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33. (~~TS~~/[redacted]) CIA's OTS obtained data on the use of the proposed EITs and their potential long-term psychological effects on detainees. OTS input was based in part on information solicited from a number of psychologists and knowledgeable academics in the area of psychopathology.

34. (~~TS~~/[redacted]) OTS also solicited input from DoD/Joint Personnel Recovery Agency (JPRA) regarding techniques used in its SERE training and any subsequent psychological effects on students. DoD/JPRA concluded no long-term psychological effects resulted from use of the EITs, including the most taxing technique, the waterboard, on SERE students.[14] The OTS analysis was used by OGC in evaluating the legality of techniques.

35. (~~TS~~/[redacted]) Eleven EITs were proposed for adoption in the CTC Interrogation Program. As proposed, use of EITs would be subject to a competent evaluation of the medical and psychological state of the detainee. The Agency eliminated one proposed technique—[redacted]—after learning from DoJ that this could delay the legal review. The following textbox identifies the 10 EITs the Agency described to DoJ.

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[14] (~~S~~) According to individuals with authoritative knowledge of the SERE program, the waterboard was used for demonstration purposes on a very small number of students in a class. Except for Navy SERE training, use of the waterboard was discontinued because of its dramatic effect on the students who were subjects.

41. (U//FOUO) A second unclassified 1 August 2002 OLC opinion addressed the international law aspects of such interrogations.[24] This opinion concluded that interrogation methods that do not violate 18 U.S.C. 2340 would not violate the Torture Convention and would not come within the jurisdiction of the International Criminal Court.

42. (TS/ [redacted]) In addition to the two unclassified opinions, OLC produced another legal opinion on 1 August 2002 at the request of CIA.[25] (Appendix C.) This opinion, addressed to CIA's Acting General Counsel, discussed whether the proposed use of EITs in interrogating Abu Zubaydah would violate the Title 18 prohibition on torture. The opinion concluded that use of EITs on Abu Zubaydah would not violate the torture statute because, among other things, Agency personnel: (1) would not specifically intend to inflict severe pain or suffering, and (2) would not in fact inflict severe pain or suffering.

43. (TS/ [redacted]) This OLC opinion was based upon specific representations by CIA concerning the manner in which EITs would be applied in the interrogation of Abu Zubaydah. For example, OLC was told that the EIT "phase" would likely last "no more than several days but could last up to thirty days." The EITs would be used on "an as-needed basis" and all would not necessarily be used. Further, the EITs were expected to be used "in some sort of escalating fashion, culminating with the waterboard though not necessarily ending with this technique." Although some of the EITs

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of conduct, although a single incident could constitute torture. OLC also noted that courts may be willing to find a wide range of physical pain can rise to the level of "severe pain and suffering." Ultimately, however, OLC concluded that the cases show that only acts "of an extreme nature have been redressed under the TVPA's civil remedy for torture." White House Counsel Memorandum at 22 - 27.

[24] (U//FOUO) OLC Opinion by John C. Yoo, Deputy Assistant Attorney General, OLC (1 August 2002).

[25] (TS/ [redacted]) Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, "Interrogation of al Qaida Operative" (1 August 2002) at 15.

might be used more than once, "that repetition will not be substantial because the techniques generally lose their effectiveness after several repetitions." With respect to the waterboard, it was explained that:

> . . . the individual is bound securely to an inclined bench . . . . The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, the air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual's blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of "suffocation and incipient panic," i.e., the perception of drowning. The individual does not breathe water into his lungs. During those 20 to 40 seconds, water is continuously applied from a height of [12 to 24] inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated. The water is usually applied from a canteen cup or small watering can with a spout. . . . [T]his procedure triggers an automatic physiological sensation of drowning that the individual cannot control even though he may be aware that he is in fact not drowning. [I]t is likely that this procedure would not last more than 20 minutes in any one application.

Finally, the Agency presented OLC with a psychological profile of Abu Zubaydah and with the conclusions of officials and psychologists associated with the SERE program that the use of EITs would cause no long term mental harm. OLC relied on these representations to support its conclusion that no physical harm or prolonged mental harm would result from the use on him of the EITs, including the waterboard.[26]

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26 ~~(TS/~~[redacted] According to the Chief, Medical Services, OMS was neither consulted nor involved in the initial analysis of the risk and benefits of EITs, nor provided with the OTS report cited in the OLC opinion. In retrospect, based on the OLC extracts of the OTS report, OMS contends that the reported sophistication of the preliminary EIT review was exaggerated, at least as it related to the waterboard, and that the power of this EIT was appreciably overstated in the report. Furthermore, OMS contends that the expertise of the SERE psychologist/interrogators on

44. (TS/ [redacted] OGC continued to consult with DoJ as the CTC Interrogation Program and the use of EITs expanded beyond the interrogation of Abu Zubaydah. This resulted in the production of an undated and unsigned document entitled, "Legal Principles Applicable to CIA Detention and Interrogation of Captured Al-Qa'ida Personnel."[27] According to OGC, this analysis was fully coordinated with and drafted in substantial part by OLC. In addition to reaffirming the previous conclusions regarding the torture statute, the analysis concludes that the federal War Crimes statute, 18 U.S.C. 2441, does not apply to Al-Qa'ida because members of that group are not entitled to prisoner of war status. The analysis adds that "the [Torture] Convention permits the use of [cruel, inhuman, or degrading treatment] in exigent circumstances, such as a national emergency or war." It also states that the interrogation of Al-Qa'ida members does not violate the Fifth and Fourteenth Amendments because those provisions do not apply extraterritorially, nor does it violate the Eighth Amendment because it only applies to persons upon whom criminal sanctions have been imposed. Finally, the analysis states that a wide range of EITs and other techniques would not constitute conduct of the type that would be prohibited by the Fifth, Eighth, or Fourteenth Amendments even were they to be applicable:

> The use of the following techniques and of comparable, approved techniques does not violate any Federal statute or other law, where the CIA interrogators do not specifically intend to cause the detainee to undergo severe physical or mental pain or suffering (i.e., they act with the good faith belief that their conduct will not cause such pain or suffering): isolation, reduced caloric intake (so long as the amount is calculated to maintain the general health of the detainees), deprivation of reading material, loud music or white

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the waterboard was probably misrepresented at the time, as the SERE waterboard experience is so different from the subsequent Agency usage as to make it almost irrelevant. Consequently, according to OMS, there was no *a priori* reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe.

27 (TS/ [redacted] "Legal Principles Applicable to CIA Detention and Interrogation of Captured Al-Qa'ida Personnel," attached to [redacted] (16 June 2003).

noise (at a decibel level calculated to avoid damage to the detainees' hearing), the attention grasp, walling, the facial hold, the facial slap (insult slap), the abdominal slap, cramped confinement, wall standing, stress positions, sleep deprivation, the use of diapers, the use of harmless insects, and the water board.

According to OGC, this analysis embodies DoJ agreement that the reasoning of the classified 1 August 2002 OLC opinion extends beyond the interrogation of Abu Zubaydah and the conditions that were specified in that opinion.

NOTICE TO AND CONSULTATION WITH EXECUTIVE AND CONGRESSIONAL OFFICIALS

45. (TS/ [redacted] At the same time that OLC was reviewing the legality of EITs in the summer of 2002, the Agency was consulting with NSC policy staff and senior Administration officials. The DCI briefed appropriate senior national security and legal officials on the proposed EITs. In the fall of 2002, the Agency briefed the leadership of the Congressional Intelligence Oversight Committees on the use of both standard techniques and EITs.

46. (TS/ [redacted] In early 2003, CIA officials, at the urging of the General Counsel, continued to inform senior Administration officials and the leadership of the Congressional Oversight Committees of the then-current status of the CTC Program. The Agency specifically wanted to ensure that these officials and the Committees continued to be aware of and approve CIA's actions. The General Counsel recalls that he spoke and met with White House Counsel and others at the NSC, as well as DoJ's Criminal Division and Office of Legal Counsel beginning in December 2002 and briefed them on the scope and breadth of the CTC's Detention and Interrogation Program.

47. (TS/ [redacted] Representatives of the DO, in the presence of the Director of Congressional Affairs and the General Counsel, continued to brief the leadership of the Intelligence Oversight Committees on the use of EITs and detentions in February

Stress Positions

97. (~~TS~~/[redacted] OIG received reports that interrogation team members employed potentially injurious stress positions on Al-Nashiri. Al-Nashiri was required to kneel on the floor and lean back. On at least one occasion, an Agency officer reportedly pushed Al-Nashiri backward while he was in this stress position. On another occasion, [redacted] said he had to intercede after [redacted] expressed concern that Al-Nashiri's arms might be dislocated from his shoulders. [redacted] explained that, at the time, the interrogators were attempting to put Al-Nashiri in a standing stress position. Al-Nashiri was reportedly lifted off the floor by his arms while his arms were bound behind his back with a belt.

Stiff Brush and Shackles

98. (~~TS~~/[redacted] interrogator reported that he witnessed other techniques used on Al-Nashiri that the interrogator knew were not specifically approved by DoJ. These included the use of a stiff brush that was intended to induce pain on Al-Nashiri and standing on Al-Nashiri's shackles, which resulted in cuts and bruises. When questioned, an interrogator who was at [redacted] acknowledged that they used a stiff brush to bathe Al-Nashiri. He described the brush as the kind of brush one uses in a bath to remove stubborn dirt. A CTC manager who had heard of the incident attributed the abrasions on Al-Nashiri's ankles to an Agency officer accidentally stepping on Al-Nashiri's shackles while repositioning him into a stress position.

Waterboard Technique

99. (~~TS~~/[redacted] The Review determined that the interrogators used the waterboard on Khalid Shaykh Muhammad in a manner inconsistent with the SERE application of the waterboard and the description of the waterboard in the DoJ OLC opinion, in that the technique was used on Khalid Shaykh Muhammad a large number of times. According to the General Counsel, the Attorney

General acknowledged he is fully aware of the repetitive use of the waterboard and that CIA is well within the scope of the DoJ opinion and the authority given to CIA by that opinion. The Attorney General was informed the waterboard had been used 119 times on a single individual.

100. ~~(TS/~~[redacted] Cables indicate that Agency interrogators [redacted] applied the waterboard technique to Khalid Shaykh Muhammad 183 [redacted]

47 [redacted]

[redacted][48]

[redacted]

101. [redacted]

102. [redacted]

48 ~~(TS/~~ [redacted] The OLC opinion dated 1 August 2002 states, "You have also orally informed us that it is likely that this procedure [waterboard] would not last more than 20 minutes in any one application." [redacted]

[redacted]

[redacted]

159. [redacted]

160. [redacted]

[redacted]

[redacted]

161. [redacted]

162. [redacted]

163. [redacted]

[redacted]

said he believes the use of EITs has proven to be extremely valuable in obtaining enormous amounts of critical threat information from detainees who had otherwise believed they were safe from any harm in the hands of Americans.

219. [redacted]

220. (~~TS~~/ [redacted]) Inasmuch as EITs have been used only since August 2002, and they have not all been used with every high value detainee, there is limited data on which to assess their individual effectiveness. This Review identified concerns about the use of the waterboard, specifically whether the risks of its use were justified by the results, whether it has been unnecessarily used in some instances, and whether the fact that it is being applied in a manner different from its use in SERE training brings into question the continued applicability of the DoJ opinion to its use. Although the waterboard is the most intrusive of the EITs, the fact that precautions have been taken to provide on-site medical oversight in the use of all EITs is evidence that their use poses risks.

221. (~~TS~~/ [redacted]) Determining the effectiveness of each EIT is important in facilitating Agency management's decision as to which techniques should be used and for how long. Measuring the overall effectiveness of EITs is challenging for a number of reasons including: (1) the Agency cannot determine with any certainty the totality of the intelligence the detainee actually possesses; (2) each detainee has different fears of and tolerance for EITs; (3) the application of the same EITs by different interrogators may have

different results; and [redacted]

222. (~~TS~~/ [redacted] The waterboard has been used on three detainees: Abu Zubaydah, Al-Nashiri, and Khalid Shaykh Muhammad. [redacted] with the belief that each of the three detainees possessed perishable information about imminent threats against the United States.

223. (~~TS~~/ [redacted] Prior to the use of EITs, Abu Zubaydah provided information for [redacted] intelligence reports. Interrogators applied the waterboard to Abu Zubaydah at least 83 times during August 2002. During the period between the end of the use of the waterboard and 30 April 2003, he provided information for approximately [redacted] additional reports. It is not possible to say definitively that the waterboard is the reason for Abu Zubaydah's increased production, or if another factor, such as the length of detention, was the catalyst. Since the use of the waterboard, however, Abu Zubaydah has appeared to be cooperative, [redacted]

224. (~~TS~~/ [redacted] With respect to Al-Nashiri, [redacted] reported two waterboard sessions in November 2002, after which the psychologist/interrogators determined that Al-Nashiri was compliant. However, after being moved [redacted] Al-Nashiri was thought to be withholding information. Al-Nashiri subsequently received additional EITs, [redacted] but not the waterboard. The Agency then determined Al-Nashiri to be "compliant." Because of the litany of

techniques used by different interrogators over a relatively short period of time, it is difficult to identify exactly why Al-Nashiri became more willing to provide information. However, following the use of EITs, he provided information about his most current operational planning and [redacted] as opposed to the historical information he provided before the use of EITs.

225. (TS/[redacted] On the other hand, Khalid Shaykh Muhammad, an accomplished resistor, provided only a few intelligence reports prior to the use of the waterboard, and analysis of that information revealed that much of it was outdated, inaccurate, or incomplete. As a means of less active resistance, at the beginning of their interrogation, detainees routinely provide information that they know is already known. Khalid Shaykh Muhammad received 183 applications of the waterboard in March 2003 [redacted]

POLICY CONSIDERATIONS AND CONCERNS REGARDING THE DETENTION AND INTERROGATION PROGRAM

226. (TS/[redacted] The EITs used by the Agency under the CTC Program are inconsistent with the public policy positions that the United States has taken regarding human rights. This divergence has been a cause of concern to some Agency personnel involved with the Program.

subject of a separate Report of Investigation by the Office of Inspector General. [redacted] unauthorized techniques were used in the interrogation of an individual who died at Asadabad Base while under interrogation by an Agency contractor in June 2003. Agency officers did not normally conduct interrogations at that location. [redacted] the Agency officers involved lacked timely and adequate guidance, training, experience, supervision, or authorization, and did not exercise sound judgment.

259. ~~(TS/~~ [redacted] The Agency failed to issue in a timely manner comprehensive written guidelines for detention and interrogation activities. Although ad hoc guidance was provided to many officers through cables and briefings in the early months of detention and interrogation activities, the DCI Confinement and Interrogation Guidelines were not issued until January 2003, several months after initiation of interrogation activity and after many of the unauthorized activities had taken place. [redacted]

260. ~~(TS/~~ [redacted] Such written guidance as does exist to address detentions and interrogations undertaken by Agency officers [redacted] is inadequate. The Directorate of Operations Handbook contains a single paragraph that is intended to guide officers [redacted] Neither this dated guidance nor general Agency guidelines on routine intelligence collection is adequate to instruct and protect Agency officers involved in contemporary interrogation activities, [redacted]

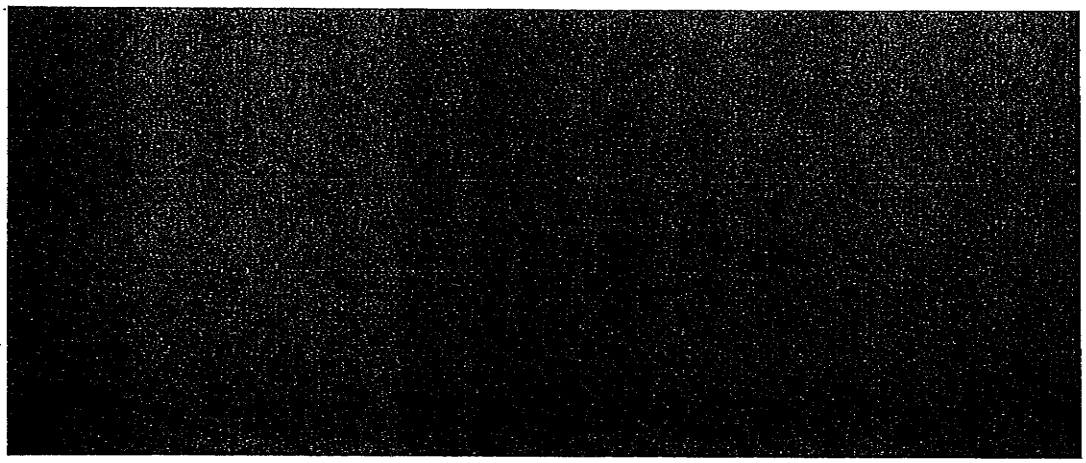
261. ~~(TS/~~ [redacted] During the interrogations of two detainees, the waterboard was used in a manner inconsistent with the written DoJ legal opinion of 1 August 2002. DoJ had stipulated that

its advice was based upon certain facts that the Agency had submitted to DoJ, observing, for example, that ". . . you (the Agency) have also orally informed us that although some of these techniques may be used with more than once [*sic*], that repetition will not be substantial because the techniques generally lose their effectiveness after several repetitions." One key Al-Qa'ida terrorist was subjected to the waterboard at least 183 times [redacted] and was denied sleep for a period of 180 hours. In this and another instance, the technique of application and volume of water used differed from the DoJ opinion.

262. (~~TS~~/ [redacted] OMS provided comprehensive medical attention to detainees [redacted] where EITs were employed with high value detainees, [redacted] OMS did not issue formal medical guidelines until April 2003. Per the advice of CTC/Legal, the OMS Guidelines were then issued as "draft" and remain so even after being re-issued in September 2003.

263. [redacted]

264. (~~TS~~/ [redacted] Agency officers report that reliance on analytical assessments that were unsupported by credible intelligence may have resulted in the application of EITs without justification. Some participants in the Program, particularly field interrogators, judge that CTC assessments to the effect that detainees are withholding information are not always supported by an objective



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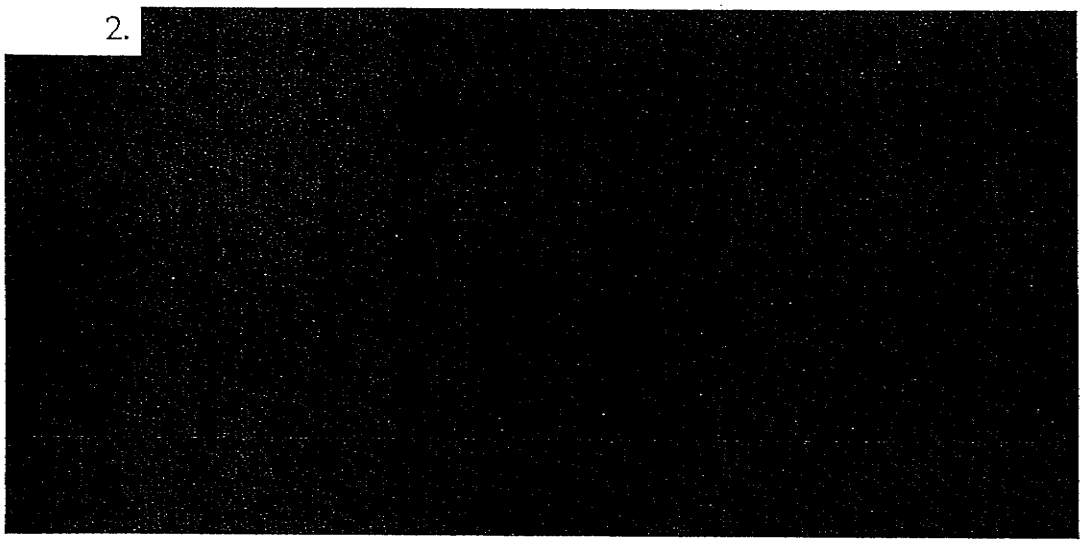

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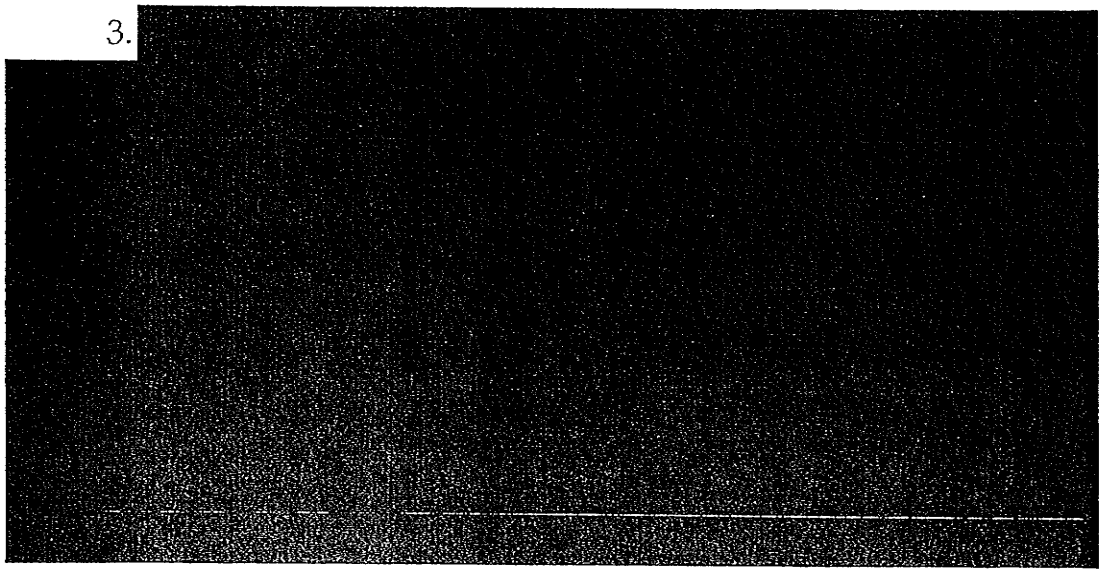

[redacted]

4. [redacted]

5. [redacted]

6. [redacted]

7. [redacted]

LEGAL AUTHORITIES

Properly conducted and authorized interrogations:

- Do not violate the **federal anti-torture statute, 18 U.S.C. 2340-2340A**

- Do not violate the **Constitution**. They do not "shock the conscience" under the **5th and 14th Amendments**. The **8th Amendment** prohibition on cruel and unusual "punishment" is inapplicable.

LEGAL AUTHORITIES CONT.

Properly conducted and authorized interrogations:

- Do not constitute "cruel, inhumane and degrading treatment or punishment" under the **Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment** because, under U.S. law, those terms are limited to U.S. constitutional requirements.

9). Stress Positions:

Purpose: A variety of stress positions are possible. They focus on producing mild physical discomfort from prolonged muscle use, rather than pain associated with contortions or twisting of the body.

Application: Among these stress positions are having:

(A) the detainee kneel on the floor and lean back at a 45-degree angle.
(B) the detainee lean against a wall with only their forehead touching the wall and feet away as far as possible from the wall.

5). Abdominal slap:

Purpose: To instill fear and despair, to punish selective behavior, and to instill humiliation or cause insult.

Application: The interrogator is positioned directly in front of the detainee. With the interrogator's fingers held tightly together and fully extended, with the palm toward the interrogator's own body and about one foot from the detainee's abdomen, using the wrist as the fixed pivot point, the interrogator slaps the detainee in the detainee's abdomen. The interrogator does not use a fist, nor is the slap delivered either below the navel or above the sternum.

[redacted]

INTERROGATIONS OF DETAINEES

- OLC issued three opinions in August 2002 and another in March 2003 that discussed the legal standards for interrogations of detainees. One other opinion, issued in March 2002, considered a related topic. (~~TS~~ [redacted]

  - In a letter opinion dated August 1, 2002, OLC advised Judge Gonzales that the use of an interrogation technique in the war against terrorism, if it did not violate the United States criminal statute forbidding torture, 18 U.S.C. §§ 2340-2340A, would neither violate the international Convention Against Torture ("CAT") nor create a basis for prosecution under the Rome Statute establishing the International Criminal Court. (U)

  - In a lengthier opinion of the same date, OLC expanded on the explanation of the scope of the criminal statute. It concluded that, to constitute torture, an act must inflict pain equivalent to that of serious physical injury, such as organ failure, impairment of bodily function, or death. Purely mental pain could amount to torture only if it resulted from one of the predicate acts named in the statute – threats of death or torture, infliction of physical pain amounting to torture, use of drugs that alter personality, or threats to do any of these things to a third party – and only if it lasted for a significant duration (months or years). The opinion found that the criminal statute would be unconstitutional if applied in a manner that interfered with the President's authority as Commander-in-Chief to conduct a military campaign. (U)

  - In an opinion also issued August 1, 2002, OLC advised the CIA that specific interrogation techniques, if used against Abu Zubaydah, would not violate the criminal statute against torture. The specific techniques were: a facial slap or insult slap not designed to inflict pain, forms of cramped confinement (including confinement in a space with an insect, of which Abu Zubaydah is particularly afraid), wall standing that induces muscle fatigue, a variety of stress positions inducing discomfort similar to muscle fatigue, sleep deprivation, "walling" (in which the subject is pushed against a wall in a manner that causes a loud noise but no injury), and the "waterboard" (in which water is dripped onto a cloth over the subject's mouth and nose, creating the perception of drowning). (~~TS~~ [redacted]

  - On March 14, 2003, OLC issued an opinion to the Department of Defense about military interrogation of alien unlawful combatants held outside the United States. The opinion specifically addressed al Qaeda and Taliban detainees.

It considered a wider range of legal authorities than the opinions for Judge Gonzales and the CIA but did not assess the legality of particular techniques, except by way of examples divorced from the specific facts of any particular interrogation. In addition to repeating much of the analysis from earlier opinions, this opinion concluded that the Fifth Amendment does not apply to the interrogation of enemy combatants outside the United States, and Eighth Amendment does not apply outside the context of punishment; that the torture statute would not apply to interrogations within the territorial United States or on permanent military bases outside the territory of the United States; and that the obligations of the United States under the CAT, with regard to the prohibition against cruel, inhuman, or degrading treatment, extend only to preventing conduct that would be "cruel and unusual" under the Eighth Amendment or would "shock the conscience" under the Due Process Clause of the Fifth Amendment. ~~(S)~~

- In addition, on March 13, 2002, OLC issued an opinion to the Department of Defense, concluding that the President has plenary authority, as Commander in Chief, to transfer to other countries any members of the Taliban militia, al Qaeda, or other terrorist organizations that the United States armed forces have captured and are holding outside the United States. (U)

• The lengthy opinion of August 1, 2002, about the scope of the criminal statute is now posted on the *Washington Post*'s web site. A draft memorandum that a Department of Defense working group prepared in March 2003 and that, we believe, reflects familiarity with a draft of the OLC opinion of March 2003 is available on the web site of National Public Radio. In addition, a draft memorandum of OLC from January 2002, dealing with the application of the Geneva Conventions to failed states, appears to have been provided to *Newsweek*, as has a December 28, 2001 opinion about the availability of habeas corpus to detainees at Guantanamo. (U)

• The Inspector General of the CIA has written a report about the CIA's program using "enhanced interrogation techniques." We have two basic disagreements with the report. First, we disagree with the IG – and with the CIA's Office of General Counsel ("OGC") – about whether OLC endorsed a set of bullet points that OGC produced in the spring of 2003, summarizing legal principles that were said to apply to interrogations of detained terrorists outside the United States. OLC attorneys reviewed and commented upon drafts of these bullet points. The General Counsel believes that this procedure amounted to OLC's concurrence. As was made clear to OGC at a meeting on June 17, 2003, OLC does not view these unsigned, undated bullet points as a opinion of OLC or a statement of its views. Second, the IG's report states that, at a meeting of the NSC principals on July 29, 2003, the Attorney General approved "expanded use of the techniques." The Attorney General did approve the use of approved techniques on detainees other than Abu Zubaydah, but the techniques were not otherwise "expanded" in any way. ~~(TS~~ [redacted]

- We expect demands for the release of the OLC opinions that have not become public. The Department believes that these opinions should remain confidential. Judge Gonzales and Andrew Card have stated that they would support an assertion of executive privilege to protect the documents, if issuance of a subpoena makes such an assertion necessary. (U)

Addendum: Summary of Advice

Advice to the Counsel to the President

In a letter opinion dated August 1, 2002, OLC advised Judge Gonzales that the use of an interrogation technique in the war against terrorism, if it did not violate the United States criminal statute forbidding torture, 18 U.S.C. §§ 2340-2340A, would neither violate the international Convention Against Torture nor create a basis for prosecution under the Rome Statute establishing the International Criminal Court. The opinion set out the elements of the criminal statute as follows: "(1) the torture occurred outside the United States; (2) the defendant acted under color of law; (3) the victim was within the defendant's custody or physical control; (4) the defendant specifically intended to cause severe physical or mental pain or suffering; and (5) . . . the act inflicted severe physical or mental pain or suffering." The opinion then concluded that, in view of the understandings about the Convention that attended its ratification by the United States, the international law obligations under the Convention could not exceed those under the criminal statute. It further concluded that the United States is not bound by the ICC Treaty, which it has not ratified, and that, in any event, the interrogation of al Qaeda operatives and Taliban soldiers could not be a crime that would come within the ICC's jurisdiction, because the interrogation would not be part of a systematic attack against a civilian population and because neither al Qaeda operatives nor Taliban soldiers are prisoners of war under the Geneva Convention. The opinion did not examine specific interrogation techniques.

In a lengthier opinion of the same date, OLC expanded on the explanation of the scope of the criminal statute. It concluded that, to constitute torture, an act must inflict pain equivalent to that of serious physical injury, such as organ failure, impairment of bodily function, or death. Purely mental pain could amount to torture only if it resulted from one of the predicate acts named in the statute – threats of death or torture, infliction of physical pain amounting to torture, use of drugs that alter personality, or threats to do any of these things to a third party – and only if it lasted for a significant duration (months or years). A defendant would violate the statute only if he specifically intended to inflict such suffering. The Convention on Torture, the opinion stated, similarly designates as torture only such extreme measures. The opinion did not review and approve specific techniques. Instead, it observed that, in other contexts, courts have tended to examine the totality of the circumstances and to find torture where the acts in question are shocking. The opinion found that the criminal statute would be unconstitutional if applied in a manner that interfered with the President's authority as Commander-in-Chief to conduct a military campaign. It argued, finally, that an interrogator might be able to assert defenses of necessity and self-defense if charged with violating the torture statute.

Advice to CIA

In an opinion also issued August 1, 2002, OLC advised the CIA that specific interrogation techniques, if used against Abu Zubaydah, would not violate the criminal statute against torture. The specific techniques were: a facial slap or insult slap not designed to inflict pain, forms of cramped confinement (including confinement in a space with an insect, of which Abu Zubaydah is particularly afraid), wall standing that induces muscle fatigue, a variety of stress positions inducing discomfort similar to muscle fatigue, sleep deprivation, "walling" (in which the subject is pushed against a wall in a manner that causes a loud noise but no injury), and the "waterboard" (in which water is dripped onto a cloth over the subject's mouth and nose, creating the perception of drowning). These techniques (except for the use of the insect) have been employed on United States military personnel as part of training and have been found not to cause prolonged mental or physical harm. Furthermore, an assessment of Abu Zubaydah by the CIA showed that he had no conditions that would make it likely for him to suffer prolonged mental harm as a result of the interrogation. With this background, the opinion concluded that none of the techniques would cause him the severe physical pain that would amount to torture under the statute, particularly because medical personnel would be monitoring the interrogation. Nor would the techniques cause the severe mental harm that might amount to torture – a prolonged mental harm resulting from one of the predicate acts in the statute. The only technique that might involve such an act was the use of the waterboard, which could convey a threat of severe pain or suffering, but research indicated that the technique would not cause prolonged mental harm and so would not come within the statute. In any event, the statute would be violated only if the defendant had a specific intent to cause severe pain or suffering. No such intent could be found here, in part because of the careful restrictions under which the interrogation would take place.

Advice to Department of Defense

On March 14, 2003, OLC issued an opinion to the Department of Defense about military interrogation of alien unlawful combatants held outside the United States. The opinion specifically addressed al Qaeda and Taliban detainees. It considered a wider range of legal authorities than the opinions for Judge Gonzales and the CIA but did not assess the legality of particular techniques, except by way of examples divorced from the specific facts of any particular interrogation. The opinion concluded that the Fifth Amendment does do not apply to the interrogation of enemy combatants outside the United States, and Eighth Amendment does not apply outside the context of punishment. It then turned to several criminal laws. It determined that interrogation methods not involving physical contact would not constitute assault, and techniques involving minimal physical contact (poking, slapping;, or shoving) are unlikely to produce the injury necessary to establish assault. 18 U.S.C. § 113. It also found it unlikely that statutes on maiming, 18 U.S.C. § 114, or interstate stalking, 18 U.S.C. § 2261A, could apply. It found that the War Crimes Act, 18 U.S.C. § 2441, could not reach the interrogation of al Qaeda and Taliban detainees because, as illegal belligerents, they do not

qualify for protection under the Geneva or Hague Conventions. The torture statute, the opinion concluded, would not apply to interrogations within the territorial United States or on permanent military bases outside the territory of the United States. It nonetheless repeated the analysis of the statutory elements as laid out in the earlier opinions, as well as the analysis of the Convention Against Torture. The opinion went beyond the earlier ones, however, by discussing the Convention's prohibition against cruel, inhuman, or degrading treatment. It found that the United States' obligations in this regard extended only to preventing conduct that would be "cruel and unusual" under the Eighth Amendment or would "shock the conscience" under the Due Process Clause of the Fifth Amendment. As to the Eighth Amendment, it observed that the analysis turns on whether the official acts in good faith or, instead, maliciously or sadistically. Whether any pain inflicted during an interrogation is proportional to the necessity for its use, for example, would inform that analysis. Cases on conditions of confinement also provide analogues. There, a violation can be shown only if there is deprivation of a basic human need, combined with a deliberate indifference to the prisoner's health and safety. The opinion specifically stated that a brief stay in solitary confinement would not amount to a violation, nor would insults or ridicule. The "shock the conscience" test, the opinion stated, is an evolving one, but it noted that rape or beating during an interrogation could constitute behavior so disproportionate to a legitimate need so inspired by malice or sadism as to meet the standard. Methods chosen solely to produce mental suffering might also shock the conscience. But some physical contact – a shove or slap – would not be sufficient. The detainee would have to suffer some physical injury or severe mental distress resulting from the interrogator's conscious disregard of a known risk to the detainee. Finally, the opinion discussed the defenses of necessity and self-defense that an interrogator might assert if charged with a crime and found that these defenses might be available under some circumstances.

1. Describe the importance of each technique as applied to this person. What do you reasonably hope to accomplish? Describe past successes of each technique in detail.

2. Describe how each technique is consistent with "traditional executive behavior, contemporary practice, and the standards of blame generally applied to them." Describe any other traditions – in state law, or in foreign practice – in which these techniques are used or approved.

3. To what extent are the techniques designed to "instill stress, hopelessness, and fear, and to break resistance."

4. Do any of the techniques cause "severe mental distress or suffering"?

5. How close is each technique to the "rack and screw"?

6. Do the techniques "offend hardened sensibilities"?

7. Do the techniques violate "the whole community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct"?

8. Do the techniques "violate the decencies of civilized conduct"?

9. Are the techniques "so egregious, so outrageous, that they fairly may be said to shock the contemporary conscience"

UNCLASSIFIED

Ann Collins

DEPARTMENT OF STATE
2002 DEC 12 P 5:17

WASHFAX RECEIPT
DEPARTMENT OF STATE

B

S/S #

J2

RELEASED IN PART
B1, 1.4(D), B6

MESSAGE NO. 02879 CLASSIFICATION Confidential No. Pages 4

FROM: [redacted] (Officer name) L/PM (Office symbol) [redacted] (Extension) 5635 (Room number) B6

MESSAGE DESCRIPTION [redacted] B1

TO: (Agency)	DELIVER TO:	Extension	Room No.
CIA	[redacted]		B6
DOJ			
DOJ			

FOR: CLEARANCE ☑ INFORMATION ☐ PER REQUEST ☐ COMMENT ☐

REMARKS: Attached for final clearance is revised cable reflecting input received from DOD and DOJ and some further refinements from State. Please clear ASAP

S/S Officer: _____

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ARCHIE M BOLSTER
DATE/CASE ID: 29 OCT 2009 200907904

FORM DS-1760 7-72

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[redacted]

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THE WHITE HOUSE

WASHINGTON

February 7, 2002

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

SUBJECT: Humane Treatment of al Qaeda and Taliban Detainees

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

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

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

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

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

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

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

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

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

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

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

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

[redacted]

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May 11, 2004

MEMORANDUM FOR THE FILES

From: Jack L. Goldsmith III
Assistant Attorney General

Re: Advice to the Department of Defense on Interrogations

On April 23, 2004, OLC advised the Department of Defense that four techniques for interrogation of a prisoner at Guantanamo would be lawful, if justified by military necessity and if conducted in accordance with the Secretary of Defense's memorandum of April 15, 2003, including Attachment B, which specified a variety of safeguards (such as "appropriate supervision" and an interrogation plan including "limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel"). Two of these techniques involved only verbal tactics to be used in the interrogation: (1) verbal strategems, "not beyond the limits that would apply to a POW," aimed at breaking down a detainee's pride and ego; (2) "Mutt and Jeff' tactics, in which one interrogator is friendly to the detainee and the other might employ the verbal stratagem under (1). The third technique consisted of providing a reward or removing a privilege, "above and beyond those that are required by the Geneva Convention." The fourth technique was isolation for a limited period. We had earlier advised the Department of Defense that "[a] brief stay in solitary confinement alone is insufficient to state a deprivation" of basic human needs and thus would not constitute "cruel, inhuman, or degrading" treatment under the Convention Against Torture, let alone meet the higher standard for "torture" under that Convention and the United States criminal law implementing it, 18 U.S.C. §§ 2340-2340A. *See* Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* at 64 (Mar. 14, 2003). The Department of Defense proposed that the solitary confinement might continue as long as 60 days, with an internal review after 30. We stated, however, that our advice was limited to the legality of the 30-day period and that we ought to be consulted again if the Department of Defense wished to extend that time.

We note here that the Department of Defense, in its Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Apr. 4, 2003), concluded that all four techniques, as described, not only were lawful under all pertinent laws, but also were of high utility and consistent with the historical role of United States forces in interrogations.

Classified: Derivative, Memorandum of Secretary
Reason: 1.5(a)
Declassify on: 2 April 2013

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Declassified by Derivation

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Applicability of Geneva Conventions III (POWs) and IV (civilians) in Iraq after June 30, 2004, and Effect on US Powers and Duties Regarding Detentions

- GC III allows the US to continue to hold POWs, and to detain any new POWs, until "the cessation of active hostilities" (Art. 118).
  - Active hostilities do not cease until military operations have ceased and there is no reasonable basis to believe that they are likely to resume.
  - Because this standard is factual, the legal changes contemplated for June 30 are not directly relevant.
  - GC III protects POWs, including any arrested after June 30, "until their final release and repatriation" (Art. 5).
  - A handover of an Iraqi POW after June 30 to the Iraqi Interim Government ("IIG") for continued detention, even prior to the cessation of active hostilities, constitutes a release and repatriation rather than a transfer, and thus terminates the applicability of GC III to that person.
    - The customary rule is that a national of the power detaining him is not a POW. GC III recognizes this rule by distinguishing between the detaining power and the power on which a POW depends (*e.g.*, Arts. 21, 43, 111) and assuming that persons tried by a detaining power will not be its nationals (Arts. 87, 100).
    - But it would be good legal policy for the US to seek assurances that the IIG will humanely treat Iraqi POWs that the US releases to it, akin to the assurances that GC III requires for transfers of POWs between powers. (Art. 12 allows such transfers only after the transferring power "has satisfied itself of the willingness and ability" of the receiving power "to apply" GC III; Art. 6 prohibits agreements between powers that adversely affect POWs.)
    - To help publicly demonstrate that the release is not really a transfer, the US also might seek assurance from the IIG that the POWs handed over will be detained and tried by civilian rather than military authorities. (*Cf.* Art. 84: POWs usually to be tried "only by a military court.")
  - GC III does not require any particular response to IIG demand for POWs before active hostilities cease..
  - US may transfer its POWs among US detention locations, including transferring out of Iraq (*see* Arts. 46-48). GC III does not impose any additional restrictions on such transfers simply b/c occupation has ended.
  - After cessation of active hostilities, US may continue to hold POWs "against whom criminal proceedings for an indictable offence are pending" (Art. 119), where the US either has commenced the proceedings or holds the POWs per an agreement with the power that has (*see* Art. 6).
  - After cessation of active hostilities, the US may decline to release and repatriate to Iraq individual POWs who have freely so requested for reasonable fear of unjust treatment (which does not include fear of a proper prosecution), notwithstanding the language of Art. 118 (imposing duty of release and repatriation) and Art. 7 (barring waiver of rights). But

such persons should be released into a country other than Iraq, absent pending criminal proceedings per Art. 119.

- GC IV allows the US to continue to hold most previously detained "protected persons" (Art. 4) at least until "the close of hostilities" (Art. 133).
  - Although each case will be highly fact-dependent, at least the following are not "protected persons" in Iraq:
    - US citizens.
    - Nationals of states that have been US allies in the war against Iraq or are otherwise "co-belligerents," which includes at least UK, Australia, Spain, Poland, Kuwait, and Qatar.
    - POWs, including prisoners who are members of militias, volunteer corps, or other organized resistance movements, so long as they otherwise meet the criteria for being lawful combatants.
    - Terrorist operatives engaged in transnational armed conflict against the US (*e.g.*, operatives of Al Qaeda and affiliated groups) who are not citizens or permanent residents of Iraq.
  - The "close of hostilities" standard is at least as broad as "cessation of active hostilities."
  - Because this standard is factual, the legal changes contemplated for June 30 are not directly relevant.
  - Protected persons detained before June 30 receive the protections of GC IV until their "release, repatriation or re-establishment" (Art. 6). But a handover of such Iraqi detainees to the IIG after June 30 would constitute a release and repatriation, by the same reasoning as for POWs.
  - There is a continuing duty to release any individual for whom "the reasons which necessitated his internment no longer exist" (Art. 132).
  - The ability of the US to transfer out of Iraq protected persons detained before June 30 would be subject to Art. 49.
  - After June 30, the US will have a duty to hand over to the IIG any detainees who "have been accused of offences or convicted by the courts in occupied territory" (Art. 77).

- After June 30, GC IV will no longer provide authority to arrest persons and detain them. (*See* Art. 78.)
  - But if hostilities are continuing, customary laws of war will permit arrest and detention of unlawful combatants: That is, non-POWs who "associate themselves with the military arm" of a group in armed conflict with the US. (*Quirin*, 317 U.S. at 37; *see also id.* at 30-38.)
  - Within Iraq, the scope of any additional arrest and detention power after occupation ends will be determined by the authorization of UN Sec. Council Res. 1511 to "take all necessary measures to contribute to the maintenance of security and stability in Iraq." International law regarding security detentions in armed conflicts (such as GC IV, Art. 78, and GC

Protocol I, Art. 75[1]), might inform the interpretation of that authorization. (*See* State paper concerning scope of 1511.)

- An agreement with the IIG or a new UN Sec. Council Resolution could provide authority to arrest and detain additional to that of Res. 1511.

- After June 30, the exercise of the above powers in Iraq will depend on either the IIG's continuing consent to, or the UN's continued authorization of, military operations in Iraq. US actions in Iraq could not be inconsistent with the scope of that consent or authorization.
  - As of June 30, Iraqi consent to continuing US military operations in Iraq can reasonably be inferred from the following:
    - Depending on its details, CPA Order 17 as revised, which will be the *de facto* SOFA;
    - The Transition Administration Law ("TAL"), which the Iraqi Governing Council approved, particularly Arts. 26(C) (continuing CPA Orders in force) and 59(B) (including the Iraqi army within the US-headed multi-national force); and
    - Any letters issued by Iraqi representatives on or before June 30 welcoming the continued presence of the multi-national force.
  - The IIG might revoke Iraqi consent at any time.
  - UN Sec. Council Res. 1511 (particularly if reaffirmed by a new Res.), to the extent of its terms, could, as a *legal* matter, trump the wishes or actions of the IIG regarding continued military operations of US forces in Iraq.
  - But as long as active hostilities have not ceased, the US may continue to hold POWs outside of Iraq pursuant to GC III.

[1] The US has not ratified Protocol I but has recognized Article 75 as setting forth fundamental guarantees that the US supports.