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The Torture Memos: The Conflict Between a Shift in U.S. Policy Towards a Condemnation of Human Rights and International Prohibitions Against the Use of Torture

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NOTE

THE TORTURE MEMOS:
THE CONFLICT BETWEEN A SHIFT IN U.S.
POLICY TOWARDS A CONDEMNATION OF
HUMAN RIGHTS AND INTERNATIONAL
PROHIBITIONS AGAINST THE USE OF TORTURE

[In the United States, the use of torture] is categorically denounced as a matter of policy and as a tool of state authority. . . . No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. . . . No exceptional circumstances may be invoked as a justification of torture. U.S. law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman, or degrading treatment or punishment to be employed on grounds of exigent circumstances . . . or on orders from a superior officer or public authority. . . . The United States is committed to the full and effective implementation of its obligations under the Convention [Against Torture] throughout its territory.1


I. INTRODUCTION

"On the dogmas of religion, as distinguished from moral principles, all mankind, from the beginning of the world to this day, have been quarreling, fighting, burning and torturing one another, for abstractions unintelligible to themselves and to all others, and absolutely beyond the comprehension of the human mind."2

—Thomas Jefferson

In the years following the terrorist attacks on New York City and Washington D.C., as well as the thwarted terrorist attempt that led to the destruction of a fourth airplane in Pennsylvania, there has been a dramatic international focus on terrorism.3 Nations are increasingly searching for ways to protect themselves and their people;4 but what boundaries on protection are being set? At what point will a nation-state cross the line of permissible protection?

International law and policy accurately reflect the changes in the nature of the law today.5 Customary law, international treaties, and domestic laws have been widely accepted as explicitly prohibiting the use of torture by a government, or anyone acting on behalf of a government.6 Immediately following the attacks, Congress passed a joint resolution authorizing President Bush to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks... or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."7 In applying the permissible scope of this authorization, two memoranda [hereinafter "torture memos"] which are the focus of this Note: (1) The August 1, 2002 Department of Justice Memorandum Re: Standards of Conduct for

3. See infra notes 5-7.
6. See infra notes 39-42.
Interrogation under 18 U.S.C. §§ 2340-2340A\(^8\) and (2) The March 6, 2003 Department of Defense Working Group Report Re: Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations,\(^9\) suggested that torturing a suspected terrorist in the hopes of preventing future attacks may not only be morally permissible, but may also be legal.\(^10\) Furthermore, those being detained by the United States government (who are also the ones that would inevitably be tortured) are not allowed to challenge the reasons for their detainment since they are “enemy combatants” and not prisoners of war.

These documents were just two of a series of memoranda and other documents, originating from the White House, Pentagon, and the Justice Department concerning the Bush Administration’s interrogation policies, released by the White House on June 22, 2004.\(^11\) In sum, these documents all dealt with the permissible bounds of preventing terrorism. The series of documents are described by White House Counsel Alberto Gonzales as

two distinct sets of documents, those that were generated by government lawyers to explore the limits of the legal landscape as to what the Executive Branch can do within the law and the Constitution as an abstract matter; [and those] that reflect the actual decisions issued by the President and senior administration officials directing the policies that our military would actually be obliged to follow.\(^12\)

In December of 2004, nearly 30 months after the publishing of the original controversial document, the Justice Department released a revised version of its August 1, 2002 Memorandum [hereinafter “Levin


\(^{10}\) See infra Part III.B.


\(^{12}\) The National Security Archive, supra note 11.
According to the Justice Department, this 17 page revision "supersedes the August 2002 Memorandum in its entirety." However, the reasons for the Levin Memorandum, the "stripped down" language implemented throughout it, and the timing of its release, may be called into question as trying to achieve some ulterior political goal. In effect, despite these new assertions set forth in the revised memorandum, the United States government has not changed its position regarding torture or the detainment of prisoners. As this Note will point out, it can be argued that the original memoranda set up a legal framework leading to the belief that torture could be legal, or at the very least, excusable. The Levin Memorandum supports this argument.

The Levin Memorandum flatly states that torture violates both United States law and international norms. It repudiated the 2002 Memorandum's interpretation of what constitutes torture and defined torture much more broadly. The narrow characterization of torture was one of the major shortcomings of the 2002 Department of Justice Memorandum. The Levin Memorandum has further diverged from the original August 2002 Memorandum by finding that an interrogator possesses sufficient intent to commit torture, and hence is subject to criminal prosecution, if he is aware that his actions will result in crossing the threshold level of "severe pain." U.S. personnel cannot contend that their interrogation methods were motivated by national security needs...

14. Id.
15. Id. at 2.
19. Levin Memorandum Dec. 30, 2004, supra note 13, at 2. "[W]e disagree with statements in the August 2002 Memorandum limiting 'severe' pain under the statute to 'excruciating and agonizing' pain, or to pain 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.'" Id. (citations omitted); see also Human Rights First, supra note 16.
20. Human Rights First, supra note 16 (stating that the new Torture Memo, by reversing portions of the controversial 2002 Department of Justice Memorandum, is an improvement but still leaves many questions unanswered).
21. Id.
and cannot justify torture after telling the detainee that he could avoid it by cooperating with interrogators.22

Elisa Massimino, Washington Director of Human Rights First, has called the Levin Memorandum “a remarkable admission of error on the part of the Administration” and has further found it “reject[s] the August 2002 memo’s strained interpretations of torture, and thereby call[es] into question the legality of the U.S. government’s interrogation policy over the last two years.”23 That being said, the Levin Memorandum has failed to reject some of the August 2002 Memorandum’s most controversial assertions: The President is unconstrained by any act of Congress criminalizing torture, and United States officials have legal defenses against criminal liability that may arise from the use of torture.24

The Levin Memorandum reaffirms that the President has complete discretion in his actions as Commander-in-Chief.25 Furthermore, despite offering a new definition of torture, which the Office of Legal Counsel believes is more in tune with the aims of Congress’ enactment of the obligations of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter “Torture Convention”] into §§ 2340-2340A,26 the Memorandum argued that under this revised definition of torture, no prior Office of Legal Counsel opinions would be different.27 This new Memorandum stated, “[w]hile [the Office of Legal Counsel has] identified various disagreements with the August 2002 Memorandum, [they] have reviewed [the] prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this [Levin] memorandum.”28

So, although the Levin Memorandum offers a more logical reading of the federal torture statute29 and international interpretations of torture under both customary international law and treaty law, it still does not address the various sources of law and other international issues that apply to the detention and interrogation of detainees.30 As pointed out by

23. Human Rights First, supra note 16.
24. Id.; see also Associated Press, supra note 17.
25. Human Rights First, supra note 16.
27. Id. at 2.
28. Id. at 2 n.8.
30. For example, Alberto Gonzales opined in a January 25, 2002 memorandum that the Geneva Conventions and the War Crimes Act did not apply to the treatment of Al Qaeda and Taliban detainees. Memorandum from Alberto R. Gonzales, to President George W. Bush, Re: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al
Human Rights First, "the Levin memo evades [these discussions on the President's Commander-In-Chief Powers and the Geneva Convention's right to a tribunal], characterizing the arguments as 'unnecessary' and 'inconsistent' with the President's statement in July of 2004 condemning torture." Assuming the Levin Memorandum supersedes the August 2002 Memorandum in its entirety, this leaves a logical question; how does the administration now feel about some of the most controversial issues discussed in the August 2002 Memorandum, but omitted from this revision?

So what were the real reasons behind the release of this Levin Memorandum? Perhaps the most obvious is timing. The memoranda was dated and released less than one week before the Senate Judiciary Committee was to consider President Bush's nomination of his chief White House counsel, Alberto Gonzales, to replace John Ashcroft as Attorney General. The controversial August 2002 Memorandum was prepared for Gonzales, and many Democrats said they would question Gonzales closely on memoranda he wrote or commissioned that appear to justify torture. The release of the Levin Memorandum also coincides with continuing revelations of possible detainee abuse contained in a series of memoranda, emails, and other documents from FBI agents uncovered in an American Civil Liberties Union lawsuit. The lawsuit alleges wrongdoing on behalf of the Defense Department during interrogation proceedings. The discoveries made within these documents have directly led to another lawsuit filed in March of 2005 in federal court in Illinois.

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31. Human Rights First, supra note 16.
32. Id.
33. Associated Press, supra note 17.
34. Id.
37. This lawsuit, Ali v. Rumsfeld, is on behalf of eight men who were subject to torture under Secretary Rumsfeld's command. They are seeking a court order declaring Secretary Rumsfeld's actions violated the U.S. Constitution, federal statutes and international law. The plaintiffs in the suit were all incarcerated in U.S. detention facilities in Iraq and Afghanistan where they allege they were subjected to torture including severe beatings, cutting with knives, sexual humiliation, sexual assault, mock executions, death threats, and restraint in contorted and excruciating positions. None of the men were ever charged with a crime and subsequently have all have been released. Danzig &
Despite this new Levin Memorandum and the dramatic reversal in opinion articulated by the administration, there is no evidence that either the legal or political strategy of the United States has changed in regards to its assertions presented in the original 2002 and 2003 Memoranda about the right to permissibly use torture or the status of those being detained by the United States in the "War on Terror." These original Memoranda conflict with the United States' international and domestic obligations concerning the prohibition against torture as set forth in the Torture Convention. In order to demonstrate this, Part II of this Note will focus on the international obligations to refrain from torture. Part III will examine the two original Memoranda and the conflict that exists between the assertions they set forth and the international law that prohibits the use of torture. Part IV of this Note will evaluate the two original Memoranda and examine whether or not the United States is abiding by the Torture Convention. Part IV will also discuss who would be held responsible for an act of torture, assuming the United States has indeed violated its obligations. Part V of this Note will briefly explore two justifications for the use of torture that are relevant to the issues presented in the Torture Memoranda, as well as what the subsequent effects would be from such a change in international policy. Finally, Part VI will sum up and offer final thoughts on the issues and legal questions raised by this Note.

II. INTERNATIONAL OBLIGATIONS TO REFRAIN FROM TORTURE

"[Torture] is a wonderful way of getting false concessions out of innocent people. It is a terrible way of getting the truth out of guilty people."°

~Tom Malinowski


A. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Nearly every major instrument that promotes or protects human rights, as well as codifications of international humanitarian law, condemns torture. The most prominent international agreement prohibiting the use of torture is the Torture Convention. This document prohibits the use of torture and requires the punishment or extradition of anyone who commits torture within a signatory’s territorial jurisdiction. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the general assembly of the United Nations on December 10, 1984, and entered into force for the first twenty states which ratified it on June 26, 1987. Since then over 140 states have signed and/or become parties to the Torture Convention. The principal aim of the convention was to strengthen existing prohibitions against torture by implementing supportive measures that will be binding to states beyond those that have become parties to the Convention. The Torture Convention requires the signatories to implement effective measures and safeguards in order to end torture within their territorial jurisdiction.

The Torture Convention is comprised of 32 articles which are broken down into three parts. The first 16 articles contained in Part 1 of the Convention are the most substantive parts of the document.

42. See generally id.
44. GARCIA, supra note 40, at 1.
45. BURGERS & DANELIUS, supra note 43, at 1. The authors explain that a common misconception is that the Torture Convention aimed to outlaw torture. This assumption is incorrect since torture was already outlawed internationally before the convention. Id.
47. Torture Convention, supra note 41; see also BURGERS & DANELIUS, supra note 43, at 1-2.
48. Torture Convention, supra note 41.
Article 2 states in relevant part that (1) each state shall take effective means to prevent acts of torture in any territory under its jurisdiction.49 (2) There is to be no circumstance that would justify torture whatsoever.50 Specifically, a state of war or a threat of war, political instability, or any other public emergency cannot be invoked as a reason to allow torture.51 (3) An order from a superior officer or other authoritative figure cannot be invoked as a justification for the use of torture.52 Article 3 requires that no state party expel, return, or extradite a person to another country where there are substantial grounds to believe he would be subjected to torture.53 The Torture Convention defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person... by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."54 This definition does not include "pain or suffering arising only from, inherent in or incidental to lawful sanctions."55 The Convention allows for no circumstances or emergencies where torture could be permitted.56

On April 18, 1988, the United States signed the Torture Convention, and in 1994 enacted the Torture Convention Implementation Act.57 The purpose of this act was to conform the Torture Convention directives to the United States Criminal Code.58 The Torture Convention was then ratified by the United States on October 21, 1994.59 In ratifying the Torture Convention, the United States did so subject to certain declarations, reservations, and understandings.60 Included in these reservations was the understanding that the Torture Convention was not self-executing.61 The State Department conducted

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49. Id. pt. I, art. 2, § 1.
50. Id. § 2.
51. Id.
52. Id. § 3.
53. Id. art. 3, § 1.
54. Id. art. 1, § 1.
55. Id. This phrase can be seen as a glaring loophole in the Torture Convention, allowing for the exclusion of conduct when such conduct is claimed to be a result of lawful sanctions. BOULESBAA, supra note 46, at 30.
56. BURGERS & DANIELIUS, supra note 43, at 47-49.
58. van der Vyver, supra note 39, at 434.
59. GARCIA, supra note 40, at 4.
60. Id. For a more complete discussion of the relevant reservations, declarations and understandings, see infra Part III.B.
an independent analysis of the Torture Convention which President Reagan included in his request to the Senate for ratification. In its analysis, the State Department concluded that the Convention's definition of torture was intended to be interpreted in a "relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned." The State Department reasoned that "torture" under the Convention's definition must be "severe" and that other forms of treatment such as police brutality, "while deplorable, does not amount to 'torture'" for purposes of the Convention. Additionally, offenses of torture require a specific intent to cause severe pain and suffering; "an act that results in unanticipated and unintended severity of pain and suffering is not torture for purposes of the Convention."

Subsequently, Congress codified the prohibitions of the Torture Convention (subject to any declarations, reservations, and understandings) in 18 U.S.C. §§ 2340-2340A. Section 2340 contains the definition section and states in relevant part:

(1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) "severe mental pain or suffering" means 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

63. GARCIA, supra note 40, at 2 (citing President's Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 62).
64. GARCIA, supra note 40, at 2.
65. Id.
(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; and

(3) "United States" includes all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and section 46501(2) of title 49.67

Section 2340A outlines the offense of torture, jurisdiction to which penalties for committing acts of torture will extend to, and criminalizes a conspiracy to commit torture. It reads in relevant part:

(a) Offense.—Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction.—There is jurisdiction over the activity prohibited in subsection (a) if—

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy.—A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.68

Despite these international and domestic laws, it is evident in examining the arguments stipulated in the two Memoranda that the Office of Legal Counsel and the Department of Justice disregard these principles.69 Instead, they are advocating for a violation of international law. Despite assertions to the contrary,70 the government continues to implement a strategy that serves its own objectives of obtaining information and detaining those who can provide it, in any way it deems

67. Id. § 2340.
68. Id. § 2340A.
69. See discussion infra Part III.A.
acceptable, regardless of the legality of the methods or techniques used. In other words, the United States is more or less adopting an "ends justify the means" stratagem.

III. THE ORIGINAL MEMORANDA—A CONFLICT BETWEEN LAW AND THE MEMOS

"Torture is an atrocious violation of human dignity. It dehumanizes both the victim and the perpetrator. The pain and terror deliberately inflicted by one human being upon another leave permanent scars: spines twisted by beatings, skulls dented by rifle butts, recurring nightmares that keep the victims in constant fear. Freedom from torture is a fundamental human right that must be protected under all circumstances."

—UN Secretary General Kofi Annan

Although there were numerous memoranda "officially released," two of the most controversial memoranda will be the focus of this


72. Besides the officially released documents discussed supra notes 8-9, the following documents were leaked to news media and have been widely reported and made available to the public by various news media sources. These records were not included in the June 22 White House release: (1) Memorandum from Patrick F. Philbin, Deputy Asst. Attorney General, U. S. Dept. of Justice, and John C. Yoo, Deputy Asst. Attorney General, U. S. Dept. of Justice, William J. Haynes, General Counsel, Department of Defense, Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba (Dec. 28, 2001); (2) Memorandum from John Yoo, Deputy Asst. Attorney General, U. S. Dept. of Justice and Robert J. Delahunty, Special Counsel, U. S. Dept. of Justice, to William J. Haynes, General Counsel, Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002); (3) Memorandum from Alberto R. Gonzales, to President George W. Bush, Re: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002) (opposing the application of Geneva Conventions to the Conflict in Afghanistan); (4) Memorandum from Colin L. Powell, U. S. Dept. of State, to Counsel to the President and Asst. to the President for Nat’l Security Affairs, Re: Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002); (5) Memorandum from William H. Taft, Legal Adviser, Dept. of State, to Counsel to the President, Re: Comments on Your Paper on the Geneva Convention (Feb. 2, 2002) (advising that the Geneva Conventions should apply); (6) Jan. 2004 Confidential Report by the International Committee of the Red Cross on Detention in Iraq, see Press Release, Int’l Comm. of the Red Cross, Iraq: ICRC Explains Position over Detention Report and Treatment of Prisoners (Aug. 5, 2004) (acknowledging the disclosure of the confidential report), at http://www.icrc.org/Web/eng/siteeng0.nsf/html/5YRMYC?OpenDocument; (7) MAJ. GEN. ANTONIO TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (Mar. 12, 2004) (detailing the findings of a Department of Defense investigation into the treatment of
discussion. In 2002, the Justice Department’s Office of Legal Counsel advised the White House that torturing captured and detained al Qaeda terrorists may be justified, and that international laws preventing the use of torture may be unconstitutional if applied to interrogations. Then, in 2003, a memorandum from a Defense Department working group convened by Defense Secretary Donald Rumsfeld employed much of the legal thinking behind the 2002 Office of Legal Counsel memorandum to develop new interrogation guidelines for detainees being held at Guantanamo Bay, Cuba.

A. The August 1, 2002 Department Of Justice Memo—A Discussion

The first of these memoranda was written on August 1, 2002, by the U.S. Department of Justice Office of Legal Counsel and was entitled “Standards of Conduct for Interrogation under 18 U.S.C. § 2340-2340A.” The memorandum was addressed to Alberto Gonzales but was later dismissed by him as “irrelevant” as the controversy grew around the illegality of techniques advocated and apparent lack of morality. The memorandum was originally written in response to a request for the Office of Legal Counsel’s views on the acceptable standards of conduct for interrogations conducted outside the United States under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, as it applies to 18 U.S.C. §§ 2340-2340A. Specifically, this memorandum was written at the request of the Central Intelligence Agency, since they sought the authority to conduct more aggressive forms of interrogation than were


75. “The Office of Legal Counsel is the federal government’s ultimate legal advisor.” Often, the federal government gives the most significant questions of law to the Office of Legal Counsel for review. Id.

76. Alberto R. Gonzales is the Counsel to the President. See generally Gonzales Aug. 1, 2002 Memo, supra note 8.


78. Gonzales Aug. 1, 2002 Memo, supra note 8, at 1. As discussed supra notes 66-68, §§ 18 U.S.C. 2340-2340A was the statute that implemented the Torture Convention domestically.
permitted at the time. The United States was looking to employ methods of interrogation that arguably crossed the bounds of torture, but wanted to examine the legal repercussions of such action.

The memorandum was signed by Jay Bybee, who was in charge of the Office of Legal Counsel in 2002. By having Bybee’s signature appear on the document, additional authority was added to the recommendations made in the memorandum, making it analogous to a binding legal opinion on the interrogation methods that can be employed by the federal government.

The memorandum is broken into six parts. Part I analyzed the text and history of the criminal statute. Part II examined the Torture Convention. Part III explored judicial interpretation of the term “torture” through civil suits under the Torture Victims Protection Act of 2000. Part IV explored the interpretation of torture in Western courts and in other international decisions. Part V examined the President’s use of his Commander-in-Chief powers. Finally, Part VI examined possible defenses to an allegation that interrogation methods used by a government official were in violation of the laws of the United States.

Part I of the August 1, 2002 memorandum examined the history and text of the criminal statute as defined in 18 U.S.C. §§ 2340 and 2340A. 18 U.S.C. § 2340 defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” 18 U.S.C. § 2340A lays out the offense of torture as

Thus, as the Department of Justice memorandum illustrates, in order to be convicted of torture under 18 U.S.C. §§ 2340 and 2340A, it

79. Priest, supra note 74.
80. Id.
82. Id.
83. Id. at 2.
84. Id.
85. Id.
87. Id. § 2340A.
must be shown that (1) the torture happened outside the United States or any area within United States jurisdiction; (2) the defendant acted under the color of law; (3) the victim suffering the torture was under the complete physical control of the defendant; (4) the defendant specifically intended to cause severe pain and suffering (either physical or mental); and (5) severe pain or suffering was endured as a result of the defendant’s act. The Office of Legal Counsel only addressed the fourth and fifth elements at the request of Alberto Gonzales, so only a discussion of “specific intent” and “infliction of pain and suffering” appeared in the memorandum.

The Office of Legal Counsel determined that a person violates § 2340 if he “acts with the “express purpose of inflicting severe pain or suffering.” Knowledge that a particular result is certain to occur does not amount to specific intent. So even if the defendant knows that severe pain will result from his actions, he lacks the requisite specific intent if causing the harm was not his objective. However, juries are allowed to infer specific intent from the factual circumstances. Therefore, even if the defendant has committed an act that he did not intend to rise to the level of torture or cause the requisite pain and suffering, the jury is still permitted to reach the conclusion that the defendant did intend to torture based on the circumstances of the action committed by the defendant.

Part II of the August 1 memorandum examined the Torture Convention itself. In short, the Office of Legal Counsel concluded that the text of the Torture Convention only prohibits acts of the “most extreme” nature by only affording punishment and penalties for acts of torture while precluding such penalties for cruel, inhuman, or degrading punishment. The Torture Convention states that an individual must act intentionally in committing torture, but this language could be interpreted to only require general intent for violations. The Office of Legal Counsel recognized this vagueness of the treaty and reached its

89. Id.
90. Id. at 4.
91. Id.
92. Id. at 3-4.
93. Id. at 4.
94. Id. at 5.
95. See generally id. at 5.
96. Id. at 1-2.
97. Id. at 3-4.
own conclusion that the “better interpretation” is that the phrase “intentionally” created a specific intent-type standard.\(^{98}\)

It appears quite obvious that the Torture Committee did not intend for only a specific intent standard. However, interpreting the Torture Convention as such allows the government to benefit from this vagueness. The Bush Administration’s understanding of the phrase “intentionally” represents an explanation of how the United States intended to implement the Torture Convention.\(^{99}\) This type of interpretation could eliminate liability on the part of the administration since the requisite level of intent is not met according to the language of the Torture Convention.\(^{100}\) If, on the other hand, the Convention established a general intent standard, then the Bush administration’s understanding represents a modification of the obligation undertaken by the United States.\(^{101}\) This distinction is what Mark Bowden refers to as the difference between “torture” and “coercion.”\(^{102}\)

To justify this, the Office of Legal Counsel also concluded that the Torture Convention defined a series of acts that states should “endeavor to prevent, but need not criminalize.”\(^{103}\) Subsequently, these acts are left without the same penalties that torture confers.\(^{104}\) The Office of Legal Counsel concluded that the Torture Convention’s text, ratification history, and negotiating history all confirm their belief that § 2340A reaches only the most heinous acts of torture, reserving criminal penalties for such acts.\(^{105}\)

In Part III of the memorandum, the Office of Legal Counsel began to question what conduct the U.S. courts would consider torture by exploring the Torture Victims Protection Act of 2000 [hereinafter “TVPA”] and the subsequent civil litigation that resulted under the Act. The Office of Legal Counsel started TVPA case history analysis by noting that the courts have not engaged in lengthy analysis of what specific acts constitute torture, mainly because the cases brought under the TVPA involved physical torture that, at times, was sadistic in

\(^{98}\) See id. at 15 n.7.

\(^{99}\) Id.; see also BOULESBAA, supra note 46, at 20 (explaining that during the drafting of the Torture Convention, the United States proposed to change the word “intentionally” to “deliberate” or “malicious”; however, the proposal was not adopted since the United States was the only country that was not satisfied with the word “intentionally”).

\(^{100}\) Gonzales Aug. 1, 2002 Memo, supra note 8, at 15 n.7.

\(^{101}\) Id.


\(^{103}\) Gonzales Aug. 1, 2002 Memo, supra note 8, at 15.

\(^{104}\) Id.

\(^{105}\) Id. at 22.
That being said, the government determined that courts analyze the entire course of conduct as opposed to any single, specific act, when deciding if torture had been committed. Although this approach makes it difficult to determine if any specific act constitutes torture, certain single acts obviously do: severe beatings with instruments, threats of imminent death, threats of removing extremities, burning, electric shocks, or threats thereof, to genitalia, rape and other forms of sexual assault, and forcing prisoners to watch torture of others. This enumerated list of seven acts set a basis for the Office of Legal Counsel to conclude that although it cannot be said with certainty that acts falling short of these seven would not constitute torture under § 2340, it may be assumed that interrogation techniques would have to be similar to the "extreme nature and in the type of harm caused in order to violate the law."109 

The Office of Legal Counsel then turned its attention to international courts and their interpretation of what constitutes torture. The government does recognize that these decisions are not binding on United States law, but decided to analyze the decisions in order to "provide guidance about how other nations will likely react to our interpretation of the [Convention Against Torture] and Section 2340."111 Arguably, in doing this, the United States was again attempting to measure what the permissible level of conduct is internationally in order to develop a stratagem for the legal implications that may result from crossing this threshold.

In Part IV of the memorandum, the Office of Legal Counsel concluded that Western nations have generally used a high standard in determining what methods employed during interrogation would violate international prohibitions on torture. They found that the decisions of these Western courts allow for various aggressive interrogation methods to, at worst, constitute cruel or inhuman punishment, but not rise to the level of torture. The Office of Legal Counsel pointed out, "[t]hese decisions only reinforce our view that there is a clear distinction between the two standards and that only extreme conduct, resulting in pain that is of an intensity often accompanying serious physical injury, will violate

106. Id. at 24.
107. Id.
108. Id.
109. Id.
110. Id. at 27.
111. Id.
112. Id.
113. Id.
the latter.”\textsuperscript{114} The Office of Legal Counsel believed that “they appear to permit, under international law, an aggressive interpretation as to what amounts to torture, leaving that label to be applied only where extreme circumstances exist.”\textsuperscript{115}

Part V of the memorandum examined the President’s use of his Commander-in-Chief powers.\textsuperscript{116} Even in light of the Levin Memorandum’s apparent reversal of opinion discussed earlier,\textsuperscript{117} the President’s Commander-in-Chief authority remains an issue of controversy. This section of the memorandum starts off by reaching the conclusion that “[e]ven if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President’s constitutional power to conduct a military campaign.”\textsuperscript{118} This interpretation continues to echo the dominating theme of this memorandum. The Office of Legal Counsel searched for end ways around legal prohibitions against torture, specifically at avoiding the domestic prohibitions against torture.

The Office of Legal Counsel reasoned that the Commander-in-Chief power gives the President constitutional authority to order interrogations of enemy combatants in order to “gain intelligence,” especially in the middle of a war where the United States has suffered a first attack by an early aggressor.\textsuperscript{119} If § 2340A was to be applied in any way that would interfere with the power of the President in his “direction of such core war matters as the detention and interrogation of enemy combatants,” such an application of § 2340A would be unconstitutional.\textsuperscript{120}

An analysis of the constitutionality of the President’s Commander-in-Chief powers began with a retrospective look at the war with al Qaeda. The Office of Legal Counsel started its analysis here because although the request for legal advice “is not specifically limited to the [war with al Qaeda]... it is useful to discuss this question [of the President’s war powers] within the context of the current war against the al Qaeda terrorist network.”\textsuperscript{121} (It should be noted that the Office of Legal Counsel has reviewed and discussed the President’s constitutional power to use force abroad in response to the September 11th terrorist
attacks, as well as the President’s constitutional authority to deploy the armed forces domestically to protect against foreign terrorist attacks in two separate memoranda.122)

After its discussion regarding the war with al Qaeda, the Office of Legal Counsel turned its attention to the interpretation of the President’s Commander-in-Chief powers in order to avoid constitutional problems.123 In relying on Hamilton v. Dillin,124 the Office of Legal Counsel reached the decision that the Supreme Court has “unanimously stated that it is the President alone who is constitutionally invested with the entire charge of hostile operations” and that “the President enjoys complete discretion in the exercise of his authority in conducting operations against hostile forces.”125 In relying on the established canon of construction that statutes are to be construed in a manner that avoids constitutional difficulties so long as a reasonable alternative interpretation is available, the Office of Legal Counsel believed that a criminal statute will not be read as infringing on the President’s ultimate authority over the conduct of war.126 Congress lacks the power under Article I of the Constitution to set terms and conditions under which the President may exercise his authority as Commander-in-Chief, so the President’s inherent constitutional authority must have greater weight than § 2340A.127 Subsequently, § 2340A must be construed as inapplicable to the interrogations and other acts undertaken by the President pursuant to his Commander-in-Chief authority.128 Without question, the “other acts” language would cover acts of torture.

The Office of Legal Counsel completed its evaluation of the Commander-in-Chief power by analyzing Congressional intent. Although it could be argued that Congress enacted § 2340A with full knowledge of the President’s Commander-in-Chief power and intended to restrict his discretion in the interrogation of enemy combatants, the Office of Legal Counsel found that the Department of Justice still could

122. See generally Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Re: The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001).
124. 88 U.S. (21 Wall.) 73, 87 (1874) (affirming that the war power is vested in the government and the President).
125. Gonzales Aug. 1, 2002 Memo, supra note 8, at 33-34.
126. Id. at 34.
127. Id.
128. Id. at 34-35; see also Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Swift Justice Authorization Act (Apr. 8, 2002).
not enforce § 2340A violations against federal officials acting pursuant to the President’s constitutional authority.129 “One of the core functions of the Commander-in-Chief is that of capturing, detaining, and interrogating members of the enemy.... Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.”130

Part VI of the memorandum discusses “justification defenses” that may be available to officials tried for torture.131 These defenses would “potentially eliminate criminal liability.”132 It is within this sixth section that the most controversial and egregious justification for torture can be found. Prior to this section, the Office of Legal Counsel had construed the definition of torture extremely narrowly, finding that § 2340 applies only to the most extreme forms of physical and mental harm.133 This sixth section takes the previous analysis one step further, reaching the conclusion that “under current circumstances certain justification defenses might be available that would potentially eliminate criminal liability. Standard criminal law defenses of necessity and self-defense could justify interrogation methods needed to elicit information to prevent a direct and imminent threat to the United States and its citizens.”134

The first defense the Office of Legal Counsel explored is that of “necessity.”135 This is referred to as the “choice of evils”136 defense, and is described as justifiable if the actor believes such conduct is necessary to avoid harm to himself.137 LaFave and Scott have described the necessity defense as justifying the killing of one person to save two others because “it is better that two lives be saved and one lost than that two be lost and one saved.”138 The memorandum stated that this defense may prove “especially relevant” in the current circumstances of fighting

130. Id. at 38-39.
131. Id. at 39.
132. Id.
133. See id. at 31.
134. Id. at 39.
135. Id.
136. It should be noted that the “choice of evils” defense has not been generally established by any federal statute. However, the Supreme Court did recognize the defense in United States v. Bailey, 44 U.S. 394 (1980).
137. MODEL PENAL CODE § 3.02 (1985).
terrorism abroad. The LaFave and Scott interpretation, sometimes also described as achieving higher values at the cost of lesser values, lays the groundwork for the Central Intelligence Agency to torture captured fighters in order to extract information that may possibly save the lives of many more. Liability can be avoided under necessity since “it is better that two lives be saved and one lost than that two be lost and one saved.”

The Administration’s view of the defense of “choice of evils” would be “it is better that thousands of lives be saved from a September 11th type terrorist attack and one lost to torture, than thousands of lives be lost in a terrorist attack because one life was spared by using legal interrogation techniques.”

On September 11, 2001, al Qaeda launched a surprise covert attack on civilian targets in the United States that led to the deaths of thousands and losses in the billions of dollars. According to public and governmental reports, al Qaeda has other sleeper cells within the United States that may be planning similar attacks. Indeed, al Qaeda plans apparently include efforts to develop and deploy chemical, biological and nuclear weapons of mass destruction. Under these circumstances, a detainee may possess information that could enable the United States to prevent attacks that potentially could equal or surpass the September 11 attacks in their magnitude. Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives.

Under the calculus described above, there are two factors the Office of Legal Counsel believed could indicate when the necessity defense could be invoked. The first factor encompasses the degree of certainty the official has that the detained individual possesses knowledge that might prevent an attack. The use of the word “may” in the phrase

140. LAFAVE & SCOTT, supra note 138, at 629.
142. LAFAVE & SCOTT, supra note 138, at 629. The Administration’s view of the defense of “choice of evils” would be “it is better that thousands of lives be saved from a September 11th type terrorist attack and one lost to torture, than thousands of lives be lost in a terrorist attack because one life was spared by using legal interrogation techniques.”
144. Id.
145. Id. at 40-41.
146. Id. at 41.
147. Id.
"may possess information" indicates that in almost all circumstances, an official could logically conclude that the detainee "may" possess information. In short, this allows for the necessity defense in virtually all situations.

The second factor is the magnitude and likelihood of an attack. However, there is still an important exception to the necessity defense. The defense is only available in situations where specific legislation has not determined values in the criminal statute. Subsequently, if Congress has stated that a violation of a statute cannot be justified by the harm avoided by the violation, then the necessity defense cannot be proffered. The Office of Legal Counsel has avoided this exception by finding that Congress has not explicitly made a determination of values with reference to torture. "In fact, Congress explicitly removed efforts to remove torture from the weighing of values permitted by the necessity defense."

The second defense explored by the Office of Legal Counsel is that of self-defense. The Office believed that even if a defendant could not raise a necessity defense to an alleged violation of § 2340A, that official would still have a self-defense claim. Under the current circumstances, a defendant accused of torture could properly claim the defense of another. The memorandum states that if an attack appears likely, but the intelligence agency and armed forces cannot prevent it without information derived from interrogation, then the more likely it will appear that the conduct in question will be necessary and a self-defense claim, if applicable, could be used.

The legal assertions regarding the permissible boundaries of interrogation techniques addressed to the administration did not end with

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148. Id.
149. Id.
150. Id.
151. LAFAVE & SCOTT, supra note 138, at 629.
152. Gonzales Aug. 1, 2002 Memo, supra note 8, at 41.
153. Id.
154. Id. at 41 n.23. The Office of Legal Counsel describes that in the Convention Against Torture, torture is defined as the intentional infliction of severe pain or suffering "for such purpose[] as obtaining from him ... information." Id. The Office then argues one could find that such a definition represented an attempt to indicate that the good of obtaining information could never be justified by torture. However, in enacting § 2340 (which codified the Torture Convention), Congress removed the purpose element in the definition, therefore allowing the necessity defense to apply when appropriate. Id.
155. Id. at 42.
156. Id.
157. Id. at 43.
158. Id. at 43-44.
this memorandum. As noted, a series of memoranda\(^{159}\) were written after August 1, 2002 dealing with various issues.\(^{160}\) However, the next highly controversial memorandum to be written was a Defense Department Working Group Paper on operational considerations, released on March 6, 2003. The theme of this Draft Report followed similar arguments and employed much of the same legal reasoning of the above discussed Office of Legal Counsel memorandum, specifically how to avoid prosecution if charged with torture.

**B. The March 6, 2003 Defense Department Working Group Paper—A Discussion**

The second memorandum to be discussed was written on March 6, 2003 and entitled “Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations.”\(^{161}\) This draft report offered arguments as to how U.S. government officials who tortured prisoners could avoid prosecution if caught.\(^{162}\) It was addressed to Secretary of Defense Donald Rumsfeld and was classified by Secretary Rumsfeld.\(^{163}\) The Draft Report was written by an ad hoc group of lawyers chosen by Secretary Rumsfeld, “mostly political appointees in the Defense and other departments, to advise him on interrogation techniques for prisoners at Guantanamo Bay.”\(^{164}\) It relied on much of the legal reasoning laid out in the 2002 Office of Legal Counsel Memorandum that covered the treatment of detainees.\(^{165}\) As such, this Note will only discuss this memorandum's interpretation of the relevant international law that governs interrogations and how the United States would presumably apply the relevant international law.

This Draft Report, in large part, interpreted “the requirements of international law as it pertains to the Armed Forces of the United States.”\(^{166}\) The memorandum recognized that other nations and international bodies (mainly the United Nations and the International

\(^{159}\) See National Security Archive, *supra* note 11.

\(^{160}\) See id.


\(^{162}\) Id.


\(^{164}\) Id.

\(^{165}\) Id.; see also Priest, *supra* note 74.

\(^{166}\) WORKING GROUP REPORT, *supra* note 9, at 4.
Court of Justice) may take a more restrictive view of the interpretations made throughout the document.\footnote{167}

The memorandum begins with a discussion of the Geneva Conventions and the Convention Against Torture.\footnote{168} The law of war contained in the Third Geneva Convention highlights the obligations relevant to the issue of interrogation.\footnote{169} However, as the memorandum noted, the United States government has taken the position that the provisions of the Geneva Convention relative to the treatment of prisoners do not apply to the al Qaeda detainees because al Qaeda is not a High Contracting Party to the Geneva Convention.\footnote{170} Furthermore, although the provisions of the Geneva Convention do apply to the Taliban, Taliban detainees do not qualify as prisoners of war under Article 4 of the Third Geneva Convention.\footnote{171} Additionally, the Fourth Geneva Convention relative to the protection of civilian personnel\footnote{172} in a time of war does not apply to unlawful combatants either.\footnote{173} The March Draft Report went on to state the United States did, indeed, ratify the Torture Convention in 1994, but did so with numerous reservations and understandings that are applicable to the circumstances described and evaluated in the report.\footnote{174} As a result, the Torture Convention prohibits torture only as defined in the U.S. understanding and prohibits cruel, inhuman, and degrading treatment or punishment only to the extent of the reservations.\footnote{175}

In Article 1 of the Torture Convention, which defines what constitutes torture, the United States conditioned its ratification of the treaty on the understanding that torture would mean (among other things) “severe physical or mental pain or suffering.”\footnote{176} Article 2 of the Convention which requires parties to “take effective legislative, administrative, judicial and other measures to prevent... torture” was believed by the United States to be adequately covered with existing federal and state criminal law.\footnote{177} Subsequently, the United States passed

\begin{footnotes}
\item[167] Id.
\item[168] Id.
\item[170] WORKING GROUP REPORT, supra note 9, at 4.
\item[171] Id.
\item[173] WORKING GROUP REPORT, supra note 9, at 4.
\item[174] Id.
\item[175] Id. at 6.
\item[176] Id. at 4.
\item[177] Id. at 5.
\end{footnotes}
no further legislation. 78 Article 3 of the Convention disallows the expulsion of a person to a nation-state "where there are substantial grounds for believing that [the person] would be in danger of being subjected to torture." 79 The United States understood this as applying only in situations where it is "more likely than not" a person would be tortured. 80 In Article 5, jurisdiction over acts of torture must be established. 81 "Chapter 113C of Title 18 of the U.S. Code provides federal criminal jurisdiction over an extraterritorial act or attempted act of torture if the offender is a U.S. national." 82 In addition to torture, the Torture Convention also prohibits cruel, inhuman, and degrading treatment or punishment within the territories under a signatories’ jurisdiction. 83 However, the Draft Report believed that since the United States found the meaning of the term "degrading treatment" to be vague and ambiguous, there is a reservation imposed on this article that binds the United States from refraining from any treatment only to the extent that the treatment would be inhuman, cruel, or degrading under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. 84

The Draft Report next considered customary international law and domestic law. The Department of Justice began by concluding that "customary international law cannot bind the President under the Constitution since it is not federal law." 85 Any decision handed down by the President in regard to al Qaeda prisoners would constitute a controlling executive interest, hence overriding any customary international law. 86 This further expands on the Department of Justice 2002 Memorandum’s conclusion that the President’s power is unbridled and any decision handed down by him (presumably regarding the use of torture) would be valid.

Turning to domestic law, specifically the codification of the Torture Convention in 18 U.S.C. §§ 2340-2340A, the memorandum first defined torture as any "act committed by a person acting under the color of law

178. Id.
179. Torture Convention, supra note 41, at pt. 1, art. 3, § 1; see also WORKING GROUP REPORT, supra note 9, at 5; BURGERS & DANELIUS, supra note 43, at 49-52.
180. WORKING GROUP REPORT, supra note 9, at 5.
181. Id.
182. Id.
183. Id. at 6.
184. Id.
185. Id. (citing Memorandum for Alberto R. Gonzales Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees at 32 (Jan. 22, 2002) (on file with author)).
186. WORKING GROUP REPORT, supra note 9, at 6.
specifically intended to inflict severe physical or mental pain” occurring “outside the United States.” The memorandum next determined that under maritime law, the Guantanamo Bay Naval Station is included within United States jurisdiction. Because of this, the Torture Convention and its proscriptions would not apply to the detainees since Guantanamo is not outside the territory of the United States as the Torture Convention requires for applicability.

The Defense Department Report continued to examine various subjects originally covered by the August 2002 memorandum but also introduced some novel ideas such as that “the administration of drugs to prisoners would violate a prohibition on disrupting ‘profoundly the sense or personality’ of a prisoner only if it produced ‘an extreme effect’ and was calculated to do so.” However as stated earlier, the remainder of this memorandum, while important in its own right, is not applicable to the issues of this Note.

Having now examined exactly what these two controversial documents cover, the theme behind them, as well as the legal reasoning and principle employed throughout the two documents, it is important to evaluate the memoranda to determine if the United States is advocating for a strategy that bypasses our international obligation prohibiting the use of torture as contained in the Torture Convention. Furthermore, if the United States is engaging in such behavior, who, if anyone, would be responsible for the violations in committing acts of torture.

IV. EVALUATING THE TWO MEMORANDA—IS THE UNITED STATES ABIDING BY THE TORTURE CONVENTION, AND IF NOT, WHO IS RESPONSIBLE?

“[P]risoners of war, some of whom are suspected of having killed or attempted to kill Americans, should [not] be rewarded with comforts . . . . However . . . [t]he inhumane treatment of prisoners, whoever they are, is beneath a great nation. It is also illegal.”

—Patrick Leahy, U.S. Senator

187. Id. at 7; see 18 U.S.C. §§ 2340-2340A (2000).
188. WORKING GROUP REPORT, supra note 9, at 7.
189. Id.
190. Lewis, supra note 163.
The underlying theme and tone of these memoranda is the avoidance of prosecution for egregious acts that cross the threshold of torture. The August 2002 document claims that officials who put physical pressure on detained fighters or other captives can literally escape any sort of punishment or liability under § 2340A if they can show that they lacked the requisite intent to cause "severe physical or mental pain or suffering."\(^{192}\) If the defendant acted in good faith, any so-called torturous acts committed by him would not amount to the acts prohibited by statute, hence he could negate a showing of specific intent.\(^{193}\) Torture, as defined in the relevant parts of § 2340, only covers extreme acts that result in severe pain.\(^{194}\) Additionally, the Memorandum makes the claim that severe mental pain can only arise from the predicate acts specifically listed in § 2340.\(^{195}\) There are acts that may be cruel, inhuman, or degrading, but these are not the same as torturous acts and do not rise to the level to be included as torture despite the fact these same acts may constitute torture on other international legal jurisdictions.\(^{196}\) Lastly, any implementation of § 2340A in respect to interrogations is unconstitutional if those interrogations were undertaken pursuant to the Constitutional grant of power to the President in his Commander-in-Chief powers.\(^{197}\)

The March 6, 2003 Draft Report echoes a similar theme to that of the 2002 Memorandum. In short, the arguments made in the portions of this Draft Report detail how the Bush administration rationalized that compliance with international treaties and U.S. laws prohibiting torture could be overlooked because of legal technicalities and national security needs.\(^{198}\) The Report’s conclusion is that the Geneva Convention dealt only with states, and al Qaeda was not a state or nation.\(^{199}\) Furthermore, the Taliban soldiers were a "‘failed state’ whose territory had been largely overrun and held by violence by a militia or faction rather than by a government.”\(^{200}\) This determination made by the Draft Report comports with President Bush’s finding that the Geneva Conventions did

\(^{192}\) Gonzales Aug. 1, 2002 Memo, supra note 8, at 3; see also Lewis, supra note 163.

\(^{193}\) Gonzales Aug. 1, 2002 Memo, supra note 8, at 3-4.

\(^{194}\) Id. at 4.

\(^{195}\) Id.

\(^{196}\) Id.

\(^{197}\) Id.

\(^{198}\) Jess Bravin, Pentagon Report Set Framework For Use of Torture, WALL ST. J., June 7, 2004, at A1; see also Priest & Smith, supra note 73 (discussing inapplicability during war, interrogations, and conduct of U.S. personnel outside of United States territory)

\(^{199}\) Lewis, supra note 163.

\(^{200}\) Id.; see WORKING GROUP REPORT, supra note 9.
not cover the prisoners held at Guantanamo. Shortly after January 9, 2002, President Bush classified them as "unlawful combatants." Likewise, soon after the Draft Report was written in March, 2003, William J. Haynes II, the Pentagon's top lawyer, wrote a letter to Kenneth Roth, the executive director of Human Rights Watch, in April, 2003, discussing America's position on human rights and its opposition to torture. Throughout the letter, Haynes used the term "enemy combatants" to describe those in custody as a result of the war on terror.

It is the government's position that once someone has been properly designated as such, that person can be held indefinitely until the end of America's war on terrorism or until the military determines on a case by case basis that the particular detainee no longer poses a threat to the United States or its allies.

There seems to be specific motivation for this labeling of detainees as "enemy combatants" or "unlawful combatants." By calling these detainees "enemy combatants" instead of "prisoners of war," the detainees are not entitled to the protections of the Geneva Convention which would prohibit physical and mental torture of prisoners of war, as well as any other form of coercion, even if it is only unpleasant or disadvantageous treatment. Detainees who are United States citizens have the protections of the Constitution and cannot be detained without charges or be denied their right to legal counsel. They also are protected under the Eighth Amendment. Consider the case of Hamdi v. Rumsfeld decided by the Supreme Court in June, 2004.

After Congress passed the Authorization for Use of Military Force, the President ordered the Armed Forces to Afghanistan to "subdue al Qaeda and quell the Taliban regime that was known to support it." Yaser Hamdi was an American citizen whom the Government had classified as an "enemy combatant" for allegedly fighting alongside the Taliban during the conflict. According to U.S. officials, Hamdi

201. Lewis, supra note 163.
202. Bowden, supra note 102.
203. Id.
205. Bowden, supra note 102.
206. Id.
207. The Eighth Amendment prohibits "cruel and unusual punishment." U.S. CONST. amend. VIII; see also Bowden, supra note 102.
209. Id. at 2635.
210. Id. at 2635-36.
surrendered to the Northern Alliance while fighting on behalf of the Taliban during the U.S. invasion of Afghanistan. After being seized, he was detained at a naval brig in Charleston, South Carolina for nearly two and a half years without access to attorneys or without charges being filed against him. Hamdi’s father filed a habeas petition on his behalf under 28 U.S.C. § 2241 alleging, among other things, that the Government held his son in violation of the Fifth and Fourteenth Amendments. Under the Geneva Convention, the United States government was required to release its prisoners of war upon the defeat of the Afghan government. Instead, the government classified all Taliban soldiers, “by virtue of having fought for [a] government that had effectively conspired to commit a terrorist act,” as enemy combatants in the U.S. government’s ongoing “war on terrorism.” The United States claimed that such a designation entitled them to withhold any protections afforded by due process of law, right to counsel, habeas corpus, and the other guarantees enumerated in the Constitution and Bill of Rights.

The Fourth Circuit found that because it was undisputed that Hamdi was captured in an active combat zone in Afghanistan, Hamdi does not have a right to a factual inquiry or evidentiary hearing allowing him to be heard or to rebut the Government’s assertions. The Fourth Circuit Court of Appeals held that assuming express congressional authorization of the detention was required by 18 U.S.C. § 4001(a), which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,” the post-September 11 Authorization for Use of Military Force provided the authorization for Hamdi’s detention. The Court also stated that

> [t]he privilege of citizenship ... entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches. ... [T]he Constitution does not entitle him to a searching review of the factual determinations underlying his seizure.

211. Id.
212. Id. at 2636.
213. Id.
214. Id.
216. Id.
218. Id. at 2638.
219. Id. at 2639.
The Supreme Court then vacated the judgment and remanded the case.\textsuperscript{220} The Court concluded “that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”\textsuperscript{221}

Although the Supreme Court decided that Hamdi could not be held indefinitely without some access to the legal system, it did not clarify how the Authorization for Use of Military Force was to be implemented.\textsuperscript{222} The decision only provided a “nebulous admission” that the concept of habeas corpus, in principle, exists.\textsuperscript{223} The Pentagon and Department of Justice decided to release Hamdi.\textsuperscript{224} The Supreme Court’s decision did not order the government to release Hamdi. Instead, it ordered that the government simply had to provide Hamdi with a hearing so that the courts could determine how to proceed. A criminal indictment of Hamdi would by its very nature give jurisdiction over Hamdi to the U.S. federal court system.\textsuperscript{225} This would undermine the Pentagon’s claim of power to label and punish “enemy combatants” without judicial interference. Furthermore, “[p]rosecuting Hamdi would have enabled the federal judiciary to directly rule that the invasion of Afghanistan was unlawful under the . . . Constitution.”\textsuperscript{226}

Although Hamdi was a citizen of the United States, the vast majority of the thousands of detainees are not American citizens, nor are they considered prisoners of war, despite the fact that they were captured during the fighting in Afghanistan. These detainees are only afforded the protections of the United States international agreements.\textsuperscript{227} These international agreements and treaties, even if valid, are in effect, unenforceable.\textsuperscript{228} There are no proficient ways of enforcing breaches of international covenants.\textsuperscript{229} To classify all prisoners detained at Guantanamo as “unlawful combatants” was an extraordinary exercise of

\begin{itemize}
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Id. at 2648.
\item \textsuperscript{222} See id.; see also Mike Whitney, Hamdi’s Deportation Case, Znet: Repression Watch (Oct. 13, 2004), available at http://www.zmag.org/content/print_article.cfm?itemID=6403&sectionID=43.
\item \textsuperscript{223} Whitney, supra note 222.
\item \textsuperscript{224} Hornberger, supra note 215.
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Id.
\item \textsuperscript{227} Bowden, supra note 102.
\item \textsuperscript{228} Id.; see also JANIS & NOYES, supra note 5.
\item \textsuperscript{229} See JANIS & NOYES, supra note 5, at 260-313. The International Court of Justice is the regulatory arm of international agreements, and it lacks power to enforce decisions. Id.
\end{itemize}
unilateral judgment.\textsuperscript{230} Without implementing a formal fact finding process through the use of a tribunal or other like hearing, it could be literally impossible to know if all detainees were, in fact, harboring terrorism.\textsuperscript{231} To illustrate this point, consider the findings of the military tribunals conducted in the 1991 Persian Gulf War. A total of 1,196 hearings were conducted before military tribunals.\textsuperscript{232} Of those, nearly seventy-five percent of prisoners, a total of 886,\textsuperscript{233} were found to be innocent civilians picked up in the wide sweeps by the military forces.\textsuperscript{234} Subsequently, those civilians were freed.\textsuperscript{235} A total of 310 detainees were granted POW status.\textsuperscript{236}

In the present situation at Guantanamo, the Bush administration has ignored international law, U.S. military regulations, and longstanding U.S. practice by making the “blanket determination that all persons held at Guantanamo Bay were ‘unlawful combatants’ and were not entitled to the protections due prisoners of war or protected persons under the Geneva Conventions.”\textsuperscript{237} Since the Court ruled in June that these detainees have a right to challenge their incarceration, the hearings have been criticized as not meeting the traditional standards of normal habeas court proceedings.\textsuperscript{238} The detainees are not afforded legal aid during the proceedings, nor are they allowed to see much of the evidence before them.\textsuperscript{239} These hearings (or “combatant status review tribunals” as they are officially called) were devised and initiated just weeks after the decision was handed down, and as such were not structured with great care.\textsuperscript{240} The administration, however, believes in the tribunals’

\begin{itemize}
  \item \textsuperscript{230} Lewis, supra note 163.
  \item \textsuperscript{231} Id. Even suspected terrorists are protected by the Convention Against Torture. See J. Herman Burgers and Hans Danelius’s \textit{The United Nations Convention Against Torture}, supra note 43 at 69-70, for a discussion of the various manifestations of the Torture Convention beginning with the Swedish draft until its final adoption in 1984. A common theme throughout all drafts was its applicability to “a person” and not limiting the proscription to those who are not accused of a malicious act. This is the premise behind not allowing a statement made under duress of torture to be used as evidence. Id.
  \item \textsuperscript{232} Human Rights Watch, \textit{United States: Guantanamo Two Years On: U.S. Detentions Undermine the Rule of Law} (Jan. 9, 2004), at \url{http://hrw.org/english/docs/2004/01/09/usdom6917.htm} [hereinafter Human Rights Watch]; see also Lewis, supra note 163.
  \item \textsuperscript{233} Human Rights Watch, supra note 232.
  \item \textsuperscript{234} Lewis, supra note 163.
  \item \textsuperscript{235} Id.
  \item \textsuperscript{236} Human Rights Watch, supra note 232.
  \item \textsuperscript{237} Id.
  \item \textsuperscript{238} Neil A. Lewis, \textit{Guantanamo Prisoners Getting Their Day, but Hardly in Court}, N.Y. TIMES, Nov. 8, 2004, at A1.
  \item \textsuperscript{239} Id.
  \item \textsuperscript{240} Id.
\end{itemize}
effectiveness, arguing in federal court that the tribunals more than satisfy the Supreme Court’s ruling.\(^{241}\) However, the inadequacies that the administration denies are evident. So far, 320 detainees have appeared before the tribunals and out of the 104 which the Pentagon has passed final judgment on, 103 were found to have been properly detained as unlawful enemy combatants.\(^{242}\) On the other hand, if complete individualized determinations of status are conducted before tribunals, the likely outcome would be: first, that many may be neither Taliban nor al Qaeda fighters; and second, that the Taliban fighters, as members of the regular armed forces of the then-government of Afghanistan, are entitled to prisoner of war status.\(^{243}\) Instead, the U.S. government has “sought to avoid the prohibition in international human rights law against prolonged, indefinite detention by claiming that terrorist suspects are combatants in the war against terrorism.”\(^{244}\) The laws of war permit the detention of captured combatants until the end of hostilities so the Administration has developed a loosely framed “war on terror” without a clear end.\(^{245}\) Subsequently, Guantanamo detainees could effectively be held indefinitely.\(^{246}\)

Because of this, there may be specific reasons why the United States has utilized the naval and military base at Guantanamo Bay, Cuba as the facility to house detained Afghani fighters.\(^{247}\) The United States base in Guantanamo Bay is controlled and run by means of a long-term, multi-year lease with the Cuban government.\(^{248}\) Previous case law\(^{249}\) has held that United States-leased territories are not within the sovereignty of the United States and subsequently, the United States federal courts do not have extraterritorial jurisdiction in these lands.\(^{250}\) That being said, the March 6, 2003 Draft Report elicits another interpretation of

\(^{241}\) *Id.*

\(^{242}\) *Id.* These detainees will have another chance at appealing their detention on the grounds they no longer pose a threat. *Id.*

\(^{243}\) Human Rights Watch, *supra* note 232.

\(^{244}\) *Id.*

\(^{245}\) *Id.*

\(^{246}\) *Id.*

\(^{247}\) van der Vyver, *supra* note 39, at 446.

\(^{248}\) *Id.*

\(^{249}\) In *Cuban American Bar Ass’n v. Christopher*, the Eleventh Circuit held that migrants at Guantanamo Bay had no legal rights in the United States judicial system. 43 F.3d 1412, 1429-30 (11th Cir. 1995). Moreover, in *Vermilya-Brown Co. v. Connell*, the Court held that since Bermuda was leased by the United States from Great Britain, it fell under the sovereignty of Great Britain. 335 U.S. 377, 380-81 (1948).

\(^{250}\) van der Vyver, *supra* note 39, at 446.
Guantanamo "ownership" put forth by the government that is as ingenious as it is troubling. The federal statute against torture is limited to acts committed "outside the United States." The 2003 Draft Report argues that the Guantanamo Bay naval base "is included within the definition of the special maritime and territorial jurisdiction of the United States," so torture that took place at those facilities would not be covered by the prohibitions set forth in § 2340A. However, in the Guantanamo cases presently before the Supreme Court and as described above, the Bush administration has vigorously defended the opinion that is, in short, the opposite view they have taken in the Draft Report: Guantanamo is under Cuban sovereignty and hence is outside all jurisdictional reach of United States courts to hear a case brought before them. This is the epitome of a double standard being used to justify the Bush administration's objectives. This trend of not extending jurisdiction to United States controlled territories continued to be implemented in the cases of Guantanamo detainees until the Supreme Court's decision in Rasul v. Bush, which finally ended this argument, holding in part that Guantanamo Bay is within the jurisdiction of federal courts.

In Rasul v. Bush, decided on June 28, 2004, the Supreme Court took a major step in affirming the rights of enemy combatants held by the United States government in the post-September 11 war on terrorism. The core question before the Court was whether non-citizens classified as enemy combatants and being detained at Guantanamo Bay had the right to file petitions for writs of habeas corpus. The Supreme Court decided two primary issues, with Justice Stevens writing the majority opinion. First, no distinction can be made between a citizen and a non-citizen held in custody and both have rights to petition for a writ of habeas corpus. Second, the majority found that Guantanamo Bay is within the jurisdiction of federal courts, entitling the non-citizens detained there to file petitions for writs of habeas corpus.

251. Lewis, supra note 163.
253. WORKING GROUP REPORT, supra note 9, at 7.
254. Lewis, supra note 163.
256. Id.
258. Rasul, 124 S. Ct. at 2690.
259. Id. at 2698-99.
260. Id. at 2696.
As this Note has discussed above, it had been the administration’s position that the federal judiciary’s reach does not extend to Guantanamo Bay because it is outside the “sovereign territory” of the United States. In rejecting that argument, the Court held that federal judicial review applies to Guantanamo Bay, since it is a territory in which the United States exercises plenary and exclusive jurisdiction, even if not “ultimate sovereignty.”

The Court found support for its analysis in history. The writ has “root[s] deep into the genius of our common law.... [and has become] an integral part of our common law heritage.” The Rasul ruling is limited to the treatment of non-citizens held as “enemy combatants.” Nevertheless, the decision handed down sets an important precedent for the rights of all non-citizens detained by the United States government. That being said, “[i]t remains unclear whether the court’s ruling in the Rasul case applies to detention of non-citizens” by the United States in other foreign locations outside of Guantanamo Bay.

In analyzing Scalia’s dissent, it seems logical that the Supreme Court’s decision does indeed extend to all non-citizens detained by the government. “In abandoning the venerable statutory line... the Court boldly extends the scope of the habeas statute to the four corners of the earth.”

The next series of cases dealing with the issue of whether or not detainees should be afforded a tribunal to determine their status started in an order dated August 17, 2004, in which Judge Kessler designated Judge Joyce Hens Green to coordinate and manage all proceedings in the cases dealing with the right to tribunal, and to render decisions in those proceedings. On September 15, 2004, an Executive Session Resolution further clarified that Judge Green would “identify and delineate both procedural and substantive issues common to all or some of these cases and, as consented to by the transferring judge in each case, rule on common procedural issues.” The resolution also stated that a transferring judge could resolve the issue on her own if that judge deemed it appropriate. This is what happened in the consolidated

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261. Id. at 2693, 2696, 2698-99.
262. Id. at 2696-97.
263. Id. at 2692.
264. Chishti, supra note 257.
265. Id.
266. Rasul, 124 S. Ct. at 2706 (Scalia, J., dissenting).
268. Id.
269. Id.
cases of *Khalid v. Bush*\(^{270}\) and *Boumedeine v. Bush*\(^{271}\). On January 19, 2005, Judge Leon found that there is "no viable legal theory under international law by which a federal court could issue a writ."\(^{272}\)

On January 31, 2005, Judge Green issued a Memorandum Opinion\(^{273}\) that applied to eleven other cases involving detainees' right to a tribunal, cases which had been transferred to her.\(^{274}\) She ruled, in part, that the Bush administration must allow prisoners at Guantanamo to contest their detention in U.S. courts, concluding that special military reviews established by the Pentagon as an alternative are illegal.\(^{275}\) Judge Green's ruling directly conflicts with the one issued by Judge Leon described above.\(^{276}\) Judge Green's decision even went "beyond the question of whether detainees had rights and found the 'combatant status review tribunals' illegal."\(^{277}\) These split decisions inevitably mean that the conflict over tribunals will now head to higher courts.\(^{278}\) Still, Judge Green's decision was a legal victory for the detainees and underscored the ongoing legal battle over how to implement the Supreme Court's ruling in *Rasul v. Bush*\(^{279}\) that gave the detainees the right to contest U.S. accusations and challenge their indefinite detentions in United States courts.\(^{280}\)

Assuming for the moment that the arguments set forth thus far are correct, and the assertions made in the various memoranda advocating the expansion of interrogation techniques and permissible forms of questioning that the administration has classified as non-torture are illegal under domestic or international law, who then may be held responsible? The August 2002 Bybee Memorandum, arguing that the President could order the use of torture, was addressed to the White House Counsel Alberto Gonzales.\(^{281}\) This begs the question as to what action, if any, did President Bush take as a result of the suggestion

\(^{271}\) Id.
\(^{272}\) Id. at 330.
\(^{273}\) In re Guantanamo Detainee Cases, 355 F. Supp. 2d at 452. Her opinion combined the 11 cases before her. Id.
\(^{274}\) Id.
\(^{275}\) Id. at 481.
\(^{276}\) Carol D. Leonnig, Judge Rules Detainee Tribunals Illegal, WASH. POST, Feb. 1, 2005, at A01.
\(^{277}\) Id.
\(^{278}\) Id.
\(^{280}\) Leonnig, supra note 276.
\(^{281}\) Memorandum from U.S. Department of Justice Office of Legal Counsel, to Alberto R. Gonzales Counsel to the President at 1 (August 1, 2002) (on file with author).
relayed by the Justice Department? Anthony Lewis has suggested that one possibility is that the President, advised by the Office of Legal Counsel that he had full discretion to disregard legal prohibitions on torture, delegated power to Rumsfeld and Tenet to use means of extracting information from detainees that would directly conflict with the laws prohibiting torture.282 This theory could help explain the reasons for Secretary Rumsfeld to authorize illegal interrogation techniques and personally approve the use of those techniques in December 2002, which is the controversy surrounding the Ali v. Rumsfeld case addressed earlier.283 The Supreme Court is currently faced with deciding the extent to which presidential power can reach.284 Nonetheless, historically, the Supreme Court has been reluctant to challenge executive assertions of power during times in which the United States has been involved in a war.285

"When a violation of international law occurs, there are consequences for the government that has committed" the violation.286 Despite the assertions made in the August 2002 Department of Justice Memorandum, there is the real possibility that agents of that government will be held personally liable for acts of torture carried out under the government’s order or command.287 Furthermore, the responsibility of the government attaches to the State itself.288 In January 2005, Army Reserve Spc. Charles Graner took the stand to testify in the penalty phase of his court martial on charges of abusing detainees at Abu Ghrabib prison.289 At a minimum, seven of the ten jurors, four officers and six enlisted personnel, had to agree before convicting Graner on each count.290 After deliberating, the jury convicted on two counts of conspiracy, including photographing a detainee being dragged by another guard; one count of dereliction of duty for failing to protect

282. Lewis, supra note 163.
283. See supra note 37.
285. Lewis, supra note 163.
287. RODLEY, supra note 286, at 96; see also BOULESBAA, supra note 46, at 25 (describing that the United States took the position that Article 1 of the Torture Convention applied to acts carried out when the person was in the government's custody or physical control).
288. RODLEY, supra note 286, at 96.
290. Id.
prisoners from abuse, cruelty and maltreatment; four counts of maltreatment of detainees; one count of aggravated assault, for striking a detainee with an expandable baton, causing him to cry out; one count of an indecent act; and a lesser charge in the alleged beating of a Syrian inmate. According to the defense put forward in the case, Graner was instructed by military intelligence officers to “rough up” inmates in order to extract information. Graner is not the first or last to be charged despite claims by the Department of Justice that agents acting in official capacity would be shielded from prosecution from charges of torture. While a state will be held liable when an individual acting on the state’s behalf commits a proscribed act of torture, an interesting question arises when an individual commits an act of torture when he is not acting in official capacity or when he is not acting on behalf of the government. The Torture Convention does not apply to private individuals not acting on behalf of the government. This obviously limits not only the scope of the Convention, but also its effectiveness.

International law prohibits the use of torture for any and all purposes. Additionally, responsibility will attach to actors engaged in torturous activities. Conversely, there are theories that exist which justify and advocate for the use of torture in certain situations. Although these uses of torture are illegal under the applicable treaties and international agreements, as well as the legal and moral principles raised in this Note, the Torture Memoranda written on behalf of the Administration advocate for a few justifiable uses of torture.

V. JUSTIFICATIONS FOR TORTURE AND EFFECTS OF A SHIFT IN POLICY

“The United States must defend liberty and justice because these principles are right and true for all people everywhere . . . .”

—United States National Security Strategy, September 2002

Justification for the use of torture will inevitably give rise to feverish controversy among the people and nations of the world, regardless of their ideological or political beliefs. Justifications such as

291. Id.
292. Id.
293. Id.
294. BOULESBAA, supra note 46, at 39.
295. Id.
those set out in the Torture Memoranda seem to be saying that torture and other ill treatment against persons may, in certain circumstances, be justifiable despite the fact that treaty obligations prohibit torture and ill treatment "in absolute terms and permitted no derogation ... even in time of war or other public emergency threatening the life [or viability] of the nation."\(^{297}\) However, as the European Commission on Human Rights asked in the case of *Ireland v. United Kingdom*,\(^ {298}\) is the prohibition against torture "an absolute one, or [are] there ... special circumstances, such as those existing in the present case, in which treatment contrary to Art. 3 [such as torture or other similar acts] may be justified or excused"?\(^{299}\) The Commission concluded that the prohibition "is an absolute one and that there can never be under the [Geneva] Convention or under international law, a justification for acts in breach of" the provisions that absolutely prohibit the use of torture and other like treatments against people.\(^ {300}\)

As Nigel S. Rodley points out, the European Commission and Court of Human Rights retraction of the "relevance of the notion of justifiability" seems to be effective, yet the Commission's "formulation still begs the question to some extent" as to the lengths of a so-called prohibition against torture.\(^ {301}\)

There are two theories that justify the use of torture which seem to be the most relevant and that seem to play a role in strategies of permissible interrogation techniques advocated by the Torture Memoranda. These two principles coincide with the objectives the United States government has explored in the memoranda. These two theories are the "Utilitarian Principle" and "Customary Use of Torture."

### A. The Utilitarian Principle—Allowable for the "Greater Good"

Justification under the utilitarian principle centers on the notion that harsh treatment is warranted in order to elicit information that may save others from future harms.\(^ {302}\) This principle has been advanced in a number of cases, although the argument has never been made by a

\(^{297}\) Rodley, supra note 286, at 74.


\(^{300}\) *Id.* at 752.

\(^{301}\) Rodley, *supra* note 286, at 75.

\(^{302}\) *Id.*; see also van der Vyver, *supra* note 39, at 453-54.
Nevertheless, the utilitarian principle of torture has a sufficient enough following to merit serious attention. Proponents of the utilitarian reasoning often demonstrate the impossibility of confining such a principle merely to the "lesser evil for the greater good." If torture is used under the premise of necessity, there is nothing that will stop it from being used on the grounds of expediency later on. It will soon become a "slippery slope"; the incorporation of justifiable torture under the utilitarian principal would undercut every formulation of the absolute prohibition against torture and other ill treatment.

It can be argued that a utilitarian principle for torture may be rooted in the United States' Joint Resolution for the Authorization for Use of Military Force, which was passed in response to the terrorist attacks on New York City and Washington D.C. This resolution appears to have been based on the utilitarian thought. In the Joint Resolution, Congress gave the President authority to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any further acts of international terrorism against the United States by such nations, organizations, or persons.

This congressional resolution was unique in that it permitted the President to engage the United States in hostilities without defining any particular nation against whom the force of the armies should be directed.

303. RODLEY, supra note 286, at 76.
305. RODLEY, supra note 286, at 76. "[H]ow many broken bodies equal how many lives? How many broken wills to save a government?" Id.
307. RODLEY, supra note 286, at 76.
309. Id.; see RODLEY, supra note 286.
310. Id.
B. Allowable Under Customary International Law

It can also be argued that torture cannot possibly violate customary international law. There are countless states that have violated human rights and committed torture with impunity and without justification. On the same token, there are also countless codes, statutes, rules of law, treaties, and other documents to enforce human rights and guarantee that they are not violated. The question becomes, how can a customary international law prohibition be grounded in the practice of states if these same states routinely engage in that practice? Nigel S. Rodley sums up the argument that torture has become a customary norm:

A number of writers have refuted this challenge, and it is not proposed to rehearse the polemic in these pages. Suffice it to say that since governments which practise torture not only do not seek to justify their behaviour but in fact deny it vehemently, human rights violations in the form of torture cannot be offered as evidence of state practice. As to the lack, or inadequacy, of enforcement machinery, this can hardly be offered as proof that the rule requiring enforcement does not exist. In fact, there has in the last two decades at the UN been a burgeoning of newly created machinery, a trend that suggests slow, and perhaps inadequate, but definite incremental steps towards more effective implementation of human rights norms.

In fact, since torture has been condemned by international communities through the use of agreements and treaties, many commentaries have now concluded that “customary international law . . . prohibits [(not allows)] the use of torture by public officials.”

VI. CONCLUSIONS

"Man torturing man is a fiend beyond description. You turn a corner in the dark and there he is. You congeal into a bundle of inanimate fear. You become the very soul of anesthesia. But there is no escaping him. It is your turn now . . . ."

—Henry Miller

313. Id.
314. Id.
316. GARCIA, supra note 40, at 1.
The legal and pragmatic issues regarding the legality of torture and the subsequent legal protections of those who commit such acts that have been raised by the sensational assertions contained in the various memorandum officially released by the White House in June 2004 are numerous and troubling. The current “war on terrorism,” as defined by the Executive Branch, has been used as a legal tool for expanding executive power at the cost of domestic law, and even more importantly, international law. These assertions contained in the aforementioned legal Memoranda that the President has unconstrained constitutional power to order the torture of prisoners despite statutes and treaties forbidding such torture is another reach of presidential hegemony.

“The basic premise of the American constitutional system is that those who hold power are subject to the law. As John Adams first said, the United States is meant to be a government of laws, not men.”

The Supreme Court, in deciding the various detainee abuse cases that are before it, could send a signal that there are limits to the expansion of Presidential authority by finding that the Executive branch overstepped constitutional bounds by detaining “combatants” indefinitely without trial. Others may argue that the answer will have to come from the political system by means of a congressional investigation or via a joint investigation committee. Even further, some advocate for a criminal investigation by an independent prosecutor with the power to subpoena.

International law specifically states that torture is a crime. It flows logically that the crime of torture as defined internationally, in treaties that we are signatories to and have ratified, should be identical.
to the domestic definition of torture. As this discussion has highlighted, this does not seem to be the actual case.\textsuperscript{325} The United States has implemented a definition of torture that is much narrower than the definition contained in international law; subsequently expanding the boundaries of what it feels is permissible behavior. The effect of suggesting that torture may be permissible legally and morally could be catastrophic. If the United States, unquestionably the strongest power in the international community, is setting out to revamp human rights, what implications will that have on the world? The need for stringent boundaries of what is permissible treatment of prisoners under international law is quickly becoming a pragmatic call for lawfulness in an apparent crisis of lawlessness. The assertions set forth by the United States in the Torture Memoranda unquestionably go against a call for lawfulness.\textsuperscript{326} One thing is clear, however. Although the Justice Department's December 30, 2004 revision\textsuperscript{327} of the controversial August 1, 2002 Torture Memorandum, which "supersedes the August 2002 Memorandum in its entirety,"\textsuperscript{328} is a step in the right direction for the administration to take, the Executive's intervention at this point in time is rudimentary and leaves one to wonder what exactly the administration hopes to achieve by the new memorandum.

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\textsuperscript{325} \textit{See} van der Vyver, \textit{supra} note 39, at 434-38.
\textsuperscript{326} \textit{See} discussion \textit{supra} Part III.
\textsuperscript{328} \textit{Id.} at 2.

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