002), *The review of 160 studies of disaster victims identified a number of risk factors for adverse outcomes such as PTSD, including the severity of exposure to trauma, secondary stressors such as financial difficulties, prior psychiatric illness, and deteriorating psychosocial resources.*

war — can have profound and long lasting consequences for the detainee.⁴⁶

Leading medical and psychological experts, including the American Psychiatric Association and the American Psychological Association, declared in a letter sent to Senator John McCain in the fall of 2006 that “there must be no mistake about the brutality of the “enhanced” interrogation techniques reportedly used by the CIA” that “have a devastating impact on the victim’s physical and mental health.”⁴⁷

The Legal Risk Under U.S. Law

The medical and psychological evidence indicates that the use of “enhanced” interrogation techniques frequently causes detainees severe and long-lasting physical and/or mental harm and may therefore be illegal under U.S. law. Given this body of medical and psychological knowledge, officials who authorize these techniques place themselves and those who engage in them at significant risk: namely, that in future trials involving the War Crimes Act and other applicable laws, courts will be presented with credible and compelling evidence of harm, provided by medical and psychological experts skilled in the docu-

mentation of physical and psychological consequences of torture and ill-treatment, in accordance with internationally accepted protocols.⁴⁸

This report assesses the legality of the “enhanced” interrogation techniques under U.S. laws that prohibit torture and cruel, inhuman or degrading treatment, including U.S. laws implementing its international legal obligations. The sources of law described in this report include the War Crimes Act, the Torture Act, the Detainee Treatment Act (which prohibits conduct in violation of the Fifth, Eighth and Fourteenth Amendments of the U.S. Constitution), Common Article 3 of the Geneva Conventions and the U.N. Convention Against Torture. Where they provide guidance on, or illustration of, the types of conduct the courts have determined to constitute torture or cruel, inhuman and degrading treatment, the report also describes judicial decisions that interpret and apply the Torture Victims Protection Act, the Federal Sovereign Immunities Act and immigration regulations.⁴⁹

Existing statutory language, under a reasonable interpretation, prohibits the use of these techniques. The U.S. Congress should further clarify this language by explicitly listing the techniques, forbidding them, and making clear that they remain criminal.

⁴⁶ See generally Chris R. Brewin & Andrews B. Valentine, *Meta-analysis of risk factors for posttraumatic stress disorder in trauma-exposed adults*, 68 J. CONSULTING & CLINICAL PSYCHOL. 748 (2000), *Literature on risk factors that affect the onset of lifetime PTSD has been summarized in a meta-analysis by Brewin and colleagues. Pretrauma vulnerability such as personal psychiatric history, family psychiatric history, and reported childhood abuse predicted PTSD more consistently, regardless of the population studied or the methods of evaluation used. Further, factors such as trauma severity, lack of social support, and additional life stress, increased the risk of developing PTSD after exposure to traumatic event.*

⁴⁷ Press Release, PHR and Seven Leading Health Professionals Call for Prohibition of Abusive CIA Interrogation Tactics in Detainee Treatment and Trial Bill (Sept. 22, 2006), available at <http://physiciansforhumanrights.org/library/news-2006-09-22.html>.

⁴⁸ See generally ISTANBUL PROTOCOL, *supra* note 22.

⁴⁹ The report’s primary focus is on the legality of the “enhanced” interrogation techniques under U.S. domestic statutes, including statutes implementing its international law obligations. It is important to note, however, that the United States also remains bound by its full obligations under international law, some of which contain a broader range of prohibitions than domestic statutes provide. A key example is Common Article 3 of the Geneva Conventions, which bans “outrages upon personal dignity.” Even though “outrages upon personal dignity” are not included among the “grave breaches” of Common Article 3 that are criminalized by the War Crimes Act, Common Article 3 remains in effect as a binding legal obligation of the United States.

III. THE ENHANCED INTERROGATION METHODS

This chapter provides a comprehensive legal and medical analysis of ten “enhanced” interrogation techniques and similar forms of abuse, particularly psychological techniques, reportedly authorized and used by U.S. personnel. It analyzes the definitions and elements of war crimes, as well as other applicable legal prohibitions, in light of an extensive body of evidence in the medical literature documenting the serious harmful consequences of these techniques. The medical and psychological harm described, can be “severe” or “serious,” “prolonged” or “non-transitory,” in the language of the “torture” and “cruel or inhuman treatment” provisions of War Crimes Act. This harm may be markedly exacerbated when the techniques are used in combination.⁵⁰

1. Stress Positions

The prisoner is forced to maintain painful physical positions, such as forced standing, and awkward sitting or suspension of the body from a chain or other implement, for prolonged periods of time.

In the 1950s, the CIA commissioned a report that described techniques used by the Soviet KGB during interrogations. One of the most common tactics KGB interrogators used to “pressure” prisoners was requiring them to “stand throughout the interrogation session or to maintain some other physical position which becomes painful.”⁵¹ The report noted that “[a]ny fixed position which is maintained over a long period of time ultimately produces excruciating pain.”⁵² In vivid terms, the report also describes the consequences: less than a day of forced standing, for example, can cause “the ankles and

feet of the prisoner to swell to twice their circumference,” “the skin to become tense and intensely painful,” and “large blisters develop which break and exude watery serum”, and usually the prisoner develops, “a delirious state ... delusions and visual hallucinations.”⁵³

Members of the U.S. military themselves have been victims of this treatment in past conflicts, with terrible consequences. Marine Colonel Frank H. Schwable, who was captured by the Chinese military during the Korean War, reported that he was forced by his interrogator to sit in “unnatural positions” for long periods, which caused him extreme pain. Because of this coercion, Colonel Schwable made a detailed false confession.⁵⁴

The United States has historically criticized other nations for using stress positions including in 2002, when the CIA was reportedly authorized to use them. Indeed, as recently as March 2007, the U.S. State Department criticized Jordan for subjecting detainees to “forced standing in painful positions for prolonged periods.”⁵⁵

Despite the extensive literature documenting the use of stress positions by repressive regimes, and evidence about the physical pain and suffering they cause, in 2002 CIA interrogators were reportedly authorized to force prisoners to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours.⁵⁶ This practice known as “short shackling” was reportedly used on detainees in military custody in Guantánamo Bay.⁵⁷ Senior military officials similarly authorized military interrogators to use forced standing on detainees

⁵³ *Id.* at 37.

⁵⁴ 5 MONTROSS LYNN ET AL., U.S. MARINE CORPS, HISTORY OF U.S. MARINE OPERATIONS IN KOREA 1950-1953, at 430 (1972).

⁵⁵ See e.g. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2006 (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/>.

⁵⁶ Ross & Esposito, *supra* note 6 (“Prisoners are forced to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours.”).

⁵⁷ GEN. RANDALL SCHMIDT & BRIG. GEN. JOHN FURLLOW, U.S. ARMY, INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTANAMO BAY, CUBA DETENTION FACILITY 12 (2005) [hereinafter THE SCHMIDT REPORT].

⁵⁰ In addressing certain techniques, based on the existing relevant medical literature, the report focuses on the physical or mental pain or both. This does not mean that the authors have concluded that any of the techniques below have only mental or physical consequences, but separate analysis is a result of the medical research available.

⁵¹ Central Intelligence Agency, *Communist Control Techniques: An Analysis of the Methods Used by Communist State Police in the Arrest, Interrogation, and Indoctrination of Persons Regarded as “Enemies of the State,”* at 36 (Apr. 2, 1956), http://www.americantorture.com/documents/cold_war/01.pdf (last visited July 26, 2007).

⁵² *Id.*

in Guantánamo in 2002⁵⁸ and in Iraq in 2003⁵⁹ in memos that have since been rescinded.

Stress positions appear to have been used in both Iraq and Afghanistan. In a 2004 report to senior U.S. military officials, the International Committee of the Red Cross (ICRC) reported that one of the most frequent allegations by detainees in Iraq was “[b]eing forced to remain for prolonged periods in stress positions such as squatting or standing with or without the arms lifted.”⁶⁰ In at least a few cases, stress positions resulted in, or contributed to (together with other abuse), detainee deaths.⁶¹

According to the Department of Defense’s own records, obtained by Physicians for Human Rights, the combined use of stress positions and blunt force led to the death of two Afghan detainees at Bagram, Afghanistan.⁶² Based on the military’s documents one man died from an embolism that the medical examiner “attributed to blows that he received combined with immobility due to restraint.”⁶³ The

other died from aggravation of a coronary artery condition “brought on by complications that arose from blows that he received from the stress [of] being restrained in a standing position.”⁶⁴

Human Rights First has reported on a case in Iraq, in November 2003, in which Iraqi General Abed Hamid Mowhoush was suffocated to death after a U.S. Army Officer forced Mowhoush head first into a sleeping bag, wrapped him in an electronic cord, and sat on him.⁶⁵ At his court-martial, the officer argued that he believed that “the sleeping bag technique” was an example of a “stress position” authorized in a September 2003 memo from General Ricardo Sanchez, then the head of U.S. forces in Iraq, which specifically permitted “the use of stress positions including sitting, standing, kneeling, etc.”⁶⁶ CIA employees were alleged to have been involved in Mowhoush’s interrogation, but to date no charges have been brought.

The CIA was allegedly involved in two other cases, in 2003 and 2004, in which detainees died after they were placed in stress positions. Within five minutes of being gagged and tied by his hands to the top of his cell’s doorframe, Iraqi army officer Abdul Jameel was dead.⁶⁷ Another Iraqi, Manadel al-Jamadi died within an hour after he was shackled, with his hands behind his back, to a window five feet from the ground.⁶⁸ Both Jameel and Al-Jamadi were beaten before they were placed in stress positions, but medical examiners found the immediate cause of death was likely suffocation from the stress positions.

It is important to note that stress positions have been used in combination with other techniques of abuse. For example stress positions appear to have been used to facilitate beating, to develop a sense of debility, dependency, and helplessness, and to result in humiliation when detainees are not provided access to toilet facilities and are forced to soil themselves.

⁵⁸ Memorandum from William Haynes, Gen. Counsel of the Dept. of Def. to Donald Rumsfeld, Sec’y of Def. (Jan. 15, 2003) (approved by Secretary of Defense Rumsfeld) (Dec. 2, 2002), available at http://www.humanrights-first.org/us_law/etn/pdf/dod-memos-120202.pdf [hereinafter Haynes Memo] (authorizing the use of stress positions (like standing), for a maximum of four hours. Haynes memo attaches a memo from General James Hill (Oct. 25, 2002), a memo from Maj. Gen. Michael Dunlavey (Oct. 11, 2002), a memo (legal review) by Lt. Col. Diane Beaver (Oct. 11, 2002) and a Request for Approval for Counter-Resistance Strategies from Lt. Col. Jerald Phifer (Oct. 11, 2002)).

⁵⁹ Memorandum from General Ricardo Sanchez to Combined Joint Task Force Seven and the Commander, 205th Intelligence Brigade 4 (Sept. 10, 2003), available at <http://www.humanrightsfirst.info/pdf/06124-etn-sep-10-sanchez-memo.pdf>.

⁶⁰ INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT OF THE COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT, AND INTERROGATION 12 (2004), available at http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.htm [hereinafter ICRC REPORT] (The ICRC report was submitted in confidence to the head of the Coalition Provisional Authority Paul Bremer and Lt-Gen. Ricardo Sanchez in February 2004. The Wall Street Journal made excerpts of the confidential report available to the public on May 7, 2004. The report describes ICRC’s observations of serious violations of international humanitarian law by Coalition Forces in Iraq between March and November 2003. It describes frequent detainee allegations of being “attached repeatedly, for several hours each time, with handcuffs to the bars of their cell door in humiliating [i.e. naked or in underwear] and/or uncomfortable position[s] causing physical pain” and “[b]eing forced to remain for prolonged periods in stress positions such as squatting or standing with or without the arms lifted.”).

⁶¹ SHAMSI, *supra* note 38, at 10.

⁶² See, e.g., Office of the Armed Forces Med. Examiner, *Final Report of Postmortem Examination*, (Dec. 6-8, 2002) (Autopsy, Habibullah), http://www.aclu.org/torturefoia/released/041905/m001_203.pdf at 19-28 (last visited July 26, 2007) [hereinafter Autopsy, Habibullah].

⁶³ *Id.*

⁶⁴ Information Paper: Afghanistan and Iraq Detainee Abuse, Document #: DOD006762 Date of Record: 2004-05-03, available at <http://www.aclu.org/projects/foiasearch/pdf/DOD006762.pdf>.

⁶⁵ SHAMSI, *supra* note 38, at 8.

⁶⁶ Memorandum from Lewis E. Welshofer Jr., Chief Warrant Officer Third Class, U.S. Army to Commander 82d ABN DIV, Champion Base, Iraq 2 (Feb. 11, 2004), available at <http://www.lchr.org/pdf/mem-dic021104.pdf> (Welshofer further argued that confinement in a sleeping bag should not prevent breathing as he explains: “in fact detainees would probably be able to breathe better in the sleeping bag than they would in the sandbag-hooded conditions in which they are frequently brought to the facility.”).

⁶⁷ SHAMSI, *supra* note 38, at 10.

⁶⁸ *Id.* at 11.

Physical Pain and Suffering

Stress positions result in a number of physical effects that can be long lasting or even permanent, such as nerve, joint and circulatory damage. These effects are relevant to the determination of whether such positions constitute “torture” or “cruel or inhuman treatment.” In one review of refugees examined in a Danish forensic medical clinic, a majority of refugees who had been exposed to suspension demonstrated signs and symptoms of joint injuries and nerve lesions.⁶⁹

As mentioned above, prolonged standing may result in blood clots in the legs (deep vein thrombosis) which may subsequently travel to the lungs as pulmonary embolism. Pulmonary embolism can be fatal, and the risk is increased when immobility follows blunt trauma. Deaths due to prolonged restraint in prison settings have occurred in both civilian and military settings.⁷⁰

In addition to circulatory effects, prolonged standing can result in musculoskeletal (muscle and joint) foot and back pain, and can result in damage to peripheral nerves. Such nerve damage can result in decreased motor sensation, and decrease the ability of an individual to feel warmth, cold, or vibrations.⁷¹ Prolonged

standing also carries the risk of fainting, which can result in significant blunt force trauma including head injury and fractures.

Legal Analysis

Although the literature on adverse mental health consequences of being subjected to stress positions is relatively limited, the array of harmful physical medical effects known to be caused by stress positions support the conclusion that stress positions constitute a prosecutable act of “torture” or “cruel or inhuman treatment” intended to cause “severe” or “serious” physical pain under the War Crimes Act.⁷²

U.S. federal courts have also labeled the use of stress positions — such as being chained to a cot or a wall — as torture for purposes of civil liability.⁷³ The Ninth Circuit quoted one plaintiff who was found to be tortured by the Filipino military as stating that while he was shackled to his cot he experienced “extreme pain, almost indescribable[.]”⁷⁴

Even if certain uses of stress positions were found to fall short of torture, they may constitute a prosecutable crime of “inhuman or cruel treatment” under the WCA if found to result in “serious” physical pain. The harm that can be caused by stress positions, including life threatening blood clots, chronic foot and back pain, and peripheral nerve damage, could be held to amount to “bodily injury that involves ... extreme physical pain” meeting the WCA’s definition of “serious” physical pain.⁷⁵ Moreover, according to reports on U.S. interrogation practices, stress positions are almost always practiced in combination with other interrogation techniques and, therefore, their effects are likely to be amplified.

Supreme Court precedent suggests that the use of stress positions in interrogations against any detainee — regardless of citizenship or location — would likely violate the Detainee Treatment Act.⁷⁶ In *Hope v. Pelzer*, the Supreme

⁶⁹ P. M. Leth & J. Banner, *Forensic Medical Examination of Refugees Who Claim to Have Been Tortured*, 26 AM. J. FORENSIC MED. & PATHOLOGY 125 (2005), *Fifty nine torture victims from around the world underwent medical examination at the Department of Forensic Medicine, University of Aarhus, Denmark between 1996 and 2002. Aftereffects of torture could be documented in 70%. Twenty-five percent (9/35) of the patients who claimed to have been suspended had scars after the lines, typically at the wrists and ankles. Fifty-three percent (19/35) had signs and symptoms of joint injuries or nerve lesions.*

⁷⁰ See generally Allen, *supra* note 37, *Combination of blunt trauma and use of restraint has been implicated in the deaths of several detainees held by U.S. forces in the war on terror. Mullah Habibullah died on December 2, 2002 at Bagram, Afghanistan following beating and physical restraint. Cause of death by autopsy was pulmonary embolism and blunt trauma.* Andrew A. Skolnick, *Prison Deaths Spotlight How Boards Handle Impaired, Disciplined Physicians*, 280 J. AM. MED. ASS’N 1387 (1998), *The death of Michael Valent, a 29 year old schizophrenic inmate of the Utah State Prison, is described. After Mr. Valent stopped taking medication and his mental health deteriorated, he was ordered into a prison restraint chair by the prison psychiatrist. He remained restrained for 16 hours. On release from the chair, he collapsed and died from blood clots that formed in his legs during his extended immobility and then traveled to his lungs.*

⁷¹ See generally John McCulloch, *Health risks associated with prolonged standing*, 19 J. PREVENTION, ASSESSMENT & REHABILITATION 201 (2002), *Prolonged standing contributes to chronic venous insufficiency, preterm birth in pregnant women, and musculoskeletal pain including foot and back pain. Venous insufficiency leads to varicose veins and burning sensations in the lower extremities. Peripheral neuropathy can also result, causing decreased motor sensation, decreased warmth and cold sensation and reduced vibration sensation. Prolonged standing refers to spending over fifty percent of the time during a full work shift in standing position.*

⁷² War Crimes Act of 1996, 18 U.S.C.A § 2441(2006); Torture Act, 18 U.S.C.A. § 2340 (2004).

⁷³ See generally *Cicippio v. Islamic Republic of Iran*, 18 F.Supp.2d 62 (D. D.C. 1998) [chaining the plaintiff Frank Reed to a wall and shackling him in a painful position and not permitting him to stand erect among many other forms of mistreatment perpetrated by the Iranian government that the Court found to constitute torture under the TVPA]; *Hilao v. Marco*, 103 F.3d 789, 790 (9th Cir. 1996) [being chained to a cot for three days was listed among many other forms of mistreatment perpetrated by Filipino military against plaintiff Jose Maria Sison that were found to constitute torture under the TVPA].

⁷⁴ *Marco*, 103 F.3d at 791.

⁷⁵ War Crimes Act of 1996, 18 U.S.C.A. § 2441(d)(2)(D) (2006).

⁷⁶ See generally 42 U.S.C.A. § 2000dd (2006).

Court held that the plaintiff's Eighth Amendment rights were violated when he was handcuffed to a hitching post for seven hours.⁷⁷ The Court cited extensively to a Fifth Circuit decision in which the court had "no difficulty" holding that detainee punishments including "forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods" ran "afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess."⁷⁸ The Supreme Court found in *Hope* that there was "obvious cruelty inherent in the [hitching post] practice"⁷⁹ citing a Department of Justice report that warned that the hitching post practice was unconstitutional and "potentially dangerous from a medical standpoint."⁸⁰

More generally, the Supreme Court has repeatedly recognized the right of detainees to be free from unnecessary bodily restraint as a due process right protected by the Fourteenth Amendment.⁸¹ Such cases have involved restraining techniques such as the four point restraint of the involuntarily committed mental patient and pre-trial detainee.⁸²

2. Beating

The prisoner is subjected to forceful physical contact, either directly or through an instrument.

⁷⁷ See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

⁷⁸ *Id.* at 742 (citing *Gates v. Collier*, 501 F.2d 1291, 1306 (11th Cir. 1974)).

⁷⁹ *Id.* at 731.

⁸⁰ *Id.* at 732. For more information about the Department of Justice report, see *Austin v. Hopper*, 15 F.Supp.2d 1210 at 1249 (1998).

⁸¹ *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (holding that an individual has a substantive due process right to freedom from bodily restraint even if they are civilly committed or criminally incarcerated, in the case of an involuntarily committed mentally retarded individual who was subjected to prolonged and repeated restraint by a hospital); see, e.g., *Davis v. Rennie*, 264 F.3d 86 (1st Cir. 2001) (upholding a §1983 claim for violation of a right to be free from unreasonable restraints and from excessive use of force against an involuntarily committed mental patient, and for the failure to intervene to prevent a violation of those rights); *S.M. v. Feaver*, No. 03-80567-CIV, 2004 WL 213198, at *3 (S.D. Fla. Jan. 22, 2004) (denying a motion to dismiss a §1983 claim based on plaintiff's allegation that she was subjected to "the use of undue physical (four point restraints) and chemical (psychotropic) restraints" while involuntarily committed); *But see Fuentes v. Wagner*, 206 F.3d 335 (3rd Cir. 2000) *cert. denied*, 531 U.S. 821 (2002) (holding that putting a pre-trial detainee in a restraining chair for eight hours while releasing the detainee every two hours for a ten minute period of stretching, exercise and use of the toilet, and a meal, when faced with the detainee's disruptive and violent behavior did not violate the detainees substantive due process rights).

⁸² See *Davis*, 264 F.3d at 92-93; *Feaver*, 2004 WL 213198, at *1; *Fuentes*, 206 F.3d at 339-40.

Historically, the United States has not only condemned the use of physical force, ranging from slaps to heavy blows, against prisoners of war, it has prosecuted such acts as war crimes. After World War II, Japanese interrogators were prosecuted for subjecting U.S. prisoners of war to beating.⁸³ For example, in a report to the United Nations after the 1990-91 Gulf War, the first Bush Administration described "slapping" as a war crime committed by Iraqis against U.S. prisoners of war.⁸⁴

But starting in or around 2002, striking detainees was reportedly authorized and carried out by U.S. personnel during CIA and military interrogations. According to press reports, in mid-March 2002, CIA interrogators were specifically authorized to beat prisoners with their hands — in the form of the "attention slap" and "belly slap."⁸⁵ In 2004 the International Committee of the Red Cross reported to senior U.S. military officials that detainees alleged being beating "with hard objects (including pistols and rifles), slapping, punching, [and] kicking with knees or feet on various parts of the body" during interrogations in Iraq.⁸⁶ In another report, Dilawar, a detainee held in Afghanistan who eventually died in U.S. custody, was struck over 100 times by U.S. military personnel causing extensive muscle breakdown and necrosis — the irreversible death of living tissue.⁸⁷

According to military documents and testimony from an army court-martial, CIA personnel were involved in the 2003 beating of Iraqi General Mowhoush; an autopsy showed that Mowhoush had "'massive' bruising and five broken ribs."⁸⁸ In another incident, a joint Navy SEAL and CIA team allegedly punched, kicked, and struck Iraqi detainee al-Jamadi, and a U.S. military autopsy found that "blunt force" injuries contributed to his death.⁸⁹

⁸³ International Military Tribunal for the Far East, Final Judgment, at 1061; see generally OFFICE OF THE JUDGE ADVOCATE GEN., UNITED STATES ARMY, REVIEWS OF THE YOKOHAMA 3 CLASS B AND C WAR CRIMES TRIALS BY THE U.S. 8TH ARMY JUDGE ADVOCATE, 1946-1949, *microformed on* National Archives Microfilm Publication M1112 (1980).

⁸⁴ WAR CRIMES DOCUMENTATION CENTER, INTERNATIONAL AFFAIRS DIVISION, OFFICE OF THE JUDGE ADVOCATE GEN., UNITED STATES ARMY, REPORT ON IRAQI WAR CRIMES (DESERT SHIELD/DESERT STORM) 26 (1992) (declassified version).

⁸⁵ Ross & Esposito, *supra* note 6.

⁸⁶ ICRC REPORT, *supra* note 60, § 3.1, at para. 25 (listing among "methods of ill-treatment most frequently alleged during interrogation" by detainees in Iraq "beatings with hard objects (including pistols and rifles), slapping, punching, kicking with knees or feet on various parts of the body (legs, sides, lower back, groin)").

⁸⁷ Twelve soldiers have been prosecuted for their involvement in Dilawar's death. SHAMSI, *supra* note 38, at 15-16.

⁸⁸ *Id.* at 7.

⁸⁹ *Id.* at 12.

Despite the benign (and misleading) terms “attention slap” or “belly slap,” there should be no misapprehension about the severity of pain and suffering that can be inflicted by a blow — or repeated blows — to the face or abdomen with an open palm, nor about the degree of mental distress or trauma that can arise from such a beating. Indeed, after much of the detainee abuse became public, the military explicitly prohibited the use of applied beating or other forms of physical pain when it issued the new Army Field Manual, in September 2006.⁹⁰

Physical Pain and Suffering

Beatings can be delivered in a variety of ways with different types of instruments, including the open palm. Most beating is known to lead to physical harm. Beating commonly results in blunt trauma — caused by the application of force to the human body but not penetrating the skin. Blunt trauma inflicted by beating may result in bruises caused by bleeding from ruptured blood vessels. The absence of a bruise, however, does not mean significant blunt trauma did not occur.⁹¹ The extent and severity of the trauma depend not only on the amount of force applied but also on where it is applied. Studies have observed the persistence of musculoskeletal pain (muscle and joint pain) caused by blunt trauma even a decade after the beating occurred.⁹² Forty-two percent (10/24)

of the patients examined at a Danish forensic medical clinic who had reported beating to the feet complained of pain when walking moderate distances.⁹³

Beating can also result in damage to the underlying muscle tissue. When released in sufficiently large amounts, breakdown products from damaged tissue can enter the circulation and result in life-threatening kidney failure in a condition known as rhabdomyolysis. A study of 34 victims of physical torture from India who presented with acute renal failure due to rhabdomyolysis found that all victims required renal dialysis. Five of the 34 (15%) died despite the initiation of renal dialysis.⁹⁴

Open hand slapping is a form of beating. A slap diffuses the blunt trauma force over a greater area than a closed-fist punch, but depending on where the slap is applied, it may nonetheless result in significant injury. Slaps delivered to vulnerable areas of the face including nose, eyes or mouth can result in severe pain and suffering, as well as soft tissue injury, bruising and lacerations. Facial bones may also be fractured, and a slap to the face may result in neck injury.

Mental Pain or Suffering

The mental effects of beating are also relevant in determining whether beating amounts to criminal acts of “torture” or “cruel or inhuman treatment.” A review of 160 prisoners from six countries who had been subjected to cruel treatment found that, even with a short period of imprisonment, 100% of subjects reported beating and blunt force trauma among other techniques of abuse, and 69-92% experienced symptoms of posttraumatic stress disorder (PTSD) with an average of 79.8% demonstrating

⁹⁰ U.S. DEP’T OF ARMY, FIELD MANUAL 2-22.3 HUMAN INTELLIGENCE COLLECTOR OPERATIONS, at para. 5-75 (Sept. 6, 2006) [hereinafter FM 2-22.3] (prohibiting the use of applying beating ... or other forms of physical pain).

⁹¹ ISTANBUL PROTOCOL, *supra* note 22, at 35.

⁹² Annemarie B. Thomsen et al., *Chronic pain in torture survivors*, 108 FORENSIC SCI. INT’L 155 (2000), *Eighteen of forty torture victims from the Middle East treated at the Rehabilitation and Research Centre for Torture Victims in Copenhagen were evaluated for unresolved pain at an average of 14.9 years after the torture event. Twelve patients experienced pain at more than three locations. Nociceptive (pain arising from stimulation of nerve cells) and neuropathic pain (caused by injury or dysfunction of a peripheral nerve) were found in all patients. Specific syndromes were associated with beating and stress positions.* Dorte Reff Olsen et al., *Prevalent musculoskeletal pain as a correlate of previous exposure to torture*, 34 SCANDINAVIAN J. PUB. HEALTH 496 (2006), *Prevalence of musculoskeletal pain among refugees who were tortured in their home countries, both male and female from Lebanon, Iraq, Iran and Turkey, was examined. The mean time of imprisonment was 3.7 years. Beating and shoving were the most frequent forms of torture for these subjects (92%). Current musculoskeletal pain (almost a decade after their torture) correlated with the physical locations where they had been beaten.* Dorte Reff Olsen et al., *Prevalent pain and pain level among torture survivors*, 53 DANISH MED BULL. 210 (2006), *Sixty-nine refugees previously exposed to beating in their home country were interviewed at a Danish rehabilitation clinic, ten years (on average) after the torture event. 89% reported pain in the head within the preceding 24 hours, 78% reported pain in the back and 59% reported pain in the feet. Pain in the feet was associated with beating in the feet. Pain in the back and head was associated with*

suffocation. V. Lök et al., *Bone scintigraphy as clue to previous torture*, 337 LANCET 846 (1991), *Bone scintigraphy and other medical diagnostic tests were performed on 62 patients who claimed to have been physically tortured. The authors were able to demonstrate after-effects of beatings in torture victims showing remnants of hematomas in soft tissue and of periosteal hematomas by bone scintigraphy.* V. LÖK ET AL., HUMAN RIGHTS FOUNDATION OF TURKEY, TREATMENT AND REHABILITATION CENTERS REPORT: BONE SCINTIGRAPHY AS AN EVIDENCE OF PREVIOUS TORTURE 91-96 (Human Rights Foundation of Turkey 1994).

⁹³ P. M. Leth & J. Banner, *Forensic Medical Examination of Refugees Who Claim to Have Been Tortured*, 26 AM. J. FORENSIC MED. & PATHOLOGY 125 (2005), *For details on this study see note 69.* V. Lök et al., *Bone scintigraphy as clue to previous torture*, 337 LANCET, at 846-47 (1991), *For the details on the study see note 92.* V. LÖK ET AL., HUMAN RIGHTS FOUNDATION OF TURKEY, TREATMENT AND REHABILITATION CENTERS REPORT: BONE SCINTIGRAPHY AS AN EVIDENCE OF PREVIOUS TORTURE 91-96 (Human Rights Foundation of Turkey 1994).

⁹⁴ G. H. Malik et al., *Further observations on acute renal failure following physical torture*, 10 NEPHROLOGY DIALYSIS TRANSPLANTATION 198 (1995); G. H. Malik et al., *Acute renal failure following physical torture*, 63 NEPHRON 434-37 (1993).

diagnosis criteria for PTSD.⁹⁵ Moreover, beating is often used in combination with other forms of abuse to amplify its effects, such as forced nudity, blind folding, and stress positions.

Legal Analysis

The known medical consequences of beating support the conclusion that beating constitutes “cruel or inhuman treatment” intended to result in “serious physical pain or suffering” under the WCA. The blunt trauma, fractures, and persistence of musculoskeletal pain (muscle and joint pain) support the argument that beating is an act intended to inflict “bodily injury” that involves “extreme physical pain.”

The serious physical consequences of beating also help explain why U.S. federal courts have repeatedly cited beating as a form of torture intended to inflict “severe pain or suffering,” resulting in violations of the Torture Victims Protection Act.⁹⁶ In *Tachiona v. Mugabe*, the district court awarded \$6,000 in damages under the TVPA for torture which included beating the soles of the feet and hitting in the face.⁹⁷ In *Mehinovic v. Vuckovic*, the court found beatings to result in severe physical pain and suffering under the TVPA in part because they caused the plaintiff to lose consciousness, may have broken his ribs and made him unable to eat.⁹⁸

Further, the known mental effects of beating are also relevant in determining whether beating amounts to a

criminal act of “torture” or “cruel or inhuman treatment.”⁹⁹ Beating constitutes “torture” or “cruel or inhuman treatment” if it is intended to result in “severe” or “serious” “mental pain or suffering” respectively, under the WCA. Mental pain or suffering is “severe” or “serious” if it involves “prolonged” or “non-transitory” mental harm, respectively, and if it results from enumerated causes.¹⁰⁰

The posttraumatic stress disorder often suffered by the victims of beating likely constitutes “prolonged” and/or “non-transitory” mental harm, and that harm likely results from either of two of the four causes enumerated in Torture Act and the War Crimes Act: 1) “the intentional infliction or threatened infliction of severe (or serious) physical pain or suffering;” or 2) “the threat of imminent death.”¹⁰¹ In *Mehinovic v. Vuckovic* the district court found that defendants had subjected the plaintiffs to mental torture because the plaintiffs continued “to suffer long-term psychological harm” such as “anxiety, nightmares, flashbacks, and difficulty sleeping” and because the beating caused the plaintiffs to “fear [] that they would be killed.”¹⁰² U.S. personnel who beat detainees with open palms risk causing similarly harmful consequences.

Beating of any individual is likely to be illegal under the Detainee Treatment Act, which prohibits conduct that violates the Fifth, Fourteenth, or Eight Amendments.¹⁰³ U.S. federal appeals courts have long held that beating during an interrogation violates the Fourteenth and Fifth Amendments regardless of whether the subject suffered physical injury.¹⁰⁴ For instance, the Fifth Circuit held that “during interrogation no physical force is constitutionally permissible” where the plaintiff alleged the police violated his due process rights during an interrogation by “striking [him] in the mouth, swinging a fist near his face and striking the wall, pulling his hair, kicking him and stomping his

⁹⁵ Pia A. Moisander & Erik Edston, *Torture and its sequel — a comparison between victims from six countries*, FORENSIC SCI. INT'L, Nov. 26, 2003, at 133, 133-140, *One hundred sixty torture victims from six different countries treated at the Centre for Trauma Victims in Stockholm. All 160 had reported beating, among other torture techniques. One hundred twenty four underwent psychiatric evaluation. PTSD was diagnosed on the basis of a psychiatric interview and psychological tests. Prevalence of PTSD ranged from 69% to 92% with an average of 79.8%*. P. M. Leth & J. Banner, *Forensic Medical Examination of Refugees Who Claim to Have Been Tortured*, 26 AM. J. FORENSIC MED. & PATHOLOGY 125 (2005), *For the details on the study see note 69*.

⁹⁶ *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 420-423 (S.D. N.Y. 2002) (the court awarded \$1,000,000 in compensatory and \$5,000,000 in punitive damages under the TVPA for torture that resulted in the plaintiff's death and which included beating the soles of Plaintiffs' feet; beating Plaintiff with rods, rocks and iron bars; hitting Plaintiff in the face; and whipping Plaintiff with a fan belt from a car); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1191, 1196 (S.D. N.Y. 1996) (a TVPA action in which the court held that beating committed during interrogations in combination with the application of electric shocks “[V]iolate[] a fundamental principle of the law of nations: the human right to be free from torture.” *Id.* at 1196).

⁹⁷ *Tachiona*, 234 F. Supp. 2d at 421.

⁹⁸ *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1345 (N.D. Ga. 2002), *overruled on other grounds*, *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005).

⁹⁹ War Crimes Act of 1994, 18 U.S.C.A. § 2441(d)(1) (2006).

¹⁰⁰ War Crimes Act of 1994, 18 U.S.C.A. § 2441(d)(1) (2006).

¹⁰¹ War Crimes Act of 1994, 18 U.S.C.A. §2441(d)(1)(B) (2006); Torture Act, 18 U.S.C. § 2340 (2004).

¹⁰² *Mehinovic*, 198 F. Supp.2d at 1334, 1346.

¹⁰³ Detainee Treatment Act of 2005, 42 U.S.C.A § 2000dd (2006).

¹⁰⁴ *Ware v. Reed*, 709 F.2d 345, 351 (5th Cir. 1983) (holding that to use any physical force against a person “who is in the presence of the police for custodial interrogation, who poses no threat to their safety . . . constitutes a constitutional violation” *Id.* at 351); *Gray v. Spillman*, 925 F.2d 90, 93 (4th Cir. 1991) (“It has long been held that beating and threatening a person in the course of custodial interrogation violates the Fifth and Fourteenth amendments of the Constitution. [Citations omitted.] The suggestion that an interrogatee’s constitutional rights are transgressed only if he suffers physical injury demonstrates a fundamental. *Id.* at 93).

feet.”¹⁰⁵ More generally, the U.S. Supreme Court has recognized that the right to bodily integrity¹⁰⁶ and to be free from the intentional infliction of unnecessary pain is one of the most obvious and commonly recognized rights protected by the Fifth and Fourteenth Amendments.¹⁰⁷

3. Temperature Manipulation

The prisoner is exposed for prolonged periods to extreme heat or to extreme cold.

Chinese interrogators subjected U.S. troops to extreme temperatures during the Korean War, eliciting false confessions.¹⁰⁸ The KGB reportedly held prisoners in cells that were deliberately too hot or too cold and also forced prisoners to strip down to their underwear in a frigid cell or to stand in cold water.¹⁰⁹ The 2005 U.S. State Department reports on human rights practices categorized the practices in Syria and Turkey of “exposure to cold”¹¹⁰ and “alternately dousing victims with freezing water and beating them in extremely cold rooms” as torture.¹¹¹ The 2006 reports categorized them as forms of “torture and abuse.”¹¹²

A 2003 Department of Defense Memorandum, which has since been rescinded, authorized the use of environmental manipulation by military interrogators in Iraq. The Department of Defense referred to exposure to cold weather or water as “legally available” to interrogators at Guantánamo Bay.¹¹³ The ICRC reported that detainees in the custody of Coalition Forces in Iraq frequently alleged

being exposed to the sun and extreme heat during interrogations.¹¹⁴ According to an inquiry conducted by Brig. Gen. Richard P. Formica of the Army on the treatment of Iraqi detainees by Special Operations forces, some detainees were stripped naked, drenched with water and then interrogated in air-conditioned rooms or in cold weather. General Formica reported that it appeared that Navy SEALs had used that technique in the case of one detainee who died after questioning in Mosul in 2004, though there were no specific allegations that the use of the technique was related to that death.¹¹⁵ Moreover, former interrogators have reported the use of extreme cold as part of interrogation techniques.¹¹⁶

U.S. Marine Major Roy H. Bley recounted his experience being subject to extreme cold by Chinese military interrogators during the Korean War: “[I]t was necessary for me to keep moving around in the cell or I would have frozen, as the temperature was below zero degrees Fahrenheit. Half frozen and without sleep for many nights, I was worn both physically and mentally.” Major Bley eventually falsely confessed to participating in germ warfare.¹¹⁷

While the new Army Field Manual has explicitly prohibited “inducing hypothermia or heat injury” it is unclear whether lesser extremes that nonetheless cause pain and suffering are prohibited or whether the CIA continues to use temperature manipulation in its interrogation practices.¹¹⁸ The CIA has reportedly authorized its interrogators to subject detainees to the “cold cell,” exposing them to temperatures of 50° F while dousing them with cold water.¹¹⁹ A Human Rights First investigation into the deaths of nearly 100 detainees in U.S. custody found that at least one detainee in a CIA-run facility died from

¹⁰⁵ *Ware*, 709 F.2d at 347, 351.

¹⁰⁶ See *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (“The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.”); *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997).

¹⁰⁷ See *Ingraham v. Wright*, 430 U.S. 651, 670 (1977).

¹⁰⁸ ARDEN A. ROWLEY, U.S. PRISONERS OF WAR IN THE KOREAN WAR: THEIR TREATMENT AND HANDLING BY THE NORTH KOREAN ARMY AND THE CHINESE COMMUNIST FORCES 86 (Turner Publishing Company 2002).

¹⁰⁹ 1 ALEKSANDR SOLZHENITSYN, *THE GULAG ARCHIPELAGO* 113 (Harper & Row 1973).

¹¹⁰ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2005 (2006), available at <http://www.state.gov/g/drl/rls/hrrpt/>.

¹¹¹ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2005 (2006), available at <http://www.state.gov/g/drl/rls/hrrpt/>.

¹¹² BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2006 (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/>.

¹¹³ HAYNES MEMO, *supra* note 58.

¹¹⁴ Ross & Esposito, *supra* note 6; HAYNES MEMO, *supra* note 58 (Stated that exposure to cold weather or water [with appropriate medical monitoring] may be legally available); ICRC REPORT, *supra* note 60, at para. 25 (Found that prolonged exposure to the sun while hooded over several hours, including during the hottest time of the day when temperatures could reach 50 degrees Celsius [122 degrees Fahrenheit] or higher was one of the most frequently alleged ill-treatment during interrogation of individuals in U.S. custody in Iraq).

¹¹⁵ RICHARD P. FORMICA, U.S. ARMY, ARTICLE 15-6 INVESTIGATION OF CJSOTF - AP [COMBINED JOINT SPECIAL OPERATIONS TASK FORCE - ARABIAN PENINSULA] AND 5TH SF [SPECIAL FORCES] GROUP DETENTION OPERATION (2004), available at <http://action.aclu.org/torturefoia/released/061906/FormicaReport.pdf>.

¹¹⁶ See generally Steven Miles, *Medical Ethics and the Interrogation of Guantánamo 063*, 7 AM. J. BIOETHICS 5 (2007).

¹¹⁷ ARDEN A. ROWLEY, U.S. PRISONERS OF WAR IN THE KOREAN WAR 86 (Turner Publishing Company 2002).

¹¹⁸ FM 2-22.3, *supra* note 90, at para. 5-75.

¹¹⁹ Ross & Esposito, *supra* note 6.

heat stroke after not being given enough water or proper care and at least one died from hypothermia after being chained to the floor without blankets.¹²⁰

Physical Pain and Suffering

Temperature manipulation has known effects on the body that are relevant for determining whether its use is permissible as an interrogation technique under U.S. law. Exposing a detainee to the cold can have serious health consequences even if the environmental temperature is well above freezing. The body is highly regulated to maintain core body temperature within a narrow range. Maintenance of this core temperature is essential to human survival. Hypothermia can have a number of adverse physical effects. Even moderate cold exposure can lead to significant shifts from the peripheral circulation to the body core, slowing heart function (including arrhythmias, ventricular fibrillation¹²¹ and cardiac arrest¹²²), gastrointestinal function, and possibly a decreased resistance to infection. If the body temperature drops below 90° F, there may be cognitive effects including amnesia. If the body temperature drops below 86° F, major organs can fail and death can occur.

Similar physical effects of exposure to cold have been described by Nazi doctors who conducted experiments on hypothermia in order to develop survival techniques for German pilots shot down over the North Sea. To simulate these conditions, hundreds of Dachau concentration camp inmates were immersed in vats of freezing water until their body temperatures fell to 79.7° F. Many died of exposure.¹²³

In addition to immediate effects, hypothermia can result in prolonged adverse health consequences. The neurologic effects of hypothermia include mental slowing, diminished reflexes and eventually flaccid muscle tone. With exposure to temperatures below 32° C (89.6° F) patients develop amnesia and below 31° C (87.8° F) there may be loss of consciousness.¹²⁴

Exposure to heat can result in elevations of core body temperature, particularly when access to water is limited. Heat stroke is a life-threatening condition that can occur when the core temperature rises above 40° C (104° F). Heat stroke is characterized as predominant central nervous system dysfunction resulting in delirium, convulsions and coma. Even with aggressive and appropriate treatment, heat stroke is often fatal.¹²⁵

Legal Analysis

All of the above immediate and long-term medical consequences support the conclusion that temperature manipulation can constitute a criminal act of “torture” or “cruel or inhuman treatment.” Under the plain language of the War Crimes Act, temperature manipulation would constitute “cruel or inhuman treatment” to the extent that it is likely to result in “serious physical pain and suffering” defined as “bodily injury that involves ... extreme physical pain.”¹²⁶ While there is yet no case law interpreting the WCA language, legislative history suggests that Congress intended, at a minimum, that induced hypothermia or heat injury be criminalized under the MCA’s amendments to the War Crimes Act.¹²⁷

U.S. federal courts have also recognized exposure to extreme heat and cold as a form of torture when used

¹²⁰ SHAMSI, *supra* note 38, at 9.

¹²¹ E. L. Lloyd, *Accidental hypothermia*, 32 RESUSCITATION 111 (1996), *Even in persons exposed to moderate cold (as opposed to freezing temperatures), vast intercompartmental fluid shifts occur due to peripheral vasoconstriction. If the rate of sequestered fluids exceeds the ability of the kidneys to remove it, fluid overload will result in cerebral or pulmonary edema or death. Active rewarming can result in mortality, and spontaneous rewarming can cause death as well. Rewarming is also associated with ventricular fibrillation, a dangerous heart arrhythmia that, untreated, leads to sudden death.*

¹²² B. Plasier, *Thoracic lavage in accidental hypothermia with cardiac arrest — report of a case and review of the literature*, 66 RESUSCITATION 99 (2005), *In a report of a successful resuscitation of a patient with hypothermia and cardiac arrest using thoracic lavage, the authors reviewed the English language literature of thirteen patients with hypothermia and cardiac arrest. Nine patients (64.3%) were found to be in ventricular fibrillation on presentation to the Emergency Department. Four patients (28.6%) died, and among the survivors, 8 had normal neurological outcome, two were left with residual neurological impairment.*

¹²³ Berryl Byman, *Bitter Fruit: the Legacy of Nazi Medical Experiments* 62 Minn. Med. 580, 582-86 (1989). *United States v. Brandt et al.*, 1 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law 10, 27-74 (1947).

¹²⁴ Gregory J. Jurkovich, *Environmental cold-induced injury*, 87 SURGICAL CLINICS N. AM. 247, viii (2007), *The neurologic response to hypothermia is heralded by progressive loss of lucidity and deep tendon reflexes, and eventually by flaccid muscular tone. Patients go on to develop amnesia below 32° C, below 31° C they lose consciousness.*

¹²⁵ A. Bouchama & J. Knochel, *Heat Stroke* 346 New Eng. J. Med. 1978 (2002), *Review article describes the consequences of heat stroke in humans. From 1979 to 1997, the Centers for Disease Control (CDC) attributed 7000 deaths in the U.S. to heat stroke. Heat stroke is frequently fatal, and survivors may suffer permanent neurologic injury. Heat stroke results from thermoregulatory failure coupled with an exaggerated acute-phase response. The ensuing multi-organ injury results from a complex interplay among the cytotoxic effect of the heat and the inflammatory and coagulation responses of the host.*

¹²⁶ War Crimes Act of 1996, 18 U.S.C. 2441(d)(1)(B) (2006).

¹²⁷ During the debate over the final version of the Military Commissions Act, Senators Durbin, Levin and Warner stated that they understood inducing hypothermia or heat injury to be criminal under the MCA’s amendments to the War Crimes Act. See 152 Cong. Rec. S10,235, S10,384, S10,390 (daily ed. Sept. 27, 2006); 152 Cong. Rec. S10, 384 (daily ed. Sept. 27, 2006).

in other countries, and have held that abuse involving such treatment creates a valid civil claim for damages under the TVPA and is a basis for asylum relief for refugees.¹²⁸ The D.C. Circuit Court of Appeals identified exposure to the cold as a form of physical torture used by Hezbollah against an American citizen in Lebanon; plaintiff Joseph Cicippio was chained outdoors and exposed to the elements during winter which caused him to develop frostbite to his hands and feet.¹²⁹ A U.S. federal district court described the method used under the Marcos regime in the Philippines of “[f]orcing a detainee while wet and naked to sit before an air conditioner often while sitting on a block of ice” as a “form of torture.”¹³⁰

Relevant Fifth, Eighth, and Fourteenth Amendment jurisprudence suggests that the use of extreme temperatures against detainees, regardless of their location or nationality, may violate the Detainee Treatment Act. The Fifth Circuit has specifically held that “turning the fan on inmates while naked and wet” constituted cruel and unusual punishment.¹³¹ More generally, the Supreme Court has held that a prisoner’s due process rights under the Fifth and Eighth Amendments include the government’s duty to provide clothing and shelter from the elements for individuals who the government has detained.¹³² Exposure to extreme temperatures arguably breaches the government’s constitutional duty to meet

¹²⁸ See, e.g., *Lhazom v. Gonzales*, 430 F.3d 833, 848 (7th Cir. 2005) (listing exposure to the cold as a form of torture used by the government of China against Tibetans as stated in the U.S. State Department Report in case remanding a Board of Immigration Appeals opinion denying an asylum claim).

¹²⁹ *Cicippio v. Islamic Republic of Iran*, 18 F.Supp. 2d 62, 64, 66 (D. D.C.) (1998) (holding that Plaintiff Joseph Cicippio allegations of abuse constituted torture and were therefore sufficient to support a claim under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(e)).

¹³⁰ *In re Estate of Marcos Human Rights Litigation*, 910 F.Supp. 1460, 1463 (D. Haw. 1995).

¹³¹ *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974).

¹³² *DeShaney v. Winnebago*, 489 U.S. 189, 199-200 (1989) (“[W]hen the state takes a person into its custody and holds him there against his will, the constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. [] The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.” *Id.*); *Hope v. Pelzer* 536 U.S. 730, 731 (2002) (citing unnecessary exposure to the heat of the sun as cruel and unusual punishment); *Martino v. Carey*, 563 F.Supp. 984, 999 (D. D.C. 1983) (holding that failure to maintain minimum requirements for human habitation in cells, such as heating in winter and cooling or ventilating in summer, violates Eighth Amendment.).

detainees’ basic need for shelter and clothing. According to the Court, deliberate indifference to such basic needs of a detainee violates that detainee’s rights under the Fifth, Eighth, and Fourteenth Amendments.¹³³

4. Waterboarding (mock drowning)

The prisoner is strapped down and immobilized and water is poured over the face to create the sensation of asphyxiation or drowning.

The practice of waterboarding can be traced back to the Middle Ages, when it was used in the Spanish and Italian inquisitions during the 1500s.¹³⁴ More recently, waterboarding was used by the brutal Khmer Rouge regime in Cambodia in the 1970s.¹³⁵ In March of 2007 the U.S. State Department criticized Sri Lanka for engaging in techniques of torture such as “near-drowning.”¹³⁶ In its reports on human rights practices in Tunisia 1996-2004, the U.S. State Department criticized the practice of “submersion of the head in water” as torture.¹³⁷ The reports from 2005 and 2006 categorize the Tunisia’s use of this practice as a form of “torture and other abuse.”¹³⁸ The United States has historically prosecuted waterboarding as a war crime: in 1947, the United States convicted a Japanese military officer of a war crime and sentenced him to fifteen years of hard labor for using a form of waterboarding against a U.S. civilian.¹³⁹

In the form of waterboarding reportedly authorized for use by the CIA, “the prisoner is bound to an inclined board, feet raised and head slightly below the feet.

¹³³ *DeShaney*, 489 U.S. at 199-200; *Hope*, 536 U.S. at 731; *Martino*, 563 F.Supp. at 999.

¹³⁴ Brian Ross, *A partial history on waterboarding*, ABC NEWS.COM, Nov. 29, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1356870>.

¹³⁵ *Id.*

¹³⁶ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2006 (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/>.

¹³⁷ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-1996-1999 (1997-2000), available at http://www.state.gov/www/global/human_rights/hrp_reports_mainhp.html; BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-1999-2004, available at <http://www.state.gov/g/drl/rls/hrrpt/>.

¹³⁸ UNITED STATES DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICE – 2005-2006 (2006-2007), available at <http://www.state.gov/g/drl/rls/hrrpt/>.

¹³⁹ Walter, Pincus, *Waterboarding Historically Controversial: In 1947, the U.S. Called It a War Crime; in 1968, It Reportedly Caused an Investigation*, WASH POST, Oct. 5, 2006 at A17.

Cellophane or a towel is wrapped over the prisoner's face and water is poured over him to simulate drowning."¹⁴⁰ In 2002, the Department of Defense referred to the "use of a wet towel and dripping water to induce the misperception of suffocation" as potentially legally available to military interrogators in a memo that was later rescinded.¹⁴¹ The use of waterboarding in military interrogations was later explicitly banned by the new Army Field Manual, though the manual provides no description or definition of the act.¹⁴² According to Defense Department reports, personnel who served with the Special Operations forces unit in Iraq described that some detainees were stripped naked and cold water was used to cause the sensation of drowning.¹⁴³

In his 1958 book, *The Question*, the journalist Henri Alleg described the experience of being subjected to waterboarding at the hands of French paratroopers during the Algerian war for independence.

*The rag soaked up rapidly. Water flowed everywhere: in my mouth, in my nose, all over my face. [] I tried, by contracting my throat, to take in as little water as possible and to resist suffocation by keeping air in my lungs for as long as I could. But I couldn't hold on for more than a few moments. I had the impression of drowning, and a terrible agony, that of death itself, took possession of me.[]*¹⁴⁴

Physical Pain or Suffering

During "simulated" drowning, hypoxia (shortage of oxygen in the body) caused by deprivation of adequate oxygen can and probably does occur. At the same time, a dramatic physiologic stress response, with tachycardia (rapid heart beat), hyperventilation (rapid respiratory rate) and labored breathing (airway obstruction and breathlessness) is almost unavoidable. The stress resulting from this technique could induce the obstruction of blood flow to the heart (cardiac ischemia) or irregular heart beat (arrhythmia) in vulnerable individuals. Brief oxygen deprivation can cause neurological damage.

¹⁴⁰ Ross & Esposito, *supra* note 6 ("The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him.").

¹⁴¹ HAYNES MEMO, *supra* note 58.

¹⁴² FM 2-22.3, *supra* note 90, at para. 5-75.

¹⁴³ Eric Schmitt, Marshall Carolyn, *In Secret Unit's 'Black Room,' A Grim Portrait of U.S. Abuse*; N.Y. TIMES, June 17, 2006.

¹⁴⁴ ALLEG, HENRI, *THE QUESTION* 48 (John Calder trans., University of Nebraska Press 2006) (1958).

Complications of near asphyxiation include bleeding into the skin (known as petechiae), nosebleeds, bleeding from the ears, congestion of the face, infections of the mouth, and acute or chronic respiratory problems.¹⁴⁵ Studies show that even more than a decade after the event, survivors of suffocation torture continue to suffer from pain in the back and head.¹⁴⁶ Breathing fluid into the lungs can result in aspiration pneumonia which can be fatal.

Mental Pain or Suffering

Studies indicate that simulated drowning — calculated as it is to "disrupt profoundly the senses" — can also cause severe psychological harm, in violation of the "torture" and "cruel or inhuman treatment" provisions of the WCA.¹⁴⁷ The experience of near-suffocation is also associated with the development of predominantly respiratory panic attacks, high levels of depressive symptoms,¹⁴⁸ and prolonged posttraumatic stress disorder.¹⁴⁹ This litera-

¹⁴⁵ ISTANBUL PROTOCOL, *supra* note 22, at 41.

¹⁴⁶ Dorte Reff Olsen et al., *Prevalent pain and pain level among torture survivors*, 53 DANISH MED BULL. 210-14 (2006), *For details on the study, see note 92.*

¹⁴⁷ C. Bouwer & D. J. Stein, *Association of panic disorder with a history of traumatic suffocation*, 154 AM. J. PSYCHIATRY 1566 (1997), *Recent research suggests that panic disorder results from a false suffocation alarm. Bouwer and Stein found that there was a significantly higher incidence of traumatic suffocation experiences (e.g., near-drowning and near-choking) in panic disorder patients (N = 176) than in psychiatric controls (N = 60), and that panic disorder patients with a history of traumatic suffocation were significantly more likely to have predominantly respiratory symptoms than those without such a history. In the majority of patients who had experienced traumatic suffocation this had been during accidental near drowning (N = 25). However, a smaller number of patients had experienced traumatic suffocation during deliberate torture (N = 8) or during rape (N = 1). In a case reported by the authors a 31 year old man with panic attacks characterized by predominantly respiratory symptoms reported that he had been tortured at the age of 18. A wet bag had been placed over his head repeatedly, leading to choking feelings, hyperventilation, and panic. At about age 20 the patient began to experience spontaneous panic attacks.*

¹⁴⁸ C. Bouwer & D. J. Stein, *Panic disorder following torture by suffocation is associated with predominantly respiratory symptoms*, 29 PSYCHOLOGICAL MED. 233 (1999), *The authors examined whether a near-suffocation experienced in certain kinds of torture is associated with the development of predominantly respiratory panic attacks. A sample of 14 South African patients who had experienced torture, were questioned about symptoms of panic disorder, posttraumatic stress disorder and depression. Patients with a history of torture by suffocation (N=8) were more likely than other patients to complain of predominantly respiratory symptoms during panic attacks (N=6). These patients also demonstrated higher levels of depressive symptoms. The authors noted that torture by suffocation is possibly associated with a specific symptomatic profile.*

¹⁴⁹ H. P. Kapfhammer et al., *Posttraumatic stress disorder and health-related quality of life in long-term survivors of acute respiratory distress*

ture is consistent with clinical experience: clinicians who treat torture survivors at the Bellevue/NYU Program for Survivors of Torture have observed that survivors of water torture and other forms of near-asphyxiation suffer from long-lasting trauma.¹⁵⁰

Legal Analysis

U.S. personnel who authorize or engage in waterboarding will almost certainly commit the criminal act of torture under the WCA and the Torture Act and /or the crime of “cruel or inhuman treatment” under the WCA. Waterboarding unquestionably — and by design — results in both “severe” and “serious” physical pain and suffering. Although there is no case law interpreting the WCA, waterboarding would meet the plain language of the Act’s definition of “cruel or inhuman treatment” if it was intended to inflict “bodily injury that involves ... extreme pain [and/or] a substantial risk of death.”¹⁵¹ Indeed, during the floor debate of the Military Commissions Act (which amended the WCA) Senators Durbin,¹⁵² McCain,¹⁵³ Levin¹⁵⁴ and Warner¹⁵⁵ all made clear that they understood waterboarding to be criminalized by the Act’s amendments to the WCA.

U.S. federal courts have recognized the physical brutality of waterboarding in civil cases: the Ninth Circuit, for example, concluded that a plaintiff subjected to waterboarding by the Filipino military under Ferdinand

Marcos had a cause of action for torture under the TVPA. The Ninth Circuit called it “water torture” where “all of [the plaintiff’s] limbs were shackled to a cot and a towel was placed over his nose and mouth; his interrogators then poured water down his nostrils so that he felt as though he were drowning.”¹⁵⁶

Medical findings suggest that waterboarding results in both “severe” and “serious” mental pain and suffering as defined by the WCA and the Torture Act. Studies suggest that waterboarding and other forms of torture by suffocation have been found to result in both “prolonged” and “non-transitory mental harm,” such as posttraumatic stress disorder. Waterboarding is designed to create the sensation of drowning and thus is likely “calculated to disrupt profoundly the senses or the personality.”¹⁵⁷

Supreme Court constitutional jurisprudence also suggests that waterboarding violates the Detainee Treatment Act, particularly because it creates the physical sensation of suffocation. The Supreme Court has repeatedly recognized that the right to bodily integrity¹⁵⁸ and to be free from the intentional infliction of unnecessary pain is one of the most obvious and commonly recognized rights protected by the Fifth and Fourteenth Amendments.¹⁵⁹ Moreover, U.S. federal appeals courts have held that the use of any physical force against a person who is in the presence of the police for custodial interrogation and who poses no threat to the safety of the police violates Fifth and Fourteenth Amendment due process protections.¹⁶⁰

syndrome, 161 AM. J. PSYCHIATRY 45 (2004), *Forty-six patients who had suffered from acute respiratory distress syndrome for various medical reasons and had been treated according to a standardized treatment protocol in the intensive care unit were enrolled in this study and followed up for about eight years. The authors found that at the time of dismissal from the intensive care unit or hospital, 43.5% of the patients had PTSD and 8.7% had sub-PTSD. In a follow up evaluation (i.e., an average of 8 years after intensive care) 23.9% continued to suffer from full-blown PTSD, and 17.4% had sub-PTSD. The patients with PTSD demonstrated a pronounced tendency for somatization and anxiety. The authors concluded that long-term survivors of acute respiratory distress syndrome seem to face a major risk of PTSD and major impairments in health-related quality of life in the long term.*

¹⁵⁰ For example, one torture survivor was unable to take showers and panicked when it rained. Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, February 14, 2005.

¹⁵¹ Torture Act, 18 U.S.C. § 2340(2).

¹⁵² 152 Cong. Rec. S10,236 (daily ed. Sept. 28, 2006) (Statement by Sen. Durbin).

¹⁵³ 152 Cong. Rec. S10, 413 (daily ed. Sept. 28, 2006) (Statement by Sen. McCain).

¹⁵⁴ 152 Cong. Rec. S10, 384 (daily ed. Sept. 28, 2006) (Statement by Levin).

¹⁵⁵ 152 Cong. Rec. S10,390 (daily ed. Sept. 28, 2006) (Statement by Sen. Warner).

¹⁵⁶ *Hilao v. Marco*, 103 F.3d 789, 790 (9th Cir. 1996); *See also In re Estate of Marcos Human Rights Litigation*, 910 F.Supp. 1460, 1463 (D. Haw. 1995) [describing many uses of suffocation used by the Marcos regime including “the ‘water cure’, where a cloth was placed over the detainee’s mouth and nose, and water poured over it producing a drowning sensation; ‘the ‘wet submarine’, where a detainee’s head was submerged in a toilet bowl full of excrement;” and “the ‘dry submarine’, where a plastic bag was placed over the detainee’s head producing suffocation.”].

¹⁵⁷ War Crimes Act of 1996, 18 U.S.C. § 2441 (d)(2)(E); Torture Act, 18 U.S.C. § 2340(2).

¹⁵⁸ *See Albright v. Oliver*, 510 U.S. 266, 272 (1994) [“The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.”]; *Washington v. Glucksberg*, 521 U.S. 702, 719 (1977).

¹⁵⁹ *See Ingraham v. Wright*, 430 U.S. 651, 670 (1977).

¹⁶⁰ *Ware v. Reed*, 709 F.2d 345, 351 (5th Cir. 1983) [recognizing that it is a constitutional violation to use any physical force against a person who is in the presence of the police for custodial interrogation and who poses no threat to their safety]; *Gray v. Spillman*, 925 F.2d 90, 93 (Cir. 4th 1991) [“It has long been held that beating and threatening a person in the course of custodial interrogation violates the fifth and fourteenth amendments of the Constitution. [Citation omitted.] The suggestion that an interrogee’s constitutional rights are transgressed only if he suffers physical injury demonstrates a fundamental misconception of the fifth and fourteenth amendments, indeed, if not our system of criminal justice.”].

5. Threats of Harm to Person, Family or Friends

The prisoner is threatened with harm against himself or against family or friends if he fails to cooperate with interrogators.

Threats against a prisoner or a prisoner's family's health and wellbeing were a common interrogation method employed by Soviet police in the 1930s.¹⁶¹ Aleksandr Solzhenitsyn, who was detained in the Soviet Gulag for eleven years, wrote of the effect of threats, "one could break even a totally fearless person through his concern for those he loved."¹⁶² Iraqi forces during the first Gulf War threatened U.S. POWs by: pointing a pistol at a prisoner's head; dry-firing a pistol in a prisoner's mouth; conducting mock executions; and threatening prisoners with dismemberment and castration during interrogations. The United States asserted that these abuses constituted war crimes.¹⁶³ In more recent years, the U.S. State Department has repeatedly called the use of threats against prisoners by Brazil, Egypt, Tunisia and Turkey a form of torture or cruel, inhuman, or degrading treatment.¹⁶⁴

In a 2004 report, the ICRC states that detainees in Iraq often alleged that interrogators used "[t]hreats of ill-treatment, reprisals against family members, imminent execution or transfer to Guantánamo."¹⁶⁵ One sworn statement dated July 2003 made during an Army investigation details an incident in which an Army captain took an Iraqi prisoner into the desert, interrogated him, made the detainee dig his own grave for two hours, threatened to kill him and had other soldiers stage a shooting of the man.¹⁶⁶

The new Army Field Manual prohibits the use of certain threats against a person and their family in interrogations, including implied threats of harsh interrogation

by non-U.S. entities.¹⁶⁷ However, the new manual also authorizes the "False Flag" technique that implies to a detainee that he is in the custody of others.¹⁶⁸

*While interrogating Abed Hamed Mowhoush in Iraq, U.S. personnel threatened his fifteen-year-old son Mohammed. According to Mohammed, who was interviewed by Human Rights First, U.S. personnel made Mowhoush believe his son would be executed if he did not answer questions, and then fired a bullet into the ground near Mohammed's head within earshot of his father. Mohammed said that this was the last time he saw his father before he died from asphyxiation during an interrogation by U.S. personnel.*¹⁶⁹

Mental Pain and Suffering

Studies have found that threats to an individual's life or physical well-being or to the well-being of his family or friends can have a long-lasting psychological impact. Research demonstrates that these threats are known to induce extreme fear and loss of control, which are strongly associated with PTSD and major depression among trauma survivors.¹⁷⁰

Individuals who have been threatened with death often relive their near-death encounters in nightmares, flash-

¹⁶¹ SOLZHENITSYN, *supra* note 109, at 106.

¹⁶² *Id.*

¹⁶³ WAR CRIMES DOCUMENTATION CENTER, INTERNATIONAL AFFAIRS DIVISION, OFFICE OF THE JUDGE ADVOCATE GEN., UNITED STATES ARMY, REPORT ON IRAQI WAR CRIMES (DESERT SHIELD/DESERT STORM) 13, 21, 26, 27 (1992) (declassified version).

¹⁶⁴ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2006, 2002 (2007, 2003), available at <http://www.state.gov/g/drl/rls/hrrpt/>.

¹⁶⁵ ICRC REPORT, *supra* note 60, at para. 25.

¹⁶⁶ Sworn Statement; Document #: DOD006865-DOD006866, Date of Record: 2003-07-15, available at <http://www.aclu.org/projects/foia-search/pdf/DOD006865.pdf>.

¹⁶⁷ FM 2-22.3, *supra* note 90, at para. 8-70 (prohibits "implied or explicit threats that non-cooperation will result in harsh interrogation by non-U.S. entities"); *Id.* at para. 5-77 ("Other forms of impermissible coercion may be more subtle, and may include threats to turn the individual over to others to be abused; ... implying harm to the individual or his property. Other prohibited actions include implying a deprivation of applicable protections guaranteed by law because of a failure to cooperate; threatening to separate parents from their children; or forcing a protected person to guide U.S. forces in a dangerous area.").

¹⁶⁸ *Id.* at para. 8-69.

¹⁶⁹ Human Rights First Telephone Interview with Mohammed Mowhoush, son of Iraqi Maj. Gen. Abed Hamed Mowhoush (Nov. 9 & 14, 2005) (transcript on file with Human Rights First).

¹⁷⁰ M. Basoglu et al., *Psychiatric and cognitive effects of war in former Yugoslavia: association of lack of redress for trauma and posttraumatic stress reactions*, 294 J. AM. MED. ASS'N 580 (2005). *The study was a cross-sectional survey of 1358 war survivors who had experienced at least 1 war-related stressor (combat, torture, internal displacement, refugee experience, siege, and/or aerial bombardment) from 4 sites in former Yugoslavia. Control groups at 2 study sites were matched with survivors on sex, age, and education. Participants reported experiencing a mean of 12.6 war-related events (including 276 torture trauma), with 22% and 33% having current and lifetime PTSD, respectively, and 10% with current major depression. The factor most strongly associated with PTSD and depression was fear and loss of control [odds ratio [OR]=2.91; OR= 2.3 respectively]. The authors concluded that fear of threat to safety and loss of control over life appeared to be the most important predictor in developing PTSD and depression among severe trauma survivors.*

backs, and intrusive memories. These experiences can provoke feelings of intense anxiety that cause dysfunction at work and in family settings and, in more extreme cases, cause self harm.¹⁷¹ Mock executions and other situations where death is threatened cause victims to repeatedly experience their last moments before anticipated death, create a sense of complete unpredictability and uncertainty over the possibility of imminent death, and induce chronic fear and hopelessness.¹⁷² Studies also show that those who experience mock executions and death threats often suffer from PTSD symptoms, anxiety and depressive symptoms and increased frequency of suicidal behavior.¹⁷³

Legal Analysis

The long-lasting psychological damage described above bolsters the argument that credible threats of physical harm to a detainee or others constitute prosecutable acts of “torture” and/or “cruel or inhuman treatment.” Under the plain language of the WCA and the Torture Act, “prolonged” and “non-transitory” mental harm — PTSD and chronic fear and hopelessness — would constitute severe or serious mental pain or suffering if it results

from the threat of death or severe physical pain or “the threat that another person will imminently be subjected to death, serious physical pain or suffering.”¹⁷⁴ During the Senate floor debate of the Military Commissions Act, Senators Levin¹⁷⁵ and Warner¹⁷⁶ stated that they understood the threat accompanying mock executions to be criminalized by the MCA’s amendments to the WCA.

U.S. federal courts have found that specific, credible threats of death or physical injury — such as castration — constitute acts of torture for civil liability purposes.¹⁷⁷ (On the other hand, courts have found that more generalized threats fall short of torture.¹⁷⁸)

Although “verbal harassment or idle threats” alone may not be unlawful under the Detainee Treatment Act,¹⁷⁹ courts have found that credible verbal threats of the use of deadly force can constitute cruel and unusual treatment that “shocks the conscience” in violation of the Fifth and Fourteenth Amendments. For instance, U.S. federal appeals courts have found that pointing a loaded

¹⁷¹ PHR BREAK THEM DOWN, *supra* note 20, at 45-55.

¹⁷² *Id.*

¹⁷³ See Marcello Ferrada-Noli et al., *Suicidal behavior after severe trauma. Part 2: The association between methods of torture and of suicidal ideation in posttraumatic stress disorder*, 11 J. TRAUMATIC STRESS 103 (1998), *The authors aimed to assess prevalence of PTSD and psychiatric comorbidity and incidence of suicidal behavior among refugees with history of exposure to severe trauma. The stressors reported comprised both personal experience of and/or forced witnessing of combat atrocities (including explosions or missile impacts in urban areas), imprisonment (including isolation), torture and inflicted pain, sexual violence, witnessing others’ suicide, and of summary and/or mock executions. Of the 149 refugees examined in this study, 104 (70%) had experienced at least one episode of torture under captivity. PTSD was diagnosed in 79% of all cases, other psychiatric illness in 16% and no mental pathology in 5%. Fifty percent of the sample reported suicidal behavior. Among the PTSD cases, 46% had diagnosis of depressive disorders, 29% had diagnosis of anxiety disorders, 56% reported suicidal behavior. J. B. Hooberman, Classifying the torture experiences of refugees living in the United States*, 22 J. INTERPERSONAL VIOLENCE 108 (2007), *Data were collected from a convenience sample of 325 refugees and survivors of torture seeking services through the Bellevue Hospital/New York University Program for Survivors of Torture. Most participants reported having been subjected to beating. Rape and other forms of sexual assault were also common (reported by 18% and 11% of the sample, respectively). Forms of psychological torture frequently reported include harassment directed at participant or family members (reported by 90% and 85% of participants respectively), witnessing violence or torture against others (79%), and torture of family members (68%). Authors reported high prevalence of anxiety (81%), depressive symptoms (84.5%) and PTSD (45.7%) in the sample. The study found that anxiety and depressive symptom were significantly higher among women and those who experienced death threats. Symptoms of PTSD were also predicted by death threats, but were also influenced by the experience of rape, family torture experiences, religion, and age of participants.*

¹⁷⁴ War Crimes Act of 1996, 18 U.S.C. § 2441(d)(2) (2006); Torture Act, 18 U.S.C. § 2340(2) (2004).

¹⁷⁵ 109 Cong. Rec. S10,384 (daily ed. Sept. 28, 2006) (Statement by Sen. Levin).

¹⁷⁶ Cong. Rec. S10,390 (daily ed. Sept. 28, 2006) (Statement by Sen. Warner).

¹⁷⁷ See e.g. *Daliberti v. Republic of Iraq*, 146 F.Supp.2d 19, 25 (D. D.C. 2001) (held that treatment “including holding him at gunpoint, threatening to injure him physically if he did not confess to espionage or otherwise provide information, and incarcerating him in a room with no bed, window, light, electricity, water, toilet or adequate access to sanitary facilities, constituted torture” as defined by FSIA); *Cicippio v. Islamic Republic of Iran*, 18 F.Supp. 2d 62, 66 (D. D.C. 1998) (threat of castration was listed as a method of torture used by Iran against a U.S. citizen which allowed the victims to bring a civil suit for damages under FSIA).

¹⁷⁸ See *Simpson v. Socialist People’s Libyan Arab Jamahiriya*, 326 F.3d 230 (Cir. Ct. App. D.C. 2003) (held that Libyan authorities did not commit torture when they took the plaintiff off a cruise ship; separated her from her husband and refused to tell her about her about his whereabouts and condition; and threatened to kill the plaintiff if she moved from the quarters where she was held).

¹⁷⁹ *Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525, 532 (11th Cir. 1995) (“Although we have not foreclosed the possibility that words or verbal harassment may constitute “conscious shocking” behavior in violation of substantive due process rights, ... our review of the case law indicates that the threshold for alleging such claims is high.”); *Pittsley v. Warish*, 927 F.2d 3, 7 (1st Cir.1991); see also *Emmons v. McLaughlin*, 874 F.2d 351 (6th Cir. 1989) (holding that threat of officer to a suspected drug dealer that he was “going to get you” did not amount to a substantive due process violation.); *Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979) (allegations that sheriff laughed at prisoner and threatened to “hang him” was not sufficient to establish a constitutional violation); *Lamar v. Steele*, 698 F.2d 1286 (5th Cir.) (holding that a claim based on “mere words” or “idle threats” is not sufficient to establish a violation of substantive due process).

weapon at a civilian without a legitimate law enforcement purpose violated the Fourteenth Amendment.¹⁸⁰

6. Sleep Deprivation

The prisoner is deprived of normal sleep for extended periods through the use of stress positions, sensory overload, or other techniques of interrupting normal sleep.

Sleep deprivation is a well established form of abuse, used in breaking down interrogation subjects.¹⁸¹ In describing the use of sleep deprivation by the Soviet police in the 1930s, Aleksandr Solzhenitsyn writes in *The Gulag Archipelago*, “[s]leeplessness befogs the reason, undermines the will, and the human being ceases to be himself, to be his own ‘I.’”¹⁸² Sleep deprivation was also used in the 1970s to interrogate political opponents by the military in Chile under General Augusto Pinochet.¹⁸³ Recently, the U.S. State Department has condemned Indonesia, Iran, Jordan, Libya, Saudi Arabia, and Turkey for using sleep deprivation as a form of torture or cruel, inhuman, or degrading treatment.¹⁸⁴

In 2002, in a memo that has since been rescinded, the Department of Defense authorized the use of sleep deprivation for use on detainees in Guantánamo Bay in the form of 20 hour interrogations.¹⁸⁵ The military investigation report documented a so-called “frequent-flyer”

program at Guantánamo in effect from 2003 and until March 2004 in which detainees were regularly moved from one cell to another at intervals of two to four hours to interrupt their sleep.¹⁸⁶ The new Army Field Manual appears to permit some sleep deprivation, so long as four hours of continuous sleep are permitted during every 24 hour period. The detainee can be sleep deprived in this manner for up to 30 consecutive days.¹⁸⁷

The former Israeli Prime Minister, Menachem Begin, describes his experiences with sleep deprivation while being held in a Soviet prison:

*In the head of the interrogated prisoner a haze begins to form. His spirit is wearied to death, his legs are unsteady, and he has one sole desire: to sleep, to sleep just a little, not to get up, to lie, to rest, to forget... Anyone who has experienced this desire knows that not even hunger or thirst are comparable with it...I came across prisoners who signed what they were ordered to sign, only to get what their interrogator promised them. He did not promise them their liberty. He promised them — if they signed — uninterrupted sleep!*¹⁸⁸

Mental Pain and Suffering

Sleep deprivation is inflicted for the purpose of destroying the subject’s capacity for psychological resistance.¹⁸⁹ It causes significant cognitive impairments including deficits in memory, learning, logical reasoning, complex verbal processing, and decision-making; sleep appears to play an important role in processes such as memory and insight formation.¹⁹⁰ Sleep deprivation may also

¹⁸⁰ *Hawkins v. Holloway*, 316 F.3d 777, 787 (8th Cir. 2003) [holding that threatening deadly force as a means of oppressing those employed in his department “elevated” his conduct to the arbitrary and conscience shocking behavior prohibited by substantive due process.”]; *Robinson v. Solano County*, 278 F.3d 1007, 1014 (9th Cir.2002) (discussing in dictum that an officer’s conduct in pointing a loaded weapon at a civilian without a legitimate law enforcement basis shocks the conscience); see also *Burton v. Livingston*, 791 F.2d 97 (8th Cir. 1986) 99, 100-101 (finding that a prisoner had stated a substantive due process claim when he alleged that a prison guard drew and pointed a loaded pistol at him and ordered him to run so that the guard would be justified in shooting him).

¹⁸¹ CENTRAL INTELLIGENCE AGENCY, KUBARK COUNTERINTELLIGENCE INTERROGATION 87-92, (July 1963), available at <http://www.kimsoft.com/2000/kubark.htm> [hereinafter KUBARK MANUAL]; JOHN MARKS, THE SEARCH FOR THE “MANCHURIAN CANDIDATE, THE CIA AND MIND CONTROL – SECRET HISTORY OF BEHAVIORAL SCIENCES” (W. W. Norton & Company 1991).

¹⁸² SOLZHENITSYN, *supra* note 109, at 112.

¹⁸³ Peter Kornbluh, *Letter from Chile*, THE NATION, Jan. 13, 2005 (quoting the Valech Commission report on investigations in abuses in Chile under Pinochet).

¹⁸⁴ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2005 (2006), available at <http://www.state.gov/g/drl/rls/hrrpt/>.

¹⁸⁵ HAYNES MEMO, *supra* note 58.

¹⁸⁶ THE SCHMIDT REPORT, *supra* note 57, at 10-11.

¹⁸⁷ FM 2-22.3, *supra* note 90, at M-30 (Use of separation must not preclude the detainee getting four hours of continuous sleep every 24 hours).

¹⁸⁸ Tom Malinowski, *The logic of torture*, WASH. POST, June 27, 2004 (quoting Mr. Begin).

¹⁸⁹ KUBARK MANUAL, *supra* note 181, at 92-3.

¹⁹⁰ D. J. Kim et al., *The effect of total sleep deprivation on cognitive functions in normal adult male subjects*, 109 INT’L J. NEUROSCIENCE 127 (2001), *In this study, 18 men were deprived of sleep for 24 hours. They were then evaluated by standardized neuropsychological tests. There were no differences in freedom from distractibility, tactile function, visual function, reading, writing, arithmetic and intellectual process function. However, cognitive functions such as motor, rhythm, receptive and expressive speech, memory and complex verbal arithmetic function were decreased after 24 hours of sleep deprivation.* Y. Harrison & J. A. Horne, *The impact of sleep deprivation on decision making: a review*, 6 J. EXPERIMENTAL PSYCHOL.: APPLIED 236 (2000), *A review of the medical literature reveals numerous adverse cognitive effects of sleep deprivation including impaired language skills-communication, lack of innovation, inflexibility of thought processes, inappropriate attention to*

result in decreases in psychomotor performance as well as alterations in mood.¹⁹¹

In recent years, a growing body of research has emerged that points to the complex and bidirectional relationships between sleep disturbance and psychiatric disorders. For example, evidence suggests that sleep disturbance is not only a symptom of major depression¹⁹² but it also independently affects the clinical outcome and the course of the disorder.¹⁹³ Moreover, sleep disturbance seems to be associated with an independent increase in the risk of suicidal ideation and actions.¹⁹⁴

peripheral concerns or distractions, over-reliance on previous strategies, unwillingness to try out novel strategies, unreliable memory for when events occurred, change in mood including loss of empathy for colleagues, and inability to deal with surprise and the unexpected.

¹⁹¹ H. R. Lieberman et al., *Effects of caffeine, sleep loss, and stress on cognitive performance and mood during U.S. Navy SEAL training Sea-Air-Land*, 164 *PSYCHOPHARMACOLOGY* 250 (2002), *Sixty-eight U.S. Navy Sea-Air-Land (SEAL) trainees, randomly assigned to 100, 200 or 300 mg of caffeine following 72 hours of sleep deprivation and continuous exposure to other stressors were subjected to cognitive testing. Virtually all cognitive and mood parameters were substantially degraded compared to pre-test baseline.*

¹⁹² APA MANUAL, *supra* note 22, *Psychiatric disorders, in particular anxiety and depressive disorders, include the symptoms of sleep disturbance in their definition.*

¹⁹³ Studies show that insomnia is associated with increased risk of depression, anxiety disorders, and alcoholism. M. Billiard & A. Bentley, *Is insomnia best categorized as a symptom or a disease?*, 5 *SLEEP MEDICINE* Supp. 1, S35 (2004), *The study reviews the complex bidirectional relationship between chronic insomnia and various conditions such as psychiatric disorders, medical disorders (e.g., chronic pain, respiratory dysfunction and movement disorders), circadian rhythm disorders and medication or substance use. The authors highlight some of the major challenges for future research in classifying both primary insomnia and insomnia related to or associated with various conditions, and their relevance to primary care. Although forced sleep deprivation and insomnia are different since insomnia is a sleep disorder characterized by an inability to sleep despite the opportunity; and "sleep deprivation" is being deprived of the opportunity to go to sleep despite the ability, the two conditions are most likely to cause similar effects on the human body.*

¹⁹⁴ N. Breslau et al., *Sleep disturbance and psychiatric disorders: a longitudinal epidemiological study of young adults*, 39 *BIOLOGICAL PSYCHIATRY* 411 (1996), *The study used data from a longitudinal epidemiological study of 1200 young adults to assess whether sleep disturbance is associated with increased lifetime prevalence of psychiatric disorders. The study found that prior insomnia is a significant predictor of subsequent major depression. The authors argued that complaints of 2 weeks or more of insomnia nearly every night might be a useful indicator of subsequent onset of major depression.* M. Y. Aargun et al., *Sleep disturbances and suicidal behavior in patients with major depression*, 58 *J. OF CLINICAL PSYCHIATRY* 249 (1997), *The study examines the association between sleep disturbances and suicidal behavior in patients with major depression (N = 113). The patients with hypersomnia and insomnia had significantly higher scores on the suicide subscale than those without sleep disturbance. Further, the patients with insomnia and hypersomnia were significantly more likely to become suicidal than the others.* P. P. Chang et al., *Insomnia in young men and subsequent depression, The Johns Hopkins Precursors Study*, 146 *AM. J. EPIDEMIOLOGY* 105 (1997), *The research was a long-term*

Physical Pain or Suffering

Even sleep restriction of four hours per night for less than a week can result in physical harm, including hypertension, cardiovascular disease, altered glucose tolerance and insulin resistance.¹⁹⁵ Sleep deprivation can impair immune function and result in increased risk of infectious diseases.¹⁹⁶ Further, chronic pain syndromes are associated with alterations in sleep continuity and sleep patterns.¹⁹⁷

Legal Analysis

The psychological impact of sleep deprivation supports the conclusion that it would constitute torture cruel or

prospectively study, used to study the relation between self-reported sleep disturbances and subsequent clinical depression and psychiatric distress. A total of 1,053 men provided information on sleep habits during medical school. For a median follow-up period of 34 years, 101 men developed clinical depression including 13 suicides. A greater risk of clinical depression was found among those who reported insomnia in medical school compared with those who did not. The authors suggest that insomnia in young men is indicative of a greater risk for subsequent clinical depression and psychiatric distress that persists for at least 30 years.

¹⁹⁵ G. G. Alvarez & N. T. Ayas, *The impact of daily sleep duration on health: a review of the literature*, 19 *PROGRESS IN CARDIOVASCULAR NURSING* 56 (2004), *Review article. Health consequences of sleep deprivation include cardiovascular disease, diabetes, and hypertension. In one study cited [Spiegel et al] 11 healthy men aged 18-27 years were subjected to six nights of four hours of sleep per night. During the sleep deprived period, subjects demonstrated impaired glucose intolerance, increased sympathetic nervous system activity, higher evening cortisol levels, and reduced appetite suppressing hormone levels. In another study [Meier-Ewert et al], partial sleep restriction (4.2 hours of sleep per night) increased C-reactive protein levels, a marker of systemic inflammation and a risk factor for heart disease.*

¹⁹⁶ M. A. Carskadon, *Sleep deprivation: health consequences and societal impact*, 88 *MED. CLINICS N. AM.* 767 (2004), *In review of the multiple effects of sleep deprivation on individuals, their families and their communities, the authors cite the following adverse health effects: immune dysfunction, such as lowered titers following influenza immunization, decreased proportion of natural killer cells, and reduced lymphokine activated killer factor, reduced interleukin-2 production. Endocrine effects include altered cortisol release, altered glucose tolerance and insulin resistance, changes that can lead to obesity and diabetes mellitus.*

¹⁹⁷ S. H. Onen et al., *The effects of total sleep deprivation, selective sleep interruption and sleep recovery on pain tolerance thresholds in healthy subjects*, 10 *J. SLEEP RES.* 35 (2001), *Nine healthy male volunteers were randomly assigned to undergo sleep deprivation in periods of six consecutive laboratory nights. Tolerance thresholds to mechanical and thermal pain were used using a standardized pressure device and a standardized heat device. Sleep deprivation significantly increased mechanical (due to applied pressure) pain thresholds. This study demonstrated an increase in pain sensitivity related to 40 hours of total sleep deprivation.* M. Haack & J. M. Mullington, *Sustained sleep restriction reduces emotional and physical well-being*, 119 *PAIN* 56, (2005), *Forty healthy subjects with a mean age of 26 were randomly assigned to an 8-hour sleep condition or a 4-hour sleep restricted condition over 12 nights. This study suggest that chronic insufficient sleep (across only 12 consecutive days) may contribute to the onset and amplification of pain and affect health by compromising optimistic outlook and psychosocial functioning.*

inhuman treatment for the purposes of criminal prosecution. Sleep deprivation is known to cause mental harm — such as the deleterious psychological and neurological effects of depression and anxiety disorders — that is both prolonged and non-transitory. Sleep deprivation also is calculated to “disrupt the senses or personality” because it is designed to break down the subject’s resistance, affect mood, and disrupt memory.

Moreover, known physical effects of sleep deprivation suggest that even its limited use may cause “severe” or “serious” physical harm and therefore may amount to “torture” or “cruel or inhuman treatment.” Indeed, during the floor debate of the MCA, Senator Durbin stated that the Act’s amendments to the WCA would criminalize prolonged sleep deprivation.¹⁹⁸

U.S. federal courts have also recognized sleep deprivation by other countries as torture. One court concluded that deprivation of sleep over two days and three nights was a key element in the torture of religious dissidents by the Chinese police.¹⁹⁹ The Board of Immigration Appeals has listed sleep deprivation as a common method of torture used by the Iranian government along with “suspension for long periods in contorted positions” and “burning with cigarettes.”²⁰⁰

U.S. federal courts have repeatedly found instances of sleep deprivation to violate both the Eighth and Fourteenth Amendments. These decisions provide support for a finding that use of sleep deprivation violates the Detainee Treatment Act. The Supreme Court has held that a confession obtained by depriving a prisoner of sleep for 36 hours violated the individual’s right to due process.²⁰¹ In that decision Justice Black wrote for the court “[i]t has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired.”²⁰² Subsequently, U.S. federal courts have held that sleep deprivation constitutes a violation of the Eighth Amendment’s protection

from cruel and inhuman punishment because sleep is “considered a basic life necessity.”²⁰³

7. Sensory Bombardment: Noise and Light

The prisoner is exposed to bright lights, flashing strobe lights and/or loud music for extended periods of time.

Sensory bombardment with light and noise can inflict extreme mental and physical harm, whether it is used as a discrete interrogation tool or to disrupt sleep. State police in the former Soviet Union used the technique routinely, barraging interrogation subjects with intense light. In its annual reports on Turkey’s human rights practices from 1999 to 2002, the U.S. State Department condemned the Turkish authorities’ use of sensory bombardment with loud music as a form of torture.²⁰⁴ The State Department has also criticized Burma’s authoritarian military regime for interrogating prisoners for long periods of time under bright lights.²⁰⁵

The systematic use of sound and light bombardment by U.S. personnel has been extensively documented. Military guards and intelligence agents have confirmed that subjecting detainees to strobe lights was regularly used in interrogation procedures at Guantánamo Bay.²⁰⁶ The ICRC associated the use of constant, bright light and blaring music with sleep deprivation, and condemned the sensory assault allegedly inflicted by coalition forces in Iraq.²⁰⁷

¹⁹⁸ 152 Cong. Rec. S10,236 (daily ed. Sept. 27, 2006) (Statement by Sen. Durbin).

¹⁹⁹ Doe v. Qi, 349 F.Supp.2d 1258, 1318 (N.D. Cal 2004) (citing sleep deprivation over “three days and two nights” as part of the Chinese police abuse of Plaintiff C that constituted torture).

²⁰⁰ Matter of G-A-, 23 I&N Dec. 366, 370 (BIA 2002) (holding that it is more likely than not that the Petitioner would be tortured if returned to Iran).

²⁰¹ Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944); see also Ashcraft v. Tennessee, 327 U.S. 274 (1946); see generally U.S. ex rel Wade v. Jackson, 256 F.2d 7 (2nd Cir. 1958) [depriving an arrestee of sleep for twenty-two hours as contributing to the violations of an individuals due process rights].

²⁰² Ashcraft, 322 U.S. at n.6.

²⁰³ Merritt v. Hawk, 153 F.Supp.2d 1216, 1228 (D. Colo. 2001); see also Keenan v. Hall, 83 F.3d 1083, 1091 (9th Cir. 1996) [held that constant illumination of plaintiff’s cell caused “grave sleep problems” could constitute a constitutional violation]; Hoptowit v. Spellman, 753 F.2d 779, 783 (8th Cir. 1983) [“[a]dequate lighting is one of the fundamental attributes of ‘adequate shelter’ required by the Eighth Amendment.”]; LeMaire v. Maass, 745 F.Supp. 623, 636 (D. Or.1990) [“[t]here is no legitimate penological justification for requiring [inmates] to suffer physical and psychological harm by living in constant illumination. This practice is unconstitutional.”], vacated on other grounds, 12 F.3d 1444, 1458-59 (9th Cir.1993).

²⁰⁴ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES- 1999-2002, 2006 (2000-2003, 2007), available at <http://www.state.gov/drl/rls/hrrpt/>.

²⁰⁵ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2000-2001 (2001-2002), available at <http://www.state.gov/drl/rls/hrrpt/>.

²⁰⁶ E-mail from Valerie E. Caproni (F.B.I.) [Aug. 16, 2004] (describing a detainee wrapped in an Israeli flag and bombarded with loud music and strobe lights), http://www.aclu.org/torturefoia/released/FBI.121504.4737_4738.pdf (last visited July 24, 2005); Neil Lewis, *Broad Use of Harsh Tactics Is Described at Cuba Base*, N.Y. TIMES, October 17, 2004.

²⁰⁷ ICRC REPORT, *supra* note 60, at para. 27.

Lt. Col. V. Stuart Couch, a Marine Corp pilot and veteran military prosecutor, recently described an example of light and sound bombardment in an interview with the *Wall Street Journal*. On a visit to Guantánamo in 2003, Col. Couch described his intense dismay when he witnessed a detainee shackled to the floor of a cell with heavy metal music blaring. The detainee was “rocking back and forth, mumbling as strobe lights flashed.” Col. Couch told the *Journal* that “the treatment resembled the abuse he had been trained to resist if captured; he never expected Americans would be the ones employing it.”²⁰⁸

The new Army Field Manual on interrogations explicitly prohibits sensory deprivation but does not include information on the subject of sensory bombardment.

Physical and Mental Pain and Suffering

Use of lights and loud music is intended to cause physiologic distress and encourages disorientation and withdrawal from reality as a defense. The body can interpret certain noises as danger signals, inducing the release of stress hormones which may increase the risk of heart disease or heart attack.²⁰⁹ Loud music can also cause hearing loss or ringing in the ears; these consequences can be both short term and chronic, with chronic tinnitus, or ringing in the ears, being more common.²¹⁰

Strobe lights may also induce a stress response with increased heart rate according to data from studies.²¹¹

²⁰⁸ Jess Bravin, *The Conscience of the Colonel*, WALL ST. J. March 31, 2007 at A1. [Col. Couch referred to the Survival, Evasion, Resistance and Escape (“SERE”) training, in which U.S. personnel are trained to resist torture techniques, several of which are identical to the CIA’s “enhanced” interrogation techniques and tactics employed by the military at Guantánamo Bay and in Iraq. A number of published reports indicate that these SERE training techniques were “reverse-engineered” into military and CIA interrogation techniques].

²⁰⁹ H. Ising & B. Kruppa, *Health Effects caused by Noise: Evidence in the Literature from the Past 25 Years*, 6 NOISE AND HEALTH 5 (2004), *A review of the literature finds that noises that might be perceived as danger signals, such as airplanes or heavy trucks that are heard induce the release of stress hormones and increase cardiovascular risk.*

²¹⁰ F.U. Metternich & T. Brusis, *Acute hearing loss and tinnitus caused by amplified recreational music*, 78 LARYNGORHINOTOLOGIE 614 (1999), *Short term exposure to loud music can result in acute hearing loss. A retrospective study reviews twenty-four patients who required rheologic therapy between 1994 and 1997 due to music related acoustic trauma. The majority of patients (67%) developed hearing loss on the basis of a one-time exposure at a rock or pop concert, 17% from discotheques, and 12% from parties. Tinnitus, a prolonged ringing in the ears, was even more common.*

²¹¹ B. Nephew et al., *Heart rate and behavior are regulated independently of cortisone following acute stressors* GEN. COMP. ENDOCRINOL 133, 173-180 (2003); R. Emdad et al., *Psychophysiological sensitization to headlight glare among professional drivers with and without cardiovascular disease*, 3

In studies involving professional drivers, headlight glare was shown to increase blood pressure, especially in drivers with underlying cardiac disease. Adverse effects of headlight glare in the laboratory include electrocortical arousal, EEG desynchronization, a rise in diastolic blood pressure and even ventricular arrhythmias, potentially life threatening electrical rhythm disturbances of the heart.²¹² Loud noise and bright lights can also be used to interrupt sleep, resulting in sleep deprivation and its associated health effects.

Legal Analysis

Exposure to lights and sounds may constitute “torture” or “cruel or inhuman treatment” under the Torture Act or the War Crimes Act if it causes severe or serious physical harm. At least one U.S. federal court has found that treatment that included keeping detainees under bright lights for 24 hours a day thereby preventing them from sleeping constituted cruel, inhuman or degrading treatment prohibited by international law.²¹³

U.S. federal courts have found that exposure to extreme noise and light in detention and interrogations violates the Eighth Amendment, supporting the conclusion that such treatment may violate the Detainee Treatment Act.²¹⁴ For example, courts have permitted prisoners to proceed

J. OCCUPATIONAL HEALTH PSYCHOL. 147 (1998), *Electroencephalographic (EEG) and cardiovascular response and recovery to simulated headlight glare was examined in four groups of male professional drivers, twelve with ischemic heart disease, twelve with hypertension and ten with borderline hypertension, thirty-four were healthy. They were compared to twenty-three non-professional driver controls. After glare exposure, the ischemic heart disease drivers showed the most pronounced rise in diastolic blood pressure. Anxiety and long work hours were associated with heightened central arousal.*

²¹² B. Nephew et al., *supra* note 211; R. Emdad et al., *supra* note 211.

²¹³ *Jama v. I.N.S.*, 22 F.Supp.2d 353, 358 (D. N.J. 1998) [Found an actionable claim for cruel, inhuman and degrading treatment under ATCA where detainees were kept under bright lights 24 hours a day and not permitted to sleep. Other mistreatment including being forced to live in filth and constant smell of human waste, packed in rooms with twenty to forty detainees, beaten, deprived of privacy, subjected to degrading comments from guards and sexual abuse.].

²¹⁴ See *Lucien v. Peters*, 107 F.3d 873 (7th Cir. 1997) (“Allegations of excessive noise can support the objective element of an Eighth Amendment claim.”); *Kost v. Kozakiewicz*, 1 F.3d 176, 180 (3d Cir. 1993) [Section 1983 challenge to conditions of confinement, including allegations of unbearable noise pollution causing inmates to suffer degenerative hearing, should not have been dismissed on ground that issues were addressed in context of previous class action suit]; *Williams v. Boles*, 841 F.2d 181, 183 (7th Cir.1988) (incessant noise may cause agony even though it leaves no physical marks); *Toussaint v. McCarthy*, 801 F.2d 1080, 1110 (9th Cir.1986) [affirming scope of relief granted by district court for noise level in the prison; evidence showed that there was a “constant level of noise” which adversely affected the inmates’ hearing].

with their claims in cases where constant lighting of a cell resulted in loss of sleep and psychological harm.²¹⁵ The Supreme Court also found that the use of a confession obtained by shining a bright light in the eyes of a subject in a 36 hour interrogation violated due process.²¹⁶ U.S. federal appeals courts have found excessive noise to violate the Eighth Amendment, particularly when it adversely affects the hearing of the detainee.²¹⁷ However, where constant illumination or noise results in no loss of sleep or other psychological or physical harm the courts have found no constitutional violation.²¹⁸

8. Violent Shaking

The interrogator forcefully shakes the prisoner.

“Shaking” is a term of art for an established, violent interrogation method. The Israeli security forces commonly subjected detainees to this practice during interrogations until the Israeli Supreme Court outlawed shaking in 1999. The technique was described as “the forceful shaking of the suspect’s upper torso, back and forth, repeatedly, in a manner which causes the neck

and head to dangle and vacillate rapidly.”²¹⁹ When the Israeli Supreme Court banned the technique, it held that: “[p]lainly put, shaking is a prohibited investigation method. It harms the suspect’s body. It violates his dignity. It is a violent method which does not form part of a legal investigation. It surpasses that which is necessary.”²²⁰ The U.N. Human Rights Committee similarly found that the violent shaking used in interrogations by the Israeli army constituted both torture and cruel, inhuman or degrading treatment and therefore violated the Convention Against Torture.²²¹

Violent shaking, euphemistically called the “attention grab,” reportedly has been authorized for use by CIA interrogators. The description of the method used by the CIA echoes that of the Israel security services: “[t]he interrogator forcefully grabs the shirt front of the prisoner and shakes him.”²²²

The *New York Times* recounted the experience of a man who gave his name only as George who was arrested by Israeli security services in 1995 and subjected to violent shaking. According to the *Times*, an Israeli soldier “seized him and violently rattled him back and forth, so that his head flopped uncontrollably, inflicting terrible pain to his spine and neck. [] He remembers passing out three times, and once he had to be carried to the doctor.”²²³

²¹⁵ Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996) (recognizing that deprivation of outdoor exercise, excessive noise, 24 hour lighting, and inadequate ventilation, food, and water violate the Eighth Amendment rights of inmates); Merritt v. Hawk, 153 F.Supp.2d 1216 (D. Colo. 2001); see also Keenan v. Hall, 83 F.3d 1083, 1091 (9th Cir. 1996) (held that where constant illumination of plaintiff’s cell caused “grave sleep problems” could constitute a constitutional violation); LeMaire v. Maass, 745 F.Supp. 623, 636 (D.Or.1990) (“[t]here is no legitimate penological justification for requiring [inmates] to suffer physical and psychological harm by living in constant illumination. This practice is unconstitutional.”), vacated on other grounds, 12 F.3d 1444, 1458-59 (9th Cir.1993).

²¹⁶ See generally Ashcraft v. Tennessee, 322 U.S. 143 (1944).

²¹⁷ See, e.g., Toussaint v. McCarthy, 801 F.2d 1080, 1110 (9th Cir.1986) (affirming scope of relief granted by district court for noise level in the prison), cert. denied 481 U.S. 1069 (1987); But see Lundsford v. Bennet, 17 F.3d 1574, 1580 (1994) (holding that prisoners’ claims that they were subjected to loud noises over intercom and served poorly prepared food did not establish Eighth Amendment violation noting “the record contains no evidence that the noise levels posed a serious risk of injury to the plaintiffs”).

²¹⁸ Rossell v. McFadden, No. 93-16967, 1994 WL 88615, at *1 (9th Cir. Mar. 16, 1994) (upholding the dismissal of an Eighth Amendment claim where plaintiff’s cell was lit from 4:30 a.m. to 10:00 p.m. because there “is no suggestion that [he] has suffered a significant medical condition as a result of the lighting in his cell”); Spivey v. Doria, No. 91-C4169, 1994 WL 97756, at *10 (N.D. Ill. Mar. 24, 1994) (holding that a pre-trial detainee failed to state a claim for a constitutional violation where he only alleged that “the lights and noise interfere[d] with his sleep” not that he was “unable to sleep or that the sleep deprivation ha[d] caused him any harm.”).

Physical and Mental Pain and Suffering

Because brain damage represents the greatest risk from violent shaking, its harmful consequences can extend to both physical and mental health. Violent shaking poses extreme danger of trauma to the brain through an acceleration-deceleration mechanism. In addition to causing retinal hemorrhages (bleeding of the retinal vessels due to tearing), violent shaking may cause intracranial hemorrhage (bleeding of the brain), and cerebral edema (swelling of the brain), resulting in increased intracranial pressure and permanent neurologic deficits

²¹⁹ Anthony Lewis, *A Light Unto the Nations*, N.Y. TIMES, Sept. 14, 1999.

²²⁰ Public Committee against Torture in Israel v. the Government of Israel, 53(4) PD 817, Sept. 6, 1999, at para. 24, available at <http://www.stoptorture.org.il/eng/images/uploaded/publications/18.pdf>.

²²¹ Concluding observations of the Committee against Torture: Israel, May, 9, 1997, A/52/44, paras. 253-260, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/69b6685c93d9f25180256498005063da?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/69b6685c93d9f25180256498005063da?Opendocument).

²²² Ross & Esposito, *supra* note 6.

²²³ Serge Schmemmann, *In Israel, Coercing Prisoners Is Becoming Law of the Land*, N.Y. TIMES, May 8, 1997, at A1.

and/or death.²²⁴ These findings are similar to the more well known traumatic condition referred to as “shaken baby syndrome.”²²⁵ Increased pressure due to swelling or bleeding is a dangerous condition as the increased pressure within the limits of the rigid skull can result in the herniation of the brain, an often fatal complication in which brain matter is literally squeezed through the narrow intracranial space into the brainstem.

Non-fatal brain trauma from violent shaking can potentially result in more subtle but clinically significant cognitive impairment possibly due to diffuse axonal injury, injury to the brain cells themselves.²²⁶ Non-fatal consequences of shaking may also include recurrent headaches, disorientation and mental status changes, all of which can become chronic.²²⁷ Violent shaking can also produce neck trauma, producing a whiplash mechanism of cervical strain. Cervical spine fracture with spinal cord compression may also occur, resulting in quadriplegia.

In one case report of a Palestinian man who died in the custody of Israeli security forces in 1995, forensic investigators concluded that the man died of injuries he sustained during interrogation, specifically as a result of having been violently shaken. The man had suffered blunt force trauma to the upper chest and shoulders, acute sub-dural hemorrhage, diffuse axonal injury and retinal hemorrhages ultimately leading to his death.²²⁸

²²⁴ T. D. Carrigan et al., *Domestic violence: the shaken adult syndrome*, J. ACCIDENT & EMERGENCY MEDICINE 138 (2000), *A case of domestic violence is reported. A 34-year old woman victim of a domestic assault presented with a triad of injuries associated with the shaking of infants: retinal hemorrhages, subdural hematoma, and patterned bruising.*

²²⁵ PHYSICIANS FOR HUMAN RIGHTS, ISRAEL AND THE OCCUPIED TERRITORIES: SHAKING AS A FORM OF TORTURE: DEATH IN CUSTODY OF “ABD AL-SAMAD HARIZAT” 8 (1995), *PHR report on the use of vigorous shaking by Israeli security officers as a method of interrogation. PHR doctors who performed an autopsy on Abd al-Samad Harizat concluded that the detainee had died as a result of trauma to brain due to shaking. The report argues that shaking is a form of torture and ill-treatment that can have a lethal outcome.*

²²⁶ D. J. Pounder, *Shaken adult syndrome*, 18 AM. J. FORENSIC MED. & PATHOLOGY 321 (1997), *Case report of a thirty-year-old Palestinian who collapsed while under interrogation by Israeli General Security Service and was declared brain dead three days later. Autopsy revealed extensive anterior chest and shoulder bruising and acute subdural hemorrhage but no other trauma. Shaking was postulated as the mechanism of injury, and Israeli investigators later confirmed this. Histopathologic examination of the brain demonstrated diffuse axonal injury and retinal hemorrhages.* A. Moreno & M. Grodin, *Torture and its neurological sequela*, 40 SPINAL CORD 213-223 (2002), *A review of the literature describes nonfatal neurologic sequela of torture. Consequences include headaches, vertigo, loss of consciousness, and seizures.*

²²⁷ ISTANBUL PROTOCOL, *supra* note 22, at 38.

²²⁸ PHYSICIANS FOR HUMAN RIGHTS, ISRAEL AND THE OCCUPIED TERRITORIES: SHAKING AS A FORM OF TORTURE: DEATH IN CUSTODY OF “ABD AL-SAMAD HARIZAT” 8 (Physicians

Legal Analysis

Violent shaking would seem clearly to violate the WCA’s torture provision when it results in severe physical pain or suffering. It also presents a significant risk of inflicting “serious” physical pain and suffering – in violation of the WCA’s “cruel or inhuman treatment” provision – through “bodily injury” ranging from headaches to paralysis. This “extreme physical pain” is a likely result of shaking and is consistent with the expected long term medical affects of such treatment.

U.S. federal court opinions support the conclusion that the use of violent shaking in interrogations is prohibited by the Detainee Treatment Act, even if the use of such techniques does not result in physical injury. U.S. federal appeals courts have held that the use of any physical force against a person who is in the presence of the police for custodial interrogation and who poses no threat to the safety of the police violates Fifth and Fourteenth Amendment due process protections.²²⁹ The Courts of Appeals for the Fifth and Fourth Circuits have also concluded that the use of force in interrogation is barred even if it results in no physical injury.²³⁰

9. Sexual Humiliation

The prisoner is subjected to sexually humiliating behavior or forced to perform sexually humiliating acts, often in an attempt to exploit cultural and religious stereotypes regarding sexual behavior and induce feelings of shame, guilt and worthlessness.

Sexual humiliation, such as locking a naked woman in a box with peep holes or having female interrogators strip in front of male prisoners, was used in Soviet interrogations.²³¹ In the 1960s, the CIA identified sexual humiliation as an interrogation tactic used to strip its victims of

for Human Rights 1995); D. J. Pounder, *Shaken adult syndrome*, 18 AM. J. FORENSIC MED. & PATHOLOGY 321 (1997).

²²⁹ *Ware v. Reed*, 709 F.2d 345, 351 (5th Cir.1983) (constitutional violation to use any physical force against a person who is in the presence of the police for custodial interrogation and who poses no threat to their safety); *Gray v. Spillman*, 925 F.2d 90, 93 (Cir. 4th 1991) (“It has long been held that beating and threatening a person in the course of custodial interrogation violates the fifth and fourteenth amendments of the Constitution. [Citation omitted.] The suggestion that an interrogatee’s constitutional rights are transgressed only if he suffers physical injury demonstrates a fundamental misconception of the fifth and fourteenth amendments, indeed, if not our system of criminal justice.”).

²³⁰ *Reed*, 709 F.2d 345 at 351; *Spillman*, 925 F.2d 90 at 93.

²³¹ SOLZHENITSYN, *supra* note 109, at 105-06.

their identities and make them feel powerless.²³² The U.S. State Department has repeatedly criticized other governments, for example Egypt²³³ and Turkey,²³⁴ for subjecting detainees to torture by forcing them to strip in front of the opposite sex, subjecting them to sexual touching or insults, or threatening them with rape.

In 2002, in a memo that has since been revoked, the Department of Defense authorized the “removal of [detainees’] clothing” in military interrogations.²³⁵ A 2005 U.S. Army investigation uncovered the infliction of sexual humiliation against detainees in Guantánamo Bay — such as having female interrogators attempt to physically seduce a Muslim detainee; forcing the detainee to wear a bra and placing women’s underwear on his head; leading him around on a leash; forcing him to perform dog tricks; stripping him naked; and calling him a homosexual.²³⁶ The ICRC reported in 2004 that detainees alleged that they were forced to be naked and to wear women’s underwear.²³⁷

According to released DOD files, one abuse investigation involved a photograph taken of a hooded and hand-cuffed detainee in a stress position with a U.S. soldier simulating sodomy on him with a broomstick.²³⁸

²³² Alfred W. McCoy, *The Long Shadow of CIA Torture Research*, COUNTERPUNCH, May 2, 2004, <http://www.counterpunch.org/mccoy05292004.html> (last visited July 24, 2007).

²³³ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2006 (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/>.

²³⁴ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2000-2002, 2006 (2001-2003, 2007), available at <http://www.state.gov/g/drl/rls/hrrpt/>.

²³⁵ HAYNES MEMO, *supra* note 58.

²³⁶ THE SCHMIDT REPORT, *supra* note 57 (concluding that the treatment was worthy of no punishment since they fell under authorized techniques by Field Manual at the time they were used as “Futility” and “Ego Down” techniques).

²³⁷ ICRC REPORT, *supra* note 60, at para. 25 (reporting frequently alleged “[a]cts of humiliation such as being made to stand naked against the wall of the cell with arms raised or with women’s underwear over the head for prolonged periods while being laughed at by guards, including female guards, and sometimes photographed in this position” and “[b]eing paraded naked outside cells in front of other persons deprived of their liberty, and guards, sometimes hooded or with women’s underwear over the head”).

²³⁸ Report of Proceedings by Investigating Officer / Board of Officers; Document #: DOD007031-DOD007184 (2004-03-01), available at <http://www.aclu.org/projects/foiasearch/pdf/DOD007035.pdf> (Investigation shows that the detainees were not put into the stress positions for reasons of the photograph, but were already in these positions for interrogation purposes when the photo was taken. It also shows that officers did not follow appropriate protocol upon discovering the photo by not categorizing it as detainee

In another released document FBI agents describe that during Ramadan in late 2002 in Guantánamo, a female agent applied lotion to a detainee, caressed him in a sexual manner, moved her hands to the detainee’s lap, and grabbed the detainee’s genitals.²³⁹

Partially in response to the detainee abuse uncovered in Iraq and Guantánamo, some forms of sexual humiliation are prohibited by the new Army Field Manual.²⁴⁰ These include: “forcing an individual to perform or simulate sexual acts or to pose in a sexual manner; exposing an individual to outrageously lewd and sexually provocative behavior” and “forced nakedness.”²⁴¹ The CIA’s policy towards sexually humiliating detainees is currently undisclosed.

Mental Pain and Suffering

Sexual humiliation causes the detainee humiliation and indignity, and can result in lasting psychological damage. Clinicians who deal with torture survivors report that sexual humiliation often leads to posttraumatic stress disorder and major depression, and that victims often relive the humiliation long after their release through flashbacks and nightmares.²⁴² They also find that sexually humiliating treatment emasculates male victims and destroys their sense of identity and autonomy.²⁴³ J.P. Wilson, an internationally recognized expert in the field of PTSD, describes the extreme stress of sexual trauma as bringing about “a loss of self-continuity and self-sameness; a loss of coherent and cohesive sense of self.”²⁴⁴

abuse and not reporting it to the chain of command. The soldiers involved claimed that they were not aware of the no photography allowed policies, and that they were under the impression that “photos could be taken in moderation” and that it was a “matter of discretion”.).

²³⁹ Letter from T. J. Harrington, Deputy Assistant Director, Counterterrorism to Major General Donald J. Ryder, DOA Criminal Investigation Command re: Suspected Mistreatment of detainees, Document #: DOJFBI001914-DOJFBI001916 (July 14, 2007), available at <http://www.aclu.org/projects/foiasearch/pdf/DOJFBI001914.pdf>.

²⁴⁰ The new Army Field Manual prohibits “forcing an individual to perform or simulate sexual acts or to pose in a sexual manner; exposing an individual to outrageously lewd and sexually provocative behavior” under any circumstances and “forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner” in conjunction with intelligence interrogations. FM 2-22.3, *supra* note 90, at 5-20.

²⁴¹ *Id.*

²⁴² PHR BREAK THEM DOWN, *supra* note 20, at 56.

²⁴³ *Id.*

²⁴⁴ J. P. WILSON, TRAUMA, TRANSFORMATION, AND HEALING: AN INTEGRATIVE APPROACH

Sexual humiliation as an interrogation technique relies on perceived cultural and religious taboos to target the detainee's sense of identity and, in men, presumed dominance as a male to humiliate and control the victim and induce the threat and fear of sexual abuse or physical assault.²⁴⁵ Survivors often experience feelings of intense shame, guilt, grief, fear, and social isolation. Victims who have been forced into humiliating acts can feel "responsible for participating in their own degradation" resulting in intense and long lasting shame.²⁴⁶

The effect of sexual victimization in prisons and jails may be more devastating and debilitating, due to the unique structure of incarceration. In prison settings, victims may experience a systematic, repetitive infliction of psychological trauma, as well as the continuation of terror, helplessness, fear and lack of autonomy.²⁴⁷ For example, the worry and constant alertness to being victimized can result in a whole host of psycho-physiological conditions which can lead to asthma, ulcers, colitis and hypertension.²⁴⁸

Legal Analysis

The medical and psychological harm suffered by victims of sexual humiliation likely amounts to "severe"

TO THEORY, RESEARCH, AND POST-TRAUMATIC THERAPY (Brunner / Mazel 1989), *Wilson reviews the theory and research studies about trauma and personal and environmental factors in the individual's response to stress. He synthesized theoretical, biological, cultural and treatment aspects of posttraumatic stress disorder.*

²⁴⁵ Interview by Soledad O'Brien of Former Army Sergeant Kayla Williams, author of the 2005 memoir, *LOVE MY RIFLE MORE THAN YOU* on CNN (Sept. 26, 2006) ("They stripped prisoners naked and then removed their blindfolds, so that I was the first thing they saw. And, then, we were supposed to mock them and degrade their manhood."); *PHR BREAK THEM DOWN*, *supra* note 20, at 56.

²⁴⁶ Uwe Jacobs, *The price of torture*, *SAN FRANCISCO CHRONICLE*, March 2, 2005.

²⁴⁷ W. R. Dumond, *The Impact and Recovery of Prisoner Rape*, A paper presented at the National Conference "Not Part of the Penalty: Ending Prisoner Rape in Washington, D.C." (Oct. 19, 2001), <http://www.spr.org/pdf/Dumond.pdf> (last visited Jan. 2007), *A comprehensive article that provides overview and history of sexual assault in incarceration settings and explores the long-term effects on victims of sexual assault. It further outlines effective interventions in treating sexual assault victims while incarcerated.*

²⁴⁸ R. C. McCorkle, *Fear of victimization and symptoms of psychopathology among prison inmates*, 19 *J. OFFENDER REHABILITATION*, 27 (1993), *Investigation of fear of victimization and mental health among 300 Tennessee inmate men who were held in a maximum-security facility show that fear of victimization is a significant predictor of well being controlling for pre-existing disorders.* W. R. Dumond, *The Impact and Recovery of Prisoner Rape*, A paper presented at the National Conference "Not Part of the Penalty: Ending Prisoner Rape in Washington, D.C." (Oct. 19, 2001), <http://www.spr.org/pdf/Dumond.pdf> (last visited July 27, 2007), *For details on the study, see note 247.*

or "serious" mental pain or suffering under the plain language of the Torture Act and the WCA definitions of "torture" or "cruel or inhuman treatment." The flashbacks, depression, and posttraumatic stress disorder that are caused by sexual humiliation likely constitute both "prolonged" and "non-transitory" mental harm. The legislative history of the WCA suggests that Congress intended to criminalize forcing detainees to be naked, perform sexual acts, or pose in a sexual manner.²⁴⁹ It may be more difficult to establish whether sexual humiliation involves one of the four enumerated predicate acts for a finding of liability under the Torture Act, in particular whether sexual humiliation constitutes "the administration or application, or threatened application of mind-altering procedures calculated to disrupt profoundly the senses or the personality."²⁵⁰ The term "disrupt profoundly the senses or the personality" is not used in health literature or anywhere else in U.S. law. Still, the likelihood that sexual humiliation used during interrogation is calculated to destroy the victim's sense of self, identity, autonomy and masculinity supports the conclusion that sexual humiliation could be calculated to "disrupt profoundly ... the personality." Whether the disruption of the personality that sexual humiliation is calculated to cause is "profound" may depend on the manner in which humiliation techniques are employed in any given instance.

In addition to the criminalizing of sexual humiliation under the WCA and the Torture Act, Common Article 3 of the Geneva Conventions clearly prohibits it. Common Article 3 bars all "outrages upon personal dignity, in particular humiliating and degrading treatment."²⁵¹ The

²⁴⁹ See 152 Cong. Rec. S10,390 [daily ed. Sept. 27, 2006] (statement of Sen. Warner); see also S10,384 [daily ed. Sept. 27, 2006] (statement of Sen. Levin).

²⁵⁰ Torture Act, 18 U.S.C. § 2340 [2006].

²⁵¹ See Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3217, 75 U.N.T.S. 31, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3>; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3217, 75 U.N.T.S. 85, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/44072487ec4c2131c125641e004a9977>; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3316, 75 U.N.T.S. 135, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636bc.org/ihl.nsf/6fef854a3517b75ac125641e004a9e68>; Geneva Convention Relative to the Protection of Civilian Persons in Times of War art. 3, Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3516, 75 U.N.T.S. 287, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5>.

International Criminal Tribunal for the Former Yugoslavia has held that forcing detainees to dance naked clearly violates Common Article 3.²⁵² U.S. federal courts have cited stripping people naked as a form of abuse that, combined with other mistreatment, can constitute torture under international law.²⁵³

Supreme Court and lower court precedent strongly suggests that the use of sexual humiliation under most circumstances violates the Detainee Treatment Act. Several U.S. federal appeals courts have specifically held that acts of sexual humiliation — such as watching a member of the opposite sex urinate— violated the due process clause of the Fifth and Fourteenth Amendments.²⁵⁴ U.S. federal courts have also repeatedly found that forced nakedness — whether in solitary confinement or in forcing an inmate to walk in front of other prisoners — violates the Eighth Amendment.²⁵⁵ One federal appeals court has stated that “clothing is

a ‘basic necessity of human existence’ which cannot be deprived in the same manner as a privilege an inmate may enjoy.”²⁵⁶ The Supreme Court has also recognized that the protection of human dignity is a primary function of the Eighth and Fourteenth Amendments.²⁵⁷

10. Prolonged Isolation and Sensory Deprivation

Prolonged Isolation: The prisoner is denied contact with other human beings, including through segregation from other prisoners, for prolonged periods of time.

Sensory Deprivation: The prisoner is subjected to reduction or removal of stimuli from one or more of the senses for prolonged periods.

The use of solitary confinement in detention can be traced back to medieval practices of imprisonment used against alleged heretics during inquisitions.²⁵⁸ The Soviet KGB laid the foundation for the use of sensory deprivation in interrogations to induce mental disorientation or artificial psychosis.²⁵⁹ U.S. prisoners of war who were subjected to periods of solitary confinement by the Chinese suffered from persistent anxiety, suspiciousness, confusion, and depression up to 40 years after they were returned home. In recent years, the U.S. State Department has repeatedly criticized the government of Jordan for engaging in prolonged isolation as a form of torture.²⁶⁰

²⁵² Prosecutor v. Dragoljub Kunarac et al., Case No. IT-96-23-T and IT-96-23/1-T, Judgement (2001).

²⁵³ Abebe-Jira v. Negewo, 72 F.3d 844, 845 (11th Cir.1996) [holding that detaining the victim, forcing her to undress, binding her legs and arms, and whipping her on the legs and back with wire and threatening her with death constituted torture.]; Doe v. Qi, 349 F.Supp.2d 1258, 1315 (N.D. Cal 2004); Daliberti v. Republic of Iraq, 97 F.Supp.2d 38, 45 (D. D.C. 2000) (holding that stripping the victim naked, blindfolding him, and threatening him with electrocution by placing wires on his testicles constitutes torture).

²⁵⁴ Haberthur v. City of Raymore, Missouri, 119 F.3d 720, 724 (8th Cir. 1997) [holding that allegations that a police officer “reached his hand underneath [plaintiff’s] shirt and fondled a private erogenous area and moved his hands along and caressed her body while making sexually suggestive remarks” sufficiently allege deprivation of her substantive due process right. The Court stated that the conduct “was intrusive, demeaning, and violative of her personal integrity.”]; Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 727 (6th Cir.1996) [holding that teacher’s fondling a student’s breast may violate the substantive due process right to bodily integrity]; McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1193 (4th Cir.) [holding that substantive due process right violated when employee was forced to his knees, a finger was inserted in his mouth and a broomstick placed next to his clothed buttocks, and he was sexually fondled], cert. denied, 519 U.S. 819 (1996); Sepulveda v. Ramirez, 967 F.2d 1413, 1415-16 (9th Cir. 1992) [holding that parole officer not entitled to qualified immunity for depriving woman of clearly established due process right to bodily privacy by entering a bathroom stall and watching her urinate).

²⁵⁵ Walker v. Johnson, 544 F.Supp. 345, 349 (D. Mich. 1982) [holding that it was a violation of the Eighth Amendment to force detainees to walk to showers naked, stating “[t]he naked walk to the shower elicits a feeling of degradation and sexual humiliation.”] aff’d, Walker v. Mintzes, 771 F.2d 920 (6th Cir. 1985); Johnson v. Williams, 788 F.2d 1319 (8th Cir. 1986) [Eighth Amendment violation found where prisoner in quiet cell for eighteen hours on two occasions with no clothing or bedding]; McGray v. Burrell, 516 F.2d 357 (4th Cir. 1975) [Eighth Amendment violation where prisoner in isolation cell for 48 hours for mental observation with no clothing or bedding], cert. dismissed, 516 F.2d 357 (1976).

²⁵⁶ Maxwell v. Mason, 668 F.2d 361, 363, 365 (8th Cir.1981) [holding that even inmates in solitary confinement have a dignitary interest in being clothed where inmate was kept in his undershorts] (citing Finney v. Arkansas Board of Corrections, 505 F.2d 194, 207-8 (8th Cir. 1974)).

²⁵⁷ Trop v. Dulles, 356 U.S. 86, 101 (1958) [plurality opinion] (“the basic concept underlying the eighth amendment is nothing less than the dignity of man”); Hope v. Pelzer, 536 U.S. 730 (2002) [the Court specifically emphasized the humiliation caused by depriving the prisoner of bathroom breaks while he was handcuffed to a hitching post as part of the Eighth Amendment violation]; Rochin v. California, 342 U.S. 165, 174 (1952) [holding that pumping a man’s stomach in search of swallowed narcotics was means “so brutal and so offensive to human dignity” that it violated the Fourteenth Amendment].

²⁵⁸ LIND MARY PATERSON, THE WORLD OF TROUBADOURS: MEDIEVAL OCCITAN SOCIETY 341 (Cambridge University Press 1993) [describing the medieval practice of *murus strictus* that involved keeping alleged heretics chained in isolated goals with no windows or visitors].

²⁵⁹ JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE (Knopf 2000).

²⁶⁰ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2005, 2006 (2006, 2007), available at <http://www.state.gov/g/drl/rls/hrrpt/>.

The Department of Defense authorized the use of sensory deprivation — in the form of deprivation of light and auditory stimuli and isolation extended beyond 30 days — for use by the military in Guantánamo in 2002.²⁶¹ The ICRC reported that detainees in Iraq frequently alleged that they were subjected to isolation — often combined with other aggravating circumstances — during interrogation.²⁶²

An FBI communication described a Guantánamo detainee who “had been subjected to intense isolation for over three months. During that time period [the detainee] was totally isolated (with the exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a corner of the cell covered with a sheet for hours on end.)”²⁶³

The new Army Field Manual offers conflicting and confusing guidance on isolation and sensory deprivation, putting U.S. personnel at risk of violating the “torture” and “cruel or inhuman treatment” provisions of the WCA. While the new manual purports to prohibit sensory deprivation, it permits the use of isolation (termed “separation”) for up to 30 days (extendable) as an interrogation method. The Manual further permits the use of sensory deprivation tools – goggles, blindfolds, earmuffs – to enhance the perception and experience of separation and to “foster a feeling of futility.”²⁶⁴ This combination of isolation and deprivation of sound and light can result in mental pain and suffering equivalent to that arising from any other form of isolation and sensory deprivation, raising the very real risk that this guidance in the Army Field Manual could lead to WCA violations.²⁶⁵

²⁶¹ HAYNES MEMO, *supra* note 58 (deprivation of light and auditory stimuli).

²⁶² ICRC REPORT, *supra* note 60, at para. 25 (“Being held in solitary confinement combined with threats (to intern the individual indefinitely, to arrest other family members, to transfer the individual to Guantánamo), insufficient sleep, food or water deprivation, minimal access to showers (twice a week), denial of access to open air and prohibition of contacts with other persons deprived of their liberty.”).

²⁶³ Letter from T. J. Harrington, Deputy Assistant Director FBI Counterterrorism Division, to Major General Donald J. Ryder, DOA Criminal Investigation Command, Re: Suspected Mistreatment of detainees, Document #: DOJFBI001914-DOJFBI001916; Date of Record: 2004-07-14, available at <http://www.aclu.org/projects/foia-search/pdf/DOJFBI001914.pdf>.

²⁶⁴ FM 2-22.3, *supra* note 90, at para. M-26.

²⁶⁵ *Id.* (“when physical separation of detainees is not feasible, goggles or blindfolds and earmuffs may be utilized as a field expedient method

Mental Pain or Suffering

Sensory deprivation is a technique that is “calculated to disrupt profoundly the senses” and “the personality.” It tends not only to result in situations of complete dependency on the interrogator but also leads to severe anxiety and often causes hallucinations.²⁶⁶

Studies have demonstrated that even short-term isolation can result in: an inability to think or concentrate; anxiety; somatic complaints; temporal and spatial disorientation; deficiencies in task performance; hallucinations; and loss of motor coordination.²⁶⁷ A number of experiments conducted at McGill University in the 1950s examined the effects of sensory deprivation and isolation on human subjects. For example, in a 1954 study led by W.H. Bexton, subjects who were required to live in conditions devoid of all external stimulation (to the extent possible) suffered from hallucinations and trance-like conditions. In another landmark study in 1951, Donald Hebb and his colleagues placed subjects in an otherwise comfortable cubicle deprived of sensory stimulation by goggles, gloves, and ear muffs. Even though the subjects knew they would be well-compensated for participating in the study, many found the experience so intolerable that they terminated the experiment after the second or third day. After two to three days of such isolation, the subjects reported difficulties in concentration and seeing visual, kinesthetic (moving), and somasthetic (feeling) hallucinations.²⁶⁸

The KUBARK Counterintelligence Interrogation Manual, the CIA’s secret manual on coercive questioning, describes human experiments that involved sensory deprivation. One reported study designed to test the results of eliminating most sensory stimuli and masking others,²⁶⁹ involved 17 paid volunteers who spent between

to general a perception of separation.”)

²⁶⁶ KUBARK MANUAL, *supra* note 181.

²⁶⁷ S. Graessner, *Gesundheitliche Auswirkungen von Langzeithaft mit Isolation; Historische Wurzeln und Forderungen*, in *DAS UNSAGBARE* 253-269 (A. Birck et al. eds., 2002).

²⁶⁸ J. Sturgeon, *The Psychology of Isolation* (unpublished article), available at <http://www.space.edu/LibraryResearch/undgrant.html>, *This paper examines the available literature from psychological experiments and space analogs to examine the psychological impact of isolation and confinement in space on astronauts. The experiments described cited here are: D. P. SCHULTZ, Sensory Restriction: Effects on Behavior* (Academic Press 1965); W. H. Bexton, et. al., *Effects of Decreased Variation in the Sensory Environment*, 8 *CANADIAN J. PSYCHOL.* 70 (1954).

²⁶⁹ Donald Wexler et al., *Sensory Deprivation*, 79 *AM. MED. ASS’N ARCHIVES NEUROLOGY & PSYCHIATRY* 225 (1958), *This article reports an experiment designed to test the results of eliminating most sensory stimuli and*

1 hour and 38 minutes and 36 hours in a tank respirator with restrained movement. Although the established time limit was 36 hours and though all physical needs were taken care of, 11 people terminated the experiment early. The results of the sensory deprivation included inability to concentrate effectively, daydreaming and fantasy, illusions, delusions, and hallucinations. It was concluded that the deprivation of sensory stimuli induces stress that may be unbearable for some subjects. Deprivation of stimuli causes some subjects progressively lose touch with reality, focus inwardly, and produce delusions, hallucinations, and other pathological effects.²⁷⁰

It has long been known that severe restriction of environmental and social stimulation and solitary confinement have profound and long-lasting psychological consequences. This issue has been a major concern for patients in intensive care units, spinal patients immobilized by the need for prolonged traction, astronauts, and super maximum security prison inmates.

Studies have identified anxiety, depression, higher measures of anger, and low self-esteem as significant negative consequences of isolation among patients in clinical settings.²⁷¹ For persons in prolonged and profound solitary confinement in a prison environment, the symptoms associated with sensory deprivation are equally, if not more, destructive than the symptoms exhibited by patients in clinical settings.

People who are exposed to isolation for the first time develop a group of symptoms that include “bewilder-

masking others. Paid volunteers spent periods from 1 hour and 38 minutes to 36 hours in a tank-respirator. The results included inability to concentrate effectively, daydreaming and fantasy, illusions, delusions, and hallucinations. The suitability of this procedure as a means of speeding up the effects of solitary confinement upon recalcitrant subjects has not been considered.

²⁷⁰ KUBARK MANUAL, *supra* note 181 (describing Donald Wexler et al., *Sensory Deprivation*, 79 AM. MED. ASS'N ARCHIVES NEUROLOGY & PSYCHIATRY 225 (1958)).

²⁷¹ P. Kennedy & L.R. Hamilton, *Psychological impact of the management of methicillin-resistant Staphylococcus aureus (MRSA) in patients with spinal cord injury*, 35 SPINAL CORD 617 (1997), *Management of MRSA infection includes immediate isolation of the patient. The authors assessed the psychological impact of isolation among spinal cord injured patients who are isolated as a result of being MRSA positive as an infection control procedure. The authors found that the isolated spinal cord injured patients were significantly more angry than the control group, and these isolated patients scored higher in all measures.* J. Gammon, *The psychological consequences of source isolation: a review of the literature*, 8 J. CLINICAL NURSING 13 (1999), *Source isolation is implemented when a person who has an infection or infectious disease has to be segregated from others to prevent cross-infection to other people. This article defines and examines the historical developments of source isolation with and then discusses related research. It suggests that source isolation has detrimental effects on the psychological well-being of individuals.*

ment, anxiety, frustration, dejection, boredom, obsessive thoughts or ruminations, depression, and, in some cases, hallucination.”²⁷² Consistently, longitudinal studies (research that follows subjects for a specific period of time) have found significantly higher risk for developing psychiatric disorders such as depression and adjustment disorders among solitary confinement prisoners compared to non-solitary confinement prisoners.²⁷³

Prolonged isolation has been demonstrated to result in increased stress, abnormal neuroendocrine function, changes in blood pressure and inflammatory stress responses.²⁷⁴ Social isolation has been associated with higher risk of death from widely varying causes. For example, reports indicate the suicide rates in Texas and California prisons are on the rise, with the majority occurring among inmates in solitary confinement.²⁷⁵

Findings from clinical research performed by prominent psychologists such as Dr. Stuart Grassian and Dr. Craig Haney, highlight the destructive impact of solitary confinement. Effects include depression, anxiety, difficulties with concentration and memory, hypersensitivity to external stimuli, hallucinations and perceptual distortions, paranoia, suicidal thoughts and behavior, and problems with impulse control.²⁷⁶

²⁷² PHR BREAK THEM DOWN, *supra* note 20, at 10.

²⁷³ H. S. Andersen et al., *A longitudinal study of prisoners on remand: repeated measures of psychopathology in the initial phase of solitary versus nonsolitary confinement*, 26 INT'L J. L. & PSYCHIATRY 165 (2003), *This study compared outcomes of patients in prison in both solitary confinement (133 patients) and non-solitary confinement (95 patients) settings. Subjects were evaluated using standardized psychological instruments and blood tests. Subjects in solitary demonstrated higher levels of psychopathology than non-solitary patients' tests. Subjects in solitary demonstrated higher levels of psychopathology than non-solitary patients.*

²⁷⁴ A. Steptoe et al., *Loneliness and neuroendocrine, cardiovascular, and inflammatory stress responses in middle-aged men and women*, 29 PSYCHONEUROENDOCRINOLOGY 593 (2004), *The revised UCLA loneliness scale was completed by 240 working men and women aged 47-59 years and related to affective state, neuroendocrine, cardiovascular and inflammatory responses. Loneliness scores were related to social isolation, low emotional support, depression, low self-esteem, and reported sleep problems. Lonely individuals displayed significantly greater fibrinogen and natural killer cell responses, both markers of systemic inflammation.*

²⁷⁵ Jeffrey Kluger, *Are Prisons Driving Prisoners Mad?*, TIMES MAGAZINE, Jan 26, 2007.

²⁷⁶ C. Haney, *Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement*, 49 CRIME & DELINQUENCY 124 (2003), *This article discusses use of solitary-like confinement in "supermax" prisons and reviews the literature on the health effects of isolation. The author states, "There are*

According to Dr. Haney many of the negative effects of solitary confinement are analogous to the acute reactions suffered by torture and trauma victims, including posttraumatic stress disorder and the kind of psychiatric consequences that plague victims of what are called “deprivation and constraint” torture techniques.

Legal Analysis

The medical impact of sensory deprivation and prolonged isolation supports the conclusion that both techniques of interrogation may be considered prosecutable acts of “torture” or “cruel or inhuman treatment” under the WCA or Torture Act because they cause “severe” and “serious” mental pain and suffering. The lasting depression and posttraumatic stress disorder that victims of isolation suffer constitute the prolonged and/or non-transitory mental harm required for mental pain to be considered severe or serious. Moreover, isolation and sensory deprivation in interrogations is likely calculated to “disrupt the senses or personality.” The KUBARK manual recognizes that sensory deprivation was meant to induce regression and anxiety.²⁷⁷

U.S. federal courts have also found solitary confinement — when used for prolonged periods of time and combined with other harsh treatment that may aggravate sensory deprivation, such as physical restraint or blind folding — to constitute torture under the U.S. Foreign Sovereign Immunities Act (FSIA).²⁷⁸

Federal case law supports the conclusion that prolonged isolation may violate the Detainee Treatment Act if the isolation results in sensory deprivation or is used in retaliation for failure to answer questions. Although the Supreme Court has held that solitary confinement under

few if any forms of imprisonment that appear to produce so much psychological trauma and in which so many symptoms of psycho-pathology are manifested.” Adverse effects of isolation in prisons described in the literature include appetite and sleep disturbances, anxiety, panic, rage, loss of control, paranoia, hallucinations, self-mutilations, a sense of impending emotional breakdown, suicidal ideation and behavior, and hypertension among others. The authors conclude, “there is not a single published study of solitary or supermax-like confinement in which nonvoluntary confinement lasting for longer than 10 days — where participants were unable to terminate their isolation at will — that failed to result in negative psychological effects.”

²⁷⁷ KUBARK MANUAL, *supra* note 181, at 87-90.

²⁷⁸ *Cicippio v. Islamic Republic of Iran*, 18 F.Supp.2d 62, 64-5 (D. D.C. 1998) (holding that an individual who was held in solitary confinement for two years, while blindfolded and chained to the wall or floor was tortured and his captures were therefore not immune under the FSIA); *In re Estate of Marcos Human Rights Litigation*, 910 F.Supp. 1460, 1463 (D. Haw. 1995) (listing solitary confinement “while handcuffed or tied to a bed” as a form of torture used during “tactical interrogations” attempting to elicit information from detainees concerning opposition to the Marcos government).

some circumstances may be justified for certain administrative and security reasons,²⁷⁹ solitary confinement may still violate a detainee’s rights if done for the purpose of facilitating interrogation. In 2000, the Fourth Circuit held that the district court properly concluded that plaintiff’s allegation that he was placed in solitary confinement for 47 days after refusing to answer questions described “a violation of clearly established law.”²⁸⁰ The Seventh Circuit also held in 1972 that a plaintiff was entitled to recover damages against police for a due process violation of the Fourteenth Amendment when police subjected the plaintiff to an interrogation immediately after being released from 18 days in solitary confinement.²⁸¹

U.S. federal courts have also found that solitary confinement violates the Eighth Amendment when used for extensive duration.²⁸² In one case, fourteen days of solitary confinement was found excessive.²⁸³ Courts are

²⁷⁹ *Sandin v. Conner*, 515 U.S. 472 (1995) (holding that a convicted prisoner’s segregation in solitary confinement for thirty days did not implicate a liberty interest under a procedural due process analysis but reserved the plaintiff’s right to assert an Eighth Amendment claim).

²⁸⁰ *Evans v. Welch*, No. 99-6716, 2000 WL 432390 (4th Cir. Apr. 20, 2000) (unpublished) (“Evans’ allegation that he was placed in solitary confinement as punishment for refusing to be interrogated describes a violation of clearly established law”) (citing *Gray v. Spillman*, 925 F.2d 90, 93 (4th Cir. 1991) (holding that it is unconstitutional to punish a pre-trial detainee for refusing to answer questions); *O’Bar v. Pinion*, 953 F.2d 74, 84-85 (4th Cir. 1991) (recognizing that administrative segregation can be a form of punishment); *see also Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (noting the general rule that it is unconstitutional to inflict punishment on pre-trial detainees).

²⁸¹ *Duncan v. Nelson*, 466 F.2d 939, 940, 944 (1972) *cert. denied* 93 S.Ct. 116, 175 (1972) (plaintiff had been subjected to a form of solitary confinement “where he slept on the floor, received one meal a day, and saw neither family nor friends.” The court concluded that because the alleged violation occurred before *Malloy v. Hogan*, 378 U.S. 1 (1964) was decided, the Plaintiff’s cause of action stood solely under the interpretation of the due process clause of the Fourteenth Amendment before the “Fifth Amendment’s privilege against self-incrimination was incorporated therein.”).

²⁸² *See Hutto v. Finney*, 437 U.S. 678, 686 (1978) (upheld a 30 day limit on solitary confinement set by the district court concluding that “the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards”); *Bono v. Saxbe*, 620 F.2d 609, 614 (7th Cir.1980); *Sweet v. S.C. Dept. of Corrections*, 529 F.2d 854, 861 (4th Cir. 1975). *But see Sostre v. McGinnis*, 442 F.2d 178 (1971), *overruled on other grounds*, *Procunier v. Martinez*, 416 U.S. 396 (1974) (holding that segregated confinement for twelve months and eight days where he was provided a diet of 2,800 to 3,300 calories a day, adequate personal hygiene, the opportunity for exercise and for participation in group therapy, reading matter, and the constant possibility of communication with other segregated prisoners, until prisoner agreed to abide by prison rules, did not violate the Eighth Amendment).

²⁸³ *Maxwell v. Mason*, 668 F.2d 361, 363 (8th Cir. 1981) (upheld district court finding that fourteen days in solitary confinement was excessive because it was “wholly inconsistent with the current minimum standard of respect for the dignity of human beings.”).

more likely to hold solitary confinement to violate the Eighth Amendment if the confinement includes conditions that aggravate sensory deprivation, such as such as extreme degrees of social isolation and the use of boxcar-like doors.²⁸⁴

²⁸⁴ See *Bono v. Saxbe*, 450 F.Supp. 934, 946-47 [E.D. Ill. 1978] (holding that the use of certain boxcar type doors on solitary confinement cells violated the Eighth Amendment because it increased the isolation and resulted in sensory deprivation and therefore “violates society’s standards of humanity and dignity, and results in the infliction of unnecessary pain and suffering”) *aff’d in part and remanded in part*, 620 F.2d 609 (7th Cir.1980); *Berch v. Stahl*, 373 F.Supp. 412, 420 [D.C. N.C. 1974] (“[W]hen used to excess [solitary confinement] is implicitly denounced by contemporary society, which has directed other criminal sanctions for conduct sufficiently reprehensible to merit stiff discipline. [] Its severity as punishment is drastically increased when the isolation is accompanied by the ‘sensory deprivation’ which is, unnecessarily, attached to the isolation in the Mecklenburg jail. Not only are inmates of the ‘box’ and inmates of solid door cells barred from visual contact and effective voice communication with others, but the cells are [] bare and dimly lighted [.] Mental and emotional stability are thus threatened, and mental health may be impaired. [citations omitted]. Jail and prison authorities are authorized to confine, but not to torture and de-humanize prisoners.”).

IV. CONCLUSION AND RECOMMENDATIONS

This report demonstrates that “enhanced” techniques of interrogation, whether practiced alone or in combination, may cause severe physical and mental pain. In fact, the use of multiple or “enhanced” interrogation virtually assures the infliction of severe physical and mental pain upon detainees. Given this knowledge, U.S. policy makers and interrogation personnel should understand that if such techniques are practiced, it would be reasonable for courts to conclude that the resulting harm was inflicted intentionally.

The interrogation techniques analyzed above - and other techniques that have comparable medical consequences - implicate legal prohibitions and could result in felony criminal prosecutions. It is therefore inappropriate that any such techniques be available for use by U.S. personnel in interrogations, and it is the responsibility of U.S. policy makers to ensure that the use of such techniques is effectively precluded.

In issuing interrogation policy, the United States should refrain from repeating the mistake of allowing euphemistic descriptions of interrogation techniques to stretch the line between permissible and impermissible treatment. Instead, all U.S. agencies should firmly adhere to a single standard of humane treatment that is consistent with the law and protects the lives and health of individuals in U.S. custody.

Recommendations to the Executive Branch

1. Prohibit the “enhanced” interrogation techniques, in order to protect U.S. officials and personnel from potential criminal liability and to ensure that all U.S. personnel adhere to U.S. law.
2. Prohibit the use of any other method that, alone or in combination with other interrogation methods, presents a significant risk of causing serious or severe physical and/or mental pain or suffering.
3. Instruct all U.S. interrogators in effective, legal, non-harmful methods of interrogation.
4. Declassify and release all documents, from all relevant U.S. agencies, which contain information on U.S. interrogation policy and practice, including but not limited to the “enhanced” interrogation methods.

Recommendations to the U.S. Congress

1. Clarify existing language in the MCA, which under a reasonable interpretation currently prohibits the use of the “enhanced” techniques, by explicitly listing the techniques, forbidding them, and making clear that they remain criminal.
2. Establish a single standard for detainee treatment and interrogation practices to be followed by all U.S. personnel, including CIA personnel.

APPENDIX A: INTRODUCTION TO U.S. LAW CONSTRAINING INTERROGATION

The Torture Act

The United States enacted the Torture Convention Implementation Act of 1994 (the Torture Act) to implement its obligation to criminalize torture under Article 5 of the U.N. Convention Against Torture (subject to reservations, understandings and declarations that the U.S. made at the time of ratification). The Torture Act applies to prohibited acts attempted or committed outside the United States, which is defined as, “the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.”²⁸⁵ Therefore, any interrogations conducted by U.S. officials outside of the United States, including at the U.S. Naval Base at Guantánamo Bay would likely be governed by the Torture Act because while it may be inside the territorial jurisdiction of the United States, it is neither a State, commonwealth, territory or possession of the United States.²⁸⁶

The Torture Act’s criminal provisions apply to individuals who are either nationals of the United States or are present in the United States.²⁸⁷ The first and — so far — only indictment under the Torture Act was filed in December 2006 against the son of the former president of Liberia, Charles Taylor.²⁸⁸

The Torture Act defines torture as an act “committed by a person acting under the 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.”²⁸⁹

The meaning of the term “severe physical pain” is not defined by statute. U.S. federal courts have made findings of “severe physical pain” in cases interpreting immigration regulations and the Torture Victims Protection Act of

1991 (TVPA), which may provide guidance in interpreting the Torture Act, but there does not appear to be a clear legal test to determine when physical pain becomes severe.

The term “severe mental pain and suffering” is defined as “prolonged mental harm caused by or resulting from” four enumerated acts: “(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.” As with “physical pain,” the term severe is not defined and the Torture Act also does not define when mental harm becomes “prolonged.” The Manual for Military Commissions, recently issued by the Pentagon to govern military commission proceedings under the MCA, states that prolonged mental harm “is a harm of some sustained duration, though not necessarily permanent in nature, such as a clinically identifiable mental disorder.”²⁹⁰ This definition has not to date been tested before any court or tribunal.

Finally, the Torture Act requires that an individual *specifically intend* that his act inflict severe physical or mental pain, but what is meant by the term “specifically intend” remains unclear.²⁹¹ “Specific intent” under U.S. domestic law has been said to describe “a state of mind which exists where circumstances indicate that an offender actively desired certain criminal consequences, or objectively desired a specific result to follow his act or failure to act.”²⁹² In 2002, the U.S. Department of Justice’s Office of Legal Counsel (OLC) issued a memo that narrowly interpreted the phrase “specifically intend” in the Torture Act as requiring that the infliction of severe pain be the defendant’s

²⁸⁵ Torture Act, 18 U.S.C. § 2340(3) [2004].

²⁸⁶ See *Rasul v. Bush*, 542 U.S. 466 [2004].

²⁸⁷ Torture Act, 18 U.S.C. § 2340A.

²⁸⁸ See *United States of America v. Emmanuel*, 207 WL 2002452 (S.D. Fla. July 5, 2007); Associated Press, *Son of Ex-Liberian President Charged with Committing Torture*, INTERNATIONAL HERALD TRIBUNE, Dec. 6, 2006.

²⁸⁹ Torture Act, 18 U.S.C. § 2340(1) [emphasis added].

²⁹⁰ MANUAL FOR MILITARY COMMISSIONS, M.C.M. (January 18, 2007) at IV-9.

²⁹¹ *U.S. v. Baily*, 444 U.S. 394, 405 [1980].

²⁹² 21 AM. JUR. 2D CRIM. L. § 128 [2006].

“precise objective.”²⁹³ The OLC subsequently retracted that memo and replaced it with another memo that stated that “it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture.”²⁹⁴

Torture Victims Protection Act of 1991 & the Foreign Sovereign Immunities Act

The Torture Victims Protection Act of 1991 provides a civil right of action for damages to victims of torture against an individual who subjected them to torture “under the actual or apparent authority, or color of law, of any *foreign* nation.”²⁹⁵ While the TVPA does not create a right of action against U.S. personnel, judicial opinions interpreting the definition of torture under the TVPA have been used by the Department of Justice in its own legal opinions interpreting the kinds of treatment that could constitute torture under the Torture Act.²⁹⁶ Judicial opinions could also be relevant in interpreting the similar definition of torture under the WCA.

The definition of torture in the TVPA is similar to that in the Torture Act except that it has a purpose requirement, that the torture be committed “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.”²⁹⁷ Techniques used for interrogation or to discipline detainees would inherently fulfill this element of the TVPA definition.

²⁹³ Memorandum for Alberto R. Gonzales Counsel to the President Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002).

²⁹⁴ Memorandum for James B. Comey Deputy Attorney General Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A, Office of Legal Counsel, U.S. Department of Justice 16 (Dec. 30, 2004) [hereinafter *Levin Memo*] (“We do not believe it is useful to try to define the precise meaning of “specific intent” in section 2340. In light of the President’s directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture.”).

²⁹⁵ Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C.A. § 1350 [2007]) (emphasis added).

²⁹⁶ *Id.* at 9.

²⁹⁷ U.S. federal courts have held that these enumerated purposes are not exhausted. See, e.g., *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002) (“As to the purposes for which abuse must be inflicted, it is clear from the text of the TVPA that the list of purposes provided was not meant to be exhaustive.”).

Cases brought under the Foreign Sovereign Immunity Act (FSIA) of 1976 provide further guidance in how the courts interpret the TVPA’s definition of torture.²⁹⁸ FSIA uses the TVPA definition of torture to define an exception to the general immunity of sovereign states from lawsuits.

U.S. Immigration Regulations

The Department of Justice has also used case law interpreting the definition of torture used in immigration regulations in interpreting the definition provided in the Torture Act. U.S. immigration regulations — which implement the United States’ obligations under the Convention Against Torture not to return individuals to countries where they are likely to be tortured — use a definition of torture very similar to that contained in the TVPA and the Torture Act.²⁹⁹

War Crimes Act

The War Crimes Act (WCA) provides U.S. courts with jurisdiction to try individuals for certain violations of the laws of war, including abuses of individuals detained by the United States in an armed conflict. From 1997, when the War Crimes Act was enacted, to 2006, any violation of Common Article 3 of the Geneva Conventions was a crime under U.S. domestic law. In September 2006, Congress passed the Military Commission Act (MCA) which amended the WCA by narrowing the scope of war crimes over which U.S. courts would have jurisdiction. The WCA now criminalizes only specifically enumerated war crimes that the legislation refers to as “grave breaches” of Common Article 3, including the war crimes of “torture” and “cruel or inhuman treatment.”

After the MCA, the WCA continues to apply to acts committed “inside or outside the United States” in any circumstance “where the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States.”³⁰⁰ No individual has yet been prosecuted under the War Crimes Act.

²⁹⁸ See Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(A)(7) (2007).

²⁹⁹ 8 C.F.R. § 208.18(a)(1) (2007).

³⁰⁰ War Crimes Act of 1996, 18 U.S.C. § 2441(a)-(b) (2007).

“Torture” under the WCA

The War Crimes Act definition of the crime of torture is similar to that in the Torture Act. The only difference is that the WCA includes a purpose requirement: an act of torture must be committed “for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination.”³⁰¹ U.S. federal courts have held, citing the ICTY, that the prohibited purpose need not be the predominant or sole purpose to meet the requisite element, but must be only part of the motivation behind the conduct.³⁰² Like the Torture Act, the War Crimes Act uses the phrase “*specifically* intend” but in the context of the WCA, this phrase likely would be found to be referring to the enumerated purposes for which the severe pain must be inflicted, not to a specific intent to inflict severe pain or suffering.³⁰³

“Cruel or Inhuman Treatment” under the WCA

The Military Commissions Act of 2006 also established a new crime under the WCA of “cruel or inhuman treatment.” “Cruel or inhuman treatment” is defined as “an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.”³⁰⁴ Severe mental pain or suffering is the same standard as that used under the WCA crime of torture.

Under the WCA, *serious physical pain* is defined as “bodily injury that involved — (I) a substantial risk of death; (II) extreme physical pain; (III) a burn or physical disfigurement of a serious nature (other than cuts, abrasions,

or bruises); or (IV) significant loss or impairment of the function of a bodily member, organ, or mental faculty.”

In defining “*serious* mental pain or suffering” the MCA uses a slightly amended version of the Torture Act’s definition of “*severe* physical pain or suffering,” by replacing the word “severe” with “serious.” (Emphasis added.) Acts committed after the MCA’s enactment need not result in “prolonged mental harm,” as required by the Torture Act’s definition, but are criminal even if the mental harm they cause is only “serious and non-transitory; the statute explicitly states that the harm need not be prolonged in order to trigger criminal liability.”³⁰⁵

The plain language and legislative history of the WCA amendment clearly indicate that for acts committed after the enactment of the MCA, a mental harm finding for “cruel or inhuman treatment” should require less than the statutory requirement for torture. Dictionaries define “transitory” as “existing or lasting only a short time; short-lived or temporary.”³⁰⁶ During the Senate floor debate of the final version of the MCA, Senator McCain emphasized that the “non-transitory” requirement applies to the duration of the harm not the act producing the harm.³⁰⁷ For a coercive interrogation technique used before the passage of the MCA to result in “serious mental pain,” therefore, the harm would need to have more than a brief duration, but does not have to last for an extended period.³⁰⁸

Culpability Requirement

Under the WCA’s definition of “cruel or inhuman treatment” the accused need only manifest a general intent to “inflict severe or serious physical or mental pain or suffering.”³⁰⁹ General intent crimes under U.S. domestic

³⁰¹ War Crimes Act of 1996, 18 U.S.C. § 2441(d)(1)(A) [2007] (defines torture as “[t]he act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering [other than pain or suffering incidental to lawful sanctions] upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.”).

³⁰² *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1346 (N.D. Ga. 2002) (quoting the ICTY as stating “[I]n order for this requirement to be met, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose”).

³⁰³ See, e.g., U.S. DEP’T OF DEF., THE MANUAL FOR MILITARY COMMISSIONS, pt. IV, §11 [2007], available at <http://www.defenselink.mil/news/d20070118MCM.pdf> (In laying out the elements of torture the manual clarifies that the accused must only “intend” (as opposed to specifically intend) to “inflict severe physical or mental pain or suffering,” inferring that the term “specifically intended” refers only to the purpose that the accused must have of “obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.”).

³⁰⁴ War Crimes Act of 1996, 18 U.S.C. § 2441 (d)(1)(B) [2007].

³⁰⁵ War Crimes Act of 1996, 18 U.S.C. § 2441 (d)(2)(E) [2007]; Torture Act, 18 U.S.C. § 2340(2) [2004].

³⁰⁶ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2002).

³⁰⁷ 153 CONG. REC. S10,399 (daily ed. Sept. 27, 2006) (Statement of Sen. McCain).

³⁰⁸ *Id.*

³⁰⁹ Absent qualifying language, the term “intent” in a criminal statute refers to general criminal intent. 21 AM. JUR. 2D CRIM. L. § 130 [2007]; see *United States v. Myers*, 104 F.3d 76, 81 [5th Cir. 1997] *cert. denied*, 520 U.S. 1218 (1997); *United States v. Martinez*, 49 F.3d 1398, 1401 [9th Cir. 1995] *cert. denied*, 516 U.S. 1065 (1996); *United States v. DeAndino*, 958 F.2d 146, 148-49 [6th Cir. 1992]; *United States v. Lewis*, 780 F.2d 1140, 1142-43 [4th Cir. 1986]; Moreover, an accepted canon of statutory construction provides that “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

law most often require the government to “prove only that the defendant intended to do the act in question and intended the reasonable and probable consequences of that act,” not “that the defendant intended to bring about a specific result.”³¹⁰

Furthermore, general intent may be inferred simply from the fact that the accused consciously committed the offending act.³¹¹ Therefore, to be guilty of “cruel or inhuman treatment” under the WCA, a crime that requires only general intent, the accused would only have to know that the “reasonable and probable consequences” of his act would be “severe or serious physical or mental pain or suffering,” and such knowledge may be inferred by the nature of the accused’s acts.³¹²

Detainee Treatment Act

The Detainee Treatment Act of 2005 explicitly bars cruel, unusual and inhuman treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments against any individual in U.S. custody regardless of location or nationality.³¹³ The Military Commissions Act reaffirmed the requirements of the DTA and required the President to take action to ensure compliance with the MCA, “including through the establishment of administrative rules and procedures.”³¹⁴

Courts have not yet interpreted the Detainee Treatment Act standard of treatment.³¹⁵ However, there is substantial jurisprudence interpreting the Fifth, Eighth, and/or Fourteenth Amendments standards of treatment in the domestic context of convicted prisoners and pre-trial

detainees. The Supreme Court has long considered prisoner treatment to violate substantive due process if the treatment “shocks the conscience,” “is bound to offend even hardened sensibilities,”³¹⁶ or offends a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”³¹⁷ Among the fundamental rights of individuals in government custody that the Supreme Court has recognized are: the right to bodily integrity³¹⁸ and to be free from the unnecessary intentional infliction of physical pain;³¹⁹ the right to have one’s basic needs met,³²⁰ and the right to basic human dignity.³²¹

In two recent cases in which the Supreme Court analyzed whether allegedly wrongful government conduct “shocked the conscience” and therefore violated a prisoner’s substantive due process rights, the Court made reference to the government’s interest in undertaking that conduct.³²² In each case, the Court required

³¹⁰ U.S. v. Francis, 164 F.3d 120 (1999); see also U.S. v. Gibbs, 182 F.3d 408 (6th Cir. 1999); United States v. Cangiano, 491 F.2d 906, 910 (2d Cir. 1974); see generally 21 AM. JUR. 2D CRIM. LAW § 127 (2007).

³¹¹ 21 AM. JUR. 2D CRIM. L. § 127 (2007).

³¹² War Crimes Act of 1996, 18 U.S.C. § 2441(d)(1)(B).

³¹³ Detainee Treatment Act of 2005, 42 U.S.C.S. § 2000dd (2006).

³¹⁴ Military Commissions Act of 2006, 18 U.S.C. § 2441 (2006).

³¹⁵ Since the Fifth Amendment Self-Incrimination Clause was incorporated through the Fourteenth Amendment in 1969, the majority of cases challenging the constitutionality of coercive interrogation tactics have been resolved under a self-incrimination clause analysis. Although some would argue that this analysis may be less relevant to detainees who are labeled enemy combatants and detained without trial, such an argument has not yet been ruled on by the courts. The recent case law interpreting substantive due process rights in the context of detention consists largely of civil suits filed under section 1983 of Title 42 of the U.S. code. To hold a government official liable under section 1983, the plaintiff must overcome the official’s absolute immunity by demonstrating that the official’s constitutional violation constituted a violation of “clearly established constitutional law.” See Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); U.S. v. Stanley, 483 U.S. 669, 694 (1987).

³¹⁶ Rochin v. People of California, 342 U.S. 165, 172 (1952).

³¹⁷ Brown v. Mississippi, 297 U.S. 278, 464 (1936) (holding that severely whipping three men until they confessed to murder violated the Fourteenth Amendment).

³¹⁸ Albright v. Oliver, 510 U.S. 266 (1994) (“The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.”); Washington v. Glucksberg, 521 U.S. 702, 719 (1977).

³¹⁹ County of Sacramento v. Lewis, 523 U.S. 833, 834 (1998) (“conduct deliberately intended to injure in some way is unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level”) (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)).

³²⁰ Deshanev v. Winnebago County Dept of Soc. Serv’s, 489 U.S. 189, 189 (1989) (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. [] The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — e.g., food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.”)

³²¹ Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) (“the basic concept underlying the eighth amendment is nothing less than the dignity of man”); Hope v. Pelzer, 536 U.S. 730 (2002) (the Court specifically emphasized the humiliation caused by depriving the prisoner of bathroom breaks while he was handcuffed to a hitching post as part of the Eighth Amendment violation); Rochin v. California, 342 U.S. 165, 174 (1952) (holding that pumping a man’s stomach in search of swallowed narcotics was means “so brutal and so offensive to human dignity” that it violated the Fourteenth Amendment).

³²² County of Sacramento v. Lewis, 523 U.S. 833, 834 (1998) (“conduct deliberately intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.”); Chavez v. Martinez, 538 U.S. 760, 776 (2003) (Thomas, J., plurality opinion) (“the need to investigate

the government interest to include an element of immediacy of threat, of pressing, identifiable and actual harm — as opposed to a generalized security threat — in order to justify actions that would otherwise violate a detained individual's fundamental rights.³²³ To the extent that the government interest may be relevant to DTA analysis, it is important to note the dearth of evidence that severely coercive interrogation techniques produce actionable intelligence information.³²⁴

Eighth Amendment precedent is also relevant to analyzing the legality of interrogation techniques under the Detainee Treatment Act. The Supreme Court has held that the Eighth Amendment prohibits “grossly disproportionate punishment”³²⁵ or “unnecessary and wanton” use of force or infliction of pain.³²⁶ Certain legal scholars have argued that the Eighth Amendment is not directly applicable to intelligence interrogation unless interrogation techniques have a punitive aspect.³²⁷ However, the Eighth Amendment precedent is still likely to be relevant because the Supreme Court has incorporated its Eighth Amendment standards into its substantive due process analysis under the Fifth and Fourteenth Amendments.

whether there had been police misconduct constituted a justifiable government interest given the risk that key evidence would have been lost if Martinez had died without the authorities ever hearing his side of the story.”); see also *Washington v. Glucksberg*, 521 US 702, 721 (1997) (establishing a two part test to determine whether a statute violates a substantive due process right; first the court must determine if the statute infringes upon a “fundamental right” and if it does the court must determine whether the government’s infringement upon the fundamental right is “narrowly tailored to serve a compelling state interest.”)

³²³ Note that the Supreme Court cases *Chavez*, *Lewis* and *Whitley v. Albers* all involved police officers confronted with situations such as a dying witness, a police chase and a prison riot all of which were clearly known to be situations requiring an immediate decision on the part of the police officer. *Chavez*, 538 U.S. at 760; *Lewis*, 523 U.S. at 853; *Whitley v. Albers*, 475 U.S. 312, 320 (1986).

³²⁴ See Educating Information, Interrogation Science and Art, Intelligence Science Board, Phase 1 Report (The Intelligence Sci. Bd. was established to advise the Office of the Director of National Intelligence and Intelligence Community leaders); J. M. Arrigo, *A Utilitarian Argument Against Interrogation of Terrorists*, 10 SCIENCE AND ENGINEERING ETHICS 543-72 (2004), available at <http://www.dia.mil/college/3866.pdf>.

³²⁵ *Solem v. Helm*, 463 U.S. 277, 288 (1983).

³²⁶ *Hudson v. McMillian*, 503 U.S. 1, 7-9 (1992).

³²⁷ See ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 136 (2002) (arguing that Eighth Amendment jurisprudence is irrelevant to evaluating the permissibility of interrogation methods); Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89 (2007) (stating that the “Eighth Amendment, which governs the punishment of convicted criminals, does not apply” in the context of intelligence gathering in the name of national security).

The Court has held that the due process clause requires that individuals detained by the state who have not been convicted by a Court, such as pre-trial detainees and the civilly committed, enjoy at least the same level of rights as convicted criminals do under the Eighth Amendment.³²⁸ Because most detainees interrogated by U.S. officials for intelligence purposes have not been convicted of any crime, an examination of their treatment under the due process analysis would likely incorporate Eighth Amendment standards even if the Eighth Amendment analysis was not applied directly.

Common Article 3 of the Geneva Conventions

The United States is bound by its full obligations under Common Article 3 of the Geneva Conventions. The amendments to the War Crimes Act contained in the MCA, which narrowed the scope of conduct that constitutes a felony war crime under domestic law, do not change the United States legal obligations. The legislative history of the MCA makes clear, in fact, that all violations of Common Article 3 of the Geneva Conventions continue to be prohibited, even if they are not prosecutable as “grave breaches” under the WCA.³²⁹

Common Article 3 of the Geneva Conventions expressly applies to all detainees in a non-international armed conflict, and international tribunals have held it to be the minimum standard for treatment in the context of all armed conflict.³³⁰ Conduct prohibited by Common Article 3 includes “torture,” “cruel treatment” and “outrages upon personal dignity, in particular, humiliating and degrading

³²⁸ *City of Revere v. Mass. Gen. Hospital*, 463 U.S. 239, 244 (1983) (holding that “the due process rights of a [pre-trial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner.”) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

³²⁹ See e.g. 152 CONG. REC. S10,409, (daily ed. Sept. 28, 2006) (statement of Sen. Biden). (“First, our colleagues did the right thing by rejecting the attempt by the administration to reinterpret, by statute, Common Article III of the Geneva Conventions.”); 152 CONG. REC. S10,399, (daily ed. Sept. 28, 2006). (statement of Sen. Levin: “And would the Senator from Arizona agree with my view that section 8(a)(3) does not make lawful or give the President the authority to make lawful any technique that is not permitted by Common Article 3 or the Detainee Treatment Act?” Sen. McCain: “I do agree.” Sen. Warner: “I agree with both of my colleagues.”).

³³⁰ *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 137, (October 2, 1995); *Prosecutor v. Blaskic*, Case No. IT-95-14-T, In the Trial Chamber ¶ 161 (March 3, 2000); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, In the Trial Chamber ¶ 132 (December 10, 1998); *Prosecutor v. Delalic et al*, Case No. IT-96-21-A, Judgment ¶ 143, 150 (Feb. 20, 2001); *The Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case No. IT-98-34-T, Judgement ¶228 (March 31, 2003).

treatment.” According to the ICRC Commentary to the Geneva Conventions, torture under Common Article 3 is “the infliction of suffering on a person in order to obtain from that person, or from another person, confessions or information.”³³¹ International tribunals have defined “cruel treatment” as an act that “causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.”³³² “Outrage upon personal dignity” has been defined as an act that causes “serious humiliation or degradation to the victim” that must be so intense that the reasonable person would be outraged.”³³³

³³¹ INT’L COMM. RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF AUGUST 12, 1949, VOL. IV (1958).

³³² *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶ 552 (Nov. 16, 1998).

³³³ *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment, ¶ 56 (June 25 1999).

While Common Article 3 definitions of torture and cruel treatment are arguably broader than those provided under U.S. law through the WCA, for the purpose of analyzing the legality of “enhanced interrogation techniques” this report uses the WCA definitions of torture and cruel treatment. It is important, however, to note that “outrages upon personal dignity” is a separate standard to which the United States must adhere under its international legal obligations.

APPENDIX B: OVERVIEW OF THE MEDICAL CONSEQUENCES OF TORTURE AND CRUEL TREATMENT

Psychological Trauma: The Common Denominator

Psychological abuse is inherent in the concept of torture. Systematic, repetitive infliction of psychological trauma establishes control over another person. Methods of psychological control are designed to instill terror, pain, and helplessness and destroy a detainee's sense of autonomy without direct use of physical violence. Such techniques include the use of sleep deprivation, sensory disorientation, forced self-induced pain, solitary confinement, mock execution, severe humiliation, mind-altering drugs and threats of violence — as well as the exploitation of personal or cultural phobias. The ultimate effect of these techniques is to convince the victim that the perpetrator is omnipotent, that resistance is futile, and his life depends on absolute compliance.

Although discussion of torture and other cruel, inhuman and degrading treatment of detainees can be divided into psychological and physical techniques, ultimately all techniques that violate human dignity carry a high risk of psychological damage. Further, the distinction between harsh physical and psychological techniques is artificial as most torture techniques involve both components.³³⁴ For example, the consequences of sexual torture, even in the absence of physical assault, are both physical and psychological. Torture is a means of denying an individual's humanity. By reducing an individual to a position of extreme helplessness and inducing a constant state of fear, torture often leads to a deterioration of cognitive, emotional and behavioral functions.³³⁵

Torture has devastating health consequences for physical, psychological, and social well-being. Many torture survivors suffer from debilitating psychological damage that stems from various combinations of intense and prolonged fear, shame, humiliation, horror, guilt, grief, and mental and physical exhaustion.³³⁶ Ample evidence from both uncontrolled and controlled studies document

that most torture survivors suffer an array of prolonged and serious psychiatric symptoms such as depression, anxiety disorders, somatic complaints such as headache and back pain, posttraumatic stress disorder, memory and concentration impairment, sleep disturbance and nightmares, sexual dysfunction, self-harming behaviors and personality changes.³³⁷

³³⁷ C. Gorst-Unsworth & E. Goldenberg, *Psychological sequelae of torture and organized violence suffered by refugees from Iraq. Trauma-related factors compared with social factors in exile*, 172 *British J. Psychiatry* 90 (1998), *Eighty-four male Iraqi refugees were interviewed. Adverse events, level of social support were measured, and psychological morbidity were assessed. Fifty-five (65%) of the sample had suffered systematic torture during a period of detention. Further, participants reported a wide range of trauma including imprisonments, enforced combat, witnessing chemical attacks on civilians, scenes of violent death, massacre and execution of relatives. Social support was significantly associated with PTSD and depressive symptoms particularly among torture survivors.* M. Van Ommeren et al., *Psychiatric disorders among tortured Bhutanese refugees in Nepal*, 58 *ARCHIVES GEN. PSYCHIATRY* 475 (2001), *A cross-sectional random survey was conducted among 418 tortured and 392 nontortured Bhutanese refugees, matched for age and gender. The authors found that the torture survivors had higher lifetime and 12-month rates of ICD-10 (International Classification of Disease, Tenth edition) psychiatric disorders. Tortured refugees, compared to nontortured refugees, were more likely to report 12-month ICD-10 PTSD (43% vs. 4%), dissociative disorders (18% vs. 3%), and persistent somatoform pain disorder (51% vs. 28%). Almost three out of four of the tortured subjects and almost one-half of the nontortured refugees had one disorder in the preceding 12 months, indicating a high rate of psychopathology among this population.* M. Van Ommeren et al., *Lifetime events and posttraumatic stress disorder in 4 postconflict settings*, 286 *J. AM. MED. ASS'N* 62 (2001), *Epidemiological survey conducted between 1997 and 1999 among 4 low-income populations who have experienced war, conflict, or mass violence in Algeria (n = 653), Cambodia (n = 610), Ethiopia (n = 1200), and Gaza (n = 585). In Ethiopia, 25.5% of the respondents reported experiencing torture compared with 15.0% in Gaza, 9.0% in Cambodia and 8.4% in Algeria. The rates of PTSD among the sample ranged from 37.4% in Algeria to 17.8% in Gaza. Torture was a risk factor for PTSD in all countries except Cambodia. In all three other countries likelihood of developing PTSD was approximately twice among torture survivors compared to non-torture participants.* D. Silove et al., *The impact of torture on post-traumatic stress symptoms in war-affected Tamil refugees and immigrants*, 43 *COMPREHENSIVE PSYCHIATRY* 49 (2002). A. Keller & J. Gold, *Survivors of Torture*, in 1 *KAPLAN AND SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY* 2400 (B. & V. Sadock eds., 8th ed. 2005). P. M. Leth & J. Banner, *Forensic medical examination of refugees who claim to have been tortured*, 26 *AM. J. OF FORENSIC MED. & PATHOLOGY* 125 (2005), *For the details on the study see note 69.* Pia A. Moisander & Erik Edston, *Torture and its sequel — a comparison between victims from six countries*, 137 *FORENSIC SCI INT'L* 133, Nov. 26, 2003, *One hundred sixty torture victims from six different*

³³⁴ ISTANBUL PROTOCOL, *supra* note 22, at 29.

³³⁵ *Id.* at 45.

³³⁶ PHR BREAK THEM DOWN, *supra* note 20, at 48.

Feelings of helplessness, anger, guilt, and fear are common psychological reactions and often associated with major depression and posttraumatic stress disorder (PTSD).³³⁸ Some experts contend that the consequences of torture go beyond psychiatric diagnosis. The psychological reactions to torture are undoubtedly very complex since the torture survivor may experience PTSD as a result of specific torture experiences; depression as a result of multiple losses associated with torture; physical symptoms resulting from the specific forms of torture; and the “existential dilemma” of surviving in a world in which torture is a reality.³³⁹

Posttraumatic Stress Disorder

Posttraumatic stress disorder (PTSD) is one of the most common long-term consequences of torture. It is estimated the rates of PTSD range from forty-five to ninety-two percent across diverse samples of torture survivors.³⁴⁰

countries treated at the Centre for Trauma Victims in Stockholm. All 160 had reported beating, among other torture techniques. Sensory deprivation by isolation and blindfolding was common in all countries except Uganda and Peru. Whipping with electric cords occurred frequently only in Iran and Syria. Rape was most often reported among the Ugandans. Genital torture was frequently alleged by patients from Bangladesh and Turkey. Suspension was common in all countries except for Uganda. Falaka, i.e. beating of the soles, and electric torture were common (>60%) in Bangladesh, Iran, Syria, and Turkey. Sharp injuries inflicted with knives and bayonets were often seen among the Bangladeshi and Ugandans. Burning injuries due to cigarettes were commonly seen only in patients from Bangladesh. Some techniques were found to be almost exclusive for each country: “water treatment” (Bangladesh), the “tyre” (Syria), “telephono” and “submarino” (Peru). One hundred twenty four underwent psychiatric evaluation. PTSD was diagnosed on the basis of a psychiatric interview and psychological tests. Prevalence of PTSD ranged from 69% to 92% with an average of 79.8%.

³³⁸ S. Turner & C. Goest-Unsworth, *Psychological sequelae of torture: a descriptive model*, 157 *BRITISH J. PSYCHIATRY* 485-80 (1990).

³³⁹ *Id.*

³⁴⁰ M. Van Ommeren et al., *Psychiatric disorders among tortured Bhutanese refugees in Nepal*, 58 *ARCH. GEN. PSYCHIATRY* 475 (2001), For the details on the study see note 318. Pia A. Moisaner & Erik Edston, *Torture and its sequel — a comparison between victims from six countries*, 137 *FORENSIC SCIENCE INT'L* 133, Nov. 26, 2003, For the details on the study see note 95. A. Keller et al., *Traumatic experiences and psychological distress in an urban refugee population seeking treatment services*, 194 *J. NERVOUS & MENTAL DISEASE* 188 (2006), Data were collected from a convenience sample of 325 refugees and survivors of torture seeking services through the Bellevue Hospital/New York University Program for Survivors of Torture. Most participants reported having been subjected to beating. Rape and other forms of sexual assault were also common (reported by 18% and 11% of the sample, respectively). Forms of psychological torture frequently reported include harassment directed at either the participant or family members (reported by 90% and 85% of participants respectively), witnessing violence or torture against others (79%), and torture of family members (68%). Authors reported high prevalence of anxiety (81%), depressive symptoms (84.5%) and PTSD (45.7%) in the sample.

Of note, the rate of PTSD among Americans between the ages of 18 and 54 is approximately 3.6 percent.³⁴¹

The symptoms of PTSD fall into three main categories: 1) re-living the experience of the traumatic event, 2) emotional numbing and detachment; and 3) hypervigilance and chronic arousal. The DSM-IV requires a one-month duration of symptoms for a diagnosis of PTSD. PTSD that endures for 3 months or more is considered to be chronic.³⁴²

Torture victims may continue to re-experience the trauma in the form of intrusive memories or flashbacks or recurrent nightmares. They may exhibit avoidance of any thought, conversation or activity that arouses recollection of the trauma. Victims also may exhibit hyperarousal or hypervigilance, which may result in difficulty concentrating, irritability or outbursts of anger.³⁴³

Studies show that more than one third of those who suffer from PTSD fail to recover even after many years.³⁴⁴ Several studies conducted on POWs from World War II and the Korean War and on Holocaust survivors have confirmed the chronic nature of PTSD, which sometimes persists 40 years after exposure to the severe trauma.³⁴⁵

³⁴¹ R. C. Kessler et al., *Prevalence, severity, and comorbidity of 12-month DSM-IV disorders in the National Comorbidity Survey Replication*. 62 *ARCHIVES GEN. PSYCHIATRY* 6, 617-27 (2005), U.S. National Comorbidity Survey Replication (NCS-R) is a nationally representative household face to face survey of English speakers 18 years and older in the coterminous United States. The survey was conducted between February 2001 and April 2003 and included 9282 respondents. The structured diagnostic interview assessed 12-month prevalence, severity, and comorbidity of DSM-IV mental disorders.

³⁴² APA MANUAL, *supra* note 22.

³⁴³ ISTANBUL PROTOCOL, *supra* note 22, at 46.

³⁴⁴ R. C. Kessler et al., *Posttraumatic stress disorder in the National Comorbidity Survey*, 52 *ARCH. GEN. PSYCHIATRY* 1048-60, (1995), *The data were obtained from a representative national sample of 5877 persons aged fifteen to fifty-four years as part of NCS, a survey designed to study the distribution, correlates, and consequences of psychiatric disorders in the United States. The authors reported a 7.8% lifetime prevalence of PTSD. PTSD is strongly comorbid with other lifetime DSM-III-R disorders. Survival analysis shows, regardless of receiving professional treatment, more than one third of people with an index episode of PTSD fail to recover even after many years.*

³⁴⁵ Engdahl et al., *Posttraumatic stress disorder in a community group of former prisoners of war: a normative response to severe trauma*, 154 *AM. J. OF PSYCHIATRY* 1576 (1997), *The study recruited a group of 262 U.S. World War II and Korean War former POWs. These men had been exposed to the multiple traumas of combat, capture, and imprisonment, yet few had ever sought mental health treatment. More than half of the men (53%) met criteria for lifetime PTSD, and 29% met criteria for current PTSD. The most severely traumatized group (POWs held by the Japanese) had PTSD lifetime rates of 84% and current rates of 59%. The authors concluded that PTSD is a persistent, normative, and primary consequence of exposure to severe trauma.* R. A. Zeiss & H. R. Dickman, *PTSD 40 years later: incidence and person-situation*

Posttraumatic stress disorder can have a negative impact on the successful management of other chronic medical diseases, and therefore can impact physical health over the long term. For example, misdiagnosis or under-treatment of posttraumatic stress disorder has been associated with poor control of diabetes in Cambodian refugees.³⁴⁶ Survivors of the Holocaust and concentration camps were observed to die at a higher rate than expected, and demonstrated higher rates of infectious diseases, cancer, cerebrovascular accidents and heart problems.³⁴⁷

Major Depression and Self-harming Behavior

Major depression and PTSD are widely acknowledged as the most common emotional and psychological forms of distress in torture survivors.³⁴⁸ Epidemiological findings have disclosed that 56% of refugees subjected to prolonged traumatization such as torture suffer from both PTSD and a depressive disorder.³⁴⁹ Further, PTSD patients with depression report a higher frequency of suicidal

thoughts, whereas patients with PTSD alone manifest an increased frequency of suicidal attempts.³⁵⁰

Studies have consistently demonstrated that exposure to torture and life-threatening events are associated with suicidal behaviors. The intractable suffering associated with torture has been found to play a central role in increased self-destructive and suicidal behavior among traumatized refugees. In a study investigating suicidal behavior among refugees subjected to diverse forms of torture (including isolation, water torture, mock execution, and electric shock), 50% of the sample reported suicidal behavior.³⁵¹ A study of former POWs found that 57% of Japanese-held POWs had suicidal thoughts, and 7% of the German-held POWs had attempted suicide.³⁵²

Strikingly, researchers found that traumatized individuals expose themselves to situations reminiscent of their torture experience.³⁵³ Others found that the nature of the torture method the individual endures is reflected in the content of self-destructive and suicidal ideation. In a sample of 65 refugees who survived torture, one study revealed an association between the torture techniques and the methods used in suicide ideations or attempts. Blunt force applied to head and body was associated with jumping from a height or in front of a train, water torture with drowning, or sharp force torture with self-inflicted stabbing or cutting.³⁵⁴

Damaged Self-concept and Foreshortened Future

Torture victims may have a damaged self-concept (the individual has a subjective feeling of having been irreparably damaged and having undergone an irreversible personality change) and a sense of foreshortened future

correlates in former POWs, 45 J. CLINICAL PSYCHOL. 80 (198), A 442 person sample of former POWs were examined for current and past difficulties with PTSD-related symptoms over the past forty years. Symptoms of severity consistent with a clinical diagnosis of PTSD were described by 56% of the sample. Approximately 50% reported being seriously troubled by PTSD symptoms over the last forty years. The authors concluded that PTSD is a highly persistent phenomenon and that both situation and person variables contribute to the development and maintenance of PTSD. See also C.L. Port et al., A longitudinal and retrospective study of PTSD among older prisoners of war, 158 AM. J. PSYCHIATRY 11474 (2001), The authors examined the retrospective symptom of PTSD dating back to shortly after repatriation and the longitudinal changes in PTSD symptom levels and prevalence rates over a four-year time period among American former POWs from World War II and the Korean War. The findings from both longitudinal and retrospective data support a PTSD symptom pattern of immediate onset and gradual decline, followed by increasing PTSD symptom levels among older trauma survivors. See R. Yehuda et al., Impact of cumulative lifetime trauma and recent stress on current posttraumatic stress disorder symptoms in holocaust survivors, 152 AM J. PSYCHIATRY 1815 (1995), Lifetime trauma, recent stressful events, and presence and severity of PTSD were assessed in seventy-two Holocaust survivors and nineteen comparison subjects. Fifty-five percent of survivors reported PTSD symptoms. The results show that presence and severity of PTSD symptoms in Holocaust survivors are related to current and cumulative lifetime trauma in addition to the Holocaust. The authors concluded that the additive impact of events in addition to the trauma must be considered in explaining the onset, persistence, and severity of PTSD.

³⁴⁶ R. F. Mollica, *Surviving Torture*, 351 NEW ENG. J. MED. 5-7 (2004).

³⁴⁷ L. Eitenger & A. Strom, *Mortality and morbidity after excessive stress*, 11 AM. J. COMMUNITY PSYCHOL. 473-491 (1983).

³⁴⁸ R. F. Mollica, *Surviving Torture*, 351 NEW ENG. J. MED. 5-7 (2004).

³⁴⁹ Marcello Ferrada-Noli et al., *Suicidal behavior after severe trauma. Part 2: The association between methods of torture and of suicidal ideation in posttraumatic stress disorder*, 11 J. TRAUMATIC STRESS 103, 113-24 (1998); For the details on the study see note 173.

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ See S. Momartin & M. Coello, *Self-harming behaviour and dissociation in complex PTSD: Case study of a male tortured refugee*, 16 TORTURE 1 (2006), *Complicated and intense case study of a male survivor of severe torture, which included the reporting of multiple rapes. The study aimed to discuss anger, dissociation, re-enactment, reliving and extreme self-harming behaviour of the patient in order to increase awareness of the serious issue of male rape, torture and its sequelae, in prison settings.*

³⁵⁴ See Marcello Ferrada-Noli et al., *supra* note 156 at 113-24, *The authors hypothesized that the predominant kind of stressful experience in PTSD patients might be reflected in their choice of method when pondering or attempting suicide. The study reports on sixty-five refugees with diagnoses of PTSD and manifest suicidal behavior (40% had suicide attempts; 29% a detailed suicide plan; 31% recurrent suicidal thoughts). Among torture survivors with PTSD symptoms, an association was found between the torture techniques that the victim had been exposed to and the suicide method used in ideation or attempts.*

(e.g., not expecting to have a career, marriage, children, or a normal life span).³⁵⁵ They may exhibit dissociation, a disruption in the integration of consciousness, self-perception, memory and actions, depersonalization, a feeling of being detached from one's self or body, or atypical behavior such as impulse control problems or engagement in high-risk behaviors.³⁵⁶

Psychosis

Although uncommon among survivors of torture, psychosis is among the most serious psychological consequences of torture, and may present itself in the form of delusions (including auditory, visual, tactile and olfactory), bizarre ideations and behaviors, illusions or perceptual distortions and paranoia. Other serious consequences include substance abuse and exacerbations of prior mental illness.³⁵⁷

Other residual effects of torture include experiencing somatic complaints such as pain, headache or other physical complaints.³⁵⁸

Physical Consequences

Empirical evidence has shown that the most important physical consequences in torture survivors involve pain in multiple sites that is long-lasting. Most frequent pains experienced by the survivors are in the head, neck,

shoulder girdle, and the lower back.³⁵⁹ These disabilities often remain years after release from detention and limit the survivors' capacity to do anything other than light work. These pains have been associated with beating and painful stress positions, and confinement in cramped, damp, unsanitary conditions.³⁶⁰

It must be noted that torture is often designed to maximize stress and physical pain *without* causing serious physical injury or death. In advocating for various aggressive interrogation procedures, a working group established in the Department of Defense by Secretary Donald Rumsfeld argued that the removal of prisoners' clothing would create "a feeling of helplessness and dependence" and that slapping a prisoner — "a quick glancing slap to the fleshy part of the cheek or stomach" — could be useful "as shock measures."³⁶¹

It is important to note that, "the absence of ... physical evidence should not be construed to suggest that torture did not occur, since such acts of violence against persons frequently leave no marks or permanent scars."³⁶²

³⁵⁵ APA MANUAL, *supra* note 22, at 424-29; ISTANBUL PROTOCOL, *supra* note 22, at 45.

³⁵⁶ ISTANBUL PROTOCOL, *supra* note 22, at 45.

³⁵⁷ *Id.* at 44.

³⁵⁸ *Id.*

³⁵⁹ Amris K, Roche P. Pain and disability rating in torture survivors: preliminary findings. Poster session presented at the 10th World Congress on pain, IASP. San Diego, California, 2002.

³⁶⁰ AMNESTY INTERNATIONAL, GLIMPSE OF HELL: REPORTS ON TORTURE WORLDWIDE (Forrest Duncan, ed., 1996).

³⁶¹ Jehl, *supra* note 29.

³⁶² Istanbul Protocol, *supra* note 22, at 31.