Testimony of Steven G. Bradbury
Acting Assistant Attorney General
Office of Legal Counsel
Department of Justice

Before the Senate Select Committee on Intelligence
Classified Hearing on the Central Intelligence Agency's
Detention and Interrogation Program
April 12, 2007 – 2:30 PM

Good afternoon. I am pleased to be here today to provide a summary of the legal standards applicable to the CIA's interrogation and detention program. I will discuss this afternoon the four requirements that apply: the federal anti-torture statute, the Detainee Treatment Act of 2005, the War Crimes Act, and Common Article 3 of the Geneva Conventions.

This list reflects a legal landscape that has changed considerably over the past fifteen months. Before December 2005, only the federal anti-torture statute was in force and determined to apply, and the Department of Justice had developed an extensive analysis of that statute, including an opinion that was publicly released on December 30, 2004. Since that time, Congress enacted the DTA, the Supreme Court decided that Common Article 3 applied to the armed conflict with al Qaeda, and Congress responded to that decision through detailed amendments to the War Crimes Act. As this Committee is aware, the CIA has not employed any enhanced interrogation techniques since December 2005. Nevertheless, the Department of Justice has developed a preliminary understanding of these three new legal requirements, as applied to an interrogation program that the CIA proposes to employ should the United States capture a terrorist believed to possess high value intelligence.

I. The Federal Anti-Torture Statute

First is the federal anti-torture statute. The anti-torture statute was designed to implement the obligations of the United States under the Convention Against Torture and applies exclusively outside the territory of the United States. The anti-torture statute prohibits conduct specifically intended to impose "severe physical or mental pain or suffering." The statute separately addresses *physical* and *mental* harm by carefully defining the mental conditions that may trigger the coverage of the statute.

Accordingly, the structure does not permit purely mental conditions to qualify as "severe physical pain or suffering." In interpreting this term, we underscore that the term "severe," much like the prohibition on torture, targets conduct that is universally condemned and thus requires physical pain or suffering that is extreme and difficult to bear. Nevertheless, we do not believe that the term "severe" reaches conduct involving only "excruciating" or "agonizing" pain. It is possible to have "severe physical suffering" without "severe physical pain," but that condition may not be purely mental and must be of an extended duration or persistence, as well as of a sufficient intensity.

The statutory definition of "severe mental pain or suffering" requires that one of four predicate acts have been committed—including a threat of imminent death or the administration of a procedure "calculated to disrupt profoundly the senses or personality." Once a predicate act is established, the statute further requires that it be specifically intended to result in "prolonged mental harm," and we believe this is a requirement distinct from the four predicate acts.

The statute also requires that an act be "specifically intended" to inflict the severe physical or mental pain or suffering that I have discussed. We have not had the need to

explore the precise contours of this requirement, except to note that it is certainly enough that a person consciously desire the proscribed result. But it is not sufficient if, in "good faith" and after "reasonable investigation," a person did not believe that "severe physical or mental pain or suffering" would result.

We believe that all of these requirements need to be applied to an interrogation program as a whole. We would not stop our analysis at concluding that each of the techniques proposed, standing alone, would not constitute torture. Instead, the statute requires us to determine that an interrogation program—the series of techniques used in combination—would not constitute torture under the totality of the circumstances.

II. The Detainee Treatment Act of 2005

The Detainee Treatment Act prohibits the imposition of "cruel, inhuman or degrading treatment or punishment" on any person—alien or citizen—in United States custody anywhere in the world. The Act incorporates U.S. constitutional standards that, but for the Act, likely would not apply to aliens abroad. The "cruel, inhuman, and degrading treatment or punishment" prohibited by the Act is the "cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments."

Of these, the Eighth Amendment applies only after a "formal adjudication of guilt." The Fourteenth Amendment applies to the States, not the federal Government. As the Supreme Court has repeatedly held, the substantive component of the Fifth Amendment's Due Process Clause governs the treatment of detainees held without a conviction by the federal Government, and thus it supplies the relevant standard for evaluating the CIA program. According to an uninterrupted line of Supreme Court

C00250

precedent, from *Rochin v. California* in 1952 to *Chavez v. Martinez* in 2003, the Due Process Clause bars interrogation techniques that "shock the conscience."

This test does not focus on whether the interrogation was "coercive," which is the standard for excluding a defendant's confession during a criminal trial in an Article III court. Instead, the "shocks the conscience" standard looks to the "totality of the circumstances." The Court has broken the inquiry into two parts, asking first whether the conduct is "arbitrary in the constitutional sense," that is, whether it is proportionate to the governmental interest involved. With regard to the CIA program, the governmental interest is of the highest order. As the President explained, and as this Committee is aware, the CIA's enhanced techniques were approved only for "dangerous terrorists with unparalleled knowledge about terrorist networks and plans for new attacks. . . . The security of our Nation and lives of our citizens depend on our ability to learn what these terrorists know." At the same time, the program is extremely limited. Enhanced interrogation techniques—and in many cases, only a small number of the techniques—have been applied only to 30 detainees in the history of the program. Plus, as has been explained to the Committee, the program is conducted pursuant to careful safeguards and limitations by highly trained CIA professionals.

Second, the "shocks the conscience" test requires an inquiry into whether conduct is "egregious" or "outrageous" in light of "traditional executive behavior and contemporary practices." While there are several sources for potentially relevant executive practice, each context presents differences from the CIA program that must be taken into account. For example, judicial decisions regarding ordinary criminal

investigations do not confront the governmental interest presented by the CIA program—preventing future, potentially catastrophic, terrorist attacks.

III. The War Crimes Act

The War Crimes Act became relevant to the CIA program after the Supreme Court's June 2006 decision in *Hamdan v. Rumsfeld*, determining for the first time that Common Article 3 of the Geneva Conventions applies to the armed conflict with al Qaeda. The Act, as amended by the Military Commissions Act of 2006, now provides specific offenses that would constitute federal crimes if committed by or against U.S. persons in a Common Article 3 conflict.

The Department of Justice has not had the occasion to examine several of the Act's offenses in depth, as they are not remotely applicable to the CIA's program. These inapplicable offenses include performing biological experiments, murder, mutilation or maiming, rape, sexual assault or abuse, and the taking of hostages.

Three of the Act's offenses are potentially relevant to the CIA program. They are torture, cruel and inhuman treatment, and intentionally causing serious bodily injury.

The Act defines torture in a manner materially identical to the federal anti-torture statute, which I have discussed earlier. The "cruel and inhuman treatment" offense—what I will call the "CIT offense"—reaches less serious conduct than the torture offense. It prohibits acts "intended to inflict severe *or serious* physical or mental pain or suffering . . . including serious physical abuse." Like the torture statute, it addresses physical and mental harm separately. However, it provides a new, specific definition of "serious physical pain or suffering." Its baseline requirement is "bodily injury." Based on its plain text and the separated treatment of physical and mental conditions, we

000252

understand this term to require some "physical injury to the body." To trigger the CIT offense, that bodily injury must result in one of four conditions. Of most relevance is the condition of a "significant loss or impairment of a bodily member, organ, or mental faculty." We believe that both gravity and duration are relevant in determining what constitutes a "significant" impairment and, again, purely mental conditions unconnected to a bodily injury would not qualify.

The CIT offense's definition of "serious mental pain or suffering" alters the parallel definition in the anti-torture statute. Notably, the CIT offense replaces the requirement that mental harm be "prolonged" with the requirement of "serious and non-transitory mental harm (which need not be prolonged)." This modification refocuses the definition on the general level of mental harm—some combination of duration and intensity—instead of the anti-torture statute's reliance on duration alone. Mental harm that is particularly intense need not be long-lasting to be serious.

The third relevant offense is that of "intentionally causing serious bodily injury." The additional relevant requirement provided here is the prohibition on "protracted . . . impairment[s] . . . of bodily member[s] . . . or mental facult[ies]," where the CIT offense targeted impairments that were "significant." The term "protracted" is directed exclusively at the duration of the impairment, and this term has been interpreted to require an inquiry into continuing mental effects.

IV. Common Article 3 of the Geneva Conventions

The War Crimes Act is directed at grave breaches of Common Article 3 of the Geneva Conventions. I now turn to the requirements of Common Article 3 itself. Again, due to the Supreme Court's decision in *Hamdan*, Common Article 3 applies to the armed

C00253

conflict with al Qaeda and thus we measure the CIA's program against the standards in that Article. The Military Commissions Act of 2006 is also relevant here, as it confirmed that the Geneva Conventions are judicially unenforceable and placed authority for interpreting the Geneva Conventions, outside of the grave breaches specified in the War Crimes Act, with the President.

With regard to the detention and interrogation of detainees, three features of Common Article 3 are relevant: the prohibition on "violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment, and torture"; the prohibition on "outrages upon personal dignity, in particular, humiliating and degrading treatment"; and the overarching requirement of "humane[]" treatment.

On the first, the War Crimes Act provides specific criminal offenses for "murder," "mutilation," "cruel treatment," and "torture." Congress's definitions of these terms are consistent with the decisions of international tribunals interpreting Common Article 3, and we believe that Congress has correctly defined these terms. The question becomes whether the term "violence to life and person" has content beyond the four types of violence specifically prohibited. International tribunals have not been able to identify such content. In any event, it is clear that the term does not reach all forms of physical contact. The surrounding terms—murder, torture, and mutilation—suggest that this provision as a whole is directed at serious acts of physical violence.

As the President explained in his September 6th address to the Nation, the meaning of Common Article 3's prohibition on "outrages upon personal dignity, in particular, humiliating and degrading treatment" is difficult to pinpoint in advance. We do know what it is not. Unlike other human rights treaties inapplicable to the United

States, Common Article 3 does not contain a free-standing prohibition on degrading or humiliating treatment. Instead, to violate Common Article 3, humiliating and degrading treatment must rise to the level of an "outrage upon personal dignity." This interpretation has been adopted by international tribunals.

We also know that the term "outrage" is directed at particularly serious conduct: the senseless and unjustified abuse—from the religious and sexual humiliation of detainees, to the gratuitous abuse of prisoners, and to the parading of prisoners in public—that was part of the dark history of the Second World War, immediately preceding the drafting of the 1949 Geneva Conventions. The term looks to the objective judgment of a reasonable person, assessing the conduct at issue under all the circumstances. As the International Criminal Tribunal for the Former Yugoslavia has put it, the conduct must be "so intense that a reasonable person would be outraged." And part of a reasonable person's evaluation would be the purpose for which the conduct was undertaken. Conduct carefully undertaken to prevent terrorist attacks against civilians may be permissible, even if, when used for other purposes or with less care, it may not be. It is noteworthy that the "shocks the conscience" test, applicable to the CIA program under the DTA, calls for a similar inquiry.

Third is Common Article 3's overarching requirement of humane treatment. Elsewhere in the Geneva Conventions, humane treatment requirements are closely tied to the provision of basic necessities, such as "sufficient food and potable water . . . necessary clothing and medical attention." [*See* Third Geneva Convention Relative to the Treatment of Prisoners of War Art. 20.] We believe that Common Article 3 entails a similar requirement that such basic necessities be provided.

As a general matter, we can say with confidence that the holding of detainees without communication to the outside world or notification of third parties is consistent with the Geneva Conventions. Elsewhere, the Geneva Conventions expressly permit the detention of certain protected persons without "rights of communication." Because Common Article 3 establishes minimum standards for the treatment of detainees, what the Geneva Conventions otherwise permit for more protected classes of detainees, Common Article 3 also permits.

* * *

I hope this general description of the legal standards applicable to the CIA's detention and interrogation program has been helpful to the Committee, and I look forward to answering the Committee's questions.