

THE *IRISH STATE CASE*, INTERROGATION TECHNIQUES AND THE GLOBAL WAR ON TERROR

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In *Ireland v. the United Kingdom*, also known as the *Irish State Case*, the European Court of Human Rights (“ECHR”) held that the “five techniques” of interrogation violated Article 3 of the European Convention on Human Rights.¹ In doing so, the ECHR determined that there was a significant legal distinction between conduct constituting “torture” and conduct amounting to “inhuman and degrading treatment.”² This decision would play a critical role in U.S. government analysis of interrogation of al-Qaeda and Taliban detainees during the global war on terror. It would also be revisited by British authorities during an investigation into prisoner abuse during the Iraq Conflict. The report in that investigation—the *Baha Mousa Public Inquiry*—was released in 2011. It recommended, among other things, that the British Ministry of Defense issue standing orders, which would forbid use of the five techniques during military operations and make them subject to criminal sanction.³ This article reviews the decision in the *Irish State Case* in Part I, and the report in the Baha Mousa case in Part II. In Part III, it analyzes how the legal issues raised by the use of special techniques to interrogate “enemy combatants” abroad have been handled in the United States.

During the course of the global war on terror, the United States has had to address whether certain kinds of coercive interrogation

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1. *Ireland v. United Kingdom (Irish State Case)*, 25 Eur. Ct. H.R. (ser. A) ¶167 (1978). Article 3 of the European Convention on Human Rights and Fundamental Freedoms states that “[n]o one shall be subjected to torture or inhuman or degrading treatment or punishment.” Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.

2. *Irish State Case*, 25 Eur. Ct. H.R. (ser. A) ¶165.

3. SIR WILLIAM GAGE, 3 BAHAMOUSAINQUIRY 1267 (2011) [hereinafter 3 MOUSA INQUIRY], available at <http://www.bahamousainquiry.org/report/index.htm>; see *infra* Part I.

tactics constitute “torture” or other criminal conduct, and whether certain kinds of procedures could lawfully be employed. United States policy on this issue was first established in 2002 in legal guidance memoranda authored by members of the Department of Justice (“DOJ”). These memoranda have become known as the “torture memos.”⁴ In 2004, after the policy had run amok in Iraq, it was revised by additional legal guidance rendered by DOJ.⁵ Congress also acted to broaden the scope of prohibited conduct by making “cruel, inhuman or degrading treatment or punishment” a crime, when it passed the Detainee Treatment Act (“DTA”) in 2005.⁶

In the Baha Mousa Public Inquiry, Great Britain chose to adhere to international law and the *Irish State Case*, saying the techniques proscribed by that decision must be clearly “banned or prohibited.”⁷ In setting national security policy, the United States opted to chart a twisting and turning path of interpretation and application of the decision. At times the *Irish State Case* was cited by federal government lawyers to support the U.S. program of enhanced interrogation techniques (“EIT”) for detainees, and at other times, the case was distinguished and deemed inapplicable to U.S. detainee

4. See, e.g., Draft Memorandum from John Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, for William J. Haynes II, Gen. Counsel of the Dep’t of Def. (Jan. 9, 2002) [hereinafter Yoo Memorandum Jan. 9, 2002], available at <http://www.torturingdemocracy.org/documents/20020109.pdf>; Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, for Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Bybee–Gonzales Memorandum Aug. 1, 2002], available at <http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf>; Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, for John Rizzo, Acting Gen. Counsel, Cent. Intelligence Agency (Aug. 1, 2002) [hereinafter Bybee–Rizzo Memorandum Aug. 1, 2002], available at <http://www.justice.gov/olc/docs/memo-bybee2002.pdf>. These legal documents have been called the “torture memos,” because they provided the legal basis for President George W. Bush’s Feb. 7, 2002 Memorandum “outlining treatment of al-Qaida and Taliban detainees.” Presidential Memorandum on Humane Treatment of al-Qaeda and Taliban Detainees (Feb. 7, 2002) [hereinafter Bush Memorandum Feb. 7, 2002], available at <http://www.torturingdemocracy.org/documents/20020207-2.pdf>. The presidential memorandum indicated that “Common Article 3 of Geneva” did “not apply to either al-Qaida or Taliban Detainees,” and that “Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva.” *Id.*

5. Memorandum from Daniel Levin, Acting Assistant Att’y Gen., Office of Legal Counsel, for James B. Comey, Deputy Att’y Gen., U.S. Dep’t of Justice (Dec. 30, 2004) [hereinafter Levin Memorandum Dec. 30, 2004], available at <https://www.aclu.org/files/projects/foiasearch/pdf/DOJOLC000045.pdf>.

6. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified at 10 U.S.C. §801 note, 28 U.S.C. §2241(e), and scattered sections of 42 U.S.C. §2000dd (2006)).

7. 3 MOUSA INQUIRY, *supra* note 3, at 1268.

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interrogations. The shift in position became necessary so that the specialized program established for interrogating enemy combatants could continue after enactment of the DTA. The inconsistent legal advice rendered by DOJ undermined, rather than supported, the war effort because military personnel and intelligence agents in the field were unable to predict whether their conduct would be viewed as lawful or illegal.⁸ It has been ten years since the first memoranda addressing this subject were issued, which makes this a particularly good time to evaluate the development of U.S. policy and law in this area of national security.

I. THE IRISH STATE CASE

In the *Irish State Case*, the ECHR was asked to decide whether the use of the “five techniques” as an aid to interrogation in Northern Ireland violated Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment.⁹ The ECHR decided the case despite the British government’s argument that jurisdiction should not be exercised. The argument was based on a representation by the United Kingdom’s Attorney General that the government “considered the question of the use of the ‘five techniques’ with very great care and with particular regard to Article 3 of the Convention . . . give this unqualified undertaking, that the ‘five techniques’ will not in any circumstances be reintroduced as an aid to interrogation.”¹⁰ The

8. Senator John McCain, who had been tortured by the North Vietnamese while a prisoner of war, has said: “We should not torture or treat inhumanely terrorists we have captured. The abuse of prisoners harms, not helps, our war effort.” Sen. John McCain, *Torture’s Terrible Toll*, NEWSWEEK, Nov. 21, 2005, at 34.

9. *Irish State Case*, 25 Eur. Ct. H.R. (ser. A) ¶¶148, 150-59 (1978).

10. *Id.* ¶¶153-55. The Attorney General’s representation to the ECHR had been preceded by issuance of the Lord Parker Commission Report in 1972. While the Parker Commission had concluded that the use of the five techniques during interrogations violated domestic law, the Parker Commission also considered Common Article 3 of the Geneva Conventions (Treatment of Prisoners of War) and concluded that use of the five techniques by trained interrogators, with the prior approval of senior officials and under conditions of medical and psychiatric monitoring posed a “negligible” risk of physical injury and “no real risk” of long term mental effects. The Commission highlighted both the threat presented by the IRA and the intelligence gained from using the techniques. It noted that using the five techniques had saved lives. Based on all of these considerations, the Parker Commission determined that the five techniques did not violate Common Article 3 of the Geneva Conventions. On the day Lord Parker’s report was released, Prime Minister Edward Heath told Parliament that “the techniques . . . will not be used in the future as an aid to interrogation.” *Id.* ¶ 101. In 2007, the Parker Commission’s Common Article 3 analysis was relied upon in legal advice rendered by the Department of Justice to the U.S. Central Intelligence Agency regarding certain enhanced interrogation techniques used on high value al-Qaeda detainees. Memorandum from Steven Bradbury,

ECHR, however, determined its exercise of jurisdiction in the matter was proper because the Irish government had established that the conduct in question under Article 3 constituted a “practice.”¹¹

The five techniques at issue were described by the European Commission on Human Rights in its fact-finding as follows:

- (a) Wall-standing: forcing the detainees to remain for periods of some hours in a “stress position,” described by those who underwent it as being “spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart with feet back, causing them to stand on their toes with the weight of the body mainly on the fingers;”
- (b) Hooding: putting a black or navy colored bag over the detainees’ heads and, at least initially, keeping it there all the time except during interrogation;
- (c) Subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
- (d) Deprivation of sleep: pending their interrogations, depriving the detainees of sleep;
- (e) Deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the center and pending interrogations.¹²

Northern Ireland Prime Minister, Major James Chichester-Clark, announced that “Northern Ireland is at war with the Irish Republican Army Provisionals” (“IRA”), after the IRA had shot and killed the first soldier to die in “the Troubles” in Belfast in 1971.¹³ One month later, three more soldiers were killed by the IRA. Brian Faulkner replaced Chichester-Clark as Prime Minister, promising to run a “law and order” administration. As part of a new strategy to combat terrorism, Faulkner instituted internment which authorized extrajudicial deprivation of liberty.¹⁴ Detainees could be arrested without warrant and held for forty-eight hours without bail for interrogation.¹⁵ Detainees could then be held for unlimited duration for further interrogation or under preventive detention as deemed

Principal Deputy Assistant Attorney General, for John A. Rizzo, Acting General Counsel, Central Intelligence Agency (July 20, 2007) [hereinafter Bradbury Memorandum July 20, 2007], *available at* <http://www.justice.gov/olc/docs/memo-warcrimesact.pdf>.

11. *Irish State Case*, 25 Eur. Ct. H.R. (ser. A) ¶157.

12. *Id.* ¶96. The European Commission found that the facts presented by the Irish government with regard to the use of the five techniques “constituted a practice not only of inhuman and degrading treatment but also of torture.” *Id.* ¶165. The ECHR disagreed with the finding on torture. *Id.* ¶167.

13. TIM PAT COOGAN, *THE TROUBLES: IRELAND’S ORDEAL 1966-1996 AND THE SEARCH FOR PEACE* 133 (1996).

14. *Irish State Case*, 25 Eur. Ct. H.R. (ser. A) ¶78.

15. *Id.* ¶ 81.

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necessary by police and government authorities.¹⁶ Judicial review of these decisions was limited to cases where detainees could make a showing that the government had acted in bad faith.¹⁷ Thousands of nationalists were swept off the streets, labeled “terrorists” and held under internment orders.¹⁸ Those arrested were interrogated, usually by Special Branch members of the Royal Ulster Constabulary (“RUC”) who had received specialized training from British intelligence on how to use the five techniques to gather evidence or to gain intelligence about the IRA.¹⁹

In deciding whether Article 3 of the European Convention had been violated, the ECHR adopted the reasonable doubt standard, which had been employed by the European Commission in its review of the case.²⁰ After setting forth this burden of proof standard, the ECHR applied a totality of the circumstances test. It considered the duration of the treatment, its physical or mental effects, and factors related to the victim, such as age, gender and health.²¹ The ECHR then set forth a two prong legal analysis: 1) related to “inhuman or degrading treatment,” and 2) related to “torture.” The ECHR noted that the two legal concepts are significantly different under Article 3 based on “a difference in the intensity of the suffering inflicted.”²² The finding in the *Irish State Case* distinguishing inhuman or degrading treatment from torture based on the intensity of the suffering and cruelty inflicted, would serve as a foundation for legal advice rendered by DOJ in 2002—which concluded that acts of torture are crimes under the War Crimes Act (“WCA”) but that conduct which is merely cruel, inhuman, or degrading is not.²³

The ECHR concurred with the European Commission’s finding that:

The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their

16. *Id.* ¶ 84.

17. *Id.* ¶ 82.

18. Two-thirds of those arrested under the Special Powers Act in 1971, were released after interrogation. JOHN MCGUFFIN, INTERNMENT 87 (1973). Loyalists were not interned until 1973. The internment policy in Northern Ireland ended in 1975.

19. *Irish State Case*, 25 Eur. Ct. H.R. (ser. A) ¶97.

20. *Id.* ¶ 161.

21. *Id.* ¶ 162.

22. *Id.* ¶¶ 167-68.

23. Bybee–Gonzales Memorandum Aug. 1, 2002, *supra* note 4, at 29. War Crimes Act of 1996, 18 U.S.C. §2441 (2006).

victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.²⁴

Thus, the ECHR concluded that the five techniques constituted “a practice of inhuman and degrading treatment” in violation of Article 3.²⁵

However, the ECHR rejected the European Commission’s finding that the use of the five techniques constituted torture, stating that “[a]lthough the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although the object was the extraction of confessions, the naming of others and/or information and although they were used systemically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture.”²⁶ The legal principle, that “torture” is different from “inhuman and degrading treatment” based on the “intensity and cruelty” of the conduct, set forth in the decision did not impact the holding in the case—that the five techniques of interrogation violated Article 3. Although the five techniques were not deemed to be torture, they were clearly illegal; the ECHR had concluded “the five techniques amounted to a practice of inhuman and degrading treatment, which practice was in breach of Article 3.”²⁷ In 2002, when DOJ latched on to the legal distinction recognized in the *Irish State Case* and relied on it to justify its policy position, the ramification was more significant. It was to bestow an *imprimatur* of legality on the U.S. enhanced interrogation techniques program. Once the DTA was passed in 2005, this reliance on the *Irish State Case* had to be shunted aside to avoid handcuffing the program.

The ECHR also held that an emergency existed in Northern Ireland during the period in question, which threatened the life of the nation, and that the British government had acted properly in “derogating” from its obligations under Article 5 (right to liberty and security) and Article 6 (right to a fair trial) of the European Convention on Human Rights.²⁸ This conclusion upheld Northern

24. *Irish State Case*, 25 Eur. Ct. H.R. (ser. A) ¶167.

25. *Id.* ¶ 168.

26. *Id.* ¶ 167. The ECHR also rejected the Irish government’s request to direct the United Kingdom to take action against members of the security forces who breached Article 3, as well as those who condoned or tolerated such conduct. The ECHR said it lacked the power to direct a Contracting State to institute disciplinary or criminal proceedings. *Id.* ¶¶ 186-87.

27. *Id.* ¶ 168.

28. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 1, art. 15, ¶1.

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Ireland's policy of internment.²⁹ But "derogation in time of emergency" of the rights set forth in Articles 2 (right to life) and 3 of the European Convention is not permitted; thus, the British government could not evade its responsibility under Article 3.³⁰ The government was required to comply with its obligation to ensure that no one is subjected to "inhuman or degrading treatment." Any re-institution of use of the five techniques as an interrogation procedure would contravene Article 3.

II. BAHAMOUS PUBLIC INQUIRY

On September 8, 2011, former Lord Justice of Appeal Sir William Gage issued his report on the Baha Mousa Public Inquiry into abuse of Iraqi prisoners by British soldiers.³¹ The report concluded that superior officers had failed to prevent soldiers from using interrogation procedures—such as hooding, sleep deprivation, and making prisoners stand in painful stress positions—that had been banned since 1972, and that these tactical questioning techniques had in fact been used systemically against Baha Mousa and other prisoners.³² The report said hooding and handcuffing were used "in order to enhance the shock of capture and improve the level of information extracted from the suspect."³³ But hooding, in particular, was found to be problematic. The report said, "[i]t is difficult to conceive how a return to the use of hoods could be justified whether militarily, legally[,] or as a matter of policy."³⁴ The report recognized that the five techniques of interrogation had been outlawed under the ECHR decision in the *Irish State Case*, and said that "[i]n the interests of clarity for all, the five techniques should be referred to as being banned or prohibited rather than proscribed."³⁵

29. GERARD HOGAN & CLIVE WALKER, *POLITICAL VIOLENCE AND THE LAW IN IRELAND* 95 (1989).

30. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 1, art. 15, ¶2.

31. Lord Justice William Gage had been appointed to preside under the Inquiries Act 2005 passed by Parliament to "provide a framework under which future inquiries . . . that have caused . . . public concern, can operate effectively to deliver valuable and practicable recommendations." Inquiries Act, 2005, c. 12 (Eng.), *available at* <http://www.legislation.gov.uk/ukpga/2005/12/contents>; SIR WILLIAM GAGE, 1 BAHAMOUS PUBLIC INQUIRY 5 (2011), [hereinafter 1 MOUSAMOUS INQUIRY].

32. John Bingham & Andrew Hough, *Baha Mousa Inquiry: Soldiers Suspended in "Dark" Day for Army*, TELEGRAPH (London) (Sept. 8, 2011, 2:46 PM), <http://www.telegraph.co.uk/news/uknews/defence/8749760/Baha-Mousa-inquiry-soldiers-suspended-in-dark-day-for-Army.html>.

33. 1 MOUSAMOUS INQUIRY, *supra* note 31, at 253 (emphasis omitted).

34. 3 MOUSAMOUS INQUIRY, *supra* note 3, at 1267.

35. *Id.* at 1268.

Baha Mousa and nine other detainees had been abused and assaulted while undergoing military interrogation in 2003. Mousa had been arrested in Basra, Iraq on suspicion of insurgency and held at a British temporary detention facility. In addition to being subjected to illegal interrogation techniques, he was punched, kicked and beaten.³⁶ Mousa died within forty-eight hours of his arrest. The report concluded that he died as a result of his “vulnerable” state caused by a “lack of food and water, the heat, . . . acute renal failure, exertion, exhaustion, fear and multiple injuries.”³⁷ Sir Gage concluded that “the use of hooding and stress positions” were key components in causing his death, and “that the use of hooding and stress positions” was a “standard operating procedure” for soldiers.³⁸ Sir Gage said that “[s]tress positions, hooding, sleep deprivation and noise should obviously not have been used to aid tactical questioning, even for short periods of time. But a distinctive feature of these events was that they were used for an excessively long time.”³⁹ He criticized the Ministry of Defense for failing to emphasize as part of both policy and training that the five techniques had been outlawed since the ECHR decision in the *Irish State Case*, and recommended the issuance of proper instruction and training with regard to hooding.⁴⁰

The Baha Mousa Inquiry has been described as “the biggest examination of [British] military conduct in the aftermath of the Iraq invasion.”⁴¹ The review into Mousa’s death had been commissioned in 2008 by the British Secretary of Defense who acknowledged that there had been “substantial breaches” of the European Convention on Human Rights. The Ministry of Defense paid 2.83 million pounds in compensation to the Mousa family and the nine men after admitting that the army had violated Articles 2 and 3 of the European Convention.⁴² The most expensive court-martial in British history

36. 1 MOUSA INQUIRY, *supra* note 31, at 263–66.

37. *Id.* at 270.

38. *Id.* at 300, 368.

39. *Id.* at 327-28. Mousa had been hooded for the majority of his “36 hours” of mistreatment at the holding facility. Sir Gage rendered no opinion on whether Mousa’s mistreatment constituted torture or other criminal conduct. He viewed the terms of reference under the Inquiries Act 2005 as authorizing him only to investigate and issue a fact-finding report on the death of Baha Mousa and the treatment of those detained with him. *Id.* at 328-29.

40. *Id.* at 382.

41. Bingham & Hough, *supra* note 32.

42. European Convention on Human Rights and Fundamental Freedoms, Article 2 states: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more

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resulted in the acquittal of six soldiers and the conviction of one in 2006. One other soldier pled guilty to the charge of inhuman treatment of prisoners. He became the first British soldier to plead guilty to a war crime.⁴³ He was sentenced to one year in jail and discharged from the army.

III. LEGAL ISSUES SURROUNDING SPECIAL INTERROGATION TECHNIQUES

Under the WCA, also known as the anti-torture statute, it is a crime for anyone outside the United States acting under color of law to inflict severe physical or mental pain or suffering upon someone within his or her custody or control.⁴⁴ In the 2002 memorandum to Alberto Gonzalez, DOJ said the WCA's criminal provisions applied to situations where "pain that is difficult to endure" is inflicted during interrogation.⁴⁵ The memorandum explained that torture, under the WCA, expressly covered the infliction of intense "physical pain" that would accompany "serious physical injury, such as organ failure, impairment of bodily function or . . . death;" and that, under the statute, torture covered the infliction of "purely mental pain or suffering" that would result in "significant psychological harm of significant duration."⁴⁶ "Significant duration" meant that the "significant psychological harm" would last for months or years.⁴⁷

Since Congress had passed the WCA to implement the United Nations Convention against Torture and Other Cruel or Degrading Treatment or Punishment ("CAT"),⁴⁸ DOJ also considered CAT in delineating the scope of the law. In Article 1 of CAT, torture was defined as: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession . . . when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in

than absolutely necessary." Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 1, art. 2. Article 2 "ranks as one of the most fundamental provisions in the Convention." *McCann and Others v. United Kingdom*, 21 Eur. Ct. H.R. 97, ¶147 (1995).

43. Bingham & Hough, *supra* note 32; Steven Morris, *First British Soldier to be Convicted of a War Crime is Jailed for Ill-Treatment of Iraqi Civilians*, *GUARDIAN* (UK), May 1, 2007.

44. War Crimes Act of 1996, 18 U.S.C. 2441(d) (2006).

45. Bybee-Gonzales Memorandum Aug. 1, 2002, *supra* note 4, at 1.

46. *Id.* at 2.

47. *Id.* at 7.

48. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 112 Stat. 2681-761, 1465 U.N.T.S. 85.

an official capacity.”⁴⁹ Article 16 of CAT required State parties to “undertake to prevent . . . other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1.”⁵⁰ DOJ concluded that CAT required criminal penalties only for torture, “the most egregious conduct,” as defined in Article 1. The memorandum said CAT did not require making conduct that is “cruel, inhuman, or degrading treatment or punishment,” as set forth in Article 16, a crime.⁵¹ Therefore, DOJ determined that conduct which can be characterized as cruel, inhuman, or degrading but which falls short of constituting torture is not a crime under the WCA. In support of this interpretation, DOJ relied on the *Irish State Case*. In citing it with approval, DOJ said that *Ireland v United Kingdom* (1978) had recognized “the same ‘intensity/cruelty’ distinction,” and had concluded that the infliction of physical pain does not always constitute torture.⁵²

Furthermore, the memorandum said that “criminal law defenses of necessity and self-defense could justify interrogation methods” which violate the law, if they are “needed to elicit information to prevent a direct and imminent threat to the United States and its citizens.”⁵³ In particular, DOJ noted al-Qaeda plans to develop and deploy chemical, biological, and nuclear weapons of mass destruction.⁵⁴ Finally, DOJ took the position that the WCA may be unconstitutional as applied to “interrogations of enemy combatants pursuant to the President’s Commander-in-Chief powers.”⁵⁵ On the same day, DOJ issued a second memorandum related to the interrogation of Abu Zubaydah, which stated that interrogators do not violate the WCA unless they have a “specific intent” to cause severe pain.⁵⁶

49. *Id.* art. 1.

50. *Id.* art. 16.

51. Bybee–Gonzales Memorandum Aug. 1, 2002, *supra* note 4, at 2.

52. *Id.* at 29.

53. *Id.* at 39.

54. *Id.* at 41.

55. *Id.* at 2.

56. Bybee–Rizzo Memorandum Aug. 1, 2002, *supra* note 4, at 16. Abu Zubaydah is a high value detainee being held at Guantanamo Bay, Cuba. He was subjected to wall standing, the waterboard, stress positions, the facial hold and facial insult slap, sleep deprivation, and cramped confinement. He was also placed in a confined space with an insect. *Id.* at 2–3. All of these procedures, including the waterboard, were approved in the memorandum, which noted that a “good faith belief” that the procedures “would not result in prolonged mental harm” existed, and that “there is no specific intent to inflict severe mental pain or suffering.” *Id.* at 18. The use of enhanced interrogation techniques on Zubaydah led to the identification of Khalid Sheikh Mohammed, the mastermind of the 9/11 terrorist attacks upon the United

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In 2004, DOJ issued a superseding memorandum that altered certain legal positions in the 2002 memorandum. The 2004 memorandum to Deputy Attorney General James Comey eliminated references to general defenses to liability, as well as the potential unconstitutional usurpation of a presidential authority claim.⁵⁷ The previously expressed opinion that the WCA was limited to covering acts causing “severe physical pain” was also changed. The 2004 memorandum expanded the conduct covered by the law to include acts causing “severe physical suffering,”⁵⁸ thereby increasing the kinds of behavior that constitute torture. However, the distinction DOJ recognized between acts constituting torture and acts amounting to less abhorrent cruel, inhuman, or degrading treatment was left unchanged; and DOJ continued to rely upon the *Irish State Case* to bolster legal support for this proposition.⁵⁹

Secretary of Defense Donald Rumsfeld approved the use of stronger, enhanced interrogation procedures at the Guantanamo Bay, Cuba detention facility than had been authorized for use by Army Field Manual 34-52.⁶⁰ For example, waterboarding was not

States, and Jose Padilla. ALI H. SOUFAN, THE BLACK BANNERS: THE INSIDE STORY OF 9/11 AND THE WAR AGAINST AL-QAEDA 427 (2011); JOSE A. RODRIGUEZ, JR., HARD MEASURES: HOW AGGRESSIVE CIA ACTIONS AFTER 9/11 SAVED AMERICAN LIVES 56–57 (2012). Padilla was convicted by a federal jury of conspiring to kill people and to fund and support terrorism. Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1. He was sentenced to seventeen years and four months in jail. Kirk Semple, *Padilla Gets 17 Years in Conspiracy Case*, N.Y. TIMES, Jan. 23, 2008, at A14.

57. Levin Memorandum Dec. 30, 2004, *supra* note 5.

58. *Id.* at 10.

59. *Id.* at 7.

60. STEVEN STRASSER & CRAIG R. WHITNEY, THE ABU GHRAIB INVESTIGATIONS: THE OFFICIAL INDEPENDENT PANEL AND PENTAGON REPORTS ON THE SHOCKING PRISONER ABUSE IN IRAQ 5 (2004). Army Field Manual 34-52 (Intelligence Interrogation) was issued in 1987. It was replaced in 2006 by Army Field Manual 22.3 (Intelligence Collector Operations). The Guantanamo Bay detention camp is located on the U.S. Guantanamo Naval Base in Cuba. Combatants captured in the Afghanistan war were first brought to Guantanamo in January 2002. Despite early promises to the contrary, Guantanamo remains open to date. In accepting the 2009 Nobel Peace Prize in Oslo, Norway, President Obama said:

[w]here force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe that the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength. That is why I prohibited torture. That is why I ordered the prison at Guantanamo Bay closed. And that is why I have reaffirmed America’s commitment to abide by the Geneva Conventions.

President Barack Obama, Nobel Peace Prize Acceptance Speech (Dec. 10 2009), available at <http://www.huffingtonpost.com/2009/12/10/obama-nobel-peace-prize->

permitted under the Army Field Manual, but was allowed under the new program.⁶¹ In addition to waterboarding, some of the other enhanced techniques approved by the Secretary of Defense included dietary manipulation and sleep deprivation, as well as the attention grasp, the facial hold, the abdominal slap and the facial insult slap. The purpose of the EIT program was to instill hopelessness and despair so that a detainee would decide it is better to cooperate. Part of the justification for employing enhanced techniques during the questioning of detainees was that the Geneva Conventions did not apply to unlawful combatants like al-Qaeda and the Taliban.⁶² This position was set forth in additional DOJ memoranda, which said that al-Qaeda and the Taliban were “non-State actors,” who cannot be parties to international agreements governing the law of war, like the Geneva Conventions.⁶³ The rationale for the aggressive,

a_n_386837.html. President Obama encountered significant resistance to his plan to close the facility. On May 20, 2009, the United States Senate overwhelmingly voted to withhold the funds needed to transfer prisoners held at Guantanamo to facilities within the United States. Supplemental Appropriations Act 2009, Pub. L. No. 111–32, § 14104(a), 123 Stat. 1859, 1920 (2009) (“None of the funds made available in this or any prior Act may be used to release an individual who is detained as of the date of enactment of this Act, at Naval Station, Guantanamo Bay, Cuba, into the . . . United States.”). On January 7, 2011 President Obama signed the 2011 Defense Authorization Bill that contained provisions restricting the transfer of detainees from Guantanamo to domestic prisons, effectively preventing the closure of the facility. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §§1032-1034, 124 Stat. 4137, 4351-54 (to be codified in scattered sections of the U.S. Code). These restrictions were extended for another year by the National Defense Authorization Act for Fiscal Year 2012. Pub. L. No. 112-81, 125 Stat. 1298 (2011) (to be codified in scattered sections of the U.S. Code). A national intelligence report estimates that approximately one in four detainees released from Guantanamo have been confirmed or suspected of being recidivistic; that is, of returning to the battlefield. *Gitmo Repeat Offender Rate Continues to Rise*, FOX NEWS (Dec. 8, 2010), <http://www.foxnews.com/politics/2010/12/08/gitmo-recidivism-rate-continues-rise/>. Other studies, however, have assessed the recidivism rate for released detainees returning to the battlefield to be as low as four percent. PETER L. BERGEN, *THE LONGEST WAR: THE ENDURING CONFLICT BETWEEN AMERICA AND AL-QAEDA* 307–08 (2011).

61. Compare DEP’T OF THE ARMY, FIELD MANUAL 34-52: INTELLIGENCE INTERROGATION 1-7 to 1-9 (1992) (prohibiting the use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment), *with* Bybee–Rizzo Memorandum Aug. 1, 2002, *supra* note 4, at 12–18 (concluding that waterboarding does not constitute torture). Waterboarding involved securing an individual to a bench with his or her feet inclined, placing a cloth over the person’s nose and mouth and saturating it. Once the cloth became saturated, the person’s airflow became restricted. This produced the “perception” of suffocation, panic and drowning. RODRIGUEZ, JR., *supra* note 56, at 69–70.

62. Bush Memorandum Feb. 7, 2002, *supra* note 4, at 1; Yoo Memorandum Jan. 9, 2002, *supra* note 4, at 1.

63. “[N]either the federal War Crimes Act nor the Geneva Conventions would

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enhanced interrogation techniques authorized for use at Guantanamo—where detainees were classified as “unlawful combatants”—carried over to the conflict in Iraq. Procedures, beyond those approved for use in Field Manual 34–52, and even beyond those approved for Guantanamo, were authorized by the military for use in Iraq.⁶⁴ The authorization to use the enhanced techniques in Iraq was rescinded in late 2003.⁶⁵

In *Hamdan v. Rumsfeld*, the United States Supreme Court determined that the Geneva Conventions applied to the conflicts in Iraq and Afghanistan, and that prisoners of war were protected by Common Article 3 of the Geneva Conventions.⁶⁶ The Supreme Court decision made it unmistakably clear that the legal advice rendered by DOJ on this issue in 2002 and 2003 memoranda was erroneous and unsustainable. Some interrogators in Iraq had gone far beyond what was permitted by the law of war. Increased pressure to gather actionable intelligence during detainee interrogations had been placed on interrogators. Intelligence was essential to fighting an

apply to the detention conditions in Guantanamo Bay, Cuba” Yoo Memorandum Jan. 9, 2002, *supra* note 4, at 42. In a second memorandum in 2003, Deputy Assistant Attorney General Yoo also indicated that alien combatants held abroad are not protected by the due process clause of the Fifth Amendment or from the infliction of cruel and unusual punishment under the Eighth Amendment. Memorandum from John Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, for William J. Haynes II, Gen. Counsel of the Dep’t of Def. 1 (Mar. 14, 2003) [hereinafter Yoo Memorandum Mar. 14, 2003], *available at* <http://www.justice.gov/olc/docs/memo-combatantsoutsideunitedstates.pdf>. *But cf.* *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006) (holding Geneva Conventions Common Article 3 applies to individuals held prisoner at Guantanamo Bay, Cuba). Furthermore, Yoo’s 2003 legal memorandum concluded “that CAT defines U.S. international law obligations with respect to torture and other cruel, inhuman, or degrading treatment or punishment[.]” and that “U.S. obligations under CAT regarding cruel, inhuman, or degrading treatment or punishment is limited to conduct prohibited by the Eight, Fifth and Fourteenth Amendments.” Yoo Memorandum Mar. 14, 2003, at 81. With regard to torture, the memorandum indicated that the “standard of conduct” was set forth “in the torture statute.” *Id.* (referring to 18 U.S.C. 2441(d)). The memorandum also noted that “[a]lthough decisions by foreign or international bodies[.]” like the ECHR, “are in no way binding authority upon the United States, they provide guidance.” *Id.* at 68. Yoo then went on to quote the *Irish State Case* for the proposition that there is a legal distinction between torture and cruel, inhuman, or degrading treatment or punishment, and that physical maltreatment can be cruel, inhuman, or degrading but lack the intensity required to constitute torture. *Id.* at 70 (“[t]his distinction derives principally from a difference in the intensity of the suffering inflicted.” (quoting *Irish State Case*, 25 Eur. Ct. H.R. (ser. A) ¶167)). This was consistent with the legal position expressed in DOJ’s 2002 memorandum. *See* Bybee–Gonzales Memorandum Aug. 1, 2002, *supra* note 4, at 2.

64. STRASSER, *supra* note 60, at 8.

65. *Id.*

66. *Hamdan*, 548 U.S. at 629–30.

asymmetric war, like the Iraq Conflict. “Tactically, detainee interrogation is a fundamental tool for gaining insight into enemy positions, strength, weapons and intentions. Thus, it is fundamental to the protection of our forces in combat.”⁶⁷ By 2003, the fighting in Iraq had become a major insurgency. There was conflation of the interrogation procedures approved by the Army Field Manual and the enhanced techniques that had been authorized for use on unlawful combatants held at Guantanamo. The use of illegal tactics in Iraq was condoned.⁶⁸ Military police units assigned to run detention facilities came to believe that they could assist military intelligence personnel by softening-up detainees for interrogation.

Abu Ghraib was the largest of the seventeen detention facilities in Iraq.⁶⁹ It held approximately 7,000 detainees by late 2003.⁷⁰ In January 2004, the first photographs of the Abu Ghraib prisoner abuse scandal began to surface, and there were calls for investigations.⁷¹ It was determined that the Abu Ghraib scandal occurred due to a multiplicity of interrelated factors, including the lack of resources, the lack of training, the lack of oversight and accountability, the backlog of detainees for interrogation, and sadism.⁷² Detainees had been physically assaulted, threatened with military dogs, stripped naked as an act of humiliation, and routinely and repetitively punished by being placed in conditions of total isolation and light deprivation without medical screening, time limits, or monitoring.⁷³

In 2004, Major General Antonio Taguba issued a report—known as the *Taguba Report*—after conducting an Army Regulation 15-6 Military Inquiry into Abu Ghraib prisoner abuse.⁷⁴ The *Taguba Report* found there had been systemic abuse of detainees at Abu

67. STRASSER, *supra* note 60, at 68. Also noted was the fact that Saddam Hussein was captured by “interrogation-derived information.” *Id.* Former Lieutenant General David Petraeus has noted that “[e]ffective, accurate, and timely intelligence is essential to the conduct of any form of warfare. This maxim applies especially to counterinsurgency operations.” U.S. DEP’T OF THE ARMY, U.S. ARMY/MARINE COUNTERINSURGENCY FIELD MANUAL 57 (2007). The Iraq war was not a conventional conflict; it required the U.S. military to engage in counterinsurgency operations.

68. STRASSER, *supra* note 60, at 26.

69. *Id.* at 11.

70. *Id.*

71. See Eric Schmitt, *Inquiry Ordered Into Reports of Prisoner Abuse*, N.Y. TIMES, Jan. 17, 2004, at A7; *60 Minutes II: Abuse of Iraqi POWs by GIs Probed* (CBS television broadcast Apr. 27, 2004).

72. STRASSER, *supra* note 60, at 66.

73. *Id.* at 111–15.

74. ANTONIO TAGUBA, THE TAGUBA REPORT ON TREATMENT OF ABU GHRAIB PRISONERS IN IRAQ (2004) [hereinafter TAGUBA REPORT].

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Ghraib prison that was “intentionally perpetrated” by members of the military police. The report said that “numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees,” and it recommended “[t]hat all military police and military intelligence personnel involved in any aspect of detainee operations or interrogation operations . . . be immediately provided with training,” specifically on “Geneva Convention Relative to the Treatment of Prisoners of War.”⁷⁵ The 2004 DOJ memorandum, correcting legal positions taken in the earlier legal memorandums, was issued after the Abu Ghraib scandal and the Taguba Report.⁷⁶

When the DTA became law in 2005, it prohibited the imposition of “cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments” on anyone in custody regardless of location or combatant status.⁷⁷ Additionally, the Supreme Court decision in *Hamdan*, had made clear that Common Article 3 of the Geneva Conventions of 1949, was part of the applicable law of war in the conflict with al-Qaeda.⁷⁸ Violations of the Article were war crimes under federal law. The WCA was subsequently amended by the Military Commissions Act of 2006 (“MCA 06”).⁷⁹ MCA 06 designated nine discrete offenses that constituted grave breaches of Common Article 3.⁸⁰

75. TAGUBA REPORT, *supra* note 74, at 16, 20.

76. Shortly after its issuance, the classified Taguba Report became public. At a meeting with Defense Secretary Rumsfeld and other high ranking military and government officials to discuss the leak, Major General Taguba said that what had occurred at Abu Ghraib was “torture.” Seymour M. Hersh, *The General's Report: How Antonio Taguba, Who Investigated the Abu Ghraib Scandal, Became one of its Casualties*, NEW YORKER, June 25, 2007, at 58, available at http://www.newyorker.com/reporting/2007/06/25/070625fa_fact_hersh.

77. 42 U.S.C. § 2000dd(d).

78. *Hamdan v. Rumsfeld*, 548 U.S. 557 at 629–32 (2006).

79. Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a-950w and scattered sections of titles 10, 18, 28, and 42).

80. The nine specific grave breaches of Common Article 3 proscribed by the MCA 06 are: torture, cruel and inhuman treatment, performing biological experiments, murder, maiming, intentionally causing serious bodily injury, rape, sexual assault, and taking hostages. The MCA 06 also left responsibility for defining additional U.S. obligations under Common Article 3 to the President. 10 U.S.C. § 948a. On July 24, 2007, President George W. Bush signed Executive Order 13440, which stated that Common Article 3 of the Geneva Conventions applied to the CIA's program of detention and interrogation. The Executive Order approved the EIT program provided written guidelines were issued addressing training, monitoring, and safe and professional operation of the program, and required that the program complied with specific conditions. Those conditions included prohibitions against the use of torture, acts of violence made illegal under the WCA, 18 U.S.C. § 2441(d), other acts of violence considered comparable to murder, torture, cruel or inhuman treatment, willful and outrageous acts of personal abuse done for the purpose of humiliation or degradation,

After the Supreme Court's decision in *Hamdan*, the enactment of the MCA 06, and the need to correct and rectify faulty legal advice previously provided, DOJ issued additional legal guidance to John Rizzo, Acting General Counsel to the CIA, in 2007.⁸¹ It addressed the use of enhanced interrogation techniques on high value detainees.⁸² Those enhanced techniques fell into two categories. The "corrective techniques" category involved physical contact with the detainee—facial hold, attention grasp, face slap, and abdomen slap. The "conditioning techniques" category involved dietary manipulation and extended sleep deprivation for periods up to ninety-six hours.⁸³ A medical professional monitored the detainee while conditioning techniques were utilized. While sleep deprivation proved to be the most effective technique, the techniques could be used in combination with one another. An interrogation plan involving the use of enhanced techniques on a detainee required the approval of the Director of the CIA. Waterboarding, which had been an authorized "coercive" technique used against detainees who still refused to cooperate despite the use of other enhanced techniques, was omitted from the 2007 memorandum to the CIA.

The new analysis addressed the legality of using these six conditioning and corrective techniques under the WCA, the DTA, and Common Article 3. The WCA prohibited three categories of criminal conduct: torture, cruel and inhuman treatment, and intentionally causing serious bodily injury. In addressing the three categories under the WCA, the 2007 memorandum adopted the definition of "torture" under the anti-torture statute as set forth in the August 2002 memorandum, treated grave breaches of Common Article 3 and violations of the DTA as constituting "cruel and inhuman treatment," and applied the statutory elements of "serious bodily injury."⁸⁴ After considering each of these elements, the memorandum concluded that the EIT program was consistent with the WCA.⁸⁵ An important component of this conclusion was the fact that there was medical

acts intended to denigrate religion, or any other acts of cruel, inhuman, or degrading treatment or punishment made illegal by the MCA 06, 10 U.S.C. § 948a, or the DTA, 42 U.S.C. § 2000dd. Exec. Order No. 13440, 72 Fed. Reg. 40,707 (July 20, 2007), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070720-4.html>.

81. Bradbury Memorandum July 20, 2007, *supra* note 10.

82. *Id.* at 1.

83. *Id.* at 8–11. None of these six enhanced techniques were explicitly prohibited under Army Field Manual 2-22.3, which had been issued in 2006. But the two conditioning techniques—dietary manipulation and sleep deprivation—had been explicitly prohibited in the prior Army Field Manual 34-52. *Id.* at 37.

84. *Id.* at 11–26.

85. *Id.* at 26.

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monitoring of detainees undergoing conditioning techniques.⁸⁶

The DTA prohibited the infliction of “cruel, inhuman or degrading treatment or punishment” contrary to the Fifth, Eighth and Fourteenth Amendments. The DTA required compliance with constitutional standards in the treatment of all persons in custody, regardless of nationality or location. Thus, substantive due process protection applied to interrogation procedures wherever deployed. Under the substantive due process analysis, the governmental interest in the EIT program—fighting terrorism and preventing attacks—must be considered. In applying a substantive due process standard, the 2007 memorandum said the ECHR failed to consider this interest in the *Irish State Case*.⁸⁷ The decision was further distinguished on the grounds that it did not take into account the medical monitoring safeguards that had been put in place.⁸⁸ Therefore, the ECHR’s holding in the *Irish State Case* with regard to acts amounting to “inhuman and degrading treatment” but not constituting “torture,” which had buttressed DOJ’s prior legal advice, was now deemed to be irrelevant and inappropriate in analyzing substantive due process under the DTA.

A substantive due process inquiry focuses on whether the conduct by government officials was so arbitrary, oppressive and unrelated to a legitimate governmental objective that it “shocks the conscience” and violates the “decencies of civilized conduct.”⁸⁹ In *County of Sacramento v. Lewis*, the Court was asked to decide whether the behavior of a Sheriff’s Officer was so egregious and outrageous that it shocked contemporary conscience, when he ran over and killed a motorcyclist he was pursuing in a high-speed

86. *Id.* at 22–23.

87. *Id.* at 40.

88. The psychiatric and medical monitoring that took place while the five techniques were being employed was not discussed in the *Irish State Case*. *Id.* But it was noted in the Lord Parker Commission Report (1972), and it became one of the reasons why that Commission concluded that the five techniques presented a “negligible” risk of causing physical injury and “no real risk” of having long term mental effects. *Id.* at 72–73.

89. *Rochin v California*, 342 U.S. 165, 172–73 (1952) (holding that forcing emetic solution through a tube into defendant’s stomach in order to extract evidence of morphine pills police observed petitioner swallow “is conduct that shocks the conscience”). In *Rochin*, the “shocks the conscience” test of the Fourteenth Amendment Due Process Clause was satisfied, requiring the suppression of the seized evidence and the reversal of the criminal conviction. *Id.* The conscience-shocking conduct was described as follows: “[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.” *Id.* at 172.

chase.⁹⁰ The Court answered that question no, observing that there was no malicious or improper intent on the part of the officer.⁹¹ Additionally, the Court noted the officer was faced with “lawless behavior for which the police were not to blame.”⁹² The Court said, “only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.”⁹³ In *Chavez v. Martinez*, the Court refused to find a substantive due process violation after police questioned Martinez, who they had just shot.⁹⁴ Police and Martinez were in a scuffle. Police said Martinez took an officer’s gun. Another officer shot Martinez many times, causing paralysis from the waist down and permanent blindness. Police questioned Martinez at the hospital, while he was pleading for treatment. Martinez claimed that he admitted to taking the officer’s gun during coercive questioning. In finding Martinez’s due process rights had not been violated by the police, the Court noted that the officers’ behavior was not “‘egregious’ or ‘conscience shocking.’”⁹⁵ The Court found “no evidence that Chavez acted with a purpose to harm Martinez by intentionally interfering with his medical treatment.”⁹⁶ In fact, Martinez was treated throughout the police interrogation. Nor was “there evidence that Chavez’s conduct exacerbated Martinez’s injuries.”⁹⁷ The Court said the need to investigate possible police misconduct and the risk of losing evidence if Martinez had died of his injuries “constituted a justifiable government interest.”⁹⁸

The 2007 memorandum applied this substantive due process standard to each of the conditioning and corrective procedures.⁹⁹ The memorandum explained that all six enhanced techniques had a

90. 523 U.S. 833, 836 (1998).

91. *Id.* at 855.

92. *Id.*

93. *Id.* at 836.

94. 538 U.S. 760, 776 (2003).

95. *Id.* at 775.

96. *Id.*

97. *Id.*

98. *Id.*

99. Bradbury Memorandum July 20, 2007, *supra* note 10, at 29–31. The substantive due process test was not a new one. It had previously been recognized in a 2003 DOJ memorandum. Yoo Memorandum Mar. 14, 2003, *supra* note 63, at 65–68. However, by the time the 2007 legal memorandum was issued, DOJ had already rejected Yoo’s opinion that criminal liability for using interrogation methods that violate the Eighth, Fifth, or Fourteenth Amendments could be defended on the grounds that “necessity or self-defense could provide justification,” for such conduct. *Id.* at 81; *see* Levin Memorandum Dec. 30, 2004, *supra* note 5, at 2.

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“close relationship to the important governmental purpose of obtaining information crucial to preventing future terrorist attack[s].”¹⁰⁰ The memorandum noted that “enhanced interrogation techniques proved particularly crucial in the interrogations of Khalid Sheikh Mohammed and Abu Zubaydah.”¹⁰¹ The memorandum also highlighted the fact that medical safeguards accompanied the use of any enhanced interrogation technique, and that the infliction of “any significant harm” during questioning would be avoided because of the safeguards.¹⁰² Based on all of these considerations, it was determined that the EIT program did not violate the Due Process Clause, and that using one or more of the enhanced techniques while questioning a high value detainee would not constitute “arbitrary or egregious conduct.”¹⁰³ None of the six procedures shocked the conscience or violated substantive due process tenets. Therefore, use of the enhanced techniques did not run afoul of the DTA, and U.S. officers and agents were permitted “to employ a narrowly drawn, extremely monitored, and carefully safeguarded interrogation program for high value terrorists . . . that do[es] not inflict significant or lasting physical or mental harm.”¹⁰⁴

Common Article 3 of the Geneva Conventions imposes an obligation on parties to a conflict to treat all prisoners of war “humanely.” It prohibits violence to life, murder, mutilation, cruel treatment and torture, taking hostages, and outrages on personal dignity such as humiliating and degrading treatment. The 2007 memorandum noted that Congress had largely addressed Common Article 3 in the WCA and DTA. Based on the conclusions reached in the memorandum regarding the WCA and DTA that the use of enhanced interrogation techniques violated neither statute, it was determined that the enhanced procedures also did not violate Common Article 3 of the Geneva Conventions of 1949.¹⁰⁵

Thus, the 2007 DOJ memorandum covered all of the legal bases necessary to uphold the EIT program, albeit modified to remove waterboarding. In doing so, it deftly avoided the problem prior DOJ

100. Bradbury Memorandum July 20, 2007, *supra* note 10, at 48.

101. *Id.* at 32.

102. *Id.* at 5.

103. *Id.* at 48.

104. *Id.* at 44.

105. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. (binding High Contracting parties in a conflict in their treatment of prisoners of war, protects “[p]ersons . . . placed ‘hors de combat’ by . . . detention,” and prohibits “the passing of sentences . . . without previous judgment . . . by a regularly constituted court affording all judicial guarantees . . . recognized as indispensable by civilized peoples”).

memoranda had created by citing the *Irish State Case* with approval and by relying upon the “intensity/cruelty” distinction between torture and inhuman or degrading treatment the decision had recognized. The *Irish State Case* had now been distinguished. It no longer applied to U.S. legal considerations of the global war on terror. The determination in the *Irish State Case* that sleep deprivation and dietary manipulation—the two conditioning techniques under the EIT program deemed lawful in the 2007 legal memorandum—amounted to “cruel and inhuman treatment” was no longer persuasive, even though that determination had previously provided legal justification for the program.¹⁰⁶ The 2007 document also made a point of sharply contrasting the six approved techniques with the “outrageous conduct documented at the Abu Ghraib prison in Iraq.”¹⁰⁷ It described the findings in the *Taguba Report* and said: “These wanton acts were undertaken for abusive and lewd purposes. They bear no resemblance, either in purpose or effect, to any of the techniques proposed for use by the CIA, whether employed individually or in combination.”¹⁰⁸

The 2007 policy memorandum was followed by an Executive Order—Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the CIA—which implemented it.¹⁰⁹ President George Bush signed the Executive Order on July 24, 2007. It was revoked by a subsequent Executive Order—Ensuring Lawful Interrogations—which President Barack Obama signed on January 22, 2009.¹¹⁰ Under the subsequent Executive Order, the CIA was permitted to use only those interrogation procedures set forth in the Army Field Manual, unless the Attorney General provided additional guidance.¹¹¹ Waterboarding was deemed to be illegal and was

106. *Irish State Case*, 25 Eur. Ct. H.R. (ser. A) ¶196, 167–68. See generally Bybee Memorandum Aug. 1, 2002, *supra* note 4; Levin Memorandum Dec. 30, 2004, *supra* note 99.

107. Bradbury Memorandum July 20, 2007, *supra* note 10, at 66.

108. *Id.* While heading the agency, Former CIA Directors Porter Goss and General Michael Hayden would repeatedly affirm that the CIA does not resort to torture. Intelligence officers followed the law and acted in accordance with DOJ legal advice. Goss told USA Today, “[t]his agency does not do torture. Torture does not work.” John Diamond, *CIA Chief: Methods ‘Unique’ but Legal*, USA TODAY, Nov. 20, 2005, at 01A. General Hayden advised incoming CIA Director Leon Panetta that “[y]ou should never use ‘torture’ and ‘CIA’ in the same paragraph.” JOBY WARRICK, *THE TRIPLE AGENT: THE AL-QAEDA MOLE WHO INFILTRATED THE CIA* 17 (2011).

109. Exec. Order No. 13,440, *supra* note 80.

110. Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1885.pdf>.

111. Exec. Order No. 13,491, *supra* note 110, § 3(b).

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outlawed. In 2009, U.S. Attorney General Eric Holder said that members of the intelligence community who acted in “good faith” reliance on legal advice rendered in DOJ memoranda from 2002 to 2005 would not be prosecuted.¹¹² He explained that “[i]t would be unfair to prosecute dedicated men and women working to protect America for conduct that was sanctioned in advance by the Justice Department.”¹¹³

In 2010, after an internal investigation by its Office of Professional Responsibility, DOJ cleared the authors of the DOJ memoranda of professional misconduct, which meant they would not face ethical consequences for their decisions or actions.¹¹⁴ Jose Padilla and his mother, Estela Lebron, filed a civil lawsuit against former DOJ Office of Legal Counsel attorney John Yoo, claiming that Padilla’s constitutional rights had been violated when he was subjected to a systemic program of abusive interrogation, which included incommunicado detention and torture.¹¹⁵ Recently, the Ninth Circuit Court of Appeals ruled that Yoo is protected by qualified immunity for his policy-making role.¹¹⁶ The court said, that the law had “not clearly established in 2001–03 that the treatment to which Padilla says he was subjected amounted to torture.”¹¹⁷ The court noted that “[t]here was at that time considerable debate, both in and out of government, over the definition of torture as applied to specific interrogation techniques. In light of that debate, as well as the judicial decisions discussed above, we cannot say that any reasonable official in 2001–03 would have known that the specific interrogation techniques allegedly employed against Padilla, however appalling, necessarily amounted to torture.”¹¹⁸ The *Irish State Case* was one of the “influential judicial decisions” discussed in the Ninth Circuit opinion.¹¹⁹

More than ten years after the global war on terror began,

112. Julie Tate & Carrie Johnson, *New Interrogation Details Emerge as it Releases Justice Department Memos: Administration Reassures CIA Questioners*, WASH. POST, Apr. 17, 2009, at A01.

113. Editorial, *President Obama’s Wise Decision on Dealing with the Legacy of Torture*, WASH. POST, Apr. 17, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/16/AR2009041603911.html>.

114. Memorandum from David Margolis, Assoc. Deputy Att’y Gen., to Eric Holder, Att’y Gen. (Jan. 5, 2010) [hereinafter Margolis Memorandum Jan. 5, 2010], available at <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf>.

115. *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009), *rev’d*, 678 F.3d 748 (9th Cir. 2012); see also *supra* note 56.

116. *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012).

117. *Id.* at 764.

118. *Id.* at 768.

119. *Id.* at 764-65.

interrogations conducted as part of our nation's conflict with al-Qaeda and others continue to present challenging legal issues that are in acute need of clarity, principled application and the development of the rule of law. On October 12, 2011, Nigerian citizen Umar Farouk AbdulMuttalab, the underwear bomber, pled guilty to attempted murder, conspiracy to commit an act of terrorism, and conspiracy to use a weapon of mass destruction. He was charged with attempting to blow up a Northwest Airlines flight on Christmas Day in 2009, as the plane was approaching Detroit for landing. He described himself as a member of al-Qaeda, who was inspired by Sheikh Anwar al-Awlaki.¹²⁰

Originally, after arrest, AbdulMutallab was cooperative. He provided U.S. law enforcement officials information about his crimes, including his involvement with al-Awlaki and al-Awlaki's instruction to "wait until the airplane was over the United States and then to take it down."¹²¹ He admitted to membership in al-Qaeda, and described how he intended to inject the contents of a syringe into the powder sown into his underwear to set off the blast. However, shortly after being advised of his *Miranda* rights, he stopped talking.¹²² Members of Congress criticized the administration's

120. Sheik al-Awlaki, an American citizen, was targeted and killed in a U.S. drone attack in Yemen on September 30, 2011, under the "just war" concept of self-defense. In *City of God*, St. Augustine wrote: "[f]or it is the injustice of the opposing side that lays on the wise man the duty of waging [just] wars." ST. AUGUSTINE, CITY OF GOD 862 (Henry Bettenson trans., Penguin Classics reprint ed. 2003). The authority for the drone campaign is rooted in the exercise of Presidential war powers and stems from congressional enactment of a joint resolution, Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (S.J. Res. 23), which authorized "all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2011." *Id.* § 2(a). State Department Legal Advisor Harold Koh has said that "a State which is engaged in an armed conflict or legitimate self-defense is not required to provide targets with legal process before the State may use lethal force." Harold Koh, Dep't of State Legal Adviser, Keynote Lecture at the American Society of International Law 104th Annual Meeting: International Law in a Time of Change (March 26, 2010). Attorney General Eric Holder has identified three factors that bear on a decision to use lethal force in an operation in a foreign country. First, "the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles." Att'y Gen. Eric Holder, Speech at Northwestern University School of Law (Mar. 5, 2012).

121. Supplemental Factual Appendix at 14, *United States v. Abdulmutallab*, No. 10-20005 (E.D. Mich. Feb. 16, 2012). On that date, Judge Edmonds sentenced Abdulmutallab to life imprisonment without parole. Judgment at 3, *United States v. Abdulmutallab*, No. 10-20005 (E.D. Mich. Feb. 16, 2012).

122. In *Miranda*, the United States Supreme Court held "that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any

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decision to have the Federal Bureau of Investigation give him *Miranda* warnings, because it was counter-productive.”¹²³

At a pre-trial motion, the trial court admitted AbdulMutallab’s statements to law enforcement under the “public safety” exception to *Miranda*. The public safety exception was first recognized by the U.S. Supreme Court in *New York v. Quarles*.¹²⁴ In *Quarles*, a young woman approached police officers and told them that she had just been raped, that the man had entered a supermarket, and that he was carrying a gun. Responding to the supermarket, an officer saw a man matching the description given by the woman. The officer frisked that man and discovered an empty shoulder holster. The officer asked him where the gun was. He “nodded in the direction of some empty cartons and responded, ‘the gun is over there.’”¹²⁵ He was read his *Miranda* rights after the gun was recovered, and the interrogation resumed. The Supreme Court held “that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.”¹²⁶ Therefore, *Miranda* warnings were not required. The Court found it significant that the officer had limited his pre-rights warning questioning to the “exigency” posed by the “danger to the public safety.”¹²⁷

Based on this decision, a court could easily conclude that an interrogation conducted in a ticking–time-bomb scenario does not trigger *Miranda*. But, when confronted with that type of situation, how far may an interrogator go in applying physical and psychological pressures to compel a terrorist to make a statement without committing a crime? Waterboarding has now been described as torture and determined to be unlawful. But are there any circumstances where, as a last resort, necessity would justify its use, or where a torture warrant would be issued by the court sanctioning it? Under what circumstances could one use coercive tactics to gain

significant way and is subjected to questioning . . . He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).

123. Kasie Hunt, *Lieberman Rips FBI on Miranda Rights*, POLITICO (Jan 25, 2010, 4:05 PM), <http://www.politico.com/news/stories/0110/31969.html>; Kasie Hunt, *Sen. Lindsey Graham: Miranda Rights ‘Counterproductive,’* POLITICO (May 5, 2010, 11:45 AM), <http://www.politico.com/news/stories/0510/36813.html>.

124. 467 U.S. 649 (1984).

125. *Id.* at 652.

126. *Id.* at 657.

127. *Id.*

evidence admissible in court?¹²⁸ Lawmakers have attempted to address these questions by passing statutes that define the parameters of lawful and unlawful behavior. As the myriad of factual challenges arise, military tribunals¹²⁹ and courts will pass judgment on those determinations and decide what conduct is constitutionally permitted and what is not. The development of this jurisprudence is necessary in order to bring understanding to an area of the law, which has been muddled to date in part due to DOJ's various and conflicting interpretations and applications of the *Irish State Case*.

128. There is an obvious distinction between gathering intelligence and securing evidence for prosecution in court. The sheriff in the 1957 western, *The Halliday Brand* said, “[y]ou don’t get a confession just by asking questions.” THE HALLIDAY BRAND (Collier Young Assocs. 1957). But it has been long held that the Due Process Clause forbids “a conviction resting solely upon confessions obtained by violence.” *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

129. The Military Commissions Act of 2009 (“MCA 09”) authorized trials before military tribunals for enemy combatants, and those who materially support enemy groups. Pub. L. No. 111-84, 123 Stat. 2190 (2009). Statements made by detainees are admissible if “voluntarily given,” or if “made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement.” *Id.* § 1802. A totality of the circumstances test is applied for voluntariness rulings, which includes consideration of the details of the taking of the statement, the characteristics of the accused, and the lapse of time, change of place or change in the identity of the questioners between the statement sought to be admitted and any prior questioning. *Id.* Enhanced interrogation techniques, including waterboarding and sleep deprivation, were used against the mastermind of 9/11, Khalid Sheikh Mohammed (“KSM”). Once he became compliant, he described the 9/11 plot in detail, admitted murdering reporter Daniel Pearl in 2002, and provided other information. RODRIGUEZ, JR., *supra* note 56, at 93–95. KSM is one of the Guantanamo detainees who are facing trial before a military tribunal.