

Counter-Resistance Techniques in the War on Terror:
A Legal Analysis of Detainee Interrogation and Treatment at Guantanamo

Javid Afzali

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“In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.... If the Government becomes a law- breaker, it breeds contempt for law.... To declare that ... the end justifies the means ... would bring terrible retribution.”¹

Introduction

This research paper will analyze the Bush Administration’s post 9-11 legal interpretation of constitutional, statutory, and customary international law as it pertains to the prohibition on torture. Although the primary focus will be on how the Executive Department justified the use of certain aggressive interrogation techniques on detainees held in Guantanamo Bay, Cuba², the proper foundation of the discussion will first be established by discussing how torture is defined and proscribed both at the international and national level. This will be accomplished by examining the Geneva Conventions III,³ Convention Against Torture,⁴ International Covenant on Civil and Political Rights (ICCPR),⁵ as well as U.S. constitutional, statutory, military, and case law available to the Administration between 2001-2004.⁶ After examining the various laws pertaining to torture, the second part of this paper will focus on the interrogation techniques, often times called “counter-resistance techniques,” authorized by the Administration to be used on detainees in GTMO. This will be accomplished by analyzing specific interrogation techniques as documented throughout various Department of Defense, Department of Justice, and White House reports and memoranda. After laying this groundwork, part

¹ *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

² Hereafter GTMO

³ 6 U.S.T 3114 (1949)

⁴ 1465 U.N.T.S. 85 (1984)

⁵ 999 U.N.T.S. 171 (1976)

⁶ The window of examination has been limited to the period right after 11 September 2001 until the beginning of 2004 for several reasons. The focus of this paper is to present the administration’s position on the use of torture before there was any influence or interference by the courts or Congress. What will be presented in this paper is an example of the abuse of power that can occur when a unitary executive goes unchecked by the other branches of government.

three of this paper will turn to the primary focus of the research, which is analyzing and understanding the Administration's position as to why the aggressive techniques authorized and used on the detainees in GTMO are both within the law and the within the Executive's powers to implement. Part four will be a critical analysis focused on one of the Executive's arguments as to why torture is permitted and will show that the Administration's policies rest on a less than solid foundation. The fifth part of this examination will document some of the more recent changes to the Executive's policy on torture as new laws and recent court opinions have started to limit some of the Administration's power. Finally, this discussion will conclude by showing that the power that the unitary executive has, especially during times of national crisis, is prone to abuse, and if left unchecked by the Judicial and Legislative branches, can ultimately result in egregious civil and human rights violations.

I. Prohibitions against Torture

Part one of this examination will focus on the various international and domestic laws that define and prohibit torture. International laws in this section will include the 1949 Geneva Conventions (GCIII), the 1984 Convention against Torture (CAT), and the International Covenant on Civil and Political Rights (ICCPR). Domestic laws focused on in this section include the War Crimes Act⁷, the Torture Act⁸, the Alien Tort Act⁹, the Uniform Code of Military Justice (UCMJ)¹⁰, and the Army Field Manual.¹¹

⁷ 18 U.S.C. §2441

⁸ 18 U.S.C. §2340

⁹ 28 U.S.C. §1350

¹⁰ 10 U.S.C. §47

¹¹ FM 2-22.3

1.1 International Law: Geneva Conventions

The Geneva Conventions were ratified in August of 1949 and established the international standards for the treatment of victims of war and those individuals captured in war. More specifically, they concern the treatment of non-combatants and prisoners of war.¹² This international treaty is comprised of four separate parts, or conventions.

Convention I pertains to the treatment of the wounded and sick in armed forces on the battlefield; Convention II pertains to the treatment of the wounded, sick, and shipwrecked, in armed forces at sea; Convention III focuses on the treatment of POW's; and Convention IV pertains to the treatment of citizens.¹³

For the purposes of examining the treatment of those detainees held at GTMO, in particular those actions which may be considered torture, this paper will focus on the Third Convention relative to the treatment of prisoners of war. The purpose of the Conventions on the whole is to prevent nation-states who are in conflict with one another from committing atrocities to each other's captives. It achieves this goal by requiring states to adopt and codify certain provisions of the treaty into domestic law and enforce it through criminal sanctions.

In particular, Article 129 states "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article." In response to this obligation, the US Congress enacted Title 18 of the U.S.C. §2441 which will be examined in a subsequent discussion.¹⁴ Article 129

¹² 6 U.S.T 3114 (1949)

¹³ To give an idea of the complexity of the Geneva Conventions, Just Convention III is comprised of 143 different articles and 4 additional annexes attached to the convention.

¹⁴ See section 1.5 of this paper

requires the enactment of domestic law for “grave breaches” to the convention and the next Article defines that terminology.

Article 130 of the Third Convention states that “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.” Article 130 provides signatories of the convention with a general category of actions that ought to be prohibited. However it leaves the onus on the particular nation-state to define what those acts entail.

Like Article 130, Article 17 states in part that, “No 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.” Again, although Article 17 prohibits “torture” it does not define what torture may be, and is left to the signatory to define.

Two other articles that are important to consider are Articles Two and Three, also known as Common Article Two and Three because it is included in all four of the Conventions.

Article Two states:

“In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by

the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”

To summarize, Article Two holds that the conventions apply in any armed conflict, recognized, declared or otherwise, when the conflict involves two or more states that have ratified the convention. So for example if England and France, who have both agreed to the Conventions engage in any type of armed military conflict, then the full rules of the Conventions apply. This article also holds that the Convention applies to all signatories in a given conflict even though not all parties in that conflict are signatories of the Convention, or if the non-contracting parties act within the Conventions’ restraints. As a hypothetical, if in 2002, the UK, France, US, all who are signatories of the convention engaged in an armed conflict with the Republic of Montenegro, Article Two binds France, US and UK to the Conventions even though the Republic of Montenegro was not party to the convention at the time.¹⁵

It is clear that Article Two deals with conflict between nation-states, particularly those that have the signed the treaty, however, the question remains as to how to deal with conflicts that occur within a state that do not involve cross-border attacks or when only one party to the conflict is a signatory to the Convention. Article Three addresses this very dilemma. It states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed [down their arms] hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse

¹⁵ See “Signatories to the Geneva Conventions” maintained by the International Committee of the Red Cross, <<http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>>

distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

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

(b) taking of hostages;

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

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

Article Three describes a set of minimal protections, not the full protections of the convention, but at a basement level, which must be adhered to during an armed conflict not of an international character involving captives who have surrendered, or who can no longer fight. Although Article Three does provide some detail as to what class of individuals are protected, and what those protections are, there are a few terms that are left open for interpretation. These include the meaning of “armed conflict not of an international character,” whether there is a class of individuals not protected by this article, and again, how torture is defined.

1.2 International Law: Convention against Torture

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted by the United Nations’ General Assembly Resolution 39/46 of 10 December 1984, and entered into force 26 June 1987. The CAT is

a UN treaty that defines what torture is, establishes a body to monitor reports of torture,¹⁶ and like the Geneva Conventions, requires those states that have signed it to prevent torture anywhere within that state's jurisdiction by passing the appropriate legislation.¹⁷

However, unlike the Conventions, the CAT more precisely defines exactly what is prohibited. CAT defines torture as:

“Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for 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.”

For a successful conviction under CAT, the defendant must be brought to a competent international tribunal, and found guilty of the following elements: 1) that he or she intentionally inflicted severe pain or suffering 2) in order to obtain information, a confession, or to punish, 3) and that pain or suffering needs to be inflicted by, or at the request of someone acting under authority. This law is reinforced by a non-derogation clause and an obligation to enforce its provisions through domestic law in Article Two of the Convention. In response to this obligation, the US Congress passed Title 18 of the United States Code §2340.

1.3 International Law: International Covenant on Civil and Political Rights

The ICCPR is a United Nations Treaty that was adopted in 1976 and monitored by the Office of the UN High Commission for Human Rights.¹⁸ In part, the ICCPR states

¹⁶ The Committee against Torture, UN High Commission for Human Rights, UN

¹⁷ 1465 U.N.T.S. 85 (1984)

in Article Seven that, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment, or punishment.” It is important to note that although the US ratified this treaty in 1992, it did so with the reservation that it defines “cruel, inhuman or degrading treatment, or punishment” within the context of the Fifth, Eighth and Fourteenth Amendments of the United States’ Constitution.¹⁹ This reservation is further qualified with the position that the United States will not apply the treaty to its military operations during times of armed conflict, nor does it apply outside the United States, including any of U.S.’s special maritime and territorial jurisdictions.²⁰ The United States’ reservation to the treaty effectively removes any new causes of action that the original treaty may have created.

1.4 Domestic Criminal Law: 18 U.S.C. §2340 “Torture Act”

Like the CAT treaty previously discussed, §2340 provides a statutory definition for torture, however it defines it differently. §2340 states:

- “(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 or

¹⁸ 999 U.N.T.S. 171 (1976)

¹⁹ S. Exec. Rep. No. 102-23 (1992)

²⁰ Working Group Report, “Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations,” *Department of Defense*, (4 April 2003)

application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and
(3) “United States” means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

In order to successfully convict a defendant under this federal law, a prosecutor must show that the defendant: 1) was acting under the color of law; 2) specifically intended to inflict severe physical or mental pain; 3) that the act did in fact cause severe physical and mental pain; 4) that the victim was within the control or custody of the defendant; and 5) the act was committed outside the United States.

Although there are similarities between §2340 and the language used in CAT, there are distinct differences as well. First, §2340 does not apply if the alleged act of torture was committed “inside” the United States as defined by §2340(3).²¹ Besides the provision requiring the act to take place outside of the United States as defined by statutory law, §2340 also differs from CAT in that the domestic law has a specific intent requirement which must be proven. §2340 requires that the defendant must act with a specific intent to inflict the requisite “severe physical or mental pain or suffering.” Specific intent is defined as “the intent to accomplish the precise criminal act that one is later charged with.”²² In other words, the infliction of severe pain or suffering must be the defendant’s precise objective.

In addition to the above mentioned elements, one other provision is important to consider. Both the CAT and §2340 use the language “severe physical pain or suffering” without providing any guidance as to how it is defined. The inclusion of the word

²¹ §2340A further qualifies §2340 by stating, “Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.”

²² *United States v. Carter*, 530 U.S. 255, 269 (2000).

“severe” suggests that the infliction of what may be normally considered pain or suffering is insufficient for the purposes of both the statute and the treaty. In absence of any specific definition, the courts are left with broad discretion as to how to interpret the meaning of the statute.

1.5 Domestic Criminal Law: 18 USC §2441- “War Crimes”

18 U.S.C. §2441 is the domestic counter part of the Geneva Conventions. Like the conventions §2441 outlines protections for prisoners of war. §2441 makes direct reference to the Geneva Conventions and codifies many of its provisions into United States statutory law. §2441(d) defines “war crimes” as any “grave breach” of the Geneva Conventions. Grave breaches include acts such as torture,²³ cruel or inhumane treatment,²⁴ performing biological experiments, murder, maiming, intentionally causing serious bodily harm, rape, and sexual assault. If a breach of these provisions results in the death of the victim, the §2441 permits the use of capital punishment.

1.6 Domestic Civil Law: 28 USC §1350 “Alien Tort Claim”

Title 28 §1350 is a civil statute that extends jurisdiction of the federal courts to “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States,” and creates a cause of action that allows an alien to use U.S. Federal courts to bring a civil suit against a foreign government for personal harm, if

²³ Defined as, “The act of a person who commits, or conspires or attempts to commit, an act 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 for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.”

²⁴ Defined as “The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.”

that government violated international laws pertaining to torture. The language in this statute limits its reach in that it cannot be used to bring suit against U.S. nationals, or those working for the United States government.

1.7 Domestic Military Law: 10 USC 47 “Uniform Code of Military Justice”

Title Ten of the United States Code, otherwise known as the Uniform Code of Military Justice (UCMJ), is a set of laws that pertain to the conduct of U.S. forces on active duty. The UCMJ can be used to sanction military personnel regardless of where the proscribed act occurred, so long as the offender was part of the U.S. Armed Forces, or contracted to provide services for the military, at the time of the offense. Unlike previously discussed statutes, the UCMJ can apply to U.S. service personnel, both within the territorial jurisdiction of the United States and outside. The following provisions can be applied to service men and women with regards to detainment, interrogation, and torture:

- § 892. Art. 92. Failure to obey order or regulation
- § 893. Art. 93. Cruelty and maltreatment
- § 897. Art. 97. Unlawful detention
- § 898. Art. 98. Noncompliance with procedural rules
- § 918. Art. 118. Murder
- § 919. Art. 119. Manslaughter
- § 920. Art. 120. Rape and carnal knowledge
- § 924. Art. 124. Maiming
- § 925. Art. 125. Sodomy
- § 928. Art. 128. Assault

Even though there are no UCMJ provisions for torture per se, service personnel who are suspected of torturing detainees could potentially be charged with a combination of the abovementioned violations which, if convicted, can be sanctioned as severely as the §2340 law. Although the UCMJ is useful in so far as it can be used to prosecute

certain egregious behavior beyond the normal bounds of U.S domestic law, it is important to note that it does have limitations. For instance, the UCMJ does not apply to agents of the Central Intelligence Agency, nor would it apply to agents of other nation-states.

1.8 Other Rules and Regulations: Army Field Manual FM 2-22.3

The Army Field Manual FM 2-22.3, entitled “Human Intelligence Collector Operations,” is a manual that provides guidance with respect to the procedures and techniques controlling the use of interrogations and other human intelligence gathering practices. Unlike the aforementioned treaties and statutes, FM 2-22.3 is not law in so far as it proscribes a particular act and provides sanctions for its violation. Instead, the field manual details what the standard protocol is for interrogations. Although one cannot be prosecuted under any of the rules, regulations, or guidelines of FM 2-22.3, the manual does provide useful insight as to what general institutional practices regarding detainee treatment, interrogations, and torture are.

FM 2-22.3 protocol establishes that all individuals captured on the battlefield are assumed to have prisoner of war status as outlined in the Geneva Conventions until it is determined otherwise by a competent authority. The manual also states that acts of violence, intimidation, physical or mental torture, or inhumane treatment are expressly prohibited and is punishable under the UCMJ. FM2-22.3 defines physical and mental torture as “the infliction of intense pain to body or mind to extract a confession or information, or for sadistic pleasure.” The manual outlines examples of physical and mental torture which include: electric shock, infliction of pain through chemicals or

bondage, prolonged stress positions, food deprivation, any form of beating, mock executions, abnormal sleep deprivation, or chemically induced psychosis.

II. Counter-Resistance Strategies

Part two of this paper will focus on the types of interrogation techniques that have been authorized by the Executive for use on detainees held at GTMO. In order to minimize questions as to the veracity of the techniques in question, this paper will only examine recently declassified reports and memoranda that were passed between the various Executive departments which documented a multitude of different interrogation techniques authorized for use.²⁵

2.1 Memo: Authorization for Counter Resistance Techniques (27 Nov 2002)

In a 27 November 2002 action memo from the General Council of the Department of Defense William Haynes to the Secretary of Defense Donald Rumsfeld, Haynes requested approval for several new interrogation techniques to be used on GTMO detainees. The memo states that current guidelines for interrogation procedures at GTMO limit the ability of interrogators to counter detainee resistance because they have no clear line as to what may or may not constitute torture. Interrogators are being forced to error on the side of caution and are not using techniques that may be considered controversial because of possible legal ramifications. The memo also states in part that, “to ensure the security of the United States and its Allies, more aggressive interrogation techniques than

²⁵ The reason for using such a narrow scope is that the focus of this paper is to go beyond the question of whether or not the government is using a particular interrogation technique but rather focus on how the administration justifies the use of certain techniques even though on its face the particular practices seem to violate the various treaties and laws discussed.

the ones presently used...may be required in order to obtain information from detainees that are resisting interrogation efforts.”²⁶

2.2 Counter Resistance Techniques

The 27 November 2002 memo organized interrogation techniques into three categories. Techniques considered to be least aggressive were considered category I techniques, category II techniques were considered to be in the mid-range, and the most aggressive ones are classified as category III techniques.

Category I techniques include:

1. Yelling at the detainee to induce stress, fear, or other emotions
2. Techniques of deception which include interrogator identifying him or herself as a citizen of a country with a known reputation for harsh treatment
3. Multiple interrogators asking questions at the same time

Category II techniques include:

1. Use of stress positions
2. The use of false records during interrogation
3. Isolation for up to thirty days
4. Deprivation of sound and light
5. Detainee being hooded or blindfolded
6. Twenty-hour interrogations
7. Removal of all clothing
8. Forced Grooming
9. Using phobias to induce stress and fear

Category III techniques include:

²⁶ Memoranda from William Haynes, General Counsel, *Department of Defense* to Donald Rumsfeld, Secretary of Defense, *Department of Defense*, Re: Counter Resistance Techniques (27 November 2002), 5.

1. Use of scenarios designed to convince detainee that death or other severe punishment is imminent for him or his family
2. Exposure to cold weather or water
3. Use of a wet towel and water to induce the perception of drowning or suffocation
4. Use of non-injurious physical contact

Although the interrogation techniques listed in the three categories provide some description as to what the particular technique may entail, it is critical to note that in another recently declassified report dated 4 April 2003 that assessed these interrogation techniques, the report made it clear that, “the title of a particular technique is not always fully descriptive of a particular technique.”²⁷ This, of course, can mean that the techniques in question may be more sinister than the title implies.

It is also important to consider that these interrogation techniques are not used in isolation of one another. The 4 April 2003 report also stated that, “while techniques are classified individually within this analysis, it must be understood that in practice, techniques are usually used in combination...” One can only imagine a scenario in which a detainee is locked naked in a cell for up to 30 days deprived of light, sound and human contact and then forced into an uncomfortable interrogation room for up to twenty hours at a time where he is made to believe his family will be killed and then he will be drowned.

2.3 Summary

To summarize the first two parts of this paper, international and domestic law that prohibits the use of torture include the 1949 Geneva Conventions, the Convention against

²⁷ Working Group Report, “Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations,” *Department of Defense*, (4 April 2003), 62.

Torture, and the domestic counterparts to the two treaties, Title 18 of the U.S. Code §2441 and §2340 respectively. CAT and §2430 define torture in part as:

- i. the intentional infliction or threatened infliction of severe physical pain or suffering;
- ii. (C) the threat of imminent death; or
- iii. (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures

The above definition should be considered in light of the 27 November 2002 memo that authorized the use interrogation techniques that include:

- i. scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and or his family;
- ii. Exposure to cold weather or water;
- iii. Use of a towel and dripping water to induce simulated drowning and suffocation

When the laws prohibiting torture are juxtaposed to the types of interrogations authorized, it is clear that there is a conflict between the Executive's actions and the relevant laws. If the United States is in fact a nation of laws and adheres to the rule of law, then the question remains as to how the Administration reconciles what seems to be a clear violation of the law.

III. Justification for the Use of Torture

The tension created by the juxtaposition of the Executive's treatment of detainees held at GTMO with international and domestic law has been a topic of intense public discourse. To begin answering some of the questions of how the Administration address this discord, part three of this paper will examine several memorandum of law passed

between the Department of Defense, Department of Justice, and the White House that shed light on how the Administration interpreted the very same laws examined in part one in a way as to make inapplicable to GTMO. In particular, part three will analyze how the Administration sidestepped the requirements of the Geneva Conventions and §2441, as well as the CAT and §2340.

3.1 §2441 and the Geneva Conventions

In a 22 January 2002 memo from the Department of Justice to then White House counsel Alberto Gonzales regarding the application of treaties and laws to al Qaeda and Taliban detainees, Jay Bybee and John Yoo explain to the White House why the protection outlined in the Geneva Conventions and its domestic counterpart §2441 do not apply to Taliban or al Qaeda captives.²⁸ Bybee and Yoo posit that in order for a captive to enjoy the protections of §2441, he or she must fall under a protected class as defined in either Common Article Two or Three. In other words, the applicability of the federal domestic law 18 U.S.C. §2441 hinges on the whether or not the detainee falls under a protected class as defined by the international treaty.

The 2001 “War against Terrorism” that started in Afghanistan, was in fact directed at two distinct organizations—al Qaeda and the Taliban.²⁹ During the 2001 conflict, the U.S. military captured, or was handed captives from both organizations and the Executive had to create a legal interpretation of the abovementioned treaties and laws that dealt with each organization individually.

²⁸ Memoranda from John Yoo, Deputy Assistant Attorney General, *Department of Justice* and Jay Bybee, Assistant Attorney General, *Department of Justice*, to William J. Haynes, General Council, *Department of Defense* and Alberto Gonzales, Counsel to the President, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (22 January 2002).

²⁹ Al Qaeda is a known international terrorist organization with active and inactive cells stationed across the globe. The Taliban is an armed political/religious movement that established itself in Afghanistan after years of civil war which was preceded by a war with the former U.S.S.R.

As discussed previously, the Conventions include Common Article Two and Common Article Three which define the two classes of individuals that are protected by the treaty. Common Article Two provides the full protection of the Conventions to anyone that falls within its scope, and Common Article Three provides a basement level of protections for individuals defined under the Article.

With regards to al Qaeda, the 22 January 2002 memo states that Article Two of the Geneva Conventions clearly does not apply because its scope is limited to conflicts between “High Contracting Parties,” meaning nation-states that are signatories to the Conventions. Al Qaeda is a non-state actor and therefore is not, and can never be, a High Contracting Party. The memo also puts forward that the Geneva Conventions do not cover al Qaeda under Article Three because it applies only to conflicts “not of an international character.” Bybee and Yoo make the case that because Al Qaeda is in fact an international terrorist organization, the conflict clearly cannot fall into Article Three’s scope. In summary, in order to be a protected POW under the Geneva Conventions, the captive must fall under either Article Two or Article Three. Because al Qaeda is an organization not covered by either article, the Conventions cannot apply to them. Therefore, because the Conventions do not apply, neither does 18 U.S.C. §2441

Turning our attention to Taliban captives, because they are affiliated with the country of Afghanistan, a signatory of the Convention, and therefore a High Contracting Party, we can see Bybee and Yoo approach the analysis from a different angle. With regards to the Taliban, the memo states that under Article Two of the U.S. Constitution, the President has the unilateral power to suspend whole treaties, or its parts, at his discretion. In particular, the memo puts forward two specific grounds as to why the President can

suspend the treaty. First, Afghanistan is a failed state, one not meeting its international obligations. Furthermore, the failed state is over run by a violent militia and cannot be seen as a legitimate sovereign in the eyes of the international community. Giving the Taliban Article Two protections would imply that they are a “High Contracting Party” and therefore the legitimate government of the people of Afghanistan. The memo states that these grounds are more than ample for the President to find that the obligations under the Geneva Conventions toward Afghanistan were suspended during the conflict.

The second basis as to why the Conventions could be suspended by the President pursuant to his Article 2 powers is that the Taliban leadership is so intertwined with Al Qaeda that it is no longer distinguishable from the terrorist organization. The memo references evidence secured on the battlefield that suggests that certain Taliban commanders were also part of the al Qaeda leadership. In light of this evidence, the memo maintains that the Taliban should be regarded as an international terrorist organization rather than a sovereign state, in which case the Conventions and §2441 do not apply because of reasons outlined in the analysis of the Convention’s applicability to al Qaeda.

In analyzing the applicability of §2441 and the Geneva Conventions, the Department of Justice memo maintains the position that the domestic law, §2441, applies only if the international treaty does. The authors then assert that that a captive must fall under a protected class as defined by either Common Article Two or Three. They then provide a very narrow definition of the different classes of individuals protected under the Conventions, and place the detainees held in GTOM outside this definition. Finally, the

authors argue that if a captive does not fall in either one of the narrowly defined Articles, then the whole treaty is moot and as a consequence so is the domestic law.

3.2 § 2340 and the Convention against Torture

In an August 2002 memo to White House Council Alberto Gonzalez, the Department of Justice's Deputy Assistant Attorney General, John Yoo, suggested an approach similar to the one he used to interpret the Geneva Conventions in order to neutralize the torture laws. However, in this memo Yoo pins applicability of the international treaty to §2340 and maintains that if §2340 does not apply, neither does the CAT.

As already demonstrated, the language defining torture in §2340 is more open for interpretation than is the definition in the CAT treaty. Because of the difference in language, certain acts that may constitute torture as defined in the CAT may in fact be permissible under §2340. Therefore, for the purposes of having a law that provides the Executive with as much leeway as possible to employ aggressive interrogation techniques, §2340 would be far more conducive for the Administration's purposes.

Under international law, a reservation or understanding made during treaty ratification effectively modifies that treaty's obligation and limits it to whatever that reservation or understanding may be. In order to minimize the scope of the CAT, Yoo puts forward that the CAT does "not hold the United States to an obligation different that that expressed in §2340," because when the treaty was signed by President George H.W. Bush, he submitted an understanding that effectively modified the treaty to mean what it

does under §2340.³⁰ Yoo maintains that because of that Presidential understanding, so long as the conduct in question does not violate §2340, it will not violate the CAT. Although Yoo's interpretation of the CAT and the understandings and reservation submitted during its signing is based on sound legal arguments, his position, if accepted, then begs the question as to how the Administration interprets the scope of §2340.

As stated in the previous discussion on 18 U.S.C. §2340, the statute is comprised of five different elements, all of which need to be proved, beyond a reasonable doubt, in a federal court, in order for the defendant to be convicted. The two elements Yoo bases his argument on are the specific intent requirement, and the provision requiring the proscribed conduct to occur outside the United States.

Unlike the general intent requirement necessary in most criminal law, specific intent as defined by the Supreme Court³¹ means an express intention to achieve the specific proscribed act. The proscribed act in §2340 which must be specifically intended is "to inflict severe physical or mental pain or suffering..." Therefore, in order to prove this element, the prosecutor must show that the interrogator's specific intent was to cause severe pain. In the case of most interrogations, it can be argued that the specific intent is not to cause pain, but rather acquire information, and that any pain caused during the course of the interrogation is only a byproduct of that specific intent. This of course makes sense and would be hard to disprove. To summarize, Yoo's position is that even if a detainee could get to a federal court, trying to prove all of the elements of this statute, particularly the specific intent element would be very difficult. However, Yoo's argument does not rest here.

³⁰ See S. Exec. Rep. No.101-30 at 36 (1990) at
<<http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=128&chapter=4&lang=en#22>>

³¹ *U.S. v. Carter*, 530 US 255 (2000)

John Yoo's interpretation of the provision that requires the proscribed act in §2340 to take place "outside the United States" places another more difficult hurdle to overcome. For this argument, Yoo relies on the text of the statute that defines "inside of the United States" to include not only the fifty states, but all of the United State's Special Maritime and Territorial Jurisdictions (SMTJ) as defined by 18 U.S.C. §7.³² In addition to the §7 requirements, the 2001 USA PATRIOT Act amends the SMTJ to include "...the premises of United States diplomatic, consular, military, or other United States missions or entities in foreign States..." and "...residences in foreign States...used by United States personnel..."³³ The plain meaning of §2340(A), when used in conjunction with the SMTJ and PATRIOT Act clearly includes U.S. personnel stationed at GTMO to mean "inside the United States," thereby precluding the application of the statute to those individuals.³⁴

IV. Analysis

At the conclusion of part two of this paper, it was clearly shown that the actions the Executive authorized were in clear violation of the rule against torture. However, the Administration's interpretations of the laws, if left unchallenged, show that there is in fact no law that applies to the situation at GTMO. If this position is accepted, then one must also accept that the treatment of the detainees at GTMO, although morally or ethically questionable, is not technically illegal. What, if anything, is wrong with the

³² Working Group Report, "Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations," *Department of Defense*, (4 April 2003), 7.

³³ USA PATRIOT Act, Public Law 107-177 115 Stat, 272 (2001).

³⁴ This is a particularly fascinating argument to be because in all of the Habeas cases, including Hamdan, and Boumediene, the administration has consistently argued that the detainees cannot have habeas corpus rights because they are not within the territorial jurisdiction of the courts pursuant to *Johnson v. Eisentrager* 339 US 763 (1950). How can GTMO be considered *inside* US jurisdiction for the purposes of avoiding §2340 sanctions but at the same time be *outside* of US jurisdiction for the purposes of denying habeas corpus rights? Here is one of those logically inconsistencies that is hard to overcome

Administration's interpretation of the rule against torture? And is there a different way to interpret the law to show that the Executive's actions are not only wrong, but also illegal? These two questions will be the focus of part four of this paper.

4.1 Legal Heuristics

Jeremy Waldron's³⁵ 2005 law review article on the subject provides useful insight into the matter.³⁶ To begin the analysis, Waldron explains two different ways in which a particular legal prohibition may be regarded. The first approach, *malum prohibitum*, is the view that absent the legal prohibition or law, the default position is complete liberty in the area in question. In other words, the act is only wrong because a law has been passed prohibiting the act.³⁷ When torture is viewed in this light, it becomes an act that is wrong if and only if there is a specific law that says it is wrong, in which case it is only wrong within the precise language of the law.

The other perspective in which a legal prohibition can be considered is the *malum in se* approach in which an act is wrong even if it is not prohibited by law. However, often times these wrongs are codified into law in order to make enforcement easier. A law can be considered *malum in se* when there is some kind of normative foundation or background upon which the law rests. This can be based on contemporaneous social mores and folkways, or other sources of law such as international law or natural law.³⁸

³⁵ Professor of Law at New York University School of Law

³⁶ Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House." *Columbia Law Review* 105, no. 6 (October 2005).

³⁷ Waldron's example is that of a parking lot where parking is limited to only a few hours a day because of a city ordinance that limits how long a car can be parked. If there was no ordinance, then drivers would be free to park as long as they want and there would be nothing inherently wrong with doing so. In light of the ordinance, the only thing making parking more than the allotted time wrong is the ordinance itself.

³⁸ Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House." *Columbia Law Review* 105, no. 6 (October 2005) 108.

When torture is viewed as *malum in se*, it is treated as a wrong in of itself and any law proscribing it is an attempt to codify the wrong and should be interpreted with a broad scope.

4.2 Application of Malum in Se

The *malum in se* perspective was used by the Supreme Court in the *Hamdan v. Rumsfeld* case which concluded that detainees at GTMO must be treated under the Geneva Conventions contrary to the conclusions of the August 2002 memo. In his opinion, Justice Stevens construes the words “not of an international character” to be a contradistinction of “conflict between High Contracting Parties” as expressed in Article Two of the Conventions. Whereas the second article deals with conflicts between nations who are signatories of the convention, Article Three deals with conflict between a signatory nation and some entity not recognized as a sovereign on the territory of a signatory nation, not necessarily its own. In order words, if captives do not fall under the full protections of Article Two, then they *must* be given the minimal protections of Article Three. To strengthen this interpretation, Justice Stevens looks to commentaries accompanying Article Three that give evidence to the fact that specific language that would have limited the article’s interpretation to favor the government’s position was specifically omitted in the final drafting of the Convention. These omissions show legislative intent on the part of the drafters to craft a law broad enough to include situations like the war with al Qaeda. In addition to these omissions, Justice Stevens notes that “the commentaries make it clear ‘that the scope of the Article must be as wide as possible.’”

Justice Stevens is not alone in his interpretation of the scope of Common Article Three. Several foreign policy specialists, including James Woolsey³⁹ and Ruth Wedgwood,⁴⁰ have written extensively on the matter. Wedgwood and Woolsey hold that the protections outlined in Common Article Three are “a rock-bottom standard” designed for all forms of armed conflict not included in Common Article Two. They maintain that Article Three “is a catch-all provision, designed for unlawful combatants who do not qualify as prisoners of war...” and is a standard applicable “at any time and in any place whatsoever,” prohibiting “outrages upon personal dignity, in particular, humiliating and degrading treatment,” as well as “mutilation, cruel treatment and torture.”⁴¹

Using this interpretation, the court reasons that Hamdan is indeed protected under the Geneva Conventions. The Treaty guarantees Hamdan both a standard of protection from abuse as a captive, as well as a right to a “regular constituted court affording all of the judicial guarantees which are recognized as indispensable by civilized peoples” as defined by Article Four of the Conventions to exclude all special tribunals.

V. Post-2004 Policy Changes

Post 2004, there have been numerous laws passed by Congress and decisions handed down by the courts that have effected the Administration’s position on aggressive interrogation techniques and the use of torture. Some of these catalysts for change include

³⁹ Central Intelligence Agency Director 1993-95

⁴⁰ Ms. Wedgwood is the Edward B. Burling Professor of International Law and Diplomacy at Johns Hopkins School of Advanced International Studies, a senior fellow at the Council on Foreign Relations, and an adviser to the Department of Defense on the issue of military tribunals in response to the September 11 crisis.

⁴¹ Ruth Wedgwood, and James R. Woolsey, “Law and Torture.” *The Wall Street Journal*. 24 June 2004, available at < http://www.spirit.tau.ac.il/government/Wedgwood_article2.pdf>.

internal Executive policy changes, the Detainee Treatment Act of 2005, the Supreme Court case of *Hamdan v. Rumsfeld*, and the Military Commissions Act of 2006. Although some of these changes have been resisted by the Executive through use of tactics such as threatened veto of a bill or signing statements that effectively amend or veto the particular law,⁴² it is important to note their effect on the Administration's policy on the use of torture overall.

5.1 Retraction of the August 2002 Memoranda

The August 2002 Department of Justice memorandum which puts forward the narrow interpretation of the Torture Convention and 18 U.S.C. §2340 became the focal point of controversy during Senate Judiciary Committee confirmation hearings considering Alberto Gonzales for Attorney General in January of 2005.⁴³ During the hearings, one of Gonzales' defenses to questions about the memorandum was that the memo was withdrawn and replaced by a new memorandum dated 30 December 2004, one week before the confirmation hearings.⁴⁴ This seventeen-page memorandum posited a new interpretation of the Torture Convention and its U.S. implementing legislation.

The 30 December memo⁴⁵ retracts some of the most controversial provisions of the August 2002 memorandum. The memo states in broad terms that torture is "abhorrent to American law and values and to international norms," and proceeds to clarify the position by discussing policy changes relating to torture. One of the first policy changes

⁴² Leonard Cutler, *Developments in the National Security Policy of the United States since 9/11*. New York: Edwin Mellen Press, 2008, p. 26-30.

⁴³ Hearing Before the Senate Judiciary Committee, "Confirmation Hearing of Alberto Gonzales." 6 January 2005.

⁴⁴ *Ibid.*

⁴⁵ Memorandum from Acting Assistant Attorney General Daniel Levin to Deputy Attorney General James B. Comfey (Dec. 30, 2004) ("Re: Legal Standards Applicable Under 18 U.S.C. §2340-2340A")

in the memo is the Administration's interpretation of the "severe pain" requirement of CAT and §2340. The August 2002 memorandum stated that "severe pain" was defined as the "excruciating and agonizing pain" that was "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." the 30 December 2004 memo disagrees with this interpretation and states that the threshold of pain does not necessarily need to reach the level of "excruciating and agonizing" to constitute torture. In addition to redefining "severe pain," the memo also discusses the specific intent element of the torture statute. Although it does not get into specifics, the memo does acknowledge that "parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture" may in fact be inappropriate.

5.2 Detainee Treatment Act (DTA) of 2005

The Detainee Treatment Act of 2005⁴⁶ was one of the first laws passed after the September 11th attacks that specifically dealt with the issue of torture and inhumane treatment of detainees. §1001(a) states, "no person in custody or under effective control of the Department of Defense ...shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual..." The intent of the DTA is to prohibit any interrogation techniques not explicitly authorized in FM 2-22.3, however specific language within other sections of the law makes the law ineffective.

Application of the law is limited in that it applies only to Department of Defense (DoD) personnel or those being held in a DoD facility. This leaves open the possibility of

⁴⁶ Public Law 109-148, Div A. Title X, 119 Stat. 2742 (2005). [Hereafter DTA]

torture being committed by U.S. agents not working for the Defense Department such as Central Intelligence Agency interrogators. In addition to being narrow in scope as to who the law applies to, the DTA has a limited definition of torture and inhumane treatment. §1003 (d) describes the proscribed act to mean treatment as defined by the narrow interpretation in the United States Reservations, Declarations and Understandings to the Convention Against Torture as previously discussed.⁴⁷

Beside these overt loopholes, the DTA has several other provisions that adversely affect detainees. §1005 allows evidence that has been gathered through the use of torture to be considered so long as it has probative value. In effect, the provision of the Act encourages the use of torture by making the fruit of the aggressive interrogation, intelligence information, permissible for use as evidence in special tribunals. §1005 also effectively removes all access to the courts including habeas corpus rights that a detainee might have by stating, “no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained...at Guantanamo Bay...” This particular provision undermines the entire intent of the Act in that detainees that may be being tortured as defined by the Act itself have no legal recourse against their torturers. The DTA was subsequently reviewed by the Supreme Court case of *Hamdan v. Rumsfeld*.

5.3 The Hamdan Case

The petitioner in *Hamdan v. Rumsfeld*⁴⁸ was Salim A. Hamdan, a Yemeni national who was the alleged chauffeur of Osama bin Laden. Hamdan was captured in

⁴⁷ See section 3.2 of this paper

⁴⁸ *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006)

Afghanistan in November of 2001 and subsequently imprisoned by the U.S. military in Guantanamo Bay, Cuba. After being detained for over a year, it was determined by President Bush that Hamdan was eligible to be tried by a special military commission. After being detained for another year, Hamdan was formally charged with one count of conspiracy. Hamdan filed a petition for a writ of habeas corpus in federal district court to challenge his detention. The D.C. District court granted the writ, but on appeal the D.C. Circuit court reversed the decision. The appellate decision was challenged by Hamdan and the Supreme Court, recognizing balance of power issues within the branches of government, granted certiorari on November 7, 2005.

The Court specifically deals with two issues: 1. whether the military commission convened to try Hamdan has the authority to do so; 2. whether Hamdan may rely on the Geneva Conventions. In 5-3 decision, the Court rules that the Hamdan can in fact rely on the protections of the Geneva Convention, and that the commission created to try Hamdan is in violation of not only the Convention, but other Constitutional, statutory and military laws as well. The judgment of the lower court is reversed, and the case is remanded for further proceedings consistent with the opinion.

In addressing the question of whether or not the Geneva Convention is applicable in this case, the government posits a three-fold argument as to why it should not be considered. The government puts forward that the Convention is not enforceable in federal court. The government also claims that regardless of whether or not it is a justiciable issue, Hamdan is not entitled to any of its protections because he does not fall into any of the protected classes of the Convention. Further, the government asserts that

even if Hamdan falls under a protected class, stare decisis will allow the court to grant abstention. The Court discredits all three of these arguments.

The government's rationale in the second argument is closely related to the Yoo memorandum of 2002 in which the interpretation of Common Article Two and Three of the Conventions excludes the war with al Qaeda and the Taliban. Focusing specifically on Article Three, the heart of the argument lies in the interpretation of the words "conflict not of an international character occurring in the territory of one of the High Contracting Parties..." The government asserts that Article Three does not apply to Hamdan because the conflict in which Hamdan was captured in was clearly on an international level, and thereby cannot qualify as a conflict "not of an international character." The government rests on the interpretation of this provision to only mean conflicts such as civil wars and other types of intra-territorial conflicts that involve the territory's government with some sort of opposing faction within it. However, the Court disagrees with this narrow reading of the provision and concludes that the Geneva Conventions do apply and that Hamdan is protected under Common Article Three of the Convention. In addition, the special tribunal used to try Hamdan violates the Article Four of the Convention.

5.4 Military Commissions Act (MCA) of 2006

In response to the Supreme Court Ruling in *Hamdan*, Congress passed the Military Commissions Act in 2006⁴⁹ which amended the DTA and effectively overruled the Court's decision granting detainees Geneva Convention protections. The stated purpose of the MCA was "to authorize trial by military commission for violations of the law of war," however, the Act also established rules pertaining detainee treatment and

⁴⁹ Pub. L No. 109-366, 120 Stat. 2600 (2006). [Hereafter MCA]

torture. Some of the relevant provisions of the MCA pertaining to the subject matter on hand are sections three, five, six, and seven.

Section Three of the MCA establishes the structure of the military commission. Within subchapter three pertaining to pre-trial procedures, the MCA outlines permissible types of evidence. Although on its face, the MCA prohibits the use of statements gathered through the use of torture, it leaves the determination as to how torture is defined up to the Executive and allows for several exceptions to the rule. In one of these exceptions, the MCA allows for the use of evidence gathered through torture so long as the evidence has “sufficient probative value.” Sections Five and Six directly address the *Hamdan* ruling and states that, “No person may invoke the Geneva Conventions or any other protocols,” and provides the President of the United States with the authority to “interpret the meaning and application of the Geneva Conventions,” as is deemed necessary. Finally, section Seven of the MCA bars all state and federal courts from reviewing habeas petitions by detainees or their families.

5.5 Conclusion: Inter Arma Silent Leges

In the course of this examination, this paper has analyzed the Executive’s interpretation of the prohibitions against torture. These prohibitions include many different laws and treaties that define and proscribe the use of torture, some of these being the Geneva Conventions, the Convention against Torture, and domestic law such as §2441 and §2340. This paper also examined evidence that shows that the Executive may have engaged in the practices may have violated these laws. In light of this evidence, the Administration attempted to create an interpretation of these laws in order to neutralize the applicability of the rules. The arguments that provided legal justification for the use

of torture on detainees held at GTMO were then scrutinized in order to determine if they were in fact reasonable. This analysis showed the narrow scope used by the Administration to interpret the rules against torture was in fact inappropriate because the prohibition of torture is a fundamental principle of international law and is accepted by the international community of states as a norm from which no derogation is ever permitted. Because of its status as a preemptory norm, rules against torture need to be considered with the broadest scope.

However, that being said, it is important to recognize that one of the principal duties of the Executive is to assure the safety of the American people and the stability of the government. To this effect, the Executive must use any and all tools available to it to assure that this heavy burden is met. This burden of course creates a direct tension between security of the nation and the civil liberties of its people. Was the Bush Administration wrong to tip the scales in favor of security, sacrificing civil liberties? I would argue that the Administration was not. The Executive used all the tools at its disposal to execute its primary responsibility—ensuring the security of this nation. That being said, should we as a society accept torture as a necessary evil? To this question, I maintain that we should not.

The Executive did what it thought was necessary to carry out its responsibility; however it is only one of three co-equal parts of the government. The other two branches of government gave too much deference to the Executive and failed to faithfully execute their own duties. One of the primary roles of the Legislature is to authoritatively allocate the values of the people, while the role of the courts is to ensure the other two branches do not act outside the scope of the law. The framers of the constitution divided political

power into three separate branches of government in order to establish a system of checks and balances that would ensure a balance power between the different branches. No one branch is supposed to hold more power than the others, and it is the responsibility of each branch to keep the others in check. It is my position that the Legislature failed in its duty by failing to pass or refine laws that clearly reflects the values of society, particularly those pertaining to the use of torture.

With every law that Congress enacted pertaining to national security⁵⁰ and every appropriation bill passed financing the war, Congress had an opportunity to rein in some of the Executive's excesses with regards to its use of aggressive interrogation of detainees. However, both the Republican Congress before the 2006 elections and the Democrat controlled Congress after the mid-term elections failed to pass effective legislation that curtailed the use of torture. Fear of reprisal from the Administration, or fear that impeding the Executive would be deemed unpatriotic by the public, may have been factors that influenced the Legislature in being subservient to the Bush Administration. However, this only reinforces the notion that Congress failed to flex its own muscle and assert itself as a co-equal branch of government. It has been said that in times of war, the laws remain silent; however, I hold that in times of war, the laws need be most vocal.

⁵⁰ See: The Authorization for Use of Military Force (AUMF 2001); The USA PATRIOT ACT (2001); Detainee Treatment Act (2005); Military Commissions Act (2006)

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