

September 2014

Enhanced Interrogation: Torture Policies of the United States

Philip A. Quigley

Follow this and additional works at: <http://digitalcommons.chapman.edu/e-Research>

 Part of the [American Politics Commons](#), [International Relations Commons](#), [Military, War, and Peace Commons](#), [Peace and Conflict Studies Commons](#), [Political History Commons](#), and the [United States History Commons](#)

Recommended Citation

Quigley, Philip A. (2014) "Enhanced Interrogation: Torture Policies of the United States," *e-Research: A Journal of Undergraduate Work*: Vol. 3: No. 2, Article 4.

Available at: <http://digitalcommons.chapman.edu/e-Research/vol3/iss2/4>

This Article is brought to you for free and open access by Chapman University Digital Commons. It has been accepted for inclusion in e-Research: A Journal of Undergraduate Work by an authorized administrator of Chapman University Digital Commons. For more information, please contact laughtin@chapman.edu.

e-Research: A Journal of Undergraduate Work, Vol 3, No 2 (2012)[HOME](#) [ABOUT](#) [LOG IN](#) [REGISTER](#) [SEARCH](#) [CURRENT](#) [ARCHIVES](#)[Home](#) > [Vol 3, No 2 \(2012\)](#) > [Quigley](#)**Enhanced Interrogation: Torture Policies of the United States**

Philip A. Quigley

ABSTRACT

Over the last decade the US Government has worked tirelessly to combat terrorists, insurgents, and those who intend harm to the US, its interests, and its allies and their interests. The US Military and the US Intelligence Community have used many tactics as part of a more complex strategy for waging a worldwide war against al-Qaeda, other terrorist organizations, and their base of support. No tactic has garnered as much public attention, media outcry, and political debate as the use of torture, or more euphemistically referred to in US Government documents, "enhanced interrogation." The use of this tactic has strained partnerships and prompted tensions, both domestically and internationally, and has raised political, legal, and ethical questions. This paper seeks to explain the issues at the heart of this intense debate and allow the US to continue its world-wide campaign against terror.

Keywords: Global War on Terror, Enhanced Interrogation, Torture, Rendition Program, John Yoo, Jay Bybee, Richard Cheney, Ticking Bomb Scenario

INTRODUCTION

In the aftermath of the al-Qaeda terrorist attacks on September 11, 2001, and the ensuing Global War on Terror (GWOT), torture, or its more politically correct government euphemism, "enhanced interrogation,"^[1] has become one of the many means that the United States Military and members of the United States Intelligence Community, specifically the Central Intelligence Agency (CIA), has used to extract mission-critical information from enemy prisoners and suspected terrorists that were detained in Afghanistan, Iraq, or elsewhere, outside of the United States of America. As the GWOT waxed and waned over two battlefronts and more than one decade; and in the process consuming the lives of thousands of American service members; the public, the media, and representatives from the US Government, have questioned the means by which the GWOT was being waged, particularly as allegations and evidence accumulated of US-involvement in so-called "torture operations" which were allegedly occurring overseas. In the wake of those allegations, and the scandals that followed, a new battle emerged at the forefront of American media attention: those who argued for the continued implementation of "enhanced interrogation" versus those who were vehemently opposed to "torture" and who called for its immediate end. The divide was based on political, legal, and ethical grounds, and those involved in the debate were inextricably entrenched in their respective positions. This battle lingers on today even as the GWOT has transitioned into the so-called "Overseas Contingency Operation"^[2] and the new presidential administration of President Barack Obama has taken office. Whether or not these policies will change is yet to be determined, but thus far, the debate has been ripe with academics, lawyers, media commentators, and politicians espousing all form of opinion and recommendation. We shall analyze the strength and weaknesses of some of these arguments and then I will offer my insights regarding the future use of "enhanced interrogation" for continuing the fight against terrorism.

POLICY THROUGH MEMORANDA

Before anyone can argue for or against enhanced interrogation or torture, it is undeniably obvious that the terminology, and the included definitions therein that will be used in any such debate, are debatable in and of themselves, and therefore must be thoroughly explained first. If one is to define the terms there are many sources

P. Quigley

which can be referenced, but the most pertinent in this case are the sources of national and international law. The most frequently cited definition for "torture" and "cruel, inhuman or degrading treatment" (CIDT) can be found in Articles 1 and 16 of the "UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment" (CAT)[3], and Articles 7 and 10 of the "International Covenant on Civil and Political Rights" (ICCPR)[4]. According to Article 1 of the CAT, torture is specifically defined as:

"...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." [5]

Further, Article 16 specifies that any "other" activities which also cause "pain or suffering" are also torture, stating:

"Each 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 as defined in article 1*, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." [6]

Then, the United States Code (USC), Title 18, Part I, Chapter 113C, § 2340A specifically states:

"(a) Offense. -- Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction. -- There is jurisdiction over the activity prohibited in subsection (a) if--

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy. -- A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

§ § 2340. Definitions

As used in this chapter--

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

incidental to lawful sanctions) upon another person within his custody or physical control;

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

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

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

(C) the threat of imminent death; or

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

(3) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States."^[7]

It is this precise idea, the meaning of terminology and the precise, or imprecise, way which one can define terms is how one of the most controversial legal writings in the past decade came about: The "[DOJ] Bybee Memorandum."^[8] On 1 August 2002, Jay Bybee, who at that time was the Assistant Attorney General for the Office of Legal Counsel at the US Department of Justice (DOJ), wrote the aforementioned memorandum to Alberto Gonzales, who at the time was Counsel to President George H.W. Bush, offering his legal interpretation regarding the definitions, previously described in 18 USC § 2340A, of "severe mental pain or suffering."

In Manfred Nowak's article, "What Constitutes Torture?: US and UN Standards,"^[9] originally printed in *Human Rights Quarterly*, Nowak discusses at length the importance of the "[DOJ] Bybee Memorandum" and how the US Government, circa 2001, redefined torture in order to distinguish "torture" from other forms of CIDT, which the US Government did not interpret as violating either Article 1 of the CAT or 18 USC § 2340A. Nowak makes the argument that by undertaking this course of action, the US Government created a legal definition which differentiated between permissible coercive methods from other actions that were already classified as "torture". What is of particular interest, and what Nowak highlights, is the conclusion of the "[DOJ] Bybee Memorandum," which says, "...even if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability."^[10] Bybee gave the Bush Administration a criminal defense argument justifying the violation of Section 2340A. It was this legal justification and individual interpretation that was used as future basis for other memoranda that were later issued by the Bush Administration to officials in various intelligence agencies and in branches of the US Military.

Jay Bybee wrote another highly controversial memorandum that Nowak doesn't mention: the "[CIA] Bybee Memorandum."^[11] This memorandum was written to the Acting General Counsel for the Central Intelligence Agency, John Rizzo, regarding the interrogation of a high value al-Qaeda detainee, Abu Zubadayah, who, according to the memorandum, circa 2002, had "been involved in every major terrorist operation carried out by al-Qaeda."^[12] At the time Nowak wrote his article "What Practices Constitute Torture?" the memorandum wasn't declassified yet. The importance of the "[CIA] Bybee Memorandum" is the fact that it illustrates in a descriptive manner the exact methodology for "enhanced interrogation" which the CIA, under orders from the Bush Administration, were planning on using against Zubadayah to obtain mission-critical, time-sensitive intelligence about "information regarding terrorist networks in the United States or in Saudi Arabia and information regarding plans to conduct attacks within the United States or against our interests overseas."^[13] These methods were simply referred to as the "increased pressure phase," and this "phase" included:

"(1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard."^[14]

The fact that the graphic details explaining each of these interrogation methods are included in the "[CIA] Bybee Memorandum" is quite astounding. Nonetheless, Bybee reached the following conclusion:

"We believe that the specific intent to inflict prolonged mental [suffering] is not present, and consequently, there is no specific intent to inflict severe mental pain or suffering. Accordingly, we conclude that on the facts in this case the use of these methods separately or a course of conduct would not violate Section 2340A...based on the foregoing, and based on the facts that you have provided, we conclude that the interrogation procedures that you propose would not: violate Section 2340A."^[15]

P. Quigley

This conclusion was reached based on the included definitions in the memorandum for "severe mental pain or suffering" and the proposed stated intent of the Central Intelligence Agency. Thus, the United States managed to elude prosecutorial troubles through interpretational legal means and precise/imprecise definitions for terminology. This is a recurring theme that is plainly visible in the legal memoranda that fueled the GWOT.

Besides the "[DOJ] Bybee Memorandum," Nowak dissects other controversial and historical memoranda: the "[2002] Yoo Memorandum,"^[16] and "[2003] Yoo Memorandum,"^[17] written by John Yoo, who at the time was the Deputy Assistant Attorney General; and the "Levin Memorandum,"^[18] written by Daniel Levin, who at the time was the Acting Assistant Attorney General. The "[2002] Yoo Memorandum" and "[2003] Yoo Memorandum" succeeded both of the memoranda written by Jay Bybee, and the "Levin Memorandum" succeeded both of the memoranda written by John Yoo. The interesting aspect which can be surmised in all of these memoranda is the way that interpretational legal means was used to circumvent prosecutorial troubles which could have occurred otherwise.

The "[2002] Yoo Memorandum," offered legal interpretations and policy recommendations based on the usage of "understandings," "reservations," and the general applicability of agreements and treaties; more specifically, it brings to question the jurisdictional limitations of the organizations under which violations of said agreements and treaties could potentially be prosecuted under. The "[2002] Yoo Memorandum" referenced the interpretations that Jay Bybee put forth in the "[DOJ] Bybee Memorandum," regarding the definitions of "torture" and "severe mental pain or suffering."^[19] Yoo concurred with Bybee in his interpretations and injected his own additional interpretations. He furthered Bybee's arguments by adding the relevance of the "understandings" and their use as conditional clauses if and when the United States allows itself and its policies to be bound by international treaties and laws. Regarding the United States' signatory agreement with the UN Convention Against Torture^[20], in the "[2002] Yoo Memorandum," Yoo highlighted the "understandings" that the US made in regards to the Convention and the willingness of the US to be bound by its content. He made two statements regarding the applicability of the Convention on the actions of the United States: 1)"Despite the apparent differences in language between the Convention and § 2340A, international law clearly could not hold the United States to an obligation different than that expressed in § 2340A,"^[21] and, 2)"It is one of the core principles of international law that in treaty relations a nation is not bound without its consent."^[22] In other words, because the United States included conditional clauses, IE "understandings," the United States was only bound by the parts of the Convention Against Torture that the US agreed to be bound by. Additionally, regarding the so-called "reservations," Yoo makes a similar argument: if a treaty doesn't specifically state that it doesn't allow "reservations," then any "reservation" that states make are legitimate, and actions of the state are accountable, except in regard to any "reservations" that the state made prior to signing the treaty. Yoo states in his interpretation, "The [Torture] Convention contains no provision that explicitly attempts to preclude states from exercising their basic right under international law to enter reservations to other provisions."^[23] So, basically, the US cannot be held accountable for actions made under the "reservations" it made to the UN CAT. Then, regarding the applicability of the Convention on the actions of the United States, specifically, the use of methods against al-Qaeda operatives which the Convention identifies as "torture," he states, "The United States refused to accept the jurisdiction of the [International Court of Justice]...to adjudicate cases under the Convention,"^[24] and further, "The United States...cannot be bound by provisions of the [Rome Statute] nor can US nationals be subject to ICC prosecution."^[25] In summary, because the US didn't ratify to the Rome Statute, and because the US made reservations to the Convention Against Torture prior its committal, the US cannot be held accountable for actions which it did not agree to. This exception is the legal clause that the Bush Administration used to exempt itself and insulate the US from international criminal prosecution, and it's not the only clause that has been used for this purpose.

The "[2003] Yoo Memorandum" was written by John Yoo to William J. Haynes II, who, circa 2003, was General Counsel for the Department of Defense.^[26] According to Nowak, the "[2003] Yoo Memorandum" was "the legal basis for the...revised interrogation techniques authorized by Secretary Rumsfeld on 16 April 2003,"^[27] and that "the memo explicitly held that the application of cruel, inhuman, and degrading treatment to the [US Naval Base Guantanamo Bay, Cuba,] detainees was authorized with few restrictions or conditions."^[28] It is important to note that the methods that were used on the detainees in Guantanamo were the same methods that the US authorized for use against the insurgents that were detained at the Abu Ghraib Army Detention Facility in Iraq. Consequently

though, in the wake of the 2004 Abu Ghraib torture scandal, the memoranda written by Jay Bybee and John Yoo were revoked.^[29]

Similar to the memoranda written by Jay Bybee and John Yoo, the "Levin Memorandum,"^[30] written in 2004 by Daniel Levin, who was the Acting Assistant Attorney General in the Office of Legal Counsel in the Department of Justice, brings forth yet more interpretations on the definition of what is considered "severe pain or suffering." Nowak opines that another similarity is the interpretational usage of terminology; again, the precise/imprecise way which each memorandum seeks to offer new definitions for the same terminology, but each doing so in a different and more complex way than the memorandum that preceded it. The "Levin Memorandum" further distinguishes "torture" from other forms of CIDT which are not considered torture, and, while distasteful, are permissible nevertheless. Levin states: "'Torture' is thus to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in the case of torture."^[31] Thus, Levin created another legal loophole for various organizations to exploit, but unlike the Bybee and Yoo memorandum preceding it, Levin's memoranda was not subsequently withdrawn by the Bush Administration.

THE GLOBAL IMPACT OF DETAINEE ABUSE

Human rights scholar David Forsythe questions US torture policies in his publication in *Human Rights Quarterly*, titled "United States Policy Towards Enemy Detainees in the 'War on Terrorism.'"^[32] Forsythe's expose is a historical examination which uses France's war in Algeria as a case study, and then compares the French-Algiers war to the GWOT waged by the United States, noting, "United States policy makers and leading media personalities have yet to draw the connections between French colonial history in Algeria and the current US 'war on terrorism.' However, the Bush policy is very similar to the French policy from 1954 to 1962, for similar reasons, and with similar results, albeit not identical."^[33] Forsythe particularly illustrates the parallels of how the French military used torture as means to fight the Algerian Separatists during the Battle of Algiers, and how the US has, respectively, used similar counter-terrorism tactics against al-Qaeda terrorists and insurgents in Afghanistan and Iraq.

Forsythe theorizes that the engulfing political disaster which France encountered after the French-Algiers war will also happen to the United States if US policies regarding torture do not change. He states, "Torture may have helped the French win the battle of Algiers, but their policy of abuse led to many negatives, including increased domestic criticism and loss of reputation in the world; meanwhile their enemies failed to lessen their struggle. The Bush policy toward enemy detainees replicates much of this French experience."^[34] As a case in point, Forsythe eludes to the events surrounding the 2004 Abu Ghraib torture scandal and the CIA's ongoing, highly-classified and equally scandalous, "Rendition Program."^[35]

Abu Ghraib is one of the most publicly recognized occurrences where members of the US Military and the CIA abused and used "enhanced interrogation" tactics on suspected terrorists and captured insurgents, but notwithstanding, Abu Ghraib only brought to surface a program that was already thoroughly established by the time the scandal erupted: the CIA's "Rendition Program". According to Forsythe, the "Rendition Program" was basically "the practice of forced disappearances. That is, US authorities held detainees in secret places but did not acknowledge detaining them, thus preventing...any law applying to them,"^[36] and further, that "certain persons were rendered, or deported or transferred, without legal process to foreign jurisdictions such as Egypt, known for harsh interrogation practices."^[37] Forsythe surmises, "one can understand the nature of interrogation in places such as Egypt by looking at the State Department's annual human rights reports, which repeatedly find that torture and other abuse of prisoners is systematic in those states."^[38] Essentially, by the time the 2004 Abu Ghraib torture scandal emerged, there was already an entrenched group within the US Military and the US Intelligence Community that had no qualms about using "enhanced interrogation," or other methods, on detainees in order to obtain the mission-critical information that they needed. The Abu Ghraib torture scandal forced the US to admit to conducting activities that the US never wanted known in the public domain and additionally brought negative

P. Quigley

media attention to an already unpopular war. The way the Bush Administration improperly handled the scandal only added insult to injury in the eyes of the global community.

Forsythe argues that the "Rendition Program" and the debacle surrounding Abu Ghraib torture scandal are primary examples of how the United States may indeed win the GWOT but lose its reputation for being an example of human rights and democracy around the world; similar to how France won the Battle of Algiers, but lost its Algerian colony and its humanitarian reputation. Forsythe laments that "some US policy after 11 September 2001 toward enemy detainees was more humane than the French policy during the Algerian war,"^[39] and that though "[the US] coerced and abused a sizable percentage of those prisoners"..."[the US] did not pull out fingernails as a matter of military policy, then use summary executions to dispose of the incriminating evidence,"^[40] like France did in Algeria, but nevertheless, that the US has "gravely undermined its own standing in global attempts to legally protect human dignity."^[41] Acknowledging the political fallout in the aftermath of Abu Ghraib, one ponders the question, "Was the intelligence the US gathered worth the loss of political capital which the US paid for that intelligence?" Besides the costs of political fallout, there are several serious consequences that the United States could face if the US does not reevaluate its torture policies.

Jeremy Waldron, in the *Columbia Law Review*, unequivocally spells out the consequences of permitting torture to be utilized as a means of obtaining information from suspected terrorists and captured insurgents. In Waldron's article, "Torture and Positive Law: Jurisprudence for the White House,"^[42] he states that by not abolishing torture, the United States has placed itself on a downward spiral which could greatly harm the US internationally and domestically. Internationally, Waldron says, the US could be harmed when drafting treaties with other states, especially in regards to the use of precise/imprecise definitions of terminology, and when the US claims that the President has unlimited legal immunity as Commander-in-Chief. He further states that domestically, the US could be harmed as well if the US continues to allow torture to be used abroad, because, sooner or later, using the same justifications which allowed foreign nationals to be tortured, eventually those justifications will allow for torture to be used domestically against Americans. These are potentially scary conclusions.

Waldron argues that the only reason states would demand a precise or imprecise definition for a term in a legal explanation is so that the state can know and press against that imaginary boundary and have precedent to cite when the state violates that boundary. He states:

"One way of thinking about the need for precise definition involves asking whether the person constrained by the norm in question--state or individual--has a legitimate interest in pressing up as close as possible to the norm, and thus a legitimate interest in having a bright-line rule stipulating exactly what is permitted and exactly what is forbidden...if he does have such an interest, then he has an interest in having the precise location of the crucial point on the continuum settled clearly in advance."^[43]

This rationale is quite logical and is more than likely the exact thinking behind the Bush Administration having so many Department of Justice jurisprudence experts submit different legal interpretations regarding the exact same laws. It can be surmised that Waldron's hypothesis is that if the United States can invariably redefine definitions for terminology in binding international contracts as the US so chooses, then what prevents other states from doing exactly the same thing to the United States? In a word: nothing. This conclusion though, in and of itself, isn't as potentially problematic as Waldron's second argument regarding the consequences for US foreign relations if the US continues to claim unlimited Commander-in-Chief immunity.

Waldron's objection regarding the United States' claim to the unlimited immunity of the Commander-in-Chief is the same objection he has regarding the United States' prerogative in determining the definitions of terminology in international contracts and treaties: what is to stop other states from taking the same prerogative? He sums up this argument, stating:

"Professor Yoo argues that the US President cannot be bound by customary international law; Judge Bybee says that there can be no legislative constraints on the President's ability to authorize torture; and the English Court of Appeal recently determined that the prohibition in the Convention Against Torture on using information obtained

by torture...applies only to information that has been extracted by torture conducted by agents of the detaining state. In the end, a legal prohibition is only as strong as the moral and political consensus that supports it."^[44]

Simply put, customs and laws are applicable only if there is a customary belief that dictates that those customs and laws are applicable. From the international relations standpoint, this theory could have tremendous impact on world affairs because if other states decide only to honor those treaties, those contracts, those international laws that the state chooses, when the state chooses, this could lead to global anarchy and the collapse of diplomacy and international relations as we know it.

The final concern that Waldron has is that if the United States continues to allow torture to be used abroad, eventually, under the certain conditions, the US may allow those same methods to be used against Americans, for the same reasons it uses torture against suspected terrorists and insurgents: to prevent an unspeakable act from occurring and to save countless lives. He offers a general observation:

"For we know that, in general, there is a danger that abuses undertaken in extraordinary circumstances (relative to the administration of law and order at home) can come back to haunt or infect the practices of the domestic legal system."^[45]

Waldron concludes, pointedly instructing this caution:

"Do not imagine that you can maintain a firewall between what is done by your soldiers and spies abroad to those they demonize as terrorists or insurgents, and what will be done at home to those who can be designated as enemies of society."^[46]

The fine line between a state's foreign enemies and a state's domestic enemies can become blurred in the fog of war. A pertinent question comes to light then: "What are those 'certain conditions' which precipitate the United States in justifying using torture?"

THE TICKING BOMB RATIONALE

David Luban asks the question, "Could there be an acceptable justification to use torture?" in his article in *The Virginia Law Review*, titled, "Liberalism, Torture, and the Ticking Bomb."^[47] To possibly satisfy this question, Luban discusses the rhetorical "ticking bomb scenario."^[48] Luban thusly describes the "ticking bomb scenario":

"Suppose [there is a] bomb...planted somewhere in the crowded heart of an American city, and you have custody of the man who planted it. He won't talk. Surely, the hypothetical suggests, we shouldn't be too squeamish to torture the information out of him and save hundreds of lives. Consequences count, and abstract moral prohibitions must yield to the calculus of consequences."^[49]

The "ticking bomb scenario" is a hypothetical morality test designed to prove that even those people who possess an absolute moral prohibition against torture will eventually concede to using torture as a "last resort" to prevent an unthinkable act from being perpetrated by some said villain. Regarding the "ticking bomb scenario" though, Luban raises another important issue which further clouds this debate:

"The ticking time-bomb scenario...makes us see the torturer in a different light...now, he is not a cruel man or a sadistic man or a coarse, insensitive brutish man. The torturer is instead a conscientious public servant...willing to do desperate things only because the plight is so desperate and so many innocent lives are weighing on the public servant's conscience."^[50]

Luban discusses the "ticking bomb scenario" to prove the point that as long as there are potential threats credible enough for people to justify the use of violence as a means to counteract that potential threat, torture will always inevitably be an option that presents itself, and those who advocate its uses will find moral, ethical, or legal justifications to do so, and will convince others of the righteousness of doing so, despite any and all political rhetoric or ideology to the contrary.

Luban concludes by addressing the unmentioned underlying need that the United States has for such dramatic, "emergency situations" like the "ticking bomb scenario". He says that "emergency situations," like, for instance, a

P. Quigley

"ticking bomb," are used as a mask to cover up for a graver issue which is hiding just beneath the surface in America: a culture of torture that is slowly being created by the refusal of the United States to abolish this practice. Luban proposes:

"The ticking time bomb distracts us from the real issue, which is not about emergencies, but about the normalization of torture. Perhaps the solution is to keep the practice of torture secret in order to avoid the moral corruption that comes from creating a public culture of torture. But this so-called "solution" does not reject the normalization of torture. It accepts it, but layers on top of it the normalization of state secrecy. The result would be a shadow culture of torturers and those who train and support them, operating outside the public eye and accountable only to other insiders of the torture culture."[\[51\]](#)

Whether or not a so-called "shadow culture of torture" exists is debatable, but nevertheless, the observations Luban makes regarding the "normalization" of torture as an element of state policy, is a valid concern and, at least in his view, the ramifications of such "normalization" could potentially spell catastrophic consequences for the United States.

In the *Johns Hopkins University Press South Central Review* article, "Information and the Tortured Imagination,"[\[52\]](#) written by Thomas Hilde, Hilde directly refutes the "ticking bomb scenario," calling into question the circular logic of the scenario itself and thereby debunking its further usage. He specifically claims:

"The time bomb argument is bogus. It suffers from the same defect of most ends-justify-the-means claims. That is, it adopts an unquestioned fixed supposition or end by which the means to achieve it are simply to be manipulated in its service. The scenario hardly qualifies, then, as a model of either morality or truth-seeking, for the only question is which means to use, or, in other words, which "facts" will prove the supposition or end. Torture becomes a "successful" means in that the torture victim will usually confess to anything the torturers desire, thus confirming the supposition. The argument is a prescription for describing reality as whatever the torturers wish it to be."[\[53\]](#)

Hilde seeks to demonstrate that torture is futile because, accordingly, a person will say anything to stop the torture, but the torturers won't stop until they believe they have the answers they need, and thus the cycle will endlessly continue. Hilde points out though that while this cycle may continue endlessly, all that the torturer is confirming is the reality which they want to confirm. Whether this is indeed the case or not is debatable. Other elements of Hilde's argument are less debatable though and are more a matter of practicality.

There is another, more practical, element to consider when generally discussing the usage of torture when seeking to acquire knowledge from captured enemy combatants: the accuracy and truthfulness of that information. Hilde believes the current interrogation methods present a significant flaw:

"How does one know when one has meaningful or true information? Under severe pain, torture victims often admit to anything to halt the pain, regardless of their guilt of possessing significant information...Since the torture victim might admit to *anything* -- whether intentional misinformation or not -- some further element is required to verify whether the information is either false or "actionable." If one already possesses whatever knowledge forms a "reasonable expectation" that the torture victim has significant information, one could then perhaps correlate the torture information with this previous knowledge in order to verify it. The problem is that this would appear to render torture moot as a practical matter. The torture information must be previously unknown (but somehow of great moral gravity) in order to justify the act of torture. It is therefore unclear whether or not it is meaningful information until one has tortured, gained information, and then somehow verified the information."[\[54\]](#)

Hilde's reasoning is logical. A torture victim will say anything to stop the pain. So, how does one know what is the truth and what is not the truth? Hilde correctly answers this question: you simply verify what you are told with another source. So, torture may not be moot as he states, but it may be a more lengthy and unreliable process than any state may be willing to tolerate. Additionally though, the veracity of the claims that a tortured individual may make could potentially be more difficult to verify than civilian intelligence operatives or military personnel may have time to verify, especially if presented with a real-life "ticking bomb scenario".

The legal aspects have been examined; the international relations aspects have been speculated about; lastly, the hypothetical aspects have been theorized. The remaining aspect is one of the most important aspects: "What do the American people think?" And further, "What actions are they willing to tolerate in order to keep them safe from potential harm?"

US PUBLIC OPINION REGARDING TORTURE

In April 2009, The Pew Research Center conducted a public opinion survey, later titled, "Public Remains Divided Over Use of Torture,"^[55] regarding whether or not the public believes that there are justifications to use torture to obtain information from detained suspected terrorists. From April 14-21, 2009, the Pew Research Center conducted interviews with 742 adults via phone interviews. According to their research findings, "nearly half [of those polled] say the use of torture...is often (15%) or sometimes (34%) justified; and approximately the same portion believes that torturing suspected terrorists is rarely (22%) or never (25%) justified."^[56] Interestingly, their February 2009 findings were not dramatically different from their November 2007 findings or their February 2008. This indicates that the US public is still divided when it comes to justifying the use of torture, and whether or not they think that the use torture should be ceased.

CONCLUSIONS

I do not fully agree with David Forsythe when he said that when "enhanced interrogation"/torture/ETC became part of US policy towards our enemies, America lost its stellar reputation as an example of democracy and human rights. Neither has changed. The US can arguably be cited as the most functional example of democracy in the world, and furthermore, the US is still known for being a champion of human rights. But, what has changed is the US now fights "fire with fire." The US has taken the fight to the enemy and we are using pages out of our allies' playbooks. Ethical or not, the US is not the first nation to use so-called "distasteful" means to win a war. Britain, France, Germany, and others within the international community have done the same, and thus have waived their right to lecture the US on using any means necessary to win its battles, or lest they forget their own history. The world map of today plainly illustrates that their methods worked at one time. Still, I will argue that it is hypocritical to demonize the actions of other states when the US itself is selectively choosing which US and UN torture policies that the US will or will not abide by. Opponents to these methods will say that it is possibly worse that these policies are policies which the US helped to create in the first place. Torture does go against US Code, international conventions, and many of the classical liberal democratic ideals which the United States was founded upon. Jeremy Waldron is mostly correct when he argues that the US Government itself, in its decision to use torture, has done a disservice to the United States and has put the US in a precarious position, both domestically and internationally.

I believe that the United States must be willing to do whatever the US feels is in the best interest of the US in order to protect the United States, its interests, and its allies and their interests from harm. This is unadulterated realist political theory at work. Realist political theory states:

"The realist school of thought is founded on the premise that as a tool for the policymaker the national interest is intended to identify what is in the best interest of his state in its relations with other states. The term 'best' is defined in terms of power and security. Realists view national security as the primary basis of a state's national interest because of the threat of anarchy and constraints on sovereign states that are part of the international system."

At present, with terrorists, including al-Qaeda and several other terrorist organizations, plotting to kill innocent Americans at home and abroad, without reservation I will say that "ticking bomb scenarios," such as presented by David Luban, do exist in reality, and I recognize that, yes, torture does go against classical liberal democratic ideals, but the use of torture does not violate the motivation behind its usage: safeguarding the national interests and security of the United States and protecting American lives. That is more important than the US upholding its supposedly stellar global reputation, or anything else. Quoting former Vice President Richard Cheney, "No moral value held dear by the American people obliges public servants ever to sacrifice innocent lives to spare a captured

P. Quigley

terrorist from unpleasant things. And when an entire population is targeted by a terror network, nothing is more consistent with American values than to stop them."[\[57\]](#) I fully agree with his statement.

As long as there are threats credible enough for ordinary people to justify the use of violence as a means to counteract threats, torture will always be an option that emerges, and there will always be people who will be willing to go to any lengths necessary to prevent unspeakable acts from happening. I know that those who advocate using torture will find any legal loophole to do so, despite any political rhetoric, public opinion survey, or ideology to the contrary. My research did not wholly contradict the Pew Research Center's conclusion that the public was divided over torture. My research, including the articles from the scholarly research journals and the law reviews which I found, indicates that the public is not divided over whether or not they support the use of torture. In fact, it seems apparent that Americans generally disapprove of torture. Even though the public may be against the usage of torture, I still think there are justifiable reasons to use torture and I believe that the American people understand that situations, such as Luban's "ticking bomb scenario," are very much real, otherwise there would not have been as large a minority group in the Pew Research Center's survey that did in fact support the use of torture. Regardless of the legalities, and regardless of the international agreements made, I do not believe that the US Government will change its policies on "enhanced interrogation". As long as there are imminent dangers posed by groups such as al-Qaeda, dangers which threaten US national security, I believe that the US will always retain the option of using torture. As a practical proponent of realist political theory, I believe this is the correct option to follow, and given the unpredictable times which we live in today, I believe this is the only logical course of action.

I have researched the legalities, ethical considerations, international relations implications, and the US policies regarding torture. After completing all of this research, I still support the use of torture. I will again quote former Vice President Richard Cheney, when he said:

"I was and remain a strong proponent of our enhanced interrogation program. The interrogations were used on hardened terrorists after other efforts failed. They were legal, essential, justified, successful, and the right thing to do. The intelligence officers who questioned the terrorists can be proud of their work and proud of the results, because they prevented the violent death of thousands, if not hundreds of thousands, of innocent people."[\[58\]](#)

The American people may never know how many lives have been saved by the use of "enhanced interrogation," and it can arguably be claimed that it is in the interest of US national security that the American people not know the precise results of these interrogations, as the information obtained during these interrogations must first be verified and corroborated by American intelligence operatives and military personnel before any action can be taken. Some things must remain secret and I fully agree with Former Vice President Richard Cheney when he said that, "Releasing the interrogation memos was flatly contrary to the national security interest of the United States. The harm done only begins with top secret information now in the hands of the terrorists, who have just received a lengthy insert for their training manual."[\[59\]](#)

Thomas Hilde was correct when he said that the current interrogation methods used by the US are flawed. If the United States continues using "enhanced interrogation" as part of the CIA's "Rendition Program," then new procedures must be implemented to ensure the veracity of the information which American intelligence operatives or military personnel obtain during those interrogations. There must be a system of checks and balances that ensures that the information received is reliable. If the United States continues this program, then the ends must justify the means, and the US must win the "war on terror." If we as a state actor are to continue to use these methods, then there must be rational, tangible, and justifiable reasons for us to continue to do so. Further, if operational security permits, the results of these enhanced interrogations, specifically, the terrorist attack plots that these interrogations uncover and prevent, should be made known publicly, so that the American people can fully understand and appreciate why these methods were and are will continue to be used on their behalf, and how exactly "enhanced interrogation" benefits the United States. It is only by exposing these plots, after they have been prevented and countered in full measure, that the American people will better understand the life-saving utility of using "enhanced interrogation" against our enemies. It is in the scores of enemies defeated, the tally of thwarted terrorist plots, and the number of American lives saved that, in the end, will justify,

to both the American people and the international community, the actions taken by the American intelligence community and US military personnel. Only these "ends" will justify the "means" of using "enhanced interrogation."

BIBLIOGRAPHY

- Bybee, Jay. United States Department of Justice. *Memorandum from Jay Bybee to the Honorable Alberto R. Gonzales on 1 August 2002*. Washington: OLC, 2002.
- Bybee, Jay. United States Department of Justice. *Memorandum from Jay Bybee to John Rizzo on 1 August 2002*. Washington: OLC, 2002.
- Cheney, Richard, (2009). "Enhanced Interrogation Techniques: Protecting This Country". *Vital Speeches of the Day*. 75 (7). 297-302.
- Forsythe, David. (2006). "United States Policy Towards Enemy Detainees in the 'War on Terrorism'". *Human Rights Quarterly*. 28 (2). 465-491.
- Hilde, Thomas. (2007). "Information and the Tortured Imagination". *Johns Hopkins University Press South Central Review*. 24 (1). 183-201.
- Levin, Daniel. United States Department of Justice. *Memorandum Opinion for the Deputy Attorney General*. Washington: OLC, 2004.
- Luban, David. (2005). "Liberalism, Torture, and the Ticking Time Bomb". *Virginia Law Review*. 91 (6).1425-1461.
- Nowak, Manfred. (2006). "What Practices Constitute Torture?: US and UN Standards". *Human Rights Quarterly*. 28 (4). 809-841.
- Pew Research Center for the People & the Press. *Public Remains Divided Over Use of Torture* (Public Research Survey; April 14-21, 2009). Washington: Pew Research Center for the People & the Press, 2009 <<http://www.people-press.org/2009/04/23/public-remains-divided-over-use-of-torture/>>.
- Waldron, Jeremy. (2005). "Torture and Positive Law: Jurisprudence for the White House". *Columbia Law Review*. 105 (6). 1681-1750.
- United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 10 December 1984. United Nations. 28 April 2012 <<http://untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.html>>.
- United Nations International Covenant on Civil and Political Rights. 16 December 1966. United Nations. 28 April 2012 <<http://www.un.org/millennium/law/iv-4.htm>>.
- United States Army. US Army War College Guide to National Security Issues. *United States Army War College*. June 2008. 28 April 2012 <<http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=871>>.
- United States Code, Title 18, Part I, Chapter 113C, § 2340A. 3 January 2012. United States Office of the Law Revision Counsel. 28 April 2012 <<http://uscode.house.gov/download/pls/18C113C.txt>>.
- Yoo, John. United States Department of Justice. *Memorandum from John Yoo to the Honorable Alberto R. Gonzales on 1 August 2002*. Washington: OLC, 2002.
- Yoo, John. United States Department of Justice. *Memorandum from John Yoo to William J. Haynes II on 14 March 2003*. Washington: OLC, 2003.

[1] Cheney, Richard. "Enhanced Interrogation Techniques: Protecting This Country," *Vital Speeches of the Day*, 75, no. 7 (2009): 298.

[2] Cheney, "Enhanced Interrogation Techniques: Protecting This Country," 300.

[3] Convention Against Torture [CAT] and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, UN GAOR, 39th Sess., Supp. No. 51, art. 1, 16, UN Doc. A/39/51 (1985), *entered into force* 26 June 1987, *reprinted in* 23 I.L.M. 1027 (1984), *substantive changes noted in* 24 I.L.M. 535 (1985).

[4] International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), UN GAOR, 21st Sess., Supp. No. 16, art. 7, 10, UN Doc. A/6316 (1966), 999 UNTS 171 (*entered into force* 23 Mar. 1976).

P. Quigley

[5] CAT, art. 1(1).

[6] CAT, art. 16(1).

[7] United States Code, Title 18, Part I, Chapter 113C, § 2340A (*effective 26 October 2001*).

[8] Bybee, Jay. United States Department of Justice. "Memorandum from Jay Bybee to the Honorable Alberto R. Gonzales on 1 August 2002". (Washington, DC: OLC, 2002).

[9] Nowak, Manfred. "What Practices Constitute Torture?: US and UN Standards," *Human Rights Quarterly*, 28, no. 4 (2006): 812.

[10] Bybee, "Memorandum from Jay Bybee to the Honorable Alberto R. Gonzales on 1 August 2002 on 1 August 2002", 42. [DOJ]

[11] Bybee, Jay. United States Department of Justice. "Memorandum from Jay Bybee to the John Rizzo on 1 August 2002". (Washington, DC: OLC, 2002). [CIA]

[12] Bybee, "Memorandum from Jay Bybee to John Rizzo on 1 August 2002", 7.

[13] Bybee, "Memorandum from Jay Bybee to John Rizzo on 1 August 2002", 1.[CIA]

[14] Bybee, "Memorandum from Jay Bybee to John Rizzo on 1 August 2002", 2. [CIA]

[15] Bybee, "Memorandum from Jay Bybee to John Rizzo on 1 August 2002", 18. [CIA]

[16] Yoo, John. United States Department of Justice. "Memorandum from John Yoo to the Honorable Alberto R. Gonzales on 1 August 2002". (Washington, DC: OLC, 2002). [2002]

[17] Yoo, John. United States Department of Justice. "Memorandum from John Yoo to William J. Haynes II on 14 March 2003". (Washington, DC: OLC, 2003). [2003]

[18] Levin, Daniel. United States Department of Justice. "Memorandum Opinion for the Deputy Attorney General on 30 December 2004". (Washington, DC: OLC, 2004).

[19] Yoo, "Memorandum from John Yoo to the Honorable Alberto R. Gonzales on 1 August 2002," 2. [2002]

[20] United Nations, "Convention Against Torture [CAT] and Other Cruel, Inhuman or Degrading Treatment or Punishment".

[21] Yoo, "Memorandum from John Yoo to the Honorable Alberto R. Gonzales on 1 August 2002," 3. [2002]

[22] Yoo, "Memorandum from John Yoo to the Honorable Alberto R. Gonzales on 1 August 2002," 3. [2002]

[23] Yoo, "Memorandum from John Yoo to the Honorable Alberto R. Gonzales on 1 August 2002," 3. [2002]

[24] Yoo, "Memorandum from John Yoo to the Honorable Alberto R. Gonzales on 1 August 2002," 3. [2002]

[25] Yoo, "Memorandum from John Yoo to the Honorable Alberto R. Gonzales on 1 August 2002," 5. [2002]

[26] Yoo, "Memorandum from John Yoo to William J. Haynes II on 14 March 2003". [2003]

[27] Nowak, "What Practices Constitute Torture?: US and UN Standards," 814.

- [28] Nowak, "What Practices Constitute Torture?: US and UN Standards," 814.
- [29] Nowak, "What Practices Constitute Torture?: US and UN Standards," 814.
- [30] Levin, "Memorandum Opinion for the Deputy Attorney General on 30 December 2004".
- [31] Levin, "Memorandum Opinion for the Deputy Attorney General on 30 December 2004," 4.
- [32] Forsythe, David. "United States Policy Towards Enemy Detainees in the 'War on Terrorism'". *Human Rights Quarterly*. 28, no. 2 (2006).
- [33] Forsythe, "United States Policy Towards Enemy Detainees in the 'War on Terrorism,'" 469.
- [34] Forsythe, "United States Policy Towards Enemy Detainees in the 'War on Terrorism,'" 470.
- [35] Forsythe, "United States Policy Towards Enemy Detainees in the 'War on Terrorism,'" 473.
- [36] Forsythe, "United States Policy Towards Enemy Detainees in the 'War on Terrorism,'" 473.
- [37] Forsythe, "United States Policy Towards Enemy Detainees in the 'War on Terrorism,'" 473.
- [38] Forsythe, "United States Policy Towards Enemy Detainees in the 'War on Terrorism,'" 478.
- [39] Forsythe, "United States Policy Towards Enemy Detainees in the 'War on Terrorism,'" 489.
- [40] Forsythe, "United States Policy Towards Enemy Detainees in the 'War on Terrorism,'" 489.
- [41] Forsythe, "United States Policy Towards Enemy Detainees in the 'War on Terrorism,'" 490.
- [42] Waldron, Jeremy. "Torture and Positive Law: Jurisprudence for the White House". *Columbia Law Review*. 105, no. 6 (2005).
- [43] Waldron, "Torture and Positive Law: Jurisprudence for the White House" 1701.
- [44] Waldron, "Torture and Positive Law: Jurisprudence for the White House" 1712.
- [45] Waldron, "Torture and Positive Law: Jurisprudence for the White House" 1740.
- [46] Waldron, "Torture and Positive Law: Jurisprudence for the White House" 1740.
- [47] Luban, David, "Liberalism, Torture, and the Ticking Time Bomb," *Virginia Law Review*, 91, no. 6 (2005).
- [48] Luban, "Liberalism, Torture, and the Ticking Time Bomb," 1426.
- [49] Luban, "Liberalism, Torture, and the Ticking Time Bomb," 1440.
- [50] Luban, "Liberalism, Torture, and the Ticking Time Bomb," 1441.
- [51] Luban, "Liberalism, Torture, and the Ticking Time Bomb," 1446.
- [52] Hilde, Thomas. "Information and the Tortured Imagination," *South Central Review*, 24, no. 1 (2007).
- [53] Hilde, "Information and the Tortured Imagination," 191.

P. Quigley

[54] Hilde, "Information and the Tortured Imagination," 193.

[55] Pew Research Center for the People & the Press. "Public Remains Divided Over Use of Torture," Public Research Survey, April 14-21 (2009). [Pew Research Center]

[56] Pew Research Center, "Public Remains Divided Over Use of Torture," 1.

[57] Cheney, "Enhanced Interrogation Techniques: Protecting This Country," 301.

[58] Cheney, "Enhanced Interrogation Techniques: Protecting This Country," 298.

[59] Cheney, "Enhanced Interrogation Techniques: Protecting This Country," 301.