

Torture, Ethics, Accountability?

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Torture—including waterboarding—has been banned under international and domestic law in the United States dating back to World War II when the U.S. sought to hold Japanese interrogators accountable for waterboarding American prisoners of war. Following the 9/11 attacks on the World Trade Center and the Pentagon, the Bush administration sought legal justification from White House counsel to detain and initiate interrogation practices long considered to constitute acts of torture. After legal memos were drafted, psychologists and physicians along with nurses and other medical professionals engaged in waterboarding and other forms of abusive interrogation often resulting in no reliable intelligence from detainees. None of the professionals involved in this torture have been charged with criminal misconduct, convicted, or sentenced for their participation. If the international and domestic legal systems are unable to hold these licensed professionals accountable, licensure boards and ethics committees should exercise their power to consider removal of licenses for violation of professional ethics codes, if not criminal misconduct.

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INTRODUCTION

They tortured innocent people. They tortured people very likely guilty of terrorism-related crimes, but ruined all chance of prosecuting these people thanks to the torture. They tortured the innocent and the likely-guilty alike when the torture had nothing to do with imminent threats: they tortured people based on bad information extracted from people they had already tortured . . . they tortured to get specific information they wanted . . . they tortured to hide their mistakes . . . They tortured people to break them, pure and simple. And they conspired to cover up their crimes.¹

Holding professionals accountable for acts of misconduct, such as engaging in the torture of detainees, helps ensure the integrity of social mores and the functionality of the legal system, and it prevents such behavior being repeated in the future. Variations in professional ethics codes, domestic law, and international law create different sets of rules for attorneys, physicians, and psychologists, and the variations often result in vastly different outcomes. Following the September 11, 2001, terrorist attacks on the Pentagon and the World Trade Center (9/11),² the United

1. LARRY SIEMS, *THE TORTURE REPORT: WHAT THE DOCUMENTS SAY ABOUT AMERICA'S POST-9/11 TORTURE PROGRAM* 6–7 (2011).

2. See Devon Haynie, *The Long-Reaching Human Toll of Sept. 11, by the Numbers*, U.S. NEWS & WORLD REP. (Sept. 10, 2021, 6:07 PM), <https://www.usnews.com/news/national-news/articles/2021-09-10/counting-the-lives-lost-as-a-result-of-9-11> [<https://perma.cc/96QA-AS5B>].

At 8:46 a.m. on Sept. 11, 2001, American Airlines Flight 11 barreled [sic] into the North Tower of the World Trade Center, instantly taking hundreds of lives and turning the heads of New Yorkers up to a smoke-filled sky. In the next hour and 45 minutes, another jetliner would slam into the South Tower, both iconic columns would collapse, a plane would strike the Pentagon and another would crash in a field near Shanksville, Pennsylvania. By the end of the day, nearly 3,000 people had died. Toxins swirling among the wreckage would be linked to the deaths of as many as 100 first responders who rushed to the scene to help. The American public didn't know it then, but the attacks would also

States adopted new policies for “enhanced” interrogation of detainees thought to have been involved in or possessing information of value for the newly declared War on Terror.³ One such policy was the use of torture when interrogating detainees.⁴ While most Americans might dispute that torture has ever been a feature of the nation’s legal heritage, the era of slavery through the first half of the twentieth century, which precluded legal redress for African Americans subjected to beatings, lynchings, sex crimes, and brutal punishments, would suggest otherwise.⁵ The U.S. War on Terror, a response to 9/11, revisited the imposition of torture, but this time as a national policy employed against Muslim detainees thought to

launch what the Bush administration dubbed the “war on terror,” decades-long military conflicts that would make the death toll on 9/11 seem small in comparison. . . . [S]cholars at the Costs of War Project at Brown University’s Watson Institute for International and Public Affairs have been working on estimates since 2010. They put the human toll at more than 890,000, including armed forces on all sides of the conflicts, contractors, civilians, journalists and humanitarian workers.

Id.

3. SENATE SELECT COMM. ON INTEL., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAMS, S. REP. NO. 113-288, at 11 (2014) [hereinafter SENATE REPORT ON TORTURE]. According to the Senate Intelligence Committee’s Report on Torture:

[S]ix days after the terrorist attacks of September 11, 2001, President George W. Bush signed a covert action Memorandum of Notification (MON) to authorize the director of central intelligence (DCI) to “undertake operations designed to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities.” Although the CIA had previously been provided limited authorities to detain specific, named individuals pending the issuance of formal criminal charges, the MON provided unprecedented authorities, granting the CIA significant discretion in determining whom to detain, the factual basis for the detention, and the length of the detention. The MON made no reference to interrogations or interrogation techniques.

Id.

4. The development of enhanced interrogation techniques was based on beliefs that terrorists had been trained to resist more traditional forms of interrogation. *See* INST. ON MED. AS PRO., ETHICS ABANDONED: MEDICAL PROFESSIONALISM AND DETAINEE ABUSE IN THE “WAR ON TERROR” 11 (2013).

In the months after the attacks of 9/11 and the start of the U.S.-led war in Afghanistan, individuals allegedly associated with the Taliban, Al Qaeda, or other groups identified as terrorist were captured by the U.S. military and CIA in Afghanistan, Pakistan, and elsewhere or turned in by individuals seeking bounties. Intelligence and military officials sought information from these detainees about plans for additional attacks on the United States as well as about the structure and operation of their terrorist networks. White House and other U.S. officials believed that these individuals had been trained by al Qaeda in techniques to resist traditional methods of interrogation and, in the service of breaking that resistance, decided to remove existing constraints on the use of highly coercive interrogation methods that were not permitted under existing U.S. laws and regulations.

Id.

5. *See* Jerome H. Skolnick, *American Interrogation: From Torture to Trickery*, in TORTURE: A COLLECTION 105, 105 (Sanford Levinson ed., 2004) (detailing how America’s history of torture has been “hidden by other labels,” such as “punishment” for enslaved people or extrajudicial “lynchings” in the post-Civil War South).

have information or to have been involved in the attacks. Presently, five detained men face charges in the U.S. military tribunal at Guantánamo Bay for conspiracy, murder in violation of the law of war, and terrorism, with 2,976 people listed as victims.⁶

The Senate Intelligence Committee found that between 2002 and 2008, 119 detainees were brought into U.S. custody.⁷ The involvement of licensed psychologists, physicians, and lawyers to create and implement newly approved interrogation techniques on detainees—thought to be terrorists fighting against the United States—has resulted in litigation along with passionate objections generated by the two largest mental-health professional associations in the country. This article will focus on the domestic and international legal barriers to utilizing torture in interrogating detainees, the various ethics codes of the organizations that licensed professionals who participated in creating and implementing torture as a matter of official U.S. policy, and the consequences for those professionals who engaged in consultation and advice at the request of U.S. agencies charged with interrogating detainees in their custody.⁸ Finally, it will propose that these identified licensed professionals have their licensure re-

6. Carol Rosenberg, *Trial Guide: The Sept. 11 Case at Guantánamo Bay*, N.Y. TIMES (March 7, 2022), <https://www.nytimes.com/article/september-11-trial-guantanamo-bay.html> [https://perma.cc/5GRB-XPTA].

The charges, which carry the death penalty, . . . [accuse the defendants] of directing or training the hijackers or helping provide them money or assistance with travel. They were captured in 2002 and 2003, held incommunicado in a secret C.I.A. prison network and transferred to Guantánamo in September 2006 for trial. . . . Although the defendants were arraigned May 5, 2012, the case is still in a pretrial phase and has experienced many delays.

Id.

7. SENATE REPORT ON TORTURE, *supra* note 3, at 96. The most active period of the CIA's Detention and Interrogation Program was 2003, bringing in fifty-three detainees and subjecting thirty-nine to the CIA's "enhanced interrogation techniques." *Id.*

8. Richard A. Posner, University of Chicago law professor and former chief judge of the U.S. Court of Appeals for the Seventh Circuit, suggested that any discussion of torture is complicated by the reality that "torture" lacks a definitive, universal meaning. See Richard A. Posner, *Torture, Terrorism, and Interrogation*, in TORTURE: A COLLECTION 291, 291 (Sanford Levinson ed., 2004).

[T]he word "torture" has been broadly defined in certain United Nations conventions and other more-or-less official documents, and more narrowly defined in others, but all these are what philosophers would call "persuasive definitions"—definitions that do not describe how a word is used but how the definer would like it to be used. The word "torture" lacks a stable definition. Almost all official interrogation is coercive, yet not all coercive interrogation would be called "torture" . . . so that what is involved in using the word is picking out the point along a continuum at which the observer's queasiness turns to revulsion. Not only will different observers fix different points, but the means of coercing information are so various that the continuum itself is not clearly demarcated. Is it worse to question a person under bright lights or to threaten to beat him up? To question him in relays or to pretend that he is being held in a secret facility in a distant country?

Id.

voked so that they will never again be in a position to function as legitimate representatives of their respective disciplines.

The professionals who helped create a national policy that radically altered the U.S. interpretation of laws prohibiting torture must be held accountable for their involvement and participation in this misconduct. Episodes of notorious involvement by physicians in acts of torture may have culminated in the prohibition of such activities, as seen in the American Psychiatric Association's ethics code, whereas the American Psychological Association in 2005 approved permitting psychologists to work in such settings, but eventually passed a near-unanimous resolution in August 2015 to prohibit psychologists from participating in national security interrogations.⁹ The legal professionals who helped create policies and justifications for implementing torture have not yet been held accountable for their roles in altering national policies and compliance with international treaties as well as domestic law and their own profession's ethical codes of conduct.

According to Article 1 of the United Nations Convention Against Torture, the term "torture" is defined as

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted upon 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.¹⁰

In response to the U.N. Convention, the United States filed the U.S. Reservations, Declarations and Understandings to the U.N. Convention Against Torture,¹¹ restricting the definition of the term "cruel, inhuman or degrading treatment or punishment" to the language contained in and prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. The U.N. General Convention Declaration from 1975 included two points: first, that torture is "any act by which severe pain or

9. *E.g.*, JEAN LAU CHIN, SOC'Y CLINICAL PSYCHS., TORTURE, ENHANCED INTERROGATIONS, AND THE ROLE OF PSYCHOLOGISTS 1 (2015), <https://www.div12.org/wp-content/uploads/2015/10/Torture-and-Social-Psychology.pdf> [<https://perma.cc/ZZ47-KTSJ>] (detailing developments in American Psychological Association's public approach to issue of torture).

10. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113 [hereinafter Convention Against Torture].

11. S. TREATY DOC. NO. 100-20 (1990) (explaining that U.S. government recognizes "the term 'cruel, inhuman or degrading treatment or punishment'" in the U.N. torture resolution as limited to "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States").

suffering, whether physical or mental, is intentionally inflicted,” and second, that “[i]t does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”¹²

The definition of “torture” changed following 9/11¹³:

In 2002, officials in the Justice Department’s Office of Legal Counsel issued a memo that argued that coercive interrogations constitute torture only if they intentionally caused suffering “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” That memo was rescinded in 2004, and since then members of the Bush administration have insisted that torture is “abhorrent” and prohibited by existing regulations. But the actual limits of permissible techniques during interrogation remain unclear.¹⁴

In an opinion article published by the *New England Journal of Medicine* in 2005, the authors focused on whether physicians and other medical professionals breached their professional ethics and the laws of war by participating in abusive interrogation practices.¹⁵ The authors concluded that the medical personnel helped develop and execute interrogation plans that included sharing detainees’ medical records and engaging in sleep deprivation practices, dietary manipulation (minimum bread and water), environmental manipulation (lowering the air conditioning in the summer and heat in winter), sensory deprivation, isolation, stress positions, and the involvement of working dogs.¹⁶ The authors proposed that follow-up investigations were necessary to determine whether the doctors participated in torture but found that they had breached the laws of war:

The Third Geneva Convention states that “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.” It adds that “prisoners of war who refuse to answer [questions] may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.” The tactics used at Abu Ghraib and Guantánamo

12. G.A. Res. 3452 (XXX), at 91 (Dec. 9, 1975).

13. See ALFRED W. MCCOY, A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR 113 (2006). McCoy stated,

On September 11, 2001, right after his evening address to a shaken nation, President Bush gave his White House counterterrorism staff wide latitude for retribution, saying “any barriers in your way, they are gone.” When Defense Secretary Donald Rumsfeld interjected that there were legal restraints on such action, the president shouted back, “I don’t care what the international lawyers say, we are going to kick some ass.”

Id.

14. Editorial, *Torture*, N.Y. TIMES, April 1, 2010, reprinted in NATIONAL SECURITY, CIVIL LIBERTIES, AND THE WAR ON TERROR 204, 204 (M. Katherine B. Darmer & Richard D. Fybel eds., 2011).

15. See generally M. Gregg Bloche & Jonathan H. Marks, *When Doctors Go to War*, 352 N. ENG. J. MED. 3 (2005).

16. *Id.* at 4.

were transparently coercive, threatening, unpleasant, and disadvantageous. Although the Bush administration took the position (rejected by the ICRC [International Committee of the Red Cross]) that none of the Guantánamo detainees were “prisoners of war,” entitled to the full protections of the Third Geneva Convention, it has acknowledged that combatants detained in Iraq are indeed prisoners of war, fully protected under this Convention.¹⁷

The Central Intelligence Agency (CIA) failed to conduct a comprehensive audit or develop “a complete and accurate list of the individuals it had detained or subjected to enhanced interrogation techniques,” misleading the U.S. Senate Intelligence Committee by claiming that fewer than 100 individuals had been detained, and less than a third of those had been subjected to enhanced interrogation.¹⁸ In the case of one detainee who had been subjected to “enhanced interrogation techniques” for approximately one month, the CIA concluded that the man appeared to have had no plans or involvement in any activities against U.S. personnel or facilities and recommended that he be released to his village and given a cash payment. Instead, interrogators transferred the man to U.S. military custody, where he was held for an additional four years before being released.¹⁹ In the fall of 2003, a CIA Report directed to CIA Headquarters concluded that, after holding forty-four detainees in solitary confinement at Detention Site Cobalt for a year, “we have made the unsettling discovery that we are holding a number of detainees about whom we know very little,” resulting in the majority of the detainees being later released and with some receiving payments for being detained.²⁰

Of course, the United States is not alone in retreating from international human rights and international legal obligations.²¹ Although European states abolished the system of judicial torture between 1740 and the early nineteenth century,²² “Amnesty International estimates that 150

17. *Id.* at 5.

18. SENATE REPORT ON TORTURE, *supra* note 3, at xxi.

19. *Id.* at 109–10. These events began in October 2003 and involved Arsala Khan, an Afghan national in his mid-fifties, who U.S. intelligence officials believed had assisted Osama bin Laden in his 2001 escape through the Tora Bora Mountains. *Id.* at 109.

20. *Id.* at 110.

21. See Will Bordell & Jon Robins, ‘A Crisis for Human Rights’: New Index Reveals Global Fall in Basic Justice, THE GUARDIAN (Jan. 31, 2018, 5:00 AM), <https://www.theguardian.com/in-equality/2018/jan/31/human-rights-new-rule-of-law-index-reveals-global-fall-basic-justice> [<https://perma.cc/9P8D-H9SE>] (“Fundamental human rights are reported to have diminished in almost two-thirds of the 113 countries surveyed for the 2018 Rule of Law Index, amid concerns over a worldwide surge in authoritarian nationalism and a retreat from international legal obligations.”).

22. *E.g.*, John H. Langbein, *The Legal History of Torture*, in TORTURE: A COLLECTION 93, 97 (Sanford Levinson ed., 2004).

Frederick the Great all but abolished torture within a month of his accession to the Prussian throne in 1740; torture was used for the last time in Prussia in 1752 and was defi-

countries currently practice torture.”²³ The involvement of torture in the U.S. legal system was laid bare in the 1936 Supreme Court decision, *Brown v. Mississippi*,²⁴ where the chief justice described how a deputy sheriff hanged a Black tenant farmer from a tree and whipped him repeatedly until he confessed to murdering a white planter.²⁵ In the United States today, there are those who publicly support the use of torture in some scenarios.²⁶ While human-rights violations persist around the globe, licensed medical and mental-health professionals are being drawn into participation by militaries and governments willing to push the envelope or disregard the rule of law and professional ethics. Governmental solicitation of licensed medical and mental-health professionals to assist in acts involving torture is not unique to the United States, and one need only consider the Nazi regime’s utilization of psychiatrists in the “Final

nately abolished in 1754. In 1770, Saxony and Denmark abolished torture; in 1776, Poland and Austria-Bohemia; in 1780, France; in 1786, Tuscany; in 1787, the Austrian Netherlands (Belgium); and in 1789, Sicily. Early in the nineteenth century, abolition reached the last corners of the Continent.

Id. at 97.

23. George J. Annas, *Unspeakably Cruel—Torture, Medical Ethics, and the Law*, 352 N. ENG. J. MED. 2127, 2131 (2005).

24. *Brown v. Mississippi*, 297 U.S. 278 (1936).

25. *Id.* at 281–82.

Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the State of Alabama; and while on the way, in that State, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate . . .

Id. Two other Black men, in addition to Ellington, “were similarly brutalized until they confessed. . . . [T]he tortured ‘confessions’ were admitted as evidence by the Mississippi trial court. On appeal, the Supreme Court of Mississippi upheld the trial court’s ruling.” Skolnick, *supra* note 5, at 108.

26. Professor of law, criminal lawyer, and constitutional scholar Alan Dershowitz, “believes we must accept that torture will be used in extreme situations and try to regularize its practice by requiring prior judicial approval of its use and limiting it to the infliction of ‘nonlethal pain’—such as ‘shoving a sterilized needle under the fingernail of a suspect.’” Annas, *supra* note 23, at 2131 (citing ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 144 (2002)).

Solution” of the Holocaust to think of the extreme abuses society’s healers commit in the name of governmental objectives.²⁷ In 2002, the American Psychological Association changed its ethics code:²⁸

To a clause that read, “If psychologists’ ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict,” the following sentence was added: “If the conflict is unresolvable via such means, *psychologists may adhere to the requirements of the law, regulations, or other governing legal authority.*” (emphasis added). As Kenneth Pope, a former chair of the APA’s Ethics Committee who resigned from the APA in protest over these changes and other ethical breaches recently wrote in the *International Journal of Law and Psychiatry*, the APA’s ethics code “now runs counter to the Nuremberg Ethic.” In other words, when American psychologists are charged with unethical conduct, they can claim that they were merely following orders, just as health care professionals in Nazi Germany did when they were prosecuted at Nuremberg.²⁹

The role of the revised ethics code of the American Psychological Association created a storm of opposition from Physicians for Human Rights, the International Committee of the Red Cross, the U.N. Commission on Human Rights, and the Senate Armed Services Committee, which have each documented instances of psychologists advising “enhanced interrogation techniques” that constitute torture prohibited under international law.³⁰ One commentator reviewing the medical ethics at Guantánamo Bay and Abu Ghraib stated:

[M]edical personnel failed to maintain medical records, conduct routine medical examinations, provide proper care of disabled and injured detainees, accurately report illnesses and injuries, and falsified medical records and death certificates. Medical personnel and medical information was also used to design and implement psychologically and physically coercive interrogations. The United States military medical system failed to protect detainee’s human rights, violated the basic principles of medical ethics and ignored the basic tenets of medical professionalism.³¹

27. See ROBERT JAY LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* 110–14, 227–28 (2000) (describing German psychiatry of the era, views on “euthanasia” within the psychiatric profession, and collaborations between psychiatrists and the Nazi regime).

28. E.g., Ghislaine Boulanger, *American Psychological Association Sees No Evil*, AM. C.L. UNION (June 16, 2009, 2:39 PM), <https://www.aclu.org/blog/national-security/torture/american-psychological-association-sees-no-evil> [<https://perma.cc/7F3U-LWHT>] (criticizing 2002 APA ethics-code clause as enabling a “culture of impunity”).

29. *Id.*

30. *Id.*

31. Peter A. Clark, *Medical Ethics at Guantánamo Bay and Abu Ghraib: The Problem of Dual Loyalty*, 34 J.L. MED. & ETHICS 570, 570 (2006).

Over the past few years, litigation has focused on the involvement of two psychologists who previously served in the U.S. Air Force, James Mitchell and Bruce Jessen,³² and their professional involvement in crafting interrogation techniques and using them on detainees situated in military facilities located, for the most part, outside of the United States. These two psychologists have defended their involvement,³³ and their stories shed light on the possible consequences of altering the professional ethics codes for some health-care professionals.³⁴ Of course, as of the date of this article, detainees remain at Guantánamo awaiting trials, and the specter of U.S. agents having tortured many of those detainees

32. See Adam Liptak & Carol Rosenberg, *Supreme Court to Rule on Whether C.I.A. Black Sites Are State Secrets*, N.Y. TIMES (Oct. 2, 2021), <https://www.nytimes.com/2021/04/26/us/politics/supreme-court-cia-black-sites-guantanamo.html> [<https://perma.cc/TNN7-AM7C>].

Dr. Mitchell has testified that he and Dr. Jessen, who had experience with an Air Force program that taught pilots how to resist torture, were hired by the C.I.A. to consult on the interrogation of Mr. Zubaydah. They were ultimately assigned to carry out the techniques on him in the summer of 2002.

Id.

33. In January 2020, Dr. Mitchell, architect of the Bush-era interrogation program used in secret CIA prisons, testified in a military war court at Guantánamo Bay. Dr. Mitchell expressed “no regrets or contrition” and described “the decision to use waterboarding and other ‘coercive physical pressure’ as born of a climate that feared Al Qaeda was plotting a nuclear attack on the United States, or plotting to crash another plane somewhere, ‘and the gloves were off.’” Carol Rosenberg, *Architect of C.I.A. Interrogation Program Testifies at Guantánamo Bay*, N.Y. TIMES (Jan. 21, 2020), <https://www.nytimes.com/2020/01/21/us/politics/guantanamo-bay-interrogation.html> [<https://perma.cc/T79R-A4R4>].

34. See Carol Rosenberg, *He Waterboarded a Detainee. Then He Had to Get the C.I.A. to Let Him Stop*, N.Y. TIMES (Oct. 6, 2021), <https://www.nytimes.com/2020/01/22/us/politics/cia-torture-interrogation-guantanamo.html> [<https://perma.cc/HHK3-QTG6>] (detailing efforts by two psychologists, Dr. Jensen and Dr. Mitchell, who worked to convince CIA it should stop its “aggressive interrogation strateg[ies]”).

hangs over any judicial process that may eventually unfold.³⁵ It is unclear whether U.S. courts will allow evidence obtained through torture to be introduced in legal proceedings.³⁶

I. JAMES MITCHELL AND BRUCE JESSEN

The U.S. military created a program called Survival, Evasion, Resistance, and Escape (SERE)³⁷ “designed to teach pilots, Special Forces, and others likely to be captured how to resist breaking and cooperating if

35. In September 2021, *The New Yorker* published a commentary explaining why the “forever war” in Afghanistan cannot end without due process of law for suspected terrorists detained at Guantánamo Bay. Amy Davidson Sorkin, *The Forever Trial at Guantánamo*, NEW YORKER (Sept. 12, 2021), <https://www.newyorker.com/magazine/2021/09/20/the-forever-trial-at-guantanamo> [<https://perma.cc/W9HA-DVMT>].

When President Joe Biden spoke, last month, about the need to end “forever wars,” he said, “I’m now the fourth American President to preside over war in Afghanistan—two Democrats and two Republicans. I will not pass this responsibility on to a fifth President.” But Biden is still presiding over a remnant of the war on terror, which might be called the forever trial. This is the prosecution of Khalid Sheikh Mohammed—the alleged mastermind of the attacks of September 11, 2001—and four other defendants, which reconvened at Guantánamo Bay last week for the first time since the pandemic began, and which has, for years, been a spectacular exercise in futility. K.S.M., as he’s known, and his co-defendants were apprehended more than eighteen years ago; the current proceedings against them formally opened in 2012, and have been stuck in pretrial hearings ever since. Jury selection is not yet in sight, let alone a verdict. The judge, Colonel Matthew McCall, is, depending on how you count, the fourth, seventh, or ninth to preside. The problems began with George W. Bush’s decision, in January, 2002, to send purported terrorism suspects to Guantánamo. Some were tortured at the base; some were tortured in other locations, such as the C.I.A.’s “black sites.” Close to eight hundred people passed through the prison. Their paths there were disparate. Some were associated with Al Qaeda or other terrorist groups. Others were detained based on flimsy or false evidence, in some cases as a result of local feuds. Twenty-two were migrant Uyghurs; several were children under the age of sixteen. The inhumane carelessness with which all the prisoners were treated was visible to the world, and it damaged America’s reputation. Successive administrations attempted to rationalize the legal disorder of those years by setting up quasi-judicial procedures that ultimately crippled attempts to apply due process and render justice.

Id.

36. In June 2021, the military judge presiding over the death-penalty case of Abd al-Rahim al-Nashiri, a Saudi prisoner awaiting trial at Guantánamo Bay accused of orchestrating the U.S.S. Cole bombing that killed seventeen U.S. sailors off the coast of Yemen in 2000, “agreed to consider information obtained during the man’s torture by the C.I.A. interrogators to support an argument in pretrial proceedings at Guantánamo Bay.” Carol Rosenberg, *Judge Permits Information from C.I.A. Torture in Terror Case*, N.Y. TIMES (June 3, 2021), <https://www.nytimes.com/2021/06/03/us/politics/cia-torture-terror-guantanamo-bay.html> [<https://perma.cc/PL4D-NCXP>]. This is the first time a U.S. military judge at the Guantánamo Bay war court has agreed to consider instances of government torture against a defendant. *Id.*

37. See Anthony P. Doran et al., *Survival, Evasion, Resistance, and Escape (SERE) Training: Preparing Military Members for the Demands of Captivity*, in MILITARY PSYCHOLOGY: CLINICAL AND OPERATIONAL APPLICATIONS 306, 308 (Carrie H. Kennedy & Eric A. Zillmer eds., 2d ed. 2012) (outlining how SERE training schools began in the Air Force during the 1970s and became standard training across the armed forces in the 1980s).

detained and tortured by a country that does not obey the Geneva Conventions.”³⁸ During their training, U.S. “service members [were] subjected to torture over several days, including sleep deprivation, beatings, sexual humiliation, confinement in tiny spaces, and . . . waterboarding” while “[p]sychologists were present to supervise the abuse . . . and evaluate how much stress an individual could tolerate.”³⁹ These techniques were then “reverse engineered” to design “counterresistance techniques” to break down detainees.⁴⁰

Two psychologists, James Mitchell and Bruce Jessen, had been involved in SERE and formed a company in 2005—Mitchell, Jessen, and Associates—to design their interrogation program.⁴¹ The CIA contacted the psychologists to interrogate Abu Zubaydah,⁴² whom the Federal Bureau of Investigation (FBI) had initially questioned using their standard rapport-building techniques.⁴³ Unlike the FBI, the psychologists would utilize severe interrogation techniques known as “enhanced interrogation”⁴⁴ in 2005. The CIA was not satisfied with the FBI’s interrogation techniques and sent a new team of interrogators, including Mitchell, to obtain further information and utilize psychologist Martin Seligman’s

38. Stephen Soldz, *Psychologists, Torture, and Civil Society: Complicity, Institutional Failure, and the Struggle for Professional Transformation*, in *THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE 177, 179* (Marjorie Cohn ed., 2011) (outlining creation of military’s SERE program).

39. *Id.*

40. *Id.*

41. *Id.* at 180.

42. *Id.*

43. *Id.*

44. Ahmed Rabbani, Opinion, *I Was Tortured for Days Thanks to Bruce Jessen and James Mitchell. A “Sorry” Would Be Nice*, NEWSWEEK (Jan. 20, 2020, 1:09 PM), <https://www.newsweek.com/tortured-jessen-mitchell-rabbani-sorry-guantanamo-1483100> [<https://perma.cc/823L-A74X>] (providing firsthand account from Ahmed Rabbani, a Pakistani prisoner at Guantánamo Bay, of torture inflicted upon him at prison).

Let me take you through the one [technique] described as “a technique in which the detainees’ wrists were tied together above their heads and they were unable to lean against a wall or lie down.” I was put down a hole, suspended by my wrists from two chains that were locked to a horizontal metal bar at a height where my feet could barely touch the ground. I was left in total darkness for days—perhaps a week. Without food. Standing on tiptoe in my own excrement. Later I learned that this was something Jessen and Mitchell picked up from the Spanish Inquisition, who called it *strappado*. . . . I felt my shoulders gradually dislocating. The pain was excruciating. Jessen and Mitchell also advocated the use of waterboarding. I have heard that some years back, Dr. Mitchell said most people would prefer to have their legs broken than to be waterboarded, but he appears to have changed his mind when he got his \$81 million contract. “I don’t know that it’s painful,” he said more recently. “I’m using the word ‘distressing.’ The right word is torture. They encouraged the CIA to destroy video footage that was made of the interrogations because it was too graphic

Id.

theory of learned helplessness,⁴⁵ which had been based upon research where “dogs were shocked in conditions where they were unable to escape the torment.”⁴⁶ The company was paid \$81 million⁴⁷ before the contract was terminated in 2009.⁴⁸ Mr. Zubaydah had been “mistakenly profiled . . . as a senior [A] Qaeda official.”⁴⁹ Mr. Zubaydah, a Palestinian, was captured in Pakistan in March 2002 and has been detained by the United States ever since, despite the fact that “[a] 2014 report from the Senate Select Committee on Intelligence [found that] ‘the C.I.A. later concluded that Abu Zubaydah was not a member of Al Qaeda.’”⁵⁰

In 2015, the psychologists were sued in federal district court in Spokane, Washington, by the American Civil Liberties Union (ACLU) on behalf of Suleiman Abdullah Salim and Mohamed Ahmed Ben Soud,

45. See generally, Terrence McCoy, ‘Learned Helplessness’: The Chilling Psychological Concept Behind the CIA’s Interrogation Methods, WASH. POST (Dec. 11, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/12/11/the-chilling-psychological-principle-behind-the-cias-interrogation-methods/> [<https://perma.cc/5VPU-ZHKE>] (summarizing psychological concept of “learned helplessness” and CIA’s adoption of technique).

46. Soldz, *supra* note 38, at 180.

We now know that part of the Mitchell-Jessen CIA “program” included waterboarding, a paradigmatic torture involving interrupted drowning, as well as throwing detainees against walls, multiple days of “sleep deprivation” induced by painful shackling to the ceiling, and semi-starvation, among other techniques designed to induce helplessness. We know that these tortures were videotaped and that the tapes were destroyed, probably to prevent public release. We also now know that this torture was micromanaged out of the White House with presidential approval by the so-called Principals Committee of Condoleezza Rice, Richard Cheney, Colin Powell, George Tenet, and Alberto Gonzales. *Id.* at 180–81 (citing Jan Crawford Greenburg et al., *Top Bush Advisors Approved ‘Enhanced Interrogation’*, ABC NEWS (Apr. 14, 2009, 1:51 PM), <http://abcnews.go.com/TheLaw/LawPolitics/story?id=4583256&page=1> [<https://perma.cc/DLF4-ARUT>]). This move away from the FBI’s techniques occurred even though Abu Zubaydah had told the FBI that Khalid Sheikh Mohammad had been the architect of the 9/11 attacks. *Id.*

47. SENATE REPORT ON TORTURE, *supra* note 3, at xx. The Senate Intelligence Committee’s Report on Torture concluded:

[T]he value of the CIA’s base contract with the company formed by the psychologists with all options exercised was in excess of \$180 million; the contractors received \$81 million prior to the contract’s termination in 2009. In 2007, the CIA provided a multi-year indemnification agreement to protect the company and its employees from legal liability arising out of the program. The CIA has since paid out more than \$1 million pursuant to the agreement.

Id.

48. Julian Borger, *Guantánamo: Psychologists Who Designed CIA Torture Program to Testify*, THE GUARDIAN (Jan. 20, 2020, 4:23 PM), <https://www.theguardian.com/us-news/2020/jan/20/guantanamo-psychologists-cia-torture-program-testify> [<https://perma.cc/J53Y-5JEY>].

49. Rosenberg, *supra* note 34.

50. Adam Liptak, *Supreme Court Justices Make a Surprising Proposal in Torture Case*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2021/10/06/us/politics/supreme-court-torture-abu-zubaydah.html> [<https://perma.cc/X6SZ-NQUA>]. Abu Zubaydah sought Dr. Jensen’s and Dr. Mitchell’s subpoenaed testimony about being tortured at a CIA black site, allegedly located in Poland. *Id.* The government blocked their testimony because it did not want them to identify where the questioning occurred, citing “relations with allies with cooperating intelligence services.” *Id.* The justices “frequently” used the word “torture” to describe what Abu Zubaydah had endured. *Id.*

both of whom were released without charges following their torture.⁵¹ The family of Gul Rahman, who died while being interrogated in 2002 in a CIA “black site,”⁵² also joined in the civil lawsuit against the psychologists. Mr. Rahman “died after being left shackled overnight naked from the waist down in a freezing concrete cell. . . . Mitchell and Jessen said they had complained about Rahman’s treatment, but their warnings were ignored by senior CIA officials.”⁵³

The civil suit filed under the Alien Tort Statute⁵⁴ against the two psychologists was settled.⁵⁵ The terms of settlement were confidential, and it remains unknown whether any plaintiffs received compensation or damages.⁵⁶ In separate litigation, the European Court of Human Rights found that Abu Zubaydah had been tortured in 2002 and 2003 at CIA black sites, including one in Poland, and Mr. Zubaydah sought to subpoena the two contractors, Mitchell and Jessen, for the Polish criminal investigation.⁵⁷ Arguing before the U.S. Supreme Court in October 2021, Mr. Zubaydah’s lawyers told the justices that:

On 83 different occasions in a single month of 2002, [Mr. Zubaydah] was strapped to an inclined board with his head lower than his feet while C.I.A. contractors poured water up his nose and down his throat, bringing him within sight of death. . . . He was handcuffed and repeatedly slammed into walls, and suspended naked from hooks in the ceiling for hours at a time. He was forced to remain awake for 11 consecutive days, and doused again and again with cold water when he collapsed into sleep. . . . He was forced into a tall, narrow box the size of a coffin, and crammed into another box that would nearly fit under a chair, where he was left for hours. He was subjected to a particularly grotesque humiliation described by the C.I.A. as “rectal rehydration.”⁵⁸

51. See Borger, *supra* note 48 (explaining that psychologists settled ACLU’s civil suit against them but had to testify in 2020 at a pre-trial hearing for a separate matter brought by forty remaining Guantánamo detainees). See generally Complaint and Demand for Jury Trial, *Salim v. Mitchell*, 183 F. Supp. 3d 1121 (E.D. Wash. 2015) (No. 15-cv-286).

52. See Borger, *supra* note 48; see also Jane Mayer, *The Black Sites: A Rare Look Inside the C.I.A.’s Secret Interrogation Program*, NEW YORKER (Aug. 5, 2007), http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer [<https://perma.cc/A3H8-GVHX>] (describing CIA black sites as secret prisons outside United States, used to subject terrorist suspects to unusually harsh interrogation methods).

53. Borger, *supra* note 48.

54. 28 U.S.C. § 1350; see generally *Alien Tort Statute*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/alien_tort_statute (last visited Mar. 20, 2022) [<https://perma.cc/UB45-MXQX>].

55. See Sheri Fink, *Settlement Reached in C.I.A. Torture Case*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/us/cia-torture-lawsuit-settlement.html> [<https://perma.cc/6A2J-2WLK>] (reporting on the settlement).

56. *Id.*

57. Liptak & Rosenberg, *supra* note 32. See generally *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13 (Feb. 16, 2015), <https://hudoc.echr.coe.int/eng?i=001-146047>.

58. Liptak & Rosenberg, *supra* note 32.

Proponents of torture in the United States, including former CIA Deputy Director of Operations Jose Rodriguez, former U.S. Vice President Dick Cheney, former CIA Director Michael Hayden, and former U.S. President Donald Trump, have suggested that, especially in the context of the War on Terror, torture results in reliable human intelligence.⁵⁹ These post-Cold War policy makers have indicated publicly their support for the use of torture despite all scientific evidence to the contrary.⁶⁰ “The U.S. Senate Select Committee on Intelligence report on the CIA’s detention and interrogation program brought to light details of such detainee abuse and confirmed what scholars have long understood . . . [t]orture—the application of coercive physical, psychological, and emotional pressures—typically produces *unreliable information*.”⁶¹ James Mitchell was one of the psychologists who developed and facilitated enhanced interrogation for the CIA. Mitchell had “publicly defended the efficacy of these approaches” designed to condition Abu Zubaydah (one of the first detainees to be interrogated in a CIA-run black site).⁶² Mitchell claimed that he “knew it would have to be based on . . . Pavlovian classical conditioning.”⁶³ In response to Mitchell’s claims, a group of psychologists asserted,

Ironically, [Mitchell] notes that earlier in his career as a behavioral psychologist he had employed Pavlovian conditioning to help his clients “overcome fear and anxiety.” Later, as part of the CIA’s interrogation

59. Aldert Vrij et al., *Psychological Perspectives on Interrogation*, 12 PERSPS. ON PSYCH. SCI. 927, 928 (2017). Academics have similarly argued:

Adding academic gravitas to the media swagger, Harvard law professor Alan M. Dershowitz told CBS Television’s popular *60 Minutes* that torture was inevitable: “If you’ve got a ticking bomb case, the case of the terrorist who knew precisely where and when the bomb would go off, and it was the only way of saving 500 or 1,000 lives, every democratic society would, have, and will use torture.” Writing in the *Los Angeles Times*, Dershowitz argued that judges should be allowed to issue “torture warrants” for “non-lethal pressure” in a “ticking bomb” case when a “captured terrorist who knows of an imminent large-scale threat refuses to disclose it. . . . But Dershowitz’s Harvard colleague Philip B. Heymann, a former deputy attorney general, challenged the chimera of limited, judicially controlled torture, saying judges would prove indiscriminate and “torture will spread,” compromising international “support of our beliefs.”

MCCOY, *supra* note 13, at 111–12.

60. CTR. FOR ETHICS & RULE OF L., CERL REPORT ON THE ETHICS OF INTERROGATION AND THE RULE OF LAW 2 (2017), <https://www.law.upenn.edu/live/files/6299-final-version-abridged-ethics-of-interrogation> [<https://perma.cc/S2JQ-YHTB>].

On January 25, 2017, President Trump repeated his belief that torture works and reaffirmed his commitment to intensify the treatment of detainees in American custody. That same day, CBS News released a draft Trump Administration executive order which would order the Intelligence Community and Defense Department to review the legality of torture as well as the potential for a revision to the Army Field Manual which would open up the possibility for harsh interrogations.

Id.

61. Vrij et al., *supra* note 59, at 927.

62. *Id.* at 928.

63. *Id.*

program, Mitchell sought to leverage that same method of conditioning to *induce* fear and anxiety. Mitchell also emphasizes that both he and his colleague, fellow psychologist Bruce Jessen, were able to accurately assess the counterinterrogation techniques being used by Abu Zubaydah (and others) by identifying his “poker tells, or body language that would tip us off to when he was telling the truth and when he was being deceitful.” . . . [S]uch a claim—the ability to meaningfully assess credibility through the observation of nonverbal indicators of deception are faint and unreliable.⁶⁴

The validity of Mitchell’s and Jessen’s assertions about the reliability of the work they performed for the CIA aside, the question to be addressed is whether their involvement in developing modern applications of centuries-old torture techniques⁶⁵ constituted a betrayal of their professional training and helped legitimize government interrogations based on a foundation lacking scientific consensus.⁶⁶ A pre-trial hearing at Guantánamo had been set to last for two weeks prior to a full trial, scheduled to start in January of 2021, in which Mitchell was scheduled to testify.⁶⁷ Mitchell, during the pre-trial hearing, indicated that after 183 waterboardings, one prisoner appeared to be “fine.”⁶⁸ Mitchell was later

64. *Id.* (citing Bella DePaulo et al., *Cues to Deception*, 129 PSYCH. BULL. 74 (2003)).

65. See generally Michael Gagarin, *The Torture of Slaves in Athenian Law*, 91 CLASSICAL PHILOLOGY 1 (1996).

66. See generally Kenneth S. Pope & Thomas G. Gutheil, *The American Psychological Association and Detainee Interrogations: Unanswered Questions*, 25 PSYCHIATRIC TIMES 8 (July 1, 2008), <https://www.psychiatrictimes.com/view/american-psychological-association-and-detainee-interrogations-unanswered-questions> [<https://perma.cc/NG5V-VY35>] (discussing ethical concerns about psychologists’ work with detainee interrogations).

67. *Architect of CIA’s ‘Enhanced Interrogation’ Testifies at Guantánamo Tribunal*, BBC NEWS (Jan. 22, 2020), <https://www.bbc.com/news/world-us-canada-51201558> [<https://perma.cc/4273-DWBC>]. Five men held at Guantánamo were due to go on trial over the 9/11 attacks, including Khalid Sheikh Mohammad, the attacks’ alleged architect. Mr. Mohammad alleged he was repeatedly tortured during his detention in Guantánamo Bay, Cuba, and CIA documents confirmed that he was subjected to waterboarding 183 times. *Id.* The other four men also claimed to have been interrogated by the CIA overseas at “black sites” before being passed on to the U.S. military. *Id.*

68. Carol Rosenberg, *Architect of C.I.A. Torture Program Testifies Prisoners Acted Well Adjusted*, N.Y. TIMES (Jan. 30, 2020), <https://www.nytimes.com/2020/01/30/us/politics/cia-torture-trial-guantanamo.html> [<https://perma.cc/C658-HMR3>].

After 183 rounds of waterboarding, Khalid Shaikh Mohammed, the man accused of plotting the Sept. 11, 2001, attacks, spent his years in C.I.A. detention as a charming captive who dabbled in Islamic mysticism and engaged in pleasantries with the psychologist who waterboarded him, that psychologist told a war crimes prosecutor on Thursday. James E. Mitchell, who as a contractor for the C.I.A. helped develop the agency’s interrogation program and handled all the waterboarding, said Mr. Mohammed managed so well in his last three years in the secret prisons after the violent questioning had ended that the two men would sit and hold hands, as Middle Eastern men sometimes do. He said Mr. Mohammed put on a “charm initiative” and described him as a well-adjusted detainee who never expressed fear of him, gave the psychologist a nickname, “Abu Captain,” and sought his help in improving his conditions as he was moved through the different C.I.A. black sites.

Id.

referenced as follows:

The apparent leader of the CIA team was a former military psychologist named James Mitchell, whom the intelligence agency had hired on a contract. Oddly, given the Agency's own dearth of experience in the area of interrogating Islamic extremists, he had no background in the Middle East or in Islamic terrorism. He spoke no Arabic and he knew next to nothing about the Muslim religion. He was himself a devout Mormon. But others present said he seemed to think he had all the answers about how to deal with Zubayda[h]. Mitchell announced that the suspect had to be treated "like a dog in a cage," informed sources said. "He said it was like an experiment, when you apply electric shocks to a caged dog, after a while, he's so diminished, he can't resist."⁶⁹

The CIA had videotaped the interrogations of various prisoners, and in November of 2005, federal prosecutors investigating the destruction of ninety-two videotapes identified Jose A. Rodriguez, Jr., the head of the CIA's clandestine service, as the person who authorized destruction of the tapes after the ACLU filed a Freedom of Information Act lawsuit in New York. The destroyed videotapes were thought to have "depicted some of the harshest interrogation techniques used by the C.I.A. during the two years after the Sept. 11 terrorist attacks"⁷⁰ Thus, some of the best and most objective evidence of the tortures authorized by Bush administration lawyers, practiced by the CIA, and fine-tuned by U.S. licensed psychologists,⁷¹ has been intentionally destroyed by government agents.

Dating back to the Cold War,⁷² the U.S. military has recruited psychologists to assist in intelligence operations,⁷³ "[j]ust as the War Department had mobilized physicists to develop radar and atomic weapons during World War II."⁷⁴ Soviet scientists "had already launched an intense effort to crack the code of human consciousness, so the CIA now felt forced to mount a massive program that soon made it a powerful patron in the infant field of behavioral science."⁷⁵ At the end of World War II,

69. JANE MAYER, *THE DARK SIDE* 156 (2008).

70. Mark Mazzetti, *U.S. Says C.I.A. Destroyed 92 Tapes of Interrogations*, N.Y. TIMES (Mar. 2, 2009), <https://www.nytimes.com/2009/03/03/washington/03web-intel.html> [<https://perma.cc/M28S-N52X>].

71. See Rosenberg, *supra* note 34 (explaining that the tapes have been destroyed and the importance of them as evidence). James Mitchell testified before the military tribunal in Guantánamo in 2020 that he attempted to get permission to stop the waterboarding of Mr. Zubaydah, but the CIA supervisors refused. *Id.*

72. See Jack W. Dunlap, *Psychologists and the Cold War*, 10 AM. PSYCH. 107, 107 (1955) (encouraging Division of Military Psychology of American Psychological Association to involve themselves in United States' military problems).

73. See generally PETER WATSON, *WAR ON THE MIND: THE MILITARY USES AND ABUSES OF PSYCHOLOGY* 266 (Basic Books 1st ed. 1978).

74. MCCOY, *supra* note 13, at 21.

75. *Id.*

the Office of Strategic Services (OSS) was used to attract German scientists, including those engaged in Nazi experiments focused on human physiology and psychology, such as Dr. Kurt Plotner.⁷⁶ The OSS morphed into the CIA in 1947, and Nazi-inspired experiments involving interrogation of suspected spies and double agents using lysergic acid diethylamide (LSD) and marijuana (THC) captured the attention of the new agency.⁷⁷ Prominent Yale psychologist Irving L. Janis⁷⁸ warned the intelligence community that the war was now being waged on the frontiers of cognitive science.⁷⁹ Following World War II, America's enemies had shifted away from German Nazis to Soviet Union communists, from Nazi-inspired interrogations to Soviet-inspired mind-control techniques.⁸⁰

By 1950, Colgate University psychologist and America's leading expert on hypnosis, Dr. George Estabrooks,⁸¹ stoked public fears about "Communist mind control,"⁸² claiming Soviets could hypnotize a man into committing treason against the United States, and arguing that psychologists from other nations had the same capabilities in the event of another war breaking out.⁸³ Washington's national security agencies spent several billion dollars over the next decade, determined to match adversaries in Moscow "weapon for weapon."⁸⁴ When Congress passed the National Security Act in July of 1947, "creating both the National Security Council as a top-level executive agency and the CIA as its instrument, it effectively removed foreign intelligence from meaningful

76. *Id.*

77. *Id.* at 21–22.

78. *See generally* IRVING L. JANIS, ARE THE COMINFORM COUNTRIES USING HYPNOTIC TECHNIQUES TO ELICIT CONFESSIONS IN PUBLIC TRIALS? (RAND Corp. 1949).

79. *Id.* at 2 (hypothesizing that Russians had developed and used some forms of hypnosis, and possibly hallucinogenic drugs and other techniques, in their interrogations). As a result of Janis's raised concerns about the Soviet use of electroshock combined with drugs, the CIA embarked on fifteen years of extreme cognitive experimentation, justifying the measures—beyond the law—to counter the Soviet threat in 1952. *See* MCCOY, *supra* note 13, at 23 (describing CIA findings that Russians had used mind-altering interrogation techniques and CIA's justification for doing the same because international treaties did not control use of unconventional methods of warfare).

80. *See generally* Lawrence E. Hinkle Jr. & Harold G. Wolff, *Communist Interrogation and Indoctrination of "Enemies of the State": Analysis of Methods Used by the Communist State Police (A Special Report)*, 76 ARCHIVES NEUROLOGY & PSYCHIATRY 115, 135 (1956).

81. *See generally* GEORGE H. ESTABROOKS, HYPNOTISM (Dutton rev. ed. 1957).

82. *See* MCCOY, *supra* note 13, at 24–25 (describing how several popular American writers used fearmongering rhetoric to heighten public's concern about Communist mind control).

83. *Id.* at 24 ("I can hypnotize a man—without his knowledge or consent—into committing treason against the United States. If I can do it, so could psychologists of other nations . . .," warned Dr. George Estabrooks.)

84. *Id.* at 25 (explaining that CIA spent several billions of dollars in the 1950s to research how to weaponize mass persuasion and coercion).

congressional oversight.”⁸⁵ The role and involvement of psychologists in fighting the Cold War had moved the profession into a new, different direction.⁸⁶

By the late 1950s, the CIA was funding and monitoring Harvard Medical School symposia on sensory deprivation and other academic programs, which included leading cognitive scientists such as Jerome S. Bruner, a pioneer in the application of behavioral science to education; Norbert Wiener, the father of cybernetics; George E. Ruff, a University of Pennsylvania psychiatrist engaged in sensory deprivation research for the Air Force; Lawrence Hinkle of Cornell, who worked on mind-control-efforts interrogation for intelligence-gathering purposes; and Donald O. Hebb, a Canadian psychologist from McGill University who became a Nobel Prize nominee and, eventually, the president of the American Psychological Association.⁸⁷ A former president of the American Psychiatric Association, D. Ewen Cameron, also began work for the CIA after publishing scientific papers claiming to have duplicated “the extraordinary political conversions . . . in the iron curtain countries” using his own non-consenting patients at McGill’s psychiatric treatment facility, the Allan Memorial Institute, in 1957.⁸⁸ Following years of covert experimentation funded by the CIA, in 1980, nine of Cameron’s former patients filed a civil suit against the CIA in Washington; “a federal judge rejected a CIA motion to dismiss in October 1988, [and] the agency settled out of court for the legislated maximum of \$750,000.”⁸⁹ The Canadian government paid nine victims of Cameron’s experiments \$180,000, and the president of the American Psychiatric Association, Dr. Paul Fink, expressed “deep regret that psychiatric patients became unwitting participants in those experiments.”⁹⁰

The origins of the use of torture by the CIA and other national organizations has its roots in the fears that arose during the Cold War with the Soviet Union and concerns that the Soviets had succeeded in developing techniques to compel individuals to disclose information during interrogations⁹¹ and to falsely testify about events or participation in activities

85. *Id.* at 26 (citing JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 107 (1981); LOCH K. JOHNSON, *A SEASON OF INQUIRY: THE SENATE INTELLIGENCE INVESTIGATION* 7 (1st ed. 1985); Alan A. Block & John C. McWilliams, *On the Origins of American Counterintelligence: Building a Clandestine Network*, 1 J. POL’Y HIST. 353 (1989)).

86. *See generally* Dunlap, *supra* note 72.

87. *See* MCCOY, *supra* note 13, at 35–44 (describing, among other things, Dr. Hebb’s construction of an experimental cubicle to study protracted isolation at McGill University in Montreal).

88. *Id.* at 42–43. The CIA stopped funding Cameron’s projects after seven years. *Id.* at 44.

89. *Id.* at 45.

90. *Id.* However, the Canadian Psychiatric Association refused to apologize but “praised Allan Memorial’s contributions to their profession.” *Id.*

91. *See generally* CHRISTOPHER SIMPSON, *SCIENCE OF COERCION: COMMUNICATION RESEARCH AND PSYCHOLOGICAL WARFARE, 1945–1960* (Oxford Univ. Press 1st ed. 1994).

that constituted confessions of guilt.⁹² The identification of academics and researchers to assist in the process of catching up with the Soviets became a CIA priority. From that point forward, U.S. government officials assisted foreign governments, authoritarian regimes, and dictators with whom the United States shared interests in utilizing interrogation techniques and honing such techniques to obtain reliable information.⁹³ One of many problems would be that information obtained through the use of torture was unreliable.⁹⁴ Another problem would be that the use of torture was not only immoral, but also illegal.

U.S. military leaders recognized that if they incorporated torture into interrogations, the same techniques would then be employed against the United States' own service members who were captured by enemy forces. The military leaders also articulated concerns that the service members involved in any such interrogations would be subject to charges for violating provisions of the Uniform Code of Military Justice in addition to domestic criminal charges and violations of international law. Finally, the torture of detainees makes it difficult, if not impossible, to bring the alleged suspects to trial for their acts of terrorism.⁹⁵ Following the sentencing hearing of Majid Khan, "a suburban Baltimore high school graduate turned Qaeda courier," at U.S. Guantánamo Bay Naval Base in October of 2021, the seven military officers who heard the graphic descriptions of his brutal treatment called it a "stain on the moral fiber America,"⁹⁶ and

92. See generally MCCOY, *supra* note 13, 21–59.

93. *Id.* at 60.

In the global dissemination of its new interrogation doctrine during the Cold War, the CIA moved through two distinct phases, first operating undercover through police-training programs in Asia and Latin America and later collaborating with Army teams that advised local counterinsurgency forces, largely in Central America. Throughout this thirty-year effort, the CIA's torture training grew increasingly brutal, moving by degrees beyond the original psychological techniques to harsh physical methods through its experience in the Vietnam War. . . . By 1971, the program had trained over one million police officers in forty-seven nations, including 85,000 in South Vietnam and 100,000 in Brazil.

Id.

94. *Id.* at 203.

After two thousand years of Western judicial torture, from imperial Rome to America's imperium, we should have ample experience to answer a . . . fundamental question: Does any torture work? Does it produce accurate information? The past two millennia are rich with examples that confirm, time and again, Ulpian's dictum from the third century A.D.: the strong can resist torture and the weak will say anything to end their pain.

Id.

95. *Torture*, *supra* note 14, at 205 ("[T]orturing detainees would prevent them from being brought to trial. In January 2009 a senior Pentagon official in the Bush administration, Susan J. Crawford, said that interrogators had tortured a Guantánamo detainee, which led her to decide against prosecuting him.").

96. Carol Rosenberg, *U.S. Military Jury Condemns Terrorist's Torture and Urges Clemency*, N.Y. TIMES (Oct. 31, 2021), <https://www.nytimes.com/2021/10/31/us/politics/guantanamo-torture-letter.html> [<https://perma.cc/2S7W-XJBU>].

requested that he be granted clemency.⁹⁷

II. WATERBOARDING

*Congress doesn't have the power to "tie the President's hands in regard to torture as an interrogation technique. It's the core of the Commander-in-Chief function. They can't prevent the President from ordering torture."*⁹⁸

In March of 2005, CIA Director Porter Goss inadvertently admitted to Congress that the agency had engaged in torture during interrogations following 9/11.⁹⁹ Goss admitted that there had been some uncertainty among CIA interrogators about what methods were allowed.¹⁰⁰ When questioned by Senator John McCain (Republican-Arizona)—a torture survivor of five years after his Skyhawk dive bomber was shot down in October of 1967 during his tour of duty as a Naval officer and pilot¹⁰¹—about the use of waterboarding, the CIA director would only say that it “was an area of what I will call professional interrogation techniques.”¹⁰² The *New York Times* ran a front-page article the next day asserting that the CIA had admitted that some of its practices might have crossed the legal limits.¹⁰³

97. See Carol Rosenberg, *For First Time in Public, a Detainee Describes Torture at C.I.A. Black Sites*, N.Y. TIMES (Oct. 30, 2021), <https://www.nytimes.com/2021/10/28/us/politics/guantanamo-detainee-torture.html> [<https://perma.cc/EEZ7-26U7>] (characterizing proposal to grant clemency, signed by seven of eight jurors, as surprising).

98. Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER (Feb. 6, 2005), <https://www.newyorker.com/magazine/2005/02/14/outsourcing-torture> [<https://perma.cc/BC7B-KYW6>] (quoting Professor John Yoo, a professor of law at the University of California at Berkeley).

99. MCCOY, *supra* note 13, at 170.

100. *C.I.A. Chief Defends Interrogation Policy and Disavows Torture*, N.Y. TIMES (Mar. 17, 2005), <https://www.nytimes.com/2005/03/17/politics/cia-chief-defends-interrogation-policy-and-disavows-torture.html> [<https://perma.cc/K9LQ-9U63>].

101. See John S. McCain, *John McCain, Prisoner of War: A First-Person Account*, U.S. NEWS & WORLD REP. (Jan. 28, 2008), <https://www.usnews.com/news/articles/2008/01/28/john-mccain-prisoner-of-war-a-first-person-account> [<https://perma.cc/2P2L-VZLK>]. Many of the torture techniques McCain was exposed to by the North Vietnamese—years of solitary confinement, beatings, no medical treatment for broken legs, arms, ribs, deprivation of mail and contact with outsiders including family, dietary manipulation, standing or sitting for hours or days, dysentery for over a year with no treatment—were similar or identical to much of the torture and interrogation techniques employed by the CIA in Abu Ghraib and Guantánamo Bay. *Id.*

102. MCCOY, *supra* note 13, at 170.

103. See Douglas Jehl, *Questions Left by C.I.A. Chief on the Use of Torture*, N.Y. TIMES (Mar. 18, 2005), <https://www.nytimes.com/2005/03/18/politics/questions-are-left-by-cia-chief-on-the-use-of-torture.html> [<https://perma.cc/J9M7-MCKZ>] (“Mr. Goss sought to reassure lawmakers that all interrogations ‘at this time’ were legal . . . [b]ut he declined, when asked, to make the same broad assertions about practices used [following 9/11].”).

The psychologists were accused of involvement in the waterboarding¹⁰⁴ of detainees as part of their “enhanced interrogation” technique. The technique, first used in the fourteenth century, “was known variously as ‘water torture,’ ‘the water cure,’ or *tormenta de toca*—a phrase that refers to the thin piece of cloth placed over the victim’s mouth.”¹⁰⁵ According to Ed Peters, a historian at the University of Pennsylvania, “[t]he thing you could not do in torture was injure the body or cause death.’ . . . That was—and still is—what makes waterboarding such an attractive interrogation technique, he says: It causes great physical and mental suffering, yet leaves no marks on the body.”¹⁰⁶

Waterboarding was used by the Japanese during World War II, the United States in the Philippines, and the French in Algeria.¹⁰⁷ It was inflicted by the United States on its prisoners of war (POW) during the

104. See Press Release, Off. of U.N. High Comm’r, *Torture Is Torture, and Waterboarding Is Not an Exception—UN Expert Urges the US Not to Reinstate It*, U.N. Press Release (Jan. 30, 2017), <https://www.ohchr.org/en/press-releases/2017/01/torture-torture-and-waterboarding-not-exception-un-expert-urges-us-not> [<https://perma.cc/KC9D-3QXR>].

The United Nations Special Rapporteur on torture, Nils Melzer, has appealed to US President Donald Trump not to reconsider the acceptability of waterboarding and other methods of torture used as interrogation techniques. “Without any doubt, waterboarding amounts to torture,” said the independent expert tasked by the Human Rights Council with monitoring and reporting on the use of torture and other cruel, inhuman or degrading treatment or punishment around the world. “Any tolerance, complacency or acquiescence with such practice, however exceptional and well-argued, will inevitably lead down a slippery slope towards complete arbitrariness and brute force,” Mr. Melzer cautioned.

Id.

105. Eric Weiner, *Waterboarding: A Tortured History*, NAT’L PUB. RADIO (Nov. 3, 2007, 1:56 PM), <https://www.npr.org/2007/11/03/15886834/waterboarding-a-tortured-history> [<https://perma.cc/6EQL-HTGS>].

106. *Id.* Waterboarding refers to two different techniques, one in which water is pumped directly into the stomach creating intense pain, and the other technique which is more widely used today, of choking the victim by filling their throat with a steady stream of water, a sort of slow-motion drowning. *Id.*

107. YVES BEIGBEDER, *JUDGING WAR CRIMES AND TORTURE: FRENCH JUSTICE AND INTERNATIONAL CRIMINAL TRIBUNALS AND COMMISSIONS (1940–2005)* 352 (2006). (“During the

American-Philippine War more than 120 years ago.¹⁰⁸ In the 1930s, the

Algerian War, atrocities were committed by the rebels and war crimes and torture were committed by the French army: the latter were never submitted to justice.”). According to Alfred McCoy:

Despite the Third Reich’s defeat in 1945, its legacy persisted in the former occupied territories, particularly among French officers in colonial Algeria. As partisans who fought the German occupation during World War II, some of these officers had suffered Nazi torture and now, ironically, used the experience to inflict this cruelty on others. In a vain attempt to crush a national revolution with repression, France launched a massive pacification that, from 1954 to 1962, resulted in the forcible relocation of two million Algerians, the deaths of 300,000 more, and the brutal torture of several hundred thousand suspected rebels and their sympathizers. By branding the guerrillas “outlaws” and denying them the Geneva protections due lawful combatants, the French kept such brutality within the bounds of formal legality through the seven years of war. . . . [T]he government’s Wullaume Report excused the army’s systemic torture of the rebels: “The water and electricity methods, provided they are carefully used, are said to produce a shock which is more psychological than physical and therefore *do not constitute excessive cruelty*.” Forcing water down a victim’s throat to simulate drowning, a technique then favored by the French army and later used by the CIA, was, the report insisted, perfectly acceptable. “According to certain medical opinion, the water-pipe method,” Wullaume wrote, “involves no risk to the health of the victim.”

MCCOY, *supra* note 13, at 18–19 (citing EDWARD PETERS, TORTURE 139 (Univ. of Penn. Press expanded ed. 1996)).

108. See GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 62, 517 (3d ed. 2021) (describing a method of interrogation called the “water cure,” where Americans would hold down a prisoner, thrust a bamboo tube into his mouth, and force dirty water—“the filthier the better”—down his throat).

French routinely used torture to maintain their control over French Indochina and, later, Vietnam.¹⁰⁹ It was used by the Khmer Rouge in Cambodia.¹¹⁰ It was employed by the British against both Arabs and Jews in Palestine in the 1930s.¹¹¹ It was relied upon by brutal regimes in Latin America¹¹² in the 1970s.¹¹³ The United Kingdom tried and executed Jap-

109. In 1932, French journalist Andrée Viollis published and denounced what she had observed as French colonial exploitation in French Indochina by French administrators, settlers, local landlords and French banks:

Accused Vietnamese were often subject to torture in police stations that involved deprivation of food and water, blows, body suspended by the arms, and torture by electricity and water. Women were often raped. Detainees were tortured until they confessed to being members of a Communist group. . . . [T]here is ample evidence that the French forces committed war crimes and crimes against humanity in the war period. Breaches of the Geneva Convention included willful killings, torture or inhuman treatment, extensive destruction of property not justified by military necessities and lack of protection of prisoners of war.

BEIGBEDER, *supra* note 107, at 67, 74.

110. *Khmer Rouge: Cambodia's Years of Brutality*, BBC NEWS (Nov. 16, 2018), <https://www.bbc.com/news/world-asia-pacific-10684399?pi=modal> [https://perma.cc/6838-LJ83] (describing brutal torture and execution of hundreds of thousands of Cambodians); *see also* David Stout, *Witness Describes Khmer Rouge's Gruesome Torture During Genocide Trial*, TIME (Feb. 2, 2015, 11:02 PM), <https://time.com/3693242/cambodia-khmer-rouge-genocide-un-trial/> [https://perma.cc/QJ4B-G4K5].

The brutal regime, in power from 1975–1979, claimed the lives of up to two million people. . . . Hundreds of thousands of the educated middle-classes were tortured and executed in special centres. The most notorious of these centres was the S-21 jail in Phnom Penh, Tuol Sleng, where as many as 17,000 men, women and children were imprisoned during the regime's four years in power. Hundreds of thousands of others died from disease, starvation or exhaustion as members of the Khmer Rouge—often just teenagers themselves—forced people to do back-breaking work.

Khmer Rouge: Cambodia's Years of Brutality, *supra* note 110.

Khmer Rouge security officials used acid and pliers to torture inmates and disemboweled a detainee and consumed her organs, according to witness testimony given in Phnom Penh this week. On Monday, former prisoner Keo Chandara told the Extraordinary Chambers in the Courts of Cambodia (ECCC)—a tribunal created to investigate the atrocities committed by the Khmer Rouge—that guards used pliers and acid to torture female detainees incarcerated at the Kraing Tachan security center. According to his testimony, prison guards at the facility would use the pliers to lacerate the inmates before pouring acid into the wounds. If the detainees passed out due to the excessive pain, the overseers would then use water to revive them.

Stout, *supra* note 110.

111. *See* Richard Andrew Cahill, “*Going Beserk*”: “*Black and Tans*” in Palestine, JERUSALEM Q., Summer 2009, at 59, 61 (describing various types of torture used by British auxiliary police forces in Palestine prior to 1948).

112. *See* Diana Kordon et al., *Torture in Argentina*, in TORTURE AND ITS CONSEQUENCES: CURRENT TREATMENT APPROACHES 433, 433 (Metin Basoglu ed., 1992) (“Even though the principal legal instruments of Argentina banned torture, it never ceased to be a part of the political landscape.”).

113. *See* Weiner, *supra* note 105 (explaining that waterboarding was particularly common under military dictatorships in Chile and Argentina).

anese interrogators who used waterboarding to interrogate prisoners during World War II.¹¹⁴ In 1947, the United States charged a Japanese officer, Yukio Asano, with war crimes for waterboarding a U.S. civilian.¹¹⁵ Asano was convicted and sentenced to fifteen years of hard labor.¹¹⁶ Waterboarding has been compared to real drowning that simulates death and causes severe psychological trauma,¹¹⁷ such as panic attacks,¹¹⁸ for years following the interrogation.¹¹⁹

During the post-Vietnam period, Navy SEALs and some Army Special Forces exposed U.S. trainees to waterboarding to better prepare them to resist interrogation, in the event they were detained or captured by enemy forces. One former Navy captain familiar with the practice reported, “The waterboarding proved so successful in breaking their will, they stopped using it because it hurt morale.”¹²⁰

114. See generally TRIAL OF SUMIDA HARUZO AND TWENTY OTHERS, THE “DOUBLE TENTH” TRIAL (Colin Sleeman & S.C. Silkin eds., 1951) (describing 1946 trials in Singapore).

115. See Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT’L L.J. 193, 215 n.135 (2010); Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT’L L. 468, 484–88 (2007) (summarizing how United States sentenced Japanese Officer Yukio Asano to fifteen years for waterboarding).

116. See Walter Pincus, *Waterboarding Historically Controversial*, WASH. POST (Oct. 5, 2006), <https://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100402005.html> [<https://perma.cc/4M9S-55BJ>] (quoting Sen. Edward M. Kennedy who confirmed that people who used waterboarding against Americans in WWII received sentences of fifteen years’ hard labor).

117. See Wallach, *supra* note 115, at 474 (“Concerning the mental trauma, Dr. Allen Keller, the director of the Bellevue/N.Y.U. Program for Survivors of Torture, says he has treated individuals who have been subjected to forms of near-asphyxiation similar to water-boarding. He affirms that it is torture, giving rise to traumatic symptoms years later.”).

118. See generally Colin Bouwer & Dan J. Stein, *Association of Panic Disorder with a History of Traumatic Suffocation*, 154 AM. J. PSYCHIATRY 1566 (1997).

119. Wolfgang Form, *Charging Waterboarding as a War Crime: U.S. War Crime Trials in the Far East After World War II*, 2 CHAPMAN J. CRIM. JUST. 247, 248–49 (2011) (explaining long-term psychological effects of waterboarding).

120. Pincus, *supra* note 116.

The United States approved and employed waterboarding to interrogate foreign prisoners following 9/11.¹²¹ CIA interrogators, unable to obtain information from low-level Taliban and Arab fighters,¹²² sought authority to employ more coercive interrogation methods—including waterboarding—which were cleared with the White House and the Department of Justice (DOJ) following briefings with senior congressional officials.¹²³ Memos were sent to Donald Rumsfeld, the Secretary of Defense under both President Ford and President George W. Bush:

[F]rom the Judge Advocates General of the Army and Navy, the Deputy Air Force JAG, and the Staff Judge Advocate to the Commandant of the Marine Corps, all warning that the Yoo memo failed to address the Uniform Code of Military Justice; that many of the techniques could place interrogators and their superiors at risk of criminal prosecution at home and abroad; that they were ineffective; that they could poison future attempts to prosecute detainees; and that they would leave U.S. servicewomen and men vulnerable to reciprocal treatment if captured.¹²⁴

Despite the objections from legal leadership in every branch of the U.S. military, the Bush administration went forward with waterboarding and other forms of torture in an effort to interrogate detainees. In 2002, the Bush administration released several denouncements of the use of torture, but it continued to defend the interrogations.¹²⁵

In 2004, President Bush spoke out in favor of a total ban against the

121. See M. Katherine B. Darmer, *Waterboarding and the Legacy of the Bybee-Yoo "Torture and Power" Memorandum: Reflections from a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist*, in NATIONAL SECURITY, CIVIL LIBERTIES, AND THE WAR ON TERROR 192, 198–99 (M. Katherine B. Darmer & Richard D. Fybel eds., 2011) (asserting that CIA admitted to using waterboarding). This illegal use of torture was the ultimate culmination of the United States' response to the widescale death and destruction by terrorists on 9/11:

On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these "acts of treacherous violence," Congress passed a resolution authorizing 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" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." Authorizations for Use of Military Force (AUMF), 115 Stat. 224. Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.

Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004) (plurality opinion).

122. Pincus, *supra* note 116.

123. See *id.* (citing a statement released by Office of Director of National Intelligence).

124. SIEMS, *supra* note 1, at 342.

125. See Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST (Dec. 26, 2002), <https://www.washingtonpost.com/archive/politics/2002/12/26/us-decries-abuse-but-defends-interrogations/737a4096-2cf0-40b9-8a9f-7b22099d733d/> [<https://perma.cc/2TP4-F53G>] (remarking that American officials continued to support use of torture even after denouncing it publicly).

use of torture imposed upon detainees in captivity.¹²⁶ In 2006, Congress passed the Military Commissions Act, which barred the use of torture while also providing retroactive legal protection to those who carried out waterboarding interrogations and other coercive interrogations prior to the enactment of the statute.¹²⁷ Despite legislative enactments seeking to ban torture, the government continued to withhold information about the use of interrogations and torture for years. It was not known publicly until 2009, when President Obama ordered the release of secret CIA interrogation memos, that interrogators had used waterboarding 266 times on two prisoners from Al Qaeda—far more exposure to torture than had been previously reported.¹²⁸

United Nations Special Rapporteur on Torture Nils Melzer summarized some of the objections to waterboarding in a 2017 statement urging the United States not to resume its use:

“First, waterboarding is a form of torture and, contrary to popular belief, torture simply does not work,” Mr. Melzer emphasized.

“Torture is known to consistently produce false confessions and unreliable or misleading information,” he said. “Faced with the imminent threat of excruciating pain or anguish, victims simply will say anything—regardless of whether it is true—to make the pain stop and try to stay alive.”

The expert recalled the 2014 U.S. Senate Intelligence Committee Report, which concluded that the CIA’s use of enhanced interrogation techniques, including waterboarding, was “not an effective means of

126. President George W. Bush, *Statement on the U.N. International Day in Support of Victims of Torture*, WHITE HOUSE ARCHIVES (June 26, 2004), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/06/20040626-19.html> [<https://perma.cc/3JFC-996X>].

Today . . . the United States reaffirms its commitment to the worldwide elimination of torture. . . . Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law. To help fulfill this commitment, the United States has joined 135 other nations in ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction. American personnel are required to comply with all U.S. laws, including the United States Constitution, Federal statutes, including statutes prohibiting torture, and our treaty obligations with respect to the treatment of all detainees.

Id.

127. Military Commissions Act of 2006, 10 U.S.C. § 948r.

128. Memorandum from Steven G. Bradbury, Principal Deputy Asst. Att’y Gen., for John A. Rizzo, Senior Deputy Gen. Couns., Cent. Intel. Agency, U.S. Dep’t of Just., *Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value Al Qaeda Detainees* (May 30, 2005), https://www.thetorturedatabase.org/files/foia_subsite/pdfs/olc_6_compressed.pdf [<https://perma.cc/Y8T8-XE5B>]; see Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. TIMES (Apr. 19, 2009), <https://www.nytimes.com/2009/04/20/world/20detain.html> [<https://perma.cc/T444-YSWC>] (describing contents of OLC memo).

acquiring intelligence or gaining cooperation from detainees”, a conclusion echoed by countless law enforcement agencies and scientific studies worldwide.

“Second, even if torture did work, that does not make it legally or morally acceptable,” he added. “Let us be clear: if you are looking for military advantage in war, you can argue that chemical weapons ‘work’, or terrorism ‘works’ as well.”

“However, all civilized peoples of this world have stood together to outlaw such abhorrent practices because, just as torture, they irreparably destroy the humanity and integrity not only of the victim, but also of the perpetrator and, ultimately of society as a whole,” Mr. Melzer underscored.

“Third,” the expert stressed, “the use or incitement of torture and other cruel, inhuman or degrading treatment or punishment has been absolutely prohibited in treaty law, such as the Convention against Torture, the International Covenant on Civil and Political Rights and the Geneva Conventions.”¹²⁹

The Special Rapporteur noted that the prohibition is absolute, and breaches amount to internationally recognized crimes and, in armed conflict, even to war crimes.

Perhaps the most telling criticism of the enhanced interrogation techniques employed by U.S. officials is that torture *does not result in reliable intelligence*.¹³⁰ In response to the DOJ’s release of legal memos on April 16, 2009, detailing the coercive interrogation techniques used with suspected terrorists, Trinity College Institute of Neuroscience’s Shane O’Mara commented:

The use of such techniques appears motivated by a folk psychology that it is demonstrably incorrect. Solid scientific evidence of how repeated and extreme stress and pain affect memory and executive functions (such as planning or forming intentions) suggests that these techniques

129. Off. of U.N. High Comm’r, *supra* note 104.

130. See Misty Duke & Damien Van Puyvelde, *‘Enhanced Interrogations’ Don’t Work as Well as Regular Ones*, WASH. POST (Feb. 9, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/09/enhanced-interrogations-dont-work-as-well-as-regular-ones/> [<https://perma.cc/7TGK-CLQG>].

Interrogators are looking for reliable information. To get there, they must ask their questions carefully, to help ensure the source’s recall remains accurate. They have to watch out for two pitfalls in particular: coercing sources so much that they give false information; and asking questions in a way that makes it harder for the source to remember information accurately. Three types of enhanced interrogation may make sources more likely to give false information, according to research: sleep deprivation, social isolation and intense interrogator pressure. In enhanced interrogation, repeated threats of physical harm, such as waterboarding, impose more severe pressure on the source than most other interrogation methods. Interrogators have only a limited ability to tell true statements from false ones, especially when they have no other evidence but the prisoner’s word. And even if analysts have other sources that they can check against, false evidence from a high value source may lead them astray.

Id.

are unlikely to do anything other than the opposite of that intended by coercive or “enhanced” interrogation.¹³¹

In his historical review of the legal history of torture, John H. Langbein concluded that “[h]istory’s most important lesson is that it has not been possible to make coercion compatible with truth.”¹³²

III. THE “TORTURE LAWYERS”

In January of 2002, John Yoo of the DOJ’s Office of Legal Counsel drafted a memo (hereinafter the “Yoo Memo”),¹³³ followed in August of 2002 by a memo signed by then-Assistant Attorney General (now Ninth

131. Shane O’Mara, *Torturing the Brain: On the Folk Psychology and Folk Neurobiology Motivating ‘Enhanced and Coercive Interrogation Techniques’*, 13 *TRENDS COGNITIVE SCI.* 497, 497 (2009). O’Mara hypothesized that the interrogators incorrectly assumed that repeated shock, stress, anxiety, disorientation, and lack of control were more effective than standard interrogatory techniques, and that information retrieved from the “enhanced interrogation” was reliable and veridical as suspects would be motivated to end the torture, but there is no supporting data for this model, and there is no scientific evidence to support it either. *Id.* at 497–98. He indicated the structure and functional integrity of the hippocampus and the prefrontal cortices, as well as regular sleep, are essential for normal memory function. *Id.* at 497. “When these brain areas function improperly, both memory and executive functions can be impaired.” *Id.* Stress causes the release of stress hormones, cortisol and catecholamines, such as nonadrenaline. *Id.* “Stress hormones provoke and control the ‘fight or flight’ response . . . that if overly prolonged, can result in compromised cognitive neurobiological function (and even tissue loss).” *Id.* Long-term damage to the brain and body results from long-term “hyperarousal,” and the amygdala can become enlarged, “creating a negative feedback loop that amplifies the effects of subsequent stressful events.” *Id.* Finally, long-term sleep deprivation results in increased cortisol levels, adversely affecting memory. *Id.* at 497–98. “[T]orture is as likely to elicit false as it is true information and . . . separating the one from the other will be difficult. It is likely to be difficult or perhaps impossible to determine during interrogation whether the information that a suspect reveals is true . . .” *Id.* at 498.

132. Langbein, *supra* note 22, at 101. Langbein further explained:

The European law of torture was suffused with the spirit of safeguard, yet it was never able to correct for the fundamental unreliability of coerced evidence. . . . I see little reason to think that modern circumstances would make investigation under torture more reliable. . . . There is, however, no escape from the reality that not every suspect is guilty, and that, for many reasons, information extracted under torture comes with no guarantee of reliability. Terrorists willing to die for their cause would also be willing to plant false tales under torture.

Id.

133. Memorandum from John Yoo, Deputy Assistant Att’y Gen., & Robert J. Delahunty, Special Couns., to William J. Haynes II, Gen. Couns., U.S. Dep’t of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees 1 (Jan. 9, 2002), <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020109.pdf> [<https://perma.cc/N7BF-4QU9>] [hereinafter Yoo Memo]. Alberto Gonzales subsequently authored another memo that reiterated and supported the conclusions reached in the Yoo Memo. See Memorandum from Alberto R. Gonzales, Att’y Gen., to George W. Bush, President of the U.S., Decision RE: Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban 1 (Jan. 25, 2002), <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020125.pdf> [<https://perma.cc/DMA5-FXNE>].

Circuit Judge) Jay Bybee,¹³⁴ discussing then-in-use interrogation methods and whether they violated U.S. or international law under 18 U.S.C. §§ 2340-40A.¹³⁵ Yoo “argued that Al Qaeda and Taliban detainees were protected neither by the Geneva Conventions nor by federal laws against torture and war crimes.”¹³⁶ By 2002, the CIA was interrogating prisoners at Bagram Air Base near Kabul by forcing men to “‘stand with their hands chained to the ceiling and their feet shackled,’ creating an effect similar to the Italian Inquisition’s *strappado*.”¹³⁷ By 2003, at Iraq’s Abu Ghraib prison,

U.S. military police would parade Iraqi prisoners naked with plastic sandbags over their heads, combining psychological humiliation with the pain of restricted breathing—just as medieval victims were once displayed in town squares with iron masks clamped on their heads, suggesting both “imagined ridiculousness” and “physical torture through obstruction of the mouth or nose.”¹³⁸

The argument focused on Common Article 3 of the Geneva Conventions, which applies to “armed conflict not of an international character,” in contrast to the bulk of the Geneva Conventions, which concern regular wars between states party to the Conventions.¹³⁹

The Yoo Memo argued that armed conflicts involving the Taliban and Al Qaeda were “not of an international character” under Common Article 3, and therefore, no provisions of the Geneva Conventions applied to those detainees.¹⁴⁰ In response, Jens David Ohlin¹⁴¹ argued that the majority view of the Geneva Conventions is that Common Article 3 applies to all armed conflicts that are not wars between States party to the Conventions, the position subsequently adopted by the Supreme Court in

134. Several months following the Yoo Memo, Bybee sent a second memo on August 1, 2002, which was also sent to Alberto Gonzalez. See Memorandum from Jay S. Bybee, Assistant Att’y Gen., to Alberto Gonzales, Couns. to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020801-1.pdf> [<https://perma.cc/6QJP-45P6>] [hereinafter Bybee Memo].

135. See Wallach, *supra* note 115, at 470 (explaining that Bybee Memo’s analysis failed to discuss why physical or psychological pain from waterboarding was insufficient to meet the criminal standards it laid out).

136. Ohlin, *supra* note 115, at 199 (citing the Yoo Memo, *supra* note 133, at n.29).

137. MCCOY, *supra* note 13, at 59.

138. *Id.*

139. Ohlin, *supra* note 115, at 200 (citing Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3615, 75 U.N.T.S. 287).

140. *Id.*

141. *Id.* Jens David Ohlin is an expert in international and comparative law, legal ethics, and criminal law and procedure and is dean of the Cornell Law School.

Hamdan v. Rumsfeld.¹⁴² After the *Hamdan* decision, the Bush administration “retroactively changed the law, immunizing much of the previous conduct in violation of Common Article III from prosecution and, proactively, purported to give the President rather than the judiciary the right to decide what qualifies as CIDT [cruel, inhuman, and degrading treatment or punishment] under Common Article III.”¹⁴³

After the Yoo Memo declared the Geneva Conventions not applicable to the detainees, the Bybee Memo concluded that “certain acts may be cruel, inhuman or degrading, but still not produce pain and suffering of the requisite intensity” to be considered torture under the law.¹⁴⁴ “Among the methods they found acceptable: ‘water-boarding,’ or dripping water over a suspect’s face, which can feel like drowning”¹⁴⁵ The Bybee Memo indicated:

[T]orture as defined in and proscribed by Sections 2340–2340A covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder. . . . Because the acts inflicting torture are extreme, there is significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture.¹⁴⁶

About four years after the Yoo and Bybee Memos were drafted, President Bush signed the Military Commissions Act of 2006 to modify the procedures and rules for military commissions and modify the War

142. 548 U.S. 557, 630–31 (2006) (applying *Hamdan*’s Common Article 3 right to be tried by a regularly constituted tribunal).

143. *Professor Discusses Legal and Ethical Issues Revealed in Report on CIA’s Use of Torture*, BOSTON UNIV. SCH. OF L. (Dec. 18, 2014), <https://www.bu.edu/law/record/articles/2014/professor-discusses-legal-and-ethical-issues-revealed-in-report-on-cias-use-of-torture/> [<https://perma.cc/A9JB-WNLQ>].

144. Bybee Memo, *supra* note 134, at 1. One reviewer responded by stating, “[t]he memos read like the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison.” Anthony Lewis, *Making Torture Legal*, N.Y. REV. (July 15, 2004), <https://www.nybooks.com/articles/2004/07/15/making-torture-legal/> [<https://perma.cc/T69W-4ZDX>].

145. John Barry, *A Tortured Debate*, NEWSWEEK (June 20, 2004, 8:00 PM), <https://www.newsweek.com/tortured-debate-128593> [<https://perma.cc/GU2L-RQCB>]. A more graphic depiction of waterboarding can be seen in the film *The Railway Man* (Lionsgate 2013). See also Stephen Holden, *Lifetime Anguish Is the High Cost of Courage*, N.Y. TIMES (April 10, 2014), <https://www.nytimes.com/2014/04/11/movies/the-railway-man-a-true-tale-of-wartime-torture-and-reconciliation.html> [<https://perma.cc/7J75-ZGEU>] (reviewing *The Railway Man*, based on a 1995 memoir by former British Army officer, Eric Lomax, and his waterboarding by Japanese following fall of Singapore during WWII in 1942).

146. Bybee Memo, *supra* note 134, at 46.

Crimes Act of 1995,¹⁴⁷ which had criminalized breaches of the Geneva Conventions. The modification of Section 3 of the War Crimes Act of 1995 removed the rights of defendants appearing before military commissions to assert any of the rights listed in the Geneva Conventions.¹⁴⁸

In a scathing rebuttal to the Yoo Memo sent to the DOJ by executive branch attorneys, Ohlin identified several licensed attorneys and questioned their civil and/or criminal liability for drafting and promulgating legal advice during the Bush administration's utilization of waterboarding at various detention facilities. Ohlin identified the attorneys as:

John Yoo, former Assistant Attorney General at the Office of Legal Counsel and now a professor of law at the University of California at Berkeley; Jay Bybee, formerly at the Office of Legal Counsel and now a federal appellate judge on the Ninth Circuit; and Alberto Gonzales, former White House Counsel and then Attorney General. David Addington, a former legal advisor to Vice President Dick Cheney, was also a key player in formulating aspects of the legal strategy of the War on Terror . . . Steven G. Bradbury, the former head of the Office of Legal Counsel, wrote several memoranda concluding that the CIA's interrogation techniques were lawful under specific circumstances.¹⁴⁹

The memos made it "possible that the torture lawyers meet the mental elements required for accomplice liability and . . . probable that the memos aided or facilitated the actual torture."¹⁵⁰ Lawyers have been charged with aiding and abetting criminal endeavors,¹⁵¹ such as in the case of the federal prosecution of the attorneys¹⁵² who "aided and abetted

147. See Wallach, *supra* note 115, at 471.

Section 3 [of the War Crimes Act of 1995] . . . criminalizes breaches of the Geneva Conventions of 1949, provid[ing] that a "war crime" includes conduct which constitutes a violation of Common Article 3 of the Geneva Conventions (covering conflicts not of an international nature in the territory of a signatory power). The Military Commissions Act modifies Section 3, adding a new subsection (d) to limit violations to include, *inter alia*, torture and cruel or inhuman treatment, only if they inflict "severe physical or mental pain or suffering [if not incidental to lawful sanctions]."

Id.

148. Wallach concluded that the reason for the modification of Section 3 of the War Crimes Act of 1995 was to "affect its application to military commissions by the United States Supreme Court in *Hamdan v. Rumsfeld*." *Id.*

149. Ohlin, *supra* note 115, at 194 n.3.

150. *Id.* at 196.

151. See David Margolick, *At the Bar; Last Year the Government Brought a Law Firm to Its Knees. Should It Have?*, N.Y. TIMES, Nov. 26, 1993, at D10 (recounting investigation into law firm attorneys for aiding client's fraudulent banking activity).

152. See Alan Yonan Jr., *Keating Law Firm Settles Government Suit*, UPI ARCHIVES (Mar. 12, 1992), <https://www.upi.com/Archives/1992/03/12/Keating-law-firm-settles-government-suit/7005700376400/> [<https://perma.cc/TJ9V-Q6L2>] ("The law firm that represented Charles Keating and his failed Lincoln Savings and Loan Association Thursday signed an agreement under which it will pay the government \$41 million to settle charges it improperly withheld information from regulators.").

Charles Keating in the savings and loan scandal.”¹⁵³ As W. Bradley Wendel has asserted,

Wrongdoing by lawyers brought about or exacerbated the Watergate crisis, the savings and loan collapse, the corporate accounting fiasco that brought the 1990s tech stock boom to a crashing halt, and innumerable less prominent harms. But for sheer audacity and shock value, it is hard to top the attempt by elite United States government lawyers to evade domestic and international legal prohibitions on torture.¹⁵⁴

Although the DOJ under the Obama administration declined to prosecute “either the agents who tortured detainees or the lawyers who approved the interrogation methods . . . the potential legal exposure of the torture lawyers [did] not end there.”¹⁵⁵ Ohlin indicated that the “torture lawyers” face disciplinary action before state bar committees, criminal charges in Spain¹⁵⁶ and possible civil liability in U.S. federal district courts.¹⁵⁷ The culmination of the memoranda prepared by the lawyers resulted in the commission of war crimes, according to one international-law scholar and former military attorney at the time of the events, comparing the memos with the Nazi era when so many lawyers were involved in international crimes concerning the treatment and interrogations of persons during war.¹⁵⁸ Ten years after the contents of the memos were

153. Ohlin, *supra* note 115, at 198 (citing William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 L. & SOC. INQUIRY 243 (1998)).

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

155. Ohlin, *supra* note 115, at 195 (citing lawsuit filed against John Yoo by José Padilla). *See also* Padilla v. Yoo, No. C 08-00035 JSW, 2009 U.S. Dist. LEXIS 50154, *86 (N.D. Cal. June 12, 2009) (noting federal district court refusal to dismiss Padilla's lawsuit, but dismissing Padilla's claim that his Fifth Amendment right against self-incrimination had been violated).

156. Ohlin, *supra* note 115, at 195. *See also* Michael Ratner, *From Guantánamo to Berlin: Protecting Human Rights After 9/11*, in THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE 203, 203 (Marjorie Cohn ed., 2011).

In June 2009, Spain moved forward with a serious case against the lawyers involved in the U.S. torture program and, perhaps against other high-ranking U.S. officials. . . . It may take a few years, but the perpetrators will more than likely be held accountable for their actions some day.

Id.

157. Ohlin, *supra* note 115, at 195.

158. *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, 812 (2005).

A major part of the [Bush administration's plan regarding Taliban detainees] was to deny protections under the customary laws of war and treaties that require humane treatment of all persons who are detained during an armed conflict, regardless of their status and regardless of any claimed necessity to treat human beings inhumanely. The common plan and authorizations have criminal implications, since denials of these protections are violations of the laws of war, which are war crimes.

Id. Paust used the following as authority for the assertion that these actions constituted “war crimes”: U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 178 (1956)

declassified,¹⁵⁹ criticisms continued to rain down with disbelief over the document signed by the president of the United States disavowing the applicability of the Geneva Conventions to the interrogations and treatment of U.S. detainees.¹⁶⁰

In the Yoo Memo, the attorneys concluded:

[N]on-treaty international law, such as customary international law, was not federal law that could bind the President.¹⁶¹ The traditional view is that customary international law was incorporated into federal law as recognized by *Paquete Habana*, and is binding on the President. The Yoo Memorandum emphatically rejected this view in favor of the revisionist view that “customary international law . . . is not federal law.”¹⁶²

(“The term ‘war crime’ is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.”); UK WAR OFFICE, *THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW*, W.O. Code 12333, ¶ 624, n.2 (1958) (“The term ‘war crime’ is the technical expression for violations of the laws of warfare, whether committed by members of the armed forces or by civilians” and “may be committed by nationals both of belligerent and of neutral States.”); Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 5 U.N. GAOR, Supp. No. 12, at 11–14, U.N. Doc. A/1316, at 2 (1950) (“War crimes: Violation of the laws or customs of war . . .”); *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defense Motion on Jurisdiction, ¶¶ 61–62 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995); see also Hague Convention No. IV on Respecting the Laws and Customs of War on Land, Annex, art. 23(h), Oct. 18, 1907, 36 Stat. 2277; T.S. No. 539 (“[I]t is especially forbidden—(h) To declare abolished, suspended, or inadmissible in a court of law the rights . . . of the nationals of the hostile party.”).

159. Apparently, the torture memos were not declassified until June 2004, “after much of the memo’s impact had become known to the world.” See Andrew Cohen, *The Torture Memos, 10 Years Later*, THE ATLANTIC (Feb. 6, 2012), <https://www.theatlantic.com/national/archive/2012/02/the-torture-memos-10-years-later/252439/> [https://perma.cc/KW5G-E6MM].

160. In 2012, Andrew Cohen, a senior contributing editor at *The Atlantic*, a legal analyst for *60 Minutes* and *CBS Radio News*, and a fellow at the Brennan Center for Justice, reported:

President Bush signed a document which stated: “. . . none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere through the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva. . . . [C]ommon Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to ‘armed conflict not of an international character.’”

Id.

161. In response to this assertion in the Yoo Memo, see Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1162 (2006) (noting that if the executive branch violates a *jus cogens* norm, it should be actionable in a U.S. court under international law); Memorandum from John C. Yoo, Deputy Assistant Att’y Gen. to William J. Haynes II, Gen. Couns. of Dep’t of Def., *Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (Mar. 14, 2003), https://www.thetorturedatabase.org/files/foia_subsite/johnyooarmymemo_0.pdf [https://perma.cc/228N-2BJW].

162. Ohlin, *supra* note 115, at 202 (first citing *The Paquete Habana*, 175 U.S. 677, 700 (1900); then citing Yoo Memo, *supra* note 133, at 34). *The Paquete Habana* concerns the extent to which U.S. law incorporates federal law and concludes:

International law is part of our law, and must be ascertained and administered by the courts of justice appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty,

The Bybee Memo was no less controversial than the Yoo Memo.¹⁶³ It was severely criticized from the moment it was first released and for years following.¹⁶⁴ Bybee's August 1, 2002, memorandum "provided an essential foundation for the Bush Administration's torture policy by crafting 'creative' legal arguments in favor of a narrow definition of torture as a crime under federal and international law."¹⁶⁵ Referring to the Bybee Memo as "[o]ne of the most notorious memos," W. Bradley Wendel at Cornell found the document:

[C]oncluded that certain interrogation methods might be cruel, inhuman, or degrading, yet fall outside the definition of prohibited acts of torture. The memo further concluded that even if an act were deemed torture, it might nonetheless be justified by self-defense or necessity. And even if an interrogation technique would otherwise be deemed wrongful, the President as Commander-in-Chief had the unilateral authority to exempt government actors from domestic and international legal restrictions on torture.¹⁶⁶

Wendel found that the "overwhelming response by experts in criminal, international, constitutional, and military law was that the legal analysis

and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, nor for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The Paquete Habana, 175 U.S. 677, 700 (1900) (citing *Hilton v. Guyot*, 159 U.S. 113, 163–64, 214–15 (1895)).

163. See Koh, *supra* note 161, at 1149–50.

We all know now, for instance, of the infamous August 1, 2002 memorandum opinion sent from then-Assistant Attorney General Jay S. Bybee of the Office of Legal Counsel (OLC) to then-Counsel to the President Alberto R. Gonzales regarding coercive interrogation tactics ("Bybee Opinion" or "Opinion"). The OLC of the United States Department of Justice is the most important legal office in the United States government, for it authoritatively determines the executive branch's legal position on matters not in litigation. The Bybee Opinion, which was apparently requested in early summer 2002 by Mr. Gonzales as White House Counsel, explores the question whether U.S. officials can use tactics tantamount to torture against suspected terrorists, without being held liable under a federal statute that criminalizes torture. The Bybee Opinion effectively answers that question "yes." The Opinion essentially concludes that American officials, despite the standing zero-tolerance policy against torture, can use tactics that are tantamount to torture without being held liable. It took more than two years for the Bybee Opinion to be withdrawn by the Office of Legal Counsel, despite having sparked a firestorm of criticism when it was leaked to the press in response to Abu Ghraib. For at least two years, then, the Bybee Opinion stood as the official executive branch interpretation of federal officials' liabilities with regard to torture and cruel treatment.

Id.

164. See Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641, 646 (2005) (noting that Bybee Memo was leaked to press after revelation of atrocities at Abu Ghraib).

165. Ohlin, *supra* note 115, at 206.

166. Wendel, *supra* note 154, at 68.

in the government memos was so faulty that the lawyers' advice was incompetent."¹⁶⁷

The Bybee Memo was "severely criticized for its shortcomings and legal distortions."¹⁶⁸ Some argue that Bybee was rewarded for his efforts in advancing the use of torture during the Bush administration with a federal judgeship.¹⁶⁹

Following the DOJ's adoption of the Yoo Memo and Bybee Memo, the Bush administration consensus reflected that the memoranda:

[W]ould lead, in the coming months, to widespread use of more brutal methods by both CIA and military interrogators. . . . In the next few years of the war on terror, the toll from President Bush's orders, as conveyed in these memos and others still secret, would be chilling—some 14,000 Iraqi "security detainees" subjected to harsh interrogation, often with systemic torture; 1,100 "high-value" prisoners interrogated, with systemic torture, at Guantánamo and Bagram; 150 extraordinary, extra-legal renditions of terror suspects to nations notorious for brutality; 68 detainees dead under suspicious circumstances; some 36 top Al Qaeda detainees held for years of sustained CIA torture; and 26 detainees murdered under questioning, at least 4 of them by the CIA. . . . To all these statistics, we should add another casualty—one great nation's international reputation.¹⁷⁰

In 2012, ten years after the first torture memo was written, Andrew Cohen published a retrospective article in *The Atlantic* evaluating the significance of the memorandum:

President George W. Bush signed a brief memorandum titled "Humane Treatment of Taliban and al Qaeda Detainees." The caption was a cruel irony, an Orwellian bit of business, because what the memo authorized and directed was the formal abandonment of America's commitment to key provisions of the Geneva Convention. This was the day, a milestone on the road to Abu Ghraib: that marked our descent into torture—the

167. See *id.* ("[I]n my professional opinion, the August 1, 2002 OLC Memorandum is perhaps the most clearly erroneous legal opinion I have ever read." (citing Dean of Yale Law School during confirmation hearing on nomination of Alberto R. Gonzales to be U.S. Attorney General)); see also Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department's Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B3 (criticizing "stunning legal contortions" in the memos).

168. Ohlin, *supra* note 115, at 206.

169. Cohen, *supra* note 159.

There will likely be other opportunities in 2012 to look back at some of those other memos. Perhaps Jay S. Bybee himself, inexplicably rewarded for his role in the scandal by getting a federal judgeship, will say something. . . . Today is a day instead to look at one of the first of these odious documents. It is a day to note how simple and easy it was, *it still is*, for political leadership to make monumental decisions on our behalf without really telling us—or by simply telling us something that isn't true.

Id.

170. MCCOY, *supra* note 13, at 124–25.

day, many would still say, that we lost part of our soul. . . . Once America crossed the line 10 years ago, the memoranda that followed, to a large extent, were merely evidence of the grinding gears of bureaucracy trying to justify itself.¹⁷¹

When Alberto Gonzales, the White House counsel, pushed the arguments to President Bush, he received “push-back from Secretary of State Colin Powell, the decorated war hero, who argued that U.S. soldiers would pay the ultimate price for their government’s decision to blow off the Geneva Convention on Prisoners of War.”¹⁷² One commentator concluded that the process of drafting the torture memoranda was “badly flawed” and excluded input from lawyers from the State Department, associated with Secretary of State Colin Powell, attorneys in the DOJ’s Criminal Division, or career military lawyers with the Judge Advocate General Corps “who would have immediately recognized the erroneous analysis of the application of the Geneva Conventions.”¹⁷³ The torture memos are:

[A] perfect case study to illustrate the application of a general jurisprudential thesis about the locus of moral responsibility in lawyering, because they show how lawyers can commit a moral wrong vis-à-vis their obligation to serve as custodians or trustees of the law, even while the law excludes recourse to first order moral consideration in practical reasoning.¹⁷⁴

The current statutes in both domestic law and international law might suggest that torture has been explicitly banned,¹⁷⁵ but remedies for those impacted by the former policies of the United States remain uncertain.¹⁷⁶

171. Cohen, *supra* note 159.

172. *Id.*

173. Wendel, *supra* note 154, at 70. “[A]lthough military lawyers adamantly opposed the administration’s approach to compliance with the Geneva Conventions, their concerns were ignored by top Defense Department lawyers.” *Id.* at 70 n.7 (citing Josh White, *Military Lawyers Fought Policy on Interrogations*, WASH. POST, July 15, 2005, at A1).

174. Wendel, *supra* note 154, at 72–73.

175. *But see Has Obama Banned Torture? Yes and No*, AL JAZEERA AM. (Dec. 1, 2015, 2:00 AM), <http://america.aljazeera.com/opinions/2015/12/has-obama-banned-torture-yes-and-no.html> [<https://perma.cc/PRB3-GEN8>] (noting that Obama had not closed all loopholes Bush’s lawyers had allowed to permit waterboarding and other harsh tactics).

176. *See* Jamil Dakwar & Joshua Manson, *U.S. Gave Its Torturers a Pass, So International Courts Steps In*, AM. C.L. UNION (Nov. 8, 2017, 2:00 PM), <https://www.aclu.org/blog/national-security/torture/us-gave-its-torturers-pass-so-international-court-steps> [<https://perma.cc/SE95-63W6>].

[T]he Obama administration opened two narrow investigations and closed both without charging anyone. The International Criminal Court [ICC] can only become involved when domestic systems fail to conduct genuine and credible investigations into major crimes as outlined by the Rome Statute, which created the international court.

Id. Following the ICC’s investigation into war crimes by U.S. forces in Afghanistan,

IV. UNITED STATES PHYSICIANS' INVOLVEMENT IN TORTURE

Renowned Harvard physician and psychiatrist, Robert Jay Lifton, wrote in July 2004's *New England Journal of Medicine*:

There is increasing evidence that U.S. doctors, nurses, and medics have been complicit in torture and other illegal procedures in Iraq, Afghanistan, and Guantánamo Bay. Such medical complicity suggests still another disturbing dimension of this broadening scandal. We know that medical personnel have failed to report to higher authorities wounds that were clearly caused by torture and that they have neglected to take steps to interrupt this torture. In addition, they have turned over prisoners' medical records to interrogators who could use them to exploit the prisoners' weaknesses or vulnerabilities. We have not yet learned the extent of medical involvement in delaying and possibly falsifying the death certificates of prisoners who have been killed by torturers.¹⁷⁷

By 2013, a Columbia University task force had found that:

[M]edical professionals working for the CIA "played a critical role in reviewing and approving forms of torture, including waterboarding, as well as in advising the Department of Justice that 'enhanced interrogation' methods, such as extended sleep deprivation and waterboarding that are recognized as forms of torture, were medically acceptable."¹⁷⁸

President Donald Trump issued an executive order on June 11 [2020] effectively criminalizing anyone who works at the ICC. Its lawyers, judges, human rights researchers and staff could now have their U.S. bank accounts frozen, U.S. visas revoked and travel to the U.S. denied. On Sept. 2, Sec. State Mike Pompeo announced the new sanctions would be applied for the first time, against ICC special prosecutor Fatou Bensouda and her top aide.

Susan M. Akram, *U.S. Punishes International Criminal Court for Investigating Potential War Crimes in Afghanistan*, THE CONVERSATION (Sept. 2, 2020, 11:03 AM), <https://theconversation.com/us-punishes-international-criminal-court-for-investigating-potential-war-crimes-in-afghanistan-143886> [<https://perma.cc/3TYZ-YFKV>].

177. Robert Jay Lifton, *Doctors and Torture*, 351 N. ENG. J. MED. 415, 416 (2004). Lifton also noted that "Other reports, though sketchier, suggest that the death certificates of prisoners who might have been killed by various forms of mistreatment have not only been delayed but may have camouflaged the fatal abuse by attributing deaths to conditions such as cardiovascular disease." *Id.*

178. Priyanka Boghani, *Did "Enhanced Interrogation" Break the CIA's Own Rules on "Human Experimentation"?*, PBS (June 15, 2015), <https://www.pbs.org/wgbh/frontline/article/did-enhanced-interrogation-break-the-cias-own-rules-on-human-experimentation/> [<https://perma.cc/8QSR-XAL9>].

Medical personnel¹⁷⁹ were clearly involved in the acts of torture designed to extract information from U.S. detainees.¹⁸⁰ Interestingly, American psychiatrists—unlike American psychologists—appear to have played little to no direct role in the detainee interrogations.¹⁸¹ The American Psychiatric Association adopted an unambiguous policy resolution *not* to participate:

[I]n contrast to the American Psychological Association's position, the American Psychiatric Association voted overwhelmingly to discourage its members from participating in any interrogation activities. In May 2006, after extensive debate and careful consideration of all points of view, the American Psychiatric Association's Board of Trustees and the Assembly of District Branches approved a clear prohibition.

*"No psychiatrist should participate directly in the interrogation of persons held in custody by military or civilian investigative or law enforcement authorities, whether in the United States or elsewhere. Direct participation includes being present in the interrogation room, asking or suggesting questions, or advising authorities on the use of specific techniques of interrogation with particular detainees."*¹⁸²

Once the claims of torture and detainee abuse during interrogations engineered by U.S. psychologists became public, the American Psychological Association (APA) might have initiated investigations and the adoption of measures and ethics rules to end any role psychologists

179. The term "medical personnel" includes nurses. The American Nurses Association repeatedly expressed its concerns to U.S. Secretary of Defense Donald Rumsfeld, among others, that registered nurses had been involved in unethical practices at Camp Delta in Guantánamo Bay, and at other detention locations including Abu Ghraib. See D. Holmes & A. Perron, *Violating Ethics: Unlawful Combatants, National Security and Health Professionals*, 33 J. MED. ETHICS 143, 144 (2007) (noting that nurses have been involved in administration of death camps during the Holocaust, the Tuskegee Syphilis Study, human-rights abuses in psychiatric hospitals in former Soviet Union, but they have been "shielded by a conspiracy of silence").

180. See generally M. Gregg Bloche & Jonathan H. Marks, *Doctors and Interrogators at Guantánamo Bay*, 353 NEW ENG. J. MED. 6 (July 7, 2005).

181. See Neil A. Lewis, *National Briefing | Washington: Psychologists Preferred for Detainees*, N.Y. TIMES (Jun. 7, 2006), <https://www.nytimes.com/2006/06/07/us/national-briefing-washington-psychologists-preferred-for-detainees.html> [<https://perma.cc/9PEW-25GF>],

Pentagon officials said . . . they would try to use only psychologists, not psychiatrists, to help interrogators devise strategies to get information from detainees at places like Guantánamo Bay, Cuba. The new policy follows by little more than two weeks an overwhelming vote by the American Psychiatric Association discouraging its members from participating in those efforts. Stephen Behnke, director of ethics for the counterpart group for psychologists . . . knew not to participate in activities that harmed detainees. But he also said the group believed that helping military interrogators made a valuable contribution because it was part of an effort to prevent terrorism.

Id.

182. Pope & Gutheil, *supra* note 66 (citing AM. PSYCHIATRIC ASS'N, POSITION STATEMENT ON PSYCHIATRIC PARTICIPATION IN INTERROGATION OF DETAINEES 2 (May 2006), <https://www.psychiatry.org/getattachment/015a4fab-0de9-4c57-96b3-126c38e40e48/Position-Psychiatric-Participation-in-Interrogation-of-Detainees.pdf> [<https://perma.cc/P9LE-9CDW>]).

played, and to hold perpetrators accountable. Instead:

APA leadership took a different path. They decided to use the opportunity to curry favor with the military/intelligence establishment and the Bush administration. They encouraged, indeed asserted without evidence, the necessity of having psychologists aid the interrogations. Until the waning days of the Bush administration, in fall 2008, APA leaders uttered not one word of concern about the role of psychologists in abusing detainees, or in teaching others to abuse. Like the Bush administration, they condemned torture in resolution after resolution and insisted that psychologists would never participate in torture.¹⁸³

The American Medical Association (AMA) has consistently denounced involvement by physicians in detainee torture and interrogations that violate the AMA Code of Ethics. “We firmly believe that U.S. policies on detainee treatment must comport with the AMA’s *Code of Medical Ethics* and the World Medical Association’s Declaration of Tokyo, which forcefully state medicine’s opposition to torture or coercive interrogation and prohibit physician participation in such activities,” said AMA President Robert M. Wah, MD.¹⁸⁴ AMA policy on the treatment of detainees by the military has been consistent, according to the Chair of the AMA Board of Trustees, Edward L. Langston:

Since the issue of detainee abuse under US custody first surfaced, leaders of the American Medical Association (AMA) have met on several occasions with high-ranking officials at the United States Department of Defense (DoD) to advocate for the treatment of detainees that is consistent with the AMA ethics policy that prohibits torture. At its 2006 Annual Meeting, the AMA House of Delegates adopted a new ethics policy on the topic of physicians’ participation in interrogation. This new policy clearly prohibits physicians’ involvement in “behavioural science consultation teams.” The AMA also reaffirmed existing policy by releasing a public statement that condemned forced feeding of hunger strikers. In addition to making our position known to the DoD, representatives from the AMA were invited to visit the detention facilities at Guantánamo. These visits provided an opportunity for the AMA to tour the facilities, but our access was limited, and at no time did we have a chance to speak with the detainees. Due to the limits placed on the AMA, we are unable to determine with any certainty whether ethics policies prohibiting physicians’ involvement in torture are being adhered to by the DoD. The AMA will continue to advocate for treatment of all detainees in US custody to be in accordance with our code of medical ethics and the Geneva Conventions. Our physician colleagues

183. Soldz, *supra* note 38, at 182–83.

184. *Torture, Coercive Interrogations and Physicians*, AM. MED. ASS’N (Dec. 12, 2014), <https://www.ama-assn.org/delivering-care/ethics/torture-coercive-interrogations-and-physicians> [<https://perma.cc/V98G-N89V>].

in the military, many of whom are placed in difficult, sometimes dangerous, situations and are serving nobly, deserve nothing less.¹⁸⁵

Citing the AMA Code of Medical Ethics's Opinion E-2.067¹⁸⁶ and the World Medical Association's Declaration of Tokyo, the AMA released a statement in December of 2014 regarding torture:

Physicians must oppose and must not participate in torture for any reason. Participation in torture includes, but is not limited to, providing or withholding any services, substances or knowledge to facilitate the practice of torture. Physicians must not be present when torture is used or threatened. Physicians should only treat individuals when it is in the patient's interest, not to verify health so that torture can begin or continue. Physicians should help provide support for victims of torture and whenever possible strive to change situations in which torture is practiced or the potential for torture is great.¹⁸⁷

The adoption of these ethical positions appears to provide a basis for reviewing the actions of any licensed physician who engaged in violations of these principles, whether participating in actual "enhanced interrogations," or by providing access to otherwise confidential medical records of detainees.

V. CURRENT LEGAL STATUS OF ENHANCED INTERROGATIONS INCLUDING WATERBOARDING

The absolutist perspective—that an unconditional ban on torture ought to apply without exception regardless of circumstances¹⁸⁸—is generally thought to have been the state of the law prior to the Bush administration seeking to declare the provisions of the Geneva Conventions non-binding

185. Edward L. Langston, *Ethical Treatment of Military Detainees*, 370 THE LANCET 1999, 1999 (2007), [https://www.thelancet.com/article/S0140-6736\(07\)61852-2/fulltext](https://www.thelancet.com/article/S0140-6736(07)61852-2/fulltext) [<https://perma.cc/QSC3-KLZQ>].

186. *Torture: Code of Medical Ethics Opinion 2.067*, AM. MED. ASS'N (2006), <https://www.ama-assn.org/delivering-care/ethics/torture> [<https://perma.cc/AH9F-BEBC>] (modernized to Rule 9.7.5).

187. *See supra* note 184.

188. Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in TORTURE: A COLLECTION 229, 229 (Sanford Levinson ed., 2004).

Absolutists . . . frequently base their position on deontological grounds, that is, they assess the intrinsic moral value of things independent of their consequences. For them, torture is inherently wrong. It is an evil that can never be justified or excused. It violates the physical and mental integrity of the person subjected to it, negates her autonomy and humanity, and deprives her of human dignity. It reduces her to a mere object, a body, from which information is to be extracted, while coercing her to act in a manner that may be contrary to her most fundamental beliefs, values, and interests. Torture is also wrong because of its degrading and corrupting effects on individual torturers as well as on society at large. Hence, under no circumstances should such actions be morally acceptable or legally allowed.

Id.

because of the new paradigm resulting from 9/11. The subsequent rejection and dismissal of the Bush era's torture and enhanced interrogation policies turned the United States' legal position on torture back toward the absolutist perspective.

In explaining that the prohibition against torture is a *jus cogens* norm,¹⁸⁹ Jeanne Mirer argued that:

The right to be free from torture and other cruel, inhuman, or degrading treatment was recognized in Article 5 of the *Universal Declaration of Human Rights*. It is contained in Article 7 of the *International Covenant on Civil and Political Rights*, and Article 5(2) of the *American Convention on Human Rights*. Torture is outlawed under the *Rome Statute* which created the International Criminal Court (ICC). The U.S. Army's *Field Manual* 34-52 makes clear that techniques of interrogation are to be established under the rules laid out by The Hague and Geneva Conventions. The manual is unambiguous in prohibiting the use of torture and any other coercion in interrogation of prisoners.

Article 17 of the 1949 *Third Geneva Convention* prohibits physical or mental torture and any other coercive action against prisoners of war, and Article 130 classifies a violation of Article 17 as a "grave breach" of the *Geneva Conventions*. The *Fourth Geneva Convention* prohibits an occupying power from torturing protected persons (Article 32) or engaging in any other "measures of brutality" (Article 283). Common Article 3 (that is, Article 3 in each of the conventions) prohibits torture as well as inhuman, humiliating, and degrading treatment of those who are taking no active part in hostilities, or any persons in detention who may be members of armed forces who have laid down their arms, or those who are *hors de combat*.¹⁹⁰

In addition, in 1984, the U.N. General Assembly adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture or CAT), which prohibited and criminalized acts that result in torture and denied all possible refuge

189. Jeanne Mirer, *The Law of Torture and Accountability of Lawyers Who Sanction It*, in THE UNITED STATES AND TORTURE: INTERROGATIONS, INCARCERATION, AND ABUSE 241, 242 (Marjorie Cohn ed., 2011); see also Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMPAR. L. REV. 411, 437-39 (1989) (describing that torture goes against *jus cogens* norms of international law).

Jus cogens norms are accepted and recognized by the international community as a whole and no deviation from them is permitted. Countries also have universal jurisdiction over violations of these basic principles, enabling them to prosecute offenders extraterritorially. In international criminal law, crimes designated as violations of *jus cogens* norms include the duty to prosecute or extradite, the non-applicability of statutes of limitations, the non-applicability of any immunities, up to and including heads of state, and the non-applicability of the defense of "obedience to superior orders."

Mirer, *supra* note 189, at 242.

190. Mirer, *supra* note 189, at 242.

to torturers.¹⁹¹ One author described the adoption of CAT:

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is regularly celebrated as one of the most successful international human rights treaties. Its adoption by the United Nations in 1984 culminated an effort to outlaw torture that began in the aftermath of atrocities of World War II. Nations that ratified the Convention consented not to intentionally inflict “severe pain or suffering, whether physical or mental,” on any person to obtain information or a confession, to punish that person, or to intimidate or coerce him or a third person. Today, with a membership of over 130 countries, the Convention stands as a symbol of the triumph of international order over disorder, of human rights over sovereign privilege.

Yet while the Convention and its regional counterparts are indisputably remarkable achievements, events of the post-September 11 era have given reason for pause. Torture, we have learned, is not just a practice of the past.¹⁹²

A. Domestic Law

Under the provisions of 18 U.S.C. § 2340A, the act of torture is illegal, as is conspiracy to commit torture by a U.S. national or any individual within the United States. Our domestic law 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”¹⁹³ Severe mental pain or suffering includes the “intentional infliction . . . of severe physical pain or suffering,” as well as “other procedures calculated to disrupt profoundly the senses or personality.”¹⁹⁴ The domestic law applies within the United States as well as to U.S. nationals acting abroad.¹⁹⁵

In June of 2004, the Supreme Court held in a 6–3 decision (*Rasul v. Bush*) that people detained in Guantánamo could file a writ of habeas corpus and force the government to identify the legal reason for the detention, but for federal statutory reasons rather than for constitutional reasons.¹⁹⁶ In 2006, in *Hamdan v. Rumsfeld*, the Supreme Court struck down

191. *Id.* at 243 (“No exceptional circumstances whatsoever, whether a state of war, or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture.”); see generally J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 1 (Brill 2d ed. 2021).

192. Oona A. Hathaway, *The Promise and Limits of the International Law of Torture*, in TORTURE: A COLLECTION 199, 199 (Sanford Levinson ed., 2004).

193. 18 U.S.C. § 2340.

194. *Id.*

195. CTR. FOR ETHICS & RULE OF L., *supra* note 60, at 3 (noting that U.S. laws apply to U.S. nationals even when outside U.S. borders).

196. *Rasul v. Bush*, 542 U.S. 466, 468, 483–84 (2004); see also Ratner, *supra* note 156, at 207 (summarizing *Rasul* holding).

the military commissions that Bush and Rumsfeld had established because they violated the Uniform Code of Military Justice and the Geneva Conventions.¹⁹⁷ “The Court affirmed that there are no gaps in the Geneva Conventions—everyone must be given due process and treated humanely.”¹⁹⁸ The Supreme Court later expressly recognized the right of detainees under the Military Commissions Act of 2006¹⁹⁹ to bring actions for writs of habeas corpus in *Boumediene v. Bush*.²⁰⁰ In January 2009, President Obama issued Executive Order 13491, which “required all government entities to bring any current and future programs in line with all international laws and treaties defining and preventing the use of torture,” and rescinded all previous Bush-era legal opinions.²⁰¹

Various statutory enactments binding on the military restricted the interrogation practices members of the military are permitted to utilize. The 2015 McCain-Feinstein Amendment of the 2016 National Defense Authorization Act for FY 2016 expanded the provisions of the previously enacted 2005 Detainee Treatment Act, restricting interrogation practices of U.S. military to those in the *Army Field Manual*, and thus eliminating military-led enhanced interrogations.²⁰² The *Army Field Manual* 2.22.3 Section 5-13, the current basis for all legal interrogations by the United States, follows the provisions in the Geneva Conventions. Paragraph 5-51 states that the lawful treatment of “enemy prisoners of war” and civilians is dictated by the Geneva Convention relative to Treatment of Prisoners of War and the Geneva Convention relative to the Protection of Civilian Persons in Time of War.²⁰³ The U.S. Department of Defense *Law of War Manual* states numerous times that armed conflict does *not* remove the international laws and norms preventing torture. Section 5.26.2 directly addresses appropriate behavior: “[i]nformation gathering measures . . . may not violate specific law of war rules. . . . [I]t would be unlawful, of course, to use torture or abuse to interrogate detainees for purposes of gathering information.”²⁰⁴

197. See David Glazier, *Destined for an Epic Fail: The Problematic Guantánamo Military Commissions*, 75 OHIO ST. L.J. 903, 911–12 (2014) (recounting Bush administration’s reinstatement of military commissions despite evolution of international law contravening their legality).

198. Marjorie Cohn, *Trading Civil Liberties for Apparent Security is a Bad Deal, Cont.*, in NATIONAL SECURITY, CIVIL LIBERTIES, AND THE WAR ON TERROR 358, 360 (M. Katherine B. Darmer & Richard D. Fybel eds., 2011).

199. Military Commissions Act of 2006, 10 U.S.C. § 948r.

200. *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008).

201. CTR. FOR ETHICS & RULE OF L., *supra* note 60, at 3.

202. See CTR. FOR VICTIMS OF TORTURE, MCCAIN-FEINSTEIN ANTI-TORTURE AMENDMENT: STRENGTHENS U.S. BAN ON TORTURE 1–2 (2015), https://www.cvt.org/sites/default/files/attachments/u11/downloads/McCain-Feinstein%20Amendment%20Factsheet_November%202015.pdf [https://perma.cc/U3NM-GAVH].

203. See DEP’T OF THE ARMY, FM-2-22.3 § 5-13, ¶ 5-51(2006) (listing rules and protocol for interrogations and required adherence to Geneva Conventions).

204. OFF. GEN. COUNS. DEP’T OF DEF., DEP’T OF DEFENSE LAW OF WAR MANUAL 333 (2015).

The U.S. Military's Uniform Code of Military Justice (UCMJ) § 928 Art. 128 deems any service member who "intentionally inflicts grievous bodily harm with or without a weapon . . . guilty of aggravated assault."²⁰⁵ After reports of the abuse of detainees in Iraq and Afghanistan, some members of the U.S. military were tried and convicted under the provisions of the UCMJ, even though the character of the offenses appeared to qualify as international and war-related offenses.²⁰⁶ Because torture has been linked to U.S. military activities in Afghanistan, Iraq, and Guantánamo, it should be noted that the UCMJ "does not contain an article expressly prohibiting the 'torture'²⁰⁷ of persons detained during an armed conflict."²⁰⁸ Nevertheless, Title 18 of the United States Code does criminalize acts or attempted acts of torture that take place outside of the United States.²⁰⁹ Additionally, the War Crimes Act "criminalizes grave breaches of the Geneva Conventions," and one of the grave breaches found in all four of the Geneva Conventions is torture of a person protected by the Conventions.²¹⁰

It is possible that torture victims who are not U.S. citizens might consider suing those officials responsible for their torture under the Alien Tort Statute (ATS), which "authorizes aliens to bring tort suits in federal courts for certain violations of international law."²¹¹ The ATS provides, "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

205. 10 U.S.C. § 928(b) Art. 128(b).

206. Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F.L. REV. 1, 3 (2005).

207. As codified in Title 18, rather than Title 10:

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

(2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration of mind-altering substances or other procedures calculated to disrupt profoundly the sense of personality

18 U.S.C. § 2340.

208. Ohman, *supra* note 206, at 45.

209. *Id.*; see also 18 U.S.C. § 2340A (criminalizing torture U.S. nationals commit outside of United States).

210. Ohman, *supra* note 206, at 46.

211. Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 763 (2006) (citing 28 U.S.C. § 1350 (2000)).

treaty of the United States.”²¹² Although the Supreme Court held in *Sosa v. Alvarez-Machain* that the ATS does authorize federal courts to adjudicate tort claims for some violations of universally accepted and clearly defined principles of international law²¹³—citing torture as an example²¹⁴—such claims cannot be asserted against the United States (because of sovereign immunity²¹⁵ and because of the exclusivity provision of the Federal Tort Claims Act²¹⁶) or against U.S. officials for conduct within the scope of their employment.²¹⁷ In other cases, the government has successfully invoked the “state secrets privilege,”²¹⁸ “a judicially created doctrine that the Bush administration ha[d] invoked to win dismissal of lawsuits that touch on issues of national security”²¹⁹ Originally recognized in the 1953 case of *United States v. Reynolds*, a lawsuit filed under the Torts Claim Act²²⁰ by three civilian survivors of a military aircraft crash, the government indicated that disclosure of the plane’s secret mission and equipment would violate national security.²²¹

B. International Law

Although various sources of international law have already been discussed, the review of all international authority outlawing torture would be outside the scope of this article. Nevertheless, recognizing some of the sources of the prohibitions including the treaties, the U.N. Security Council, the Committee under the Torture Convention, the European court rulings, the U.N. Human Rights Commission, the decisions by the International Criminal Court, the various decisions incorporating provisions of the Geneva Conventions and interpreting the Conventions and declaring the prohibition against torture is uniform and requires no elaboration. Torture is a grave violation of human rights, a *jus cogens* norm—a peremptory norm that is deemed universally binding—in international

212. 28 U.S.C. § 1350.

213. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004).

214. *See id.* at 728 (noting that torture is clearly accepted as a violation against international law).

215. *See Seamon, supra* note 211, at 724–27 (detailing United States’ sovereign immunity protection from most tort liability).

216. 28 U.S.C. § 1346(b).

217. *See Seamon, supra* note 211, at 763–64 (explaining Court’s holding in *Sosa* that U.S. officials cannot be held liable under ATS for conduct within scope of employment).

218. For a discussion on the history of the State Secrets Privilege, see Jason A. Crook, *From the Civil War to the War on Terror: The Evolution and Application of the State Secrets Privilege*, 72 ALB. L. REV. 57 (2009).

219. Linda Greenhouse, *Supreme Court Refuses to Hear Torture Appeal*, N.Y. TIMES (Oct. 10, 2007), <https://www.nytimes.com/2007/10/10/washington/10scotus.html> [<https://perma.cc/DR6X-8MUV>].

220. 28 U.S.C. §§ 1346, 2674.

221. *See United States v. Reynolds*, 345 U.S. 1, 4–5 (1953) (detailing a case where disclosing information would violate national security).

law.²²² Oren Gross has found that:

Torture is absolutely prohibited under all the major international human rights and humanitarian law conventions. This unconditional ban also forms part of customary international law and, arguably, amounts to a preemptory norm of international law. No country around the world admits to the use of torture by its agents or openly challenges the absolute nature of the prohibition.²²³

International tribunals have explained the provisions of the Convention Against Torture, which separate illegal practices into two categories while conceding that not all mistreatment amounts to torture:²²⁴

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, 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.²²⁵

“[I]n addition to complying with a nation’s obligations under international law, upholding an uncompromising ban on torture sends a clear and strong message to other countries around the world about the impermissibility of such practices.”²²⁶ Gross found the absolute prohibition on interrogational torture compelling.²²⁷ Nevertheless, the enforcement of

222. Many U.S. court decisions have stated explicitly that the prohibition on torture is *jus cogens*. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 305–06 (S.D.N.Y. 2003) (affirming that genocide, war crimes, torture, and enslavement are universally acknowledged violations of international law, per *jus cogens* principles); *Doe I v. Unocal Corp.*, 395 F.3d 932, 945 (9th Cir. 2002) (recognizing torture, murder, and slavery as *jus cogens* violations); *Kadic v. Karadžić*, 70 F.3d 232, 243 (2d Cir. 1995) (noting international law prescribes torture and summary execution committed by state officials under color of law); *In re Estate of Ferdinand Marcos* 25 F.3d 1467, 1475 (9th Cir. 1994) (affirming that torture is *jus cogens* violation).

223. Gross, *supra* note 188, at 232–33.

224. John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, in *TORTURE: A COLLECTION* 145, 146–47 (Sanford Levinson ed., 2004) (noting that definition of torture does not encompass all mistreatments).

225. *Id.* at 147.

226. Gross, *supra* note 188, at 235 (citing John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 U. PITT. L. REV. 743, 763 (2002)).

227. Gross, *supra* note 188, at 233–34.

Taken from a purely Kantian perspective, the ban on torture is considered to be an unconditional duty under all circumstances. For this statement to hold true, we must conclude that the ban on torture trumps all competing values, including, for example, the right to life (e.g., we may not torture even when this is necessary to save the lives of innocent individuals). Moral absolutists must maintain their support for the absolute ban on torture even when the outcome of abstaining from use of torture in any given case is

international law obligations imposed upon States that enter into these agreements has more than a few limitations. If the legal system seeking enforcement is dependent upon the United Nations, then States' vetoes may prevent successful enforcement.²²⁸ If sanctions are sought to punish human-rights violations, then the sanctioning entity must have the financial resources, the political clout, power and the will to pursue the enforcement, although one study on the effectiveness of sanctions found that sanctions failed in most cases, with only five percent of imposed sanctions achieving their goals.²²⁹ If the international legal case involves extraterritorial crimes (i.e., war crimes by members of the Bush administration), the implementation of law such as “the Statute of the International Criminal Court in the Netherlands on 1 October 2003, the Netherlands can exercise universal jurisdiction for genocide, crimes against humanity, war crimes and torture,” but such cases are not without inherent limitations.²³⁰

In Paris, on December 10, 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights (UDHR), a “milestone document in the history of human rights,” now translated into over five hun-

truly catastrophic, indeed, even if the survival of the whole world is at stake. *Fiat justitia et pereat mundus* (let justice be done though the world perish) . . . [M]any who support absolute, categorical rights, and (where relevant) prohibitions, realize that their position is untenable, not only practically but also morally speaking, when applied to . . . catastrophic cases.

Id. Gross then concluded that although an absolute ban on torture may not be practical or moral, that an absolute *legal* ban on torture makes sense. *Id.*

228. Specifically, the five permanent members of the U.N. Security Council have this veto power. U.N. Charter art. 23. *See also* Michael J. Kelly, *United Nations Security Council Permanent Membership and the Veto Problem*, 52 CASE W. RES. J. INT'L L. 101, 101–02 (2020) (discussing whether reforms should be taken to prevent permanent Security Council members from wielding or threatening their veto power); *see also* Bardo Fassbender, *On the Boulevard of Broken Dreams: The Project of a Reform of the UN Security Council After the 2005 World Summit*, 2 INT'L ORGS. L. REV. 391, 398 (2005) (discussing intractability of reform efforts).

229. Hamed Hashemi Sougheh & Rohaida Nordin, *New Approaches of Understanding Human Rights: Paradox of Sanctions at the United Nations*, 4 ASIAN J. SOC. SCIS. & HUMANITIES 134, 134–35 (2015) (citing HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY*, 2 WASH. INST. INT'L AFFAIRS (2d ed. 1990)).

230. Larissa van den Herik, *The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia*, 9 INT'L CRIM. L. REV. 211, 213 (2009). Van den Herik discussed complications of adjudicating foreign cases in the context of one that involved a Dutch businessman convicted of violating an arms embargo during the civil war in Liberia, only to be acquitted of all charges when his case was heard by the Court of Appeal at The Hague. *Id.* at 211–12. In such matters, national judges are often unfamiliar with historical and cultural settings and lack expertise in the evidentiary regulations of the foreign State, while judicial proceedings may operate without any mutual legal-assistance treaties. *Id.* at 213, 215–16.

dred languages and considered the inspiration for more than seventy human-rights treaties around the world.²³¹ The UDHR was “written for nations and define[d] human entitlements to be promoted and protected by all nations.”²³² Prominent among the original Declaration articles is Article 5: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²³³ This fundamental statement of basic human rights followed widespread disclosures of the atrocities committed by the Nazis before and during the Holocaust in World War II.

1. The International Criminal Court, The Hague²³⁴

Hailed as “[o]ne of the most important legal developments since the Nuremberg trials,” in 1994, the U.N. General Assembly proposed a permanent judicial tribunal with global jurisdiction to try individuals for “gross breaches of international humanitarian law” with jurisdiction over individuals, unlike the International Court of Justice’s limited jurisdiction over states.²³⁵ On July 17, 1998, the U.N. Diplomatic Conference held in Rome established the International Criminal Court (ICC) following a vote of 120 in favor, seven against, and twenty-one abstentions.²³⁶ The United States, China, Israel, Libya, Iraq, Qatar, and Yemen voted against adoption, while Russia abstained. In 2000, Russia and the United States signed the Statute,²³⁷ although later withdrew from the Statute on May 6, 2002.²³⁸ The United States, during the Bush administration, outlined five reasons for U.S. opposition to ratifying the Rome Statute of the ICC, despite the fact that President Clinton signed the Statute “at the end of his term on December 31, 2000, hours before the period for signature expired.”²³⁹ Clinton signed the Statute, then Bush “unsigned” the Statute.

231. *Universal Declaration of Human Rights*, UNITED NATIONS, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> [<https://perma.cc/NM94-VDFU>] (last visited Mar. 15, 2022) [hereinafter UDHR].

232. Janel Gauthier, *Ethical Principles and Human Rights: Building a Better World Globally*, 22 COUNSELLING PSYCH. Q. 25, 30 (2009). The UDHR thus contrasts with published ethical principles that allow for appropriate differences in interpretation between professions and cultural or national contexts. *Id.*

233. UDHR, *supra* note 231.

234. Rome Statute of the International Criminal Court, July 12, 1998, 2187 U.N.T.S. 90.

235. BRIT. MED. ASS’N, *THE MEDICAL PROFESSION AND HUMAN RIGHTS HANDBOOK FOR A CHANGING AGENDA* 460 (2001).

236. UNITAR, *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* 26 (Roy S. Lee ed., 1999).

237. *But see* Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT’L L. 347, 347–49 (2000) (noting that when United States signs international human-rights treaties, they often have little domestic effect).

238. BEIGBEDER, *supra* note 107, at 333.

239. John Burroughs, *U.S. Opposition to the International Criminal Court*, 1 EYES ON THE ICC 147, 147 (2004). U.S. opposition included:

The de-emphasis of the role of the U.N. Security Council and the struggle over whether the use of nuclear weapons constitutes a crime subject to the ICC jurisdiction were major factors in U.S. opposition to global legal regimes and multilateral agreements that the United States also rejected, including: “the Rome Statute . . . , the Comprehensive Test Ban Treaty, the Kyoto Protocol, the Landmines Treaty, the verification protocol for the Biological Weapons Convention, and disarmament commitments under the Nuclear Nonproliferation Treaty.”²⁴⁰ The U.S. aversion to becoming a party to the ICC is part of a pattern of U.S. rejection to becoming a party to international agreements that restrict U.S. options and autonomy.

“The ICC is a court of last resort. It acts only when national governments cannot or will not investigate and prosecute war crimes. Its jurisdiction is intentionally narrow. It means countries with a strong rule of law need not fear international investigation.”²⁴¹ The United States’ resistance to the ICC is not a recent development,²⁴² and the prospect that the ICC will be met with cooperation from U.S. authorities is unlikely. Although the Obama and Biden administrations have engaged in some unofficial cooperation by providing intelligence to ICC investigations, the U.S. remains opposed to further involvement as it might interfere with internal U.S. military operations.

The ICC has decided to begin investigating the various acts of torture identified by agents of the U.S. government resulting from the “war on terror.” The ICC has found that lack of political will, enduring influence of perpetrators of crimes, lack of sympathy for victims, evidentiary problems, delays and time limitations, inadequate resources, lack of witness protection programs, and victims’ lack of knowledge about how to initiate proceedings all contribute to the ICC’s limited effectiveness to hold

[T]he Rome Statute bestow[ed] unchecked power on the Court, especially on a self-initiating prosecutor, usurping the role of the [U.N.] Security Council. . . . [T]he Court dilute[d] the authority of the Security Council, especially with regard to the crime of aggression yet to be defined. . . . [T]he Court threaten[ed] the sovereignty of the United States because it could try U.S. nationals though the United States [had] not agreed to be bound by the Roman Statute. . . . [T]he ICC undermine[d] the principled use of force. . . . [And] the ICC could complicate U.S. military cooperation with friends and allies who will have a treaty obligation to hand over U.S. nationals to the Court.

Id. at 147–49.

240. *Id.* at 150.

241. Akram, *supra* note 176. Following the ICC’s announcement of an investigation of the United States’ alleged war crimes in Afghanistan, President Trump issued an executive order criminalizing anyone who worked with the ICC. *Id.* Retired General Wesley Clark called Trump’s order a “tragic mistake” in foreign policy. *Id.* He said the United States had nothing to fear from the ICC, which “exists to deter and punish the kinds of atrocities committed by Germany and Japan during World War II.” *Id.*

242. See HUM. RTS. WATCH, UNITED STATES EFFORTS TO UNDERMINE THE INTERNATIONAL CRIMINAL COURT: ARTICLE 98 AGREEMENTS 1 (2002), https://www.hrw.org/legacy/campaigns/icc/icc_article98.pdf [<https://perma.cc/YRW7-GAUE>] (discussing U.S. efforts in early 2000s to exploit Article 98 agreements through Status of Force Agreements with state parties).

accountable violators of international criminal laws.²⁴³

2. The Convention Against Torture (CAT)

*Often ignored in the celebrations of the Convention Against Torture is the fact that while it is quite strong in substance, it is remarkably weak in enforcement. The central enforcement procedure in the treaty is a requirement that states submit reports to the Committee against Torture, an international body created by the treaty to oversee the Convention. But failure to abide by even this minimal commitment is frequently ignored. Stronger enforcement procedures are available but wholly optional: countries can agree to allow states and individuals to file complaints against them with the Committee against Torture, but they are not required to do so in order to join the treaty. Consequently, only about 30 percent of those who have joined the Convention have accepted these additional procedures. According to the skeptical view of international law, these weak enforcement provisions mean that states will never change their behavior to obey the Convention.*²⁴⁴

Adoption of international treaties against torture²⁴⁵ will not put an end to signatory nations' use of torture as a means of interrogating detained enemies or perceived enemies. However, the utilization of international law remains one avenue to help change the world for the better.²⁴⁶ Interestingly, in mid-2003, CIA officials discussed with officials at the Department of Justice, officials at the Department of Defense, and attorneys in the White House whether representations could be made that the United States had been in compliance with the Convention Against Torture, specifically whether the treatment of detainees met constitutional standards in the Fifth, Eighth, and Fourteenth Amendments.²⁴⁷ The CIA claimed that the August 1, 2002, opinion from the Office of Legal Counsel (the Bybee Memo) provided a legal "safe harbor" for the CIA's use

243. BRIT. MED. ASS'N, *supra* note 235, at 460–66 (listing obstacles to obtaining justice in ICC).

244. Hathaway, *supra* note 192, at 205.

245. *See* Convention Against Torture, *supra* note 10 (detailing state parties' legal obligations to prevent acts of torture in any territory under their jurisdiction).

246. Hathaway, *supra* note 192, at 210.

The Convention against Torture has not brought an end to states' horrific abuse of their own citizens. Far from it. Each day we learn of new violations, even by states that joined the Convention in its earliest days. Violations of both the letter and spirit of the law are rampant. Yet while the Convention is not a panacea, neither is the problem of torture beyond the reach of international law. Although the Convention has not achieved its lofty goals, it has contributed to the now almost universal view that torture is an unacceptable practice. By facing up to the Convention's successes and its failures, we can begin to learn how to harness the real but limited power of international law to change the world for the better.

Id.

247. SENATE REPORT ON TORTURE, *supra* note 3, at 116.

of enhanced interrogations, although it failed to address the constitutional issues.²⁴⁸ A Spanish court “has taken the first steps toward opening a criminal investigation into allegations that six former high-level Bush administration officials violated international law by providing the legal framework to justify torture of prisoners at Guantánamo Bay, Cuba,” under the Geneva Conventions and the 1984 Convention Against Torture.²⁴⁹ The United States would likely ignore any extradition requests for former officials.²⁵⁰

Possible legal remedies for the victims of torture by the CIA against detainees will have to be found in venues other than more traditional recourse such as an action under 42 U.S.C. § 1983, the Civil Rights Act.²⁵¹ Proposals have been made to treat torture by government agents as a special civil-rights violation for the purpose of providing victims with specific legal remedies, but this would require congressional approval, of course.²⁵²

VI. *BIVENS* CLAIMS

Until any legislative changes occur, the only promising legal basis for civil remedies against U.S. officials for constitutional tort claims would be based upon *Bivens v. Six Unknown Named Federal Narcotics Agents*,²⁵³ which recognized a federal tort claim for monetary damages

248. *Id.*

249. Marlise Simons, *Spanish Court Weighs Inquiry on Torture for 6 Bush-Era Officials*, N.Y. TIMES (Mar. 28, 2009), <https://www.nytimes.com/2009/03/29/world/europe/29spain.html> [<https://perma.cc/35GZ-GFK8>]. Spain may claim jurisdiction because five citizens or residents of Spain were prisoners at Guantánamo Bay where they were tortured. *Id.* The officials named in the ninety-eight-page complaint included former U.S. Attorney General Alberto R. Gonzales; John C. Yoo, the former Justice Department lawyer who wrote legal opinions claiming the president had authority to circumvent the Geneva Conventions; Douglas J. Feith, the former undersecretary of Defense for Policy; Jay S. Bybee, Mr. Yoo’s former boss at the Justice Department’s Office of Legal Counsel; William J. Hynes II, former general counsel for the Department of Defense; and David S. Addington, the chief of staff and legal adviser to Vice President Dick Cheney. *Id.*

250. *See id.*

251. Unlike U.S. citizens who bring legal actions against government officials when their legal rights have been violated by “persons acting under color of state law,” the torture detainees have not been the beneficiaries of legal actions under the civil side of 42 U.S.C. § 1983, which itself remained dormant and unused for nearly a century. Skolnick, *supra* note 5, at 117.

252. Seamon, *supra* note 211, at 715.

[I]nstead of being treated like a tort, torture should be treated like a civil rights and a human rights violation. Specifically, the United States should be liable for torture under at least the same circumstances as units of local government would be under the civil rights statute, 42 U.S.C. § 1983; and U.S. officials should be liable for torture under at least the same circumstances as state and local officials would be under § 1983, or as foreign officials would be under the Torture Victim Protection Act of 1991.

Id.

253. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). *Bivens* remedies are not without several hurdles, however. *See, e.g.*, Seamon, *supra* note 211, at 774–82 (noting that courts will not always recognize *Bivens* claims for all constitutional violations in all circumstances).

against federal agents charged with violating the plaintiff's Fourth Amendment rights.²⁵⁴ Subsequently, the Supreme Court expanded *Bivens* claims to include claims under the Fifth Amendment's Due Process Clause,²⁵⁵ as well as the Eighth Amendment's Cruel and Unusual Punishment Clause.²⁵⁶ *Bivens* claims may be limited if defendants are successful in demonstrating "special factors counselling hesitation in the absence of affirmative action by Congress," and "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective."²⁵⁷ So, courts may not recognize *Bivens* tort claims even if there is a constitutional violation.²⁵⁸ Finally, most officials sued under *Bivens* for unconstitutional torture²⁵⁹ may assert that they have qualified immunity²⁶⁰ under either sovereign immunity (when a government has been named as a defendant) or official immunity (when a government official has been named as a defendant).²⁶¹ If the action is filed against a government official, that individual may invoke absolute immunity or qualified immunity from lawsuits.²⁶² This may not be the case

254. *Bivens*, 403 U.S. at 391–97 (embracing a less restrictive view of Fourth Amendment's protection against unreasonable searches and seizures).

255. See *Davis v. Passman*, 442 U.S. 228, 234, 248–49 (1979) (holding that petitioner had a cause of action under Fifth Amendment and her case may be redressed by damages remedy).

256. See *Carlson v. Green*, 446 U.S. 14, 23–25 (1980) (finding that a person damaged by a federal officer's violation of Eighth Amendment has access to a *Bivens* remedy).

257. Seamon, *supra* note 211, at 774 (citing *Carlson*, 446 U.S. at 18–19).

258. *Id.* See also *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to persons outside of our geographic borders.").

259. But see Andrew Kent, *Lessons for Bivens and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers*, 96 NOTRE DAME L. REV. 1755, 1757 (2021).

Since [the decisions in *Carlson* and *Davis*], the Court has declined to extend its *Bivens* cause of action and remedy to any new contexts, new constitutional provisions, or new types of defendants. And more recently, the Court has treated *Bivens* with evident disfavor. The Court now says that judicial implication of a damages remedy is a nearly always unjustified intrusion into an area that Congress should control: assessing the costs and benefits of various remedial regimes for U.S. government misconduct. And the Court has voiced additional separation-of-powers concerns when the substantive area covered by a putative *Bivens* suit—for example, military discipline, foreign affairs, counterterrorism, or extraterritorial government action—is one in which Congress and/or the Executive have constitutional primacy. As a result of recent developments, the Supreme Court seems to allow *Bivens* suits only in legal and factual circumstances close to those approved in the three decisions from forty to fifty years ago.

Id.

260. See Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1410 (2019) (arguing that development of qualified-immunity doctrine must be viewed in context of Supreme Court's hostility towards expanding grounds for *Bivens* suits).

261. See Seamon, *supra* note 211, at 780 (discussing official immunity).

262. *Id.*; but see *Buckley v. Fitzsimmons*, 509 U.S. 259, 268–69 (1993) (discussing both absolute and qualified immunity).

in foreign courts, after the German Federal Court of Justice, der Bundesgerichtshof (BGH), ruled that war crimes committed abroad can be tried in the German courts and that foreign soldiers are not immune from war-crimes charges.²⁶³

It may be too soon to declare that the various international law treaties have failed entirely to provide accountability for those involved in torturing detainees,²⁶⁴ but the ongoing efforts to bring violators to justice now date back nearly twenty years with no significant results.

As an alternative to relying exclusively on these legal processes, holding individuals accountable by revoking professional licensure at the state level has been initiated, albeit without much success, but it remains one approach that deserves further exploration.

VII. PROFESSIONAL ETHICS CODES

There is no reason to assume that professional ethics codes function as a panacea for all acts of misconduct engaged in by licensed professionals, but they do embrace common goals and aspirations shared by the members of such organizations, and they may also create standards of accountability for licensed professionals. If codes are written in language that permits enforcement, then these codes serve the interests of the organizational members along with the individuals the professionals serve.

A. ABA Model Rules

Some codal enactments, such as the American Bar Association's Model Rules of Professional Conduct's Preamble, make clear that the legal ethics code was never intended to impose civil liability on violators of the codal provisions.²⁶⁵ Such language in the Preamble to the ABA

263. *Federal Court of Justice Rules on the Immunity of a State Authority in the Event of War Crimes*, PRESS OFF. OF FED. CT. OF JUST. (Jan. 28, 2021), <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021019.html?nn=10690868> [<https://perma.cc/JT2S-W9WP>] (detailing how foreign courts have ruled differently on war crime immunity).

264. It must also be conceded that torture is practiced routinely by a large number of states, notwithstanding their adoption of laws that expressly prohibit torture. *See, e.g., Afghanistan: Authorities Must Prohibit Torture in Any Circumstances*, U.N. HUM. RTS. (Sept. 2, 2021), <https://www.ohchr.org/en/press-releases/2021/09/afghanistan-authorities-must-prohibit-torture-any-circumstances-un-torture?LangID=E&NewsID=27424#:~:text=%E2%80%9CAs%20Afghanistan%20has%20entered%20into,times%20and%20under%20all%20circumstances> [<https://perma.cc/8Y8C-T2C3>] (calling on Afghanistan to prohibit torture and adhere to provisions of Convention Against Torture, which it previously ratified).

265. Paragraph 20 of the Preamble and Scope to the 2021 Edition of the ABA Model Rules of Professional Conduct states:

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In

Model Rules is something of a paradox.²⁶⁶

Lawyers within the Bush administration discussed the destruction of interrogation videotapes of detainees,²⁶⁷ an apparent attempt to hide the acts of misconduct that violated international and domestic law. The destruction of these materials would be considered a violation of the ABA Model Rule 3.4, “Fairness to Opposing Party and Counsel.”²⁶⁸ Bush administration lawyers drafted the memos seeking to offer justification to engage in acts of torture.²⁶⁹ One of the foundational rules of ethics governing the conduct of lawyers is ABA Model Rule 1.2(d), which states:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.²⁷⁰

addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.

MODEL RULES OF PRO. CONDUCT Pmb. & Scope, ¶ 20 (AM. BAR ASS’N 2021).

266. See Donald E. Campbell, *The Paragraph 20 Paradox: An Evaluation of the Enforcement of Ethical Rules As Substantive Law*, 8 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 252, 252 (2018) (discussing the seemingly contradictory guidance in Paragraph 20 of Scope section of Model Rules of Professional Conduct).

267. Mark Mazzetti & Scott Shane, *Bush Lawyers Discussed Fate of C.I.A. Tapes*, N.Y. TIMES (Dec. 17, 2007), http://www.nytimes.com/2007/12/19/washington/19intel.html?_r=1&page-wanted=1 [https://perma.cc/XKJ6-HK82] (detailing discussion of destroying interrogations within the Bush administration); see also Scott Shane & Mark Mazzetti, *Tapes by C.I.A. Lived and Died to Save Image*, N.Y. TIMES (Dec. 30, 2007), <http://query.nytimes.com/gst/full-page.html?res=9D06E6DC1639F933A05751C1A9619C8B63> [https://perma.cc/XNU2-73VA] (noting that Justice Department, CIA’s inspector general and Congress were investigating whether any official broke the law by destroying interrogation tapes).

268. Model Rule 3.4(a) states “A lawyer shall not: unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.” MODEL RULES OF PRO. CONDUCT r. 3.4(a) (AM. BAR ASS’N 1983, as amended 2020).

269. Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for the Use of Torture*, WASH. POST (June 8, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html> [https://perma.cc/9XSM-JTJU] (detailing how Bush administration worked towards justifying torture).

270. MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS’N 1983, as amended 2020). Interpreting Model Rule 1.2(d), ABA Formal Opinion 491 (April 29, 2020) found that:

Model Rule 1.2(d) prohibits a lawyer from advising or assisting in conduct the lawyer “knows” is criminal or fraudulent. That knowledge may be inferred from the circumstances, including a lawyer’s willful blindness to or conscious avoidance of facts. Accordingly, where facts known to the lawyer establish a high probability that a client seeks to use the lawyer’s services for criminal or fraudulent activity, the lawyer has a duty to inquire further to avoid advising or assisting such activity.

ABA Comm. on Ethics & Pro. Resp., Formal Op. 491 (2020).

In addition, according to ABA Model Rule 8.4, it is professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,”²⁷¹ or to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation,”²⁷² or to “engage in conduct that is prejudicial to the administration of justice.”²⁷³

Thus, the Bush administration lawyers were free to discuss with their clients the legal consequences of the ongoing policy of torturing detainees, but they could not ethically advise the clients to continue in acts which violated the law. In addition, the Bush administration lawyers were ethically prohibited from advising their clients to destroy tapes that had potential evidentiary value, knowing that legal proceedings had either been initiated or were in the process of being initiated and that these tapes might provide the best evidence of what had actually occurred during the contested interrogations. It would be difficult to argue that approving acts of torture as a national policy during the interrogation of detainees would not constitute a crime that reflects adversely on a lawyer’s fitness to practice law, however subjective or conclusory such an assertion might be.

It might be equally difficult to defend against the assertion that the torture memos did not misrepresent the law as it was at the time the memos were drafted. Calling such positions minority interpretations seems disingenuous at the least. Finally, by drafting legal memoranda for the president to utilize and to justify the shackling of prisoners, hanging of detainees by their wrists, depriving them of sleep, waterboarding some of them hundreds of times, and placing them in solitary confinement, would be a legal spin on practices not to be found in even the harshest prison system of any state in the United States. How would such a recommendation not be considered conduct that is prejudicial to the administration of justice?

These ethics rules, although promulgated by the ABA, must be adopted by each individual jurisdiction (each state and the District of Columbia), making them enforceable in the jurisdictions in which each lawyer involved holds licensure. The highest court of each jurisdiction, usually the state supreme court, has the authority to oversee compliance with the ethics codes. Each jurisdiction has its own process of creating committees or organizations to investigate complaints about ethics violations, providing the attorney against whom an ethics violation has been lodged an opportunity to respond to any complaint, and making a determination as to whether any of the ethics rules adopted in that jurisdiction may have been

271. MODEL RULES OF PRO. CONDUCT r. 8.4(b) (AM. BAR ASS’N 1983, AS AMENDED 2020).

272. *Id.*

273. *Id.*

violated. The attorney subject to this review has the right to challenge the committee's decision, and then the matter goes forward to a hearing. The attorney also has the right to negotiate with the committee, often in an effort to reduce the charge to a lesser offense, and then to discuss possible recommended sanctions. Many such ethics cases result in stipulations between the disciplinary counsel and the individual attorney charged as to the rules which have been violated along with recommended sanctions for the lawyer. This process requires the cooperation of the lawyers involved in reviewing and recommending charges, along with the lawyers charged with the ethics violation.²⁷⁴

Given the process by which state organizations seek to enforce legal ethics codes, it would be difficult to imagine how any consensus might occur once a lawyer has been charged with drafting a legal memorandum to advise the president of the United States to maintain a policy that includes torturing detainee combatants through the use of waterboarding and other severe acts that resulted in the loss of life of multiple interrogated prisoners. It would not be so difficult to contemplate a process of disciplining lawyers who engaged in advising clients to destroy physical evidence of the client's acts of misconduct, as such actions have been investigated over the years since adoption of the ABA Model Rules by individual jurisdictions.

B. *AMA Code of Medical Ethics*

In December of 1999, "the American Medical Association amended its 152-year-old Code of Medical Ethics to include this provision regarding torture:"

Physicians must oppose and must not participate in torture for any reason. Participation in torture includes, but is not limited to, providing or withholding any services, substances, or knowledge to facilitate the practice of torture. Physicians must not be present when torture is used or threatened. Physicians may treat prisoners or detainees if doing so is in their best interest, but physicians should not treat individuals to verify their health so that torture can begin or continue. Physicians who treat torture victims should not be persecuted. Physicians should help provide support for victims of torture and, whenever possible, strive to change situations in which torture is practiced or the potential for torture is great.²⁷⁵

Even if physicians who did not participate in the interrogations of de-

274. See generally CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 3.4 *Disciplinary Procedure* (West 1986).

275. SIEMS, *supra* note 1, at 233 (citing AMA CODE OF MED. ETHICS, *Opinion 2.067—Torture* (Dec. 1999), <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinions2067.shtml>).

tainees provided medical information to interrogators, this violated detainees' medical privacy rights—an ethical and a legal violation by the medical providers.²⁷⁶ Accounts include providing medical information and stressors tailored to the psychological and cultural vulnerabilities of detainees (such as phobias, personality features, and religious beliefs) about detainees directly to interrogators for purposes of better knowing the weaknesses or medical conditions of individuals subjected to interrogation.²⁷⁷ “Wholesale disregard for clinical confidentiality is a large leap across the threshold, since it makes every caregiver into an accessory to intelligence gathering.”²⁷⁸

C. APA Ethical Principles of Psychologists and Code of Conduct

In 2008, the General Assembly of the International Union of Psychological Science and the Board of Directors of the International Association of Applied Psychology in Berlin unanimously “developed a universal declaration of ethical principles to ensure psychology’s universal recognition and promotion of fundamental ethical principles” entitled *Universal Declaration of Ethical Principles for Psychologists*.²⁷⁹

Nevertheless, the enforcement of ethics codes, including the code that

276. See Bloche & Marks, *supra* note 180, at 6–7.

Health information has been routinely available to behavioral science consultants and others who are responsible for crafting and carrying out interrogation strategies. Through early 2003 . . . interrogators had access to medical records. And since late 2002, psychiatrists and psychologists have been part of a strategy that employs extreme stress, combined with behavior-shaping rewards, to extract actionable intelligence from resistant captives. . . . [A] statement embedded . . . in the personnel section of the [U.S. Southern Command] Web site not only requires caregivers to provide clinical information to military and Central Intelligence Agency interrogation teams on request; it calls on them to volunteer information that they believe might be of value. It thereby makes them part of Guantanamo’s surveillance network, dissolving the Pentagon’s purported separation between intelligence gathering and patient care.

Id. The authors contend that these practices run contrary to settled medical ethical precepts, medical privacy rules, and the Geneva Conventions laws of war, which defer to medical ethics, now embedded in customary international law, including the 1966 International Covenant on Civil and Political Rights. *Id.* at 7.

277. *Id.*

After the International Committee of the Red Cross charged last year that interrogators tapped clinical data to craft interrogation strategies, Defense Department officials issued a statement denying “the allegation that detainee medical files were used to harm detainees.” . . . [A]n inquiry led by . . . the inspector general of the U.S. Navy concluded: “While access to medical information was carefully controlled at [Guantánamo], . . . in Afghanistan and Iraq . . . interrogators sometimes had easy access to medical information.” The implication is that interrogators had no such access at Guantanamo and that medical confidentiality was shielded, albeit with some exceptions. . . . [These claims are] sharply at odds with orders given to military medical personnel—and with actual practice at Guantánamo.

Id. at 6.

278. *Id.* at 8.

279. Janel Gauthier, *Ethical Principles and Human Rights: Building a Better World Globally*, 22 COUNSELLING PSYCH. Q. 25, 26 (2009).

pertains to psychologists formulated by the American Psychological Association (APA), does not provide an enforcement mechanism that oversees the licensure of members of the organization:

A frequent misunderstanding about association ethics programs is that they are able to take actions on a member's license. Professional associations may be recognized by the state in various ways, but nonetheless they generally remain private entities. As a result, association ethics programs do not have the authority to remove an individual's ability to practice; only the relevant jurisdiction has this power. For a variety of reasons, certain association ethics programs offer ethics education and consultation and do not adjudicate ethics matters.²⁸⁰

Thus, the accountability of licensed psychologists who engaged in the consulting for or perpetration of torture of detainees would fall within the authority of state licensure boards rather than within a professional organization such as the APA. The APA has asserted that the involvement of psychologists in military interrogations "has challenged the APA on many fronts."²⁸¹

As it was going to print in 2010, the *APA Ethics Code, Commentary and Case Illustrations*²⁸² was under examination for further clarification, but indicated the contents of Standard 1.02, Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority, of the Ethical Principles of Psychologists and Code of Conduct (APA Ethics Code) was:

If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict. If the conflict is irresolvable via such means, psychologists may adhere to the requirements of the law, regulations, or other governing legal authority.²⁸³

280. Stephen H. Behnke & Stanley E. Jones, *Ethics and Ethics Codes for Psychologists*, in 1 APA HANDBOOK OF ETHICS IN PSYCHOLOGY: MORAL FOUNDATIONS AND COMMON THEMES 43, 48, (Samuel J. Knapp et al. eds., 2012).

281. *Id.* at 53.

Memos written during the George W. Bush administration gave legal permission to engage in behaviors that would meet virtually any psychologist's definition of torture. In response, the APA Council of Representatives passed a series of resolutions, and the APA membership adopted a resolution that established APA's position on the issue of appropriate techniques of interrogation and the nature of settings in which psychologists could do national security-related work. APA has a 20-year history of statements against torture, and the Council of Representatives stated repeatedly that engagement of torture and abuse was always and in every instance unethical. These statements, however, did not elaborate on what constitutes torture. . . . In June 2009, the Ethics Committee issued an explicit statement that there is no defense to torture under the Ethics Code.

Id.

282. LINDA CAMPBELL ET AL., *APA ETHICS CODE: COMMENTARY AND CASE ILLUSTRATIONS* (Am. Psych. Ass'n 2010) (detailing APA's stance on psychologists being involved in torture).

283. *Id.* at 18.

The commentary to the Standard was intriguing:

Standard 1.02 indicates that a psychologist may adhere to the law in resolving an “irresolvable” conflict between ethical responsibilities and “law, regulations, or other governing legal authority,” but it does not require the psychologist to adhere to the law. As a consequence, the Ethics Code relies on the professional judgment and decision making of psychologists to weigh the respective values and standards implicated in this dilemma.²⁸⁴

In 2010, the APA adopted the APA Ethics Code, including Standard 1.02, Conflicts between Ethics and Law, Regulations, or Other Governing Authority, and Standard 1.03.²⁸⁵ The earlier edition of APA Ethics Code Ethical Standard 1.02, adopted in 2002 and quoted above, instructed psychologists to:

[T]ry to resolve the matter by first bringing the Ethics Code to the notice of the authority. It indirectly indicates that the psychologist should educate pertinent individuals about the nature of the conflict. The second step is to problem solve to find a best interests solution . . . that meets the needs of both the organization and the law while adhering to the Ethics Code. Finally, if other measures failed, the psychologist could obey the law or other legitimate authority (e.g., military regulations) and remain within compliance of the Ethics Code.²⁸⁶

APA Standard 1.02 now reads:

If psychologists’ ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. Under no circumstances may this standard be used to justify or defend violating human rights.²⁸⁷

The current language of the ethics code for psychologists who are members of the APA would not permit the psychologist to choose to follow the “other legitimate authority,” i.e., the military regulations.²⁸⁸ Thus,

284. *Id.*

285. The language of the original 2002 Ethical Standard 1.03 was: “If the demands of an organization with which psychologists are affiliated or for whom they are working conflict with this Ethics Code, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and to the extent feasible, resolve the conflict in a way that permits adherence to the Ethics Code.” *Ethical Principles of Psychologists and Code of Conduct*, 57 AM. PSYCH. 1060, 1063 (2002).

286. Carrie H. Kennedy, *Institutional Ethical Conflicts with Illustrations from Police and Military Psychology*, in 1 APA HANDBOOK OF ETHICS IN PSYCHOLOGY: MORAL FOUNDATIONS AND COMMON THEMES 123, 125 (Samuel J. Knapp et al. eds., 2012).

287. *2010 Amendments to the 2002 “Ethical Principles of Psychologists and Code of Conduct*, 65 AM. PSYCH. 493, 493 (2010).

288. See Kennedy, *supra* note 286 at 125 (providing that psychologists cannot follow military authority under 2010 APA guidelines).

the Bush administration's legal memorandum suggesting that waterboarding while interrogating detainees was not a form of torture would violate the current APA Standard.²⁸⁹

VIII. ACCOUNTABILITY ALMOST EIGHTY YEARS AFTER THE NUREMBERG TRIALS?

Although one might think that professional ethics codes create a foundation upon which violators of such codes might be held legally accountable, or at the very least that they might be subject to disciplinary actions by their licensure organizations or individual states where they are licensed, that is often not the case. In the Preamble to the *ABA Model Rules of Professional Conduct*, for instance, specific language was included that declared the ethics provisions were not intended to create civil liability for those found to have violated the provisions of the ethics code.²⁹⁰ Many courts have disregarded the explicit language in the Preamble when asked to pass judgment in civil actions brought against lawyers for acts of misconduct or negligence. The likelihood that ethics violations will cause those licensed professionals involved in creating and utilizing torture during the interrogations of detainees—including the use of waterboarding—to be held accountable for their actions seems slim.

As for accountability, the Bush administration not only denied culpability for engaging in acts of torture with the imprimatur of their legal advisers, but they protected, and even promoted, almost all the “architects of its policy.” Alberto Gonzales was confirmed as attorney general in February 2005; Donald Rumsfeld, the defense secretary who implemented the torture directives, survived a cabinet reshuffle and remained for a second presidential term; William Haynes, the Pentagon legal counsel who approved Rumsfeld's expanded interrogation procedures, was nominated—but not appointed—for the federal bench; Jay Bybee, the author of the Justice Department's now notorious August 2002 memo, was confirmed as federal judge for the Ninth Circuit in March 2003 with lifetime tenure; after Paul Wolfowitz became head of the World Bank in March 2005, Stephen Camborne, the undersecretary of defense for intelligence who pushed the harsh interrogation policy was proposed to serve as Rumsfeld's deputy, but withdrawn without explanation; and Timothy Flanagan, who helped frame the torture policies as White House deputy counsel in 2002, was nominated for deputy attorney general, the second-

289. And yet, Carrie Kennedy concluded her article about the changing language of the APA Ethics Code, “The impact of a change in the language of Ethical Standard 1.02 is unknown, namely, the removal of the language that allows psychologists to follow the law if all attempts [at problem solving strategies] fail.” *Id.* at 126.

290. MODEL RULES OF PRO. CONDUCT Pmb1. & Scope, ¶ 20 (AM. BAR ASS'N 2021).

highest-ranking post in the Justice Department.²⁹¹ The National Lawyers Guild has called for the prosecution and dismissal from their jobs “such persons as then Deputy Assistant Attorney General John Choon Yoo, then Assistant Attorney General Jay Bybee, and others who caused to be drafted or participated in the drafting of the memoranda that authorized acts of torture and other cruel, inhuman, or degrading treatment.”²⁹² As of the date of this publication, no such actions have occurred. So much for accountability in the short term.²⁹³

Even the Obama administration failed to initiate any process to review and hold accountable members of the U.S. Justice Department who drafted legal memoranda. This failure gives a green light to other government agencies to engage in acts that U.S. courts had historically considered “torture” and resulted in prison sentences at hard labor for fifteen years for individuals found guilty of using waterboarding for interrogating U.S. victims during World War II. So, what progress had been made since the Nuremberg trials held in Germany following the end of World War II, when numerous war commissions and tribunals were created to punish Nazi war criminals for crimes against individuals and against humanity?²⁹⁴ One commentator has reflected on the Nuremberg trials and compared it to the use of torture employed at Abu Ghraib, Iraq, and Guantánamo Bay, Cuba:

Torture is a particularly horrible crime, and any participation of physicians in torture has always been difficult to comprehend. As General Telford Taylor explained to the American judges at the trial of the Nazi doctors in Nuremberg, Germany (called the “Doctors’ Trial”), “To kill, to maim, and to torture is criminal under all modern systems of law . . . yet these [physician] defendants, all of whom were fully able to comprehend the nature of their acts . . . are responsible for wholesale murder and unspeakably cruel tortures.” Taylor told the judges that it was the obligation of the United States “to all peoples of the world to show why

291. MCCOY, *supra* note 13, at 160–61.

292. Mirer, *supra* note 189, at 241.

293. Despite the Bush administration’s announcement that the United States would lead the rest of the world by setting an example for all to follow. In June 2003, facing criticism over the conduct of U.S. forces in Afghanistan and Iraq, President Bush went further and called on “all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture.” Peter Slevin, *U.S. Pledges Not to Torture Terror Suspects*, WASH. POST, June 27, 2003, at A1 (quoting President Bush). The United States, he claimed, was “leading this fight by example.” *Id.*

294. See George J. Annas & Michael A. Grodin, *Introduction*, in *THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION* 3, 3 (George J. Annas & Michael A. Grodin eds. 1992) (“After [World War II], the United States and its allies were involved in a succession of criminal trials. Perhaps the most famous Nuremberg trial involved the military officers of the Third Reich. Other trials involved soldiers, industrialists, and politicians. The Doctors’ Trial, although less well known, is perhaps the most disturbing chapter of Nazi ideology.”).

and how these things happened,” with the goal of trying to prevent repetition in the future. The Nazi doctors defended themselves primarily by arguing that they were engaged in necessary wartime medical research and were following the orders of their superiors. These defenses were rejected because they were at odds with the Nuremberg Principles, articulated a year earlier, at the conclusion of the multinational war crimes trial in 1946, that there are crimes against humanity (such as torture), that individuals can be held to be criminally responsible for committing them, and that obeying orders is no defense.²⁹⁵

The British Medical Association has addressed the participation of physicians in torture by advising that human-rights guidelines and protocols by national and international medical organizations should be made widely available through media such as the internet so that disciplinary bodies “have effective mechanisms for addressing promptly any evidence of abuse by their members” and so as to require professional associations to be required “to pass information . . . to agencies that have appropriate investigative procedures.”²⁹⁶ In order for licensed professionals to be held accountable for acts of misconduct involving torture, members of the professions must both report the acts and support the members who disclose such abuses.²⁹⁷

Although professional organizations do not serve the same public service as law-enforcement agencies or court systems, they do often control the professional licensure of members. Disciplinary hearings and expulsion from such organizations (or, in instances where the organization controls professional licensure, suspension or revocation of a professional license) is one method for holding accountable those professionals who follow the requests of national governments, agencies, or the military seeking to engage in acts of torture of detainees for whatever purpose.²⁹⁸

295. Annas, *supra* note 23, at 2127.

296. BRIT. MED. ASS'N, *supra* note 235, at 522–23.

297. *Id.* at 522.

The BMA re-affirms its support for the Declaration of Tokyo and its condemnation of the practice of torture or other cruel, inhuman or degrading treatment. Doctors should neither participate in, nor advise or train others how to carry out torture. Professional associations must play a key role in supporting individual doctors who speak out against such abuses. . . . Evidence continues to confirm that torture and maltreatment are most likely to occur in places of detention. Medical disciplinary bodies should take a lead in good standard setting for members of the medical profession who work in places of detention.

Id.

298. See Stephen T. DeMers & Jack B. Schaffer, *The Regulation of Professional Psychology*, in 1 APA HANDBOOK OF ETHICS IN PSYCHOLOGY: MORAL FOUNDATIONS AND COMMON THEMES, 453, 468 (Samuel J. Knapp et al. eds., 2012) (“All licensing boards in the United States and Canada have a legislative mandate to protect the public, including the authority and responsibility to investigate and take disciplinary action against licensees who violate the standards of professional conduct adopted by the licensing board.”). It has been suggested within the profession that licensed

In many instances, government organizations rely upon various professionals—physicians, lawyers, psychologists—to engage with detainees, and creating responses that hold these professionals accountable is one step that does not require approval from the governments that seek to illegally employ torture, or from the agencies that seek to use the service of professionals to torture detainees. If a professional's years of study, discipline, and training is suspended or revoked by their professional association, their function as a licensed professional comes to an end, regardless of whether they are held accountable in their nation's courts, or in any international judicial settings.

Psychiatrist Robert Jay Lifton has suggested that the reports of U.S. physicians' involvement in torture from Iraq, Afghanistan, and Guantánamo echo those of the Nazi doctors who were "the most extreme example of doctors' becoming socialized to atrocity."²⁹⁹ Doctors have been used to assess detainees' fitness, or they "may actually be present in the torture room to monitor the process. In the past, allegations about doctors supervising torture sessions have been commonly linked with the military dictatorships that were widespread in Latin America in the 1970s and 1980s, under which most opposition leaders were imprisoned."³⁰⁰ In addition, Elie Wiesel has posed the question: why the "shameful torture to which Muslim prisoners were subjected by American soldiers" has not "been condemned by legal professionals and military doctors alike"?³⁰¹

And so it goes, more than seventy years after the Nuremberg trials:³⁰² the lawyers who gave written justifications for torturing detainees, the psychologists who collected \$81 million in fees paid by American taxpayers to develop "enhanced interrogation," and the physicians who oversaw the medical examinations of detainees³⁰³ suspended in the air by hanging from their wrists, or kept in freezing conditions while naked, or

psychologists should not work at all for governmental agencies that might require adherence to superiors over professional ethical codes, as is the case in the military:

In 1947, Tyson wrote "It is submitted that the place for military psychologists is outside the Armed Forces, acting freely in an advisory capacity." Older (1947), an active duty psychologist responded at that time by saying, "Advice from the outside on psychological problems is largely unproductive unless the Armed Forces have someone in the active organization who will actually implement these suggestions."

Kennedy, *supra* note 286, at 130–31 (citing R. Tyson, *Footnote to Military Psychology*, THE AMERICAN PSYCHOLOGIST 21–22 (1947)). In any case, boards can initiate disciplinary sanctions psychologists who act in contravention to professional ethics standards at the military's behest. DeMers & Schaffer, *supra* note 298, at 473.

299. Lifton, *supra* note 177, at 415–16.

300. BRIT. MED. ASS'N, *supra* note 235, at 72. In some countries, these doctors have faced professional consequences. *See id.* (describing case of Brazilian gynecologist Jose Lino Coutinho, accused of overseeing eleven prisoners' torture in 1969, resulting in his license's withdrawal).

301. Elie Wiesel, *Without Conscience*, 352 N. ENG. J. MED. 1511, 1513 (2005).

302. *See generally* Annas & Grodin, *supra* note 294, at 3–4.

303. *See generally* Ole Vedel Rasmussen, *Medical Aspects of Torture*, 6 MED. & WAR 299 (1990) (detailing study of historical medical involvement in torture across countries).

subjected to waterboarding, and yet, where is the accountability? Not one lawyer has lost a law license,³⁰⁴ not one physician has lost their medical license, and not one psychologist has been disciplined by their professional organizations or licensure boards or brought to trial for crimes and involvement in exposing detainees to torture. One commentator has asserted that:

Preventing torture is everyone's business—but three professions seem to be especially well suited to prevent torture: medicine, law, and the military.³⁰⁵ Each profession has particular obligations. Physicians have the obligations of the universally recognized and respected role of healers. Lawyers have the obligations to respect and uphold the law, including international humanitarian law. And military officers have the obligation to follow the international laws of war, including the Geneva Conventions.³⁰⁶

A task force of physicians analyzing the involvement and ethical lapses of healthcare providers in the interrogations and torture of detainees concluded:

No health professionals who were employed by or contracted with military and intelligence agencies have been held accountable for any acts of torture and other forms of mistreatment of post-9/11 detainees, either by those agencies or by civilian disciplinary boards. The costs of non-enforcement are great: non-enforcement undermines professional standards, erodes public trust, and undercuts deterrence of future misconduct. Lack of consistent enforcement also compromises protection of health professionals who face institutional pressure to violate their ethical obligations. By contrast, attention to accountability signals to licensees and those who employ them that the profession and institutions designed to ensure adherence to ethical obligations take violations seriously.³⁰⁷

304. MCCOY, *supra* note 13, at 161 (noting lawyers who drafted torture memos suffered no consequences). Losing a law license would be significant, but these lawyers remain completely unrepentant of their conduct and involvement in eradicating the application of the Geneva Conventions' protections for detainees.

To cite the most prominent example, John Yoo, a former Justice department lawyer who helped draft the interrogation memos, is back at the law school of the University of California, Berkeley, where he waved away critics of the White House torture policy. "Why is it so hard for people to understand that there is a category of behavior not covered by the legal system?" Professor Yoo asked. "Historically, there were people so bad that they were not given protection of the laws." In his view, the Geneva Conventions' "simple binary classification of civilian or soldier isn't accurate." Arguing that Bush's reelection had ended the discussion, he concluded: "The debate is over. The issue is dying out. The public has had its referendum."

Id.

305. This author would add psychologists to this list of professions, given the documented involvement of Mitchell and Jessen in "enhanced interrogation" of detainees.

306. Annas, *supra* note 23, at 2131.

307. INST. ON MED. AS PRO., *supra* note 4, at 135.

The involvement of the torture lawyers who drafted legal rationalizations for the implementation of torture contributed as much as the psychologists who consulted on interrogation techniques,³⁰⁸ or the physicians who examined torture victims, or the CIA agents or military officers who oversaw and perpetrated the torture. None of the professionals involved in these actions can properly assert that their individual behaviors were somehow justified because they just followed orders from superiors. The Nuremberg trials put an end to that rationalization and defense strategy.³⁰⁹ But changing the language of professional ethics codes seems to offer little hope of systemic change, unless, of course, we take these ethics codes seriously, enforce them when violated, and deny access to professional licensure for those who flagrantly violate international law,³¹⁰ the War Crimes Act, and the precedent set by U.S. courts in holding accountable individuals who engaged in water boarding American prisoners in World War II and other combat exchanges. From a pragmatist's perspective, we are unable to separate wheat from chaff when information has been obtained from torture victims.³¹¹ The U.S. Senate Intelligence Committee Report concluded that:

[B]ased on a review of CIA interrogation records . . . the use of the CIA's enhanced interrogation techniques was not an effective means of obtaining accurate information or gaining detainee cooperation. . . . While being subjected to the CIA's enhanced interrogation techniques and afterwards, multiple CIA detainees fabricated information, resulting in faulty intelligence. Detainees provided fabricated information on critical intelligence issues, including the terrorist threats which the CIA identified as its highest priorities.³¹²

308. Soldz, *supra* note 38, at 177–78.

The roles of psychologists in the U.S. torture program appear to be central and multifold. One of these roles flowed directly from the “torture” memos issued by the OLC [the Justice Department’s Office of Legal Counsel] in 2002 and 2005. . . . That is, psychologists or other mental health professionals are essential for deciding how much abuse an individual can endure before suffering prolonged mental harm, which would officially constitute illegal torture. A simple statement by a psychologist that a prisoner would not suffer prolonged harm, that an interrogation was *safe* for the prisoner, would likely be sufficient defense against any claim that the interrogator “intended” mental harm, thus keeping the interrogation “safe and ethical” for the interrogator. In short, psychologists helped to define what constitutes “torture” in general terms of detainee breaking points.

Id.

309. See Annas & Grodin, *supra* note 294, at 3 (“The physicians and professors prosecuted at Nuremberg represent a frightening example of medicine gone wrong. . . . How could physician healers have turned into murderers?”).

310. See AHCENE BOULESBAA, THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT 41 (1999) (explaining that ambiguous language is often cited as a reason for parties avoiding enforcement).

311. See O’Mara, *supra* note 131, at 498 (explaining difficulty in determining whether information obtained from torture victims is accurate).

312. SENATE REPORT ON TORTURE, *supra* note 3, at xi.

Currently, no state licensure boards have taken any actions to hold accountable the various professionals who engaged in acts of torture, interrogation, or any violations of state ethics codes or licensure requirements. Not one individual has been held accountable through the revocation of their professional credentials.³¹³

CONCLUSION

[T]orture is inherently wrong. It is an evil that can never be justified or excused. It violates the physical and mental integrity of the person subjected to it, negates her autonomy and humanity, and deprives her of human dignity. It reduces her to a mere object, a body, from which information is to be extracted, while coercing her to act in a manner that may be contrary to her most fundamental beliefs, values, and interests. Torture is also wrong because of its depraving and corrupting effects on individual torturers as well as on society at large. Hence, under no circumstances should such actions be morally acceptable or legally allowed.³¹⁴

The weaknesses and apparent unenforceability of international law and domestic law have been thoroughly exposed by the U.S. response to the September 11, 2001, attacks on the World Trade Center and the Pentagon. If international and domestic courts remain unable to address the legal and human-rights violations that followed 9/11, and if licensed professionals knowingly engaged in creating national policies that embraced the use of torture for interrogations of detainees by U.S. agents, then other responses should be explored and considered. This article has suggested that revoking the licensure of those professionals involved in the U.S.

313. INST. ON MED. AS PRO., *supra* note 4, at 135–36 (explaining failure of professional licensure organizations to hold people accountable).

To date, state licensing and disciplinary boards in Alabama, California, Georgia, Louisiana, New York, Ohio, and Texas have received and then dismissed complaints against health professionals for alleged abuse of detainees at Guantánamo and secret CIA detention centers. To our knowledge, none of these complaints of complicity in abuse has led to a formal hearing on the merits, let alone any formal sanction, suggesting that the system of civilian discipline has not adequately addressed acts conducted during military or intelligence agency activities. The near-uniform dismissal of claims without substantive investigation into the merits suggests further that disciplinary boards are effectively exempting licensees who work for national security agencies from the standards these boards are meant to enforce. Additionally, the dismissal of complaints may signal to military and intelligence health professionals that the tolerated and safer course of action is to participate or silently acquiesce in abuse.

In almost all cases the boards either did not explain the reason for dismissal or did so in such cryptic terms, such as claiming lack of jurisdiction without specific explanation, that the basis for the decision remains opaque. All but one failed to address the evidence submitted by the complainant. Nor did any board provide grounds to believe that the individual's conduct conformed to professional standards.

Id.

314. Gross, *supra* note 188, at 229.

response to 9/11 is one such option that would at the very least hold some form of accountability for the educated men and women who should have known better than to embrace torture as a mechanism of national policy.

From a legal perspective, such actions are against the law,³¹⁵ and assisting clients in pursuing such acts exposes lawyers to both crimes and professional ethical violations that include becoming complicit and aiding and abetting criminals. From a psychological perspective, consulting clients about effective torture strategies constitutes criminal misconduct and violates the most fundamental aspects of psychological training.³¹⁶ And from a physician's perspective, assisting in torture³¹⁷ may be criminal conduct, is violative of the Hippocratic oath and the physicians' ethics code, and is precisely what Robert Jay Lifton cautioned us against after spending ten years writing *The Nazi Doctors*.³¹⁸ We have shown ourselves to be no better than our predecessors, and certainly have no reason to condescend upon those Nazi doctors and the roles they played in separating, torturing, and murdering Holocaust victims.³¹⁹

Unless and until our justice system and our professional licensure boards take seriously the involvement of professionals in acts of torture, such behaviors seem likely to continue unchecked and with no accountability on the parts of professionals who clearly know better. Although the individuals responsible for creating a U.S. policy that endorsed torture by interrogators of detainees remain essentially free from criminal responsibility, free from professional licensure suspension or even ethical code violation hearings, the impact of their behavior continues to live on.

For generations to come, America's torture of detainees at Abu Ghraib and Guantánamo has caused "incalculable damage to America's international prestige. . . . [I]mages of depravity will inflame anti-American sentiment in the Muslim world for a generation, driving who knows how many would-be jihadists into the ranks of Al Qaeda and other terrorist organizations."³²⁰ One of the central elements of American foreign policy

315. See MCCOY, *supra* note 13, at 163–65 (explaining legal prohibition of torture).

316. See O'Mara, *supra* note 131, at 499 (explaining culpability behind these consultations).

[C]oercive interrogations involving extreme stress are unlikely to facilitate the release of veridical information from long-term memory, given our current cognitive neurobiological knowledge. On the contrary, these techniques cause severe, repeated and prolonged stress, which compromises brain tissue supporting memory and executive function. The fact that the detrimental effects of these techniques on the brain are not visible to the naked eye makes them no less real.

Id.

317. See Steven H. Miles, *Medical Ethics and the Interrogation of Guantánamo 063*, 7 AM. J. BIOETHICS 1, 5–6 (2007) (explaining perspective of physicians on torture).

318. See generally LIFTON, *supra* note 27 (supporting assertion that physicians should not engage in this conduct).

319. See generally ERNST WINKLER, *FOUR YEARS OF NAZI TORTURE* (1st ed. 1943) (describing Nazi regime).

320. MCCOY, *supra* note 13, at 200.

for decades has been focused on promoting human rights. By authorizing as U.S. policy and then practicing cruel, inhuman, and degrading treatment of detainees, this country has engaged in the very same practices that we have routinely condemned.³²¹

The enforcement limitations of international treaties and courts have become all too clear following the U.S. endorsement of torture of detainees as an approved national policy after 9/11, so we either ignore our violations of international and domestic law, or we seek other methods of holding accountable the officials and licensed professionals who assisted and engaged in torture under the rationale of obtaining information to protect other innocent lives. At the very least, professional licensure organizations must hold licensees accountable for acts of misconduct that violate the ethical beliefs and foundations of groups of physicians, psychologists, and lawyers. As government documents become unclassified, more verifiable information about the roles licensed professionals played in the torture of detainees is accessible. Such information, combined with the replacement of government officials who were involved in the policies of torture³²² with officials who have condemned the U.S. role in torture, might open doors previously shut to state organizations that have an interest in holding accountable those responsible for torture. As we wait to see whether international or domestic legal systems ever gear up to initiate prosecutions of the powerful members of government along with the educated professionals who brought about the use of torture while interrogating detainees, the existing remedy of rescinding professional licensure is but one form of accountability that would demonstrate the disapproval of professional organizations and state boards responsible for ensuring that professional standards of behavior are enforced.

Revocation of professional licensure for those involved in utilizing torture may not be the most equitable response for torture victims, but it is a response that would prevent such professionals from continuing to hold licensure and from legitimately earning a living as licensed professionals.³²³ Perhaps it would serve as a warning to others who might otherwise

321. See SIEMS, *supra* note 1, at 318 (explaining how these actions are hypocritical to positions taken before).

322. During an oral argument before the U.S. Supreme Court in October 2021, a journalist wrote “It is undisputed that Abu Zubaydah was tortured at one or more black sites, and the justices frequently used the word ‘torture’ to describe what he had endured.” Liptak, *supra* note 50.

323. See BRIT. MED. ASS’N, *supra* note 235, at 81–82.

In recent years, however, a growing number of national medical associations have initiated a proactive response to torture. Among the first to do so was the Chilean medical College which published in 1990 a very damaging report cataloguing its past failures to live up to ethical standards, during the dictatorships period of 1973–89. It related how a “chain of complicity” developed around the practice of torture. In the College’s view,

wander down that odious path.³²⁴

this complicity seriously impeded public discussion of what had really occurred for many years.

Id.

324. See SENATE REPORT ON TORTURE, *supra* note 3, at vi (warning against continuing these practices after past experience). The Chairman of the Senate Select Committee on Intelligence, Senator Dianne Feinstein, concluded in her Foreword to the Senate Select Committee on Intelligence's report on torture:

[T]he CIA itself determined from its own experience with coercive interrogations, that such techniques "do not produce intelligence," "will probably result in false answers," and had historically proven to be ineffective. Yet these conclusions were ignored. We cannot allow history to be forgotten and grievous past mistakes to be repeated.

Id.