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**Working Group Report**  
**On**  
**Detainee Interrogations in the Global War on**  
**Terrorism:**  
**Assessment of Legal, Historical, Policy, and**  
**Operational Considerations**

**6 March 2003**

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**SECRET/NOFORN****II. International Law**

(U) The following discussion addresses the requirements of international law, as it pertains to the Armed Forces of the United States, as interpreted by the United States. As will be apparent in other sections of this analysis, other nations and international bodies may take a more restrictive view, which may affect our policy analysis and thus is considered elsewhere.

**A. The Geneva Conventions**

(U) The laws of war contain obligations relevant to the issue of interrogation techniques and methods. It should be noted, however, that it is the position of the U.S. Government that none of the provisions of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Third Geneva Convention) apply to al Qaida detainees because, *inter alia*, al Qaida is not a High Contracting Party to the Convention.<sup>1</sup> As to the Taliban, the U.S. position is that the provisions of Geneva apply to our present conflict with the Taliban, but that Taliban detainees do not qualify as prisoners of war under Article 4 of the Geneva Convention.<sup>2</sup> The Department of Justice has opined that the Geneva Convention Relative to the Protection of Civilian Personnel in time of War (Fourth Geneva Convention) does not apply to unlawful combatants.

**B. The 1994 Convention Against Torture**

(U) The United States' primary obligation concerning torture and related practices derives from the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (commonly referred to as "the Torture Convention"). The United States ratified the Convention in 1994, but did so with a variety of Reservations and Understandings.

(U) Article 1 of the Convention defines the term "torture" for purpose of the treaty.<sup>3</sup> The United States conditioned its ratification of the treaty on an understanding 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

(U) Article 1 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 acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

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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.<sup>4</sup>

(U) Article 2 of the Convention requires the Parties to "take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under its jurisdiction". The U. S. Government believed existing state and federal criminal law was adequate to fulfill this obligation, and did not enact implementing legislation. Article 2 also provides that acts of torture cannot be justified on the grounds of exigent circumstances, such as a state of war or public emergency, or on orders from a superior officer or public authority.<sup>5</sup> The United States did not have an Understanding or Reservation relating to this provision.

(U) Article 3 of the Convention contains an obligation not to expel, return, or extradite a person to another state where there are "substantial grounds" for believing that the person would be in danger of being subjected to torture. The U. S. understanding relating to this article is that it only applies "if it is more likely than not" that the person would be tortured.

(U) Under Article 5, the Parties are obligated to establish jurisdiction over acts of torture when committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state, or by its nationals wherever committed. The "special maritime and territorial jurisdiction of the United States" under 18 U.S.C. § 7 satisfies the U. S. obligation to establish jurisdiction over torture committed in territory under U.S. jurisdiction or on board a U.S. registered ship or aircraft. However, the additional requirement of Article 5 concerning jurisdiction over acts of torture by U.S. nationals "wherever committed" needed legislative implementation. Chapter 113C of Title 18 of the U.S. Code provides federal criminal jurisdiction over an extraterritorial act or attempted act of torture if the offender is a U.S. national. The statute defines "torture" consistent with the U.S. Understanding on Article 1 of the Torture Convention.

(U) The United States is obligated under Article 10 of the Convention to ensure that law enforcement and military personnel involved in interrogations are educated and informed regarding the prohibition against torture. Under Article 11, systematic reviews of interrogation rules, methods, and practices are also required.

<sup>4</sup> (U) 18 U.S.C. § 2340 tracks this language. For a further discussion of the U.S. understandings and reservations, see the Initial Report of the U.S. to the U.N. Committee Against Torture, dated October 15, 1999.

<sup>5</sup> (U) But see discussion to the contrary at the Domestic Law section on the necessity defense.

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(U) In addition to torture, the Convention prohibits cruel, inhuman and degrading treatment or punishment within territories under a Party's jurisdiction (Art 16). Primarily because the meaning of the term "degrading treatment" was vague and ambiguous, the United States imposed a Reservation on this article to the effect that it considers itself bound only to the extent that such treatment or punishment means the cruel, unusual and inhumane treatment or punishment prohibited by the 5<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> Amendments to the U.S. Constitution (see discussion *infra*, in the Domestic Law section).

(U) In sum, the obligations under the Torture Convention apply to the interrogation of unlawful combatant detainees, but the Torture Convention prohibits torture only as defined in the U.S. Understanding, and prohibits "cruel, inhuman, and degrading treatment and punishment" only to the extent of the U.S. Reservation relating to the U.S. Constitution.

(U) An additional treaty to which the United States is a party is the International Covenant on Political and Civil Rights, ratified by the United States in 1992. Article 7 of this treaty provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The United States' ratification of the Covenant was subject to a Reservation that "the United States considers itself bound by Article 7 only to the extent that cruel, inhuman, or degrading treatment or punishment means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." Under this treaty, a "Human Rights Committee" may, with the consent of the Party in question, consider allegations that such Party is not fulfilling its obligations under the Covenant. The United States has maintained consistently that the Covenant does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict.

**C. Customary International Law**

(U) The Department of Justice has concluded that customary international law cannot bind the Executive Branch under the Constitution, because it is not federal law.<sup>6</sup> In particular, the Department of Justice has opined that "under clear Supreme Court precedent, any presidential decision in the current conflict concerning the detention and trial of al-Qaida or Taliban militia prisoners would constitute a "controlling" Executive act that would immediately and completely override any customary international law".<sup>7</sup>

<sup>6</sup>(U) Memorandum dated January 22, 2002, *Re: Application of Treaties and Laws to al-Qaida and Taliban Detainees* at 32.

<sup>7</sup>(U) Memorandum dated January 22, 2002, *Re: Application of Treaties and Laws to al-Qaida and Taliban Detainees* at 35.

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## III. Domestic Law

## A. Federal Criminal Law

## 1. Torture Statute

(U) 18 U.S.C. § 2340 defines as torture any "act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain..."<sup>8</sup> The intent required is the intent to inflict severe physical or mental pain. 18 U.S.C. § 2340A requires that the offense occur "outside the United States". Jurisdiction over the offense extends to any national of the United States or any alleged offender present in the United States, and could, therefore, reach military members, civilian employees of the United States, or contractor employees.<sup>9</sup> The "United States" is defined to include all areas under the jurisdiction of the United States, including the special maritime and territorial jurisdiction (SMTJ) of the United States. SMTJ is a statutory creation<sup>9</sup> that extends the criminal jurisdiction of the United States for designated crimes to defined areas.<sup>10</sup> The effect is to grant federal court criminal jurisdiction for the specifically identified crimes.

\* (U) Guantanamo Bay Naval Station (GTMO) is included within the definition of the special maritime and territorial jurisdiction of the United States, and accordingly, is within the United States for purposes of § 2340. Thus, the Torture Statute does not apply to the conduct of U.S. personnel at GTMO. That GTMO is within the SMTJ of the United States is manifested by the prosecution of civilian dependents and employees living in GTMO in Federal District Courts based on SMTJ jurisdiction and Department of Justice opinion<sup>11</sup> and the clear intention of Congress as reflected in the 2001 amendment to the SMTJ. The USA Patriot Act (2001) amended § 7 to add subsection 9, which provides:

"With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act -

<sup>8</sup> (U) Section 2340A provides, "Whoever outside the United States commits or attempts to commit torture shall be fined or imprisoned..." (emphasis added).

<sup>9</sup> (U) 18 USC § 7, "Special maritime and territorial jurisdiction of the United States" includes any lands under the exclusive or concurrent jurisdiction of the United States.

<sup>10</sup> (U) Several paragraphs of 18 USC §7 are relevant to the issue at hand. Paragraph 7(3) provides: [SMTJ includes:] "Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place..." Paragraph 7(7) provides: [SMTJ includes:] "Any place outside the jurisdiction of any nation to an offense by or against a national of the United States." Similarly, paragraphs 7(1) and 7(5) extend SMTJ jurisdiction to, "the high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, and any vessel belonging in whole or in part to the United States..." and to "any aircraft belonging in whole or in part to the United States ... while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State".

<sup>11</sup> (U) 6 Op.OLC 236 (1982). The issue was the status of GTMO for purposes of a statute banning slot-machines on "any land where the United States government exercises exclusive or concurrent jurisdiction".

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(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of maintaining those missions or entities, irrespective of ownership; and

(B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title.

(U) Any person who commits an enumerated offense in a location that is considered within the special maritime and territorial jurisdiction is subject to the jurisdiction of the United States.

(U) For the purposes of this discussion, it is assumed that an interrogation done for official purposes is under "color of law" and that detainees are in DOD's custody or control.

(U) Although Section 2340 does not apply to interrogations at GTMO, it would apply to U.S. operations outside U.S. jurisdiction, such as Afghanistan. The following analysis is relevant to such activities.

(U) To convict a defendant of torture, the prosecution must establish that: (1) the torture occurred outside the United States; (2) the defendant acted under color of law; (3) the victim was within the defendant's custody or physical control; (4) the defendant specifically intended to cause severe physical or mental pain or suffering; and (5) that the act inflicted severe physical or mental pain or suffering. See also S. Exec. Rep. No. 101-30, at 6 (1990). ("For an act to be 'torture,' it must...cause severe pain and suffering, and be intended to cause severe pain and suffering.")

a. "Specifically Intended"

(U) To violate Section 2340A, the statute requires that severe pain and suffering must be inflicted with specific intent. See 18 U.S.C. § 2340(1). In order for a defendant to have acted with specific intent, he must have expressly intended to achieve the forbidden act. See *United States v. Carter*, 530 U.S. 255, 269 (2000); Black's Law Dictionary at 814 (7th ed. 1999) (defining specific intent as "[t]he intent to accomplish the precise criminal act that one is later charged with"). For example, in *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994), the statute at issue was construed to require that the defendant act with the "specific intent to commit the crime". (Internal quotation marks and citation omitted). As a result, the defendant had to act with the express "purpose to disobey the law" in order for the *mens rea* element to be satisfied. *Ibid.* (Internal quotation marks and citation omitted.)

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(U) Here, because Section 2340 requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective. If the statute had required only general intent, it would be sufficient to establish guilt by showing that the defendant "possessed knowledge with respect to the *actus reus* of the crime." *Carter*, 530 U.S. at 268. If the defendant acted knowing that severe pain or suffering was reasonably likely to result from his actions, but no more, he would have acted only with general intent. See *id* at 269; *Black's Law Dictionary*: 813 (7th ed. 1999) (explaining that general intent "usu[ally] takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence)"). The Supreme Court has used the following example to illustrate the difference between these two mental states:

[A] person entered a bank and took money from a teller at gunpoint, but deliberately failed to make a quick getaway from the bank in the hope of being arrested so that he would be returned to prison and treated for alcoholism. Though this defendant knowingly engaged in the acts of using force and taking money (satisfying "general intent"), he did not intend permanently to deprive the bank of its possession of the money (failing to satisfy "specific intent").

*Carter*, 530 U.S. at 268 (citing 1 W. LaFare & A. Scott, *Substantive Criminal Law* § 3.5, at 315 (1986)).

(U) As a theoretical matter, therefore, knowledge alone that a particular result is certain to occur does not constitute specific intent. As the Supreme Court explained in the context of murder, "the...common law of homicide distinguishes...between a person who knows that another person will be killed as a result of his conduct and a person who acts with the specific purpose of taking another's life[.]" *United States v. Bailey*, 444 U.S. 394, 405 (1980). "Put differently, the law distinguishes actions taken 'because of a given end from actions taken 'in spite' of their unintended but foreseen consequences.'" *Yacco v. Quill*, 521 U.S. 793, 802-03 (1997): Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control. While as a theoretical matter such knowledge does not constitute specific intent, juries are permitted to infer from the factual circumstances that such intent is present. See, e.g., *United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001); *United States v. Karro*, 257 F.3d 112, 118 (2d Cir. 2001); *United States v. Wood*, 207 F.3d 1222, 1232 (10th Cir. 2000); *Henderson v. United States*, 202 F.2d 400, 403 (6th Cir. 1953). Therefore, when a defendant knows that his actions will produce the prohibited result, a jury will in all likelihood conclude that the defendant acted with specific intent.

(U) Further, a showing that an individual acted with a good faith belief that his conduct would not produce the result that the law prohibits negates specific intent. See, e.g., *South Atl. Lmt'd. Prrshp. of Tenn. v. Reise*, 218 F.3d 518, 531 (4th Cir. 2002). Where

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## c. "Severe mental pain or suffering"

(U) Section 2340 gives further guidance as to the meaning of "severe mental pain or suffering," as distinguished from severe physical pain and suffering. The statute defines "severe mental pain or suffering" as:

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). In order to prove "severe mental pain or suffering", the statute requires proof of "prolonged mental harm" that was caused by or resulted from one of four enumerated acts. We consider each of these elements.

## i. "Prolonged Mental Harm"

(U) As an initial matter, Section 2340(2) requires that the severe mental pain must be evidenced by "prolonged mental harm". To prolong is to "lengthen in time" or to "extend the duration of, to draw out". Webster's Third New International Dictionary 1815 (1988); Webster's New International Dictionary 1980 (2d ed. 1935). Accordingly, "prolong" adds a temporal dimension to the harm to the individual, namely, that the harm must be one that is endured over some period of time. Put another way, the acts giving rise to the harm must cause some lasting, though not necessarily permanent, damage. For example, the mental strain experienced by an individual during a lengthy and intense interrogation, such as one that state or local police might conduct upon a criminal suspect, would not violate Section 2340(2). On the other hand, the development of a mental disorder such as posttraumatic stress disorder, which can last months or even years, or even chronic depression, which also can last for a considerable period of time if untreated, might satisfy the prolonged harm requirement. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 426, 439-45 (4th ed. 1994) ("DSM-IV"). See also Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477,509 (1997) (noting that posttraumatic stress disorder is frequently found in torture victims); cf. Sara Love, *Immigration Law and Health* § 10:46 (2001) (recommending evaluating for post-traumatic stress disorder immigrant-client

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who has experienced torture).<sup>12</sup> By contrast to "severe pain" the phrase "prolonged mental harm" appears nowhere else in the U.S. Code nor does it appear in relevant medical literature or international human rights reports.

(U) Not only must the mental harm be prolonged to amount to severe mental pain and suffering, but also it must be caused by or result from one of the acts listed in the statute. In the absence of a catchall provision, the most natural reading of the predicate acts listed in Section 2340(2)(A)(D) is that Congress intended the list to be exhaustive. In other words, other acts not included within Section 2340(2)'s enumeration are not within the statutory prohibition. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius*"); Norman Singer, 2A Sutherland on Statutory Construction § 47.23 (6th ed. 2000) ("[W]here a form of conduct the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions.") (footnotes omitted). We conclude that torture within the meaning of the statute requires the specific intent to cause prolonged mental harm by one of the acts listed in Section 2340(2).

(U) A defendant must specifically intend to cause prolonged mental harm for the defendant to have committed torture. It could be argued that a defendant needs to have specific intent only to commit the predicate acts that give rise to prolonged mental harm. Under that view, so long as the defendant specifically intended to, for example, threaten a victim with imminent death, he would have had sufficient *mens rea* for a conviction. According to this view, it would be further necessary for a conviction to show only that the victim factually suffered prolonged mental harm, rather than that the defendant intended to cause it. We believe that this approach is contrary to the text of the statute. The statute requires that the defendant specifically intend to inflict severe mental pain or suffering. Because the statute requires this mental state with respect to the infliction of severe mental pain and because it expressly defines severe mental pain in terms of prolonged mental harm, that mental state must be present with respect to prolonged mental harm. To read the statute otherwise would read the phrase "prolonged mental harm caused by or resulting from" out of the definition of "severe mental pain or suffering".

(U) A defendant could negate a showing of specific intent to cause severe mental pain or suffering by showing that he had acted in good faith that his conduct would not

<sup>12</sup> The DSM-IV explains that posttraumatic disorder ("PTSD") is brought on by exposure to traumatic events, such as serious physical injury or witnessing the deaths of others and during those events the individual felt "intense fear" or "horror." *Id.* at 424. Those suffering from this disorder re-experience the trauma through, *inter alia*, "recurrent and intrusive distressing recollections of the event", "recurrent distressing dreams of the event", or "intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event." *Id.* at 428. Additionally, a person with PTSD "[p]ersistent[ly]" avoids stimuli associated with the trauma, including avoiding conversations about the trauma, places that stimulate recollections about the trauma, and they experience a numbing of general responsiveness, such as a "restricted range of affect (e.g., unable to have loving feelings)", and "the feeling of detachment or estrangement from others." *Ibid.* Finally, an individual with PTSD has "[p]ersistent symptoms of increased arousal," as evidenced by "irritability or outbursts of anger", "hypervigilance", "exaggerated startle response", and difficulty sleeping or concentrating. *Ibid.*

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amount to the acts prohibited by the statute. Thus, if a defendant has a good faith belief that his actions will not result in prolonged mental harm, he lacks the mental state necessary for his actions to constitute torture. A defendant could show that he acted in good faith by taking such steps as surveying professional literature, consulting with experts, or reviewing evidence gained from past experience. See, e.g., *Ratzlaf*, 510 U.S. at 142 n.10 (noting that where the statute required that the defendant act with the specific intent to violate the law, the specific intent element "might be negated by, e.g., proof that defendant relied in good faith on advice of counsel.") (citations omitted). All of these steps would show that he has drawn on the relevant body of knowledge concerning the result proscribed by the statute, namely prolonged mental harm. Because the presence of good faith would negate the specific intent element of torture, good faith may be a complete defense to such a charge. See, e.g., *United States v. Wall*, 130 F.3d 739, 746 (6th Cir. 1997); *United States v. Casperson*, 773 F.2d 216, 222-23 (8th Cir. 1985).

**ii. Harm Caused By Or Resulting From Predicate Acts**

(U) Section 2340(2) sets forth four basic categories of predicate acts. The first category is the "intentional infliction or threatened infliction of severe physical pain or suffering". This might at first appear superfluous because the statute already provides that the infliction of severe physical pain or suffering can amount to torture. This provision, however, actually captures the infliction of physical pain or suffering when the defendant inflicts physical pain or suffering with general intent rather than the specific intent that is required where severe physical pain or suffering alone is the basis for the charge. Hence, this subsection reaches the infliction of severe physical pain or suffering when it is only the means of causing prolonged mental harm. Or put another way, a defendant has committed torture when he intentionally inflicts severe physical pain or suffering with the specific intent of causing prolonged mental harm. As for the acts themselves, acts that cause "severe physical pain or suffering" can satisfy this provision.

(U) Additionally, the threat of inflicting such pain is a predicate act under the statute. A threat may be implicit or explicit. See, e.g., *United States v. Sachdev*, 279 F.3d 25, 29 (1st Cir. 2002). In criminal law, courts generally determine whether an individual's words or actions constitute a threat by examining whether a reasonable person in the same circumstances would conclude that a threat had been made. See, e.g., *Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that whether a statement constituted a threat against the president's life had to be determined in light of all the surrounding circumstances); *Sachdev*, 279 F.3d at 29 ("a reasonable person in defendant's position would perceive there to be a threat, explicit or implicit, of physical injury"); *United States v. Khorrami*, 895 F.2d 1186, 1190 (7th Cir. 1990) (to establish that a threat was made, the statement must be made "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates a statement as a serious expression of an intention to inflict bodily harm upon [another individual]") (citation and internal quotation marks omitted); *United States v. Peterson*, 483 F.2d 1222, 1230 (D.C. Cir. 1973) (perception of threat of imminent harm necessary to establish self-defense had to be "objectively reasonable in light of the surrounding circumstances"). Based on this common approach,

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we believe that the existence of a threat of severe pain or suffering should be assessed from the standpoint of a reasonable person in the same circumstances.

(U) Second, Section 2340(2)(B) provides that prolonged mental harm, constituting torture, can be caused by "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". The statute provides no further definition of what constitutes a mind-altering substance. The phrase "mind-altering substances" is found nowhere else in the U.S. Code, nor is it found in dictionaries. It is, however, a commonly used synonym for drugs. See, e.g., *United States v. Kingsley*, 241 F.3d 828, 834 (6<sup>th</sup> Cir.) (referring to controlled substances as "mind-altering substance[s]"), *cert. denied*, 122 S. Ct. 137 (2001); *Hogue v. Johnson*, 131 F.3d 466, 501 (5<sup>th</sup> Cir. 1997) (referring to drugs and alcohol as "mind altering substance[s]"), *cert. denied*, 523 U.S. 1014 (1998). In addition, the phrase appears in a number of state statutes, and the context in which it appears confirms this understanding of the phrase. See, e.g., Cal. Penal Code § 3500 (o) (West Supp. 2000) ("Psychotropic drugs also include mind-altering... drugs..."); Minn. Stat. Ann. § 260B.201(b) (West Supp. 2002) ("chemical dependency treatment" defines as programs designed to "reduc[e] the risk of the use of alcohol, drugs, or other mind-altering substances").

(U) This subparagraph, section 2340(2)(B), however, does not preclude any and all use of drugs. Instead, it prohibits the use of drugs that "disrupt profoundly the senses or the personality". To be sure, one could argue that this phrase applies only to "other procedures", not the application of mind-altering substances. We reject this interpretation because the terms of Section 2340(2) expressly indicate that the qualifying phrase applies to both "other procedures" and the "application of mind-altering substances". The word "other" modifies "procedures calculated to disrupt profoundly the senses". As an adjective, "other" indicates that the term or phrase it modifies is the remainder of several things. See Webster's Third New International Dictionary 1598 (1986) (defining "other" as "being the one (as of two or more) remaining or not included"). Or put another way, "other" signals that the words to which it attaches are of the same kind, type, or class as the more specific item previously listed. Moreover, where a statute couples words or phrases together, it "denotes an intention that they should be understood in the same general sense." Norman Singer, 2A Sutherland on Statutory Construction § 47:16 (6<sup>th</sup> ed. 2000); see also *Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). Thus, the pairing of mind-altering substances with procedures calculated to disrupt profoundly the sense or personality and the use of "other" to modify "procedures" shows that the use of such substances must also cause a profound disruption of the senses or personality.

(U) For drugs or procedures to rise to the level of "disrupt[ing] profoundly the sense or personality", they must produce an extreme effect. And by requiring that they be "calculated" to produce such an effect, the statute requires that the defendant has consciously designed the acts to produce such an effect. 28 U.S.C. § 2340(2)(B). The word "disrupt" is defined as "to break asunder; to part forcibly; rend," imbuing the verb

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with a connotation of violence. Webster's New International Dictionary 753 (2d ed. 1935); see Webster's Third New International Dictionary 656 (1986) (defining disrupt as "to break apart: Rupture" or "destroy the unity or wholeness of"); IV the Oxford English Dictionary 832 (1989) (defining disrupt as "[t]o break or burst asunder; to break in pieces; to separate forcibly"). Moreover, disruption of the senses or personality alone is insufficient to fall within the scope of this subsection; instead, that disruption must be profound. The word "profound" has a number of meanings, all of which convey a significant depth. Webster's New International Dictionary 1977 (2d ed. 1935) defines profound as: "Of very great depth; extending far below the surface or top; unfathomable [;]...[c]oming from, reaching to, or situated at a depth or more than ordinary depth; not superficial; deep-seated; chiefly with reference to the body; as a *profound* sigh, wounded, or pain[;]...[c]haracterized by intensity, as of feeling or quality; deeply felt or realized; as, *profound* respect, fear, or melancholy; hence, encompassing; thoroughgoing; complete; as, *profound* sleep, silence, or ignorance." See Webster's Third New International Dictionary 1812 (1986) ("having very great depth: extending far below the surface. . .not superficial"). Random House Webster's Unabridged Dictionary 1545 (2d ed. 1999) also defines profound as "originating in or penetrating to the depths of one's being" or "pervasive or intense; thorough; complete" or "extending, situated, or originating far down, or far beneath the surface." By requiring that the procedures and the drugs create a *profound* disruption, the statute requires more than the acts "forcibly separate" or "rend" the senses or personality. Those acts must penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality.

(U) The phrase "disrupt profoundly the senses or personality" is not used in mental health literature nor is it derived from elsewhere in U.S. law. Nonetheless, we think the following examples would constitute a profound disruption of the senses or personality. Such an effect might be seen in a drug-induced dementia. In such a state, the individual suffers from significant memory impairment, such as the inability to retain any new information or recall information about things previously of interest to the individual. See DSM-IV at 134.<sup>13</sup> This impairment is accompanied by one or more of the following: deterioration of language function, e.g., repeating sounds or words over and over again; impaired ability to execute simple motor activities, e.g., inability to dress or wave goodbye; "[in]ability to recognize [and identify] objects such as chairs or pencils" despite normal visual functioning, or "[d]isturbances in executive level functioning", i.e., serious impairment of abstract thinking. *Id.* At 134-35. Similarly, we think that the onset of "brief psychotic disorder" would satisfy this standard. See *id.* at 302-03. In this disorder, the individual suffers psychotic symptoms, including among other things, delusions, hallucinations, or even a catatonic state. This can last for one day

<sup>13</sup> (U) Published by the American Psychiatric Association, and written as a collaboration of over a thousand psychiatrists, the DSM-IV is commonly used in U.S. courts as a source of information regarding mental health issues and is likely to be used in trial should charges be brought that allege this predicate act. See, e.g., *Atkins v. Virginia*, 122 S. Ct. 2242, 2245 n. 3 (2002); *Kansas v. Crane*, 122 S. Ct. 867, 871 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 359-60 (1997); *McClellan v. Merrifield*, No. 00-CV-0120E(SC), 2002 WL 1477607 at \*2 n.7 (W.D.N.Y. June 28, 2002); *Peoples v. Coastal Office Prods.*, 203 F. Supp. 2d 432, 439 (D. Md. 2002); *Lassigne v. Taco Bell Corp.*, 202 F. Supp. 2d 512, 519 (E.D. La. 2002).

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or even one month. *See id.* We likewise think that the onset of obsessive-compulsive disorder behaviors would rise to this level. Obsessions are intrusive thoughts unrelated to reality. They are not simple worries, but are repeated doubts or even "aggressive or horrific impulses." *See id.* at 418. The DSM-IV further explains that compulsions include "repetitive behaviors (e.g., hand washing, ordering, checking)" and that "[b]y definition, [they] are either clearly excessive or are not connected in a realistic way with what they are designed to neutralize or prevent". *See id.* Such compulsions or obsessions must be "time-consuming". *See id.* at 419. Moreover, we think that pushing someone to the brink of suicide (which could be evidenced by acts of self-mutilation), would be a sufficient disruption of the personality to constitute a "profound disruption". These examples, of course, are in no way intended to be an exhaustive list. Instead, they are merely intended to illustrate the sort of mental health effects that we believe would accompany an action severe enough to amount to one that "disrupt[s] profoundly the sense or the personality".

(U) The third predicate act listed in Section 2340(2) is threatening an individual with "imminent death". 18 U.S.C. § 2340(2)(C). The plain text makes clear that a threat of death alone is insufficient; the threat must indicate that death is "imminent". The "threat of imminent death" is found in the common law as an element of the defense of duress. *See Bailey*, 444 U.S. at 409. "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette v. United States*, 342 U.S. 246, 263 (1952). Common law cases and legislation generally define "imminence" as requiring that the threat be almost immediately forthcoming. 1 Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7, at 655 (1986). By contrast, threats referring vaguely to things that might happen in the future do not satisfy this immediacy requirement. *See United States v. Fiore*, 178 F.3d 917, 923 (7<sup>th</sup> Cir. 1999). Such a threat fails to satisfy this requirement not because it is too remote in time but because there is a lack of certainty that it will occur. Indeed, timing is an indicator of certainty that the harm will befall the defendant. Thus, a vague threat that someday the prisoner *might* be killed would not suffice. Instead, subjecting a prisoner to mock executions or playing Russian roulette with him would have sufficient immediacy to constitute a threat of imminent death. Additionally, as discussed earlier, we believe that the existence of a threat must be assessed from the perspective of a reasonable person in the same circumstances.

(U) Fourth, if the official threatens to do anything previously described to a third party, or commits such an act against a third party, that threat or action can serve as the necessary predicate for prolonged mental harm. *See* 18 U.S.C. § 2340(2)(D). The statute does not require any relationship between the prisoner and the third party.

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## 2. Other Federal Crimes that Could Relate to Interrogation Techniques

(U) Through the SMTJ, the following federal crimes are generally applicable to actions by military or civilian personnel: murder (18 U.S.C. § 1111), manslaughter (18 U.S.C. § 1112), assault (18 U.S.C. § 113), maiming (18 U.S.C. § 114), kidnapping (18 U.S.C. § 1201). These, as well as war crimes (18 U.S.C. § 2441)<sup>14</sup> and conspiracy (18 U.S.C. § 371), are discussed below.

## a. Assaults within maritime and territorial jurisdiction, 18 U.S.C. § 113

(U) 18 U.S.C. § 113 proscribes assault within the special maritime and territorial jurisdiction. Although section 113 does not define assault, courts have construed the term "assault" in accordance with that term's common law meaning. See, e.g., *United States v. Estrada-Fernandez*, 150 F.3d 491, 494 n.1 (5<sup>th</sup> Cir. 1998); *United States v. Juvenile-Male*, 930 F.2d 727, 728 (9<sup>th</sup> Cir. 1991). At common law an assault is an attempted battery or an act that puts another person in reasonable apprehension of bodily harm. See e.g., *United States v. Bayes*, 210 F.3d 64, 68 (1<sup>st</sup> Cir. 2000). Section 113 reaches more than simple assault, sweeping within its ambit acts that would at common law constitute battery.

(U) 18 U.S.C. § 113 proscribes several specific forms of assault. Certain variations require specific intent, to wit: assault with intent to commit murder (imprisonment for not more than twenty years); assault with intent to commit any felony (except murder and certain sexual abuse offenses) (fine and/or imprisonment for not more than ten years); assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse (fine and/or imprisonment for not more than ten years, or both). Other defined crimes require only general intent, to wit: assault by striking, beating, or wounding (fine and/or imprisonment for not more than six months); simple assault (fine and/or imprisonment for not more than six months), or if the victim of the assault is an individual who has not attained the age of 16 years (fine and/or imprisonment for not more than 1 year); assault resulting in serious bodily injury (fine and/or imprisonment for not more than ten years); assault resulting in substantial bodily injury to an individual who has not attained the age of 16 years (fine and/or imprisonment for not more than 5 years). "Substantial bodily injury" means bodily injury which involves (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty. "Serious bodily injury" means bodily injury which involves (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty. "Bodily injury" means (A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of

<sup>14</sup> (U) 18 U.S.C. § 2441 criminalizes the commission of war crimes by U.S. nationals and members of the U.S. Armed Forces. Subsection (c) defines war crimes as (1) grave breaches of any of the Geneva Conventions; (2) conduct prohibited by the Hague Convention IV, Respecting the Law and Customs of War on Land, signed 18 October 1907; or (3) conduct that constitutes a violation of common Article 3 of the Geneva Conventions. The Department of Justice has opined that this statute does not apply to conduct toward al-Qaida or Taliban operatives because the President has determined that they are not entitled to the protections of Geneva and the Hague Regulations.

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