TOP SECRET MR

Central Intelligence Agency
Office of General Counsel
Washington, D.C. 20505

Date: 06/23/04

To: Jack Goldsmith
Organization: Department of Justice/OLC
Phone: [ ]
Fax: [ ]

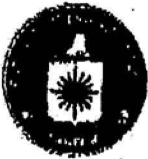
From: Scott W. Muller
Organization: Office of General Counsel
Phone:
Fax:

Number of Pages (Including Cover) 2

Comments:

TOP SECRET/ /MR

TOP SECRET/ MR



CENTRAL INTELLIGENCE AGENCY
Washington, D.C. 20505

General Counsel

22 June 2004

The Honorable Jack L. Goldsmith III
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D.C. 20530

Dear Mr. Goldsmith:

(TS/ NF) This responds to your 18 June 2004 letter to the Director of Central Intelligence in which you suggested modifications to the Inspector General's report on the Central Intelligence Agency's (CIA) Counterterrorism Detention and Interrogation Activities. We have forwarded to the Inspector General your letter and its attached memorandum and addendum containing your suggested changes to the report. The Inspector General will consult with you and determine whether the report should be supplemented with the changes you have recommended.

(TS/ //NF) We will forward the Inspector General's report to the intelligence oversight committees this week. As you know, Appendix C of the report includes a copy of the 1 August 2002 legal opinion from your office to CIA regarding the use of certain interrogation techniques with Abu Zubaydah.

Sincerely,

Scott W. Muller

TOP SECRET/ MR

Central Intelligence Agency

Washington, D.C. 20505

Inspector General
703-874-2555

2 July 2004

Mr. Jack L. Goldsmith III
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D.C. 20530

Dear Mr. Goldsmith:

(TS//) This is in response to your letter to the Director of Central Intelligence (DCI), dated 18 June 2004, and a memorandum of the same date addressed to me, regarding the "Special Review: Counterterrorism Detention and Interrogation Activities." The DCI has requested that I respond directly to you.

(TS//) The purpose of the Special Review was to document and assess the actions of CIA with respect to counterterrorism detention and interrogation activities and to develop recommendations to strengthen the management and conduct of the activities. We limited the scope of the Special Review to Agency activities and the perspective of Agency officers regarding the activities under review. In doing so, we attributed factual assertions to the officers making the assertions, rather than drawing factual conclusions that might be inaccurate or be viewed differently by those outside the Agency.

(U//FOUO) We have carefully reviewed the comments of the Department of Justice regarding the Special Review. We concluded that it would not be practicable to recall the Review and integrate those comments into the body of the Review. However, we do agree that it is appropriate for those reading the Review to have the benefit of those comments. Accordingly, we intend to include your 18 June memorandum with any future circulation of the Review. After consultation with you, we did transmit the memorandum to the Chairmen and ranking minority members of the Congressional

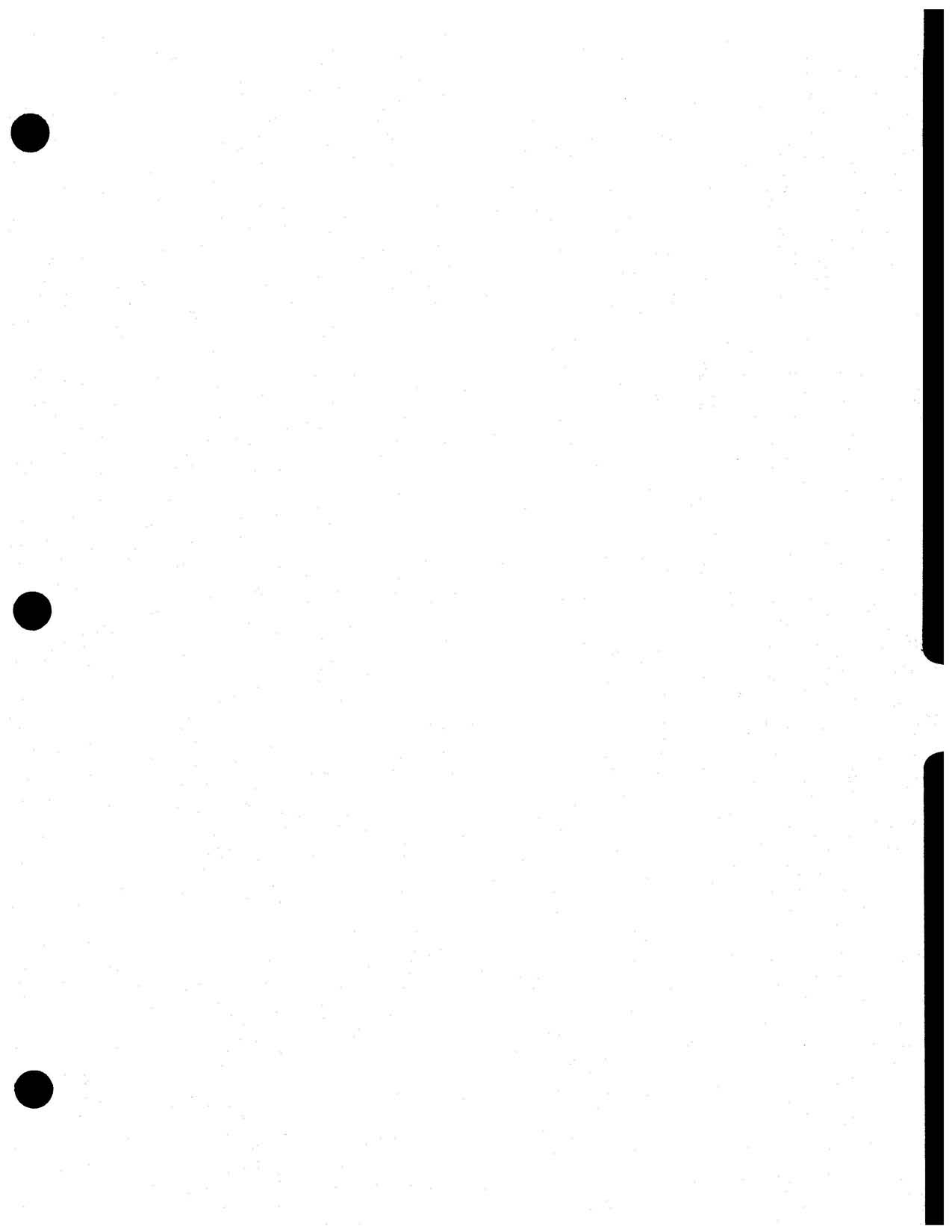
Mr. Jack L. Goldsmith III

Intelligence Oversight Committees. I am also transmitting the memorandum to the Chairman of the Intelligence Oversight Board, who has already received a copy of the Review.

(U) If you have any questions regarding these matters you may contact me or

Sincerely,

John L. Helgerson



T/S/ X1

No. 79203

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CIA

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7/2/04

SITE 3
CIA
MESSAGE NUMBER
59

TIME TRANSMITTED TIME RECEIVED

FROM: OGC **Office/Desk:** ______ **Phone:** ______

SUBJECT: Memo

DELIVERY INSTRUCTIONS: **Pages:** 2 **(Including Cover)**

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DOJ	James Comey		[ ]

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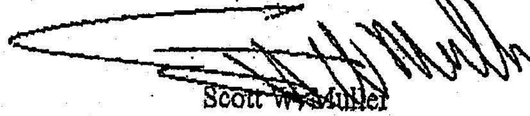
79203

2 July 2004

Memorandum for John Bellinger

Subsequent to today's meeting we have had further discussions that clarified the extent of today's approval of certain techniques. The authorized techniques are those previously approved for use with Abu Zubaydah (with the exception of the waterboard) and the 24 approved by the Secretary of Defense on 16 April 2003 for use by the Department of Defense. I have relayed this information to the CIA's Counterterrorist Center.



Scott W. Muller

cc. James B. Comey

2 July 2004

Memorandum for John Bellinger

Subsequent to today's meeting we have had further discussions that clarified the extent of today's approval of certain techniques. The authorized techniques are those previously approved for use with Abu Zubaydah (with the exception of the waterboard) and the 24 approved by the Secretary of Defense on 16 April 2003 for use by the Department of Defense. I have relayed this information to the CIA's Counterterrorist Center.

Scott W. Muller

cc. James B. Comey

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CLASSIFICATION

//MK

JUSTICE

Refer OLC

TIME TRANSMITTED (LOCAL) MSG NBR

FROM Mr Goldsmith OFFICE/DESK OLC PHONE

SUBJECT

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CIA	Scott Muller	OGC		

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JUSTICE COMMAND CENTER (202) 514-5000

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CLASSIFICATION

48

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//MR

81

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

July 7, 2004

Mr. Scott W. Muller
General Counsel
Central Intelligence Agency
Washington, D.C. 20505

Dear Scott:

I am writing to follow up on your discussion last Friday with the Attorney General and the Deputy Attorney General concerning the use of interrogation techniques on a certain high-value detainee.

The Deputy Attorney General asked me to emphasize to you that approval of the nine techniques described in the 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), presupposes that the techniques will adhere closely to the assumptions and limitations stated in that memorandum.

The Deputy Attorney General also asked me to emphasize that approval of the twenty-four interrogation techniques in the Secretary of Defense's April 15, 2003, memorandum was conditioned on the set of "General Safeguards" set out as an attachment to that memorandum, and on the cross-referenced descriptions of seventeen of the twenty-four techniques set forth in *Army Field Manual 34-54: Intelligence Interrogation* (1992). Please ensure that your use of these techniques follows the "General Safeguards" and the descriptions and conditions set forth in the Field Manual.

Sincerely,

Jack L. Goldsmith III
Assistant Attorney General

SECRET

THIS IS A COVER SHEET

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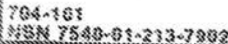
49  SECRET 82

704-101
NSN 7540-01-213-7902

STANDARD FORM 704 (8-85)
Prescribed by GSA/ISOO
32 CFR 2003

Central Intelligence Agency
Office of General Counsel
Washington, D.C. 20505

Date: 06/22/04

To: Patrick Philbin
Organization: Department of Justice
Phone:
Fax:

From: John A. Rizzo
Organization: Office of General Counsel

Number of Pages (Including Cover) 4

Comments:

Refer OLC

~~SECRET~~

JUSTICE COMMAND CENTER

FACSIMILE COVER SHEET

FROM John Yoo OFFICE Office of Legal Counsel PHONE [ ]

SUBJECT Section 2340 PAGES 2 (DO NOT COUNT COVER SHEET)

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TRANSMIT TO

ORGANIZATION	NAME	FAX NUMBER	PHONE
CIA	John Rizzo		

REMARKS

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VOICE: [ ]
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UNCLASSIFIED FAX: [ ]

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U.S. Department of Justice

Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, DC 20530

July 13, 2002

John Rizzo
Acting General Counsel
Central Intelligence Agency
Washington, D.C. 20505

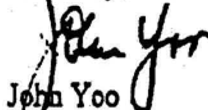
Dear Mr. Rizzo:

This letter is in response to your inquiry at our meeting today about what is necessary to establish the crime of torture, as set forth in 18 U.S.C. § 2340 *et seq*. The elements of the crime of torture are: (1) the torture occurred outside the United States; (2) the defendant acted under the color of law; (3) the victim was within the defendant's custody or physical control; (4) the defendant specifically intended to cause severe mental or physical pain or suffering; and (5) the act inflicted severe mental or physical pain or suffering. *See* 18 U.S.C. § 2340(1); *id.*, § 2340. With respect to severe mental pain or suffering specifically, prolonged mental harm must be established. That prolonged mental harm must result from one of the following acts: intentional infliction or threatened infliction of severe physical pain or suffering; administration or application of or threatened administration or application of mind-altering drugs or other procedures designed to profoundly disrupt the senses or personality; threat of imminent death; or threatening to subject another person to imminent 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. *See* 18 U.S.C. § 2340(2).

Moreover, to establish that an individual has acted with the specific intent to inflict severe mental pain or suffering, an individual must act with specific intent, i.e., with the express purpose, of causing prolonged mental harm in order for the use of any of the predicate acts to constitute torture. Specific intent can be negated by a showing of good faith. Thus, if an individual undertook any of the predicate acts for severe mental pain or suffering, but did so in the good faith belief that those acts would not cause the prisoner prolonged mental harm, he would not have acted with the specific intent necessary to establish torture. If, for example, efforts were made to determine what long-term impact, if any, specific conduct would have and it was learned that the conduct would not result in prolonged mental harm, any actions undertaken relying on that advice would have be undertaken in good faith. Due diligence to meet this standard might include such actions as surveying professional literature, consulting with experts, or evidence gained from past experience.

As you know, our office is in the course of finalizing a more detailed memorandum opinion analyzing section 2340. We look forward to working with you as we finish that project. Please contact me or Jennifer Koester if you have any further questions.

Sincerely,



John Yoo
Deputy Assistant Attorney General

U.S. Department of Justice

Office of Legal Counsel

TOP SECRET/ /NOFORN

Office of the Assistant Attorney General

Washington, D.C. 20530

July 22, 2004

Scott W. Muller, Esq.
General Counsel
Central Intelligence Agency
Washington, D.C. 20505

Dear Scott:

We have been asked whether a certain detainee in the war on terrorism may be subjected to the "waterboard" interrogation technique, consistent with 18 U.S.C. §§ 2340 and 2340A. In connection with this opinion, we would be grateful if you could provide us with a precise description of the technique. As you know, the CIA Office of Inspector General, in its *Special Review: Counterterrorism Detention and Interrogation Activities (September 2001-October 2003)* (May 7, 2004) ("*OIG Review*"), raised several questions about whether the technique, as actually used, conforms to the description in the Memorandum for John A. Rizzo, Acting General Counsel, CIA, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Interrogation of al Qaeda Operative* (Aug. 1, 2002). For example, the *OIG Review* repeatedly disputes that the technique, in practice, matches the technique as used at the U.S. Air Force Survival, Evasion, Resistance, and Escape ("SERE") training program, although our opinion assumed that we were addressing the SERE technique. *See OIG Review* at 21 n.26, 37, 44. It would greatly assist us if you could address the details of the technique, including whether the technique on which we would now opine differs in any respect from the one considered in our earlier memorandum. If there are differences but you believe those differences should not alter our conclusion that the technique is lawful under the statute, we would appreciate receiving an explanation of your view, including any medical or other factual support on which you rely. Finally, we would be grateful if you could provide information about the facts and circumstances of this detainee, including his medical and psychological condition, of the sort provided with respect to the detainee discussed in our earlier opinion. (TS/ /NF)

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Thank you for your assistance. (U)

Sincerely,

Daniel B. Levin
Acting Assistant Attorney General

Office of the Attorney General
Washington, D.C. 20530

TOP SECRET/[redacted]/NOFORN/MR

July 22, 2004

John E. McLaughlin
Acting Director of Central Intelligence
Central Intelligence Agency
Washington, D.C. 20505

Dear John:

This letter will confirm my advice that, in the contemplated interrogation of [redacted] the use of the following interrogation techniques outside territory subject to United States jurisdiction would not violate the United States Constitution or any statute or treaty obligation of the United States, including Article 16 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988) (entered into force June 26, 1987): the nine techniques (other than the waterboard) described in the Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, *Re: Interrogation of al Qaeda Operative* (Aug. 1, 2002), subject to the assumptions and limitations stated there. (TS/[redacted]/NF)

Sincerely,

John D. Ashcroft

John D. Ashcroft
Attorney General

TOP SECRET/[redacted]/NOFORN/MR

TOP SECRET/ //MR1
HANDLE VIA JOINTLY

Central Intelligence Agency

Washington, D.C. 20505

5 August 2004

Transmitted by Secure Facsimile
Dan Levin
Acting Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, DC 20530

Dear Mr. Levin:

(TS// ,OC) This letter responds to the questions you and members of your office raised in a meeting yesterday with officers from the DCI Counterterrorist Center regarding use of the waterboard as an interrogation technique. Specifically, you asked whether the Agency had limits in place for the duration of each application of water, for each session of the waterboard, for how many waterboard sessions may be held in any one day, and for how many days the waterboard technique could be applied. Answers to your questions follow.

(TS// ,OC) Our guidelines.

a. Approvals for use of the waterboard last for only 30 days. During that 30-day period, the waterboard may not be used on more than 20 days during that 30-day period.

b. The number of waterboard sessions on a given day may not exceed four.

c. A waterboard "session" is the period of time in which a subject is strapped to the waterboard before being removed. It may involve multiple applications of water. You were informed yesterday that our Office of Medical Services had established a 20-minute time limit for waterboard sessions. That was in

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Dupe

Dan Levin, Esq.

error. OMS has not established any time limit for a waterboard session.

d. An "application" during a waterboard session is the time period in which water is poured on the cloth being held on the subject's face. Under the DCI interrogation guidelines, the time of total contact of water with the face will not exceed 40 seconds. The vast majority of applications are less than 40 seconds, many for fewer than 10 seconds. Individual applications lasting 10 seconds or longer will be limited to no more than 10 applications during any one waterboard session.

(U//FOUO) If you have any questions, or would like briefings, please contact . He will obtain answers and/or arrange those briefings.

Sincerely,

Associate General Counsel

FAX COVER SHEET
Central Intelligence Agency

Washington, DC 20505

5 August 2004

To:	DOJ Command Center For Dan Levin
Organization:	Office of Legal Counsel U.S. Department of Justice
Phone:	
Fax:	DOJCC Stu-III
From:	
Organization:	
Phone:	
Fax:	

Number of pages (including cover sheet): 3

Comments: (S//NF) Dan, A letter responding to the questions you posed at yesterday's meeting. Thank you.

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Central Intelligence Agency

Washington, D.C. 20505

5 August 2004

Transmitted by Secure Facsimile
Dan Levin
Acting Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, DC 20530

Dear Mr. Levin:

(TS/ ,OC) This letter responds to the questions you and members of your office raised in a meeting yesterday with officers from the DCI Counterterrorist Center regarding use of the waterboard as an interrogation technique. Specifically, you asked whether the Agency had limits in place for the duration of each application of water, for each session of the waterboard, for how many waterboard sessions may be held in any one day, and for how many days the waterboard technique could be applied. Answers to your questions follow.

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Dan Levin, Esq.

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(U//FOUO) If you have any questions, or would like briefings, please contact . He will obtain answers and/or arrange those briefings.

Sincerely,

Associate General Counsel

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

August 6, 2004

John A. Rizzo, Esq.
Acting General Counsel
Central Intelligence Agency
Washington, D.C. 20505

Dear John:

(TS/ [redacted] NF) This letter will confirm our advice that, although it is a close and difficult question, the use of the waterboard technique in the contemplated interrogation of [redacted] outside territory subject to United States jurisdiction would not violate any United States statute, including 18 U.S.C. § 2340A, nor would it violate the United States Constitution or any treaty obligation of the United States. We will supply, at a later date, an opinion that explains the basis for this conclusion. Our advice is based on, and limited by, the following conditions:

1. The use of the technique will conform to the description attached to your letter to me of August 2, 2004 ("Rizzo Letter").

2. A physician and psychologist will approve the use of the technique before each session, will be present throughout the session, and will have authority to stop the use of the technique at any time.

3. There is no material change in the medical and psychological facts and assessments set out in the attachment to your August 2 letter, including that there are no medical or psychological contraindications to the use of the technique as you plan to employ it on [redacted]

4. The technique will be used in no more than two sessions, of two hours each, per day. On each day, the total time of the applications of the technique will not exceed 20 minutes. The period over which the technique is used will not extend longer than 30 days, and the technique will not be used on more than 15 days in this period. These limits are consistent with the Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, *Re: Interrogation of al Qaeda Operative* (Aug. 1, 2002), and with the previous uses of the technique, as they have been described to us. As we understand the facts, the detainees previously subjected to the technique "are in good physiological and

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psychological health," *see* Rizzo Letter at 2, and they have not described the technique as physically painful. This understanding of the facts is material to our conclusion that the technique, as limited in accordance with this letter, would not violate any statute of the United States.

(TS/ [redacted] /NF) We express no opinion on any other uses of the technique, nor do we address any techniques other than the waterboard or any conditions under which [redacted] or other detainees are held. Furthermore, this letter does not constitute the Department of Justice's policy approval for use of the technique in this or any other case.

Sincerely,

Daniel B. Levin
Acting Assistant Attorney General

U.S. Department of Justice

Office of Legal Counsel

TOP SECRET/ [redacted] /NOFORN/MR

Office of the Assistant Attorney General

Washington, D.C. 20530

September 20, 2004

John A. Rizzo, Esq.
Acting General Counsel
Central Intelligence Agency
Washington, D.C. 20505

Dear John:

(TS/ [redacted] /NF) You have asked our advice regarding whether the use of twelve particular interrogation techniques (attention grasp, walling, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, dietary manipulation, nudity, water dousing, and abdominal slap) in the interrogation of [redacted] would violate any United States statute (including 18 U.S.C. § 2340A), the United States Constitution, or any treaty obligation of the United States. We understand that [redacted] is an al- Qa'ida operative who "is believed to be involved in the operational planning of an al-Qa'ida attack or attacks to take place in the United States prior to the November 2004 elections." September 19, 2004 letter from [redacted] to Dan Levin. This letter confirms our advice that the use of these techniques on [redacted] outside territory subject to United States jurisdiction would not violate any of these provisions. We will supply, at a later date, an opinion that explains the basis for this conclusion. Our advice is based on, and limited by, the following conditions:

1. The use of these techniques will conform to all representations previously made to us, including those listed in my August 26, 2004 letter to you.

2. The medical and psychological facts and assessments for [redacted] indicate that there are no medical or psychological contraindications to the use of any of these techniques as you plan to employ them.

3. Medical officers will be present to observe [redacted] whenever any enhanced techniques are applied and will closely monitor him while he is subject to sleep deprivation or dietary manipulation, in addition to the normal monitoring of him throughout his detention, to ensure that he does not sustain any physical or mental harm.

TOP SECRET/ [redacted] /NOFORN/MR

~~(TS/~~[redacted]~~/NF)~~ We express no opinion on any other uses of these techniques, nor do we address any other techniques or any conditions under which [redacted] or other detainees are held. Furthermore, this letter does not constitute the Department of Justice's policy approval for use of the techniques in this or any other case.

Sincerely,

Daniel Levin
Acting Assistant Attorney General

U.S. Department of Justice

Office of Legal Counsel

~~TOP SECRET~~/[REDACTED]/~~NOFORN~~/MR

Office of the Assistant Attorney General

Washington, D.C. 20530

August 26, 2004

John A. Rizzo, Esq.
Acting General Counsel
Central Intelligence Agency
Washington, D.C. 20505

Dear John:

(~~TS~~/[REDACTED]/~~NF~~) You have asked our advice regarding whether the use of four particular interrogation techniques (dietary manipulation, nudity, water dousing, and abdominal slaps) in the ongoing interrogation of [REDACTED] would violate any United States statute (including 18 U.S.C. § 2340A), the United States Constitution, or any treaty obligation of the United States. We understand that [REDACTED] a high-value al Qaeda operative who is believed to possess information concerning an imminent terrorist threat to the United States. This letter confirms our advice that the use of these techniques [REDACTED] outside territory subject to United States jurisdiction would not violate any of these provisions. We will supply, at a later date, an opinion that explains the basis for this conclusion. Our advice is based on, and limited by, the following conditions:

1. The use of these techniques will conform to: (i) the representations made in [REDACTED] letters to me of July 30, 2004 (and attachment) and August 25, 2004; and (ii) the representations made by CIA officials, including representatives of the Office of Medical Services, during our August 13, 2004 meeting. Based on that meeting, we understand that ambient air temperature is the most important determinate for hypothermia in water dousing. Additionally, we were informed that the Agency has based the safety margins set forth in its water dousing procedures on experience with actual extended submersion in water of comparable temperature. Thus, although water as cold as 41 degrees may be used for short periods of time, in view of these factors and the comparatively small amount of water used, especially compared to submersion, we were advised that the dousing technique as it will be employed poses virtually no risk of hypothermia or any other serious medical condition. We were further advised that the dousing technique is designed to get the detainee's attention and it is not intended to cause, and does not cause, any appreciable pain.

2. There is no material change in the medical and psychological facts and assessments for

[redacted] in the attachment to your August 2 letter, and in [redacted] August 25, 2004, letter, including that there are no medical or psychological contraindications to the use of these techniques as you plan to employ them on [redacted]

3. Medical officers will be present to observe [redacted] whenever water dousing and/or abdominal slaps are used and will closely monitor him while he is subject to dietary manipulation (in addition to the normal monitoring of him throughout his detention) to ensure that he does not sustain any physical or mental harm. This includes making sure that [redacted] can sustain a normal body temperature after dousing and that his intake of fluids and nutrition are adequate.

4. We understand the statements in [redacted] August 25, 2004, letter that the measures are "designed ... to weaken [redacted] physical ability and mental desire to resist interrogation over the long run" (Letter at 3), and that "water dousing sessions, in conjunction with sleep deprivation, facilitates in weakening a detainee's ability and motivation to resist interrogations" (Letter at 4), to be consistent with the prior representations we have received – i.e., these techniques are not physically painful and are not intended to, or expected to, cause any physical or psychological harm. Rather, they are intended to reduce [redacted] desire to continue to engage in the counter-interrogation techniques he has been utilizing to date. Indeed, you consider these four techniques to be "more subtle" than some of the interrogation measures used to date (Letter at 3.)

~~(TS/~~[redacted]~~/NF)~~ We express no opinion on any other uses of these techniques, nor do we address any techniques other than these four or any conditions under which [redacted] or other detainees are held. Furthermore, this letter does not constitute the Department of Justice's policy approval for use of the techniques in this or any other case.

Sincerely,

Daniel Levin
Acting Assistant Attorney General

U.S. Department of Justice

Office of Legal Counsel

TOP SECRET/ NOFORN/MR

Office of the Assistant Attorney General

Washington, D.C. 20530

September 6, 2004

John A. Rizzo, Esq.
Acting General Counsel
Central Intelligence Agency
Washington, D.C. 20505

Dear John:

(TS/ NF) You have asked our advice regarding whether the use of twelve particular interrogation techniques (attention grasp, walling, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, dietary manipulation, nudity, water dousing, and abdominal slap) in the interrogation of would violate any United States statute (including 18 U.S.C. § 2340A), the United States Constitution, or any treaty obligation of the United States. We understand that is an al- Qa'ida operative who "is believed to be involved in the operational planning of an al-Qa'ida attack or attacks to take place in the United States prior to the November elections." September 5, 2004 letter from to Dan Levin. This letter confirms our advice that the use of these techniques on outside territory subject to United States jurisdiction would not violate any of these provisions. We will supply, at a later date, an opinion that explains the basis for this conclusion. Our advice is based on, and limited by, the following conditions:

1. The use of these techniques will conform to all representations previously made to us, including those listed in my August 26, 2004 letter to you.

2. The medical and psychological facts and assessments for indicate that there are no medical or psychological contraindications to the use of any of these techniques as you plan to employ them.

3. Medical officers will be present to observe whenever any enhanced techniques are applied and will closely monitor him while he is subject to sleep deprivation or dietary manipulation, in addition to the normal monitoring of him throughout his detention, to ensure that he does not sustain any physical or mental harm.

TOP SECRET NOFORN/MR

88

(TS/[redacted]/NF) We express no opinion on any other uses of these techniques, nor do we address any other techniques or any conditions under which [redacted] or other detainees are held. Furthermore, this letter does not constitute the Department of Justice's policy approval for use of the techniques in this or any other case.

Sincerely,

Daniel Levin
Acting Assistant Attorney General

MEMORANDUM

TO: ATTORNEY GENERAL
DEPUTY ATTORNEY GENERAL

FROM: Dan Levin
Acting Assistant Attorney General

RE: Status of Interrogation Advice

DATE: September __, 2004

You have asked for an update on the status of interrogation advice.

A. GENERAL ADVICE

1. Previously Given

a.. The primary prior general advice was an unclassified August 1, 2002 memorandum from Jay Bybee to Judge Gonzales interpreting the torture statute. It contains discussion of a variety of matters that are not necessary to resolving any issues raised to date.

2. Current/Pending

a. [ ]

B. CIA ADVICE

1. Previously Given

a. The primary prior advice was a classified August 1, 2002 memorandum from Jay Bybee to John Rizzo discussing ten techniques under the torture statute (attention grasp, walling, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, insects placed in a confinement box, and the waterboard).

2. Current/Pending

a. The Attorney General reaffirmed the conclusion as to nine of the techniques (excluding the waterboard) in a July 22, 2004 letter to John McLaughlin.

b. In addition, I have written letters as to three detainees to date:

i. [ ] [the waterboard is currently subject to the following limits: no more than two sessions a day; sessions on no more than 5 out of 30 days; sessions last no more than two hours each; no single application can exceed 40 seconds and no more than 6 applications exceeding 10 seconds in any one session; no more than 12 minutes total application per day] [ ]

ii. [ ]

iii. [ ]

c. [ ]

d. CIA has also requested an opinion on whether any of their techniques would "shock the conscience" if that legal standard applied [ ]

C. DOD ADVICE

1. Previously Given

a. There was a classified March 14, 2003 opinion to William Haynes from John Yoo which contains extensive discussion of the torture statute and other matters that is not necessary to resolve any issue.

b. In addition, we approved 24 specific techniques the use of which the Secretary of Defense approved. Although it is not entirely clear to me when that was done it was reaffirmed, for example, in a July 7, 2004 letter from Jack Goldsmith to Scott Muller (referring to approval of both CIA and DOD techniques) and also in a July 17, 2004 fax by Jack.

2. Current/Pending

a. [ ]

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

December 30, 2004

MEMORANDUM FOR JAMES B. COMEY
DEPUTY ATTORNEY GENERAL

Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A

Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law, for example, 18 U.S.C. §§ 2340-2340A; international agreements, exemplified by the United Nations Convention Against Torture (the "CAT")[1]; customary international law[2]; centuries of Anglo-American law[3]; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.[4]

This Office interpreted the federal criminal prohibition against torture—codified at 18 U.S.C. §§ 2340-2340A—in *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002) ("August 2002 Memorandum"). The August 2002 Memorandum also addressed a number of issues beyond interpretation of those statutory provisions, including the President's Commander-in-Chief power, and various defenses that might be asserted to avoid potential liability under sections 2340-2340A. *See id.* at 31-46.

Questions have since been raised, both by this Office and by others, about the

[1] 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. *See also, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

[2] It has been suggested that the prohibition against torture has achieved the status of *jus cogens* (*i.e.*, a peremptory norm) under international law. *See, e.g.*, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); *Regina v. Bow Street Metro. Stipendiary Magistrate Ex Parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147, 198; *see also* Restatement (Third) of Foreign Relations Law of the United States § 702 reporters' note 5.

[3] *See generally* John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (1977).

[4] *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 unfortunately still prevalent in the world today.").

96

appropriateness and relevance of the non-statutory discussion in the August 2002 Memorandum, and also about various aspects of the statutory analysis, in particular the statement that "severe" pain under the statute was limited to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." *Id.* at 1.[5] We decided to withdraw the August 2002 Memorandum, a decision you announced in June 2004. At that time, you directed this Office to prepare a replacement memorandum. Because of the importance of—and public interest in—these issues, you asked that this memorandum be prepared in a form that could be released to the public so that interested parties could understand our analysis of the statute.

This memorandum supersedes the August 2002 Memorandum in its entirety.[6] Because the discussion in that memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture.[7]

We have also modified in some important respects our analysis of the legal standards applicable under 18 U.S.C. §§ 2340-2340A. For example, we disagree with statements in the August 2002 Memorandum limiting "severe" pain under the statute to "excruciating and agonizing" pain, *id.* at 19, or to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," *id.* at 1. There are additional areas where we disagree with or modify the analysis in the August 2002 Memorandum, as identified in the discussion below.[8]

The Criminal Division of the Department of Justice has reviewed this memorandum and concurs in the analysis set forth below.

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[5] *See, e.g.*, Anthony Lewis, *Making Torture Legal*, N.Y. Rev. of Books, July 15, 2004; R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos*, Wash. Post, July 4, 2004, at A12; Kathleen Clark & Julie Mertus, *Torturing the Law; the Justice Department's Legal Contortions on Interrogation*, Wash. Post, June 20, 2004, at B3; Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L. Rev. 97 (2004).

[6] This memorandum necessarily discusses the prohibition against torture in sections 2340-2340A in somewhat abstract and general terms. In applying this criminal prohibition to particular circumstances, great care must be taken to avoid approving as lawful any conduct that might constitute torture. In addition, this memorandum does not address the many other sources of law that may apply, depending on the circumstances, to the detention or interrogation of detainees (for example, the Geneva Conventions; the Uniform Code of Military Justice, 10 U.S.C. § 801 et seq.; the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-3267; and the War Crimes Act, 18 U.S.C. § 2441, among others). Any analysis of particular facts must, of course, ensure that the United States complies with all applicable legal obligations.

[7] *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167-68 (July 5, 2004) ("America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.").

[8] While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.

I.

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."[9] Section 2340(1) defines "torture" 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."[10]

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[9] 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 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 (2000).

[10] 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)).

In interpreting these provisions, we note that Congress may have adopted a statutory definition of "torture" that differs from certain colloquial uses of the term. *Cf. Cadet v. Bulger*, 377 F.3d 1173, 1194 (11th Cir. 2004) ("[I]n other contexts and under other definitions [the conditions] might be described as torturous. The fact remains, however, that the only relevant definition of 'torture' is the definition contained in [the] CAT. . . ."). We must, of course, give effect to the statute as enacted by Congress.[11]

Congress enacted sections 2340-2340A to carry out the United States' obligations under the CAT. *See* H.R. Conf. Rep. No. 103-482, at 229 (1994). The CAT, among other things, obligates state parties to take effective measures to prevent acts of torture in any territory under their jurisdiction, and 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.[12] Conduct constituting "torture" occurring within the United States was—and remains—prohibited by various other federal and state criminal statutes that we do not discuss here.

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 attached the following understanding to 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

[11] Our task is only to offer guidance on the meaning of the statute, not to comment on policy. It is of course open to policymakers to determine that conduct that might not be prohibited by the statute is nevertheless contrary to the interests or policy of the United States.

[12] Congress limited the territorial reach of the federal torture statute, 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).

> 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 the 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 prohibition in the CAT, subject to the U.S. understanding.

II.

Under the language adopted by Congress in sections 2340-2340A, to constitute "torture," the conduct in question must have been "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"; (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").[13]

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[13] Common dictionary definitions of "torture" further support 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).

This interpretation is also consistent with the history of torture. *See generally* the descriptions in Lord Hope's lecture, *Torture*, University of Essex/Clifford Chance Lecture 7-8 (Jan. 28, 2004), and in Professor Langbein's book, *Torture and the Law of Proof: Europe and England in the Ancien Régime*. We emphatically are not saying that only such historical techniques—or similar ones—can constitute "torture" under sections 2340-

The statute, moreover, was intended to implement the United States' obligations under the CAT, which, as quoted above, defines as "torture" acts that inflict "severe pain or suffering" on a person. 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. . . .
>
> . . . .
>
> . . . 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.").

Further, the CAT distinguishes between torture and "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1." CAT art. 16. The CAT thus treats torture as an "extreme form" of cruel, inhuman, or degrading treatment. *See* S. Exec. Rep. No. 101-30 at 6, 13; *see also* J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 80 (1988) ("*CAT Handbook*") (noting that Article 16 implies "that torture is the *gravest form* of [cruel, inhuman, or degrading] treatment [or] punishment") (emphasis added); Malcolm D. Evans, *Getting to Grips with Torture*, 51 Int'l & Comp. L.Q. 365, 369 (2002) (The CAT "formalises a distinction between torture on the one hand and inhuman and degrading treatment on the other by attributing different legal consequences to them.").[14] The Senate Foreign Relations Committee emphasized

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2340A. But the historical understanding of "torture" is relevant to interpreting Congress's intent. *Cf. Morissette v. United States*, 342 U.S. 246, 263 (1952).

[14] This approach—distinguishing torture from lesser forms of cruel, inhuman, or degrading treatment—is consistent with other international law sources. The CAT's predecessor, the U.N. Torture Declaration, defined torture as "an *aggravated* and deliberate form of cruel, inhuman or degrading treatment or punishment." Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Res. 3452, art. 1(2) (Dec. 9, 1975) (emphasis added); *see also* S. Treaty Doc. No. 100-20 at 2 (The U.N. Torture Declaration was "a point of departure for the drafting of the [CAT]."). Other treaties also distinguish torture from lesser forms of cruel, inhuman, or degrading treatment. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, 213 U.N.T.S. 221 (Nov. 4, 1950) ("European Convention") ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); Evans, *Getting to Grips with Torture*, 51 Int'l & Comp. L.Q. at 370 ("[T]he ECHR organs have adopted . . . a 'vertical' approach . . . , which is seen as comprising three separate elements, each representing a progression of seriousness, in which one moves progressively from forms of ill-treatment which are

this point in its report recommending that the Senate consent to ratification of the CAT. *See* S. Exec. Rep. No. 101-30 at 13 ("'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. . . . The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to 'other acts of cruel, inhuman or degrading treatment or punishment *which do not amount to torture* . . . .'"). *See also Cadet*, 377 F.3d at 1194 ("The definition in CAT draws a critical distinction between 'torture' and 'other acts of cruel, inhuman, or degrading punishment or treatment.'").

Representations made to the Senate by Executive Branch officials when the Senate was considering the CAT are also relevant in interpreting the CAT's torture prohibition—which sections 2340-2340A implement. Mark Richard, a Deputy Assistant Attorney General in the Criminal Division, testified that "[t]orture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct." *Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 16 (1990) ("*CAT Hearing*") (prepared statement). The Senate Foreign Relations Committee also understood torture to be limited in just this way. *See* S. Exec. Rep. No. 101-30 at 6 (noting that "[f]or an act to be 'torture,' it must be an extreme form of cruel and inhuman treatment, causing severe pain and suffering, and be intended to cause severe pain and suffering"). Both the Executive Branch and the Senate acknowledged the efforts of the United States during the negotiating process to strengthen the effectiveness of the treaty and to gain wide adherence thereto by focusing the Convention "on torture rather than on other relatively less abhorrent practices." *Letter of Submittal from George P. Shultz, Secretary of State, to President Ronald Reagan* (May 10, 1988), *in* S. Treaty Doc. No. 100-20 at v; *see also* S. Exec. Rep. No. 101-30 at 2-3 ("The United States" helped to focus the Convention "on torture rather than other less abhorrent practices."). Such statements are probative of a treaty's meaning. *See* 11 Op. O.L.C. at 35-36.

'degrading' to those which are 'inhuman' and then to 'torture'. The distinctions between them is [*sic*] based on the severity of suffering involved, with 'torture' at the apex."); Debra Long, Association for the Prevention of Torture, *Guide to Jurisprudence on Torture and Ill-Treatment: Article 3 of the European Convention for the Protection of Human Rights* 13 (2002) (The approach of distinguishing between "torture," "inhuman" acts, and "degrading" acts has "remained the standard approach taken by the European judicial bodies. Within this approach torture has been singled out as carrying a special stigma, which distinguishes it from other forms of ill-treatment."). *See also CAT Handbook* at 115-17 (discussing the European Court of Human Rights ("ECHR") decision in *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978) (concluding that the combined use of wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink constituted inhuman or degrading treatment but not torture under the European Convention)). Cases decided by the ECHR subsequent to *Ireland* have continued to view torture as an aggravated form of inhuman treatment. *See, e.g., Aktas v. Turkey*, No. 24351/94 ¶ 313 (E.C.H.R. 2003); *Akkoc v. Turkey*, Nos. 22947/93 & 22948/93 ¶ 115 (E.C.H.R. 2000); *Kaya v. Turkey*, No. 22535/93 ¶ 117 (E.C.H.R. 2000).

The International Criminal Tribunal for the Former Yugoslavia ("ICTY") likewise considers "torture" as a category of conduct more severe than "inhuman treatment." *See, e.g., Prosecutor v. Delalic*, IT-96-21, Trial Chamber Judgment ¶ 542 (ICTY Nov. 16, 1998) ("[I]nhuman treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture.").

Although Congress defined "torture" under sections 2340-2340A to require conduct specifically intended to cause "severe" pain or suffering, we do not believe Congress intended to reach only conduct involving "excruciating and agonizing" pain or suffering. Although there is some support for this formulation in the ratification history of the CAT,[15] a proposed express understanding to that effect[16] was "criticized for setting too high a threshold of pain," S. Exec. Rep. No. 101-30 at 9, and was not adopted. We are not aware of any evidence suggesting that the standard was raised in the statute and we do not believe that it was.[17]

Drawing distinctions among gradations of pain (for example, severe, mild, moderate, substantial, extreme, intense, excruciating, or agonizing) is obviously not an easy task, especially given the lack of any precise, objective scientific criteria for measuring pain.[18] We are, however,

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[15] Deputy Assistant Attorney General Mark Richard testified: "[T]he essence of torture" is treatment that inflicts "excruciating and agonizing physical pain." *CAT Hearing* at 16 (prepared statement).

[16] *See* S. Treaty Doc. No. 100-20 at 4-5 ("The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.").

[17] Thus, we do not agree with the statement in the August 2002 Memorandum that "[t]he Reagan administration's understanding that the pain be 'excruciating and agonizing' is in substance not different from the Bush administration's proposal that the pain must be severe." August 2002 Memorandum at 19. Although the terms are concededly imprecise, and whatever the intent of the Reagan Administration's understanding, we believe that in common usage "excruciating and agonizing" pain is understood to be more intense than "severe" pain.

The August 2002 Memorandum also looked to the use of "severe pain" in certain other statutes, and concluded that to satisfy the definition in section 2340, pain "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." *Id.* at 1; *see also id.* at 5-6, 13, 46. We do not agree with those statements. Those other statutes define an "emergency medical condition," for purposes of providing health benefits, as "a condition manifesting itself by acute symptoms of sufficient severity (including severe pain)" such that one could reasonably expect that the absence of immediate medical care might result in death, organ failure or impairment of bodily function. *See, e.g.*, 8 U.S.C. § 1369 (2000); 42 U.S.C. § 1395w-22(d)(3)(B) (2000); *id.* § 1395dd(e) (2000). They do not define "severe pain" even in that very different context (rather, they use it as an indication of an "emergency medical condition"), and they do not state that death, organ failure, or impairment of bodily function cause "severe pain," but rather that "severe pain" may indicate a condition that, if untreated, could cause one of those results. We do not believe that they provide a proper guide for interpreting "severe pain" in the very different context of the prohibition against torture in sections 2340-2340A. *Cf. United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (phrase "wages paid" has different meaning in different parts of Title 26); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997) (term "employee" has different meanings in different parts of Title VII).

[18] 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.

aided 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 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 "severe physical or mental pain or suffering."[19] 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). That court 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

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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.

[19] Section 3(b)(2) of the TVPA defines "mental pain or suffering" similarly to the way that section 2340(2) defines "severe mental pain or suffering."

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 suggest the nature of the extreme 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 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." Although we think the meaning of "severe physical pain" is relatively straightforward, the question remains whether Congress intended to prohibit a category of "severe physical suffering" distinct from "severe physical pain." We conclude that under some circumstances "severe physical suffering" may constitute torture even if it does not involve "severe physical pain." Accordingly, to the extent that the August 2002 Memorandum suggested that "severe physical suffering" under the statute could in no circumstances be distinct from "severe physical pain," *id.* at 6 n.3, we do not agree.

We begin with the statutory language. 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." This is especially so in light of the general principle against interpreting a statute in such a manner as to render words surplusage. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Exactly what is included in the concept of "severe physical suffering," however, is difficult to ascertain. We interpret the phrase in a statutory context where Congress expressly distinguished "physical pain or suffering" from "mental pain or suffering." Consequently, a separate category of "physical suffering" must include something other than any type of "mental

pain or suffering."[20] Moreover, given that Congress precisely defined "mental pain or suffering" in the statute, it is unlikely to have intended to undermine that careful definition by including a broad range of mental sensations in a "physical suffering" component of "physical pain or suffering."[21] Consequently, "physical suffering" must be limited to adverse "physical" rather than adverse "mental" sensations.

The text of the statute and the CAT, and their history, provide little concrete guidance as to what Congress intended separately to include as "severe physical suffering." Indeed, the record consistently refers to "severe physical pain or suffering" (or, more often in the ratification record, "severe physical pain *and* suffering"), apparently without ever disaggregating the concepts of "severe physical pain" and "severe physical suffering" or discussing them as separate categories with separate content. Although there is virtually no legislative history for the statute, throughout the ratification of the CAT—which also uses the disjunctive "pain or suffering" and which the statutory prohibition implements—the references were generally to "pain *and* suffering," with no indication of any difference in meaning. The *Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which appears in S. Treaty Doc. No. 100-20 at 3, for example, repeatedly refers to "pain *and* suffering." *See also* S. Exec. Rep. No. 101-30 at 6 (three uses of "pain and suffering"); *id.* at 13 (eight uses of "pain and suffering"); *id.* at 14 (two uses of "pain and suffering"); *id.* at 35 (one use of "pain and suffering"). Conversely, the phrase "pain or suffering" is used less frequently in the Senate report in discussing (as opposed to quoting) the CAT and the understandings under consideration, *e.g.*, *id.* at 5-6 (one use of "pain or suffering"), *id.* at 14 (two uses of "pain or suffering"); *id.* at 16 (two uses of "pain or suffering"), and, when used, it is with no suggestion that it has any different meaning.

Although we conclude that inclusion of the words "or suffering" in "severe physical pain or suffering" establishes that physical torture is not limited to "severe physical pain," we also

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[20] Common dictionary definitions of "physical" confirm that "physical suffering" does not include mental sensations. *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*)").

[21] This is particularly so given that, as Administration witnesses explained, the limiting understanding defining mental pain or suffering was considered necessary to avoid problems of vagueness. *See, e.g., CAT Hearing* at 8, 10 (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.").

conclude that Congress did not intend "severe physical pain or suffering" to include a category of "physical suffering" that would be so broad as to negate the limitations on the other categories of torture in the statute. Moreover, the "physical suffering" covered by the statute must be "severe" to be within the statutory prohibition. We conclude that under some circumstances "physical suffering" may be of sufficient intensity and duration to meet the statutory definition of torture even if it does not involve "severe physical pain." To constitute such torture, "*severe* physical suffering" would have to be a condition of some extended duration or persistence as well as intensity. The need to define a category of "severe physical suffering" that is different from "severe physical pain," and that also does not undermine the limited definition Congress provided for torture, along with the requirement that any such physical suffering be "severe," calls for an interpretation under which "severe physical suffering" is reserved for physical distress that is "severe" considering its intensity and duration or persistence, rather than merely mild or transitory.[22] Otherwise, the inclusion of such a category would lead to the kind of uncertainty in interpreting the statute that Congress sought to reduce both through its understanding to the CAT and in sections 2340-2340A.

(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. *Id.* § 2340(1).

An important preliminary question with respect to this definition is whether the statutory

[22] Support for concluding that there is an extended temporal element, or at least an element of persistence, in "severe physical suffering" as a category distinct from "severe physical pain" may also be found in the prevalence of concepts of "endurance" of suffering and of suffering as a "state" or "condition" in standard dictionary definitions. *See, e.g., Webster's Third New International Dictionary* at 2284 (defining "suffering" as "the endurance of or submission to affliction, pain, loss"; "a pain endured"); *Random House Dictionary of the English Language* 1901 (2d ed. 1987) ("the state of a person or thing that suffers"); *Funk & Wagnalls New Standard Dictionary of the English Language* 2416 (1946) ("A state of anguish or pain"); *American Heritage Dictionary of the English Language* at 1795 ("The condition of one who suffers").

list of the four "predicate acts" in section 2340(2)(A)-(D) is exclusive. We conclude that Congress intended the list of predicate acts to be exclusive—that is, to constitute the proscribed "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. We reach 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").[23] Congress plainly considered very specific predicate acts, and this definition tracks the Senate's understanding concerning mental pain or suffering when giving its advice and consent to ratification of the CAT. 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 it was adopted out of concern that the CAT's definition of torture did not otherwise meet the requirement for clarity in defining crimes. *See supra* note 21. 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 adopt its understanding when giving 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 always causes prolonged mental harm, we do not believe that was Congress's intent. As noted, this language closely tracks the understanding that the Senate adopted when it gave 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. We 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

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[23] 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.*, *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.

suffering as articulated in the Senate's understanding to the CAT. The legislative history, moreover, confirms that sections 2340-2340A were intended to fulfill—but not go beyond—the United States' obligations under the CAT: "This section provides the necessary legislation to implement the [CAT]. . . . 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). This understanding, embodied in the statute, was meant to define 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 do not believe that Congress intended the definition to create a presumption that any time one of the predicate acts occurs, prolonged mental harm is deemed to result.

Turning to the question of what constitutes "prolonged mental harm caused by or resulting from" a predicate act, we believe that Congress intended this phrase to require mental "harm" that is caused by or that results from a predicate act, and that has some lasting duration. There is little guidance to draw upon in interpreting this phrase.[24] 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" or to "extend in duration," or to "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 continue for a "prolonged" period of time.[25] Finally, under section 2340(2), the "prolonged mental harm" must be "caused by" or "resulting from" one of the enumerated predicate acts.[26]

[24] The phrase "prolonged mental harm" does not appear in the relevant medical literature or elsewhere in the United States Code. The August 2002 Memorandum concluded that to constitute "prolonged mental harm," there must be "significant psychological harm of significant duration, e.g., lasting for months or even years." *Id.* at 1; *see also id.* at 7. Although we believe that the mental harm must be of some lasting duration to be "prolonged," to the extent that that formulation was intended to suggest that the mental harm would have to last for at least "months or even years," we do not agree.

[25] For example, 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).

[26] This 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. Early occurrences of the predicate act could cause mental

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*, the court explained that:

> [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 the plaintiffs were continuing to suffer serious mental harm even ten years after the events in question: One plaintiff "suffers from anxiety, flashbacks, and nightmares and has difficulty sleeping. [He] continues to suffer thinking about what happened to him during this ordeal and has been unable to work as a result of the continuing effects of the torture he endured." *Id.* at 1334. Another plaintiff "suffers from anxiety, sleeps very little, and has frequent nightmares. . . . [He] has found it impossible to return to work." *Id.* at 1336. A third plaintiff "has frequent nightmares. He has had to use medication to help him sleep. His experience has made him feel depressed and reclusive, and he has not been able to work since he escaped from this ordeal." *Id.* at 1337-38. And the fourth plaintiff "has flashbacks and nightmares, suffers from nervousness, angers easily, and has difficulty trusting people. These effects directly impact and interfere with his ability to work." *Id.* at 1340. In each case, these mental effects were continuing years after the infliction of the predicate acts.

And in *Sackie v. Ashcroft*, 270 F. Supp. 2d 596 (E.D. Pa. 2003), the individual had been kidnapped and "forcibly recruited" as a child soldier at the age of 14, and over the next three to four years had been forced to take narcotics and threatened with imminent death. *Id.* at 597-98, 601-02. The court concluded that the resulting mental harm, which continued over this three-to-four-year period, qualified as "prolonged mental harm." *Id.* at 602.

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.

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harm that could continue—and become prolonged—during the extended period the predicate acts continued to occur. For example, in *Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601-02 (E.D. Pa. 2003), the predicate acts continued over a three-to-four-year period, and the court concluded that "prolonged mental harm" had occurred during that time.