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Civil Liberties Lost, Waterboarding and the Legacy of the Bybee-Yoo 'Torture-Power' Memorandum: Reflections from an Erstwhile Bush Administration Apologist

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**DRAFT PAPER:**

**Introduction**

*It is commonly said that we are a nation of laws, not men. And we are. But beyond the laws, we are also a nation of men and women with a common ethic. Some things are not American. Torture, for damned sure, is one of them.*

This essay argues that waterboarding is torture and that torture is illegal and wrong. It is unfortunate that these are really debatable propositions in the United States of America in 2009, but we know all too well that our country has engaged in waterboarding and that prominent academics and lawyers continue to defend such tactics today.

When I first read the August 1, 2002 Department of Justice Memorandum by Jay Bybee and John Yoo regarding torture, my reaction was one that occurs “[t]oo often in the academy.” We “talk in muted voices, hushed, pseudo-intellectual whispers, unsure whether we should take a stand . . . .” Despite my

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3 See, e.g., Thomas P. Crooker, *Torture, With Apologies*, 86 Tex. L. Rev. 569 (2008) (reviewing books by Eric Posner A. and Adrian Vermeule and by Richard A. Posner that “eschew the practice of principle, articulating instead consequentialist apologies on behalf of official actions ranging from the suppression of dissent to the practice of torture.”); cf. Alan M. Dershowitz, *Should the Ticking Bomb Terrorist Be Tortured? A Case Study in how a Democracy Should Make Tragic Choices* in Civil Liberties, supra note 1, at 189-217 (advocating availability of “torture warrants” in some situations). For a thorough critique of the “ticking bomb” scenario, see Alan Clarke, *Creating a Torture Culture*, 32 Suffolk Transnat’l L. Rev. 1, 21-28 (pointing out that reasoning is “fallacious” and has no “practical significance”) and David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 Va. L. Rev. 1425 1425 1439-1445 (“in a world of uncertainty and imperfect knowledge, the ticking-bomb scenario should not form the point of reference”). Ordinary citizens also seem willing to condone torture. See *id.* at 1425-26 (noting that American abhorrence to torture “appears to have extraordinarily shallow roots” after September 11 and that support for torture “runs independent of progressive or liberal ideology.”).

4 Regarding the memo’s authorship, see infra notes ____ and accompanying text.

5 Email from Kurt Eggert dated 3/11/09 (on file with author; sent regarding issue unrelated to torture).
initial reticence, the memorandum was roundly, almost uniformly condemned in the academic community. While I did join the choir of condemners, my voice was not among the early, courageous voices of criticism.

Perhaps I was over-awed by the credentials of those who produced the memorandum and felt enduring ties of loyalty to a Justice Department I had only recently left. Perhaps I noted that, beyond the memorandum’s authors, there were other serious lawyers and academics who defended the Administration as taking prudent, defensive measures. Having lived and worked in Manhattan, I was deeply affected by the tragedy of September 11 and was reluctant, even within the academy and far removed from real-world decisionmaking, to be “on record” opposing any legitimate tactic that might make us safer. I failed to appreciate that what the Memo was defending were tactics like waterboarding. I was not yet

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6 See, e.g., Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 COLUM. L. REV. 1189, 1231 and n.182 (2006) (“In the two years since it was leaked to the public, the . . . memo has been withered by criticism for the poor quality of its legal analysis (citing sources of criticism, including statement by Yale Law School Dean Harold H. Koh that it was “perhaps the most clearly erroneous legal opinion I have ever read.”); Jeremy Waldron, Torture and Positive Law, 105 COLUM. L. REV. 1681, 1703-1709 (2005) (analyzing memo and concluding that the quality of legal work reflected therein “is a disgrace”); Luban, supra note ___, at 1455 (noting “near concensus that the legal analysis in the . . . Memo was bizarre”).

7 As an edited book I was working on regarding civil liberties and national security went to press (see CIVIL LIBERTIES, supra note 1, the Abu Ghraib scandal came to light, as did the August 1, 2002 memorandum regarding interrogation techniques, which I included in the book more than five years ago without “weighing in” as to the memo’s merits. See id. at 17 (describing Abu Ghraib and development regarding the memo).

8 John Yoo, who has acknowledged an important role in drafting the memorandum, is a professor of law at Berkeley and former law clerk to the Honorable Clarence Thomas. He is widely published in leading law reviews. Professor Yoo currently holds a distinguished visiting professorship at Chapman University School of Law. Jay Bybee, the memorandum’s signatory, is now a judge on the United States Court of Appeals for the Ninth Circuit.

9 The World Trade Center was for me, like all New York residents, both symbol and guidepost. I worked in the shadow of the towers, in lower Manhattan, as an Assistant United States Attorney for four years. In my early days in the office, respected senior colleagues were prosecuting those responsible for the first attacks on the Towers, which attacks occurred in 1993. Other colleagues became involved later in the investigation of the attacks on the U.S.S. Cole. The name Osama bin Laden was familiar to me even before September 11, and it was the first name that crossed my mind when the terrorists struck.

When the towers collapsed, I felt an acute sense of “survivor’s guilt.” Having left Manhattan for the comparative safety of Chapman’s academic halls in 1999, I listened raptly to the tales of former colleagues’ stories of escape from lower Manhattan. I broke down in a faculty meeting when a cousin’s wife could not at first be located in New York City on the day of the attacks. A well-respected FBI agent whom I had briefly worked with died at the Towers. Visiting Manhattan now is disorienting, with the lack of the landmark as a point of reference a constant reminder of the horror of how it was lost.
willing to believe that the Justice Department was actually defending torture. Rather, I noted the Administration’s disavowal of the Memo, assumed the Memo was not broadly representative of Administration views, and accepted the explanation that Abu Ghraib was perpetrated by a “few bad apples.” I was unwilling to accept the notion that the Memo reflected and sought to justify a “torture culture.” The term “waterboarding” was not yet in the popular lexicon.

In the immediate aftermath of the September 11 attacks, moreover, I was fully supportive of what appeared to be appropriate law enforcement responses. I was impressed with President Bush’s declaration that hate crimes against Muslims would not be tolerated and by his Administration’s swift move against the perpetrators of hate crimes. Aggressive use of material witness warrants and other temporary detentions struck me as prudent.

As time went on, however, unease set in, and then alarm. Those of Middle Eastern descent were targeted for questioning. Detentions at Guantanamo continued, with minimal process for detainees. Even more troubling, it became plain that tactics such as waterboarding had been used by our country in interrogating suspects. Those who had read the August 1, 2002 Memo with a more jaundiced view than I had were already on record with dire warnings regarding the Memo’s implications. Their concerns were realized.

Because the August 1, 2002 Memo and related memoranda have been so thoroughly and effectively addressed by others, I will draw heavily on that work to address the question whether waterboarding is torture and then turn to a January 29, 2009 Wall Street Journal op-ed published by Professor John Yoo on the eve of this symposium. In that op-ed, Professor Yoo decried the Obama Administration’s decision to terminate the CIA’s “special authority to interrogate

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10 See, e.g., Marjorie Cohn, Trading Civil Liberties for Apparent Security is a Bad Deal, ___ CHAP. L. REV. at 11 [her draft page no.] (detailing abuses, including torture at both Guantanamo Bay and Abu Ghraib).
11 See, e.g., Waldron, supra note 6, at 1703-1709.
terrorists” and suggested that “coercive interrogation methods,” including waterboarding, were appropriately used in the prior Administration.12

This essay expands upon arguments made at a debate in which both Professor John Yoo and I participated on April 21, 2009.13 The essay is also an outgrowth of my Symposium presentation on a panel entitled Civil Liberties for Civil Rights: Justifying Wartime Decline of Civil Liberties by a Gain of Civil Rights, a title that reflects some ambiguity.14 In the context of this symposium addressing wartime, however, it appears that those who framed this discussion had in mind that we have given up certain freedoms in order to gain more safety. Indeed, Yoo himself subscribes to this view, rejecting as “naïve” and “high-flying rhetoric” President Obama’s inaugural speech statement “that we can ‘reject as false the choice between our safety and our ideals.’”15 This essay subscribes to our new president’s vision, however, that holding certain ideals as sacrosanct can be done consistent with making us safer, particularly in the long run.16 While some minor inconveniences such as longer lines at airports and greater scrutiny of luggage may have made us marginally safer, the fundamental transgressions of civil liberties that are the topic of this particular paper have not, I submit, made us

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14 In grappling with the title of the symposium panel, I started with Black’s Law Dictionary in an effort to illuminate the understood difference between the juxtaposed terms. Black’s Law Dictionary defines “civil liberties” as “Personal, natural rights guaranteed and protected by Constitution . . . .” For “civil rights,” however, Black’s says, simply “See Civil liberties.” BLACK’S LAW DICTIONARY (5th ed. 1979). Sometimes I think we think of “civil liberties” in terms of negative liberties, or freedom from governmental interference with, e.g., free speech, whereas “civil rights” sometimes connotes positive rights. “Civil rights” is often also a term associated with the attainment of right by minority groups. See, e.g., WEBSTERS II NEW RIVERSIDE DICTIONARY (1984) (defining “civil liberty” as “[f]reedom from governmental infringement of such individual rights as freedom of speech and action.”)
15 Yoo, supra note ___.
16 I acknowledge concerns that the reality of our new president’s policies regarding civil liberties may not live up to campaign rhetoric. See Remarks of Nadine Strossen, Chapman University Dean’s Dialogue Series (March 13, 2009) (available via webcast?); William Glaberson, U.S. Won’t Label Terror Suspects as ‘Combatants,’ N.Y. Times (March 14, 2009) at A1 (noting argument by current Justice Department that president has authority to detain terrorism suspects without charge).
more secure. Instead, they have resulted in a “plunge from the moral heights”\textsuperscript{17} with no demonstrable increase in our safety. Perhaps more important, even if waterboarding has made us safer, it is an abandonment of core principles to engage in it and thus we should reject it categorically, Yoo’s past and current arguments notwithstanding.\textsuperscript{18}

The Bybee-Yoo Torture and Power Memorandum

The August 1, 2002 memorandum, prepared for Alberto R. Gonzalez, counsel to the President, was prepared by the United States Department of Justice Office of Legal Counsel (“OLC”) and signed by Jay S. Bybee, then Assistant Attorney General\textsuperscript{19} and now a Ninth Circuit judge. John Yoo, a professor of law at Berkeley who served in the OLC when the memorandum was prepared, drafted and defended the memo,\textsuperscript{20} which is sometimes referred to as the “Yoo Memorandum, sometimes as the “Bybee Memorandum”\textsuperscript{21} and sometimes as the

\textsuperscript{17}Richard Cohen, \textit{A Plunge from the Moral Heights} in \textsc{Civil Liberties}, supra note 1, at 317.

\textsuperscript{18}In his dissenting opinion in \textit{Olmstead v. United States}, Justice Brandeis stated that “Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.” 277 U.S. 438, ___ (1928). I re-read this passage recently in a context unrelated to the subject of torture, but it resonated in this context and I note that Nadine Strossen, in a recent article, referred to Brandeis’s warning in the context of discussing Yoo and other Bush Administration lawyers. See Nadine Strossen, \textit{Freedom and Fear Post-9/11: Are We Again Fearing Witches and Burning Women} [add rest of cite]; see also Cohn, supra note ____, at [her draft p. 10] (also citing to Brandeis’s \textit{Olmstead} dissent in context of War on Terror).

\textsuperscript{19}See \textsc{Civil Liberties}, supra note 1, at 303-315 (excerpted copy of OLC memorandum) (hereafter “BYTAP Memo”).


\textsuperscript{21}Peter Margulies, \textit{True Believers at Law: National Security Agendas, the Regulation of Cults, and the Separation of Powers}, 68 MD. L. REV. 1, 36 (noting that the “Bybee Memo” . . . “was actually authored by John Yoo, and eventually withdrawn by Jack Goldsmith”) and n.167 (noting that author refers to memo as “Yoo Memo” for clarity); cf. Trevor W. Morrison, \textit{Constitutional Avoidance in the Executive Branch}, 106 Colum. L. Rev. 1189, 1229 and n.179 (2006) (referring to memorandum as the “Bybee Memorandum” while noting that many have ascribed the writing to Yoo and that the memo has been described as “Yoo’s most famous piece of advice”); Waldron, supra note 6, at 1703 (referring to memorandum as the “Bybee Memorandum”), Luban, supra note ____ at 1455 (same).
“Torture Memorandum.” 22 Because Yoo is widely acknowledged as the primary author but Judge Bybee, who was Yoo’s superior, actually signed the memo and bears ultimate responsibility, it seems to me appropriate to refer to the memo as the “Bybee-Yoo Memorandum.” Moreover, the memorandum is as astonishing for its arrogation of virtually unlimited executive powers as it is for its narrowly circumscribed definition of “torture,” and so I will refer to the memorandum as the “Bybee-Yoo Torture and Power Memorandum,” or BYTAP Memo. 23 A second memo of the same date, which was released in April 2009, outlined particular interrogation techniques, including waterboarding, in much greater detail.

Two provisions of the BYTAP Memo have come under the most sustained attack: (1) the narrow definition of “torture,” which evidence suggests was solicited in order to justify waterboarding tactics the Administration was already using when the Memo was written 24 and (2) the claim of unlimited executive power to engage in any tactic, including torture.

With regard to the narrow definition, the BYTAP Memo starts with the statutory prohibition on torture, which forbids the infliction of “severe physical or mental pain or suffering.” 25 The full definition of “torture” is as follows:

(1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or

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22 See Glenn, supra note ___ (referring to various Yoo Memoranda as the “Torture Memos”).
23 As an aside, there is something unsettling about the degree of opprobrium faced by Professor Yoo when contrasted with the relative quiet regarding Judge Bybee. I have read no reports of protests at the Court of Appeals where Judge Bybee sits, whereas Yoo has been the target of a number of protests (including a very loud one outside the building where this is being written). I also note that Alberto Gonzalez seems to have faced more vilification than others equally complicit in the failings at the Justice Department. Is it a coincidence that Yoo and Gonzalez, who seem to have faced the sharpest criticism, are Asian and Latino, respectively, whereas Jay Bybee is a white man? I think this is a troubling question, but one that I will leave aside for now while acknowledging its existence.
24 Marjorie Cohn, COWBOY REPUBLIC: SIX WAYS THE BUSH GANG HAS DEFIED THE LAW 36 & n.19 (2007) (noting that memo was written after Attorney General Gonzalez met with lawyers for the Defense Department and for Vice President Dick Cheney “to discuss specific interrogation techniques”) (citing Michael Hirsh, John Barry, and Daniel Kleidman, A Tortured Debate Amid Feuding and Turf Battles, Lawyers in the White House Discussed Specific Terror-Interrogation Techniques Like “Water-Boarding” and “Mock Burials,” Newsweek 50 (June 21, 2004)).
suffering incidental to lawful sanctions) upon another person within his custody or physical control; (2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from-- (A) the intentional infliction of severe physical pain or suffering; (B) the administration or application, or threatened application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality. . . .

The BYTAP Memo then borrows from language contained in a statute addressing medical care and concludes that those statutes suggest that “severe pain” as used in the anti-torture statute “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 bodily functions—in order to constitute torture.”

But even this narrowed definition would not limit the President, according to the BYTAP Memo. Rather, “In order to respect the President’s inherent constitutional authority to manage a military campaign against al Qaeda and its allies, Section 2340A must be construed as not applying to interrogations undertaken pursuant to his Commander in Chief authority.” In other words, despite the constitutional command that the executive branch execute the laws (including those categorically forbidding torture,) the BYTAP Memo concludes that, simply by invoking the term “Commander in Chief,” the president could authorize any interrogation technique, including torture. In short, the BYTAP Memo permitted the conclusion that waterboarding isn’t torture, but even if it is, the President can do it. He can do anything.

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27 BYTAP Memo, supra note ____, at 305.
28 Id. at 311 (emphasis added).
The BYTAP Memo has been harshly criticized for, among other things, failing to construe the torture ban in a way that would avoid conflict with international law, using an unrelated medical statute in order to reach a narrow definition of “severe pain,” failing to recognize that the statutory ban on torture does not admit of exceptions, and asserting the view that the President has a “blank check,” despite the fact that such a position “is against the great weight of precedent.” The BYTAP Memo has also been criticized for starting from the premise that international and domestic laws wrongly frustrate the ability of United States officials to act with flexibility, while ignoring long-term consequences of acting unilaterally in a way that is premised on “the epic assertions of executive power proclaimed by Yoo.”

The conservative Jack Goldsmith, who succeeded Yoo at OLC, found that Yoo’s memoranda were not only one-sided but contrary to law. “The idea that Congress could not oversee the interrogation of detainees . . . ‘has no foundation in prior OLC opinion, judicial decisions, or in any other source of law.’” The BYTAP Memo does not acknowledge the President’s constitutional obligation to take care that the laws are “faithfully executed,” nor does it acknowledge Congress’s delegated powers to make rules and regulations for the conduct of the armed forces and for “captures.”

Dean Harold H. Koh of the Yale Law School has described the August 1, 2002 BYTAP Memo as “perhaps the most clearly erroneous legal opinion I have ever read.” Yet the BYTAP Memo “has proved to be enormously influential.” Although the Justice Department formally withdrew the BYTAP memo shortly after it was leaked, the Administration adhered to many of its premises even while

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30 Id. at 39.
31 Id. at 22.
32 See id. at 47-48.
33 Id. at 82.
34 Glenn, supra note __, at 3 (citing Jack L. Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration (2007)).
35 See Morrison, supra note ____, at n.182.
36 Luban, supra note _____, at 1454.
issuing a new memorandum (the “Levin Memo”) that embraced the unequivocal rhetoric that “‘torture is abhorrent.’”  As Professor Margulies points out, “Levin deserves substantial credit for clear and resonant language that accurately represented the consensus on this issue. If one reads the memo more carefully, however, loopholes appear, justifying what the Administration had already done.”  One of the tactics the Administration sought to justify was waterboarding.

**Waterboarding and Torture**

The United States admits to having “waterboarded” suspects under the auspices of the CIA and continued to claim the authority to use the technique as recently as 2005.  The BYTAP memo’s narrow definition of torture may well have been designed to allow for this particular procedure.

Professor Jeremy Waldron’s article, *Torture and Positive Law: Jurisprudence for the White House* is a powerful indictment of the BYTAP Memo and other lawyerly efforts to justify coercive interrogation techniques in the wake of September 11. Waldron disagrees with the argument that we should be more sympathetic to the use of torture in circumstances presented after 9/11. Rather, “torture prohibitions are set up precisely to address the circumstances where torture is likely to be the most tempting. If the prohibitions do no hold fast in these circumstances, then they are of little use in any circumstances.”

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37 See Margulies, supra note ___, at 40-41 (citing Memorandum from Daniel Levin, Acting Asst. Att’y Gen., to James B. Comey, Deputy Att’y Gen. (Dec. 30, 2004)).
38 *Id.* at 41; see also Luban, supra note ___, at 1457 (“Although the Levin Memo condemns torture and repudiates [the BYTAP Memo’s] narrow definition of ‘severe pain,’ a careful reading shows that it does not broaden it substantially.”).
39 See Margulies, *supra* note ___, at 41.
40 Alan Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT’L L. REV. 1, 2, 40 and n. 195 (noting that waterboarding was used on at least three detainees); see also Cohn, *supra* note ___ at [her draft] 11 (noting that United States has admitted to waterboarding); Margulies, *supra* note ___, at 41 (noting that waterboarding was used “at least for three high-level al Qaeda detainees”).
41 See *supra* note ___ and accompanying text [describing Newsweek account].
42 105 Colum. L. Rev. 1681 (2005).
43 See *id.* at 1686.
rule which has significance not just in and of itself, but also as the embodiment of a pervasive principle.”

The history of water torture has been thoroughly laid out in a recent article by Evan Wallach, a judge on the United States Court of International Trade. Judge Wallach traces the use of the technique, including by the Japanese against Allied prisoners of war in World War II, by the United States during its occupation of the Philippines and in one instance, domestically, by a sheriff in Texas. “In all cases, whether the water treatment was applied by Americans or to Americans, or simply reviewed by American courts, it has uniformly been rejected as illegal, often with severely punitive results for the perpetrators.”

Judge Wallach recounts the description provided by a United States aviator subjected to the practice by Japanese captors: “I was put on my back on the floor with my arms and legs stretched out, one guard holding each limb. The towel was wrapped around my face and put across my face and water poured on. They poured water on this towel until I was almost unconscious from strangulation, then they would let up until I’d get my breath, then they’d start over again.” Similarly, in the Texas case, law enforcement officers were charged with “handcuffing prisoners to chairs, placing towels over their faces, and pouring water on the cloth until they gave what the officers considered to be confessions.” The sheriff was convicted and received a ten-year prison sentence; other defendants also received significant prison sentences.

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44 Id. at 1687.
46 Id. at 477. For example, one defendant received a ten-year sentence. See infra note 49 and accompanying text.
47 Id. at 476 (quoting Excerpts from testimony of Cpt. Chase Jay Nielsen, Trial Record at 55, United States v. Sawada, 5 L. Rep. Trials of War Criminals 1 (1948)). Nielsen was one of ten U.S. B-52 bombers captured by the Japanese during a raid. The Japanese tried the men before a Japanese Army Tribunal and executed three of the men. The U.S. Army later prosecuted the trial’s participants. See id. n.1 (citing Craig Nelson, THE FIRST HEROES (2002)).
48 Id. at 502.
49 See id. at 503 and n.159.
sentencing, the judge noted that the Texas law enforcement operation would embarrass even “a dictator.”

Wallach noted that the “water torture” or “water boarding” technique has long been prized as an interrogation method because it imposes “severe mental trauma and physical pain but no traces of physical trauma that would be discoverable without an autopsy.”

During the height of the debate about waterboarding as used by the United States against terrorist suspects, the journalist Christopher Hitchens chose to voluntarily undergo the experience. As he describes it: “I was pushed on to a sloping board and positioned with my head lower than my heart. . . . Then my legs were lashed together so that the board and I were one single trussed unit.”

Hitchens was already wearing a hood, and three layers of “enveloping towel” were applied. Then,

In this pregnant darkness, head downward, I waited for a while until I abruptly felt a slow cascade of water going up my nose. Determined to resist . . . I held my breath for a while and then had to exhale and—as you might expect—inhale in turn. The inhalation brought the damp cloths tights against my nostrils, as if a huge wet paw had been suddenly and annihilatingly clamped over my face. Unable to determine whether I was breathing in or out, and flooded more with sheer panic than with mere water, I triggered the pre-arranged signal and felt the unbelievable relief of being pulled upright and having the soaking and stifling layers pulled off me.

After being checked by a paramedic and taking a break, Hitchens endured a second episode: “I fought down the first, and some of the second, wave of nausea and terror but soon found that I was an abject prisoner of my gag reflex.

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50 Id. at 504.
51 Id. at 473.
53 Id. at 2-3.
54 Id. at 3.
The interrogators would hardly have had time to ask me any questions and I
would quite readily have agreed to supply any answer.”\textsuperscript{55}

Hitchens took strong issue with the “official lie” that waterboarding
“simulates’ the feeling of drowning.”\textsuperscript{56} In his words, “You feel that you are
drowning because you \textit{are} drowning—or, rather, being drowned, albeit slowly
and under controlled conditions and at the mercy (or otherwise) of those who are
applying the pressure.”\textsuperscript{57} Even after the ordeal, Hitchens has experienced feelings
of panic upon awakening or in circumstances where he is short of breath. He
concludes that “if waterboarding does not constitute torture, then there is no such
thing as torture.”\textsuperscript{58}

A majority of Americans share Hitchens’s view that waterboarding
constitutes torture.\textsuperscript{59} Judge Wallach, too, concludes that waterboarding is torture
\textit{even under the narrow BYTAP Memo definition}. However, the fact that the
BYTAP Memo seems to have been designed to exclude tactics such as
waterboarding from the definition of torture illustrates the problem with the
BYTAP Memo. Surely waterboarding, under any reasonable definition of torture,\textit{ is} torture. Yet we now know that this tactic was used more than 200 times against
two suspects alone.\textsuperscript{60}

Torture is illegal, and given our country’s (historic) moral stature, it “has a
special responsibility” to enforce the prohibition, as noted by Eyal Press.\textsuperscript{61} We
lead by example, and without condemning torture ourselves, we cannot expect
others to do so.\textsuperscript{62} That condemnation must be more than rhetorical. Insisting that
the United States does not torture is empty rhetoric if we make the claim while
inflicting waterboarding on suspects.

\textsuperscript{55} Id. at 3.
\textsuperscript{56} Id. at 2.
\textsuperscript{57} Id. at 3.
\textsuperscript{58} Id. at 3.
\textsuperscript{59} Alan Clarke, \textit{Creating a Torture Culture}, 32 SUFFOLK TRANSNAT’L L. REV. 1, 2 and n.4 (citing
results of 2007 CNN poll).
\textsuperscript{60} [add cite]
\textsuperscript{61} Eyal Press, \textit{In Torture we Trust?} in CIVIL LIBERTIES, supra, note 1, at 228.
\textsuperscript{62} See id. at 228.
Equivocating on torture not only causes us to lose moral standing on the international stage but places our own soldiers at risk. As Professor Philip B. Heymann points out, if we approve torture in particular circumstances, other countries will do the same. It was that concern that led us to accept Geneva Convention prohibitions on torture, despite the cost of obtaining information that “might save dozens of American lives.”

Yoo’s Recent Op-Ed

Yoo continues to view the Geneva Convention restrictions and other limits on the President’s use of coercive techniques as wrong-headed and dangerous. In his recent op-ed, Yoo laments that President Obama will likely “declare terrorists to be prisoners of war under the Geneva Convention,” whereas the Bush Administration classified terrorists “like pirates, illegal combatants who do not fight on behalf of a nation and refuse to obey the laws of war.”

Professor Alan Clarke has argued that the demonization of an enemy and the argument that some people are just “outside the law” are elements of the creation of a torture culture. “We inhabit a world of ‘us’ against ‘the evil doers’ which permits a torture culture to take hold. Al-Qaeda becomes equated with pirates and slave traders to be dealt with or extirpated at will.” And as the journalist Eyal Press argues, torture is a function “not of brute sadism but of the willingness to view one’s enemies as less than human.”

Moreover, while some of those classed as “enemy combatants” have in fact been terrorists, others have not. In demonizing the enemy and acting as

63 Philip B. Heymann, *Torture Should not be Authorized* in Civil Liberties, *supra* note ---, at 215, 217. The notion that torture will save lives is a dubious proposition, moreover. “Torture subjects typically know less than what we think we know, and often tell us what we want to hear.”Margulies, *supra* note ____, at 33; see also Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 Mich. L. Rev. 1168, 1173 (2001) (“In Brown [v. Mississippi, involving torture] and other early cases, the Court was clearly believed that innocent persons had been convicted, and that their confessions were unreliable”); cf. M. Katherine B. Darmer, *Miranda Warnings, Torture, the Right to Counsel and the War on Terror*, 10 Chap. L. Rev. 631, 654 (2007) (noting that the criminal justice system has taught us much “about the dangers and unfairness of coerced confessions”).
64 Yoo, *supra* note ___.
65 Clarke, *supra*, note ____ at 18.
though we are justified in treating such a class of persons as “outside the law,” we run the grave risk that innocents will be victims, as they have been in the past. As Clarke points out, “[e]xperts estimate that eighty percent of people tortured by our forces and our South Vietnamese allies during the Vietnam War were wholly innocent people who were in the wrong place at the wrong time.”

As Clarke illustrates in his recent article, Creating a Torture Culture, the use of torture is not easily cabined. Rather, “[o]nce started, torture and other abusive practices spread. Their logic cannot be easily contained. If it is right to torture in the extreme situation, what about a slightly less extreme case? . . . . In every case, harsh practices can be justified on the ground that the person being questioned may harbor information that could save innocent lives.”

Relying on history and behavioral science studies, Clarke also points out that torture is a “true slippery slope.” Most of us are capable of torture and, “in the absence of enforced prevention rules, systematic abuses become prevalent.”

Even after Abu Ghraib, Yoo acknowledges no such risk of systematic abuse, focusing instead only on the risk attendant to foregoing harsh interrogation tactics. With regard to waterboarding specifically, Professor Yoo adheres steadfastly to the view that it is a legitimate practice, acknowledging that President Bush authorized the practice three times and suggesting that President Obama acted precipitously and foolishly in terminating the CIA’s “special authority to interrogate terrorists.” Yet even before Obama was sworn in the Department of Justice OLC had “conceded that waterboarding was no longer legal” after the passage of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, albeit still claiming that the President could authorize waterboarding and other such techniques “in special circumstances.” In

67 Id. at 24.
69 Id. at 21; see also Luban, supra note ___, at 1445-1448 (noting that torture is not limited to “one-off” decisions” and discussing “normalization of torture”).
70 Id. at 13.
71 Id. at 13.
72 Clarke, supra, note ___, at 3.
eschewing any authority for such practices, the new President is doing nothing more than agreeing to follow the law.

President Obama is also reclaiming some of the moral high ground lost when it was revealed that the United States had engaged in torture. While Yoo predicts that “Mr. Obama may have opened the door to further terrorist attacks on U.S. soil by shattering some of the nation’s most critical defenses,” we can hope that instead President Obama has begun the laborious process of reclaiming the country’s moral standing on the international stage. As Washington Post columnist Richard Cohen wrote five years ago in response to the BYTAP Memo:

“The Bush administration constantly reminds us that there’s a war on. That’s wrong. There are two. One is being fought by soldiers in combat, and the other is being fought for the hearts and mind of people who are not yet our enemies. However badly the administration has botched the first war . . . it has done even worse with the second. It has jutted its chin to the world, appeared pugnacious and unilateralist, permitted the abuse of POWs and others at Abu Ghraib, and now toyed in some fashion with torture. The Bush administration has shamed us all, reducing us to the level of those governments that also have wonderful laws forbidding torture, but condone it anyway.”73

It is notable that Yoo’s opinion piece adhering to the view that waterboarding is an indispensable tool in the War on Terror was written more than eight years after the tragic events of 9/11; it was not written under the same pressures that Yoo and others faced when they first advocated a narrow definition of “torture” when advising the Administration. In other words, even after considerable reflection and presumably considering the virtual cottage industry that has developed to criticize Yoo’s wartime memos, he remains strident in his defense of his first instincts. Fortunately, the majority of academics and lawyers acted quickly and decisively to illustrate the dangers of instincts that would act to grab power and inflict torture in the name of making us safer.

73 Cohen, supra note ____ , at 318-19.
In the opening quote of his piece, *In Torture We Trust?*, Eyal Press quotes from John-Paul Sartre: “If patriotism has to precipitate us into dishonor, if there is no precipice of inhumanity over which nations and men will not throw themselves, then, why in fact do we go to so much trouble to become, or to remain, human?”74 Indeed.

74 Press, supra, note 60, at 219.