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August 8, 2007

Steven Bradbury
Acting Assistant Attorney General for the Office of Legal Counsel
Office of Legal Counsel, Department of Justice
Washington, D.C. 20530

Dear Mr. Bradbury:

I appreciated our recent discussion regarding the legal authorities that derive from and pertain to the President's recent Executive Order interpreting the Geneva Conventions. Your clarifications were helpful, and I think a more detailed explanation would be useful to me as I continue to examine this issue.

Specifically, could you please explain the scope of this order in more detail? Exactly when might it apply, and when might it not apply? You may also recall that I was interested in the interpretation of the phrase "humane treatment". Could you please explain the meaning of this phrase, as interpreted by the Office of Legal Counsel? Under what circumstances might the meaning of this phrase vary? Are there instances in which the identity of a detainee, or the type of information that the detainee is assessed to possess, can help determine what sort of treatment would be considered humane? To what extent does the totality of circumstances, including the detainee's identity and access to information, affect determinations about what sort of treatment is appropriate? Please answer all of these questions as they apply to the phrase "humane treatment", as well as the phrase "cruel, inhuman and degrading treatment".

I would appreciate a response no later than September 5th. Thank you for your assistance on this matter.

Sincerely,

Ron Wyden

Ron Wyden
United States Senator

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Office of Legislative Affairs

Office of the Assistant Attorney General

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SEP 27 2007

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

Dear Senator Wyden:

This responds to your letter dated August 8, 2007, to Principal Deputy Assistant Attorney General Steven G. Bradbury asking for more detail relating to the scope of Executive Order 13440 and to the Department's interpretation of several terms contained therein.

With respect to your first question, Executive Order 13440 interprets Common Article 3 of the Geneva Conventions as it applies to a program of detention and interrogation, such as the program operated by the CIA. The Military Commissions Act of 2006 ("MCA") provided that the President may issue authoritative guidance by executive order concerning how the United States interprets the meaning and application of the Geneva Conventions, beyond the criminal prohibitions of the War Crimes Act. *See* MCA § 6(a)(3). Executive Order 13440 provides a detailed set of substantive and procedural requirements that the CIA program must meet to ensure that it complies with our Nation's international obligations under Common Article 3 of the Geneva Conventions.

Your letter asked for clarification concerning the circumstances under which this order would apply. By its terms, the order interprets Common Article 3 as applied to the circumstances presented by the CIA's specialized detention and interrogation program. The Order is not intended to, and does not, displace or supersede the policies and directives of the Department of Defense that govern the treatment and interrogation of detainees by military personnel. Military personnel are subject to other legal restrictions and regulations, particularly the Army Field Manual on Interrogations, that separately ensure that their activities comply with the Geneva Conventions.

Your letter also asks how the United States interprets the "humane treatment" requirement of Common Article 3. Common Article 3 provides that detainees in a conflict not of an international character "shall in all circumstances be treated humanely." *E.g.*, Geneva Convention Relative to the Treatment of Prisoners of War Art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135. Like the executive order, Common Article 3 does not directly define "humane treatment," but rather provides content by enumerating the specific prohibitions that would contravene that standard. In particular, Common Article 3 prohibits four specific and serious acts—"violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture"; the "taking of hostages"; "outrages upon personal dignity, in particular,

humiliating and degrading treatment"; and "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* Art. 3 ¶ 1(a)-(d).

Common Article 3 does not separately define humane treatment, and international tribunals have had difficulty identifying content to the humane treatment requirement that is distinct from the four specified prohibitions in Common Article 3. References to humane treatment elsewhere in the Geneva Conventions suggest that humane treatment may be associated with ensuring that detainees are supplied with the basic necessities of life—including adequate food, water, shelter from the elements, protection from extremes of heat and cold, necessary clothing, and essential medical care. *Cf. id.* Art. 20 (requiring that "[t]he evacuation of prisoners of war shall always be effected humanely" and shall include "sufficient food and potable water, and with the necessary clothing and medical attention"). Accordingly, the President's order requires that the CIA program not only comply with the specific prohibitions of Common Article 3, but also that detainees be provided with the basic necessities of life. *See* Exec. Order 13440 § 3(b)(iv). These provisions ensure that all detainees within the CIA program shall be treated humanely.

Your letter asks whether the meaning of humane treatment could vary based on the identity of the detainee or the information he is believed to possess. Common Article 3 requires that detainees be treated humanely "in all circumstances." At the same time, Common Article 3 does require consideration of the circumstances in evaluating whether in fact the governmental conduct would implicate the Article's specific prohibitions. For instance, Common Article 3 may prohibit "murder" regardless of circumstance, but the killing of an enemy combatant on the battlefield would not constitute a "murder." Thus, in evaluating whether a homicide violates Common Article 3, it would be necessary to consider the circumstances surrounding the act.

Even more directly, Common Article 3's prohibition of "outrages upon personal dignity" requires consideration of the circumstances in determining whether conduct would amount to an outrage. For instance, a general policy to shave detainees for hygienic and security purposes may well be justifiable, but the targeted decision to shave the beard of a devout Sikh for the purpose of humiliation and abuse would raise different concerns. International tribunals interpreting Common Article 3 accordingly have recognized that what constitutes an "outrage" requires an evaluation of the motivation for the conduct and an objective weighing of the circumstances, so as to determine whether the conduct should be deemed to as outrageous and universally condemned. *See, e.g., Prosecutor v. Aleksovski*, IT-95-14/1-T, ¶¶ 55-56 (ICTY Trial Chamber I 1999). To rise to the level of an outrage, the conduct must be "animated by contempt for the human dignity of another person" and it must be so deplorable that the reasonable observer would recognize it as something that should be universally condemned. *Id.* Consistent

with these decisions, the executive order prohibits "willful and outrageous acts of personal abuse" that are "done for the purpose of humiliating or degrading the individual" and that are "so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency." Exec. Order 13440 § 3(b)(i)(E).

To be clear, neither the executive order nor Common Article 3 would permit an individual to commit an "outrage upon personal dignity" based upon the type of information a detainee is believed to possess or the government interest at stake. Nor would the purpose requirement demand that the individual act with specific intent; it requires merely *an* intent to humiliate and degrade. To make this clear, the executive order provides illustrations of the kinds of conduct that would be prohibited in all cases, regardless of the circumstances and purported justifications, including forcing an individual to perform sexual acts, threatening an individual with sexual mutilation, or using an individual as a human shield. *See also Aleksovski*, at ¶ 57 n 81 (noting that the use of a human shield "*per se*" violates Common Article 3). At the same time, these provisions reflect the common sense notion that a reasonable observer, in determining whether conduct should be deemed outrageous and particularly revolting, would take into account the circumstances surrounding the conduct, including what justifications might exist. *See id.* at ¶ 53 (noting that the standard established by Common Article 3 "is, in the nature of things, relative: it depends on all the circumstances of the case").

Your letter also asks whether the meaning of "cruel, inhuman and degrading treatment" ("CIDT") might similarly depend upon the circumstances. Congress prohibited CIDT of all persons in the custody of the United States, regardless of location or nationality, under the Detainee Treatment Act of 2005 ("DTA"). *See* Pub. L. 109-148, tit. X, § 1403(a), 119 Stat. 2680, 2739 (2005). The DTA defines CIDT to mean "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States." Although Common Article 3 does not directly prohibit CIDT, Congress has recognized a close correspondence between the prohibition on CIDT and those of Common Article 3, describing the CIDT prohibition in the MCA as an "additional prohibition" directed at satisfying Common Article 3's obligations. *See* MCA § 6(c). Consistent with that statutory directive, Executive Order 13440 further requires that the CIA program comply with the prohibition on CIDT as a means of ensuring compliance with Common Article 3.

With respect to captured terrorists who are subject to a detention and interrogation program like that of the CIA, the CIDT prohibition requires compliance with the substantive component of the Fifth Amendment's Due Process Clause, which governs the types of treatment that are permissible without trial and conviction.[1] *See, e.g.*, *Chavez v. Martinez*, 538 U.S. 760, 779-80 (2003); *see also id.* at 773 (plurality op.), *id.* at 787 (Stevens, J., concurring in part and dissenting in part). The Supreme Court has held that to violate substantive due process, the conduct must be deemed to "shock[] the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952); *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

Like Common Article 3's prohibition of outrages upon personal dignity, the CIDT prohibition requires, under longstanding Supreme Court precedent, "an exact analysis of circumstances" in determining what "shocks the conscience." *Lewis*, 523 U.S. at 850; *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). In any context, however, the Court has identified two general principles as relevant to determining whether the conduct "shocks the conscience." The test first requires an inquiry into whether the conduct is "arbitrary in the constitutional sense," that is, whether the conduct is proportionate to the governmental interest involved. *Id.* at 846. In addition, the test requires an objective inquiry into whether the conduct is "egregious" or "outrageous" in light of "traditional executive behavior and contemporary practices." *Id.* at 847 n.8. Accordingly, as with the prohibition upon outrages upon personal dignity, it is clear that while context and circumstance may be relevant to the analysis, some conduct would be deemed to "shock the conscience" under any circumstances.

If we can be of further assistance regarding this or any other matter, please do not hesitate to contact this office.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

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[1] The Eighth Amendment prohibits the infliction of "cruel and unusual punishments" and does not apply until there has been a "formal adjudication of guilt." *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (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"). The Fourteenth Amendment, which regulates the conduct of the States, does not apply to the federal Government. *See, e.g.*, *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987).

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December 20, 2007

The Honorable Brian A. Benczkowski
Principal Deputy Assistant Attorney General
Office of Legislative Affairs
Department of Justice
Washington, D.C. 20530

Dear Mr. Benczkowski:

Thank you for your response to my letter to Principal Deputy Assistant Attorney General Bradbury, regarding Executive Order 13440 and the CIA detention and interrogation program. While I do not agree with all of the conclusions that have been reached regarding the legality of this program, I appreciate your detailed explanation of the Executive Branch's current interpretation of the law.

Your letter raises two sets of questions that I would like to address. In my previous letter I asked whether the Department of Justice believed that the meaning of the term "humane treatment" could vary based on the identity of a detainee, or the information that he or she is believed to possess. Your response notes that Common Article 3 of the Geneva Conventions requires that detainees be treated humanely "in all circumstances", but does not directly address my question about whether or not the Department of Justice believes that the meaning of this phrase can vary.

Similarly, your response to my question about whether or not the definition of "cruel, inhuman and degrading treatment" can vary based on a detainee's identity, or the information that he or she is believed to possess, notes that the legal prohibition on cruel, inhuman and degrading treatment essentially mandates compliance with due process requirements of the Fifth Amendment. Your response cites *Rochin v. California* and *County of Sacramento v. Lewis*, and concludes that in order to violate the Fifth Amendment, and thereby violate prohibitions on cruel, inhuman and degrading treatment, a detainee would have to be subjected to treatment that "shocks the conscience".

The idea that treatment which shocks the conscience is a violation of the Fifth Amendment does indeed stem from *Rochin v. California.* And in *Sacramento v. Lewis*, the Supreme Court concluded that prisoners who are already in custody have a right to expect different treatment than suspects who are attempting to flee police in a high-speed chase. However, neither of these cases appears to directly answer the question of whether or not the definition of "humane treatment" can vary from one detainee to the next. This begs my first set of questions: are there any possible instances in which the identity of a detainee, or the information that the detainee is assessed to possess, could

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help determine what sort of treatment can be considered humane? Similarly, can the definition of "cruel, inhuman and degrading treatment" vary based on these factors?

My second question stems from your statement that the Eighth Amendment does not apply in situations where there has been no formal adjudication of guilt. The Detainee Treatment Act of 2005 prohibits the infliction of "cruel, inhuman and degrading treatment or punishment" as defined by the Fifth, Eighth and Fourteenth Amendments to the Constitution. While the Eighth Amendment itself refers to punishment, in my view the clear intent of this statute is to prohibit any treatment that would violate the Eighth Amendment if the treatment were imposed as punishment.

This raises my second set of questions: if, in the Department of Justice's view, the Eighth Amendment protections granted by the Detainee Treatment Act do not apply to pretrial detainees, is there any point at which they apply to long-term detainees who have not been brought to trial? If not, does the reference to the Eighth Amendment in the Detainee Treatment Act confer any protections at all on individuals who have been detained by the CIA and not brought to trial?

Thank you for your attention to this issue. I would appreciate a response no later than February 5.

Sincerely,

Ron Wyden

Ron Wyden
United States Senator

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,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Wednesday, April 30, 2008

Extreme Treatment Is Not "An Outrage Upon Personal Dignity" If We Urgently Need the Information (More Deceptive Legal Reasoning from the DoJ)

Brian Tamanaha

Once again, the Bush Administration and the Justice Department have argued that whether an interrogation technique violates the Geneva Convention (as an "outrage upon personal dignity") depends upon how badly we need the information (by our own assessment). The New York Times quotes the pertinent assertion:

> "The fact that an act is undertaken to prevent a threatened terrorist attack, rather than for the purposes of humiliation or abuse, would be relevant to a reasonable observer in measuring the outrageousness of the act," said Brian A. Benczkowski, a deputy assistant attorney general, in the letter, which had not previously been made public."

Benczkowski's recent letter (thanks to How Appealing for the links) was the latest response in an exchange with Senator Ron Wyden, who has valiantly tried to pin down the Administration's position on this question: "Are there instances in which the identity of a detainee, or the type of information that the detainee is assessed to possess, can help determine what sort of treatment would be considered human?"

The short answer Benczkowski gives (after much maneuvering) is "Yes" and "No." (His most elaborate discussion is here). The "No" part is that, regardless of the justification, the interrogators may not engage in "forcing an individual to perform sexual acts, threatening an individual with sexual mutilation, or using an individual as a human shield." (set forth in Executive Order 13440). These are per se violations. They are described as "illustrations" of strictly prohibited actions, suggesting that more techniques might fall in this "No" category, but the real effect of this language is to leave everything else on the table.

Beyond those examples, the answer is "Yes"--the (perceived) need for the information is a factor in determining whether the interrogation technique is an "outrage upon the personal dignity" of the victim.

Accordingly, it might *not be* an "outrage upon the personal dignity" of a prisoner—for example, subjected to extreme cold, extreme periods of standing, or water boarding—when we have an urgent need for the information, while those same actions might *well be* a violation if we don't have an urgent need for the information.

What's odd about this is that the provision protects the "*personal* dignity" of victims, and from the victim's standpoint the violation is not reduced by the felt urgency of the violator (not to mention that interrogators and their higher-ups will always feel, or at least *claim*, such urgency when resorting to extreme measures).

So how does the question get flipped around in this way? Here's where Benczkowski's argument gets desperate, and deceptive.

The desperate part is that Benczkowski's *only* support for his argument on this point comes out of a 1999 trial court opinion issued in an obscure case, *Prosecutor v. Aleksovski*, by the International Criminal Tribunal for Yugoslavia.

A good rule of thumb is that any lawyer who cites an obscure trial court opinion is really stretching to find some supportive authority. That rule is softened here because Common Article 3 of the Geneva Convention has not been interpreted many times, but there are other interpretations of this provision (cited in the court's opinion).

A second rule of thumb is that when you see citations to an obscure trial court opinion, you had better go read it because chances are the (desperate) lawyer lifted the language from the opinion in a way that twisted what the court said. (It can be found on the ICTY website).

That's precisely what Mr. Benczkowski did.

He cites the case for this pivotal proposition: "To rise to the level of an outrage, the conduct must be 'animated by contempt for the human dignity of another person' and it must be so deplorable that the reasonable observer would recognize it as something that should be universally condemned." (citing Sections 55-57 of opinion) And he relies upon the case for this additional point: Common Article 3 reflects "the common sense notion that a reasonable observer, in determining whether conduct should be deemed outrageous and particularly revolting, would take into account the circumstances surrounding the conduct, including what justifications might exist." (citing Section 53.)

Purportedly relying upon the court's opinion, Benczkowski thus established two crucial standards in determining whether the conduct is an "outrage upon personal dignity." The first standard is that issue must be decided from the perspective of a "reasonable observer." The second standard is that when asking this question one must consider "all the circumstances of the case" (including justifications for the action).

Benczkowski distorted what the court held on both points.

1. Benczkowski was right that the court imposed an "objective" "reasonable person" test, but it did not operate the way he claims.

There is a subjective component to this violation which requires that the victim actually feel humiliated. The court worried that extra-sensitive individuals might feel such humiliation for relatively minor conduct, which would not be fair to the accused. The court was concerned that "culpability would depend not upon the gravity of the act but wholly on the sensitivity of the victim." So the court added this as a check: "an objective component to the actus reus is apposite: the humiliation of the victim must be so intense that the reasonable person would be outraged." (Section 56).

The difference is subtle, but important. The test the Court formulated specifically looks at the humiliation of the *victim* to ask whether a reasonable person under those circumstances would be outraged—another way of formulating this is whether "a reasonable victim subjected to that conduct would have been outraged."

But the test Benczkowski comes up with turns away from the victim entirely, and forgets about the humiliation. Instead, he focuses exclusively on the conduct, and escalates the test to this (extremely high standard): the conduct must be "so deplorable that the reasonable observer would recognize it as something that should be universally condemned."

Although Benczkowski cites the Court for this proposition (he drops the quote marks when he injects his own special heightened test, but cites the Court at the end), the opinion says nothing even remotely close to this--with no mention of "universally condemned". Benczkowski *might* have been confused about how to formulate the "reasonable person" standard (it is a bit tricky), but there is no question that he deliberately altered what the court required to state a much higher standard.

His treatment of the second standard is even more deceptive.

2. Benczkowski is right that a judgment about the "degrading" nature of the treatment must take into consideration "all the circumstances of the case." This is *the* key point in his argument. He asserts that the "reasonable observer…would take into account the circumstances surrounding the conduct, *including what justifications might exist*." That final clause--what justifications might exist--is what makes the (claimed) *urgent need* for the information a relevant factor in evaluating the conduct.

Benczkowski cites Section 53 of the Court's opinion for this proposition. Here is the entire paragraph 53, so judge for yourself:

> It is also instructive to recount the general definition of the term "inhuman treatment" propounded by the ECHR, which to date is the only human rights monitoring body that defined the term:

> "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (ECHR). The assessment of this minimum is, in the nature of things, relative: it depends upon 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 the heath of the victim, etc." The test offered by this definition is the level of suffering endured by the victim.

The court makes it absolutely clear that the phrase "all the circumstances" relates entirely to (and is bounded by) the "level of suffering endured by the victim."

For Benczkowski to claim that this language in any way includes consideration of "what justifications might exist" for the ill-treatment is an *outrageous* distortion.

It is disgraceful that Justice Department lawyers would supply such deceptive legal analysis to a Senator.

The bottom line: whether an act is "torture" or an "outrage on personal dignity" has nothing to do with (is not in the least diminished by) how urgently we feel we need the information.