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U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General — *Washington, D.C. 20530*

May 10, 2005

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

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

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

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

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

[redacted]

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

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

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

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

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

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

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

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

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

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

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

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

I.

A.

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

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

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

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

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

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

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

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

Medical and psychological personnel are on-scene throughout (and, as detailed below, physically present or otherwise observing during the application of many techniques, including all techniques involving physical contact with detainees), and "[d]aily physical and psychological evaluations are continued throughout the period of [enhanced interrogation technique] use." *IG Report* at 30 n.35; *see also* George J. Tenet, Director of Central Intelligence, *Guidelines on Confinement Conditions for CIA Detainees*, at 1 (Jan. 28, 2003) ("*Confinement Guidelines*") ("Medical and, as appropriate, psychological personnel shall be physically present at, or reasonably available to, each Detention Facility. Medical personnel shall check the physical condition of each detainee at intervals appropriate to the circumstances and shall keep appropriate records."); *IG Report* at 28-29.[8] In addition, "[i]n each interrogation session in which an Enhanced Technique is employed, a contemporaneous record shall be created setting forth the nature and duration of each such technique employed." *Interrogation Guidelines* at 3.

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

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

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

B.

You have described the specific techniques at issue as follows:[9]

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

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

- Fluid requirement: 35 ml/kg/day. This may be increased depending on ambient temperature, body temperature, and level of activity. Medical officers must monitor fluid intake, and although detainees are allowed as much water as they want, monitoring of urine output may be necessary in the unlikely event that the officers suspect that the detainee is becoming dehydrated.

- Calorie requirement: The CIA generally follows as a guideline a calorie requirement of 900 kcal/day + 10 kcal/kg/day. This quantity is multiplied by 1.2 for a sedentary activity level or 1.4 for a moderate activity level. Regardless of this formula, the recommended minimum calorie intake is 1500 kcal/day, and in no event is the detainee allowed to receive less than 1000 kcal/day.[10] Calories are provided using commercial liquid diets (such as Ensure Plus), which also supply other essential nutrients and make for nutritionally complete meals.[11]

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

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

[10] This is the calorie requirement for males; the CIA presently has no female detainees.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[19] OMS identified other potential risks:

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

* * *

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

C.

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

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

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

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

II.

A.

Section 2340A provides that "[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life."[22] Section 2340(1) defines "torture" as "an

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

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

[22] Section 2340A provides in full:

(a) Offense.—Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any

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

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

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

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

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

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

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

18 U.S.C. § 2340A.

[23] Section 2340 provides in full:

As used in this chapter—

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

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

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

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

(C) the threat of imminent death; or

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

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

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

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

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

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

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

> The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

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

B.

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

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

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

(1) The meaning of "severe."

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

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

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

Torture and the Law of Proof at 15 (footnote omitted).[25]

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

> The [CAT] seeks to define "torture" in a relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned. . . .
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> . . . .
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> . . . The term "torture," in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.

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

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

> any act, directed against an individual in the offender's custody or physical control, by which *severe pain or suffering* (other than pain or suffering arising

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

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

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

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

> only from or inherent in, or incidental to, lawful sanctions), *whether physical or mental*, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind . . . .

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

> The severity requirement is crucial to ensuring that the conduct proscribed by the [CAT] and the TVPA is sufficiently extreme and outrageous to warrant the universal condemnation that the term "torture" both connotes and invokes. The drafters of the [CAT], as well as the Reagan Administration that signed it, the Bush Administration that submitted it to Congress, and the Senate that ultimately ratified it, therefore all sought to ensure that "only acts of a certain gravity shall be considered to constitute torture."
>
> The critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim. The more intense, lasting, or heinous the agony, the more likely it is to be torture.

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

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

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

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

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

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

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

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

including essentially mental distress within the separate category of "physical suffering."[29]

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

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

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

distress or discomfort that is lacking in extreme intensity may not constitute "severe physical suffering" regardless of its duration—i.e., even if it lasts for a very long period of time. In defining conduct proscribed by sections 2340-2340A, Congress established a high bar. The ultimate question is whether the conduct "is sufficiently extreme and outrageous to warrant the universal condemnation that the term 'torture' both connotes and invokes." *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d at 92 (interpreting the TVPA); *cf. Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1332-40, 1345-46 (standard met under the TVPA by a course of conduct that included severe beatings to the genitals, head, and other parts of the body with metal pipes and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim's forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of "Russian roulette").

(3) The meaning of "severe mental pain or suffering."

Section 2340 defines "severe mental pain or suffering" to mean:

> the prolonged mental harm caused by or resulting from—
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality[.]

18 U.S.C. § 2340(2). Torture is defined under the statute to include an act specifically intended to inflict severe mental pain or suffering. *See id.* § 2340(1).

An important preliminary question with respect to this definition is whether the statutory list of the four "predicate acts" in section 2340(2)(A)-(D) is exclusive. We have concluded that Congress intended the list of predicate acts to be exclusive—that is, to satisfy the definition of "severe mental pain or suffering" under the statute, the prolonged mental harm must be caused by acts falling within one of the four statutory categories of predicate acts. *2004 Legal Standards Opinion* at 13. We reached this conclusion based on the clear language of the statute, which provides a detailed definition that includes four categories of predicate acts joined by the disjunctive and does not contain a catchall provision or any other language suggesting that additional acts might qualify (for example, language such as "including" or "such acts as"). *Id.*[30]

[30] These four categories of predicate acts "are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). *See also, e.g.,*

Congress plainly considered very specific predicate acts, and this definition tracks the Senate's understanding concerning mental pain or suffering on which its advice and consent to ratification of the CAT was conditioned. The conclusion that the list of predicate acts is exclusive is consistent with both the text of the Senate's understanding, and with the fact that the understanding was required out of concern that the CAT's definition of torture would not otherwise meet the constitutional requirement for clarity in defining crimes. *See 2004 Legal Standards Opinion* at 13. Adopting an interpretation of the statute that expands the list of predicate acts for "severe mental pain or suffering" would constitute an impermissible rewriting of the statute and would introduce the very imprecision that prompted the Senate to require this understanding as a condition of its advice and consent to ratification of the CAT.

Another question is whether the requirement of "prolonged mental harm" caused by or resulting from one of the enumerated predicate acts is a separate requirement, or whether such "prolonged mental harm" is to be presumed any time one of the predicate acts occurs. Although it is possible to read the statute's reference to "*the* prolonged mental harm caused by or resulting from" the predicate acts as creating a statutory presumption that each of the predicate acts will always cause prolonged mental harm, we concluded in our *2004 Legal Standards Opinion* that that was not Congress's intent, since the statutory definition of "severe mental pain or suffering" was meant to track the understanding that the Senate required as a condition to its advice and consent to ratification of the CAT:

> in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30 at 36. As we previously stated, "[w]e do not believe that simply by adding the word 'the' before 'prolonged harm,' Congress intended a material change in the definition of mental pain or suffering as articulated in the Senate's understanding to the CAT." *2004 Legal Standards Opinion* at 13-14. "The definition of torture emanates directly from article 1 of the [CAT]. The definition for 'severe mental pain and suffering' incorporates the [above mentioned] understanding." S. Rep. No. 103-107, at 58-59 (1993) (emphasis added). This understanding, embodied in the statute, defines the obligation undertaken by the United States. Given this understanding, the legislative history, and the fact that section 2340(2) defines "severe mental pain or suffering" carefully in language very similar to the understanding, we believe that Congress did not intend to create a presumption that any time one of the predicate

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Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993); 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.23 (6th ed. 2000). Nor do we see any "contrary indications" that would rebut this inference. *Vonn*, 535 U.S. at 65.

acts occurs, prolonged mental harm is automatically deemed to result. *See 2004 Legal Standards Opinion* at 13-14. At the same time, it is conceivable that the occurrence of one of the predicate acts alone could, depending on the circumstances of a particular case, give rise to an inference of intent to cause prolonged mental harm, as required by the statute.

Turning to the question of what constitutes "prolonged mental harm caused by or resulting from" a predicate act, we have concluded that Congress intended this phrase to require mental "harm" that has some lasting duration. *Id.* at 14. There is little guidance to draw upon in interpreting the phrase "prolonged mental harm," which does not appear in the relevant medical literature. Nevertheless, our interpretation is consistent with the ordinary meaning of the statutory terms. First, the use of the word "harm"—as opposed to simply repeating "pain or suffering"—suggests some mental damage or injury. Ordinary dictionary definitions of "harm," such as "physical or mental *damage: injury*," *Webster's Third New International Dictionary* at 1034 (emphasis added), or "[p]hysical or psychological *injury or damage*," *American Heritage Dictionary of the English Language* at 825 (emphasis added), support this interpretation. Second, to "prolong" means to "lengthen in time," "extend in duration," or "draw out," *Webster's Third New International Dictionary* at 1815, further suggesting that to be "prolonged," the mental damage must extend for some period of time. This damage need not be permanent, but it must be intended to continue for a "prolonged" period of time.[31] Moreover, under section 2340(2), the "prolonged mental harm" must be "caused by" or "resulting from" one of the enumerated predicate acts. As we pointed out in *2004 Legal Standards Opinion*, this conclusion is not meant to suggest that, if the predicate act or acts continue for an extended period, "prolonged mental harm" cannot occur until after they are completed. *Id.* at 14-15 n.26. Early occurrences of the predicate act could cause mental harm that could continue—and become prolonged—during the extended period the predicate acts continued to occur. *See, e.g., Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601-02 (E.D. Pa. 2003) (finding that predicate acts had continued over a three-to-four-year period and concluding that "prolonged mental harm" had occurred during that time).

Although there are few judicial opinions discussing the question of "prolonged mental harm," those cases that have addressed the issue are consistent with our view. For example, in the TVPA case of *Mehinovic v. Vuckovic*, the district court explained that:

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[31] Although we do not suggest that the statute is limited to such cases, development of a mental disorder—such as post-traumatic stress disorder or perhaps chronic depression—could constitute "prolonged mental harm." *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 369-76, 463-68 (4th ed. 2000) ("DSM-IV-TR"). *See also, e.g., Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/59/324, at 14 (2004) ("The most common diagnosis of psychiatric symptoms among torture survivors is said to be post-traumatic stress disorder."); *see also* Metin Basoglu et al., *Torture and Mental Health: A Research Overview*, *in* Ellen Gerrity et al. eds., *The Mental Health Consequences of Torture* 48-49 (2001) (referring to findings of higher rates of post-traumatic stress disorder in studies involving torture survivors); Murat Parker et al., *Psychological Effects of Torture: An Empirical Study of Tortured and Non-Tortured Non-Political Prisoners*, *in* Metin Basoglu ed., *Torture and Its Consequences: Current Treatment Approaches* 77 (1992) (referring to findings of post-traumatic stress disorder in torture survivors). OMS has advised that—although the ability to predict is imperfect—they would object to the initial or continued use of any technique if their psychological assessment of the detainee suggested that the use of the technique might result in PTSD, chronic depression, or other condition that could constitute prolonged mental harm.

> [The defendant] also caused or participated in the plaintiffs' mental torture. Mental torture consists of "prolonged mental harm caused by or resulting from: the intentional infliction or threatened infliction of severe physical pain or suffering; . . . the threat of imminent death . . . ." As set out above, plaintiffs noted in their testimony that they feared that they would be killed by [the defendant] during the beatings he inflicted or during games of "Russian roulette." *Each plaintiff continues to suffer long-term psychological harm as a result of the ordeals they suffered at the hands of defendant and others.*

198 F. Supp. 2d at 1346 (emphasis added; first ellipsis in original). In reaching its conclusion, the court noted that each of the plaintiffs were continuing to suffer serious mental harm even ten years after the events in question. *See id.* at 1334-40. In each case, these mental effects were continuing years after the infliction of the predicate acts. *See also Sackie v. Ashcroft*, 270 F. Supp. 2d at 597-98, 601-02 (victim was kidnapped and "forcibly recruited" as a child soldier at the age of 14, and, over a period of three to four years, was repeatedly forced to take narcotics and threatened with imminent death, all of which produced "prolonged mental harm" during that time). Conversely, in *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003), the court rejected a claim under the TVPA brought by individuals who had been held at gunpoint overnight and repeatedly threatened with death. While recognizing that the plaintiffs had experienced an "ordeal," the court concluded that they had failed to show that their experience caused lasting damage, noting that "there is simply no allegation that Plaintiffs have suffered any prolonged mental harm or physical injury as a result of their alleged intimidation." *Id.* at 1294-95.

(4) The meaning of "specifically intended."

It is well recognized that the term "specific intent" has no clear, settled definition, and that the courts do not use it consistently. *See* 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e), at 355 & n.79 (2d ed. 2003). "Specific intent" is most commonly understood, however, "to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." *Id.* at 354; *see also Carter v. United States*, 530 U.S. 255, 268 (2000) (explaining that general intent, as opposed to specific intent, requires "that the defendant possessed knowledge [only] with respect to the *actus reus* of the crime"). Some cases suggest that only a conscious desire to produce the proscribed result constitutes specific intent; others suggest that even reasonable foreseeability may suffice. In *United States v. Bailey*, 444 U.S. 394 (1980), for example, the Court suggested that, at least "[i]n a general sense," *id.* at 405, "specific intent" requires that one consciously desire the result. *Id.* at 403-05. The Court compared the common law's *mens rea* concepts of specific intent and general intent to the Model Penal Code's *mens rea* concepts of acting purposefully and acting knowingly. *See id.* at 404-05. "[A] person who causes a particular result is said to act purposefully," wrote the Court, "if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct.'" *Id.* at 404 (internal quotation marks omitted). A person "is said to act knowingly," in contrast, "if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'" *Id.* (internal quotation marks omitted). The Court then stated: "In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general

intent." *Id.* at 405. In contrast, cases such as *United States v. Neiswender*, 590 F.2d 1269 (4th Cir. 1979), suggest that to prove specific intent it is enough that the defendant simply have "knowledge or notice" that his act "would have likely resulted in" the proscribed outcome. *Id.* at 1273. "Notice," the court held, "is provided by the reasonable foreseeability of the natural and probable consequences of one's acts." *Id.*

As in *2004 Legal Standards Opinion*, we will not attempt to ascertain the precise meaning of "specific intent" in sections 2340-2340A. *See id.* at 16-17. It is clear, however, that the necessary specific intent would be present if an individual performed an act and "consciously desire[d]" that act to inflict severe physical or mental pain or suffering. 1 LaFave, *Substantive Criminal Law* § 5.2(a), at 341. Conversely, if an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not be expected to inflict severe physical or mental pain or suffering, he would not have the specific intent necessary to violate sections 2340-2340A. Such an individual could be said neither consciously to desire the proscribed result, *see, e.g.*, *Bailey*, 444 U.S. at 405, nor to have "knowledge or notice" that his act "would likely have resulted in" the proscribed outcome, *Neiswender*, 590 F.2d at 1273.

As we did in *2004 Legal Standards Opinion*, we stress two additional points regarding specific intent: First, specific intent is distinguished from motive. A good motive, such as to protect national security, does not excuse conduct that is specifically intended to inflict severe physical or mental pain or suffering, as proscribed by the statute. Second, specific intent to take a given action can be found even if the actor would take the action only upon certain conditions. *Cf., e.g.*, *Holloway v. United States*, 526 U.S. 1, 11 (1999) ("[A] defendant may not negate a proscribed intent by requiring the victim to comply with a condition the defendant has no right to impose."). *See also id.* at 10-11 & nn. 9-12; Model Penal Code § 2.02(6). Thus, for example, the fact that a victim might have avoided being tortured by cooperating with the perpetrator would not render permissible the resort to conduct that would otherwise constitute torture under the statute. *2004 Legal Standards Opinion* at 17.[32]

III.

In the discussion that follows, we will address each of the specific interrogation techniques you have described. Subject to the understandings, limitations, and safeguards discussed herein, including ongoing medical and psychological monitoring and team intervention as necessary, we conclude that the authorized use of each of these techniques, considered individually, would not violate the prohibition that Congress has adopted in sections 2340-2340A. This conclusion is straightforward with respect to all but two of the techniques. Use of sleep deprivation as an enhanced technique and use of the waterboard, however, involve more substantial questions, with the waterboard presenting the most substantial question. Although we conclude that the use of these techniques—as we understand them and subject to the limitations you have described—would not violate the statute, the issues raised by these two techniques counsel great caution in their use, including both careful adherence to the limitations and

[32] The Criminal Division of the Department of Justice has reviewed this memorandum and is satisfied that our general interpretation of the legal standards under sections 2340-2340A is consistent with its concurrence in the *2004 Legal Standards Opinion*.

restrictions you have described and also close and continuing medical and psychological monitoring.

Before addressing the application of sections 2340-2340A to the specific techniques in question, we note certain overall features of the CIA's approach that are significant to our conclusions. Interrogators are trained and certified in a course that you have informed us currently lasts approximately four weeks. Interrogators (and other personnel deployed as part of this program) are required to review and acknowledge the applicable interrogation guidelines. *See Confinement Guidelines* at 2; *Interrogation Guidelines* at 2 ("The Director, DCI Counterterrorist Center shall ensure that all personnel directly engaged in the interrogation of persons detained pursuant to the authorities set forth in [redacted] have been appropriately screened (from the medical, psychological and security standpoints), have reviewed these Guidelines, have received appropriate training in their implementation, and have completed the attached Acknowledgement."). We assume that all interrogators are adequately trained, that they understand the design and purpose of the interrogation techniques, and that they will apply the techniques in accordance with their authorized and intended use.

In addition, the involvement of medical and psychological personnel in the adaptation and application of the established SERE techniques is particularly noteworthy for purposes of our analysis.[33] Medical personnel have been involved in imposing limitations on—and requiring changes to—certain procedures, particularly the use of the waterboard.[34] We have had extensive

[33] As noted above, each of these techniques has been adapted (although in some cases with significant modifications) from SERE training. Through your consultation with various individuals responsible for such training, you have learned facts relating to experience with them, which you have reported to us. Again, fully recognizing the limitations of reliance on this experience, you have advised us that these techniques have been used as elements of a course of training without any reported incidents of prolonged mental harm or of any severe physical pain, injury, or suffering. With respect to the psychological impact [redacted] of the SERE school advised that during his three and a half years in that position, he trained 10,000 students, only two of whom dropped out following use of the techniques. Although on rare occasions students temporarily postponed the remainder of the training and received psychological counseling, we understand that those students were able to finish the program without any indication of subsequent mental health effects. [redacted] who has had over ten years experience with SERE training, told you that he was not aware of any individuals who completed the program suffering any adverse mental health effects (though he advised of one person who did not complete the training who had an adverse mental health reaction that lasted two hours and spontaneously dissipated without requiring treatment and with no further symptoms reported). In addition, the [redacted] who has had experience with all of the techniques discussed herein, has advised that the use of these procedures has not resulted in any reported instances of prolonged mental harm and very few instances of immediate and temporary adverse psychological responses to the training. Of 26,829 students in Air Force SERE training from 1992 through 2001, only 0.14% were pulled from the program for psychological reasons (specifically, although 4.3% had some contact with psychology services, only 3% of those individuals with such contact in fact withdrew from the program). We understand that the [redacted] expressed confidence—based on debriefing of students and other information—that the training did not cause any long-term psychological harm and that if there are any long-term psychological effects of the training at all, they "are certainly minimal."

[34] We note that this involvement of medical personnel in designing safeguards for, and in monitoring implementation of, the procedures is a significant difference from earlier uses of the techniques catalogued in the Inspector General's Report. *See IG Report* at 21 n.26 ("OMS was neither consulted nor involved in the initial analysis of the risk and benefits of [enhanced interrogation techniques], nor provided with the OTS report cited in the OLC opinion [the *Interrogation Memorandum*]."). Since that time, based on comments from OMS, additional constraints have been imposed on use of the techniques.

meetings with the medical personnel involved in monitoring the use of these techniques. It is clear that they have carefully worked to ensure that the techniques do not result in severe physical or mental pain or suffering to the detainees.[35] Medical and psychological personnel evaluate each detainee before the use of these techniques on the detainee is approved, and they continue to monitor each detainee throughout his interrogation and detention. Moreover, medical personnel are physically present throughout application of the waterboard (and present or otherwise observing the use of all techniques that involve physical contact, as discussed more fully above), and they carefully monitor detainees who are undergoing sleep deprivation or dietary manipulation. In addition, they regularly assess both the medical literature and the experience with detainees.[36] OMS has specifically declared that "[m]edical officers must remain cognizant at all times of their obligation to prevent 'severe physical or mental pain or suffering.'" *OMS Guidelines* at 10. In fact, we understand that medical and psychological personnel have discontinued the use of techniques as to a particular detainee when they believed he might suffer such pain or suffering, and in certain instances, OMS medical personnel have not cleared certain detainees for some—or any—techniques based on the initial medical and psychological assessments. They have also imposed additional restrictions on the use of techniques (such as the waterboard) in order to protect the safety of detainees, thus reducing further the risk of severe pain or suffering. You have informed us that they will continue to have this role and authority. We assume that all interrogators understand the important role and authority of OMS personnel and will cooperate with OMS in the exercise of these duties.

Finally, in sharp contrast to those practices universally condemned as torture over the centuries, the techniques we consider here have been carefully evaluated to avoid causing severe pain or suffering to the detainees. As OMS has described these techniques as a group:

> In all instances the general goal of these techniques is a psychological impact, and not some physical effect, with a specific goal of "dislocat[ing] [the detainee's] expectations regarding the treatment he believes he will receive. . . ." The more physical techniques are delivered in a manner carefully limited to avoid serious pain. The slaps, for example, are designed "to induce shock, surprise, and/or humiliation" and "not to inflict physical pain that is severe or lasting."

Id. at 8-9.

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[35] We are mindful that, historically, medical personnel have sometimes been used to enhance, not prevent, torture—for example, by keeping a torture victim alive and conscious so as to extend his suffering. It is absolutely clear, as you have informed us and as our own dealings with OMS personnel have confirmed, that the involvement of OMS is intended to prevent harm to the detainees and not to extend or increase pain or suffering. As the *OMS Guidelines* explain, "OMS is responsible for assessing and monitoring the health of all Agency detainees subject to 'enhanced' interrogation techniques, and for determining that the authorized administration of these techniques would not be expected to cause serious or permanent harm." *OMS Guidelines* at 9 (footnote omitted).

[36] To assist in monitoring experience with the detainees, we understand that there is regular reporting on medical and psychological experience with the use of these techniques on detainees and that there are special instructions on documenting experience with sleep deprivation and the waterboard. *See OMS Guidelines* at 6-7, 16, 20.

With this background, we turn to the application of sections 2340-2340A to each of the specific interrogation techniques.

1. *Dietary manipulation.* Based on experience, it is evident that this technique is not expected to cause any physical pain, let alone pain that is extreme in intensity. The detainee is carefully monitored to ensure that he does not suffer acute weight loss or any dehydration. Further, there is nothing in the experience of caloric intake at this level that could be expected to cause physical pain. Although we do not equate a person who voluntarily enters a weight-loss program with a detainee subjected to dietary manipulation as an interrogation technique, we believe that it is relevant that several commercial weight-loss programs available in the United States involve similar or even greater reductions in caloric intake. Nor could this technique reasonably be thought to induce "severe physical suffering." Although dietary manipulation may cause some degree of hunger, such an experience is far from extreme hunger (let alone starvation) and cannot be expected to amount to "severe physical suffering" under the statute. The caloric levels are set based on the detainee's weight, so as to ensure that the detainee does not experience extreme hunger. As noted, many people participate in weight-loss programs that involve similar or more stringent caloric limitations, and, while such participation cannot be equated with the use of dietary manipulation as an interrogation technique, we believe that the existence of such programs is relevant to whether dietary manipulation would cause "severe physical suffering" within the meaning of sections 2340-2340A. Because there is no prospect that the technique would cause severe physical pain or suffering, we conclude that the authorized use of this technique by an adequately trained interrogator could not reasonably be considered specifically intended to do so.

This technique presents no issue of "severe mental pain or suffering" within the meaning of sections 2340-2340A, because the use of this technique would involve no qualifying predicate act. The technique does not, for example, involve "the intentional infliction or threatened infliction of severe physical pain or suffering," 18 U.S.C. § 2340(2)(A), or the "application . . . of . . . procedures calculated to disrupt profoundly the senses or the personality," *id.* § 2340(2)(B). Moreover, there is no basis to believe that dietary manipulation could cause "prolonged mental harm." Therefore, we conclude that the authorized use of this technique by an adequately trained interrogator could not reasonably be considered specifically intended to cause such harm.[37]

2. *Nudity.* We understand that nudity is used as a technique to create psychological discomfort, not to inflict any physical pain or suffering. You have informed us that during the use of this technique, detainees are kept in locations with ambient temperatures that ensure there is no threat to their health. Specifically, this technique would not be employed at temperatures below 68°F (and is unlikely to be employed below 75°F). Even if this technique involves some physical discomfort, it cannot be said to cause "suffering" (as we have explained the term

[37] In *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978), the European Court of Human Rights concluded by a vote of 13-4 that a reduced diet, even in conjunction with a number of other techniques, did not amount to "torture," as defined in the European Convention on Human Rights. The reduced diet there consisted of one "round" of bread and a pint of water every six hours, *see id.*, separate opinion of Judge Zekia, Part A. The duration of the reduced diet in that case is not clear.

above), let alone "severe physical pain or suffering," and we therefore conclude that its authorized use by an adequately trained interrogator could not reasonably be considered specifically intended to do so. Although some detainees might be humiliated by this technique, especially given possible cultural sensitivities and the possibility of being seen by female officers, it cannot constitute "severe mental pain or suffering" under the statute because it does not involve any of the predicate acts specified by Congress.

3. *Attention grasp.* The attention grasp involves no physical pain or suffering for the detainee and does not involve any predicate act for purposes of severe mental pain or suffering under the statute. Accordingly, because this technique cannot be expected to cause severe physical or mental pain or suffering, we conclude that its authorized use by an adequately trained interrogator could not reasonably be considered specifically intended to do so.

4. *Walling.* Although the walling technique involves the use of considerable force to push the detainee against the wall and may involve a large number of repetitions in certain cases, we understand that the false wall that is used is flexible and that this technique is not designed to, and does not, cause severe physical pain to the detainee. We understand that there may be some pain or irritation associated with the collar, which is used to help avoid injury such as whiplash to the detainee, but that any physical pain associated with the use of the collar would not approach the level of intensity needed to constitute severe physical pain. Similarly, we do not believe that the physical distress caused by this technique or the duration of its use, even with multiple repetitions, could amount to severe physical suffering within the meaning of sections 2340-2340A. We understand that medical and psychological personnel are present or observing during the use of this technique (as with all techniques involving physical contact with a detainee), and that any member of the team or the medical staff may intercede to stop the use of the technique if it is being used improperly or if it appears that it may cause injury to the detainee. We also do not believe that the use of this technique would involve a threat of infliction of severe physical pain or suffering or other predicate act for purposes of severe mental pain or suffering under the statute. Rather, this technique is designed to shock the detainee and disrupt his expectations that he will not be treated forcefully and to wear down his resistance to interrogation. Based on these understandings, we conclude that the authorized use of this technique by adequately trained interrogators could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of sections 2340-2340A.[38]

5. *Facial hold.* Like the attention grasp, this technique involves no physical pain or suffering and does not involve any predicate act for purposes of severe mental pain or suffering. Accordingly, we conclude that its authorized use by adequately trained interrogators could not

[38] In *Interrogation Memorandum*, we did not describe the walling technique as involving the number of repetitions that we understand may be applied. Our advice with respect to walling in the present memorandum is specifically based on the understanding that the repetitive use of walling is intended only to increase the drama and shock of the technique, to wear down the detainee's resistance, and to disrupt expectations that he will not be treated with force, and that such use is not intended to, and does not in fact, cause severe physical pain to the detainee. Moreover, our advice specifically assumes that the use of walling will be stopped if there is any indication that the use of the technique is or may be causing severe physical pain to a detainee.

reasonably be considered specifically intended to cause severe physical or mental pain or suffering.

6. *Facial slap or insult slap.* Although this technique involves a degree of physical pain, the pain associated with a slap to the face, as you have described it to us, could not be expected to constitute severe physical pain. We understand that the purpose of this technique is to cause shock, surprise, or humiliation, not to inflict physical pain that is severe or lasting; we assume it will be used accordingly. Similarly, the physical distress that may be caused by an abrupt slap to the face, even if repeated several times, would not constitute an extended state or condition of physical suffering and also would not likely involve the level of intensity required for severe physical suffering under the statute. Finally, a facial slap would not involve a predicate act for purposes of severe mental pain or suffering. Therefore, the authorized use of this technique by adequately trained interrogators could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of sections 2340-2340A.[39]

7. *Abdominal slap.* Although the abdominal slap technique might involve some minor physical pain, it cannot, as you have described it to us, be said to involve even moderate, let alone *severe*, physical pain or suffering. Again, because the technique cannot be expected to cause severe physical pain or suffering, we conclude that its authorized use by an adequately trained interrogator could not reasonably be considered specifically intended to do so. Nor could it be considered specifically intended to cause severe mental pain or suffering within the meaning of sections 2340-2340A, as none of the statutory predicate acts would be present.

8. *Cramped confinement.* This technique does not involve any significant physical pain or suffering. It also does not involve a predicate act for purposes of severe mental pain or suffering. Specifically, we do not believe that placing a detainee in a dark, cramped space for the limited period of time involved here could reasonably be considered a procedure calculated to disrupt profoundly the senses so as to cause prolonged mental harm. Accordingly, we conclude that its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of sections 2340-2340A.

9. *Wall standing.* The wall standing technique, as you have described it, would not involve severe physical pain within the meaning of the statute. It also cannot be expected to cause severe physical suffering. Even if the physical discomfort of muscle fatigue associated with wall standing might be substantial, we understand that the duration of the technique is self-limited by the individual detainee's ability to sustain the position; thus, the short duration of the discomfort means that this technique would not be expected to cause, and could not reasonably be considered specifically intended to cause, severe physical suffering. Our advice also assumes that the detainee's position is not designed to produce severe pain that might result from contortions or twisting of the body, but only temporary muscle fatigue. Nor does wall standing

[39] Our advice about both the facial slap and the abdominal slap assumes that the interrogators will apply those techniques as designed and will not strike the detainee with excessive force or repetition in a manner that might result in severe physical pain.

involve any predicate act for purposes of severe mental pain or suffering. Accordingly, we conclude that the authorized use of this technique by adequately trained interrogators could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of the statute.

10. *Stress positions.* For the same reasons that the use of wall standing would not violate the statute, we conclude that the authorized use of stress positions such as those described in *Interrogation Memorandum*, if employed by adequately trained interrogators, could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of sections 2340-2340A. As with wall standing, we understand that the duration of the technique is self-limited by the individual detainee's ability to sustain the position; thus, the short duration of the discomfort means that this technique would not be expected to cause, and could not reasonably be considered specifically intended to cause, severe physical suffering. Our advice also assumes that stress positions are not designed to produce severe pain that might result from contortions or twisting of the body, but only temporary muscle fatigue.[40]

11. *Water dousing.* As you have described it to us, water dousing involves dousing the detainee with water from a container or a hose without a nozzle, and is intended to wear him down both physically and psychologically. You have informed us that the water might be as cold as 41°F, though you have further advised us that the water generally is not refrigerated and therefore is unlikely to be less than 50°F. (Nevertheless, for purposes of our analysis, we will assume that water as cold as 41°F might be used.) OMS has advised that, based on the extensive experience in SERE training, the medical literature, and the experience with detainees to date, water dousing as authorized is not designed or expected to cause significant physical pain, and certainly not severe physical pain. Although we understand that prolonged *immersion* in very cold water may be physically painful, as noted above, this interrogation technique does not involve immersion and a substantial margin of safety is built into the time limitation on the use of the CIA's water dousing technique—use of the technique with water of a given temperature must be limited to no more than two-thirds of the time in which hypothermia could be expected to occur from *total immersion* in water of the same temperature.[41] While being cold can involve physical discomfort, OMS also advises that in their professional judgment any resulting discomfort is not expected to be intense, and the duration is limited by specific times tied to

[40] A stress position that involves such contortion or twisting, as well as one held for so long that it could not be aimed only at producing temporary muscle fatigue, might raise more substantial questions under the statute. *Cf. Army Field Manual 34-52: Intelligence Interrogation* at 1-8 (1992) (indicating that "[f]orcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time" may constitute "torture" within the meaning of the Third Geneva Convention's requirement that "[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war," but not addressing 18 U.S.C. §§ 2340-2340A); United Nations General Assembly, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/59/150 at 6 (Sept. 1, 2004) (suggesting that "holding detainees in painful and/or stressful positions" might in certain circumstances be characterized as torture).

[41] Moreover, even in the extremely unlikely event that hypothermia set in, under the circumstances in which this technique is used—including close medical supervision and, if necessary, medical attention—we understand that the detainee would be expected to recover fully and rapidly.

water temperature. Any discomfort caused by this technique, therefore, would not qualify as "severe physical suffering" within the meaning of sections 2340-2340A. Consequently, given that there is no expectation that the technique will cause severe physical pain or suffering when properly used, we conclude that the authorized use of this technique by an adequately trained interrogator could not reasonably be considered specifically intended to cause these results.

With respect to mental pain or suffering, as you have described the procedure, we do not believe that any of the four statutory predicate acts necessary for a possible finding of severe mental pain or suffering under the statute would be present. Nothing, for example, leads us to believe that the detainee would understand the procedure to constitute a threat of imminent death, especially given that care is taken to ensure that no water will get into the detainee's mouth or nose. Nor would a detainee reasonably understand the prospect of being doused with cold water as the threatened infliction of severe pain. Furthermore, even were we to conclude that there could be a qualifying predicate act, nothing suggests that the detainee would be expected to suffer any prolonged mental harm as a result of the procedure. OMS advises that there has been no evidence of such harm in the SERE training, which utilizes a much more extreme technique involving total immersion. The presence of psychologists who monitor the detainee's mental condition makes such harm even more unlikely. Consequently, we conclude that the authorized use of the technique by adequately trained interrogators could not reasonably be considered specifically intended to cause severe mental pain or suffering within the meaning of the statute.

The flicking technique, which is subject to the same temperature limitations as water dousing but would involve substantially less water, *a fortiori* would not violate the statute.

12. *Sleep deprivation.* In the *Interrogation Memorandum*, we concluded that sleep deprivation did not violate sections 2340-2340A. *See id.* at 10, 14-15. This question warrants further analysis for two reasons. First, we did not consider the potential for physical pain or suffering resulting from the shackling used to keep detainees awake or any impact from the diapering of the detainee. Second, we did not address the possibility of severe physical suffering that does not involve severe physical pain.

Under the limitations adopted by the CIA, sleep deprivation may not exceed 180 hours, which we understand is approximately two-thirds of the maximum recorded time that humans have gone without sleep for purposes of medical study, as discussed below.[42] Furthermore, any detainee who has undergone 180 hours of sleep deprivation must then be allowed to sleep without interruption for at least eight straight hours. Although we understand that the CIA's guidelines would allow another session of sleep deprivation to begin after the detainee has gotten

[42] The *IG Report* described the maximum allowable period of sleep deprivation at that time as 264 hours or 11 days. *See IG Report* at 15. You have informed us that you have since established a limit of 180 hours, that in fact no detainee has been subjected to more than 180 hours of sleep deprivation, and that sleep deprivation will rarely exceed 120 hours. To date, only three detainees have been subjected to sleep deprivation for more than 96 hours.

at least eight hours of uninterrupted sleep following 180 hours of sleep deprivation, we will evaluate only one application of up to 180 hours of sleep deprivation.[43]

We understand from OMS, and from our review of the literature on the physiology of sleep, that even very extended sleep deprivation does not cause physical pain, let alone severe physical pain.[44] "The longest studies of sleep deprivation in humans . . . [involved] volunteers [who] were deprived of sleep for 8 to 11 days. . . . Surprisingly, little seemed to go wrong with the subjects physically. The main effects lay with sleepiness and impaired brain functioning, but even these were no great cause for concern." James Horne, *Why We Sleep: The Functions of Sleep in Humans and Other Mammals* 23-24 (1988) ("*Why We Sleep*") (footnote omitted). We note that there are important differences between sleep deprivation as an interrogation technique used by the CIA and the controlled experiments documented in the literature. The subjects of the experiments were free to move about and engage in normal activities and often led a "tranquil existence" with "plenty of time for relaxation," *see id.* at 24, whereas a detainee in CIA custody would be shackled and prevented from moving freely. Moreover, the subjects in the experiments often increased their food consumption during periods of extended sleep loss, *see id.* at 38, whereas the detainee undergoing interrogation may be placed on a reduced-calorie diet, as discussed above. Nevertheless, we understand that experts who have studied sleep deprivation have concluded that "[t]he most plausible reason for the uneventful physical findings with these human beings is that . . . sleep loss is not particularly harmful." *Id.* at 24. We understand that this conclusion does not depend on the extent of physical movement or exercise by the subject or whether the subject increases his food consumption. OMS medical staff members have also informed us, based on their experience with detainees who have undergone extended sleep deprivation and their review of the relevant medical literature, that extended sleep deprivation does not cause physical pain. Although edema, or swelling, of the lower legs may sometimes develop as a result of the long periods of standing associated with sleep deprivation, we understand from OMS that such edema is not painful and will quickly dissipate once the subject is removed from the standing position. We also understand that if any case of significant edema develops, the team will intercede to ensure that the detainee is moved from the standing position and that he receives any medical attention necessary to relieve the swelling and allow the edema to dissipate. For these reasons, we conclude that the authorized use of extended sleep

[43] As noted above, we are not concluding that additional use of sleep deprivation, subject to close and careful medical supervision, would violate the statute, but at the present time we express no opinion on whether additional sleep deprivation would be consistent with sections 2340-2340A.

[44] Although sleep deprivation is not itself physically painful, we understand that some studies have noted that extended total sleep deprivation may have the effect of reducing tolerance to some forms of pain in some subjects. *See, e.g.*, B. Kundermann, et al., *Sleep Deprivation Affects Thermal Pain Thresholds but not Somatosensory Thresholds in Healthy Volunteers*, 66 Psychosomatic Med. 932 (2004) (finding a significant decrease in heat pain thresholds and some decrease in cold pain thresholds after one night without sleep); S. Hakki Onen, et al., *The Effects of Total Sleep Deprivation, Selective Sleep Interruption and Sleep Recovery on Pain Tolerance Thresholds in Healthy Subjects*, 10 J. Sleep Research 35, 41 (2001) (finding a statistically significant drop of 8-9% in tolerance thresholds for mechanical or pressure pain after 40 hours); *id.* at 35-36 (discussing other studies). We will discuss the potential interactions between sleep deprivation and other interrogation techniques in the separate memorandum, to which we referred in footnote 6, addressing whether the combined use of certain techniques is consistent with the legal requirements of sections 2340-2340A.

deprivation by adequately trained interrogators would not be expected to cause and could not reasonably be considered specifically intended to cause severe physical pain.

In addition, OMS personnel have informed us that the shackling of detainees is not designed to and does not result in significant physical pain. A detainee subject to sleep deprivation would not be allowed to hang by his wrists, and we understand that no detainee subjected to sleep deprivation to date has been allowed to hang by his wrists or has otherwise suffered injury.[45] If necessary, we understand that medical personnel will intercede to prevent any such injury and would require either that interrogators use a different method to keep the detainee awake (such as through the use of sitting or horizontal positions), or that the use of the technique be stopped altogether. When the sitting position is used, the detainee is seated on a small stool to which he is shackled; the stool supports his weight but is too small to let the detainee balance himself and fall asleep. We also specifically understand that the use of shackling with horizontal sleep deprivation, which has only been used rarely, is done in such a way as to ensure that there is no additional stress on the detainee's arm or leg joints that might force the limbs beyond natural extension or create tension on any joint. Thus, shackling cannot be expected to result in severe physical pain, and we conclude that its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to do so. Finally, we believe that the use of a diaper cannot be expected to—and could not reasonably be considered intended to—result in any physical pain, let alone severe physical pain.

Although it is a more substantial question, particularly given the imprecision in the statutory standard and the lack of guidance from the courts, we also conclude that extended sleep deprivation, subject to the limitations and conditions described herein, would not be expected to cause "severe physical suffering." We understand that some individuals who undergo extended sleep deprivation would likely at some point experience physical discomfort and distress. We assume that some individuals would eventually feel weak physically and may experience other unpleasant physical sensations from prolonged fatigue, including such symptoms as impairment to coordinated body movement, difficulty with speech, nausea, and blurred vision. *See Why We Sleep* at 30. In addition, we understand that extended sleep deprivation will often cause a small drop in body temperature, *see id.* at 31, and we assume that such a drop in body temperature may also be associated with unpleasant physical sensations. We also assume that any physical discomfort that might be associated with sleep deprivation would likely increase, at least to a point, the longer the subject goes without sleep. Thus, on these assumptions, it may be the case that at some point, for some individuals, the degree of physical distress experienced in sleep deprivation might be substantial.[46]

On the other hand, we understand from OMS, and from the literature we have reviewed on the physiology of sleep, that many individuals may tolerate extended sleep deprivation well

[45] This includes a total of more than 25 detainees subjected to at least some period of sleep deprivation. *See January 4 [redacted] Fax* at 1-3.

[46] The possibility noted above that sleep deprivation might heighten susceptibility to pain, *see supra* note 44, magnifies this concern.

and with little apparent distress, and that this has been the CIA's experience.[47] Furthermore, the principal physical problem associated with standing is edema, and in any instance of significant edema, the interrogation team will remove the detainee from the standing position and will seek medical assistance. The shackling is used only as a passive means of keeping the detainee awake and, in both the tightness of the shackles and the positioning of the hands, is not intended to cause pain. A detainee, for example, will not be allowed to hang by his wrists. Shackling in the sitting position involves a stool that is adequate to support the detainee's weight. In the rare instances when horizontal sleep deprivation may be used, a thick towel or blanket is placed under the detainee to protect against reduction of body temperature from contact with the floor, and the manacles and shackles are anchored so as not to cause pain or create tension on any joint. If the detainee is nude and is using an adult diaper, the diaper is checked regularly to prevent skin irritation. The conditions of sleep deprivation are thus aimed at preventing severe physical suffering. Because sleep deprivation does not involve physical pain and would not be expected to cause extreme physical distress to the detainee, the extended duration of sleep deprivation, within the 180-hour limit imposed by the CIA, is not a sufficient factor alone to constitute severe physical suffering within the meaning of sections 2340-2340A. We therefore believe that the use of this technique, under the specified limits and conditions, is not "extreme and outrageous" and does not reach the high bar set by Congress for a violation of sections 2340-2340A. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d at 92 (to be torture under the TVPA, conduct must be "extreme and outrageous"); *cf. Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1332-40, 1345-46 (standard met under the TVPA by a course of conduct that included severe beatings to the genitals, head, and other parts of the body with metal pipes and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim's forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of "Russian roulette").

Nevertheless, because extended sleep deprivation could in some cases result in substantial physical distress, the safeguards adopted by the CIA, including ongoing medical monitoring and intervention by the team if needed, are important to ensure that the CIA's use of extended sleep deprivation will not run afoul of the statute. Different individual detainees may react physically to sleep deprivation in different ways. We assume, therefore, that the team will separately monitor each individual detainee who is undergoing sleep deprivation, and that the application of this technique will be sensitive to the individualized physical condition and reactions of each detainee. Moreover, we emphasize our understanding that OMS will intervene to alter or stop the course of sleep deprivation for a detainee if OMS concludes in its medical judgment that the detainee is or may be experiencing extreme physical distress.[48] The team, we

[47] Indeed, although it may seem surprising to those not familiar with the extensive medical literature relating to sleep deprivation, based on that literature and its experience with the technique, in its guidelines, OMS lists sleep deprivation as less intense than water dousing, stress positions, walling, cramped confinement, and the waterboard. *See OMS Guidelines* at 8.

[48] For example, any physical pain or suffering associated with standing or with shackles might become more intense with an extended use of the technique on a particular detainee whose condition and strength do not permit him to tolerate it, and we understand that personnel monitoring the detainee will take this possibility into account and, if necessary, will ensure that the detainee is placed into a sitting or horizontal position or will direct that the sleep deprivation be discontinued altogether. *See OMS Guidelines* at 14-16.

understand, will intervene not only if the sleep deprivation itself may be having such effects, but also if the shackling or other conditions attendant to the technique appear to be causing severe physical suffering. With these precautions in place, and based on the assumption that they will be followed, we conclude that the authorized use of extended sleep deprivation by adequately trained interrogators would not be expected to and could not reasonably be considered specifically intended to cause severe physical suffering in violation of 18 U.S.C. §§ 2340-2340A.

Finally, we also conclude that extended sleep deprivation cannot be expected to cause "severe mental pain or suffering" as defined in sections 2340-2340A, and that its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to do so. First, we do not believe that use of the sleep deprivation technique, subject to the conditions in place, would involve one of the predicate acts necessary for "severe mental pain or suffering" under the statute. There would be no infliction or threatened infliction of severe physical pain or suffering, within the meaning of the statute, and there would be no threat of imminent death. It may be questioned whether sleep deprivation could be characterized as a "procedure[] calculated to disrupt profoundly the senses or the personality" within the meaning of section 2340(2)(B), since we understand from OMS and from the scientific literature that extended sleep deprivation might induce hallucinations in some cases. Physicians from OMS have informed us, however, that they are of the view that, in general, no "profound" disruption would result from the length of sleep deprivation contemplated by the CIA, and again the scientific literature we have reviewed appears to support this conclusion. Moreover, we understand that any team member would direct that the technique be immediately discontinued if there were any sign that the detainee is experiencing hallucinations. Thus, it appears that the authorized use of sleep deprivation by the CIA would not be expected to result in a profound disruption of the senses, and if it did, it would be discontinued. Even assuming, however, that the extended use of sleep deprivation may result in hallucinations that could fairly be characterized as a "profound" disruption of the subject's senses, we do not believe it tenable to conclude that in such circumstances the use of sleep deprivation could be said to be "calculated" to cause such profound disruption to the senses, as required by the statute. The term "calculated" denotes something that is planned or thought out beforehand: "Calculate," as used in the statute, is defined to mean "to plan the nature of beforehand: think out"; "to design, prepare, or adapt by forethought or careful plan: fit or prepare by appropriate means." *Webster's Third New International Dictionary* at 315 (defining "calculate"—"used chiefly [as it is in section 2340(2)(B)] as [a] past part[iciple] with complementary infinitive <*calculated* to succeed>"). Here, it is evident that the potential for any hallucinations on the part of a detainee undergoing sleep deprivation is not something that would be a "calculated" result of the use of this technique, particularly given that the team would intervene immediately to stop the technique if there were signs the subject was experiencing hallucinations.

Second, even if we were to assume, out of an abundance of caution, that extended sleep deprivation could be said to be a "procedure[] calculated to disrupt profoundly the senses or the personality" of the subject within the meaning of section 2340(2)(B), we do not believe that this technique would be expected to—or that its authorized use by adequately trained interrogators could reasonably be considered specifically intended to—cause "*prolonged* mental harm" as required by the statute, because, as we understand it, any hallucinatory effects of sleep deprivation would dissipate rapidly. OMS has informed us, based on the scientific literature and

on its own experience with detainees who have been sleep deprived, that any such hallucinatory effects would not be prolonged. We understand from OMS that *Why We Sleep* provides an accurate summary of the scientific literature on this point. As discussed there, the longest documented period of time for which any human has gone without sleep is 264 hours. *See id.* at 29-34. The longest study with more than one subject involved 205 hours of sleep deprivation. *See id.* at 37-42. We understand that these and other studies constituting a significant body of scientific literature indicate that sleep deprivation temporarily affects the functioning of the brain but does not otherwise have significant physiological effects. *See id.* at 100. Sleep deprivation's effects on the brain are generally not severe but can include impaired cognitive performance and visual hallucinations; however, these effects dissipate rapidly, often with as little as one night's sleep. *See id.* at 31-32, 34-37, 40, 47-53. Thus, we conclude, any temporary hallucinations that might result from extended sleep deprivation could not reasonably be considered "prolonged mental harm" for purposes of sections 2340-2340A.[49]

In light of these observations, although in its extended uses it may present a substantial question under sections 2340-2340A, we conclude that the authorized use of sleep deprivation by adequately trained interrogators, subject to the limitations and monitoring in place, could not reasonably be considered specifically intended to cause severe mental pain or suffering. Finally, the use of a diaper for sanitary purposes on an individual subjected to sleep deprivation, while potentially humiliating, could not be considered specifically intended to inflict severe mental pain or suffering within the meaning of the statute, because there would be no statutory predicate act and no reason to expect "prolonged mental harm" to result.[50]

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[49] Without determining the minimum time for mental harm to be considered "prolonged," we do not believe that "prolonged mental harm" would occur during the sleep deprivation itself. As noted, OMS would order that the technique be discontinued if hallucinations occurred. Moreover, even if OMS personnel were not aware of any such hallucinations, whatever time would remain between the onset of such hallucinations, which presumably would be well into the period of sleep deprivation, and the 180-hour maximum for sleep deprivation would not constitute "prolonged" mental harm within the meaning of the statute. Nevertheless, we note that this aspect of the technique calls for great care in monitoring by OMS personnel, including psychologists, especially as the length of the period of sleep deprivation increases.

[50] We note that the court of appeals in *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996), stated that a variety of techniques taken together, one of which was sleep deprivation, amounted to torture. The court, however, did not specifically discuss sleep deprivation apart from the other conduct at issue, and it did not conclude that sleep deprivation alone amounted to torture. In *Ireland v. United Kingdom*, the European Court of Human Rights concluded by a vote of 13-4 that sleep deprivation, even in conjunction with a number of other techniques, did not amount to torture under the European Charter. The duration of the sleep deprivation at issue was not clear, *see* separate opinion of Judge Fitzmaurice at ¶ 19, but may have been 96-120 hours, *see* majority opinion at ¶ 104. Finally, we note that the Committee Against Torture of the Office of the High Commissioner for Human Rights, in *Concluding Observations of the Committee Against Torture: Israel*, U.N. Doc. A/52/44, at ¶ 257 (May 9, 1997), concluded that a variety of practices taken together, including "sleep deprivation for prolonged periods," "constitute torture as defined in article 1 of the [CAT]." *See also* United Nations General Assembly, *Report of the Committee Against Torture*, U.N. Doc. A/52/44 at ¶ 56 (Sept. 10, 1997) ("sleep deprivation practised on suspects . . . may in some cases constitute torture"). The Committee provided no details on the length of the sleep deprivation or how it was implemented and no analysis to support its conclusion. These precedents provide little or no helpful guidance in our review of the CIA's use of sleep deprivation under sections 2340-2340A. While we do not rely on this fact in interpreting sections 2340-2340A, we note that we are aware of no decision of any foreign court or international tribunal finding that the techniques analyzed here, if subject to the limitations and conditions set out, would amount to torture.

13. *Waterboard.* We previously concluded that the use of the waterboard did not constitute torture under sections 2340-2340A. *See Interrogation Memorandum* at 11, 15. We must reexamine the issue, however, because the technique, as it would be used, could involve more applications in longer sessions (and possibly using different methods) than we earlier considered.[51]

We understand that in the escalating regimen of interrogation techniques, the waterboard is considered to be the most serious, requires a separate approval that may be sought only after other techniques have not worked (or are considered unlikely to work in the time available), and in fact has been—and is expected to be—used on very few detainees. We accept the assessment of OMS that the waterboard "is by far the most traumatic of the enhanced interrogation techniques." *OMS Guidelines* at 15. This technique could subject a detainee to a high degree of distress. A detainee to whom the technique is applied will experience the physiological sensation of drowning, which likely will lead to panic. We understand that even a detainee who knows he is not going to drown is likely to have this response. Indeed, we are informed that even individuals very familiar with the technique experience this sensation when subjected to the waterboard.

Nevertheless, although this technique presents the most substantial question under the statute, we conclude for the reasons discussed below that the authorized use of the waterboard by adequately trained interrogators, subject to the limitations and conditions adopted by the CIA and in the absence of any medical contraindications, would not violate sections 2340-2340A. (We understand that a medical contraindication may have precluded the use of this particular technique on [redacted]. In reaching this conclusion, we do not in any way minimize the

[51] The *IG Report* noted that in some cases the waterboard was used with far greater frequency than initially indicated, *see IG Report* at 5, 44, 46, 103-04, and also that it was used in a different manner. *See id.* at 37 ("[T]he waterboard technique . . . was different from the technique described in the DoJ opinion and used in the SERE training. The difference was in the manner in which the detainee's breathing was obstructed. At the SERE school and in the DoJ opinion, the subject's airflow is disrupted by the firm application of a damp cloth over the air passages; the interrogator applies a small amount of water to the cloth in a controlled manner. By contrast, the Agency interrogator . . . applied large volumes of water to a cloth that covered the detainee's mouth and nose. One of the psychologists/interrogators acknowledged that the Agency's use of the technique is different from that used in SERE training because it is 'for real' and is more poignant and convincing."); *see also id.* at 14 n.14 ("The Inspector General further reported that "OMS contends that the expertise of the SERE psychologist/interrogators on 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." *Id.* at 21 n.26. We have carefully considered the *IG Report* and discussed it with OMS personnel. As noted, OMS input has resulted in a number of changes in the application of the waterboard, including limits on the frequency and cumulative use of the technique. Moreover, OMS personnel are carefully instructed in monitoring this technique and are personally present whenever it is used. *See OMS Guidelines* at 17-20. Indeed, although physician assistants can be present when other enhanced techniques are applied, "use of the waterboard requires the presence of a physician." *Id.* at 9 n.2.

experience. The panic associated with the feeling of drowning could undoubtedly be significant. There may be few more frightening experiences than feeling that one is unable to breathe.[52]

However frightening the experience may be, OMS personnel have informed us that the waterboard technique is not physically painful. This conclusion, as we understand the facts, accords with the experience in SERE training, where the waterboard has been administered to several thousand members of the United States Armed Forces.[53] To be sure, in SERE training, the technique is confined to at most two applications (and usually only one) of no more than 40 seconds each. Here, there may be two sessions, of up to two hours each, during a 24-hour period, and each session may include multiple applications, of which six may last 10 seconds or longer (but none more than 40 seconds), for a total time of application of as much as 12 minutes in a 24-hour period. Furthermore, the waterboard may be used on up to five days during the 30-day period for which it is approved. *See August 19 [redacted] Letter* at 1-2. As you have informed us, the CIA has previously used the waterboard repeatedly on two detainees, and, as far as can be determined, these detainees did not experience physical pain or, in the professional judgment of doctors, is there any medical reason to believe they would have done so. Therefore, we conclude that the authorized use of the waterboard by adequately trained interrogators could not reasonably be considered specifically intended to cause "severe physical pain."

We also conclude that the use of the waterboard, under the strict limits and conditions imposed, would not be expected to cause "severe physical suffering" under the statute. As noted above, the difficulty of specifying a category of physical suffering apart from both physical pain and mental pain or suffering, along with the requirement that any such suffering be "severe," calls for an interpretation under which "severe physical suffering" is reserved for physical distress that is severe considering both its intensity and duration. To the extent that in some applications the use of the waterboard could cause choking or similar physical—as opposed to mental—sensations, those physical sensations might well have an intensity approaching the degree contemplated by the statute. However, we understand that any such physical—as opposed to mental—sensations caused by the use of the waterboard end when the application

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[52] As noted above, in most uses of the technique, the individual is in fact able to breathe, though his breathing is restricted. Because in some uses breathing would not be possible, for purposes of our analysis we assume that the detainee is unable to breathe during applications of water.

[53] We understand that the waterboard is currently used only in Navy SERE training. As noted in the *IG Report*, "[a]ccording to individuals with authoritative knowledge of the SERE program, . . . [e]xcept for Navy SERE training, use of the waterboard was discontinued because of its dramatic effect on the students who were subjects." *IG Report* at 14 n.14. We understand that use of the waterboard was discontinued by the other services not because of any concerns about possible physical or mental harm, but because students were not successful at resisting the technique and, as such, it was not considered to be a useful training technique. We note that OMS has concluded that "[w]hile SERE trainers believe that trainees are unable to maintain psychological resistance to the waterboard, our experience was otherwise. Some subjects unquestionably can withstand a large number of applications, with no immediately discernible cumulative impact beyond their strong aversion to the experience." *OMS Guidelines* at 17. We are aware that at a recent Senate Judiciary Committee hearing, Douglas Johnson, Executive Director of the Center for Victims of Torture, testified that some U.S. military personnel who have undergone waterboard training have apparently stated "that it's taken them 15 years of therapy to get over it." You have informed us that, in 2002, the CIA made inquiries to Department of Defense personnel involved in SERE training and that the Department of Defense was not aware of any information that would substantiate such statements, nor is the CIA aware of any such information.

ends. Given the time limits imposed, and the fact that any physical distress (as opposed to possible mental suffering, which is discussed below) would occur only during the actual application of water, the physical distress caused by the waterboard would not be expected to have the duration required to amount to severe physical suffering.[54] Applications are strictly limited to at most 40 seconds, and a total of at most 12 minutes in any 24-hour period, and use of the technique is limited to at most five days during the 30-day period we consider. Consequently, under these conditions, use of the waterboard cannot be expected to cause "severe physical suffering" within the meaning of the statute, and we conclude that its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to cause "severe physical suffering."[55] Again, however, we caution that great care should be used in adhering to the limitations imposed and in monitoring any detainee subjected to it to prevent the detainee from experiencing severe physical suffering.

The most substantial question raised by the waterboard relates to the statutory definition of "severe mental pain or suffering." The sensation of drowning that we understand accompanies the use of the waterboard arguably could qualify as a "threat of imminent death" within the meaning of section 2340(2)(C) and thus might constitute a predicate act for "severe mental pain or suffering" under the statute.[56] Although the waterboard is used with safeguards that make actual harm quite unlikely, the detainee may not know about these safeguards, and even if he does learn of them, the technique is still likely to create panic in the form of an acute instinctual fear arising from the physiological sensation of drowning.

Nevertheless, the statutory definition of "severe mental pain or suffering" also requires that the predicate act produce "prolonged mental harm." 18 U.S.C. § 2340(2). As we understand from OMS personnel familiar with the history of the waterboard technique, as used both in SERE training (though in a substantially different manner) and in the previous CIA interrogations, there is no medical basis to believe that the technique would produce any mental effect beyond the distress that directly accompanies its use and the prospect that it will be used again. We understand from the CIA that to date none of the thousands of persons who have undergone the more limited use of the technique in SERE training has suffered prolonged mental harm as a result. The CIA's use of the technique could far exceed the one or two applications to which SERE training is limited, and the participant in SERE training presumably understands that the technique is part of a training program that is not intended to hurt him and will end at some foreseeable time. But the physicians and psychologists at the CIA familiar with the facts

[54] We emphasize that physical suffering differs from physical pain in this respect. Physical pain may be "severe" even if lasting only seconds; whereas, by contrast, physical distress may amount to "severe physical suffering" only if it is severe both in intensity and duration.

[55] As with sleep deprivation, the particular condition of the individual detainee must be monitored so that, with extended or repeated use of the technique, the detainee's experience does not depart from these expectations.

[56] It is unclear whether a detainee being subjected to the waterboard in fact experiences it as a "threat of imminent death." We understand that the CIA may inform a detainee on whom this technique is used that he would not be allowed to drown. Moreover, after multiple applications of the waterboard, it may become apparent to the detainee that, however frightening the experience may be, it will not result in death. Nevertheless, for purposes of our analysis, we will assume that the physiological sensation of drowning associated with the use of the waterboard may constitute a "threat of imminent death" within the meaning of sections 2340-2340A.

have informed us that in the case of the two detainees who have been subjected to more extensive use of the waterboard technique, no evidence of prolonged mental harm has appeared in the period since the use of the waterboard on those detainees, a period which now spans at least 25 months for each of these detainees. Moreover, in their professional judgment based on this experience and the admittedly different SERE experience, OMS officials inform us that they would not expect the waterboard to cause such harm. Nor do we believe that the distress accompanying use of the technique on five days in a 30-day period, in itself, could be the "prolonged mental harm" to which the statute refers. The technique may be designed to create fear at the time it is used on the detainee, so that the detainee will cooperate to avoid future sessions. Furthermore, we acknowledge that the term "prolonged" is imprecise. Nonetheless, without in any way minimizing the distress caused by this technique, we believe that the panic brought on by the waterboard during the very limited time it is actually administered, combined with any residual fear that may be experienced over a somewhat longer period, could not be said to amount to the "prolonged mental harm" that the statute covers.[57] For these reasons, we conclude that the authorized use of the waterboard by adequately trained interrogators could not reasonably be considered specifically intended to cause "prolonged mental harm." Again, however, we caution that the use of this technique calls for the most careful adherence to the limitations and safeguards imposed, including constant monitoring by both medical and psychological personnel of any detainee who is subjected to the waterboard.

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[57] In *Hilao v. Estate of Marcos*, the Ninth Circuit stated that a course of conduct involving a number of techniques, one of which has similarities to the waterboard, constituted torture. The court described the course of conduct as follows:

> He was then interrogated by members of the military, who blindfolded and severely beat him while he was handcuffed and fettered; they also threatened him with death. When this round of interrogation ended, he was denied sleep and repeatedly threatened with death. In the next round of interrogation, all of his limbs were shackled to a cot and a towel was placed over his nose and mouth; his interrogators then poured water down his nostrils so that he felt as though he were drowning. This lasted for approximately six hours, during which time interrogators threatened [him] with electric shock and death. At the end of this water torture, [he] was left shackled to the cot for the following three days, during which time he was repeatedly interrogated. He was then imprisoned for seven months in a suffocatingly hot and unlit cell, measuring 2.5 meters square; during this time he was shackled to his cot, at first by all his limbs and later by one hand and one foot, for all but the briefest periods (in which he was allowed to eat or use the toilet). The handcuffs were often so tight that the slightest movement . . . made them cut into his flesh. During this period, he felt 'extreme pain, almost undescribable, the boredom' and 'the feeling that tons of lead . . . were falling on [his] brain. [He] was never told how long the treatment inflicted upon him would last. After his seven months shackled to his cot, [he] spent more than eight years in detention, approximately five of them in solitary confinement and the rest in near-solitary confinement.

103 F.3d at 790-91. The court then concluded, "it seems clear that all of the abuses to which [a plaintiff] testified—including the eight years during which he was held in solitary or near-solitary confinement—constituted a single course of conduct of torture." *Id.* at 795. In addition to the obvious differences between the technique in *Hilao* and the CIA's use of the waterboard subject to the careful limits described above (among other things, in *Hilao* the session lasted six hours and followed explicit threats of death and severe physical beatings), the court reached no conclusion that the technique by itself constituted torture. However, the fact that a federal appellate court would even colloquially describe a technique that may share some of the characteristics of the waterboard as "water torture" counsels continued care and careful monitoring in the use of this technique.

Even if the occurrence of one of the predicate acts could, depending on the circumstances of a particular case, give rise to an inference of intent to cause "prolonged mental harm," no such circumstances exist here. On the contrary, experience with the use of the waterboard indicates that prolonged mental harm would not be expected to occur, and CIA's use of the technique is subject to a variety of safeguards, discussed above, designed to ensure that prolonged mental harm does not result. Therefore, the circumstances here would negate any potential inference of specific intent to cause such harm.

Assuming adherence to the strict limitations discussed herein, including the careful medical monitoring and available intervention by the team as necessary, we conclude that although the question is substantial and difficult, the authorized use of the waterboard by adequately trained interrogators and other team members could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering and thus would not violate sections 2340-2340A.[58]

* * *

In sum, based on the information you have provided and the limitations, procedures, and safeguards that would be in place, we conclude that—although extended sleep deprivation and use of the waterboard present more substantial questions in certain respects under the statute and the use of the waterboard raises the most substantial issue—none of these specific techniques, considered individually, would violate the prohibition in sections 2340-2340A. The universal rejection of torture and the President's unequivocal directive that the United States not engage in torture warrant great care in analyzing whether particular interrogation techniques are consistent with the requirements of sections 2340-2340A, and we have attempted to employ such care throughout our analysis. We emphasize that these are issues about which reasonable persons may disagree. Our task has been made more difficult by the imprecision of the statute and the relative absence of judicial guidance, but we have applied our best reading of the law to the specific facts that you have provided. As is apparent, our conclusion is based on the assumption that close observation, including medical and psychological monitoring of the detainees, will continue during the period when these techniques are used; that the personnel present are authorized to, and will, stop the use of a technique at any time if they believe it is being used improperly or threatens a detainee's safety or that a detainee may be at risk of suffering severe physical or mental pain or suffering; that the medical and psychological personnel are continually assessing the available literature and ongoing experience with detainees, and that, as they have done to date, they will make adjustments to techniques to ensure that they do not cause severe physical or mental pain or suffering to the detainees; and that all interrogators and other team members understand the proper use of the techniques, that the techniques are not designed

[58] As noted, medical personnel are instructed to exercise special care in monitoring and reporting on use of the waterboard. *See OMS Guidelines* at 20 ("NOTE: In order to best inform future medical judgments and recommendations, it is important that every application of the waterboard be thoroughly documented: how long each application (and the entire procedure) lasted, how much water was used in the process (realizing that much splashes off), how exactly the water was applied, if a seal was achieved, if the naso- or oropharynx was filled, what sort of volume was expelled, how long was the break between applications, and how the subject looked between each treatment.") (emphasis omitted).

or intended to cause severe physical or mental pain or suffering, and that they must cooperate with OMS personnel in the exercise of their important duties.

Please let us know if we may be of further assistance.

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