

WATERBOARDING IS ILLEGAL

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In his 2007 confirmation hearing before the Senate Judiciary Committee considering his nomination to be Attorney General of the United States, Judge Michael Mukasey refused to address the legality of waterboarding.¹ In my opinion there is no reasonable dispute about this matter. The laws of the United States make waterboarding unlawful in no uncertain terms.²

In July 2002, President Bush's lawyers reportedly approved the use of what are euphemistically called "enhanced interrogation techniques" to question prisoners detained in the War on Terror.³ These techniques reportedly included subjecting prisoners to "longtime standing," in which "prisoners are forced to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours;" "the cold cell," where "[t]he prisoner is left to stand naked in a cell kept near 50 degrees [and] [t]hroughout the time in the cell the prisoner is doused with cold water;" and "waterboarding," which is an old form of torture also known as "water torture" or "the water cure."⁴ This latter method is preferred by some interrogators because, if the victim lives, it leaves no visible signs of torture upon the prisoner's body.⁵ During

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¹ See Dan Eggen, *Torture Stance Raises Doubts on Mukasey*, WASH. POST, Oct. 27, 2007, at A02.

² See Letter from Donald J. Guter, John D. Hutson, John L. Fugh, and David M. Brahms, retired U.S. Armed Forces Officers, to Patrick J. Leahy, United States Senator, (Nov. 2, 2007) (*available at* <http://leahy.senate.gov/press/200711/110207RetGeneralsOnMukasey.pdf>) ("Waterboarding is inhumane, it is torture, and it is illegal."); see also Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1237 (2007) (comparing the United States' program of extraordinary rendition to the Nazi practices of "Nacht und Nebel" or Night and Fog).

³ See Evan Thomas et al., *The Debate Over Torture Right After 9/11, Cheney Said, "We have to work ... the dark side if you will."*, NEWSWEEK, Nov. 21, 2005, at 26 (stating that, following meetings convened by White House Counsel Alberto Gonzales, administration lawyers "approved 'waterboarding,' dripping water onto a wet cloth over the suspect's face, which feels like drowning.").

⁴ See Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in the United States*, 45 COLUM. J. TRANSNAT'L L. 468, 473 (2007). Other methods of torture have also reportedly been employed by American officials. See Eric Lichtblau, *Justice Dept. Opens Inquiry Into Abuse of U.S. Detainees*, N.Y. TIMES, Jan. 14, 2005, at A20 (quoting memoranda by FBI agents stationed at Guantanamo Bay who observed interrogators "beating prisoners and grabbing their genitals. Bureau personnel also told of detainees' being chained for up to 24 hours and left on the cold floor to urinate and defecate on themselves.").

⁵ See Wallach, *supra* note 4, at 474; Cristian Correa, *Waterboarding Prisoners and Justifying Torture: Lessons for the U.S. from the Chilean Experience*, 14 NO. 2 HUM. RTS. BRIEF 21 (2007). The author states: Waterboarding entails many different methods of torture, each using water to suffocate detainees and provoke the sensation of drowning. The effect results within a few seconds or minutes and leaves no external injuries, thereby eluding a definition of torture which requires proof of injury, bleeding, or other physical harm. Waterboarding has been

waterboarding, the victim is tied to an inclined board, his head lower than his feet, while interrogators pour water over the victim's face, which may be covered with a towel or cellophane.⁶ As the victim breathes in water, "a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt."⁷ It was reported that "CIA officers who subjected themselves to the waterboarding technique lasted an average of 14 seconds before caving in."⁸ According to the CIA, three prisoners in American custody have been "waterboarded."⁹

This essay is concerned solely with the legality of waterboarding.

In 2002, secret memos were issued by Justice Department officials John Yoo, Jay Bybee, and White House Counsel Alberto Gonzales, in which they argued that torturing prisoners was not against the law.¹⁰ When these memos came to light in 2004 the administration withdrew them, calling torture "abhorrent."¹¹ However, in 2005, after Mr. Gonzales became Attorney General, the Justice Department reportedly issued two more secret memos, authored by Steven Bradbury, Director of the Office of Legal Counsel. These memos, which specifically approved waterboarding and other violent interrogation techniques, concluded that these practices would not violate the Detainee Treatment Act, which was at that time pending before Congress.¹² Later in 2005, Congress adopted the Detainee Treatment Act, which prohibited the "cruel, inhumane, or degrading" treatment

designed to cause intense psychological pain while granting technical impunity to those administering the punishment.

Id. at 21.

⁶ See Brian Ross and Richard Esposito, *Exclusive: Only Three Have Been Waterboarded by C.I.A.*, ABC NEWS, Nov. 2, 2007, <http://blogs.abcnews.com/theblotter/2007/11/exclusive-only-.html>; Thomas et al., *supra* note 3.

⁷ Ross & Esposito, *supra* note 6. See Peter Grier, *When Cooperating with U.S. Antiterror Efforts is Risky*, CHRISTIAN SCIENCE MONITOR, Nov. 14, 2007, at 1 (describing waterboarding in the following terms: "Cloth is placed over his mouth, and water is poured onto it, to the point where the liquid overcomes the gag reflex and begins to fill the throat and lungs.").

⁸ Ross & Esposito, *supra* note 6.

⁹ See *id.*

¹⁰ See Memorandum from Jay S. Bybee, Assistant U.S. Attorney General, to Alberto Gonzales, Counsel to the U.S. President (Aug. 1, 2002) (available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>); Memorandum from Alberto Gonzales, Counsel to the U.S. President, to President George W. Bush (Jan. 25, 2002) (available at http://www.hereinreality.com/alberto_gonzales_torture_memo.html) (concluding that the Geneva Convention does not apply to al Qaeda or to the Taliban, and stating that a "positive" consequence of this is that it "renders obsolete Geneva's strict limitations on questioning of enemy prisoners . . ."); see also Confirmation Hearing Before the Subcomm. on the Nomination of the Alberto R. Gonzales to be Attorney General of the United States, 109th Cong. 1 (2005) (statement of Prof. Harold Koh, Dean of Yale Law School) (describing the Bybee memorandum as "perhaps the most clearly erroneous legal opinion I have ever read," and stating that "Mr. Gonzales' legal positions have sent a confusing message to the world about our Nation's commitment to human rights and the rule of law. They have fostered a sense that we apply double standards and tolerate a gap between our rhetoric and our practice.").

¹¹ See R. Jeffrey Smith and Dan Eggen, *Justice Dept. Expands 'Torture' Definition*, WASH. POST, Dec. 31, 2004, at A01; Scott Shane, David Johnston, and James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

¹² See Shane et al., *supra* note 11.

of prisoners.¹³ However, in signing the bill, President Bush issued a statement implying that, under the Constitution, he was not bound by this provision of the Act.¹⁴ Furthermore, the Bradbury memos authorizing the use of waterboarding have not been made public, nor have they been withdrawn.¹⁵ On July 20, 2007, the President issued an executive order stating that the interrogation program conducted by the CIA “fully complies” with applicable law.¹⁶ However, the order conspicuously failed to identify the specific interrogation techniques which are permitted or prohibited. Despite the persistent equivocation of the President, Vice-President, and Attorney General concerning the legality of waterboarding,¹⁷ it appears that, at least so far as the Executive

¹³ See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003, 119 Stat. 2680, 2739 (2005) (codified at 42 U.S.C. § 2000dd(a) (Supp. 2006)) (“No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”); see also *infra* notes 37-40, 44 and accompanying text.

¹⁴ See President George W. Bush, President’s Statement on Signing of H.R. 2863, the Department of Defense Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.

¹⁵ See Shane et al., *supra* note 11.

¹⁶ See *Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*, Exec. Order No. 13,340, 72 Fed. Reg. 40,707 (July 20, 2007).

¹⁷ See Clint Talbott, *Torturers and Enablers: Sadly, Senate Panel Errs*, BOULDER DAILY CAMERA, Nov. 7, 2007, at A19. The author stated:

Over and over again, members of the Senate asked Mukasey – who would lead a department that was instrumental in crafting the administration’s contemptible torture policies – if waterboarding is torture and is illegal. Over and over, Mukasey demurred, deferred and declined to answer. He said he did not know what practices the CIA has engaged in. He said he did not want to subject any government worker to legal liability.

Id.; Dan Eggen, *Cheney’s Remarks Fuel Torture Debate*, WASH. POST, Oct 27, 2006, at A09 (stating that Vice-President Richard Cheney agreed with a radio talk show host that “a dunk in the water” was “a no-brainer” if it would save lives. Cheney then added, “But for a while there, I was criticized as being the vice president for torture. We don’t torture.”); *Today Show: George W. Bush Interview* (NBC television broadcast, Sep. 11, 2006) (transcript available through FDCH Capital Transcripts, 2006 WLNR 15735071). During Matt Lauer of NBC’s interview with President Bush, the following exchange occurred:

Lauer: These alternative methods you talked about, in terms of extracting information from these suspected terrorists, were you made personally aware of all of the techniques that were used, for example, against a Khalid Sheik Mohammed? And did you approve all of those techniques?

Bush: I told our people get information without torture, and was assured by our Justice Department that we were not torturing.

Lauer: It’s been reported with Khalid Sheik Mohammed, he was what they call waterboarded.

Bush: I’m not going to talk about techniques that we use on people. One reason why is because we don’t want the enemy to adjust. The American people need to know we’re using techniques within the law to protect them.

Id.

Branch of our government is concerned, the legality of waterboarding is still an open question.

Three major treaties that the United States has signed and unambiguously ratified prohibit the United States from subjecting prisoners in the War on Terror to this kind of treatment. First, Common Article 3 of the Geneva Convention Relative to the Treatment of Prisoners of War, which the Senate unanimously ratified in 1955, prohibits the parties to the treaty from acts upon prisoners including “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.”¹⁸ Second, the International Covenant on Civil and Political Rights, which the Senate ratified in 1992, states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹⁹ Third, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, which the Senate ratified in 1994, provides that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction,”²⁰ and that “[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture”²¹

The United States has enacted statutes prohibiting torture and cruel or inhuman treatment. It is these statutes which make waterboarding illegal.²²

The four principal statutes which Congress has adopted to implement the provisions of the foregoing treaties are the Torture Act,²³ the War Crimes Act,²⁴ and the laws entitled “Prohibition on Cruel, Inhuman, or Degrading Treatment or Punishment of Persons Under Custody or Control of the United States Government”²⁵ and “Additional Prohibition on Cruel, Inhuman or Degrading Treatment or Punishment.”²⁶ The first two statutes are criminal laws while the latter two statutes extend civil rights to any person in the custody of the United States anywhere in the world.

¹⁸ Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 135.

¹⁹ International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171.

²⁰ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2.1, Jun. 26, 1987, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 112.

²¹ *Id.* at art. 16.1.

²² *See* Military Commissions Act of 2006, 18 U.S.C. § 2441 (Supp. 2006) (“No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d)” of the War Crimes Act); 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990) (“the United States declares that the provisions of articles 1 through 16 of the Convention [Against Torture] are not self-executing.”).

²³ 18 U.S.C. §§ 2340, 2340A (2000).

²⁴ 18 U.S.C. § 2441 (Supp. 2006).

²⁵ 42 U.S.C. § 2000dd (Supp. 2006).

²⁶ 42 U.S.C. § 2000dd-0 (Supp. 2006).

The Torture Act makes it a felony for any person, acting under color of law, to commit an act of torture upon any person within the defendant's custody or control outside the United States.²⁷ Torture is defined as the intentional infliction of "severe physical or mental pain or suffering" upon a person within the defendant's custody or control.²⁸ To be "severe," any mental pain or suffering resulting from torture must be "prolonged."²⁹ Under this law, torture is punishable by up to twenty years imprisonment unless the victim dies as a result of the torture, in which case the penalty is death or life in prison.³⁰

The War Crimes Act differs from the Torture Act in several respects. It applies to acts committed inside or outside the United States, not simply to acts committed outside the United States.³¹ Second, it prohibits actions by any American citizen or any member of the armed forces of the United States, not simply to persons acting under color of law.³² Third, violations of the War Crimes Act that do not result in death of the victim are punishable by life in prison, not simply for a term of twenty years.³³ Finally, when it was enacted in 1996, the War Crimes Act did not mention torture or any other specific conduct like the Torture Act does, but rather contained a very broad definition of the offense. The original statute provided that "war crimes" included any "grave breach" of the Geneva Conventions.³⁴ In 2006, in the Military Commissions Act, Congress defined the term "grave breach" of Common Article 3 of the Geneva Convention to include "torture" as well as "cruel or inhuman treatment" of prisoners.³⁵ As in the Torture Act, the War Crimes Act (as amended by the Military Commissions Act of 2006) defines "torture" as the intentional infliction of "severe physical or mental pain or suffering."³⁶ Cruel or inhuman treatment is defined as "serious physical or mental pain or suffering," and also includes "serious physical abuse."³⁷ The law defines "serious physical pain or suffering" as including "extreme physical pain."³⁸ All of these clarifications of the term "grave breaches" of Common Article 3 were made retroactive to 1997.³⁹ The 2006 Act replaced the requirement that mental harm be "prolonged" with a more broad definition that mental harm be merely "serious and non-transitory."⁴⁰

The third federal statute that prohibits waterboarding is entitled "Prohibition on Cruel, Inhuman or Degrading Treatment or Punishment of Persons under Custody or

²⁷ See 18 U.S.C. §§ 2340(1), 2340A(a) (2000).

²⁸ See *id.* § 2340(1).

²⁹ See *id.* § 2340(2).

³⁰ See *id.* § 2340A(a).

³¹ See 18 U.S.C. § 2441(a) (Supp. 2006).

³² See *id.* § 2441(b).

³³ See *id.* § 2441(a).

³⁴ See *id.* § 2441(c)(1) (making it a criminal offense to commit any "grave breach" of the Geneva Conventions).

³⁵ See Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b)(1)(B), 120 Stat. 2600, 2633-34 (2006) (codified at 18 U.S.C. § 2441(d) (Supp. 2006)).

³⁶ *Id.* § 2441(d)(1)(A).

³⁷ *Id.* § 2441(d)(1)(B).

³⁸ *Id.* § 2441(d)(2)(D)(ii).

³⁹ *Id.* § 2441 Note 2 (entitled "Retroactive Applicability").

⁴⁰ See *id.*; see also *id.* § 2441(d)(2)(E)(ii).

Control of the United States Government.”⁴¹ This law was enacted in 2005 as part of the Detainee Treatment Act,⁴² and in 2006 it was supplemented in the Military Commissions Act by a statutory provision entitled “Additional Prohibition on Cruel Inhuman or Degrading Treatment or Punishment.”⁴³ These civil rights laws very simply state that no person under the physical control of the United States anywhere in the world may be subjected to any “cruel, inhuman, or degrading treatment or punishment,”⁴⁴ and they each define “cruel, inhuman, or degrading treatment or punishment” to be any treatment or punishment which would violate the Fifth, Eighth, or Fourteenth Amendments to the Constitution of the United States.⁴⁵ These civil rights laws award the same rights to all prisoners who are in the custody of the United States anywhere in the world as citizens of the United States are entitled to under the Constitution. This means that if it is unconstitutional to subject prisoners in the United States to waterboarding, then it is illegal to commit this act against prisoners in the War on Terror, wherever they are being detained.

There is no doubt that waterboarding is illegal under the plain language of each of these four statutes. When it is practiced in other countries, the State Department characterizes waterboarding as “torture.”⁴⁶ Waterboarding inflicts “severe pain and suffering” on its victims, both physically and mentally, and therefore it is torture within the meaning of the Torture Act and the War Crimes Act.⁴⁷ Finally, American courts have

⁴¹ 42 U.S.C. § 2000dd (Supp. 2006).

⁴² Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003, 119 Stat. 2680, 2739 (2005) (codified at 42 U.S.C. § 2000dd (Supp. 2005)); Detainee Treatment Act of 2005, Pub. L. No. 109-163, § 1403, 119 Stat. 3136, 3475 (2006) (codified at 42 U.S.C. § 2000dd (Supp. 2006)). The Detainee Treatment Act also prohibits the Department of Defense from using any interrogation techniques which are forbidden by the United States Army Field Manual. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1002(a), 119 Stat. 2680, 2739 (2006) (codified at 10 U.S.C. § 801 note (Supp. 2005)).

⁴³ Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(c), 120 Stat. 2600, 2635 (2005) (codified at 42 U.S.C. § 2000dd-0 (Supp. 2006)). The “Additional Prohibition on Cruel and Unusual Punishment” imposes upon the President the duty to issue “administrative rules and procedures” to ensure compliance with this law. *Id.*

⁴⁴ 42 U.S.C. § 2000dd(a).

⁴⁵ *Id.* § 2000dd(d); 42 U.S.C. § 2000dd-0(2).

⁴⁶ See Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89 (2007). The author states:

The government insists that it does not torture, yet it uses methods that it calls torture when practiced by other governments. In Jordan, for example, the State Department observes that “the most frequently alleged methods of torture are sleep deprivation, beatings, and extended solitary confinement.” In State Department reports on other countries, sleep deprivation, waterboarding, forced standing, hypothermia, blindfolding, and deprivation of food and water are specifically referred to as torture.

Id. at 92 (internal citations omitted).

⁴⁷ See Correa, *supra* note 5, at 21. The author states:

The profoundly debilitating and long-lasting effects of waterboarding were recently exposed in Chile through victim testimony to the Commission to Investigate and Report on Cases of Torture and Political Imprisonment during the Augusto Pinochet dictatorship from 1973-1990. The Commission's ensuing report contained testimony of waterboarding victims who attested that more than 30 years after being tortured, they continued to suffer the devastating effects of psychological torture.

Id.; Wallach, *supra* note 4, at 474 (citing evidence of the long-term psychological effects of torture by suffocation).

ruled that when prisoners in the United States are subjected to waterboarding, it is a violation of the Fifth, Eighth, and Fourteenth Amendments, and therefore it would be a violation of 42 U.S.C. §§ 2000dd and 2000dd-0 prohibiting cruel, inhuman, or degrading treatment.⁴⁸

One of the principal sponsors of the provisions of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 clarifying the War Crimes Act and outlawing cruel, inhumane, and degrading treatment of prisoners was Senator John McCain, who was tortured by the North Vietnamese when he was a prisoner of war during the Vietnam War.⁴⁹ During Attorney General Mukasey's confirmation hearings, Senator McCain and Senator Lindsey Graham, another sponsor of the legislation, issued a statement declaring that these laws were intended to prohibit waterboarding.⁵⁰ In this statement they also disclosed that when the Military Commissions Act was enacted, the Bush Administration had personally assured them that the law as written outlawed waterboarding.⁵¹

⁴⁸ See Wallach, *supra* note 4, at 502-504 (describing the conviction of Sheriff James Parker, of San Jocinto County, Texas, and three of his deputies, for violating the civil rights of prisoners by subjecting them to waterboarding. The facts of this case are set forth in U.S. v. Lee, 744 F.2d 1124 (1984)); Morris v. State, 697 S.W.2d 687, 689 (Tex. App. 1985) (describing how water torture was used by San Jocinto County authorities to extract the defendant's confession); Fisher v. State, 110 So. 361, 363 (Miss. 1926) (reversing the defendant's conviction because it was obtained by means of the "water cure").

⁴⁹ See John McCain for President – A Lifetime of Service, <http://www.johnmccain.com/About/johnmccain.htm> (last visited Apr. 15, 2008) (describing McCain's military service and prisoner of war experiences). On November 4, 2005, during the Senate debate over the Detainee Treatment Act, Senator McCain stated:

We all know we need intelligence. We all know it is vital. We know how important it is. But to do differently not only offends our values as Americans but undermines our war efforts because abuse of prisoners harms, not helps, us in the war against terror. First, subjecting prisoners to abuse leads to bad intelligence because under torture a detainee will tell his interrogator anything to make the pain stop. Second, mistreatment of our prisoners endangers U.S. troops who might be captured by the enemy, if not in this war then in the next. And third . . . [i]f we inflict this cruel and inhumane treatment, the cruel actions of a few darken the reputation of our country in the eyes of millions. American values should win against all others in any war of ideas, and we cannot let prisoner abuse tarnish our image.

151 CONG. REC. S123781 (daily ed., Nov. 04, 2005) (statement of Sen. McCain).

⁵⁰ See Press Release, United States Senator John McCain Press Office, Senator McCain and Graham Offer Support for Attorney General Nominee (Nov. 1, 2007) (*available at* http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=fca2e817-7e9c-9af9-7d5b-55ef66eeb23f&Region_id=&Issue_id). In their joint press release, Senators McCain and Graham stated:

Waterboarding is clearly outlawed by several statutes, including both the Detainee Treatment Act and the 2006 Military Commissions Act (MCA). The MCA, for example, specifically prohibits acts that inflict 'serious and non-transitory mental harm' that 'need not be prolonged.' Staging a mock execution by inducing the misperception of drowning is a clear violation of this standard. For this reason, during the negotiations that led to the MCA, we were personally assured by Administration officials that this language, which applies to all agencies of the U.S. Government, prohibits waterboarding.

Id.

⁵¹ See *id.*

Even before these laws were adopted the United States considered waterboarding to be torture and a criminal offense.⁵² After World War II, the United States prosecuted and convicted a number of Japanese officers for torturing captured American servicemen by waterboarding.⁵³ Great Britain prosecuted another group of Japanese officers who had tortured British soldiers using this technique, and sentenced them to death.⁵⁴ Over a century ago, the United States prosecuted and convicted American military officers who used waterboarding against prisoners in the Philippines.⁵⁵

Waterboarding and the other forms of torture approved by the Bush administration for use in the War on Terror are inconsistent with our Nation's deepest values and traditions.⁵⁶ Our grandparents defeated the Germans and the Japanese in World War II, and our parents overcame the Soviet Union and China during the Cold War. They did so without using torture, even though our *enemies* did.⁵⁷ In fact, this is the principal factor that distinguished us from our enemies. Alexander Solzhenitzen's *Gulag Archipelago*, Arthur Koester's *Darkness at Noon*, and William Shirer's *Rise and Fall of the Third Reich* told us the nature of our enemies, whom we justifiably considered to be evil because of how they treated their prisoners. But through all of these military and political struggles, we did not torture captured soldiers or political prisoners. Instead, America led the world community against the use of torture.⁵⁸

Furthermore, there are instrumental arguments against the use of waterboarding. First, torture is neither an efficient nor an effective means of gathering intelligence.⁵⁹ Second, waterboarding prisoners violates our treaty obligations, thus offending our allies in the War on Terror.⁶⁰ Third, by engaging in this practice ourselves, we invite our

⁵² See generally Wallach, *supra* note 4.

⁵³ See *id.* at 477-494

⁵⁴ See *id.* at 472.

⁵⁵ See *id.* at 494-501.

⁵⁶ See David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1425 (2005) ("Torture used to be incompatible with American values."); *Fisher v. State*, 110 So. 361, 365 (Miss. 1926). The court stated:

Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy of the Star Chamber, and the inquisition, and other similar institutions. The Constitution recognized the evils that lay behind these practices and prohibited them in this country.

Id.

⁵⁷ See Wallach, *supra* note 4, at 478 ("Japan's use of the technique [water torture] was extremely common, and was part of the widespread use of torture as a tool of interrogation.") (internal citations omitted); Mayerfeld, *supra* note 41, at 91-92 ("Several of the [administration's] techniques – including sleep deprivation, forced standing, and waterboarding – are infamously associated with the Gestapo, Stalin's secret police, and the Inquisition.").

⁵⁸ See Wallach, *supra* note 4, at 472 ("[N]obody seems to remember that, not so very long ago, the United States, acting alone before domestic courts, commissions, and courts-martial, and as a participant in the world community, not only condemned the use of water torture, but severely punished as criminals those who applied it.").

⁵⁹ See DARIUS REJALI, *TORTURE AND DEMOCRACY* (2007) (stating that the available empirical evidence is conclusive that torture is no more effective than other policing techniques).

⁶⁰ See Statement of Prof. Harold Koh, *supra* note 10, at 6 ("It will undermine public support among critical allies, making military cooperation more difficult to sustain."); Gonzales Memorandum, *supra* note 10

enemies to treat our captured soldiers likewise,⁶¹ and if our government adopts the position that waterboarding is legal, then we will have given up the right to prosecute our enemies for subjecting our soldiers to this treatment.⁶² Finally, in the event that we were to obtain useful information from a prisoner by means of waterboarding, it would be virtually impossible to prosecute the prisoner because coerced confessions⁶³ and any evidence obtained by means of a coerced confession⁶⁴ are constitutionally inadmissible, despite provisions of the Detainee Treatment Act and the Military Commissions Act which purport to preserve the admissibility of coerced confessions.⁶⁵

The policy considerations which militate against the use of waterboarding are compelling, but they are not relevant to assessing the legality of the practice. Regardless of its utility or lack of utility as a method of interrogation, waterboarding violates both the letter and the spirit of the Torture Act, the War Crimes Act, and the Prohibition against Cruel, Inhuman, or Degrading Treatment. Accordingly, waterboarding is illegal.

(“[O]ur position would likely provoke widespread condemnation among our allies”); Statement of John McCain, *supra* note 49.

⁶¹ See Statement of John McCain, *supra* note 49.

⁶² See Gonzales Memorandum, *supra* note 10 (stating that if the War Crimes Act is narrowly construed to allow abusive methods of interrogation, “the War Crimes Act could not be used against the enemy,” but justifying this result by observing that the threat of prosecution would not deter the enemy from engaging in this behavior, stating “terrorists will not follow GPW rules in any event.”).

⁶³ See *Brown v. Mississippi*, 297 U.S. 278, 285-286 (1936) (excluding coerced confessions under the Due Process Clause of the 14th Amendment, and stating, “[t]he rack and torture chamber may not be substituted for the witness stand.”); *Bram v. United States*, 168 U.S. 532 (1897) (containing an extensive discussion of the history of the doctrine excluding coerced confessions); *R. v. Rudd*, (1783) 168 Eng. Rep. 160 (K.B.); *R. v. Warickshall*, (1783) 168 Eng. Rep. 234 (K.B.).

⁶⁴ See *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973) (“[A] witness . . . may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant.”); *New Jersey v. Portash*, 440 U.S. 450, 463 (1979) (“[T]he Fifth Amendment prohibits a State from using compulsion to extract truthful information from a defendant, when that information is to be used later in obtaining that individual’s conviction.”).

⁶⁵ See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(b)(1), 119 Stat. 2680, 2741 (2005) (to be codified at 10 U.S.C. § 801A note) (providing that Combatant Status Review Panels should, “to the extent practicable, assess . . . the probative value” of any statement obtained as the result of coercion, and which further provides that this requirement of such an assessment apply only to proceedings beginning on or after the date of the enactment of the Detainee Treatment Act); Military Commissions Act of 2006, Pub. L. No. 109-366, § 948r, 120 Stat. 2600, 2607 (2006) (to be codified at 10 U.S.C. §948(r)) (providing that military commissions trying prisoners for war crimes may not admit confessions obtained through the use of torture, and may not admit confessions obtained after the enactment of the Detainee Treatment Act if they were the result of cruel, inhuman, or degrading treatment. Statements extracted as the result of cruel, inhuman, or degrading treatment which were obtained prior to the date of the enactment of the Detainee Treatment Act are admissible based upon a “totality of the circumstances” test); see generally Peter Margulies and Laura Corbin, *Reliability and the Interests of Justice: Interpreting the Military Commissions Act of 2006 to Deter Coercive Interrogations*, 12 ROGER WILLIAMS U. L. REV. 750 (2007) (contending that the Military Commissions Act can be interpreted to exclude coerced confessions, and suggesting that to admit coerced confessions into evidence would be unconstitutional); Jonathan Hafetz, *Torture, Judicial Review, and the Regulation of Custodial Interrogations*, 62 N.Y.U. ANN. SURV. AM. L. 433, 463 (2006) (stating, “just as courts developed rules to help regulate custodial interrogation of defendants by police in criminal cases, they must play a meaningful role in supervising post-September 11 counterterrorism detentions and interrogations if we are to take seriously our opposition to torture and other mistreatment.”).