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GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
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WASHINGTON, D. C. 20301-1600

MAR 17 2005

MEMORANDUM FOR THE JUDGE ADVOCATES GENERAL AND THE STAFF JUDGE
ADVOCATE TO THE COMMANDANT

SUBJECT: Department of Defense Interrogation Policy

Thank you for your memorandum of January 18, 2005 and follow-on memorandum of January 31, 2005 (see attached). I agree that, in light of the Justice Department's modification of its earlier legal analysis, the legal portion of the 2003 DoD Working Group Report on Detainee Interrogations does not reflect now-settled executive branch views of the relevant law. As the DoD Working Group Report was never officially distributed (it was provided in final only to the Secretary of Defense), and as the operative Justice Department memorandum of December 30, 2004 has been distributed publicly as well as through command channels, one could reasonably conclude no further action is required.

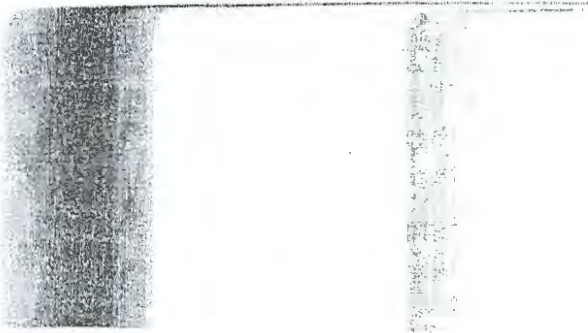
Nevertheless, I determine that the Report of the Working Group on Detainee Interrogations is to be considered a historical document with no standing in policy, practice, or law to guide any activity of the Department of Defense. This determination should be disseminated throughout the Department of Defense, as appropriate.

Your proposed DoD interrogation policy attached to your January 31, 2005 memorandum is an excellent starting point for discussion and coordination with my staff and the General Counsels of the military departments. We must be mindful of the work of the Defense Intelligence Agency, the Joint Staff, the Office of Detainee Affairs, and others as they also are working to promulgate Department-wide interrogation policy. This is a profoundly important issue that must surely both comply with the law and incorporate appropriate consideration of operational, intelligence, and policy matters.

David J. Dell'Anno, Principal Deputy
for William J. Haynes II

Attachment: As stated

cc: GCs of the Mil Depts



ENCL (8)

18 January 2005

MEMORANDUM FOR DEPARTMENT OF DEFENSE GENERAL COUNSEL

SUBJECT: Review of Department of Justice Memorandum on the U.S. Statute Implementing the Convention Against Torture

1. On December 30, 2004, the Department of Justice, Office of Legal Counsel (OLC), issued a memorandum that constitutes a binding interpretation of the United States Government's criminal prohibition against torture (the "2004 OLC Opinion"). This memorandum supersedes, in its entirety, an August 2002 OLC Memorandum (the "2002 OLC Opinion") that dealt with the same subject. You requested that each of the service Judge Advocates General and the Legal Counsel to the Chairman, Joint Chiefs of Staff, review the 2004 OLC Opinion to determine whether it impacts the Department's current interrogation guidance (FM 34-52, Intelligence Interrogations, and the Secretary of Defense memo of 16 April 2003, Counter-Resistance Techniques in the War on Terrorism, with respect to interrogations at Guantanamo Bay, Cuba (GTMO)). Having done so, it is our view that the current interrogation policies and techniques approved for use today in Iraq, Afghanistan and Guantanamo Bay (FM 34-52 and the April 2003 memo) are well within the standards discussed in the 2004 OLC Opinion. We further recommend that you issue Department-level guidance that the 2003 Working Group Report on Detainee Interrogations in the Global War on Terror, discussed further below, be treated as a historical document and not be used or relied upon as guidance or authority on detainee interrogations.
2. The 2002 OLC Opinion detailed the manner in which the Torture Statute, 18 U.S.C. Sections 2340-2340A, applied to techniques that might be used in interrogating enemy combatants. In doing so, it discussed the legal standards deemed applicable to assessing what constitutes the "severe" physical and mental pain and suffering addressed by the statute, certain Presidential powers as Commander-in-Chief, and possible legal defenses to prosecution under the Torture Statute. In June 2004, the Department of Justice formally withdrew the 2002 OLC Opinion.
3. The 2004 OLC Opinion differs from the 2002 OLC Opinion in several critical aspects. It eliminates all references in the 2002 OLC Opinion to the President's authority as Commander-in-Chief, to include the assertion that, as a result of such authority, the Torture Statute "does not apply to the President's detention and interrogation of enemy combatants." Also absent is any discussion of the availability of potential defenses to criminal liability under the Torture Statute. Instead, the 2004 OLC Opinion focuses on the legal standards applicable to adjudging what physical or mental pain and suffering is required to constitute

torture and, in effect, broadens the scope of what is considered "severe" pain. Finally, the 2004 OLC Opinion distinguishes motive from the "specific intent" element of the Torture Statute, and notes that there exists no exception under the statute that would permit torture to be used for "a good reason."

4. The 2004 OLC Opinion and the 1984 Convention Against Torture (CAT) make clear that torture is extreme, arbitrary, illegal conduct prohibited by international convention and U.S. law. As previously noted, the current DOD interrogation policies and approved techniques are well within the standards set forth in the 2004 OLC Opinion dealing exclusively with torture. Of particular importance, however, is the fact that the baseline standard of treatment for detainees is not whether such treatment might be viewed as torture. The standard is and has always been a more protective one of "humane treatment." The President has unequivocally directed US Forces to treat all detainees humanely, whether or not that individual is entitled to protections under the 1949 Geneva Conventions. The CAT specifically addresses "cruel, inhuman or degrading treatment or punishment which does not amount to torture," and the Uniform Code of Military Justice makes it a criminal offense to maltreat detainees, even though such maltreatment would not rise to the level of torture. We note that current guidelines regarding the interrogation of detainees are found in FM 34-52, Intelligence Interrogations, and the 16 April 2003 SECDEF memo (for GTMO), and it is our opinion that the interrogation techniques contained therein, do not rise to the level of either torture or inhumane treatment.

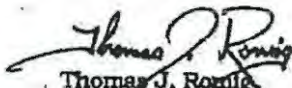
5. We have been informed that on 6 May 2004 the Commander, USCENTCOM, orally directed that only those interrogation approaches in FM 34-52 be authorized for operations in Iraq and Afghanistan. As to GTMO, the SECDEF reiterated, in his 16 April 2003 memorandum, that all detainees are to be treated "humanely, and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions." "Humane treatment" is a cornerstone of both FM 34-52 and the April 2003 memo, and neither provides for any interrogation techniques that could be considered to constitute torture or inhumane treatment.

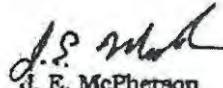
6. The above analysis leads us to a fundamentally important aspect of the 2004 OLC Opinion. As noted, that opinion has superseded the 2002 OLC Opinion dealing with the Torture Statute. Much of the analysis and many of the conclusions and recommendations contained in the April 2003 Working Group Report, to include those dealing with certain interrogation techniques, were based on the Justice Department analysis of the Torture Statute as set forth in the 2002 OLC Opinion. With the withdrawal of the 2002 OLC Opinion, the legal analysis and conclusions contained in the Working Group Report can no longer be viewed as applicable or binding guidance. Our concern is that, despite this fact, significant portions of this Working Group Report are now widely available to the general public and might well be mistakenly viewed by

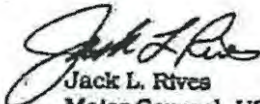
personnel in the field as a basis for departing from U.S law and policy. We strongly recommend you take action, similar to that taken by the Department of Justice in withdrawing the 2002 OLC Opinion, and issue Department-level guidance that this Report be treated as a historical document and is not to be used or relied upon as guidance or authority on detainee interrogations.

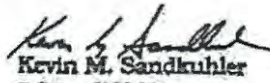
7. We also strongly urge DOD to consider issuing an overarching policy for all interrogation operations. The 2002 OLC Opinion has been incorrectly characterized as justifying a departure from the minimum standards of humane treatment and we believe it is important to correct this misperception. Further, one of the significant lessons-learned from the various investigations into detainee abuse is that a clear, consistent, overarching policy from DOD is essential in ensuring department-wide adherence to acceptable standards of conduct. Each service and the Joint Staff have coordinated on the proposed DIA interrogation guidance. Drawing on key elements of DIA's guidance, we will offer you specific recommendations on a draft DOD interrogation policy, including guidelines as to the minimum standards for "humane treatment." An overarching DOD policy will assist in correcting any misperceptions from the 2002 OLC Opinion as well as eliminate any potential confusion in the field as to specific interrogation techniques to be implemented.

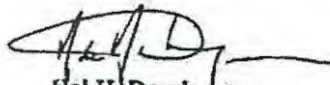
8. Thank you for the opportunity to provide comments on the December 2004 OLC Opinion. We stand ready to further discuss the 2004 OLC Opinion at your convenience.

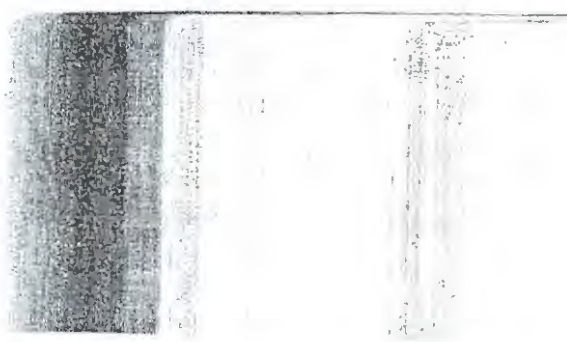

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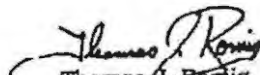



31 January 2005

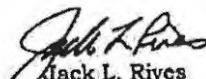
MEMORANDUM FOR DEPARTMENT OF DEFENSE GENERAL COUNSEL


SUBJECT: Proposed DOD Interrogation Policy


- 1. In our 18 Jan 05 memo, we committed to preparing a recommendation for a DOD interrogation policy. Attached, please find our proposal.
- 2. We welcome the opportunity to discuss our recommendation with you and to review any modifications or changes you propose.

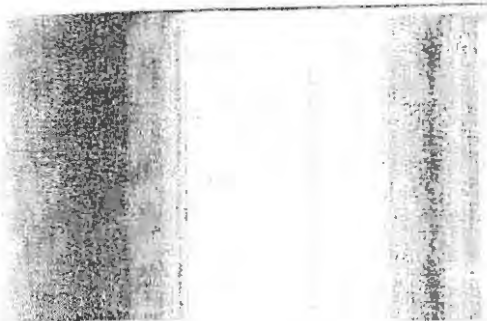

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DOD Interrogation Policy

It is the policy of the United States Government to treat all detainees humanely and in compliance with all applicable laws, including the US Constitution, federal statutes, and US treaty obligations. Department of Defense (DOD) interrogations will be conducted in compliance with this policy.

- In no case will torture or cruel, inhumane or degrading treatment of detainees be authorized or tolerated.
- In addition to the absolute duty to refrain from such acts, DOD personnel are obligated to prevent others from committing such acts, and to report such acts to the appropriate authorities.

A key component to our successful wartime efforts is the effective interrogation of those individuals we detain.

- The need to obtain timely strategic, operational, and tactical intelligence must, however, be accomplished in compliance with the overarching duty to treat all detainees humanely.
- DOD personnel will pursue strategic, operational, and tactical intelligence through rigorous, disciplined interrogations in compliance with this policy.
- Interrogations conducted IAW approved techniques provide necessary and reliable intelligence consistent with the mandate to treat all detainees humanely.

Interrogations will at all times be conducted in compliance with all applicable laws and regulations, including the US Constitution, federal statutes, US treaty obligations, Secretary of Defense and Combatant Commander orders, and the policy set forth in this memo.

- Army Field Manual 34-52 sets forth the basic principles, methods, and techniques for interrogations by the United States Armed Forces.
- Use of any interrogation technique outside of those provided in FM 34-52 requires the explicit, written approval of the Combatant Commander with notification to the Secretary of Defense.

All detainees will be held and interrogated in a safe and humane environment. Necessary and adequate food, water, clothing, shelter, and medical care will be provided at all times.