1. 27 February 2003 memo from BG Kevin M. Sandkuhler, U.S. Marine Corps, Staff Judge Advocate to CMC.

DEPARTMENT OF THE NAVY,

HEADQUARTERS U.S. MARINE CORPS,

Washington, DC, February 27, 2003.
Memorandum for General Counsel of the Air Force
Subject: Working Group Recommendations on Detainee Interrogations

1. In addition to comments we submitted 5 February, we concur with the recommendations submitted by the Navy (TJAG RADM Lohr), the Air Force (TJAG MGen Rives), and the Joint Staff Legal Counsel's Office. Their recommendations dealt with policy considerations, contention with the OLC opinion, and foreign interpretations of GC IV (Civilians) and customary international law, respectively.

2. The common thread among our recommendations is concern for serv□ice□mem□bers. OLC does not represent the services; thus, understandably, concern for serv□ice□mem□bers is not reflected in their opinion. Notably, their opinion is silent on the UCMJ and foreign views of international law.

3. We nonetheless recommend that the Working Group product accurately portray the services' concerns that the authorization of aggressive counter-resistance techniques by servicemembers will adversely impact the following:

a. Treatment of U.S. Servicemembers by Captors and compliance with International Law.

b. Criminal and Civil Liability of DOD Military and Civilian Personnel in Domestic, Foreign, and International Forums.

c. U.S. and International Public Support and Respect of U.S. Armed Forces.

d. Pride, Discipline, and Self-Respect within the U.S. Armed Forces.

e. Human Intelligence Exploitation and Surrender of Foreign Enemy Forces, and Cooperation and Support of Friendly Nations.

Kevin M. Sandkuhler,
Brigadier General, USMC, Staff Judge Advocate to CMC.

Comments on Draft Working Group Report on Detainee Interrogations

1. Change p. 54, fifth paragraph, to read as follows (new language italic):

([S/NF]U) Choice of interrogation techniques involves a risk benefit analysis in each case, bounded by the limits of DOD policy and law. When assessing whether to use exceptional interrogation techniques, consideration should be given to the possible adverse effects on U.S. Armed Forces culture and self-image *which suffered during the Vietnam conflict and at other times due to perceived law of war violations. DOD policy indoctrinated in the DOD Law of War Program in 1979 and subsequent service regulations, greatly restored the culture and self-image of U.S. Armed Forces by establishing high benchmarks of compliance with the principles and spirit of the law of war and humane treatment of all persons in U.S. Armed Forces custody.* In addition, consideration should be given to whether implementation of such techniques is likely to result in adverse impacts for DOD personnel who are *captured or detained* [become POWs,] including possible perceptions by other nations that the United States is lowering standards related to the treatment of prisoners *and other detainees*, generally.

2. Add to p. 68, a paragraph after the seventh paragraph that reads:

(U) Comprehensive protection is lacking for DOD personnel who may be tried by other nations and/or international bodies for violations of international law, such as violations of the Geneva or Hague Conventions, the Additional Protocols, the Torture Convention, the Rome Statute of the ICC, or the Customary International Law of Human Rights. This risk has the potential to impact future operations and overseas travel of such personnel, both on and off duty.

2. MG Thomas J. Romig, U.S. Army, the Judge Advocate General, dated 3 March 2003.

Department of the Army, Office of the Judge Advocate General,

Washington, DC, March 3, 2003.

MEMORANDUM FOR GENERAL COUNSEL OF THE DEPARTMENT OF THE AIR FORCE
Subject: Draft Report and Recommendations of the Working Group to Access the Legal, Policy and Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (U)

1. (U) The purpose of this memorandum is to advise the Department of Defense (DOD) General Counsel of a number of serious concerns regarding the draft Report and Recommendations of the Working Group to Access the Legal, Policy and Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (Final Report). These concerns center around the potential Department of Defense (DOD) sanctioning of detainee interrogation techniques that may appear to violate international law, domestic law, or both.

2. (U) The Office of Legal Counsel (OLC), Department of Justice (DOJ), provided DOD with its analysis of international and domestic law as it relates to the interrogation of detainees held by the United States Government. This analysis was incorporated into the subject draft Report and forms, almost exclusively, the legal framework for the Report's Conclusions, Recommendations, and PowerPoint spreadsheet analysis of the interrogation techniques in issue. I am concerned with several pivotal aspects of the OLC opinion.

3. (U) While the OLC analysis speaks to a number of defenses that could be raised on behalf of those who engage in interrogation techniques later perceived to be illegal, the ``bottom line'' defense proffered by OLC is an exceptionally broad concept of ``necessity.'' This defense is based upon the premise that any existing federal statutory provision or international obligation is unconstitutional per se, where it otherwise prohibits conduct viewed by the President, acting in his capacity as Commander-in-Chief, as essential to his capacity to wage war. I question whether this theory would ultimately prevail in either the U.S. courts or in any international forum. If such a defense is not available, soldiers ordered to use otherwise illegal techniques run a substantial risk of criminal prosecution or personal liability arising from a civil lawsuit.

4. (U) The OLC opinion states further that customary international law cannot bind the U.S. Executive Branch as it is not part of the federal law. As such, any presidential decision made in the context of the ongoing war on terrorism constitutes a ``controlling'' Executive act; one that immediately and automatically displaces any contrary provision of customary international law. This view runs contrary to the historic position taken by the United States Government concerning such laws and, in our opinion, could adversely impact DOD interests worldwide. On the one hand, such a policy will open us to international criticism that the ``U.S. is a law unto itself.'' On the other, implementation of questionable techniques will very likely establish a new

baseline for acceptable practice in this area, putting our service personnel at far greater risk and vitiating many of the POW/detainee safeguards the U.S. has worked hard to establish over the past five decades.

5. (U) I recommend that the aggressive counter-resistance interrogation techniques under consideration be vetted with the Army intelligence community before a final decision on their use is made. Some of these techniques do not comport with Army doctrine as set forth in Field Manual (FM) 34-52 Intelligence Interrogation, and may be of questionable practical value in obtaining reliable information from those being interrogated.

THOMAS J. ROMIG,

Major General, U.S. Army,
The Judge Advocate General.

3. Memo from MG Jack L. Rives, Deputy Judge Advocate General of the U.S. Air Force, dated 6 February 2003.

Department of the Air Force, Office of the Judge Advocate General,

Washington, DC, February 6, 2003.

MEMORANDUM FOR SAF/GC
From: AF/JA
Subject: Comments on Draft Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (U)

1. (U) Please note that while I accept that the Department of Justice, Office of Legal Counsel (DoJ/OLC), speaks for the Executive Branch and that its legal opinions in this matter are to be followed, I continue to maintain that DoJ/OLC's opinions on several of the Working Group's issues are contentious. Others may disagree with various portions of the DoJ/OLC analysis. I believe we should recognize this fact and therefore urge that certain factors should be prominently provided to the DoD/GC before he makes a final recommendation to the Secretary of Defense. I recommend the following specific modifications to the draft report dated 4 February 2003:

a. Page 2, add the following sentence to the end of paragraph 2:

It should be noted that several of the legal opinions expressed herein are likely to be viewed as contentious outside the Executive Branch, both domestically and internationally.

b. Page 54, change fourth full paragraph to read as follows:

(U) Choice of interrogation techniques involves a risk benefit analysis in each case, bounded by the limits of DOD policy and law. When assessing whether to use exceptional interrogation techniques, consideration should be given to the possible adverse effects on U.S. Armed Forces culture and self- image, *which suffered during the Vietnam conflict and at other times due to perceived law of armed conflict violations. DoD policy, indoctrined in the DoD Law of War Program in 1979 and subsequent service regulations, greatly restored the culture and self-image of U.S. Armed Forces by establishing high benchmarks of compliance with the principles and spirit of the law of war, and humane treatment of all persons in U.S. Armed Forces custody. U.S. Armed Forces are continuously trained to take the legal and moral ``high-road'' in the conduct of our military operations regardless of how others may operate. While the detainees' status as unlawful belligerents may not entitle them to protections of the Geneva Conventions, that is a legal distinction that may be lost on the members of the armed forces. Approving exceptional interrogation techniques may be seen as giving official approval and legal sanction to the application of interrogation techniques that U.S. Armed Forces have heretofore been trained are unlawful.* In addition, consideration should be given to whether implementation of such techniques is likely to result in adverse impacts for DoD personnel who become POWs,

including possible perceptions by other nations that the United States is lowering standards related to the treatment of prisoners, generally.

Alternatively, change the last paragraph on page 68, to read as follows:

(U) The cultural and self-image of the U.S. Armed Forces suffered during the Vietnam conflict and at other times due to perceived law of armed conflict violations. DoD policy, indoctrinated in the DoD Law of War Program in 1979 and subsequent service regulations, greatly restored the culture and self-image of U.S. Armed Forces. U.S. Armed Forces are continuously trained to take the legal and moral ``high-road'' in the conduct of our military operations regardless of how others may operate. While the detainees' status as unlawful belligerents may not entitle them to protections of the Geneva Conventions, that is a legal distinction that may be lost on the members of the armed forces. Approving exceptional interrogation techniques may be seen as giving official approval and legal sanction to the application of interrogation techniques that U.S. Armed Forces have heretofore been trained are unlawful. General use of exceptional techniques (generally, having substantially greater risk than those currently, routinely used by U.S. Armed Forces interrogators), even though lawful, may create uncertainty among interrogators regarding the appropriate limits of interrogations, and may adversely affect the cultural self-image of the U.S. armed forces.

c. Page 68, add the following new paragraphs after the sixth full paragraph:

(U) Several of the exceptional techniques, on their face, amount to violations of domestic criminal law and the UCMJ (e.g., assault). Applying exceptional techniques places interrogators and the chain of command at risk of criminal accusations domestically. Although one or more of the aforementioned defenses to these accusations may apply, it is impossible to be certain that any of these defenses will be successful as the judiciary may interpret the applicable law differently from the interpretation provided herein.

(U) Other nations are likely to view the exceptional interrogation techniques as violative of international law and perhaps violative of their own domestic law. This places interrogators and the chain of command at risk of criminal accusations abroad, either in foreign domestic courts or in international fora, to include the ICC.

d. Page 68, add the following new paragraphs after the eighth full paragraph:

(U) Employment of exceptional interrogation techniques may have a negative effect on the treatment of U.S. POWs. Other nations may disagree with the President's status determination regarding Operation ENDURING FREEDOM (OEF) detainees, concluding that the detainees are POWs entitled to all of the protections of the Geneva Conventions. Treating OEF detainees inconsistently with the Conventions arguably ``lowers the bar'' for the treatment of U.S. POWs in future conflicts. Even where nations agree with the President's status determination, many may view the exceptional techniques as violative of other law.

2. (U) Should any information concerning the exceptional techniques become public, it is likely to be exaggerated/distorted in both the U.S. and international media. This could have a

negative impact on international, and perhaps even domestic, support for the war on terrorism. It could likewise have a negative impact on public perception of the U.S. military in general.

JACK L. RIVES,

Major General, USAF,
Deputy Judge Advocate General.

4. Memo from RADM Michael F. Lohr, Judge Advocate General, U.S. Navy, dated 6 February 2003.

Department of the Navy, Office of the Judge Advocate General,

Washington, DC, February 6, 2003.
Subj: Working Group recommendations relating to interrogation of detainees.

1. Earlier today I provided to you a number of suggested changes, additions, and deletions to the subject document.

2. I would like to further recommend that the document make very clear to decision-makers that its legal conclusions are limited to arguably unique circumstances of this group of detainees, i.e., unlawful combatants held ``outside'' the United States. Because of these unique circumstances, the U.S. Torture Statute, the Constitution, the Geneva Conventions and customary international law do not apply, thereby affording policy latitude that likely does not exist in almost any other circumstance. (The UCMJ, however, does apply to U.S. personnel conducting the interrogations.)

3. Given this unique set of circumstances, I believe policy considerations continue to loom very large. Should service personnel be conducting the interrogations? How will this affect their treatment when incarcerated abroad and our ability to call others to account for their treatment? More broadly, while we may have found a unique situation in GTMO where the protections of the Geneva Conventions, U.S. statutes, and even the Constitution do not apply, will the American people find we have missed the forest for the trees by condoning practices that, while technically legal, are inconsistent with our most fundamental values? How would such perceptions affect our ability to prosecute the Global War on Terrorism?

4. I accept the premise that this group of detainees is different, and that lawyers should identify legal distinctions where they exist. It must be conceded, however, that we are preparing to treat these detainees very differently than we treat any other group, and differently than we permit our own people to be treated either at home or abroad. At a minimum, I recommend that decision-makers be made fully aware of the very narrow set of circumstances--factually and legally--upon which the policy rests. Moreover, I recommend that we consider asking decision-makers directly: is this the ``right thing'' for U.S. military personnel?

MICHAEL F. LOHR,

Rear Admiral, JAGC, U.S. Navy,
Judge Advocaate General.

5. Memo from Rear Admiral Lohr, dated 13 March 2002.

Department of the Navy, Office of the Judge Advocate General,

Washington, DC, March 13, 2002.

MEMORANDUM FOR THE AIR FORCE GENERAL COUNSEL
Subject: Comments on the 6 March 2003 Detainee Interrogation Working Group Report

1. My comments on subject report are provided below. These comments incorporate and augment those submitted by my action officer earlier this week. New comments are highlighted within the previously submitted text.

1. (U) Page 2, second paragraph: Add new penultimate sentence to read, ``In addition this paper incorporates significant portions of work product provided by the Office of Legal Counsel, United States Department of Justice." In the last sentence change ``by a Department ....." to ``by the Department ....." Finally, add new footnote to reference the OLC opinion to read ``Memorandum dated March xx, 2003., Re: xxxxxxxxxx.

Rationale: this WG paper contains large segments of DOJ work product, rather than being ``informed" by DOJ. We believe the OLC opinion should be incorporated by reference into the WG report.

2. (U) Page 24, second paragraph, last sentence: delete.

Rationale: this sentence is not true. There are domestic limits on the President's power to interrogate prisoners. One of them is Congress's advice and consent to the US ratification to the Geneva Conventions that limit the interrogation of POWs. The willingness of the Executive, and of the Legislative Branch, to enforce those restrictions is a different matter.

3. (U) Page 24, footnote 20: delete or rewrite to read, ``This is the stated view of the Department of Justice."

Rationale: Mr. Yoo clearly stated that he believes the viability of these defenses is greatly enhanced by advance Presidential direction in the matter. He specifically recommended obtaining such direction in writing.

4. (U) Page 26, first full paragraph, first sentence: delete.

Rationale: this statement is too broad. The similar language used at the end of the following paragraph is more accurate.

5. (U) Page 29, second paragraph, fifth sentence: Rewrite sentence to read, ``A leading scholarly commentator ....." and later in the sentence change ``..... section 2340 would be justified under ....." to ``..... section 2340 should be justified under ....."

Rationale: There is only one article written by one person cited. Also the quoted language from the commentator indicates his view that torture should be permissible, not a statement that international law allows such.

6. (U) Page 29, second paragraph, last sentence: delete.

Rationale: this conclusion is far too broad but the general principle can be inferred from the discussion.

7. (U) Page 31, para d, third sentence and penultimate sentences: delete.

Rationale: This analogy is inapt. There is nothing in law enforcement that would authorize the use of torture or excessive force against persons for intelligence gathering.

8. (U) Page 41, second paragraph, penultimate sentence: delete.

Rationale: it is not clear what the meaning of the sentence is.

9. (U) Page 59, second paragraph: it is unclear if SECDEF must approve exceptional techniques on a case-by-case basis, or just approve their use generally.

10. (U) Page 63, footnote 86. The text of this footnote does not correspond to its citation in the paper. It appears that the current text of footnote 86 belongs as part of the discussion of API in the paragraph above, or as part of the text of footnotes 83 or 84. Footnote 86 should detail the rationale for the Justice Department determination that GCIV does not apply.

11. (U) Page 67, technique 26: Add last sentence to read, ``Members of the armed forces will not threaten the detainee with the possible results of the transfer, but will instead limit the threat to the fact of transfer to allow the detainee to form their own conclusions about such a move."

Rationale: threatening the detainee with death or injury (by the transfer) may be considered torture under international law.

12. (U) Page 72, second paragraph: in the last sentence replace ``protections of the Geneva Conventions" with ``protections of the third Geneva Convention."

Rationale: clarity

13. (U) Page 72, second paragraph: add new last sentence to read: ``Under international law, the protections of the fourth Geneva Convention may apply to the detainees."

Rationale: this view is shared by Chairman's Legal and all the services.

14. (U) Page 72, third paragraph: at the beginning add, ``In those cases where the President has made a controlling executive decision or action ....."

Rationale: this is the standard by which the President may ``override" CIL.

15. (U) Page 73, sixth paragraph: Add new last sentence to read, ``Presidential written directive to engage in these techniques will enhance the successful assertion of the potential defenses discussed in this paper."

Rationaie: much of the analysis in this paper is premised on the authority of the President as delegated/directed, in writing, to SECDEF and beyond. This point needs to be made prominently.

16. (U) Matrix Annex, Technique 33: delete.

Rationale: It is not clear what the intent of this technique is. If it loses its effectiveness after the first or second use, it appears to be little more than a gratuitous assault. Other methods are equally useful in getting/maintaining the attention of the detainee. It also has the potential to be applied differently by different individuals.

17. (U) Page 75, first paragraph, in the discussion re technique 36: Rewrite 3rd to last and penultimate sentences to read, ``The working group believes use of technique 36 would constitute torture under international and U.S. law and, accordingly, should not be utilized. In the event SECDEF decides to authorize this technique, the working group believes armed forces personnel should not participate as interrogators as they are subject to UCMJ jurisdiction at all times."

This is a correct statement of the positions of the services party to the working group, who all believe this technique constitutes torture under both domestic and international law.

18. Thank you for the opportunity to comment. My action officer in this matter is CDR Steve Gallotta.

MICHAEL F. LOHR,

Rear Admiral, JAGC, U.S. Navy,
Judge Advocate General.

6. Memo from Major General Rives, Deputy Judge Advocate General, U.S. Air Force, dated 5 February 2003.

Department of the Air Force, Office of the Judge Advocate General,

Washington, DC, February 5, 2003.

MEMORANDUM FOR SAF/GC
From: AF/JA
Subject: Final Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (U)

1. (U) In drafting the subject report and recommendations, the legal opinions of the Department of Justice, Office of Legal Counsel (DoJ/OLC), were relied on almost exclusively. Although the opinions of DoJ/OLC are to be given a great deal of weight within the Executive Branch, their positions on several of the Working Group's issues are contentious. As our discussion demonstrate, others within and outside the Executive Branch are likely to disagree. The report and recommendations caveat that it only applies to ``strategic interrogations'' of ``unlawful combatants'' at locations outside the United States. Although worded to permit maximum flexibility and legal interpretation, I believe other factors need to be provided to the DoD/GC before he makes a final recommendation to the Secretary of Defense.

2. (U) Several of the more extreme interrogation techniques, on their face, amount to violations of domestic criminal law and the UCMJ (e.g., assault). Applying the more extreme techniques during the interrogation of detainees places the interrogators and the chain of command at risk of criminal accusations domestically. Although a wide range of defenses to these accusations theoretically apply, it is impossible to be certain that any defense will be successful at trial; our domestic courts may well disagree with DoJ/OLC's interpretation of the law. Further, while the current administration is not likely to pursue prosecution, it is impossible to predict how future administrations will view the use of such techniques.

3. (U) Additionally, other nations are unlikely to agree with DoJ/OLC's interpretation of the law in some instances. Other nations may disagree with the President's status determination regarding the Operation ENDURING FREEDOM (OEF) detainees; they may conclude that the detainees are POWs entitled to all of the protections of the Geneva Conventions. Treating OEF detainees inconsistently with the Conventions arguably ``lowers the bar'' for the treatment of U.S. POWs in future conflicts. Even where nations agree with the President's status determination, many would view the more extreme interrogation techniques as violative of other international law (other treaties or customary international law) and perhaps violative of their own domestic law. This puts the interrogators and the chain of command at risk of criminal accusations abroad, either in foreign domestic courts or in international fora, to include the ICC.

4. (U) Should any information regarding the use of the more extreme interrogation techniques become public, it is likely to be exaggerated/distorted in both the U.S. and international media. This could have a negative impact on international, and perhaps even domestic, support for the war on terrorism. Moreover, it could have a negative impact on public perception of the U.S. military in general.

5. (U) Finally, the use of the more extreme interrogation techniques simply is not how the U.S. armed forces have operated in recent history. We have taken the legal and moral ``high-road'' in the conduct of our military operations regardless of how others may operate. Our forces are trained in this legal and moral mindset beginning the day they enter active duty. It should be noted that law of armed conflict and code of conduct training have been mandated by Congress and emphasized since the Viet Nam conflict when our POWs were subjected to torture by their captors. We need to consider the overall impact of approving extreme interrogation techniques as giving official approval and legal sanction to the application of interrogation techniques that U.S. forces have consistently been trained are unlawful.

JACK L. RIVES,

Major General, USAF,
Deputy Judge Advocate General.