

**ACLU v. DOD, No. 08-1003 (D.D.C.)**



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

August 24, 2009

Mr. Jameel Jaffer  
ACLU Foundation  
Legal Department  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004-2400

Re: American Civil Liberties Union v. Department of Defense, et al.,  
No. 1:08-cv-01003-RJL

Dear Mr. Jaffer:

This is in partial response to your Freedom of Information Act request dated April 22, 2008, to the Department of Justice Office of the Inspector General (DOJ OIG). The Office of the Inspector General referred 398 pages of documents to the Criminal Division that are responsive to the request, as modified by your later agreement to accept those documents actually considered by the OIG in the course of its investigation. This letter responds to you regarding the unclassified documents that originated in the Criminal Division.

There are additional documents that originated in the Criminal Division that are not encompassed by this response. Those documents (11) contain classified information and have been sent to the CIA for consultation. Once we have received the CIA's comments regarding the applicability of FOIA exemptions to that information, we will process them and be in further contact with you.

The remaining documents were referred to the Central Intelligence Agency (CIA)[four documents], the Department of Defense (DOD)[one document], the DOJ Office of Legal Counsel (OLC)[nine documents, but two were duplicates], and the Federal Bureau of Investigation (FBI)[one document]. It is my understanding that the FBI and DOD have reviewed the documents referred to them and corresponded directly with you regarding their release. One document originated in the National Security Council (NSC); it consists of forty pages of various items of information about the war on terrorism. It covers such topics as the public diplomacy goal of the war, the legal authority to detain enemy combatants, the Geneva Conventions and the status of detainees, the conditions of detention and treatment of detainees, military commissions, and the standards of conduct for U.S. personnel who take part in military operations. It is a draft inter-agency document that was sent to the Department of Justice for review and possible corrections and changes. It is exempt from mandatory release pursuant to exemption (b)(5).

Enclosed are copies of the six unclassified documents that originated in the Criminal Division. I have reviewed these documents and have determined to release them in full or in part and to withhold certain items, as described below. I am releasing the first two enclosed documents to you without excisions as a matter of discretion, even though technically portions may very well be exempt. I am withholding the information redacted from the released documents pursuant to one or more of the following FOIA exemptions set forth in 5 U.S.C. 552(b):

- (5) which permits the withholding of inter-agency or intra-agency memorandums or letters which reflect the pre-decisional, deliberative processes of the Department, and/or which consist of attorney work product prepared in anticipation of litigation, and/or which consist of confidential attorney-client information;
- (6) which permits the withholding of personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) which permits the withholding of records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information...

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Although you are aware of this, I must inform you that your client has a right to an administrative appeal of this denial/partial denial of its request. The appeal should be addressed to: The Office of Information Policy, United States Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, DC 20530-0001. Both the envelope and the letter should be clearly marked with the legend "FOIA Appeal." Department regulations provide that such appeals must be received by the Office of Information Policy within sixty days of the date of this letter. 28 C.F.R. 16.9. If you exercise this right and your appeal is denied, you also have the right to seek judicial review of this action in the federal judicial district (1) in which you reside, (2) in which you have your principal place of business, (3) in which the records denied are located, or (4) for the District of Columbia.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard M. Rogers", followed by a stylized flourish.

Richard M. Rogers  
Senior Counsel

Attachments

cc: Marcia Sowles  
Federal Programs  
Civil Division

## DOJ'S ACTIVITIES IN IRAQ

**Issue:** What role is the Department of Justice playing in the United States Government's efforts in Iraq?

### Talking Points:

- The Department of Justice is contributing to the United States and its coalition partners' efforts in Iraq in three different respects: conducting law enforcement operations to protect the United States; supporting Iraqi investigations and prosecutions relating to war crimes by the Saddam Hussein regime; and providing training and assistance to the Iraqi justice sector as a whole – including police, prosecutors, judges, and corrections officials.
- First, with regard to law enforcement operations, the Department of Justice deployed FBI teams to Iraq shortly after the fall of Baghdad to assist in investigations that had a nexus to the United States, including matters relating to terrorism and espionage. FBI teams have been in Iraq since that time, and we expect that there will be an FBI Legal Attache assigned to Embassy Baghdad. *[FBI to supplement, as appropriate, as to role/ number of agents already deployed]*
- Second, in order to assist Iraqi efforts to prosecute war criminals from the prior regime, the Department of Justice has created a War Crimes Advisory Office to work with experts in the Iraqi government and in Non-Governmental Organizations. This Office, which will be supported by the FBI and the United States Marshals Service, is led by an experienced federal prosecutor who has also served as a prosecutor at the Hague's International Tribunal for War Crimes in the Former Yugoslavia. *[War Crimes Advisory Office/ODAG to supplement, as appropriate]*
- Finally, in order to help establish the rule of law in Iraq, the Department of Justice, with the support of the State Department, has launched an ambitious effort to help train Iraqi police, prosecutors, judges, and corrections officials. These programs are under the operational control of the Coalition Provisional Authority ("CPA"). The programs are funded by the State Department, and administered through two offices of the Criminal Division of the Department of Justice: the International Criminal Investigative Training Assistance Program ("ICITAP"), which focuses on police and correctional officials; and the Office of Overseas Prosecutorial Development, Assistance and Training ("OPDAT"), which focuses on prosecutors and the judicial process.
- Currently, the Justice Department has six federal prosecutors assigned to Iraq under the auspices of OPDAT. These prosecutors, at great personal risk and sacrifice, have played a key role in establishing a new criminal justice system in Iraq – a system that respects individual rights and due

CRM 138

## Status of Abu Ghraib-related Investigative Activities

Issue: What is the Department doing to investigate the Iraqi prisoner abuses by DoD personnel at Abu Ghraib?

### Talking Points:

- Like all Americans, I am appalled and saddened by the abusive conduct that has been reported.
- There is a complicated framework, set by statute, policy, and longstanding practice, that establishes the respective responsibility and jurisdiction of DoD and DOJ to investigate and prosecute current and former military personnel, as well as civilians employed by or accompanying the armed forces. Under a longstanding MOU, crimes committed on a military installation or related to scheduled military activities or matters normally tried by court-martial will be investigated by the Department of Defense investigative agency concerned. This framework includes an established protocol by which DoD refers cases to DOJ for prosecution when circumstances indicate that jurisdiction is appropriately vested in DOJ. This framework reflects the reality that criminal conduct that occurs during ongoing military operations will ordinarily be discovered and initially investigated by the military. Our capacity to obtain evidence and witnesses from a war zone is, of course, very limited.
- On May 20, the Department of Justice received a referral from the Department of Defense regarding a civilian contractor in Iraq. We immediately opened an investigation into the matter. As this is an ongoing investigation, I cannot offer further comment on the matter.
- In addition to our work on this open investigation, we have asked DoD for additional information regarding the conduct of civilian employees at Abu Ghraib, including information on several specific individuals. If we locate evidence indicating criminal activity by others over whom we have jurisdiction, we will initiate formal investigations. Of course, we must proceed prudently, given that DoD has apparently been investigating these allegations for some time. We do not want to do anything to disrupt their investigation.

DOJ015111CRM

As of June 4, 2004 10:08 a.m.

CRM 139



U.S. Department of Justice

Criminal Division

Counterterrorism Section

Washington, D.C. 20530

August 2, 2004

MEMORANDUM

TO: Christopher A. Wray  
Assistant Attorney General

THROUGH: David Nahmias, *DN 8/5/04*  
Deputy Assistant Attorney General

THROUGH: [REDACTED]

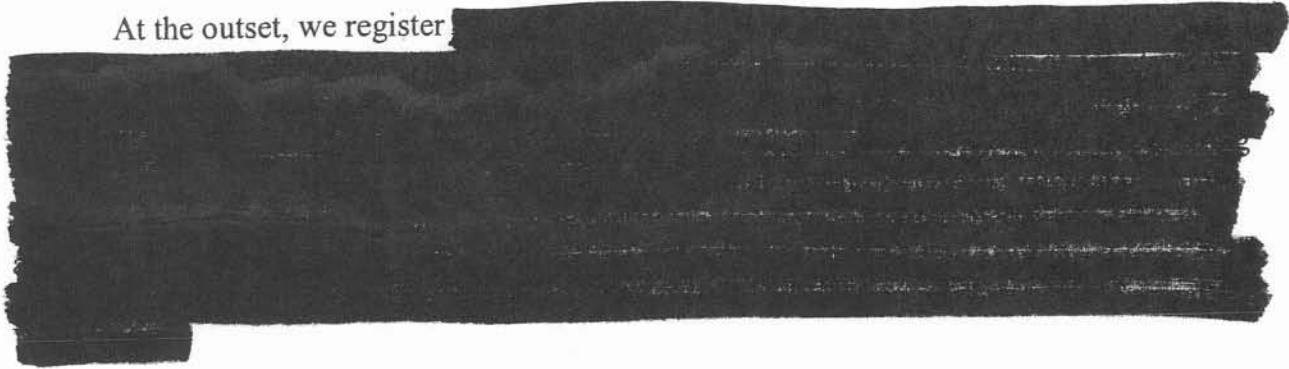
FROM: [REDACTED]

SUBJECT: Comments, [REDACTED] on the Draft OLC Memorandum  
Concerning Protected Person Status Under the Fourth Geneva Convention<sup>1</sup>

Within the Criminal Division, the Counterterrorism Section has responsibility for supervising prosecutions and providing guidance concerning violations under the federal war crimes statute, 18 U.S.C. § 2441, when such offenses involve international terrorism. That statute makes subject to prosecution, *inter alia*, any person who, whether inside or outside the United States, commits a "grave breach" of any of the four Geneva Conventions of 1949, as long as either the perpetrator or the victim is a member of the armed forces of the United States or a U.S. national. Consequently, we take a particular interest in any Departmental guidance tending to confine the scope of any such violation. We therefore appreciate the opportunity to review and comment upon a draft OLC Memorandum to the General Counsel of the Department of Defense addressing the question whether Taliban fighters enjoy protected status under the Geneva Convention Relative to the Protection of Civilian Persons In Time of War, commonly referred to as the "Fourth Geneva Convention" or "GC." While the time allotted for review precludes extensive analysis of OLC's reasoning, and we have not had an opportunity to review a number of the authorities referenced in OLC's draft memorandum, we offer the following comments and observations.

<sup>1</sup>Additional comments of the Domestic Security Section are being submitted in a separate memorandum.

At the outset, we register

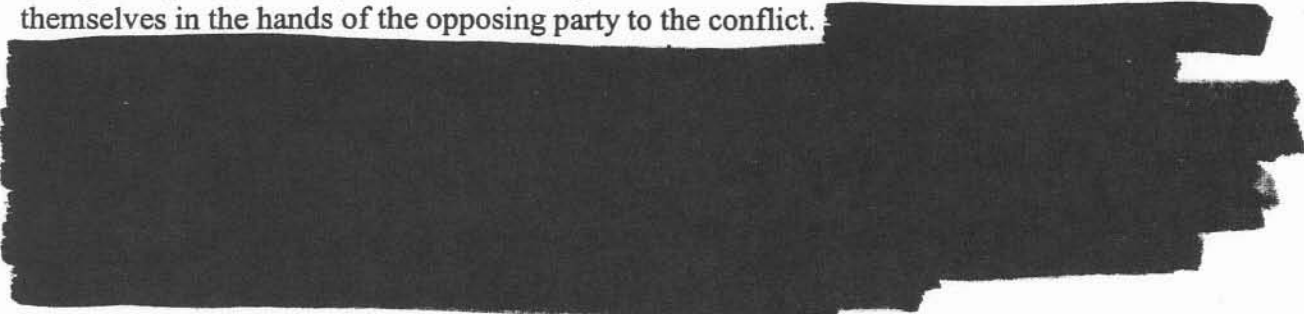


In broad and sweeping language, Article 4 of the Fourth Geneva Convention provides in pertinent part as follows:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Article 6 (*italics added*) further provides that, “[t]he present Convention shall apply *from the outset of any conflict* or occupation mentioned in Article 2. In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.”

As the OLC draft Memorandum explains, the Fourth Geneva Convention therefore protects two broad classes of civilian persons: (1) those who are in territory occupied by a belligerent party; and (2) those, who during a conflict to which the Convention applies, find themselves in the hands of the opposing party to the conflict.



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<sup>2</sup> Art. 42 of the Annex to Hague Convention No. IV Respecting the Laws and Customs of War on Land (36 Stat. 2277 (1907)) provides that “[t]erritory is considered occupied when it



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

---

is placed under the authority of the hostile army [and] extends only to the territory where such authority has been established and can be exercised.”

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>3</sup> This Article is in Part III Section 1, which is captioned "Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories."

WTT / Arthur

Swartz, Bruce

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From: [REDACTED]  
Sent: Tuesday, September 27, 2005 6:30 PM  
To: Swartz, Bruce  
Subject: FW: H36, Detainees - DoD Q&A (Control -9777)

Importance: High

Attachments: Fw: H36, Detainees - DoD Q&A (Control -9777)

Fw: H36, Detainees  
- DoD Q&A (...)

Bruce:

I just sent [REDACTED] comments on some QFRs. Here is the original email so you can actually see the responses my comments discuss.

Please let me know if you have any questions.

Thanks!

[REDACTED]

Swartz, Bruce

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From: [REDACTED]  
Sent: Tuesday, September 27, 2005 4:49 PM  
To: [REDACTED]  
Subject: FW: H36, Detainees - DoD Q&A (Control -9777)

Importance: High

Attachments: UCMJ Punitive Articles.doc; PMO November 13, 2001.doc; Geneva III.doc; r190\_8.pdf; SJC QFRs.pdf; RE: 1PM Sept 27 LRM MBL19 - - DEFENSE Qs and As on Detainees for Senate Judiciary Committee; Defense Questions/Answers on Detainees for Senate Judiciary Committee (OLA#-9777); FW: 1PM Sept 27 LRM MBL19 - - DEFENSE Qs and As on Detainees for Senate Judiciary Committee

Could you look at this. Please look for any international issue you think may be of concern to Bruce and contact him if you spot one. Thanks.

-----  
Sent from my BlackBerry Wireless Handheld

-----Original Message-----

From: [REDACTED]  
To: [REDACTED]  
CC: [REDACTED]

Sent: Tue Sep 27 16:42:30 2005  
Subject: H36, Detainees - DoD Q&A (Control -9777)

FW: 1PM Sept 27  
LRM MBL19 -- ...

A y ODAG objection to submitting the following draft Justice Department comments (from OLC, OLP, and CIV) on the above to OMB? FYI:

- a) OLC's comments appear in blue font, OLP's comments appear in black font, and the Civil Division's comments appear in red font. Please note that the comments on page 12, item # 13, take different approaches to the DoD text. I have attached the comments as submitted.
- b) At DoD's request, OLC already provided its views directly to DoD.
- c) I am running the final paragraph of the draft comments by CRM/CTS, in accordance with OLP's wishes.
- d) I have attached the underlying documents.
- e) OMB had requested our comments by 1 p.m. and is prepared to go without us this afternoon.

<<UCMJ Punitive Articles.doc>> <<PMO November 13, 2001.doc>> <<Geneva III.doc>> <<r190\_8.pdf>> <<SJC QFRs.pdf>> <<RE: 1PM Sept 27 LRM MBL19 - - DEFENSE Qs and As on Detainees for Senate Judiciary Committee>> <<Defense Questions/Answers on Detainees for Senate Judiciary Committee (OLA#-9777)>> <<FW: 1PM Sept 27 LRM MBL19 - - DEFENSE Qs and As on Detainees for Senate Judiciary Committee>>

The Department of Justice has the following comments on the DOD Qs and As on Detainees for the Senate Judiciary Committee:

The existing answer does not

we recommend replacing

Indeed

We recommend changing

Additionally, in the first paragraph, the phrase

should be modified to say,

Also in the bullet

point list of factors considered by the ARB, the third factor

is a matter that normally would

The references to

should be

ct

To avoid suggesting

we suggest replacing this:

with this:

[REDACTED]

[REDACTED]

A sentence should be inserted at the beginning of the answer saying something like:

[REDACTED]

We recommend

This change should also be made on [REDACTED] where this same language appears.

: Replace

[REDACTED] This change should also be made on [REDACTED] where this same language appears.

We recommend

[REDACTED]

[REDACTED] and page [REDACTED] the answers are not consistent.

we recommend

[REDACTED]

[REDACTED]

[REDACTED] we recommend revising [REDACTED]

[REDACTED] Delete the phrase [REDACTED]

[REDACTED] We recommend that [REDACTED]

[REDACTED] The last [REDACTED] and we suggest [REDACTED]

[REDACTED] it should be deleted.

[REDACTED] we recommend replacing [REDACTED]

[REDACTED] we suggest [REDACTED]

[REDACTED] we recommend [REDACTED]

[REDACTED]

deleted. Same comment with respect

[REDACTED]

[REDACTED] unnecessary

[REDACTED] We suggest

[REDACTED], replace [REDACTED] with [REDACTED]

[REDACTED] we recommend [REDACTED] of

[REDACTED] We recommend [REDACTED]

[REDACTED] are not consistent.

[REDACTED] We recommend replacing [REDACTED]

[REDACTED]



[REDACTED]

We recommend [REDACTED]

We recommend [REDACTED]

We recommend [REDACTED]

We recommend [REDACTED]

Other comments:

- 1) When answers are classified, [REDACTED]
- 2) [REDACTED]
- 3) [REDACTED]
- 4) [REDACTED]

INCLUDE??? We are troubled by [REDACTED]

Swartz, Bruce

From: [REDACTED]

Sent: Tuesday, September 27, 2005 6:28 PM

To: [REDACTED]

Subject: H36, Detainees -DoD Q&A (Control 9777)

[REDACTED]

CES has reviewed the responses to the QFRs you circulated and has the following comments on the portions addressing CIPA:

The following text appears four times in the QFRs [REDACTED]

[REDACTED]

We believe this statement

[REDACTED]

The following text appears on

[REDACTED]

Once again, we

Ultimately, it may very well be that CIPA will not adequately protect the information that would need to be used to hold these hearings. We do not opine on that issue, but merely seek to clarify the true nature and function of CIPA.



**U.S. Department of Justice**

Office of Legal Counsel

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Washington, D.C. 20530

August 24, 2009

Jameel Jaffer  
Director, National Security Project  
American Civil Liberties Union Foundation  
125 Broad Street  
New York, NY 10004

Dear Mr. Jaffer:

This responds to your Freedom of Information Act ("FOIA") request submitted to the Department of Justice and the Department of Defense on April 22, 2008. The Criminal Division referred to the Office of Legal Counsel ("OLC") for processing nine documents originating with OLC that are responsive to this request. Since two of these documents are duplicates, we are only processing eight of the nine documents.

Five of the eight documents were identified and processed in connection with previous FOIA requests submitted by your organization. Accordingly, as you have agreed, we are not processing these five documents in connection with the present request. Two of the remaining three documents are drafts of OLC memoranda, and we are withholding them in full pursuant to FOIA Exemptions One and Five, 5 U.S.C. § 552(b)(1), (5). We are invoking Exemption Five with respect to information protected by the deliberative process privilege and Exemption One with respect to information that is classified. Finally, we are releasing the remaining document, which is enclosed.

Although I understand that your request is the subject of litigation, I am required by statute and regulation to inform you that you have the right to file an administrative appeal.

Sincerely,

A handwritten signature in cursive script, appearing to read "Paul P. Colborn".

Paul P. Colborn  
Special Counsel

Enclosure

cc: Marcia Sowles (without enclosures)  
Federal Programs Branch, Civil Division  
Department of Justice

## LEGAL RESTRICTIONS ON INTERROGATIONS ABROAD

**Question:** There have been press reports indicating that the Department of Justice has taken the position that certain treaties and statutes may not apply in Guantanamo or in other situations. How can that be?

### Talking Points:

- I cannot comment on specific legal advice that has been given to, requested by, or provided for Executive branch departments. Institutional interests in ensuring that the Executive branch can receive confidential legal advice from the Department of Justice requires that that advice not be publicly disclosed.
- *The actual words of statutes and treaties control.* We are all repulsed by the abuses of Abu Ghraib, and our intuition recoils from treatment that is abusive or indecent. But when it comes to applying the legal standards that govern interrogations, we must take care to apply the laws that Congress has written according to the words that Congress has enacted.
  - Determining whether a particular statute or treaty applies to particular conduct is often a matter of complex legal questions depending on specific language adopted by Congress and “understandings” or “reservations” to treaties adopted by the Senate.
    - These questions include whether a particular statute applies in a certain territory outside the United States and whether it applies to particular categories of persons and specific kinds of activities.
  - All of these limitations are especially important to bear in mind when it comes to criminal statutes and criminal prosecutions, because criminal statutes are generally construed strictly, in favor of the criminal defendant.
- *The Uniform Code of Military Justice governs everywhere.* In addition, while a great of discussion has been focused on international legal obligations, and in particular the Geneva Conventions, it is important to remember that when it comes to the actions of

U.S. military personnel, whether in Iraq during time of war or anywhere else in the world at any time, the Uniform Code of Military Justice always applies, and it fully proscribes any conduct toward prisoners of war or other detainees that could fairly be described as torture, cruelty or maltreatment.

- ***Other criminal provisions.*** Beyond the UCMJ, there are still other federal criminal provisions that potentially may apply to interrogations conducted abroad, depending upon the circumstances, including who is conducting the interrogations and where the conduct takes place.

**Question: What legal standards govern interrogations in Iraq?**

**Talking Points:**

- **The Uniform Code of Military Justice applies to members of the armed forces everywhere, including in Iraq.**
  - The UCMJ prohibits assault (art. 128), cruelty and maltreatment (art. 93), disobedience to orders and dereliction of duty (art. 92), maiming (art. 124), involuntary manslaughter (art. 119), and murder (art. 118).
  
- **The Military Extraterritorial Jurisdiction Act, or “MEJA,” applies in certain circumstances to others who are working with the military. See CRM Talkers.**
  - Under MEJA, those accompanying United States Armed Forces, former members of the military no longer subject to the UCMJ, and members of the military who act with others may be prosecuted for certain acts committed “outside the United States” that would be a felony if committed within the “special maritime and territorial jurisdiction of the United States.” (18 U.S.C. § 3261(a)).
  - Such crimes could include assault (18 U.S.C. § 113), maiming (*id.* § 114), murder (*id.* § 1111), and manslaughter (*id.* § 1112).
  - MEJA applies only “outside the United States,” as defined by Congress in the general criminal provisions of the U.S. Code. For these purposes, however, Congress has defined the “United States” to include the “special maritime and territorial jurisdiction of the United States,” which may include certain military bases or other areas in Iraq, at least with respect to certain conduct. Accordingly, MEJA’s application in Iraq will depend on the nature of particular areas and the conduct at issue.
  
- **The Geneva Conventions apply in Iraq.**
  - As a general rule, captured members of the Iraqi armed forces are entitled to the protections of the Third Geneva Convention covering Prisoners of War.



- The Third Geneva Convention protects prisoners of wars against “grave breaches,” which include “wilful killing,” “torture or inhuman treatment,” or “wilfully causing great suffering or serious injury to body or health.”
    - Furthermore, under article 17 of the Third Geneva Convention, “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”
  - The United States is an “occupying power” in Iraq, and the Fourth Geneva Convention covering Civilians thus also applies.
    - The Fourth Geneva Convention protects Iraqis against essentially the same “grave breaches” proscribed by the Third Convention.
    - The Fourth Geneva Convention further protects Iraqis against “outrages upon personal dignity” and “humiliating and degrading treatment.”
- **The Geneva Conventions can be enforced through the federal War Crimes Act.**
  - The War Crimes Act imposes criminal liability on any U.S. citizen or any member of the U.S. armed forces who commits a “grave breach” of the Geneva Conventions. (18 U.S.C. § 2441)
  - “Grave breaches” under the relevant treaties include “wilful killing,” “torture or inhuman treatment,” and “wilfully causing great suffering or serious injury to body or health.”
  - Congress deliberately crafted the War Crimes Act to fulfill our treaty obligations and thus limited it to situations where the treaties apply, and then only to grave breaches of the Conventions.
- **In addition, the federal torture statute makes it a crime for any person “outside the United States [to] commit or attempt[] to commit torture.” (18 U.S.C. § 2340A).**
  - Torture is defined as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other

than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” *Id.* § 2340(1).

- Congress placed limiting definitions on the terms of the statute. It defined “severe mental pain and suffering” as “the prolonged mental harm caused or resulting from” specified acts, including the “intentional infliction or threatened infliction of severe physical pain or suffering” and the threat of imminent death, and the actual or threatened administration of mind-altering substances. *Id.* § 2340(2).
- The torture statute would generally apply to acts of torture committed in Iraq. In particular cases, however, there may be difficult legal questions about the scope of its application.
  - While Congress made the torture statute apply “outside the United States,” it also included a special definition of the “United States” that includes the “special maritime and territorial jurisdiction of the United States,” which, in turn, may include certain military bases and other areas overseas, at least for certain kinds of conduct. (18 U.S.C. § 7(3) & 7(9))
  - Because of the way Congress drafted the torture statute, therefore, its application to certain areas in Iraq, particularly U.S. military bases, and to particular conduct in those areas may vary depending on the circumstances at issue.

- **The international Convention Against Torture is also relevant.**

- When the United States ratified the Convention Against Torture, the President and the Senate defined United States obligations through an “understanding” according to which “torture” under the treaty is interpreted to have essentially the same meaning as in the federal torture statute.

**Question: What legal standards govern interrogations in Guantanamo and Afghanistan?**

**Talking Points:**

- Quite apart from treaty obligations, the President early on announced the policy that detainees at Guantanamo will be treated “humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949,” and that “[t]he detainees will not be subjected to physical or mental abuse or cruel treatment.” White House Fact Sheet (Feb. 7, 2002).
  
- **The Uniform Code of Military Justice (“UCMJ”) applies to members of the armed forces everywhere, including in Guantanamo and Afghanistan.**
  - The UCMJ prohibits assault (art. 128), cruelty and maltreatment (art. 93), disobedience to orders and dereliction of duty (art. 92), maiming (art. 124), involuntary manslaughter (art. 119), and murder (art. 118).
  
- **The Military Extraterritorial Jurisdiction Act, or “MEJA,” applies in certain circumstances to others who are working with the military in Afghanistan.** See CRM Talkers.
  - Under MEJA, those accompanying United States Armed Forces, former members of the military no longer subject to the UCMJ, and members of the military who act with others may be prosecuted for certain acts that would be a felony if committed within the “special maritime and territorial jurisdiction of the United States.” (18 U.S.C. § 3261(a)).
  - Such crimes could include assault (18 U.S.C. § 113), maiming (*id.* § 114), murder (*id.* § 1111), and manslaughter (*id.* § 1112).
  - MEJA applies only “outside the United States,” as defined by Congress in the general criminal provisions of the U.S. Code. The “United States” is defined in those statutes to include the “special maritime and territorial jurisdiction of the United States,” and it is likely that a court would hold that such areas may include Guantanamo and certain areas in Afghanistan, at least with respect to certain conduct. Accordingly, MEJA may not apply in Guantanamo and its application in

Afghanistan will depend on the nature of particular areas and the specific conduct at issue.

- **As a matter of law (distinct from the policy announced by the President), the protections of the Geneva Conventions do not apply to al Qaeda and the Taliban.**
  - The Geneva Conventions do not protect members of al Qaeda because al Qaeda “is not a state party to [the treaties]; it is a foreign terrorist group.” White House Fact Sheet (Feb. 7, 2002).
  - Although Afghanistan is a party to the Geneva Conventions, the Taliban detainees are not entitled to the protections of the Third Geneva Convention covering Prisoners of War because they do not satisfy the four conditions for status as POWs under the treaty.
    - Those conditions are: to be commanded by a person responsible for his subordinates, to have distinctive and recognizable identifying insignia, to carry arms openly, and to act in accordance with the laws of war. Because the Taliban failed to meet each of these standards, except the open carrying of arms, Taliban detainees, whether held in Afghanistan or at Guantanamo, do not qualify for POW status under the Third Geneva Convention.
    - The only court to address the issue has upheld the President’s determination that members of the Taliban militia fail to qualify for POW status under the Third Geneva Convention. *See United States v. Lindh*, 212 F. Supp. 2d 541, 556-558 (E.D. Va. 2002).
  - The Fourth Geneva Convention covering Civilians also covers “cases of partial or total occupation of the territory of a High Contracting Party,” as informed by the Hague Regulations. The United States is not an “occupying power” in Afghanistan within the meaning of the Hague Regulations, because Afghanistan has not been “actually placed under the authority of the hostile army.” (Hague Regulations, art. 42(1))

- **The interrogation of al Qaeda and Taliban detainees could not violate the federal War Crimes Act, because in relevant part the Act criminalizes only “grave breaches” of the Geneva Conventions, and there can be no breaches of these treaties where they do not apply.**
  
- **The federal torture statute makes it a crime for any person “outside the United States [to] commit or attempt[] to commit torture.” (18 U.S.C. § 2340A).**
  - Torture is defined as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” *Id.* § 2340(1).
  - Congress placed limiting definitions on the terms of the statute. It defined “severe mental pain and suffering” as “the prolonged mental harm caused or resulting from” specified acts, including the “intentional infliction or threatened infliction of severe physical pain or suffering” and the threat of imminent death, and the actual or threatened administration of mind-altering substances. *Id.* § 2340(2).
  - The torture statute would generally apply to acts of torture committed in Afghanistan. In particular cases, however, there may be difficult legal questions about the scope of its application.
    - While Congress made the torture statute apply “outside the United States,” it also included a special definition of the “United States” that includes the “special maritime and territorial jurisdiction of the United States,” which, in turn, may include certain military bases and other areas overseas, at least for certain kinds of conduct. (18 U.S.C. § 7(3) & 7(9))
    - Because of the way Congress drafted the torture statute, therefore, its application to certain areas in Afghanistan, particularly U.S. military bases, and to particular conduct in those areas may vary depending on the circumstances at issue.
    - In addition, it is likely that a court would hold that the torture statute does not apply in Guantanamo, because the Guantanamo base may be considered within the “special maritime and territorial jurisdiction of the United States.”

- **The international Convention Against Torture is also relevant.**
  - When the United States ratified the Convention Against Torture, the President and the Senate defined United States obligations through an “understanding” according to which “torture” under the treaty is interpreted to have essentially the same meaning as in the federal torture statute.

**Question: Does the U.S. Constitution restrain interrogation overseas?**

**Talking Points:**

- The two provisions of the Constitution that are potentially applicable, the **Fifth and Eighth Amendments**, likely do not apply abroad and, in any event, may not provide clear substantive constraints on interrogations that occur overseas.
  
- **The Fifth Amendment does not apply to actions taken against aliens abroad.**
  - The Supreme Court has held that the **Fifth Amendment** does not apply to actions taken against aliens abroad. *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950); see *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (describing *Eisentrager* as having “rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States”).
    - Accordingly, Fifth Amendment protections do not apply to alien detainees in Iraq or Afghanistan.
    - Furthermore, the United States has argued in the Guantanamo cases currently pending before the Supreme Court that Guantanamo is not part of the “sovereign territory” of the U.S.; thus, the Fifth Amendment would not apply to alien detainees at Guantanamo, as well.
  
- **In any event, even if the Fifth Amendment were to apply, the Due Process Clause of the Fifth Amendment proscribes only conduct that “shocks the conscience.”**
  - The substantive limits of the Due Process Clause have been held to protect against “only the most egregious official conduct” that “shocks the conscience,” which likely would include only “conduct intended to injure in some way unjustifiable by any government interest,” based on “an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them.” *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 & n.8, 849 (1998).

- **The protections of the Eighth Amendment, like those of the Fifth Amendment, likely would be held not to apply to aliens detained abroad.**
  
- **In any event, even if it were applicable overseas, the Eighth Amendment only forbids cruel and unusual punishment that is imposed after an adjudication of guilt, and thus likely would not restrain the conduct of interrogations occurring prior to such an adjudication.**
  - The Eighth Amendment, which forbids cruel and unusual punishment, applies only after a formal adjudication of guilt. *See City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983) (“Because there had been no formal adjudication of guilt against Kivlin at the time he required medical care, the Eighth Amendment has no application.”).
  
  - Accordingly, the Eighth Amendment would not apply to the interrogation of detainees prior to any adjudication of guilt.



**Question: Does the International Covenant on Civil and Political Rights (“ICCPR”) restrain interrogation overseas?**

**Talking Points:**

- **The ICCPR does not apply to conduct outside the United States.**
  - Under the plain terms of the ICCPR, each contracting party undertakes to ensure the rights enumerated in the treaty “to all individuals *within* its territory *and* subject to its jurisdiction.” Art. 2(1) (emphases added).
  - This is the position the United States has taken in the Guantanamo cases, and it is also the consistent position of the State Department.
  
- **The ICCPR is a human rights treaty and does not apply in wartime or to the conduct of war.**
  - The laws of armed conflict constitute a separate body of international and domestic law that the ICCPR was not intended to supplant.
  - This conclusion is based on application of the principle that specific provisions trump general provisions.
  - This position has also been taken in the Guantanamo cases and approved by the State Department.
  
- **Article 7 of the ICCPR declares that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”**
  - With respect to “cruel, inhuman or degrading treatment or punishment,” the United States took a reservation, limiting the phrase to conduct that would violate the U.S. Constitution.
  - The explanation of the Covenant sent to the Senate also said that “we interpret our obligations under [the provision on torture] consistently with those we have undertaken in [the Convention Against Torture].”



**Question:** What about Common Article 3 of the Geneva Conventions – does it apply?

**Talking Points:**

- Common article 3 of the Geneva Conventions proscribes cruel, humiliating and degrading treatment of persons who are not actively engaged in hostilities, but by its terms it applies only “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”
  - The conflicts in Iraq and Afghanistan are of an international character and thus common article 3 does not apply.

**Question: What about Article 16 of the Convention Against Torture – does it apply?**

**Talking Points:**

- Article 16 of the Convention Against Torture proscribes “cruel, inhuman or degrading treatment or punishment which do not amount to torture.” Under a “reservation” to the treaty, the United States defines this phrase to refer to “the cruel, unusual and inhumane treatment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments” to the U.S. Constitution.
- **As a textual matter, Article 16 might not apply in times of war or times of extreme threat to national security.**
  - The Convention clearly states that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of *torture*,” as proscribed in Article 1 of the Convention. (Art. 2) No similar declaration applies to Article 16.
  - Under ordinary rules of construction, the absence of a parallel declaration excluding “exceptional circumstances” for Article 16 suggests that “a state of war or a threat of war, internal political instability or . . . other public emergency” might justify conduct that would otherwise be prohibited by Article 16.
- By virtue of the U.S. reservation interpreting Article 16 to incorporate the substantive protections of the Fifth and Eighth Amendments of the U.S. Constitution, Article 16 might not apply extraterritorially, since the Fifth Amendment has been held not to apply to aliens abroad and the Eighth Amendment is also probably so limited in application.
- Finally, it is important to point out that unlike the Article 1 prohibition against torture, which Congress has enforced through the federal torture statute, Congress has not chosen to enact any criminal statute to enforce Article 16.

**Question: When and how does the federal torture statute apply to interrogations conducted overseas?**

**Talking Points:**

- **The federal torture statute makes it a crime for any person “outside the United States [to] commit or attempt[] to commit torture.” (18 U.S.C. § 2340A).**
  
- **Congress placed limits on the definition of “torture” in the federal torture statute.**
  - Torture is defined as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” *Id.* § 2340(1).
  - Congress defined “severe mental pain and suffering” as “the prolonged mental harm caused or resulting from” specified acts, including the “intentional infliction or threatened infliction of severe physical pain or suffering” and the threat of imminent death, and the actual or threatened administration of mind-altering substances. *Id.* § 2340(2).
  
- **Congress also placed limits on the territorial scope of the torture statute by including a special definition of what constitutes “outside the United States,” and these limits on the scope of the statute give rise to difficult legal questions about its application to interrogations in Iraq, Afghanistan and Guantanamo.**
  - While Congress made the torture statute apply “outside the United States,” it also included a special definition of the “United States” that includes the “special maritime and territorial jurisdiction of the United States,” which, in turn, may include certain military bases and other areas overseas, at least for certain kinds of conduct. (18 U.S.C. § 7(3) & 7(9))
  - Because of the way Congress drafted the torture statute, therefore, its application to certain areas in Iraq and Afghanistan, particularly U.S. military bases, and to particular conduct in those areas may vary depending on the circumstances at issue.