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REDEFINING TORTURE IN THE AGE OF TERRORISM: AN ARGUMENT AGAINST THE DILUTION OF HUMAN RIGHTS

Miri Lim

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REDEFINING TORTURE IN THE AGE OF TERRORISM: AN ARGUMENT AGAINST THE DILUTION OF HUMAN RIGHTS

Miri Lim*

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I. Introduction

In our "war on terrorism," national security interests may constitute a legitimate reason for sacrificing other interests, except for one uncompromising interest: the human right against torture. For the U.S. government, the fear of terrorist attacks has triggered a narrow interpretation of the definition of torture and led to increased flexibility in the interrogation techniques applied to terrorism suspects. As evident in the legal memoranda prepared by the Office of Legal Counsel (OLC) for the Department of Justice, the U.S. interpretation of torture is narrower than that of international law as well as of ordinary domestic law. This redefinition has, to varying degrees, given rise to three problems: the tragic prisoner abuse in Abu Ghraib, indefinite detention with little protection against torture in Guantanamo Bay, and the dangerous policy of rendition.

This Note argues that redefining torture is ineffective in furthering U.S. interests in the war on terrorism and undermines both human dignity and respect for racial and cultural differences. Part II of this Note identifies areas where the redefinition has led to tragic results. Part III compares the narrow interpretation of torture in the two OLC memoranda and the McCain Amendment with the broader interpretation in the U.N. Convention Against Torture, 18 U.S.C. § 2340, and the Torture Victim Protection Act. Part IV analyzes the effects of the redefinition in terms of policy and critical race theory. Part V suggests two potential solutions for eliminating the use of torture: the creation of a transparent system and the enforcement of strict adherence to international norms and values.

II. Problems Created by the Redefinition of Torture

A. Abu Ghraib

Abu Ghraib is an example of the abusive use of interrogation methods in the name of fighting against terrorism. Allegations of detainees at the Abu Ghraib prison in Iraq compel one to question the scope of torture.¹ Statements from thirteen detainees taken shortly after a soldier reported the

¹ See Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge: Abu Ghraib Detainees' Statements Describe Sexual Humiliation and Savage Beatings*, WASH. POST, May 21, 2004, at A01 (describing in detail various allegations of prisoners at Abu Ghraib).

incidents to military investigators in January 2004 allege that the detainees were "being ridden like animals, sexually fondled by female soldiers and forced to retrieve their food from toilets."² The detainees were also savagely beaten, force-fed pork and liquor, sexually humiliated and assaulted with rape and sodomy, and forced to masturbate in front of female soldiers.³ Hiadar Sabar Abed Miktub al-Aboodi, detainee No. 13077, said American soldiers forced the detainees to walk like dogs on their hands and knees and started hitting the detainees hard on their faces and chests if they did not bark like dogs.⁴ He also said, "[a]fter that, they took us to our cells, took the mattresses out and dropped water on the floor and they made us sleep on our stomachs on the floor with the bags on our head and they took pictures of everything."⁵

While it may be easy to shift all the blame for the abuse to a few individuals, the question of the precise role of those highest up on the chain of command cannot be ignored. It is important to determine whether the narrow interpretation of torture by senior officials contributed to the poor oversight of the Abu Ghraib prison.⁶ An Army report by retired Colonel Stuart A. Herrington showed that U.S. military leaders in Iraq were told of allegations of detainee abuse even before January 2004, when they first learned about the situation in Abu Ghraib.⁷ Another Army inquiry by Major General George R. Fay concluded that the U.S. commanders played no role in ordering or permitting the abuse, but that they failed to provide sufficient supervision and leadership.⁸ In fact, "[w]ithout adequate oversight and discipline, an environment was created in which shifting guidelines for control over an estimated 45,000 detainees, and evolving rules for interrogations, could be interpreted freely and even disregarded."⁹ Furthermore, the Schlesinger Report found that the "abuses were not just the failure of some individuals to follow known standards, and they are more

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See Mark A. Drumbl, "Lesser Evils" in the War on Terrorism, 36 CASE W. RES. J. INT'L L. 335, 340 (2004) ("Independent and Army inquiries into the prison abuses suggest that senior officials, while not personally culpable, are to be faulted for failing to exercise proper oversight.").

⁷ See Josh White, *U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds*, WASH. POST, Dec. 1, 2004, at A01 (describing the report warning Army generals of detainee abuse by members of an elite military and CIA task force more than a month before the Army investigators received photographs from Abu Ghraib).

⁸ See Thom Shanker & Kate Zernike, *Abuse Inquiry Faults Officers on Leadership*, N.Y. TIMES, Aug. 19, 2004, at A1 (stating that an Army inquiry found that senior U.S. commanders, because of both inadequate leadership and insufficient resources, created conditions that allowed abuses to occur at Abu Ghraib).

⁹ *Id.*

than the failure of a few leaders to enforce proper discipline. . . . There is both institutional and personal responsibility at higher levels."¹⁰ Lastly, the Church Report found that early warning signs of serious abuses did not receive enough attention and that the unit commanders did not get clear instructions that might have stopped the abuses.¹¹ The Report also faulted senior officials for failing to establish clear interrogation policies, even though it did not place direct responsibility on those officials for the abuses.¹²

B. Guantanamo Bay

The U.S. military base in Guantanamo Bay, Cuba has detained 450 foreign nationals as of July 2006.¹³ Pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War, the U.S. has occupied the Guantanamo Base, which is comprised of forty-five square miles of land and water along the southeast coast of Cuba.¹⁴ The United States exercises complete jurisdiction and control over the Base while it recognizes the continuance of the ultimate sovereignty of Cuba over the area.¹⁵

The American policy of detaining foreign nationals at Guantanamo is a controversial issue, largely because of allegations of egregious human rights abuses at the base. The International Committee of the Red Cross (ICRC) criticized the military base for the quality of interrogation methods used against the detainees.¹⁶ The ICRC charged that the U.S. military has "intentionally used psychological and sometimes physical coercion 'tantamount to torture' on prisoners at Guantanamo Bay."¹⁷ For example, detainees were subject to beatings, exposure to loud and persistent noise and music, humiliating acts, solitary confinement, temperature extremes, and

¹⁰ See Bradley Graham & Josh White, *Top Pentagon Leaders Faulted in Prison Abuse: Oversight by Rumsfeld and Others Inadequate, Panel Says*, WASH. POST, Aug. 25, 2004, at A01 (noting that an independent panel faulted the Pentagon's top leaders for failing to exercise adequate oversight and for allowing conditions that led to the detainee abuse).

¹¹ See Eric Schmitt, *New Interrogation Rules Set for Detainees in Iraq*, N.Y. TIMES, Mar. 10, 2005, at A1 (describing the naval inspector general inquiry that criticized the little control exerted over the conduct of interrogations in Iraq).

¹² *Id.*

¹³ Josh White, *Hurdle to Closing Guantanamo: Where to Put Inmates*, WASH. POST, July 2, 2006, at A08.

¹⁴ *Rasul v. Bush*, 542 U.S. 466, 471 (2004).

¹⁵ *Id.*

¹⁶ See Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES, Nov. 30, 2004, at A1 (describing the report of the International Committee of the Red Cross following a month-long visit to Guantanamo in June 2004).

¹⁷ *Id.*

forced into bodily positions.¹⁸ This is the first time the ICRC has asserted in such strong terms that both physical and psychological treatment of detainees amounted to torture.¹⁹

One possible contribution to the alleged use of torture in Guantanamo Bay is the U.S. government's attempt to avoid judicial intervention in the handling of terrorism suspects. In *Rasul v. Bush*,²⁰ the Supreme Court held that United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay.²¹ In response to this decision, the Pentagon held new hearings, called the Combatant Status Review Tribunals (CSRTs), in order to determine whether each detainee met the definition of an enemy combatant.²² The determination of enemy combatant status is important in that a wrongfully detained noncombatant ostensibly would be released from detention at Guantanamo Bay.²³ Furthermore, if the CSRTs find a detainee to be an enemy combatant, the detainee would receive the prisoner of war status under Article 4 of the Geneva Convention only if he is a lawful combatant.²⁴ If a combatant follows the international laws of armed conflict and thus becomes a lawful combatant during war, combatant's privilege applies and the combatant is immune from prosecution for lawful combat activities.²⁵ Unlawful combatants are those who are not legally authorized to engage in armed conflict but do so without authority.²⁶

An order establishing CSRTs stated that every detainee would be notified of the opportunity to contest designation as an enemy combatant, of

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (allowing federal jurisdiction to hear challenges of foreign detainees at Guantanamo Bay). This case involved two Australian citizens and twelve Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban. *Id.* at 471. The Court considered whether U.S. courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. *Id.* at 470. The Court reasoned that the federal courts have jurisdiction over the petitioners because petitioners contended that they were being held in federal custody in violation of the laws of the United States. *Id.* at 483.

²¹ *Id.*

²² See John Mintz, *Pentagon Sets Hearings for 595 Detainees*, WASH. POST, July 8, 2004, at A01 (stating that the Pentagon announced that it would hold hearings for detainees at the Guantanamo Bay prison in response to the Supreme Court ruling that the government was jailing terrorism suspects without due process).

²³ See Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 8 (2004) (noting that noncombatants include protected civilians, interned civilians, military medical personnel, military chaplains, civilian war correspondents and journalists, and United Nations peacekeepers).

²⁴ Geneva Convention Relative to the Treatment of Prisoners of War art. 4, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

²⁵ Bialke, *supra* note 23, at 9.

²⁶ *Id.* at 4.

the opportunity to consult with and be assisted by a personal representative, and of the right to seek a writ of habeas corpus in the U.S. federal courts.²⁷ Three neutral commissioned officers of the U.S. Armed Forces would hear and decide each detainee's case with a preponderance of evidence, but "there shall be a rebuttable presumption in favor of the Government's evidence."²⁸ Through this process, thirty-three out of 558 detainees were deemed to have been "improperly labeled enemy combatants" at the CSRT hearings, and five of those thirty-three have been released because of difficulties in making arrangements to have them transferred to their home countries.²⁹

Although the creation of CSRTs indicates the government's response to the Supreme Court's ruling, the actual function of these tribunals is to buttress the government's case when confronted by defense attorneys in federal court hearings.³⁰ In mandating an order establishing the CSRTs, Deputy Secretary of Defense Paul D. Wolfowitz stated that the sole intention of the order to create CSRTs was to "improve management within the Department of Defense concerning its detention of enemy combatants at Guantanamo Bay Naval Base, Cuba, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law, in equity, or otherwise by any party against the United States."³¹ Moreover, the officials said that the essential function of the new hearings was to help government lawyers argue their cases for continued detention in the habeas corpus hearings, reasoning that a judge need not inquire too deeply into the cases since the government has already deliberated on each case.³²

Nevertheless, many detainee lawyers and detainees have criticized the CSRTs for their allegedly unfair review process. For example, the CSRTs define an enemy combatant as an individual "who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."³³ Several detainee lawyers argued that this definition of enemy combatant was "so broad that the military has incarcerated people who never took up arms against the United States . . .

²⁷ Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunals (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> [hereinafter Order Establishing CSRTs].

²⁸ *Id.*

²⁹ See Neil A. Lewis, *Guantanamo Detainees Make Their Case*, N.Y. TIMES, Mar. 24, 2005, at A21 (referring to the procedures of the CSRTs preceding the Administrative Review Boards).

³⁰ See Mintz, *supra* note 22, at A01 (noting that the new tribunals were designed for the government to argue that it has been deliberative in its detention decisions and afforded due process).

³¹ Order Establishing CSRTs, *supra* note 27.

³² Mintz, *supra* note 22, at A01.

³³ Order Establishing CSRTs, *supra* note 27.

and professionals who say they unknowingly gave money to charitable organizations that funded al Qaeda."³⁴ Furthermore, one detainee who has been ruled to be "no longer an enemy combatant" thought the review process was unfair and that "the definition of the term 'enemy combatant' was so broad that it could not be understood."³⁵ In addition to the detainee lawyers and detainees, Judge Joyce Hens Green of the United States District Court for the District of Columbia joined their criticism of CSRTs by holding in *In re Guantanamo Detainee Cases*³⁶ that CSRTs were unconstitutional because they denied the detainees' fundamental right to due process under the Fifth Amendment.³⁷ Regarding the allegations of torture, Judge Green stated that "the CSRT did not sufficiently consider whether the evidence upon which the tribunal relied in making its 'enemy combatant' determinations was coerced from the detainees."³⁸ Lawyer Eugene R. Fidell, an expert on military law, said that Judge Green's ruling was "one of a growing number of court decisions limiting White House efforts to claim unbridled power in the name of combating terrorism."³⁹

Similarly, in *Hamdan v. Rumsfeld*,⁴⁰ the district court found that the CSRT was not a competent tribunal to determine Hamdan's status as a prisoner of war under the Geneva Conventions because the CSRT was established to decide whether a detainee is properly detained as an enemy combatant for purposes of continued detention.⁴¹ However, the D.C. Circuit Court reversed the judgment, stating that Congress authorized the President to take action to deter and prevent acts of international terrorism against the

³⁴ Carol D. Leonnig & Julie Tate, *Detainee Hearings Bring New Details and Disputes*, WASH. POST, Dec. 11, 2004, at A01.

³⁵ Josh White & Julie Tate, *In Guantanamo Bay Documents, Prisoners Plead for Release: U.S. Makes First Public Accounting of Detainees*, WASH. POST, Mar. 5, 2006, at A08.

³⁶ See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005) (holding that the detainees have due process right and that the CSRT procedures are unconstitutional for failing to comport with the requirements of due process). In this case, eleven detainees held as enemy combatants at Guantanamo Bay filed habeas corpus petitions. *Id.* at 445. The court considered the contours of the Fifth Amendment right as it applies to the alleged enemy combatants. *Id.* at 465. The court stated that the detainees were entitled to the Fifth Amendment due process right, which is one of the fundamental rights recognized by the U.S. Constitution. *Id.* at 464. The court also noted that the CSRT's reliance on statements allegedly obtained through torture was not constitutional. *Id.* at 472.

³⁷ *Id.* at 481.

³⁸ *Id.* at 473.

³⁹ Carol D. Leonnig, *Judge Rules Detainee Tribunals Illegal*, WASH. POST, Feb. 1, 2005, at A01.

⁴⁰ See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 162 (D.D.C. 2004) (finding that Hamdan had not been determined by a competent tribunal to be an offender triable under the law of war and that the procedures established for the Military Commission by the President's order were contrary to or inconsistent with those applicable to courts-martial). In *Hamdan*, petitioner was captured in Afghanistan in late 2001 during a time of hostilities in that country that followed the terrorist attacks in the United States. *Id.* at 155. Hamdan was detained by American military forces and transferred to Guantanamo Bay. *Id.* The court stated that no proper determination has been made that Hamdan was an offender triable by military tribunal. *Id.* at 158.

⁴¹ *Id.* at 162.

U.S., including establishing military commissions to try detainees like Hamdan.⁴² The Circuit Court disagreed with the district court's holding that Hamdan could not be tried by a military commission unless a competent tribunal determined his prisoner of war status.⁴³ Instead, the Circuit Court found that a military commission is a competent tribunal where Hamdan could assert his claim to his prisoner of war status.⁴⁴ On March 28, 2006, the U.S. Supreme Court heard oral argument in the case. At the Supreme Court, Hamdan argued that the military commission should not charge "a violation in a stateless, territoryless conflict, something as to which the full laws of war have never applied."⁴⁵ Hamdan also argued that public interest requires some limits to be placed on military commissions because the lack of structural limits would "give the President . . . essentially [a] blank check"⁴⁶ Hamdan continued to claim that the CSRT was not a competent tribunal and that a different tribunal must make a determination of his prisoner of war status.⁴⁷ On June 29, 2006, the U.S. Supreme Court concluded that the military commission convened to try Hamdan lacked power to proceed because its structure and procedures violated the Uniform Code of Military Justice and the Geneva Conventions.⁴⁸ The Court disapproved of the military commission's policies of excluding the accused from any part of the proceeding, precluding the accused from ever learning evidence presented against him, admitting testimonial hearsay and evidence obtained through coercion, and permitting the use of unsworn testimony and witnesses' written statements.⁴⁹

The United States began a new set of proceedings called the Administrative Review Boards (ARB) for further determinations operating after a CSRT finding.⁵⁰ Consisting of panels of three military officers, the ARB hearings allow detainees to tell their stories without lawyers and dispute accusations that they were part of the Taliban or allied with Al Qaeda.⁵¹ However, in order to be released, the detainees "must persuade the board that no matter their history, they are not a threat to the United States or its allies."⁵² Like the CSRT hearings, most of the evidence used in ARB

⁴² Hamdan v. Rumsfeld, 415 F.3d 33, 37 (D.C. Cir. 2005).

⁴³ *Id.* at 36.

⁴⁴ *Id.* at 43.

⁴⁵ Transcript of Oral Argument at 19, Hamdan v. Rumsfeld, 2006 WL 846264 (No. 05-184).

⁴⁶ *Id.* at 20.

⁴⁷ *See id.* at 35 (arguing against Rumsfeld's claim that Hamdan could have brought his claim to prisoner of war status before the CSRT and the military commission).

⁴⁸ Hamdan v. Rumsfeld, No. 05-184, 2006 U.S. LEXIS 5185, at 22 (June 29, 2006).

⁴⁹ *Id.* at 97-98.

⁵⁰ *See Lewis, supra* note 29, at A21 (describing the procedures and effect of the Administrative Review Boards).

⁵¹ *Id.*

⁵² *Id.*

proceedings comes from classified reports, which are not available for the detainees to see.⁵³ Although these proceedings seem to provide the detainees with more process, the ARB hearings raise "concerns regarding the role of law in the struggle against terrorism."⁵⁴

To address the concerns raised by the proceedings, on December 30, 2005, Congress enacted the Detainee Treatment Act of 2005.⁵⁵ Although the act barred torture, the act also amended the habeas corpus statute to provide that no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained at Guantanamo Bay or any other action against the United States or its agents relating to any aspect of the detention.⁵⁶ Senator Lindsey Graham asserted that U.S. courts have become clogged by "frivolous claims" on behalf of nearly 300 detainees in Cuba and favored "denying foreign terrorism suspects the same rights in federal court that are afforded to U.S. citizens."⁵⁷

C. The Policy of Rendition

If Guantanamo Bay illustrates the problem of moving away from judicial intervention under the color of national law, the policy of rendition reflects the U.S. government's resistance to assuming responsibility to act under any law. Rendition is "a system of sending captives to other countries with less progressive human rights standards in order to interrogate them more aggressively, [and it] often results in torture."⁵⁸ The CIA has taken this approach "to transfer captives it picks up abroad to third countries willing to hold them indefinitely and without public proceedings."⁵⁹ Rendition involves arrangements between the United States and other countries, such as Egypt, Jordan, and Afghanistan, that agree to have local security services hold terrorism suspects in their facilities for interrogation by CIA and foreign liaison officers.⁶⁰ Although rendition originated in the 1990s "as a way of picking up criminals abroad, such as drug kingpins, and delivering them to courts in the United States or other countries," the practice has changed since

⁵³ *Id.*

⁵⁴ Mark A. Drumbl, *Guantanamo, Rasul, and the Twilight of Law*, 53 *DRAKE L. REV.* 897, 900 (2005).

⁵⁵ Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006 (2005).

⁵⁶ *Id.*

⁵⁷ Josh White, *Detainees Face Limited Access to Courts: But Bill Awaiting Bush Signature Would Shield Terror Suspects from U.S. Abuse*, *WASH. POST*, Dec. 24, 2005, at A04.

⁵⁸ Andrew A. Moher, Note and Comment, *The Lesser of Two Evils? An Argument for Judicially Sanctioned Torture in a Post-9/11 World*, 26 *T. JEFFERSON L. REV.* 469, 479-80 (2004).

⁵⁹ Dana Priest, *Long-Term Plan Sought for Terror Suspects*, *WASH. POST*, Jan. 2, 2005, at A01.

⁶⁰ *Id.*

2001 to make certain detainees neither go to court nor go back to the streets.⁶¹ In contrast to Guantanamo Bay, where military lawyers, news reporters, and the Red Cross have access to monitor the conditions of the prison and the treatment of prisoners, the CIA's overseas interrogation facilities are "off-limits" to outsiders.⁶² The CIA, finding itself "[f]ree from the scrutiny of military lawyers steeped in the international laws of war, . . . [has] the leeway to exert physically and psychologically aggressive techniques. . ."⁶³ The policy of rendition by definition creates situations in which interrogators are prone to view torture as part of the interrogation process.

One vivid example of the danger of this policy is the case of Maher Arar, a Canadian citizen rendered to Syria. On September 26, 2002, Arar was detained at JFK airport while in transit to Canada and held in U.S. custody for thirteen days while he was questioned about his alleged links with Al-Qaeda.⁶⁴ After being deported to Syria without any hearing and without his family, lawyer, or the Canadian consulate being informed, Arar was taken to the Palestine branch of Syrian military intelligence known for the routine torture of political prisoners.⁶⁵ The Syrian military officers severely beat him with electrical cables during six days of interrogation and threatened him with electric shocks and the "metal chair," a torture device that stretches the spine.⁶⁶ Consequently, Arar falsely confessed to having trained in Afghanistan with al-Qaeda and was held in a tiny basement cell without light for more than ten months.⁶⁷ The U.S. finally returned him to Canada after determining that he was not a member of al-Qaeda.⁶⁸ Arar later sued the United States for this action, but the United States District Court judge in Brooklyn dismissed the case, holding that the court did not have the authority to review the actions because they involved national security and foreign relations.⁶⁹ Arar's lawyer said that the ruling set "a frightening precedent" by suggesting that the courts were unable to prevent torture.⁷⁰ Arar also testified in Brussels before a European Parliament committee

⁶¹ *Id.*

⁶² See Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A01 (describing the rendition process in countries known for human rights violations, such as Afghanistan, Jordan, Egypt, and Morocco).

⁶³ *Id.*

⁶⁴ Press Release, Amnesty International, USA: *Deporting for Torture?* (Nov. 14, 2003), available at <http://web.amnesty.org/library/index/engamr511392003> [hereinafter *Deporting for Torture*].

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006).

⁷⁰ Scott Shane, *U.S. Judge Dismisses Suit by Canadian Deported to Syria*, N.Y. TIMES, Feb. 17, 2006, at A10.

investigating allegations that the CIA has used European airports for the outsourcing of torture:

I am testifying so the world will know that the U.S. government abducted me for no reason in New York and sent me to Syria, where I was tortured and the U.S. government knew this was a common practice. The Bush administration does not dispute that I was held without ever being charged or tried with any crime. I still believe that when people realize they are living in countries that advance the detainment and torture of innocent people, they will rise up and demand change.⁷¹

One of the U.S. State Department's human rights reports cites "credible evidence that security forces [in Syria] continue to use torture," and President Bush called Syria a country with a "legacy of torture" in his major address on the Middle East on November 6, 2003.⁷²

One major problem with the policy of rendition is the lack of accountability for countries that employ it. By sending away terrorism suspects to countries where torture is commonplace, the United States enjoys the fruits of information gained from the interrogations, presumably by the use of torture. The United States "can gain valuable information with impunity, while claiming that [it] [has] 'no direct knowledge' of the host country's interrogation methods."⁷³ Furthermore, rendition is a dangerous interrogation policy because it places detainees in situations where torture is viewed as a desirable and effective method. Interrogation methods of the receiving countries are "often ghastly in nature."⁷⁴ Therefore, the consequence of rendition is "the manipulation of the international law system, as well as the circumnavigation of domestic law prohibitions against torture."⁷⁵

⁷¹ *Testimony of Torture: Maher Arar Speaks to the European Parliament*, Amnesty International USA (Mar. 23, 2006), available at <http://blogs.amnestyusa.org/denounce-torture/archive/2006/03/23/n4khegauzh3y.htm>.

⁷² *Deporting for Torture*, *supra* note 64.

⁷³ *Moher*, *supra* note 58, at 480.

⁷⁴ *Id.*

⁷⁵ *Id.* at 481.

III. Narrowing the Definition of Torture

The memorandum from Jay S. Bybee to Alberto R. Gonzales written on August 1, 2002 (Bybee Memo)⁷⁶ demonstrates the U.S. government's narrow understanding of torture, which possibly contributed to the problems of Abu Ghraib, Guantanamo Bay, and the policy of rendition. Even though a later memorandum superseded the Bybee Memo, many incidents of abuse and torture occurred between the issuance of the two memoranda, suggesting that the Bybee Memo contributed to the creation of an environment permissive of torture. The Bybee Memo interprets the Convention Against Torture, 18 U.S.C. §§ 2340-2340A, and the Torture Victims Protection Act. The interpretation of these three legal documents as prohibiting only extreme acts may have led to severe violations of human rights against torture.

A. The Convention Against Torture

On December 10, 1984, the United Nations General Assembly defined the term "torture" by adopting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which entered into force on June 26, 1987.⁷⁷ The first draft of the CAT defined torture as an "aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."⁷⁸ Although later versions removed this hierarchical relationship between torture and other cruel, inhuman or degrading treatment, the concept remains in Article 16, which states that each party should "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture. . . ."⁷⁹ It is clear that "the use of ill treatment is no more condoned under international law than torture. Just as a square is also a rectangle, torture is also ill treatment. Both are illegal and prohibited under international law."⁸⁰

⁷⁶ Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002) available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> [hereinafter Bybee Memo].

⁷⁷ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

⁷⁸ Draft International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, *submitted by Sweden*, U.N. Doc. No. E/CN.4/1285 (1978).

⁷⁹ *Id.* at art. 16(1).

⁸⁰ Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT'L L. REV. 9, 22 (2005); see *infra* Part III(C) (describing the ratified U.S. definition).

The definition of torture in the CAT, which the U.S. accepted with some reservations and understandings, is the following:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁸¹

This definition comprises seven main elements: (1) an act; (2) severe pain or suffering; (3) physical or mental pain; (4) intent; (5) particular purposes; (6) involvement of a public official; and (7) the absence of pain or suffering from lawful sanctions.⁸²

First, torture must be an "act" that causes severe pain or suffering, whether physical or mental.⁸³ It is important to note that an act includes both pro-active behavior and omissions, since excluding omissions would run contrary to the purpose of the CAT.⁸⁴ The object and purpose of the CAT are "the regulation and prohibition of all governmental conduct that inflicts pain or suffering for the ends stated in Article 1, regardless of whether such conduct is affirmative or negative. . . . Negative acts may inflict as much physical and mental harm as positive acts and achieve the same inhuman ends."⁸⁵ For example, the failure to provide a prisoner with food or water for several days would cause severe pain or suffering even if the "act" may technically be an omission.⁸⁶

Secondly, an act of torture must constitute "severe pain or suffering."⁸⁷ The CAT places torture "at the extreme end of a spectrum of pain-inducing acts."⁸⁸ The distinction between torture and other cruel,

⁸¹ CAT, *supra* note 77, at art. 1.

⁸² GAIL H. MILLER, *DEFINING TORTURE* 6 (2005).

⁸³ CAT, *supra* note 77, at art. 1.

⁸⁴ MILLER, *supra* note 82, at 7.

⁸⁵ AHCENE BOULESBAA, *THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT* 51 (1999).

⁸⁶ MILLER, *supra* note 82, at 7.

⁸⁷ CAT, *supra* note 77, at art. 1.

⁸⁸ MILLER, *supra* note 82, at 8.

inhuman, or degrading acts articulated in Article 16 of the CAT elevates the severity of pain or suffering caused by torture over less severe acts. Furthermore, the impact of the severe pain or suffering on a particular victim is relevant in cases where severity of the pain is at issue.⁸⁹ This subjective standard takes into account the reality that the same act could have different effects on different people "depending on their natural susceptibility and threshold for pain."⁹⁰

The third element of the CAT's definition is that pain or suffering must be either physical or mental in order for an act to be torture.⁹¹ Although the CAT does not describe what constitutes physical or mental pain, the CAT acknowledges that there is a difference between the two types of pain or suffering by naming both physical and mental.⁹² Furthermore, by using the conjunction "or" instead of "and," the definition implies that mental pain or suffering alone can constitute torture and that physically visible pain is not required in all situations of alleged torture.

Fourthly, severe pain or suffering must be "intentionally inflicted" on a person.⁹³ This intent requirement emphasizes the torturer's state of mind and allows instances where an act causing the same amount of severe pain or suffering may be excused due to lack of intent. For example, the definition does not cover a prisoner experiencing severe pain or suffering as a result of poor prison conditions if the officials did not intend the conditions to affect the prisoner severely.⁹⁴ Moreover, the actor must intend to "inflict" severe pain or suffering, which implies that the actor must intend both to act and to cause a particular harm.⁹⁵ This requirement of intent substantially narrows the definition of torture by excluding incidents in which the alleged victim cannot prove the actor's state of mind due to several difficulties, such as inability to acquire evidence of intent.

The CAT definition of torture also includes a list of purposes for which the torturer must have performed the act. It is significant that the definition lists certain kinds of purposes. The reference of purposes would be meaningless if any purpose can be the basis for torture.⁹⁶ However, the phrase "such purposes as" suggests that the list is non-exhaustive.⁹⁷ The definition does not use the phrase "or for any other purposes" which indicates that relevant purposes not listed must have something in common

⁸⁹ *Id.* at 10.

⁹⁰ *Id.*

⁹¹ CAT, *supra* note 77, at art. 1.

⁹² MILLER, *supra* note 82, at 12.

⁹³ CAT, *supra* note 77, at art. 1.

⁹⁴ MILLER, *supra* note 82, at 13.

⁹⁵ *Id.* at 14.

⁹⁶ *Id.* at 15.

⁹⁷ CAT, *supra* note 77, at art. 1.

with those listed in the definition.⁹⁸ The torturous act "must be performed for a separate purpose and cannot be an end in itself."⁹⁹

Moreover, the CAT definition of torture requires state involvement; the act must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."¹⁰⁰ The definition does not cover private torture because national criminal laws generally sanction private torture.¹⁰¹ However, any level of state involvement can constitute torture as long as a public official consents to, acquiesces in, or instigates private acts.¹⁰² Therefore, "state inaction in the face of private violence can constitute torture."¹⁰³

Lastly, pain or suffering from lawful sanctions does not constitute torture under the CAT.¹⁰⁴ This lawful sanctions exception may be "the result of political compromises intended to allow particular forms of punishment, such as the death penalty, without undermining the core principles of the CAT."¹⁰⁵ For instance, in its understandings of the CAT, the United States articulated that it "understands that international law does not prohibit the death penalty and does not consider this Convention to restrict or prohibit the United States from applying the death penalty."¹⁰⁶ Nonetheless, this exception can swallow the rule by allowing a state to call an act a lawful sanction in order to avoid the prohibition on torture.¹⁰⁷ Additionally, this exception creates a lack of universality by allowing states to carve out exceptions based on national law.¹⁰⁸ Although allowing severe pain or suffering under lawful sanctions gives the states flexibility, the potential abuse of this exception can undermine the very purpose of eliminating torture.

⁹⁸ See MILLER, *supra* note 82, at 16 (stating that some conclude that the common element is "a relation between the purpose and state interests or policies").

⁹⁹ *Id.*

¹⁰⁰ CAT, *supra* note 77, at art. 1.

¹⁰¹ MILLER, *supra* note 82, at 17.

¹⁰² *Id.* at 18.

¹⁰³ *Id.*

¹⁰⁴ CAT, *supra* note 77, at art. 1.

¹⁰⁵ MILLER, *supra* note 82 at 21.

¹⁰⁶ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Reservations, Understandings and Declarations Made by the United States of America, II(4), available at <http://ohchr.org/english/countries/ratification/9.htm> (last visited Nov. 18, 2006) [hereinafter CAT Reservations, Understandings and Declarations].

¹⁰⁷ See MILLER, *supra* note 82, at 20 (stating that "as to date, no country has defended against charges of torture on the grounds that the actions were incidental to lawful sanctions").

¹⁰⁸ See *id.* at 21 (indicating that some states have attempted to solve this ambiguity by eliminating or clarifying the exception in their own torture definitions).

B. The United States' Reservations and Understandings of the CAT

In interpreting the CAT definition of torture, the United States made a reservation to indicate that it considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment" only insofar as the term means "cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."¹⁰⁹ This reservation narrows the application of the CAT by allowing instances of cruel, inhuman or degrading treatment that are not prohibited by the U.S. laws of due process and cruel and unusual punishment. The reservation also raises the possibility that the U.S. might have had a narrower understanding of torture than that found under international law as early as the 1990s. If this were the case, deviations in the Bybee Memo from the CAT definition need not be viewed as new interpretations, even though the public perceived them to be based on the narrow interpretation of "torture" in the Memo.

Unlike the definition in the CAT, a formal U.S. understanding includes the terms "specifically intended" in order to add the specific intent requirement to the definition.¹¹⁰ The drafters of the understanding were concerned that the CAT definition requires only general intent as opposed to specific intent.¹¹¹ As a condition for ratifying the CAT, the U.S. also submitted an understanding which listed the sources of the mental pain or suffering:

Mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) 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; (3) the threat of imminent death; or (4) the threat that another person will imminently 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 of personality.¹¹²

¹⁰⁹ CAT Reservations, Understandings and Declarations, *supra* note 106, at I(1).

¹¹⁰ *Id.* at II(1)(a).

¹¹¹ See MILLER, *supra* note 82, at 14 (distinguishing between general intent and specific intent: "General intent is a less demanding standard, requiring merely that the actor intended to perform the conduct as opposed to intending to create a particular result in violation of the law. Specific intent requires acting with the intent to achieve a result or intending to commit a particular crime.").

¹¹² CAT Reservations, Understandings and Declarations, *supra* note 106, at II(1)(a).

This enumeration of sources of the mental harm narrows the definition by excluding other sources that may clearly qualify for causing severe mental harm. Confining mental harm to a list of enumerated actions thus narrows the definition.¹¹³ Moreover, the addition of the word "prolonged" eliminates instant or brief mental harm caused by the listed sources. The definition also gives no "guidance [for] differentiating between transient mental harm and prolonged mental harm."¹¹⁴

The U.S. also presented a different approach to the "public official" requirement. While including a concept of custody or physical control, the U.S. understanding also added the new term "offender."¹¹⁵ If the government is defined as the offender, the additional requirement that the offender must have custody or physical control of the victim may require a closer nexus between the public official and the victim.¹¹⁶ Consequently, this requirement also narrows the CAT definition by adding another burden of proof for the alleged victim to prove.

Finally, the U.S. stated its view that the Convention does not prohibit the death penalty.¹¹⁷ This leaves open the possibility that the U.S. may impose the death penalty on terrorism suspects, because the definition of torture in the CAT permits pain or suffering arising from lawful sanctions. The lawful sanctions provision precludes arguments that the death penalty constitutes torture and thus narrows the U.S. definition of torture even further.

C. Ratification of the CAT

On November 20, 1994, the United States ratified the CAT into 18 U.S.C. § 2340 pursuant to Article 2 of the CAT, which requires each country to establish its own national legislation to prevent torture.¹¹⁸ In this process of establishing national legislation, many signatories "have tinkered with the CAT's definition of torture, redefining the term through slight alteration. Consequently, implementation of the CAT has resulted in the emergence of numerous definitions of torture, rather than a unitary, uniform definition."¹¹⁹

¹¹³ See MILLER, *supra* note 82, at 12.

¹¹⁴ See *id.* at 12 ("Must the harm be constant and enduring, or might periodic yet debilitating flashbacks suffice?").

¹¹⁵ See CAT Reservations, Understandings and Declarations, *supra* note 106, at II(1)(b) ("The definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.").

¹¹⁶ MILLER, *supra* note 82, at 19.

¹¹⁷ CAT Reservations, Understandings and Declarations, *supra* note 106, at II(4).

¹¹⁸ See CAT, *supra* note 77, at art. 2 § 1 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.").

¹¹⁹ MILLER, *supra* note 82, at 6.

The United States is one of the parties that made changes to the definition of torture when it ratified the treaty into its national law.

The U.S. legislation ratifying the CAT 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."¹²⁰ This definition makes major changes to the definition of torture in the CAT. First, the U.S. definition keeps the U.S. understanding's addition of the term "specific" restricted to the intent requirement.¹²¹ By requiring specific intent, the definition legalizes instances of a torturous act in which the actor only had general intent. Furthermore, proving specific intent can be a more challenging requirement than showing general intent.¹²²

The second major change to the CAT definition is that the U.S. statute defines mental pain or suffering by keeping the list of sources for mental harm found in the U.S. understanding.¹²³ The U.S. definition also replaces the public official language with a new phrase: "upon another person within his custody or physical control."¹²⁴ Whereas the CAT definition allows any state involvement to constitute torture, the U.S. definition seems to limit the public official requirement to situations where the person "acting under the color of law" inflicts harm upon the victim only when the victim is within the actor's custody or physical control.¹²⁵ It is interesting to note that the U.S. ratification does not keep the phrase "in the offender's custody or physical control" from the U.S. understanding. Lastly, 18 U.S.C. § 2340 eliminates the illustrative list of purposes included in the CAT. This elimination potentially "broadens the reach of § 2340 to torturous acts the purpose of which is unknown or unconnected to the CAT's list."¹²⁶

D. The Torture Victim Protection Act

The Bybee Memo also analyzed the Torture Victim Protection Act (TVPA), and reached the same conclusion that torture only prohibits heinous

¹²⁰ 18 U.S.C. § 2340(1) (1994).

¹²¹ *Id.*

¹²² See *infra* Part III(E)(1)(d) (comparing the specific intent element in the U.S. ratified definition with the change of definition in the Bybee Memo).

¹²³ See 18 U.S.C. § 2340(2); see also *supra* Part III(B) (discussing the list of sources of mental harm in detail).

¹²⁴ 18 U.S.C. § 2340(1).

¹²⁵ *Id.*

¹²⁶ MILLER, *supra* note 82, at 26.

acts.¹²⁷ Congress adopted the TVPA in response to the concerns prompted by a narrow construction of the Alien Tort Claims Act (ATCA),¹²⁸ which had created jurisdictional difficulties for foreign human rights victims.¹²⁹ The ATCA gives the district court jurisdiction to hear civil actions brought by aliens for torts committed in violation of the law of nations.¹³⁰ Unlike the ATCA, the TVPA provides alien and American victims of official torture and extrajudicial killing with a private right of action in American courts.¹³¹ The TVPA provides that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual."¹³²

The TVPA definition of torture is essentially the 18 U.S.C. § 2340 definition without the "specifically intended" language, and including the CAT's purpose requirement.¹³³ The TVPA's definition of torture is the following:

The term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.¹³⁴

Unlike 18 U.S.C. § 2340 and the CAT, the TVPA includes the word "offender" found in the U.S. understanding. The TVPA also includes the list of sources for mental pain or suffering as included in § 2340.¹³⁵ However,

¹²⁷ See Bybee Memo, *supra* note 76, at 2 (stating that cases involving the Torture Victim Protection Act demonstrate that "most often torture involves cruel and extreme physical pain").

¹²⁸ Alien Tort Claims Act, 28 U.S.C. § 1350 (2003).

¹²⁹ Jennifer Correale, *The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture?*, 6 PACE INT'L L. REV. 197, 198 (1994).

¹³⁰ See Alien Tort Claims Act § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

¹³¹ Correale, *supra* note 129, at 198–99.

¹³² Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), *codified at* 28 U.S.C. § 1350 note.

¹³³ MILLER, *supra* note 82, at 29–30.

¹³⁴ Torture Victim Protection Act of 1991.

¹³⁵ *Id.*

the TVPA uses the phrase "arising only from or inherent in, or incidental to, lawful sanctions," instead of "incidental to lawful sanctions," as in § 2340. Cases applying the TVPA have not provided in-depth discussion of what constitutes torture because most cases dealt with abuse in the extreme.¹³⁶

E. The Bush Administration's Definition of Torture

1. The Bybee Memo

a. Comparison with the Text of the CAT

In the Bybee Memo, the OLC interpreted the CAT's definition of torture very narrowly. First, the OLC concluded that the text of the CAT prohibits only the most extreme acts by reserving criminal penalties solely for torture and declining to require such penalties for "cruel, inhuman, or degrading treatment or punishment."¹³⁷ Consequently, torture is "at the farthest end of impermissible actions, and . . . it is distinct and separate from the lower level of 'cruel, inhuman or degrading treatment or punishment.'"¹³⁸ This narrow reading allows torturous acts to fall under the category of cruel, inhuman or degrading punishment so that the government can avoid criminal penalties.

In addition, the OLC noted that the text of the CAT requires the pain and suffering to be "severe" to reach the threshold of torture and that torture must be an extreme act.¹³⁹ In reaching this conclusion, the OLC acknowledged that the text of the treaty requires that an individual act "intentionally" but offered a different interpretation: "This language might be read to require only general intent for violations of the Torture Convention. We believe, however, that the better interpretation is that the use of the phrase 'intentionally' also created a specific intent-type standard."¹⁴⁰ The OLC offered a narrower interpretation of torture by understanding the text of the CAT to require specific intent even though the word "specific" was never used.¹⁴¹

The OLC also emphasized that the list of purposes in the CAT's definition was illustrative rather than exhaustive.¹⁴² The OLC justified the exclusion of the list of purposes in 18 U.S.C. § 2340 by reasoning that "a

¹³⁶ MILLER, *supra* note 82, at 30.

¹³⁷ Bybee Memo, *supra* note 76, at 1-2.

¹³⁸ *Id.* at 15.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 15 n.7.

¹⁴¹ *Id.*

¹⁴² *Id.* at 14.

purpose of the same kind" can satisfy the purpose requirement of the definition.¹⁴³ This omission of the list enables the government to perform torturous acts for purposes that could violate the definition of torture, because it would be difficult for the alleged victim to prove the purpose without a set of purposes with which he or she can compare the perpetrator's act.

b. Comparison with U.S. Reservations to the CAT

The OLC's interpretation of torture as being at the extreme end of impermissible actions is even narrower than the U.S. reservations to the CAT.¹⁴⁴ The OLC's view of the text of the CAT to require specific intent is consistent with the U.S. understanding.¹⁴⁵ However, the OLC interprets the Article 16 of the CAT more narrowly than the drafters of the reservations.¹⁴⁶ Although the reservations limit the definition of "cruel, inhuman or degrading treatment or punishment" to the meaning found in the Fifth, Eighth, and Fourteenth Amendments, the reservations make it clear that "the United States considers itself bound by the obligation under article 16."¹⁴⁷ This means that the U.S. will undertake to prevent other acts of cruel, inhuman or degrading treatment, even if they do not amount to torture.¹⁴⁸ By only focusing on the parts "which do not amount to torture," the OLC tries to lower the government's obligation to prevent torturous acts, whether or not they are placed at the farthest end of extreme acts.¹⁴⁹

c. Comparison with Executive Interpretations of the CAT

The OLC looked at the executive branch interpretations of the treaty and concluded that the treaty was intended to reach only the most extreme acts.¹⁵⁰ The Reagan administration recommended the following understanding: "The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and

¹⁴³ *Id.*

¹⁴⁴ CAT Reservations, Understandings and Declarations, *supra* note 106, at II(1)(a).

¹⁴⁵ *Id.*

¹⁴⁶ Bybee Memo, *supra* note 76, at 15.

¹⁴⁷ CAT Reservations, Understandings and Declarations, *supra* note 106, at I(1).

¹⁴⁸ *Id.*

¹⁴⁹ Bybee Memo, *supra* note 76, at 15.

¹⁵⁰ *Id.* at 2.

agonizing physical or mental pain or suffering."¹⁵¹ The Reagan administration viewed torture to include "extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain."¹⁵² This list of examples suggests that the Bybee Memo demonstrates an even narrower understanding of torture than the Reagan administration because the latter did not mention such extreme examples as organ failure, impairment of bodily function, or death.¹⁵³ According to the OLC, the Reagan administration took a narrow approach because it described torture to be an extreme form of cruel and inhuman treatment.¹⁵⁴ The Reagan administration acknowledged that torture is to be distinguished from lesser forms of cruel, inhuman or degrading treatment and punishment, which "are to be deplored and prevented, but not so universally and categorically condemned."¹⁵⁵ However, it is questionable whether the administration viewed the scope of cruel, inhuman or degrading acts so narrowly that it could only include such extreme practices as organ failure, impairment of bodily function, or death.¹⁵⁶

The OLC also mentioned that the Bush administration joined the Reagan administration in interpreting torture as only reaching extreme acts.¹⁵⁷ For instance, at the Senate hearing on the CAT, Mark Richard, Deputy Assistant Attorney General of the Department of Justice's Criminal Division, stated that under the Bush administration's submissions with the treaty, the essence of torture was excruciating and agonizing pain.¹⁵⁸ According to the OLC, the Bush administration had the same purpose as the Reagan administration in terms of ensuring that the prohibition against torture reaches only the most extreme acts.¹⁵⁹ The OLC also examined the negotiating history of states in crafting the definition of torture.¹⁶⁰ The OLC emphasized that the state parties rejected a proposal that would have defined torture merely as cruel, inhuman or degrading treatment or punishment.¹⁶¹ Therefore, the OLC's view of the executive interpretations as limiting torture

¹⁵¹ President's Message to Senate Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Treaty Doc. No. 100-20, 1988 U.S.T. LEXIS 202, 18 (Apr. 18, 1998) [hereinafter President's Message].

¹⁵² *Id.* at 16.

¹⁵³ Bybee Memo, *supra* note 76, at 1.

¹⁵⁴ *Id.* at 17.

¹⁵⁵ President's Message, *supra* note 151, at 13.

¹⁵⁶ *Id.* at 14.

¹⁵⁷ Bybee Memo, *supra* note 76, at 18.

¹⁵⁸ *Id.* at 19-20.

¹⁵⁹ *Id.* at 19.

¹⁶⁰ *Id.* at 20.

¹⁶¹ *Id.* at 21.

to the most heinous acts permits the government to perform allegedly torturous acts without the legal prohibition of torture.¹⁶²

d. Comparison with 18 U.S.C. § 2340

The Bybee Memo also adopted an extremely narrow definition of torture under 18 U.S.C. § 2340.¹⁶³ The OLC concluded that the statute prohibits only extreme acts:

We conclude that for an act to constitute torture as defined in Section 2340, it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.¹⁶⁴

After examining different definitions from dictionaries, the OLC noted that the adjective "severe" means that the pain or suffering must be "of such a high level of intensity that the pain is difficult for the subject to endure."¹⁶⁵ The OLC also looked at statutes defining an emergency medical condition and stated that the statutes treat severe pain "as an indicator of ailments that are likely to result in permanent and serious physical damage in the absence of immediate medical treatment."¹⁶⁶ For mental pain, the acts must "cause some lasting, though not necessarily permanent, damage."¹⁶⁷ According to the OLC, the mental harm from a lengthy and intense police interrogation does not violate § 2340(2), but post-traumatic stress disorder or chronic depression might satisfy the prolonged harm requirement.¹⁶⁸ The OLC also stated that specific intent must be present with respect to prolonged mental harm, thereby creating even a higher standard of meeting the intent requirement.¹⁶⁹

Another narrow interpretation of the statute by the OLC is its understanding of the specific intent requirement. Knowledge alone that a

¹⁶² *Id.* at 22.

¹⁶³ *Id.* at 1.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 5.

¹⁶⁶ *Id.* at 6.

¹⁶⁷ *Id.* at 7.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 8.

particular result is going to occur does not satisfy specific intent.¹⁷⁰ Therefore, a person is guilty of torture "only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control."¹⁷¹ Although the OLC maintains that specific intent is required, it fails to define specific intent in this context.¹⁷² It is also questionable whether a precise definition of "express purpose" is possible, and if so, whether torturers expressly indicate their intention to inflict harm on others as their main objective.¹⁷³

The Bybee Memo received overwhelming criticism from the legal community, mainly because its definition including organ failure, impairment of bodily function, or even death derives from a statutory framework that has nothing to do with torture.¹⁷⁴ Experts in criminal, international, constitutional, and military law argued that the legal analysis was so faulty that the lawyers' advice was incompetent.¹⁷⁵ State Departments, military Judge Advocate General lawyers, and many others have attacked the Memo as "legally and morally unsupportable, likely to endanger our own military personnel, and damaging to our country's reputation and national interest."¹⁷⁶ Professor W. Bradley Wendel points out that "burning detainees with cigarettes, administering electric shocks to their genitals, hanging them by the wrists, submerging them in water to simulate drowning, beating them, and sexually humiliating them would not be deemed 'torture' under this definition."¹⁷⁷ Although it is not clear to what extent the Bybee Memo may have contributed to the abuses at Abu Ghraib, Guantanamo, and other places, it has been suggested that it may at least have "fostered a permissive climate in which such abuses were more likely."¹⁷⁸ It is not surprising that such a narrow interpretation of torture might have sent a message to the interrogators that only a few instances would actually amount to torture.

¹⁷⁰ *Id.* at 4.

¹⁷¹ *Id.*

¹⁷² MILLER, *supra* note 82, at 14.

¹⁷³ *Id.* at 15-17.

¹⁷⁴ See Bybee Memo, *supra* note 76, at 5 ("Significantly, the phrase 'severe pain' appears in statutes defining an emergency medical condition for the purpose of providing health benefits.").

¹⁷⁵ W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 68 (2005).

¹⁷⁶ Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689, 690 (2004).

¹⁷⁷ Wendel, *supra* note 175, at 81.

¹⁷⁸ Bilder & Vagts, *supra* note 176, at 691.

e. Comparison with the TVPA

The Bybee Memo also recognized that U.S. courts have not analyzed in detail the definition of torture in their application of the TVPA, due to the nature of the acts alleged in past TVPA cases.¹⁷⁹ However, the OLC stated that there are certain kinds of acts that consistently reappear in the cases and that a court would find such acts tantamount to torture.¹⁸⁰ The OLC interpreted the totality-of-the-circumstances approach of the TVPA cases as the courts' tendency to construe the nature of torture to be extreme: "The adoption of such an approach suggests that torture generally is of such an extreme nature—namely, the nature of acts are [sic] so shocking and obviously incredibly painful—that courts will more likely examine the totality of the circumstances, rather than engage in a careful parsing of the statute."¹⁸¹ Although it is true that the TVPA cases do not offer a thorough analysis of the definition of torture, it is not clear whether courts do so because they view the nature of torture to be so extreme as to produce organ failure, impairment of bodily function, or even death.¹⁸² In fact, the OLC "labors to distinguish cases tending to show that severe pain can result from acts that do not necessarily threaten permanent organ failure or dysfunction."¹⁸³ This analysis again demonstrates the government's attempt to redefine the scope of torture so that the government can have freedom to employ torturous acts.

2. The Levin Memo

On December 30, 2004, Daniel Levin, Acting Assistant Attorney General in the Office of Legal Counsel, submitted a new memorandum to James B. Comey, Deputy Attorney General (Levin Memo),¹⁸⁴ that

¹⁷⁹ Bybee Memo, *supra* note 76, at 24.

¹⁸⁰ *See id.* (listing seven major kinds of acts that are likely to constitute torture: "(1) severe beatings using instruments such as iron bars, truncheons, and clubs; (2) threats of imminent death, such as mock executions; (3) threats of removing extremities; (4) burning, especially burning with cigarettes; (5) electric shocks to genitalia or threats to do so; (6) rape or sexual assault, or injury to an individual's sexual organs, or threatening to do any of these sorts of acts; and (7) forcing the prisoner to watch the torture of others").

¹⁸¹ *Id.* at 27.

¹⁸² *See* Bybee Memo, *supra* note 76, at 5 (defining torture to include organ failure, impairment of bodily function, or even death).

¹⁸³ Wendel, *supra* note 175, at 82.

¹⁸⁴ Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to James B. Comey, Deputy Attorney General, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A* (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/dagmemo.pdf> [hereinafter Levin Memo].

superseded the Bybee Memo in its entirety.¹⁸⁵ Even though this new memorandum followed the Bybee Memo, a permissive environment had already been created by the Bybee Memo. The Levin Memo omitted the old narrow definition of torture as pain being "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."¹⁸⁶ The Levin Memo also disagrees with the previous memorandum in that the OLC no longer believes that Congress intended to reach only conduct involving "excruciating and agonizing" pain or suffering.¹⁸⁷ The Levin Memo describes the severe pain as falling below the level of excruciating pain, but above the level of pain from cruel and inhuman treatment.¹⁸⁸

Furthermore, the Levin Memo concludes that the inclusion of the words "or suffering" in "severe physical pain or suffering" establishes that physical torture is not limited to "severe physical pain."¹⁸⁹ The OLC also interpreted the phrase "the prolonged mental harm" to mean that the harm has "some lasting duration" instead of narrowly requiring months or years as in the Bybee Memo.¹⁹⁰ Lastly, the Levin Memo acknowledges that the meaning of "specific intent" is ambiguous but does not offer a definition. Instead, it dismisses the usefulness of defining the meaning of the words by stating that "in light of the President's directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture."¹⁹¹

Although the new memorandum moves away from the extremely narrow interpretation of torture offered in the Bybee Memo, the Levin Memo does not provide more guidance in defining what each element of the definition means so that interrogators of terrorism suspects can comply with a clearly defined law. For instance, a couple of weeks before the publication of the Levin Memo in December 2004, a Justice Department lawyer informed a CSRT that "it would not be illegal to torture detainees to obtain statements about them."¹⁹² Whether the Levin Memo has had any impact on broadening the narrow interpretation of torture from the Bybee Memo is still not clear.

¹⁸⁵ *Id.* at 2.

¹⁸⁶ *Id.* (quoting Bybee Memo, *supra* note 76, at 1).

¹⁸⁷ *Id.* at 8.

¹⁸⁸ MILLER, *supra* note 82, at 27.

¹⁸⁹ Levin Memo, *supra* note 184, at 11.

¹⁹⁰ *Id.* at 14.

¹⁹¹ *Id.* at 16–17.

¹⁹² Leonnig & Tate, *supra* note 34.

3. The McCain Amendment

On December 30, 2005, President Bush signed into law the Detainee Treatment Act of 2005, commonly referred to as the "McCain Amendment."¹⁹³ The Amendment provides that "no person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation."¹⁹⁴ Senator McCain proposed the Army Field Manual to be the guidepost for interrogations of detainees:

The advantage of setting a standard for interrogation based on the Field Manual is to cut down on the significant level of confusion that still exists with respect to which interrogation techniques are allowed. . . . [D]istinguished officers believe that the abuses at Abu Ghraib, Guantanamo and elsewhere took place in part because our soldiers received ambiguous instructions, which in some cases authorized treatment that went beyond what the Field Manual allows.¹⁹⁵

Limiting interrogations to treatment or techniques authorized by the Army Field Manual may provide better guidance to the interrogators.¹⁹⁶ However, critics argue that the Army Field Manual is always subject to revision and therefore to changes in the definition of authorized techniques.¹⁹⁷

In addition, the McCain Amendment does not define or even include the word "torture" but merely uses the existing definition of "cruel, inhuman, or degrading treatment or punishment," that is, "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States."¹⁹⁸ Therefore, the Amendment fails to offer a precise definition of torture and to describe how torture is distinguishable from other cruel, inhuman and degrading treatment.¹⁹⁹ Although the McCain Amendment provides the basis for uniform and clear instructions on interrogations, the definition of torture in the Army Field Manual must be more precise and clear.

¹⁹³ Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006 (2005).

¹⁹⁴ *Id.* at § 1002 (a).

¹⁹⁵ John McCain, U.S. Senator, Statement of Amendment on Army Field Manual (Jul. 25, 2005), available at <http://www.humanrightsfirst.info/pdf/05117-etn-mccain-stat-detain-amdts-auth.pdf>.

¹⁹⁶ MILLER, *supra* note 82, at Addendum.

¹⁹⁷ *Id.*

¹⁹⁸ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(d) (2005).

¹⁹⁹ MILLER, *supra* note 82, at Addendum.

IV. The Effects of Narrowing the Definition of Torture

A. Causal Connection between the Narrowed Definition and the Occurrence of Torture

The narrowed definition of torture in the Bybee Memo contributed to the human rights abuses evident in Abu Ghraib, Guantanamo Bay, and facilitated the rendering of detainees to other jurisdictions that interrogate abusively. Although the Levin Memo superseded the Bybee Memo, the effects of the Bybee Memo are significant in that the occurrence of torture happened in between the two memos. For example, Colonel Thomas M. Pappas, the top U.S. military intelligence officer at the Abu Ghraib prison, testified in a trial of a military police dog handler that he inappropriately approved the use of dogs for interrogations without consulting higher-ranking officers.²⁰⁰ Pappas said that a series of interrogation memos from Baghdad that listed dogs as an option led him to believe he did not need to seek approval from Lieutenant General Ricardo S. Sanchez, then the top general in Iraq in 2003.²⁰¹ The dispute in the case was whether the actions were the work of a few bad soldiers or whether they were part of a system of aggressive tactics sanctioned by the highest levels of government.²⁰² Pappas told the jurors that he "proceeded without clearance in telling one of his interrogators he could bring dogs into an interrogation booth to scare a detainee."²⁰³ Sergeant Michael J. Smith, the military police dog handler in this case, was found guilty of tormenting detainees with his snarling Belgian shepherd for his own amusement.²⁰⁴

The fact that top officials ordered interrogators to use dogs without explaining the rules to the military police dog handlers shows that there is lack of concern for whether such an act constitutes torture. The government cannot dismiss this problem by pointing fingers at a few individuals. For instance, Sergeant Smith said he was merely following interrogation procedures approved by the chief intelligence officer at Abu Ghraib, Colonel Pappas, who in turn said he had been following guidance from Major General Geoffrey D. Miller.²⁰⁵ This chain of responsibilities indicates that

²⁰⁰ See Josh White, *Officer Says He Wrongly Approved Use of Dogs*, WASH. POST, Mar. 16, 2006, at A01 (describing the testimony of Colonel Thomas M. Pappas, who testified at the trial of a military police dog handler accused of abuse at the Abu Ghraib prison).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Eric Schmitt, *Army Dog Handler Is Convicted in Detainee Abuse at Abu Ghraib*, N.Y. TIMES, Mar. 21, 2006, at A1.

²⁰⁵ See Eric Schmitt, *Iraqi Abuse Trial Is Again Limited to Lower Ranks*, N.Y. TIMES, Mar. 23, 2006, at A1; see also Josh White, *Top Officer Ordered to Testify on Abuse: Use of Dogs to Scare*

there is an organized and systematic problem coming from policies written by top officials in the administration.²⁰⁶ The Bush administration "decided to go outside the law to deal with prisoners, and soldiers carried out that policy. Those who committed these atrocities deserve the punishment they are getting, but virtually all high-ranking soldiers have escaped unscathed."²⁰⁷ Narrowing the definition of torture to extreme acts may have created confusion and lack of communications between officials to discuss what would constitute torture.

B. Security Interests versus Respect for the Law

Violating human rights by narrowing the definition of torture leads to undesirable results and poor policymaking decisions. In the war on terrorism, the use of abuse and torture has been "sanitized under the guise of interrogation and intelligence-gathering. Rendering an individual for interrogation or holding someone for intelligence-gathering has bleached the more sinister reality of indefinite detention and infliction of aggressive use of violence (psychological and physical)."²⁰⁸ Moreover, the information gathered from interrogations involving abuse and torture may not always be reliable or accurate.²⁰⁹

Furthermore, disrespecting law in the name of national security interests may cause damage to the country's image as well as a lack of respect and support from other countries. Professor Mark Drumbl believes that disregarding law in one context may have spillover effects in other contexts:

Once governments go down the road of slicing away rule of law by bending the rules on torture, they may hungrily continue to slice, and ordinary individuals may internalize this hunger from above. In the end, one might soon end up in a stygian place, and perhaps have gotten there quite quickly.²¹⁰

Detainees at Issue, WASH. POST, Apr. 19, 2006, at A14 (stating that a military judge in Washington ordered prosecutors to produce Army Major General Geoffrey Miller as a defense witness in the trial of another military dog handler).

²⁰⁶ Editorial, *The Joy of Being Blameless*, N.Y. TIMES, Mar. 23, 2006, at A24.

²⁰⁷ *Id.*

²⁰⁸ Drumbl, *supra* note 6, at 347.

²⁰⁹ *See id.* (asking "[W]hat value really can be had from the Guantanamo and Afghan detainees: incarcerated, isolated . . . has any information they might ever have had not become stale?").

²¹⁰ Drumbl, *supra* note 6, at 346–47.

Not only will this phenomenon cause the United States to lose respect for law in times of fear, but it will also create the image of the United States as a human rights violator. Because the war on terrorism is fought on the international level, U.S. national security depends on "multilateral cooperation and the willingness of other nations to conform their conduct to the requirements of international law."²¹¹ Philosopher Michael Ignatieff argues that Abu Ghraib and other catastrophes of occupation have cost America to lose the power to shape Iraq for the better.²¹²

This disregard of law also gives tremendous propaganda to the enemies. In fact, "abuses at Abu Ghraib have increased the risk that a greater number of previously unmotivated individuals now feel motivated to lead a life of terror."²¹³ Therefore, sacrificing the legitimacy of law in the name of national security interests sends dangerous messages both to the international community and to the enemies of the war on terrorism.

C. Respect for Race and Culture

Racial stereotyping is one possible explanation for the abuse and torture of terrorism suspects. After the terrorist attacks of September 11, 2001, a new identity category called "Middle Eastern, Arab, or Muslim" has emerged.²¹⁴ Stereotyping involves identifying members of this group as terrorists, leading to racial profiling.²¹⁵ According to Leti Volpp, there was overwhelming public opposition to racial profiling before September 11 because of its inefficiency, ineffectiveness, and unfairness.²¹⁶ However, there is now public consensus that racial profiling is "a good thing, and in fact necessary for survival."²¹⁷ In fact, the U.S. government has explicitly engaged in racial profiling of its targets in the war on terror.²¹⁸ Racial profiling only occurs when the government believes that certain groups of people have indistinguishable members who are potential terrorists.²¹⁹ This view of Arab-looking people as terrorism suspects has created the image of

²¹¹ *Id.* at 348.

²¹² See Michael Ignatieff, *Mirage in the Desert*, WASH. POST, June 27, 2004, at 13 (criticizing American exceptionalism, which is "the idea that America is too noble, too special, too great to actually obey international treaties like the Torture Convention or international bodies like the Red Cross").

²¹³ Drumbl, *supra* note 54, at 919.

²¹⁴ Leti Volpp, *Critical Race Studies: The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002).

²¹⁵ See *id.* ("The stereotype of the 'Arab terrorist' is not an unfamiliar one. But the ferocity with which multiple communities have been interpellated as responsible for the events of September [11] suggests that there are particular dimensions that have converged in this rationalization.").

²¹⁶ *Id.*

²¹⁷ *Id.* at 1577.

²¹⁸ *Id.* at 1581.

²¹⁹ *Id.* at 1584.

the United States as disrespecting differences in race and culture by employing such racialized methods as racial profiling.

Furthermore, thinking of the Muslim culture in political terms has caused certain elements of the U.S. government to view the culture as producing terrorist political figures. Professor Mahmood Mamdani believes that culture talk has turned religious experience into a political category, differentiating "good Muslims" from "bad Muslims" rather than terrorists from civilians.²²⁰ This culture talk implies that "Islam must be quarantined and the devil must be exorcized from it by a civil war between good Muslims and bad Muslims."²²¹ It is doubtful whether one can read people's political behavior from their religion or culture.²²²

Respecting the Muslim culture requires that society not politicize Muslims as a territorial unit from which terrorists flow. For example, dehumanizing interrogation methods, such as sexual humiliation in Abu Ghraib and other prisons, show disrespect for Muslim culture. Nudity "is considered particularly shameful in Muslim culture, a violation of religious principles."²²³ Despite this, forced nudity has commonly been employed as part of interrogation procedures at detention facilities in Abu Ghraib, Guantanamo Bay, and other places.²²⁴ At Abu Ghraib, detainees were paraded naked past other prisoners and guards, and some were even ordered to do jumping jacks and sing "The Star-Spangled Banner" while naked.²²⁵ A detainee was kept naked for five days when he first arrived at Abu Ghraib and was forced to crawl on his stomach while guards were spitting on him and hitting him on his back, his head, and his feet.²²⁶ Disregard for racial and cultural differences might have led the government to allow abuses that can easily lead to torture and have facilitated foot-soldiers to commit these degrading acts, because these perceptions dehumanized the victims fully.

Reinforcing negative stereotypes of Arabs as terrorists can also make it easier for the abusers of terrorism suspects to forget that even they are human beings who deserve fundamental human rights. For example, in the investigation of the hijackings of September 11, the Department of Justice enlisted the assistance of state and local law enforcement agencies in the

²²⁰ Mahmood Mamdani, *Good Muslim, Bad Muslim: A Political Perspective on Culture and Terrorism*, 104 AM. ANTHROPOLOGIST 766 (2002).

²²¹ *Id.*

²²² *Id.* at 768.

²²³ Kate Zernike & David Rohde, *Forced Nudity of Iraqi Prisoners Is Seen as a Pervasive Pattern, Not Isolated Incidents*, N.Y. TIMES, June 8, 2004, at A14.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Higham & Stephens, *supra* note 1, at A1.

questioning of Arabs and Muslims.²²⁷ In times of threat to national security, people might be "more willing to accept aggressive measures when they target small and politically disempowered groups, specifically racial and ethnic minorities, and foreign nationals."²²⁸ Furthermore, media and film have been feeding on existing stereotypes in American society about Arabs and Muslims with dangerous and one-dimensional images.²²⁹ Taking the stereotypically Arab terrorists out of the scope of human rights makes it so much easier for interrogators to abuse terrorism suspects. However, one should remember that racial stereotyping cannot be an excuse for allowing torture in any circumstance.

V. Potential Solutions

Although the McCain Amendment shows an effort of the government to prevent cruel, inhuman or degrading treatment of terrorism suspects, the U.S. must take proactive actions for eliminating the use of torture against anyone. First, the government must move towards the establishment of a clear definition of what constitutes torture, and this definition must be consistent with international human rights standards. This would require the official banning of renditions of terrorism suspects to countries with an extensive history of using torture. The U.S. officials are "no less culpable because the victim is being tortured at their request, rather than by their own hands."²³⁰ The United States should not encourage other countries like Morocco and Egypt to use torture as a way of winning political favor with the U.S., because other countries with high rate of human rights violations will see this as a sign of "terrorism exception" for torture.²³¹

More importantly, the U.S. government must give strong adherence to international norms and values during the war on terrorism. Because fighting terrorism involves international relations and cooperation with the people of other countries, the government must take into account international law when it balances national security interests with the rule of law. Utilizing the coordinating function of international law can help the government fight the war on terrorism more effectively. The President and every member of the executive branch are bound by treaties and customary

²²⁷ Susan M. Akram & Kevin R. Johnson, "Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy": *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 298 (2005).

²²⁸ *Id.* at 300.

²²⁹ *Id.* at 308.

²³⁰ J. Trevor Ulbrick, *Tortured Logic: The (Il)legality of United States Interrogation Practices in the War on Terror*, 4 NW. U.J. INT'L HUM. RTS. 210, 78 (2005).

²³¹ *Id.*

international law in times of relative peace and war.²³² In fact, agreeing with the McCain Amendment, President Bush said that the agreement will "make it clear to the world that this government does not torture and that we adhere to the international convention of torture whether it be here at home or abroad."²³³ Therefore, respecting international norms at all times will not only prevent abuses and torture of terrorism suspects, but also lead to increased respect from the international community in support of the war on terrorism.

VI. Conclusion

Protecting one's nation from threats of and attacks by terrorists is a crucial national security interest that should not be overlooked. However, fighting a war on terrorism must embrace the rule of law rather than redefining the law in the name of national security. As Abu Ghraib, Guantanamo, and the policy of rendition illustrate, narrowing the definition of torture only creates more problems than advancing against the real enemies of the war. Even though the Levin Memo superseded the Bybee Memo in its entirety, its interpretations of the CAT, 18 U.S.C. § 2340, and TVPA indicate that an understanding of torture that is narrower than international and domestic laws brings confusion, inconsistency, and abuse to the interrogation system. It is also important to remember that the departures triggered by the Bybee Memo led the U.S. to experience the shame of the Abu Ghraib scandal. Sacrificing legitimacy for the sake of national security interests will damage the country's image and will invite enemies to justify their action on behalf of the human rights violations committed by the U.S. Furthermore, narrowing the definition of torture will lead to disrespect for racial and cultural differences which will only darken the country's reputation. Creating a clear and broad definition of torture in conjunction with faithful adherence to international norms and values will help the United States fight the war on terrorism with effectiveness and success.

²³² See Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 856 (2005) (arguing that the plan and authorizations to violate international law are not only illegal but also unconstitutional).

²³³ Peter Hardin, *Accord Reached on Torture Ban Bush and McCain's Agreement Gives CIA Interrogators the Same Legal Rights as Military*, RICHMOND TIMES DISPATCH, Dec. 16, 2005, at A11.

