U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

August 31, 2006

MEMORANDUM FOR JOHN A. RIZZO
ACTING GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY

Re: Application of the Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Detention Facilities

The Detainee Treatment Act of 2005, in relevant part, prohibits any individual in U.S. custody or control from being "subject to cruel, inhuman, or degrading treatment or punishment," "regardless of nationality or physical location." Detainee Treatment Act of 2005, Pub. L. No. 109-163, tit. XIV, § 1403, 119 Stat. 3136, 3475 (2006) ("DTA" or "Act"); *see also* Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739 (2005) (same). You have asked whether particular "standard conditions of detention" at certain Central Intelligence Agency ("CIA") facilities located overseas are consistent with the applicable standards of the DTA. Letter for Steve Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from John A. Rizzo, Senior Deputy General Counsel, CIA at 1 (Dec. 19, 2005) ("*Rizzo Letter*").

The DTA was designed to establish a domestic legal requirement that the United States abide by the relevant substantive constitutional standard, applicable to the United States under Article 16 of the Convention Against Torture, in its treatment of detainees in certain limited circumstances, regardless of location or nationality. The relevant standard applicable to CIA detention facilities under the DTA is that of the Fifth Amendment, in particular the Amendment's prohibition of government conduct that "shocks the conscience." *See County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). To determine whether the conditions of confinement at issue here "shock the conscience" within the meaning of the Fifth Amendment, the ultimate inquiry is whether they amount to punishment—which occurs where the hardships associated with a particular condition or set of conditions are out of proportion to a legitimate governmental interest. Applying that standard, we conclude that the conditions at issue here, considered both separately and collectively, are consistent with the requirements of the DTA.[1]

[1] The legal advice provided in this memorandum does not represent the policy views of the Department of Justice concerning any particular condition of confinement.

[redacted]

~~This memorandum is classified in its entirety.~~

I.

A.

The conditions of confinement in question here are used in covert overseas facilities operated by the CIA as part of its authorized program to capture, detain, and interrogate individuals who pose serious threats to the United States or are planning terrorist attacks. The CIA operates this program under the legal authorities granted to it in [redacted] Over the history of the program, the CIA has detained a total of 96 individuals. At this time, the CIA has fewer than 20 detainees in its custody under this program, the remainder having been transferred to other forms of custody or other nations. Herein, we assume that the CIA has a sound basis for determining that each detainee it is holding in the program is an enemy combatant covered by the terms of [redacted] throughout his detention.[2] In addition, we understand that, once the CIA assesses that a detainee no longer possesses significant intelligence value, the CIA seeks to move the detainee into alternative detention arrangements.

The CIA believes this program has been critical to our national security: "the intelligence acquired from these interrogations has been a key reason why al-Qa'ida has failed to launch a spectacular attack in the West since 11 September 2001." Memorandum for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from [redacted]

[2] We understand that all persons currently in CIA custody under this program are enemy combatants. Thus, we need not consider and do not discuss here the detention of other persons—covered under the [redacted] —but who are not enemy combatants under the law of armed conflict.

We also understand that none of the terrorist enemy combatants detained by the CIA for purposes of this program is entitled to the privileges of prisoners of war under the Third Geneva Convention or protected persons under the Fourth Geneva Convention, and we express no opinion as to whether the conditions of confinement addressed in this opinion would satisfy the full requirements of the Geneva Conventions in circumstances where those Conventions would apply. Pursuant to *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), common Article 3 of the Geneva Conventions does apply to the armed conflict with al Qaeda and thus to the detainees at issue here who are being held in that armed conflict. In a letter issued today by this Office, we conclude that the conditions of confinement described herein also satisfy the requirements of common Article 3. Letter to John A. Rizzo, General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel (Aug. 31, 2006).

[redacted] DCI Counterterrorist Center, *Re: Effectiveness of the CIA Counterintelligence Interrogation Techniques* at 2 (Mar. 2, 2005) ("*Effectiveness Memo*"). As we previously have discussed at greater length, interrogations conducted pursuant to the program have led to specific, actionable intelligence about terrorist threats to the United States and its interests. *See* Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees* at 10 (May 30, 2005) ("*Article 16 Memorandum*") (citing *Counterterrorism Detention and Interrogation Activities (September 2001-October 2003)*, No. 2003-7123-IG, at 85-91 (May 7, 2004) ("*IG Report*")). "More generally, the CIA has informed us that, since March 2002, the intelligence derived from CIA detainees has resulted in more than 6,000 intelligence reports and, in 2004, accounted for approximately half of CTC's reporting on al Qaeda." *Article 16 Memorandum* at 11 (citing Fax from [redacted] DCI Counterterrorist Center, *Briefing Notes on the Value of Detainee Reporting* at 1 (Apr. 15, 2005) ("*Briefing Notes*"); *IG Report* at 86). According to the CIA, the program has had a crucial synergistic effect on other intelligence resources, in that it has been [redacted] *Briefing Notes* at 6. Moreover, the detention of these extremely dangerous individuals has prevented them from planning, facilitating, or executing further terrorist attacks against the United States.

Critical to the legal analysis that follows is the special nature of the detention facilities in which the CIA keeps its high value detainees. It is clear that such detainees pose unique security risks; not only are they a serious risk to escape and to the safety of CIA personnel in the facility, but any facility housing them is under the threat of an armed attack by their supporters in an attempt to free the detainees or to do harm to those responsible for their detention. Yet the covert facilities in which the CIA houses those detainees were not designed as ordinary prisons, much less as high-security detention centers for extremely dangerous, and often highly sophisticated, international terrorists. [redacted]

B.

You have asked us to evaluate the legality of six standard conditions of confinement in the facilities in question. According to your account, the common characteristic of each condition is "ensuring the safety of both Agency personnel and the terrorist-detainees at our overseas covert detention facilities." Letter from [redacted] to Steven Bradbury, *Re: Requests for Information on Security Measures* at 1 (May 18, 2006) ("*Security Measures Letter*"). Underlying our analysis of all these methods is our understanding that the CIA provides regular and thorough medical and psychological care to the detainees in its custody.

1. We begin with the CIA's practice of blocking detainees' vision by covering their eyes with some opaque material, [redacted] Letter for Steven Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from [redacted] Associate General Counsel, CIA at 2 (Jan. 25, 2006) ("*January 25 Letter*"). Significantly, the detainee's vision is not blocked at all times. [redacted] *Standard Conditions of CIA Detention* at 1; *January 25 Letter* at 2. Detainees are thus prevented from seeing only when necessary and not during formal interrogation. *Security Measures Letter* at 4. [redacted] *January 25 Letter* [redacted] We understand that the methods used by the CIA to prevent detainees from seeing do not harm the detainees in any way. The detainee, for example, is able to breathe easily despite the presence of the goggles or other eye coverings.

The Agency uses this condition of confinement for security purposes, more specifically, to "prevent the detainee from learning his location or the layout of the detention facility," *Standard Conditions of CIA Detention* at 1, to prevent the detainee from learning [redacted] *January 25 Letter* at 2, to ensure the safety of certain personnel [redacted] *Standard Conditions of CIA Detention* at 1, and to protect the identity of [redacted] *January 25 Letter* at 2.

2. Upon arrival at the detention facility, the head and facial hair of each detainee is shaved with an electric shaver, while the detainee is shackled to a chair for security reasons. *Standard Conditions of CIA Detention* at 1; *see also January 25* [redacted] *Letter* at 1. This shaving "is not done as a punitive step and only takes place upon the initial intake into the program." *January 25* [redacted] *Letter* at 2. "After the detainee is settled and being debriefed he is allowed to grow his beard and head hair to whatever length he desires (within limits of hygiene and safety)." *Id.* The CIA provides detainees "the option to shave once a week if they so choose" and offers "haircuts as needed or as requested by the detainee." *Id.* It also provides detainees, at their request, the option of shaving other parts of their bodies, recognizing that such shaving may relate to specific Islamic practices. *Id.* Shaving helps enhance security at the detention facility "by removing hair in which a detainee might hide small items that might be used against his interrogators and other detention personnel." *Standard Conditions of CIA Detention* at 1. In addition, "[s]having is used for hygiene." *Id.*[3]

3. The CIA detainees are held in [redacted] *Standard Conditions of CIA Detention* at 1-2. In addition,

[3] The CIA also employs the initial shaving upon intake [redacted] *January 25* [redacted] *Letter* at 1. Arguably, this initial act of shaving is more like an interrogation technique than a condition of confinement. Here, however, we analyze shaving only as a condition of confinement, and thus examine only the corresponding government interest associated with using shaving to facilitate institutional security.

this [redacted] "includes no contact with the outside world," including no mail or telephone access. Fax from [redacted] to Steven Bradbury at 4 (Apr. 19, 2006) ("*April 19 [redacted] Fax*"). Although "CIA detainees [redacted] they are not isolated from all human contact, nor are they in any way subject to "sensory deprivation." *Id.* at 2. Indeed, the CIA has taken specific measures to counteract any potentially adverse effects of limited human interaction. For example, [redacted], *January 25 [redacted] Letter* at 3. As a condition of confinement, the detainees also have access to books, music, and movies. [redacted] The Agency also affords detainees "regular access to gym equipment and physical exercise." *Id.* Finally, each detainee receives [redacted] psychological examination to assess how well he is adapting to his confinement. *Id.*

Solitary confinement "is used for security purposes [redacted] According to the CIA, such confinement helps prevent the detainees from planning a potential escape or an attack on agency personnel.

4. The CIA plays white noise in the walkways of the detention facilities to prevent detainees from being able to communicate with each other while they are being moved within the facilities. *See* Letter from [redacted] to Steven Bradbury at 2 (May 23, 2006) ("*May 23 [redacted] Letter*"). White noise is used in the walkways only, although it is possible that the detainees are able to hear some of that noise in their cells, [redacted] "At no time, however, is the detainee exposed to an extended period of white noise." *Id.* The noise in the walkways is played at all times below 79 dB. We can safely assume that the noise level in the cells is considerably less than the level of the noise in the walkways; recent measurements taken by the CIA indicated that the noise level in detainees' cells was in the range of 56-58 dB, compared with a range of 68-72 dB in the walkways. *See* Letter from [redacted] to Steven Bradbury (May 24, 2006) ("*May 24 [redacted] Letter*"). This level of noise is similar to that of normal conversation. According to CIA's Office of Medical Services; "there is no risk of permanent hearing loss for continuous, 24-hours-a-day exposure to sound at 82 dB or lower . . . ." *Id.* "[S]ound in the dB 80-99 range is experienced as loud; about 100 dB as uncomfortably loud." *Id.*

5. The CIA also keeps detainees' cells illuminated 24-hours-a-day. *Standard Conditions of CIA Detention* at 3. Each cell is lit by two 17-watt T-8 fluorescent tube light bulbs, which illuminate the cell to about the same brightness as an office. [redacted] We understand that some detainees are provided eyeshades to permit them to block out the light when they are sleeping. Detainees are also provided with blankets in their cells, which they may use for the same

purpose. Over the course of several years, the CIA has not observed that the light has had any adverse effect on detainees' ability to obtain adequate sleep.

6. Finally, the CIA uses leg shackles to enhance security "in all aspects of detainee management and movement." *Id.* Shackling, however, is kept to the minimum required by the CIA's security concerns; the number of hours per day that a detainee is shackled is calibrated to the threat that the detainee poses to detention facility staff. *Id.* Detainees thus are not shackled while in their cells unless they have previously demonstrated that they are a threat to themselves or to facility personnel while in their cells. You have informed us that, at present, no detainee is shackled 24 hours per day [redacted] *Id.* Shackling is done in such a manner as not to restrict the flow of blood or cause any bodily injury. *Id.* [redacted] Restraints should neither impede circulation nor lead to abrasions." *Id.* We understand that detainees, while shackled, are able to walk comfortably.

II.

The DTA provides that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." DTA § 1403(a). It further provides that "[n]othing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section." DTA § 1403(b). The Act defines the term "cruel, inhuman, or degrading treatment or punishment" to include only

> the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

DTA § 1403(d). The U.S. reservation to Article 16 of the Convention Against Torture ("CAT") provides 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.

136 Cong. Rec. 36,198 (1990). The DTA's definition of "cruel, inhuman, or degrading treatment or punishment," including its reference to the U.S. reservations to the CAT, is designed to establish a domestic legal requirement that the United States abide by the substantive standards

applicable to the United States under Article 16 of the CAT in its treatment of detainees, regardless of their location or nationality.[4]

In evaluating the legality of conditions of confinement under the DTA, we look primarily to the standards imposed by the Fifth Amendment, in particular the "substantive" component of the Due Process Clause. The other two constitutional amendments referenced in the statute are not directly applicable in these circumstances. The Fourteenth Amendment does not apply to actions taken by the federal Government, *see, e.g.*, *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954); and the Eighth Amendment does not apply until there has been a formal adjudication of guilt, *see, e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977). The Fifth Amendment, in contrast, is not subject to these same limitations.

As applied to the actions of the Executive Branch, substantive due process generally requires that executive officers refrain from conduct that "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience."); *see also Rochin v. California*, 342 U.S. 165, 172 (1952). The Supreme 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.*

The Supreme Court repeatedly has held that the substantive component of the Due Process Clause applies to the evaluation of conditions of confinement of persons detained in the absence of a formal adjudication of guilt. The mere fact that a person has been detained under "proper procedures does not deprive him of all substantive liberty interests under the Fourteenth Amendment." *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982). The "'process' that the

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[4] *See* 151 Cong. Rec. S14,269 (daily ed. Dec. 21, 2005) (statement of Sen. Graham) ("In section 1403, we close the loophole in the [CAT]. As National Security Advisor Stephen Hadley said, 'those standards, as a technical, legal matter, did not apply abroad. And that is what Senator MCCAIN . . . wanted to address—wanted to make clear that those would apply abroad. We applied them abroad as a matter of policy; he wanted to make sure they applied as a matter of law. And when this legislation is adopted, it will.'"); *id.* at S14,257 (statement of Sen. Levin) ("This language firmly establishes in law that the United States will not subject any individual in our custody, regardless of nationality or physical location, to cruel, inhuman, or degrading treatment or punishment. The amendment provides a single standard—'cruel, inhuman, or degrading treatment or punishment'—without regard to what agency holds the detainee, what the nationality of the detainee is, or where the detainee is held."); *id.* at S14,269 (statement of Sen. McCain) ("With the detainee treatment provisions, Congress has clearly spoken that the prohibition against torture and other cruel, inhuman or degrading treatment should be enforced and that anyone engaging in or authorizing such conduct, whether at home or overseas, is violating the law."). *See also* 151 Cong. Rec. H12,205 (daily ed. Dec. 18, 2005) (statement of Rep. Hoekstra) ("The principles of the conference report relating to cruel and inhuman and degrading treatment should not be controversial or even remarkable. . . . [This conference report] does not modify the substantive definition of cruel, inhuman, and degrading treatment that applies to the United States under its existing treaty obligations."); *id.* at H12,204 ("Mr. MARSHALL. Mr. Chairman, is it your understanding that the bill's language referencing the Senate's 1994 reservation to the United Nations' Convention Against Torture is intended to prohibit conduct that shocks the conscience, the standard adopted by the United States Supreme Court in *Rochin v. California*? . . . . Mr. HUNTER. That is my understanding.").

Constitution guarantees in connection with any deprivation of liberty thus includes a continuing obligation to satisfy certain minimal custodial standards." *Collins v. City of Harker Heights*, 503 U.S. 115, 127-28 (1992). For example, the Court has held that persons involuntarily committed to institutions for the mentally retarded have substantive due process rights to such basic necessities as food, shelter, clothing, and medical care, as well as to "safe conditions," and "freedom from bodily restraint." *Youngberg*, 457 U.S. at 315-16. Similarly, in the criminal context, the Court has held that "the Due Process Clause protects a detainee from certain conditions and restrictions of pretrial detainment." *Wolfish*, 441 U.S. at 533. In these situations, the Court has developed a more specific analysis than the general "shocks the conscience" test for determining whether the requirements of due process have been satisfied. This inquiry shares the core of the "shocks the conscience" test, requiring the weighing of "the individual's interest in liberty against the State's asserted reasons for restraining individual liberty." *Youngberg*, 457 U.S. at 320.

In evaluating the conditions of confinement used by the CIA in its overseas covert detention facilities, we pay particular attention to the substantive due process standards applicable to pretrial detention. Like the CIA's detention program, pretrial detention involves the confinement of individuals who have not been convicted of crimes, but who nevertheless may present "an identified and articulable threat to an individual or the community." *United States v. Salerno*, 481 U.S. 739, 751 (1987).[5] Of course, the Constitution forbids the punishment of pretrial detainees, so these cases have evaluated whether the conditions "amount to punishment of the detainee." *Id.* at 535; *see also Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) (stating that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment"); *Schall v. Martin*, 467 U.S. 253, 269 (1984) ("It is axiomatic that '[d]ue process requires that a pretrial detainee not be punished.'") (quoting *Wolfish*, 441 U.S. at 535 n.16) (alteration in *Schall*)). "[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Wolfish*, 441 U.S. at 535. Imposing punishment on such detainees for their past behavior

[5] Although we believe that pretrial detention provides a useful analogy to the CIA detention, we recognize that there are important differences between the two modes of detention. The detainees held by the CIA are not ordinary accused criminals; instead, they are extremely dangerous, and often quite sophisticated, terrorist enemy combatants detained because they pose a serious and direct threat to the national security of the United States. Pretrial detainees are held to secure their presence at trial and because of the threat they may pose to the community. *See Salerno*, 481 U.S. at 751. The constitutional limits upon their detention reflect the balance struck for the ordinary operation of the criminal justice system. By contrast, the primary purpose of detaining enemy combatants is to prevent their return to battle, and in the case of the dangerous terrorists at issue here, these individuals have proven themselves dedicated to killing American civilians. Moreover, the facilities in which they are held are not dedicated jails that have been built specifically for the purpose of detaining potentially violent and escape-minded detainees. Detaining these individuals therefore poses special security challenges. The special status of these individuals, and the greater threat they pose—both to CIA personnel and to the Nation at large—would suggest that the Fifth Amendment balance struck in the pretrial detention cases would not necessarily impose the same limits upon the Government in this context. But even taking the pretrial detention cases on their own terms, we are confident that the conditions of confinement at issue here satisfy the constitutional standards recognized in that context.

necessarily "shocks the conscience," *see Salerno*, 481 U.S. at 746, and is thus forbidden by the DTA.[6]

The Supreme Court has made clear, however, that "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." *Id.* "Not every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense." *Wolfish*, 441 U.S. at 537. Because the Government is "obviously . . . entitled to employ devices that are calculated to effectuate [authorized] detention," *id.*, "[a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose," *id.* at 538. Accordingly, the first question in determining "whether a restriction on liberty constitutes impermissible punishment or permissible regulation" is whether there is any expressed intent to punish for past criminal behavior. *Salerno*, 481 U.S. at 747. Even if there is no evidence of such intent, however, the inquiry is not over. "Absent a showing of an expressed intent to punish on the part of detention facility officials," the due process analysis "generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Wolfish*, 441 U.S. at 538 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)) (alterations in original).

In *Wolfish*, the Court formulated the following test for evaluating the conditions of confinement in pretrial detention under the Due Process Clause:

> [I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the government action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

441 U.S. at 539 (footnote omitted).[7] This is not a least restrictive means test, *see Block v. Rutherford*, 468 U.S. 576, 591 n.11 (1984), but it is nevertheless relevant whether the governmental objective sought to be advanced by some particular condition of confinement

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[6] Consistent with this constitutional limitation, certain sanctions may nevertheless be imposed on pretrial detainees who violate administrative rules while they are lawfully detained. *See, e.g., Sandin v. Connor*, 515 U.S. 472, 484-85 (1995) (distinguishing administrative penalties used to "effectuate[] prison management" from the punishment without conviction that is prohibited by the Due Process Clause); *West v. Schwebke*, 333 F.3d 745, 748 (7th Cir. 2003).

[7] In *Youngberg*, the Court applied a similarly deferential standard to evaluate the substantive due process rights of persons involuntarily committed to mental institutions "to reasonable conditions of safety and freedom from unreasonable restraints." 457 U.S. at 321. The Court held that "the Constitution only requires that the courts make certain that professional judgment in fact was exercised." *Id.* Under this standard, "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323.

could be accomplished by "alternative and less harsh methods." *Wolfish*, 441 U.S. at 539 n.20. The existence of such alternatives that the government either failed to consider or arbitrarily rejected may support the conclusion that the purpose for which the harsher conditions were imposed was in fact to punish. *Id.*; *see also Block*, 468 U.S. at 594 (Blackmun, J., concurring) ("The fact that particular measures advance prison security, however, does not make them *ipso facto* constitutional."); *Schall*, 467 U.S. at 269 (observing that it is "necessary to determine whether the terms and conditions of confinement . . . are in fact compatible with th[e] purposes [of detention]").[8]

Although the standard used by the Supreme Court to evaluate the constitutionality of pretrial detention conditions is relevant to our present analysis, it is important to recognize that the Court's deferential formulation is, at least in part, driven by concerns about separation of powers that are not directly applicable in this context. Indeed, the insistence that *judges* not make decisions properly vested in the political Branches is a recurrent theme in the Court's conditions of confinement decisions:

> [U]nder the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. . . . The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside the Judicial Branch of Government.

Wolfish, 441 U.S. at 562; *see also id.* at 547 n.29 (noting that the "principle of deference" in this field is derived from the fact that "the realities of running a corrections institution are complex and difficult, courts are ill equipped to deal with these problems, and the management of these facilities is confided to the Executive and Legislative Branches, not to the Judicial Branch"); *Block*, 468 U.S. at 584 (emphasizing the "very limited role that courts should play in the administration of detention facilities"). In evaluating these prison management matters as members of the Executive Branch, we must take these assertions for deference to the detaining authority with a grain of salt. Although we certainly do not claim expertise in running detention facilities, and have neither desire nor cause to substitute our judgment for that of the CIA in such matters, the Executive Branch is not subject to the same constitutional limitations that require courts to defer so extensively to prison administrators. It is appropriate, therefore, that our legal advice undertake the best reading of the applicable legal principles. Also, we may insist upon a somewhat closer connection between the conditions of confinement and the governmental

[8] In the detention context, moreover, substantive due process can be violated not merely by intentional harms, but also where the conditions of confinement evince "deliberate indifference" to the risk that detainees may suffer unjustifiable injuries. The Supreme Court has observed that "in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare." *Lewis*, 523 U.S. at 850-51; *see also DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 199-200 (1989) (observing that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being"). Accordingly, the procedures that the CIA has in place for mitigating the possibility that its conditions of confinement might harm detainees in ways not necessarily intended by the Agency are relevant to any analysis of whether those conditions comport with the DTA.

interest at stake than courts would demand, and may conduct a more searching examination of the detaining authority's assertions and justifications. Even without such deference to the CIA, the conditions of confinement satisfy the legal standards applicable under the DTA.

Finally, we note that in conducting this Fifth Amendment inquiry, the substantive standards of the Eighth Amendment remain relevant. Although the Eighth Amendment does not directly apply to the detainees at issue here because they have not been subject to a formal adjudication of guilt, *see Wolfish*, 441 U.S. at 535 & n.16, conditions of confinement that would, with respect to convicted prisoners, constitute "cruel and unusual" punishment in violation of the Eighth Amendment may very well also constitute "punishment" when imposed on otherwise similarly situated detainees protected by the Fifth Amendment. *See City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (suggesting, in the context of pretrial detention, that "the due process rights of a person in [the Government's care] are at least as great as the Eighth Amendment protections available to a convicted prisoner"); *Youngberg*, 457 U.S. at 321-22 ("Persons who have been involuntarily committed are entitled to more considerate treatments and conditions of confinement than criminals whose conditions of confinement are designed to punish."); *Lock v. Jenkins*, 641 F.2d 488, 492 n.9 (7th Cir. 1981) ("Although the Eighth Amendment is not applicable to pretrial detainees, Eighth Amendment cases involving conditions of convicted prisoners are useful by analogy because any prohibited 'cruel and unusual punishment' under the Eighth Amendment obviously constitutes punishment which may not be applied to pretrial detainees."). Accordingly, where appropriate in our discussion below, we have considered cases applying the Eighth Amendment to conditions of confinement similar to those used by the CIA.[9]

III.

A.

Applying this due process analysis, we conclude that the conditions of confinement described above do not amount to punishment. Because we are aware of no evidence "of an expressed intent to punish on the part of detention facility officials" involved in the CIA program, the critical question under the DTA is whether the conditions imposed are sufficiently related to the CIA's need to secure its detention facilities without imposing excessive or needless hardship on the detainees. Having carefully examined those conditions, as well as the reasons that the CIA has adopted them in lieu of either harsher or more mild alternatives, we conclude

[9] We caution, however, that the Eighth Amendment is an imperfect fit for the legal analysis of the CIA's conditions of confinement. The Eighth Amendment does not apply until there has been a "formal adjudication of guilt." *See Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979); *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977). In proscribing certain criminal *punishments*, the Eighth Amendment necessarily seeks to balance the Government's penological interest against an individual's interest in avoiding particular kinds of suffering and hardship. Thus, there may be certain types of treatment that no penological interest could support, and thus that may run afoul of the Eighth Amendment. The conditions at issue here, however, are characterized by different interests, including the securing of dangerous terrorists in a manner that does not give information to the enemy in a time of war. Whatever balancing the Fifth and Eighth Amendments may require in this regard, the outcome of those analyses may not always be aligned.

that those conditions are consistent with the requirements of substantive due process made applicable by the DTA.

The primary objective that each of the conditions of confinement seeks to advance is the safe and secure functioning of the CIA's detention facilities. By imposing those conditions, the CIA aims both to protect the officials operating the facilities from harm and to ensure that the detainees are unable to escape or otherwise to defeat the objectives of the detention program. There is, of course, "no dispute that internal security of detention facilities is a legitimate governmental interest." *Block*, 468 U.S. at 586. "Once the Government has exercised its conceded authority to detain a person . . . , it obviously is entitled to employ devices that are calculated to effectuate this detention." *Wolfish*, 441 U.S. at 537. In *Wolfish*, the Court recognized that the "Government must be able to take steps to maintain security and order at the institution," *id.* at 540, including "appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry," *id.* at 547. Indeed, "maintaining institutional security and preserving internal order and discipline" are not merely legitimate objectives, they are "essential goals." *Id.* at 546; *see also Harris v. Chapman*, 97 F.3d 499, 504 (11th Cir. 1996) (observing that prison administrators' "compelling interest in security and order within their prisons" is particularly acute in facilities that "contain extremely violent [individuals]"). For these reasons, anyone attempting to show that detention facility officials have "exaggerated their response to the genuine security considerations that actuated these restrictions and practices" carries a "heavy burden." *Id.* at 561-62.

We understand that the detainees held by the CIA are extremely dangerous and pose unique security concerns. They are individuals whom the CIA has determined either to [redacted] They include individuals such as Khalid Shaykh Muhammad ("KSM") and Abu Zubaydah. KSM, "a mastermind" of the September 11, 2001, attacks, was regarded as "one of al-Qa'ida's most dangerous and resourceful operatives." *Article 16 Memorandum* at 6 (quoting [redacted] *Khalid Shaykh Muhammad* at 1 (Nov. 1, 2002) ([redacted] *KSM Biography*")). KSM admitted that he personally murdered *Wall Street Journal* reporter Daniel Pearl in February 2002 and recorded the brutal decapitation on videotape, which he subsequently released for broadcast. *See id.* Prior to KSM's capture, the CIA considered him to be one of al Qaeda's "most important operational leaders . . . based on his close relationship with Usama Bin Laden and his reputation among the al-Qa'ida rank and file." *Id.* at 6-7 (quoting [redacted] *KSM Biography* at 1). After the September 11 attacks, KSM assumed "the role of operations chief for al-Qa'ida around the world." *Id.* at 7 (quoting CIA Directorate of Intelligence, *Khalid Shaykh Muhammad: Preeminent Source on Al-Qa'ida* 7 (July 13, 2004) ("*Preeminent Source*")). KSM also planned additional attacks within the United States both before and after September 11th. *See Preeminent Source* at 7-8; *see also The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 150 (official gov't ed. 2004). Prior to his capture, Zubaydah was "one of Usama Bin Laden's key lieutenants." *Article 16 Memorandum* at 6 (quoting [redacted] *Zayn al-Abidin Muhammad Husayn ABU ZUBAYDAH* at 1 (Jan. 7, 2002) ("*Zubaydah Biography*")). "Indeed, Zubaydah was al Qaeda's third or fourth highest ranking member and had been involved 'in every major terrorist operation carried out by al Qaeda.'" *Id.* (quoting Memorandum for John Rizzo, Acting General Counsel, Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General,

Office of Legal Counsel, *Re: Interrogation of al Qaeda Operative* at 7 (Aug. 1, 2002) ("*Interrogation Memorandum*")).[10] Upon his capture on March 27, 2002, Zubaydah became the most senior member of al Qaeda in United States custody. *Id.* These detainees have demonstrated that they are also a threat to guards in the facility. Several detainees have physically attacked the guards. Many have stated that they plan to kill their captors.

Although the primary purpose of the conditions of confinement we consider here is to maintain the security of the CIA's detention facilities, this observation does not mean that those conditions do not *also* serve other purposes. [redacted] Isolation and white noise for [redacted] For the reasons set forth below, however, we conclude that the security rationale alone is sufficient to justify each of the conditions of confinement in question. Accordingly, these conditions of confinement may be applied to detainees who no longer have significant intelligence value but who nonetheless meet the standards for detention under [redacted] and who continue to present a clear danger to the United States as terrorist enemy combatants in the ongoing armed conflict with al Qaeda and its affiliates. *See* Part III.D., *infra.*

B.

As an initial matter, we consider the legality of each of the conditions *seriatim*. In this exercise, we are aided by judicial decisions considering the legality of many of these discrete conditions in U.S. domestic prisons. We recognize, however, that the ultimate inquiry is to assess the legality of subjecting detainees to *all* of the conditions in combination. In addition, as we describe below, the CIA detainees are in constantly illuminated cells, substantially cut off from human contact, and under 24-hour-a-day surveillance. We also recognize that many of the detainees have been in the program for several years and thus that we cannot evaluate these conditions as if they have occurred only for a passing moment. Nevertheless, we must also take into account the nature of the detainees whom the CIA is holding. They are not ordinary criminal suspects and they undoubtedly pose extraordinary security risks: [redacted] requires special conditions to ensure their security and to prevent the escape of these dangerous terrorists.[11]

[10] We discuss these two detainees as examples, but we understand that the detainees as a group are of a dangerousness that justifies the conditions of confinement at issue, as we discuss below.

[11] Indeed, as a recent coordinated hunger strike among several convicted al Qaeda terrorists held at the maximum security prison at Florence, Colorado, demonstrates, even those terrorists kept in physical isolation within maximum security facilities can often find ways of communicating and thereby compromising institutional security. According to Bureau of Prisons officials, the al Qaeda terrorists communicated with each other by using the pipes in the facility to carry sound. Together, the terrorists orchestrated the beginning of their hunger strike and developed a sophisticated method to resist compulsory feeding. Ultimately, due to this coordination, the al Qaeda terrorists succeeded in gaining transfer from high security detention. Al Qaeda detainees at Guantanamo Bay, Cuba similarly

1. As described above, the purpose of using blindfolds or similar eye-coverings is "to prevent the detainee from learning his location or the layout of the detention facility," *Standard Conditions of CIA Detention* at 1 [redacted] It is important to our conclusion that detainees are not blindfolded when they are alone in their cells [redacted] These limitations make clear that the CIA does not use this condition of confinement as a disguised form of "sensory deprivation" aimed at weakening the detainees psychologically, but instead as a bona fide security measure, one used only when necessary to advance the narrow goal of institutional security. Indeed, the form of blindfolding used by the CIA appears to be the least restrictive and intrusive means of obstructing the detainee's vision and thus of preventing detainees from learning their location, the layout of the facilities, [redacted] Blindfolding detainees only when they are moved around the facility or when they are in close proximity to security personnel prevents detainees from acquiring information that could allow them to compromise the security of the detention facilities.

Nor is the use of this condition likely to harm detainees, much less in a way that is excessive in light of the concrete security objectives it furthers. None of the methods that the CIA uses to prevent the detainees from seeing poses any likelihood of injury, and the detainees have no difficulty breathing freely while their vision is obstructed. It is also relevant to our analysis that the CIA uses the [redacted] By choosing to effectuate its security goal in ways calibrated to minimizing the physical discomfort and psychological distress that detainees are likely to suffer, the CIA further demonstrates the non-punitive nature of this condition of confinement. Accordingly, we conclude that the use of non-injurious means of blocking detainees' vision during limited times where allowing them to see could jeopardize institutional security satisfies the standards of the DTA.

2. Shaving detainees upon intake is likewise directly related to the CIA's need to secure its detention facilities. Shaving advances this end "by removing hair in which a detainee might hide small items that might be used against his interrogators and other detention personnel." *Standard Conditions of CIA Detention* at 1. Because the detention facility is secure and because the detainees' access to contraband is so limited once they are detained, safety considerations do not require continuing to shave the detainee. Accordingly, after the initial shave, the detainee is

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staged a coordinated riot in recent weeks that resulted in significant property damage and injury to some of the guards dispatched to put the uprising down. Through communication and planning among detainees, more than 75 al Qaeda detainees staged a coordinated hunger strike, again attempting to undermine the conditions of their confinement. In facilities considerably less structurally secure than the Florence "Supermax" facility, other means of ensuring that detainees are unable to communicate with one another (such as the use of white noise and full-time surveillance) thus become particularly important. These events highlight the overriding need for maintaining tight security—including rigorous controls on detainee communications—at facilities housing terrorist detainees.

"allowed to grow his beard and head hair to whatever length he desires," consistent with the CIA's safety imperatives. *January 25* [redacted] *Letter* at 2. The CIA has even gone so far as to provide detainees, after their initial shaving upon intake, the option of shaving and receiving haircuts "as requested by the detainee," including the option of shaving other parts of their bodies, in recognition of specific Islamic practices. *Id.*

The case law provides substantial support for the conclusion that the CIA's shaving policy is consistent with the substantive standard of the Fifth Amendment. Most importantly, the courts of appeals have consistently rejected prisoners' Fifth and Fourteenth Amendment challenges to shaving policies in domestic prisons and jails. *See Ralls v. Wolfe*, 448 F.2d 778, 779 (8th Cir. 1971) (per curiam) ("This Court has held that an incarcerated prisoner does not have a constitutional right to the length, style and growth of his hair and growing a beard and moustache to suit his personal desires."); *Blake v. Pryse*, 444 F.2d 218, 219 (8th Cir. 1971) (holding that prison regulation requiring inmate "to shave and cut his hair" "does not deprive him of any federal civil or constitutional right"); *Brooks v. Wainwright*, 428 F.2d 652, 653 (5th Cir. 1970) (per curiam) (affirming dismissal as frivolous of prisoner's Fourteenth Amendment due process challenge to prison rule requiring that he "shave twice a week and receive periodic haircuts"); *id.* at 653-544 (disposing of prisoner's due process challenge because the shaving regulation was neither unreasonable nor arbitrary). Although these cases involve individuals convicted of crimes, rather than individuals detained for intelligence value (or held pretrial in criminal cases), they nonetheless provide substantial support for the view that the CIA's shaving policy does not violate the DTA.

The courts of appeals also have upheld shaving policies against Eighth Amendment challenges brought by convicted prisoners. *See Martin v. Sargent*, 780 F.2d 1334, 1339 (8th Cir. 1985) (concluding that "reasonable regulation of a prisoner's hair length" satisfies the Eighth Amendment "when necessary for security reasons"); *Blake*, 444 F.2d at 219 (holding that prison regulation requiring inmate "to shave and cut his hair" does not constitute "cruel and unusual punishment"). Although these cases, like the Fifth Amendment cases discussed above, concern convicted prisoners, not individuals detained for intelligence value, they are nonetheless informative in that the Fifth Amendment standard applicable to pretrial detainees is to some extent informed by the Eighth Amendment standard, as explained above. These cases, too, support the view that the CIA's shaving policy is consistent with the DTA.[12]

[12] Indeed, some courts have even upheld prisons' shaving policies under the Religious Freedom Restoration Act ("RFRA"), which imposes a standard of review far more demanding than the "reasonably related to a legitimate governmental objective" standard that applies here. In *Harris v. Chapman*, for example, the court of appeals held that shaving prisoners was the least restrictive means of furthering a compelling governmental interest—a hurdle even higher than the one that the Fifth Amendment imposes in this context. *Id.* at 504. Indeed, in the court's view, shaving was the *only* means of advancing the state's interest in "the identification of escapees and the preventing of secreting of contraband or weapons" in prisoner's "hair or beards," *id.*, and thus advanced the "compelling interest in security and order" in the prison, *id.* at 504. *See also Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996) (rejecting similar RFRA claim). *But see Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005) (finding that minimum security prison's hair policy failed the least restrictive means test of the Religious Land Use and Institutionalized Persons Act).

Finally, the courts have consistently credited testimony advancing the same security justification for shaving that the CIA advances here. The courts, for example, have credited prison officials' testimony that "long hair poses a threat to prison safety and security" and that "inmates could conceal contraband, including dangerous materials, in their long hair." *Hamilton v. Schriro*, 74 F.3d 1545, 1548 (8th Cir. 1996); *see also, e.g., Martinelli v. Dugger*, 817 F.2d 1499, 1506 n.23 (11th Cir. 1987) (noting that "[e]vidence before the magistrate indicated that in prisons without shaving and hair length regulations, inmates had been caught with contraband or weapons hidden in their long hair"); *Pollock v. Marshall*, 845 F.2d 656, 658 (6th Cir. 1988) (finding that prison superintendent stated "legitimate" interests, that were "reasonably related to the regulation limiting the length of prisoners' hair," including preventing inmates from "hid[ing] contraband . . . in his hair"); *Dreibelbis v. Marks*, 742 F.2d 792, 795 (3d Cir. 1984) (crediting testimony of Pennsylvania Commissioner of Corrections that "[a] restriction on long hair and beards prevents concealment of contraband, such as weapons . . . , on the person, thus increasing the security of the institution and limiting the potential for dangerous situations therein"). Courts also have accepted the conclusion that, "without the hair length regulation, prison staff would be required to perform more frequent searches of inmates, which could cause conflicts between staff and inmates." *Id.* Indeed, the Eighth Circuit has characterized the government interest in regulating the hair length of particularly dangerous prisoners as "compelling": "It is more than merely 'eminently reasonable' for a maximum security prison to prohibit inmates from having long hair in which they could conceal contraband and weapons. It is compelling. . . . These are valid and weighty concerns." *Hamilton*, 74 F.3d at 1555. If the Government's interest in regulating detainees' hair length is "compelling" in a high-security domestic prison or jail, *id.*, then we think it is at the very least "legitimate" in an overseas CIA covert detention facility housing extremely dangerous detainees who either pose serious threats to the United States or were planning terrorist attacks at the time of their capture.

For these reasons, we conclude that the CIA's shaving policy comports with the requirements of the DTA.

3. Isolating detainees [redacted] is intended to ensure the security of CIA detention facilities by preventing detainees from "conspiring with each other to plan escape attempts or commit acts of violence against each other or CIA personnel." *Standard Conditions of CIA Detention* at 2. Enforced isolation also prevents detainees from [redacted]

Although this condition presents a closer question than the previous conditions we have examined, the solitary confinement of high-value detainees is sufficiently related to the CIA's interest in institutional security to satisfy the DTA. First, preventing detainees from interacting with one another or with the outside world is directly related to the security of the CIA facilities. Isolation prevents conspiracy, making it considerably more difficult for detainees to coordinate escapes or attacks. In addition, the CIA uses solitary confinement narrowly in service of its security objectives. In this regard, it is important to emphasize that the isolation at issue here is not designed as or akin to "sensory deprivation"; it does not impose upon detainees a complete seclusion from human contact. Although detainees [redacted] the CIA has taken measures to counteract any potentially adverse effects of limited human interaction. For

example, as described more fully above, [redacted] demonstrate that the CIA is attempting to calibrate its use of isolation so that it directly advances the interest in security without imposing unnecessary hardship on the detainees. The CIA further strikes that balance by affording detainees regular access to gym equipment and physical exercise, and by providing each detainee with [redacted] psychological examination to assess how well he is adapting to his confinement. *Id.* The CIA also counteracts the psychological effects of isolation by providing detainees with "a wide variety of books, puzzles, paper and 'safe' writing utensils, chess and checker sets, a personal journal, and access to DVD and VCR videotapes." *January 25* [redacted] *Letter* at 3.

Nevertheless, we recognize that the isolation experienced by the CIA detainees may impose a psychological toll. In some cases, solitary confinement may continue for years and may alter the detainee's ability to interact with others. This is not an area, however, where we are without judicial guidance, as the U.S. courts have repeatedly considered the constitutionality of isolation used as a condition of confinement in domestic prisons. These cases support the conclusion that isolation, even under conditions similar to those considered here, does not violate the requirements of substantive due process. For example, the Fifth Circuit has held that the solitary confinement of a pretrial detainee is, under certain circumstances, consistent with the Fifth Amendment. *McMahon v. Beard*, 583 F.2d 172, 173, 175 (5th Cir. 1978). In that case, the government confined the detainee stripped of all of his clothing, and without a mattress, sheets, or blankets. *Id.* Although these conditions were imposed for the detainee's self-protection—he had attempted suicide—the case makes clear that there is no per se bar under the Fifth Amendment to isolating even a pretrial detainee. *Id.* at 174-75; *see also Hutto v. Finney*, 437 U.S. 678, 686 (1978) (observing that it is "perfectly obvious that every decision to remove a particular inmate from the general prison population for an indeterminate period could not be characterized as cruel and unusual").[13]

The courts of appeals have often rejected Eighth Amendment challenges to the use of solitary confinement. The Fourth Circuit considered convicted prisoners' Eighth Amendment claims based on their allegations that they were "confined to their cells for twenty-three hours per day without radio or television." *In Re Long Term Administrative Segregation of Inmates Designated as Five Percenters*, 174 F.3d 464, 471 (4th Cir. 1999). The court, noting that "[t]hese conditions are indeed restrictive," explained that "the restrictive nature of high-security incarceration does not alone constitute cruel and unusual punishment." *Id.* The court held that

[13] In a recent decision, the Supreme Court suggested, albeit in dicta, that "extreme isolation" in which inmates were confined for 23 hours per day deprived of almost any environmental or sensory stimuli and of almost all human contact "may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners." *Wilkinson v. Austin*, 125 S. Ct. 2384, 2395 (2005).

"the isolation inherent in administrative segregation or maximum custody is not itself constitutionally objectionable." *Id.* at 472; *see also, e.g., Novack v. Beto*, 453 F.2d 661, 665 (5th Cir. 1972) (noting the "long line of cases, to which we have found no exception, holding that solitary confinement *per se* is not 'cruel and unusual'"). Likewise, in *Jackson v. Meachum*, 699 F.2d 578 (1st Cir. 1983), the court held that "very extended, indefinite segregated confinement in a facility that provides satisfactory shelter, clothing, food, exercise, sanitation, lighting, heat, bedding, medical and psychiatric attention, and personal safety, but virtually no communication or association with fellow inmates" does not violate the Eighth Amendment, even where it "results in some degree of depression." *Id.* at 581. That court, surveying a decade of federal appellate decisions, noted a "widely shared disinclination to declare even very lengthy periods of segregated confinement beyond the pale of minimally civilized conduct on the part of prison authorities." *Id.* at 583. More specifically, "[t]hose courts which have had occasion also to deal with claims of psychological deterioration caused by confinement have rejected these claims." *Id.* The courts have also rejected claims based on allegedly harmful incidents of isolation, such as idleness and lack of human interaction. The courts have held that "isolation from companionship" and "restriction on intellectual stimulation and prolonged inactivity" are simply "inescapable accompaniments of segregated confinement" that will not render such confinement unconstitutional "absent other illegitimate deprivations." *Sweet v. South Carolina Dep't of Corrections*, 529 F.2d 854, 861 (4th Cir. 1975).

Moreover, the courts have not accepted the claim that isolation becomes unconstitutional as a sole result of its duration. Indeed, the Fourth Circuit rejected inmates' constitutional challenge to over three years of solitary confinement, despite the lack of any expectation of release, concluding that "the indefinite duration of the inmates' segregation does not render it unconstitutional." *In Re Long Term Administrative Segregation*, 174 F.3d at 472. The court noted that "[t]he duration of confinement in some of these cases has been long, but length of time is 'simply one consideration among many' in the Eighth Amendment inquiry." *Id.* (quoting *Hutto v. Finney*, 437 U.S. 678, 687 (1978)). Likewise, in *Sweet*, the court held that the "prolonged and indefinite" nature of segregated confinement is insufficient to render it unconstitutional, though it is a relevant factor. 529 F.2d at 861. Indeed, the court noted that in the federal prison system, "segregated confinement is 'indefinite.'" *Id.*

In the rare cases in which courts have found isolation unconstitutional, it was not the isolation alone that drove the analysis, but instead the use of isolation in combination with factors that left prisoners living in appalling, and indeed dangerous, conditions. For example, the Ninth Circuit found an Eighth Amendment violation where a prisoner was sent to solitary confinement in a six foot by six foot, windowless, unclean cell, known as the "dark hole," with no lights, toilet, sink, or other furnishings, and where the prisoner was naked, and provided no hygienic material, bedding, adequate food, adequate heat, or opportunity to clean himself, for longer than twenty-four hours continuously. *Gates v. Collier*, 501 F.2d 1291, 1304-05 (9th Cir. 1974). Likewise, the Fifth Circuit held unconstitutional the use of punitive isolation in which as many as seven prisoners were placed in a six foot by eight foot cell, with no bunks, toilets, or other facilities, with human excrement on the floor, and without the ability to lie down simultaneously. *McCray v. Sullivan*, 509 F.2d 1332, 1336 (5th Cir. 1975). Although these cases leave no doubt that isolation may be a factor in determining that a set of prison conditions crosses the constitutional line, the use of isolation by the CIA is not accompanied by the special

circumstances present where constitutional violations have been found. In particular, the isolation that we consider is not used in conjunction with those severe conditions—such as inadequate food, inadequate heat, and filth—that some courts have found cruel and unusual. We emphasize as important to our analysis that the detainees in the CIA program are held in clean, sanitary facilities at all times during their detention. Those facilities are kept at appropriate temperatures, and are adequately furnished and maintained. These accompanying conditions highlight that isolation here is not being used in order to punish detainees, or make them suffer needlessly, but instead to prevent coordination and conspiracy that may compromise the security of the facilities and the CIA personnel who work there.

Finally, recognizing that the solitary confinement considered in much of the case law involves high-security prison settings and dangerous, high-risk inmates, we think it relevant that the CIA's security concerns appear at least similarly weighty. The CIA's overseas, covert facilities house extremely dangerous detainees who, as previously explained, the CIA has determined either pose serious threats to the United States or were planning terrorist attacks at the time of their capture. Certainly, there are some differences—detainees sentenced to terms of imprisonment at least have some certainty about the duration of their overall confinement, while the CIA detainees do not know how long they will be detained. This uncertainty may impose an increased psychological toll. Although these post-conviction cases are not squarely applicable, they support the conclusion that the use of solitary confinement in the CIA's facilities is consistent with the substantive standard of the Fifth Amendment, and thus with the standard of the DTA.

4. As described above, the CIA plays white noise in the walkways of the detention facilities, *see May 23 Letter* at 2, [redacted] Both the volume of this noise and the locations in which it is used have been carefully calibrated so as to block communications among detainees without posing any risk of harming them. Indeed, because the noise is not piped into the detainees' cells, detainees experience the sound (at any significant volume) only during the limited periods in which they are being moved around the facility. Even in the walkways, the noise is at all times kept below 79 dB—a volume that, according to CIA's Office of Medical Services, creates no risk of permanent hearing loss, even if exposure is continuous for 24 hours a day. *See Standard Conditions of CIA Detention* at 2. Recent measurements taken by the CIA indicate that the noise level in detainees' cells is in the range of 56-58 dB, compared with a range of 68-72 dB in the walkways, a significant difference. *May 24 [redacted] Letter*. Indeed, normal conversation typically registers at approximately 60 dB. In addition, we understand that the CIA has observed the noise to have no effect on the detainees' ability to sleep. This suggests that detainees have adjusted to any noise that may filter into their cells and learned to disregard it. We have little doubt that this limited use of white noise is consistent with the requirements of the DTA.

[14] Although we do not rely on this fact to support the legal conclusion in this memorandum, [redacted]

Unlike some of the other conditions of confinement, we are aware of no direct analogue in U.S. prisons and jails to the white noise that the CIA employs. This fact is not surprising, as such domestic facilities have neither a mission comparable to the CIA's nor face similar constraints, and therefore do not have an interest in masking sound and preventing detainee communication that approaches the CIA's. In contrast to the detention facilities at issue, U.S. prisons and jails generally do not, for instance, have a legitimate interest in denying inmates an ability to determine their location or the identity of fellow prisoners. There are, however, cases in which U.S. courts have considered prisoner complaints about noise levels. These cases clearly establish that noise that merely irritates is not unconstitutional. In *Peterkin v. Jeffes*, 855 F.2d 1021 (3d Cir. 1988), for example, the court concluded that prisoners on death row did not state an Eighth Amendment violation where the noise in the cells was merely "irritating to some prisoners." *Id.* at 1027. In that case, the district court noted testimony describing the noise on one hand as a "constant din" (quoting plaintiffs' expert), and on the other hand as "cyclical." *Peterkin v. Jeffes*, 661 F. Supp. 895, 909 (E.D. Pa. 1987). Likewise, the Seventh Circuit held that prisoners failed to state an Eighth Amendment violation where the record contained "no evidence that the noise levels posed a serious risk of injury to the plaintiffs." *Lunsford v. Bennett*, 17 F.3d 1574, 1580 (7th Cir. 1994). Thus, at least to state a claim of cruel and unusual punishment under the Eight Amendment, rather than merely of punishment alone under the Fifth Amendment, noise must be more than merely annoying or unpleasant. Moreover, it has been held that noise, even if severe enough to cause headaches, does not give rise to an Eighth Amendment violation where it is used for a legitimate purpose. *See, e.g., Givens v. Jones*, 900 F.2d 1229, 1234 (8th Cir. 1990) (concluding that noise, which the prisoner alleged caused him migraine headaches, did not constitute cruel and unusual punishment where it was an incident of needed prison remodeling).

We are aware that some courts have concluded that a prisoner's allegation of "continuous, excessive noise states a claim under the due process clause," and also under the Eighth Amendment. *Sanders v. Sheahan*, 198 F.3d 626, 628 (7th Cir. 1999) (holding that "excessive noise" is a deprivation serious enough to meet the objective component of the Eighth Amendment); *see also, e.g., Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996) (allegations that "at all times of day and night inmates were 'screaming, wailing, crying, singing and yelling,' often in groups, and that there was a 'constant, loud banging,'" were sufficient to avoid summary judgment); *Antonelli*, 81 F.3d at 1433 (holding that allegation of noise that "occurred every night, often all night, interrupting or preventing [a detainee's or prisoner's] sleep" stated a claim under the Fifth or Eighth Amendment). As experienced by detainees who spend the vast majority of their time confined in their cells, however, the white noise used by the CIA in the walkways of its detention facilities is not remotely comparable with the noise at issue in these cases. In addition, none of these decisions addressed noise that was employed by prison administrators in direct furtherance of manifestly important security objectives. There is nothing in the case law or in common sense to suggest that the limited use of noise loud enough to block communications among extremely dangerous individuals under conditions analogous to those at the CIA detention sites, but not louder than an ordinary conversation, and certainly not loud enough to cause harm or interfere with sleep, amounts to the kind of "punishment" proscribed by the Fifth or Eighth Amendments. In sum, the white noise at issue here is carefully tailored to advance the CIA's interest in institutional security while minimizing the discomfort of the detainees, and thus readily satisfies the DTA.

5. The CIA keeps its detention facilities under constant illumination [redacted] The light, however, is not unusually bright. *Id.* We understand that detainees are provided eyeshades or blankets, which they may use to block out light by covering their eyes while sleeping. *Cf. Chavarria v. Stacks*, No. 03-40977, 102 Fed. Appx. 433, 437 (5th Cir. 2004) (unpublished) (Reavley, J., specially concurring) (noting that judicial attention to prisoner's constant illumination complaint is "much ado about nothing" because "[a] little cloth over his eyes would solve the problem"). In addition, we understand, and think it significant, that the CIA has observed no adverse effects on any detainee's sleep as a result of the constant illumination, suggesting that the burden imposed by this condition of confinement is relatively minimal.

Also relevant to our analysis are the holdings of several courts that constant light, even for pretrial detainees, does not violate the Fifth Amendment, at least where that illumination is reasonably related to the government's legitimate objective of maintaining institutional security. The Eighth Circuit in *O'Donnell v. Thomas*, 826 F.2d 788 (8th Cir. 1987), for example, held that a pretrial detainee, held for over half a year in a cell with "continuous lighting" and who alleged he could not sleep, failed to establish a constitutional violation because the lighting was "not unreasonable given the need for jail security and the need to monitor [the detainee]," who had tried to kill himself. *Id.* at 790. *See also Chavarria*, 102 Fed. Appx. at 436 (holding that a "policy of constant illumination" is "reasonably related" to the legitimate interest of "guard security"); *Shannon v. Graves*, No. 98-3395, 2000 WL 206315, at *13 (D. Kan. Jan. 5, 2000) (unpublished) (stating that facility "officials need lights to observe inmate activity in cells, to maintain safety and security" and that "[s]uch concerns are a legitimate interest"); *Fillmore v. Ordonez*, 829 F. Supp. 1544, 1568 (D. Kan. 1993) (holding "as a matter of law that the electronic surveillance system, with its around-the-clock beeping and soft lighting, was reasonably related to the maintenance of internal security of the [pretrial detention facility], and as such did not amount to punishment prohibited by the Due Process Clause"). Similarly, in *Ferguson v. Cape Girardeau County*, 88 F.3d 647 (8th Cir. 1996), the Eighth Circuit held that pretrial detention "under bright lights, which were on twenty-four hours a day," was reasonably related to a legitimate government interest of "keep[ing] the detainee under observation for both his medical condition as well as general safety concerns," and thus did not violate the detainee's Fifth Amendment rights, *id.* at 650. Although, in that case, the detainee was confined under bright lights for a relatively short duration, the court of appeals, which applied a "totality of the circumstances" analysis, did not suggest that the limited duration was a precondition to finding constant light to be constitutional. *Id.* at 650.[15]

We recognize that detention with constant illumination has been held unconstitutional under certain circumstances. For example, in *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996), the Ninth Circuit held that "[t]here is no legitimate penological justification for requiring [inmates]

[15] In dicta, the Supreme Court recently suggested that constant light in cells holding high-risk detainees "may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners." *Wilkinson v. Austin*, 125 S. Ct. 2384, 2395 (2005). This suggestion applied even where "an inmate who attempts to shield the light to sleep [was] subject to further discipline." *Id.* at 2389.

to suffer physical and psychological harm by living in constant illumination. This practice is unconstitutional." *Id.* at 1090 (alterations in original) (quoting *LeMaire v. Maass*, 745 F. Supp. 623, 636 (D. Or. 1990), *vacated on other grounds*, 12 F.3d 1444, 1458-59 (9th Cir. 1993)). The court concluded that summary judgment against a convicted prisoner was inappropriate where the prisoner alleged that his cell's constant illumination caused him "'grave sleeping problems' and other mental and psychological problems." *Id.* at 1091 (quoting plaintiff's amended complaint and motion). Likewise, the district court opinion concluded that although constant illumination is a legitimate security measure "[i]n the abstract," it was unconstitutional where there was "no evidence" that facility staff needed to, or even attempted to, monitor the cells 24 hours a day. *LeMaire*, 745 F. Supp. at 636. Likewise, in *Shepherd v. Ault*, 982 F. Supp. 643, 648 (N.D. Iowa 1997), the court found that the plaintiff stated an Eighth Amendment claim where he alleged that constant illumination of his cell prevented him from sleeping, and where there were triable issues regarding the facility's need or desire to monitor his cells 24 hours a day. That case also suggested that "different inferences arise concerning the effects of constant illumination when exposure to that condition is long term." *Id.*

The unique circumstances of the CIA's detention facilities constitute grounds to distinguish these cases. As noted above, however, the circumstances of the CIA's program demonstrate a special need for 24-hour monitoring. *See id.* at 645 (noting that "[t]he reason for . . . mixed results on 'constant illumination' claims . . . is that such cases are fact-driven"). The CIA's interest in observing the detainees at all times is acute. Because the CIA detains only extremely dangerous individuals whom it has determined to pose serious threats to the United States or to be planning terrorist attacks, *see supra* p. 12, its interest in being able to observe its detainees at all times is considerably greater, in most circumstances, than the need to keep a pretrial detainee under constant surveillance in a U.S. prison or jail. The uniquely vulnerable nature of the CIA's detention facilities further heightens the need for special means of securing those facilities from within. As described above, [redacted] the CIA must house extremely dangerous terrorist detainees, who often have significant training in the making and use of improvised weapons.

These unique characteristics of the CIA detention facilities make the use of unusual security conditions like constant illumination defensible in a way that such a condition might not be in a more traditional facility. By keeping the facilities under constant illumination and closed-circuit surveillance, the CIA is attempting to do with technology what other detention facilities do with architecture or manpower. Accordingly, our analysis of the use of illumination is limited to the CIA's covert detention facilities and would not necessarily carry over to more permanent prisons where alternative ways of keeping watch over detainees might be possible. Indeed, we find it relevant that the CIA has considered, only to reject as impracticable or inadequate, alternative methods of keeping detainees under surveillance, [redacted] The careful decision-making process that led the CIA to adopt

constant illumination further illustrates the nexus between the CIA's security needs and the condition it has imposed.

We therefore conclude that the use of constant illumination, under these special circumstances, satisfies the substantive Fifth Amendment standard relevant here, and thus is consistent with the DTA.

6. The CIA's purpose in shackling detainees is to enhance security "in all aspects of detainee management and movement." *Standard Conditions of CIA Detention* at 3. The use of shackles is calibrated to advance this purpose: the number of hours per day that a detainee is shackled is directly linked to the security threat that the detainee has been shown to pose to detention facility staff. *Id.* We understand, and think it highly significant, that detainees are not shackled while in their cells unless they are a demonstrated threat to themselves or to facility personnel while in their cells. Thus, although detainees whose demonstrated history of misconduct has shown them to pose a serious threat, or who otherwise are reasonably believed to be exceptionally dangerous, might wear shackles at all times, others might be shackled only when CIA personnel are in the room with them, such as during an interrogation session. *Id.* You recently informed us that, at present, no detainee is shackled 24 hours per day.

Also significant to our analysis is our understanding that detainees, while shackled, are able to walk comfortably and that the shackles are fitted "in such a manner as to not restrict the flow of blood or cause any bodily injury." *Standard Conditions of CIA Detention* at 3. This fact helps confirm that such shackling is in fact related to the CIA's interest in security and that it does not cross the line into impermissible punishment. Indeed, our conclusion might well be different were detainees routinely shackled without any individualized determination about the security risks they pose or in such a way as to cause them physical pain or suffering. *Cf. Williams v. Burton*, 943 F.2d 1572, 1574-75 (11th Cir. 1991) (per curiam) (keeping a prisoner in four-point restraints, even for more than twenty-four hours at a time, does not violate the Eighth Amendment where no actual injury is inflicted). But to shackle a demonstrably violent or escape-minded detainee while he is in close proximity to CIA personnel, where the shackles are merely a restraint and not a source of injury, undoubtedly has a direct connection to the CIA's interest in protecting its facilities and its employees. Used in that careful way, shackling is not intended as punishment and cannot be said to be so excessive in relation to the legitimate objective it advances that it can only be understood as punishment.

Shackling, moreover, is a condition of confinement that is addressed in the case law. Courts have often rejected constitutional claims alleging impermissible shackling. For example, in *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996), a prisoner asserted an Eighth Amendment claim based on his allegation that "every time [prison] guards moved him from his cell, they placed him in restraints that caused pain and cuts." *Id.* at 1092. The court of appeals, however, rejected that claim, concluding that, "for the protection of staff and other inmates, prison authorities may place a dangerous inmate in shackles and handcuffs when they move him from his cell." *Id.* Likewise, in *LeMaire v. Maass*, 12 F.3d 1444, 1457 (9th Cir. 1993), the court of appeals rejected an Eighth Amendment claim brought by prisoners who were put in handcuffs and shackles when removed from their cells to shower, stating that the claim was "manifestly without merit." In *LeMaire*, as here, the purpose of the shackling was "to protect staff and inmates." *Id.* That court

also upheld the use of in-cell restraints, concluding that, where used to control behavior of dangerous prisoners and maintain security, the use of such restraints does not violate the Eighth Amendment. *Id.* at 1460. Finally, in *Bruscino v. Carlson*, 854 F.2d 162 (7th Cir. 1988), the court of appeals found that a maximum security prison's policy of handcuffing an inmate and shackling his legs whenever he is outside his cell was a "reasonable measure in view of the history of violence at the prison and the incorrigible, undeterrable character of the inmates." *Id.* at 166.

We therefore conclude that the CIA's use of shackling, as you have described it to us, is sufficiently related to the CIA's objective of institutional security, and sufficiently unlikely to cause needless hardship for detainees, that it does not constitute the kind of "cruel, inhuman, or degrading treatment or punishment" prohibited by the DTA.

C.

Thus far, we have analyzed the CIA's conditions of confinement individually. Courts, however, at least when evaluating an Eighth Amendment conditions-of-confinement claim, tend to take a totality-of-the-circumstances approach. As the Supreme Court has stated, "*[s]ome* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone." *Wilson v. Seiter*, 501 U.S. 294, 304 (1991); *see also Palmer v. Johnson*, 193 F.3d 346, 353 (5th Cir. 1999) (stating that "we must consider the totality of the specific circumstances that constituted the conditions of [the prisoner's] confinement, with particular regard for the manner in which some of those conditions had a mutually reinforcing effect"); *Bruscino v. Carlson*, 854 F.2d 162, 166 (7th Cir. 1988) ("The whole is sometimes greater than the sum of its parts: the cumulative effect of the indignities, deprivations, and constraints to which inmates are subjected determines whether they are receiving cruel and unusual punishment.").

This totality-of-the-circumstances approach has its limits, however. Conditions of confinement may give rise to a constitutional violation together, where they would not do so alone, "only when they have a mutually enforcing effect." *Wilson*, 501 U.S. at 305; *see also Palmer*, 193 F.3d at 353 (considering the manner in which certain conditions had a "mutually reinforcing effect"); *Bruscino*, 854 F.2d at 166 (analyzing conditions' "cumulative effect"). The Supreme Court has explained that

> [t]o say that some prison conditions may interact in this fashion is a far cry from saying that all prison conditions are a seamless web for Eighth Amendment purposes. 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.

We have examined the conditions of confinement employed by the CIA in its covert detention program and see nothing to suggest that they might produce such an effect. In particular, it does not appear that any of the conditions render the detainees unusually susceptible to harm from any of the other conditions. To the contrary, the evidence that we have considered demonstrates that the CIA has gone to great lengths to counteract the potential for any mutually

reinforcing harmful effects of the conditions of detention, including by giving each detainee a quarterly psychological examination to assess how well he is adapting to his confinement. *Id.* In this way, the CIA has instituted procedures to ensure that any unforeseen, mutually reinforcing harmful effects of the conditions of confinement would be brought to the attention of facility personnel and addressed in an appropriate manner.

Nevertheless, we approach this question with no illusions about the cumulative strain that these conditions may impose on detainees. The detainee is isolated from most human contact, . . . confined to his cell for much of each day, under constant surveillance, and is never permitted a moment to rest in the darkness and privacy that most people seek during sleep. These conditions are unrelenting and, in some cases, have been in place for several years. That these conditions, taken together and extended over an indefinite period, may exact a significant psychological toll illustrates the importance of the medical monitoring conducted by the CIA. But CIA's periodic monitoring is not, on its own, sufficient to ensure the non-punitive nature of the combined conditions. Instead, our determination that these conditions are permissible, even when used in combination, rests ultimately on two critical points: (1) the detainees in question are exceptionally dangerous terrorists who pose a serious and continuing threat to the United States and, by extension, the CIA personnel effectuating their detention; (2) [redacted] nature of the CIA facilities does not permit the use of other, sufficiently effective, means of detecting and preventing threats against the security of the facilities. These points highlight that the CIA's security concerns are not exaggerated and, indeed, that in many ways they exceed even those that exist in maximum security domestic prisons. Moreover, the CIA has attempted to calibrate its conditions of confinement so that they not only directly advance its security interests, but so that they do so in ways that avoid causing the detainees excessive or unnecessary hardship. We expect that the CIA will continue to engage in this calibration and will be prepared to modify conditions of confinement (whether for individual detainees or collectively) if experience or new circumstances suggest that some of the conditions discussed above are no longer needed to secure a particular facility or are in fact causing the detainees unjustifiable harm. On the basis of current circumstances, however, we conclude that these conditions, considered both individually and collectively, are consistent with the DTA.[16]

[16] On May 18, 2006, the Committee Against Torture—a body established by Article 17 of the Convention Against Torture ("CAT")—issued a series of recommendations pursuant to the Second Periodic Report of the United States to the Committee. In those recommendations, the Committee stated without elaboration or argument that the detention of any person "in any secret detention facility under its de facto effective control . . . constitutes, *per se*, a violation of the Convention." As the Department of State has explained, the Committee's summary conclusion on this issue is neither authoritative nor correct. As an initial matter, the Committee's mandate under Article 18 is merely to make "suggestions," not to serve as an authoritative interpreter of the Convention as a matter of international law. Moreover, in arguing that incommunicado detention is unlawful, the Committee did not indicate what provisions of the CAT such detention would violate. That omission is not surprising, as the CAT says nothing whatsoever about affording detainees the ability to communicate outside of the facility in which they are being detained. *See* Statement of John Bellinger III to U.N. Committee Against Torture at 23 (May 8, 2006).

IV.

For these reasons, and subject to all the limitations described above, we conclude that the conditions of confinement that are the subject of your inquiry do not constitute "cruel, inhuman, or degrading treatment or punishment" forbidden by the DTA.

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

Steven G. Bradbury
Acting Assistant Attorney General