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U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

April 13, 2006

MEMORANDUM FOR THE FILES

From: Steven G. Bradbury
Acting Assistant Attorney General

Re: *Legal Review of Department of Defense Draft Documents Regarding Treatment and Interrogation of Detainees*

~~(S)~~ The Department of Defense ("DOD") has asked us to review for form and legality the revised drafts of the Army Field Manual 2-22.3 ("Human Intelligence Collector Operations"), Appendix M of FM 2-22.3 ("Restricted Interrogations Techniques"), and the Policy Directive regarding DOD's Detainee Program. By letter sent today to the General Counsel of DOD, we advised that these documents are consistent with the requirements of law, in particular with the requirements of the Detainee Treatment Act of 2005, Pub. L. No. 109-163, tit. XIV, 119 Stat. 3136, 3475 (2006) ("DTA"). This memorandum explains that conclusion.

(U) We begin with the Army Field Manual. The Field Manual reflects the military's historical practice toward the treatment of prisoners of war and other detainees in compliance with all of relevant legal obligations of the United States, including the Uniform Code of Military Justice and the 1949 Geneva Conventions. The modest revisions that have now been proposed to the Field Manual are fully consistent with this historical practice and thus do not require us to undertake a more detailed analysis of these issues.

~~(S)~~ Appendix M of the FM 2-22.3, provides guidance for the use of six "restricted interrogation techniques" that are not otherwise permitted by the Field Manual. The Department of Justice has previously concluded that techniques virtually identical to these are consistent with applicable U.S. legal obligations, including general criminal statutes relating to assault, maiming, murder and manslaughter, the federal torture statute (18 U.S.C. §§ 2340-2340A), Article 16 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the War Crimes Act (18 U.S.C. § 2441), and the Constitution. *See* Testimony of Patrick F. Philbin Before the House Permanent Select Committee on Intelligence

Derived from: Field Manual FM 2-22.3, Human Intelligence Collector Operations, Appendix M, Restricted Interrogation Techniques

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(July 14, 2004). There is no need to revisit those determinations here.[1] Indeed, the only relevant legal issue that we have not previously addressed is whether these techniques satisfy the standard imposed by the DTA, which mandates that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." DTA § 1403. Our conclusion that the six restricted techniques are consistent with the DTA follows from both the nature of those techniques and from the careful limitations that Appendix M imposes on their use.

~~(S)~~ These restrictions are significant. First, the techniques may be used only during the interrogation of "unlawful enemy combatants," that is, "persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict." M-3. Second, the techniques may only be used "when there is a good basis to believe that the detainee is likely to possess *important* intelligence." M-6 (emphasis added). Third, use of the techniques requires "special approval, judicious execution, special control measures, and rigorous oversight." *Id.* This includes a two-step approval process (including ultimate approval by the first General Officer/Flag Officer) for each specific use of one or more of the restricted techniques, and the development of an interrogation plan that includes specific limitations on duration, interval between application of the techniques, and termination criteria. M-15. Fourth, only DOD interrogators specially trained and certified to use restricted interrogation techniques are authorized to employ those techniques. M-23. Finally, Appendix M requires that detainees receive adequate medical care, including periodic check-up to ensure that they are "fit for interrogation." M-21. Detainees determined to be unfit for interrogation may not be interrogated. *Id.* Medical personnel also must be on call should an emergency arise during an interrogation. *Id.*

~~(S)~~ Appendix M describes the six restricted interrogation techniques as follows.

~~(S)~~ 1. "Mutt and Jeff." This technique uses two interrogators. The first conveys a strict and unfeeling attitude. Despite his attitude, however, the interrogator is not permitted to threaten or coerce the detainee. (b)(2) [redacted]

[1] Although the restricted techniques described in Appendix M differ in certain minor respects from those evaluated in the Philbin testimony, we do not think those difference are sufficient to alter the conclusions previously reached that the techniques comport with the general criminal statutes, the prohibition on torture, or the War Crimes Act. We assess below whether these revised techniques are consistent with the DTA, which imposes a standard identical to that of both Article 16 of the Convention Against Torture and the U.S. Constitution, as well as with the Geneva Conventions. We have not been asked to address the consistency of these techniques with the requirements of the Uniform Code of Military Justice, we assume that DOD has determined that the authorized use of the techniques, consistent with the applicable safeguards, accords with those requirements.

(b)(2) [redacted]

(b)(2) [redacted]. No violence, threats, or impermissible physical contact may be used in connection with the Mutt and Jeff technique.

~~(S)~~ 2. "False Flag." The goal of this technique is to convince the detainee that he is being interrogated by a country other than the United States in order to trick the detainee into cooperating with U.S. forces. In using the False Flag technique, interrogators may not make any implied or explicit threats that non-cooperation may result in harsh interrogation by non-U.S. entities. In addition, interrogators may not pose or portray themselves as medical personnel, members of the International Committee of the Red Cross, members of the clergy, journalists, or members of Congress.

(b)(5) [redacted]

(b)(5)

[redacted]

~~(S)~~ The DTA imposes two requirements relevant to Appendix M. First, section 1402(a) provides that "[n]o person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the Army Field Manual on Intelligence Interrogation." Appendix M is part of the Army Field Manual referenced in this provision, and thus the six restricted techniques described above are clearly "authorized by and listed in" that Manual. We therefore have no trouble concluding that the use of these techniques would satisfy section 1402(a).

~~(S)~~ Second, section 1403(a) of the DTA provides that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." This requirement applies to detainees held by DOD, and we must therefore determine whether the six restricted techniques listed in Appendix M are consistent with the obligation to avoid "cruel, inhuman, or degrading treatment or punishment." We conclude that they are consistent.

(U) According to the DTA, "the term 'cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations, and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984." DTA § 1003(d); *see also* U.S. Reservation to Article 16 of Convention Against Torture, 136 Cong. Rec. 36, 198 (1990) (undertaking Article 16 obligation "only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth,

and/or Fourteenth Amendments to the Constitution of the United States"). Because the Eighth Amendment applies only once there has been a "formal adjudication of guilt," *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977), and the Fourteenth Amendment applies only to the States, *see Bolling v. Sharpe*, 347 U.S. 651, 671 n.40 (1954), the relevant constitutional provision here is the Fifth Amendment. The Fifth Amendment (through the doctrine of substantive due process) regulates the treatment of detainees before conviction, requiring that such persons be subjected neither to "punishment," *Bell v. Wolfish*, 441 U.S. 520 (1979), nor to conduct that "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). *See also Chavez v. Martinez*, 538 U.S. 760, 773 (2003) (plurality op.) (observing that the Due Process Clause governs the inquiry in cases involving "police torture or other abuse that results in a confession" that is not used in a criminal trial); *id.* at 779 (Souter, J., concurring) (same).

~~(S)~~ The Supreme Court has said that "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental interest, it does not, without more, amount to 'punishment.'" *Wolfish*, 441 U.S. at 539. Similarly, "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Lewis*, 523 U.S. at 849. Moreover, in the "custodial situation of a prison," where "forethought about an inmate's welfare is not only feasible but obligatory," *id.* at 851, "deliberate indifference" to the medical needs of detainees may also rise to conscience-shocking levels. *Id.* at 850-52. Recognizing that there is "no calibrated yardstick" for applying these tests, *id.* at 847, and that "preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking," *id.* at 850, we conclude that none of the techniques at issue exceeds the bounds of due process.

~~(S)~~ First, the government interest justifying the use of the restricted interrogation techniques is not merely "legitimate," it is compelling. As described above, these techniques are not used in order to punish detainees, but instead may be used only to interrogate enemy combatants believed to possess important intelligence that may help safeguard U.S. forces and protect U.S. interests. M-1, M-6. This limitation on the category of detainees against whom the restricted techniques may be used both reinforces the importance of the Government's interest and demonstrates a calibrated connection between ends and means.[2] Obtaining actionable intelligence in the context of an ongoing armed conflict against a dedicated enemy that has demonstrated a willingness to disregard the laws of war is unquestionably of vital national

[2] Our analysis here thus does not suggest that any or all of the six restricted techniques would necessarily satisfy the requirements of the DTA if they were permitted in the interrogation of *all* DOD detainees, regardless of their combatant status and without regard to the level of intelligence value they might possess. Nor does our analysis suggest that these techniques would be lawful if used in the criminal justice process as a means of obtaining information about ordinary crimes.

importance. And the six techniques are well-suited to that goal. They are designed to create a favorable environment for intelligence gathering, but at the same time have been carefully limited in their scope and duration to ensure that they are not used in ways that might either inflict unwarranted harm on the detainees or reflect a deliberate indifference to their well-being.

~~(S)~~ None of the techniques allow interrogators to make physical contact with the detainees. None contemplate the infliction of any pain or suffering. They may be used only by specially trained interrogators in order to minimize the risk that they will lead to unintended hardship. "Mutt and Jeff" is really nothing more than a combination of techniques already included in the Army Field Manual. "False Flag" is merely a psychological ploy that is not designed to inflict mental hardship on the detainee. Quite the contrary, the express restriction of the ability of interrogators to threaten detainees with abuse at the hands of foreign entities significantly limits the potential adverse effects of this technique on the detainee's well-being. Similarly, the three "Adjustment" techniques are designed to change the detainee's environment (b)(2) [redacted] but without depriving him of any basic necessities or exposing him to dangerous or tortuous conditions. Whether these techniques are used separately or in tandem, the detainee is guaranteed to receive adequate levels of food, water, sleep, heat, ventilation, and light. In addition, the detainee's health must be continually monitored by medical personnel. These safeguards ensure that these techniques do not involve the infliction of punishment and negate any inference that they represent deliberative indifference.

~~(S)~~ Finally, the "Separation" technique expressly requires that the "basic standards of humane treatment" be maintained even though the detainee may be isolated from other detainees. A detainee subjected to this technique does not undergo sensory deprivation and thus is far less likely to suffer the adverse physiological consequences associated with that experience. M-51. In addition, the Separation technique is carefully limited in its duration, which is not to exceed 30 days without express authorization from a senior military officer. With these limitations in place, and given the important role isolation can play in conditioning detainees for interrogation (including limiting the ability to frustrate or mislead interrogators by sharing information about the interrogation process), the Separation technique does not amount to punishment and is not shocking to the conscience. *Cf. Hutto v. Finney*, 437 U.S. 678, 686 (1978) (observing that it is "perfectly obvious that every decision to remove a particular inmate from the general prison population for an indeterminate period could not be characterized as cruel and unusual"); *McMahon v. Beard*, 583 F.2d 172 (5th Cir. 1978) (even in ordinary criminal system, substantive due process imposes no per se bar to the physical isolation of pretrial detainees).

~~(S)~~ In the limited context in which they may be used, and subject to these carefully considered restrictions that we have described, each the six techniques maintains a reasonable relationship to the legitimate government interest associated with obtaining valuable military intelligence. Nothing in Appendix M allows interrogators to impose physical or mental hardship

on the detainees in ways that are out of proportion to that goal. Nothing permits the wanton infliction of pain or suffering, or evinces deliberate indifference to such suffering. For these reasons, we conclude that the techniques authorized by Appendix M do not shock the conscience and thus comport with the requirements of the DTA.

~~(S)~~ This analysis does not change merely because some of these techniques may be used in conjunction with one another. Although it is impossible to address the potential combined effects of these techniques in the abstract, it is important to note that Appendix M expressly requires that "planning must consider the possible cumulative effect of multiple techniques and take into account the age, sex, and health of the detainees, as appropriate." M-26. The restricted techniques thus are not to be combined haphazardly, but instead may be aggregated only as part of a carefully considered interrogation plan. This requirement diminishes the prospect that deliberate indifference or excessive hardship will result from the use of multiple techniques. This is not to foreclose the possibility that, in certain contexts, combining interrogation techniques that are lawful when used individually might violate due process. Instead, our conclusion is that due process does not prohibit DOD from using individually tailored interrogation plans that, in service of the objective of obtaining valuable intelligence from unlawful enemy combatants, simultaneous employ multiple interrogation techniques.

~~(S)~~ We add only a brief comment about the Geneva Conventions. Because we understand that DOD will not allow use of these techniques on any detainee entitled to the protections of the Geneva Conventions, we need not assess whether the techniques comport with the substantive standards that the Conventions impose for the treatment of prisoners of war and protected persons.

(U) Finally, we turn to the Draft Policy Directive. It is important to emphasize that this document is merely a statement of DOD policy and does not reflect the legal obligations of the United States. In particular, the Directive does not purport to state U.S. legal obligations under the Constitution, the Uniform Code of Military Justice, the Geneva Conventions, or any other treaty of the United States. Nor does the Directive purport to state legal obligations created by the laws of war or any other body of customary international law. With this important caveat, we approve issuance of the revised Directive.