

## LEGAL RESTRICTIONS ON INTERROGATIONS ABROAD

**Question:** There have been press reports indicating that the Department of Justice has taken the position that certain treaties and statutes may not apply in Guantanamo or in other situations. How can that be?

### Talking Points:

- I cannot comment on specific legal advice that has been given to, requested by, or provided for Executive branch departments. Institutional interests in ensuring that the Executive branch can receive confidential legal advice from the Department of Justice requires that that advice not be publicly disclosed.
- *The actual words of statutes and treaties control.* We are all repulsed by the abuses of Abu Ghraib, and our intuition recoils from treatment that is abusive or indecent. But when it comes to applying the legal standards that govern interrogations, we must take care to apply the laws that Congress has written according to the words that Congress has enacted.
  - Determining whether a particular statute or treaty applies to particular conduct is often a matter of complex legal questions depending on specific language adopted by Congress and “understandings” or “reservations” to treaties adopted by the Senate.
    - These questions include whether a particular statute applies in a certain territory outside the United States and whether it applies to particular categories of persons and specific kinds of activities.
  - All of these limitations are especially important to bear in mind when it comes to criminal statutes and criminal prosecutions, because criminal statutes are generally construed strictly, in favor of the criminal defendant.
- *The Uniform Code of Military Justice governs everywhere.* In addition, while a great of discussion has been focused on international legal obligations, and in particular the Geneva Conventions, it is important to remember that when it comes to the actions of

U.S. military personnel, whether in Iraq during time of war or anywhere else in the world at any time, the Uniform Code of Military Justice always applies, and it fully proscribes any conduct toward prisoners of war or other detainees that could fairly be described as torture, cruelty or maltreatment.

- ***Other criminal provisions.*** Beyond the UCMJ, there are still other federal criminal provisions that potentially may apply to interrogations conducted abroad, depending upon the circumstances, including who is conducting the interrogations and where the conduct takes place.

**Question: What legal standards govern interrogations in Iraq?**

**Talking Points:**

- **The Uniform Code of Military Justice applies to members of the armed forces everywhere, including in Iraq.**
  - The UCMJ prohibits assault (art. 128), cruelty and maltreatment (art. 93), disobedience to orders and dereliction of duty (art. 92), maiming (art. 124), involuntary manslaughter (art. 119), and murder (art. 118).
- **The Military Extraterritorial Jurisdiction Act, or "MEJA," applies in certain circumstances to others who are working with the military. See CRM Talkers.**
  - Under MEJA, those accompanying United States Armed Forces, former members of the military no longer subject to the UCMJ, and members of the military who act with others may be prosecuted for certain acts committed "outside the United States" that would be a felony if committed within the "special maritime and territorial jurisdiction of the United States." (18 U.S.C. § 3261(a)).
  - Such crimes could include assault (18 U.S.C. § 113), maiming (*id.* § 114), murder (*id.* § 1111), and manslaughter (*id.* § 1112).
  - MEJA applies only "outside the United States," as defined by Congress in the general criminal provisions of the U.S. Code. For these purposes, however, Congress has defined the "United States" to include the "special maritime and territorial jurisdiction of the United States," which may include certain military bases or other areas in Iraq, at least with respect to certain conduct. Accordingly, MEJA's application in Iraq will depend on the nature of particular areas and the conduct at issue.
- **The Geneva Conventions apply in Iraq.**
  - As a general rule, captured members of the Iraqi armed forces are entitled to the protections of the Third Geneva Convention covering Prisoners of War.

- The Third Geneva Convention protects prisoners of wars against “grave breaches,” which include “wilful killing,” “torture or inhuman treatment,” or “wilfully causing great suffering or serious injury to body or health.”
  - Furthermore, under article 17 of the Third Geneva Convention, “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”
- The United States is an “occupying power” in Iraq, and the Fourth Geneva Convention covering Civilians thus also applies.
  - The Fourth Geneva Convention protects Iraqis against essentially the same “grave breaches” proscribed by the Third Convention.
  - The Fourth Geneva Convention further protects Iraqis against “outrages upon personal dignity” and “humiliating and degrading treatment.”
- **The Geneva Conventions can be enforced through the federal War Crimes Act.**
  - The War Crimes Act imposes criminal liability on any U.S. citizen or any member of the U.S. armed forces who commits a “grave breach” of the Geneva Conventions. (18 U.S.C. § 2441)
  - “Grave breaches” under the relevant treaties include “wilful killing,” “torture or inhuman treatment,” and “wilfully causing great suffering or serious injury to body or health.”
  - Congress deliberately crafted the War Crimes Act to fulfill our treaty obligations and thus limited it to situations where the treaties apply, and then only to grave breaches of the Conventions.
- **In addition, the federal torture statute makes it a crime for any person “outside the United States [to] commit or attempt[] to commit torture.” (18 U.S.C. § 2340A).**
  - Torture is defined as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other

than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” *Id.* § 2340(1).

- Congress placed limiting definitions on the terms of the statute. It defined “severe mental pain and suffering” as “the prolonged mental harm caused or resulting from” specified acts, including the “intentional infliction or threatened infliction of severe physical pain or suffering” and the threat of imminent death, and the actual or threatened administration of mind-altering substances. *Id.* § 2340(2).
- The torture statute would generally apply to acts of torture committed in Iraq. In particular cases, however, there may be difficult legal questions about the scope of its application.
  - While Congress made the torture statute apply “outside the United States,” it also included a special definition of the “United States” that includes the “special maritime and territorial jurisdiction of the United States,” which, in turn, may include certain military bases and other areas overseas, at least for certain kinds of conduct. (18 U.S.C. § 7(3) & 7(9))
  - Because of the way Congress drafted the torture statute, therefore, its application to certain areas in Iraq, particularly U.S. military bases, and to particular conduct in those areas may vary depending on the circumstances at issue.
- **The international Convention Against Torture is also relevant.**
  - When the United States ratified the Convention Against Torture, the President and the Senate defined United States obligations through an “understanding” according to which “torture” under the treaty is interpreted to have essentially the same meaning as in the federal torture statute.

**Question: What legal standards govern interrogations in Guantanamo and Afghanistan?**

**Talking Points:**

- Quite apart from treaty obligations, the President early on announced the policy that detainees at Guantanamo will be treated “humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949,” and that “[t]he detainees will not be subjected to physical or mental abuse or cruel treatment.” White House Fact Sheet (Feb. 7, 2002).
- **The Uniform Code of Military Justice (“UCMJ”) applies to members of the armed forces everywhere, including in Guantanamo and Afghanistan.**
  - The UCMJ prohibits assault (art. 128), cruelty and maltreatment (art. 93), disobedience to orders and dereliction of duty (art. 92), maiming (art. 124), involuntary manslaughter (art. 119), and murder (art. 118).
- **The Military Extraterritorial Jurisdiction Act, or “MEJA,” applies in certain circumstances to others who are working with the military in Afghanistan. See CRM Talkers.**
  - Under MEJA, those accompanying United States Armed Forces, former members of the military no longer subject to the UCMJ, and members of the military who act with others may be prosecuted for certain acts that would be a felony if committed within the “special maritime and territorial jurisdiction of the United States.” (18 U.S.C. § 3261(a)).
  - Such crimes could include assault (18 U.S.C. § 113), maiming (*id.* § 114), murder (*id.* § 1111), and manslaughter (*id.* § 1112).
  - MEJA applies only “outside the United States,” as defined by Congress in the general criminal provisions of the U.S. Code. The “United States” is defined in those statutes to include the “special maritime and territorial jurisdiction of the United States,” and it is likely that a court would hold that such areas may include Guantanamo and certain areas in Afghanistan, at least with respect to certain conduct. Accordingly, MEJA may not apply in Guantanamo and its application in

Afghanistan will depend on the nature of particular areas and the specific conduct at issue.

- **As a matter of law (distinct from the policy announced by the President), the protections of the Geneva Conventions do not apply to al Qaeda and the Taliban.**
  - The Geneva Conventions do not protect members of al Qaeda because al Qaeda “is not a state party to [the treaties]; it is a foreign terrorist group.” White House Fact Sheet (Feb. 7, 2002).
  - Although Afghanistan is a party to the Geneva Conventions, the Taliban detainees are not entitled to the protections of the Third Geneva Convention covering Prisoners of War because they do not satisfy the four conditions for status as POWs under the treaty.
    - Those conditions are: to be commanded by a person responsible for his subordinates, to have distinctive and recognizable identifying insignia, to carry arms openly, and to act in accordance with the laws of war. Because the Taliban failed to meet each of these standards, except the open carrying of arms, Taliban detainees, whether held in Afghanistan or at Guantanamo, do not qualify for POW status under the Third Geneva Convention.
    - The only court to address the issue has upheld the President’s determination that members of the Taliban militia fail to qualify for POW status under the Third Geneva Convention. *See United States v. Lindh*, 212 F. Supp. 2d 541, 556-558 (E.D. Va. 2002).
  - The Fourth Geneva Convention covering Civilians also covers “cases of partial or total occupation of the territory of a High Contracting Party,” as informed by the Hague Regulations. The United States is not an “occupying power” in Afghanistan within the meaning of the Hague Regulations, because Afghanistan has not been “actually placed under the authority of the hostile army.” (Hague Regulations, art. 42(1))

- **The interrogation of al Qaeda and Taliban detainees could not violate the federal War Crimes Act, because in relevant part the Act criminalizes only “grave breaches” of the Geneva Conventions, and there can be no breaches of these treaties where they do not apply.**
- **The federal torture statute makes it a crime for any person “outside the United States [to] commit or attempt[] to commit torture.” (18 U.S.C. § 2340A).**
  - Torture is defined as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” *Id.* § 2340(1).
  - Congress placed limiting definitions on the terms of the statute. It defined “severe mental pain and suffering” as “the prolonged mental harm caused or resulting from” specified acts, including the “intentional infliction or threatened infliction of severe physical pain or suffering” and the threat of imminent death, and the actual or threatened administration of mind-altering substances. *Id.* § 2340(2).
  - The torture statute would generally apply to acts of torture committed in Afghanistan. In particular cases, however, there may be difficult legal questions about the scope of its application.
    - While Congress made the torture statute apply “outside the United States,” it also included a special definition of the “United States” that includes the “special maritime and territorial jurisdiction of the United States,” which, in turn, may include certain military bases and other areas overseas, at least for certain kinds of conduct. (18 U.S.C. § 7(3) & 7(9))
    - Because of the way Congress drafted the torture statute, therefore, its application to certain areas in Afghanistan, particularly U.S. military bases, and to particular conduct in those areas may vary depending on the circumstances at issue.
    - In addition, it is likely that a court would hold that the torture statute does not apply in Guantanamo, because the Guantanamo base may be considered within the “special maritime and territorial jurisdiction of the United States.”



- **The international Convention Against Torture is also relevant.**
  - When the United States ratified the Convention Against Torture, the President and the Senate defined United States obligations through an “understanding” according to which “torture” under the treaty is interpreted to have essentially the same meaning as in the federal torture statute.

**Question: Does the U.S. Constitution restrain interrogation overseas?**

**Talking Points:**

- The two provisions of the Constitution that are potentially applicable, the **Fifth and Eighth Amendments**, likely do not apply abroad and, in any event, may not provide clear substantive constraints on interrogations that occur overseas.
- The **Fifth Amendment does not apply to actions taken against aliens abroad.**
  - The Supreme Court has held that the **Fifth Amendment** does not apply to actions taken against aliens abroad. *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950); see *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (describing *Eisentrager* as having “rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States”).
    - Accordingly, Fifth Amendment protections do not apply to alien detainees in Iraq or Afghanistan.
    - Furthermore, the United States has argued in the Guantanamo cases currently pending before the Supreme Court that Guantanamo is not part of the “sovereign territory” of the U.S.; thus, the Fifth Amendment would not apply to alien detainees at Guantanamo, as well.
- **In any event, even if the Fifth Amendment were to apply, the Due Process Clause of the Fifth Amendment proscribes only conduct that “shocks the conscience.”**
  - The substantive limits of the Due Process Clause have been held to protect against “only the most egregious official conduct” that “shocks the conscience,” which likely would include only “conduct intended to injure in some way unjustifiable by any government interest,” based on “an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them.” *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 & n.8, 849 (1998).

- The protections of the Eighth Amendment, like those of the Fifth Amendment, likely would be held not to apply to aliens detained abroad.
- In any event, even if it were applicable overseas, the Eighth Amendment only forbids cruel and unusual punishment that is imposed after an adjudication of guilt, and thus likely would not restrain the conduct of interrogations occurring prior to such an adjudication.
  - The Eighth Amendment, which forbids cruel and unusual punishment, applies only after a formal adjudication of guilt. *See City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983) (“Because there had been no formal adjudication of guilt against Kivlin at the time he required medical care, the Eighth Amendment has no application.”).
  - Accordingly, the Eighth Amendment would not apply to the interrogation of detainees prior to any adjudication of guilt.

**Question: Does the International Covenant on Civil and Political Rights (“ICCPR”) restrain interrogation overseas?**

**Talking Points:**

- **The ICCPR does not apply to conduct outside the United States.**
  - Under the plain terms of the ICCPR, each contracting party undertakes to ensure the rights enumerated in the treaty “to all individuals *within* its territory *and* subject to its jurisdiction.” Art. 2(1) (emphases added).
  - This is the position the United States has taken in the Guantanamo cases, and it is also the consistent position of the State Department.
- **The ICCPR is a human rights treaty and does not apply in wartime or to the conduct of war.**
  - The laws of armed conflict constitute a separate body of international and domestic law that the ICCPR was not intended to supplant.
  - This conclusion is based on application of the principle that specific provisions trump general provisions.
  - This position has also been taken in the Guantanamo cases and approved by the State Department.
- **Article 7 of the ICCPR declares that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”**
  - With respect to “cruel, inhuman or degrading treatment or punishment,” the United States took a reservation, limiting the phrase to conduct that would violate the U.S. Constitution.
  - The explanation of the Covenant sent to the Senate also said that “we interpret our obligations under [the provision on torture] consistently with those we have undertaken in [the Convention Against Torture].”



**Question:** What about Common Article 3 of the Geneva Conventions -- does it apply?

**Talking Points:**

- Common article 3 of the Geneva Conventions proscribes cruel, humiliating and degrading treatment of persons who are not actively engaged in hostilities, but by its terms it applies only “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”
  - The conflicts in Iraq and Afghanistan are of an international character and thus common article 3 does not apply.

**Question:** What about Article 16 of the Convention Against Torture – does it apply?

**Talking Points:**

- Article 16 of the Convention Against Torture proscribes “cruel, inhuman or degrading treatment or punishment which do not amount to torture.” Under a “reservation” to the treaty, the United States defines this phrase to refer to “the cruel, unusual and inhumane treatment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments” to the U.S. Constitution.
- **As a textual matter, Article 16 might not apply in times of war or times of extreme threat to national security.**
  - The Convention clearly states that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of *torture*,” as proscribed in Article 1 of the Convention. (Art. 2) No similar declaration applies to Article 16.
  - Under ordinary rules of construction, the absence of a parallel declaration excluding “exceptional circumstances” for Article 16 suggests that “a state of war or a threat of war, internal political instability or . . . other public emergency” might justify conduct that would otherwise be prohibited by Article 16.
- By virtue of the U.S. reservation interpreting Article 16 to incorporate the substantive protections of the Fifth and Eighth Amendments of the U.S. Constitution, Article 16 might not apply extraterritorially, since the Fifth Amendment has been held not to apply to aliens abroad and the Eighth Amendment is also probably so limited in application.
- Finally, it is important to point out that unlike the Article 1 prohibition against torture, which Congress has enforced through the federal torture statute, Congress has not chosen to enact any criminal statute to enforce Article 16.

**Question: When and how does the federal torture statute apply to interrogations conducted overseas?**

**Talking Points:**

- **The federal torture statute makes it a crime for any person “outside the United States [to] commit or attempt[] to commit torture.” (18 U.S.C. § 2340A).**
- **Congress placed limits on the definition of “torture” in the federal torture statute.**
  - Torture is defined as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” *Id.* § 2340(1).
  - Congress defined “severe mental pain and suffering” as “the prolonged mental harm caused or resulting from” specified acts, including the “intentional infliction or threatened infliction of severe physical pain or suffering” and the threat of imminent death, and the actual or threatened administration of mind-altering substances. *Id.* § 2340(2).
- **Congress also placed limits on the territorial scope of the torture statute by including a special definition of what constitutes “outside the United States,” and these limits on the scope of the statute give rise to difficult legal questions about its application to interrogations in Iraq, Afghanistan and Guantanamo.**
  - While Congress made the torture statute apply “outside the United States,” it also included a special definition of the “United States” that includes the “special maritime and territorial jurisdiction of the United States,” which, in turn, may include certain military bases and other areas overseas, at least for certain kinds of conduct. (18 U.S.C. § 7(3) & 7(9))
  - Because of the way Congress drafted the torture statute, therefore, its application to certain areas in Iraq and Afghanistan, particularly U.S. military bases, and to particular conduct in those areas may vary depending on the circumstances at issue.



- In addition, it is likely that a court would hold that the torture statute does not apply in Guantanamo, because the Guantanamo base may be considered within the “special maritime and territorial jurisdiction of the United States.”

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