

ACLU 2004 Remand Documents

CIA OIG Releases

1. 2004 CIA OIG Report
2. 07 March 2003 CIA business plan discussing RDI program [OIG Vaughn # Other-29]
3. 31 January 2003 Draft psychological assessment of Abu Zubaydah [OIG Vaughn # Other-39]
4. 20 November 2002 Spot report discussing interrogation of al-Nashiri [OIG Vaughn # Other-63]
5. 24 July 2002 Draft psychological assessment of Abu Zubaydah [OIG Vaughn # Other-71]
6. Undated certification sheet used in interrogation training [OIG Vaughn # Other-93]
7. Undated blank "Enhanced Pressures" sheet used for waterboard training [OIG Vaughn # Other-103]
8. 17 July 2003 interview with a senior CIA officer regarding CIA RDI program [OIG Vaughn # Interview-83]

9. 22 January 2003 Email with attached spot report regarding interrogation of al-Nashiri [OIG Vaughn # Email-196]

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*Central Intelligence Agency
Inspector General*

SPECIAL REVIEW



(TS [REDACTED]) COUNTERTERRORISM DETENTION AND
INTERROGATION ACTIVITIES
(SEPTEMBER 2001 – OCTOBER 2003)
(2003-7123-IG)

7 May 2004

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OFFICE OF INSPECTOR GENERAL

SPECIAL REVIEW

(TS [REDACTED]) COUNTERTERRORISM DETENTION AND
INTERROGATION ACTIVITIES
(SEPTEMBER 2001 - OCTOBER 2003)
(2003-7123-IG)

7 May 2004

INTRODUCTION

1. [REDACTED]

2. (TS [REDACTED]) In November 2002, the Deputy Director for Operations (DDO) informed the Office of Inspector General (OIG) that the Agency had established a program in the Counterterrorist Center to detain and interrogate terrorists at sites abroad ("the CTC Program"). He also informed OIG that he had just learned of and had dispatched a team to investigate [REDACTED]

[REDACTED] In January 2003, the DDO informed OIG that he had received allegations that Agency personnel had used unauthorized interrogation techniques with a detainee, 'Abd Al-Rahim Al-Nashiri, at another foreign site, and requested that

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OIG investigate. Separately, OIG received information that some employees were concerned that certain covert Agency activities at an overseas detention and interrogation site might involve violations of human rights. In January 2003, OIG initiated a review of Agency counterterrorism detention and interrogation activities [REDACTED] and the incident with Al-Nashiri.¹ This Review covers the period September 2001 to mid-October 2003.² [REDACTED]

SUMMARY

3. (TS) [REDACTED] the DCI assigned responsibility for implementing capture and detention authority to the DDO and to the Director of the DCI Counterterrorist Center (D/CTC). When U.S. military forces began detaining individuals in Afghanistan and at Guantanamo Bay, Cuba, [REDACTED]

4. (TS) [REDACTED] the Agency began to detain and interrogate directly a number of suspected terrorists. The capture and initial Agency interrogation of the first high value detainee, Abu Zubaydah, [REDACTED]

¹ (S) [REDACTED] (NF) Appendix A addresses the Procedures and Resources that OIG employed in conducting this Review. The Review does not address renditions conducted by the Agency or interrogations conducted jointly with [REDACTED] the U.S. military.

² (U) Appendix B is a chronology of significant events that occurred during the period of this Review. [REDACTED]

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in March 2002, presented the Agency with a significant dilemma.⁴ The Agency was under pressure to do everything possible to prevent additional terrorist attacks. Senior Agency officials believed Abu Zubaydah was withholding information that could not be obtained through then-authorized interrogation techniques. Agency officials believed that a more robust approach was necessary to elicit threat information from Abu Zubaydah and possibly from other senior Al-Qa'ida high value detainees.

5. (TS [REDACTED]) The conduct of detention and interrogation activities presented new challenges for CIA. These included determining where detention and interrogation facilities could be securely located and operated, and identifying and preparing qualified personnel to manage and carry out detention and interrogation activities. With the knowledge that Al-Qa'ida personnel had been trained in the use of resistance techniques, another challenge was to identify interrogation techniques that Agency personnel could lawfully use to overcome the resistance. In this context, CTC, with the assistance of the Office of Technical Service (OTS), proposed certain more coercive physical techniques to use on Abu Zubaydah. All of these considerations took place against the backdrop of pre-September 11, 2001 CIA avoidance of interrogations and repeated U.S. policy statements condemning torture and advocating the humane treatment of political prisoners and detainees in the international community.

6. (TS [REDACTED]) The Office of General Counsel (OGC) took the lead in determining and documenting the legal parameters and constraints for interrogations. OGC conducted independent research

⁴ (TS [REDACTED]) The use of "high value" or "medium value" to describe terrorist targets and detainees in this Review is based on how they have been generally categorized by CTC. CTC distinguishes targets according to the quality of the intelligence that they are believed likely to be able to provide about current terrorist threats against the United States. Senior Al-Qa'ida planners and operators, such as Abu Zubaydah and Khalid Shaykh Muhammad, fall into the category of "high value" and are given the highest priority for capture, detention, and interrogation. CTC categorizes those individuals who are believed to have lesser direct knowledge of such threats, but to have information of intelligence value, as "medium value" targets/detainees.

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and consulted extensively with Department of Justice (DoJ) and National Security Council (NSC) legal and policy staff. Working with DoJ's Office of Legal Counsel (OLC), OGC determined that in most instances relevant to the counterterrorism detention and interrogation activities [REDACTED] the criminal prohibition against torture, 18 U.S.C. 2340-2340B, is the controlling legal constraint on interrogations of detainees outside the United States. In August 2002, DoJ provided to the Agency a legal opinion in which it determined that 10 specific "Enhanced Interrogation Techniques" (EITs) would not violate the torture prohibition. This work provided the foundation for the policy and administrative decisions that guide the CTC Program.

7. (TS [REDACTED]) By November 2002, the Agency had Abu Zubaydah and another high value detainee, 'Abd Al-Rahim Al-Nashiri, in custody [REDACTED]

[REDACTED] and the Office of Medical Services (OMS) provided medical care to the detainees.

8. [REDACTED]

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9. ~~(TS)~~ [REDACTED]

From the beginning, OGC briefed DO officers assigned to these [REDACTED] facilities on their legal authorities, and Agency personnel staffing these facilities documented interrogations and the condition of detainees in cables.

10. ~~(TS)~~ [REDACTED] There were few instances of deviations from approved procedures [REDACTED] with one notable exception described in this Review. With respect to two detainees at those sites, the use and frequency of one EIT, the waterboard, went beyond the projected use of the technique as originally described to DoJ. The Agency, on 29 July 2003, secured oral DoJ concurrence that certain deviations are not significant for purposes of DoJ's legal opinions.

11. [REDACTED]

12. [REDACTED]

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[REDACTED]

13. [REDACTED]

[REDACTED] there were instances of improvisation and other undocumented interrogation techniques [REDACTED]

14. [REDACTED]

15. (TS, [REDACTED]) Agency efforts to provide systematic, clear and timely guidance to those involved in the CTC Detention and Interrogation Program was inadequate at first but have improved considerably during the life of the Program as problems have been identified and addressed. CTC implemented training programs for interrogators and debriefers.⁶ Moreover, building upon operational and legal guidance previously sent to the field, the DCI

⁶ (TS, [REDACTED]) Before 11 September (9/11) 2001, Agency personnel sometimes used the terms *interrogation/interrogator* and *debriefing/debriefer* interchangeably. The use of these terms has since evolved and, today, CTC more clearly distinguishes their meanings. A debriefer engages a detainee solely through question and answer. An interrogator is a person who completes a two-week interrogations training program, which is designed to train, qualify, and certify a person to administer EITs. An interrogator can administer EITs during an interrogation of a detainee only after the field, in coordination with Headquarters, assesses the detainee as withholding information. An interrogator transitions the detainee from a non-cooperative to a cooperative phase in order that a debriefer can elicit actionable intelligence through non-aggressive techniques during debriefing sessions. An interrogator may debrief a detainee during an interrogation; however, a debriefer may not interrogate a detainee.

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on 28 January 2003 signed "Guidelines on Confinement Conditions for CIA Detainees" and "Guidelines on Interrogations Conducted Pursuant [REDACTED]

[REDACTED] The DCI Guidelines require individuals engaged in or supporting interrogations [REDACTED]

[REDACTED] be made aware of the guidelines and sign an acknowledgment that they have read them. The DCI Interrogation Guidelines make formal the existing CTC practice of requiring the field to obtain specific Headquarters approvals prior to the application of all EITs. Although the DCI Guidelines are an improvement over the absence of such DCI Guidelines in the past, they still leave substantial room for misinterpretation and do not cover all Agency detention and interrogation activities.

16. (TS [REDACTED]) The Agency's detention and interrogation of terrorists has provided intelligence that has enabled the identification and apprehension of other terrorists and warned of terrorist plots planned for the United States and around the world. The CTC Program has resulted in the issuance of thousands of individual intelligence reports and analytic products supporting the counterterrorism efforts of U.S. policymakers and military commanders.

17. (TS [REDACTED]) The current CTC Detention and Interrogation Program has been subject to DoJ legal review and Administration approval but diverges sharply from previous Agency policy and rules that govern interrogations by U.S. military and law enforcement officers. Officers are concerned that public revelation of the CTC Program will seriously damage Agency officers' personal reputations, as well as the reputation and effectiveness of the Agency itself.

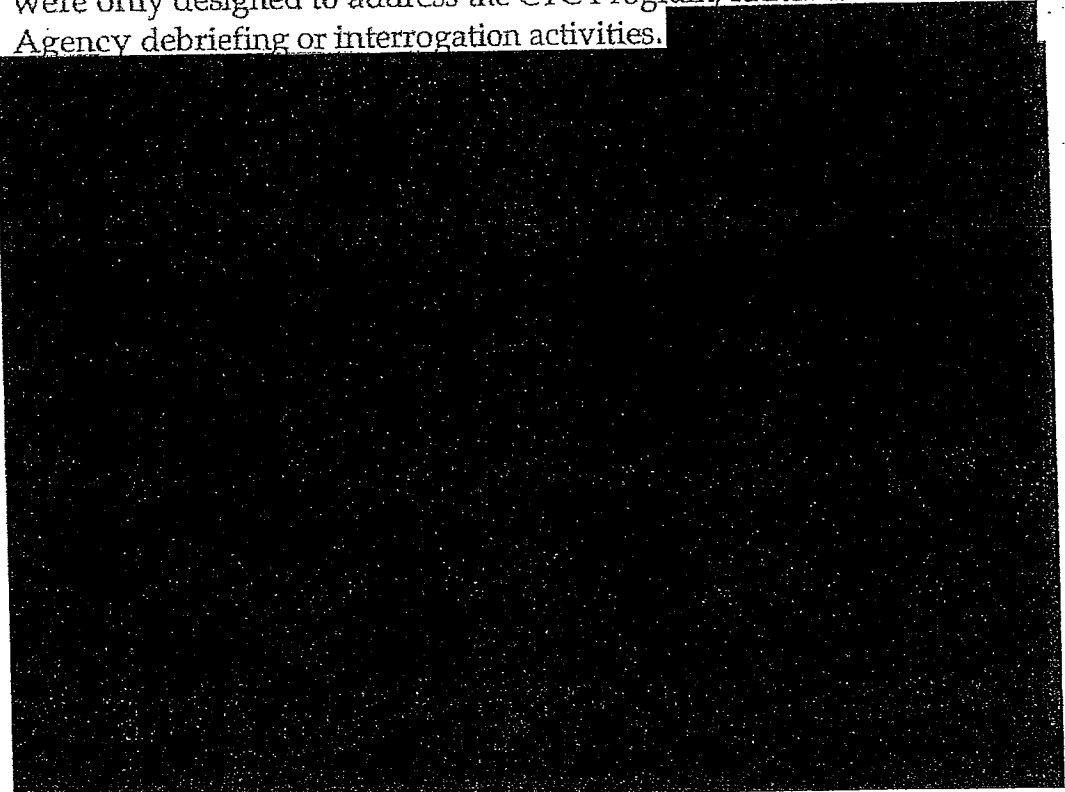
18. (TS [REDACTED]) recognized that detainees may be held in U.S. Government custody indefinitely if appropriate law enforcement jurisdiction is not asserted. Although there has been ongoing discussion of the issue inside the Agency and among NSC,

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Defense Department, and Justice Department officials, no decisions on any "endgame" for Agency detainees have been made. Senior Agency officials see this as a policy issue for the U.S. Government rather than a CIA issue. Even with Agency initiatives to address the endgame with policymakers, some detainees who cannot be prosecuted will likely remain in CIA custody indefinitely.

19. (TS [REDACTED]) The Agency faces potentially serious long-term political and legal challenges as a result of the CTC Detention and Interrogation Program, particularly its use of EITs and the inability of the U.S. Government to decide what it will ultimately do with terrorists detained by the Agency.

20. (TS [REDACTED]) This Review makes a number of recommendations that are designed to strengthen the management and conduct of Agency detention and interrogation activities. Although the DCI Guidelines were an important step forward, they were only designed to address the CTC Program, rather than all Agency debriefing or interrogation activities.



21. [REDACTED]

BACKGROUND

22. (S) The Agency has had intermittent involvement in the interrogation of individuals whose interests are opposed to those of the United States. After the Vietnam War, Agency personnel experienced in the field of interrogations left the Agency or moved to other assignments. In the early 1980s, a resurgence of interest in teaching interrogation techniques developed as one of several methods to foster foreign liaison relationships. Because of political sensitivities the then-Deputy Director of Central Intelligence (DDCI) forbade Agency officers from using the word "interrogation." The Agency then developed the Human Resource Exploitation (HRE) training program designed to train foreign liaison services on interrogation techniques.

23. (S) In 1984, OIG investigated allegations of misconduct on the part of two Agency officers who were involved in interrogations and the death of one individual [REDACTED]. Following that investigation, the Agency took steps to ensure Agency personnel understood its policy on

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interrogations, debriefings, and human rights issues. Headquarters sent officers to brief Stations and Bases and provided cable guidance to the field.

24. (S) In 1986, the Agency ended the HRE training program because of allegations of human rights abuses in Latin America.

[REDACTED] DO Handbook [REDACTED]

which remains in effect, explains the Agency's general interrogation policy:

[REDACTED]

~~TOP SECRET~~ [REDACTED]

DISCUSSION

GENESIS OF POST 9/11 AGENCY DETENTION AND INTERROGATION ACTIVITIES

25. (~~TS~~ [REDACTED]) The statutory basis for CIA's involvement in detentions and interrogations is [REDACTED] the National Security Act of 1947, as amended.⁷

[REDACTED]

26. (~~TS~~ [REDACTED])

[REDACTED]

27. (~~S//NF~~) The DCI delegated responsibility for implementation [REDACTED] to the DDO and D/CTC. Over time, CTC also solicited assistance from other Agency components, including OGC, OMS, [REDACTED] and OTS.

⁷ (U//FOUO) DoJ takes the position that as Commander-in-Chief, the President independently has the Article II constitutional authority to order the detention and interrogation of enemy combatants to gain intelligence information.

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

28. (TS [REDACTED]) To assist Agency officials in understanding the scope and implications [REDACTED] OGC researched, analyzed, and wrote "draft" papers on multiple legal issues. These included discussions of the [REDACTED]

[REDACTED] OGC shared these "draft" papers with Agency officers responsible [REDACTED]

29. [REDACTED]

THE CAPTURE OF ABU ZUBAYDAH AND DEVELOPMENT OF EIT'S

30. (TS [REDACTED]) The capture of senior Al-Qa'ida operative Abu Zubaydah on 27 March 2002 presented the Agency with the opportunity to obtain actionable intelligence on future threats to the United States from the most senior Al-Qa'ida member in U.S. custody at that time. This accelerated CIA's development of an interrogation program [REDACTED]

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[REDACTED]

31. (TS [REDACTED]) To treat the severe wounds that Abu Zubaydah suffered upon his capture, the Agency provided him intensive medical care from the outset and deferred his questioning for several weeks pending his recovery. The Agency then assembled a team that interrogated Abu Zubaydah using non-aggressive, non-physical elicitation techniques. [REDACTED]

[REDACTED] The Agency believed that Abu Zubaydah was withholding imminent threat information.

32. (TS [REDACTED]) Several months earlier, in late 2001, CIA had tasked an independent contractor psychologist, who had [REDACTED] experience in the U.S. Air Force's Survival, Evasion, Resistance, and Escape (SERE) training program, to research and write a paper on Al-Qa'ida's resistance to interrogation techniques.¹³ This psychologist collaborated with a Department of Defense (DoD) psychologist who had [REDACTED] SERE experience in the U.S. Air Force and DoD to produce the paper, "Recognizing and Developing Countermeasures to Al-Qa'ida Resistance to Interrogation Techniques: A Resistance Training Perspective." Subsequently, the two psychologists developed a list of new and more aggressive EITs that they recommended for use in interrogations.

12 [REDACTED]

13 (U//FOUO) The SERE training program falls under the DoD Joint Personnel Recovery Agency (JPRA). JPRA is responsible for missions to include the training for SERE and Prisoner of War and Missing In Action operational affairs including repatriation. SERE Training is offered by the U.S. Army, Navy, and Air Force to its personnel, particularly air crews and special operations forces who are of greatest risk of being captured during military operations. SERE students are taught how to survive in various terrain, evade and endure captivity, resist interrogations, and conduct themselves to prevent harm to themselves and fellow prisoners of war.

~~TOP SECRET~~ [REDACTED]

~~TOP SECRET~~ [REDACTED]

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.

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.

~~TOP SECRET~~ [REDACTED]

~~TOP SECRET~~ [REDACTED]

~~TOP SECRET~~ [REDACTED]

Enhanced Interrogation Techniques

- ◆ The attention grasp consists of grasping the detainee with both hands, with one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the detainee is drawn toward the interrogator.
- ◆ During the walling technique, the detainee is pulled forward and then quickly and firmly pushed into a flexible false wall so that his shoulder blades hit the wall. His head and neck are supported with a rolled towel to prevent whiplash.
- ◆ The facial hold is used to hold the detainee's head immobile. The interrogator places an open palm on either side of the detainee's face and the interrogator's fingertips are kept well away from the detainee's eyes.
- ◆ With the facial or insult slap, the fingers are slightly spread apart. The interrogator's hand makes contact with the area between the tip of the detainee's chin and the bottom of the corresponding earlobe.
- ◆ In cramped confinement, the detainee is placed in a confined space, typically a small or large box, which is usually dark. Confinement in the smaller space lasts no more than two hours and in the larger space it can last up to 18 hours.
- ◆ Insects placed in a confinement box involve placing a harmless insect in the box with the detainee.
- ◆ During wall standing, the detainee may stand about 4 to 5 feet from a wall with his feet spread approximately to his shoulder width. His arms are stretched out in front of him and his fingers rest on the wall to support all of his body weight. The detainee is not allowed to reposition his hands or feet.
- ◆ The application of stress positions may include having the detainee sit on the floor with his legs extended straight out in front of him with his arms raised above his head or kneeling on the floor while leaning back at a 45 degree angle.
- ◆ Sleep deprivation will not exceed 11 days at a time.
- ◆ The application of the waterboard technique involves binding the detainee to a bench with his feet elevated above his head. The detainee's head is immobilized and an interrogator places a cloth over the detainee's mouth and nose while pouring water onto the cloth in a controlled manner. Airflow is restricted for 20 to 40 seconds and the technique produces the sensation of drowning and suffocation.

~~TOP SECRET~~ [REDACTED]

~~TOP SECRET~~ [REDACTED]

DOJ LEGAL ANALYSIS

36. (TS [REDACTED]) CIA's OGC sought guidance from DoJ regarding the legal bounds of EITs vis-à-vis individuals detained [REDACTED]. The ensuing legal opinions focus on the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment (Torture Convention),¹⁵ especially as implemented in the U.S. criminal code, 18 U.S.C. 2340-2340A.

37. (U//FOUO) The Torture Convention specifically prohibits "torture," which it defines in Article 1 as:

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

Article 4 of the Torture Convention provides that states party to the Convention are to ensure that all acts of "torture" are offenses under their criminal laws. Article 16 additionally provides that each state party "shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to acts of torture as defined in Article 1."

¹⁵ (U//FOUO) Adopted 10 December 1984, S. Treaty Doc. No. 100-20 (1988) 1465 U.N.T.S. 85 (entered into force 26 June 1987). The Torture Convention entered into force for the United States on 20 November 1994.

~~TOP SECRET~~ [REDACTED]

38. (U//FOUO) The Torture Convention applies to the United States only in accordance with the reservations and understandings made by the United States at the time of ratification.¹⁶ As explained to the Senate by the Executive Branch prior to ratification:

Article 16 is arguably broader than existing U.S. law. The phrase "cruel, inhuman or degrading treatment or punishment" is a standard formula in international instruments and is found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights. To the extent the phrase has been interpreted in the context of those agreements, "cruel" and "inhuman" treatment or punishment appears to be roughly equivalent to the treatment or punishment barred in the United States by the Fifth, Eighth and Fourteenth Amendments. "Degrading" treatment or punishment, however, has been interpreted as potentially including treatment that would probably not be prohibited by the U.S. Constitution. [Citing a ruling that German refusal to recognize individual's gender change might be considered "degrading" treatment.] To make clear that the United States construes the phrase to be coextensive with its constitutional guarantees against cruel, unusual, and inhumane treatment, the following understanding is recommended:

"The United States understands the term 'cruel, inhuman or degrading treatment or punishment,' as used in Article 16 of the Convention, to mean the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."¹⁷ [Emphasis added.]

¹⁶ (U) Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980). The United States is not a party to the Vienna Convention on treaties, but it generally regards its provisions as customary international law.

¹⁷ (U//FOUO) S. Treaty Doc. No. 100-20, at 15-16.

~~TOP SECRET~~ [REDACTED]

39. (U//FOUO) In accordance with the Convention, the United States criminalized acts of torture in 18 U.S.C. 2340A(a), which provides as follows:

Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

The statute adopts the Convention definition of "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."¹⁸ "Severe physical pain and suffering" is not further defined, but Congress added a definition of "severe mental pain or suffering:"

[T]he prolonged mental harm caused by or resulting from—

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

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

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality. . . .¹⁹

These statutory definitions are consistent with the understandings and reservations of the United States to the Torture Convention.

¹⁸ (U//FOUO) 18 U.S.C. 2340(1).

¹⁹ (U//FOUO) 18 U.S.C. 2340(2).

40. (U//FOUO) DoJ has never prosecuted a violation of the torture statute, 18 U.S.C. §2340, and there is no case law construing its provisions. OGC presented the results of its research into relevant issues under U.S. and international law to DoJ's OLC in the summer of 2002 and received a preliminary summary of the elements of the torture statute from OLC in July 2002. An unclassified 1 August 2002 OLC legal memorandum set out OLC's conclusions regarding the proper interpretation of the torture statute and concluded that "Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering whether mental or physical."²⁰ Also, OLC stated that the acts must be of an "extreme nature" and that "certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A's proscription against torture." Further describing the requisite level of intended pain, OLC stated:

Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.²¹

OLC determined that a violation of Section 2340 requires that the infliction of severe pain be the defendant's "precise objective." OLC also concluded that necessity or self-defense might justify interrogation methods that would otherwise violate Section 2340A.²² The August 2002 OLC opinion did not address whether any other provisions of U.S. law are relevant to the detention, treatment, and interrogation of detainees outside the United States.²³

²⁰ (U//FOUO) Legal Memorandum, Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A (1 August 2002).

²¹ (U//FOUO) *Ibid.*, p. 1.

²² (U//FOUO) *Ibid.*, p. 39.

²³ (U//FOUO) OLC's analysis of the torture statute was guided in part by judicial decisions under the Torture Victims Protection Act (TVPA) 28 U.S.C. 1350, which provides a tort remedy for victims of torture. OLC noted that the courts in this context have looked at the entire course

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

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

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

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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

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).

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