Transnational Torture

Law, Violence, and State Power in the United States and India

Jinee Lokaneeta

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"Being Helplessly Civilized Leaves Us at the Mercy of the Beast"

Post-9/11 Discourses on Torture in the United States

The hooded Iraqi man standing on a box with his outstretched arms tied to electric wires, the goggled and muffled prisoners at Guantánamo, and the former U.S. army reservist Lynndie England smilingly pointing to the naked Iraqi detainees are just some of the iconic images that have shocked the world in recent years.[1] Yet much before these pictures were released in 2004, there were comments by U.S. state officials about the need for unprecedented actions in the post-9/11 context. For instance, Cofer Black, the CIA's former counterterrorism chief, in his testimony before the U.S. Congress, said in 2002, "There was a before-9/11 and an after-9/11. After 9/11, the gloves came off."[2] Similarly, former vice president Dick Cheney proclaimed right after 9/11, "defeating terrorists meant that we also have to work . . . sort of the dark side. . . . A lot of what needs to be done here will have to be done quietly, without any discussion,"[3] thereby earning his nickname of Darth Vader.[4] President George W. Bush, while denying the use of torture by the United States, simultaneously made comments such as, "I will never relent in defending America—whatever it takes."[5] These comments collectively reflected an exceptional rhetoric that emerged right after 9/11, their meanings becoming more visible only in the 2004 Abu Ghraib pictures.

In this chapter, I analyze the post-9/11 debates on torture in the United States concerning Guantánamo Bay, Cuba. I examine the theorizations by scholars that Guantánamo constituted a state of exception or a space without legal and political rights.[6] In particular, I ask whether the state-of-exception argument adequately captures the torture debate in the context of Guantánamo (and by extension Abu Ghraib). While Guantánamo has certainly not been the only site of the torture debates, especially given the extraordinary rendition program under which detainees were transferred to countries that torture, or to secret CIA prisons, here I focus on Guantánamo as a primary site of the torture debates in part because of the symbolic and normative significance of this space for the post-9/11 debates.

In the chapter, I suggest that in contrast to the state-of-exception argument, a more useful framework for understanding the torture debate is to analyze the tension between law and violence in liberal democracies. This tension is most apparent in the withdrawal of the so-called torture memo by the United States.[7] The liberal state's need to distinguish its own "humane" violence from "inhumane" violence forces the state to find ways of "taming" the violence both literally (by withdrawing the memo) and rhetorically. Rhetorically, the state first attempts to deny the very existence of torture and subsequently characterizes the acts of violence as "not torture" rather than torture.[8] The reason why it is able to do so is that the extent of violence permitted and prohibited is by definition ambiguous.

The withdrawal of the torture memo, of course, does not indicate that the state stops using excess violence. The state allows law to accommodate the possibility of using violence as long as it does not reach the threshold of its own definition of torture. Thus, the introduction of aggressive methods against particular subjects at Guantánamo is a manifestation of a constant negotiation of the state and law with violence. Even the Supreme Court's nonintervention in the post-9/11 torture debate is emblematic of the ambiguous status of excess violence in liberal democracies. The broader implication of law's constant struggle with violence is that it is necessary to reconceptualize state power by rethinking Foucault's notion of governmentality. I suggest that excess violence should be considered not merely as a remnant of past spectacular torture but rather more centrally as a part and parcel of the art of government. Here I illustrate the use of medical personnel in developing interrogation techniques as just one instance of the way excess violence functions within the art of government through the formation of what Foucault has termed the juridico-medical complex.

Undoing the Exception

As indicated in the introduction, post-9/11 policies in the United States have been primarily analyzed as representing a "state of exception" or a "legal black hole" where no legal or political rights exist. To recall one of the most influential conceptions in this regard: Giorgio Agamben has argued that the "unclassifiable and unnameable" status of the detainees in Guantánamo pro-

vides the perfect example of "bare life," which is a life reduced to a subhuman level, in a state of exception.[9] Similarly, Judith Butler characterizes the treatment of the detainees in the "Guantánamo Limbo" in the following way: "They are outside the law, outside the framework of countries at war imagined by the law, and so outside the protocols governing civilized conduct."[10] In contrast to this conceptualization of the post-9/11 policies on detention and interrogation as an exception, a closer analysis of the memos suggests that Guantánamo exhibits not a suspension of laws per se but a more selective albeit aggressive engagement with the laws.

Here Nasser Hussain's analysis of memos that focus on detention and lack of rights for detainees is useful. As Hussain puts it, Guantánamo is more of a "legal loophole" than a "legal black hole."[11] He notes, "It is empirically the case that what one witnesses in contemporary emergency is a proliferation of new laws and regulations passed in an ad hoc or tactical manner, administrative procedures, and the use of older laws and cases tweaked and transformed for newer purposes."[12] Hussain describes the proliferation of laws and detailed analysis in these memos as exhibiting a form of "hyperlegality."[13] Similarly, Fleur Johns points out, "Far from a space of 'utter lawlessness' . . . one finds in Guantánamo Bay a space filled to the brim with expertise, procedure, scrutiny and analysis."[14] Indeed, even though these authors do not focus on the torture memo in their analysis, I illustrate that the latter also represents a form of "hyperlegality" that involves a more aggressive use of gaps within the preexisting laws on torture. Thus, the torture memo could be termed as an instance of "aggressive hyperlegality" where the hyperlegality is meant specifically to narrow the protections possible under the laws. Further, even conceptually, the meaning of emergency or exception is belied by the recent policies. As Hussain writes,

> That is, traditionally an emergency or exception, at least as an ideal type, [is] operated by suspending regular law and utilizing a range of maneuvers that were both temporary and specific in order to confront a given situation. Today most emergency laws are neither temporary nor categorically distinct from a larger set of state practices.[15]

Thus, both in terms of the traditional notion of exception as a more bounded concept—temporary and specific—and in terms of the aggressive use of gaps within actual laws against torture and indefinite detention, the state-of-exception framework appears inadequate. Further, I contend that the state-of-exception argument does not explain three particular aspects

of the torture debate. First, it does not explain why the liberal state withdrew the so-called torture memo (which narrowed the protections against torture) despite insisting on the validity of its arguments. Second, as noted earlier, it does not acknowledge that the state memos do not represent complete lawlessness but rather exhibit an aggressive use of preexisting gaps within the laws. Third, it does not address the continuities in the practices of torture in the pre- and post-9/11 period, which are crucial to explaining the significance of violence in the art of government. The analysis of the post-9/11 memos as aggressive hyperlegality thus becomes particularly crucial at this time because, as I illustrate, even when some of the so-called exceptional policies are withdrawn, the preexisting tensions in law toward excess violence still continue to function as a continuously negotiated part of governmentality.

Contextualizing the Torture Debate

The post-9/11 torture saga in the United States became explicitly visible only in 2004. In that year the infamous abuses in the Abu Ghraib prison, Iraq, emerged in the public arena in the CBS show *Sixty Minutes* when the show aired the pictures of Iraqis being tortured and abused by U.S. personnel. Even though immediately after 9/11 there had been numerous allegations of torture of detainees at Guantánamo Bay, Cuba, it was the shocking pictures of torture that confirmed the presence of these practices at Abu Ghraib and, later, in Guantánamo. These abuses ranged from acts of physical torture, such as beating, jumping on the back and legs, sexual assault, kicking to the point of bleeding and, often, becoming unconscious to forms of mental torture, for example, being stripped naked, forced to wear women's underwear (up to fifty-one days as the sole article of clothing), frightened through the use of phobias, put on leashes, hooded, deprived of food, sexually humiliated, and denied religious requirements.[16]

The pictures were soon followed by the leak of a number of formerly classified official U.S. memos. These memos, written in the 2001-2003 period, seemed to suggest that the acts of torture were not "aberrations" but rather were part of an authorized policy for Guantánamo (if not for Iraq). If one looked at the methods authorized by the state for Guantánamo at one point or another, they were sleep deprivation, stress positions, isolation up to thirty days, use of phobias such as fear of dogs, removal of clothes, environmental manipulation, and mild, noninjurious physical contact such as grabbing and poking in the chest with the finger as well as light pushing.[17] Thus, there

appeared to be a clear relationship between many of the methods authorized in the leaked memos and the acts at Abu Ghraib. The state responded by first trying to delink the discussions in the memos about the use of aggressive methods in Guantánamo Bay from torture in Iraq.[18] Yet that strategy did not work, because the logic of the memos was apparent in both the review of methods authorized in Guantánamo Bay and in the pictures of torture in Iraq. The second major step in 2004 was the withdrawal of the most egregious of these memos, the Bybee memo (which I discuss below), and the replacement of this by the Levin memo. I use this example of withdrawal of the memo both as symbolizing the limitations of the state-of-exception analysis and for strengthening an alternative framework for analyzing the torture debate: namely, the continuing struggle of law with excess violence.

The Liberal State and the Act of Withdrawal: Why Was the Bybee/Yoo Memo Withdrawn?

As noted in the last chapter, states rarely admit their reliance on torture, but a liberal state in particular has to distance itself from torture precisely because the absence of these acts represents the success of the "progressive narrative" that Paul Kahn refers to.[19] Thus, when there emerged in 2004 memos linking acts of torture to actual policy discussions, and authorizing documents, a moment of crisis was potentially created. The anxiety was reflected in the multiple strategies employed by the United States, which initially denied the existence of torture and then, when it proved impossible to sustain that denial, denied authorship of policies related to these acts especially in Iraq.

Despite these classic strategies of official denial that the United States invoked, a particularly crisis-generating memo in the post-9/11 period was the August 2002 memo signed by the then–assistant attorney general, Department of Justice, Jay S. Bybee (now widely believed to have been authored by another state official, John Yoo, and henceforth referred to as the Bybee/Yoo memo). This memo has been considered an exceptional document because of its attempt to narrow protections against torture, thereby threatening to challenge one of the basic premises of a liberal democracy: that democracies do not condone torture under any circumstances.[20] A close examination of the Bybee/Yoo memo illustrates the ways in which it transgressed the delicate balance that a liberal state seeks to maintain between relying on legal violence and transforming itself into the "brutal other." The Bybee/Yoo memo attempted to maintain the balance by indulging in what I term an aggressive hyperlegality and yet had to be withdrawn precisely because of its inability to do so.

Many scholars suggest that the Bybee/Yoo memo was primarily written for the CIA and, therefore, may not be directly relevant for understanding the torture debate at Guantánamo because of its status as a U.S. naval base.[21] However, I focus here on the Bybee/Yoo memo because the memo remains both symbolically and conceptually one of the most controversial and significant moments of the torture debate. This is the case primarily because it was one of the first memos to emerge after the Abu Ghraib pictures were leaked and soon became a symbol of the exceptional policies of the administration, since it was read as authorizing torture. The memo became so controversial that it was publicly withdrawn and replaced by a new memo—an action unprecedented as far as the other memos and documents were concerned. Further, the Bybee/Yoo memo is pertinent because even its arguments regarding the scope of the commander-in-chief powers and the definition of torture are reiterated in many different memos and documents of the post-9/11 context. Indeed, some of the same arguments that form the foundation of the Bybee/Yoo memo were echoed in another John Yoo memo, written in March 2003 (that surfaced in 2008), this time explaining how protections against torture were limited in relation to the military as well.[22] As the author of the two memos, John Yoo, told *Esquire* in 2008, "The basic substance of the memo released yesterday [2008] and the one released in 2004 is the same."[23] Therefore, Yoo himself notes the similarities in his interpretation of laws regarding the CIA and the military interrogators for a certain period. Further, the memos and documents that emerged in 2009 concerning the high-value detainees (defined as high-ranking al Qaeda and affiliate members, with knowledge of imminent threat and potentially threatening to the United States if released) echo some of the core arguments.[24] Thus, even though the continued emergence of new memos explains specific parts of the puzzle regarding different sites and actors, the Bybee/Yoo memo retains particular significance in understanding the torture debate.

The Bybee/Yoo memo follows the same framework as the other formerly classified memos in the 2001-2002 period regarding the nonapplicability of U.S. and international laws to the detainees at Guantánamo. The 2002 John Yoo memo on detention claimed that the Geneva Conventions were not applicable to the detainees at Guantánamo Bay because of the unique nature of the conflict and thereby made the Federal Torture Statute (based on the UN Convention on Torture) the focus of attention.[25] This is the case because

the Federal Torture Statute (1994) characterized any attempt or act of torture by U.S. state officials outside the United States as a criminal offense.[26]

Two of the more controversial suggestions of the Bybee/Yoo memo were that the executive as commander-in-chief could unilaterally introduce aggressive methods of interrogation beyond the ones permissible under the Federal Torture Statute, and certain excuses or justifications could be provided for methods that violate this statute. The Bybee/Yoo memo emphasized the unprecedented nature of the terrorist attacks and suggested that even if cases regarding the aggressive methods of interrogation authorized by the president come up for prosecution under the Federal Torture Statute, the courts should not entertain these cases since that would challenge the president's authority.[27] In fact, the memo suggests that even the application of the congressional statute against torture could be considered unconstitutional if the commander-in-chief authorized certain methods as necessary for the war. The Bybee/Yoo memo also stated that if some officials did violate the statute, "standard criminal law defenses of necessity and self-defense" may be used to bypass criminal prosecutions.[28] The conditions for evoking the necessity and self-defense arguments were by definition fulfilled by the context of terrorism.

Since the Bybee/Yoo memo did not directly address why the military would not be bound by the several other laws that could apply to the use of torture, the 2003 Yoo memo illustrates that the Bybee/Yoo logic could simply be extended to almost all the other laws. In other words, the commander-in-chief could override any laws if the methods prohibited under them were considered necessary for the war. Just for example, the Yoo memo notes the following regarding the federal criminal laws that prohibit assault, maiming, and torture: "if they were misconstrued to apply to the interrogation of enemy combatants," they "would conflict with the Constitution's grant of the Commander in Chief power solely to the President."[29]

These memos, ironically enough, identify the source of the president's inherent authority as the U.S. Constitution. On the basis of the "text, structure and history of the Constitution,"[30] Yoo places in the executive the entire responsibility of declaring war, conducting war, and protecting the security of the nation. His positions differ little in his academic writings, particularly regarding the president's commander-in-chief powers. As David Shultz writes, "To read *The Powers of War and Peace* is to read the ideological latticework upon which the Bush Administration's grasp for presidential power is constructed."[31] Sure enough, in his book, Yoo writes, "If we assume that the foreign affairs power is an executive one, Article II effectively grants to the president any unenumerated foreign affairs powers not given elsewhere to the other branches."[32] Once Yoo establishes that the executive does have control over foreign affairs, including the conduct of war, it is not difficult for him to conclude that "in wartime, it is for the President alone to decide what methods to use to best prevail against the enemy."[33]

For Yoo, the position is further strengthened by the post-9/11 actions of the Congress and the past decisions of the Supreme Court. Yoo, for instance, points to the Supreme Court's acceptance in the past (reiterated to some extent by the Thomas opinion in Hamdi)[34] that the president had the power to decide the exact nature of the operations within the context of the war.[35] Yoo also notes that by passing the Authorization of Military Force (AUMF) resolution in 2001, the Congress designated the president as the authority responsible for conducting the war against al Qaeda (and the Taliban).[36] War operations, according to Yoo, included not only killing and capturing the enemies in the battlefield but also detaining and interrogating them. Indeed, by describing the nonstate (almost invisible) nature of the multinational terrorist group al Qaeda, Yoo creates a powerful defense for detention and for gaining "information [as] . . . perhaps the most critical weapon for defeating al Qaeda."[37]

Yoo's theoretical justifications of the president's powers have been subject to much criticism by constitutional law scholars and human rights activists.[38] However, even while recognizing that Yoo's arguments provided an unprecedented ideological justification for the increased powers of the executive after 9/11, it is significant that these arguments were essentially based on a particularly aggressive reading of the existing U.S. Constitution that did not require a formal suspension of the laws.

Of course, even while the memos suggested that the commander-in-chief powers regarding interrogations cannot be challenged in times of war, especially by congressional statutes, the Bybee/Yoo memo writers also needed to make sure that in case this interpretation were not accepted, the definition of torture within existing statutes was narrowly interpreted. As further evidence of aggressive hyperlegality, the Bybee/Yoo memo circumscribed the scope of the main statute on torture, namely, the Federal Torture Statute, by suggesting a very narrow way of defining torture as involving the most egregious physical acts.[39] Here the significance of the memos on detention that declared the nonapplicability of the Geneva Conventions to the detainees (thereby removing the prohibitions under the Uniform Code of Military Justice and the War Crimes Act for the military) becomes especially visible. The main hurdle to the introduction of harsh interrogation techniques then becomes the Federal Torture Statute.[40]

The Federal Torture Statute (Section 2340A) defines torture as an "act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."[41] It is important to note here that the United States had introduced certain reservations during the ratification of the UN Convention against Torture that were reflected in the Federal Torture Statute.[42] But as another indication of its aggressive hyperlegality, the Bybee/Yoo memo used these reservations to vigorously restrict the scope of the U.S. torture statute, especially with regard to defining terms such as "severity" and "specific intent." For instance, one of the major differences between the U.S. statute and the UN convention was that in the UN convention there was little clarity about "intent," whereas the United States wanted to emphasize "specific intent" rather than "general intent" as far as the act of torture was concerned.[43] The Bybee/Yoo memo went a step further to ensure that "specific intent" was extremely narrowly defined "as the intent to accomplish the precise criminal act that one is [was] later charged with."[44] In this case, "severe pain and suffering" had to be the precise purpose of the act for it to be culpable, thereby rendering mere knowledge of pain resulting from the actions as inadequate for establishing culpability, making it almost impossible to prove specific intent.

Further, in the absence of an accepted definition of "severity" in the legal discourse, the memo specified a certain understanding of severity based on discussions in certain health statutes. The Bybee/Yoo memo states, "These statutes suggest that 'severe pain,' as used in Section 2340, must rise to a similarly high level—the level that would ordinarily be associated with a sufficiently *serious physical condition or injury such as death, organ failure, or serious impairment of body functions*—in order to constitute torture."[45] Here the lack of clarity in discussions within Congress on the precise meaning of the term "severe" led to the memo focusing on other statutes regarding health benefits to shed light on what constituted severity. Thus, a particularly narrow legal regime seemed to have been created by the Bybee/Yoo memo, wherein the protections against torture were limited to the most egregious physical pain. A narrow way of defining torture made it difficult to consider a number of controversial methods of interrogation authorized and visible at Guantánamo and Abu Ghraib as torture, and if by chance they were challenged under the torture statute, the methods could be defended as having being authorized by the commander-in-chief.

Unsurprisingly, the Bybee/Yoo memo has been the subject of much criticism. The memo has been criticized from a more normative point of view as being a "disgrace" for the United States.[46] Some others have considered this memo as exemplifying the role of "right-wing radicals" under the Bush administration.[47] Thus, both these formulations see this memo as an exceptional moment in the U.S. context. A very powerful critique of the memo has been written by David Luban, who not only looks at the fallacies in the legal arguments used by the Bybee/Yoo memo but also suggests that the memo represents an explicit creation of a "liberal ideology of torture."[48] This liberal ideology of torture is a peculiarly liberal phenomenon that ironically emerges from a rejection of four other aims of torture, namely, cruelty, punishment, judicial torture, and terrorizing people, each of which is, according to Luban, unacceptable to liberalism due to the latter's emphasis on human dignity.[49] Thus, only one particular aim for torture is conceivable for liberals: intelligence gathering in order to prevent future harm. And when torture is used for this "purer" purpose, it may not even be considered torture and, indeed, there are limits to the nature of torture allowed.[50] Luban, of course, questions even this form of torture as being unacceptable because its basis—the ticking-bomb scenario—is never reliable and threatens to be unabashedly consequentialist.[51]

Luban and others also critique the Bybee/Yoo memo as a legal document, claiming that none of its arguments is very convincing and that all of them lack adequate support. For instance, Luban and Margulies critique the appropriateness of using a definition of "severity of pain" based on a health statute about an "emergency medical condition" to analyze U.S. protections against torture.[52] Jeremy Waldron also points to the faulty understanding of severity in the Bybee/Yoo memo, which considers the impact of an untreated condition leading to impairment or dysfunction as the meaning of severity itself.[53] Further, according to Luban, the emphasis on the "specific intent" requirement and the use of "self-defense" and "necessity" defenses were either misconstrued or had little precedent in U.S. law and were primarily meant to deliberately create a liberal ideology of torture. As Margulies explains, while a distinction between "intent" and "knowledge" can be made in the case of a surgeon who may know that pain would be caused by her actions but did not intend to cause it, in the case of interrogation this has little meaning because the point in interrogation is to inflict pain.[54] While all these arguments present effective critiques of the legal arguments in the Bybee/Yoo memo, portraying it as an example of bad lawyering, they underscore the aggressive hyperlegality in the memo rather than consider the memo as a lawless attempt.

Conversely, a focus on aggressive hyperlegality also allows us to note the limitations of this phenomenon vis-à-vis torture. In other words, while the

memo did represent aggressive hyperlegality, not lawlessness, it did become a liability for the state, especially after the Abu Ghraib pictures were released. Thus, an additional question that is addressed neither by exception theorists nor by these critiques of bad lawyering is why, after creating and justifying the narrowing of protections against torture, the liberal state had to withdraw the egregious memo on torture from the realm of public discourse. In particular, I am referring to the need for the Bybee/Yoo memo to be withdrawn after the memo provided ways to narrow the protections against torture. In the new Levin memo, the section on necessity, self-defense, and the commander-in-chief powers was dropped in its entirety by the administration, which claimed that the "President's Commander-in-Chief power and the potential defenses to liability [were]—and [remain]—unnecessary."[55] The use of the term "unnecessary" is significant because it reveals the belief among state officials that the president can authorize methods in violation of the Federal Torture Statute. However, the fact remains that the blatant aspects of the torture memo were withdrawn in the Levin memo. Here I take the withdrawal of the Bybee/Yoo memo as an instance of the state taking deliberate actions to contain the torture controversy and explore its significance.[56]

As noted earlier, the symbolic act of withdrawal cannot be explained either by the exception argument or by a mere critique of bad lawyering. I suggest that the withdrawal of the memo became necessary because, first, it created a direct link between the U.S. policymakers and the perpetrators of violence and, second, the memo explicitly provided a framework for authorizing acts that exceeded the acceptable levels of violence in a liberal democracy.

In this context, the contributions by Robert Cover, Austin Sarat, and Timothy Kaufman-Osborn (as discussed in the introduction) on the ambivalent relationship of law to violence becomes useful.[57] Apart from pointing to ways in which mainstream theorists such as Hart and Dworkin focus on law as primarily rules, norms, and principles, leading to a "forgetting of violence," these scholars illustrate how the state tries to deny the role of violence in law despite its use.[58] According to Austin Sarat and Thomas Kearns, the dominant theory of legal violence suggests that "necessary" violence is primarily the action of agents who enforce the decisions made on the basis of abstract rules and principles. The emphasis of the mainstream legal theorists is on a bureaucratic structure of judicial decision making rather than on concrete acts of legal interpretation by the judges.[59] This, in turn, denies the important fact pointed out by Robert Cover that "legal interpretation takes place in a field of pain and death" and has physical implications.[60]

The example of the death penalty illustrates how the judges distance themselves from acts of violence. As Kaufman-Osborn explains, the violence is seen as being reflected only in the "deeds" of the executioner while carrying out the act of execution and not in the "words" of the judge proclaiming the execution, thereby allowing judges to ignore the integral relation between the two.[61] Thus, liberal states attempt to present violence as being marginal to law, rather than being integrally pervasive at both levels: legal interpretation and legal enforcement. In the post-9/11 context, the presence of the justificatory memos alongside the acts of torture in Abu Ghraib created a direct link between the interpreters of law (memo writers) and the acts of torture. When the pictures of torture confirmed the presence of these acts, the state started denying having authorized them, and when that tactic failed, withdrew the visible and explicit justificatory discourses. The symbolic significance of the act of withdrawal is that even at the height of the "war on terror" rhetoric, the Bush administration could not defend torture as torture, and when the leaked Bybee/Yoo memo appeared to be the genesis of the torture and abuse at Abu Ghraib (via Guantánamo), the memo had to be publicly withdrawn.

This was the case because the state always attempts to portray its own violence as "humane" in opposition to "inhuman" nonstate violence. This is most visible in the change in the methods of execution in the United States from hanging to gas chamber to electric chair and, finally, to lethal injection.[62] Each time the newer method was proclaimed as a less painful method of execution, and lethal injection was considered the most humane one. The withdrawal of the Bybee/Yoo memo, thus, has to be seen as the liberal state's attempt to ensure that the distinction between the humane "self" and the inhuman "other" is clearly maintained. If torture were allowed, this major distinction between the controlled state and the brutal other would have been questioned. Here again the parallel between methods of execution and methods of interrogation becomes important. Developing humane methods of execution, Austin Sarat notes, is not done out of concern for the executed; rather it is done to constantly ensure that the liberal state seems more humane than the other. The humane methods exist also to spare the witnesses from watching the pain and seeing the marks on the body of the condemned.[63] In fact, the recent debates on botched executions by lethal injections indicate the inability of the state to do away with pain even in its most humane method of killing.[64] In the case of interrogations, it is also the use of sanitized terms and comparisons to routine activities (as well as references to "harsh" or "enhanced" techniques), on the one hand, and the use of mental and less physically brutal methods of torture, on the other, that allowed the

state to proclaim that it does not use torture (see chapter 3). Thus, the withdrawal of the memo became necessary because the Bybee/Yoo memo alongside the Abu Ghraib pictures explicitly linked the state to unacceptable levels of violence, creating a crisis in the legitimacy of the liberal state.

When does violence reach such a magnitude that it threatens the legitimacy of a state? Here the argument is not so much a particular identifiable or fixed threshold of violence that the state crosses but rather a combination of contingent circumstances that creates the anxiety for the state. In the post-9/11 context, it was the leak of the photos, the emergence of the memos and documents, and the Bybee/Yoo memo clearly articulating the overstepping of some boundaries of unacceptable violence (always negotiated, as a later section will illustrate) that required a withdrawal of this egregious document. The focus, therefore, is on the symbolic act of withdrawal that follows precisely because of a peculiar relationship that law has with violence in liberal states: the state cannot embrace its own violence when it is too explicit but still requires it and, hence, finds ways of reining in the violence to acceptable levels. The difficulties in doing so are illustrated in the death penalty debates mentioned earlier and also will be more specifically discussed in the last section of this chapter, which addresses the liberal state's innovative and constantly negotiated attempts to accommodate excess violence through, for example, the creation of a juridico-medical apparatus.

The question is whether with the withdrawal of the Bybee/Yoo memo, the liberal state's tension with excess violence during interrogations disappears. I argue that while the Bybee/Yoo memo, based on arguments advocating "unchecked and unbalanced" presidential power, explicitly narrows the protections against torture, its withdrawal does not represent the end of the torture debates.[65] To put it another way, the reason why the torture debate is better explained by analyzing law's relationship to violence is that the Bybee/Yoo memo's definition of torture is not an entirely new creation. I argue that while the Bybee/Yoo memo is significant to the extent that it narrowly reads the protections against torture, some of its arguments rely on torture debates in the pre-9/11 period, making it difficult for the liberal state to completely do away with the problem of dealing with this form of excess violence. This tension is articulated by the architect of the torture memos in the following way. When John Yoo was asked about his specific interpretation of the term "severity," he said,

> It's the phrase Congress used. The main criticism, which is certainly fair, is that statute is so different from this one, how can you borrow the language of one and include it in the other. On the other hand, that's the closest you can get to any definition of that phrase at all. . . . The other thing I was quite conscious of was I didn't want the opinion to be vague so that the people who actually have to carry these things out don't have a clear line, because I think that would be very damaging and unfair to the people who are actually asked to do these things. The way I read what the department did two years later, was they just made the line blurry again.[66]

Thus, Yoo points to an existing lack of specificity regarding the definition of torture and the meaning of these terms that the memos pounce upon and aggressively interpret. And Yoo went on: "Yeah, so when they rewrote the memo, they made the lines less clear. They deleted that sentence. But it's not all that different in what it actually says and what it actually allows."[67] Is the statement made by John Yoo that nothing changed in the Levin memo actually true?

Definitional Ambiguities That Linger On

The Bybee/Yoo memo was presented by critics as an exceptional moment in the torture debate and its withdrawal as indicating that the liberal state could put to rest all suspicions regarding its reliance on illegitimate violence. However, in this section, I note how one of the more controversial sections of the Bybee/Yoo memo—namely, the narrow definition of torture—is not just a creation of the post-9/11 period. Rather, it is a reflection of a more ambiguous relationship that U.S. law has to the definition of torture that was present in the very formulation of the Federal Torture Statute. Analyzing the tensions regarding the definition of torture in the very ratification of the same statute indicates the constantly negotiated nature of law with excess violence even while the liberal state emphatically claims both legally and morally that torture is impermissible in a democracy. Further, the pre-9/11 debates also register ways in which the liberal state often struggles to find ways of accommodating excess violence even while trying to conform to its legal obligations. It is this tension that underlies the quotation from Judge Gonzales at a press briefing in 2004: "The administration has made clear before, and I will reemphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the Torture Convention or the Torture Statute, or other applicable laws."[68] The emphasis on legal obligations rather than a general denial of torture points to the ambiguities that remain from the pre-9/11 context in the laws regarding the definition of torture in the Federal Torture Statute.

The narrow definition of torture has, of course, not been the only area of concern as far as aggressive interrogation methods are concerned. Other strategies included the use of euphemisms or sanitized terms such as "sleep adjustment" or a "frequent flyer program" for sleep deprivation. While I discuss these additional strategies applied by the liberal state to mask its tension with excess violence in chapter 3, here I focus on the definition of torture in the Federal Torture Statute as an illustration of the liberal state's continued tension with excess violence. In particular, I point to the similarities between the definitions of torture in the U.S. Senate ratification debates in 1990 and the Bybee/Yoo memo. While the similarities themselves are not surprising given that the Bybee/Yoo memo is merely interpreting the same statute, they serve as a reminder that these definitional ambiguities troubled the Senate ratification debates as well and that the withdrawal of the Bybee/Yoo memo did not automatically resolve these tensions.

The definition of physical and mental torture was a subject of much concern in the U.S. Congress during the ratification of the UN Torture Convention. For instance, in 1990, Mark Richard, the then–deputy assistant attorney general in the Department of Justice, stated in his written and oral statement in front of the Senate Foreign Relations Committee, "Torture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct."[69] Richard goes on to explain what he calls a "relatively general definition." According to Richard, there seemed to be a "degree of consensus" on physical torture—"the mere mention of which send chills down one's spine: the needle under the fingernail, the application of electric shock to the genital area, the piercing of eye balls etc."[70] Indeed, he terms techniques that "inflict such excruciating and agonizing physical pain . . . as the essence of torture."[71] Hence, he writes, "the Convention chose the word 'severe' to indicate the high level of the pain required to support a finding of torture."[72] Thus, the 1990 Justice Department lists techniques that cause long-lasting physical injuries on the body as the "essence" of torture and link this to the term "severity," thereby exhibiting the origins of some of the arguments found in the Bybee/Yoo memo.

In fact, even the new Levin memo (that replaced the Bybee/Yoo memo) inherited this more ambiguous understanding of torture based on the 1990 Senate discussions. The Levin memo clarifies that the Department of Justice officials disagree with the statements made by the Bybee/Yoo memo that torture includes only acts causing "excruciating and agonizing" pain or suffering and reject the specific definition of severity given in the memo, which is based on the health statutes (pain in relation to death, organ failure, and impairment of bodily function).[73] The question is whether the Levin memo is able to explain the terms "severe pain" and "suffering" in a more encompassing way.

After stating the problem of objectively defining these terms, the Levin memo turns to the Torture Victim Protection Act cases to explicate the meaning of torture.[74] The cases primarily include "extreme" acts such as "electric shock, severe beating on genitals, cutting a figure on forehead," and "removal of teeth with pliers," although ostensibly "less [visibly] painful" acts such as "extreme limitations of food and water, sleep deprivation," and "shackling to a cot" were also included as forms of torture.[75] The question, however, is whether these "less visibly painful" forms by themselves are adequate to constitute torture, something not addressed by the cases and the memo. In other words, while the Levin memo distances itself from the Bybee/Yoo memo's emphasis on extreme acts, it does not clarify what its own interpretation of these terms is.

Thus, the Levin memo's own definition and citation of cases seem closer to what the Bybee/Yoo memo suggested because of the common source of these definitions being the Senate discussions on torture. There is, of course, a distinction to be made between the 1990 Senate discussions, which left room for ambiguity, and the Bybee/Yoo memo, which aggressively narrowed the protections against torture in the post-9/11 period. After all, even in the legal arena, the definition of torture is not clear. As Kim Lane Scheppele very aptly explains, "Torture does not have a clear legal meaning, in part because there have been no general and systematic attempts to map the border between 'torture' and 'not torture.'"[76] She further explains that in international law "torture is generally twinned with cruel, inhuman or degrading treatment or punishment," citing the definitions of these terms in the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention against Torture.[77] But she goes on to state that in many instances the distinction between the two does not matter because both are legally prohibited. The United States did distinguish between the two to the extent that only torture was criminalized under the Federal Torture Statute.[78] The Yoo and Bybee memos utilize the distinction between the two terms to suggest that ostensibly cruel, inhuman, and degrading treatment could be used overseas as long as the methods do not constitute torture. Nonetheless, the discussions in the Levin and Bybee/Yoo memos and the 1990s Senate indicate that only the most brutal forms of physical torture were consensually considered as torture, leaving room for interpreting the less brutal methods (and/or mental torture) in different ways.

The debate on mental torture in the 1990s Senate thus has significant implications for the current context. According to Mark Richard, while there

was some consensus on physical torture, it was mental pain that was seen as the "greatest problem" since it is "by its nature subjective."[79] He explains, "action that causes one person severe mental suffering may seem inconsequential to another person." Furthermore, he writes that "mental suffering is often transitory, causing no lasting harm."[80] Thus, the United States emphasized "prolonged mental harm" and the four predicate acts that would encompass the arena of mental torture. The predicate acts that led to "prolonged mental harm" were "infliction (or threat) of severe physical pain and suffering, administering (or threatening to administer) mind altering substances, threatening imminent death and threatening to do all these acts to a third person."[81]

One of the examples of the vagueness of the definition of mental torture mentioned by Mark Richard is the characterization by some international law treatises of "solitary confinement, or insulting language or . . . having been forced to strip naked" as mental torture.[82] In light of some of the methods of interrogation that have been used in the war on terror, namely, isolation, stress positions, removal of clothes, and sexual humiliation, it may be useful to note the lack of consensus on these methods even in the 1990s.

It is this emphasis on physical torture and a limited understanding of mental torture that allowed the Bush administration to claim not only that torture was never authorized but also that torture never took place in Guantánamo (or even Abu Ghraib).[83] The definitional ambiguities, particularly concerning acts of mental torture, especially in a context where Geneva conventions were not applicable, led to the authorization of certain methods, such as sleep deprivation, isolation up to thirty days, use of phobias, and removal of clothes, for the first few months at Guantánamo in November–December 2002.[84] But these methods were withdrawn because of their possible controversial nature and instead the methods that were authorized in 2003 were sleep adjustment, environmental manipulation, isolation, and dietary manipulation.[85] The criteria for determining whether a method was to be allowed or not was whether there was "an intent" to injure or not, whether "severe" physical or mental pain was involved or not, and, finally, whether there was a "legitimate government interest" or not, echoing the language of the Bybee/Yoo memo.[86] The military subsequently explicitly excluded some of the more controversial methods from its arsenal, but it is important to note that before the methods were rescinded, all of them were used both by the CIA and by the military interrogators at Guantánamo and, indeed, these methods have a longer history than that, at least for the CIA.[87]

Thus, the debates on the definition of torture in the 1990s Senate reflect a similar tension regarding the protections against mental torture that one observes in the withdrawn Bybee/Yoo memo and the Levin memo. While it is not surprising to note this similarity, given their common source, the significance of this analysis is that while the Bybee/Yoo memo may have been an example of aggressive hyperlegality (not a suspension), the ambiguities regarding definition cannot be said to disappear with the withdrawal of the Bybee/Yoo memo. Whether this was a conscious desire on the part of the United States is not the primary concern; rather, the concern is to point to a continuing struggle with excess violence that has preexisted the current period and continues to threaten the legal discourse as far as the detainees are concerned. The following question remains: did the absolute prohibition of torture primarily concern the most egregious of physical acts and was there a lack of clarity on methods permissible short of such acts?

Another question that has not been as carefully studied is whether in an era when the democratic branches were constantly, publicly, and proactively engaged in authorizing harsh interrogation methods (CIDT—cruel, inhuman, and degrading treatment—or torture) and some members within these branches were challenging them, how was the Supreme Court responding to the torture debate? While the Court has certainly responded consistently in the context of detention and the right to habeas corpus, as far as the torture debate was concerned, the Supreme Court responded mostly with silence.

Two Models of Governance and the Silence in the "Enemy Combatant" Cases

Immediately after 9/11, civil liberties activists in the United States identified a dual mode of governance in the "war on terror" in which a distinction was made between citizens with well-defined constitutional rights and noncitizens with few, if any, rights. As Michael Ratner from the Center for Constitutional Rights noted,

> I think one of the reasons we have seen so little opposition to some of these laws, apart from the fear factor . . . is that everybody (at least citizens) can say: "it's not me, it's someone else who will be treated badly." It is the other. It is not I as a citizen; it is a non-citizen. There has also been a tendency in the government to justify these laws by arguing that they are affecting non-citizens only.[88]

Thus, the president's military order of November 2001 explicitly stated that the detainees captured in Afghanistan and elsewhere would not be accorded the normal due process rights.[89] Meanwhile, within the United States, there was large-scale detention of noncitizens based on the material witness warrants and immigration laws.[90] Both these acts almost confirmed a parallel mode of governance for noncitizens. The clear government demarcations between citizens and noncitizens were severed when suspected terrorists turned out to be U.S. citizens (Yasser Hamdi, José Padilla, and John Walker Lindh).[91] However, the government was not willing to give up its dual mode of governance and instead created a new category of "enemy combatants" that would allow for citizen/enemy combatant and noncitizen/enemy combatant to be treated differently to some extent.

In this section, I discuss the response of the Supreme Court to the so-called exceptional policies introduced by the president in the post-9/11 period, with a special focus on its implications for the torture debate. I note that while the Supreme Court has upheld some important procedural and substantive rights for detainees, at times even challenging the executive and the Congress squarely, the Court's jurisprudence has stopped short of addressing the torture debate. Thus, I argue that the Court has primarily addressed what I term the "visible excesses" or only those actions that could not be hidden, namely, the detention of the actual bodies. In the process, what the Court managed to avoid were the implications of the visible (detention) for the invisible or partly visible excesses (torture and CIDT), as well as the intricate connection among detention, interrogation, and torture in the post-9/11 period. Despite numerous images, reports (official and unofficial), memos, testimonies, and, more importantly, direct requests to the Court from the amicus curiae and parties involved in the cases to address torture alongside detention, the Court somehow has managed to keep out of the torture debate.

The Supreme Court has intervened in five cases that have directly dealt with the "war on terror," namely, the Hamdi, Padilla, and Rasul cases in 2004 followed by the Hamdan and Boumediene cases in 2006 and 2008, respectively.[92] In the first three enemy combatant cases, the Supreme Court rejected some of the major arguments of the executive, especially the power to indefinitely detain citizens and noncitizens "based on nothing more than the president's word."[93]

José Padilla, a U.S. citizen, was arrested in the United States on a material witness warrant in relation to the 9/11 investigations, but in June 2002 the president designated him as an enemy combatant associated with al Qaeda.[94] Padilla was detained at the Consolidated Naval Brig, Charleston, South Carolina, for nearly four years without charges or a trial until 2006, when he was charged and convicted in a federal criminal court.[95] In 2004, the only time when the Supreme Court discussed the Padilla case, the Court accepted the government's position that the habeas petition had been filed in the wrong jurisdiction and should be filed again. The Court argued that since Padilla had been moved from New York (where the material witness warrant was based) to South Carolina and the commander in charge was outside the jurisdiction of the Southern District Court of New York, the petition had to be filed again in South Carolina.[96] Thus, the Court decided the case primarily in terms of jurisdiction. Indeed, Ackerman reads this nonintervention in the case as indicating that the Court found it "too hot to handle" and notes that while perhaps a "strategic retreat" was better than "to capitulate to the war on terror," it did not bode well for protections of liberty.[97]

Yasser Hamdi was arrested in Afghanistan and initially taken to Guantánamo, but once it was discovered that he was an American citizen, he was brought to the United States. In Hamdi's case in 2004, the plurality of the Supreme Court agreed that Congress had authorized the detention of enemy combatants as a tool of war but also stated that as an American citizen, Hamdi had to be given "a meaningful opportunity to contest the factual basis for the detention before a neutral decision maker."[98] The Supreme Court, however, also stated that in order to reduce the burden on the executive, even "hearsay" could be admitted as the "most reliable available evidence" as long as the person had the right to rebut it. Thus, once the government gave adequate evidence for a person to be termed an enemy combatant, the burden of proof shifted to the enemy combatant to prove why he should not be termed as such, thereby radically changing the meaning of due process rights.[99] Ackerman criticizes the Hamdi Court for its use of a test (termed the Mathews test) to balance individual rights with government interests since the test in question was primarily used in public administration to determine pollution permits and welfare payments.[100] Cass Sunstein draws attention to Justice Thomas's dissent in Hamdi where he toes the executive's line, reflecting what Sunstein has called a "national security fundamentalism."[101]

In the third enemy combatant case and the first case concerning noncitizens, *Rasul v. Bush* (2004), the Supreme Court argued that enemy aliens held outside the United States did have access to U.S. courts, disagreeing with the lower courts on the issue. Differentiating this case from a previous U.S. case, Eisentrager, used to deny aliens a right to U.S. courts, the Court argued that in the Rasul case, the petitioners were not from countries at war, had denied

their involvement in terrorism, and yet had been deprived of counsel, not charged, and detained for two years in an area that was under the United States' "exclusive jurisdiction and control."[102] The Supreme Court also stated that unless there were clear mention in a statute that it could not be used extraterritorially, the statute (in this case regarding habeas corpus) could be used in Guantánamo, especially since the base was within the "jurisdiction and control" of the United States.[103]

The Rasul decision, while welcomed by scholars and activists, was criticized for not clarifying the substantive rights available to the detainees in relation to U.S. and international laws.[104] As Chemerinsky put it, "I believe that the Supreme Court got it half right. They recognized a right of access to the courts. However, they do not go nearly far enough in specifying the rights that have to be accorded a detainee."[105] In that sense, by not elaborating on the rights available to noncitizen detainees (as compared to Hamdi's case), the Supreme Court continued to follow the two modes of governance based on citizenship. Of course, the distinction between the citizens and noncitizens was not as blatant as that observed in the lower courts in Rasul. As Gathhii notes, the lower courts' rejection of the access of detainees to U.S. courts was almost a continuation of previous colonial policies in which subjects were not given similar rights as citizens.[106]

My main point in considering the enemy combatant cases is to analyze the interventions of the Court in the torture debate. Here the brief discussion of the three cases suggests that while the Court did intervene in the detention cases, for the most part, it did not address the question of torture. The only place where torture was discussed was in the dissenting opinion in Padilla. Justice Stevens in his dissent (joined by Justices Souter, Ginsburg, and Breyer) pointed to the flexibility in the rules for filing habeas cases that could have allowed the court to accept and address the substantive questions of the Padilla case.[107] In addition, Justice Stevens noted,

> At stake in this case is nothing less than the essence of a free society. . . . Unconstrained executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. . . . Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. *Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence.* For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.[108]

The dissent clearly found the very act of indefinite detention for prolonged interrogations unacceptable regardless of whether the information gained was reliable or not. Here the dissent did make a distinction between the methods used in the post-9/11 United States (incommunicado detention for months) and the more extreme forms of torture, but still determined the methods to be unacceptable.

Notwithstanding the dissenting opinion in the Padilla case, it is noteworthy that in all three enemy combatant cases there was a lack of discussion of the close linkages between detention and unlawful interrogation. After all, in the lower court proceedings of the same case, the government had accepted that the primary reason for the indefinite detention was information. The district court in the Padilla case noted this statement from the then–defense secretary, Donald Rumsfeld:

> It seems to me that the problem in the United States is that we . . . are in a certain mode. Our normal procedure is that if somebody does something unlawful . . . that the first thing we want to do is apprehend them, then try them in a court and then punish them. In this case that is not our first interest. . . . We are interested in finding out what he knows . . . our job, as responsible government officials, is to do *everything possible* to find out what that person knows, and see if we can't help our country or other countries.[109]

Thus, gaining information by doing "everything possible" was admittedly the primary purpose of the detention. In 2003, when the district court asked the government to grant Padilla access to counsel, one of the arguments made by the government in a subsequent hearing was that access to counsel would drastically affect the process of interrogating Padilla. The Jacoby Declaration made by Vice Admiral Lowell E. Jacoby, director of the Defense Intelligence Agency, stated the following:

> Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of

> counsel into the subject-interrogator relationship, for example—even if only for a limited duration or for a specific purpose—can undo months of work and may permanently shut down the interrogation process. Therefore, it is critical to minimize external influences on the interrogation process.[110]

Despite such direct statements by the custodians of the detainees, it is surprising that the Supreme Court did not address the motivations behind the indefinite incommunicado detentions that were initially even denying counsel for the sake of gaining information at all costs. The psychological element of interrogation described by the administration was based on complete isolation and deprivation of contact with anyone for several months altogether (eerily close to the methods propounded by the CIA Kubark Manual that I discuss in the next section). Regardless of whether the domestic protections were considered applicable to suspected terrorists or not, the lack of discussion in the Court on the possible use of illegal methods of interrogation during the indefinite detentions remains noteworthy.[111]

Indeed, it was occasionally the lower courts that indicated the need for challenging the government's position. In the Rasul case, the district court wrote,

> [U]nless the Court assumes jurisdiction over their suits, they will be left without any rights and thereby be held *incommunicado*. In response . . . the government . . . conceded that "It is the government's position that the scope of those rights are for the military and political branches to determine. . . ." Therefore, the government recognizes that these aliens fall within the protections of certain provisions of international law. . . . While these two cases provide no opportunity for the Court to address these issues, the Court would point out that the notion that these aliens could be held *incommunicado* from the rest of the world would appear to be inaccurate.[112]

Yet, even while admitting that there was a serious concern regarding the possibility of the detainees being held incommunicado, the district court in Rasul accepted the government's theoretical suggestions that those concerns could be considered under international law, and the Supreme Court notably neither directly nor indirectly raised this issue.

This is despite the well-known fact that in a war situation, once the court accepts the fact of detention, the executive gets to determine the conditions of confinement entirely.[113] This point is reiterated by a report of the Association of the Bar of the City of New York in 2004:

> Our whole tradition is opposed to coerced confessions, including by extended detentions designed to extract information. Once that Rubicon is crossed, the courts are poorly positioned to second-guess executive decisions as to the utility or necessity of extracting information from a particular detainee, or the tactics—including the length and conditions of the detentions—best calculated to perform the extraction.[114]

Thus, once the courts accept the general technique of indefinitely detaining an "enemy combatant," they lack the ability to control or oversee the conditions of detention and interrogation.[115] And sure enough, one observes the articulation of this deference toward the executive regarding the conditions of detention in *Odah v. U.S.* (2003), where the district court judge wrote,

> The level of threat a detainee poses to United States interests, the amount of intelligence a detainee might be able to provide, the conditions under which the detainee may be willing to cooperate, the disruption visits from family members and lawyers might cause—these types of judgments have traditionally been left to the exclusive discretion of the Executive branch, and there they should remain.[116]

Thus, what seemed missing from the discussions in the lower court decisions but more significantly in the Supreme Court were the implications of indefinite detention for illegal interrogations in either citizen or noncitizen enemy combatant cases.[117]

One could argue that the Supreme Court did not address the issue of torture in these cases because the torture debate had not assumed as much significance by then and the cases had not directly brought it up. After all, the Abu Ghraib pictures that brought the torture debate into public discourse were only exposed after the oral arguments in the cases (in fact, the same evening).[118] Further, the pictures created a crisis of legitimacy for the state only after the controversial memos regarding Guantánamo emerged. Thus, in 2004, the Court was more concerned with the actual questions raised in these cases that constituted the visible excesses of the "war on terror"—indefinite detention and lack of due process—and the Court's decisions did lead to some changes in executive policy.

The impact of the Hamdi case, in particular, was the implementation of some form of due process even in the Guantánamo cases. Combatant Status Review Tribunals (CSRTs) were set up to review the status of the detainees before they were subjected to the military commissions. The CSRTs were to

ascertain whether the detainees could be considered enemy combatants. The latter was defined as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."[119] Those who were declared enemy combatants were to be tried by the military commissions.

The question is, once the issue of torture became a nationwide and indeed worldwide concern and the courts were forced to take up additional cases clarifying their own previous decisions, did the Court respond more directly to the torture debate? In the Hamdan and the Boumediene cases, even though the Court was willing to challenge the democratically elected branches more directly, there was still no clear intervention in the torture debate despite the fact that the issue of coercion-tainted evidence had become a major point of contention.[120]

Salim Hamdan was captured in Afghanistan in 2001, transferred to Guantánamo in 2002, and subsequently charged with conspiracy by the president, who proclaimed him eligible to be tried by the military commissions.[121] Hamdan challenged the constitutionality of the military commissions, the charge of conspiracy, as well as the procedures that did not allow him to "see and hear the evidence against him."[122] The Supreme Court agreed with Hamdan that the president could not arbitrarily use military commissions in the absence of a specific congressional statute and that since conspiracy was not a violation of the laws of war, it could not be addressed by the military commissions. Further, the Court argued that even the procedures of the military commissions were a violation of American common law and the Uniform Code of Military Justice (UCMJ), particularly considering the fact that Hamdan, the accused, was on at least one occasion excluded from his own trial, along with his counsel.[123] Regarding the Geneva conventions that had very clearly been denied to the detainees by the executive, even though the Court did not clarify whether they had protections under the Third Geneva Convention (regarding the prisoner of war status), the Court did state unequivocally that Common Article 3 of all the Geneva Conventions was applicable to the detainees.[124] This was the case because the Court considered Common Article 3 applicable to any conflict that was not between nations, and that meant the detainees deserved a "regularly constituted court affording all judicial guarantees recognized as indispensable by civilized peoples."[125]

The Hamdan decision was possibly the most serious repudiation of the commander-in-chief by the Court. This is the case because the executive branch considered the CSRTs to be an adequate response to the Court's earlier decision requiring some due process, and yet the Court struck down the new procedures as unacceptable. Neal Katyal, who was then one of the

lead counsels for Hamdan, wrote, "the real significance of Hamdan lies in its repudiation of the Administration's radical theory that the President has the ability to interpret creatively, and even set aside, statutes that he claims interfere with his war powers."[126] According to Katyal, the most significant evidence of the repudiation of the inherent power doctrine was the executive's acceptance of the suggestion by the concurrent opinion of the Court that the executive had to go to Congress to get authorization for the military commissions, and that is exactly what happened subsequently.

Yet, even in the landmark Hamdan case, the Court once again paid little attention to the issue of torture despite the fact that the torture debate was brought within the purview of the Court in the form of evidence linked to coercion. The plurality opinion as well as the concurring opinion in Hamdan did point out that the rules of evidence allowed by the military commissions were tainted by coercion. As the concurring opinion wrote, "they make no provision for exclusion of coerced declarations save those 'established to have been made as a result of torture.'"[127] It was left to the presiding officer to decide whether the evidence had "probative value to a reasonable person."[128] Thus, surprisingly, even while noting the unfair rules regarding coercive evidence, the Court's decision remained focused on ensuring that the accused in the trial be present and privy to the evidence against him.

One could, of course, claim that the Court was not responsible for ruling on all the defective rules of the military commissions, but to the extent that torture had been one of the most controversial policies (especially after the classified memos showed that they were not aberrant acts such that the only memo that was clearly repudiated was the torture memo), it was surprising that the Court did not take this opportunity to give a clear signal on the issue.

Hamdan was decided in 2006. By then not only were the Abu Ghraib abuses well known but so were the ones at Guantánamo. The implications of the statements regarding the tensions in the prohibitions against torture had become a part of the legal and political discourse. The Court even talked about the applicability of Common Article 3 to the detainees but stopped short of identifying the implications of it for the torture debate, namely, that acts of violence were potentially a violation of the War Crimes Act of 1996, meant to address "grave breaches" of the Geneva Conventions. One of the key provisions of Common Article 3 of the Geneva Conventions was that it disallowed "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . outrages upon personal dignity, in particular humiliating and degrading treatment."[129] This meant that acts less than torture that had permeated the post-9/11 context could have been

addressed by the Court. Indeed, even if the Court did not want to confront the excess violence directly, it could have at least squarely addressed the issue of coercion-tainted evidence.

This is particularly significant when considered in the context of the military order that governed the first version of the military commissions (MC 1). Several amicus briefs had pointed to the fact that the president's military order in 2001 had stated that evidence shall be admitted if, "in the opinion of the Presiding Officer . . . the evidence would have probative value to a reasonable person."[130] According to the amicus, the wording implied that evidence derived as a result of torture was also not excluded by the president's order.[131] In fact, the ACLU read the language of the first military order as "an invitation to torture." The ACLU explains,

> The possibility that evidence secured through the methods described above might form the basis for a conviction—or even a sentence of death—infects the legitimacy of the entire commission process. Indeed, the absence of an express prohibition against the use of such tainted evidence creates an *irresistible incentive for the prosecutors of the detainees to become their torturers.*[132]

Even though the March 24, 2006, military commission instructions clarified that evidence gained from torture would not be used, they still did not explain whether evidence derived as a result of actions short of torture or in the realm of CIDT would be allowed. Thus, the lack of initiative on the part of the Court is significant also because torture and abuse were no longer invisible issues by the time the Court took up Hamdan. Even the amicus curiae and the petitioners in the case noted that Hamdan had been abused:

> Hamdan alleges—without contradiction—that while in the custody of U.S. forces, he was beaten, forced to sit motionless for days on end and exposed to sub-freezing temperatures without adequate clothing. After being transferred to the detention facility at Guantanamo Bay in 2002, he was held in solitary confinement in an eight-by-five-foot cell for ten months.[133]

Thus, the need for a clear signal from the Court on torture and CIDT was felt by the amicus groups both because of the narratives of abuse and torture and also because the groups saw a close link between the question of the constitutionality of the military commissions and the rules regarding coerced evidence. As the amici put it,

> Amici believe that this Court should make clear that a trial system based on evidence gained by torture is not a legal proceeding at all. . . . Beyond the legal question of authority and its limits that are embraced within the question presented, there are pressing reasons for the Court to address the question of coerced evidence now.[134]

Even though the Court effectively challenged the Military Commissions (MC) as a violation of the UCMJ and Article 3 of the Geneva Conventions, pointing to other rules and procedures, it did not take this opportunity, despite the requests from amici, to send a clear signal on torture and CIDT, especially regarding the link between detention and interrogation. In fact, the amici even argued that the Court should not decide the case without clarifying the rules of evidence. "The legitimacy of future proceedings, the safety of those held at Guantanamo Bay, and adherence to basic standards of fairness and justice all depend on a clear statement that reliance on the fruits of torture will not be tolerated under law."[135]

Thus, the failure of the Court to send a clear signal on torture and the unacceptability of coercive evidence is significant and needs to be focused more. Despite the limitations in the Court's decisions, one could argue that the Hamdan case did lead to the executive's move to the Congress for authorization of some of its acts and ultimately led to a repudiation of the previous military order, resulting in the new Military Commissions Act in 2006.

The Military Commissions Act of 2006 (MC A), however, retained two very controversial aspects of the executive's position, namely, the suspension of habeas corpus for the detainees and a narrow definition of coercive acts, the latter giving the Court another opportunity to address the question of torture and coercive evidence when the case came up. In a landmark judgment in June 2008, the Supreme Court in *Boumediene v. Bush* claimed that the suspension of habeas corpus by the Military Commission Act was not acceptable and that the Detainee Treatment Act (DTA) review procedures were not an adequate substitute for habeas corpus.[136] The Court rejected the government's argument that only formal de jure sovereignty ensures the reach of the constitutional privilege of habeas corpus. Rather, the Court asserted that as long as there was a de facto control over the territory, the Constitution and the right to habeas corpus were applicable.[137] Furthermore, the Court asserted that the DTA did not provide adequate procedures required to substitute the right to habeas corpus due to some of its provisions, including the lack of counsel, limited knowledge of classified charges, and use of hearsay evidence—all leading to the conclusion that "even when

all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's finding of fact."[138]

While this is an extremely significant decision, hailed as being one of the most effective rebuttals of both the executive and the Congress for suspending a basic liberty that had always been available to citizens and noncitizens, the Court's silence on the question of torture and CIDT remains troubling. In one context, the Court writes, "in view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement."[139] But one of the most significant aspects of indefinite detention has been the unlawful conditions of treatment or confinement that the Court clearly could have addressed but did not. Thus, even if the Hamdi, Padilla, and Rasul cases were more about the legality of detention, the two later cases—Hamdan and Boumediene—delved more deeply into the constitutionality of procedures that were directly or indirectly linked to torture and CIDT—either by omission (as in the president's military order and MC) or by being mentioned in some form (CSRT, DTA, and MC A).

The Court once again ignored a plea from the amici to address the issue of coerced statements. While torture was not the primary issue raised in the case, the DTA review process was attacked by amicus briefs filed by former federal judges precisely because "[t]he public record reveals that CSRT panels routinely made detention determinations without investigating torture allegations or excluding statements allegedly extracted through impermissible coercion, and the government maintains that the CSRT panels were authorized to rely on evidence extracted through such means."[140]

Thus, the entire review process was tainted by evidence derived from torture. Here, one of the caveats mentioned by many of the briefs is that regardless of whether these allegations were true or not, the more troubling issue was that there was no attempt by the CSRT review boards to assess the veracity of the claims. This is particularly significant given that the 2006 Military Commissions Act (MCA) had restricted the meaning of the protections provided by Common Article 3 of the Geneva Conventions. The grave breaches were limited to actions such as torture, rape, mutilating, maiming, or cruel and inhuman treatment.[141] The Military Commissions Act defined cruel and inhuman treatment

> as 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. . . . [T]he term "serious physical pain or suffering" shall be applied as meaning bodily injury that involves—(i) a substantial risk of death; (ii) extreme physical pain; (iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or (iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty.[142]

The narrow meaning of this term was interpreted by scholars such as Marty Lederman to point out that even a form of interrogation such as waterboarding, which many consider as torture or at least CIDT, would not be prohibited.[143] Similarly, Michael Matheson noted that the MCA did not clearly explain whether methods such as "beatings that do not cause permanent injury, exposure to cold or heat that does not cause permanent impairment, or deprivation of food, water, or medical treatment" would be prohibited.[144] Furthermore, Matheson writes, "Even more problematically, does the text apply to forcing a detainee to be naked or to commit sexual acts, or to the threatening use of dogs?"[145]

Thus, in the MCA, the broader protections provided by the original text of Common Article 3 of the Geneva Conventions against "humiliating" treatment or "outrages upon personal dignity" were deliberately removed from the scope of the War Crimes Act. Although the military specifically prohibited many of the abovementioned methods in its new field manual, the question is whether these limitations were applicable to the nonmilitary interrogators.[146] After all, some of the most controversial techniques, including waterboarding, were used against the high-value detainees, such as Abu Zubaydah and al Nashiri, who were kept at black sites.[147] Former president Bush answered this question by vetoing a bill that would have limited the CIA to using only those methods of interrogation mentioned in the army field manual.[148]

This was the broader political context of the Boumediene case, and the Court's silence was surprising also because even the petitioners in the Boumediene case, including five Bosnians, had alleged that they were subjected to "15 months of solitary confinement, sleep deprivation and extreme temperature conditions."[149] In fact, almost all the detainees who have approached the Supreme Court in the habeas cases have alleged that they have been tortured.

Thus, even if the Court were unwilling to take up torture and CIDT as a substantive due process issue, its focus on the constitutionality of the DTA and CSRTs as substitutes for the right to habeas corpus gave it adequate opportunity to make a direct intervention on torture and CIDT, and yet it did not. One has to keep in mind that the executive had asked the Court

for avoidance or extreme deference in times of war.[150] The Court, however, rejected that request in some important respects, so it is intriguing that it did not extend its intervention to issues concerning torture. Here I do not attempt an in-depth analysis of why the Court did not intervene in the torture debate. Nonetheless, a couple of theorizations regarding the response of the courts to emergencies and war may be useful in explaining why the Court did not address the issue of torture directly. Neal Katyal, for instance, notes that the Court reflects some passive virtues, a notion pointed out by Alexander Bickel, which leads the courts to take a really long time to take up a case and decide on it. As Katyal explains, the "Court employed procedural and jurisdictional doctrines to produce a useful 'time lag between legislation and adjudication, as well as shifting the line of vision.'"[151] Of course, the adverse impact of this approach of the Court is the delay of due process rights for those concerned—a good example being Padilla.[152] So is the nonintervention just a reflection of the passive virtue of the Court? The question is, how long does it take the Court to address this issue?

In contrast to this empirical observation about the nature of the Court, Sunstein actually believes that the Court should follow a minimalist perspective. As Sunstein explains,

> Minimalists believe that, in the most controversial areas, judges should refuse to endorse any large-scale approach and should be reluctant to adopt wide rulings that will . . . bind the country in unforeseen circumstances. Instead, minimalists want judges to rule narrowly and cautiously. In the context of war, minimalists would like courts to avoid constitutional issues by, for example, holding that Congress has not authorized the executive to intrude into the domain of constitutionally protected interests. Minimalists also like to avoid broad judicial pronouncements about either presidential power or liberty, preferring instead close consideration of particular measures. In the aftermath of September 11, minimalists want courts to proceed in small steps, leaving the largest issues undecided as long as possible.[153]

To be fair, Sunstein does not directly analyze whether the courts should decide on torture and CIDT. Indeed, Sunstein is highly critical of the "national security fundamentalism" (reflected by Thomas in the Hamdi case) that does not challenge the executive power at all and reads the second circuit's rejection of Padilla's arbitrary detention as an example of minimalism. However, since he rejects "liberty perfectionism," it is not clear whether his framework would be open to a broader ruling on the substantive rights of the detainees, including a right not to be subject to harsh interrogations.

The unfortunate result of the Court's silence is that it ultimately ignored the issue of aggressive interrogations both in the pre–Abu Ghraib and the post–Abu Ghraib period. There was an expectation from a wide range of groups that the Court would respond to the torture debate in the Boumediene and Hamdan cases and reiterate the protections against torture and CIDT. The post–Abu Ghraib context did force the Supreme Court to accord certain due process rights to both citizens and noncitizen enemy combatants.[154] However, the interventions failed to address the conditions of detentions despite widespread discourses on the authorization of torture.[155] Significantly, the only cases on torture that did reach the Supreme Court were not taken up by the Court since they would involve issues of "state secrets" or because they were seen as already resolved.[156]

Apart from structural reasons that may explain why the Supreme Court did not address the issue of torture, I suggest that the reason may be that doing so would have led to uncomfortable conversations on excess violence that the Court as a normative institution would be less willing to take up. In particular, addressing the torture debate in the post-9/11 context would have meant not only defining torture clearly (beyond extreme physical violence) but also specifying the nature of violence acceptable in times of necessity. Thus, in extraordinary contexts, the Court hesitated to enter the conversation on excess violence and yet, as noted earlier, the focus on judicial authenticity in torture debates has been crucial historically.[157] The silence on the torture debate, however, reflects the continuation of the uneasy relationship that law has with excess violence in both routine and extraordinary times. Of course, even while the courts stay away from the question of excess violence, the state, in its own quest for legitimacy and control, continues to find ways of accommodating acceptable levels of excess violence within an art of government.

Excess Violence as a Part of Governmentality: Building the Juridico-Medical Complex

As the preceding discussion indicates, the continuing struggle of law with excess violence is an ongoing theme in a liberal democracy and is unaddressed by the dominant framework for understanding torture, namely, the state-of-exception analysis. Similarly, the Foucauldian paradigm assumes the disappearance of excessive violence in contemporary societies because of the emphasis on an art of government that controls individuals primar-

ily by channeling their productive power. In particular, Foucault's notion of governmentality focuses on harnessing the productive capacity of individuals within a population: "government has as its purpose . . . the welfare of the population, the improvement of its condition, the increase of its wealth, longevity, health, etc."[158] Indeed, governmentality studies after Foucault have primarily been concerned with understanding how "liberal democracies developed technologies of governance which shifted away from 'top down' disciplinary and repressive controls to more indirect and persuasive controls."[159] As David Garland notes, it is the decentered state analysis emphasizing two poles of governance—how authorities govern and how individuals self-regulate—that is at the center of governmentality studies.[160] This framework largely seems to suggest an insignificant role for excess violence in modern societies. As Colin Gordon puts it,

> The idea of an "economic government" has, as Foucault points out, a double meaning for liberalism: that of a government informed by the precepts of political economy, but also that of a government which economizes on its own costs: a greater effort of technique aimed at *accomplishing more through a lesser exertion of force and authority.*[161]

Foucault's framework, from *Discipline and Punish* to his essay on governmentality, suggests that spectacular forms of violence, including torture, are rendered unnecessary because sovereignty based on obedience and fear is replaced by a decentralized power that works through disciplinary mechanisms and manages the conduct of populations. Foucault compares such a government to "the bumble bee who rules the bee hive *without needing a sting.*"[162]

In contrast to this Focauldian reading of state power, I reclaim certain key Foucaldian terms and concepts to account for the process of accommodation of excess violence by the modern state. This is significant because, while for the most part there is a transformation in the nature of state power such that direct reliance on physical pain and suffering is less visible in modern societies, there remains a space for what I call "excess violence." As noted earlier, "excess violence" is a term I reclaim from Foucaldian literature and define as violence that the state claims is unnecessary but still struggles to contain and in the process accommodates. Thus, even though Foucault underplays the role of excess violence in more modern societies, especially where the art of government emerges as a prominent mode of control, his notion of governmentality can actually be reinterpreted to allow for an understanding of how excess violence could be addressed within that framework. Here I turn to Kevin Stenson's formulation that since liberalism always struggles to maintain sovereignty, it turns to "harsh despotic technologies of rule to bring government to areas and groups deemed to be most troublesome."[163] The emphasis by Stenson on these harsh technologies of rule easily fit within the Foucauldian framework if one understands the workings of sovereignty, discipline, and governmentality not in a chronological way, with the latter replacing the former two, but rather in a "synchronic" way, with all three working together.[164] Thus, even though governmentality studies for the most part have not focused on the role of excess violence in modern states, the Foucualdian framework does allow for such exploration.

Here I develop the Foucauldian notion of governmentality by indicating just one instance of the way excess violence is accommodated in the art of government. Using Foucault's concept of juridico-medical complex, I analyze how medical professionals have actually been drawn into the state's attempt to accommodate excess violence. In the post-9/11 context, there have been different kinds of allegations against medical professionals in the context of Iraq, Guantánamo Bay, Cuba, and Afghanistan, ranging from nonreporting of torture and ill treatment[165] to nonintervention in cases of torture[166] to actual participation in interrogations, including its "harsh" or "enhanced" forms. The latter allegation is of most interest to this argument because it notes a long-standing history of psychologists being involved in developing interrogation techniques.

Many scholars, including Alfred McCoy and Naomi Klein, have pointed out that the genesis of the "harsh" methods of interrogation used in the post-9/11 period lies in the experiments and studies conducted by psychologists during the Cold War.[167] The similarities between the methods used by the CIA from the 1960s till the present is so strong that Alfred McCoy writes, "Across the span of three continents and four decades, there is a striking similarity in U.S. torture techniques—from the CIA's original Kubark Manual, to the agency's 1983 Honduras training handbook, all the way to General Ricardo Sanchez's 2003 orders for interrogation in Iraq."[168]

During the Cold War, the CIA funded a number of studies that looked into the possibility of using psychological methods of control.[169] The first phase of these studies and experiments was focused on mind control with the help of "hypnosis and hallucinogenic drugs."[170] The experiments with drugs and hypnosis, however, failed. As Mark Bowden puts it, "fear and anxiety turned into terrifying hallucinations and fantasies, which made it difficult to elicit secrets, and added a tinge of unreality to whatever information was divulged."[171]

This led to a focus, in the second phase, on sensory deprivation and self-inflicted techniques, or what McCoy calls a "new approach to torture that was psychological, not physical, perhaps best described as 'no-touch torture.'"[172] Relating these methods to the current conflict, McCoy points out that the classic Abu Ghraib picture with the hooded Iraqi man with arms extended and wires attached to him exemplifies the methods of sensory deprivation (hooding) combined with extended arms as an example of the self-inflicted pain. Self-inflicted pain occurs when the subject's own action—extended arms—is responsible for the pain rather than an external force.[173] Well-known psychologists at famous universities, such as McGill in Canada, conducted many of these studies.[174] McCoy points to one such study in which student subjects were put in isolation, with reduced stimuli: "light 'diffused' by translucent goggles, 'auditory stimulation' limited by sound proofing and constant low noise, and 'tactual perception' blocked by thick gloves and a U-Shaped foam pillow about the head."[175] McCoy points to the similarities between these methods and the "goggled and muffled prisoners" at Guantánamo, thus illustrating the actual use of methods developed as a result of these studies and experiments.[176] What emerged from a number of studies and experiments funded and/or supported by the CIA was the Kubark Manual, produced in 1963, which emphasized the importance of using these psychological techniques to create "regression," "dependence," and "confusion" so as to make the situation "mentally intolerable" for the subjects.[177]

Even when CIA programs (exported to Asia and Latin America, among other parts of the world) were uncovered and U.S. congressional inquiries were held, according to McCoy, these inquiries did not look into the extent and source of psychological torture.[178] In fact, McCoy explains that the need to narrow the definition of mental torture was motivated by the state's desire to exempt some of these methods used by the CIA. As McCoy writes, "Strikingly, Washington's narrow definition of 'mental harm' excluded sensory deprivation (hooding), self-inflicted pain (stress positions) and disorientation (isolation and sleep denial)—the very techniques the CIA had refined at such great cost over several decades."[179] Thus, even while excluding egregious forms of physical torture and some forms of mental torture (limited to the four predicate acts), this narrow definition is another instance of the way the liberal state allowed for a limited understanding of torture that accounts for a number of psychological techniques in current times.

The development of these techniques, according to Darius Rejali, was not an accident of history but a necessity for democracies such as the United States. Rejali writes that these "clean" (nonscarring) "stealth techniques" are developed not by authoritarian governments, as is commonly believed, but rather have been the product of the main Western democracies—England, France, and the United States.[180] Indeed, one of the main reasons why these are primarily found in democracies is that their history of human-rights monitoring requires democracies to use torture techniques that leave fewer marks and can thus evade detection. As Rejali explains,

> *Public monitoring leads institutions that favor painful coercion to use and combine clean torture techniques to evade detection, and, to the extent that public monitoring is not only greater in democracies, but that public monitoring of human rights is a core value in modern democracies, it is the case that where we find democracies torturing today we will also be more likely to find stealthy torture.*[181]

Thus, Rejali forcefully illustrates that it was necessary for these states to develop less visible forms of torture in order to maintain their legitimacy. This further strengthens my central argument that not only is torture an ongoing issue for liberal states but there is in fact a long-standing history of these techniques being constantly developed in such a way as to evade detection by leaving fewer marks, further exhibiting a constant negotiation with excess violence. The question is the exact nature of this excess violence. Is it lawless? What are the parameters of its functioning? Taking the case of the juridico-medical complex, I suggest that the state constantly negotiates the boundaries of excess violence to ascertain what is permissible and the extent to which it can push those boundaries without explicitly appearing lawless.

In the post-9/11 context, the role of psychologists was not just restricted to conducting studies for the purpose of developing psychological techniques for the CIA; medical professionals actually became part of a juridico-medical complex. In 2002, Geoffrey Miller, who was in charge of Guantánamo, set up what is called a behavioral science consultant team (BSCT).[182] These BSCTs always had a psychologist and a psychiatrist who helped in developing strategies of interrogation. The strategies were based on psychological analyses of detainees, who were assessed by medical personnel who either participated in interrogations or observed the sessions and gave feedback to the interrogators. Many of these interrogation techniques were based on specific medical information about the detainees. This medical information was provided by caregivers ostensibly on the basis of a 2002 memo suggesting that privacy rights did not apply to detainees at Guantánamo and a 2005 memo that allowed for medical information to be used in interrogations.[183] Even when the Pentagon

created guidelines regarding the involvement of medical caregivers in interrogations, prohibiting those directly engaged in caregiving from participating, they did not clarify whether noncaregivers could still be involved.[184]

While the BSCT developed customized methods for individual detainees, the base material appears to have been provided by the army's own program: SERE (Survival, Evasion, Resistance, Escape)—a program meant to train military personnel in ways of resisting torture when confronted by enemy forces. Mayer describes the SERE training as including the following: "trainees are hooded; their sleep patterns are disrupted; they are starved for extended periods; they are stripped of their clothes; they are exposed to extreme temperatures; and they are subjected to harsh interrogations by officials impersonating enemy captors."[185]

The link between SERE and Guantánamo is confirmed by the Department of Defense (DOD) inspector general's report that notes a meeting in Fort Bragg in September 2002 at which the members of the behavioral science consultation team from Guantánamo were familiarized with the SERE methods that they could potentially develop for use by the interrogators (JTF [Joint Task Force]-170) at Guantánamo. These methods eventually got used as counterresistance techniques in Guantánamo and later traveled to Iraq. The DOD continues to oppose the understanding that "SERE training was a determinate variable in the development of JTF-170 interrogation techniques."[186] However, it is important for our purpose to note the debate on the role of psychologists that has ensued as a result of these revelations. In other words, regardless of whether SERE methods were directly exported or not, the coincidental similarity between the methods used at Guantánamo, SERE, and the studies conducted in the past is striking, especially because of the central role of psychologists in all these contexts.

As a result, medical professionals seem to have emerged as central actors in the debate on interrogations, pointing to a key role of medicine in state power, as noted by Foucault. In an interview in 1976 Foucault remarked, "Medicine has taken on a general social function: it infiltrates law, it plugs into it, it makes it work. A sort of juridico-medical complex is presently being constituted, which is the major form of power."[187] Foucault notes how law and medicine work together in what he terms "the juridico-medical complex." The relationship between law and medicine in modern societies is of course an uneasy one, as illustrated in the dilemma faced by the doctors in another context of state power, namely, executions by lethal injections. Timothy Kaufman-Osborn eloquently writes about this paradox for state (law) and doctors (medicine) regarding executions:

> On the one hand, the state has an interest in medicalizing capital punishment as fully as possible since it thereby assumes the character of a depoliticized humanitarian (non) event, a painless matter of putting someone "to sleep." . . . On the other hand, the medical profession has an obvious interest in resisting the conscription of its members for this purpose.[188]

Thus, as far as the doctors are concerned, the dilemma is that as healers they are unwilling to participate in state killing. However, as Kaufman-Osborn points out, they also risk being found guilty of violating their "code of ethics" by not providing suitable medical services during executions and in the process making the state look incompetent.[189]

The role of psychologists in the post-9/11 context has also raised similar questions about law and medicine. In response to the various criticisms of the role of psychologists in developing interrogation methods, there has been a very intense debate within the American Psychological Association (APA) on the role of psychologists in interrogations.[190] The APA set up a Presidential Task Force on Psychological Ethics and National Security (PENS) to look into the issue, especially since many of its members criticized psychologists for violating U.S. and international laws against torture and cruel, inhuman, and degrading treatment.[191] The PENS report, however, concluded that "[t]he Task Force believes that a central role for psychologists working in the area of national security–related investigations is to assist in ensuring that processes are *safe, legal, and ethical* for all participants."[192] The PENS report confirmed their commitment against torture and CIDT, stating that psychologists have a responsibility not only to stay away from these practices but to report them and to make sure that they do not get involved in situations where there could be a conflict between their role as consultants and their role as caregivers. Yet the report accepted a central role for psychologists in interrogations that was reiterated by the APA in 2007. Members of the APA, in contrast, criticized the report, claiming that members of the PENS were in fact directly involved in creating interrogation methods for Guantánamo, Iraq, and Afghanistan and that three members actually converted the SERE methods into harsh interrogation techniques for Guantánamo.[193] In 2008, the APA managed to find a majority willing to bar its members from participating in interrogations.[194] However, what this intense debate indicates in the post-9/11 context is yet another illustration of the uneasy relationship between law and medicine in the juridico-medical complex.

That the United States envisioned a role for medical professionals in interrogations was visible in the Report of the Working Group on Detainee Interrogations (DOD), which asked officials to ensure that

> the detainee is *medically and operationally evaluated as suitable* (considering all techniques to be used in combination); interrogators are specifically trained for the technique(s); a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the *presence or availability of qualified medical personnel*) is developed; appropriate supervision is provided and appropriate specified senior approval is given for use with any specific detainee (after considering the foregoing and receiving legal advice).[195]

Indeed, medical professionals played a particularly visible role in justifying the use of "harsh interrogation techniques" on the high-value detainees. As the May 2005 memo on evaluating the legality of certain interrogation techniques stated,[196] "You have also explained that, prior to interrogation, each detainee is evaluated by medical and psychological professionals from the CIA's Office of Medical Services ('OMS') to ensure that he is not likely to suffer any severe physical or mental pain or suffering as a result of interrogation."[197] However, safety and evaluation here not only mean protecting the welfare of the detainee but more significantly refer to making it safe for the interrogator who is interested in gaining information even while trying to avoid violation of any laws against torture and CIDT. The psychologists then have to make sure that the interrogations continue as long as they do not reach the threshold of state definitions of torture, namely, the Federal Torture Statute (and CIDT if applicable). As the 2005 memo notes,

> At anytime, any on-scene personnel (including the medical or psychological personnel . . .) can intervene to stop the use of any technique if it appears that the technique is being used improperly, and on scene medical personnel can intervene if the detainee has developed a condition making the use of the technique unsafe. More generally, medical personnel watch for signs of physical distress or mental harm so significant as possibly to amount to the "severe physical or mental pain or suffering" that is prohibited by sections 2340-2340A.[198]

This is suggestive again of the anxiety of the liberal state. The state cannot stop relying on excess violence but has to ensure that the severity does not reach the levels that would constitute torture and CIDT under international and national laws. What the psychologists supporting a ban understand is that while formal laws against torture and CIDT would serve as some protection against illegal interrogations, they still allow for a great deal of flexibility and accommodation of excess violence, especially when these terms and laws are narrowly defined. Thus, the post-9/11 context brings to the fore another instance of negotiating excess violence where the psychologists are forced to balance their role as healers while responding to the state's need for excess violence. The juridico-medical complex thus formed is unstable and under attack and yet it indicates an instance of excess violence functioning within the art of government and not outside of it.

The recurrence of these acts, not as aberrations but as policies, at different moments of history suggests a constant negotiation with excess violence—an issue unsettled. The difference in the post-9/11 context is that these methods appear to be much more visible and, at least initially, explicitly defended. Yet what the withdrawal of the memo and the methods of interrogation exhibit is that even then the state has to ensure, both rhetorically and legally, that the terms being used are "enhanced or harsh interrogation techniques" and not a defense of torture by the all-powerful commander-in-chief in an exceptional context. The rhetoric and ambiguous laws work together to attempt a coherent state narrative that often breaks down and needs renegotiating. The constant negotiation and accommodation of excess violence lead to the assertion that excess violence is compatible with governmentality, not outside or in excess of it. Even if traditional forms of sovereignty are replaced by an art of government that focuses on populations, it is important to recognize that the very art of government includes certain excess forms of violence.

CHAPTER 2

1. The quotation used as the first part of the chapter title can be found at Mail Call, "Torture and the Modern World," *Newsweek*, December 17, 2001. http://proquest.umi.com/pqdweb?did=96371833&sid=2&Fmt=3&clientId=5239&RQT=309&VName=PQD (last visited May 10, 2006).

2. Mike Dorning, "Prisoner Abuse Poses Peril for Bush," *Chicago Tribune*, July 12, 2004.

3. Daniel Benjamin, "Perils of the Dark Side: U.S. Excesses in the Terror War Are Causing a Self-Defeating Backlash," *Time International*, December 12, 2005.

4. Lynne Cheney, wife of former U.S. vice president Dick Cheney, gave the *Daily Show* host, Jon Stewart, a Darth Vader statue as a gift, clearly acknowledging the fact that the former vice president was being compared to the *Star Wars* character. http://starwarsblog.wordpress.com/2007/10/11/darth-vader-gift-on-the-daily-show/ (last visited January 30, 2008).

5. George Bush's Nomination Acceptance Speech, Republican Convention, 2004. http://www.presidentialrhetoric.com/campaign/rncspeeches/bush.html.

6. Giorgio Agamben, *State of Exception*, translated by Kevin Attell (Chicago: University of Chicago Press, 2005).

7. The torture memo is the memo signed by Jay S. Bybee though written by John Yoo. Lisa Hajjar had very early on noted the significance of actors such as John Yoo, who had written this memo and who had also been the main state official to put forward the arguments about the nonapplicability of Geneva Conventions to the "war on terror." Lisa Hajjar, "What's the Matter with Yoo? The Crime of Torture and the Role of Lawyers," paper presented at Law and Society Association Annual Meeting, Las Vegas, 2005. Bybee worked as an assistant attorney general in the Office of Legal Counsel at the U.S. Department of Justice from 2001 to 2003. John Yoo worked as a deputy assistant attorney general in the Office of Legal Counsel at the U.S. Department of Justice from 2001 to 2003. Memorandum for Alberto R. Gonzales, Counsel to the President, from U.S. Department of Justice, Office of the Attorney General, Jay S. Bybee (August 1, 2002), "Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340 – 2340A," in *Torture and Truth: America, Abu Ghraib, and the War on Terror*, edited by Mark Danner, 115 – 66 (New York: New York Review of Books, 2004).

8. Kim Lane Scheppele, "Hypothetical Torture in the War on Terrorism," *Journal of National Security Law & Policy* 1 (2005): 285-340, 289.

9. Agamben, *State of Exception*, 3.

10. Judith Butler, "Guantánamo Limbo," *Nation*, April 1, 2002.

11. Nasser Hussain, "Beyond Norm and Exception: Guantanamo," *Critical Inquiry* (Summer 2007): 734-53, 739.

12. Ibid., 741.

13. Ibid.

14. Fleur Johns, "Guantánamo Bay and the Annihilation of the Exception," *European Journal of International Law* 16 (2005): 613-35, 618.

15. Hussain, "Beyond Norm and Exception," 735.

16. Danner, ed., *Torture and Truth*. Diane Marie Amann, "Abu Ghraib," *University of Pennsylvania Law Review* 153 (2005): 2085-2141.

17. Memorandum for Commander, Joint Task Force 170, "Request for Approval of Counter-Resistance Strategies" (October 11, 2001), in Danner, ed., *Torture and Truth*, 167-68. Memorandum for the Commander, U.S. Southern Command, "Counter Resistance Techniques" (January 15, 2003) (Signed by Secretary Rumsfeld), in Danner, ed., *Torture and Truth*, 183.

18. Press Briefing by White House Counsel, Judge Alberto Gonzales, DOD General Counsel, William Haynes, DOD Deputy General Counsel, Daniel Dell'Orto, and Army Deputy Chief of Staff for Intelligence, General Keith Alexander, June 22, 2004. http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html (last visited July 6, 2004).

19. See Paul Kahn, *Sacred Violence: Torture, Terror, and Sovereignty* (Ann Arbor: University of Michigan Press, 2008), 9.

20. Indeed, one could argue that the Bybee memo was more crisis generating than even the recent memos precisely because now a lot of documents are emerging as representing moments of the past rather than as representing the policies of a government in power.

21. This is the case because many of its sections did not explain why military interrogators would not be inhibited by the Uniform Code of Military Justice and other laws concerning the military. Marty Lederman, "Heather MacDonald's Dubious Counter-'Narrative' on Torture," January 1, 2005. http://balkin.blogspot.com/2005/01/heather-macdonalds-dubious-counter.html (last visited, June 26, 2007).

22. The Yoo memo is even more egregious because it went beyond the Bybee/Yoo memo and argued that the president, on the basis of commander-in-chief powers, could bypass all laws regarding interrogations—the Fifth and Eighth Amendments of the U.S. Constitution, as well as federal criminal laws—if the interrogations are "properly authorized interrogations of enemy combatants." Here I primarily focus on the commander-in-chief powers, the necessity defenses, and the definitions on torture that are common to both the Bybee and the Yoo memos. Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, "Re: Military Interrogation of Alien Unlawful Combatants Held outside the United States," March 14, 2003. http://graphics8.nytimes.com/packages/pdf/national/OLC_Memo1.pdf (last visited January 30, 2008).

23. "Torture Memo Author John Yoo Responds to This Week's Revelations," Esquire.com, April 3, 2008. http://www.esquire.com/the-side/qa/john-yoo-responds (last visited December 30, 2008).

24. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven Bradbury, Principal Deputy Assistant Attorney General, "Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee," May 10, 2005. http://luxmedia.com.edgesuite.net/aclu/olc_05102005_bradbury46pg.pdf (last visited January 23, 2011).

25. Memorandum for William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo and Robert J. Delahunty, "Application of Treaties and Laws to al Qaeda and Taliban Detainees (January 9, 2002)," in *The Torture Papers: The Road to Abu Ghraib*, edited by Karen J. Greenberg and Joshua L. Dratel, 38-79 (New York: Cambridge University Press, 2005), 43-47.

26. *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Initial Reports of the States Parties Due in 1995 (United States of America) to the United Nations Committee against Torture*, October 15, 1999. More discussion on the definitional issues in the Bybee memo will come later.

27. Bybee/Yoo Memo, in Danner, ed., *Torture and Truth*.

28. Bybee/Yoo Memo, in Danner, ed., *Torture and Truth*, 149.

29. Yoo, "Re: Military Interrogation of Alien Unlawful Combatants Held outside the United States," 1.

30. John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago: University of Chicago Press, 2005), 5.

31. David Schultz, Book Review of John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago: University of Chicago Press, 2005). http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/yoo0106.htm (last visited January 30, 2008).

32. Yoo, *The Powers of War and Peace*, 18.

33. Yoo, "Re: Military Interrogation of Alien Unlawful Combatants Held outside the United States," 5.

34. Justice Thomas criticized the plurality for not being deferential enough to the rights of the executive, the president, and, more importantly, the commander-in-chief and stated that the Court should not second guess his actions. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

35. The inherent powers doctrine has been used a number of times in the war on terror, such as in the context of the NSA wiretapping. The Court's decisions in old and new cases are also used to bolster this argument. See Department of Justice Defense on NSA wiretapping, December 2005. http://www.sinc.sunysb.edu/Class/pol325/DoJ%20Letter%200n%20NSA%20Eavesdropping.htm (last visited, October, 2006); John Yoo, "Commentary: Behind the 'Torture Memos'; As Attorney General Confirmation Hearings Begin for Alberto Gonzales, Boalt Law School Professor John Yoo Defends Wartime Policy," January 2005. http://www.berkeley.edu/news/media/releases/2005/01/05_johnyoo.shtml (last visited July 5, 2007).

36. Here the congressional authorization was for Afghanistan and, later, for Iraq. Fisher points out that even though George Bush Jr. did go to the Congress before attacking Afghanistan and Iraq, there were two caveats. The first was that the administration still insisted that, under the "inherent" powers doctrine, they need not have gone to the Congress for authorization, and the second was that the Iraq resolution did not clearly indicate use of force. Louis Fisher, *Presidential War Power* (Lawrence: University Press of Kansas, 2004).

37. Yoo, "Re: Military Interrogation of Alien Unlawful Combatants Held outside the United States," 4.

38. While Fisher cannot deny that the past presidents have not necessarily gone to the Congress in order to get their consent (in terms of declaration or authorization), he disagrees with Yoo that this was the intent of the founders (Fisher, *Presidential War Power*, preface, xi). One of Fisher's most powerful critiques of the unilateral commander-in-chief inherent powers doctrine is that even in a new nation that was in the process of formation

and faced various crises, the founders chose to reject the British model of resting all powers in the executive and asked for statutory authorization, not relying on inherent powers. Fisher, *Presidential War Power*.

39. In its ratification of the UN convention, the United States limited the protections against cruel, inhuman, and degrading treatment to violations disallowed by the Fifth, Fourteenth, and Eighth Amendments of the U.S. Constitution. Further, since the Fifth Amendment was not considered applicable outside the United States, there was an assumption that there was no prohibition on CIDT abroad. The John Yoo memo actually argues that the "Fifth Amendment Due Process Clause does not apply to the President's conduct of a war" and that, even if it does, the "Fifth Amendment does not apply extraterritorially to aliens." Yoo, "Re: Military Interrogation of Alien Unlawful Combatants Held outside the United States," 6. See critique of this position in Seth F. Kreimer, "'Torture Lite,' 'Full-Bodied' Torture, and the Insulation of Legal Conscience," *Journal of National Security Law & Policy* 1 (2005): 187-229. Kreimer's analysis suggests that the basis for some of the constitutional protections against torture, namely, to defend "bodily integrity" from "pain and suffering" and "cruelty," are equally applicable to cruel, inhuman, and degrading treatment, therefore making such distinctions redundant. In contrast to Kreimer, Parry states that existing laws are inadequate to deal with torture primarily because the laws do not provide a broader definition of torture that includes not only inflicting "severe pain and suffering" for information gathering or punishment but also "domination" and "blaming the victim for the pain." John T. Parry, "'Just for Fun': Understanding Torture and Understanding Abu Ghraib," *Journal of National Security Law and Policy* 1 (2005): 253-84, 260.

40. Yoo, "Re: Military Interrogation of Alien Unlawful Combatants Held outside the United States," 32. The 2003 Yoo memo does try to argue that the Federal Torture Statute may not even be applicable to Guantánamo since it was "within the territorial United States or on [a] permanent military [base] outside the territory of the United States." Yet it still needs to make sure that the definition of torture is narrow in case the statute is seen as applicable, especially when Yoo argued elsewhere that the aliens at Guantánamo Bay didn't have access to U.S. courts and constitutional protections.

41. Bybee/Yoo memo in Danner, ed., *Torture and Truth*, 108; Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, "Re: Legal Standards Applicable under 18 U.S.C. §§ 2340-2340A" (December 30, 2004) (hereafter Levin Memo, 2004) http://www.usdoj.gov/olc/dagmemo.pdf (last visited March 3, 2006), 3.

42. Statement of Mark Richard, Deputy Assistant Attorney General, U.S. Department of Justice, in *Convention against Torture*, Hearing before the Senate Committee on Foreign Relations, 101st Congress, 1990.

43. See discussions on definition of torture in Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (The Hague: Martinus Nijhoff, 1999).

44. *Black's Law Dictionary* quoted in Bybee/Yoo memo, in Danner, ed., *Torture and Truth*, 117. Also, Joan Dayan's work points to the fact that specific intent has been an important requirement in the applicability of the protections under the Eighth Amendment in recent years. Joan Dayan, "Cruel and Unusual: The End of the Eighth Amendment," *Boston Review* (October/November, 2004). http://bostonreview.net/BR29.5/dayan.html (last visited March 31, 2006).

45. Bybee/Yoo Memo, in Danner, ed., *Torture and Truth*, 119-20, emphasis added.

46. Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House," *Columbia Law Review* 105 (2005): 1681-1750, 1708.

47. See Hajjar, "What's the Matter with Yoo?"

48. David Luban, "Liberalism, Torture, and the Ticking Bomb," in *The Torture Debate in America*, edited by Karen J. Greenberg, 35-83 (Cambridge: Cambridge University Press, 2005).

49. Ibid., 38-42.

50. Ibid., 43-44.

51. Ibid., 44-45.

52. Ibid., 57; Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* (New York: Simon & Schuster, 2006), 91.

53. Waldron, "Torture and Positive Law."

54. Margulies, *Guantánamo and the Abuse of Presidential Power*, 92.

55. Levin Memo, 2004, 2.

56. In September 2006, the military introduced a new manual that explicitly prohibited certain methods of interrogation, including hooding, electric shocks, food deprivation, mock executions, waterboarding, use of military dogs, and sexual humiliation. Field Manual No. 2-22.3, 2006. http://www.fas.org/irp/doddir/army/fm2-22-3.pdf (last visited December 25, 2007).

57. Austin Sarat, "Situating Law between the Realities of Violence and the Claims of Justice: An Introduction," in *Law, Violence, and the Possibility of Justice*, edited by Austin Sarat, 3-16 (Princeton, NJ: Princeton University Press, 2001). Timothy Kaufman-Osborn, *From Noose to Needle: Capital Punishment and the Late Liberal State* (Ann Arbor: University of Michigan Press, 2002).

58. Here, of course, I refer to the well-known essay by Austin Sarat and Thomas R. Kearns, "A Journey through Forgetting: Towards a Jurisprudence of Violence," in *The Fate of Law*, edited by Austin Sarat and Thomas Kearns, 209-73 (Ann Arbor: University of Michigan Press, 1991).

59. Sarat, "Situating Law between the Realities of Violence and the Claims of Justice," 3.

60. Robert Cover, "Violence and the Word," in *Narrative, Violence, and the Law: The Essays of Robert Cover*, edited by Austin Sarat, Michael Ryan, and Martha Minow, 203-38 (Ann Arbor: University of Michigan Press, 1995), 203.

61. Kaufman-Osborn, *From Noose to Needle*, chapter 2.

62. Austin Sarat, "Killing Me Softly: Capital Punishment and the Technologies for Taking Life," in Sarat, *When the State Kills: Capital Punishment and the American Condition*, 60-84 (Princeton, NJ: Princeton University Press, 2001).

63. Ibid.

64. Kate Randall, "Executions on Hold in Two U.S. States," *World Socialist Website* 18 (December 2006). http://www.wsws.org/articles/2006/dec2006/leth-d18.shtml (last visited, May 1, 2007).

65. Frederick A. O. Schwarz and Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (New York: New Press, 2007).

66. "'Torture Memo Author John Yoo Responds to This Week's Revelations."

67. Ibid.

68. Press Briefing by White House Counsel, Judge Alberto Gonzales (June 22, 2004). http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html (last visited July 6, 2004).

69. Statement of Mark Richard, 13.

70. Ibid., 16.

71. Ibid.

72. Ibid.

73. Levin Memo, 2004, 8.

74. Claims for civil damages are allowed under the TVPA (Torture Victim Protection Act) but are primarily for torture committed by non-U.S. officials or foreigners.

75. Levin Memo, 2004, 9-10.

76. Scheppele, "Hypothetical Torture," 289. Even legal scholars, while being extremely critical of the narrow definitions of torture adopted by the Bush administration, are seldom unanimous on the parameters of the term. For instance, John Parry suggests that torture and CIDT should not be considered different because that distinction allows officials to claim that "no matter what they do, at least it was not torture." He argues that torture should be considered on a continuum with a number of other forms of "violent and coercive state practices." John T. Parry, "Just for Fun," 258. Sanford Levinson, in contrast, disagrees with Parry that the distinction between terms such as "torture" and "cruel, inhuman, and degrading treatment" should not be maintained. For Levinson, making that distinction does not mean that CIDT is being allowed or accepted. Levinson writes, "To say that something is 'not torture' is not to commend or even to tolerate it." But he adds, "I think it is especially important to differentiate between 'degrading treatment' and 'torture,' lest one end up trivializing the concept of torture and diminishing the special horror attached to that term." Sanford Levinson, "In Quest of a 'Common Conscience': Reflections on the Current Debate about Torture," *Journal of National Security Law & Policy* 1 (2005): 231-52, 242.

77. See definitions of torture and CIDT in ICCPR and UN Convention, Scheppele. "Hypothetical Torture."

78. Ibid. and Federal Torture Statute, 1994. http://caselaw.lp.findlaw.com/casecode/uscodes/18/parts/i/chapters/113c/sections/section_2340.html (last visited December 15, 2007).

79. Statement of Mark Richard, 17.

80. Ibid.

81. When the United States signed and ratified the treaty in 1994, it put forward this particular understanding of the definition of torture. This specific version of the UN convention subsequently became the basis of the Federal Torture Statute. U.S. Report to CAT, 1999, 25.

82. Statement of Mark Richard, 17.

83. *Review of Department of Defense Detention Operations and Detainee Interrogation Techniques (Church Report)*, 2005. http://humanrights.ucdavis.edu/resources/library/documents-and-reports/ChurchReport.pdf (last visited January 23, 2011).

84. For Secretary of Defense from William Haynes, "Counter Resistance Techniques" (November 27, 2002) (Signed by Secretary Rumsfeld, December 2002), in Danner, ed., *Torture and Truth*, 181-82.

85. Memorandum for the Commander, U.S. Southern Command, from Secretary of Defense, "Counter Resistance Techniques in the War on Terrorism" (April 16, 2003), in Danner, ed., *Torture and Truth*, 199-204.

86. Memorandum for Commander, Joint Task Force, from Diane Beaver, "Legal Review on Aggressive Interrogation Techniques" (11 Oct. 2002), in Danner, ed., *Torture and Truth*, 169-177.

87. Field Manual No. 2-22.3, 2006. http://www.fas.org/irp/doddir/army/fm2-22-3.pdf (last visited December 25, 2007).

88. Michael Ratner, "Moving Away from the Rule of Law: Military Tribunals, Executive Detentions, and Torture," *Cardozo Law Review* 24 (2003): 1513-22, 1515.

89. President Bush, Military Order of November 13, 2001, in Danner, ed., *Torture and Truth*, 78-82.

90. Frank H. Wu, "Profiling in the Wake of September 11," *Criminal Justice Magazine* 17 (2002).

91. Walker Lindh (the "American Taliban") was arrested in Afghanistan and initially detained but was immediately given access to lawyers once his U.S. citizenship was revealed. Subsequently, he was tried in the civilian court. In the case of Lindh there were allegations of torture that may have come up in a U.S. court had there not been a bargain made between Lindh and the government. However, some scholars argue, using the *New York v. Quarles* case, that the public safety exception would allow the use of coercion in case of Lindh. M. K. B. Darmer, "Lessons from the Lindh Case: Public Safety and Fifth Amendment," *Brooklyn Law Review* 68 (2002): 241-87.

92. *Padilla v. Rumsfeld*, 542 U.S. 426 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush* 128 S. Ct. 2229 (2008).

93. Margulies, *Guantánamo and the Abuse of Presidential Power*, 157.

94. On September 18, 2001, the U.S. Congress passed a joint "Authorization for Use of Military Force" allowing the president "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html (last visited May 10, 2006). Also see President's Military Order in Danner, ed., *Torture and Truth*.

95. *Padilla v. Rumsfeld*, 233 F. Supp. 2d 564 (2002) and *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42 (2003).

96. *Jose Padilla v. Rumsfeld*, 542 U.S. 426 (2004). A few days before the government was supposed to file its response to Padilla's appeal to the Supreme Court (again), the government stated that they were transferring his case to a federal criminal court for materially supporting the terrorists and moved him to civilian custody, and finally he was tried and convicted in the domestic system. In April 2006, the Supreme Court decided not to take up the Padilla case and as a result did not rule on the extremely significant aspect of the Padilla case regarding the issue of indefinite detention of American citizens. Linda Greenhouse, "Justices Decline Terrorism Case of a U.S. Citizen," *New York Times*, April 4, 2006.

97. Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven, CT: Yale University Press, 2006), 26-27.

98. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

99. The Court's decision is nonetheless extremely significant because of the highly divided nature of the Court in the case. While the plurality (O'Connor, Rehnquist, Kennedy, and Breyer) found this balance between individual and government interests, Scalia disagreed that the Court should have dealt with it this way. He believed that Hamdi should have been tried either for treason or for another crime. If that was not possible,

the writ should have been suspended. In the absence of both these options, Hamdi should be released. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

100. Ackerman, *Before the Next Attack*.

101. Cass R. Sunstein, "Recent Decisions of the United States Court of Appeals for the District Court: National Security, Liberty, and the D.C. Circuit," *George Washington Law Review* 73 (2005): 693 – 709.

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

103. The dissent, however feels that by deciding the case this way, "the court boldly extends the scope of the habeas statute to the four corners of the earth" since it allows anyone "captured in active combat" from any part of the world to be able to file a *habeas* petition against the secretary of defense. The dissent concludes by stating strongly that the action of the Court is a "clumsy counter textual reinterpretation that gives wartime prisoners greater habeas rights than domestic detainees," mentioning specifically Padilla. *Rasul v. Bush*, 542 U.S. 466, 498-505 (2004).

104. Indeed, Chemerinsky points out that the government did achieve major victories during this time. Hamdi did allow for detention of an American enemy combatant, Rasul did not specify the due process available, and Padilla was asked to go back to the courts. Erwin Chemerinsky, "Wartime Security and Constitutional Liberty: Detainees," *Albany Law Review* 68 (2005): 1119-26.

105. Ibid., 1122.

106. James Thuo Gathii writes that the extraterritoriality argument, used in the Rasul case in district court, was primarily an excuse used by the government not to intervene in cases where the United States could be using torture against noncitizens. He points to other cases outside the United States involving destruction of U.S. property, commercial agreements, and torture by others that had not been considered outside the jurisdiction of the U.S. courts. According to Gathii, the ruse of extraterritoriality has not only been used previously by the United States in the case of Haitian refugees but also constitutes a more modern version of a typical colonial strategy of denying rights on the basis of citizenship to the colonial subjects and territories under their control. James Thuo Gathii, "Torture, Extraterritoriality, Terrorism, and International Law," *Albany Law Review* 67 (2003): 335-70.

107. In the oral arguments for the Hamdi case, there is a brief mention of the Torture Convention by Justice Ginsburg but it is not explored much. http://www.oyez.org/cases/2000-2009/2003/2003_03_6696/argument/ (last visited January 30, 2008).

108. *Jose Padilla v. Rumsfeld*, 542 U.S. 426 (2004), 465, emphasis added.

109. *Padilla v. Rumsfeld*, 233 F. Supp. 2d 564, 574 (2002), emphasis added.

110. *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 49 (2003). The government, for its part, argued that the Mobbs and Jacoby declarations (based on some interviews and interrogations by state officials) used to confer the status of "enemy combatant" to Padilla were adequate to fulfill the "some evidence" test.

111. Some indication of what the justices were thinking in the Padilla case was apparent in the oral argument. There was concern about constraints on the use of torture that the state actually accepted and also discusson on whether there was precedent of incommunicado detention for information gathering. The majority, however, did not finally concern itself with this explicitly in the opinion, and only the dissent pointed to the integral relation between detention and interrogation. See oral arguments in Padilla case. http://www.oyez.org/cases/2000-2009/2003/2003_03_1027/argument (last visited January 30, 2008).

112. *Rasul v. Bush*, 215 F. Supp. 2d 55, 56-57 (2002).

113. Gathii, "Torture, Extraterritoriality, Terrorism, and International Law."

114. "The Indefinite Detention of 'Enemy Combatants': Balancing Due Process and National Security in the Context of the War on Terror," *Record of the Association of the Bar of the City of New York* 59 (2004): 41-169, 105.

115. Ibid.

116. *Odah v. U. S.*, 321 F.3d 1134, 1150 (2003), emphasis added.

117. There is a brief moment in the Padilla case when during the oral arguments, Justice Ginsburg does bring up the question of what prevents the executive from using torture during these detentions, and while the deputy solicitor general, Paul Clement, does mention the treaty obligations, he also ultimately takes refuge in the fact that torture is not being authorized by the executive and that the court should trust the executive in times of war. See http://www.oyez.org/cases/2000-2009/2003/2003_03_1027/argument/ (last visited January 30, 2008).

118. It is of course ironic that the day the Supreme Court finished the oral arguments for the Hamdi and Padilla case, April 28, 2004, is also the day when the Abu Ghraib pictures were shown by the press.

119. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004).

120. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (2004); *Hamdan v. Rumsfeld*, 367 U.S. App. D.C. 265 (2005). See also criticism of initial tribunals by scholars. David D. Caron and David L. Sloss, "International Decision: Availability of U.S. Courts to Detainees at Guantánamo Bay Naval Base—Reach of Habeas Corpus—Executive Power in War on Terror," *American Journal of International Law* 98 (2004): 788 – 98. There was also a presumption of guilt that the detainees were enemy combatants, and the detainees had to prove they were not. Jameel Jaffer, "Dispatches from Guantánamo," November 4, 2004. http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=16924&c=206 (last visited April 4, 2005).

121. Here I differentiate between the military commissions introduced before Hamdan (MC) and the military commissions introduced under the act in 2006 (MCA).

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

123. Ibid.

124. Ibid.

125. There has been discussion among scholars and officials about whether the Geneva Conventions were being used as a part of treaty law within the Uniform Code of Military Justice or as customary international law. See implications of this in John B. Bellinger III, legal advisor to the U.S. secretary of state, "Symposium on the New Face of Armed Conflict: Enemy Combatants after Hamdan v. Rumsfeld; Transcript of Remarks, October 20, 2006," *George Washington Law Review* 75 (2007): 1007-20.

126. Neal Kumar Katyal, "*Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice," *Harvard Law Review* 120 (2006): 65-123, 98.

127. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), 2807-8.

128. Ibid.

129. Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. http://www.icrc.org/ihl.nsf/0/e160550475c4b133c12563cd0051aa66?OpenDocument (last visited July 6, 2007).

130. President Bush, Military Order of November 13, 2001, in Danner, ed., *Torture and Truth*, 80.

131. The brief filed by the Bar Human Rights Committee of the Bar of England and Wales and the Commonwealth Lawyers Association added that in a recent case regarding international terrorists, the House of Lords clearly stated that evidence gained as a result of torture, even in a foreign state without the involvement of the English, would not be accepted in the proceedings. Bar Human Rights Committee of the Bar of England and Wales and the Commonwealth Lawyers Association, 2005 U.S. Briefs 184.

132. Amicus Curiae Brief of the American Civil Liberties Union in Support of Petitioner, 2005 U.S. Briefs 184, 8, emphasis added.

133. Brief of Amicus Curiae Human Rights First, Physicians for Human Rights, Center for Victims of Torture, Advocates for Survivors of Torture and Trauma, Boston Center for Refugee Health and Human Rights, and a number of human rights groups against torture, 2005 U.S. Briefs 184, 29-30. Brief for Petitioner Salim Ahmed Hamdan, 2005 U.S. Briefs 184.

134. Brief of Amicus Curiae Human Rights First, Physicians for Human Rights, Center for Victims of Torture, Advocates for Survivors of Torture and Trauma, Boston Center for Refugee Health and Human Rights, and a number of human rights groups against torture, 2005 U.S. Briefs 184, 2, emphasis added.

135. Ibid.

136. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

137. Ibid.

138. Ibid., 2270.

139. Ibid., 2274.

140. Brief on Behalf of Former Federal Judges as Amici Curiae in Support of Petitioners, Boumediene, 2006 U.S. Briefs 1195, 5.

141. Military Commissions Act, 2006, http://thomas.loc.gov/cgi-bin/query/D?c109:3:./temp/~c109LgPKpw (last visited, July 6, 2007). Since there were attempts by the United States to take advantage of the possible gaps in the existing laws prohibiting torture and CIDT abroad, it was not surprising that (despite the U.S. Supreme Court's insistence on the application of Common Article 3 to the conflict) one of the major concerns of the United States was to limit Common Article 3's broad protections. The administration was concerned that American soldiers and commanders could be held in violation of the War Crimes Act of 1996 for committing "grave breaches" of the Geneva Convention.

142. Military Commissions Act, 2006. http://thomas.loc.gov/cgi-bin/query/D?c109:3:./temp/~c109LgPKpw (last visited, July 6, 2007). See critique in David Glazier, "Full and Fair by What Measure: Identifying the International Law Regulating Military Commission Procedure," *Boston University International Law Journal* 24 (2006): 55-122.

143. See Marty Lederman, "Yes, It's a No-Brainer: Waterboarding *Is* Torture," October 28, 2006. http://balkin.blogspot.com/2006/10/yes-its-no-brainer-waterboarding-is.html (last visited April 21, 2007). Marty Lederman, "Three of the Most Significant Problems with the 'Compromise,'" September 22, 2006. http://balkin.blogspot.com/2006/09/three-of-most-significant-problems.html (last visited April 21, 2007).

144. Michael J. Matheson, "Agora: Military Commissions Act of 2006; The Amendment of the War Crimes Act," *American Journal of International Law* 101 (2007): 48-55, 52.

145. Ibid. Also, the MCA does not clarify whether evidence gained as a result of humiliating treatment would be allowed and may even allow for some evidence tainted by torture if it was gained before December 2005. See Jack M. Beard, "Agora: Military Commissions Act of 2006; The Geneva Boomerang; The Military Commissions Act of 2006 and U.S. Counterterror Operations," *American Journal of International Law* 101 (2007): 56-73.

146. See note 56.

147. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven Bradbury, Principal Deputy Assistant Attorney General, "Re: Application of United States Obligation under Article 16 of UN Convention against Torture That May be Used in the Interrogation of High Value al Qaeda Detainees," May 30, 2005. http://luxmedia.com.edgesuite.net/aclu/olc_05302005_bradbury.pdf (last visited January 23, 2011).

148. Deb Riechmann, "Bush Vetoes Waterboarding Bill," March 8, 2008. http://news.yahoo.com/s/ap/20080308/ap_on_go_pr_wh/bush_torture (last visited March 14, 2008).

149. Petition for Writ of Certiorari, 2006 U.S. Briefs 1195, 5.

150. Yoo, "Re: Military Interrogation of Alien Unlawful Combatants Held outside the United States."

151. Katyal, "*Hamdan v. Rumsfeld*," 84.

152. These passive virtues, however, were taken into account by Hamdan's counsel by educating the Court early on about all the issues. Ibid.

153. Sunstein, "National Security, Liberty, and the D.C. Circuit," 694-95.

154. See Steven R Shapiro, "Defending Civil Liberties in the War on Terror: The Role of the Courts in the War against Terrorism; A Preliminary Assessment," *Fletcher Forum of World Affairs Journal* 29 (2005): 103-16.

155. Similar to the Court, scholars such as Ackerman also seem to ignore this relationship between detention and torture. Rejecting torture as Ackerman does may not be adequate to ensure the protections in a context where the very definition of torture and CIDT and excess violence in general is being debated. Here, framing the need for the state to reconstitute effective sovereignty both symbolically and functionally by allowing the state to take extraordinary measures precludes a discussion on some of these historically linked relations between detention and torture and between detention and race, citizenship, and ethnicity. Thus, Ackerman underestimates the power of the panic that will ensure that detentions are not just neutral, egalitarian measures that affect all but rather have very particularized impact based on preexisting stigmas that often result in violent measures against specific sections. Ackerman, *Before the Next Attack*.

156. *El-Masri v. United States*, 128 S. Ct. 373 (2007); *Arar v. Ashcroft*, 2010 U.S. LEXIS 4750 (2010).

157. See page 48.

158. Michel Foucault, "Governmentality," in The *Foucault Effect: Studies in Governmentality*, edited by Graham Burchell, Colin Gordon, and Peter Miller, 87-104 (Chicago: University of Chicago Press, 1991), 100.

159. Kevin Stenson, "Crime Control, Governmentality, and Sovereignty," in *Governable Places: Readings on Governmentality and Crime Control*, edited by Russell Smandych, 45-73 (Aldershot, England: Ashgate/Dartmouth, 1999), 47.

160. David Garland, "'Governmentality' and the Problem of Crime," in *Governable Places: Readings on Governmentality and Crime Control*, edited by Russell Smandych, 15-43 (Aldershot, England: Ashgate/Dartmouth, 1999), 15.

161. Colin Gordon, "Governmental Rationality: An Introduction," in Burchell, Gordon, and Miller, eds., *The Foucault Effect: Studies in Governmentality*, 1-51, 24 (emphasis added).

162. Foucault, "Governmentality," 96 (emphasis added) using physiocrat La Perriere's work.

163. Stenson, "Crime Control, Governmentality, and Sovereignty," 46.

164. Ibid.

165. Lifton writes that there were instances when nurses and doctors saw injuries such as dislocated shoulders as a result of detainees being handcuffed or forced to hold their hands over their head but did not report it. Robert Jay Lifton, "Doctors and Torture," *New England Journal of Medicine* 351 (2004): 415-16.

166. Physicians for Human Rights points out that apart from issues of quality and access that were really problems in Iraq and Afghanistan, doctors did not try to intervene when they saw the use of torture. Sometimes they were present and actually revived the detainee so that the torture could continue. And even when they saw the impact of torture on the detainees, they did not intervene. Physician for Human Rights, *Broken Laws, Broken Lives* (2008), 86. http://brokenlives.info/?page_id=69 (last visited January 23, 2011).

167. Alfred W. McCoy, *A Question of Torture: CIA Interrogation from the Cold War to the War on Terror* (New York: Metropolitan Books, 2006); Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (New York: Metropolitan Books, 2007).

168. McCoy, *A Question of Torture*, 12. These methods traveled from the United States to different parts of the world. In fact, there were actual training schools in the United States. Timothy J. Kepner, "Torture 101: The Case against the United States for Atrocities Committed by School of the Americas Alumni," *Dickinson Journal of International Law* 19 (2001): 475-529.

169. I emphasize that the relationship of law and state to violence is a constant negotiation because the argument is not that excess violence is an unchanging part of governmentality. Rather, it is a historically variable relationship and the exact nature of the excess violence also differs in varied circumstances at different moments in time. For instance, even the role of doctors and medical professionals in state power has transformed over different periods of history. During the Second World War, doctors, psychologists, and psychiatrists had been involved in actual human experiments and in the process caused immense pain and suffering (Nazi doctors' experiments, for example). However, that was transformed in the post–World War II context, when certain medical protocols were introduced, as reflected in the Geneva Conventions but most specifically in the Declaration of Tokyo in 1973 and UN principles in 1982 prohibiting the involvement of doctors in torture and CIDT. And yet the participation of medical professionals in different forms in the current context is significant.

170. McCoy, *A Question of Torture*, 26.

171. Mark Bowden, "The Dark Art of Interrogation," *Atlantic Monthly*, October 2003. http://www.theatlantic.com/magazine/archive/2003/10/the-dark-art-of-interrogation/2791/ (last visited January10, 2011); ibid., 57.

172. McCoy, *A Question of Torture*, 7.

173. Ibid., 8.

174. In fact, Naomi Klein points out that one of the reasons the experiments may not have been conducted in the United States was their potential impact, but there is adequate evidence to show that these studies were clearly funded and utilized by the CIA. Naomi Klein, *The Shock Doctrine*.

175. McCoy, *A Question of Torture*, 35.

176. Ibid.

177. KUBARK Counterintelligence Interrogation, Central Intelligence Agency (July 1963). http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/ (last visited March 3, 2006). For instance, strikingly reminiscent of present debates, the CIA Kubark Manual back in 1963 suggested that the best way to ensure compliance is to use environmental manipulation and sensory deprivation in less intense ways. Minor changes in sleep patterns and food timings were considered more effective methods of interrogation than more drastic measures that could lead to hallucinations and delusions. KUBARK Counterintelligence Interrogation, Central Intelligence Agency, July 1963. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/ (last visited March 3, 2006), 92.

178. McCoy, *A Question of Torture*. Indeed, the highly controversial Kubark Manual was replaced by the 1983 Honduras Manual with little change as far as the psychological methods were concerned. As Kaufman-Osborn writes, while the more explicit provisions were removed from the 1983 manual and the current army manual, "there is little reason to believe that the basic logic of these disciplinary practices has changed in any significant way." Timothy V. Kaufman-Osborn, "Gender Trouble at Abu Ghraib?" *Politics & Gender* 1 (2005): 597-619, 608.

179. McCoy, *A Question of Torture*, 100. This may have also been possible because, according to Naomi Klein, the discourse in the 1970s and 1980s had primarily been on mind control and brainwashing. "The word 'torture' was almost never used." Naomi Klein, *The Shock Doctrine*, 38.

180. Rejali uses the term "nonscarring" to note that the distinction between physical and psychological is not adequate to explain the nature of some of these techniques. He notes that many of these are physical techniques except that they do not leave marks. Darius Rejali, *Torture and Democracy* (Princeton, NJ: Princeton University Press, 2007), 4.

181. Ibid., 8.

182. M. Gregg Bloche and Jonathan H. Marks, "Doctors and Interrogators at Guantanamo Bay," *New England Journal of Medicine* 353 (2005): 6-8.

183. Ibid.

184. Jane Mayer, "The Experiment: The Military Trains People to Withstand Interrogation; Are Those Methods Being Misused at Guantánamo?" *New Yorker*, July 11, 2005. http://www.newyorker.com/archive/2005/07/11/050711fa_fact4?printable=true (last visited September 25, 2008).

185. Other methods mentioned are Bible trashing, noise stress, waterboarding, and sexual humiliation. Some of these were used in the Qahtani case and the log shows the participation of a psychologist. Ibid.

186. Review of DOD-Directed Investigations of Detainee Abuse, Office of the Inspector General of the Department of Defense, August 25, 2006. See appendix, 107. http://human-rights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-the-defense-department/dod_inspector_general.pdf (last visited January 23, 2011).

187. Michel Foucault, *Foucault Live: Collected Interviews, 1961-1984*, edited by Sylvere Lotringer (New York: Semiotext, 1996), 197.

188. Kaufman-Osborn, *From Noose to Needle*, 199.

189. Ibid. The inability of the state to visibly use pain in its executions reflects the basic instability between the state's punitive functions (sovereignty) and its welfare functions (juridico-medical complex in the realm of governmentality).

190. Here I focus on the psychologists because the American Psychiatric Association and the American Medical Association bar their members from participating in interrogations. http://www.psych.org/MainMenu/Newsroom/NewsReleases/2008NewsReleases/APAStatementonInterrogation.aspx (last visited September 25, 2008).

191. "How Pentagon Report Contradicts APA Statements Q&A," June 9, 2007. http://www.scoop.co.nz/stories/WO0706/S00114.htm (last visited September 25, 2008).

192. Report of the American Psychological Association, Presidential Task Force on Psychological Ethics and National Security, June 2005, 2. http://www.apa.org/pubs/info/reports/pens.pdf (last visited January 11, 2011).

193. "How Pentagon Report Contradicts APA Statements Q&A."

194. In 2008, the American Psychological Association banned its members from participating in interrogations. "Psychologists Ban Role in Interrogations," September 18, 2008. http://www.cbsnews.com/stories/2008/09/18/terror/main4457822.shtml (last visited September 30, 2008).

195. Working Group Report, "Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, and Policy and Operational Considerations" (April 4, 2003), in Danner, ed., *Torture and Truth*, 187-98, 197. This was subsequently approved by the defense secretary. Memorandum for the Commander, U.S. Southern Command, from Secretary of Defense, "Counter Resistance Techniques in the War on Terrorism" (April 16, 2003), in Danner, ed., *Torture and Truth*, 199-204, 203.

196. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven Bradbury, Principal Deputy Assistant Attorney General, "Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee," May 10, 2005. http://luxmedia.com.edgesuite.net/aclu/olc_05102005_bradbury46pg.pdf (last visited January 23, 2011).

197. Ibid., 4.

198. Ibid., 6.