(U) A claim by an individual of the defense of another would be further supported by the fact that in this case, the nation itself is under attack and has the right to self-defense. This fact can bolster and support an individual claim of self-defense in a prosecution, according to the Supreme Court in *In re Neagle*, 135 U.S. 1 (1890). In that case, the State of California arrested and held deputy U.S. Marshal Neagle for shooting and killing the assailant of Supreme Court Justice Field. In granting the writ of habeas corpus for Neagle's release, the Supreme Court did not rely alone upon the marshal's right to defend another or his right to self-defense. Rather, the Court found that Neagle, as an agent of the United States and of the executive branch, was justified in the killing because in protecting Justice Field, he was acting pursuant to the executive branch's inherent constitutional authority to protect the United States government. *Id.* at 67 ("We cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death. That authority derives, according to the Court, from the President's power under Article II to take care that the laws are faithfully executed. In other words, Neagle as a federal officer not only could raise self-defense or defense of another, but also could defend his actions on the ground that he was implementing the Executive Branch's authority to protect the United States government.

(U) If the right to defend the national government can be raised as a defense in an individual prosecution as *Neagle* suggests, then a government defendant, acting in his official capacity, should be able to argue that any conduct that arguably violated a criminal prohibition was undertaken pursuant to more than just individual self-defense or defense of another. In addition, the defendant could claim that he was fulfilling the Executive Branch's authority to protect the federal government, and the nation, from attack. The September 11 attacks have already triggered that authority, as recognized both under domestic and international law. Following the example of *In re Neagle*, we conclude that a government defendant may also argue that his conduct of an interrogation properly authorized, is justified on the basis of protecting the nation from attack.

(U) There can be little doubt that the nation's right to self-defense has been triggered under our law. The Constitution announces that one of its purposes is "to provide for the common defense." U.S. Const., Preamble. Article I, § 8 declares that Congress is to exercise its powers to "provide for the common defense". *See also* 2 Pub. Papers of Ronald Reagan 920, 921 1988-89) (right to self-defense recognized by Article 51 of the U.N. Charter). The President has particular responsibility and power to take steps to defend the nation and its people. *In re Neagle*, 135 U.S at 64. *See also* U.S. Const., art. IV, § 4 ("The United States shall ...protect [each of the States] against Invasion"). As Commander-in-Chief and Chief Executive, he may use the Armed Forces to protect the nation and its people. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). And he may employ secret agents to aid in his work as Commander-in-Chief. *Totten v. United States*, 92 U.S. 105, 106 (1876). As the Supreme Court observed in *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), in response to an armed attack on the United States "the President is not only authorized but bound to resist force by force ...without waiting for any special legislative authority." *Id.* at 668. The September 11 events were a direct attack on the United States, and as we have explained

above, the President has authorized the use of military force with the support of Congress.[24]

(U) As DOJ has made clear in opinions involving the war on al Qaida, the nation's right to self-defense has been triggered by the events of September 11. If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate criminal prohibition, he would be doing so in order to prevent further attacks on the United States by the al Qaida terrorist network. In that case, DOJ believes that he could argue that the executive branch's constitutional authority to protect the nation from attack justified his actions. This national and international version of the right to self-defense could supplement and bolster the government defendant's individual right.

d. Law Enforcement Actions

(U) Use of force in military law enforcement is authorized for (1) self-defense and defense of others against a hostile person when in imminent danger of death or serious bodily harm *by the hostile person*; (2) to prevent the actual theft or sabotage of assets vital to national security; (3) to prevent the actual theft or sabotage of resources that are inherently dangerous to others; (4) to prevent the commission of a serious crime that involves imminent danger of death or serious bodily harm; (5) to prevent the destruction of vital public utilities or similar critical infrastructure; (6) for apprehension; and (7) to prevent escape. (DODD 5210.56, 1 Nov 2001). These justifications contemplate the use of force against a person who has committed, is committing, or is about to commit, a serious offense. This recognized concept that force used for such purposes is not unlawful could be argued to apply, at least by analogy, to the use of force against a detainee to extract intelligence to prevent a serious and imminent terrorist incident. However, we are unaware of any authority for the proposition. For an analogous discussion pertaining to the pending commission of a serious crime, see the "necessity" and "self-defense" discussions, *supra*.

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[24] (U) While the President's constitutional determination alone is sufficient to justify the nation's resort to self-defense, it also bears noting that the right to self-defense is further recognized under international law. Article 51 of the U.N. Charter declares that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security". The attacks of September 11, 2001, clearly constitute an armed attack against the United States, and indeed were the latest in a long history of al Qaida sponsored attacks against the United States. This conclusion was acknowledged by he United Nations Security Council on September 29, 2001, when it unanimously adopted Resolution 1373 explicitly "reaffirming the inherent right of individual and collective defense as recognized by the charter of the United Nations. This right of self-defense is a right to effective self-defense. In other words, the victim state has the right to use force against the aggressor who has initiated an "armed attack" until the threat has abated. The United States, through its military and intelligence personnel, has a right recognized by Article 51 to continue using force until such time as the threat posed by al Qaida and other terrorist groups connected to the September 11th attack is completely ended." Other treaties re-affirm the right of the United States to use force in its self-defense. See, e.g., Inter-American Treaty of Reciprocal Assistance, art. 3, Sept. 2, 1947, T.I.A.S. No. 1838, 21 U.N.T.S. 77 (Rio Treaty); North Atlantic Treaty, art. 5, Apr. 4,1949, 3 Stat. 2241, 34 U.N.T.S. 243.

e. Superior Orders

(U) Under both international law and U.S. law, an order to commit an obviously criminal act, such as the wanton killing of a noncombatant or the torture of a prisoner, is an *unlawful* order and will not relieve a subordinate of his responsibility to comply with the law of armed conflict.[25] Only if the individual did not know of the unlawfulness of an order, and he could not reasonably be expected under the circumstances to recognize the order as unlawful, will the defense of obedience of a superior order protect a subordinate from the consequences of violation of the law of armed conflict.[26]

(U) Under international law, the fact that a war crime is committed pursuant to the orders of a military or civilian superior does not by itself relieve the subordinate committing it from criminal responsibility under international law.[27] It may, however, be considered in mitigation of punishment.[28]

(U) For instance, the Charter of the International Military Tribunal at Nuremberg, art. 8, stated:

> The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[29]

(U) Similarly, the Statute for the International Tribunal for Yugoslavia, and the Statute for the International Criminal Tribunal for Rwanda provide (in articles 7(4) & 6(4), respectively) provide:

> The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in anticipation of punishment if the Tribunal determines that justice so requires.

(U) As to the general attitude taken by military tribunals toward the plea of superior orders, the following statement is representative:

> It cannot be questioned that acts done in time of war under the military authority of an enemy cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war. Implicit obedience to orders of superior officers

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[25] (U) *See* Section 6.1.4, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (NWP 1-14M 1997)

[26] *Id*

[27] Conversely, the International Criminal Court reflects the traditional view. Article 33 of the Rome Statute, recognizes the defense of superior orders: "1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

[28] *Id.*, at §6.2.5.5.1.

[29] *See* U.S. Naval War College, International Law Documents, at 1944-45, 255 (1946).

> is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a superior's orders be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the interior [*sic*] will be protected. But the general rule is the members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice.

The Hostage Case (*United States v. Wilhelm List et al.*), 11 TWC 1236.

(U) The International Military Tribunal at Nuremberg declared in its judgment that the test of responsibility for superior orders "is not the existence of the order, but whether moral choice was in fact possible."[30]

(U) Domestically, the UCMJ discusses the defense of superior order in The Manual Courts-Martial, which provides in R.C.M. 916(d), MCM 2002:

> It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful. An act performed pursuant to a lawful order is justified. An act performed pursuant to an unlawful order is excused unless the accused knew it to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.

Inference of lawfulness. An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate.[31]

(U) In sum, the defense of superior orders will generally be available for U.S. Armed Forces personnel engaged in exceptional interrogations except where the conduct goes so far as to be patently unlawful.

[30] (U) 1 Trial of Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945- 1 October 1946, at 224 (1947), *excerpted in* U.S. Naval War College, International Law Documents, 1946-1947, at 260 (1948).

[31] (U) This inference does not apply to a patently illegal order, such as one that directs the commission of a crime. (Article 90, UCMJ).

4. Lack of DOJ Representation for DOD Personnel Charged with a Criminal Offense

(U) DOJ representation of a defendant is generally not available in federal criminal proceedings, even when the defendant's actions occur within the scope of federal employment.[32]

B. Federal Civil Statutes

1. 28 U.S.C. §1350

(U) 28 U.S.C. §1350 extends the jurisdiction of the U.S. District Courts to "*any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States*".[33] Section 1350 is a vehicle by which victims of torture and other human rights violations by their native government and its agents have sought judicial remedy for the wrongs they've suffered. However, all the decided cases we have found involve foreign nationals suing in U.S. District Courts for conduct by foreign actors/governments.[34] The District Court for the District of Columbia has determined that section 1350 actions, by the GTMO detainees, against the United States or its agents acting within the scope of employment fail. This is because (1) the United States has not waived sovereign immunity to such suits like those brought by the detainees, and (2) the *Eisentrager* doctrine barring habeas access also precludes other potential avenues of jurisdiction.[35] This of course leaves interrogators vulnerable in their individual capacity for conduct a court might find tortuous. Assuming a court would take jurisdiction over the matter and grant standing to the detainee[36], it is possible that this statute would provide an avenue of relief for actions of the United States or its agents found to violate customary international law. The application of international law, specifically that which might be considered custom, is discussed *supra* in Section IV at "International Considerations that May Affect Policy Determinations".

2. Torture Victims Protection Act (TVPA)

(U) In 1992, President Bush signed into law the Torture Victims Protection Act of 1991.[37] Appended to the U.S. Code as a note to section 1350, the TVPA specifically creates a cause of action for individuals (or their successors) who have been subjected to torture or extra-judicial killing by "an individual who, under actual or apparent authority,

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[32] (U) 28 CFR § 50.15 (a)(4)

[33] (U) 28 U.S.C. §1350, the Alien Tort Claim Act (ATCA).

[34] (U) See, for example, *Abebe-Jira v. Negewo*, No. 93-9133, United States Court of Appeals, Eleventh Circuit, Jan 10, 1996. In this case the 11th Circuit concluded, "the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law."

[35] (U) *Al Odah v. United States*, (D.D.C., 2002)

[36] (U) *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980) 885, note 18, "conduct of the type alleged here [torture] would be actionable under 42 U.S.C. § 1983, or undoubtedly the Constitution, if performed by a government official."

[37] (U) Pub. L. No. 102-256, 106 Stat. 73, 28 U.S.C § 1350 (note).

or color of law, *of any foreign nation* - (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extra-judicial killing shall, in a civil action, be liable for damages ...." (emphasis added)[38] It thus appears that the TVPA does not apply to the conduct of U.S. agents acting under the color of law.

C. Applicability of the United States Constitution

1. Applicability of the Constitution to Aliens Outside the United States

(U) Nonresident enemy aliens do not enjoy constitutional rights outside the sovereign territory of the United States.[39] The courts have held that unlawful combatants do not gain constitutional rights upon transfer to GTMO as unlawful combatants merely because the U.S. exercises extensive dominion and control over GTMO.[40] Moreover, because the courts have rejected the concept of "de facto sovereignty," constitutional rights apply to aliens only on sovereign U.S. territory. (See discussion under "Jurisdiction of Federal Courts", *infra*.)

(U) Although U.S. constitutional rights do not apply to aliens at GTMO, the U.S. criminal laws do apply to acts committed there by virtue of GTMO's status as within the special maritime and territorial jurisdiction.

2. The Constitution Defining U.S. Obligations Under International Law

(U) In the course of taking reservations to the Convention Against Torture and Other Cruel, and Inhuman or Degrading Treatment or Punishment, the United States determined that the Convention's prohibitions against cruel, inhuman or degrading treatment or punishment applied only to the extent that such conduct was prohibited by the Fifth, Eighth and Fourteenth Amendments to our Constitution.[41] Consequently, analysis of these amendments is significant in determining the extent to which the United States is bound by the Convention. It should be clear, however, that aliens held at GTMO do not have constitutional rights under the 5th Amendment's Due Process clause

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[38] (U) The definition of torture used in PL 102-256 is: "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to lawful sanctions) whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind." This is similar, but broader, than the definition in the Torture Statute. The definition of mental pain and suffering is the same as in the Torture Statute.

[39] (U) *Eisentrager* at 764.

[40] (U) *Al Odah v. United States*, (D.D.C., 2002).

[41] (U) Articles of ratification, 21 Oct 1994: "I. The Senate's advice and consent is subject to the following reservations: (1) That the United States considers itself 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." Available at the UN documents site: http://193.194.138.190/html/menu3/treaty12_asp.htm.

or the 8th Amendment. See, *Johnson v. Eisenberger*, 339 U.S. 763 (1950) and *Verdugo-Urquidez*, 494 U.S. 259 (1990).

a. Eighth Amendment

(U) "An examination of the history of the Amendment and the decisions of this [Supreme] Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes."[42] The import of this holding is that, assuming a detainee could establish standing to challenge his treatment, the claim would not lie under the 8th Amendment. Accordingly, it does not appear detainees could successfully pursue a claim regarding their pre-conviction treatment under the Eight Amendment.

(U) The standards of the Eighth Amendment are relevant, however, due to the U.S. Reservation to the Torture Convention's definition of cruel, inhuman, and degrading treatment. Under "cruel and unusual punishment" jurisprudence, there are two lines of analysis: (1) conditions of confinement, and (2) excessive force. As a general matter, the excessive force analysis applies to the official use of physical force, often in situations in which an inmate has attacked another inmate or a guard whereas the conditions of confinement analysis applies to such things as administrative segregation. Under the excessive force analysis, "a prisoner alleging excessive force must demonstrate that the defendant acted 'maliciously and sadistically to cause harm.'" *Porter* v. *Nussle*, 534 U.S. 516, 528 (2002) (quoting *Hudson* v. *McMillan*, 503 U.S.1, at 7). Excessive force requires the unnecessary and wanton infliction of pain. *Whitney v. Albers*, 475 U.S. 312, 319 (1986).

(U) A condition of confinement is not "cruel and unusual" unless it (1) is "sufficiently serious" to implicate constitutional protection, *id.* at 347, and (2) reflects "deliberate indifference" to the prisoner's health or safety, *Farmer v. Brennan* 511 U.S. 825, 834 (1994). The first element is objective, and inquires whether the challenged condition is cruel and unusual. The second, so-called "subjective" element requires examination of the actor's intent and inquires whether the challenged condition is imposed as punishment. *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) ("The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.").

(U) The Supreme Court has noted that "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Rhodes*, 452 U.S. at 146 (citation omitted). *See also Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (stating that the Eighth Amendment embodies

[42] (U) *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). In *Ingraham*, a case about corporal punishment in a public junior high school, the Court analyzed the claim under the 14th amendment's Due Process clause, concluding that the conduct did not violate the 14th amendment, even though it involved up to 10 whacks with a wooden paddle.

"broad and idealistic concepts of dignity, civilized standards, humanity, and decency"). Nevertheless, certain guidelines emerge from the Supreme Court's jurisprudence.

(U) The Court has established that "only those deprivations denying 'the minimal civilized measures of life's necessities' sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson*, 501 U.S. at 298, *quoting Rhodes*, 452 U.S. at 347. It is not enough *for* a prisoner to show that he has been subjected to conditions that are merely "restrictive and even harsh," as such conditions are simply "part of the penalty that criminal offenders pay *for* their offenses against society." *Rhodes*, 452 U.S. at 347. *See also Wilson* at 349 ("the Constitution does not mandate comfortable prisons"). Rather, a prisoner must show that he has suffered a "serious deprivation of basic human needs," *id.* at 347, such as "essential food, medical care, or sanitation," *Id.* at 348. *See also Wilson*, 501 U.S. at 304 (requiring "the deprivation of a single, identifiable human need such as food, warmth, or exercise"). "The Amendment also imposes [the duty on officials to] provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates." *Farmer*, 511 U.S. at 832 (citations omitted). The Court has also articulated an alternative test inquiring whether an inmate was exposed to "a substantial risk or serious harm." *Id* at 837. *See also DeSpain v.. Uphoff*, 264 F.3d 965, 971 (10th Cir. 2001) ("In order to satisfy the [objective] requirement, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.").

(U) The various conditions of confinement are not to be assessed under a totality of the circumstances approach. In *Wilson* v. *Seiter*, 501 U.S. 294 (1991), the Supreme Court expressly rejected the contention that "each condition must be considered as part of the overall conditions challenged." *Id.* at 304 (internal quotation marks and citation omitted). Instead the Court concluded that "Some conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single identifiable human need such as food, warmth, or exercise--for example, a low cell temperature at night combined with a failure to issue blankets." *Id.* at 304. As the Court further explained, "Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." *Id.* at 305.

(U) To demonstrate deliberate indifference, a prisoner must demonstrate "that the official was subjectively aware of that risk". *Farmer* v. *Brennan* 511 U.S. 125 (1994). As the Supreme Court further explained:

> We hold... that a prison official cannot be found liable under the Eighth Amendment for denying any inmate humane conditions of confinement unless the official knows of and regards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference can be drawn that a substantial risk of serious harm exists and he must also draw the inference.

that "[t]his punitive treatment amount[ed] to [the] gratuitous infliction of 'wanton and unnecessary' pain that our precedent clearly prohibits." *Id.* at 2515. Thus, the necessity of the governmental action bears upon both the conditions of confinement analysis as well as the excessive force analysis.

(U) The government interest here is of the highest magnitude. The typical prison case, the protection of other inmates or officers, the protection of the inmate alleged to have suffered the cruel and unusual punishment, or even the maintenance of order in the prison provide valid government interests for various deprivations. *See .e.g.,Anderson v. Nosser*, 438 F.2d 183, 193 (5th Cir. 1971) ("protect[ing] inmates from self-inflicted injury, protect[ing] the general prison population and personnel from violate acts on his part, prevent[ing] escape" are all legitimate penological interests that would permit the imposition of solitary confinement); *McMahon* v. *Beard*, 583 F.2d 172, 175 (5th Cir. 1978) (prevention if inmate suicide is a legitimate interest). If the protection of one person or even prison administration can be deemed to be valid governmental interests in such cases frequently permitted deprivations, it follows *a fortiori* that the interest of the United States here--obtaining intelligence vital to the protection of untold thousands of American citizens--can be no less valid. To be sure, no court has encountered the precise circumstances hereunder Eighth Amendment jurisprudence. Nonetheless, it can be forcefully argued that there can be no more compelling government interest than that which is presented here. *See Hope v. Pelzer*, 122 S. Ct. 2508 (2002) ("The unnecessary and wanton infliction of pain ...constitutes cruel and unusual punishment forbidden by the Eighth Amendment. We have said that among unnecessary and wanton inflictions of pain are those that are totally without penological justification.")

b. Fifth Amendment and Fourteenth Amendment[48]

(U) "It is now the settled doctrine ... that the Due Process Clause embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just."[49] Due process is violated if a practice or rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".[50]

(U) Standing by itself, the phrase "due process" would seem to refer solely and simply to procedure, to process in court, and therefore to be so limited that "due process of law" would be what the legislative branch enacted it to be. But that is not the interpretation which has been placed on the term. "It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law'

[48] (U) Because the Due Process considerations under the 5th and 14th amendments are the same for our purposes, this analysis considers them together.
[49] (U) *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Justice Frankfurter dissenting).
[50] (U) *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

Farmer v. *Brennan* 511 U.S. 825, 837 (1994). This standard requires greater culpability than mere negligence. *See Farmer* v. *Brennan*, 511 U.S. 825, 837 (1994); *Wilson v. Seiter*, 501 U.S. 294, 302 (1991) ("mere negligence would satisfy neither [the *Whitley* standard of malicious and sadistic infliction] nor the more lenient deliberate indifference standard") (internal quotation marks omitted).

(U) The second line of cases considers the use of force against prisoners. The situation often arises in cases addressing the use of force while quelling prison disturbances. In cases involving the excessive use of force the central question is whether the force was applied with good intentions in an attempt to restore order or maliciously and sadistically with the purpose of causing harm.[43] Malicious and sadistic use of force always violates contemporary standards of decency and would constitute cruel and unusual punishment.[44] The courts apply a subjective test when examining intent of the official. In determining whether a correctional officer has used excessive force in violation of the Eighth Amendment, courts look to several factors including: (1) "the need for the application of force"; (2) "the relationship between the need and the amount of force that was used"; (3) "the extent of injury inflicted"; (4) "the extent of the threat to the safety of staff and inmates, as reasonably perceived by responsible officials on the basis of the facts known to them"; and (5) "any efforts made to temper the severity of a forceful response."[45] Great deference is given to the prison official in the carrying out of his duties.[46]

(U) One of the Supreme Court's most recent opinions on conditions of confinement – *Hope v. Pelzer*, 122 S.Ct. 2508 (2002) – illustrates the Court's focus on the necessity of the actions undertaken in response to a disturbance in determining the officer's subjective state of mind.[47] In *Hope*, following an "exchange of vulgar remarks" between the inmate Hope and an officer, the two got into a "wrestling match". *Id* at 2512. Additional officers intervened and restrained Hope. See *id*. These officers then took Hope back to prison. Once there, they required him to take off his shirt and then attached him to the hitching post, where he remained in the sun for the next seven hours. See *id*. at 2512-13. During this time, Hope received no bathroom breaks. He was given water only once or twice and at least one guard taunted him about being thirsty. See *id*. at 2513. The Supreme Court concluded that the facts Hope alleged stated an "obvious" Eighth Amendment violation. *Id* at 2514. The obviousness of this violation stemmed from the utter lack of necessity for the actions the guards undertook. The Court emphasized that "any safety concerns" arising from the scuffle between Hope and the officer "had long since abated by the time [Hope] was attached to the hitching post" and that there was a "clear lack of an emergency situation". *Id*. As a result, the Court found

[43] (U) *Whitley v. Albers*, 475 U.S. (1986)
[44] (U) *Hudson v. McMillian*, 503 U.S. 1, 9 (1992)
[45] (U) *Whitley* at 321.
[46] (U) *Whitley v. Albers*, 475 U.S. (1986).
[47] (U) Although the officers' actions in Hope were undertaken in response to a scuffle between an inmate and a guard, the case is more properly thought of a "conditions of confinement" case rather than an "excessive force" case. By examining the officers' actions through the "deliberate indifference standard" the Court analyzed it as a "conditions of confinement" case. The deliberate indifference standard is inapplicable to claims of excessive force.

by its mere will."[51] With this viewpoint, the Supreme Court has carved out a role for the courts to judge the legislative and executive acts for their effect on the rights of the people.

(U) All persons within the territory of the United States are entitled to the protections of due process, including corporations, aliens, and presumptively citizens seeking readmission to the United States. It is effective in the District of Columbia and in territories which are part of the United States, but does not apply of its own force to unincorporated territories. But, it does not reach enemy alien belligerents engaged in hostilities against the United States and/or tried by military tribunals outside the territorial jurisdiction of the United States.[52] The *Eisentrager* doctrine works to prevent access by enemy belligerents, captured and held abroad, to U.S. courts. Further, in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Supreme Court held that aliens outside the United States did not have Fourth Amendment rights against the U.S. government. Indeed, in that case, the Court observed that extension of constitutional rights to aliens outside of the United States would interfere with the military operations against the nation's enemies.

(U) Even if a Court were to find mistakenly that unlawful combatants at GTMO did have constitutional rights, it is unlikely that due process would pose any standards beyond those required by the Eighth Amendment. In 1972 the Supreme Court held that "[f]ederal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' which include prisoners..."[53] The Supreme Court's review of state criminal justice systems under the due process clause has never been subject to precise statement of metes and bounds. In each case the Court asks whether the challenged practice or policy violates "a fundamental principle of liberty and justice which inheres in the very idea of a free government and is the inalienable right of a citizen of such government".[54] The Court has generally treated challenges to prison conditions as a whole under the cruel and unusual punishments clause of the Eighth Amendment, rather than the Fifth Amendment's Due Process Clause, and challenges to particular incidents and practices under the due process clause as well as under more specific provisions, such as the First Amendment speech and religion clauses.[55]

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[51] (U) *Murray's Lessee v. Hoboken Land and Improvement Co.* 59 U.S. (18 How.) 272, 276 (1856).

[52] (U) *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946). Justices Rutledge and Murphy in the latter case argued that the due process clause applies to every human being, including enemy belligerents.

[53] (U) *Cruz v. Beto*, 405 U.S. 319, 321 (1972)

[54] (U) *Twining v. New Jersey*, 211 U.S. 78, 106 (1908)

[55] (U) By way of example, the courts have recognized several rights of prisoners. Prisoners have a right to be free of racial segregation in prisons, except for the necessities of prison security and discipline. *Lee v. Washington*, 390 U.S. 333 (1968). They have the right to petition for redress of grievances, which includes access to the courts for purposes of presenting their complaints, *Ex parte Hull*, 312 U.S. 546 (1941); *White v. Ragen*, 324 U.S. 760 (1945). Prisoners must have reasonable access to a law library or to persons trained in the law, *Younger v. Gilmore*, 404 U.S. 15 (1971); *Bounds v. Smith*, 430 U.S. 817 (1978) and to bring actions in federal courts to recover for damages wrongfully done them by prison administrators. *Haines v. Kerner*, 404 U.S. 519 (1972); *Preiser v. Rodriguez*, 411 U.S. 475 (1973). And they have a right, circumscribed by legitimate prison administration considerations, to fair and regular treatment during their incarceration.

(U) On the other hand, some conduct is so egregious that there is no justification. In *Rochin v. California*, the Supreme Court found that the State's actions in unlawfully entering the defendant's room, grappling with him to prevent him from swallowing the evidence, and then transporting him to the hospital to have his stomach pumped "shocked the conscience." The Court said of the police methods "they are methods too close to the rack and the screw to permit of constitutional differentiation".[61] Even though *Rochin* is about evidence seizure, the rationale for judicial intervention is the infringement of due process. Explaining the importance of due process the Court said "involuntary verbal confessions...are inadmissible under the Due Process Clause even [if true]... Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct ...would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society."[62] Only interrogation techniques that "shock the conscience" would not be analyzed under the standard due process balancing test.

(U) The Fifth Amendment standards are also relevant due to the U.S. Reservations to the Torture Convention's definition of cruel, inhuman, and degrading treatment.

(U) Under the Fifth Amendment right to Due Process, substantive due process protects an individual from "the exercise of power without any reasonable justification in the service of any legitimate governmental objective." *County of Sacremento v. Lewis*, 523 U.S. 833, 846 (1998). Under substantive due process "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id* at 846 (internal quotation marks omitted). That conduct must "shock the conscience." *See generally id; Rochin v. California*, 342 U.S. 165 (1952).[63] By contrast to deprivations in procedural due process, which can occur so long as the government affords adequate processes, government actions that "shock the conscience" are prohibited irrespective of the procedures the government may employ in undertaking those actions. *See generally Rochin v. California*, 342 U.S. 164 (1952).

(U) To shock the conscience, the conduct at issue must involve more than mere negligence. *See County of Sacramento*, 523 U.S. at 849. *See also Daniel v. Williams*, 474 U.S. 327 (1986) ("Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property.") (collecting cases). Instead, "[I]t is...behavior on the other end of the culpability spectrum that would most probably support a substantive due process claim:

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[61] (U) *Rochin v. California*, 342 U.S. 165, 172 (1952).
[62] (U) Id. at 174.
[63] (U) In the seminal case of *Rochin v California*, 342 U.S. 165 (1952), the police had some information that the defendant was selling drugs. Three officers went to and entered the defendant's home without a warrant and forced open the door to defendant's bedroom. Upon opening the door, the officers saw two pills and asked the defendant about them. The defendant promptly put them in his mouth. The officers "jumped upon him and attempted to extract the capsules." 342 U.S. at 166. The police tried to pull the pills out of his mouth but despite considerable struggle the defendant swallowed them. The police then took the defendant to a hospital where a doctor forced an emetic solution into the defendant's stomach by sticking a tube down his throat and into his stomach, which cause the defendant to vomit up the pills. The pills did in fact contain morphine. *See id.* The Court found that the actions of the police officers "shocked the conscience" and therefore violated Rochin's due process rights. *Id* at 170.

conduct 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.* In some circumstances, however, recklessness or gross negligence may suffice. *See id.* The requisite level of culpability is ultimately "not subject to mechanical application in unfamiliar territory." *Id.* at 850. As the Court explained: "Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Id.* Nonetheless, the Court opined that as a general matter such a standard would be appropriate where there is a real possibility for actual deliberation as opposed to those circumstances, such as responding to a prison riot, where quick decisions must be made and a heightened level of culpability is thus more appropriate. *See id.* at 851-52

(U) This standard appears to be an evolving one as the Court's most recent opinion regarding this standard emphasized that the conscience shocked was the "contemporary conscience." *County of Sacramento,* 523 U.S. at 847 n.8 (emphasis added). The court explained that while a judgment of what shocks the conscience "may be informed by a history of liberty protection, [] it necessarily reflects a traditional understanding of executive behavior, of contemporary practice, and of the standards of blame generally applied to them." *Id.* Despite the evolving nature of the standard, the standard is objective rather than subjective. The *Rochin* Court cautioned that although "the gloss has ... has not been fixed" as to what substantive due process is, judges "may not drawn on "their" merely personal and private notions and disregard the limits that bind judges in their judicial function... [T]hese limits are derived from considerations that are fused in the whole nature of our judicial process." *Id.* At 170. *United States v. Lovasco,* 431 U.S. 783 (1973) (reaffirming that the test is objective rather than subjective). As the Court explained, the conduct issue must "do more than offend some fastidious squeamishness or private sentimentalism' in order to violate due process. *Rochin,* 342 U.S. 165, 172.

(U) The Supreme Court also clarified in *Ingraham v. Wright,* 430 U.S. 651 (1977), that under substantive due process, "[t]there is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." *Id.* at 674. And as Fourth Circuit has noted, it is a "principle...inherent in the Eighth and the Fourteenth Amendments" that "[n]ot ...every malevolent touch by a prison guard gives rise to a federal cause of action". *See Johnson v. Glick,* 481 F.2d at 1033 ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights")." *Riley v. Dorton,* 115 F.3d 1159, 1167 (4th Cir. 1997) (quoting *Hudson,* 503 U.S. at 9). Instead, the [shock-the-conscience]... inquiry....[is] whether the force applied caused injury so severe, and was so inspired by malice or sadism...that it amounted to a brutal and inhumane abuse of official power literally socking to the conscience." *Webb v. McCullough,* 828 F.2d 1151, 1158 (6th Cir. 1987). Examples of physical brutality that "shock the conscience" include: rape of plaintiff by uniformed officer, see *Jones v. Wellham,* 104 F.3d 620 (4th Cir. 1997); police officer struck plaintiff in retaliation for photographing police officer, see *Shillinford v. Holmes,* 634 F.2d 263 (5th Cir. 1981); police officer shot a fleeing suspect's legs without any

probable cause other than the suspect's running and failing to stop, see *Aldridge v. Mullins*, 377 F. Supp. 850 (M.D. Tenn. 1972) aff'd, 474 1189 (6th Cir. 1973). Moreover, beating or sufficiently threatening someone during the course of an interrogation can constitute conscience-shocking behavior. See *Gray v. Spillman*, 925 F.2d 90, 91 (4th Cir. 1991) (plaintiff was beaten and threatened with further beating if he did not confess). By contrast, for example, actions such as verbal insults and an angry slap of "medium force" did not constitute behavior that "shocked the conscience." See *Riley v. Dorton*, 115 F.3d 1159, 1168 n.4 (4th Cir. 1997) (finding claims that such behavior shocked the conscience "meritless"). We note, however, that courts have distinguished between the use of force in interrogations and the use of force in the prison or arrest settings. The Fifth Circuit has held that "the use of physical violence against a person who is in the presence of the police for custodial interrogation, who poses no threat to others, and who does not otherwise initiate action which would indicate to a reasonably prudent police officer that the use of force is justified, is a constitutional violation." *Ware v. Reed*, 709 F.2d 345, 351 (5TH Cir. 1983).

(U) Physical brutality is not the only conduct that may meet the shock-the-conscience standard. In *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (en banc), the Ninth Circuit held that certain psychologically-coercive interrogation techniques could constitute a violation of substantive due process. The interrogators techniques were "designed to instill stress, hopelessness, and fear, and to break [the suspect's] resistance." *Id.* at 1229. The officers planned to ignore any request for a lawyer and to ignore the suspect's right to remain silent, with the express purpose that any statements he might offer would help keep him from testifying in his own defense. *See id.* at 1249. It was this express purpose that the court found to be the "aggravating factor" leading to its conclusion that the conduct of the police "shocked the conscience." *Id.* at 1249. The court reasoned that while "it is a legitimate purpose of police investigation to gather evidence and muster information that will surround a guilty defendant and make it difficult if not impossible for him to escape justice [,]" when the methods chosen to gather evidence and information are deliberately unlawful and flout the Constitution, the legitimacy is lost." *Id.* at 1250. In *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989), the Seventh Circuit found that severe mental distress inflicted on a suspect could be a basis for a substantive due process claim. *See id.* at 195. *See also Rhrodes v. Robinson*, 612 F.2d 766, 771 (3d Cir. 1979) (claim of emotional harm could be the basis of a substantive due process claim). The *Wilkins* court found that under certain circumstances interrogating a suspect with gun at his head could violate those rights. *See* 872 F.2d at 195. Whether it would rise to the level of violation depended upon whether the plaintiff was able to show "misconduct that a reasonable person would find so beyond the norm of proper police procedure as to shock the conscience, and that it is, calculated to induce not merely momentary fear or anxiety, but severe mental suffering, in the plaintiff." *Id.* On the other hand, we note that merely deceiving the suspect does not shock the conscience, see, e.g., *United States v. Byram*, 145 F.3d 405 (1st Cir. 1998) (assuring defendant he was not in danger of prosecution did not shock the conscience) nor does the use of sympathy or friends as intermediaries, see, e.g., *United States v. Simtob*, 901 F.2d 799, 809 (9th Cir. 1990).

D. Jurisdiction of Federal Courts

1. Jurisdiction to Consider Constitutional Claims

(U) The federal habeas statute provides that courts may only grant the writ "within their respective jurisdictions". This has been interpreted to limit a court's subject matter jurisdiction over habeas cases to those in which a custodian lies within the jurisdiction. For U.S. citizens, habeas jurisdiction lies regardless of where the detention occurs. The habeas action must be brought in the district in which a custodian resides or, if all custodians are outside the United States, in the District of Columbia. For aliens, there is no habeas jurisdiction outside the sovereign territory of the United States.[64]

(U) As construed by the courts, habeas jurisdiction is coterminous with the reach of constitutional rights, although that result is a matter of statutory construction. Congress has the power to extend habeas jurisdiction beyond the reach of constitutional rights but may not place greater restrictions on it.

(U) In *Johnson v. Eisentrager*, the Supreme Court ruled that enemy aliens, captured on the field of battle abroad by the U.S. Armed Forces, tried abroad for war crimes, and incarcerated abroad do not have access to the U.S. courts[65] over a habeas petition filed by German nationals seized by U.S. soldiers in China. *Eisentrager* considered habeas corpus petitions by German soldiers captured during WWII in China supporting the Japanese, convicted by Military Commission sitting in China, and incarcerated in Germany and concluded that United States courts lacked jurisdiction.[66]

(U) Recently, unlawful combatants detained at Guantanamo Bay, Cuba (GTMO) have sought review in U.S. district court through the writ of habeas corpus, 28 U.S.C. § 2241.[67]

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[64] (U) *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[65] (U) *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950). "We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." With those words, the Supreme Court held that: "a nonresident enemy alien has no access to our courts in wartime." Currently, the D.C. Circuit is considering the appeal of several detainees at GTMO in which action the District Court denied their writ of habeas corpus challenging their detention. *Al Odah et al. v. United States*, Nos. 02-5251, 02-5284, and 02-5288 (D.C. Circ. 2002).

[66] (U) For a fuller discussion of Habeas Corpus law as it applies to Naval Base, Guantanamo Bay, *see* memorandum, LCDR F. Greg Bowman of 29 Jan 02, subj: CRIMINAL JURISDICTION AND ITS EFFECTS OF AVAILABILITY OF THE WRIT OF HABEAS CORPUS AT U.S. NAVAL BASE, GUANTANAMO BAY, CUBA (on file).

[67] (U) *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal.), affirmed in part and vacated in part, 310 F.3d 1153 (9th Cir. 2002); *Rasul v. Bush*, 215 F.2d 55 (D.D.C. 2002).

(U) Two courts have examined, and rejected, petitioners' claims that U.S. exclusive jurisdiction over GTMO results in a form of "de facto sovereignty" and, therefore, vests habeas jurisdiction in the federal courts.

2. Other Bases for Federal Jurisdiction

(U) In addition, one group of GTMO detainees has challenged conditions of confinement through the Alien Tort Claims Act (ATCA) and the Administrative Procedures Act (APA). The courts have declined to exercise jurisdiction on those theories in each case to date.[68] Petitioners in *Al Odah* attempted to circumvent the territorial limitations of habeas by bringing their action under the APA and ATCA. The district court found that, although petitioners did not seek release from custody, their suit challenging conditions of confinement was, nonetheless, required to be brought under habeas.

(U) The court also held, in the alternative, that it lacked jurisdiction even if petitioners were not barred by the exclusive nature of habeas actions. The ATCA provides the "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 18 U.S.C. § 1350. The ATCA, although it provides federal jurisdiction over private suits, does not waive sovereign immunity for a suit against the United States. The courts have held that the APA's waiver of sovereign immunity for nonmonetary damages can theoretically be used to maintain an ATCA action against the United States. The *Al Odah* Court, however, found that the APA's exemption for "military authority exercised in the field in time of war or in occupied territory" precluded the ATCA.

3. The Military Extraterritorial Jurisdiction Act

(U) The Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. § 3261 *et seq*, extends Federal criminal jurisdiction for serious Federal offenses committed outside the United States to civilian persons accompanying the Armed Forces (e.g., civilian employees and contractor employees), and to members of the Armed Forces who committed a criminal act while subject to the UCMJ but who are no longer are subject to the UCMJ or who committed the offense with a defendant not subject to the UCMJ. The standard is that if the conduct by the individual would "constitute an offense punishable by imprisonment for more than one year *if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States*." (emphasis added). In the absence of implementing regulations, the practical effect of MEJA is uncertain; however, MEJA remains Federal law.

E. The Uniform Code of Military Justice

(U) The Uniform Code of Military Justice (UCMJ) applies to United States Forces on active duty, at all times and in all places throughout the world. Members of the

[68] (U) The ACTA and APA theories, rejected in the District Court for D.C., are awaiting review in the D.C. Circuit at this time in the *Rasul* and *Al Odah* cases.

Reserve component and retired regular officers can, under certain circumstances, also be subject to the UCMJ, as can civilians accompanying the Armed Forces in time of war under certain circumstances.[69]

1. Offenses

(U) A number of UCMJ provisions potentially apply to service members involved in the interrogation and supervision of the interrogation of detainees. Most significant are the following:[70]

a. Cruelty, Oppression or Maltreatment, Art 93

(U) The elements of the offense are that the alleged victim was subject to the orders of the accused and that the accused was cruel toward, oppressed, or maltreated the victim. The cruelty, etc. need not be physical. Subject to the orders of, includes persons, subject to the UCMJ or not, who are by some reason of some duty are required to obey the lawful orders of the accused, even if not in the direct chain of command of the accused. "Cruel", "oppressed", and "maltreated" refer to unwarranted, harmful, abusive, rough or other unjustifiable treatment that, under all the circumstances, results in physical or mental pain or suffering and is unwarranted, unjustified and unnecessary for any lawful purpose. It is measured by an objective standard. MCM IV-25; MJB, Section 3-17-1.

b. Reckless Endangerment, Art 134

(U) The elements of the offense are that the accused engaged in wrongful conduct that was reckless or wanton and that the conduct was likely to produce death or grievous bodily harm. "[L]ikely to produce" means the natural or probable consequences of particular conduct. "[G]rievous bodily harm" includes injuries comparable to fractured or dislocated bones, serious damage to internal organs. MCM IV-119; MJB, Section 3-100A-1.

c. Assault, Art 128

(U) This article encompasses the following offenses:

(U) Simple assault – The elements are that the accused attempted or offered to do bodily harm to an individual and that such attempt or offer was done with unlawful force and violence. An act of force or violence is unlawful if done without legal justification or excuse and without the consent of the victim. The use of threatening words accompanied by a menacing act or gesture may constitute an assault. MCM IV-81; MJB, Section 3-54-1.

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[69] (U) Article 2 UCMJ; Rules for Courts-Martial, Rule 202, and Discussion.

[70] (U) The following are extracted from the Department of the Army Pamphlet 27-9, Military Judges' Benchbook (MJB), which summarizes the requirements of the Manual For Courts-Martial (MCM) and case law applicable to trials by courts martial.

(U) Assault consummated by a battery – An assault resulting in actual infliction of bodily harm is a battery. Bodily harm means any physical injury to or offensive touching, however slight. MCM IV-83; MJB, Section 3-54-1A

(U) Aggravated assault (use of a dangerous weapon, means or force) – In addition to the elements of an assault, this offense requires that the means or force attempted or offered was used in a manner likely to produce death or grievous bodily harm. Any object, regardless of its normal use, could become a means likely to inflict grievous bodily harm depending on the manner in which it is actually used. MCM IV-84; MJB, Section 3-54-8

(U) There are multiple instances in which authority and context permit touching – by police officers, prison guards, training NCOs, etc. – that would not be lawful under other circumstances. A central issue would be how clearly the limits of authority were defined and whether under the circumstances the individual exceeded the scope of that authority.

d. Involuntary Manslaughter, Art 119

(U) The elements of this offense are that acts or omissions constituting culpable negligence resulted in an unlawful killing. Culpable negligence contemplates a level of heedlessness in circumstances in which, when viewed in the light of human experience, might foreseeably result in death. MCM IV-64. Failure to assiduously follow protocols providing for the health and safety of detainees during interrogations of detainees could amount to such culpable negligence. MJB, Section 3-44-2.

e. Unpremeditated Murder, Art 118

(U) The relevant elements of the offense are that the person is dead, his death resulted from the act or failure to act of the accused, that the killing was unlawful, without legal justification, and at that time the accused had the intent to inflict great bodily harm upon the person. MCM IV-118, MJB, Section 3-43-2.

f. Disobedience of Orders, Art 92

(U) This offense is committed when the accused, having a duty to do so, fails to obey lawful orders or regulations. MCM IV-23; MJB, Section 3-16. The duty to obey may extend to treaties and statutes as well as regulations. The Convention against Torture and the general case law regarding cruel and unusual punishment may be relevant here as it is for Article 93. *See generally, Wilson v. Seiter*, 501 U.S. 294 (1991).

g. Dereliction of Duty, Art 92

(U) A dereliction occurs when an individual knew or should have known of certain prescribed duties and either willfully or through neglect was derelict in the performance of those duties. MCM IV-24; MJB, Section 3-16-4. Customs of the service

as well as statutes and treaties that have become the law of the land may create duties for purposes of this article.

h. Maiming, Art 124

(U) The elements of this offense are that the accused intentionally inflicted an injury on a person, and whether intended or not, that the injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished the person's physical vigor. MCM IV-77; MJB, Section 3-50-1.

2. Affirmative Defenses under the UCMJ (R.C.M. 916)

(U) In order for any use of force to be lawful, it must either be justified under the circumstances or an accepted affirmative defense is present to excuse the otherwise unlawful conduct. No case law was found that defines at what point force or violence becomes either lawful or unlawful during war. Each case is by its nature, dependent upon the factual circumstances surrounding the incident.

(U) Applying accepted rules for the law of armed conflict, the use of force is only authorized when there is a military purpose and the force used is no greater than necessary to achieve the objective. The existence of war does not in and of itself justify all forms of assault. For instance, in *United States v. Calley*, 22 U.S.C.M.A. 534, 48 C.M.R.19 (1973), the court recognized that "while it is lawful to kill an enemy in the heat and exercise of war, to kill such an enemy after he has laid down his arms . . . is murder." Further, the fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment. The thrust of these holdings is that even in war, limits to the use and extent of force apply.

a. Self-Defense

(U) For the right of self-defense to exist, the accused must have had a reasonable apprehension that death or grievous bodily harm was about to be inflicted on himself. The test is whether, under the same facts and circumstances, an ordinary prudent adult person faced with the same situation would have believed that there were grounds to fear imminent death or serious bodily harm (an objective test) and the person must have actually believed that the amount of force used was required to protect against death or serious bodily harm (a subjective test). Grievous bodily harm means serious bodily injury. It does not mean minor injuries such as a black eye or a bloody nose, but does mean fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries. MJB, Section 5-2. (See also the discussion of "Self-Defense" under the discussion of Federal law, *supra*.)

b. Defense of Another

(U) For this defense, the accused must have had a reasonable belief that harm was about to be inflicted and that the accused actually believed that force was necessary to protect that person. The accused must actually believe that the amount of force used was necessary to protect against the degree of harm threatened. MJB, Section 5-3-1.

c. Accident

(U) This defense arises when an accused is doing a lawful act in a lawful manner, free of any negligence, and unforeseeable or unintentional death or bodily harm occurs. MJB, Section 5-4.

d. Mistake of Fact

(U) If ignorance or mistake of a fact concerns an element of an offense involving specific intent, the ignorance or mistake need only exist in the mind of the accused, i.e., if the circumstances of an event were as the accused believed, there would be no offense. For crimes not involving specific intent, the ignorance or mistake must be both honest (actual) and reasonable. The majority of the crimes discussed above do not require specific intent. For instance, in the case of violations of general orders, knowledge is presumed. Most of the "mistakes" would likely be mistakes of law in that the accused would not believe that the conduct was unlawful. While mistakes of law are generally not a defense, unawareness of a law may be a defense to show the absence of a criminal state of mind when actual knowledge is not necessary to establish the offense. MJB, Section 5-11.

e. Coercion or duress

(U) It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately

suffer serious bodily injury if the accused did not commit the act. This apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply. R.C.M. 916(h), MJB, Section 5-5.

(U) To establish a duress defense it must be shown that an accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily harm if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply. The Court of Appeals stated in *United States v. Fleming*, 23 C.M.R. 7 (1957), that the defense of duress is available to an accused only if his commission of the crime charged resulted from reasonable fear of imminent death or grievous bodily harm to himself or his family. The risk of injury must continue throughout the criminal venture.

f. Obedience to Orders (MJB, Sections 5-8-1 and 5-8-2)

(U) The viability of obedience to orders as a defense turns on the directives and policy of the service member's Chain of Command. For example, when the interrogator at the direction of the command employs the use of physical force as an interrogation method, he/she would certainly raise the defense of obedience to orders. The question then becomes one of degree. While this may be a successful defense to simple assaults or batteries, it would unlikely be as successful to more serious charges such as maiming, manslaughter, and maiming. Within the middle of the spectrum lay those offenses for which the effectiveness of this defense becomes less clear. Those offenses would include conduct unbecoming an officer, reckless endangerment, cruelty, and negligent homicide.

(U) Obedience to orders provides a viable defense only to the extent that the accused acted under orders, and did not know (nor would a person of ordinary sense have known), the orders were unlawful. Thus, the viability of this defense is keyed to the accused's (or a reasonable person's) knowledge of the lawfulness of the order. Common sense suggests that the more aggressive and physical the technique authorized (ordered) by the command, the more unlikely the reasonable belief that the order to employ such methods is lawful.

(U) In order for any use of force to be lawful, it must either (i) be justified under the circumstances or (ii) an accepted affirmative defense is present to excuse the otherwise unlawful conduct. No case law was found that defines at what point force or violence becomes either lawful or unlawful during war. Each case is by its nature, dependent upon the factual circumstances surrounding the incident.

(U) Applying accepted rules for the law of armed conflict, the use of force is only authorized when there is a military purpose and the force used is no greater than

necessary to achieve the objective. The existence of war does not in and of itself justify all forms of assault. For instance, in *US v. Calley*, the court recognized that "while it is lawful to kill an enemy "in the heat and exercise of war, to kill such an enemy after he has laid down his arms . . . is murder." Further, the fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense to the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment." The thrust of these holdings is that even in war, limits to the use and extent of force apply.

2. Necessity

(U) Another common law affirmative defense is one of necessity. This defense is recognized by a number of states and is applicable when: 1) the harm must be committed under the pressure of physical or natural force, rather than human force; 2) the harm sought to be avoided is greater than (or at least equal to) that harm sought to be prevented by the law defining the offense charged; 3) the actor reasonably believes at the moment that his act is necessary and is designed to avoid the greater harm; 4) the actor must be without fault in bringing about the situation; and 5) the harm threatened must be imminent, leaving no alternative by which to avoid the greater harm.

(U) However, military courts have treated the necessity defense with disfavor, and in fact, some have refused to accept necessity as a permissible defense (the MCM does not list necessity as an affirmative defense under RCM 916). "The problem with the necessity doctrine is that it involves a weighing of evil inflicted against evil avoided and is, thereby, difficult to legislate." The courts also have been reluctant to embrace the defense due to a "fear that private moral codes will be substituted for legislative determination, resulting in a necessity exception that swallows the rule of law." *United States v. Rockwood*, 34 MJ 326 (CMA 1992).

(U) The effect of these cases is that the MCM recognizes that an accused may commit an illegal act in order to avoid the serious injury or death of the accused or an innocent person. However, military law limits this defense only when there is an imminent and continuing harm that requires immediate action to prevent. Once the immediacy is gone, the defense will no longer apply. Ostensibly, the use of force to acquire information from an unlawful combatant, absent immediate and compelling circumstances, will not meet the elements established by the MCM and case law. (But see the necessity defense in the discussion of Federal law, *supra*.)

3. Legal doctrines could render specific conduct, otherwise criminal, *not* unlawful

See discussion of Commander-in-Chief Authority, *supra*.

IV. Considerations Affecting Policy

A. Historical Role of U.S. Armed Forces

1. Background

(U) The basic principles of interrogation doctrine, procedures, and techniques applicable to Army intelligence interrogations from June 1945 through May 1987 were contained in Field Manual (FM) 30-15, Examination of Personnel and Documents. FM 30-15 was the Army doctrine pertaining to the basic principles of intelligence interrogations and established the procedures and techniques applicable to Army intelligence interrogations of non-U.S. personnel. The other Services report that they too apply the provisions of this Field Manual.

2. Interrogation Historical Overview

(U) FM 30-15 stated that the principles and techniques of interrogation discussed within the manual are to be used within the constraints established by humanitarian international law and the Uniform Code of Military Justice ("UCMJ"). The fundamental principle underlying Army doctrine concerning intelligence interrogations between 1945 and the issuance of current doctrine in 1987 (FM 34-52), is that the commander may utilize all available resources and lawful means in the accomplishment of his mission and for the protection and security of his unit. However, a strong caveat to this principle noted, "treaty commitments and policy of the United States, international agreements, international law, and the UCMJ require the conduct of military to conform with the law of war." FM 30-15 also recognized that Army intelligence interrogations must conform to the "specific prohibitions, limitations, and restrictions established by the Geneva Conventions of 12 August 1949 for the handling and treatment of personnel captured or detained by military forces" (citing FM 27-10, The Law of Land Warfare).

(U) FM 30-15 also stated that "violations of the customary and treaty law applicable to the conduct of war normally constitute a concurrent violation of the Uniform Code of Military Justice and will be prosecuted under that code." The manual advised Army personnel that it was "the direct responsibility of the Commander to insure that the law of war is respected in the conduct of warfare by forces in his command." Thus, the intelligence interrogation techniques outlined in FM 30-15 were based upon conduct sanctioned under international law and domestic U.S. law and as constrained within the UCMJ.

(U) Historically, the intelligence staff officer (G2/S2) was the primary Army staff officer responsible for all intelligence functions within the command structure. This responsibility included interrogation of enemy prisoners of war (EPW), civilian internees, and other captured or detained persons. In conducting interrogations, the intelligence staff officer was responsible for insuring that these activities were executed in accordance with international and domestic U.S. law, United States Government policy, and the applicable regulations and field manuals regarding the treatment and handling of EPWs,

civilian detainees, and other captured or detained persons. In the maintenance of [illegible] collection, the intelligence staff officer was required to provide guidance and training to interrogators, assign collection requirements, promulgate regulations, directives, and field manuals regarding intelligence interrogation, and insure that [illegible] were trained in international and domestic U.S. law and the applicable Army publications.

(U) FM 30-15 stated that intelligence interrogations are an art involving the questioning and examination of a source in order to obtain the maximum amount of usable information. Interrogations are of many types, such as the interview, a debriefing, and an elicitation. However, the FM made clear that the principles of objective, initiative, accuracy, prohibitions against the use of force, and security apply to all types of interrogations. The manual indicated that the goal is to collect usable and reliable information, in a lawful manner, promptly, while meeting the intelligence requirements of the command.

(U) FM 30-15 emphasized a prohibition on the use of force during interrogations. This prohibition included the actual use of force, mental torture, threats, and exposure to inhumane treatment of any kind. Interrogation doctrine, procedures, and techniques concerning the use of force are based upon prohibitions in international and domestic U.S. law. FM 30-15 stated that experience revealed that the use of force was unnecessary to gain cooperation and was a poor interrogation technique, given that its use produced unreliable information, damaged future interrogations, and induced those being interrogated to offer information viewed as expected in order to prevent the use of force. However, FM 30-15 stated that the prohibition on the use of force, mental or physical, must not be confused with the use of psychological tools and deception techniques designed to induce a source into providing intelligence information.

(U) The Center for Military History has been requested to conduct a search of government databases, to include the Investigative Records Repository, for documentation concerning the historical participation of the U.S. Armed Forces in interrogations and any archival materials related to interrogation techniques. As of the writing of this analysis, no reply has been received.

3. Current Doctrine

(U) In May 1987, the basic principles of current doctrine, procedures, and techniques applicable to Army intelligence interrogations were promulgated in Field Manual (FM) 34-52, Intelligence Interrogation. FM 34-52 provides general guidance for commanders, staff officers, and other personnel in the use of interrogation elements in Army intelligence units. It also outlines procedures for handling sources of interrogations, the exploitation and processing of documents, and the reporting of intelligence gained through interrogation. Finally, FM 34-52 covers directing and supervising interrogation operations, conflict scenarios, and their impact on interrogation operations, to include peacetime interrogation operations.

(U) Army interrogation doctrine today, and since 1945, places particular emphasis on the humane handling of captured personnel. Interrogators receive specific instruction by Army Judge Advocates on the requirements of international and domestic US law, to include constraints established by the Uniform Code of Military Justice (e.g. assault, cruelty and maltreatment, and communicating a threat).

(U) FM 34-52 adopted the principles and framework for conducting intelligence interrogations as stated in FM 30-15. FM 34-52 maintained the established Army doctrine that intelligence interrogations involved the art of questioning and examining a source in order to obtain the maximum amount of useable information. FM 34-52 also reiterated Army doctrine that the principles of objective, initiative, accuracy, prohibition on the use of force, and security apply to all types of interrogations. The goal of [illegible] interrogation under current doctrine is the same, the collection of usable and reliable information promptly and in a lawful manner, while meeting the intelligence requirements of the command.

(U) FM 34-52 and the curriculum at U.S. Army Intelligence Center, Fort Huachuca, continue to emphasize a prohibition on the use of force. As stated in its predecessor, FM 34-52 defines the use of force to include actual force, mental torture, threats, and exposure to inhumane treatment of any kind. The underlying basis for this prohibition is the proscriptions contained in international and domestic U.S. law. Current Army intelligence interrogation doctrine continues to view the use of force as unnecessary to gain the cooperation of captured personnel. Army interrogation experts view the use of force as an inferior technique that yields information of questionable quality. The primary concerns, in addition to the effect on information quality, are the adverse effect on future interrogations and the behavioral change on those being interrogated (offering particular information to avoid the use of force). However, the Army's doctrinal prohibition on the use of force does not proscribe legitimate psychological tools and deception techniques.

(U) FM 34-52 outlines procedures and approach techniques for conducting Army interrogations. While the approach techniques are varied, there are three common purposes: establish and maintain control over the source and the interrogation, establish and maintain rapport between the interrogator and the source, and manipulate the source's emotions and weaknesses to gain willing cooperation. Approved techniques include: Direct, Incentive; Emotional (Love & Hate); Increased Fear Up (Harsh & Mild); Decreased Fear Down; Pride and Ego (Up & Down); Futility Technique; We Know All; Establish Your Identity; Repetition; File and Dossier; and Mutt and Jeff (Friend & Foe). These techniques are discussed at greater length in Section V, *infra*.

B. Presidential and Secretary of Defense Directives

(U) The President's Military Order that addresses the detention, treatment, and trial of certain non-citizens in the war against terrorism,[71] provides, *inter alia*, that any

[71] (U) *Military Order - Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, President of the United States, November 13, 2001.