Analysis of DOD Directive 3115.09

A Major Step Backwards. The Directive is hopelessly vague, containing no specific standards. It says only that detainees be treated "humanely" in accordance with "applicable law" which "*may include* the law of war, *relevant* international law, U.S. law and applicable directives, including DOD Directive 2310.01 (*under revision*)...." (Emphasis added). While the Directive references its sister DOD Directive, 2310.1, which established the DOD's Enemy Prisoner of War/internee program with the express purpose of ensuring compliance with applicable law, including the Geneva Conventions, this Directive pointedly avoids referencing or incorporating the Conventions, the Convention against Torture, or any codified law. Moreover, because 2310.1 is "under revision," reference to that directive can offer no guidance or support for the position that this Directive 3115.09 guarantees any real protection to detainees. Given the text of this Directive, we have every reason to believe that the revised 2310.1 will likewise reflect a full-blown effort to abandon the long-established adherence to US and international law. It prohibits "physical and mental torture" without definition and without dispelling prior DOD/DOJ distortions and equivocations concerning those terms. It contains no ban on "cruel, inhuman and degrading treatment." When compared with the text of the 1994 version of 2310.1, the major purpose of this revision is apparent: it backtracks from an unequivocal commitment to uphold the Geneva Conventions and international law generally. This is done by avoiding direct references to the Geneva Conventions, communicating doubt as to the applicability of international law, and trumpeting the power of the SecDef to direct that law be disregarded. Whereas the old directive said "shall comply with" the new states that interrogations shall comply with "applicable law… *unless otherwise authorized*." (3.4.1) Removing references to the Geneva Conventions constitutes an offensive denigration of the Conventions and their importance. Suggesting that the SecDef has authority to authorize conduct which is contrary to applicable law is amazing and disturbing.

"Humane." The key commitment made by the Directive is to "humane" treatment of detainees. However, the word "humane" as used in the Administration's parlance has been stripped of its traditional meaning so as to permit conduct which would be considered "cruel, inhuman and degrading" under current US and international standards. *See* statements/testimony to Senate Judiciary Committee by Tim Flanigan and Alberto Gonzales; Report of Lt. Gen. Randall Mark Schmidt concerning allegations of abuse at GTMO. (3.1)

Redefinition Pending – Prospects Bleak. The term "humane" also awaits redefinition in DOD Directive 2310.01, now under review. According to published press accounts, notwithstanding efforts from within DOD to retain traditional DOD understandings about the meaning of "humane" (namely, the standards of GC Common Article 3), the White House is insisting on rejection of such standards. ("Detainee Policy Sharply Divides Bush Officials," *New York Times,* Nov. 3, 2005)

Specific Techniques Unaddressed. The sole concession made by the new Directive is to declare off-limits the use of dogs in connection with interrogations. (3.4.4.4) While this practice had apparently crept in to use in some facilities, it has always clearly been improper under published DOD materials. The following are specific examples of techniques which have raised major concern, and which are unaddressed by the Directive:

Stress techniques. A number of highly aggressive stress techniques have been linked to homicides and severe physical and mental injury to detainees. Prior DOD statements and reports reflect an understanding that even severe stress techniques are consistent with "humane" treatment.

Sexual humiliation practices. Since 2002, a number of highly offensive and inflammatory sexual humiliation practices have been introduced as interrogation techniques. These prac-

tices are clearly inconsistent with our obligation not to use "degrading" practices. Prior DOD statements reflect an understanding that sexual humiliation practices are consistent with the "humane" standard. These practices degrade not only the detainee to whom they are subjected, but also the military personnel employing them.

Religious values. Since the American Revolution, our military has established the practice of demonstrating respect for the religious values of our adversaries, particularly those who are held in captivity. Beginning in 2002, these policies have been reversed and interrogation techniques have been introduced which seek to ridicule or debase religion and seek to use a detainee's religious values to "break" him. These practices have been consistently defended as "humane" by the Pentagon.

Reporting Process. The provisions providing for reporting of allegations of abuse and investigation of such violations incorporate no process for monitoring or acting on cases of abuse involving personnel associated directly with the Office of Secretary of Defense (OSD). Information now at hand strongly links OSD personnel, particularly high-level civilian personnel, with abuse. Accordingly, an investigation and enforcement process drawing on the nation's criminal justice machinery should be employed to address OSD involvement in abuses.

Transfer of Control. Prior Directives have addressed the legal limitations on transfer of control, and this language is omitted from the current Directive. It is a well established principle of law that transfer of custody of an individual from DOD control to that of another government agency, or to the control of civilians acting in concert with the US Government does not alter the legal rights afforded the detainee. The DOD bears responsibility for what happens to a detainee so transferred. It is therefore imperative that the DOD strictly control the process by which a detainee may be transferred, and require compliance with the law at all points.

Access to OGA and Contractors. The Directive states that OGA/contractors who have access to detainees must abide by DOD rules. This is an important condition. However, putting implementation responsibility in the hands of DOD interrogators, principally NCO personnel, raises questions. JAG personnel should be detailed to interrogation facilities and should have a monitoring and implementation function generally. This should extend to the involvement of OGA and contractors. Further attention is required to the issue of enforcement of any undertakings by OGA and contractors, since UCMJ tools are unavailable. Moreover, contractors are bound by the rules only "to the extent incorporated in the contract." This loophole is very disturbing. (3.4.4.3)

Applicable Only to Detainees in DOD Control. The Directive is limited in its scope to detainees *under DOD control*. (3.4) It is clear that military interrogators have ready access to detainees under the control of other agencies and potentially to those under the control of cooperating foreign powers. The Directive should govern the conduct of US personnel and attached civilians engaged in intelligence gathering activities, regardless of who technically exercises custody over the detainee.

Renditions. The DOD must uphold the law respecting the rendition of detainees if they are transferred to the control of a foreign power. In particular, no transfer may occur if the purpose is to subject the detainee to interrogation by a nation that employs torture, or if there is a reasonable basis for the detainee to fear he will be tortured in the hands of the transferee power. Considering that the Directive raises the issue of access to detainees by non-DOD personnel, this limitation should be included.

Professional Ethics. The Directive adopts an inappropriately limited view of medical confidentiality and ethics. Medical professionals should be permitted to discharge their obligations consistently with the requirements of medical ethics and other professional standards as established by the American Medical Association and other professional associations, and the DOD should

refrain from any efforts to undermine those standards. Drawing a distinction between "medical professionals" and "behavioral science consultants," while appropriate in some circumstances, is inappropriate when used as a pretext for directing medical professionals to behave in a manner inconsistent with the standards of the medical profession. (3.4.3)

Detention Operations Issues. The Taguba and Fay/Jones Reports note clear error resulted from a failure to draw a bright-line distinction between the functions of intelligence gathering and detention security arrangements. The directive says that those responsible for "detention security" "shall not directly participate." As shown by the example of Abu Ghraib, participation was never "direct," but only in "preparing" detainees for interrogation. The Directive therefore appears to ratify an abusive practice which unfairly subjects military police personnel to exposure for matters well beyond their training or preparation. (3.4.4)

It should be noted that the Directive cannot cover interrogations conducted separately by the CIA and hence only applies to CIA interrogations of DOD detainees.