Department of Justice

STATEMENT

OF

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BEFORE THE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

TREATMENT OF DETAINEES IN THE GLOBAL WAR AGAINST TERRORISM

PRESENTED ON

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Mr. Chairman, Ranking Member Harman, and Members of the Committee, it's a privilege to be here today as a representative of the Department of Justice to address the legal standards that govern treatment of detainees in the global war on terrorism.

Let me begin by describing the various statutes, treaties and constitutional provisions that are potentially relevant. Then I'll discuss the application of these legal standards, with particular reference to the 24 interrogation techniques approved by the Secretary of Defense for use with al Qaeda and Taliban detainees held at the Guantanamo Bay Naval Base. As I'll explain, each of these techniques is plainly lawful.

General Criminal Statutes

First, there are a number of general criminal statutes potentially relevant in cases of mistreatment of detained persons. These may include, for example, the general crimes of assault, maiming, and, in cases where a death has resulted, murder and manslaughter. These offenses are federal crimes when committed within the "special maritime and territorial jurisdiction of the United States," which includes Guantanamo in most cases.

Even in locations beyond the reach of the special maritime and territorial jurisdiction, conduct that would constitute a felony under these same criminal statutes can be prosecuted under the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-3267, when committed by certain persons employed by or accompanying the Armed Forces, which includes employees and contractors of the Department of Defense and their dependents. In addition, of course, members of the Armed Forces are subject at all times to the Uniform Code of Military Justice, which applies everywhere. The UCMJ

also proscribes various potentially relevant offenses, including murder, manslaughter, maiming, assault, cruelty and maltreatment, and dereliction of duty. As you know, a number of military personnel are currently being prosecuted by the Defense Department under the UCMJ in connection with mistreatment of prisoners overseas.

Prohibitions on Torture

Second, let me turn to the treaty and statutory prohibitions on torture. The United States is a party to the U.N. Convention Against Torture, which prohibits official acts of torture and requires the United States to ensure that torture is a crime under U.S. laws when committed anywhere by a U.S. national or by persons who are present in territory under our jurisdiction and who are not extradited.

The Convention defines torture to mean the intentional infliction of "severe pain or suffering" by a person acting in an official capacity. The Senate attached the following understanding to its resolution of advice and consent to the Convention:

> The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36 (1990). This understanding is part of the United States instrument of ratification and thus controls the scope of U.S. obligations under the treaty. Pursuant to this understanding imposed by the Senate, the offense of torture requires

specific intent, and "severe . . . mental pain or suffering" for purposes of the Convention requires a specific intent to cause prolonged mental harm.

To carry out United States obligations under the Convention Against Torture, Congress enacted the federal torture statute, 18 U.S.C. §§ 2340-2340A, in which Congress defined the crime of torture as: "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." Congress further defined "severe mental pain and suffering" by incorporating the language that the Senate included in the understanding attached to the Convention. Thus, the prohibition on torture that Congress codified in the federal torture statute tracks precisely the prohibition in the Torture Convention, as defined by the U.S. understanding.

Congress also defined a limited territorial reach for the torture statute. Congress limited the prohibition to apply solely "outside the United States," which is defined in the statute to mean outside both the sovereign territory and the special maritime and territorial jurisdiction of the United States. Conduct that occurs within those areas is already generally subject to existing federal and state criminal statutes, which include those I have discussed earlier.

As I have noted, for most cases, the Guantanamo Bay Naval Base is within the special maritime and territorial jurisdiction. The precise interaction of the torture statute and the special maritime and territorial jurisdiction is complex, however, and I do not intend to parse the details here for three reasons. First, any mistreatment amounting to torture committed in Guantanamo would likely violate the UCMJ, if committed by a

member of the Armed Forces, or some other statute that applies within the special maritime and territorial jurisdiction. Second, the Convention Against Torture, which mirrors the torture statute in substance, forbids the United States from taking any official actions at Guantanamo that constitute torture. As the President has made clear, the United States stands by its obligations under the Torture Convention. Third, as explained below, none of the 24 interrogation techniques approved by the Defense Department for use in Guantanamo would even remotely constitute torture, nor would the use of these measures as approved violate other potentially applicable criminal statutes.

Laws of War

Next, I'll discuss the statutory and treaty provisions related to the laws of war. These include the War Crimes Act, 18 U.S.C. § 2441, and the related provisions of the Geneva Conventions. In the War Crimes Act, Congress made it a crime for U.S. nationals, including members of the Armed Forces, to engage in acts that constitute certain grave breaches of the Geneva Conventions and related treaties. Where these treaties do not apply or the alleged acts do not constitute a grave breach as defined by the Conventions, there can be no violation of the War Crimes Act.

The Geneva Conventions protect prisoners of war and many of the other detainees held in Iraq as a result of Operation Iraqi Freedom. Generally speaking, the Geneva Conventions require humane treatment of prisoners, and grave breaches of the Conventions include "wilful killing," "torture or inhuman treatment," and "wilfully causing great suffering or serious injury to body or health." The Department of Defense and the various branches of the Armed Forces have decades of experience with the

Geneva Conventions, including as they relate to the legal standards governing interrogations.

I will address more particularly the al Qaeda and Taliban detainees held at Guantanamo. By their express terms, the Geneva Conventions apply only to armed conflicts between signatory States or Powers that accept and apply the provisions of the Conventions. Al Qaeda is a global terrorist network that does not recognize or respect international law or the customs of war; it is not a State that is or could ever be a Party to the Geneva Conventions. Accordingly, the Geneva Conventions do not apply to members of al Qaeda. Afghanistan, however, is a Party to the Geneva Conventions, and in February 2002 the President determined that the Geneva Convention Relative to the Treatment of Prisoners of War (the Third Geneva Convention) applies to the conflict with the Taliban. The Third Geneva Convention, however, protects only captives who fulfill a number of well-defined requirements for "prisoner of war" status. The President conclusively determined that Taliban forces did not meet the qualifications necessary for "prisoner of war" status under the Third Geneva Convention. The only court to consider this issue, in the case of John Walker Lindh, upheld the President's determination that Taliban detainees do not qualify as prisoners of war under the Third Geneva Convention. *United States v. Lindh*, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002).

Taliban fighters also do not have "protected person" status under the Geneva Convention Relative to the Treatment of Civilians in Time of War (the Fourth Geneva Convention). "Protected persons" under the Fourth Geneva Convention include certain persons detained by an occupying power in occupied territory and certain persons held by a party to the conflict within its own home territory. The Taliban detainees are neither.

Although the United States has undertaken military operations there, under well-settled legal authorities, the United States is not and has never been an occupying power in Afghanistan for purposes of the laws and customs of war. And Guantanamo is not part of the home territory of the United States.

In any event, the President has ordered that all prisoners held at Guantanamo, including the Taliban, be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions.

Constitutional Protections

Finally, I will address two constitutional provisions that could have potential relevance to the treatment of persons in detention—the Fifth and Eighth Amendments. The Supreme Court has held that the Fifth Amendment does not apply to aliens outside the United States. *See Johnson v. Eisentrager*, 339 U.S. 763, 783-85 (1950). Even if it did apply, however, the Due Process Clause of the Fifth Amendment, in its substantive, as opposed to procedural, aspects, protects against treatment that, in the words of the Supreme Court, "shocks the conscience," meaning (again in the words of the Court) "only the most egregious conduct" or "conduct intended to injure in some way unjustifiable by any government interest." *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 849 (1998).

The Eighth Amendment forbids cruel and unusual punishments. As the term "punishment" implies, the Cruel and Unusual Punishments Clause "was designed to protect those convicted of crimes," *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977), and has no application to the treatment of detainees where there "ha[s] been no formal

adjudication of guilt," *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983). *See Bell v. Wolfish*, 441 U.S. 520, 536 n.16 (1979). In any event, where the Eighth Amendment applies, its protections, too, are roughly comparable to those provided by the Fifth Amendment.

It's appropriate here to mention one aspect of the U.N. Convention Against Torture that I did not discuss earlier. Under Article 16 of the Torture Convention, the United States has agreed to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment." Fearing that this undefined phrase was vague and might be applied in unanticipated ways, the Senate included a reservation to Article 16 when it gave its advice and consent to ratification of the Convention. The Senate defined this phrase to mean only "the cruel, unusual and inhumane treatment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments" to the U.S. Constitution. S. Exec. Rep. No. 101-30, at 36. This reservation is part of the United States instrument of ratification. Thus, to the extent Article 16 may be relevant, it concerns only conduct that would violate these same Amendments.

Application of Legal Standards to Interrogation Practices

Let me now turn to the 24 specific interrogation techniques approved by the Secretary of Defense for military interrogations at Guantanamo. It is readily apparent that each of these techniques, when used according to the safeguards specified by the Secretary, is well within the legal standards I've just described.

Seventeen of the 24 techniques have long been approved for use by the U.S. military on those who have status as prisoners of war under the Geneva Conventions, and these techniques are included in the *Army Field Manual for Intelligence Interrogation*

(1992). The *Army Field Manual* reflects the military's historical practices toward the treatment of prisoners of war in compliance with all requirements of the Geneva Conventions and the UCMJ. Under that long-standing tradition, then, none of these 17 established interrogation techniques, properly used, is contrary to the legal standards and prohibitions discussed earlier.

That leaves seven techniques not already included in the *Army Field Manual.* The *Field Manual* itself expressly contemplates that additional interrogation techniques may be approved for use with prisoners. The seven additional techniques approved by the Secretary for Guantanamo are: (1) placing the detainee in a less comfortable setting, but without any "substantial change in environmental quality"; (2) altering his diet, for example by giving him military MREs, but without depriving him of food or water, harming him medically, or offending him culturally; (3) changing his environment to cause "moderate discomfort," for example by "adjusting the temperature or introducing an unpleasant smell," but with the significant caveat that the interrogator would have to remain with the detainee "at all times" and thus largely subject himself to the same conditions; (4) adjusting his sleep cycle, for example by requiring him to sleep days instead of nights, but without depriving him of sleep; (5) convincing him that he is being held by a country other than the United States; (6) physically isolating him from other detainees, but not for longer than 30 days; and (7) questioning him with a "Mutt and Jeff" team, where one interrogator asks questions in a harsh manner and the other is friendly. The last technique, the "Mutt and Jeff" or "good cop/bad cop" routine, is really just a combination of other techniques already included in the *Army Field Manual.*

The Secretary strictly limited the use of four of the techniques, including two that come from the *Army Field Manual* (supplying rewards/removing privileges and insulting the ego) and two of the additional seven techniques ("Mutt and Jeff" and isolation). None of these four techniques may be used with any detainee unless a determination is first made by a commanding officer that "military necessity requires use" of the technique with that particular detainee, and then not until notice is first given to the Secretary of Defense.

In authorizing these 24 interrogation techniques, the Secretary of Defense reiterated the President's stated policy "that US Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions." In addition, the Secretary specified that all of the approved techniques must be applied in accordance with General Safeguards, under which no technique could be used unless "there is a good basis to believe that the detainee possesses critical intelligence."

Moreover, the General Safeguards require that all interrogators must be "specifically trained for the technique(s)" used and must develop and follow a "specific interrogation plan," which must include "limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel." The Safeguards also require the interrogators to "take into account . . . factors such as . . . a detainee's emotional and physical strengths and weaknesses" and to proceed with a technique only if "the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination)." More generally, the Safeguards specify that the purpose of the interrogations is "to get the most information

from a detainee with the least intrusive method, always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators."

The proper use of each of these 24 techniques, in accordance with the General Safeguards, is lawful under any relevant legal standard. None of them, as approved, would amount to a crime under the torture statute or any other potentially relevant criminal statute. And far from "shocking the conscience" or being "unjustifiable by any government interest" within the meaning of the Due Process Clause or Article 16 of the Torture Convention, they are justified by a valid government interest of the highest importance—the collection of critical intelligence potentially vital to the Nation. Finally, they are fully consistent with the historical standards of treatment of detainees followed by the U.S. military. For all these reasons, I have no hesitation in concluding that these interrogation techniques, when properly applied as authorized, are lawful.

That concludes my prepared remarks, Mr. Chairman, and I would be happy to respond to any questions the Committee may have.