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Subj: The McCain Amendment and U.S. Obligations under Article 16 of the Convention Against Torture

Article 16 of the Convention Against Torture requires parties "to prevent in any territory under its jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture ...," The State Department agreed with the Justice Department May 2005 conclusion that this Article did not apply to CIA interrogations in foreign countries.

That situation has now changed. As a matter of policy, the U.S. government publicly extended the prohibition against cruel, inhuman, or degrading treatment to all conduct worldwide. And then, as a matter of law, the McCain Amendment extended the application of Article 16 of the Convention Against Torture to conduct by U.S. officials anywhere in the world.

The prohibitions of Article 16 of the CAT now do apply to the enhanced interrogation techniques authorized for employment by CIA. In this case, given the relationship of domestic law to the question of treaty interpretation, the responsibility of advising on interpretation is shared by both the Department of State and the Department of Justice.

The Senate's reservation stated that the CAT's ban on "cruel, inhuman, or degrading treatment or punishment" would bind the U.S. only insofar as it meant the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments. So, to define the CAT's ban, we are to look principally to America's 'cruel and unusual' standard. Though that standard is found in the Eighth Amendment, the Senate's invocation of the Fifth and Fourteenth Amendments made sense because, as a matter of substantive due process, "the Due Process Clause of the Fourteenth Amendment [which uses the same language as the Fifth Amendment] incorporates the Eighth Amendment's guarantee against cruel

1.4(c)

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and unusual punishment." Goodman v. Georgia, 126 S.Ct. 877, 879 (Jan. 10, 2006), *citing* Louisiana ex rel Francis v. Resweber, 329 U.S. 459, 463 (1947).

The "cruel and unusual" standard is also the least restrictive standard available anywhere in American jurisprudence. After all, the Eighth Amendment sets the floor on what can be done to the most dangerous offenders that exist in American law, people who can legally be punished, even legally put to death. All other standards of treatment in American law are more restrictive, since they apply to people who have not been convicted of crimes (as with pretrial detention, civil commitment, etc.) and where the due process standard judges whether they can be deprived of their liberty at all. This is why the "cruel and unusual' test is considered one aspect of substantive due process, where it is a kind of floor in a larger structure of protections. E.g., Jones v. Johnson, 781 F.2d 769 (9th Cir. 1986)(8th Amendment as minimum standard in case involving pretrial detention).

Further, the term "degrading" is a vaguer and potentially more restrictive term than "cruel" or "inhuman." This is another reason why it is fortunate that the Senate pointed to the "cruel and unusual" line of cases as the place to define the ban.[1]

There are a great many cases on the meaning of "cruel and unusual." As the Supreme Court has repeatedly said, writing about conditions of confinement, the words should be interpreted in a "flexible and dynamic manner." "No static test can exist by which courts may determine whether conditions of

[1] OLC did not cite Eighth Amendment precedents in its 2005 opinion because the Eighth Amendment would not apply to people who had not been judged guilty of a crime. (1) This argument confuses two kinds of references. The Senate commanded that the 'cruel and unusual' standard be used for substantive definition of conduct prevented by the treaty, not for a definition of the categories of people who could claim the treaty's protections. (2) The distinction is also substantively immaterial. No constitutional protections formally apply to these prisoners. The protections, including the Fifth Amendment ones that OLC acknowledges, are all being artificially imported to them by the operation of the CAT and the Senate reservation. The Eighth Amendment carries over just as well, both directly and through its inclusion as an aspect of the substantive due process protected under the Fifth and Fourteenth. (3) The Eighth Amendment is a minimum standard. If we reject this standard because the people have not been convicted of a crime, the government must find a standard of treatment even higher; and more restrictive, that would apply in situations like pretrial detention or civil commitment.

confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" Rhodes v. Chapman, 452 U.S. 337, 346 (1981), *citing* Trop v. Dulles, 356 U.S. 86, 101 (1958). The treatment or punishment need not be barbarous. The Court has used terms like "serious deprivations of human needs" or conditions which "deprive inmates of the minimal civilized measure of life's necessities." But treatment or punishment, if it is otherwise justified, can certainly be "restrictive and even harsh." Rhodes, 452 U.S. at 347.

Though the Supreme Court has frequently been divided on applying the "evolving standards of decency" test, it has clearly agreed that, "In discerning those 'evolving standards,' we have looked to objective evidence of how our society views a particular punishment today," looking for reliable objective evidence of contemporary values, such as the practices of legislatures. Penry v. Lynaugh, 492 U.S. 302, 331 (1989)(unanimous portion of opinion).

In addition to the 'cruel and unusual' standard, which especially applies to conditions of confinement, the substantive due process requirements also prohibit methods of interrogation that would "shock the conscience." Both standards must be discussed. The enhanced interrogation techniques combine manipulations of the conditions of confinement with the use of specific coercive methods during the questioning itself.

The 'shocks the conscience' test has been applied to interrogations on several occasions, but such cases are now relatively rare. The Court ruled in 2003, for example, that a man who had been questioned for ten minutes while in pain after being justifiably wounded by police officers could sue with a claim that his right to substantive due process had been violated by conduct that shocked the conscience. Chavez v. Martinez, 538 U.S. 760 (2003). Such interrogation cases have seldom risen to Supreme Court review in the post-Miranda era since the 1960s. Among the last such cases, the Court found violations of due process where the prisoner had been held incommunicado and questioned for a prolonged period. E.g., Darwin v.

Connecticut, 391 U.S. 346 (1968); Clewis v. Texas, 386 U.S. 707 (1967). In another case where a police officer questioned a wounded prisoner, threatened to kill him, and fired a gun near his ear, the Court also found "gross coercion." Beecher v. Alabama, 389 U.S. 35, 38 (1967).

In applying both tests, courts look to cumulative effect – it judges the acts both alone or in combination. Rhodes, 452 U.S. at 347 (sometimes also referred to as the "totality of circumstances").

The cases reveal a spectrum of views. Some techniques that are merely intrusive or harsh may pass either test if there is a worthy state interest in using them. Almost all of the techniques in question here would be deemed wanton and unnecessary and would immediately fail to pass muster unless there was a strong state interest in using them. So we presume for this opinion that they are all justified by a valid state interest -- the need to obtain information to protect the country.

But that is only part of the test. Under American law, there is no precedent for excusing treatment that is intrinsically "cruel" even if the state asserts a compelling need to use it.

The OLC agrees that some conduct is prohibited no matter how compelling the state interest may be. In attempting to define such intrinsically prohibited conduct, OLC looked at whether the enhanced interrogation techniques in question caused severe pain or suffering or inflicted significant or lasting harm. In other words, OLC concluded that "the techniques do not amount to torture." OLC opinion of May 30 (p. 27 and note 26 in the May 26 draft).

But the CAT's Article 16 states explicitly that the prohibited cruel, inhuman, or degrading treatment or punishment are acts "which do not amount to torture." Moreover, OLC's own opinion on the legal definition of torture emphasizes the difference. OLC quoted the Senate's explanation that: "'Torture' is thus to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented,

but are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in the case of torture." OLC opinion of Dec. 30, 2004, p. 4, see also note 14.

If the techniques, taken together, are intrinsically cruel, inhuman, or degrading – i.e., if under American constitutional law they would be either be considered cruel and unusual or shock the conscience, then they are prohibited. They can be barred, per se, even if they do not amount to torture. And they can be barred even if there is a compelling state interest asserted to justify them.

In looking to objective standards to inform a judgment about evolving standards of decency or interrogation techniques that shock the conscience, three sources stand out:

- American government practice, by any agency, in holding or questioning enemy combatants – including enemy combatants who do not have Geneva protection or who were regarded at the time as suspected terrorists, guerrillas, spies, or saboteurs. We are unaware of any precedent in World War II, the Korean War, the Vietnam War, or any subsequent conflict for authorized, systematic interrogation practices similar to those in question here, even where the prisoners were presumed to be unlawful combatants.[2]

- Recent practice by police and prison authorities in confining or questioning their most dangerous suspects. This practice is especially helpful since these authorities are governed by substantively similar standards to those that would apply under the CAT, given the Senate's reservation. We have not conducted a review of American domestic

[2] OLC noted that some of the questioned practices are openly regarded as torture in the Army Field Manual. It said that the Manual applied to combatants receiving Geneva protections, and these do not. OLC did not discuss military practice in confining and questioning enemy combatants who did not qualify for Geneva protection. Also, the question of whether combatants are protected or not is not necessarily relevant to noting whether the military regards the practices as torturous or cruel, for the purpose of establishing evolving standards of decency.

practice. From the available cases, it appears likely that some of the techniques being used would likely pass muster; several almost certainly would not.[3]

- Recent practice by other advanced governments that face potentially catastrophic terrorist dangers. [redacted] governments have abandoned several of the techniques in question here. 1.4(d)

It therefore appears to us that several of these techniques, singly or in combination, should be considered "cruel, inhuman, or degrading treatment or punishment" within the meaning of Article 16.

The techniques least likely to be sustained are the techniques described as "coercive," especially viewed cumulatively, such as the waterboard, walling, dousing, stress positions, and cramped confinement.

Those most likely to be sustained are the basic detention conditions and, in context, the corrective techniques, such as slaps.

The control conditions, such as nudity, sleep deprivation, and liquid diet, may also be sustainable, depending on the circumstances and details of how these techniques are used.

[3] OLC did not review domestic practice of police and prison authorities. OLC did argue that national security interests could justify more invasive practices than might perhaps be justifiable only by law enforcement interests. This may be a valid argument where the technique might be close to the line, domestically. But if the technique, or techniques, would violate domestic constitutional standards, it is nonetheless forbidden. The Senate pointed to domestic constitutional law as the source for defining this international treaty obligation.

1.4(c)