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PROPOSED ENHANCED INTERROGATION TECHNIQUES

- The CIA has proposed using a set of “enhanced interrogation techniques” in the interrogation of high-value al Qaeda detainees. The techniques at issue fall into two categories (all subject to medical and psychological assessments and close medical and other monitoring):
 - “Conditioning techniques”
 - nudity
 - dietary manipulation (with minimum caloric intake requirements)
 - extended sleep deprivation (more than 48 hours but in no event exceeding 180 hours) (primarily relying on shackling to keep the detainee in a standing position, or alternatively in a sitting or lying position)
 - “Corrective techniques”
 - facial slap (not done with sufficient force or repetition to cause severe pain)
 - abdominal slap (not done with sufficient force or repetition to cause severe pain)
 - facial hold
 - attention grasp

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OUTLINE OF PRELIMINARY ANALYSIS

- The proposed enhanced interrogation techniques are consistent with the McCain Amendment.
- The McCain Amendment prohibits any individual in U.S. custody or control, “regardless of nationality or physical location,” from being subjected to “the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.” The Amendment is intended to extend, without regard for nationality or physical location, the substantive constitutional standards applicable to the United States under Article 16 of the Convention Against Torture (“CAT”).
- The relevant constitutional standard is the “shocks the conscience” standard of substantive due process under the Fifth Amendment, which entails a *context-specific and fact-dependent inquiry* into whether:
 - (1) the government conduct at issue is “arbitrary in the constitutional sense,” meaning that it involves an “exercise of power without any reasonable justification in the service of a legitimate governmental objective” or is “intended to injure in some way unjustifiable by any government interest,” *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 849 (1998); and
 - (2) in light of “traditional executive behavior, of contemporary practice, and the standards of blame generally applied to them,” the conduct “is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” *Id.* at 847 n.8.
 - The CIA’s interrogation program is not “arbitrary in the constitutional sense” because it is limited to what is reasonably necessary to acquire actionable intelligence to avoid terrorist attack on the U.S. (a vital government interest), is limited to a small number of the most high value detainees, and is carefully designed and administered to avoid injury to the detainees and any suffering that is unnecessary or lasting.
 - The CIA’s interrogation program cannot “fairly be said to shock the contemporary conscience,” although this inquiry is much more subjective and difficult because of the lack of relevant executive practice either condemning or condoning the sorts of interrogation practices used by the CIA.
 - Although the use of certain interrogation practices has been condemned in other contexts—including ordinary domestic law enforcement; military interrogations of POWs under the Third Geneva Convention (as reflected in the *Army Field Manual*); and the State Department’s Country Reports on Human Rights Practices of other nations—none of these other contexts is particularly relevant or useful in judging the unique context of the CIA program.
 - SERE training practice, from which all of the CIA interrogation techniques have been adapted, is also different from the present context in important respects; however, the use in SERE of similar and far more coercive techniques on our own U.S. troops for purposes of training strongly indicates that the use by the Government of techniques like these is not entirely beyond the pale of what is permissible executive practice.

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