

Supp. 707, 711–12 (N.D. Cal. 1988) (sustaining earlier dismissal of cruel, inhuman, or degrading treatment or punishment because the court concluded that there was insufficient consensus defining the prohibited conduct). *Cf. Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J. concurring in the denial of cert.) (noting that international courts were not in agreement as to whether a lengthy delay between sentencing and execution constituted “cruel inhuman or degrading treatment or punishment” and that every court of appeals to have addressed such a claim had rejected it). Indeed, the drafters of CAT expressly recognized the absence of any consensus as to what kind of treatment or punishment rose to the level of “cruel, inhuman, or degrading treatment or punishment.” As noted above, it is precisely because this term had no coherent meaning under international law that the drafters chose not to require the criminalization of such conduct. *See CAT Handbook* at 47. *Compare* CAT, art. 4 (“Each State Party shall ensure that all acts of torture are offences under its criminal law.”) *with id.* art. 16 (“Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, human, or degrading treatment or punishment which do not amount to torture . . .”). Given the wide-ranging nature of international decisions regarding this phrase, some international decisions might give the phrase almost limitless application. For example, in *Iwanczuk v. Poland* (Eur. Ct. H.R. 2001), the European Court of Human Rights concluded that a strip search, undertaken because a prisoner had once been found with a knife, as well as certain humiliating remarks the guards allegedly made about the prisoner’s body (which the government disputed), “amounted to degrading treatment . . .” *Id.* at ¶ 59. In reaching that conclusion, the court reasoned, “[I]t is sufficient if the victim is humiliated in his or her own eyes.” *Id.* at ¶ 51 (citations omitted). And in *Ireland v. United Kingdom* (Eur. Ct. H.R. 1977), a decision discussed in more detail below, the court concluded that actions that “arouse . . . feelings of fear, anguish and inferiority capable of humiliating and debasing [the prisoners] and possibly breaking their physical or moral resistance” constitutes degrading treatment. *Id.* at ¶ 167. Under these decisions anything that a *detainee* finds humiliating or offensive, or anything geared toward reducing that person’s moral or physical resistance to cooperating could constitute degrading treatment or punishment. These opinions would reach conduct far below the standard articulated in the U.S. reservation and would produce precisely the expansive and limitless results that the United States sought to avoid. Ultimately, as explained above, the United States is bound only by the treaty obligations to which it has consented. We explain below the substantive standards that this reservation to the definition of cruel, inhuman, and degrading treatment or punishment establishes. We address first the Eighth Amendment and then the standard established by the Fifth and Fourteenth Amendments.⁶⁵

i. Eighth Amendment

Under the Supreme Court’s “cruel and unusual punishment” jurisprudence, there are two lines of analysis that might be relevant to the conduct of interrogations: (1) when prison officials use excessive force; and (2) when prisoners challenge their conditions of confinement. As a general matter, the excessive force analysis often arises in situations in which an inmate has attacked another inmate or a guard. Under this analysis, “a prisoner alleging excessive force must demonstrate that the defendant acted ‘maliciously and sadistically’” for the very purpose of causing harm. *Porter v. Nussle*, 534 U.S. 516, 528 (2002) (quoting *Hudson v. McMillian*, 503

⁶⁵ As we explained in Part I, neither the Fifth Amendment nor the Eighth Amendment apply of their own force to the interrogations of alien enemy combatants held abroad.

U.S. 1, 7 (1992)). Actions taken in "good-faith . . . to maintain or restore discipline" do not constitute excessive force. *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) ("[W]e think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.") (internal quotation marks and citation omitted). To determine whether an official has met this standard, factors such as "the need for the application of force, the relationship between the need and the amount of force that was used, [] the extent of injury inflicted[,] " are to be considered as well as "the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response." *Id.* at 321 (internal quotation marks and citation omitted). Put another way, the actions must be necessary and proportional in light of the danger that reasonably appears to be posed. Moreover, the Supreme Court has emphasized that deference must be accorded to the decisions of prison officials "taken in response to an actual confrontation with riotous inmates" as well as "to prophylactic or preventative measures intended to reduce the incidence of these or any other breaches of prison discipline." *Id.* at 322.

This standard appears to be most potentially applicable to interrogation techniques that may involve varying degrees of force. As is clear from above, the excessive force analysis turns on whether the official acted in good faith or maliciously and sadistically for the very purpose of causing harm. For good faith to be found, the use of force should, among other things, be necessary. Here, depending upon the precise factual circumstances, such techniques may be necessary to ensure the protection of the government's interest here—national security. As the Supreme Court recognized in *Haig v. Agee*, 435 U.S. 280 (1981), "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Id.* at 307 (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)). In the typical excessive force case, the protection of other inmates and officers or the maintenance of order are valid government interests that may necessitate the use of force. If prison administration or the protection of one person can be deemed to be valid governmental interests necessitating the use of force, then the interest of the United States here—obtaining intelligence vital to the protection of thousands of American citizens—can be no less valid.

To be sure, no court has encountered the precise circumstances here. Nonetheless, Eighth Amendment cases most often concern instances in which the inmate is a threat to safety, and here force would be used to prevent a threat to the safety of the United States that went beyond a single inmate or a single prison. We believe it is beyond question that there can be no more compelling government interest than that which is presented here. Just as prison officials are given deference in their response to rioting inmates or prison discipline, so too must the Executive be given discretion in its decisions to respond to the grave threat to national security posed by the current conflict. Whether the use of more aggressive techniques that involve force is permissible will depend on the information that relevant officials have regarding the nature of the threat and the likelihood that the particular detainee has information relevant to that threat.

Whether the interrogators have acted in good faith would turn in part on the injury inflicted. For example, if the technique caused minimal or minor pain, it is less likely to be problematic under this standard. The use of force must also be proportional, i.e., there should

also be some relationship between the technique used and the necessity of its use. So, if officials had credible threat information that a U.S. city was to be the target of a large-scale terrorist attack a month from now and the detainee was in a position to have information that could lead to the thwarting of that attack, physical contact such as shoving or slapping the detainee clearly would not be disproportionate to the threat posed. In such an instance, those conducting the interrogations would have acted in good faith rather than maliciously and sadistically for the very purpose of causing harm.

We also note that the excessive force analysis might also apply to the use of threats. Some courts have held that threats can state an excessive force claim. For example, in *Chandler v. District of Columbia Dept. of Corrections*, 145 F.3d 1355 (D.C. Cir. 1998), the D.C. Circuit found that a correctional officer's threat to the inmate had put him in "imminent fear of his life because she was in a position to carry it out." *Id.* at 1361. The court concluded that "[d]epending upon the gravity of the fear, the credibility of the threat, and on [the inmate's] psychological condition, the threat itself could have caused more than *de minimis* harm and therefore could have been sufficient to state a claim of excessive use of force." *Id.* at 1361. See also *Northington v. Jackson*, 973 F.2d 1518 (10th Cir. 1992) (holding that allegation that officer put a gun to the inmate's head and threatened to kill him stated an excessive force claim). But see *Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979) (sheriff's idle threat to hang prisoner did not state a claim for an Eighth Amendment violation); *Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987) (allegations that defendants threatened inmate with physical harm, where plaintiff also alleged the defendants had beaten him, did not state an Eighth Amendment claim).

The conditions of confinement cases provide a useful analogue to interrogation techniques that alter the conditions of a detainee's cell and surrounding environment. The conditions of confinement analysis often arises in claims concerning the use of administrative segregation and conditions attendant that segregation. In those cases, a condition of confinement is not "cruel and unusual" unless it (1) is "sufficiently serious" to implicate constitutional protection, *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), and (2) reflects "deliberate indifference" to the prisoner's health or safety, *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The failure to demonstrate either one of these components is fatal to the claim. The first element is objective, and inquires whether the challenged condition is cruel and unusual. The second, so-called "subjective" element requires an examination of the actor's intent and inquires whether the challenged condition is imposed as a punishment. *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) ("The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.").

The Supreme Court has noted that "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Rhodes*, 452 U.S. at 346 (1981) (internal quotations marks and citation omitted). See also *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (stating that the Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency"). Despite

this broad language, in recent years the Supreme Court clearly has sought to limit the reach of the Eighth Amendment in the prison context and certain guidelines emerge from these cases.

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

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

To show deliberate indifference under the subjective element of the conditions of confinement test, a prisoner must show that "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference can be drawn that a substantial risk of serious harm exists and he must also draw the inference." *Farmer*, 511 U.S. at 837. This standard requires greater culpability than mere negligence. *See id.* at 835; *Wilson*, 501 U.S. at 305 ("mere negligence would satisfy neither [the *Whitley* standard of malicious and sadistic infliction] nor the more lenient deliberate indifference standard") (internal quotation marks omitted). Deliberate indifference is, however, "satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer*, 511 U.S. at 835. Moreover, the Court has emphasized that there need not be direct evidence of such intent. Instead, the "existence of this subjective state of mind [may be

inferred] from the fact that the risk of harm is obvious.” *Hope v. Pelzer*, 122 S. Ct. 2508, 2514 (2002).

One of its most recent opinions on conditions of confinement—*Hope v. Pelzer*, 122 S. Ct. 2508 (2002)—illustrates the Court’s focus on the necessity of the actions undertaken in response to a disturbance in determining the officer’s subjective state of mind.⁶⁶ In *Hope*, following an “exchange of vulgar remarks” between the inmate Hope and an officer, the two got into a “wrestling match.” *Id.* at 2512. Additional officers intervened and restrained Hope. *See id.* These officers then took Hope back to the prison. Once there, they required him to take off his shirt and then attached him to the hitching post, where he remained in the sun for the next seven hours. *See id.* at 2512–13. During this time, Hope received no bathroom breaks. He was given water only once or twice and at least one guard taunted him about being thirsty. *See id.* at 2513. The Supreme Court concluded that the facts Hope alleged stated an “obvious” Eighth Amendment violation. *Id.* at 2514. The obviousness of this violation stemmed from the utter lack of necessity of the guard’s actions. The Court emphasized that “[a]ny safety concerns” arising from the scuffle between Hope and the officer “had long since abated by the time [Hope] was handcuffed to the hitching post” and that there was a “clear lack of an emergency situation.” *Id.* As a result, the Court found that “[t]his punitive treatment amount[ed] to [the] gratuitous infliction of ‘wanton and unnecessary’ pain that our precedent clearly prohibits.” *Id.* at 2515. Thus, the necessity of the governmental action bears upon both the conditions of confinement analysis as well as the excessive force analysis.

Here, interrogation methods that do not deprive enemy combatants of basic human needs would not meet the objective element of the conditions of confinement test. For example, a deprivation of a basic human need would include denial of adequate shelter, such as subjecting a detainee to the cold without adequate protection. *See Dixon v. Godinez*, 114 F.3d 640, 642 (7th Cir. 1997). A brief stay in solitary confinement alone is insufficient to state a deprivation. *See, e.g., Leslie v. Doyle*, 125 F.3d 1132, 1135 (7th Cir. 1997) (“A brief stay in disciplinary segregation[, here 15 days,] is, figuratively, a kind of slap on the wrist that does not lead to a cognizable Eighth Amendment claim.”). Such things as insulting or verbally ridiculing detainees would not constitute the deprivation of a basic human need. *See Somers v. Thurman*, 109 F.3d 614, 624 (9th Cir. 1997) (“To hold that gawking, pointing, and joking [about nude prisoners] violates the prohibition against cruel and unusual punishment would trivialize the objective component of the Eighth Amendment test and render it absurd.”). Additionally, the clothing of a detainee could also be taken away for a period of time without necessarily depriving him of a basic human need that satisfies this objective test. *See, e.g., Seltzer-Bey v. Delo*, 66 F.3d 961, 964 (8th Cir. 1995). While the objective element would not permit the deprivation of food altogether, alterations in a detainee’s diet could be made that would not rise to the level of a denial of life’s necessities. As the Ninth Circuit has explained, “The Eighth Amendment requires only that prisoners receive food that is adequate to maintain health; it need not be tasty or aesthetically pleasing.” *LaMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993).

⁶⁶ Although the officers’ actions in *Hope* were undertaken in response to a scuffle between an inmate and a guard, the case is more properly thought of as a conditions of confinement case rather than as an “excessive force” case. By examining the officers’ actions under the “deliberate indifference standard” the Court analyzed it as a conditions of confinement case. As explained in text, the deliberate indifference standard is inapplicable to claims of excessive force.

Even if an interrogation method amounted to a deprivation of life's necessities under the objective test, the subjective component would still need to be satisfied, i.e., the interrogators would have to act with deliberate indifference to the detainee's health or safety. We believe that if an interrogator acts with the honest belief that the interrogation methods used on a particular detainee do not present a serious risk to the detainee's health or safety, he will not have acted with deliberate indifference. An honest belief might be demonstrated by due diligence as to the effects of a particular interrogation technique combined with an assessment of the prisoner's psychological health.

Finally, the interrogation methods cannot be unnecessary or wanton. As we explained regarding the excessive force analysis, the government interest here is of the highest magnitude. In the typical conditions of confinement case, the protection of other inmates or officers, the protection of the inmate alleged to have suffered the cruel and unusual punishment, or even the maintenance of order in the prison, provide valid government interests that may justify various deprivations. See, e.g., *Anderson v. Nosser*, 438 F.2d 183, 193 (5th Cir. 1971) ("protect[ing] inmates] from self-inflicted injury, [] protect[ing] the general prison population and personnel from violate acts on his part, [and] prevent[ing] [] escape" are all legitimate penological interests that would permit the imposition of solitary confinement); *McMahon v. Beard*, 583 F.2d 172, 175 (5th Cir. 1978) (prevention of inmate suicide is a legitimate interest). As with excessive force, no court has encountered the precise circumstances here under conditions of confinement jurisprudence. Nonetheless, we believe it is beyond question that there can be no more compelling government interest than that which is presented here and depending upon the precise factual circumstances of an interrogation, e.g., where there was credible information that the enemy combatant had information that could avert a threat, deprivations that may be caused would not be wanton or unnecessary.

ii. Fifth and Fourteenth Amendments

Under the Due Process clauses of the Fifth and Fourteenth Amendments,⁶⁷ substantive due process protects an individual from "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Under substantive due process "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id.* at 846 (internal quotation marks and citation omitted). That conduct must "shock[] the conscience." See generally *id.*; *Rochin v. California*, 342 U.S. 165 (1952).⁶⁸ Unlike government actions subjected

⁶⁷ The substantive due process standard discussed in this section applies to both the Fourteenth and Fifth Amendment Due Process Clauses.

⁶⁸ In the seminal case of *Rochin v. California*, 342 U.S. 165 (1952), the police had some information that the defendant was selling drugs. Three officers went to and entered the defendant's home without a warrant and forced open the door to the defendant's bedroom. Upon the opening door, the officers saw two pills and asked the defendant about them. The defendant promptly put them in his mouth. The officers "jumped upon him and attempted to extract the capsules." *Id.* at 166. The police tried to pull the pills out of his mouth but despite considerable struggle the defendant swallowed them. The police then took the defendant to a hospital, where a doctor forced an ermetic solution into the defendant's stomach by sticking a tube down his throat and into his stomach, which caused the defendant to vomit up the pills. The pills did in fact contain morphine. See *id.* The

to scrutiny under procedural due process, which are constitutionally permissible so long as the government affords adequate processes, government actions that "shock the conscience" are prohibited irrespective of the procedures that the government may employ in undertaking those actions. See generally *Rochin v. California*, 342 U.S. 165 (1952). The Supreme Court has limited the use of the nebulous standards of substantive due process and sought to steer constitutional claims to more specific amendments. See, e.g., *Graham v. Connor*, 490 U.S. 386, 393-95 (1989) (holding that damages claim for injuries sustained when officers used physical force during a stop should be analyzed under the Fourth Amendment rather than substantive due process); *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (holding that substantive due process provides no greater protection to prisoner shot during a prison riot than does the Eighth Amendment). See also *Matta-Ballesteros v. Henman*, 896 F.2d 255, 261 (7th Cir. 1990) (declining to analyze claim under the "shock-the-conscience" standard because Fourth Amendment provided that court with an explicit textual constitutional protection under which to analyze the plaintiff's claim of excessive force). As the Court explained in *Albright v. Oliver*, 510 U.S. 266 (1994), "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of governmental behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Id.* at 273 (plurality opinion of Rehnquist, C.J.). See also *County of Sacramento*, 523 U.S. at 843 ("[s]ubstantive due process analysis is therefore inappropriate" if the claim is covered by a specific Amendment). Thus, although substantive due process offers another line of analysis, it does not provide any protection greater than that which the Eighth Amendment provides. See *Whitley*, 475 U.S. at 327.

To shock the conscience, the conduct at issue must involve more than mere negligence by the executive official. See *County of Sacramento*, 523 U.S. at 849. See also *Daniels v. Williams*, 474 U.S. 327 (1986) ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property.") (collecting cases). Instead, "[i]t is . . . behavior on the other end of the culpability spectrum that would most probably support a substantive due process claim: conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *County of Sacramento*, 523 U.S. at 849. In some circumstances, however, recklessness or gross negligence may suffice. See *id.* The requisite level of culpability is ultimately "not . . . subject to mechanical application in unfamiliar territory." *Id.* at 850. As the Supreme Court has explained: "Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Id.* As a general matter, deliberate indifference would be an appropriate standard where there is a real possibility for actual deliberation. In other circumstances, however, where quick decisions must be made (such as responding to a prison riot), a heightened level of culpability is more appropriate. See *id.* at 851-52.

The shock-the-conscience standard appears to be an evolving one. The Court's most recent opinion regarding this standard emphasized that the conscience shocked was the

Court found that the actions of the police officers "shocked the conscience" and therefore violated Rochin's due process rights. *Id.* at 170.

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

Additionally, *Ingraham v. Wright*, 430 U.S. 651 (1977), clarified that under substantive due process, "[t]here is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." *Id.* at 674. And as the Fourth Circuit has noted, it is a "principle" "inherent in the Eighth [Amendment] and [substantive due process]" that "[n]ot . . . every malevolent touch by a prison guard gives rise to a federal cause of action. See *Johnson v. Glick*, 481 F.2d at 1033 ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights")." *Riley v. Dorton*, 115 F.3d 1159, 1167 (4th Cir. 1997) (quoting *Hudson*, 503 U.S. at 9). Instead, "the [shock-the-conscience] . . . inquiry . . . [is] whether the force applied caused injury so severe, and was so disproportionate to the need presented and so inspired by malice or sadism . . . that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987). Examples of physical brutality that "shock the conscience" include: the rape of a plaintiff by a uniformed officer, see *Jones v. Wellham*, 104 F.3d 620 (4th Cir. 1997); a police officer striking the plaintiff in retaliation for the plaintiff photographing the police officer, see *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981); police officer shooting a fleeing suspect's legs without any probable cause other than the suspect's running and failure to stop, see *Aldridge v. Mullins*, 377 F. Supp. 850 (M.D. Tenn. 1972) *aff'd*, 474 F.2d 1189 (6th Cir. 1973). Moreover, beating or sufficiently threatening someone during the course of an interrogation can constitute conscience-shocking behavior. See *Gray v. Spillman*, 925 F.2d 90, 91 (4th Cir. 1991) (plaintiff was beaten and threatened with further beating if he did not confess). By contrast, for example, actions such as verbal insults and an angry slap of "medium force" did not constitute behavior that "shocked the conscience." See *Riley*, 115 F.3d at 1168 n.4 (4th Cir. 1997) (finding claims that such behavior shocked the conscience "meritless").

Physical brutality is not the only conduct that may meet the shock-the-conscience standard. In *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (en banc), the Ninth Circuit held that certain psychologically-coercive interrogation techniques could constitute a violation of substantive due process. The interrogators techniques were "designed to instill stress, hopelessness, and fear, and to break [the suspect's] resistance." *Id.* at 1229. The officers planned to ignore any request for a lawyer and to ignore the suspect's right to remain silent, with the express purpose that any statements he might offer would help keep him from testifying in his own defense. See *id.* at 1249. It was this express purpose that the court found to be the "aggravating factor" that led it to conclude that the conduct of the police "shocked the

conscience.” *Id.* at 1249. The court reasoned that while “[i]t is a legitimate purpose of police investigation to gather evidence and muster information that will surround a guilty defendant and make it difficult if not impossible for him to escape justice[.]” “when the methods chosen to gather such evidence and information are deliberately unlawful and flout the Constitution, the legitimacy is lost.” *Id.* at 1250. In *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989), the Seventh Circuit found that severe mental distress inflicted on a suspect could be a basis for a substantive due process claim. *See id.* at 195. *See also Rhodes v. Robinson*, 612 F.2d 766, 771 (3d Cir. 1979) (claim of emotional harm could be the basis of a substantive due process claim). The *Wilkins* court found that under certain circumstances interrogating a suspect with gun at his head could violate those rights. *See* 872 F.2d at 195. Whether it would rise to the level of a violation depended upon whether the plaintiff was able to show “misconduct that a reasonable person would find so beyond the norm of proper police procedure as to shock the conscience, and that it is calculated to induce not merely momentary fear or anxiety, but severe mental suffering, in the plaintiff.” *Id.* On the other hand, we note that merely deceiving the suspect does not shock the conscience, see, e.g., *United States v. Byram*, 145 F.3d 405 (1st Cir. 1998) (assuring defendant he was not in danger of prosecution did not shock the conscience), nor does the use of sympathy or friends as intermediaries, see, e.g., *United States v. Simtob*, 901 F.2d 799, 809 (9th Cir. 1990).

Although the substantive due process case law is not pellucid, several principles emerge. First, whether conduct is conscience-shocking turns in part on whether it is without any justification, i.e., it is “inspired by malice or sadism.” *Webb*, 828 F.2d at 1158. Although enemy combatants may not pose a threat to others in the classic sense seen in substantive due process cases, the detainees here may be able to prevent great physical injury to countless others through their knowledge of future attacks. By contrast, if the interrogation methods were undertaken solely to produce severe mental suffering, they might shock the conscience. Second, the official must have acted with more than mere negligence. Because, generally speaking, there will be time for deliberation as to the methods of interrogation that will be employed, it is likely that the culpability requirement here is deliberate indifference. *See County of Sacramento*, 523 U.S. at 851–52. Thus, an official must know of a serious risk to the health or safety of a detainee and he must act in conscious disregard for that risk in order to violate due process standards. Third, this standard permits some physical contact. Employing a shove or slap as part of an interrogation would not run afoul of this standard. Fourth, the detainee must sustain some sort of injury as a result of the conduct, e.g., physical injury or severe mental distress.

5. International Decisions on the Conduct of Interrogations

Although decisions by foreign or international bodies are in no way binding authority upon the United States, they provide guidance about how other nations will likely react to our interpretation of the CAT and Section 2340. As this Part will discuss, other Western nations have generally used a high standard in determining whether interrogation techniques violate the international prohibition on torture. In fact, these decisions have found various aggressive interrogation methods to, at worst, constitute cruel, inhuman, and degrading treatment, but not torture. These decisions only reinforce our view that there is a clear distinction between the two standards and that only extreme conduct, resulting in pain that is of an intensity often accompanying serious physical injury, will violate the latter.

a. **European Court of Human Rights**

An analogue to CAT's provisions can be found in the European Convention on Human Rights and Fundamental Freedoms (the "European Convention"). This convention prohibits torture, though it offers no definition of it. It also prohibits cruel, inhuman, or degrading treatment or punishment, again without definition. By barring both types of acts, the European Convention implicitly distinguishes between them and further suggests that torture is a grave act beyond cruel, inhuman, or degrading treatment or punishment.

The leading European Court of Human Rights case explicating the differences between torture and cruel, inhuman, or degrading treatment or punishment is *Ireland v. the United Kingdom* (1978).⁶⁹ In that case, the European Court of Human Rights examined interrogation techniques somewhat more sophisticated than the rather rudimentary and frequently obviously cruel acts described in the TVPA cases. Careful attention to this case is worthwhile not just because the case examines methods not used in the TVPA cases, but also because the Reagan administration relied on this case in reaching the conclusion that the term torture is reserved in international usage for "extreme, deliberate, and unusually cruel practices." S. Treaty Doc. No. 100-20, at 4.

The methods at issue in *Ireland* were:

- (1) Wall Standing. The prisoner stands spread eagle against the wall, with fingers high above his head, and feet back so that he is standing on his toes such that his all of his weight falls on his fingers.
- (2) Hooding. A black or navy hood is placed over the prisoner's head and kept there except during the interrogation.
- (3) Subjection to Noise. Pending interrogation, the prisoner is kept in a room with a loud and continuous hissing noise.
- (4) Sleep Deprivation. Prisoners are deprived of sleep pending interrogation.
- (5) Deprivation of Food and Drink. Prisoners receive a reduced diet during detention and pending interrogation.

The European Court of Human Rights concluded that these techniques used in combination, and applied for hours at a time, were inhuman and degrading but did not amount to torture. In analyzing whether these methods constituted torture, the court treated them as part of a single program. See *Ireland*. ¶ 104. The court found that this program caused "if not actual bodily injury, at least intense physical and mental suffering to the person subjected thereto and also led to acute psychiatric disturbances during the interrogation." *Id.* ¶ 167. Thus, this program "fell into the category of inhuman treatment[.]" *Id.* The court further found that "[t]he techniques were also degrading since they were such as to arouse in their victims feeling of fear,

⁶⁹ According to one commentator, the Inter-American Court of Human Rights has also followed this decision. See Julie Lantrip, *Torture and Cruel, Inhuman and Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights*, 5 ILSA J. Int'l & Comp. L. 551, 560-61 (1999). The Inter-American Convention to Prevent and Punish Torture, however, defines torture much differently from CAT or U.S. law and, as such, any cases under that treaty are not relevant here. See Inter-American Convention to Prevent and Punish Torture, *opened for signature* Dec. 9, 1985, art. 2, OAS T.S. No. 67, 25 I.L.M. 419 (1985) (entered into force Feb. 28, 1987 but the United States has never signed or ratified it).

anguish and inferiority capable of humiliating and debasing them and possible [sic] breaking their physical or moral resistance." *Id.* Yet, the court ultimately concluded:

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confession, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular *intensity* and *cruelty* implied by the word torture

Id. (emphasis added). Thus, even though the court had concluded that the techniques produce "intense physical and mental suffering" and "acute psychiatric disturbances," they were not of sufficient intensity and cruelty to amount to torture.

The court reached this conclusion based on the distinction the European Convention drew between torture and cruel, inhuman, or degrading treatment or punishment. The court reasoned that by expressly distinguishing between these two categories of treatment, the European Convention sought to "attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering." *Id.* ¶ 167. According to the court, "this distinction derives principally from a difference in the intensity of the suffering inflicted." *Id.* The court further noted that this distinction paralleled the one drawn in the U.N. Declaration on the Protection From Torture, which specifically defines torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." *Id.* (quoting U.N. Declaration on the Protection From Torture).

The court relied on this same "intensity/cruelty" distinction to conclude that some physical maltreatment fails to amount to torture. For example, four detainees were severely beaten and forced to stand spread eagle up against a wall. *See id.* ¶ 110. Other detainees were forced to stand spread eagle while an interrogator kicked them "continuously on the inside of the legs." *Id.* ¶ 111. Those detainees were beaten, some receiving injuries that were "substantial" and, others received "massive" injuries. *See id.* Another detainee was "subjected to . . . 'comparatively trivial' beatings" that resulted in a perforation of the detainee's eardrum and some "minor bruising." *Id.* ¶ 115. The court concluded that none of these situations "attain[ed] the particular level [of severity] inherent in the notion of torture." *Id.* ¶ 174.

b. Israeli Supreme Court

The European Court of Human Rights is not the only other court to consider whether such a program of interrogation techniques was permissible. In *Public Committee Against Torture in Israel v. Israel*, 38 I.L.M. 1471 (1999), the Supreme Court of Israel reviewed a challenge brought against the General Security Service ("GSS") for its use of five techniques. At issue in *Public Committee Against Torture In Israel* were: (1) shaking, (2) the Shabach, (3) the Frog Crouch, (4) the excessive tightening of handcuffs, and (5) sleep deprivation. "Shaking" is "the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly." *Id.* ¶ 9. The "Shabach" is actually a combination of methods wherein the detainee

is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair's seat and back support. His second hand is tied behind the chair, against its back support. The suspect's head is covered by an opaque sack, falling down to his shoulders. Powerfully loud music is played in the room.

Id. ¶ 10.

The "frog crouch" consists of "consecutive, periodical crouches on the tips of one's toes, each lasting for five minute intervals." *Id.* ¶ 11. The excessive tightening of handcuffs simply referred to the use handcuffs that were too small for the suspects' wrists. *See id.* ¶ 12. Sleep deprivation occurred when the *Shabach* was used during "intense non-stop interrogations."⁷⁰ *Id.* ¶ 13.

While the Israeli Supreme Court concluded that these acts amounted to cruel, and inhuman treatment, the court did not expressly find that they amounted to torture. To be sure, such a conclusion was unnecessary because even if the acts amounted only to cruel and inhuman treatment the GSS lacked authority to use the five methods. Nonetheless, the decision is still best read as indicating that the acts at issue did not constitute torture. The court's descriptions of and conclusions about each method indicate that the court viewed them as merely cruel, inhuman or degrading but not of the sufficient severity to reach the threshold of torture. While its descriptions discuss necessity, dignity, degradation, and pain, the court carefully avoided describing any of these acts as having the severity of pain or suffering indicative of torture. *See id.* at ¶¶ 24–29. Indeed, in assessing the *Shabach* as a whole, the court even relied upon the European Court of Human Right's *Ireland* decision for support and it did not evince disagreement with that decision's conclusion that the acts considered therein did not constitute torture. *See id.* ¶ 30.

In sum, both the European Court on Human Rights and the Israeli Supreme Court have recognized a wide array of acts that constitute cruel, inhuman, or degrading treatment or punishment, but do not amount to torture. Thus, they appear to permit, under international law, an aggressive interpretation as to what amounts to torture, leaving that label to be applied only where extreme circumstances exist.

B. Customary International Law

CAT constitutes the United States' primary international obligation on the issue of torture. Some, however, might argue that the United States is subject to a second set of obligations created by customary international law. Customary international law and treaties are often described as the two primary forms of international law. Unlike treaties, however, customary international law is unwritten, arises from the practice of nations, and must be followed out of a sense of legal obligation. While it may be the case that customary international

⁷⁰ The court did, however, distinguish between this sleep deprivation and that which occurred as part of routine interrogation, noting that some degree of interference with the suspect's regular sleep habits was to be expected. *Public Committee Against Torture in Israel* ¶ 23.

law prohibits torture, we believe that it cannot impose a substantive obligation that would vary from that which CAT creates. As a broad, recent multilateral agreement, CAT is the very state practice allegedly represented by customary international law, and thus customary international law could not functionally be any different from CAT.

As our Office has previously explained, customary international law "evolves through a dynamic process of state custom and practice." *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163, 170 (1989). As one authority has described it, customary international law can be defined as a "general and consistent practice of states followed by them from a sense of legal obligation." *Restatement (Third)*, at § 102(2). The best evidence of customary international law is proof of state practice. *Id.* § 103 cmt. a; *see also Iraq Memorandum* at 23. Authorities observe that multilateral treaties are important evidence of state practice. *See Restatement (Third)*, pt. III introductory note at 144-45 ("Multilateral treaties are increasing used also to codify and develop customary international law. . . ."); *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)*, 1986 I.C.J. 14 (June 27) (relying on multilateral treaties as evidence of customary international law).

First, this must be the case because CAT, like other treaties, is the written expression of an agreement among signatories that willingly are bound by its terms. It provides a carefully crafted definition of the obligation regarding torture that nations, including the United States, have agreed to obey. By contrast, customary international law has no written definition, and the sources from which it can be drawn, such as the opinion of scholars, non-binding declarations by various meetings and assemblies, diplomatic notes and domestic judicial decisions, do not yield a defined and universal definition of the prohibited conduct. It is also unclear how universal and uniform state practice must be in order to crystallize into a norm of customary international law. Indeed, scholars will even argue that a norm has entered into customary international law, such as the prohibition on torture, while admitting that many states practice torture on their own citizens. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980); B. Simma & P. Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Australian Y. B. Int'l L. 82, 90-93 (1992). International law itself provides no guide for determining when the almost 200 nations in the world follow the same state practice sufficiently to create a new norm of customary international law. Even under the ambiguous methodology of international law, it is difficult to see how this form of law, which is never enacted through any accountable process nor accepted by any written form of consent, could supercede the obligations recently established through a carefully negotiated and written multilateral treaty on the identical subject.

Second, even if there is a uniform and universal state practice concerning torture sufficient to raise it to the level of customary international law, we believe it analytically incoherent to establish a norm of customary international law that differs from a recent, broadly accepted, multilateral agreement on the same exact issue. CAT provides substantive content to the prohibition on torture and cruel, inhuman, or degrading treatment or punishment. CAT is a multilateral agreement, ultimately joined by 132 state parties, to establish a definition of torture. In this context, we cannot see evidence of customary international law that could be a more compelling or conclusive definition of state practice. *See Restatement (Third)*, at § 102 cmt. i.

("[i]nternational agreements constitute practice of states and as such can contribute to the growth of customary international law"). Indeed, any effort to draw forth a norm of customary international law at odds with the Torture Convention would ignore the most basic evidence of state practice—that of broad agreement to a written text—in favor of more speculative, ambiguous, and diverse definitions of dubious legitimacy.

Thus, it is CAT's substantive obligations as defined by our reservations, understandings, and declarations that govern the United States' international law obligations on torture. CAT not only governs U.S. obligations with respect to torture but it also does so with respect to cruel, inhuman, or degrading treatment or punishment. Thus, even if customary international law prohibits cruel, inhuman, or degrading treatment or punishment, CAT and the reservations, understandings, and declarations that the United States has taken with respect to the scope of that term's reach are definitive of United States' obligations. Customary international law cannot override carefully defined U.S. obligations through multilateral treaties on the exact same subject.

Finally, even if customary international law on torture created a different standard than that which the Torture Convention creates, and even if such a standard were somehow considered binding under international law, it could not bind the President as a matter of domestic law. We have previously concluded that customary international law is not federal law. *See Treaties and Laws Memorandum* at 32–33. This has been the longstanding view of this Office and of the Department of Justice. *See Authority of the Federal Bureau of Investigation to Override International in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. at 168–171. The constitutional text provides no support for the notion that customary international law is part of federal law. *See id.* at 33. Indeed, because customary international has not undergone the processes the Constitution requires for "the enactment of constitutional amendments, statutes, or treaties," it is not law and "can have no legal effect on the government or on American citizens." *Treaties and Laws Memorandum* at 33–34. As we explained, to elevate customary international law to federal law would "raise deep structural problems" by "import[ing] a body of law to restrain the three branches of American government that never underwent any approval by our democratic political process." *Id.* at 36. Further, treating customary international law as federal law would directly invade "the President's discretion as the Commander in Chief and Chief Executive to determine how best to conduct the Nation's military affairs." *Id.* at 36. Thus, we concluded that "customary international law does not bind the President or the U.S. Armed Forces in their decisions concerning the detention conditions of al Qaeda and Taliban prisoners." *Id.* at 37. That conclusion is no less true there than here. Customary international law cannot interfere, as a matter of domestic law, with the President and the U.S. Armed Forces as they carry out their constitutional duties to successfully prosecute war against an enemy that has conducted a direct attack on the United States.

Even if one were to accept the notion that customary international law has some standing within our domestic legal system, the President may decide to override customary international law at his discretion. "It is well accepted that the political branches have ample authority to override customary international law within their respective spheres of authority." *Id.* at 34 (discussing *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812) and *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814)); *The Paquete Habana*, 175 U.S. 677 (1900). Our

Office has made clear its agreement with these Supreme Court cases that the President can unilaterally order the violation of customary international law. 13 Op. O.L.C. at 170. Indeed, there is a strong argument under international law that nations must have the ability to violate customary international law. Because the very essence of customary international law is that it evolves through state custom and practice, “[s]tates necessarily must have the authority to contravene international norms.” *Id.* at 36 (quoting *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. at 170). Otherwise, custom itself could not change. Thus, if the President were to order interrogation methods that were inconsistent with some notion of customary international law, he would have the authority to override the latter as a matter of domestic law, and he could also argue that as a matter of international law such conduct was needed to shape a new norm to address international terrorism.

IV. Defenses

Even if an interrogation method might arguably cross the line drawn in one of the criminal statutes described above, and application of the statute was not held to be an unconstitutional infringement of the President’s Commander-in-Chief authority, we believe that under the current circumstances certain justification defenses might be available. Standard criminal law defenses of necessity and self-defense could justify interrogation methods needed to elicit information to prevent a direct and imminent threat to the United States and its citizens. The availability of these defenses would depend upon the precise factual circumstances surrounding a particular interrogation.

A. Necessity

We believe that a defense of necessity might be raised in certain circumstances. Often referred to as the “choice of evils” defense, necessity has been defined as follows:

Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

- (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
- (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
- (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Model Penal Code § 3.02. *See also* LaFave & Scott, § 5.4 at 627. Although there is no federal statute that generally establishes necessity or other justifications as defenses to federal criminal laws, the Supreme Court has recognized the defense. *See United States v. Bailey*, 444 U.S. 394, 410 (1980) (relying on LaFave & Scott and Model Penal Code definitions of necessity defense).

The necessity defense might prove especially relevant in the current conflict. As it has been described in the case-law and literature, the purpose behind necessity is one of public

policy. According to LaFave and Scott, "the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." LaFave & Scott, at 629. In particular, the necessity defense can justify the intentional killing of one person to save two others because "it is better that two lives be saved and one lost than that two be lost and one saved." *Id.* Or, put in the language of a choice of evils, "the evil involved in violating the terms of the criminal law (. . . even taking another's life) may be less than that which would result from literal compliance with the law (. . . two lives lost)." *Id.*

Additional elements of the necessity defense are worth noting here. First, the defense is not limited to certain types of harms. Therefore, the harm inflicted by necessity may include intentional homicide, so long as the harm avoided is greater (i.e., preventing more deaths). *Id.* at 634. Second, it must actually be the defendant's intention to avoid the greater harm; intending to commit murder and then learning only later that the death had the fortuitous result of saving other lives will not support a necessity defense. *Id.* at 635. Third, if the defendant reasonably believed that the lesser harm was necessary, even if, unknown to him, it was not, he may still avail himself of the defense. As LaFave and Scott explain, "if A kills B reasonably believing it to be necessary to save C and D, he is not guilty of murder even though, unknown to A, C and D could have been rescued without the necessity of killing B." *Id.* Fourth, it is for the court, and not the defendant to judge whether the harm avoided outweighed the harm done. *Id.* at 636. Fifth, the defendant cannot rely upon the necessity defense if a third alternative is open and known to him that will cause less harm.

It appears to us that the necessity defense could be successfully maintained in response to an allegation of a violation of a criminal statute. Al Qaeda's September 11, 2001 attack led to the deaths of thousands and losses in the billions of dollars. According to public and governmental reports, al Qaeda has other sleeper cells within the United States that may be planning similar attacks. Indeed, we understand that al Qaeda seeks to develop and deploy chemical, biological and nuclear weapons of mass destruction. Under these circumstances, a particular detainee may possess information that could enable the United States to prevent imminent attacks that could equal or surpass the September 11 attacks in their magnitude. Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives.

Under this calculus, two factors will help indicate when the necessity defense could appropriately be invoked. First, the more certain that government officials are that a particular individual has information needed to prevent an attack, the more necessary interrogation will be. Second, the more likely it appears to be that a terrorist attack is likely to occur, and the greater the amount of damage expected from such an attack, the more that an interrogation to get information would become necessary. Of course, the strength of the necessity defense depends on the particular circumstances, and the knowledge of the government actors involved, when the interrogation is conducted. While every interrogation that might violate a criminal prohibition does not trigger a necessity defense, we can say that certain circumstances could support such a defense.

We note that legal authorities identify an important exception to the necessity defense. The defense is available "only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values." *Id.* at 629. Thus, if Congress explicitly has made clear that violation of a statute cannot be outweighed by the harm avoided, courts cannot recognize the necessity defense. LaFave and Israel provide as an example an abortion statute that made clear that abortions even to save the life of the mother would still be a crime; in such cases the necessity defense would be unavailable. *Id.* at 630. Here, however, Congress has not explicitly made a determination of values vis-à-vis torture. It has not made any such determination with respect to the federal criminal statutes applicable in the special maritime and territorial jurisdiction.

In fact, in enacting the torture statute to implement CAT, Congress declined to adopt language from the treaty's definition of torture that arguably seeks to prohibit the weighing of values. As discussed above CAT defines torture as the intentional infliction of severe pain or suffering "for such purpose[] as obtaining from him or a third person information or a confession." CAT art. 1.1. It could be argued that this definition means that the good of obtaining information—no matter what the circumstances—cannot justify an act of torture. In other words, necessity would not be a defense. In enacting section 2340, however, Congress removed the purpose element in the definition of torture, defining torture in terms of conduct rather than by reference to the purpose for which it was carried out. By leaving section 2340 silent as to the harm done by torture in comparison to other harms, Congress allowed the necessity defense to go forward when appropriate.

Further, CAT contains an additional provision that "no 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." CAT art. 2.2. Given that Congress enacted 18 U.S.C. §§ 2340–2340A in light of CAT, Congress presumably was aware of this provision of the treaty, and of the definition of the necessity defense that allows the legislature to provide for an exception to the defense, see Model Penal Code § 3.02(b), yet Congress did not incorporate CAT article 2.2 into section 2340. Nor did Congress amend any of the generally applicable criminal statutes to eliminate this defense in cases of torture. Given that Congress omitted CAT's effort to bar a necessity or wartime defense, we read section 2340 and the federal criminal statutes applicable to the special maritime and territorial jurisdiction as permitting the defense.

Additionally, criminal statutes are to be "strictly construed in favor of the defendant." LaFave, at § 2.2(d). As noted above, sections 2340–2340A do not expressly preclude the common law defenses of necessity nor as we explain below do they preclude the defense of self-defense. To find the necessity defense barred based on art. 2, which is not part of our domestic law because it is non-self-executing, would be a gross breach of this fundamental tenet. Indeed, such a conclusion would raise constitutional concerns. It would not only raise the specter that section 2340A is unconstitutionally vague, in violation of a defendant's Fifth Amendment right to due process, but invoking this article to preclude either self-defense or necessity defenses could also raise ex post facto-like concerns that may implicate a defendant's Fifth Amendment right to due process. See *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) ("[W]e conclude that a judicial alteration of a common law doctrine of criminal law violates the principle of fair

warning, and hence must not be given retroactive effect, only where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.”) (internal quotation marks and citations omitted). Cf. U.S. Const. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed”).

B. Self-Defense

Even if a court were to find that necessity did not justify the violation of a criminal statute, a defendant could still appropriately raise a claim of self-defense. The right to self-defense, even when it involves deadly force, is deeply embedded in our law, both as to individuals and as to the nation as a whole. As the Court of Appeals for the D.C. Circuit has explained:

More than two centuries ago, Blackstone, best known of the expositors of the English common law, taught that “all homicide is malicious, and of course amounts to murder, unless . . . excused on the account of accident or self-preservation. . . .” Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone’s time.

United States v. Peterson, 483 F.2d 1222, 1228–29 (D.C. Cir. 1973). Self-defense is a common-law defense to federal criminal offenses, and nothing in the text, structure or history of section 2340A precludes its application to a charge of torture. Similarly, in light of Congress’s failure to eliminate this defense for defendants accused of torture but charged with one of the offenses applicable to the special maritime and territorial jurisdiction, we believe that nothing precludes the assertion of this defense. In the absence of any textual provision to the contrary, we assume self-defense can be an appropriate defense to an allegation of torture, irrespective of the offense charged.

The doctrine of self-defense permits the use of force to prevent harm to another person. As LaFave and Scott explain, “one is justified in using reasonable force in defense of another person, even a stranger, when he reasonably believes that the other is in immediate danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger.” *Id.* at 663–64. Ultimately, even deadly force is permissible, but “only when the attack of the adversary upon the other person reasonably appears to the defender to be a deadly attack.” *Id.* at 664. As with our discussion of necessity, we will review the significant elements of this defense.⁷¹ According to LaFave and Scott, the elements of the defense of others are the same as those that apply to individual self-defense.

First, self-defense requires that the use of force be *necessary* to avoid the danger of unlawful bodily harm. *Id.* at 649. A defender may justifiably use deadly force if he reasonably believes that the other person is about to inflict unlawful death or serious bodily harm upon another, and that it is necessary to use such force to prevent it. *Id.* at 652. Looked at from the opposite perspective, the defender may not use force when the force would be as equally effective at a later time and the defender suffers no harm or risk by waiting. See Paul H.

⁷¹ Early cases had suggested that in order to be eligible for defense of another, one should have some personal relationship with the one in need of protection. That view has been discarded. LaFave & Scott at 664.

Robinson, 2 *Criminal Law Defenses* § 131(c) at 77 (1984). If, however, other options permit the defender to retreat safely from a confrontation without having to resort to deadly force, the use of force may not be necessary in the first place. La Fave & Scott at 659-60.

Second, self-defense requires that the defendant's belief in the necessity of using force be reasonable. If a defendant honestly but unreasonably believed force was necessary, he will not be able to make out a successful claim of self-defense. *Id.* at 654. Conversely, if a defendant reasonably believed an attack was to occur, but the facts subsequently showed no attack was threatened, he may still raise self-defense. As LaFave and Scott explain, "one may be justified in shooting to death an adversary who, having threatened to kill him, reaches for his pocket as if for a gun, though it later appears that he had no gun and that he was only reaching for his handkerchief." *Id.* Some authorities, such as the Model Penal Code, even eliminate the reasonability element, and require only that the defender honestly believed—regardless of its unreasonableness—that the use of force was necessary.

Third, many legal authorities include the requirement that a defender must reasonably believe that the unlawful violence is "imminent" before he can use force in his defense. It would be a mistake, however, to equate imminence necessarily with timing—that an attack is immediately about to occur. Rather, as the Model Penal Code explains, what is essential is that, the defensive *response* must be "immediately necessary." Model Penal Code § 3.04(1). Indeed, imminence may be merely another way of expressing the requirement of necessity. Robinson at 78. LaFave and Scott, for example, believe that the imminence requirement makes sense as part of a necessity defense because if an attack is not immediately upon the defender, the defender has other options available to avoid the attack that do not involve the use of force. LaFave & Scott at 656. If, however, the fact of the attack becomes certain and no other options remain, the use of force may be justified. To use a well-known hypothetical, if A were to kidnap and confine B, and then tell B he would kill B one week later, B would be justified in using force in self-defense, even if the opportunity arose before the week had passed. *Id.* at 656; *see also* Robinson at § 131(c)(1) at 78. In this hypothetical, while the attack itself is not imminent, B's use of force becomes immediately necessary whenever he has an opportunity to save himself from A.

Fourth, the amount of force should be proportional to the threat. As LaFave and Scott explain, "the amount of force which [the defender] may justifiably use must be reasonably related to the threatened harm which he seeks to avoid." LaFave & Scott at 651. Thus, one may not use deadly force in response to a threat that does not rise to death or serious bodily harm. If such harm may result, however, deadly force is appropriate. As the Model Penal Code § 3.04(2)(b) states, "[t]he use of deadly force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat."

In the current conflict, we believe that a defendant accused of violating the criminal prohibitions described above might, in certain circumstances, have grounds to properly claim the defense of another. The threat of an impending terrorist attack threatens the lives of hundreds if not thousands of American citizens. Whether such a defense will be upheld depends on the specific context within which the interrogation decision is made. If an attack appears increasingly certain, but our intelligence services and armed forces cannot prevent it without the information from the interrogation of a specific individual, then the more likely it will appear

that the conduct in question will be seen as necessary. The increasing certainty of an attack will also satisfy the imminence requirement. Finally, the fact that previous al Qaeda attacks have had as their aim the deaths of American citizens, and that evidence of other plots have had a similar goal in mind, would justify proportionality of interrogation methods designed to elicit information to prevent such deaths.

To be sure, this situation is different from the usual self-defense justification, and, indeed, it overlaps with elements of the necessity defense. Self-defense as usually discussed involves using force against an individual who is about to conduct the attack. In the current circumstances, however, an enemy combatant in detention does not himself present a threat of harm. He is not actually carrying out the attack; rather, he has participated in the planning and preparation for the attack, or merely has knowledge of the attack through his membership in the terrorist organization. Nonetheless, some leading scholarly commentators believe that interrogation of such individuals using methods that might violate section 2340A would be justified under the doctrine of self-defense, because the combatant by aiding and promoting the terrorist plot "has culpably caused the situation where someone might get hurt. If hurting him is the only means to prevent the death or injury of others put at risk by his actions, such torture should be permissible, and on the same basis that self-defense is permissible." Michael S. Moore, *Torture and the Balance of Evils*, 23 Israel L. Rev. 280, 323 (1989) (symposium on Israel's Landau Commission Report).⁷² See also Alan M. Dershowitz, *Is It Necessary to Apply "Physical Pressure" to Terrorists—and to Lie About It?*, 23 Israel L. Rev. 192, 199–200 (1989). Thus, some commentators believe that by helping to create the threat of loss of life, terrorists become culpable for the threat even though they do not actually carry out the attack itself. If necessary, they may be hurt in an interrogation because they are part of the mechanism that has set the attack in motion, Moore, at 323, just as is someone who feeds ammunition or targeting information to an attacker. Under the present circumstances, therefore, even though a detained enemy combatant may not be the exact attacker—he is not planting the bomb, or piloting a hijacked plane to kill civilians—he still may be harmed in self-defense if he has knowledge of future attacks because he has assisted in their planning and execution.

In addition, we believe that a claim by an individual of the defense of another would be further supported by the fact that, in this case, the nation itself is under attack and has the right to self-defense. As *In re Neagle*, 135 U.S. 1 (1890) suggests, a federal official who has used force in self-defense may also draw upon the national right to self-defense to strengthen his claim of justification. In that case, the State of California arrested and held deputy U.S. Marshal Neagle for shooting and killing the assailant of Supreme Court Justice Field. In granting the writ of habeas corpus for Neagle's release, the Supreme Court did not rely alone upon the marshal's right to defend another or his right to self-defense. Rather, the Court found that Neagle, as an agent of the United States and of the executive branch, was justified in the killing because, in protecting Justice Field, he was acting pursuant to the executive branch's inherent constitutional authority to protect the United States government. *Id.* at 67 ("We cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States

⁷² Moore distinguishes that case from one in which a person has information that could stop a terrorist attack, but who does not take a hand in the terrorist activity itself, such as an innocent person who learns of the attack from her spouse. Moore, 23 Israel L. Rev. at 324. Such individuals, Moore finds, would not be subject to the use of force in self-defense, although they might be under the doctrine of necessity.

who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death.”). That authority derives, according to the Court, from the President’s power under Article II to take care that the laws are faithfully executed. In other words, Neagle as a federal officer not only could raise self-defense or defense of another, but also could defend his actions on the ground that he was implementing the Executive Branch’s authority to protect the United States government.

If the right to defend the national government can be raised as a defense in an individual prosecution, as *Neagle* suggests, then a government defendant, acting in his official capacity, should be able to argue that any conduct that arguably violated a criminal prohibition was undertaken pursuant to more than just individual self-defense or defense of another. In addition, the defendant could claim that he was fulfilling the Executive Branch’s authority to protect the federal government and the nation from attack after the events of September 11, which triggered the nation’s right to self-defense. Following the example of *In re Neagle*, a government defendant may also argue that his conduct of an interrogation, if properly authorized, is justified on the basis of protecting the nation from attack. In order to make the fullest use of this defense, the defendant would want to show that his conduct was specifically ordered by national command authorities that have the authority to decide to use force in national self-defense.

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

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

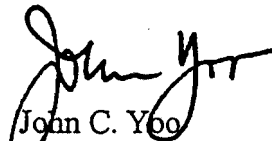
Conclusion

For the foregoing reasons, we conclude that the Fifth and Eighth Amendments do not extend to alien enemy combatants held abroad. Moreover, we conclude that different canons of construction indicate that generally applicable criminal laws do not apply to the military interrogation of alien unlawful combatants held abroad. Were it otherwise, the application of these statutes to the interrogation of enemy combatants undertaken by military personnel would conflict with the President's Commander-in-Chief power.

We further conclude that CAT defines U.S. international law obligations with respect to torture and other cruel, inhuman, or degrading treatment or punishment. The standard of conduct regarding torture is the same as that which is found in the torture statute, 18 U.S.C. §§ 2340-2340A. Moreover, the scope of U.S. obligations under CAT regarding cruel, inhuman, or degrading treatment or punishment is limited to conduct prohibited by the Eighth, Fifth and Fourteenth Amendments. Customary international law does not supply any additional standards.

Finally, even if the criminal prohibitions outlined above applied, and an interrogation method might violate those prohibitions, necessity or self-defense could provide justifications for any criminal liability.

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



John C. Yoo
Deputy Assistant Attorney General