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- As a matter of law, the CIA interrogation program, which is conducted outside the special maritime and territorial jurisdiction of the United States, is not subject to the requirements of Article 16 of the Convention Against Torture ("CAT").

    - By its terms, Article 16(1) requires that the United States "undertake to prevent . . . cruel, inhuman or degrading treatment or punishment" only in "*any territory under its jurisdiction.*"

    - The phrase "any territory under its jurisdiction" cannot be read to reach territory outside the special maritime and territorial jurisdiction. Indeed, it likely does not extend that far.

        - The CAT uses the phrase "any territory under its jurisdiction" to refer to territory over which a state may "take . . . legislative, administrative, judicial or other measures." Art. 2(1). *See also* S. Treaty Doc. No. 100-20, at 5 (Secretary Shultz) (explaining that the phrase "refers to all places that the State Party controls *as government authority*").

        - The CAT uses the phrase "any territory under its jurisdiction" to refer to areas where a state exercises jurisdiction based on territorial control, as opposed to jurisdiction based on other grounds, such as nationality, or registration of ships and aircraft. *See* Art. 5(1).

    - Article 16's limited territorial reach is confirmed by a reservation required by the Senate as a condition of its advice and consent to the ratification of the CAT, under which the United States is "bound by the obligation under Article 16 . . . only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." This reservation, which was deposited with the United States instrument of ratification, defines the scope of United States obligations under the CAT.

        - The enumerated constitutional amendments do not apply to aliens outside of the United States. *See, e.g., Johnson v. Eisentrager* (1950); *United States v. Curtiss-Wright* (1936) ("[T]he Constitution [has no] force in foreign territory unless in respect to our own citizens.").

        - The ratification history confirms that the reservation was intended to "limit our obligations under [Article 16] to the proscriptions already covered in our Constitution." *CAT Hearing*, 101st Cong. 11 (1990) (prepared statement of Abraham Sofaer, Legal Adviser, Department of State).

- Although it is a close question, we conclude that the CIA interrogation program, subject to its careful screening criteria and medical safeguards, would not violate United States obligations under Article 16 even if that provision applied.

- As noted, United States obligations under Article 16 extend only to "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments." With respect to treatment of detainees by the United States Government, as opposed to punishment for crimes (which is governed by the Eighth Amendment) or treatment by state governments (which is governed by the Fourteenth Amendment), the apposite Amendment is the Fifth Amendment. As relevant here, that Amendment prohibits treatment that "shocks the conscience."

    - Although it is a close question, we conclude that the CIA interrogation program, subject to its careful screening criteria and medical safeguards, does not "shock the conscience."

        - Under Supreme Court precedent, whether government conduct shocks the conscience turns primarily on two factors: (1) Whether the conduct is arbitrary in the constitutional sense—i.e., "without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id.* at 849. (2) Whether, considered 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 interrogation program, subject to its careful screening criteria and medical safeguards, cannot be said to be "arbitrary" or "intended to injure in some way unjustifiable by any government interest."

            - The interrogation program furthers the government's interest in national security. As the Court has emphasized: "It is 'obvious and unarguable' that no government interest is more compelling than the security of the Nation." *Haig v. Agee* (1981). The CIA believes that information obtained through its interrogation program has "been a key reason why al-Qa'ida has failed to launch a spectacular attack in the West since 11 September 2001."

            - The techniques are authorized *only as necessary* to protect that interest.

                - The techniques have been carefully designed to avoid inflicting serious physical or mental pain or suffering, as well any serious or lasting harm. Medical screening, monitoring, and ongoing evaluation further lower any such risk.

                - Enhanced techniques are used only on individuals who are believed to be senior members of al Qaeda, to have knowledge of imminent terrorist threats against the United States, and to pose a clear threat to the United States if released. The "waterboard" is used only if the CIA has credible intelligence that a terrorist attack is imminent, that

the subject has actionable intelligence, and that other techniques have failed or are unlikely to yield intelligence quickly.

- Whether, when considered in light of "traditional executive behavior, of contemporary practice, and the standards of blame generally applied to them," the interrogation techniques are "so egregious, so outrageous, that [they] may fairly be said to shock the contemporary conscience" is a much more difficult question. Although the interrogation techniques would not be appropriate if applied indiscriminately or in other contexts, we conclude that the CIA's interrogation techniques, when carefully limited to those persons who satisfy the screening criteria and conducted in conformity to the medical safeguards, do not shock the conscience.

  - Whether conduct shocks the conscience is an inherently fact-specific question on which existing precedent provides little guidance. *See id.* "'Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other considerations, fall short of such a denial." *Lewis*, 523 U.S. at 850 (quoting *Betts v. Brady* (1942)).

  - Use of the interrogation techniques in the context of ordinary criminal investigations might "shock the conscience." *See, e.g, Rochin v. California* (1952) (holding that convicting a defendant based on evidence obtained by pumping his stomach shocked the conscience); *Chavez v. Martinez* (2003) (remanding for consideration of whether repeated police questioning of a gunshot wound victim suffering from severe pain might shock the conscience). The government interest in law enforcement, however, is different from the government interest in national security and is subject to various special constitutional limitations including, for example, the privilege against self-incrimination.

  - The techniques at issue appear to be inconsistent with traditional United States military doctrine. That doctrine, however, was developed for traditional armed conflict and is premised on the applicability of various treaties (such as the Geneva Conventions) that do not apply to the conflict with al Qaeda.

  - Each year, in the State Department's "Country Reports on Human Rights Practices," the United States condemns coercive conduct employed by other countries. Although some of the condemned conduct resembles some of the CIA techniques, the condemned conduct usually goes far beyond the CIA techniques and would constitute torture under U.S. law (for example, rape, severe beatings, and electric shocks). Further, the condemned conduct is

often applied indiscriminately or in very different contexts (for example, for law enforcement or against political opponents).

- By contrast, the CIA interrogation techniques are all adapted from the military Survival, Evasion, Resistance, Escape ("SERE") training. Although there are obvious differences between military training and actual interrogation, the fact that the United States uses these techniques on its own troops strongly suggests that these techniques are not categorically beyond the pale, regardless of context.

- Given the vague nature of the shocks-the-conscience test and the lack of precedent in this context, we cannot predict with confidence whether a court would agree with our analysis. But because of the territorial limitation in Article 16 and the fact that it is non-self-executing, we think the question should not reach the courts.