



ISOLATIONISM EXPOSED: THE EVOLUTION OF THE CRUEL, INHUMAN, AND DEGRADING TREATMENT STANDARD IN THE UNITED STATES SINCE 2001

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I. INTRODUCTION

A policy storm has hovered over the standard of torture since Congress declared the “war on terror.”¹ The series of bills, amendments, and revisions prompted by the Administration of President Bush have left the public and the academic community in disarray and has cast a veil on the international norm of torture. The international community did not agree on a definition of torture until the adoption of the Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture) on December 10, 1984.² Following the adoption of the Convention Against Torture, the policy debate shifted from defining torture to implementing and interpreting the Convention. With the “war on terror” and the departure from conventional warfare arose a need to set the boundaries of intelligence interrogations.³ This need brought another shift in the policy debate on torture and presented the first major challenge to the Convention Against Torture by a Western democracy. The debate on the scope of permissible interrogation techniques does not focus on what constitutes torture but on what is cruel, inhuman, and degrading treatment. Throughout the “war on terror,” the Bush Administration has readily admonished torture. What is at issue is the relatively unexplored and vague parameters of Article 16 of the Convention Against Torture, which bans cruel, inhuman, and degrading treatment.⁴ Within this new debate, the central issues are: what constitutes cruel, inhuman, and degrading treatment; what is the threshold difference between torture and cruel, inhuman, and degrading treatment; and is the United States bound by Article 16 of the Convention Against Torture.

This paper traces the evolution of the United States’ definition of cruel, inhuman, and degrading treatment and demonstrates that fueling the policy storm hovering over the standard of torture since 2001 is an intent by the Bush Administration to repudiate the international safeguards against cruel,

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¹ Authorization for Use of Military Force, 115 Stat. 224 (2001). The Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) confirmed Congress’ authorization as a declaration of war that triggered the President’s war powers.

² 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (statement of Assistant Legislative Clerk). The United Nations General Assembly adopted unanimously the Convention Against Torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment on December 10, 1984.

³ President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sep. 6, 2006), <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984), at Art. 16.

inhuman, and degrading treatment. The impetus for the policy changes stems from the ban on cruel, inhuman, and degrading treatment in the Geneva Convention relative to the Treatment of Prisoners of War⁵ and the Convention Against Torture. The first part of this paper examines the norms established by these two treaties and the resulting restrictions. Having presented the international norms governing cruel, inhuman, and degrading treatment, the second part of the paper provides a chronological examination of how the Bush Administration repudiated these norms. Prior to 2001, the United States had an absolute stance against torture and cruel, inhuman, and degrading treatment.⁶ With the declaration of the “war on terror” and the invasion in Afghanistan, the absolute stance against cruel, inhuman, and degrading treatment eroded. In the months following the attacks of September 11, 2001, the Bush Administration requested a series of memoranda on the threshold of torture.⁷ To provide the intelligence and military community with more discretion during interrogations, the first memorandum adopted a very narrow definition of torture and exploited Congress’ refusal to criminalize cruel, inhuman, and degrading treatment.⁸ Upon the public outcry to the memorandum and the abuse of detainees at Abu Ghraib, the Bush Administration rescinded the 2002 memorandum⁹ and Congress enacted the Detainee Treatment Act.¹⁰ In contrast to the Convention Against Torture the Detainee Treatment Act does not criminalize cruel, inhuman, and degrading treatment nor does the Act adopt international norms. Though the standards delineated in the Detainee Treatment Act successfully isolated the United States from the Convention Against Torture, looming in the background were the protections extended to detainees under the Geneva Convention relative to the Treatment of Prisoners of War. The Supreme Court in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), confirmed that the United States’ treatment of detainees had to conform to the Geneva Conventions. The last section of Part II examines how the Military Commissions Act of 2006 redefined Common Article III of the Geneva Conventions and revoked the last international restriction on the use of cruel, inhuman, and degrading treatment.

The paper concludes by asking where the United States now stands on the issue of cruel, inhuman, and degrading treatment. Though the bout of legislative action since 2001 has isolated the United States from the international bans on cruel, inhuman, and degrading treatment, domestic legislation does uphold a constitutional ban against such treatment. The question re-

⁵ Geneva Convention relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135, Aug. 12, 1949.

⁶ *E.g.*, Comm. Against Torture, United States Report submitted under Article 19 of the Convention Against Torture and Other, Cruel or Degrading Treatment or Punishment, CAT/C/28/Add.5 (Feb. 9, 2000).

⁷ *E.g.*, Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002); Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Deputy Attorney General (Dec. 30, 2004).

⁸ *Id.*

⁹ Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Deputy Attorney General (Dec. 30, 2004).

¹⁰ Detainee Treatment Act of 2005, P.L. No. 109-148 (codified in scattered sections of 10 U.S.C.).

mains whether the domestic ban on cruel, inhuman, and degrading treatment protects the value of human dignity recognized in international norms.

II. INTERNATIONAL NORMS

To assess the impact of the policy changes prompted by the Bush Administration (“Administration”), it is necessary to first settle what was the object of change. The debates since 2001 on interrogation techniques do not tread on uncharted ground. The international community has regulated the treatment of detainees since the Hague Convention in 1899.¹¹ The Hague Convention established that the detaining power must treat prisoners of war humanely.¹² Following the Hague Convention, the international community elaborated on this general concept of humane treatment in a series of treaties. With the ratification of the Geneva Conventions, the Convention Against Torture, and the International Convention of Culture and Political Rights, the United States became bound by the international norms regulating the treatment of detainees. These three treaties and their respective norms are the focus of the policy changes since 2001. If the United States was to honor its international commitments, the intelligence and military communities’ palette of interrogation techniques would have been severely limited. As Part II of this paper will present, the Administration found that the restrictions placed by international norms on interrogation techniques were unacceptable. The following sections present the repudiated international norms.

A. Geneva Convention relative to the Treatment of Prisoners of War

Within the framework of the Geneva Conventions,¹³ the international community first encoded the rights of prisoners of war in 1929 with the Convention relative to the Treatment of Prisoners of War (“Geneva Convention for POWs”).¹⁴ In reaction to World War II, the international community expanded the Geneva Conventions.¹⁵ When the United States ratified the

¹¹ Hague Convention (II) with Respect to the Laws and Customs of War on Land and Annex: Regulation concerning the Laws and Customs of War on Land, Jul. 29, 1899, 32 Stat. 1803.

¹² *Id.*, at Chap. ii of the Annex.

¹³ The Geneva Conventions consist of four conventions: 1) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted in 1864; 2) Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, adopted in 1907; 3) Convention relative to the Treatment of Prisoners of War, adopted in 1929; and 4) Convention relative to the Protection of Civilian Persons in Time of War, adopted in 1949. In 1949, the international community revised the three existing conventions and adopted the fourth. The four conventions are referred to as the Geneva Conventions of 1949. In the United States, the Geneva Conventions of 1949 entered into force on February 2, 1956.

¹⁴ Geneva Convention relative to the Treatment of Prisoners of War, 47 Stat. 2021, 75 U.N.T.S. 135, Jul. 27, 1929.

¹⁵ Lawfulness of Interrogation Techniques under the Geneva Conventions, CRS Report for Congress, Sep. 8, 2004, at 2.

amended Geneva Conventions in 1955,¹⁶ the Geneva Convention for POWs now provided more defined protections under Article 13 and 17 and included Common Article 3.

Common Article 3 was a compromise on whether to accord all insurgents the protections extended to prisoners of war.¹⁷ In light of the compromise Common Article 3 represents, the Article must be interpreted in relation to the rights accorded to prisoners of war. Article 13 and Article 17 of the Geneva Convention for POWs encode the fundamental principles that underlie the Geneva Conventions for POWs. Beginning with Article 13, the Geneva Convention for POWs provides a broad protection against the physical and psychological abuse of prisoners of war. Article 13 directs that:

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited.¹⁸

The first sentence of Article 13 provides the objective of the Article, to elaborate on the amorphous concept of humane treatment provided in the Hague Convention of 1899.¹⁹ The widespread abuses of detainees in World War II had just occurred, and it was clear to the international community that broadly worded precepts were not sufficient.²⁰ Article 13 ensures the bodily integrity and survival of prisoners of war by adopting a result and not a cause approach. Article 13 does not attempt to provide the universe of actions a detaining power may not take. Rather, Article 13 directs the detaining power to maintain the health of prisoners of war. Under this approach, both affirmative acts and omissions are held illegal if they endanger a detainee's health. Beyond maintaining the health of prisoners of war, Article 13 protects the physical and mental integrity of prisoners of war. Regardless of the medical harm, the detaining power cannot perform physical experiments on a prisoner of war.²¹ Article 13 also obliges the detaining power to protect a prisoner of war against

¹⁶ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5.

¹⁷ Lawfulness of Interrogation Techniques under the Geneva Conventions, *supra* note 15, at 7.

¹⁸ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5.

¹⁹ Hague Convention (II) with Respect to the Laws and Customs of War on Land and Annex: Regulation concerning the Laws and Customs of War on Land, *supra* note 11.

²⁰ Lawfulness of Interrogation Techniques under the Geneva Conventions, CRS Report for Congress, Sep. 8, 2004, at 2.

²¹ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 13.

all acts of violence and intimidation.²² When taken in their totality, the obligations imposed by Article 13 enshroud prisoners of war in an inviolable physical and mental cloak.

The norms for interrogating prisoners of war delineated in Article 17 reinforce the notion that the Geneva Convention for POWs creates a set of inviolable rights.²³ Article 17 provides that:

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.²⁴

The restrictions of Article 17 stemmed from the signatories' desire to balance the need to extract information and the need to protect one's own soldiers and information.²⁵ By including the right not to answer, Article 17 extends the protection on mental integrity to include free will.

When read in conjunction, Article 13 and 17 oblige the detaining power to maintain the health of prisoners of war, protect them from physical and psychological abuse, and respect their free will.²⁶ Instead of creating a ceiling detaining powers may not breach, these conditions create a floor threshold detaining powers must respect. What emerges from this floor threshold is a notion of human dignity comprised of a physical, psychological, and mental component. Article 13 and 17 of the Geneva Convention for POWs protect this notion of human dignity by going as far as prohibiting the use of insults, intimidation, and coercion. Stemming from this threshold, the following issues arise: what level of conduct constitutes coercion and intimidation; to what extent is the manipulation of environmental variables in the cells permissible; and can a detaining power place a prisoner of war in physical positions that cause pain only indirectly.

The protections created by Article 13 and 17 are constrained to detainees deemed prisoners of war. The Administration has taken the position that Al Qaeda and Taliban members do not qualify as prisoners of war.²⁷ In order to qualify as a prisoner of war, a detainee must satisfy the conditions of Article 4

²² *Id.*

²³ *Id.*, at Art. 17.

²⁴ *Id.*

²⁵ Lawfulness of Interrogation Techniques under the Geneva Conventions, CRS Report for Congress, Sep. 8, 2004, at 1.

²⁶ In addition, Article 14 provides that "[p]risoners of war are entitled in all circumstances to respect for their persons and their honor;" Article 16 provides that prisoners shall be treated equally; and Article 25 ensures a minimum level of living conditions.

²⁷ See, U.S. Dep't of Def., Guantanamo Detainees (Mar. 16, 2004), <http://usinfo.state.gov/dhr/Archive/2004/Mar/17-718401.html> (last visited Nov. 24, 2006) (the controversy concerning prisoner of war status is limited to Taliban fighters, as there is a general consensus that Al Qaeda fighters do not qualify as prisoners of war).

of the Geneva Convention for POWs.²⁸ The Administration asserts that because Taliban and Al Qaeda fighters do not abide by the laws and customs of war, target civilians, and do not wear a fix distinctive sign recognizable at a distance they are not entitled to the protections under Article 13 and 17.²⁹ Though Article 13 and 17 are only applicable to prisoners of war, Common Article 3 rights apply to all detainees.

Common Article 3, present in the four Geneva Conventions, provides a set of rights that transcends the classification of persons involved in armed conflicts and that protects the inherent dignity of all humans recognized in Article 13 and 17.³⁰ Common Article 3 stemmed from a compromise between the signatories that wanted to extend the protections of the Geneva Convention for POWs to all insurgents in an armed conflict and those that wanted to limit the protections to soldiers of a state.³¹ The compromise extended protections to all insurgents but only within a subset of conflicts. Common Article 3 governs all detainees in an “armed conflict not of an international character occurring in the territory of one of the high Contracting Parties.”³² The United States Supreme Court in *Hamdan v. Rumsfeld*, 126 S.Ct. 2795 (2006), interpreted “armed conflict not of an international character” to signify armed conflicts between a state actor and a non-state actor.

Insurgents in an armed conflict that falls within the jurisdiction of Common Article 3 are accorded the following protections:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in an place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

²⁸ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 4.

²⁹ See, U.S. Dep’t of Def., Guantanamo Detainees (Mar. 16, 2004), <http://usinfo.state.gov/dhr/Archive/2004/Mar/17-718401.html> (last visited Nov. 24, 2006).

³⁰ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 13.

³¹ Lawfulness of Interrogation Techniques under the Geneva Conventions, CRS Report for Congress, Sep. 8, 2004, at 8. “Soldiers of a state” refers to fighters fighting of the behalf of a recognized state, either as part of a standing army or militia.

³² Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 3.

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.³³

The two relevant protections regarding the treatment of detainees during interrogations are clauses (1)(a) and (1)(c). Clause (1)(a) prohibits “violence to life and person,”³⁴ which includes torture and cruel treatment. Clause (1)(a) does not specify what constitutes torture or cruel treatment. Issues such as the threshold of pain required for an act to constitute torture remain open. Beyond the absence of a pain threshold, the clause also does not provide any contextual parameters. Is the intent to extract information and the intentional causing of pain necessary for an act to constitute torture or cruel treatment? The lack of specificity of Clause (1)(a) provides signatories with ample discretion in their selection of interrogation techniques. On the other hand, the expansiveness of clause (1)(c) is a liability to signatories. Clause (1)(c) prohibits acts that constitute “outrages upon personal dignity, in particular, humiliating and degrading treatment.”³⁵ Based on a literal reading, this prohibition creates a very low threshold for the range of acceptable interrogation techniques. The concept of personal dignity potentially includes far reaching rights. The Universal Declaration of Human Rights sets out an expansive view of human dignity that is rooted in the concepts of freedom and equality.³⁶ Based on Article 13 and Article 17, upholding dignity entails preserving a detainee’s free will and protecting the detainee against coercion. In view of the compromise nature of Common Article 3, there is a strong argument that the Article, while not according all the privileges given to prisoners of war or the rights in the Universal of Declaration of Human Rights, protects the mental and physical integrity of a detainee. Under this view, Common Article 3 prohibits a detaining power from using coercive interrogation techniques.

Beyond observing the thresholds set in Common Article 3, a signatory has to enact criminal penalties in order to satisfy its obligations under the Geneva Conventions.³⁷ When the United States ratified the Geneva Conventions in 1955, it agreed to criminalize the commission of grave breaches.³⁸ Congress did not satisfy this obligation until 1996, when it enacted 18 U.S.C. §2441.³⁹ Section 2441(a) states, “[w]hoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Universal Declaration of Human Rights, U.N. Doc A/810 at 71 (1948).

³⁷ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 129.

³⁸ H.R. Rep. No. 104-698, at 3 (1996).

³⁹ *Id.*

penalty of death.”⁴⁰ Subsection (b) of section 2441 defines war crimes. Among the crimes listed is a grave breach of Common Article 3.⁴¹

B. Convention Against Torture

The United Nations General Assembly adopted unanimously the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment in 1984.⁴² The United States signed the treaty in 1988, and the Senate consented to the Convention Against Torture in 1990.⁴³ However, the United States could not ratify the Convention Against Torture until the Senate criminalized torture in 1994.⁴⁴ The Senate made the ratification of the Convention Against Torture contingent on several understandings and reservations.⁴⁵ The international community contested these understandings and reservations, which significantly limited the United States’ obligations under the Convention Against Torture.⁴⁶ The United States prevailed and adopted both a narrow definition of torture and a standard of cruel, inhuman, and degrading treatment confined to domestic jurisprudence.⁴⁷

The significance of the Convention Against Torture lies in its definition of torture and obligation to prosecute torturers.⁴⁸ In relation to torture, the Convention provides the leading international norms governing the use of force against detainees. Article 1 of Convention Against Torture states:

[T]he term "torture" means 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

⁴⁰ War Crimes Act of 1996, 18 U.S.C.A. § 2441.

⁴¹ *Id.*

⁴² 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (statement of Assistant Legislative Clerk).

⁴³ *Id.*

⁴⁴ S. Rep. No. 103-107 (1993).

⁴⁵ 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (statement of Assistant Legislative Clerk).

⁴⁶ Sanford Levinson, “Precommitment” and “Postcommitment”: the ban on torture in the wake of September 11, 81 TEX. L. REV. 2013, 2037 (2003) (the Netherlands contested the United States reservations and understandings, alleging that they fundamentally altered the character of the Convention).

⁴⁷ *Id.*

⁴⁸ 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (Sen. Pell).

not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁴⁹

In consenting to the Convention Against Torture, the Senate passed the following understanding concerning Article 1:

[I]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) 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; (3) the threat of imminent death; or (4) the threat that another person will imminently be subject 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.⁵⁰

As explicitly stated by the understanding, torture according to the Senate requires a specific intent. Such a requirement is not present in Article 1. Article 1 requires the alleged torturer to only have intentionally performed the condoned act. In contrast, the Senate's understanding requires that the alleged torturer had the intent to inflict "severe physical pain or suffering." The specific intent requirement narrows the definition of torture and places the United States at odds with the definition adopted by the 141 other signatories.⁵¹ Because the standard set in Article 1 is the foundation for the subsequent articles, the Senate's understanding essentially created a parallel convention.

The Senate's reservation to Article 16 further supports that the Senate drafted a new convention. Article 16 of the Convention Against Torture states that:

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

⁴⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 4, at Art. 1.

⁵⁰ *Id.*

⁵¹ Office of the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/english/countries/ratification/9.htm> (last visited on Dec. 31, 2006).

the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁵²

Beyond outlawing torture, the Convention Against Torture in Article 16 bans cruel, inhuman, and degrading treatment. Though Article 16 does not provide a definition of cruel, inhuman, and degrading treatment, it does instruct that the threshold for the ban on cruel, inhuman, and degrading treatment is to be lower than torture.⁵³ Given that Article 1 encapsulates the most egregious breaches to the human body, the Convention Against Torture through Article 16 seeks to ban more than sheer brutality. Article 16 instills and protects the concept of human dignity. Article 16 and Common Article 3 recognize a set of intrinsic values and rights that stem from the mere fact of being human and that belong to a person regardless of the status assigned by the detaining power.

The Senate's reservation to Article 16 unilaterally sets the threshold on cruel, inhuman, and degrading treatment. The reservation asserts that an action violates Article 16 only if the action violates the 5th, 8th, or 14th Amendments of the United States' Constitution.⁵⁴ Beyond the lack of international consensus, the reservation raises several issues. What threshold do the 5th, 8th, and 14th Amendments create? There is precedent involving domestic police enforcement,⁵⁵ but is this precedent applicable? Would the Supreme Court apply the same thresholds in the context of war and terrorism? Further complicating the issue is the non-categorical nature of the ban on cruel, inhuman, and degrading treatment. In Article 2, the Convention Against Torture explicitly states that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."⁵⁶ There is no comparable clause concerning the ban on cruel, inhuman, and degrading treatment. Does this imply that a war or emergency may justify cruel, inhuman, and degrading treatment? Would the war on terrorism qualify or could the ongoing threat of terrorism constitute an emergency? Do the 5th, 8th, and 14th Amendments recognize such a justification?

Lastly, in consenting to the ratification of the Convention Against Torture, the Senate declared that Articles 1 through 16 were not self-executing (implying that without further legislation, the Convention Against Torture has no legal teeth against an American citizen).⁵⁷ By making Article 1 through 16 not self-executing, Congress was able to pick and choose which sections of the Convention Against Torture to implement and further limit the liability

⁵² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 4, at Art. 16.

⁵³ The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens, CRS Report for Congress, Mar. 11, 2004, at 4.

⁵⁴ 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (statement of Assistant Legislative Clerk).

⁵⁵ *E.g.*, *Rochin v. California*, 342 U.S. 165 (1952).

⁵⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 4, at Art. 2.

⁵⁷ 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (statement of Assistant Legislative Clerk).

of the intelligence community. The Convention Against Torture only obliges signatories to criminalize torture.⁵⁸ So, Congress enacted 18 U.S.C. §2340-2340B and did not criminalize cruel, inhuman, and degrading treatment. The definition of torture adopted by section 2340 mirrors the definition provided by the Senate in the understanding to Article 1. The Department of Justice would come to rely on the disparate treatment between cruel, inhuman, and degrading treatment and torture to stretch the boundaries of permissible interrogation techniques.⁵⁹ Through understandings, reservations, and declarations, Congress created a shadow Convention Against Torture that differed fundamentally from the international norm.

C. Other Relevant Treaties and Declarations

The Universal Declaration of Human Rights (“Declaration”) and the International Covenant on Civil and Political Rights (“Covenant”) are the other two primary international texts outlawing torture and cruel, inhuman, and degrading treatment. The Declaration emerged from the international community’s belief that peace could only be achieved if the world strived to respect a basic set of rights and values.⁶⁰ The Declaration is the embodiment of these rights and the recognition of all human beings’ inherent dignity.⁶¹ Article 5 of the Declaration states, “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.” Though the Declaration is not legally binding on the signatories, Article 5 reflects the international community’s consensus on cruel, inhuman, and degrading treatment.

The Covenant stemmed from the international community’s effort to elaborate on the rights in the Declaration and make the rights legally binding. The United States signed the Covenant in 1977; but, the Senate did not ratify it until 1992 and made the Covenant non-self-executing.⁶² Article 7 of the Covenant provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”⁶³ In Article 10, the Covenant further provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”⁶⁴ Article 7 of the Covenant parallels the ban on torture in the Convention Against Torture; while, Article 10 reflects the no-

⁵⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 4, at Art. 4.

⁵⁹ “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.” Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), at 7.

⁶⁰ Eleanor Roosevelt, <http://www.udhr.org/history/ergeas48.htm> (last visited Dec. 31, 2006).

⁶¹ Universal Declaration of Human Rights, U.N. Doc A/810 at 71 (1948).

⁶² *See*, Sen. Comm. on Foreign Relations Report on the International Covenant on Civil and Political Rights (Comm. Print 1992).

⁶³ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1976).

⁶⁴ *Id.*, at Art. 7.

tion embodied by Common Article 3 that, beyond not committing acts of torture, a detaining power has an affirmative duty to respect a detainee's mental and physical integrity.

The central issue with the Covenant is that it does not present a liability threat to United States' officials because the Covenant is not self-executing and Congress did not enact Article 7 or 10. In addition, the Covenant contains a derogation clause. Article 4 of the Covenant allows a signatory to derogate from the obligations under the treaty "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed."⁶⁵ Though there is strong argument that Congress' declaration of the "war on terror" triggered the derogation clause, the clause gave the Administration little respite. The rights under Article 7 and 10 of the Covenant and the rights in the Declaration are embodied in the Geneva Convention for POWs and the Convention Against Torture, which were legally binding on the United States.

III. THE POLICY STORM

The unconventional nature and tactics of terrorists has posed the intelligence community⁶⁶ and the Department of Defense a thorny dilemma. How do you extract information from combatants who believe martyrs are rewarded in the afterlife? Aggravating the problem is the pressing need for information. There is little debate that Al Qaeda and terrorists pose a serious threat to the United States; yet, terrorists present no clear targets to attack, their leadership is not accessible, and their operations are covert.⁶⁷ If the intelligence community and the military are to protect the United States, they need information and targets.⁶⁸ Shortly after the attacks on September 11, 2001, the Administration realized that standing in the way of obtaining information was the Convention Against Torture and Common Article 3. The policy storm surrounding the standard of torture and cruel, inhuman, and degrading treatment since 2001 has centered on dismantling the barriers raised by these international norms. The policy changes instigated by the Administration came in two waves. The first series of policy activity were aimed at the Convention Against Torture and involved the torture memoranda, Abu Ghraib, and the resulting Detainee Treatment Act. The Supreme Court's decision in *Hamdan* prompted the second series of policy changes, which centered on shielding the United States from Common Article 3. The following sections trace the evolution of the United States' standard on cruel, inhuman, and degrading treatment in these two waves of policy changes.

⁶⁵ *Id.*, at Art. 10.

⁶⁶ For the purposes of this paper, the term "intelligence community" refers to the Central Intelligence Agency, the National Security Agency, and the Federal Bureau of Investigation. A distinction is made between the Department of Defense and intelligence community because they are subject to different standards. *See*, Detainee Treatment Act of 2005, P.L. No. 109-148 (codified in scattered sections of 10 U.S.C.).

⁶⁷ President Discusses Creation of Military Commissions to Try Suspected Terrorists on Sep. 6, 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> (last visited Dec. 12, 2006).

⁶⁸ *Id.*

A. Before 9/11

Prior to 2001, the United States supported an absolute stance against torture and cruel, inhuman, and degrading treatment. Beginning in 1984, in the midst of United Nations' adoption of the Convention Against Torture, Congress declared:

[I]t is the continuing policy of the United States Government to oppose the practice of torture by foreign governments through public and private diplomacy and, when necessary and appropriate, through the enactment and vigorous implementation of laws intended to reinforce United States policies with respect to torture.⁶⁹

Six years later, in consenting to the Convention Against Torture, Senator Kassebaum stated, “[t]orture is simply not accepted in this country, and never will be.”⁷⁰ The United States reaffirmed its position against torture and cruel, inhuman, and degrading treatment in the Report to the Commission Against Torture in 1999. In the Report, the United States declared that “[t]orture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority.”⁷¹ Concerning cruel, inhuman, and degrading treatment, the Report noted that the United States' laws do not permit cruel, inhuman, and degrading treatment even in times of emergency.⁷²

The Military perpetuated Congress' zero-tolerance policy in the Field Manual on Intelligence Interrogation (“Field Manual I”).⁷³ Field Manual I extended to prisoners of war, captured insurgents, and “other captured, detained, or retained persons” the protections under the Geneva Conventions.⁷⁴ This grant of protections by the Military was quite broad. Notably, Field Manual I did not differentiate between lawful and unlawful enemy combatants.

In discussing the extent to which Military interrogators were to respect the bodily integrity of detainees, Field Manual I stated that “.... US policy expressly prohibit[s] acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhuman treatment as a means of or aid to interrogation.”⁷⁵ Not satisfied with simply making a policy statement,

⁶⁹ H.R.J. Res. 605, 98th Cong. (1984).

⁷⁰ 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (statement of Sen. Kassebaum); in further a condemnation of torture Senator Pell in consenting to CAT's resolution for ratification states, “By ratifying this convention, the United States will demonstrate that it is determined to take concrete steps to eradicate this evil and inhumane practice.” 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (statement of Sen. Pell).

⁷¹ Comm. Against Torture, United States Report submitted under Article 19 of the Convention Against Torture and Other, Cruel or Degrading Treatment or Punishment, *supra* note 5, at 4.

⁷² *Id.*, at 5.

⁷³ U.S. Dep't. of the Army, Field Manual 34-52: Intelligence Interrogation, Headquarters (Sep. 28, 1992).

⁷⁴ *Id.*, at 1-7.

⁷⁵ *Id.*, at 1-8.

Field Manual I supported its stance against torture and cruel, inhuman, and degrading treatment with the following reasoning:

Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear. Revelation of use of torture by US personnel will bring discredit upon the US and its armed forces while undermining domestic and international support for the war effort. It also may place US and allied personnel in enemy hand at a greater risk of abuse by their captors.⁷⁶

Because the Geneva Conventions did not provide a definition of torture or cruel, inhuman, and degrading treatment and the United States had not yet ratified the Convention Against Torture, the Military adopted a two-prong strategy to define the scope of permissible interrogation techniques. First, the Military defined the parameters of torture and cruel, inhuman, and degrading treatment. Field Manual I provided:

Physical or mental torture and coercion revolve around eliminating the source's free will, and are expressly prohibited by GWS [Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field], Article 13; GPW [Geneva Convention relating to the Treatment of Prisoners of War], Articles 13 and 17; and GC [Geneva Conventions relative to the Protection of Civilian Persons During Times of War], Articles 31 and 32. Torture is defined as the infliction of intense pain to body or mind to extract a confession or information, or for sadistic pleasure....Coercion is defined as actions designed to unlawfully induce another to compel an act against one's will.⁷⁷

The second prong of the strategy centered on providing examples of torture and coercion. Under the examples of physical torture, the Military included bondage inflicting excessive pain, stress positions, and any form of beating.⁷⁸ Within the examples of mental torture, the Military included abnormal sleep deprivation.⁷⁹ By not differentiating acts of abuse according to how much pain they inflict, Field Manual I set a low threshold for torture that incorporated the Convention Against Torture's ban on cruel, inhuman, and degrading treatment. Pre-2001, the Military adhered to a standard of torture that indisputably protected the bodily integrity of all detainees. This standard would come to pose unwelcomed limitations after 9/11.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

B. Immediately following 9/11

The attacks of September 11, 2001, and the declaration of the “war on terror” by Congress altered the operational theater of the intelligence community and the Military. The United States was suddenly at war with a faceless enemy that had a different set of values and did not abide by international norms. The looming domestic threat and the invasion of Afghanistan created a pressing need for information and the Administration demanded results.⁸⁰ However, unlike a conventional enemy, Al Qaeda did not have identifiable troops, headquarters, weapons, and most importantly, Al Qaeda did not fight its war in the open.⁸¹ The only sources of information available were captured Taliban and Al Qaeda members.⁸² Inevitably, the issue arose of which techniques interrogators could use to extract information from detainees. Given Congress’ approval to use all necessary and appropriate force⁸³ and the need for information, the intelligence community and the Military were confronted with a new set of demands and challenges compared to pre-9/11.

Pressure to loosen the restrictions on interrogation techniques arose from frustrated federal agents shortly after September 11, 2001.⁸⁴ An article published in the *Washington Post* on October 21, 2001, documents that within a month of the attacks, federal officials began concluding that traditional interrogation techniques were not effective.⁸⁵ Offers of reduced sentences, money, and witness protection programs were being rebuffed by detainees, who the Federal Bureau of Investigation (“FBI”) believed possessed valuable information. The article quotes one FBI agent as stating “[w]e’re into this thing for 35 days and nobody is talking....[and] frustration has begun to appear.”⁸⁶ Another senior FBI official was quoted as stating, “[u]sually there is some incentive, some angle to play, what you can do for them. But it could get to that spot where we could go to pressure....where we don’t have a choice, and we are probably getting there.”⁸⁷ Beyond the domestic realm, testimony by a Central Intelligence Agency (“CIA”) official indicates that harsher interrogation techniques were resorted to immediately after the September 11, 2001 attacks. While testifying to a joint hearing of the House and Senate intelligence committees on September 26, 2001, Coffer Black, then head of the CIA coun-

⁸⁰ President Discusses Creation of Military Commissions to Try Suspected Terrorists on Sep. 6, 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> (last visited Dec. 12, 2006).

⁸¹ *Id.*

⁸² Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma*, WASH. POST, Oct. 21, 2001, at A6.

⁸³ Authorization for Use of Military Force, 115 Stat. 224 (2001).

⁸⁴ Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma*, WASH. POST, Oct. 21, 2001, at A6. Article is further discussed by Sanford Levinson, “Precommitment” and “Postcommitment”: the ban on torture in the wake of Sep. 11, 81 TEX. L. REV. 2013, 2037 (2003).

⁸⁵ Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma*, WASH. POST, Oct. 21, 2001, at A6.

⁸⁶ *Id.*

⁸⁷ *Id.*

terterrorism center, stated, “[a]ll I want to say is that there was ‘before 9/11’ and ‘after 9/11.’ After 9/11 the gloves came off.”⁸⁸

Aggravating the frustration of the interrogators and the absolute need for information was Congress’ broad authorization of force. The Authorization for Use of Military Force (“Authorization”) states,

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁸⁹

Beyond authorizing the use of force against a nation, the Authorization permits the use of all necessary and appropriate force against persons.⁹⁰ The lack of meaningful limitations on this consent of force against persons presented a departure from Congress’ past stance on interrogation techniques. Prior to 9/11, Congress and the Military had made it clear that torture and cruel, inhuman, and degrading treatment were not permissible.⁹¹ One explanation for this authorization is that Congress completely reversed its policy. Another interpretation is that because the threat of terrorism arises from individuals and not nations, Congress needed to allow the intelligence community and the Military to kill or capture individuals. Regardless of the interpretation, the specific authorization to use force immediately shed doubts on the zero-tolerance policy Congress supported prior to 9/11.

Turning to the wording of the Authorization, Congress conditioned the use of force against persons to “necessary and appropriate” situations. What is appropriate at a given point in time depends on context. The attacks on September 11, 2001, drastically changed the operating context. Therefore, what may have been inappropriate before 9/11, such as the use of force against detainees, could now be appropriate. Faced with the FBI’s inability to lure information from detainees, the need for information, and a broad delegation of power, justifying the use of force against detainees became an irresistible solution.

C. Memoranda on Torture

The Administration had secured a broad declaration of war and now it needed information to wage a successful “war on terror.” Standing in the way was the Convention Against Torture. When the United States ratified the Convention Against Torture, Congress criminalized torture.⁹² A primary con-

⁸⁸ J. Trevor Ulbrick, *Tortured Logic: the (il)legality of United States interrogation practices in the war on terror*, 4 Nw. U. J. INT’L HUM. RTS. 210, para. 21 (2005) (discussing the Department of Justice memoranda on torture between 2001 and 2003).

⁸⁹ Authorization for Use of Military Force, 115 Stat. 224 (2001).

⁹⁰ *Id.*

⁹¹ See, *supra* note 73 and 76.

⁹² 18 U.S.C. §2340-2340A.

cern of the Administration was that a court may qualify certain interrogation techniques as torture and subject interrogators to criminal sanctions.⁹³ Other international norms were not of concern because procedural guards were available. The Administration had already taken the position that the Geneva Conventions did not apply to illegal enemy combatants;⁹⁴ while, the non-self-executing nature of the International Covenant for Political and Civil Rights and its derogation clause made any obligations arising from the treaty moot.⁹⁵ The Department of Justice took the first stab at the Convention Against Torture on August 1, 2002, in a memorandum interfering the definition of torture.⁹⁶ The memorandum supported a shockingly narrow definition and a blanket immunity for interrogators.⁹⁷ Following the memorandum came the public outcry over the treatment of detainees at Abu Ghraib, and the Department of Justice rescinded its 2002 position in a new memorandum.⁹⁸ While the 2004 memorandum adopted a definition of torture that was more aligned with the Convention Against Torture, the memorandum remained silent on cruel, inhuman, and degrading treatment.⁹⁹ By the end of 2004, though the Administration had not succeeded in watering down the definition of torture, it had successfully defended the use of cruel, inhuman, and degrading treatment.

The Office of Legal Counsel drafted the first memorandum entitled, “Standards of Conduct for Interrogation under 18 U.S.C. § 2340-2340A” (Memorandum I), at the request of the President.¹⁰⁰ To expand the scope of permissible interrogation techniques, the memorandum drew several tenuous conclusions. 18 U.S.C. §2340A criminalizes acts of torture performed outside the United States, regardless of the victim’s nationality. Therefore, the majority of the memorandum centered on narrowing the definition of torture and determining which interrogation techniques were beyond the definition. Memorandum I first affirmed the specific intent requirement created by the Senate’s understanding to Article I of the Convention Against Torture and reflected in 18 U.S.C. §2340.¹⁰¹ Section 2340 requires that the defendant specifically intended to inflict severe pain, instead of Article 1’s general intent requirement that the defendant only have knowledge of the forbidden act’s consequences.¹⁰²

Not satisfied with the already narrow definition established by the Senate’s reservation, Memorandum I provided a contentious interpretation of “severe pain.” According to both Article 1 of the Convention Against Torture and section 2340, an act to constitute torture must cause “severe physical or

⁹³ Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) at 1.

⁹⁴ *Id.*

⁹⁵ *Supra* note 64.

⁹⁶ Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*, at 2.

¹⁰⁰ *Id.*, at 1.

¹⁰¹ *Id.*

¹⁰² *Id.*, at 4.

mental pain or suffering.”¹⁰³ To interpret the condition of “severe pain” Memorandum I turned to domestic statutes on emergency medical conditions.¹⁰⁴ Based on these statutes, Memorandum I established that “severe pain” does not correspond to a victim’s experience of pain but to the severity of the ailment causing the pain.¹⁰⁵ Using this interpretation, Memorandum I concluded that a victim only experiences severe pain if the victim dies, suffers from organ failure, or suffers the permanent impairment of a significant body function.¹⁰⁶ With regard to mental harm, Memorandum I opted for a less disingenuous approach. The additional requirement adopted by the Senate that the mental harm be prolonged¹⁰⁷ does not appear in United States Code.¹⁰⁸ As a result, Memorandum I confined its interpretation of “prolonged” to “some lasting, though not necessarily permanent damage.”¹⁰⁹ However, Memorandum I’s use of permanent is misleading. To illustrate the lasting but not permanent threshold Memorandum I cited chronic depression and post-traumatic stress disorder. Post-traumatic stress disorder is documented to last years,¹¹⁰ suggesting the Administration’s interpretation of “prolonged” was as radical as its interpretation of “severe pain.” In addition to establishing a prohibitive temporal requirement, Memorandum I limited the recognized causes of mental harm to the four sources provided in Section 2340.¹¹¹ When combined, the Senate’s intent requirement and Memorandum I’s interpretation of “severe” and “prolonged” created a threshold of torture that outlawed only the most heinous of acts.

¹⁰³ *Id.*, at 5.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*, at 6.

¹⁰⁶ *Id.*

¹⁰⁷ 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (statement of Assistant Legislative Clerk).

¹⁰⁸ Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) at 7.

¹⁰⁹ *Id.*

¹¹⁰ The epistemological facts about Post Traumatic Stress Disorder (PTSD) provided by the National Center for PTSD state that “PTSD is a highly prevalent lifetime disorder that often persists for years.” The Center is part of the United States department of Veterans Affairs. United States Department of Veterans Affairs, http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_epidemiological.html (last visited on Mar. 4, 2007). Chronic depression refers to a less severe form of depression that lasts for a prolonged period of time and for which the average recovery time is 4 years. Harvard Mental Health Letter (Feb. 2005), <http://www.health.harvard.edu/news/week/Dysthymia.htm>.

¹¹¹ Detainee Treatment Act of 2005, P.L. No. 109-148 (codified in scattered sections of 10 U.S.C.) (Section 2340 recognizes causes of mental harm from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) 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; (3) the threat of imminent death; or (4) the threat that another person will imminently be subject 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).

Beyond making extremely brutal acts legal, Memorandum I differentiated with little impunity cruel, inhuman, and degrading treatment from torture.¹¹² Memorandum I stated that “certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the prerequisite intensity to fall within 2340A’s proscription against torture.”¹¹³ In illustrating its dismissal of cruel, inhuman, and degrading treatment, Memorandum I found that simply kicking the detainee in the stomach did not violate section 2340.¹¹⁴ Memorandum I completed its analysis of section 2340 with a very contentious declaration that the section could be held unconstitutional if it prevented the Commander-in-Chief from gaining intelligence.¹¹⁵ This argument is beyond the scope of this paper and as such is not further discussed.

Two years passed before the public became aware of the intelligence community and the Military’s mistreatment of detainees. The public outcry over the treatment of detainees at Abu Ghraib arose in the spring of 2004¹¹⁶ and led to the Department of Justice rescinding Memorandum I.¹¹⁷ In a memorandum to the Deputy Attorney General entitled, “Legal Standards Applicable under 18 U.S.C. §2340-2340A” (Memorandum II), the Administration adopted a more neutral interpretation of section 2340.¹¹⁸ Released on December 22, 2004, Memorandum II began by confirming American law and values’ admonishment of torture, a position that Memorandum I did not iterate.¹¹⁹ Memorandum II then used the plain meaning rule of construction in conjunction with the Convention Against Torture to determine the meaning of “severe pain” in section 2340.¹²⁰ According to the dictionaries severe means “extremely violent or intense.”¹²¹ Memorandum II placed the dictionary definition in the context of the Convention Against Torture and determined that torture is an extreme form of cruel, inhuman, and degrading treatment.¹²² In qualifying extreme, Memorandum II explicitly stated that torture is not confined to excruciating and agonizing levels of pain or suffering.¹²³ To provide parameters of “severe pain,” Memorandum II turned to cases under the Torture Victims Protection Act.¹²⁴ By focusing on the pain felt by the victim, in-

¹¹² See, Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002).

¹¹³ *Id.*, at 1.

¹¹⁴ *Id.*, at 27.

¹¹⁵ *Id.*, at 31.

¹¹⁶ Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 *IND. L.J.* 1255, 1282 (Fall 2006) (analyzing the factors that lead to the abuse of detainees at Abu Ghraib).

¹¹⁷ Press Briefing by White House Counsel Judge Alberto Gonzales et al. on Jun. 22, 2004, at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html> (last visited Mar. 5, 2007).

¹¹⁸ Memorandum from U.S. Dep’t of Justice, Office of Legal Counsel, to Deputy Attorney General (Dec. 30, 2004).

¹¹⁹ *Id.*, at 1.

¹²⁰ *Id.*, at 2.

¹²¹ *AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 1653 (3rd ed. 1992); see also *supra* note 119, at 3.

¹²² *Id.*, at 3.

¹²³ *Id.*, at 4.

¹²⁴ *Id.*, at 5.

stead of the source of the pain, Memorandum II realigned the United States' interpretation of "severe pain" with the Convention Against Torture.

As to "prolonged mental harm," Memorandum II found that section 2340 predicates the harm on two requirements. The first requirement is that the mental pain arise from one of the four sources delineated in section 2340.¹²⁵ The second requirement centers on the durational requirement inserted by the Senate. In interpreting this durational requirement, Memorandum II also resorted to a plain meaning construction and referred to cases under the Torture Victims Protection Act.¹²⁶ Other than finding that the harm must have some lasting duration,¹²⁷ Memorandum II shied away from providing concrete parameters. Memorandum II concluded by casting doubt on the requisite intent a person must have to commit torture and whether knowledge may satisfy the intent requirement.¹²⁸

The significance of Memorandum II does not lie in the standards it sets but in its interpretation of Article 1 of the Convention Against Torture. By restating the issues and parameters associated with Article 1 as they were expressed during the ratification of the Convention Against Torture,¹²⁹ Memorandum II signaled the United States had reverted to its pre-9/11 position on torture.¹³⁰ Though Memorandum II realigned the United States' position on torture, it did not reestablish the ban on cruel, inhuman, and degrading treatment. By the end of 2004, the Administration had successfully provided interrogators with a wider palette of permissible techniques. In contrast to the 2000 Report to the Committee Against Torture,¹³¹ the Administration was no longer explicitly prohibiting cruel, inhuman, and degrading treatment. The Administration's silence on the issue amounted to a grant of discretion. The decision to use cruel, inhuman, and degrading treatment now rested in an interrogator's personal assessment and not on a binding legal standard.

D. Detainee Treatment Act of 2005

The first phase of the policy storm ended with the enactment of the Detainee Treatment Act of 2005.¹³² Other than a rescinded attempt to narrow the definition, the Administration had maintained the United States' stance against torture in the post-9/11 period.¹³³ What the Administration had ex-

¹²⁵ *Id.*, at 7.

¹²⁶ *Id.*, at 8.

¹²⁷ *Id.*

¹²⁸ *Id.*, at 9.

¹²⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 4, at Art. 1.

¹³⁰ See, Memorandum from U.S. Dep't of Justice, Office of Legal Counsel, to Deputy Attorney General (Dec. 30, 2004).

¹³¹ Comm. Against Torture, United States Report submitted under Article 19 of the Convention Against Torture and Other, Cruel or Degrading Treatment or Punishment, *supra* note 5, at 4.

¹³² Detainee Treatment Act of 2005, P.L. No. 109-148 (codified in scattered sections of 10 U.S.C.).

¹³³ In a 2000 report, President Clinton's Administration took the position that "Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority." Comm. Against Tor-

ploited since 2001 is the loophole the Senate created in 1994 by not criminalizing cruel, inhuman, and degrading treatment.¹³⁴ In reaction to the abuse of detainees at Abu Ghraib and the torture memoranda, the need for a binding policy on cruel, inhuman, and degrading treatment became evident. In the fall of 2005, Congress enacted the Detainee Treatment Act to address the legal vacuum surrounding cruel, inhuman, and degrading treatment.¹³⁵ Though it is undisputable that some form of policy is better than no regulation, the Detainee Treatment Act furthered the Administration's objective of isolating the United States from international norms.

The Detainee Treatment Act delineates a general standard prohibiting cruel, inhuman, and degrading treatment and a specific standard governing the conduct of Department of Defense officials. Section 1003 prohibits cruel, inhuman, and degrading treatment by asserting, "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."¹³⁶ Section 1003's prohibition is expansive and conveys an absolute stance against cruel, inhuman, and degrading treatment. The prohibition applies regardless of where the public official is located and regardless of the detainee's status.¹³⁷ Further, section 1003 creates a legally binding norm on all public officials.¹³⁸ By enacting such an expansive and legally binding norm, it appeared Congress had closed the loophole the Senate created in 1994.¹³⁹

In light of section 1003's broad ban and application, the lurking question remains how did Congress define cruel, inhuman, and degrading treatment. The Detainee Treatment Act defines cruel, inhuman, and degrading treat-

ture, United States Report submitted under Article 19 of the Convention Against Torture and Other, Cruel or Degrading Treatment or Punishment, *supra* note 5, at 4. In June 2004, White House Counsel Judge Alberto Gonzales stated, "President Bush knows his most important job is to protect this nation. At the same time, he's made it clear, in the war against al Qaeda and its supporters, the United States will follow its treaty obligations and U.S. law, both of which prohibit the use of torture." Press Briefing by White House Counsel Judge Alberto Gonzales, et al. on June 22, 2004, at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>. In September 2006, President Bush stated, "I want to be absolutely clear with our people, and the world: The United States does not torture. It's against our laws, and it's against our values. I have not authorized it -- and I will not authorize it." President Discusses Creation of Military Commissions to Try Suspected Terrorists on Sept. 26, 2006, at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

¹³⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 4, at Art. 1. Because the Senate declared that the Convention Against Torture was not a self-executing treaty, a legal obligation did not arise from the Convention's ban on cruel, inhuman, and degrading treatment.

¹³⁵ RS Report for Congress, Interrogation of Detainees: Overview of the McCain Amendment, Jan. 24, 2006, at CRS-2.

¹³⁶ Detainee Treatment Act of 2005, P.L. No. 109-148 (codified in scattered sections of 10 U.S.C.) at sec. 1003.

¹³⁷ CRS Report for Congress, Interrogation of Detainees: Overview of the McCain Amendment, Jan. 24, 2006, at CRS-4.

¹³⁸ *Id.*, at CRS-3.

¹³⁹ *See*, Detainee Treatment Act of 2005, P.L. No. 109-148 (codified in scattered sections of 10 U.S.C.).

ment as “the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.”¹⁴⁰ By creating a standard of cruel, inhuman, and degrading treatment exclusively grounded in the United States Constitution, the Detainee Treatment Act’s ban played directly in the Administration’s hand. The Detainee Treatment Act’s definition isolated the United States. An integral aspect of the Convention Against Torture is that it represents an international consensus.¹⁴¹ With the enactment of the Detainee Treatment Act, Congress opted to ignore the international norm on cruel, inhuman, and degrading treatment in the Convention Against Torture and adopt the Senate’s understanding to Article 16. This benefited the Administration because problematic decisions by the European Court of Human Rights (European Court) concerning which techniques constitute inhuman and degrading treatment now bared little to no weight. In *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (1978), the European Court found that stress-positions, hooding, subjection to noise, sleep deprivation, and deprivation of food and water were impermissible interrogation techniques that amounted to inhuman and degrading treatment.¹⁴² The Administration has sanctioned the use of all these interrogation techniques.¹⁴³

The second standard in the Detainee Treatment Act regulates the conduct of Department of Defense officials. Section 1002 states:

No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.¹⁴⁴

In addition to respecting the ban against cruel, inhuman, and degrading treatment in section 1003, Section 1002 requires that Department of Defense officials abide by the Army Field Manual on Intelligence Interrogation. When Congress enacted the Detainee Treatment Act, the Army Field Manual on Intelligence Interrogation (Field Manual I) provided detainees with broad protections under the Geneva Conventions and forbid interrogators from physi-

¹⁴⁰ Detainee Treatment Act of 2005, P.L. No. 109-148 (codified in scattered sections of 10 U.S.C.) at sec. 1002.

¹⁴¹ See, Office of the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/english/countries/ratification/9.htm> (last visited on Dec. 31, 2006).

¹⁴² See also, CRS Report for Congress, *Lawfulness of Interrogation Techniques under the Geneva Conventions*, Sep. 8, 2004, at CRS-21.

¹⁴³ See, Dep’t of the Army, Field Manual 2-22.3: Human Intelligence Collector Operations, Sep. 6, 2006, at 5-75 (in contrast to Field Manual I, Field Manual II does not categorize hooding, water boarding, or sleep deprivation as torture or cruel, inhuman, and degrading treatment).

¹⁴⁴ See, Detainee Treatment Act of 2005, P.L. No. 109-148 (codified in scattered sections of 10 U.S.C.), at sec. 1002.

cally abusing detainees.¹⁴⁵ Contrary to the Administration's stance that the Geneva Conventions did not apply to unlawful enemy combatants, Section 1002 through its reference to Field Manual I raised the possibility that detainees' had rights under the Geneva Convention for POWs. Therefore, prior to Congress' enactment of the Detainee Treatment Act, Secretary of Defense Rumsfeld announced that the Military would revise Field Manual I.¹⁴⁶

Not surprisingly, the revised version of Field Manual I¹⁴⁷ (Field Manual II) restricted the protections accorded to unlawful enemy combatants. Other than reaffirming the United States' ban on torture,¹⁴⁸ Field Manual II contrasts sharply with Field Manual I. Field Manual II does not refer to the Geneva Conventions to delineate the minimum set of protections granted to detainees.¹⁴⁹ Instead, Field Manual II directs army officials to treat all detainees in accordance with the Detainee Treatment Act.¹⁵⁰ To the advantage of the Administration, the Detainee Treatment Act does not provide the safeguards on dignity that are stated in the Geneva Conventions. Such safeguards may flow from the 5th, 8th, and 14th Amendments, but they have yet to be established in the context of cruel, inhuman, and degrading treatment. Further indicating that the Administration shifted the emphasis away from the mental and physical integrity of a detainee, Field Manual II removed the definition of coercion and only refers to a detainee's free will when discussing the treatment of lawful enemy combatants.¹⁵¹ In an attempt to make the Detainee Treatment Act more concrete to military officers, Field Manual II also provides examples that violate the Act. In contrast to Field Manual I, the examples do not include stress positions and sleep deprivation.¹⁵² One of the examples does provide, "applying beatings, electric shock, burns, or other forms of physical pain."¹⁵³ However, the cause of pain between "beatings, electric shocks, and burns" and stress positions differs. With stress position, the actions of the interrogator do not inflict the pain.¹⁵⁴ As a result of the revisions, Field Manual II striped the protections accorded by international norms to unlawful enemy combatants and left interrogators with an abstract standard.

The liability threat that the Administration perceived under 18 U.S.C. §2430 instigated the first phase of the policy storm. To satisfy the need for in-

¹⁴⁵ See, U.S. Dep't. of the Army, Field Manual 34-52: Intelligence Interrogation, Headquarters (Sep. 28, 1992); see also, *supra* note 71.

¹⁴⁶ Human Rights First Press Release, Torture: Proposed New Army Field Manual Is a First Step but Must Apply to Everyone, http://www.humanrightsfirst.org/media/2005_alerts/etn_0428_manual.htm (last visited Dec. 8, 2006).

¹⁴⁷ Dep't of the Army, Field Manual 2-22.3: Human Intelligence Collector Operations, Sep. 6, 2006.

¹⁴⁸ *Id.* at 5-89. Consistent with Field Manual I, Field Manual II asserts that "[a]cts of violence or intimidation, including physical or mental torture, or exposure to inhumane treatment as a means of or aid to interrogation are expressly prohibited" and declares torture inefficient."

¹⁴⁹ *Id.* at 5-74.

¹⁵⁰ *Id.* at 5-74.

¹⁵¹ *Id.* at 5-89.

¹⁵² *Id.* at 5-75 (for a complete list of prohibited actions).

¹⁵³ *Id.* at 5-75.

¹⁵⁴ CRS Report for Congress, Lawfulness of Interrogation Techniques Under the Geneva Conventions, Sep. 8, 2004, at CRS-38.

formation and ensure that interrogators did not breach section 2340's torture ban, the Administration adopted a very narrow view of torture. The lack of legally binding norms on cruel, inhuman, and degrading treatment and ambiguous guidance by commanders resulted in the abuses at Abu Ghraib.¹⁵⁵ In response, the Administration revised its narrow definition of torture and Congress enacted the Detainee Treatment Act. Where did this leave the United States on the issue of torture and cruel, inhuman, and degrading treatment? Concerning the standard of torture, the United States reverted to the Senate's interpretation of torture made in 1992. As for cruel, inhuman, and degrading treatment, Congress did create a legally binding standard; but, the Administration succeeded in ensuring that the international norms on cruel, inhuman, and degrading treatment did not govern American interrogators. By the end of the policy storm's first phase, the administration had isolated the United States from the ban on cruel, inhuman, and degrading treatment in the Convention Against Torture and had fully revoked the protections of unlawful enemy combatants under the Geneva Conventions.

E. Military Commissions Act of 2006

The Supreme Court spurred the second phase of the policy storm by breathing life back into the Geneva Conventions. As a result of the policy storm's first phase, the Administration's policy on the treatment of detainees was only constrained by domestic norms. On June 29, 2006, the Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), shattered the Administration carefully constructed isolationism. In *Hamdan*, the Supreme Court made it clear that Common Article 3 of the Geneva Conventions applied to all detainees, including unlawful enemy combatants.¹⁵⁶ The Supreme Court's recognition of Common Article 3 threatened interrogators with civil lawsuits and criminal charges. The Administration responded by urging Congress to enact the Military Commissions Act.¹⁵⁷ On October 17, 2006, the Military Commissions Act became law¹⁵⁸ and stripped once again unlawful enemy combatants of their rights under the Geneva Conventions.¹⁵⁹

Salim Ahmed Hamdan (Hamdan) was Osama bin Laden's bodyguard and personal driver.¹⁶⁰ As a member of Al Qaeda, Hamdan was subject to the presidential order of November 13, 2001, and to be tried by a military commission.¹⁶¹ The government charged Hamdan of conspiracy to commit the at-

¹⁵⁵ Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 *IND. L.J.* 1255, 1259 (Fall 2006) (analyzing the factors that lead to the abuse of detainees at Abu Ghraib).

¹⁵⁶ *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2796 (2006).

¹⁵⁷ Military Commissions Act of 2006, H.R. 6166, 109TH Cong. (2nd Sess. 2006).

¹⁵⁸ Military Commissions Act of 2006, PL 109-366 (codified in scattered sections of 10 U.S.C.).

¹⁵⁹ *Id.*

¹⁶⁰ *Hamdan*, 126 S.Ct. at 2761.

¹⁶¹ On November 13, 2001, President Bush issued a presidential order that stated that any member of Al Qaeda or any detainee engaged in terrorist activities against the United States shall be tried by military commission. Presidential Order, "detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism," 66 *Fed. Reg.* 57833, Nov. 13, 2001.

tacks of September 11, 2001, and prior terrorist attacks.¹⁶² Hamdan filed a writ of habeas corpus, and on November 8, 2004, the United States District Court for the District of Columbia granted Hamdan's petition.¹⁶³ The District Court found that conspiracy was not a triable offense under the law of war and that Hamdan was entitled to the full protections under Common Article 3.¹⁶⁴ The Court of Appeals for the District of Columbia reversed, finding that a military commission could not try Hamdan for the charge of conspiracy and that the Geneva Conventions did not apply to Hamdan.¹⁶⁵ On November 7, 2005, the Supreme Court granted certiorari to determine whether a military commission could try a charge of conspiracy and whether the Geneva Conventions applied to Hamdan.¹⁶⁶

Focusing on the Supreme Court's discussion of the Geneva Conventions, the Supreme Court provided a concise argument for enforcing the Geneva Conventions. Dismissing the precedent relied on by the Court of Appeals as not controlling,¹⁶⁷ the Supreme Court found that the Geneva Conventions were indisputably part of the law of war.¹⁶⁸ Based on the premise that a reference to the law of war entailed the application of the Geneva Conventions, the Supreme Court observed that Article 21 of the United Code of Military Justice (Military Justice Code) limited the jurisdiction of military commissions to offenses recognized by statute or the law of war.¹⁶⁹ The Court therefore concluded that military commissions had to apply the Geneva Conventions.¹⁷⁰

The thornier issue was whether the Geneva Conventions applied to Hamdan, a member of a terrorist organization. The Supreme Court turned to Common Article 3. The jurisdictional clause of Common Article 3 states, "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions."¹⁷¹ The issue was whether the conflict in Afghanistan constituted an "armed conflict not of an international character." To interpret the meaning of "armed conflict not of an international character" the Supreme Court compared Common Article 2 and 3. The Supreme Court found that Common Article 2 addressed conflicts between two or more nations, while Common Article 3 addressed conflicts between a nation and individuals.¹⁷² Because the conflict with al Qaeda involved a nation against a group of individuals, the Supreme Court held that

¹⁶² *Hamdan*, 126 S.Ct. at 2759.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 2760.

¹⁶⁵ *Id.* at 2762.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*, at 2794.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*, at 2774.

¹⁷⁰ *Id.*

¹⁷¹ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 3.

¹⁷² *Hamdan*, 126 S.Ct. at 2796 (in reaching its interpretation of Common Article 3, the Supreme applied the literal meaning of "not of an international character," not between nations).

the protections of Common Article 3 extended to Hamdan, an unlawful enemy combatant.¹⁷³

The Supreme Court's finding that Common Article 3 extended to unlawful enemy combatants shattered the Administration's policy on interrogation techniques. Field Manual II references the law of war under the list of laws and policies that govern the conduct of interrogations.¹⁷⁴ Because it was the appeal to the law of war in the Military Justice Code that triggered the Court's application of Common Article 3 in Hamdan, Field Manual II now opened the door for detainees to challenge the Administration's interrogation techniques as violations of Common Article 3. Further threatening the Administration's stance on interrogation techniques was the liability *Hamdan* created under the War Crimes Act.¹⁷⁵ The Administration's interrogation techniques now potentially constituted war crimes.

The Administration had refused to apply the Geneva Conventions to illegal enemy combatants because Common Article 3 sets a low threshold. Common Article 3 protects detainees against "outrages upon personal dignity, in particular, humiliating and degrading treatment."¹⁷⁶ As discussed in Part I, the concept of "personal dignity" implies potentially far-reaching protections, and at a minimum, protects the mental and physical integrity of a detainee. The threshold created by Common Article 3 stood completely at odds with the Administration's stance on interrogations. As of June 2006, the Administration firmly believed that terrorism was still a serious threat to the United States and that physical pressure was a legitimate interrogation technique when a detainee with valuable information refused to cooperate.¹⁷⁷ In view of the Administration's interrogation policy, it was a matter of time before the Supreme Court held that recourse to physical pressure violated Common Article 3. The Administration's answer to the liability threat created by *Hamdan* was the Military Commissions Act of 2006.

The Military Commissions Act strips unlawful enemy combatants of all rights under the Geneva Conventions and amends the War Crimes Act.¹⁷⁸

¹⁷³ *Id.* (for Common Article 3 to apply there is the added condition that the armed conflict take place within the territory of a High Contracting Parties, which Afghanistan was).

¹⁷⁴ *Id.*, at 5-68.

¹⁷⁵ War Crimes Act, 18 U.S.C. § 2441 (1997).

¹⁷⁶ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 3.

¹⁷⁷ "I cannot describe the specific methods used -- I think you understand why -- if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks on our country. But I can say the procedures were tough, and they were safe, and lawful, and necessary." President Discusses Creation of Military Commissions to Try Suspected Terrorists, Sep. 6, 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> (last visited Dec. 12, 2006).

¹⁷⁸ The Military Commissions Act of 2006 has broad repercussions on the legal rights of detainees classified as unlawful enemy combatants. Besides the Act's amendment of Common Article 3, other prominent repercussions not discussed in this paper are the mandating of trials by military commission and the revoking of habeas corpus. *See*, Military Commissions Act of 2006, PL 109-366 (codified in scattered sections of 10 U.S.C.).

Beginning with the status of a detainee, the Military Commissions Act defines a lawful enemy combatant as either:

- a) A member of a state's regular forces.
- b) A member of a militia group affiliated with a state who wears a distinctive and observable sign and that abides by the law of war.
- c) A member of a regular armed force whose allegiance is to a government the United States does not recognize.¹⁷⁹

These definitions parallel the criteria set by the Geneva Convention for POWs to determine whether a detainee qualifies as a prisoner of war.¹⁸⁰ Anyone who does not meet one of the above criteria is an unlawful enemy combatant under the Military Commissions Act.¹⁸¹

Upon providing an expansive definition of an unlawful enemy combatant, the Military Commissions Act proceeds to revoke the rights of unlawful enemy combatants under the Geneva Conventions. The revocation is indirect. First, the Military Commissions Act states that all unlawful enemy combatants are subject to trial by military commission.¹⁸² Then, the Military Commissions Act states that military commissions will not enforce the rights of unlawful enemy combatants under the Geneva Conventions.¹⁸³ Therefore, technically, the Military Commissions Act does not repeal rights; the Act only revokes the remedy to any violation of the Geneva Conventions. In analyzing the relationship between a right and a remedy, Justice Marshall in *Marbury v. Madison*, 5 U.S. 137 (1803) stated, “[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”¹⁸⁴ By refusing to recognize the Geneva Conventions, the Military Commissions Act renders the rights of unlawful enemy combatants under the Geneva Conventions legally unenforceable. A legally unenforceable right is a right without a remedy, and based on Justice Marshall's invariable principle, a right without a remedy is not a right. Therefore, the Military Commissions Act's refusal to recognize the Geneva Conventions did, in effect repeal the rights of unlawful enemy combatants under the Geneva Conventions.

Simply preventing unlawful enemy combatants from invoking their rights under the Geneva Conventions was not sufficient to address the liability threat created by *Hamdan*. The refusal to recognize the Geneva Conventions only prevented detainees from suing the Administration. Criminal liability still threatened the interrogators. When the Supreme Court issued its judgment in *Hamdan*, grave breaches of Common Article 3 was a punishable of-

¹⁷⁹ *Id.*, at 948a.

¹⁸⁰ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 4.

¹⁸¹ Military Commissions Act of 2006, PL 109-366 (codified in scattered sections of 10 U.S.C.), at 948a.

¹⁸² *Id.*, at 948c.

¹⁸³ *Id.*, at 948b(f).

¹⁸⁴ *Marbury v. Madison*, 5 U.S. 137, 147 (1803)

fense under the War Crimes Act.¹⁸⁵ In view of the broad ban on cruel, inhuman, and degrading treatment in Common Article 3, it was a distinct possibility that the use of physical pressure on a detainee could constitute a grave breach. To shield interrogators from criminal liability, the Administration amended the War Crimes Act.

In 1996, the United States enacted the War Crimes Act to comply with Article 129 of the Geneva Convention for POWs.¹⁸⁶ Article 129 requires signatories to criminalize grave breaches of the Geneva Convention for POWs.¹⁸⁷ The War Crimes Act declared a grave breach of Common Article 3 as one of the several punishable offenses. By not specifying which violations of Common Article 3 constituted a grave breach, the War Crimes Act bound the United States to the totality of Common Article 3. To shield interrogators from criminal liability, the Military Commissions Act confined “grave breaches” of Common Article 3 to torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages.¹⁸⁸

In stark contrast to Common Article 3, the list of grave breaches detailed by the Military Commission Act does not refer to human dignity and degrading or humiliating treatment. Though the list does include “cruel and inhuman treatment” and “intentionally causing serious bodily injury,” these violations have a very high threshold. The Military Commissions Act limits “cruel and inhuman treatment” to severe or serious physical or mental pain or suffering,¹⁸⁹ which is nothing less than the threshold for torture.¹⁹⁰ While for “causing serious bodily injury,” the Military Commissions Act requires either a substantial risk of death, extreme physical pain, disfigurement, or significant loss or impairment of a bodily part.¹⁹¹ The threshold for “causing serious bodily injury” is arguably higher than the threshold for torture set in 18 U.S.C. §2340.¹⁹² As a result, by limiting grave breaches to extremely violent acts, the Military Commissions Act rendered breaches of Common Article 3 moot.

In a clear indication of the Administration’s intent, the Military Commissions Act directs the Supreme Court not to rely on foreign or international sources of law to interpret grave breaches of Common Article 3¹⁹³ and entrusts the President with the authority to interpret the Geneva Conven-

¹⁸⁵ War Crimes Act, 18 U.S.C. § 2441 (1997), at (a)(3).

¹⁸⁶ War Crimes Act, 18 U.S.C. § 2441 (1997).

¹⁸⁷ Geneva Convention relative to the Treatment of Prisoners of War, *supra* note 5, at Art. 4.

¹⁸⁸ Military Commissions Act of 2006, PL 109-366 (codified in scattered sections of 10 U.S.C.), at sec. 8.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* (the Military Commissions Act refers to 18 USC §2430 to define “severe and serious.” 18 USC §2430 is the statute Congress enacted to criminalize torture, as mandated by the Convention Against Torture.).

¹⁹¹ *Id.*

¹⁹² For a discussion on the interpretation of “severe” refer to Part II(C) of this paper.

¹⁹³ Military Commissions Act of 2006, PL 109-366 (codified in scattered sections of 10 U.S.C.), at sect. 8(a) (subsection (d) of 18 U.S.C. §2441 enumerates the list of actions constituting grave breaches of Common Article 3 under the War Crimes Act.).

tions.¹⁹⁴ The intent of the Administration in drafting the Military Commissions Act was to shield interrogators and military commissions from the international norms embodied in the Geneva Conventions. The Administration achieved this objective by revoking the protections of unlawful enemy combatants under the Geneva Conventions and essentially redrafting Common Article 3. The purpose of Common Article 3 was to create a basic set of protections for all individuals involved in armed conflict, including insurgents. To this end, Common Article provided a list of prohibited actions.¹⁹⁵ By altering the list of prohibited actions, the Military Commissions Act changed the essence of Common Article 3. The second phase of the policy storm ended with the Administration successfully revoking the last international safeguard against cruel, inhuman, and degrading treatment and changing the law of war. The international precepts of war no longer protected the physical and mental integrity of illegal enemy combatants.

IV. CONCLUSION

Everyone prizes information, but when does the price for the information become unacceptable? The attacks of September 11, 2001, made it clear that terrorism is a serious threat to the United States and that terrorists are not the traditional enemy. The tactical tools of terrorists are secrecy and the disregard of the law.¹⁹⁶ Piercing terrorists' covert networks is necessary to defend the United States.¹⁹⁷ However, how do you extract information from individuals for whom dying in the name of their cause constitutes an honor? This problem plagued the Administration in the aftermath of September 11, 2001, and so, the Administration resorted to physical force.¹⁹⁸ Besides the questionable efficiency of forceful interrogation techniques,¹⁹⁹ the international community has raised two central safeguards against torture and cruel, inhuman, and degrading treatment. The Convention Against Torture and the Geneva Convention for POWs both ban the use of physical pressure during interrogations and uphold the mental and physical integrity of all detainees, regardless of their status as unlawful or lawful enemy combatants. As a result of the Detainee Treatment Act and the Military Commissions Act, the international norms governing cruel, inhuman, and degrading treatment no longer apply. Interrogators in their treatment of unlawful enemy combatants only have to abide by the constitutional standards set in the 5TH, 8TH, and 14TH Amendments.

Two salient questions that arise from the Administration's actions to liberalize interrogation techniques are whether the President can make a binding

¹⁹⁴ Military Commissions Act of 2006, PL 109-366 (codified in scattered sections of 10 U.S.C.), at sect. 8(a).

¹⁹⁵ *Hamdan*, 126 S.Ct. at 2796 n63.

¹⁹⁶ President Discusses Creation of Military Commissions to Try Suspected Terrorists on Sep. 6, 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ U.S. Dep't. of the Army, Field Manual 34-52: Intelligence Interrogation, Headquarters (Sep. 28, 1992), at 1-8.

interpretation of a treaty without the prior consent of two-thirds of the Senate, and what standards do the 5TH, 8TH, and 14TH Amendments of the United States Constitution set? Concerning the latter issue, Prof. Kreimer's analysis of the 13th Amendment poses an important obstacle to the Administration's stance that the use of physical pressure is legal.²⁰⁰ Before the 13th Amendment abolished slavery, the law recognized a master's absolute authority over a slave.²⁰¹ Whether to respect a slave's bodily integrity was at the master's discretion.²⁰² By enacting the 13TH Amendment, Congress extended the legal protection against assaults on the body to all persons and recognized bodily integrity as a fundamental value.²⁰³ Given this recognition of bodily integrity, the sanctioning of the cruel, inhuman, and degrading treatment does not seem reconcilable with the 13TH Amendment. Reflecting on fundamental values, Deputy Under Secretary of State Robert Murphy stated about the Geneva Conventions that,

They reflect enlightened practices as carried out by the United States and other civilized countries and they represent largely what the United States would do whether or not a party to the conventions. Our own conduct has served to establish higher standards and we can only benefit by having them incorporated in a stronger body of conventional war-time law.²⁰⁴

Given the supremacy of the Constitution and the enlightened norms prescribed in the Geneva Conventions, it is far from clear that intelligence gathering should come at the expense of the 13TH Amendment or Common Article 3.

Since this paper was written, the Administration has confirmed its attempt to exploit the ambiguity surrounding the cruel, inhuman, and degrading standard and has partially reversed its policy. On July 20, 2007, President Bush signed an executive order that sought to realign the United States' policy with the Geneva Conventions.²⁰⁵ When Congress enacted the Military Commissions Act, it limited which crimes constituted grave breaches of the Geneva Conventions and gave the President the authority to specify which

²⁰⁰ Seth F. Kreimer, "Torture lite," *full bodied* Torture, and the Insulation of Legal Conscience, 1 J. NAT'L SECURITY L. & POL'Y 187, 210 (2005) (analyzing the standards the Supreme Court discussed in relation to detainee's constitutional protections against physical abuse and discussing possible constitutional arguments against the use of cruel, inhuman, and degrading treatment).

²⁰¹ *Id.*, at 210.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ S. Rep. No. 103-107 (1993).

²⁰⁵ Executive Order: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, July 20, 2007, <http://www.whitehouse.gov/news/releases/2007/07/20070720-5.html>.

acts would constitute non-grave breaches.²⁰⁶ As a result of the Military Commissions Act, the United States found itself only outlawing the most egregious of acts. Recognizing that such a position undermined the essence of the Geneva Conventions and fundamental values embodied in the Constitution, the President used his authority under the Military Commissions Act to lower the threshold on acceptable interrogation techniques.

While reaffirming that unlawful enemy combatants are not entitled to the protections accorded under the Geneva Conventions, the executive order extends Common Article 3 protections to all detainees. Section 3 of the executive order begins with the President asserting, “I hereby determine that Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency.”²⁰⁷ The executive order then enumerates which thresholds the Central Intelligence Agency (“CIA”) must respect in order to comply with Common Article 3. Beyond torture and the acts listed in 18 U.S.C. §2241, the executive order prohibits:

(E) willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield

(F) acts intended to denigrate the religion, religious practices, or religious objects of the individual²⁰⁸

In a marked contrast to Field Manual II and the Military Commissions Act, the executive order includes humiliating and degrading acts. However, similarly to the Senate’s understanding on torture,²⁰⁹ the President added an intent requirement that is not present in Common Article 3. Under the executive order, a humiliating or degrading act is forbidden only if the actor acts with the specific intent of humiliating or degrading a detainee. In comparison, Common Article 3 outlaws all humiliating or degrading acts regardless of the actor’s intent.

Though the executive order is a clear attempt by the Administration to reconcile the Military Commissions Act with the Geneva Conventions and acknowledges the value of outlawing humiliating and degrading treatment, the executive order may be just a façade. As noted by P.X. Kelley and Robert F. Turner, both appointees of President Reagan and staunch advocates of the

²⁰⁶ Military Commissions Act of 2006, PL 109-366 (codified in scattered sections of 10 U.S.C.), at sec. 8.

²⁰⁷ Executive Order: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, July 20, 2007, <http://www.whitehouse.gov/news/releases/2007/07/20070720-5.html>, sec. 3(a).

²⁰⁸ *Id.*, at sec. 3(b)(i)(C).

²⁰⁹ See, *supra* note 51.

Administration's war time measures, "[i]t is clear to us that the language in the executive order cannot even arguably be reconciled with America's clear duty under Common Article 3 to treat all detainees humanely and to avoid any acts of violence against their person."²¹⁰ Supporting the notion that the executive order is little more than window dressing is its unilaterally setting of a specific intent requirement and its omission of any reference to human dignity. Moreover, the executive order shields interrogators from liability by indirectly applying Common Article 3 and does not ban the use of stress positions, sleep deprivation, or water boarding. These discrepancies suggest that the Administration has understood the political value of recognizing the dignity of all humans but cannot resist the expediency of violence.

²¹⁰ P.X. Kelley and Robert F. Turner, *War Crimes and the White House*, WASH. POST, July 26, 2007, at A21.