Report of the United Nations Commission on Human Rights, E/CN.4/1347 35, 40 (1979); *CAT Handbook* at 48. Although France suggested replacing "within its jurisdiction" with "in its territory," the phrase "any territory under its jurisdiction" was chosen instead. *See CAT Handbook* at 48.

There is some evidence that the United States understood these phrases to mean essentially the same thing. *See, e.g.*, Exec. Report 101-30, 101st Cong., 2d Sess., 23-24 (Aug. 30, 1990) (Senate Foreign Relations Committee Report) (suggesting that the phrase "in any territory under its jurisdiction" would impose obligations on a State Party with respect to conduct committed "in its territory" but not with respect to conduct "occurring abroad"); *Convention Against Torture: Hearing Before the Committee on Foreign Relations, United States Senate*, S. Hrg. 101-718 at 7 (Jan. 30, 1990) (prepared statement of Hon. Abraham D. Sofaer, Legal Adviser, Department of State) (stating that under Article 2, State Parties would be obligated "to take administrative, judicial or other measures to prevent torture *within their territory*") (emphasis added). Other evidence, however, suggests that the phrase "territory under its jurisdiction" has a somewhat broader meaning than "in its territory." According to the record of the negotiation relating to Articles 12 and 13 of the CAT, "[i]n response to the question on the scope of the phrase 'territory under its jurisdiction' as contained in these articles, it was said that it was intended to cover, *inter alia*, territories still under colonial rule and occupied territory." U.N. Doc. E/CN.4/1367, Mar. 5, 1980, at 13. And one commentator has stated that the negotiating record suggests that the phrase "territory under its jurisdiction" "is not limited to a State's land territory, its territorial sea and the airspace over its land and sea territory, but it also applies to territories under military occupation, to colonial territories and to any other territories over which a State has factual control." *Id.* at 131. Others have suggested that the phrase would also reach conduct occurring on ships and aircraft registered in a State. *See CAT Handbook* at 48; Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20, at 5 (1988) (Secretary of State Schultz) (asserting that "territory under its jurisdiction" "refers to all places that the State Party controls as a governmental authority, including ships and aircraft registered in that State").[16]

Thus, although portions of the negotiating record of the CAT may support reading the phrase "any territory under its jurisdiction" to include not only sovereign territory but also areas subject to de facto government authority (and perhaps registered ships and aircraft), the negotiating record as a whole tends to confirm that the phrase does not extend to places where a State Party does not exercise authority as the government.

The CIA has assured us that the interrogations at issue here do not take place within the sovereign territory or special maritime and territorial jurisdiction ("SMTJ") of the United States. *See* 18 U.S.C. § 5 (defining "United States"); *id.* § 7 (defining SMTJ). As relevant here, we

[16] This suggestion is in tension with the text of Article 5(1)(a), which seems to distinguish "territory under [a State's] jurisdiction" from "ship[s] or aircraft registered in that State." *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 n.5 (1989) (noting that where treaty text is not perfectly clear, the "natural meaning" of the text "could properly be contradicted only by clear drafting history"). Because the CIA has assured us that its interrogations do not take place on ships or aircraft registered in the United States, we need not resolve this issue here.

believe that the phrase "any territory under its jurisdiction" certainly reaches no further than the sovereign territory and the SMTJ of the United States.[17] Indeed, in many respects, it probably does not reach this far. Although many provisions of the SMTJ invoke territorial bases of jurisdiction, other provisions assert jurisdiction on other grounds, including, for example, sections 7(5) through 7(9), which assert jurisdiction over certain offenses committed by or against United States citizens. Accordingly, we conclude that the interrogation program does not take place within "territory under [United States] jurisdiction" and therefore does not violate Article 16—even absent the Senate's reservation limiting United States obligations under Article 16, which we discuss in the next section.

B.

As a condition to its advice and consent to the ratification of the CAT, the Senate required a reservation that provides that the United States is

> bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," 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.

Cong. Rec. 36,198 (1990). This reservation, which the United States deposited with its instrument of ratification, is legally binding and defines the scope of United States obligations under Article 16 of the CAT. *See Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 33 (1987) (Reservations deposited with the instrument of ratification "are generally binding . . . both internationally and domestically . . . in . . . subsequent interpretation of the treaty.").[18]

Under the terms of the reservation, the United States is obligated to prevent "cruel, inhuman or degrading treatment" only to the extent that such treatment amounts to "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments." Giving force to the terms of this reservation, treatment that is not

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[17] As we have explained, there is an argument that "territory under [a State's] jurisdiction" might also include occupied territory. Accordingly, at least absent the Senate's reservation, Article 16's obligations might extend to occupied territory. Because the United States is not currently an occupying power within the meaning of the laws of war anywhere in the world, we need not decide whether occupied territory is "territory under [United States] jurisdiction."

[18] "The Senate's right to qualify its consent to ratification by reservations, amendments and interpretations was established through a reservation to the Jay treaty of 1794," Quincy Wright, *The Control of American Foreign Relations* 253 (1922), and has been frequently exercised since then. The Supreme Court has indicated its acceptance of this practice. *See Haver v. Yaker*, 76 U.S. (9 Wall.) 32, 35 (1869); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 107 (1801). *See also Constitutionality of Proposed Conditions to Senate Consent to the Interim Convention on the Conservation of North Pacific Fur Seals*, 10 Op. O.L.C. 12, 16 (1986) ("[T]he Senate's practice of conditioning its consent to particular treaties is well-established.").

"prohibited by" these amendments would not violate United States obligations as limited by the reservation.

Conceivably, one might read the text of the reservation as limiting only the substantive (as opposed to the territorial) reach of United States obligations under Article 16. That would not be an unreasonable reading of the text. Under this view, the reservation replaced only the phrase "cruel, inhuman or degrading treatment or punishment" and left untouched the phrase "in any territory under its jurisdiction," which defines the geographic scope of the Article. The text of the reservation, however, is susceptible to another reasonable reading—one suggesting that the Senate intended to ensure that the United States would, with respect to Article 16, undertake no obligations not already imposed by the Constitution itself. Under this reading, the reference to the treatment or punishment prohibited by the constitutional provisions does not distinguish between the substantive scope of the constitutional prohibitions and their geographic scope. As we discuss below, this second reading is strongly supported by the Senate's ratification history of the CAT.

The Summary and Analysis of the CAT submitted by the President to the Senate in 1988 expressed concern that "Article 16 is arguably broader than existing U.S. law." Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *in* S. Treaty Doc. No. 100-20, at 15. "In view of the ambiguity of the terms," the Executive Branch suggested "that U.S. obligations under this article [Article 16] should be limited to *conduct prohibited by the U.S. Constitution*." S. Exec. Rep. No. 101-30, at 8 (1990) (emphasis added); *see also id.* at 25-26. Accordingly, it proposed what became the Senate's reservation in order "[t]o make clear that the United States construes the phrase ["cruel, inhuman or degrading treatment or punishment"] to be coextensive with its constitutional guarantees against cruel, unusual, and inhumane treatment." *Id.* at 25-26; S. Treaty Doc. No. 100-20, at 15 (same). As State Department Legal Adviser Abraham D. Sofaer explained, "because the Constitution of the United States directly addresses this area of the law . . . [the reservation] would limit our obligations under this Convention to the proscriptions already covered in our Constitution." *Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 11 (1990) (prepared statement). The Senate Foreign Relations Committee expressed the same concern about the potential scope of Article 16 and recommended the same reservation to the Senate. *See* S. Exec. Rep. No. 101-30, at 8, 25-26.

Furthermore, the Senate declared that Articles 1 through 16 of the CAT are not self-executing, *see* Cong. Rec. 36,198 (1990), and the discussions surrounding this declaration in the ratification history also indicate that the United States did not intend to undertake any obligations under Article 16 that extended beyond those already imposed by the Constitution. The Administration expressed the view that "as indicated in the original Presidential transmittal, existing Federal and State law appears sufficient to implement the Convention," except that "new Federal legislation would be required *only to establish criminal jurisdiction under Article 5*." Letter for Senator Pressler, from Janet Mullins, Assistant Secretary, Legislative Affairs, Department of State (April 4, 1990), *in* S. Exec. Rep. No. 101-30, at 41 (emphasis added). It was understood that "the majority of the obligations to be undertaken by the United States pursuant to the Convention [were] already covered by existing law" and that "additional implementing legislation [would] be needed *only with respect to article 5*." S. Exec. Rep. No. 101-30, at 10

(emphasis added). Congress then enacted 18 U.S.C. §§ 2340-2349A, the only "necessary legislation to implement" United States obligations under the CAT, noting that the United States would "not become a party to the Convention until the necessary implementing legislation is enacted." S. Rep. No. 103-107, at 366 (1993). Reading Article 16 to extend the substantive standards of the Constitution in contexts where they did not already apply would be difficult to square with the evident understanding of the United States that existing law would satisfy its obligations under the CAT except with respect to Article 5. The ratification history thus strongly supports the view that United States obligations under Article 16 were intended to reach no further—substantively, territorially, or in any other respect—than its obligations under the Fifth, Eighth, and Fourteenth Amendments.

The Supreme Court has repeatedly suggested in various contexts that the Constitution does not apply to aliens outside the United States. *See, e.g., United States v. Belmont*, 301 U.S. 324, 332 (1937) ("[O]ur Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . . ."); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (noting that cases relied upon by an alien asserting constitutional rights "establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"). Federal courts of appeals, in turn, have held that "[t]he Constitution does not extend its guarantees to nonresident aliens living outside the United States," *Vancouver Women's Health Collective Soc'y v. A.H. Robins Co.*, 820 F.2d 1359, 1363 (4th Cir. 1987); that "non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States," *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) (per curiam); and that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise," *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (quoting *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)).[19]

As we explain below, it is the Fifth Amendment that is potentially relevant in the present context. With respect to that Amendment, the Supreme Court has "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Verdugo-Urquidez*, 494 U.S. at 269. In *Verdugo-Urquidez*, 494 U.S. at 269, the Court noted its "emphatic" "rejection of extraterritorial application of the Fifth Amendment" in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which rejected "[t]he doctrine that the term 'any person' in the Fifth Amendment spreads its protection over alien enemies anywhere in the world engaged in hostilities against us," *id.* at 782. *Accord Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Verdugo-Urquidez* and *Eisentrager* and noting that "[i]t is well established that" Fifth Amendment protections "are unavailable to aliens outside of our geographic borders"). Federal

[19] The Restatement (Third) of Foreign Relations Law asserts that "[a]lthough the matter has not been authoritatively adjudicated, at least some actions by the United States in respect to foreign nationals outside the country are also subject to constitutional limitations." *Id.* § 722, cmt. m. This statement is contrary to the authorities cited in the text.

courts of appeals have similarly held that "non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections." *Jifry v. F.A.A.*, 370 F.3d 1174, 1182 (D.C. Cir. 2004); *see also Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000) (relying on *Eisentrager* and *Verdugo-Urquidez* to conclude that an alien could not state a due process claim for torture allegedly inflicted by United States agents abroad), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002); *Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1428-29 (11th Cir. 1995) (relying on *Eisentrager* and *Verdugo-Urquidez* to conclude that aliens held at Guantanamo Bay lack Fifth Amendment rights).[20]

The reservation required by the Senate as a condition of its advice and consent to the ratification of the CAT thus tends to confirm the territorially limited reach of U.S. obligations under Article 16. Indeed, there is a strong argument that, by limiting United States obligations under Article 16 to those that certain provisions of the Constitution already impose, the Senate's reservation limits the territorial reach of Article 16 even more sharply than does the text of Article 16 standing alone. Under this view, Article 16 would impose no obligations with respect

[20] The Court's decision in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), is not to the contrary. To be sure, the Court stated in a footnote that:

> Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States."

Id. at 2698 n.15. We believe this footnote is best understood to leave intact the Court's settled understanding of the Fifth Amendment. First, the Court limited its holding to the issue before it: whether the federal courts have *statutory jurisdiction* over habeas petitions brought by such aliens held at Guantanamo as enemy combatants. *See id.* at 2699 ("Whether and what further proceedings may become necessary . . . are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."). Indeed, the Court granted the petition for writ of certiorari "limited to the following Question: Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." *Rasul v. Bush*, 540 U.S. 1003 (2003).

Second, the footnote relies on a portion of Justice Kennedy's concurrence in *Verdugo-Urquidez* "and the cases cited therein," *Rasul*, 124 S. Ct. at 2698 n.15. In this portion of Justice Kennedy's *Verdugo-Urquidez* concurrence, Justice Kennedy discusses the *Insular Cases*. These cases stand for the proposition that although not every provision of the Constitution applies in United States territory overseas, certain core constitutional protections may apply in certain insular territories of the United States. *See also, e.g., Reid v. Covert*, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring in judgment) (discussing *Insular Cases*); *Balzac v. Porto Rico*, 258 U.S. 298 (1922). Given that the Court in *Rasul* stressed GTMO's unique status as "territory subject to the long-term, exclusive jurisdiction and control of the United States," *Rasul*, 124 S. Ct. at 2698 n.15, in the very sentence that cited Justice Kennedy's concurrence, it is conceivable that footnote 15 might reflect, at most, a willingness to consider whether GTMO is similar in significant respects to the territories at issue in the *Insular Cases*. *See also id.* at 2696 (noting that under the agreement with Cuba "the United States exercises complete jurisdiction and control over the Guantanamo Bay Navel Base") (internal quotation marks omitted); *id.* at 2700 (Kennedy, J., concurring) (asserting that "Guantanamo Bay is in every practical respect a United States territory" and explaining that "[w]hat matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay").

to aliens outside the United States.[21] And because the CIA has informed us that these techniques are not authorized for use against United States persons, or within the United States, they would not, under this view, violate Article 16. Even if the reservation is read only to confirm the territorial limits explicit in Article 16, however, or even if it is read not to bear on this question at all, the program would still not violate Article 16 for the reasons discussed in Part II.A. Accordingly, we need not decide here the precise effect, if any, of the Senate reservation on the geographic scope of U.S. obligations under Article 16.[22]

III.

You have also asked us to consider whether the CIA interrogation program would violate the substantive standards applicable to the United States under Article 16 if, contrary to the conclusions reached in Part II above, those standards did extend to the CIA interrogation program. Pursuant to the Senate's reservation, the United States is bound by Article 16 to prevent "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." As we explain, the relevant test is whether use of the CIA's enhanced interrogation techniques constitutes government conduct that "shocks the conscience." Based on our understanding of the relevant case law and the CIA's descriptions of the interrogation program, we conclude that use of the enhanced interrogation techniques, subject to all applicable conditions, limitations, and safeguards, does not "shock the conscience." We emphasize, however, that this analysis calls for the application of a somewhat subjective test with only limited guidance from the Court. We therefore cannot predict with confidence whether a court would agree with our conclusions, though, as discussed more fully below, we believe the interpretation of Article 16's substantive standard is unlikely to be subject to judicial inquiry.

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[21] Additional analysis may be required in the case of aliens entitled to lawful permanent resident status. *Compare Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), *with Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). You have informed us that the CIA does not use these techniques on any United States persons, including lawful permanent residents, and we do not here address United States obligations under Article 16 with respect to such aliens.

[22] Our analysis is not affected by the recent enactment of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005). Section 1031(a)(1) of that law provides that

> [n]one of the funds appropriated or otherwise made available by this Act shall be obligated or expended to subject any person in the custody or under the physical control of the United States to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.

119 Stat. at 256. Because the Senate reservation, as deposited with the United States instrument of ratification, defines United States obligations under Article 16 of the CAT, this statute does not prohibit the expenditure of funds for conduct that does not violate United States obligations under Article 16, as limited by the Senate reservation. Furthermore, this statute itself defines "cruel, inhuman, or degrading treatment or punishment" as "the cruel, unusual, and inhumane treatment or punishment prohibited by the fifth amendment, eighth amendment, or fourteenth amendment to the Constitution of the United States." *Id.* § 1031(b)(2).

A.

Although, pursuant to the Senate's reservation, United States obligations under Article 16 extend to "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States," only the Fifth Amendment is potentially relevant here. The Fourteenth Amendment provides, in relevant part: "No *State* shall . . . deprive any person of life, liberty, or property, without due process of law." (Emphasis added.) This Amendment does not apply to actions taken by the federal Government. *See, e.g., San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (explaining that the Fourteenth Amendment "does not apply" to the federal Government); *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954) (noting that the Fifth Amendment rather than the Fourteenth Amendment applies to actions taken by the District of Columbia). The Eighth Amendment prohibits the infliction of "cruel and unusual *punishments*." (Emphasis added.) As the Supreme Court has repeatedly held, the Eighth Amendment does not apply until there has been a formal adjudication of guilt. *E.g., Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979); *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977). *See also In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480 (D.D.C. 2005) (dismissing detainees' claims based on Eighth Amendment because "the Eighth Amendment applies only after an individual is convicted of a crime") (stayed pending appeal). The same conclusion concerning the limited applicability of the Eighth Amendment under Article 16 was expressly recognized by the Senate and the Executive Branch during the CAT ratification deliberations:

> The Eighth Amendment prohibition of cruel and unusual punishment is, of the three [constitutional provisions cited in the Senate reservation], the most limited in scope, as this amendment has consistently been interpreted as protecting only "those convicted of crimes." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). The Eighth Amendment does, however, afford protection against torture and ill-treatment of persons in prison and similar situations of *criminal punishment*.

Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *in* S. Treaty Doc. No. 100-20, at 9 (emphasis added). Because the high value detainees on whom the CIA might use enhanced interrogation techniques have not been convicted of any crime, the substantive requirements of the Eighth Amendment would not be relevant here, even if we assume that Article 16 has application to the CIA's interrogation program.[23]

The Fifth Amendment, however, is not subject to these same limitations. As potentially relevant here, the substantive due process component of the Fifth Amendment protects against executive action that "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("To this end, for half a

[23] To be sure, treatment amounting to punishment (let alone, cruel and unusual punishment) generally cannot be imposed on individuals who have not been convicted of crimes. But this prohibition flows from the Fifth Amendment rather than the Eighth. *See Wolfish*, 441 U.S. at 535 n.16; *United States v. Salerno*, 481 U.S. 739, 746-47 (1987). *See also infra* note 26.

century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience.").[24]

B.

We must therefore determine whether the CIA interrogation program involves conduct that "shocks the conscience." The Court has indicated that whether government conduct can be said to "shock the conscience" depends primarily on whether the conduct is "arbitrary in the constitutional sense," *Lewis*, 523 U.S. at 846 (internal quotation marks omitted); that is, whether it amounts to the "exercise of power without any reasonable justification in the service of a legitimate governmental objective," *id.* "[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, although, in some cases, deliberate indifference to the risk of inflicting such unjustifiable injury might also "shock the conscience," *id.* at 850-51. The Court has also suggested that it is appropriate to consider whether, in light of "traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them," conduct "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 847 n.8.[25]

Several considerations complicate our analysis. First, there are relatively few cases in which the Court has analyzed whether conduct "shocks the conscience," and these cases involve contexts that differ dramatically from the CIA interrogation program. Further, the Court has emphasized that there is "no calibrated yard stick" with which to determine whether conduct "shocks the conscience." *Id.* at 847. To the contrary: "Rules of due process are not . . . subject to mechanical application in unfamiliar territory." *Id.* at 850. A claim that government conduct "shocks the conscience," therefore, requires "an exact analysis of circumstances." *Id.* The Court has explained:

[24] Because what is at issue under the text of the Senate reservation is the subset of "cruel, inhuman or degrading treatment" that is "the cruel, unusual and inhumane treatment . . . prohibited by the Fifth . . . Amendment[]," we do not believe that the procedural aspects of the Fifth Amendment are relevant, at least in the context of interrogation techniques unrelated to the criminal justice system. Nor, given the language of Article 16 and the reservation, do we believe that United States obligations under this Article include other aspects of the Fifth Amendment, such as the Takings Clause or the various privacy rights that the Supreme Court has found to be protected by the Due Process Clause.

[25] It appears that conscience-shocking conduct is a necessary but perhaps not sufficient condition to establishing that executive conduct violates substantive due process. *See Lewis*, 523 U.S. at 847 n.8 ("Only if the *necessary condition* of egregious behavior were satisfied would there be a *possibility* of recognizing a substantive due process right to be free of such executive action, and *only then* might there be a debate about the sufficiency of historical examples of enforcement of the right claimed, or its recognition in other ways.") (emphases added); *see also, e.g., Terrell v. Larson*, 396 F.3d 975, 978 n.1 (8th Cir. 2005) ("To violate substantive due process, the conduct of an executive official must be conscience shocking *and* must violate" a fundamental right.); *Slusarchuck v. Hoff*, 346 F.3d 1178, 1181 (8th Cir. 2003). It is therefore arguable that conscience-shocking behavior would not violate the Constitution if it did not violate a fundamental right or if it were narrowly tailored to serve a compelling state interest. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Because we conclude that the CIA interrogation program does not "shock the conscience," we need not address these issues here.

> The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial 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.

Id. at 850 (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)) (alteration in *Lewis*). Our task, therefore, is to apply in a novel context a highly fact-dependent test with little guidance from the Supreme Court.

I.

We first consider whether the CIA interrogation program involves conduct that is "constitutionally arbitrary." We conclude that it does not. Indeed, we find no evidence of "conduct intended to injure in some way unjustifiable by any government interest," *id.* at 849, or of deliberate indifference to the possibility of such unjustifiable injury, *see id.* at 853.

As an initial matter, the Court has made clear that whether conduct can be considered to be constitutionally arbitrary depends vitally on whether it furthers a government interest, and, if it does, the nature and importance of that interest. The test is not merely whether the conduct is "intended to injure," but rather whether it is "intended to injure *in some way unjustifiable by any government interest*." *Id.* at 849 (emphasis added). It is the "exercise of power *without any reasonable justification in the service of a legitimate governmental objective*" that can be said to "shock the conscience." *Id.* at 846 (emphasis added). In *United States v. Salerno*, 481 U.S. 739, 748 (1987), for example, the Court explained that the Due Process Clause "lays down [no] . . . categorical imperative," and emphasized that the Court has "repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *See also Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2646 (2004) (plurality opinion) (explaining that the individual's interests must be weighed against the government's). The government's interest is thus an important part of the context that must be carefully considered in evaluating an asserted violation of due process.[26]

[26] The pretrial detention context is informative. Analysis of the government's interest and purpose in imposing a condition of confinement is essential to determining whether there is a violation of due process in this context. *See Salerno*, 481 U.S. at 747-50. The government has a legitimate interest in "effectuat[ing] th[e] detention," *Wolfish*, 441 U.S. at 537, which supports government action that "may rationally be connected" to the detention, *Salerno*, 481 U.S. at 747 (internal quotation marks omitted). By contrast, inflicting cruel and unusual punishment on such detainees would violate due process because the government has no legitimate interest in inflicting punishment prior to conviction. *See Wolfish*, 441 U.S. at 535 & n.16.

In addition, *Lewis* suggests that the Court's Eighth Amendment jurisprudence sheds at least some light on the due process inquiry. *See* 523 U.S. at 852-53 (analogizing the due process inquiry to the Eighth Amendment context and noting that in both cases "liability should turn on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm'") (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). The interrogation program we consider does not involve or allow

Al Qaeda's demonstrated ability to launch sophisticated attacks causing mass casualties within the United States and against United States interests worldwide, as well as its continuing efforts to plan and to execute such attacks, *see supra* p. 9, indisputably pose a grave and continuing threat. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citations omitted); *see also Salerno*, 481 U.S. at 748 (noting that "society's interest is at its peak" "in times of war or insurrection"). It is this paramount interest that the Government seeks to vindicate through the interrogation program. Indeed, the program, which the CIA believes "has been a key reason why al-Qa'ida has failed to launch a spectacular attack in the West since 11 September 2001," *Effectiveness Memo* at 2, directly furthers that interest, producing substantial quantities of otherwise unavailable actionable intelligence. As detailed above, ordinary interrogation techniques had little effect on either KSM or Zubaydah. Use of enhanced techniques, however, led to critical, actionable intelligence such as the discovery of the Guraba Cell, which was tasked with executing KSM's planned Second Wave attacks against Los Angeles. Interrogations of these most valuable detainees and comparatively lower-tier high value detainees [redacted] have also greatly increased the CIA's understanding of our enemy and its plans.

As evidenced by our discussion in Part I, the CIA goes to great lengths to ensure that the techniques are applied only as reasonably necessary to protect this paramount interest in "the security of the Nation." Various aspects of the program ensure that enhanced techniques will be used only in the interrogations of the detainees who are most likely to have critical, actionable intelligence. The CIA screening procedures, which the CIA imposes in addition to the standards applicable to activities conducted pursuant to paragraph four of the Memorandum of Notification, ensure that the techniques are not used unless the CIA reasonably believes that the detainee is a "senior member of al-Qai'da or [its affiliates]," *and* the detainee has "knowledge of imminent terrorist threats against the USA" or has been directly involved in the planning of attacks. *January 4 [redacted] Fax* at 5; *supra* p. 5. The fact that enhanced techniques have been used to date in the interrogations of only 28 high value detainees out of the 94 detainees in CIA custody demonstrates this selectivity.

Use of the waterboard is limited still further, requiring "credible intelligence that a terrorist attack is imminent; . . . substantial and credible indicators that the subject has actionable intelligence that can prevent, disrupt or delay this attack; and [a determination that o]ther interrogation methods have failed to elicit the information [and that] . . . other . . . methods are unlikely to elicit this information *within the perceived time limit for preventing the attack*." *August 2 Rizzo Letter* (attachment). Once again, the CIA's practice confirms the program's selectivity. CIA interrogators have used the waterboard on only three detainees to date—KSM, Zubaydah, and Al-Nashiri—and have not used it at all since March 2003.

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the malicious or sadistic infliction of harm. Rather, as discussed in the text, interrogation techniques are used only as reasonably deemed necessary to further a government interest of the highest order, and have been carefully designed to avoid inflicting severe pain or suffering or any other lasting or significant harm and to minimize the risk of any harm that does not further this government interest. *See infra* pp. 29-31.

Moreover, enhanced techniques are considered only when the on-scene interrogation team considers them necessary because a detainee is withholding or manipulating important, actionable intelligence or there is insufficient time to try other techniques. For example, as recounted above, the CIA used enhanced techniques in the interrogations of KSM and Zubaydah only after ordinary interrogation tactics had failed. Even then, CIA Headquarters must make the decision whether to use enhanced techniques in any interrogation. Officials at CIA Headquarters can assess the situation based on the interrogation team's reports and intelligence from a variety of other sources and are therefore well positioned to assess the importance of the information sought.

Once approved, techniques are used only in escalating fashion so that it is unlikely that a detainee would be subjected to more duress than is reasonably necessary to elicit the information sought. Thus, no technique is used on a detainee unless use of that technique at that time appears necessary to obtaining the intelligence. And use of enhanced techniques ceases "if the detainee is judged to be consistently providing accurate intelligence of if he is no longer believed to have actionable intelligence." *Techniques* at 5. Indeed, use of the techniques usually ends after just a few days when the detainee begins participating. Enhanced techniques, therefore, would not be used on a detainee not reasonably thought to possess important, actionable intelligence that could not be obtained otherwise.

Not only is the interrogation program closely tied to a government interest of the highest order, it is also designed, through its careful limitations and screening criteria, to avoid causing any severe pain or suffering or inflicting significant or lasting harm. As the *OMS Guidelines* explain, "[i]n all instances the general goal of these techniques is a psychological impact, and not some physical effect, with a specific goal of 'dislocate[ing] [the detainee's] expectations regarding the treatment he believes he will receive.'" *OMS Guidelines* at 8-9 (second alteration in original). Furthermore, techniques can be used only if there are no medical or psychological contraindications. Thus, no technique is ever used if there is reason to believe it will cause the detainee significant mental or physical harm. When enhanced techniques are used, OMS closely monitors the detainee's condition to ensure that he does not, in fact, experience severe pain or suffering or sustain any significant or lasting harm.

This facet of our analysis bears emphasis. We do not conclude that any conduct, no matter how extreme, could be justified by a sufficiently weighty government interest coupled with appropriate tailoring. Rather, our inquiry is limited to the program under consideration, in which the techniques do not amount to torture considered independently or in combination. *See Techniques* at 28-45; *Combined Use* at 9-19. Torture is categorically prohibited both by the CAT, *see* art. 2(2) ("No exceptional circumstances whatsoever . . . may be invoked as a justification of torture."), and by implementing legislation, *see* 18 U.S.C. §§ 2340-2340A.

The program, moreover, is designed to minimize the risk of injury or any suffering that is unintended or does not advance the purpose of the program. For example, in dietary manipulation, the minimum caloric intake is set at or above levels used in commercial weight-loss programs, thereby avoiding the possibility of significant weight loss. In nudity and water dousing, interrogators set ambient air temperatures high enough to guard against hypothermia. The walling technique employs a false wall and a C-collar (or similar device) to help avoid

whiplash. *See Techniques* at 8. With respect to sleep deprivation, constant monitoring protects against the possibility that detainees might injure themselves by hanging from their wrists, suffer from acute edema, or even experience non-transient hallucinations. *See Techniques* at 11-13. With the waterboard, interrogators use potable saline rather than plain water so that detainees will not suffer from hyponatremia and to minimize the risk of pneumonia. *See id.* at 13-14. The board is also designed to allow interrogators to place the detainee in a head-up position so that water may be cleared very quickly, and medical personnel and equipment are on hand should any unlikely problems actually develop. *See id.* 14. All enhanced techniques are conducted only as authorized and pursuant to medical guidelines and supervision.[27]

As is clear from these descriptions and the discussion above, the CIA uses enhanced techniques only as necessary to obtain information that it reasonably views as vital to protecting the United States and its interests from further terrorist attacks. The techniques are used only in the interrogation of those who are reasonably believed to be closely associated with al Qaeda and senior enough to have actionable intelligence concerning terrorist threats. Even then, the techniques are used only to the extent reasonably believed to be necessary to obtain otherwise unavailable intelligence. In addition, the techniques are designed to avoid inflicting severe pain or suffering, and no technique will be used if there is reason to believe it will cause significant harm. Indeed, the techniques have been designed to minimize the risk of injury or any suffering that does not further the Government's interest in obtaining actionable intelligence. The program is clearly not intended "to injure in some way unjustifiable by any government interest." *Lewis*, 523 U.S. at 849. Nor can it be said to reflect "deliberate indifference" to a substantial risk of such unjustifiable injury. *Id.* at 851.[28]

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[27] The CIA's CTC generally consults with the CIA's Office of General Counsel (which in turn may consult with this Office) when presented with novel circumstances. This consultation further reduces any possibility that CIA interrogators could be thought to be "abusing [their] power, or employing it as an instrument of oppression," *Lewis*, 523 U.S. at 840 (citation and quotation marks omitted; alteration in *Lewis*); *see also Chavez*, 538 U.S. at 774 (opinion of Thomas, J.), so as to render their conduct constitutionally arbitrary.

[28] This is not to say that the interrogation program has worked perfectly. According to the *IG Report*, the CIA, at least initially, could not always distinguish detainees who had information but were successfully resisting interrogation from those who did not actually have the information. *See IG Report* at 83-85. On at least one occasion, this may have resulted in what might be deemed in retrospect to have been the unnecessary use of enhanced techniques. On that occasion, although the on-scene interrogation team judged Zubaydah to be compliant, elements within CIA Headquarters still believed he was withholding information [redacted] *See id.* at 84. At the direction of CIA Headquarters, interrogators therefore used the waterboard one more time on Zubaydah. [redacted] *See id.* at 84-85.

~~This example, however, does not show CIA "conduct [that is] intended to injure in some way unjustifiable~~ by any government interest," or "deliberate indifference" to the possibility of such unjustifiable injury. *Lewis*, 523 U.S. at 849. As long as the CIA reasonably believed that Zubaydah continued to withhold sufficiently important information, use of the waterboard was supported by the Government's interest in protecting the Nation from subsequent terrorist attacks. The existence of a reasonable, good faith belief is not negated because the factual predicates for that belief are subsequently determined to be false. Moreover, in the Zubaydah example, CIA Headquarters dispatched officials to observe the last waterboard session. These officials reported that enhanced techniques were no longer needed. *See IG Report* at 85. Thus, the CIA did not simply rely on what appeared to be credible intelligence but rather ceased using enhanced techniques despite this intelligence.

We next address whether, considered in light of "an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them," use of the enhanced interrogation techniques constitutes government behavior that "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 847 n.8. We have not found evidence of traditional executive behavior or contemporary practice either condemning or condoning an interrogation program carefully limited to further a vital government interest and designed to avoid unnecessary or serious harm.[29] However, in many contexts, there is a strong tradition against the use of coercive interrogation techniques. Accordingly, this aspect of the analysis poses a more difficult question. We examine the traditions surrounding ordinary criminal investigations within the United States, the military's tradition of not employing coercive techniques in intelligence interrogations, and the fact that the United States regularly condemns conduct undertaken by other countries that bears at least some resemblance to the techniques at issue.

These traditions provide significant evidence that the use of enhanced interrogation techniques might "shock the contemporary conscience" in at least some contexts. *Id.* As we have explained, however, the due process inquiry depends critically on setting and circumstance, *see, e.g., id.* at 847, 850, and each of these contexts differs in important ways from the one we consider here. Careful consideration of the underpinnings of the standards of conduct expected in these other contexts, moreover, demonstrates that those standards are not controlling here. Further, as explained below, the enhanced techniques are all adapted from techniques used by the United States on its own troops, albeit under significantly different conditions. At a minimum, this confirms that use of these techniques cannot be considered to be categorically impermissible; that is, in some circumstances, use of these techniques is consistent with "traditional executive behavior" and "contemporary practice." *Id.* at 847 n.8. As explained below, we believe such circumstances are present here.

Domestic Criminal Investigations. Use of interrogation practices like those we consider here in ordinary criminal investigations might well "shock the conscience." In *Rochin v.*

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[29] CIA interrogation practice appears to have varied over time. The *IG Report* explains that the CIA "has had intermittent involvement in the interrogation of individuals whose interests are opposed to those of the United States." *IG Report* at 9. In the early 1980s, for example, the CIA initiated the Human Resource Exploitation ("HRE") training program, "designed to train foreign liaison services on interrogation techniques." *Id.* The CIA terminated the HRE program in 1986 because of allegations of human rights abuses in Latin America. *See id.* at 10.

[redacted]

California, 342 U.S. 165 (1952), the Supreme Court reversed a criminal conviction where the prosecution introduced evidence against the defendant that had been obtained by the forcible pumping of the defendant's stomach. The Court concluded that the conduct at issue "shocks the conscience" and was "too close to the rack and the screw." *Id.* at 172. Likewise, in *Williams v. United States*, 341 U.S. 97 (1951), the Court considered a conviction under a statute that criminalized depriving an individual of a constitutional right under color of law. The defendant suspected several persons of committing a particular crime. He then

> over a period of three days took four men to a paint shack . . . and used brutal methods to obtain a confession from each of them. A rubber hose, a pistol, a blunt instrument, a sash cord and other implement were used in the project. . . . Each was beaten, threatened, and unmercifully punished for several hours until he confessed.

Id. at 98-99. The Court characterized this as "the classic use of force to make a man testify against himself," which would render the confessions inadmissible. *Id.* at 101. The Court concluded:

> But where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court.

Id. at 101.

More recently, in *Chavez v. Martinez*, 538 U.S. 760 (2003), the police had questioned the plaintiff, a gunshot wound victim who was in severe pain and believed he was dying. At issue was whether a section 1983 suit could be maintained by the plaintiff against the police despite the fact that no charges had ever been brought against the plaintiff. The Court rejected the plaintiff's Fifth Amendment Self-Incrimination Clause claim, *see id.* at 773 (opinion of Thomas, J.); *id.* at 778-79 (Souter, J., concurring in judgment), but remanded for consideration of whether the questioning violated the plaintiff's substantive due process rights, *see id.* at 779-80. Some of the justices expressed the view that the Constitution categorically prohibits such coercive interrogations. *See id.* at 783, 788 (Stevens, J., concurring in part and dissenting in part) (describing the interrogation at issue as "torturous" and asserting that such interrogation "is a classic example of a violation of a constitutional right implicit in the concept of ordered liberty") (internal quotation marks omitted); *id.* at 796 (Kennedy, J., concurring in part and dissenting in part) ("The Constitution does not countenance the official imposition of severe pain or pressure for purposes of interrogation. This is true whether the protection is found in the Self-Incrimination Clause, the broader guarantees of the Due Process Clause, or both.").

The CIA program is considerably less invasive or extreme than much of the conduct at issue in these cases. In addition, the government interest at issue in each of these cases was the general interest in ordinary law enforcement (and, in *Williams*, even that was doubtful). That government interest is strikingly different from what is at stake here: the national security—in particular, the protection of the United States and its interests against attacks that may result in

massive civilian casualties. Specific constitutional constraints, such as the Fifth Amendment's Self-Incrimination Clause, which provides that "[n]o person . . . shall be compelled *in any criminal case* to be a witness against himself," (emphasis added), apply when the government acts to further its general interest in law enforcement and reflect explicit fundamental limitations on how the government may further that interest. Indeed, most of the Court's police interrogation cases appear to be rooted in the policies behind the Self-Incrimination Clause and concern for the fairness and integrity of the trial process. In *Rochin*, for example, the Court was concerned with the use of evidence obtained by coercion to bring about a criminal conviction. *See, e.g.*, 342 U.S. at 173 ("Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'") (citation omitted); *id.* (refusing to hold that "in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach"). *See also Jackson v. Denno*, 378 U.S. 368, 377 (1964) (characterizing the interest at stake in police interrogation cases as the "right to be free of a conviction based upon a coerced confession"); *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944) (explaining that "[a] coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt"). Even *Chavez*, which might indicate the Court's receptiveness to a substantive due process claim based on coercive police interrogation practices irrespective of whether the evidence obtained was ever used against the individual interrogated, involved an interrogation implicating ordinary law enforcement interests.

Courts have long distinguished the government's interest in ordinary law enforcement from other government interests such as national security. The Foreign Intelligence Surveillance Court of Review recently explained that, with respect to the Fourth Amendment, "the [Supreme] Court distinguishe[s] general crime control programs and those that have another particular purpose, such as protection of citizens against special hazards or protection of our borders." *In re Sealed Case*, 310 F.3d 717, 745-46 (For. Intel. Surv. Ct. Rev. 2002) (discussing the Court's "special needs" cases and distinguishing "FISA's general programmatic purpose" of "protect[ing] the nation against terrorists and espionage threats directed by foreign powers" from general crime control). Under the "special needs" doctrine, the Supreme Court has approved of warantless and even suspicionless searches that serve "special needs, beyond the normal need for law enforcement." *Vernonia Schol Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (quotation marks and citation omitted). Thus, although the Court has explained that it "cannot sanction [automobile] stops justified only by the" "general interest in crime control," *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (quotation marks and citation omitted), it suggested that it might approve of a "roadblock set up to thwart an imminent terrorist attack," *id.* *See also* Memorandum for James B. Comey, Deputy Attorney General, from Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Whether OFAC May Without Obtaining a Judicial Warrant Enter the Commercial Premises of a Designated Entity To Secure Property That Has Been Blocked Pursuant to IEEPA* (April 11, 2005). Notably, in the due process context, the Court has distinguished the Government's interest in detaining illegal aliens generally from its interest in detaining suspected terrorists. *See Zadvydas*, 533 U.S. at 691. Although the Court concluded that a statute permitting the indefinite detention of aliens subject to a final order of removal but who could not be removed to other countries would raise

substantial constitutional questions, it suggested that its reasoning might not apply to a statute that "appl[ied] narrowly to a small segment of particularly dangerous individuals, say, suspected terrorists." *Id.* at 691 (quotation marks and citation omitted).

Accordingly, for these reasons, we do not believe that the tradition that emerges from the police interrogation context provides controlling evidence of a relevant executive tradition prohibiting use of these techniques in the quite different context of interrogations undertaken solely to prevent foreign terrorist attacks against the United States and its interests.

United States Military Doctrine. *Army Field Manual 34-52* sets forth the military's basic approach to intelligence interrogations. It lists a variety of interrogation techniques that generally involve only verbal and emotional tactics. In the "emotional love approach," for example, the interrogator might exploit the love a detainee feels for his fellow soldiers, and use this to motivate the detainee to cooperate. *Id.* at 3-15. In the "fear-up (harsh) approach," "the interrogator behaves in an overpowering manner with a loud and threatening voice [and] may even feel the need to throw objects across the room to heighten the [detainee's] implanted feelings of fear." *Id.* at 3-16. The *Field Manual* counsels that "[g]reat care must be taken when [using this technique] so any actions would not violate the prohibition on coercion and threats contained in the GPW, Article 17." *Id.* Indeed, from the outset, the *Field Manual* explains that the Geneva Conventions "and US policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation." *Id.* at 1-8. As prohibited acts of physical and mental torture, the *Field Manual* lists "[f]ood deprivation" and "[a]bnormal sleep deprivation" respectively. *Id.*

The *Field Manual* provides evidence "of traditional executive behavior[and] of contemporary practice," *Lewis*, 523 U.S. at 847 n.8, but we do not find it dispositive for several reasons. Most obviously, as the *Field Manual* makes clear, the approach it embodies is designed for traditional armed conflicts, in particular, conflicts governed by the Geneva Conventions. *See Field Manual 34-52* at 1-7 to 1-8; *see also id.* at iv-v (noting that interrogations must comply with the Geneva Conventions and the Uniform Code of Military Justice). The United States, however, has long resisted efforts to extend the protections of the Geneva Conventions to terrorists and other unlawful combatants. As President Reagan stated when the United States rejected Protocol I to the Geneva Conventions, the position of the United States is that it "must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law." President Ronald Reagan, Letter of Transmittal to the Senate of Protocol II additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977 (Jan. 29, 1987). President Bush, moreover, has expressly determined that the Geneva Convention Relative to the Treatment of Prisoners of War ("GPW") does not apply to the conflict with al Qaeda. *See* Memorandum from the President, *Re: Humane Treatment of al Qaeda and Taliban Detainees* at 1 (Feb. 7, 2002); *see also* Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 9-10 (Jan. 22, 2002) (explaining that GPW does not apply to non-state actors such as al Qaeda).

We think that a policy premised on the applicability of the Geneva Conventions and not purporting to bind the CIA does not constitute controlling evidence of executive tradition and contemporary practice with respect to untraditional armed conflict where those treaties do not apply, where the enemy flagrantly violates the laws of war by secretly attacking civilians, and where the United States cannot identify the enemy or prevent its attacks absent accurate intelligence.

State Department Reports. Each year, in the State Department's Country Reports on Human Rights Practices, the United States condemns coercive interrogation techniques and other practices employed by other countries. Certain of the techniques the United States has condemned appear to bear some resemblance to some of the CIA interrogation techniques. In their discussion of Indonesia, for example, the reports list as "[p]sychological torture" conduct that involves "food and sleep deprivation," but give no specific information as to what these techniques involve. In their discussion of Egypt, the reports list as "methods of torture" "stripping and blindfolding victims; suspending victims from a ceiling or doorframe with feet just touching the floor; beating victims [with various objects]; . . . and dousing victims with cold water." *See also, e.g.*, Algeria (describing the "chiffon" method, which involves "placing a rag drenched in dirty water in someone's mouth"); Iran (counting sleep deprivation as either torture or severe prisoner abuse); Syria (discussing sleep deprivation and "having cold water thrown on" detainees as either torture or "ill-treatment"). The State Department's inclusion of nudity, water dousing, sleep deprivation, and food deprivation among the conduct it condemns is significant and provides some indication of an executive foreign relations tradition condemning the use of these techniques.[30]

To the extent they may be relevant, however, we do not believe that the reports provide evidence that the CIA interrogation program "shocks the contemporary conscience." The reports do not generally focus on or provide precise descriptions of individual interrogation techniques. Nor do the reports discuss in any detail the contexts in which the techniques are used. From what we glean from the reports, however, it appears that the condemned techniques are often part of a course of conduct that involves techniques and is undertaken in ways that bear no resemblance to the CIA interrogation program. Much of the condemned conduct goes far beyond the CIA techniques and would almost certainly constitute torture under United States law. *See, e.g.*, Egypt (discussing "suspending victims from a ceiling or doorframe with feet just touching the floor" and "beating victims [with various objects]"); Syria (discussing finger crushing and severe beatings); Pakistan (beatings, burning with cigarettes, electric shock); Uzbekistan (electric shock, rape, sexual abuse, beatings). The condemned conduct, moreover, is often undertaken for reasons totally unlike the CIA's. For example, Indonesia security forces apparently use their techniques in order to obtain confessions, to punish, and to extort money. Egypt "employ[s] torture to extract information, coerce opposition figures to cease their political activities, and to deter others from similar activities." There is no indication that techniques are

[30] We recognize that as a matter of diplomacy, the United States may for various reasons in various circumstances call another nation to account for practices that may in some respects resemble conduct in which the United States might in some circumstances engage, covertly or otherwise. Diplomatic relations with regard to foreign countries are not reliable evidence of United States executive practice and thus may be of only limited relevance here.

used only as necessary to protect against grave terrorist threats or for any similarly vital government interests (or indeed for any legitimate government interest). On the contrary, much of the alleged abuses discussed in the reports appears to involve either the indiscriminate use of force, *see, e.g.*, Kenya, or the targeting of critics of the government, *see, e.g.*, Liberia, Rwanda. And there is certainly no indication that these countries apply careful screening procedures, medical monitoring, or any of the other safeguards required by the CIA interrogation program.

A United States foreign relations tradition of condemning torture, the indiscriminate use of force, the use of force against the government's political opponents, or the use of force to obtain confessions in ordinary criminal cases says little about the propriety of the CIA's interrogation practices. The CIA's careful screening procedures are designed to ensure that enhanced techniques are used in the relatively few interrogations of terrorists who are believed to possess vital, actionable intelligence that might avert an attack against the United States or its interests. The CIA uses enhanced techniques only to the extent reasonably believed necessary to obtain the information and takes great care to avoid inflicting severe pain or suffering or any lasting or unnecessary harm. In short, the CIA program is designed to subject detainees to no more duress than is justified by the Government's interest in protecting the United States from further terrorist attacks. In these essential respects, it differs from the conduct condemned in the State Department reports.

SERE Training. There is also evidence that use of these techniques is in some circumstances consistent with executive tradition and practice. Each of the CIA's enhanced interrogation techniques has been adapted from military SERE training, where the techniques have long been used on our own troops. *See Techniques* at 6; *IG Report* at 13-14. In some instances, the CIA uses a milder form of the technique than SERE. Water dousing, as done in SERE training, involves complete immersion in water that may be below 40°F. *See Techniques* at 10. This aspect of SERE training is done outside with ambient air temperatures as low as 10°F. *See id.* In the CIA technique, by contrast, the detainee is splashed with water that is never below 41°F and is usually warmer. *See id.* Further, ambient air temperatures are never below 64°F. *See id.* Other techniques, however, are undeniably more extreme as applied in the CIA interrogation program. Most notably, the waterboard is used quite sparingly in SERE training—at most two times on a trainee for at most 40 seconds each time. *See id.* at 13, 42. Although the CIA program authorizes waterboard use only in narrow circumstances (to date, the CIA has used the waterboard on only three detainees), where authorized, it may be used for two "sessions" per day of up to two hours. During a session, water may be applied up to six times for ten seconds or longer (but never more than 40 seconds). In a 24-hour period, a detainee may be subjected to up to twelve minutes of water application. *See id.* at 42. Additionally, the waterboard may be used on as many as five days during a 30-day approval period. *See August 19[redacted] Letter* at 1-2. The CIA used the waterboard "at least 83 times during August 2002" in the interrogation of Zubaydah, *IG Report* at 90, and 183 times during March 2003 in the interrogation of KSM, *see id.* at 91.

In addition, as we have explained before:

> Individuals undergoing SERE training are obviously in a very different situation from detainees undergoing interrogation; SERE trainees know it is part of a

training program, not a real-life interrogation regime, they presumably know it will last only a short time, and they presumably have assurances that they will not be significantly harmed by the training.

Techniques at 6. On the other hand, the interrogation program we consider here furthers the paramount interest of the United States in the security of the Nation more immediately and directly than SERE training, which seeks to reduce the possibility that United States military personnel might reveal information that could harm the national security in the event they are captured. Again, analysis of the due process question must pay careful attention to these differences. But we can draw at least one conclusion from the existence of SERE training. Use of the techniques involved in the CIA's interrogation program (or at least the similar techniques from which these have been adapted) cannot be considered to be *categorically* inconsistent with "traditional executive behavior" and "contemporary practice" regardless of context.[31] It follows that use of these techniques will not shock the conscience in at least some circumstances. We believe that such circumstances exist here, where the techniques are used against unlawful combatants who deliberately and secretly attack civilians in an untraditional armed conflict in which intelligence is difficult or impossible to collect by other means and is essential to the protection of the United States and its interests, where the techniques are used only when necessary and only in the interrogations of key terrorist leaders reasonably thought to have actionable intelligence, and where every effort is made to minimize unnecessary suffering and to avoid inflicting significant or lasting harm.

Accordingly, we conclude that, in light of "an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them," the use of the enhanced interrogation techniques in the CIA interrogation program as we understand it, does not constitute government behavior that "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 847 n.8.

C.

For the reasons stated, we conclude that the CIA interrogation techniques, with their careful screening procedures and medical monitoring, do not "shock the conscience." Given the relative paucity of Supreme Court precedent applying this test at all, let alone in anything resembling this setting, as well as the context-specific, fact-dependent, and somewhat subjective nature of the inquiry, however, we cannot predict with confidence that a court would agree with our conclusion. We believe, however, that the question whether the CIA's enhanced interrogation techniques violate the substantive standard of United States obligations under Article 16 is unlikely to be subject to judicial inquiry.

As discussed above, Article 16 imposes no legal obligations on the United States that implicate the CIA interrogation program in view of the language of Article 16 itself and

[31] In addition, the fact that individuals voluntarily undergo the techniques in SERE training is probative. *See Breithaupt v. Abram*, 352 U.S. 432, 436-37 (1957) (noting that people regularly voluntarily allow their blood to be drawn and concluding that involuntary blood testing does not "shock the conscience").

independently, the Senate's reservation. But even if this were less clear (indeed, even if it were false), Article 16 itself has no domestic legal effect because the Senate attached a non-self-execution declaration to its resolution of ratification. *See* Cong. Rec. 36,198 (1990) ("the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing"). It is well settled that non-self-executing treaty provisions "can only be enforced pursuant to legislation to carry them into effect." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *see also Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) ("A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, . . . but is carried into execution by the sovereign power of the respective parties to the instrument."). One implication of the fact that Article 16 is non-self-executing is that, with respect to Article 16, "the courts have nothing to do and can give no redress." *Head Money Cases*, 112 U.S. 580, 598 (1884). As one court recently explained in the context of the CAT itself, "Treaties that are not self-executing do not create judicially-enforceable rights unless they are first given effect by implementing legislation." *Auguste v. Ridge*, 395 F.3d 123, 132 n.7 (3d Cir. 2005) (citations omitted). Because (with perhaps one narrow exception[32]) Article 16 has not been legislatively implemented, the interpretation of its substantive standard is unlikely to be subject to judicial inquiry.[33]

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Based on CIA assurances, we understand that the CIA interrogation program is not conducted in the United States or "territory under [United States] jurisdiction," and that it is not authorized for use against United States persons. Accordingly, we conclude that the program does not implicate Article 16. We also conclude that the CIA interrogation program, subject to its careful screening, limits, and medical monitoring, would not violate the substantive standards

[32] As noted above, Section 1031 of Public Law 109-13 provides that "[n]one of the funds appropriated or otherwise made available by this Act shall be obligated or expended to subject any person in the custody or under the physical control of the United States to . . . cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States." To the extent this appropriations rider implements Article 16, it creates a narrow domestic law obligation not to expend funds appropriated under Public Law 109-13 for conduct that violates Article 16. This appropriations rider, however, is unlikely to result in judicial interpretation of Article 16's substantive standards since it does not create a private right of action. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."); *Resident Council of Allen Parkway Vill. v. Dep't of Hous. & Urban Dev.*, 980 F.2d 1043, 1052 (5th Cir. 1993) ("courts have been reluctant to infer congressional intent to create private rights under appropriations measures") (citing *California v. Sierra Club*, 451 U.S. 287 (1981)).

It is possible that a court could address the scope of Article 16 if a prosecution were brought under the Antideficiency Act, 31 U.S.C. § 1341 (2000), for a violation of section 1031's spending restriction. Section 1341(a)(1)(A) of title 31 provides that officers or employees of the United States may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." "[K]nowing[] and willful[] violati[ons]" of section 1341(a) are subject to criminal penalties. *Id.* § 1350.

[33] Although the interpretation of Article 16 is unlikely to be subject to judicial inquiry, it is conceivable that a court might attempt to address substantive questions under the Fifth Amendment if, for example, the United States sought a criminal conviction of a high value detainee in an Article III court in the United States using evidence that had been obtained from the detainee through the use of enhanced interrogation techniques.

applicable to the United States under Article 16 even if those standards extended to the CIA interrogation program. Given the paucity of relevant precedent and the subjective nature of the inquiry, however, we cannot predict with confidence whether a court would agree with this conclusion, though, for the reasons explained, the question is unlikely to be subject to judicial inquiry.

Please let us know if we may be of further assistance.

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