



U.S. Department of Justice

Office of Legislative Affairs

Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

MAR 6 2008

The Honorable Ron Wyden
United States Senate
Washington, D.C. 20510

Dear Senator Wyden:

This responds to your letter, dated December 20, 2007, asking additional questions concerning the Department of Justice's interpretation of Common Article 3 and the Detainee Treatment Act of 2005.

Your letter asks whether the humane treatment requirement of Common Article 3 may vary based on the identity of the detainee or the information he is believed to possess. As we explained in our September 27, 2007 letter, Common Article 3 requires that detainees be treated humanely "in all circumstances." Therefore, if an act violates one of Common Article 3's prohibitions, it would be unlawful, regardless of the identity of the detainee or the information he is believed to possess. As we explained in detail in the previous letter, Common Article 3 sometimes requires the consideration of the circumstances in evaluating whether certain governmental conduct would implicate the Article's specific prohibitions. As the International Criminal Court for the former Yugoslavia ("ICTY") has held, the meaning of "humane" treatment "is, in the nature of things, relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc." *Prosecutor v. Aleksovski*, IT-95-14/1-T, ¶ 53 (ICTY Trial Chamber I 1999) (quotation omitted).

Because Common Article 3's humane treatment requirement includes a number of specific prohibitions, the circumstances relevant to evaluating an act may vary with that prohibition. We do not believe, for instance, that it would be relevant in determining whether an act constitutes torture to take into account the information a detainee possesses or the identity of the detainee (divorced from any physical characteristics of the detainee, such as his "sex, age and state of health," *see id.*, that could bear on the impact that an act could be expected to have on that detainee). Indeed, the War Crimes Act, which criminalizes such grave breaches of Common Article 3, admits of no such distinction.

At the same time, some prohibitions under Common Article 3, such as the prohibition on "outrages upon personal dignity," do invite the consideration of the circumstances surrounding the action. As we noted in our previous letter, a general policy to shave detainees for hygienic and security purposes would not be an "outrage upon personal dignity," but the targeted decision to shave the beard of a devout Sikh for the purpose of humiliation and abuse would present a much more serious issue. In such an example, the identity of the detainee and the purpose underlying the act clearly would be relevant. Similarly, the fact that an act is undertaken to

prevent a threatened terrorist attack, rather than for the purpose of humiliation and abuse, would be relevant to a reasonable observer in measuring the outrageousness of the act. That said, even if an act were motivated by such a compelling government interest, it still would be necessary to consider the nature of the act itself, such as “the duration of the treatment, its physical or mental effects,” and the like. *Aleksovski* ¶ 53. Under this analysis, some acts would clearly be deemed outrageous regardless of the identity of a detainee or any information he may possess. Executive Order 13440 provides specific examples of such acts, such as forcing an individual to perform sexual acts, threatening an individual with sexual mutilation, or using an individual as a human shield. *See* Exec. Order 13440 § 3(b)(i)(E).

Your letter also asks whether the meaning of “cruel, inhuman and degrading treatment” under the Detainee Treatment Act of 2005 would depend upon the identity of the detainee or the information he is believed to possess. As we explained in our prior letter, the statutory prohibition on such conduct requires compliance with the Supreme Court’s “shocks the conscience” test, and that test demands “an exact analysis of circumstances” in determining whether the relevant conduct “shocks the conscience.” *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998); *see also id.* (“That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other considerations, fall short of such a denial.”) (internal quotation omitted). The Supreme Court has recognized in weighing those circumstances the nature and importance of the government interest implicated. *See id.* at 846. Because the Government has a stronger interest in preventing a future terrorist attack than in collecting evidence about past criminal activities, the identity and information possessed by a detainee could be relevant to that analysis. *See, e.g., Haig v. Agee*, 453 U.S. 280, 307 (1981) (“[N]o governmental interest is more compelling than the security of the Nation.”); *cf. Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (emphasizing that “special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security” and “terrorism”). At the same time, while context and circumstance are relevant, conduct that is “egregious” or “outrageous” in light of “traditional executive behavior and contemporary practices” would be deemed to “shock the conscience” under any circumstances, no matter the identity of the detainee or the information that he possesses. *See Lewis*, 523 U.S. at 847 n.8.

Finally, your letter asks whether there is any circumstance under which the Eighth Amendment could apply to the pretrial detention of an enemy combatant. As we previously explained, the Supreme Court has made clear that, strictly speaking, the Eighth Amendment only applies after an individual is convicted of a crime. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *see also In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480 (D.D.C. 2005) (dismissing detainees’ Eighth Amendment claims because “the Eighth Amendment applies only after an individual is convicted of a crime”). As the Court has emphasized, “Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.” *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) (internal citation omitted). That said, although the Eighth Amendment does not apply by its own force, the Due Process Clause prohibits treatment of pretrial detainees that constitutes punishment—cruel, unusual, or otherwise—as understood under Eighth Amendment principles. *See id.* (“Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.”); *see also*

Bell, 441 U.S. at 435-36 & n.16 (where the detainee is held by the Federal government, the Fifth Amendment's Due Process Clause applies and prohibits the pretrial imposition of "punitive" conditions of confinement). Thus, to say that Eighth Amendment scrutiny does not apply to treatment of an enemy combatant is not to say that an individual in detention therefore could be subjected to cruel and unusual punishment. Rather, it means that the standard for the individual's treatment must be measured under the Due Process Clause, which requires consideration as to whether the treatment would shock the conscience, including whether the treatment would amount to punishment absent a trial. See *Ingraham*, 430 U.S. at 671 n.40.

Please do not hesitate to contact the Department if we can be of assistance in other matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian A. Benczkowski". The signature is fluid and cursive, with a large initial "B" and "A".

Brian A. Benczkowski
Principal Deputy Assistant Attorney General