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## OUTLINE OF THREE OLC OPINIONS

- OLC has issued three recent opinions for the CIA on the legality of its interrogation practices.
  - The first opinion concluded that the CIA's interrogation techniques, considered individually, are consistent with the federal anti-torture statute, 18 U.S.C. §§ 2340-2340A, as interpreted in OLC's Dec. 30, 2004 published opinion. *Interrogation Techniques Opinion* (May 10, 2005).
  - The second concluded that the combined use of the techniques is also consistent with 18 U.S.C. §§ 2340-2340A. *Combined Use Opinion* (May 10, 2005).
  - The third concluded that the CIA's interrogation practices are consistent with U.S. obligations under Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). *Article 16 Opinion* (May 30, 2005).
- The CIA interrogation techniques at issue fall into three categories (all subject to medical and psychological assessments and close medical and other monitoring):
  - "Conditioning techniques"—nudity, dietary manipulation (with minimum caloric intake requirements), and extended sleep deprivation (more than 48 hours but in no event exceeding 180 hours) (primarily relying on shackling to keep the detainee in a standing position, or alternatively in a sitting or lying position).
  - "Corrective techniques"—facial slap (not done with sufficient force or repetition to cause severe pain), abdominal slap (ditto), facial hold, and attention grasp.
  - "Coercive techniques"—walling (using a false, flexible wall and a collar to protect against whiplash), water dousing (with limits on duration and minimum warmth requirements for water temperature and ambient air temperature), stress positions (relying on temporary muscle fatigue), wall standing (ditto), cramped confinement (with time limits of 8 hrs for large box and 2 hrs for small box), and the waterboard (which is subject to strict time limits and close physician supervision, and which may only be used with HQ approval when the detainee is believed to have actionable intelligence about an imminent terrorist attack and other techniques have failed).
- OLC interprets the anti-torture statute to incorporate three legal standards—i.e., the statute prohibits conduct specifically intended to cause one of three types of harm, as follows:
  - "severe physical pain"—which OLC concluded means "physical pain that is extreme in intensity and difficult to endure";
  - "severe physical suffering"—which OLC concluded means "a state or condition of physical distress, . . . usually involving physical pain, that is both extreme in intensity and significantly protracted in duration or persistent over time"; or
  - "severe mental pain or suffering"—which is specially defined in the statute to mean "the prolonged mental harm caused by" one or more of four predicate acts, including (1) the threat of imminent death; (2) the intentional infliction or threatened infliction of severe physical pain or suffering; (3) the administration or threatened administration of mind-altering substances or

other procedures calculated to disrupt profoundly the senses or the personality; or (4) such conduct or threats directed at another person.

- OLC concluded that an intent to cause “prolonged mental harm” is a separate element of “severe mental pain or suffering” under the statute, although, depending on the circumstances of a particular case, the occurrence of a predicate act may give rise to an inference of intent to cause prolonged mental harm.
- As used by the CIA, none of the interrogation techniques, including the shackling used with sleep deprivation, can be expected to cause, and none could reasonably be considered intended to cause, “severe physical pain” within the meaning of 18 U.S.C. §§ 2340-2340A.
- With respect to “severe physical suffering” and “severe mental pain or suffering,” two of the CIA techniques—the waterboard and extended sleep deprivation (particularly in combination with other techniques, such as walling and water dousing)—raise substantial issues, with the waterboard raising the most difficult issues; OLC concluded, however, that, subject to all of the CIA limitations and safeguards, including careful medical monitoring and intervention if necessary, none of the techniques used by the CIA violates the statute.
  - The waterboard involves substantial physical distress, but because this distress is experienced for only a short period of time, it is not expected to cause, and cannot reasonably be considered intended to cause, severe physical suffering.
  - The waterboard also involves a sensation of drowning, and this sensation may entail a “threat of imminent death” for purposes of the statute; however, based on experience with many thousands of applications of the waterboard in SERE training (albeit in a somewhat different form and under different circumstances), this technique is not expected to cause “prolonged mental harm” and thus cannot reasonably be considered specifically intended to cause such harm.
  - Extended sleep deprivation of up to 180 hours, particularly in the standing position, may, depending on the individual detainee, involve substantial physical distress and a risk of minor hallucinations, although these effects dissipate rapidly and an individual is expected to recover with a single night’s sleep; the fatigue and physical effects of extended sleep deprivation, however, may also exacerbate the combined effects of interrogation when used in combination with other techniques, including slaps, walling, stress positions, and water dousing.
    - For these reasons, OLC stressed that it is especially important that each detainee subject to extended sleep deprivation be carefully monitored for any signs of extreme physical distress or hallucinations, and that the use of the technique be altered or stopped to avoid any such result.
    - OLC’s opinion was also subject to the understanding that other techniques, which might involve some degree of physical pain, such as walling, slaps, stress positions, and water dousing, “would not be used during a course of extended sleep deprivation with such frequency and intensity as to induce in the detainee a persistent condition of extreme physical distress.” *Combined Use Opinion* at 16.

- In its May 30 *Article 16 Opinion*, OLC concluded that Article 16 of the CAT, which obligates the U.S. to take steps to prevent “cruel, inhuman or degrading treatment or punishment” in “any territory under its jurisdiction,” is inapplicable as a matter of law to the CIA’s interrogation program.
  - By its own terms, Article 16 applies only in “territory under [United States] jurisdiction,” and such territory includes, at most, land areas over which the U.S. exercises dominion and control—i.e., areas where the U.S. exercises at least de facto *authority as the government*; the CIA’s interrogation program is conducted outside any such territory, and therefore it cannot violate Article 16.
  - Moreover, because of concerns about the ill-defined nature of Article 16, the United States ratified the CAT subject to a Senate reservation, which binds the U.S. under Article 16 “only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited [in relevant part here] by the Fifth . . . Amendment[] to the Constitution.”
    - There is a strong argument that the Senate and the Executive Branch intended U.S. obligations under Article 16 to be co-extensive with the scope of U.S. obligations under the relevant Amendments to the Constitution, and the Fifth Amendment has been held not to create obligations on the U.S. with respect to aliens outside U.S. territory.
    - In light of the geographic limitation that appears in the text of Article 16, however, we need not decide here the precise effect, if any, that the Senate reservation has on the geographic scope of Article 16.
- Even if we assume, for the sake of policy and contrary to the legal determination above, that Article 16 does apply, OLC concluded that the CIA’s interrogation program would be consistent with the substantive requirements of Article 16, although there is very little relevant judicial guidance on this question.
  - The relevant constitutional standard is the “shocks the conscience” standard of substantive due process under the Fifth Amendment, which entails a *context-specific and fact-dependent inquiry* into whether:
    - (1) the government conduct at issue is “arbitrary in the constitutional sense,” meaning that it involves an “exercise of power without any reasonable justification in the service of a legitimate governmental objective” or is “intended to injure in some way unjustifiable by any government interest,” *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 849 (1998); and
    - (2) in light of “traditional executive behavior, of contemporary practice, and the standards of blame generally applied to them,” the conduct “is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” *Id.* at 847 n.8.
  - OLC concluded that the CIA’s interrogation program is not “arbitrary in the constitutional sense” because it is limited to what is reasonably necessary to acquire actionable intelligence to avoid terrorist attack on the U.S. (a vital government interest), is limited to a small number of the most high value detainees, and is carefully designed and administered to avoid injury to the detainees and any suffering that is unnecessary or lasting.

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- OLC also concluded that the CIA's interrogation program cannot "fairly be said to shock the contemporary conscience," although this inquiry is much more subjective and difficult because of the lack of relevant executive practice either condemning or condoning the sorts of interrogation practices used by the CIA.
  - Although the use of coercive interrogation practices has been condemned in other contexts—including ordinary domestic law enforcement; military interrogations of POWs under the Third Geneva Convention (as reflected in the *Army Field Manual*); and the State Department's Country Reports on Human Rights Practices of other nations—none of these other contexts is particularly relevant or useful in judging the unique context of the CIA program.
  - SERE training practice, from which all of the CIA interrogation techniques have been adapted, is also different from the present context in important respects; however, the use in SERE of similar techniques on our own U.S. troops for purposes of training does strongly indicate that the use by the Government of techniques like these is not entirely beyond the pale of what is permissible executive practice.