distress or discomfort that is lacking in extreme intensity may not constitute "severe physical suffering" regardless of its duration—i.e., even if it lasts for a very long period of time. In defining conduct proscribed by sections 2340-2340A, Congress established a high bar. The ultimate question is whether the conduct "is sufficiently extreme and outrageous to warrant the universal condemnation that the term 'torture' both connotes and invokes." *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d at 92 (interpreting the TVPA); *cf. Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1332-40, 1345-46 (standard met under the TVPA by a course of conduct that included severe beatings to the genitals, head, and other parts of the body with metal pipes and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim's forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of "Russian roulette").

(3) The meaning of "severe mental pain or suffering."

Section 2340 defines "severe mental pain or suffering" to mean:

> the prolonged mental harm caused by or resulting from—
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality[.]

18 U.S.C. § 2340(2). Torture is defined under the statute to include an act specifically intended to inflict severe mental pain or suffering. *See id.* § 2340(1).

An important preliminary question with respect to this definition is whether the statutory list of the four "predicate acts" in section 2340(2)(A)-(D) is exclusive. We have concluded that Congress intended the list of predicate acts to be exclusive—that is, to satisfy the definition of "severe mental pain or suffering" under the statute, the prolonged mental harm must be caused by acts falling within one of the four statutory categories of predicate acts. *2004 Legal Standards Opinion* at 13. We reached this conclusion based on the clear language of the statute, which provides a detailed definition that includes four categories of predicate acts joined by the disjunctive and does not contain a catchall provision or any other language suggesting that additional acts might qualify (for example, language such as "including" or "such acts as"). *Id.*[30]

[30] These four categories of predicate acts "are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). *See also, e.g.,*

Congress plainly considered very specific predicate acts, and this definition tracks the Senate's understanding concerning mental pain or suffering on which its advice and consent to ratification of the CAT was conditioned. The conclusion that the list of predicate acts is exclusive is consistent with both the text of the Senate's understanding, and with the fact that the understanding was required out of concern that the CAT's definition of torture would not otherwise meet the constitutional requirement for clarity in defining crimes. *See 2004 Legal Standards Opinion* at 13. Adopting an interpretation of the statute that expands the list of predicate acts for "severe mental pain or suffering" would constitute an impermissible rewriting of the statute and would introduce the very imprecision that prompted the Senate to require this understanding as a condition of its advice and consent to ratification of the CAT.

Another question is whether the requirement of "prolonged mental harm" caused by or resulting from one of the enumerated predicate acts is a separate requirement, or whether such "prolonged mental harm" is to be presumed any time one of the predicate acts occurs. Although it is possible to read the statute's reference to "*the* prolonged mental harm caused by or resulting from" the predicate acts as creating a statutory presumption that each of the predicate acts will always cause prolonged mental harm, we concluded in our *2004 Legal Standards Opinion* that that was not Congress's intent, since the statutory definition of "severe mental pain or suffering" was meant to track the understanding that the Senate required as a condition to its advice and consent to ratification of the CAT:

> in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30 at 36. As we previously stated, "[w]e do not believe that simply by adding the word 'the' before 'prolonged harm,' Congress intended a material change in the definition of mental pain or suffering as articulated in the Senate's understanding to the CAT." *2004 Legal Standards Opinion* at 13-14. "The definition of torture emanates directly from article 1 of the [CAT]. The definition for 'severe mental pain and suffering' incorporates the [above mentioned] understanding." S. Rep. No. 103-107, at 58-59 (1993) (emphasis added). This understanding, embodied in the statute, defines the obligation undertaken by the United States. Given this understanding, the legislative history, and the fact that section 2340(2) defines "severe mental pain or suffering" carefully in language very similar to the understanding, we believe that Congress did not intend to create a presumption that any time one of the predicate

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Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993); 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.23 (6th ed. 2000). Nor do we see any "contrary indications" that would rebut this inference. *Vonn*, 535 U.S. at 65.

acts occurs, prolonged mental harm is automatically deemed to result. *See 2004 Legal Standards Opinion* at 13-14. At the same time, it is conceivable that the occurrence of one of the predicate acts alone could, depending on the circumstances of a particular case, give rise to an inference of intent to cause prolonged mental harm, as required by the statute.

Turning to the question of what constitutes "prolonged mental harm caused by or resulting from" a predicate act, we have concluded that Congress intended this phrase to require mental "harm" that has some lasting duration. *Id.* at 14. There is little guidance to draw upon in interpreting the phrase "prolonged mental harm," which does not appear in the relevant medical literature. Nevertheless, our interpretation is consistent with the ordinary meaning of the statutory terms. First, the use of the word "harm"—as opposed to simply repeating "pain or suffering"—suggests some mental damage or injury. Ordinary dictionary definitions of "harm," such as "physical or mental *damage: injury*," *Webster's Third New International Dictionary* at 1034 (emphasis added), or "[p]hysical or psychological *injury or damage*," *American Heritage Dictionary of the English Language* at 825 (emphasis added), support this interpretation. Second, to "prolong" means to "lengthen in time," "extend in duration," or "draw out," *Webster's Third New International Dictionary* at 1815, further suggesting that to be "prolonged," the mental damage must extend for some period of time. This damage need not be permanent, but it must be intended to continue for a "prolonged" period of time.[31] Moreover, under section 2340(2), the "prolonged mental harm" must be "caused by" or "resulting from" one of the enumerated predicate acts. As we pointed out in *2004 Legal Standards Opinion*, this conclusion is not meant to suggest that, if the predicate act or acts continue for an extended period, "prolonged mental harm" cannot occur until after they are completed. *Id.* at 14-15 n.26. Early occurrences of the predicate act could cause mental harm that could continue—and become prolonged—during the extended period the predicate acts continued to occur. *See, e.g., Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601-02 (E.D. Pa. 2003) (finding that predicate acts had continued over a three-to-four-year period and concluding that "prolonged mental harm" had occurred during that time).

Although there are few judicial opinions discussing the question of "prolonged mental harm," those cases that have addressed the issue are consistent with our view. For example, in the TVPA case of *Mehinovic v. Vuckovic*, the district court explained that:

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[31] Although we do not suggest that the statute is limited to such cases, development of a mental disorder—such as post-traumatic stress disorder or perhaps chronic depression—could constitute "prolonged mental harm." *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 369-76, 463-68 (4th ed. 2000) ("DSM-IV-TR"). *See also, e.g., Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/59/324, at 14 (2004) ("The most common diagnosis of psychiatric symptoms among torture survivors is said to be post-traumatic stress disorder."); *see also* Metin Basoglu et al., *Torture and Mental Health: A Research Overview*, *in* Ellen Gerrity et al. eds., *The Mental Health Consequences of Torture* 48-49 (2001) (referring to findings of higher rates of post-traumatic stress disorder in studies involving torture survivors); Murat Parker et al., *Psychological Effects of Torture: An Empirical Study of Tortured and Non-Tortured Non-Political Prisoners*, *in* Metin Basoglu ed., *Torture and Its Consequences: Current Treatment Approaches* 77 (1992) (referring to findings of post-traumatic stress disorder in torture survivors). OMS has advised that—although the ability to predict is imperfect—they would object to the initial or continued use of any technique if their psychological assessment of the detainee suggested that the use of the technique might result in PTSD, chronic depression, or other condition that could constitute prolonged mental harm.

> [The defendant] also caused or participated in the plaintiffs' mental torture. Mental torture consists of "prolonged mental harm caused by or resulting from: the intentional infliction or threatened infliction of severe physical pain or suffering; . . . the threat of imminent death . . . ." As set out above, plaintiffs noted in their testimony that they feared that they would be killed by [the defendant] during the beatings he inflicted or during games of "Russian roulette." *Each plaintiff continues to suffer long-term psychological harm as a result of the ordeals they suffered at the hands of defendant and others.*

198 F. Supp. 2d at 1346 (emphasis added; first ellipsis in original). In reaching its conclusion, the court noted that each of the plaintiffs were continuing to suffer serious mental harm even ten years after the events in question. *See id.* at 1334-40. In each case, these mental effects were continuing years after the infliction of the predicate acts. *See also Sackie v. Ashcroft*, 270 F. Supp. 2d at 597-98, 601-02 (victim was kidnapped and "forcibly recruited" as a child soldier at the age of 14, and, over a period of three to four years, was repeatedly forced to take narcotics and threatened with imminent death, all of which produced "prolonged mental harm" during that time). Conversely, in *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003), the court rejected a claim under the TVPA brought by individuals who had been held at gunpoint overnight and repeatedly threatened with death. While recognizing that the plaintiffs had experienced an "ordeal," the court concluded that they had failed to show that their experience caused lasting damage, noting that "there is simply no allegation that Plaintiffs have suffered any prolonged mental harm or physical injury as a result of their alleged intimidation." *Id.* at 1294-95.

(4) The meaning of "specifically intended."

It is well recognized that the term "specific intent" has no clear, settled definition, and that the courts do not use it consistently. *See* 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e), at 355 & n.79 (2d ed. 2003). "Specific intent" is most commonly understood, however, "to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." *Id.* at 354; *see also Carter v. United States*, 530 U.S. 255, 268 (2000) (explaining that general intent, as opposed to specific intent, requires "that the defendant possessed knowledge [only] with respect to the *actus reus* of the crime"). Some cases suggest that only a conscious desire to produce the proscribed result constitutes specific intent; others suggest that even reasonable foreseeability may suffice. In *United States v. Bailey*, 444 U.S. 394 (1980), for example, the Court suggested that, at least "[i]n a general sense," *id.* at 405, "specific intent" requires that one consciously desire the result. *Id.* at 403-05. The Court compared the common law's *mens rea* concepts of specific intent and general intent to the Model Penal Code's *mens rea* concepts of acting purposefully and acting knowingly. *See id.* at 404-05. "[A] person who causes a particular result is said to act purposefully," wrote the Court, "if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct.'" *Id.* at 404 (internal quotation marks omitted). A person "is said to act knowingly," in contrast, "if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'" *Id.* (internal quotation marks omitted). The Court then stated: "In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general

intent." *Id.* at 405. In contrast, cases such as *United States v. Neiswender*, 590 F.2d 1269 (4th Cir. 1979), suggest that to prove specific intent it is enough that the defendant simply have "knowledge or notice" that his act "would have likely resulted in" the proscribed outcome. *Id.* at 1273. "Notice," the court held, "is provided by the reasonable foreseeability of the natural and probable consequences of one's acts." *Id.*

As in *2004 Legal Standards Opinion*, we will not attempt to ascertain the precise meaning of "specific intent" in sections 2340-2340A. *See id.* at 16-17. It is clear, however, that the necessary specific intent would be present if an individual performed an act and "consciously desire[d]" that act to inflict severe physical or mental pain or suffering. 1 LaFave, *Substantive Criminal Law* § 5.2(a), at 341. Conversely, if an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not be expected to inflict severe physical or mental pain or suffering, he would not have the specific intent necessary to violate sections 2340-2340A. Such an individual could be said neither consciously to desire the proscribed result, *see, e.g.*, *Bailey*, 444 U.S. at 405, nor to have "knowledge or notice" that his act "would likely have resulted in" the proscribed outcome, *Neiswender*, 590 F.2d at 1273.

As we did in *2004 Legal Standards Opinion*, we stress two additional points regarding specific intent: First, specific intent is distinguished from motive. A good motive, such as to protect national security, does not excuse conduct that is specifically intended to inflict severe physical or mental pain or suffering, as proscribed by the statute. Second, specific intent to take a given action can be found even if the actor would take the action only upon certain conditions. *Cf., e.g., Holloway v. United States*, 526 U.S. 1, 11 (1999) ("[A] defendant may not negate a proscribed intent by requiring the victim to comply with a condition the defendant has no right to impose."). *See also id.* at 10-11 & nn. 9-12; Model Penal Code § 2.02(6). Thus, for example, the fact that a victim might have avoided being tortured by cooperating with the perpetrator would not render permissible the resort to conduct that would otherwise constitute torture under the statute. *2004 Legal Standards Opinion* at 17.[32]

III.

In the discussion that follows, we will address each of the specific interrogation techniques you have described. Subject to the understandings, limitations, and safeguards discussed herein, including ongoing medical and psychological monitoring and team intervention as necessary, we conclude that the authorized use of each of these techniques, considered individually, would not violate the prohibition that Congress has adopted in sections 2340-2340A. This conclusion is straightforward with respect to all but two of the techniques. Use of sleep deprivation as an enhanced technique and use of the waterboard, however, involve more substantial questions, with the waterboard presenting the most substantial question. Although we conclude that the use of these techniques—as we understand them and subject to the limitations you have described—would not violate the statute, the issues raised by these two techniques counsel great caution in their use, including both careful adherence to the limitations and

[32] The Criminal Division of the Department of Justice has reviewed this memorandum and is satisfied that our general interpretation of the legal standards under sections 2340-2340A is consistent with its concurrence in the *2004 Legal Standards Opinion*.

restrictions you have described and also close and continuing medical and psychological monitoring.

Before addressing the application of sections 2340-2340A to the specific techniques in question, we note certain overall features of the CIA's approach that are significant to our conclusions. Interrogators are trained and certified in a course that you have informed us currently lasts approximately four weeks. Interrogators (and other personnel deployed as part of this program) are required to review and acknowledge the applicable interrogation guidelines. *See Confinement Guidelines* at 2; *Interrogation Guidelines* at 2 ("The Director, DCI Counterterrorist Center shall ensure that all personnel directly engaged in the interrogation of persons detained pursuant to the authorities set forth in [redacted] have been appropriately screened (from the medical, psychological and security standpoints), have reviewed these Guidelines, have received appropriate training in their implementation, and have completed the attached Acknowledgement."). We assume that all interrogators are adequately trained, that they understand the design and purpose of the interrogation techniques, and that they will apply the techniques in accordance with their authorized and intended use.

In addition, the involvement of medical and psychological personnel in the adaptation and application of the established SERE techniques is particularly noteworthy for purposes of our analysis.[33] Medical personnel have been involved in imposing limitations on—and requiring changes to—certain procedures, particularly the use of the waterboard.[34] We have had extensive

[33] As noted above, each of these techniques has been adapted (although in some cases with significant modifications) from SERE training. Through your consultation with various individuals responsible for such training, you have learned facts relating to experience with them, which you have reported to us. Again, fully recognizing the limitations of reliance on this experience, you have advised us that these techniques have been used as elements of a course of training without any reported incidents of prolonged mental harm or of any severe physical pain, injury, or suffering. With respect to the psychological impact, [redacted] of the SERE school advised that during his three and a half years in that position, he trained 10,000 students, only two of whom dropped out following use of the techniques. Although on rare occasions students temporarily postponed the remainder of the training and received psychological counseling, we understand that those students were able to finish the program without any indication of subsequent mental health effects. [redacted] who has had over ten years experience with SERE training, told you that he was not aware of any individuals who completed the program suffering any adverse mental health effects (though he advised of one person who did not complete the training who had an adverse mental health reaction that lasted two hours and spontaneously dissipated without requiring treatment and with no further symptoms reported). In addition, the [redacted] who has had experience with all of the techniques discussed herein, has advised that the use of these procedures has not resulted in any reported instances of prolonged mental harm and very few instances of immediate and temporary adverse psychological responses to the training. Of 26,829 students in Air Force SERE training from 1992 through 2001, only 0.14% were pulled from the program for psychological reasons (specifically, although 4.3% had some contact with psychology services, only 3% of those individuals with such contact in fact withdrew from the program). We understand that the [redacted] expressed confidence—based on debriefing of students and other information—that the training did not cause any long-term psychological harm and that if there are any long-term psychological effects of the training at all, they "are certainly minimal."

[34] We note that this involvement of medical personnel in designing safeguards for, and in monitoring implementation of, the procedures is a significant difference from earlier uses of the techniques catalogued in the Inspector General's Report. *See IG Report* at 21 n.26 ("OMS was neither consulted nor involved in the initial analysis of the risk and benefits of [enhanced interrogation techniques], nor provided with the OTS report cited in the OLC opinion [the *Interrogation Memorandum*]."). Since that time, based on comments from OMS, additional constraints have been imposed on use of the techniques.

meetings with the medical personnel involved in monitoring the use of these techniques. It is clear that they have carefully worked to ensure that the techniques do not result in severe physical or mental pain or suffering to the detainees.[35] Medical and psychological personnel evaluate each detainee before the use of these techniques on the detainee is approved, and they continue to monitor each detainee throughout his interrogation and detention. Moreover, medical personnel are physically present throughout application of the waterboard (and present or otherwise observing the use of all techniques that involve physical contact, as discussed more fully above), and they carefully monitor detainees who are undergoing sleep deprivation or dietary manipulation. In addition, they regularly assess both the medical literature and the experience with detainees.[36] OMS has specifically declared that "[m]edical officers must remain cognizant at all times of their obligation to prevent 'severe physical or mental pain or suffering.'" *OMS Guidelines* at 10. In fact, we understand that medical and psychological personnel have discontinued the use of techniques as to a particular detainee when they believed he might suffer such pain or suffering, and in certain instances, OMS medical personnel have not cleared certain detainees for some—or any—techniques based on the initial medical and psychological assessments. They have also imposed additional restrictions on the use of techniques (such as the waterboard) in order to protect the safety of detainees, thus reducing further the risk of severe pain or suffering. You have informed us that they will continue to have this role and authority. We assume that all interrogators understand the important role and authority of OMS personnel and will cooperate with OMS in the exercise of these duties.

Finally, in sharp contrast to those practices universally condemned as torture over the centuries, the techniques we consider here have been carefully evaluated to avoid causing severe pain or suffering to the detainees. As OMS has described these techniques as a group:

> In all instances the general goal of these techniques is a psychological impact, and not some physical effect, with a specific goal of "dislocat[ing] [the detainee's] expectations regarding the treatment he believes he will receive. . . ." The more physical techniques are delivered in a manner carefully limited to avoid serious pain. The slaps, for example, are designed "to induce shock, surprise, and/or humiliation" and "not to inflict physical pain that is severe or lasting."

Id. at 8-9.

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[35] We are mindful that, historically, medical personnel have sometimes been used to enhance, not prevent, torture—for example, by keeping a torture victim alive and conscious so as to extend his suffering. It is absolutely clear, as you have informed us and as our own dealings with OMS personnel have confirmed, that the involvement of OMS is intended to prevent harm to the detainees and not to extend or increase pain or suffering. As the *OMS Guidelines* explain, "OMS is responsible for assessing and monitoring the health of all Agency detainees subject to 'enhanced' interrogation techniques, and for determining that the authorized administration of these techniques would not be expected to cause serious or permanent harm." *OMS Guidelines* at 9 (footnote omitted).

[36] To assist in monitoring experience with the detainees, we understand that there is regular reporting on medical and psychological experience with the use of these techniques on detainees and that there are special instructions on documenting experience with sleep deprivation and the waterboard. *See OMS Guidelines* at 6-7, 16, 20.

With this background, we turn to the application of sections 2340-2340A to each of the specific interrogation techniques.

1. *Dietary manipulation*. Based on experience, it is evident that this technique is not expected to cause any physical pain, let alone pain that is extreme in intensity. The detainee is carefully monitored to ensure that he does not suffer acute weight loss or any dehydration. Further, there is nothing in the experience of caloric intake at this level that could be expected to cause physical pain. Although we do not equate a person who voluntarily enters a weight-loss program with a detainee subjected to dietary manipulation as an interrogation technique, we believe that it is relevant that several commercial weight-loss programs available in the United States involve similar or even greater reductions in caloric intake. Nor could this technique reasonably be thought to induce "severe physical suffering." Although dietary manipulation may cause some degree of hunger, such an experience is far from extreme hunger (let alone starvation) and cannot be expected to amount to "severe physical suffering" under the statute. The caloric levels are set based on the detainee's weight, so as to ensure that the detainee does not experience extreme hunger. As noted, many people participate in weight-loss programs that involve similar or more stringent caloric limitations, and, while such participation cannot be equated with the use of dietary manipulation as an interrogation technique, we believe that the existence of such programs is relevant to whether dietary manipulation would cause "severe physical suffering" within the meaning of sections 2340-2340A. Because there is no prospect that the technique would cause severe physical pain or suffering, we conclude that the authorized use of this technique by an adequately trained interrogator could not reasonably be considered specifically intended to do so.

This technique presents no issue of "severe mental pain or suffering" within the meaning of sections 2340-2340A, because the use of this technique would involve no qualifying predicate act. The technique does not, for example, involve "the intentional infliction or threatened infliction of severe physical pain or suffering," 18 U.S.C. § 2340(2)(A), or the "application . . . of . . . procedures calculated to disrupt profoundly the senses or the personality," *id.* § 2340(2)(B). Moreover, there is no basis to believe that dietary manipulation could cause "prolonged mental harm." Therefore, we conclude that the authorized use of this technique by an adequately trained interrogator could not reasonably be considered specifically intended to cause such harm.[37]

2. *Nudity*. We understand that nudity is used as a technique to create psychological discomfort, not to inflict any physical pain or suffering. You have informed us that during the use of this technique, detainees are kept in locations with ambient temperatures that ensure there is no threat to their health. Specifically, this technique would not be employed at temperatures below 68°F (and is unlikely to be employed below 75°F). Even if this technique involves some physical discomfort, it cannot be said to cause "suffering" (as we have explained the term

[37] In *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978), the European Court of Human Rights concluded by a vote of 13-4 that a reduced diet, even in conjunction with a number of other techniques, did not amount to "torture," as defined in the European Convention on Human Rights. The reduced diet there consisted of one "round" of bread and a pint of water every six hours, *see id.*, separate opinion of Judge Zekia, Part A. The duration of the reduced diet in that case is not clear.

above), let alone "severe physical pain or suffering," and we therefore conclude that its authorized use by an adequately trained interrogator could not reasonably be considered specifically intended to do so. Although some detainees might be humiliated by this technique, especially given possible cultural sensitivities and the possibility of being seen by female officers, it cannot constitute "severe mental pain or suffering" under the statute because it does not involve any of the predicate acts specified by Congress.

3. *Attention grasp.* The attention grasp involves no physical pain or suffering for the detainee and does not involve any predicate act for purposes of severe mental pain or suffering under the statute. Accordingly, because this technique cannot be expected to cause severe physical or mental pain or suffering, we conclude that its authorized use by an adequately trained interrogator could not reasonably be considered specifically intended to do so.

4. *Walling.* Although the walling technique involves the use of considerable force to push the detainee against the wall and may involve a large number of repetitions in certain cases, we understand that the false wall that is used is flexible and that this technique is not designed to, and does not, cause severe physical pain to the detainee. We understand that there may be some pain or irritation associated with the collar, which is used to help avoid injury such as whiplash to the detainee, but that any physical pain associated with the use of the collar would not approach the level of intensity needed to constitute severe physical pain. Similarly, we do not believe that the physical distress caused by this technique or the duration of its use, even with multiple repetitions, could amount to severe physical suffering within the meaning of sections 2340-2340A. We understand that medical and psychological personnel are present or observing during the use of this technique (as with all techniques involving physical contact with a detainee), and that any member of the team or the medical staff may intercede to stop the use of the technique if it is being used improperly or if it appears that it may cause injury to the detainee. We also do not believe that the use of this technique would involve a threat of infliction of severe physical pain or suffering or other predicate act for purposes of severe mental pain or suffering under the statute. Rather, this technique is designed to shock the detainee and disrupt his expectations that he will not be treated forcefully and to wear down his resistance to interrogation. Based on these understandings, we conclude that the authorized use of this technique by adequately trained interrogators could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of sections 2340-2340A.[38]

5. *Facial hold.* Like the attention grasp, this technique involves no physical pain or suffering and does not involve any predicate act for purposes of severe mental pain or suffering. Accordingly, we conclude that its authorized use by adequately trained interrogators could not

[38] In *Interrogation Memorandum*, we did not describe the walling technique as involving the number of repetitions that we understand may be applied. Our advice with respect to walling in the present memorandum is specifically based on the understanding that the repetitive use of walling is intended only to increase the drama and shock of the technique, to wear down the detainee's resistance, and to disrupt expectations that he will not be treated with force, and that such use is not intended to, and does not in fact, cause severe physical pain to the detainee. Moreover, our advice specifically assumes that the use of walling will be stopped if there is any indication that the use of the technique is or may be causing severe physical pain to a detainee.

reasonably be considered specifically intended to cause severe physical or mental pain or suffering.

6. *Facial slap or insult slap*. Although this technique involves a degree of physical pain, the pain associated with a slap to the face, as you have described it to us, could not be expected to constitute severe physical pain. We understand that the purpose of this technique is to cause shock, surprise, or humiliation, not to inflict physical pain that is severe or lasting; we assume it will be used accordingly. Similarly, the physical distress that may be caused by an abrupt slap to the face, even if repeated several times, would not constitute an extended state or condition of physical suffering and also would not likely involve the level of intensity required for severe physical suffering under the statute. Finally, a facial slap would not involve a predicate act for purposes of severe mental pain or suffering. Therefore, the authorized use of this technique by adequately trained interrogators could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of sections 2340-2340A.[39]

7. *Abdominal slap*. Although the abdominal slap technique might involve some minor physical pain, it cannot, as you have described it to us, be said to involve even moderate, let alone *severe*, physical pain or suffering. Again, because the technique cannot be expected to cause severe physical pain or suffering, we conclude that its authorized use by an adequately trained interrogator could not reasonably be considered specifically intended to do so. Nor could it be considered specifically intended to cause severe mental pain or suffering within the meaning of sections 2340-2340A, as none of the statutory predicate acts would be present.

8. *Cramped confinement*. This technique does not involve any significant physical pain or suffering. It also does not involve a predicate act for purposes of severe mental pain or suffering. Specifically, we do not believe that placing a detainee in a dark, cramped space for the limited period of time involved here could reasonably be considered a procedure calculated to disrupt profoundly the senses so as to cause prolonged mental harm. Accordingly, we conclude that its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of sections 2340-2340A.

9. *Wall standing*. The wall standing technique, as you have described it, would not involve severe physical pain within the meaning of the statute. It also cannot be expected to cause severe physical suffering. Even if the physical discomfort of muscle fatigue associated with wall standing might be substantial, we understand that the duration of the technique is self-limited by the individual detainee's ability to sustain the position; thus, the short duration of the discomfort means that this technique would not be expected to cause, and could not reasonably be considered specifically intended to cause, severe physical suffering. Our advice also assumes that the detainee's position is not designed to produce severe pain that might result from contortions or twisting of the body, but only temporary muscle fatigue. Nor does wall standing

[39] Our advice about both the facial slap and the abdominal slap assumes that the interrogators will apply those techniques as designed and will not strike the detainee with excessive force or repetition in a manner that might result in severe physical pain.

involve any predicate act for purposes of severe mental pain or suffering. Accordingly, we conclude that the authorized use of this technique by adequately trained interrogators could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of the statute.

10. *Stress positions*. For the same reasons that the use of wall standing would not violate the statute, we conclude that the authorized use of stress positions such as those described in *Interrogation Memorandum*, if employed by adequately trained interrogators, could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of sections 2340-2340A. As with wall standing, we understand that the duration of the technique is self-limited by the individual detainee's ability to sustain the position; thus, the short duration of the discomfort means that this technique would not be expected to cause, and could not reasonably be considered specifically intended to cause, severe physical suffering. Our advice also assumes that stress positions are not designed to produce severe pain that might result from contortions or twisting of the body, but only temporary muscle fatigue.[40]

11. *Water dousing*. As you have described it to us, water dousing involves dousing the detainee with water from a container or a hose without a nozzle, and is intended to wear him down both physically and psychologically. You have informed us that the water might be as cold as 41°F, though you have further advised us that the water generally is not refrigerated and therefore is unlikely to be less than 50°F. (Nevertheless, for purposes of our analysis, we will assume that water as cold as 41°F might be used.) OMS has advised that, based on the extensive experience in SERE training, the medical literature, and the experience with detainees to date, water dousing as authorized is not designed or expected to cause significant physical pain, and certainly not severe physical pain. Although we understand that prolonged *immersion* in very cold water may be physically painful, as noted above, this interrogation technique does not involve immersion and a substantial margin of safety is built into the time limitation on the use of the CIA's water dousing technique—use of the technique with water of a given temperature must be limited to no more than two-thirds of the time in which hypothermia could be expected to occur from *total immersion* in water of the same temperature.[41] While being cold can involve physical discomfort, OMS also advises that in their professional judgment any resulting discomfort is not expected to be intense, and the duration is limited by specific times tied to

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[40] A stress position that involves such contortion or twisting, as well as one held for so long that it could not be aimed only at producing temporary muscle fatigue, might raise more substantial questions under the statute. *Cf. Army Field Manual 34-52: Intelligence Interrogation* at 1-8 (1992) (indicating that "[f]orcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time" may constitute "torture" within the meaning of the Third Geneva Convention's requirement that "[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war," but not addressing 18 U.S.C. §§ 2340-2340A); United Nations General Assembly, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/59/150 at 6 (Sept. 1, 2004) (suggesting that "holding detainees in painful and/or stressful positions" might in certain circumstances be characterized as torture).

[41] Moreover, even in the extremely unlikely event that hypothermia set in, under the circumstances in which this technique is used—including close medical supervision and, if necessary, medical attention—we understand that the detainee would be expected to recover fully and rapidly.

water temperature. Any discomfort caused by this technique, therefore, would not qualify as "severe physical suffering" within the meaning of sections 2340-2340A. Consequently, given that there is no expectation that the technique will cause severe physical pain or suffering when properly used, we conclude that the authorized use of this technique by an adequately trained interrogator could not reasonably be considered specifically intended to cause these results.

With respect to mental pain or suffering, as you have described the procedure, we do not believe that any of the four statutory predicate acts necessary for a possible finding of severe mental pain or suffering under the statute would be present. Nothing, for example, leads us to believe that the detainee would understand the procedure to constitute a threat of imminent death, especially given that care is taken to ensure that no water will get into the detainee's mouth or nose. Nor would a detainee reasonably understand the prospect of being doused with cold water as the threatened infliction of severe pain. Furthermore, even were we to conclude that there could be a qualifying predicate act, nothing suggests that the detainee would be expected to suffer any prolonged mental harm as a result of the procedure. OMS advises that there has been no evidence of such harm in the SERE training, which utilizes a much more extreme technique involving total immersion. The presence of psychologists who monitor the detainee's mental condition makes such harm even more unlikely. Consequently, we conclude that the authorized use of the technique by adequately trained interrogators could not reasonably be considered specifically intended to cause severe mental pain or suffering within the meaning of the statute.

The flicking technique, which is subject to the same temperature limitations as water dousing but would involve substantially less water, *a fortiori* would not violate the statute.

12. *Sleep deprivation.* In the *Interrogation Memorandum*, we concluded that sleep deprivation did not violate sections 2340-2340A. *See id.* at 10, 14-15. This question warrants further analysis for two reasons. First, we did not consider the potential for physical pain or suffering resulting from the shackling used to keep detainees awake or any impact from the diapering of the detainee. Second, we did not address the possibility of severe physical suffering that does not involve severe physical pain.

Under the limitations adopted by the CIA, sleep deprivation may not exceed 180 hours, which we understand is approximately two-thirds of the maximum recorded time that humans have gone without sleep for purposes of medical study, as discussed below.[42] Furthermore, any detainee who has undergone 180 hours of sleep deprivation must then be allowed to sleep without interruption for at least eight straight hours. Although we understand that the CIA's guidelines would allow another session of sleep deprivation to begin after the detainee has gotten

[42] The *IG Report* described the maximum allowable period of sleep deprivation at that time as 264 hours or 11 days. *See IG Report* at 15. You have informed us that you have since established a limit of 180 hours, that in fact no detainee has been subjected to more than 180 hours of sleep deprivation, and that sleep deprivation will rarely exceed 120 hours. To date, only three detainees have been subjected to sleep deprivation for more than 96 hours.

at least eight hours of uninterrupted sleep following 180 hours of sleep deprivation, we will evaluate only one application of up to 180 hours of sleep deprivation.[43]

We understand from OMS, and from our review of the literature on the physiology of sleep, that even very extended sleep deprivation does not cause physical pain, let alone severe physical pain.[44] "The longest studies of sleep deprivation in humans . . . [involved] volunteers [who] were deprived of sleep for 8 to 11 days. . . . Surprisingly, little seemed to go wrong with the subjects physically. The main effects lay with sleepiness and impaired brain functioning, but even these were no great cause for concern." James Horne, *Why We Sleep: The Functions of Sleep in Humans and Other Mammals* 23-24 (1988) ("*Why We Sleep*") (footnote omitted). We note that there are important differences between sleep deprivation as an interrogation technique used by the CIA and the controlled experiments documented in the literature. The subjects of the experiments were free to move about and engage in normal activities and often led a "tranquil existence" with "plenty of time for relaxation," *see id.* at 24, whereas a detainee in CIA custody would be shackled and prevented from moving freely. Moreover, the subjects in the experiments often increased their food consumption during periods of extended sleep loss, *see id.* at 38, whereas the detainee undergoing interrogation may be placed on a reduced-calorie diet, as discussed above. Nevertheless, we understand that experts who have studied sleep deprivation have concluded that "[t]he most plausible reason for the uneventful physical findings with these human beings is that . . . sleep loss is not particularly harmful." *Id.* at 24. We understand that this conclusion does not depend on the extent of physical movement or exercise by the subject or whether the subject increases his food consumption. OMS medical staff members have also informed us, based on their experience with detainees who have undergone extended sleep deprivation and their review of the relevant medical literature, that extended sleep deprivation does not cause physical pain. Although edema, or swelling, of the lower legs may sometimes develop as a result of the long periods of standing associated with sleep deprivation, we understand from OMS that such edema is not painful and will quickly dissipate once the subject is removed from the standing position. We also understand that if any case of significant edema develops, the team will intercede to ensure that the detainee is moved from the standing position and that he receives any medical attention necessary to relieve the swelling and allow the edema to dissipate. For these reasons, we conclude that the authorized use of extended sleep

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[43] As noted above, we are not concluding that additional use of sleep deprivation, subject to close and careful medical supervision, would violate the statute, but at the present time we express no opinion on whether additional sleep deprivation would be consistent with sections 2340-2340A.

[44] Although sleep deprivation is not itself physically painful, we understand that some studies have noted that extended total sleep deprivation may have the effect of reducing tolerance to some forms of pain in some subjects. *See, e.g.*, B. Kundermann, et al., *Sleep Deprivation Affects Thermal Pain Thresholds but not Somatosensory Thresholds in Healthy Volunteers*, 66 Psychosomatic Med. 932 (2004) (finding a significant decrease in heat pain thresholds and some decrease in cold pain thresholds after one night without sleep); S. Hakki Onen, et al., *The Effects of Total Sleep Deprivation, Selective Sleep Interruption and Sleep Recovery on Pain Tolerance Thresholds in Healthy Subjects*, 10 J. Sleep Research 35, 41 (2001) (finding a statistically significant drop of 8-9% in tolerance thresholds for mechanical or pressure pain after 40 hours); *id.* at 35-36 (discussing other studies). We will discuss the potential interactions between sleep deprivation and other interrogation techniques in the separate memorandum, to which we referred in footnote 6, addressing whether the combined use of certain techniques is consistent with the legal requirements of sections 2340-2340A.

deprivation by adequately trained interrogators would not be expected to cause and could not reasonably be considered specifically intended to cause severe physical pain.

In addition, OMS personnel have informed us that the shackling of detainees is not designed to and does not result in significant physical pain. A detainee subject to sleep deprivation would not be allowed to hang by his wrists, and we understand that no detainee subjected to sleep deprivation to date has been allowed to hang by his wrists or has otherwise suffered injury.[45] If necessary, we understand that medical personnel will intercede to prevent any such injury and would require either that interrogators use a different method to keep the detainee awake (such as through the use of sitting or horizontal positions), or that the use of the technique be stopped altogether. When the sitting position is used, the detainee is seated on a small stool to which he is shackled; the stool supports his weight but is too small to let the detainee balance himself and fall asleep. We also specifically understand that the use of shackling with horizontal sleep deprivation, which has only been used rarely, is done in such a way as to ensure that there is no additional stress on the detainee's arm or leg joints that might force the limbs beyond natural extension or create tension on any joint. Thus, shackling cannot be expected to result in severe physical pain, and we conclude that its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to do so. Finally, we believe that the use of a diaper cannot be expected to—and could not reasonably be considered intended to—result in any physical pain, let alone severe physical pain.

Although it is a more substantial question, particularly given the imprecision in the statutory standard and the lack of guidance from the courts, we also conclude that extended sleep deprivation, subject to the limitations and conditions described herein, would not be expected to cause "severe physical suffering." We understand that some individuals who undergo extended sleep deprivation would likely at some point experience physical discomfort and distress. We assume that some individuals would eventually feel weak physically and may experience other unpleasant physical sensations from prolonged fatigue, including such symptoms as impairment to coordinated body movement, difficulty with speech, nausea, and blurred vision. *See Why We Sleep* at 30. In addition, we understand that extended sleep deprivation will often cause a small drop in body temperature, *see id.* at 31, and we assume that such a drop in body temperature may also be associated with unpleasant physical sensations. We also assume that any physical discomfort that might be associated with sleep deprivation would likely increase, at least to a point, the longer the subject goes without sleep. Thus, on these assumptions, it may be the case that at some point, for some individuals, the degree of physical distress experienced in sleep deprivation might be substantial.[46]

On the other hand, we understand from OMS, and from the literature we have reviewed on the physiology of sleep, that many individuals may tolerate extended sleep deprivation well

[45] This includes a total of more than 25 detainees subjected to at least some period of sleep deprivation. *See January 4 [redacted] Fax* at 1-3.

[46] The possibility noted above that sleep deprivation might heighten susceptibility to pain, *see supra* note 44, magnifies this concern.

and with little apparent distress, and that this has been the CIA's experience.[47] Furthermore, the principal physical problem associated with standing is edema, and in any instance of significant edema, the interrogation team will remove the detainee from the standing position and will seek medical assistance. The shackling is used only as a passive means of keeping the detainee awake and, in both the tightness of the shackles and the positioning of the hands, is not intended to cause pain. A detainee, for example, will not be allowed to hang by his wrists. Shackling in the sitting position involves a stool that is adequate to support the detainee's weight. In the rare instances when horizontal sleep deprivation may be used, a thick towel or blanket is placed under the detainee to protect against reduction of body temperature from contact with the floor, and the manacles and shackles are anchored so as not to cause pain or create tension on any joint. If the detainee is nude and is using an adult diaper, the diaper is checked regularly to prevent skin irritation. The conditions of sleep deprivation are thus aimed at preventing severe physical suffering. Because sleep deprivation does not involve physical pain and would not be expected to cause extreme physical distress to the detainee, the extended duration of sleep deprivation, within the 180-hour limit imposed by the CIA, is not a sufficient factor alone to constitute severe physical suffering within the meaning of sections 2340-2340A. We therefore believe that the use of this technique, under the specified limits and conditions, is not "extreme and outrageous" and does not reach the high bar set by Congress for a violation of sections 2340-2340A. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d at 92 (to be torture under the TVPA, conduct must be "extreme and outrageous"); *cf. Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1332-40, 1345-46 (standard met under the TVPA by a course of conduct that included severe beatings to the genitals, head, and other parts of the body with metal pipes and various other items; removal of teeth with pliers; kicking in the face and ribs; breaking of bones and ribs and dislocation of fingers; cutting a figure into the victim's forehead; hanging the victim and beating him; extreme limitations of food and water; and subjection to games of "Russian roulette").

Nevertheless, because extended sleep deprivation could in some cases result in substantial physical distress, the safeguards adopted by the CIA, including ongoing medical monitoring and intervention by the team if needed, are important to ensure that the CIA's use of extended sleep deprivation will not run afoul of the statute. Different individual detainees may react physically to sleep deprivation in different ways. We assume, therefore, that the team will separately monitor each individual detainee who is undergoing sleep deprivation, and that the application of this technique will be sensitive to the individualized physical condition and reactions of each detainee. Moreover, we emphasize our understanding that OMS will intervene to alter or stop the course of sleep deprivation for a detainee if OMS concludes in its medical judgment that the detainee is or may be experiencing extreme physical distress.[48] The team, we

[47] Indeed, although it may seem surprising to those not familiar with the extensive medical literature relating to sleep deprivation, based on that literature and its experience with the technique, in its guidelines, OMS lists sleep deprivation as less intense than water dousing, stress positions, walling, cramped confinement, and the waterboard. *See OMS Guidelines* at 8.

[48] For example, any physical pain or suffering associated with standing or with shackles might become more intense with an extended use of the technique on a particular detainee whose condition and strength do not permit him to tolerate it, and we understand that personnel monitoring the detainee will take this possibility into account and, if necessary, will ensure that the detainee is placed into a sitting or horizontal position or will direct that the sleep deprivation be discontinued altogether. *See OMS Guidelines* at 14-16.

understand, will intervene not only if the sleep deprivation itself may be having such effects, but also if the shackling or other conditions attendant to the technique appear to be causing severe physical suffering. With these precautions in place, and based on the assumption that they will be followed, we conclude that the authorized use of extended sleep deprivation by adequately trained interrogators would not be expected to and could not reasonably be considered specifically intended to cause severe physical suffering in violation of 18 U.S.C. §§ 2340-2340A.

Finally, we also conclude that extended sleep deprivation cannot be expected to cause "severe mental pain or suffering" as defined in sections 2340-2340A, and that its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to do so. First, we do not believe that use of the sleep deprivation technique, subject to the conditions in place, would involve one of the predicate acts necessary for "severe mental pain or suffering" under the statute. There would be no infliction or threatened infliction of severe physical pain or suffering, within the meaning of the statute, and there would be no threat of imminent death. It may be questioned whether sleep deprivation could be characterized as a "procedure[] calculated to disrupt profoundly the senses or the personality" within the meaning of section 2340(2)(B), since we understand from OMS and from the scientific literature that extended sleep deprivation might induce hallucinations in some cases. Physicians from OMS have informed us, however, that they are of the view that, in general, no "profound" disruption would result from the length of sleep deprivation contemplated by the CIA, and again the scientific literature we have reviewed appears to support this conclusion. Moreover, we understand that any team member would direct that the technique be immediately discontinued if there were any sign that the detainee is experiencing hallucinations. Thus, it appears that the authorized use of sleep deprivation by the CIA would not be expected to result in a profound disruption of the senses, and if it did, it would be discontinued. Even assuming, however, that the extended use of sleep deprivation may result in hallucinations that could fairly be characterized as a "profound" disruption of the subject's senses, we do not believe it tenable to conclude that in such circumstances the use of sleep deprivation could be said to be "calculated" to cause such profound disruption to the senses, as required by the statute. The term "calculated" denotes something that is planned or thought out beforehand: "Calculate," as used in the statute, is defined to mean "to plan the nature of beforehand: think out"; "to design, prepare, or adapt by forethought or careful plan: fit or prepare by appropriate means." *Webster's Third New International Dictionary* at 315 (defining "calculate"—"used chiefly [as it is in section 2340(2)(B)] as [a] past part[iciple] with complementary infinitive <*calculated* to succeed>"). Here, it is evident that the potential for any hallucinations on the part of a detainee undergoing sleep deprivation is not something that would be a "calculated" result of the use of this technique, particularly given that the team would intervene immediately to stop the technique if there were signs the subject was experiencing hallucinations.

Second, even if we were to assume, out of an abundance of caution, that extended sleep deprivation could be said to be a "procedure[] calculated to disrupt profoundly the senses or the personality" of the subject within the meaning of section 2340(2)(B), we do not believe that this technique would be expected to—or that its authorized use by adequately trained interrogators could reasonably be considered specifically intended to—cause "*prolonged* mental harm" as required by the statute, because, as we understand it, any hallucinatory effects of sleep deprivation would dissipate rapidly. OMS has informed us, based on the scientific literature and

on its own experience with detainees who have been sleep deprived, that any such hallucinatory effects would not be prolonged. We understand from OMS that *Why We Sleep* provides an accurate summary of the scientific literature on this point. As discussed there, the longest documented period of time for which any human has gone without sleep is 264 hours. *See id.* at 29-34. The longest study with more than one subject involved 205 hours of sleep deprivation. *See id.* at 37-42. We understand that these and other studies constituting a significant body of scientific literature indicate that sleep deprivation temporarily affects the functioning of the brain but does not otherwise have significant physiological effects. *See id.* at 100. Sleep deprivation's effects on the brain are generally not severe but can include impaired cognitive performance and visual hallucinations; however, these effects dissipate rapidly, often with as little as one night's sleep. *See id.* at 31-32, 34-37, 40, 47-53. Thus, we conclude, any temporary hallucinations that might result from extended sleep deprivation could not reasonably be considered "prolonged mental harm" for purposes of sections 2340-2340A.[49]

In light of these observations, although in its extended uses it may present a substantial question under sections 2340-2340A, we conclude that the authorized use of sleep deprivation by adequately trained interrogators, subject to the limitations and monitoring in place, could not reasonably be considered specifically intended to cause severe mental pain or suffering. Finally, the use of a diaper for sanitary purposes on an individual subjected to sleep deprivation, while potentially humiliating, could not be considered specifically intended to inflict severe mental pain or suffering within the meaning of the statute, because there would be no statutory predicate act and no reason to expect "prolonged mental harm" to result.[50]

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[49] Without determining the minimum time for mental harm to be considered "prolonged," we do not believe that "prolonged mental harm" would occur during the sleep deprivation itself. As noted, OMS would order that the technique be discontinued if hallucinations occurred. Moreover, even if OMS personnel were not aware of any such hallucinations, whatever time would remain between the onset of such hallucinations, which presumably would be well into the period of sleep deprivation, and the 180-hour maximum for sleep deprivation would not constitute "prolonged" mental harm within the meaning of the statute. Nevertheless, we note that this aspect of the technique calls for great care in monitoring by OMS personnel, including psychologists, especially as the length of the period of sleep deprivation increases.

[50] We note that the court of appeals in *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996), stated that a variety of techniques taken together, one of which was sleep deprivation, amounted to torture. The court, however, did not specifically discuss sleep deprivation apart from the other conduct at issue, and it did not conclude that sleep deprivation alone amounted to torture. In *Ireland v. United Kingdom*, the European Court of Human Rights concluded by a vote of 13-4 that sleep deprivation, even in conjunction with a number of other techniques, did not amount to torture under the European Charter. The duration of the sleep deprivation at issue was not clear, *see* separate opinion of Judge Fitzmaurice at ¶ 19, but may have been 96-120 hours, *see* majority opinion at ¶ 104. Finally, we note that the Committee Against Torture of the Office of the High Commissioner for Human Rights, in *Concluding Observations of the Committee Against Torture: Israel*, U.N. Doc. A/52/44, at ¶ 257 (May 9, 1997), concluded that a variety of practices taken together, including "sleep deprivation for prolonged periods," "constitute torture as defined in article 1 of the [CAT]." *See also* United Nations General Assembly, *Report of the Committee Against Torture*, U.N. Doc. A/52/44 at ¶ 56 (Sept. 10, 1997) ("sleep deprivation practised on suspects . . . may in some cases constitute torture"). The Committee provided no details on the length of the sleep deprivation or how it was implemented and no analysis to support its conclusion. These precedents provide little or no helpful guidance in our review of the CIA's use of sleep deprivation under sections 2340-2340A. While we do not rely on this fact in interpreting sections 2340-2340A, we note that we are aware of no decision of any foreign court or international tribunal finding that the techniques analyzed here, if subject to the limitations and conditions set out, would amount to torture.

13. *Waterboard.* We previously concluded that the use of the waterboard did not constitute torture under sections 2340-2340A. *See Interrogation Memorandum* at 11, 15. We must reexamine the issue, however, because the technique, as it would be used, could involve more applications in longer sessions (and possibly using different methods) than we earlier considered.[51]

We understand that in the escalating regimen of interrogation techniques, the waterboard is considered to be the most serious, requires a separate approval that may be sought only after other techniques have not worked (or are considered unlikely to work in the time available), and in fact has been—and is expected to be—used on very few detainees. We accept the assessment of OMS that the waterboard "is by far the most traumatic of the enhanced interrogation techniques." *OMS Guidelines* at 15. This technique could subject a detainee to a high degree of distress. A detainee to whom the technique is applied will experience the physiological sensation of drowning, which likely will lead to panic. We understand that even a detainee who knows he is not going to drown is likely to have this response. Indeed, we are informed that even individuals very familiar with the technique experience this sensation when subjected to the waterboard.

Nevertheless, although this technique presents the most substantial question under the statute, we conclude for the reasons discussed below that the authorized use of the waterboard by adequately trained interrogators, subject to the limitations and conditions adopted by the CIA and in the absence of any medical contraindications, would not violate sections 2340-2340A. (We understand that a medical contraindication may have precluded the use of this particular technique on [redacted]. In reaching this conclusion, we do not in any way minimize the

[51] The *IG Report* noted that in some cases the waterboard was used with far greater frequency than initially indicated, *see IG Report* at 5, 44, 46, 103-04, and also that it was used in a different manner. *See id.* at 37 ("[T]he waterboard technique . . . was different from the technique described in the DoJ opinion and used in the SERE training. The difference was in the manner in which the detainee's breathing was obstructed. At the SERE school and in the DoJ opinion, the subject's airflow is disrupted by the firm application of a damp cloth over the air passages; the interrogator applies a small amount of water to the cloth in a controlled manner. By contrast, the Agency interrogator . . . applied large volumes of water to a cloth that covered the detainee's mouth and nose. One of the psychologists/interrogators acknowledged that the Agency's use of the technique is different from that used in SERE training because it is 'for real' and is more poignant and convincing."); *see also id.* at 14 n.14. The Inspector General further reported that "OMS contends that the expertise of the SERE psychologist/interrogators on the waterboard was probably misrepresented at the time, as the SERE waterboard experience is so different from the subsequent Agency usage as to make it almost irrelevant. Consequently, according to OMS, there was no *a priori* reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe." *Id.* at 21 n.26. We have carefully considered the *IG Report* and discussed it with OMS personnel. As noted, OMS input has resulted in a number of changes in the application of the waterboard, including limits on the frequency and cumulative use of the technique. Moreover, OMS personnel are carefully instructed in monitoring this technique and are personally present whenever it is used. *See OMS Guidelines* at 17-20. Indeed, although physician assistants can be present when other enhanced techniques are applied, "use of the waterboard requires the presence of a physician." *Id.* at 9 n.2.

experience. The panic associated with the feeling of drowning could undoubtedly be significant. There may be few more frightening experiences than feeling that one is unable to breathe.[52]

However frightening the experience may be, OMS personnel have informed us that the waterboard technique is not physically painful. This conclusion, as we understand the facts, accords with the experience in SERE training, where the waterboard has been administered to several thousand members of the United States Armed Forces.[53] To be sure, in SERE training, the technique is confined to at most two applications (and usually only one) of no more than 40 seconds each. Here, there may be two sessions, of up to two hours each, during a 24-hour period, and each session may include multiple applications, of which six may last 10 seconds or longer (but none more than 40 seconds), for a total time of application of as much as 12 minutes in a 24-hour period. Furthermore, the waterboard may be used on up to five days during the 30-day period for which it is approved. *See August 19* [redacted] *Letter* at 1-2. As you have informed us, the CIA has previously used the waterboard repeatedly on two detainees, and, as far as can be determined, these detainees did not experience physical pain or, in the professional judgment of doctors, is there any medical reason to believe they would have done so. Therefore, we conclude that the authorized use of the waterboard by adequately trained interrogators could not reasonably be considered specifically intended to cause "severe physical pain."

We also conclude that the use of the waterboard, under the strict limits and conditions imposed, would not be expected to cause "severe physical suffering" under the statute. As noted above, the difficulty of specifying a category of physical suffering apart from both physical pain and mental pain or suffering, along with the requirement that any such suffering be "severe," calls for an interpretation under which "severe physical suffering" is reserved for physical distress that is severe considering both its intensity and duration. To the extent that in some applications the use of the waterboard could cause choking or similar physical—as opposed to mental—sensations, those physical sensations might well have an intensity approaching the degree contemplated by the statute. However, we understand that any such physical—as opposed to mental—sensations caused by the use of the waterboard end when the application

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[52] As noted above, in most uses of the technique, the individual is in fact able to breathe, though his breathing is restricted. Because in some uses breathing would not be possible, for purposes of our analysis we assume that the detainee is unable to breathe during applications of water.

[53] We understand that the waterboard is currently used only in Navy SERE training. As noted in the *IG Report*, "[a]ccording to individuals with authoritative knowledge of the SERE program, . . . [e]xcept for Navy SERE training, use of the waterboard was discontinued because of its dramatic effect on the students who were subjects." *IG Report* at 14 n.14. We understand that use of the waterboard was discontinued by the other services not because of any concerns about possible physical or mental harm, but because students were not successful at resisting the technique and, as such, it was not considered to be a useful training technique. We note that OMS has concluded that "[w]hile SERE trainers believe that trainees are unable to maintain psychological resistance to the waterboard, our experience was otherwise. Some subjects unquestionably can withstand a large number of applications, with no immediately discernible cumulative impact beyond their strong aversion to the experience." *OMS Guidelines* at 17. We are aware that at a recent Senate Judiciary Committee hearing, Douglas Johnson, Executive Director of the Center for Victims of Torture, testified that some U.S. military personnel who have undergone waterboard training have apparently stated "that it's taken them 15 years of therapy to get over it." You have informed us that, in 2002, the CIA made inquiries to Department of Defense personnel involved in SERE training and that the Department of Defense was not aware of any information that would substantiate such statements, nor is the CIA aware of any such information.

ends. Given the time limits imposed, and the fact that any physical distress (as opposed to possible mental suffering, which is discussed below) would occur only during the actual application of water, the physical distress caused by the waterboard would not be expected to have the duration required to amount to severe physical suffering.[54] Applications are strictly limited to at most 40 seconds, and a total of at most 12 minutes in any 24-hour period, and use of the technique is limited to at most five days during the 30-day period we consider. Consequently, under these conditions, use of the waterboard cannot be expected to cause "severe physical suffering" within the meaning of the statute, and we conclude that its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to cause "severe physical suffering."[55] Again, however, we caution that great care should be used in adhering to the limitations imposed and in monitoring any detainee subjected to it to prevent the detainee from experiencing severe physical suffering.

The most substantial question raised by the waterboard relates to the statutory definition of "severe mental pain or suffering." The sensation of drowning that we understand accompanies the use of the waterboard arguably could qualify as a "threat of imminent death" within the meaning of section 2340(2)(C) and thus might constitute a predicate act for "severe mental pain or suffering" under the statute.[56] Although the waterboard is used with safeguards that make actual harm quite unlikely, the detainee may not know about these safeguards, and even if he does learn of them, the technique is still likely to create panic in the form of an acute instinctual fear arising from the physiological sensation of drowning.

Nevertheless, the statutory definition of "severe mental pain or suffering" also requires that the predicate act produce "prolonged mental harm." 18 U.S.C. § 2340(2). As we understand from OMS personnel familiar with the history of the waterboard technique, as used both in SERE training (though in a substantially different manner) and in the previous CIA interrogations, there is no medical basis to believe that the technique would produce any mental effect beyond the distress that directly accompanies its use and the prospect that it will be used again. We understand from the CIA that to date none of the thousands of persons who have undergone the more limited use of the technique in SERE training has suffered prolonged mental harm as a result. The CIA's use of the technique could far exceed the one or two applications to which SERE training is limited, and the participant in SERE training presumably understands that the technique is part of a training program that is not intended to hurt him and will end at some foreseeable time. But the physicians and psychologists at the CIA familiar with the facts

[54] We emphasize that physical suffering differs from physical pain in this respect. Physical pain may be "severe" even if lasting only seconds; whereas, by contrast, physical distress may amount to "severe physical suffering" only if it is severe both in intensity and duration.

[55] As with sleep deprivation, the particular condition of the individual detainee must be monitored so that, with extended or repeated use of the technique, the detainee's experience does not depart from these expectations.

[56] It is unclear whether a detainee being subjected to the waterboard in fact experiences it as a "threat of imminent death." We understand that the CIA may inform a detainee on whom this technique is used that he would not be allowed to drown. Moreover, after multiple applications of the waterboard, it may become apparent to the detainee that, however frightening the experience may be, it will not result in death. Nevertheless, for purposes of our analysis, we will assume that the physiological sensation of drowning associated with the use of the waterboard may constitute a "threat of imminent death" within the meaning of sections 2340-2340A.

have informed us that in the case of the two detainees who have been subjected to more extensive use of the waterboard technique, no evidence of prolonged mental harm has appeared in the period since the use of the waterboard on those detainees, a period which now spans at least 25 months for each of these detainees. Moreover, in their professional judgment based on this experience and the admittedly different SERE experience, OMS officials inform us that they would not expect the waterboard to cause such harm. Nor do we believe that the distress accompanying use of the technique on five days in a 30-day period, in itself, could be the "prolonged mental harm" to which the statute refers. The technique may be designed to create fear at the time it is used on the detainee, so that the detainee will cooperate to avoid future sessions. Furthermore, we acknowledge that the term "prolonged" is imprecise. Nonetheless, without in any way minimizing the distress caused by this technique, we believe that the panic brought on by the waterboard during the very limited time it is actually administered, combined with any residual fear that may be experienced over a somewhat longer period, could not be said to amount to the "prolonged mental harm" that the statute covers.[57] For these reasons, we conclude that the authorized use of the waterboard by adequately trained interrogators could not reasonably be considered specifically intended to cause "prolonged mental harm." Again, however, we caution that the use of this technique calls for the most careful adherence to the limitations and safeguards imposed, including constant monitoring by both medical and psychological personnel of any detainee who is subjected to the waterboard.

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[57] In *Hilao v. Estate of Marcos*, the Ninth Circuit stated that a course of conduct involving a number of techniques, one of which has similarities to the waterboard, constituted torture. The court described the course of conduct as follows:

> He was then interrogated by members of the military, who blindfolded and severely beat him while he was handcuffed and fettered; they also threatened him with death. When this round of interrogation ended, he was denied sleep and repeatedly threatened with death. In the next round of interrogation, all of his limbs were shackled to a cot and a towel was placed over his nose and mouth; his interrogators then poured water down his nostrils so that he felt as though he were drowning. This lasted for approximately six hours, during which time interrogators threatened [him] with electric shock and death. At the end of this water torture, [he] was left shackled to the cot for the following three days, during which time he was repeatedly interrogated. He was then imprisoned for seven months in a suffocatingly hot and unlit cell, measuring 2.5 meters square; during this time he was shackled to his cot, at first by all his limbs and later by one hand and one foot, for all but the briefest periods (in which he was allowed to eat or use the toilet). The handcuffs were often so tight that the slightest movement . . . made them cut into his flesh. During this period, he felt 'extreme pain, almost undescribable, the boredom' and 'the feeling that tons of lead . . . were falling on [his] brain. [He] was never told how long the treatment inflicted upon him would last. After his seven months shackled to his cot, [he] spent more than eight years in detention, approximately five of them in solitary confinement and the rest in near-solitary confinement.

103 F.3d at 790-91. The court then concluded, "it seems clear that all of the abuses to which [a plaintiff] testified—including the eight years during which he was held in solitary or near-solitary confinement—constituted a single course of conduct of torture." *Id.* at 795. In addition to the obvious differences between the technique in *Hilao* and the CIA's use of the waterboard subject to the careful limits described above (among other things, in *Hilao* the session lasted six hours and followed explicit threats of death and severe physical beatings), the court reached no conclusion that the technique by itself constituted torture. However, the fact that a federal appellate court would even colloquially describe a technique that may share some of the characteristics of the waterboard as "water torture" counsels continued care and careful monitoring in the use of this technique.

Even if the occurrence of one of the predicate acts could, depending on the circumstances of a particular case, give rise to an inference of intent to cause "prolonged mental harm," no such circumstances exist here. On the contrary, experience with the use of the waterboard indicates that prolonged mental harm would not be expected to occur, and CIA's use of the technique is subject to a variety of safeguards, discussed above, designed to ensure that prolonged mental harm does not result. Therefore, the circumstances here would negate any potential inference of specific intent to cause such harm.

Assuming adherence to the strict limitations discussed herein, including the careful medical monitoring and available intervention by the team as necessary, we conclude that although the question is substantial and difficult, the authorized use of the waterboard by adequately trained interrogators and other team members could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering and thus would not violate sections 2340-2340A.[58]

* * *

In sum, based on the information you have provided and the limitations, procedures, and safeguards that would be in place, we conclude that—although extended sleep deprivation and use of the waterboard present more substantial questions in certain respects under the statute and the use of the waterboard raises the most substantial issue—none of these specific techniques, considered individually, would violate the prohibition in sections 2340-2340A. The universal rejection of torture and the President's unequivocal directive that the United States not engage in torture warrant great care in analyzing whether particular interrogation techniques are consistent with the requirements of sections 2340-2340A, and we have attempted to employ such care throughout our analysis. We emphasize that these are issues about which reasonable persons may disagree. Our task has been made more difficult by the imprecision of the statute and the relative absence of judicial guidance, but we have applied our best reading of the law to the specific facts that you have provided. As is apparent, our conclusion is based on the assumption that close observation, including medical and psychological monitoring of the detainees, will continue during the period when these techniques are used; that the personnel present are authorized to, and will, stop the use of a technique at any time if they believe it is being used improperly or threatens a detainee's safety or that a detainee may be at risk of suffering severe physical or mental pain or suffering; that the medical and psychological personnel are continually assessing the available literature and ongoing experience with detainees, and that, as they have done to date, they will make adjustments to techniques to ensure that they do not cause severe physical or mental pain or suffering to the detainees; and that all interrogators and other team members understand the proper use of the techniques, that the techniques are not designed

[58] As noted, medical personnel are instructed to exercise special care in monitoring and reporting on use of the waterboard. *See OMS Guidelines* at 20 ("NOTE: In order to best inform future medical judgments and recommendations, it is important that every application of the waterboard be thoroughly documented: how long each application (and the entire procedure) lasted, how much water was used in the process (realizing that much splashes off), how exactly the water was applied, if a seal was achieved, if the naso- or oropharynx was filled, what sort of volume was expelled, how long was the break between applications, and how the subject looked between each treatment.") (emphasis omitted).

or intended to cause severe physical or mental pain or suffering, and that they must cooperate with OMS personnel in the exercise of their important duties.

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

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