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James P. Terry

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Torture and the Interrogation of Detainees

JAMES P. TERRY*

Following the September 11, 2001 attack on the United States by al Qaeda, the United States captured a number of “high value” detainees who were believed to have knowledge of imminent terrorist threats against our nation and its allies.¹ CIA operatives, who understood that the use of torture is unlawful under both international and domestic law, and above all, is abhorrent to American values, interrogated the high value detainees. The United States rejects torture as a means to garner information—a fact reflected in our domestic criminal law, but also by the country’s signature on the United Nations Convention Against Torture.²

I. FRAMING THE DEBATE ON DETAINEE INTERROGATIONS

In consideration of the national position on torture, the Central Intelligence Agency (CIA), with Justice Department approval through its Office of Legal Counsel (OLC),³ used a series of enhanced techniques in interrogating high value al Qaeda detainees. One technique, waterboarding, was used on three detainees by CIA interrogators.⁴

* S.J.D., George Washington University; LL.M., George Washington University; J.D., Mercer University; M.Ed., University of Virginia; B.A., University of Virginia. Mr. Terry serves as Chairman of the Board of Veterans Appeals, having previously served as Principal Deputy Assistant Secretary and Deputy Assistant Secretary of State, and as Legal Counsel to the Chairman of the Joint Chiefs of Staff. He is widely published in the area of national security law. The author thanks Mr. Jan Fladeboe, U.S. Department of State, for his excellent suggestions. The views expressed, however, are solely those of the author.

1. See Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to John Rizzo, Senior Deputy Gen. Counsel, CIA 14 (May 10, 2005) [hereinafter Techniques Memorandum], available at <http://www.fas.org/irp/agency/doj/olc/techniques.pdf>.

2. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture], available at http://treaties.un.org/doc/Treaties/1987/06/19870626%2002-38%20AM/Ch_IV_9p.pdf.

3. Techniques Memorandum, *supra* note 1, at 3.

4. See Memorandum from Steven G. Bradbury, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to John Rizzo, Senior Deputy Gen. Counsel, CIA 15 (May 30, 2005) [hereinafter Obligations Memorandum], available at http://dspace.wrlc.org/doc/bitstream/2041/70997/02941_050530display.pdf.

These techniques, even when combined, were determined by the Bush-era OLC not to violate the applicable provisions against the use of torture within 18 U.S.C. §§ 2340–2340A.⁵ The administration of President Barack Obama does not hold this view.⁶

Following the harsh interrogation of high value detainees, the Department of Justice OLC prepared a memorandum describing highly valuable information obtained by the CIA from using these methods.⁷ In support of the proposition that these methods saved American lives, the memorandum reported some of the CIA information obtained from Khalid Shaykh Muhammad (referred to in the memorandum as “KSM”) and Abu Zubaydah:

You have informed us that the interrogation of KSM—once enhanced techniques were employed—led to the discovery of a KSM plot, the “Second Wave,” “to use East Asian operatives to crash a hijacked airliner into” a building in Los Angeles. You have informed us that information obtained from KSM also led to the capture of Riduan bin Isomuddin, better known as Hambali, and the discovery of the Guraba Cell, a 17-member Jemaah Islamiyah cell tasked with executing the “Second Wave.” More specifically, we understand that KSM admitted that he had tasked Majid Khan with delivering a large sum of money to an al Qaeda associate. Khan subsequently identified the associate (Zubair), who was then captured. Zubair, in turn, provided information that led to the arrest of Hambali. The information acquired from these captures allowed CIA interrogators to pose more specific questions to KSM, which led the CIA to Hambali’s brother, al-Hadi. Using information obtained from multiple sources, al-Hadi was captured, and he subsequently identified the Guraba cell. With the aid of this additional information, interrogations of Hambali confirmed much of what was learned from KSM.

Interrogations of Zubaydah—again, once enhanced techniques were employed—furnished detailed information regarding al Qaeda’s “organizational structure, key operatives, and modus operandi” and identified KSM as the mastermind of the September 11 attacks. You have informed us that Zubaydah also “provided significant information on two operatives, [including] Jose Padilla[,] who planned to build and detonate a ‘dirty bomb’ in the Washington DC area.” Zubaydah and KSM have also supplied important information about al-Zarqawi and his network.

5. Techniques Memorandum, *supra* note 1, at 1.

6. See Exec. Ord. No. 13,492, 74 Fed. Reg. 4897, 4898 (Jan. 22, 2009); President Barack Obama, Address to Joint Session of Congress (Feb. 24, 2009), http://www.whitehouse.gov/the_press_office/remarks-of-president-barack-obama-address-to-joint-session-of-congress.

7. Obligations Memorandum, *supra* note 4.

More generally, the CIA has informed us that, since March 2002, the intelligence derived from CIA detainees has resulted in more than 6,000 intelligence reports and, in 2004, accounted for approximately half of CTC's reporting on al Qaeda. You have informed us that the substantial majority of this intelligence has come from detainees subjected to enhanced interrogation techniques. In addition, the CIA advises us that the program has been virtually indispensable to the task of deriving actionable intelligence from other forms of collection.⁸

The memorandum concludes that the interrogation of KSM led to the discovery of the planned "Second Wave" attacks on the United States and the connection to Hambali.⁹ However, as noted by President George W. Bush in a statement on February 9, 2006, the plot and even the connection to Hambali had been thwarted before KSM had even been captured:

Since September the 11th, the United States and our coalition partners have disrupted a number of serious al Qaeda terrorist plots—including plots to attack targets inside the United States. Let me give you an example. In the weeks after September the 11th, while Americans were still recovering from an unprecedented strike on our homeland, al Qaeda was already busy planning its next attack. We now know that in October 2001, Khalid Shaykh Muhammad—the mastermind of the September the 11th attacks—had already set in motion a plan to have terrorist operatives hijack an airplane using shoe bombs to breach the cockpit door, and fly the plane into the tallest building on the West Coast. We believe the intended target was Liberty [sic] Tower in Los Angeles, California.

Rather than use Arab hijackers as he had on September the 11th, Khalid Shaykh Muhammad sought out young men from Southeast Asia—whom he believed would not arouse as much suspicion. To help carry out this plan, he tapped a terrorist named Hambali, one of the leaders of an al Qaeda affiliated group in Southeast Asia called "J-I." JI terrorists were responsible for a series of deadly attacks in Southeast Asia, and members of the group had trained with al Qaeda. Hambali recruited several key operatives who had been training in Afghanistan. Once the operatives were recruited, they met with Osama bin Laden, and then began preparations for the West Coast attack.

Their plot was derailed in early 2002 when a Southeast Asian nation arrested a key al Qaeda operative. Subsequent debriefings and other intelligence operations made clear the intended target, and how al Qaeda hoped to execute it. This critical intelligence helped other

8. *Id.* at 10-11 (citations omitted). The report emphasized that this was but a small portion of the intelligence obtained through interrogations of KSM and Abu Zubaydah. *See id.*

9. *See id.* at 10.

allies capture the ringleaders and other known operatives who had been recruited for this plot. The West Coast plot had been thwarted. Our efforts did not end there. In the summer of 2003, our partners in Southeast Asia conducted another successful manhunt that led to the capture of the terrorist Hambali.

As the West Coast plot shows, in the war on terror we face a relentless and determined enemy that operates in many nations—so protecting our citizens requires unprecedented cooperation from many nations as well. It took the combined efforts of several countries to break up this plot. By working together, we took dangerous terrorists off the streets; by working together we stopped a catastrophic attack on our homeland.¹⁰

Indeed, KSM was captured on March 1, 2003, and as President Bush noted in praising the antiterrorism efforts of coalition partners, the “Second Wave” attacks were broken up in early 2002, almost a year before. In addition, Hambali was tied to that effort in 2002, again before KSM was captured.

The information that Abu Zubaydah purportedly divulged under interrogation, including waterboarding interrogation, has been questioned as well.¹¹ Ali Soufan, a former FBI agent who participated in the initial questioning of Abu Zubaydah, has directly refuted some of the claims made in the OLC memorandum.¹² For example, Soufan has said that Abu Zubaydah was already providing intelligence *before* torture techniques were employed:

One of the most striking parts of the memos is the false premises on which they are based. The first, dated August 2002, grants authorization to use harsh interrogation techniques on a high-ranking terrorist, Abu Zubaydah, on the grounds that previous methods hadn’t been working. The next three memos cite the successes of those methods as a justification for their continued use.

It is inaccurate, however, to say that Abu Zubaydah had been uncooperative. Along with another FBI agent, and with several CIA officers present, I questioned him from March to June 2002, before the harsh techniques were introduced later in August. Under traditional interrogation methods, he provided us with important actionable intelligence.

We discovered, for example, that Khalid Shaikh Mohammed was the mastermind of the 9/11 attacks. Abu Zubaydah also told us about

10. Press Release, George W. Bush, President of the United States, President Discusses Progress in War on Terror to National Guard (Feb. 9, 2006), <http://georgewbush-whitehouse.archives.gov/news/releases/2006/02/20060209-2.html>.

11. Ali Soufan, *My Tortured Decision*, N.Y. TIMES, Apr. 23, 2009, at A27, available at http://www.nytimes.com/2009/04/23/opinion/23soufan.html?_r=3&ref=opinion.

12. *Id.*

Jose Padilla, the so-called dirty bomber. This experience fit what I had found throughout my counter-terrorism career: traditional interrogation techniques are successful in identifying operatives, uncovering plots and saving lives.

There was no actionable intelligence gained from using enhanced interrogation techniques on Abu Zubaydah that wasn't, or couldn't have been, gained from regular tactics. In addition, I saw that using these alternative methods on other terrorists backfired on more than a few occasions—all of which are still classified. The short sightedness behind the use of these techniques ignored the unreliability of the methods, the nature of the threat, the mentality and *modus operandi* of the terrorists, and due process.

Defenders of these techniques have claimed that they got Abu Zubaydah to give up information leading to the capture of Ramzi bin al-Shibh, a top aide to Khalid Shaikh Mohammed, and Mr. Padilla. This is false. The information that led to Mr. Shibh's capture came primarily from a different terrorist operative who was interviewed using traditional methods. As for Mr. Padilla, the dates just don't add up: the harsh techniques were approved in the memo of August 2002, Mr. Padilla had been arrested that May.¹³

These remarks demonstrate that despite claimed intelligence "takes," the use of enhanced interrogation techniques is certainly not without its detractors.¹⁴ Constant criticism of the methodology by those opposed to the war policies of President Bush prior to and during the 2008 presidential campaign led to a commitment by President Obama to review all aspects of the detention program and to shut down the U.S. facility at Guantanamo Bay by January 2010.¹⁵

In addition, military interrogators and FBI agents have questioned the usefulness and reliability of enhanced interrogations:

Without more transparency, the value of the CIA's interrogation and detention program is impossible to evaluate. Setting aside the moral, ethical, and legal issues, even supporters, such as John Brennan, acknowledge that much of the information that coercion produces is unreliable. As he put it, "All these methods produced useful information, but there was also a lot that was bogus." When pressed, one former top agency official estimated that "ninety per cent of the information was unreliable." Cables carrying Mohammed's interroga-

13. *Id.*

14. See *What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration: Hearing Before the S. Comm. On the Judiciary*, 111th Cong. (2009) (featuring testimony of witnesses concerning the controversy as well as remarks of Senate members critical of the Bush Administration's policies), <http://judiciary.senate.gov/hearings/hearing.cfm?id=3842>.

15. See sources cited *supra* note 6.

tion transcripts back to Washington reportedly were prefaced with the warning that “the detainee has been known to withhold information or deliberately mislead.” Mohammed, like virtually all the top Al Qaeda prisoners held by the CIA, has claimed that, while under coercion, he lied to please his captors.¹⁶

And as Jack Cloonan of the FBI noted, “The proponents of torture say, ‘Look at the body of information that has been obtained by these methods.’ But if KSM and Abu Zubaydah did give up stuff, we would have heard the details What we got was pabulum.”¹⁷

The discussion that follows describes the specific enhanced techniques used in the interrogation program. The legal parameters of the Torture Convention are then dissected, as are the implementing provisions within Title 18 of the United States Code. Next, the law applicable to lesser forms of enhanced interrogation is addressed. Finally, the policy concerns that have been raised in regard to the use of enhanced techniques are addressed with respect to solutions for future conflicts.

II. THE ENHANCED INTERROGATION TECHNIQUES USED AT GUANTANAMO

The United States interrogation program at Guantanamo Bay consisted of three separate categories of enhanced interrogation methodologies: conditioning techniques, corrective techniques, and coercive techniques.¹⁸

A. Conditioning Techniques

The conditioning techniques included nudity, dietary manipulation, and sleep deprivation.¹⁹ They were described in the May 30, 2005 OLC Memorandum as placing the detainee in a “baseline” state, in order to “demonstrate to the detainee that he has no control over basic human needs.”²⁰

Nudity was imposed to create psychological unease. It had the benefit of allowing interrogators to provide the detainee nearly instant

16. Jane Meyer, *The Black Sites*, NEW YORKER, Aug. 13, 2007, http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer.

17. David Rose, *Tortured Reasoning*, VANITY FAIR, Dec. 16, 2008, <http://www.vanityfair.com/magazine/2008/12/torture200812>.

18. See Obligations Memorandum, *supra* note 4, at 12 (citing Fax from Assoc. Gen. Counsel, CIA, for Daniel Levin, Acting Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, *Background Paper on CIA’s Combined Use of Interrogation Techniques* 4 (Dec. 30, 2004) [hereinafter *Background Paper*]). The *Background Paper*, which was cited in many of the documents declassified and released by the Obama Administration on April 16, 2009, has not been declassified or released.

19. Obligations Memorandum, *supra* note 4, at 12.

20. *Id.* (citing *Background Paper*, *supra* note 18, at 13).

reward for his cooperation by returning his clothing.²¹ The OLC Memorandum made clear that no sexual abuse or threats of sexual abuse were involved.²²

The *dietary manipulation* program involved the substitution of a bland liquid meal in lieu of the detainee's normal dietary regime. Dietary manipulation magnified the effectiveness of other techniques—especially sleep deprivation.²³ The program required that the detainee receive at least 1000 calories each day and each detainee on the program be monitored to ensure they not lose more than ten percent of their starting weight.²⁴ The detainee's water intake was not restricted in any way.²⁵

Sleep deprivation was employed to weaken a detainee's resistance through an extended period of sleeplessness. Although the program authorized up to 180 hours of sleeplessness, only three detainees were subjected to more than 96 hours of sleep deprivation.²⁶ Sleep deprivation, according to the literature, while not physically painful in itself, may have the effect of reducing tolerance to some forms of pain in some subjects.²⁷ In one significant study, researchers found that sleep deprivation caused a significant decrease in heat pain thresholds and some decrease in cold pain thresholds after one night without sleep.²⁸ In another, sleep deprivation was found to cause a statistically significant drop of between eight and nine percent in tolerance thresholds for mechanical or pressure pain after forty hours.²⁹ A detainee undergoing sleep deprivation was shackled in a standing position with his hands in front of his body, which would prevent him from falling asleep but allow him to move around within a two- to three-foot diameter.³⁰

21. Techniques Memorandum, *supra* note 1, at 7.

22. *Id.* at 7-8.

23. *Id.* at 7.

24. *Id.*

25. *Id.*

26. *Id.*

27. See, e.g., B. Kunderman et al., *Sleep Deprivation Affects Thermal Pain Thresholds But Not Somatosensory Thresholds in Healthy Volunteers*, 66 *PSYCHOSOMATIC MED.* 932 (2004).

28. *Id.*

29. S. Hakki Onen et al., *The Effects of Total Sleep Deprivation, Selective Sleep Interruption, and Sleep Recovery on Pain Tolerance Thresholds on Healthy Subjects*, 10 *J. SLEEP RES.* 35, 41 (2001); see also *id.* at 35-36 (discussing other relevant studies).

30. See Techniques Memorandum, *supra* note 1, at 11-13 (explaining these procedures at length).

B. *Corrective Techniques*

Corrective techniques were used “to correct, startle, or to achieve another enabling objective with the detainee.”³¹ As described, these techniques “condition[ed] a detainee to pay attention to the interrogator’s questions and . . . dislodge[d] expectations that the detainee [would] not be touched.”³² The enhanced techniques in this category included insulting (facial) slaps, abdominal slaps, facial holds, and “attention grasps.”³³

The *facial or insult slap* was used to induce shock, surprise, or humiliation, but not to inflict physical pain of a severe and lasting nature.³⁴ With this technique, the interrogator slapped the individual’s face with fingers slightly spread.³⁵ Medical and psychological personnel are physically present or otherwise observing whenever this technique is applied.³⁶

The *abdominal slap* involved striking the abdomen of the detainee with the back of the interrogator’s hand.³⁷ Standing in front of the detainee and approximately eighteen inches away, with fingers extended and held tightly together, the interrogator slapped the detainee’s abdomen above the navel and below the sternum.³⁸ The interrogator could not use a fist.³⁹ The abdominal slap was not intended to inflict injury or cause any significant pain. As with the facial slap, medical personnel were present or observing whenever this technique was employed.⁴⁰

The *facial hold* was used to hold the face immobile during interrogation. One open palm was placed on either side of the detainee’s face.⁴¹ The fingertips were kept well away from the individual’s eyes.⁴²

The *attention grasp* consisted of grabbing the individual with both hands, one hand on each side of the collar opening, in a controlled and

31. Obligations Memorandum, *supra* note 4, at 13 (quoting Background Paper, *supra* note 18, at 5) (internal quotation marks omitted).

32. *Id.* at 14 (citing Background Paper, *supra* note 18, at 5-7); Techniques Memorandum, *supra* note 1, at 8-9.

33. Obligations Memorandum, *supra* note 4, at 8-9.

34. Techniques Memorandum, *supra* note 1, at 8, 33.

35. *Id.* at 8.

36. Obligations Memorandum, *supra* note 4, at 8.

37. Techniques Memorandum, *supra* note 1, at 8.

38. *Id.* at 9.

39. *Id.*

40. *Id.* at 8-9.

41. *Id.* at 8.

42. *Id.*

quick motion.⁴³ In the same motion as the grasp, the individual was drawn toward the interrogator.⁴⁴

C. Coercive Techniques

Coercive techniques, according to the OLC Memorandum, “place[d] the detainee in more physical and psychological stress” than the other techniques and were “considered to be more effective tools in persuading a resident [detainee] to participate with CIA interrogators.”⁴⁵ The coercive techniques reportedly were not used simultaneously, and included walling, water dousing, stress positions, wall standing, cramped confinement, and waterboarding.⁴⁶

The *walling* technique involved placing the detainee against a flexible false wall with a normal appearance.⁴⁷ The detainee was then pulled forward by the interrogator and slammed against the flexible false wall, creating a loud sound and shocking the detainee without causing significant pain.⁴⁸ The CIA regarded walling as “one of the most effective interrogation techniques.”⁴⁹ It was designed to wear down and shock the detainee while altering his expectations about the treatment he would receive.⁵⁰

Water dousing involved pouring cold water on the detainee either from a container or from a hose without a nozzle.⁵¹ This technique was intended to weaken the detainee’s resistance and persuade him to cooperate with interrogators. In employing this technique, the following limitations applied: for water temperature of 41 degrees Fahrenheit, total duration of exposure could not exceed 20 minutes without drying and re-warming; for water temperature of 50 degrees, the exposure limit was 40 minutes; and for water temperature of 59 degrees, 60 minutes.⁵²

Stress positions were designed to produce the physical discomfort associated with temporary muscle fatigue.⁵³ The three principal stress positions forced detainees to (1) sit on the floor with legs extended straight out and arms raised above their head; (2) kneel on the floor

43. *Id.*

44. Obligations Memorandum, *supra* note 4, at 8.

45. *Id.* at 14 (citing Background Paper, *supra* note 18, at 7).

46. *Id.*

47. *Id.* (citing Techniques Memorandum, *supra* note 1, at 8).

48. Techniques Memorandum, *supra* note 1, at 8.

49. Obligations Memorandum, *supra* note 4, at 14.

50. *Id.*

51. Techniques Memorandum, *supra* note 1, at 9.

52. *Id.* at 10.

53. Obligations Memorandum, *supra* note 4, at 15.

while leaning back at a forty-five degree angle; or (3) lean against a wall, generally about three feet away from the detainee's feet, with only the head touching the wall and with wrists handcuffed in front of him or behind the back.⁵⁴

Wall standing, according to the CIA, was used only to induce temporary muscle fatigue.⁵⁵ The detainee would stand about four to five feet from a wall, with his feet spread approximately shoulder width. His arms would be stretched out in front, with only his fingers resting on the wall to support his body weight.⁵⁶ The detainee would not be permitted to move or reposition his hands or feet.⁵⁷

Cramped confinement involved placing the detainee in a confined space that restricts the individual's movement. The confined space was usually dark, and the duration of confinement varied based upon the size of the container.⁵⁸ In a larger space, the detainee could stand up or sit down; the smaller spaces were only large enough for detainees to sit down.⁵⁹ Confinement in the larger space was not permitted to last more than eight hours at a time or for more than eighteen hours per day; for the smaller space, confinement could last no more than two hours.⁶⁰ Limits on the duration of cramped confinement were based on considerations of the detainee's size and weight as well as his response to the technique.⁶¹

Waterboarding required the detainee to lay on a gurney horizontally inclined at an angle of ten to fifteen degrees, with his head toward the lower end of the gurney.⁶² A cloth would be placed over the detainee's face, and cold water would be poured onto the cloth from a height of approximately six to eighteen inches. The wet cloth created a barrier through which it was difficult (and in some cases impossible) to breath.⁶³ A single application of water could not last for more than forty seconds, measuring the duration of an application from the

54. Techniques Memorandum, *supra* note 1, at 9.

55. See OFFICE OF MEDICAL SERVICES, CIA, GUIDELINES ON MEDICAL AND PSYCHOLOGICAL SUPPORT TO DETAINEE RENDITION, INTERROGATION AND DETENTION 8-10 (2004). The CIA's OMS carefully evaluated detainees before any enhanced technique was authorized in order to ensure that the detainee "[was] not likely to suffer any severe physical or mental pain or suffering as a result of interrogation." *Id.* at 9.

56. Techniques Memorandum, *supra* note 1, at 9.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 6.

62. *Id.* at 13.

63. *Id.* at 13.

moment water is first poured onto the cloth until the moment the cloth is removed from the detainee's face. The effects included a sensation of drowning, even if the subject was aware he was not physically drowning.⁶⁴ While the process was not physically painful, it usually caused fear and panic.⁶⁵ CIA interrogators used this technique on only three detainees, and did not use it after March 2003.⁶⁶

Further conditions were placed on the use of the waterboarding technique: it was authorized for, at most, one thirty-day period during which it could not be applied for more than five days. Further, only two sessions were permitted in any twenty-four-hour period.⁶⁷ However, the CIA Inspector General's report found that the CIA waterboarded Khalid Shaykh Mohammed 183 times in March 2003 and Abu Zubaydah 83 times in August 2002.⁶⁸ Those figures far surpass the CIA's own internal guidelines for the use of waterboarding, and raise the question of whether a technique—authorized under strict guidelines to avoid being deemed torture—can nevertheless be considered torture if those guidelines are excessively exceeded.⁶⁹

III. THE PROHIBITION AGAINST TORTURE IN INTERNATIONAL AND DOMESTIC LAW

A. *International Law*

The Convention Against Torture, negotiated during the Reagan Administration, was considered and consented to by the Senate during the first Bush Administration.⁷⁰ The Convention prohibits "torture," which is defined as

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

64. See REPORT OF CIA INSPECTOR GENERAL, COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPT. 2001-OCT. 2003), at 15 (May 7, 2004) ("Airflow is restricted . . . and the technique produces the sensation of drowning and suffocation.").

65. Techniques Memorandum, *supra* note 1, at 13.

66. Obligations Memorandum, *supra* note 4, at 29. The three detainees upon whom the waterboarding technique was used were Khalid Shaykh Mohammed, Abu Zubaydah, and Al-Nashiri. *Id.*

67. *Id.* at 14.

68. Obligations Memorandum, *supra* note 4, at 37.

69. See *id.*

70. S. TREATY DOC. NO. 100-20 (1994).

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.⁷¹

The Convention distinguishes between torture as defined above and “other acts of cruel, inhuman or degrading treatment or punishment.”⁷² While state parties are called upon in Article 16 of the Convention to prevent these “other acts” as well, there is no legal requirement that state parties enact criminal penalties for enforcement of prohibitions against the cruel and inhuman treatment that is lesser than torture. This dual-level approach is consistent with the 1975 non-binding U.N. Resolution that describes torture as “an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”⁷³

When the Convention was submitted to the Senate for consideration, the administration under President George H. W. Bush included the following understanding to clarify the difference between torture and other lesser acts in Article 16 described above:

The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that 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 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.⁷⁴

In submitting the Convention to the Senate for ratification, the administration also included a reservation to Article 16, addressing other lesser acts of inhumane treatment, as follows:

[T]he United States considers itself bound by the obligation under Article 16 . . . only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual, and inhumane

71. Convention Against Torture, *supra* note 2, art. 1, para. 1.

72. *Id.* art. 16(1).

73. Declaration on Protection from Torture, G.A. Res. 3452 (XXX), Annex, art. 1, ¶ 2, U.N. GAOR, 30th Sess., Supp. No. 34, at 92, U.N. Doc. A/1034 (Dec. 9, 1975).

74. S. EXEC. DOC. NO. 101-30, at 36 (1990).

treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.⁷⁵

In accepting this reservation, the Senate clearly intended to limit the United States' obligations under Article 16 to obligations already imposed by those amendments to the Constitution.⁷⁶ Those amendments have never been construed by federal courts to extend protections to aliens outside the United States.⁷⁷

B. *Interpretation by Other Nations*

Other organizations and states that are parties to the Convention Against Torture have drawn similar distinctions between torture and the lesser category of cruel, inhuman, or degrading treatment or punishment. The European Court of Human Rights, for example, reviewed interrogation techniques analogous to the enhanced interrogation techniques used at Guantanamo. In *Ireland v. United Kingdom*,⁷⁸ the methods at issue were:

(a) *wall standing*: forcing the detainees to remain for periods of some hours in a "stress position," described by those who underwent it as being "spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers";

(b) *hooding*: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;

(c) *subjection to noise*: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;

(d) *deprivation of sleep*: pending their interrogations, depriving the detainees of sleep.

(e) *deprivation of food and drink*: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.⁷⁹

In reviewing these techniques, which were applied in combination and for hours at a time, the court concluded they were inhumane and degrading, but did not amount to torture.⁸⁰ The court treated the five

75. 136 CONG. REC. 36198 (1990).

76. See Obligations Memorandum, *supra* note 4, at 16.

77. *Id.*

78. *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25 (ser. A) (1978).

79. *Id.* at para. 96.

80. See *id.* at para. 104, 167.

categories of enhanced interrogation as a single program.⁸¹ In reaching its judgment, the court determined that

[a]lthough the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture.⁸²

A similar result occurred in the Israeli high court's decision in *Public Committee Against Torture in Israel v. Israel*.⁸³ This case concerned a challenge to the General Security Service's use of five enhanced interrogation techniques. These techniques included forcefully shaking the suspect's upper torso,⁸⁴ restraining him in the "Shabach" posture,⁸⁵ forcing him assume the "Frog Crouch" position repeatedly,⁸⁶ over-tightening his handcuffs,⁸⁷ and depriving him of sleep.⁸⁸ In each instance, the Supreme Court of Israel found that these acts reflected cruel and inhumane treatment, but carefully avoided describing any of them as having the severity of pain or suffering indicative of torture⁸⁹

C. *The Geneva Conventions of 1949*

Because the al Qaeda members captured in Afghanistan and elsewhere do not qualify as prisoners of war (since they do not carry arms

81. *See id.*

82. *Id.* at para. 167.

83. HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. Israel [1999] IsrSC 53(4) 817, reprinted in JUDGMENTS OF THE ISRAEL SUPREME COURT: FIGHTING TERRORISM WITHIN THE LAW 25 (n.d.), http://www.jewishvirtuallibrary.org/jsourc/Politics/terrorism_law.pdf (English translation by Israeli Supreme Court).

84. *Id.* at para. 9 (describing this technique as "the forceful and repeated shaking of the suspect's upper torso, in a manner which causes the neck and head to swing rapidly" and relating evidence that this was "likely to cause serious brain damage, harm the spinal cord, cause the suspect to lose consciousness, vomit and urinate uncontrollably and suffer serious headaches").

85. *Id.* at para. 10. The Shabach involves seating the detainee in a low, forward-tilted chair and tying his arms together with one behind the backrest and the other in front of it, all while keeping his head covered with a sack and playing "powerfully loud music." *Id.* The position "causes serious muscle pain." *Id.*

86. *Id.* at para. 11 (defining this technique as the imposition of "consecutive, periodical crouches on the tips of one's toes, each lasting for five minute intervals").

87. *Id.* at para. 12.

88. *Id.* at para. 13 (stating that the alleged sleep deprivation resulted from extended use of the Shabach as well as non-stop interrogations).

89. *See id.* at 1482-84.

openly, wear identifying insignia, adhere to the law of armed conflict, or reflect a recognizable command structure), the general provisions of the Third 1949 Geneva Convention do not apply.⁹⁰ But Article 3, which is common to each of the four Geneva Conventions, does apply—or at least it has applied since 2006 with respect to U.S. personnel, according to the U.S. Supreme Court.⁹¹ It is important to note that Common Article 3 addresses both torture and other lesser forms of treatment identified as “[o]utrages upon personal dignity, in particular, *humiliating and degrading treatment*.”⁹²

Until the decision in *Hamdan v. Rumsfeld*⁹³ in 2006 (long after the harshest interrogation of the detainees had ceased in March 2003), there was great debate concerning whether the struggle to suppress al Qaeda was an “armed conflict not of an international character.”⁹⁴ Because nearly seventy-five states were involved in the struggle, many international lawyers were not convinced that Article 3 could be held to apply in Afghanistan, a party to the Geneva Conventions, which was

90. See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135.

91. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–30 (2006) (holding that Article 3 of the 1949 Geneva Convention applied to the al Qaeda conflict). Common Article 3 provides:

In the case of *armed conflict not of an international character occurring in the territory of one of the High Contracting Parties*, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) *Persons taking no active part in the hostilities, including members of Armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion, or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:*

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and *torture*;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular, *humiliating and degrading treatment*;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded, sick and shipwrecked shall be collected and cared for. Geneva Convention, *supra* note 90, art. 3 (emphasis added) (original emphasis omitted).

92. *Id.* art 3, para. (1)(c).

93. *Hamdan*, 548 U.S. at 557.

94. Geneva Convention, *supra* note 90, art. 3.

struggling against the Taliban—an organization with roots in both Pakistan and Afghanistan and whose funding largely emanated from Pakistan, which was also a party to the Conventions.

Nor, as Professor Robert Turner pointed out, could it be easily argued that the conflict against al Qaeda was clearly “occurring in the territories of one of the High Contracting Parties,” as attacks by al Qaeda had occurred in *several* territories, including the United States, Dar As Salaam, Tanzania, Nairobi, Kenya, the territorial waters of Yemen, and Saudi Arabia, where the Khobar Towers had been bombed.⁹⁵ Of equal concern was the legislative history of Common Article 3. White House attorneys and the Department of Justice in the George W. Bush administration argued that Common Article 3 is intended only to apply “to internal conflicts between a State and an insurgent group,”⁹⁶ and the conflict with al Qaeda clearly takes place in several nations. Thus, as Turner observes, the White House characterized the conflict as *international*, rather than as an “armed conflict not of an international character” subject to Common Article 3.⁹⁷ And while Turner joins those disagreeing with the Bush Administration’s interpretation,⁹⁸ he points out that commentaries on the legislative history of the Geneva Convention provide some support for it.⁹⁹

But the Supreme Court in *Hamdan v. Rumsfeld* found that Common Article 3 did apply to the conflict with al Qaeda.¹⁰⁰ The Court overturned the 2005 decision of the Court of Appeals for the District of Columbia, which had ruled that Common Article 3 was inapplicable

95. Robert F. Turner, *What Went Wrong? Torture and the Office of Legal Counsel in the Bush Administration*, 32 CAMPBELL L. REV. 529, 546-47 (2010) (relating his testimony before the Subcommittee on Administrative Oversight and the Courts).

96. A. John Radsan, *The Collision Between Common Article Three and the Central Intelligence Agency*, 56 CATH. U. L. REV. 959, 972 (2007).

97. Turner, *supra* note 95, at 553; see also Radsan, *supra* note 96, at 972 (“President Bush announced that, although terrorism ‘detainees [would] be treated humanely,’ neither Common Article 3 nor any other part of the Geneva Conventions would apply except to the extent ‘appropriate and consistent with military necessity.’”).

98. Turner, *supra* note 95, at 553-54; cf. Fionnuala Ní Aoláin, *Hamdan and Common Article 3: Did the Supreme Court Get It Right?*, 91 MINN. L. REV. 1523, 1556 (2007) (observing that one reason for scholars’ disagreement is “the apparent absence of a nexus between al-Qaeda and any sovereign State”).

99. See Turner, *supra* note 95, at 554-55 (discussing JEAN S. PICTET, INTERNATIONAL COMMITTEE OF THE RED CROSS: COMMENTARY TO THE CONVENTION (I) RELATIVE TO THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 38-43, 49-50 (1952); G.I.A.D. Draper, *Humanitarian Law and Internal Armed Conflict*, 13 GA. J. INT’L 7 COMP. L. 253, 268 (1983)).

100. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

to Hamdan because the conflict with al Qaeda is international in scope and thus not a “conflict not of an international character.”¹⁰¹ In reversing, the Court, per Justice Stevens, held that “Common Article 3 . . . affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a non-signatory ‘Power’ who are involved in a conflict ‘in the territory of a signatory.’”¹⁰² However, as Turner noted, that conclusion was “based upon an interpretation of the 1949 Conventions, and under *Whitney v. Robertson*, the Court will be bound by an inconsistent statute of more recent date.”¹⁰³

D. Domestic Law

1. The Law Addressing Torture

The Convention Against Torture required all signatories “to ensure that all acts of torture are offenses under its criminal law.”¹⁰⁴ Sections 2340 through 2340A of Title 18 were included in the Senate version of the 1994 Foreign Affairs Authorization Act.¹⁰⁵ The House took no parallel action, but the House and Senate Conferees accepted without change the Senate version.¹⁰⁶ It is clear from the limited legislative history that Congress intended that § 2340’s definition of torture track directly with the definition set forth in the Convention.¹⁰⁷ The Senate Report said as much: “The definition of torture emanates directly from Article 1 of the Convention.”¹⁰⁸

Section 2340A makes it a criminal offense for any person “outside the United States [to] commit[] or attempt[] to commit torture.”¹⁰⁹

101. *Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005).

102. *Hamdan*, 548 U.S. at 630.

103. Turner, *supra* note 95, at 555 (citing *Whitney v. Robertson*, 124 U.S. 190 (1888)).

104. Convention Against Torture, *supra* note 2, art. 4.

105. S. REP. NO. 103-107, at 58 (1993).

106. See H.R. REP. NO. 103-482, at 229 (1994) (Conf. Rep.).

107. See S. REP. NO. 103-107, at 58-59 (1993).

108. *Id.*

109. An individual convicted of torture faces a fine or confinement up to 20 years or both. For those acts resulting in a victim’s death, a defendant may be sentenced to life imprisonment or death. 18 U.S.C. § 2340A(a) (2006). When death does not result, the statute of limitations is eight years; but where death results, there is no statute of limitations. *Id.* §§ 2332b(g)(5)(B), 3286(b). Section 2340A as originally enacted did not provide for the death penalty, but it was amended in 1994 to do so. See Pub. L. No. 103-322, § 60020, 108 Stat. 1796, 1979 (1994); H.R. CONF. REP. NO. 103-711, at 388 (1994) (Conf. Rep.) (noting that the act added the death penalty as a penalty for torture).

The act of torture is defined in § 2340 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.”¹¹⁰

Therefore, the offense of torture can be established only if the prosecutor can show: (1) the torture occurred outside the United States; (2) the defendant acted under color of law; (3) the victim was within the defendant’s custody or physical control; (4) the defendant specifically intended to cause severe physical or mental pain and suffering; and (5) that the act inflicted severe physical or mental pain or suffering.¹¹¹ Further, those involved in the infliction of severe pain or suffering through *planning* or *approval*, although not direct participants, can be prosecuted as conspirators to commit torture.¹¹²

There have been no criminal prosecutions under § 2340A. The sections were passed into law with no debate over the definition of torture and were clearly intended solely to fulfill the United States obligation under the Convention Against Torture. Despite the lack of prosecutions, federal courts have defined conduct that would constitute torture in civil suits brought under the Torture Victims Protection Act (TVPA).¹¹³ This Act provides a tort remedy for victims of torture.¹¹⁴ More importantly, the cases interpreting the TVPA offer insights into what acts U.S. federal courts will conclude constitute torture under the criminal statutes. As with § 2340, the TVPA’s definition of torture was intended to follow closely the definition found in the Convention.¹¹⁵

The cases brought under the TVPA reference seven distinct forms of severe abuse that would constitute torture: (1) severe beatings using weapons such as truncheons and clubs; (2) threats of imminent death, to include mock executions; (3) threats of removing body parts and or extremities; (4) burning, especially burning with cigarettes; (5) electric shocks to genital areas, or threats to do so; (6) rape or sexual assault, to include injury to sexual organs, or threats of the same; and (7) forcing the detainee to watch the extreme physical or mental torture of

110. 18 U.S.C. § 2340(1), 2340A.

111. See S. EXEC. DOC. NO. 101-30, at 6 (1990) (stating that “[f]or an act to be ‘torture,’ it must . . . cause severe pain and suffering, and be intended to cause severe pain and suffering”).

112. See 18 U.S.C. § 2340A(c).

113. See sources cited *infra* notes 115–20.

114. Pub. L. No. 102-256 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1359 note (2006)).

115. See *Xuncax v. Gramajo*, 886 F. Supp. 162, 176 n.12 (D. Mass. 1995).

others.¹¹⁶ The severity of these examples of treatment found in civil proceedings suggests that similar severity would have to be found to warrant conviction under the criminal provisions in 18 U.S.C. §§ 2340-2340A.

2. *The Law Addressing Humiliating and Degrading Treatment*

Quite apart from the issue of whether torture occurred in the use of the harshest techniques in the interrogation of high value detainees, it is clear from the program described above that even the lesser conditioning and corrective techniques used in the CIA's detainee interrogation program implicated the prohibition against *humiliating and degrading treatment* within Common Article 3.

The reason this is important is that the War Crimes Act of 1996¹¹⁷ includes within its definition of "war crimes" any conduct "which constitutes a grave breach of common Article 3."¹¹⁸ At a minimum, the corrective and coercive measures used in the CIA interrogations at Guantanamo would qualify as humiliating and degrading treatment. This would trigger application of the War Crimes Act unless an exception under carefully circumscribed conditions for cases of imminent harm or extreme emergency is legislatively carved. Such an exception may be warranted.

IV. ANALYSIS AND PERSPECTIVE

The question of what constitutes improper interrogation, and the role of Congress and the Courts in that determination, continues to be a vexing problem. As the Supreme Court recognized in 2004, the President's constitutional authority to deploy military and intelligence capabilities to protect the interests of the United States in times of armed conflict necessarily includes the authority to effect the capture, detention, *interrogation*, and, where appropriate, trial of enemy forces, as well as their transfer to other nations.¹¹⁹ President Clinton's Justice Department further recognized in 1996 that Congress "may not unduly constrain or inhibit the President's authority to make and to

116. *See, e.g.,* *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Ortiz v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

117. 18 U.S.C. § 2441.

118. *Id.* § 2241(c)(3).

119. *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (describing important incidents of war).

implement the decisions that he deems necessary or advisable for the successful conduct of military operations in the field.”¹²⁰

Concurrently, Article I, Section 8 of the Constitution grants significant war powers to Congress. Its power to “define and punish . . . offenses against the laws of nations”¹²¹ provides a basis for Congress to establish a statutory framework, such as that set forth in the Military Commissions Act (MCA) of 2006 for trying and punishing unlawful enemy combatants for violations of the law of war and other hostile acts in support of terrorism.¹²² This view was confirmed by former President Bush’s support for enactment of the MCA following the Supreme Court’s decision in *Hamdan v. Rumsfeld*.¹²³ Furthermore, the power “[t]o make rules for the government and regulation of the land and naval forces” gives Congress the recognized authority to establish standards for detention, interrogation, and transfer to foreign nations.¹²⁴ This is precisely what Congress did in passing the Detainee Treatment Act of 2005 that addresses the treatment of alien detainees held in the custody of the Department of Defense.¹²⁵

While the Executive and Congress share responsibility for detainee matters, the detention of unlawful combatants rests solely with the Executive. Early in the present conflict, Congress passed Senate Joint Resolution 23 (SJR 23),¹²⁶ which recognizes that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.”¹²⁷ Additionally, the resolution specifically authorizes the President “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 future acts of international terrorism against the United States.*”¹²⁸ Thus, through SJR 23, Congress has specifically endorsed not only the use of appropriate military force, but also the included authority to detain enemy combatants to prevent them from conducting further hostilities

120. U.S. Dep’t of Justice, *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. Off. Legal Counsel 182, 185 (1996).

121. U.S. CONST. art. I, § 8, cl. 10.

122. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

123. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

124. U.S. CONST. art. I, § 8, cl. 14.

125. Pub. L. No. 109-148, 119 Stat. 2863 (2005).

126. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

127. *Id.* pmbl.

128. *Id.* § 2(a) (emphasis added).

against this nation. Effective interrogation of those with knowledge of terrorist planning is directly related to preventing future terrorist acts.

These views of the relative roles of the President and Congress during periods in which the United States faces imminent harm were placed in context by then-Congressman (later Judge) Abe Mikva in 1971, while addressing the effect on the President's power of the repeal of the 1950 Emergency Detention Act. Representative Mikva stated:

After all, if the President's war powers are inherent, he must have the right to exercise them without regard to congressional action. Arguably, any statute which impeded his ability to preserve and protect the republic from imminent harm could be suspended from operation. It is a contradiction in terms to talk of Congress' limiting or undercutting an inherent power given by the Constitution or some higher authority.¹²⁹

Some have related this need for executive flexibility of action to the harsh interrogation used by intelligence agency professionals against Khalid Shaykh Mohammed (namely waterboarding), pointing to intelligence secured in this fashion that is purported to have saved American lives.¹³⁰

While the harsh interrogation measures delineated above probably do not meet the standard of torture, if the precedents for tort recovery from tortuous acts previously addressed have any meaning, we are left searching for guidance on what constitutes the line between lawful and unlawful interrogation in light of the Common Article 3 prohibitions against humiliating and degrading treatment.¹³¹ This question is of special concern in circumstances involving "imminent harm" or "extreme necessity."

The answer may come from the new Commander in Chief himself. When President Obama was campaigning for office, he was sharply critical of then-President Bush's acceptance of practices involving enemy operatives and detainees in foreign locations deemed necessary to secure information and keep the nation free from subsequent attack. These practices included warrantless wiretaps, enhanced interrogation, and detention without trial (as provided at that time by *Johnson v. Eisentrager*).¹³² Since his election, however, President Obama

129. 117 CONG REC. 31557 (1971) (statement of Rep. Mikva).

130. See, e.g., Peter Finn et al., *How a Detainee Became an Asset*, WASH. POST, Aug. 29, 2009, at A1, A6. Recall, however, former FBI agent Ali Soufan's claim that the information was secured not by harsh interrogation, but rather by traditional interrogation methods. See *supra* text accompanying notes 11-13.

131. See Geneva Convention, *supra* note 90, art. 3.

132. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

has moderated these statements, and opined recently that “we shouldn’t be making judgments based upon the basis of incomplete information or campaign rhetoric.”¹³³ As cautious a leader as President Obama apparently is, he will likely be reluctant to throw away the entirety of the intelligence architecture that has kept the United States safe for the past eight years.

In late 2005, the Senate passed a bill sponsored by Senator John McCain that amended the Defense Authorization Bill that now regulates the interrogation of detainees held by U.S. military forces.¹³⁴ The amendment severely restricts harsh interrogation practices and prohibits “cruel, inhuman or degrading” treatment of detainees.¹³⁵ Senator McCain has subsequently indicated he does not rule out harsh treatment in an emergency such as a hostage rescue or an imminent attack.¹³⁶

To obtain the best possible balance between the obligations of both national security and human rights and to define this process more carefully, three different strictures ought to be considered in synthesis. The first, as suggested by Charles Krauthammer, would prohibit military personnel from ever engaging in the harsh techniques addressed by the McCain Amendment and would require that when they are authorized under limited and discrete circumstances, their application would be restricted to non-military interrogation professionals.¹³⁷ The second would require that the rationale be carefully circumscribed to situations of imminent danger to the United States, as suggested by Senator McCain.¹³⁸ The third, given voice by President Obama in August 2009, would require prior National Security Council approval for the parameters of interrogation of high value targets, and these could only be conducted by FBI personnel and not CIA operatives as occurred prior to April 2003.¹³⁹

133. *This Week: Interview by George Stephanopoulos with President-Elect Barack Obama* (ABC television broadcast Jan. 11, 2009), available at <http://abcnews.go.com/thisweek/economy/story?id=6618199&page=1>.

134. S. Amend. 1556 to S. 1042, 109th Cong. (2005), reprinted in 151 Cong. Rec. S8889 (daily ed. July 25, 2005).

135. *Id.*

136. See Cathy Young, *Torturing Logic*, REASON, Mar. 2006, at <http://www.reason.com/news/show/33263.html>.

137. See Charles Krauthammer, *The Truth About Torture*, WEEKLY STANDARD, Dec. 5, 2005, available at <http://www.weeklystandard.com/content/public/articles/000/000/006/400rhqav.asp>.

138. *Supra* text accompanying notes 134-37.

139. See Anne Kornblut, *New Unit to Question Key Terror Suspects*, WASH. POST, Aug. 24, 2009, at A1, A5.

This careful balancing of interests, with the new procedures in place, will ensure that information necessary to protect American lives and vital national interests is obtained under rational processes that are legally defensible, and should aid in avoiding violation of Common Article 3.¹⁴⁰

140. Legislation authorizing U.S. personnel to conduct harsh interrogations if the NSC determines an imminent self-defense situation exists would satisfy the tenets of *Whitney v. Robertson*, 124 U.S. 190 (1888).