Bush, Obama and Continuity:

Torture and American Foreign Policy in the 21st Century

By James M. Tuttle

Student No. 480627

Contact: 480627jt@eur.nl

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Erasmus School of History, Culture and Communication

Erasmus University Rotterdam

Advisor: Dr. M. Lak

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Introduction

When two planes crashed into the World Trade Centre in New York, killing three thousand people, the world looked on with horror, and sadly continues to do so. The response of the U.S. government to the terrorist attacks of 9th September 2001 would ripple across the world in the first nineteen years of the 21st century and potentially will beyond. Pundits and scholars would describe a new era of international relations, dubbed the 'post-9/11 world', ushered in through the shroud of war in Iraq and Afghanistan, against an ominous and supposedly unprecedented threat, terrorism.[1] Accordingly, the G.W. Bush administration argued it was waging a new type of war, global in scale and unrelenting in its ambition, to face this menace.[2] The crucial ingredient to fighting the War on Terror would be intelligence, necessitating the capture and detainment of individuals deemed to hold this information and then extracting it.

This is the beginning of the story of torture carried out by U.S. military and intelligence personnel in the War on Terror, but the story is not complete. The conventional narrative places condonation of torture squarely at the feet of the Bush administration, which pursued the War on Terror with vigor. Indeed, places like Guantanamo, Bagram and Abu Ghraib have become synonymous with Bush's political legacy.[3] After all, it was the Bush administration that gave the political and legal cover to its personnel to conduct torture, both in the U.S. and around the world. This is to say nothing of the invasions of Iraq and Afghanistan themselves.

The inauguration of Barack Obama in 2008 was to change everything, or so his presidential campaign declared. He promised hope and change, but above all he promised to close Guantanamo prison and end torture.[4] With the new administration came a sweeping reorientation of U.S. role in the world, one that sought to realign the United States with its international allies by recommitting the country to multilateralism. Truly American values, like the commitment to human rights and a community of shared interests, were to once again be the guiding principles of how the U.S. conducted its relations with the world. In 2016 however, Guantanamo Bay was still open and holding prisoners, whilst detainment and detention of individuals was still being carried out globally by U.S. forces, contrary to Obama's 2008 campaign pledges. [5]

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[1] Omer Aziz, "The World 9/11 Took From Us," *New York Times*, September 11, 2019. https://www.nytimes.com/2019/09/11/opinion/september11-attacks-2001.html; Michael Hirsh, "Bush and the World," *Foreign Affairs*, September, 2002. https://www.foreignaffairs.com/articles/united-states/2002-09-01/bush-and-world; Michael Cox, "Paradigm Shifts and 9/11: International Relations After the Twin Towers," Security Dialogue 33, No. 2 (2002); Meagan Smith & Sean M. Zeigler, "Terrorism Before and After 9/11 – a More Dangerous World?" *Research and Politics* 4, No. 4 (2017).

[2] Gary Younge, "Bush Talks of a 'Different Kind of War'," *The Guardian*, September 21, 2001, https://www.theguardian.com/world/2001/sep/21/afghanistan.september1113.

[3] Stephen John Hartnett, "An Ugly and Sickening Business," or, the Bush "legacy" and the Decimation of Iraq," *Cultural Studies/Critical Methodologies* 9, No. 6, (2009), 784.

[4] Peter Baker & Jeff Zeleny, "Obama Repeats a Campaign Staple: Time for Change," *New York Times*, October 29, 2008.

[5] Perry Bacon Jr, "Hope and Change? Obama's Legacy at a Crossroads," *NBC News*, December 26, 2016. https://www.nbcnews.com/storyline/president-obama-the-legacy/hope-change-obama-s-legacy-crossroads-n697691.

The purpose of this thesis is to challenge this conventional narrative, arising from his election campaign's promises and slogans, with which the presidency of Barack Obama is typically framed. The aim then is to place the 2008-2016 period into a broader era of continuity between his administration and his predecessor's. The torture debate encapsulates just how fundamentally flawed the rhetoric-based perspective of the two administrations is. This thesis' relevance is most apparent in deconstructing this outdated view and instead emphasize the broader historical continuity between the two administrations through their respective attitudes to torture.

Research Question and Sub Questions

The focus of this thesis is the role of the Obama administration in the torture program during the War on Terror. The stress on historical continuity contained within this thesis lends force to questions about the nature of torture from one administration to another. As such, the principal research question follows as: To what extent did the resort to torture change between Bush and Obama? In order to answer this question, focus is brought on to the political and legal level of analysis. It is through analyzing the legal justifications of, and political attitudes towards torture that the continuity between Bush and Obama will be described. This also reflects the innovative angle of this thesis, using torture to emphasize and explain this continuity.

In order to fully contextualize the torture carried out by the U.S. in waging the War on Terror, a definition of torture must be included. The scholarly, legal and public debate on this issue is lively, particularly considering the consensus over how difficult the term is to define. The purpose of the first chapter is to fully define what is meant by the word torture. To arrive at a suitable and defensible definition of torture, the various legal and scientific debates and definitions must be analyzed and contrasted. The first chapter answers the following sub question: What is torture?

While outside the temporal scope of this thesis, it is imperative to understand the role torture has played in U.S. politics historically. As will be shown, the Bush administration did not introduce torture to the American public out of nowhere and with no historical basis. The U.S. has indeed tortured before 2001, and so this history must be illuminated in order to understand the torture that took place after. The question follows two strands of analysis. Firstly, by seeking to understand how torture has been used, and for what reasons, in the past. Secondly, it follows logically to explore how this has been justified over time. As such, the second chapter answers the sub question: How has torture been used in the past by the United States and how has this changed over time?

Continuing from the previous sub question, it then follows to ask what was new about the torture program initiated under the Bush administration. Given that torture was not a new feature of American society in 2001, what was novel or different about Bush's program from previous uses of torture? Following from sub question two, it is also necessary to explore how the Bush administration justified torture as a policy. These questions are answered in

chapter three, which answers the sub question: In what ways did the Bush administration change the role of torture in U.S. security policy?

From the outset, this thesis emphasizes the continuity between the Bush and Obama administrations' relationship to the torture program. It is explicitly shown throughout this thesis that Obama failed to achieve many of his campaign goals relating to torture and the War on Terror more generally. But to qualify this assertion, why this happened and how, must form the basis of answering the principal research question itself. The final sub question answered in chapter four follows as: Where does responsibility lay for the continuation of torture under the Obama administration?

Theoretical Concepts

Two theoretical concepts will feature throughout this thesis in various forms and on different topics, but will serve to underscore the central arguments about torture and the role of the Bush and Obama administrations. Firstly, Just War Theory provides the broader theoretical background to the War on Terror and how the wars in Iraq and Afghanistan were justified during the Bush presidency. Just War Theory stipulates the justifications of why wars are fought and how they are conducted in both theoretical and historical examples, the first of whom to discuss these principles was St. Augustine.[6] But the theory has received ample treatment in the 20th century. Of note is Michael Walzer's *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977), wherein he addresses the strictly moral concerns of war.[7] Also of note is Richard Norman's *Ethics, Killing and War* (1995), in which he explores the dilemmas of war and peace and ultimately attacks the moral presumptions for war based on his assertion on the moral presumption against taking human life.[8]

Whilst Just War Theory has been written on by various intellectuals over many centuries, some commonly held and fundamental principles have emerged. These principles are: the war having a just cause, being of last resort, possessing the right intention, being declared by a legal authority, having a realistic chance of succeeding, and in the end being proportional to the methods used.[9] Torture and the War on Terror are excellent candidates for applying Just War Theory, due to the legal and ethical considerations of state-sanctioned violence. Indeed, the justifications for the invasions of Iraq and Afghanistan were highly contested and debated in public, to say nothing of the wars themselves and how they were conducted. The Bush government would use the justification of defense to carry out torture on detainees, in fact the justification for all of the War on Terror, and so believed it was acting morally and legally. Just War Theory will be used in reference to the justifications for torture and the entire War on Terror.

The final theoretical concept, or rather debate, to be deployed is unilateralism versus multilateralism. This theoretical debate centers on the conduct of the United States in international relations in the post-Cold War era and especially in the 21st century of the Bush

[6] John Mark Mattox, *Saint Augustine and the Theory of Just War* (London: Continuum Books, 2006), 1.
[7] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), 3.
[8] Richard Norman, *Ethics, Killing and War* (Cambridge Cambridge University Press, 1995), 2.
[9] Ibid, 118.

and Obama governments. Unilateralism here means the course to a particular action or decision is taken of one's own accord, and conversely multilateralism meaning to arrive at this decisive point in consultation with others, the core units here being states themselves.[10]

The debate largely exists between the unilateralist Bush administration and the multilateralist government of Obama. In response to the 9/11 attacks in 2001, the Bush government took it upon itself to launch the invasions of Afghanistan and then Iraq. This is remembered in popular culture as the "you're either with us or against us" moment for the United States in calling upon allies, and the international community more generally, to follow its lead in the War on Terror. It was further signified by the lack of enthusiasm for international organizations and treaties during the Bush years. Obama's election in 2008 would push the unilateral inclination aside in favor of a more inclusive strategy to counter the threat of terrorism, and to wind down the wars the U.S. had spearheaded.[11] This would perhaps become the defining contrast between the two administrations on the role of the United States in international affairs, and would serve as the point of reorientation over the strategic goals and how they would be achieved.

Literature Review

This literature review is structured in three parts. This has been done to reflect the structure of this thesis and convey the separate areas of analysis. As such, the first section reviews the literature on the Bush doctrine, his administration's security and defense policy, but also the unipolar order within which these policies, and principally for this thesis, torture, related to one another. The second section, following chronologically, reviews the literature on Obama's administration, his response to the and actions taken in the War on Terror and security policy more generally. The final section addresses the literature on torture directly, the numerous debates over its legal justifications and strategic functions, but also its explicit role in the War on Terror.

Unipolarity and George W. Bush

In seeking to broaden the scope of the Unites States' international position after the collapse of the Soviet Union, Hal Brands' *Making the Unipolar Moment: U.S Foreign Policy and the Rise of the Post-Cold War Order* (2016) is indispensable. Brands himself is an esteemed academic in American foreign policy at John Hopkins University, Washington D.C. Brands' book deals with the changing role of the US in the post-Cold War era, and his focus is on the unipolar world order in this period and how it came about, in terms of which US policies led to the 'moment'. The period in question in Brands' book is somewhat dislodged from the period of this thesis. His argument starts in the 1970s with the US beginning to reap rewards of

[10] Robert O. Keohane, "Multilateralism: An Agenda for Research," *International Journal* 45, No. 4, (Autumn, 1990), 731.
[11] Alexandra Homolar, "Multilateralism in Crisis? The Character of US International engagement Under Obama," *Global Society* 26, No. 1, (Winter: 2012), 103.

globalization and the beginning of Soviet decline,[12] and ends with H.W Bush. The text informs the broader implications of a changing U.S. position internationally, which is a key element of Brands' book, as he argues that the structure of the international system was a key element of rising U.S. supremacy.[13]

In seeking to understand why there was such pronounced continuity between the Bush and Obama administrations, Brands' book identifies the broader structures that led the U.S. to a position of unipolar superiority. However, despite the rhetorical changes from Bush to Obama, the post-Cold War order is still largely unchanged. Brands emphasizes the importance of structure *and* strategy, structure here pertaining the order of the international community and power differentials between states, and strategy meaning how this structure is approached and navigated to achieve strategic goals. For Brands it is the strategic element that will be the deciding factor in shaping future international relations.

Melvyn Leffler and Jeffry Legro's book *To Lead the World: American Strategy after the Bush Doctrine* (2008) paints a gloomy picture of American strategy during the Bush era (2000-2008). Both Leffler and Legro are academics with specializations in foreign and public policy at the University of Virgina. In their edited book, a wide collection of experts and scholars offer insights into the Bush administration's conduct and legacy in foreign policy. There is a near consensus on the damage the Bush admiration's foreign policy directives have done to the U.S. standing and power abroad, although they agree less about what should be done to remedy this.[14]

Despite this lack of consensus over what should be done explicitly, most of the scholars agree that reengagement with the U.S. traditional allies in the world is of overbearing importance.[15] On torture, there is consensus over the potentially irreparable damage done to the international image of the U.S.[16] Overall, the contributors stress the failures of the Bush-era unilateralism and the need for a new direction.[17] Yet their stress for change opens avenues for discussion on why so little did change, as this thesis argues. The authors all share Brands' view on the importance of strategy to shape success in the international arena. Yet their accounting of the Bush doctrine seems to go further by emphasizing the importance of a multilateral strategic vision, perhaps going as far as to justify the old bipolar world order that necessitated multilateralism and engagement with the international community.

Reviewing the legacy of the George W. Bush presidency from 2001-2008, Ilan Peleg's book *The Legacy of George W. Bush's Foreign Policy: Moving beyond Neoconservatism* offers critical analysis of a 'revolutionary' period in American political history. Professor at Lafayette College, Pennsylvania, Peleg establishes the G.W Bush administration as breaking with

[12] Hal Brands*, Making the Unipolar Moment: U.S. Foreign Policy and the Rise of the Post-Cold War Order* (London: Cornell University Press, 2016), 69.
[13] Ibid, 224.
[14] Melvyn P. Leffler & Jeffrey W. Legro, *To Lead the World: American Strategy after the Bush Doctrine* (New York: Oxford University Press, 2008), 8.
[15] John G. Ikenberry, "Liberal Order Building," In *To Lead the World: American Strategy after the Bush Doctrine*, eds. Melvyn P. Leffler & Jeffrey W. Legro (New York: Oxford University Press, 2008), 98.
[16] Ibid, 96.
[17] Leffler & Legro, *To Lead the World,* 4.

previous foreign policy strategies and objectives.[18] This break came about through the arrival of the neoconservatives into the administration, those who advocated the establishment of American hegemonic control of the world through whatever means necessary after 9/11. The combination of this ideological predisposition of Bush's administration and the terror attacks of 9/11 would lead the United States into the self-fulfilling disasters of Iraq and Afghanistan.[19]

Importantly for Peleg, the follies of the Bush administration substantially reduced American prestige and standing worldwide. This important loss would, and continues to, undermine the pursuit of American security and foreign policy objectives worldwide.[20] Peleg shares with Leffler, Legro and their contributors, a critical appraisal of the Bush administration's foreign policy, with much of the same reasoning. Of importance is the shared belief that Bush-era unilateralism has severely undermined American power in the 21st century.[21] Peleg's book sits in accordance with the arguments made by Stephen Van Evra, of the Massachusetts Institute of Technology, in his chapter in Legro and Leffler's edited book. Primarily on this significance of the neoconservative thrust into the white house after Bush's presidential victory in 2000 and the ideological beliefs and polices they brought with them.[22]

The Presidency of Barack Obama

Reengagement with the wider international community would be a central feature of the Obama administration's strategic vision. Julian Zelizer, of Princeton University, opens the discussion around Obama's strategic vision in his edited book *The Presidency of Barack Obama: A First Historical Assessment* (2018). But this text comprises a collection of authors with a predominantly historical background that critically analyze the administration of Barack Obama (2008-2016). Most of the articles are written around the Trump electoral victory in 2016, perhaps not being as critical as one might expect in this context. University of Texas professor Jeremi Suri, sees Obama as affirming the indispensable role of the U.S. in international relations. This is in spite of his obvious strategic and rhetorical change from G.W Bush,[23] which fits neatly with the arguments made in chapters by Ikenberry in Legro and Leffler's book about the importance of rhetoric and image.[24]

Yet for all the emphasis on difference, both in Zelizer's book and in Legro and Leffler's edited work, there is agreement about the continuity of the violent pursuit of terrorists between both governments. Kathryn Olmsted of the University of California, notes that while Obama declared his decision to close Guantanamo Bay, to end torture and to close CIA black sites, he also pursued the drone assassination campaign with vigor and expanded it, and also

[18] Ilan Peleg, *The Legacy of George W Bush's Foreign Policy: Moving Beyond Neoconservatism* (Boulder, Westview Press, 2009), 5.
[19] Ibid, 10.
[20] Ibid, 146.
[21] Leffler & Legro, *To Lead the World*, 4.
[22] Ibid, 28.
[23] Jeremi Suri, "Liberal Internationalism, Law and the First African American President," In *The Presidency of Barack Obama: A First Historical Assessment*, ed. Julian E. Zelizer (New Jersey: Princeton University Press, 2018), 197.
[24] Ikenberry, *To Lead The World*, 98.

failed to prosecute officials involved in torture.[25] Yet there exists a contradiction between Obama's words and actions that the authors do not question, perhaps in light of the book being published around the election of Donald Trump.

What is the Obama doctrine? This is the question Professor of Policy and Government at George Mason University, Colin Dueck, seeks to answer in his 2015 *The Obama Doctrine: American Grand Strategy Today*. He argues that the core of the Obama strategy is retrenchment and accommodation internationally, in order to allow a greater focus on his domestic agenda.[26] More specifically, Obama pursued an assortment of policies aimed at reducing the cost of American military presence abroad and also initiating gestures of goodwill with hostile countries and rival powers.[27] This was all done to allow his administration to focus on a lasting and liberal, domestic agenda. Dueck argues that Obama was influenced by how disastrous the interventions in Iraq and Afghanistan had been, and how they had sapped attention away from crucial domestic issues. [28]

But Dueck is overtly critical about this strategy and its results. Ultimately, for him, it just isn't working.[29] Instead, he advances his own policy prescriptions, based on what he calls Conservative American Realism. By this he means a foreign policy that is focused on supporting American allies and resisting adversaries through strategies of pressure.[30] While Dueck's analysis of Obama is restricted to his foreign policy strategies, there are comparisons between his and Zelizer's work. Both note the rhetorical change between the administrations while acknowledging the limits of such inspiring, yet lofty promises.[31] Agreement is also found between Dueck and Goldsmith on the continuity, and the reasons behind it, of counter-terrorism policies. Dueck sees this continuity as arising from the same process described by Goldsmith during Bush's second term, as a revising of policies by Congress, interest groups and the judicial system.[32]

Assessing the results of Obama's foreign policy during his first term, Robert Singh's *Barack Obama's Post-American Foreign Policy: The Limits of Engagement* (2012), is both critical and supportive. The Professor of Politics at the University of Birkbeck, London, encases the foreign policy strategy of the first Obama term in what he calls a post-American foreign policy. By this Singh means an approach to foreign affairs with a conception of world order where American power overall is declining, and so strategizing how best to manage this

[25] Kathryn Olmsted, "Terror Tuesdays: How Obama Refined Bush's Counterterrorism Policies" *In The Presidency of Barack Obama: A First Historical Assessment,* ed. Julian E. Zelizer (New Jersey: Princeton University Press, 2018), 212.
[26] Colin Dueck, *The Obama Doctrine: American Grand Strategy Today* (Oxford: Oxford University Press, 2015), 2.
[27] Ibid.
[28] Ibid, 33.
[29] Ibid, 42.
[30] Ibid, 198.
[31] Julian E. Zelizer, *The Presidency of Barack Obama: A First Historical Assessment* (New Jersey: Princeton University Press, 2018), 140.
[32] Dueck, *The Obama Doctrine*, 49; Goldsmith*, Power and Constraint*, 3.

decline.[33] This is also how the foreign policy of George W. Bush is understood, as post-American, and as such Singh sees a clear continuity within Obama's first term with the previous eight years of Bush. Rather than actual policy changes, Obama brought an unequivocal rhetorical change from his predecessor to match the changed relations on the international stage, the post-American world.[34]

Unlike Brands, Singh describes a post-Soviet world where the U.S power is in steady decline. While Singh agrees with the idea put forward by Brands about the importance of using strategy to navigate a changing international structure, they diverge on their conclusions about where power resides today. Singh places greater emphasis on non-state actors and what he calls a new 'multi-layered' international system.[35] Singh shares with Dueck the notion that Obama's foreign policy strategy hasn't produced results, or rather that the results were modest at best.[36] Crucially, both Dueck and Singh are in agreement over the continuity of policy between Bush and Obama, although for different reasons, something Zelizer and his contributors also accept, albeit in areas not totally foreign policy-related.[37]

Charlie Savage, *New York Times* journalist and Pulitzer Prize winner, delves deep into the national security apparatus under the presidency of Barack Obama in his 2015 book *Power Wars: Inside Obama's Post-9/11 Presidency*. A journalist's account of the political and judicial apparatus behind the national security policies of the Obama administration He utilizes extensive interviews with government insiders about the nature of national security polices and decisions post-9/11 by the Obama and his team. The key theme throughout Savage's book is the extent to which the Obama administration carried the torch of many Bush-era national security policies and programs. In national security Obama was acting like Bush.[38] This is because, Savage argues, Obama and his team did not want to halt the War on Terror and its related polices, merely put them on sounder legal footing.[39] That position was in contrast to the previous administration that had wanted to rid itself of unsuitable and dangerous restrictions on presidential power.[40] Where Savage's book fits into the broader literature, despite not being a scholarly work in nature, is the emphasis on continuity. Here, Savage also subscribes to the Goldsmith analysis, where Obama continued many of the War on Terror policies that had undergone some tweaks and alterations during Bush's second term.[41]

[33] Robert Singh, *Barack Obama's Post-American Foreign Policy: The Limits of Engagement* (London: Bloomsbury Academic, 2012), 4.
[34] Ibid, 13.
[35] Ibid, 5.
[36] Ibid, 194.
[37] Zelizer, *The Presidency of Barack Obama*, 23.
[38] Charlie Savage, *Power Wars: Inside Obama's Post-9/11 Presidency* (New York: Little, Brown and Company, 2015), 35.
[39] Ibid, 129.
[40] Ibid, 38.
[41] Ibid, 40.

Torture and The United States

While it must be noted that the academic debate on torture touches a variety of disciplines, Jeremey Wisnewski's book *Understanding Torture* (2010) opens the torture debate through ethical inquiry. Professor of Philosophy at Hartwick College, New York, the core claim Wisnewski seeks to understand is the idea that we are "the animal who tortures and is tortured."[42] He makes the case against torture from an ethical and philosophical position, which places it in the long tradition of scholarly literature on the moral debate over torture. He examines the torture topic's many facets, its use in history, the role of torture in judicial procedure and its legal status. One significant contribution to the broader torture debate involves how to define it, and Wisnewksi acknowledges how official definitions, such as the UN Convention against Torture and even the World Medical Association, can be problematic in their language.[43]

In fact, he goes as far as to suggest the problem of prohibiting torture lays precisely in how it is defined.[44] But what is given chief importance for Wisnewski is exploration of the reality of torture, which forms the basis of his case against it. For this argument, the diminishment or destruction of human agency forms the basis of why, even in special circumstances, torture is impermissible.[45] Overall, his aim is to explore arguments that condone or justify torture.[46] His book fits into the much broader moral and philosophical debate around torture, some of which is outside the scope of this thesis, but nonetheless still informs the broader debates around American torture.

Scott Anderson, of the University of British Columbia, and Martha Nussbaum, of the University of Chicago Law School, offer contributions to the torture debate across a variety of fields in their edited book. *Confronting Torture: Essays on the Ethics, Legality, History, and Psychology of Torture Today* (2018) is a multidisciplinary analysis of the torture debate, reflected in the book's title and an opening remark from Anderson that "Torture is a multidimensional phenomenon."[47] The book's intention is to answer five sub questions relating to: the desire to torture, why its use is particularly egregious to us, its justifications, how employing torture effects societies that condone it, and finally how it can be prevented in the future.[48] Of particular use to this thesis is the chapter on torture in US history, specifically the Philippine War 1899-1902 by Christopher J. Einolf, of Northern Illinois University. His main assertion is that, based on historical data, American soldiers have used torture only in counterinsurgency conflicts.[49] Through a process of delegitimization, in counterinsurgency conflicts, soldiers come to view their enemy as illegitimate on the

[42] Jeremy J. Wisewski, *Understanding Torture* (Edinburgh: Edinburgh University Press, 2010), 3.
[43] Ibid, 5.
[44] Ibid, 12.
[45] Ibid, 66.
[46] Ibid, 95.
[47] Scott A. Anderson & Martha C. Nussbaum, *Confronting Torture: Essays on the Ethics, Legality, History, and Psychology of Torture Today* (Chicago: Chicago University Press 2018), 6.
[48] Ibid.
[49] Christopher J. Einolf, "US Torture of Prisoners of War in Historical Perspective: The Role of Delegitimization." In *Confronting Torture: Essays on the Ethics, Legality, History, and Psychology of Torture Today*, eds. S. A. Anderson & M. C. Nussbaum, 120.

battlefield and as such is not afforded the same moral or legal protections as state-based fighters.[50] This relates directly to the counter-insurgency campaigns that the U.S military authorized in Iraq and Afghanistan, and offers a possible explanation of the emergence and acceptability of torture on and off the battlefield.

Keeping the focus on torture in a contemporary American context, Lisa Hajjar's article *American Torture: The Price Paid, the Lessons Learned* (2009) outlines the dark history, immediate results, and legacy of torture in the War on Terror.[51] Chair of the Law and Society Program at the University of California, Hajjar succinctly describes the history of America's torture policy from 2001. From its inception in the immediate days of the 9/11 attacks, to the election of Obama alongside his many promises to end torture. She describes how torture was officially justified and carried out, under the dubious legal arguments of the Office of Legal Council (OLC) at the time. Particularly the derision of the Geneva Conventions and the tightening of the definition of torture.[52] Further to this, the information gained from this legally vague torture turned out to be mostly inaccurate or outrights lies, told to make the pain stop.[53] The dearth of actionable information from torture would draw into question how the CIA and other intelligence agencies were choosing who to torture. Even when high profile detainees, like Khalid Sheikh Muhammad, were tortured, nothing valuable was gained that hadn't already been gained from traditional interrogation techniques (deception and rapport-building).[54] For Hajjar, the U.S. hasn't learned the lesson of the past, that torture doesn't work.[55]

Darius Rejali's seminal work *Torture and Democracy* (2007) is indispensable to any discussion about torture, especially when it occurs in democratic contexts. Of Reed College, Oregon, Rejali's central claim is that democracies have a long history of torture.[56] This history has bequeathed most forms of modern torture to countries that employ it today, contrary to the view they developed in fascist or communist societies.[57] Furthermore, because democracies must, or at least appear to, adhere to human rights norms that developed in the 20th century, many of the torture techniques employed were selected because they left no visible marks, they were stealthy techniques.[58] Public monitoring of human rights is the central reason institutions that torture turn towards techniques that leave no visible marks, and thus can absolve responsibility.[59] Since this monitoring is greater in democracies, the preference for these techniques is greater. Rejali prefers to use a state-centric definition of torture that focuses solely on the infliction of physical pain.[60] This could potentially be

[50] Ibid, 136.
[51] Lisa Hajjar, "American Torture: The Price Paid, the Lessons Learned," *Middle East Report*, No. 251 (Summer 2009).
[52] Ibid, 15.
[53] Ibid, 16.
[54] Ibid.
[55] Ibid, 19.
[56] Darius Rejali, *Torture and Democracy* (Princeton: Princeton University Press 2007), 4.
[57] Ibid, 67.
[58] Ibid, 8.
[59] Ibid, 410.
[60] Ibid, 35.

problematic, as Wisnewski points out on state-centric definitions[61] and the physical/mental pain distinction.[62] But Rejali defends this definition, because torture as a modern problem stems from states, and it is states that regularly employ it for reasons of state security.[63]

Moving on from the ethical and moral implications of torture, Tracy Lightcap's *The Politics of Torture* (2011) discusses the political reality of torture. The essential question the LaGrange College professor seeks to answer in his book, is why the United States started torturing detainees during the War on Terror?[64] In answering this question, he looks at through three different historical case studies: the USSR under Stalin, the Mexican-American war under President Polk, and Bush's War on Terror. Critically, Lightcap argues that the widespread torture that occurred under Bush was not a result of new leadership and not simply an aberration that would change with a new administration. Instead, he understands torture as a "systemic and institutional" problem. The 'space' for torture to become an official military tool is when leadership narratives are challenged or contested, for example during the post-invasion reconstruction of Iraq for G.W. Bush, which can loosen the official controls prohibiting its use.[65]

Lightcap prescribes more stringent legal barriers against practicing torture, although he recognizes the political nature of the problem as well, and argues for reducing the political incentives to use torture. Yet the incentives are hardly forthcoming for Lightcap, as he notes that torture was never a campaign issue for the Bush administration, and the Republicans were swept back into power in 2004.[66] The book goes some length to understand why torture became an official policy of the Bush administration, which for Lightcap is shown in a lack of effective leadership over control the prison system in Iraq, Afghanistan and elsewhere. But the other reason, and as Lightcap notes more convincing explanation, is that torture resulted from deliberate policy decisions of the Bush administration, particularly the decision to export methods from Guantanamo to elsewhere.[67] The book crucially underlies, at least theoretically, the continuity of torture after a dramatic change of administrations. The 'executive discretion' afforded to presidents as commander-in-chief, is where informal institutions that propagate torture emerge, according to Lightcap.[68]

In contrast to Lightcap's emphasis on structural factors, John Parry's book *Understanding Torture: Law, Violence and Political Identity* (2010) places greater weight on the influence of law and identity. The title of this book eludes to Parry's background in law, specifically in civil litigation. The focus in Parry's book is on the legal regimes that can allow torture to take place and then become legally defensible.[69] He challenges notions that it is only authoritarian regimes, and not democracies, that feature torture as a practice, similarly

[61] Wisnewski, *Understanding Torture*, 6.
[62] Ibid, 8.
[63] Rejali, *Torture and Democracy*, 39.
[64] Lightcap, *The Politics of Torture*, 9.
[65] Ibid, 153.
[66] Ibid, 133.
[67] Ibid, 152.
[68] Ibid, 154.
[69] Parry, *Understanding Torture,* 3.

to Rejali's account of torture in democratic societies. Parry makes the case that the laws prohibiting torture in international, U.S. and European law are ambiguous and open to interpretation.[70] In terms of definition, international laws seem to produce a legally vague parting between torture and "cruel, inhuman, and degrading treatment." For example, the United Nations Convention on Torture, according to Parry, leaves open a legal loophole which allows for "pain and suffering" that is legally sanctioned.[71]

Specifically for the United States and the War on Terror, Parry argues that the identification of 'others' allowed the U.S. to prohibit the legal protections against torture in international law, such as the Geneva Conventions.[72] According to Parry, the legal ambiguity around torture and the process of othering was enough to encourage the establishment of torture in practice for the United States and wherever it operated.[73] Parry's work fits within the wider literature on torture by emphasizing the legal-structural and political basis upon which the U.S tortured people it had detained. Parry agrees with what Einolf has written on delegitimization as a requirement for torture in asymmetric conflicts. More specifically, they agree on the role of identities and the acknowledgment of that identity, and its rights, by the state in order to prohibit actions like torture.[74]

Adding to the other literature that discusses the history of torture in American society, Alfred McCoy adds further detail and nuance in his 2012 book *Torture and Impunity: The U.S. Doctrine of Coercive Interrogation*. To understand the contemporary uses of torture by the U.S., how they developed and why, McCoy traces the historical genealogy of torture by American forces. Starting with the CIA's psychological experiments in the 1950s, to the spread of these techniques globally during the Cold War, through Bush's revival and normalization of torture for the American public, and finally to the imposition of impunity for torturers under Obama.[75] McCoy's unique contribution is his starting point in the 1950s with what he calls the marriage of science and intelligence, borne from scientific research in sensory stimuli and mind control.[76] It is from this marriage, through the Cold War, that many of the common techniques of torture today were spread.[77] In the final chapter, McCoy shows that repeated administrations in the U.S. have opted towards offering impunity for its forces that have been found to have committed torture. For McCoy, this is most clear during the Obama administration that flatly refused to entertain the idea of convicting its forces for committing torture, a useful method to ensure public forgetting.[78]

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[70] Ibid, 19.
[71] Ibid, 21.
[72] Ibid, 207.
[73] Ibid, 109.
[74] Einolf, "US Torture of Prisoners of War in Historical Perspective: The Role of Delegitimization" In *Confronting Torture: Essays on the Ethics, Legality, History, and Psychology of Torture Today*, eds. S. A. Anderson & M. C. Nussbaum, 128.
[75] Alfred W. McCoy, *Torture and Impunity: The U.S. Doctrine of Coercive Interrogation* (Wisconsin: University of Wisconsin Press 2012), 6.
[76] Ibid, 18.
[77] Ibid, 86.
[78] Ibid, 264.

The contribution of Fitzhugh Brundage's *Civilizing Torture: an American Tradition* (2018) seeks to broaden the historical scope to better understand the current torture debate in American society. Brundage, professor of history at the University of North Carolina, uses examples such as the treatment of Native Americans, the lynching of African Americans, to the use of the 'third degree' to extract confessions in police interrogations, to show extensive historical torture. Torture has been in plain sight in the United States since its inception, to Brundage it's an American tradition.[79]

The 'civilized' and the 'barbarian' are themes Brundage works with in attempting to explain, as torture has been so widely practiced in American society, why so little attention has been paid to it. Ultimately, it is the idea of the United States being special or apart from other countries, intimately tied together with notions of American innocence that explain why such violence remains forgotten.[80] After all, how could a people with such right and noble intentions debase themselves with wonton infliction of pain and suffering? In Brundage's argument, the self-perception of civility serves to mask the violent tendencies of U.S. society and its past. In the final chapter, Brundage sees these arguments re-emerging during the Bush administration to justify torture of those detained in the War on Terror.[81] Brundage fills the gap here by emphasizing this self-perception in explaining how torture became widely practiced, for he argues that those claiming to be civilized are also quick to develop myopia, to hide an ugly truth. The argument chimes with what authors like Parry and Einolf have written on the 'othering' process in determining who can or should be tortured.

Innovative and Scientific Contributions

Superficial interpretations of the Bush and Obama administrations place both governments in stark contrast, and are typified by the 'change' slogan of the first Obama presidential campaign. At first glance, the argument makes sense. The Bush administration from 2001-2008 has become synonymous with the wars in the Middle East, the War on Terror, Guantanamo Bay and even torture itself. In terms of language, the 'change' could not have been starker. The Bush-era language of unilateral action in a unipolar world came to be symbolized by the phrase "You're either with us or against us."

In contrast, the Obama campaign from 2008 utilized an array of language, emphasizing the need for multilateral decision making in the international community and reengagement with the international institutions that the United States helped to establish. However, in the retrospective light of the post-Obama world, this common interpretation doesn't hold up, and to rely on the rhetoric of either is deeply limited. Obama continued and intensified the War on Terror, expanding the drone assassination program to a global scale, whilst Guantanamo Bay remained open, and the United States continues to carry out special renditions. It was under the Obama administration that the decision not to prosecute U.S. personnel who had carried out or had been implicated in torture was made. Indeed, many

[79] Fitzhugh Brundage, *Civilizing Torture: An American Tradition* (Cambridge: Cambridge University Press), 2.
[80] Ibid, 154.
[81] Ibid, 314.

Bush-era security and defense officials remained in office for much of the Obama administration.

These facts draw the superficial interpretation of the Bush-Obama years into question, but this thesis will go a step further. Many writers, some of which have been discussed already, make note of the continuity between the two administrations across different policy fields, particularly security and defense. However, this thesis uses torture to describe this continuity, specifically in relation to their political attitudes and legal arguments about torture. The rhetorical change is indisputable, and this thesis doesn't seek to challenge such a notion. In fact, using torture to describe this continuity is especially insightful given the very clear rhetorical divergence on torture, but again, one must not rely too much on this aspect of 'change.' But on the core strategic issues, the Obama administration continued to pursue Bush's policies on the War on Terror, and explains why he failed to close Guantanamo Bay or to end torture carried out by U.S. military and intelligence forces.

The Obama administration saw the same enemies internationally that the Bush government defined as an 'Axis of Evil,' but approached some of the challenges differently. Torture would come to define the War on Terror from 2001. In fact, it became an integral part of it. Obama believed in the necessity of the War on Terror. Torture and the War on Terror became inseparable forces for both Bush and eventually Obama, which explains why, in pursuing the War on Terror, the Obama government would tacitly continue to accept an array of other Bush-era policies in the War on Terror.

Nature of Sources

The sources available on torture are predominantly primary and secondary written sources. The nature of the torture debate, especially the specific legal approaches of the Bush and Obama governments, invariably relies on declassified documents. Some documents, such as the John Yoo (Deputy Assistant Attorney General) to William Haynes (General Council of Department of Defense) memorandum, show how the Bush government entertained legal distortions to justify torture and, more generally, the parameters of executive power. Another declassified memorandum sent between John Rizzo (Acting General Counsel of the Central Intelligence Agency) and Jay Bybee (Assistant Attorney General for the Office of Legal Counsel) discusses the extent to which certain 'methods' constitute torture. Declassified documents will certainly form an integral part of the explanation of how torture became both legally defended and widely practiced. Most of the declassified documents discussed here were collated through the National Security Archive, an independent non-profit organization that serves a variety of information related to freedom of information requests that primarily serves academics and journalists.

Other primary sources, such as the National Security Strategy publications for Bush and Obama, serve to highlight the changing strategic and political imperatives from one administration to the next. For the Obama administration, this is particularly true, because his strategy publications specifically mention ending torture and closing Guantanamo Bay

prison. Both official documents and those declassified will form an integral part of the thesis' broader arguments about continuity between both governments.

Key challenges to be confronted will be in the way in which the secondary literature is positioned alongside the primary documents, declassified or not. Related to this, correctly applying the insights gained from the primary sources will present a challenge, as their official nature can certainly contain biases.

In conjunction with the sources available from the National Security Archives and governmental publications, further primary documents will be collected and researched at the Roosevelt Institute of American Studies (RIAS). The RIAS specializes in U.S. history and transatlantic relations, and also contains a large library of secondary literature and a comprehensive primary source database. The Internship conducted here focused on primary sources, and where applicable, secondary literature applicable to the thesis topic.

Methods and Challenges

Within this thesis, the research conducted is primarily qualitative in nature. This is necessitated by the limits of quantitative research within the topic of this thesis. Torture is firmly a human issue. To refer back to Wisnewski's assertion, that humans are the animal who tortures and is tortured, serves to acknowledge the uniquely human act of torture and simultaneously recognize the limits of quantitative data. Further to this, the torture topic fits within the purview of many academic disciplines and sub-disciplines, touching on law, morality, philosophy, politics and many more. It would then be hard to encapsulate the debates on torture, in abstract and in specifics, within a quantitative research approach.

The research will be conducted through careful analysis of primary, both declassified and not, and secondary sources. Importantly, this thesis doesn't seek to argue whether or not torture took place, as this would be outside the scope of this project. But in making that statement, coming to a widely agreed definition of torture will be difficult. The object of study here is the United States government, who notoriously claimed that its conduct in interrogations amounted to the now infamous phrase 'enhanced interrogation.'

In terms of internationally recognized definitions, the Convention against Torture and the Geneva Conventions require torture to be carried out by an agent of a state, as one might expect from state-based international bodies. The World Medical Association on the other hand, places no such state/non-state requirements, reflecting the different roles these institutions fulfil in public life. Here lies the crux of the definitional problem of the torture debate today. Within the scholarly literature, the problem is no clearer, and the problem of definition appears frequently. It is expected that this will be the main issue with the methodological approach to this thesis, for which the main remedy is to collate a multiplicity of definitions and come to an acceptable definition.

-Chapter One-

What is Torture?

It is necessary, in order to answer the question this chapter asks, to explore how torture is prohibited. While this avenue of investigation does not lead to a definition of torture itself, it does help to distinguish torture from other forms of treatment. As will be shown, there are many ways in which torture is legally prohibited and through many instruments. The U.S. Constitution is the first area in which one finds prohibition against torture, but also associated rights such as due process and protection against self-incrimination. This can be seen in the Fourth, Fifth, Eighth, and Fourteenth Amendments of the Constitution.

Prohibitions against torture are also prevalent in domestic legislation, not all of them straightforwardly related to torture, but certainly ancillary aspects. This means such legislation that has enabled the power of citizens to take governments to court, for instance the Foreign Sovereign Immunities Act. But measures such as the Torture Victim Protection Act have provided more direct proscriptions. Internationally, a variety of declarations, treaties and international bodies prohibit torture. Torture has developed beyond the necessity of requiring international prohibitions against it though, as torture has developed a *jus cogens* status in international law, a total ban. These topics will be expanded upon further throughout.

Beyond how torture is proscribed in domestic and international laws, this chapter seeks to explore how torture is defined. Domestic laws in the U.S. do define torture, but typically relate back to the U.S. international commitments, such as the 1984 Convention Against Torture, the most widely regarded definition. The final analysis of the definition of torture involves a reading of how academics and scholars have defined torture, and how they have defended their definitions.

Prohibiting Torture

The U.S. Constitution and torture

In terms of domestic prohibitions of torture in the United States, the first site of examination is the Constitution. As the supreme law of the country, it is necessary to explore its prohibitions regarding torture.[82] Firstly, the Fourth Amendment, describes the rights of people to *"…be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures*." [83] The Fourth Amendment broadly proscribes arbitrary searches and seizures, or more precisely, those without probable cause, among arbitrary arrest warrants.

Many of the Fifth Amendment's provisions were denied by the U.S. to detainees in the War on Terror. Of principal importance is the clause that no person *"…shall be compelled in*

[82] Pauline Maier, *Ratification: The People Debate the Constitution 1787-1788* (New York: Simon & Schuster, 2011), 94.
[83] U.S. Constitution, amend. IV.

any criminal case to be a witness against himself."[84] It goes without saying that torture would be in direct contradiction of the Fifth Amendment, in terms of compelling someone with suffering to self-incriminate.[85] Yaser Hamdi's case in *Hamdi vs. Rumsfeld*, is glaring example of the Fifth's power in torture litigation.[86] Captured in the War on Terror (WoT) and sent to Guantanamo, Hamdi's defence team successfully secured his Fifth Amendment rights at the Supreme Court, and he was eventually released. The Fifth Amendment's powerful provisions have been shown to be effective in overturning decisions in relation to unlawful conduct by the executive in the War on Terror.

The Eighth Amendment of the U.S. Constitution concerns itself with excessive bail requirements and criminal and civil forfeiture. However, for the purposes of this thesis, this amendment also prohibits the infliction of "cruel and unusual punishments."[87] In determining whether treatment amounted to the Eighth's "cruel and unusual punishment," the Supreme Court found in the 1959 *Trop v. Dulles* case that meaning is drawn "from the evolving standards of decency that mark the progress of a maturing society."[88] As is shown later in this chapter, the terms "cruel and unusual" are difficult for judges and legal practitioners to define, or even distinguish, in exact.[89]

One of the core provisions of the Fourteenth Amendment concerns due process, amongst other provisions. It states "…nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[90] The historical roots of this amendment lay in the American Civil War of 1861-1865, predominantly aimed at abolishing slavery and granting broader civil and political rights to former slaves.[91]

By the late twentieth century, it had even served to secure the rights of ethnic and religious minorities throughout the United States.[92] The amendment itself is perhaps the most influential protection against torture largely because of its guarantees of due process and the application of this protection wherever the U.S. has jurisdiction. It would, however, be unhelpful to focus solely on constitutional protections in the case of the U.S. and its

[84] U.S. Constitution, amend. V.
[85] Geoffrey R. Skoll, "Torture and the Fifth Amendment: Torture, the Global War on Terror, and Constitutional Values," *Criminal Justice Review* 33, No. 1 (March 2008): 43.
[86] James B. Anderson, "Hamdi v. Rumsfeld: Judicious Balance at the Intersection of the Executive's Power to Detain and the Citizen-Detainee's Right to Due Process," *The Journal of Criminal Law & Criminology* 95, No. 3 (Spring 2005): 722.
[87] U.S. Constitution. amend. VIII.
[88] *Trop v. Dulles*, 356 U.S. 86, 101 (1958).
[89] Celia Rumann, "Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment," *Pepperdine Law Review* 31, No. 3 (April 2004): 700.
[90] U.S. Constitution. amend. XIV.
[91] Deak Nabers, *Victory of the Law: The Fourteenth Amendment, the Civil War, and American Literature, 1852-1867* (Baltimore: John Hopkins University Press, 2006), 6; Garet Epps, "The Antebellum Political Background of the Fourteenth Amendment," *Law and Contemporary Problems* 67, No. 3 (Summer 2004): 209.
[92] Judith A. Baer, *Equality Under the Constitution: Reclaiming the Fourteenth Amendment* (New York: Cornell University Press, 2018), 18.

relationship to torture. More important domestic legislation has been developed long after the Constitutional Amendments were devised, and this will be the focus of the next section.

Legislating Torture

This section will focus on the domestic legislation enacted in the U.S. that relates directly to the prohibition of torture. While the previous section examined the constitutional provisions relating to torture, a sole focus on the constitution for how the U.S. legal system understands and defines torture would be unfulfilling and one-dimensional. Some have that constitutional torture prohibitions do not reduce incidences of torture at all.[93] As such, a further exploration of the legislation that relates to torture is necessary in order to get a more complete picture of domestic legal prohibitions.

Legislation relating to torture in the 20th century has served to prohibit and protect against torture in more exact terms than the constitutional guarantees. Firstly, the 1976 Foreign Sovereign Immunities Act (FSIA) ended U.S. adherence to the theory of Sovereign Immunity, whereby foreign governments were immune from prosecution in U.S. courts.[94] The FSIA legislation provides victims of torture an avenue to redress for their treatment by foreign governments. The Federal Tort Claims Act (FTCA) had already abolished domestic sovereign immunity in 1946, allowing federal employees, essentially the sovereign, to be prosecuted in U.S. federal courts.[95] Finally, the Alien Tort Statute Act (ATCA) of 1789, while an old legal instrument in the U.S. Code of Laws, took on new life in the twentieth century. In the case of *Filartiga vs. Pena-Irala*, 1980, a Paraguayan man was able to sue a police officer in Paraguay for torturing his son to death.[96] The Second Circuit court found that the ATCA could be utilized in cases of breaches of international human rights law, including torture.[97] Taken together, the FSIA, FTCA, and ATCA represented a judicial development that empowered individuals to take greater legal action against sovereign governments, including the U.S. itself. That is a slight oversimplification, but these developments would become the stepping stones of further legislative action on torture in later decades.

The first of such legislation that would provide the right of torture victims to sue their captors was the 1991 Torture Victim Protection Act (TVPA). Further legislation was needed beyond the developments of FSIA and ATCA. This was in light of the recent signing of the CAT, which required party states to take "effective legislative, administrative, judicial..." actions to

[93] Adam S. Chilton & Mila Versteeg, "The Failure of Constitutional Torture Prohibitions," *Journal of Legal Studies* 44, No. 2 (June 2015): 447.
[94] Lauren F. Redman, "The Foreign Sovereign Immunities Act: Using a 'Shield' Statute as a 'Sword' for Obtaining Federal Jurisdiction in Art and Antiquities Cases," *Fordham International Law Journal* 781 (2007): 789.
[95] Kevin M. Lewis, "The Federal Tort Claims ACT (FTCA): A Legal Overview," *Congressional Research Service* (2019): 1.
[96] *Filartiga v. Pena-Irala*, 630 F.2d 876, (1980).
[97] The Committee On International Human Rights of the Association of the Bar of the City of New York, "Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions," *New York University School of Law* (2004): 122.

prevent torture.[98] But also because the decision reached in *Filartiga* 1980 was not precedent setting, as it was decided in the Second Circuit.[99] The TVPA provides many legislative measures, principal among which is the right of victims of state torture to take their captors to court.[100] The TVPA also incorporates the definition of torture from the CAT, adding intimidation by an official as an example of torture.[101]

There were, however, some limitations to this legislation. Firstly, by requiring that a claimant "exhaust adequate and available remedies" before seeking to apply the TVPA.[102] A court could dismiss the claim of the defendant, unless they had proven they had exhausted all remedies, especially, if applicable, in their home countries. Secondly, the TVPA contained within it a statute of limitation. It stipulated that action under the TPVA must occur "within 10 years after the cause of action arose."[103] This was included to ensure that fresh evidence and witnesses would be available at short notice.[104] The TVPA, much like the Torture Statute, were incorporated into U.S. law as a requirement of the CAT. It also included other measures such as the Foreign Affairs Reform and Restructuring Act (FARRA), protecting against extraditions and removals.[105]

Other legislation has been enacted in the twenty-first century in the midst of the U.S torture program. The 2005 Detainee Treatment Act (DTA) was the first of such legislation enacted as a response to the growing disquiet over detainee treatment in the WoT. The act sought to prohibit the "cruel, inhuman, or degrading treatment" of anyone detained by the U.S., including those at Guantanamo Bay.[106] The act itself, put forward by then Senator John McCain, also sought to restrict military interrogation guidelines to those contained in the Field Army Manual (FAM),[107] which excluded acts such as waterboarding and forced nudity.[108]

However, the Bush administration designed the legislation so that it did not apply to CIA interrogations,[109] and that the provisions would be interpreted in a way the administration saw fit.[110] The Obama administration would later amend, or outright rescind, these laws with two Executive Orders (EO). Firstly, EO 13491, ended the Bush administration's legal opinion

[98] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), UN General Assembly, Dec. 10, 1984, Article 2.
[99] Robert F. Drinan & Teresa T. Kuo, "Putting the World's Oppressors on Trial: The Torture Victim Protection Act" *Human Rights Quarterly* 15, No. 3 (August 1993): 608.
[100] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, §2, A.
[101] Torture Victim Protection Act of 1991, §3, B.
[102] Drinan & Kuo, "Putting the World's Oppressors on Trial," 614.
[103] Torture Victim Protection Act of 1991, Note 1, §2, C.
[104] Drinan & Kuo, "Putting the World's Oppressors on Trial," 615.
[105] Parry, *Understanding Torture*, 60.
[106] Elizabeth G. Arsenault & Catherine Chiang, "The U.S. Department of Defence and its Torture Program," *Armed Forces and Security* 46, No. 2 (April 2019): 207.
[107] Jonathan J. Marks, "The Logic and Language of Torture," *CLCWeb: Comparative Literature and Culture* 9, No. 1 (2007): 9.
[108] Human Rights Watch, "Getting Away with Torture: The Bush Administration and Mistreatment of Detainees,"(2001). Human Rights Watch. https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees. Accessed on 12/03/2020.
[109] Mark L. Schneider, "Human Rights and U.S. Foreign Policy: The Use of Torture," in *Human Rights in a Shifting Landscape*" ed. Amy K. Lehr et al, Centre for Strategic and International Studies. 2019. 38.
[110] Marks, "Logic and Language," 9.

reinterpreting Article 3 of the Geneva Conventions.[111] That same day, EO 13492 sought to close Guantanamo Bay and review the detainees cases. It would not be until 2015, in the aftermath of the 2014 Senate Intelligence Select Committee's report on detainee treatment, that laws themselves would change. This was the McCain-Feinstein Anti-Torture amendment to the National Defence Authorization Act for FY 2016. The amendment sought to codify in law the spirit of the 2005 DTA and the Obama administration's Executive Orders.[112]

International Law

Domestic law in the United States clearly forbids torture through a variety of legislative and constitutional prohibitions. But the United States is also signatory and a member of a variety of international legal torture regimes. It would be imperative then to explore the international legal regimes of torture, their proscriptions and, later, their definitions. It is important to expand the scope in this way, because the international regimes of torture are far more expansive and descriptive then domestic law in the United States. Since the end of the Second World War, the expansion of international criminal and human rights law has developed clear prohibitions against torture as a conduct of states. Over time, this has meant that the prohibition on torture has attained *jus cogens* status in customary international law, meaning there can be no derogation, regardless of the circumstances.[113] In this section, the various international treaties, conventions, declarations, and laws that cover torture are explored and analyzed.

Adopted in 1948 and 1949 respectively, the Universal Declaration of Human Rights (UDHR) and the Geneva Conventions contained the first international commitments to prohibit torture. Agreed to in the bloody aftermath of World War Two, they contained commitments to various areas of human rights.[114] Article 5 of the UDHR is stated in the note.[115] The sentiment is shared in other international bodies, such as the European Union, and other regional agreements such as the African Charter on Human and People's Rights[116] and the American Convention on Human Rights.[117] One of the important features of the UDHR's prohibition is the distinguishing between torture and other forms of treatment, namely: *cruel, inhuman or degrading treatment or punishment* (CIDT). The UDHR makes no attempt to define either but noting that certain kinds of treatment, while cruel or inhuman,

[111] Schneider, "Human Rights and U.S. Foreign Policy," 36.
[112] Adam D. Jacobson, "Could the United States Reinstitute an Official Torture Policy?," *Journal of Strategic Security* 10, No. 2 (2017): 99.
[113] Nienke van der Have, *The Prevention of Gross Human Rights Violations Under International Human Rights Law* (The Hague: T.M.C Asser Press, 2018), 31.
[114] Johannes Morsink, *The Universal Declaration of Human Rights and the Challenge of Religion* (Columbia: University of Missouri Press, 2017), 21; *Gilad Ben-Nun, The Fourth Geneva convention for Civilians: The History of International Humanitarian Law* (London: Bloomsbury Publishing, 2020), 3.
[115] "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." UN General Assembly, *Universal Declaration of Human Rights*, 1948, Article 5.
[116] Organization of African Unity, *African Charter on Human and Peoples' Rights*, 1981, Article 5.
[117] Organization of American States, *American Conventions on Human Right,* 1978. Article 5, Sec 2.

might not amount to torture, is important both in definitional terms and with real life consequences as discussed later.

The Geneva Conventions are more specific, relating to treatment of Prisoners of War (POWs). Article 99 of the Geneva Conventions states.[118] Geneva also makes a similar distinction to the UDHR, where article 130 prohibits "willful killing, torture or inhuman treatment."[119] The Geneva Conventions relate entirely to the treatment of prisoners of war, which is important to note in the American torture story. The Bush administration went to great lengths to argue that those captured in the War on Terror were not prisoners of war but enemy combatants, discussed in chapter 3. It was the legal opinion of U.S. Attorney General Alberto Gonzales that those captured in the War on Terror were "unlawful combatants" and not POWs. Therefore, the Geneva Conventions did not apply.[120] While this interpretation of the Geneva Conventions was eventually reversed by the Obama administration, it should draw into question how Bush's legal team was able to justify this interpretation, and how it curtailed foundational commitments to human rights. Despite the efforts of Bush's legal mystics, there is a clear and unambiguous prohibition against torture in international law,[121] a *jus cogens* custom that cannot be violated, even in times of war.

Further prohibitions against torture exist in international law, of which the U.S. is signatory partner. The 1976 International Covenant of Civil and Political Rights (ICCPR) was one such agreement, protecting basic civil and political rights, such as freedom of speech, the right to vote, and *habeas corpus*.[122] Article 7 lays out its prohibition against 'torture and cruel, inhuman or degrading punishment.'[123] The ICCPR was meant to 'carry the torch' of the aspirations of the UDHR,[124] and much like the UDHR and Geneva Conventions, the ICCPR does not define torture. The reasoning here was that "the distinctions depend on the nature, purpose and severity of the treatment applied,"[125] and the same could be said of its definition of 'cruel, inhuman or degrading treatment.' Failing to define its key terms is an important fault in the ICCPR, meaning its interpretations could be understood broadly by state governments. The United States ratified the ICCPR in 1994, although with some reservations. Key among them was the reservation that the United States was bound to Article 7 of the

[118] "No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused." International Committee of the Red Cross (ICRC), Geneva Convention Three Relative To The Treatment Of Prisoners Of War, 1949, Article 99.
[119] Ibid, Article 130.
[120] Timothy W. Harding, "Torture," in *History and Hope: The International Humanitarian Reader*, ed. Kevin M. Cahil, 69-83 (New York: Fordham University Press, 2013), 73.
[121] Winston P. Hagan & Lucie Atkins, "The International Law of Torture: From Universal Proscription to Effective Application and Enforcement," *Harvard Human Rights Journal* 14, No. 87 (Spring 2001): 96.
[122] Wade M. Cole, "Mind the Gap: State Capacity and the Implementation of Human Rights Treaties," *International Organization* 69, No. 2 (Spring 2015): 406; Mohd Yousuf Bhat, "Menace of Torture: Prohibition in International Law," *The Indian Journal of Political Science* 67, No. 3 (Autumn, 2006): 599.
[123] UN General Assembly, *International Covenant on Civil and Political Rights*, 1976, Part 3, Article 7.
[124] Ibid.
[125] UN Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment),* 1992, 44th Session, Article 7.

ICCPR to the extent that the provisions against torture and cruel treatment were already covered by the Fifth, Eighth, and Fourteenth Amendments of the Constitution.[126]

Defining Torture

We now turn to the definition of torture itself. This half of the chapter explores in-depth a variety of definitions of torture coming from international law, non-governmental organizations, and academics. The different nature of these sources reflects the desire to arrive at a more complete definition of torture. Firstly, this section studies legal definitions of torture, some of which come from international law and some in legislation.

The first such piece of legislation under examination is 'The Torture Statute' or 18 U.S. Code § 2340. It was enacted in 1994, upon U.S. ratification of the Convention Against Torture (CAT) 1988, subject to certain reservations and understandings, discussed later in this chapter.[127] U.S. Code 18 Section 2340 defines torture as.[128]

It became law upon Congressional ratification of the CAT, although the U.S. submitted an understanding that the convention has not self-executing and thus required further domestic legislating.[129] One obvious note is the length to which 'mental pain and suffering' are defined as opposed to physical. The Statute goes as far as to focus on certain mental torture techniques, such as threats of pain or death. While the focus on a few techniques is itself narrowing the definition unnecessarily, a focus on techniques is problematic generally, because the methods of torture are so superfluous.[130] This is clearly shown in the actions of U.S. personnel, who used a wide array of techniques, including sexual humiliation.[131] So too could it include phobias or desecration of religious symbols.[132] These kinds of treatment do

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[126] Jeremy Waldron, "Torture and Positive Law," in *Confronting Torture: Essays on the Ethics, Legality History, and Psychology of Torture Today*, eds. Scott A. Anderson and Martha Nussbaum (Chicago: University of Chicago Press, 2018), 260.

[127] Michael, J. Garcia, "The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens," *Congressional Research Service* (2009). 3.

[128] *"torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;*
(2)"severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—
(A)the intentional infliction or threatened infliction of severe physical pain or suffering;
(B)the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
(C)the threat of imminent death; or
(D)the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality, U.S Code of Law 18, Section 2340.

[129] Garcia, "The U.N. Convention Against Torture," 3.

[130] Matthew H. Kramer, *Torture and Moral Integrity* (Oxford: Oxford University Press, 2018), 33.

[131] Kate Zernike & David Rohde, "The Reach of War: Sexual Humiliation; Forced Nudity of Iraqi Prisoners is Seen as a Pervasive Pattern, Not Isolated Incidents," *The New York Times*, June 2008. https://www-nytimes-com.eur.idm.oclc.org/2004/06/08/world/reach-war-sexual-humiliation-forced-nudity-iraqi-prisoners-seen-pervasive.html. Accessed on 23/02/2020.

[132] Kramer, *Torture and Moral Integrity*, 35.

not amount to torture according to the Statute, a result of attempting to narrow the causes of pain and suffering. Perhaps out of initial negligence or perhaps more. For instance, Michael Vicaro, of the University of Pittsburgh, argues that the Torture Statute constitutes a liberal misunderstanding of pain and humiliation.[133]

Apart from focusing on the variety of techniques used, the Torture Statute goes to great lengths to describe and define pain and its severity. As will be shown, nearly every definition of torture, whether domestic or international, features a direct reference to severity of pain. Political scientist Paul Kenny argues that severity of pain is one of the three references by which torture is typically defined, the others being the identity of the torturer and the purpose of the torture.[134] Unfortunately, the Statute doesn't make reference to the purpose of the torture beyond the pain someone "specifically intended" to cause, which is left unclear within the Statute. According to the Statute then, someone who sadistically tortures someone else, as in solely wanting their victim to feel pain, would constitute torture. However, if someone is tortured during an interrogation for information or a confession, this would not constitute torture, as the intent was not the pain in itself, but the response from the victim. This was actually the position of Bush's legal team, as revealed in Jay Bybee's (Office of Legal Counsel lawyer) memo to Attorney General Alberto Gonzales regarding standards of conduct for interrogations.[135]

However, the Statute does elicit a reference to the identity of the torture, namely someone "acting under the cover of the law."[136] The identity of the torturer is included to distinguish the torture carried out by private individuals or non-state actors, and the torture carried out by or on behalf of the state.[137] This reference in the Statute is part of the legislative conformity required by the CAT to incorporate its provisions into domestic criminal law.

The 1984 Convention Against Torture contains what is perhaps the most widely regarded definition of torture.[138] Besides the important job of defining torture, the CAT also controls, regulates and prohibits its use.[139] The convention defines torture as stated in the note.[140]

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[133] Michael P. Vicaro, "A Liberal Use of "Torture": Pain Personhood, and the Precedent in the U.S federal Definition of Torture," *Rhetoric and Public Affairs* 14, No. 3 (Autumn 2011): 403.
[134] Paul D. Kenny, "The Meaning of Torture," *Polity* 42, No. 2 (April 2010): 136.
[135] Jay s. Bybee, "Memo to Alberto R. Gonzales Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340a," in *The Torture Papers*, eds. Karen J. Greenberg and Joshua L. Dratel (New York: Cambridge University Press, 2002) 81.
[136] U.S Code of Law 18, Section 2340.
[137] Kenny, "Meaning of Torture," 137.
[138] Parry, *Understanding Torture*, 34.
[139] Hagan & Atkins, "International Law of Torture," 97.
[140] *For the purposes of this Convention, the 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 not include pain or suffering arising only from, inherent in or incidental to lawful sanctions*, United Nations Convention Against Torture. Part 1, Article 1. 1984.

The CAT, as can be seen in how it defines torture through a particular agent, is primarily concerned with the regulation of torture conducted by states.[141] This is because the CAT is an agreement between states as signatories, and so the primary units of focus are states. Torture carried out by private citizens, while undoubtedly as harmful to their victims as torture carried out by public agents, is viewed differently by the CAT.[142] As previously noted, the CAT, in Article 2, requires signatory states to enact anti-torture legislation into their national law codes.[143] If states did not already have adequate legislative mechanisms to deal with torture in their national legal systems, they would be bound by the CAT to introduce them, as the U.S. did in 1994 with the Torture Statute. As such, even the most egregious acts of torture would not be applicable to the CAT itself, if carried out by a private citizen.

A key element of most definitions of torture relates to the severity of pain.[144] Here the CAT is no exception, requiring that for an act to be considered torture, the pain must be severe, and does include both mental and physical pain. However, there is no further definition of what is considered 'severe pain or suffering' by the CAT, which leaves the meaning of 'severe' ambiguous and open to interpretation.[145] The framers of the CAT debated the issue of severity, well, severely, but eventually decided to leave the wording as it was, finding severe pain the key ingredient of any act of torture.[146]

The CAT distinguishes, like the Geneva Conventions, between acts that are torture and those that are not. On one side is torture, and on the other, as Article 16 of the CAT states, is 'cruel, inhuman or degrading treatment' (CIDT).[147] The CAT treats this category of abuse as separate from torture; furthermore, the CAT legally prohibits torture, whereas it only encourages state parties to 'prevent' CIDT in law.[148] Unlike torture, CIDT is not defined by the CAT at all. Seemingly, the CAT treats CIDT as a lesser harm than torture, and unlike the utter 'no justification' clause for torture, this does not apply to CIDT.[149] Ultimately, the CAT seems to assert that, for an act to be torture, there must be 'severe pain,' and if this requirement is not met, then the treatment falls under the category of CIDT, making torture an aggravated form of CIDT.

In terms of the purposes of torture, the CAT includes a more inclusive list of reasons to torture that are prohibited. Unlike the Torture Statute, the CAT leaves open the possibility of other reasons to torture through the inclusion of 'for such purposes as…' which, unlike the Torture Statute, seems to leave a more open ended purpose for torture. However, it could be argued that, as with the Torture Statute, the CAT leaves out the possibility that someone might torture for no greater purpose, or rather for sadistic purposes.[150] This brings us back to the

[141] Kramer, *Torture and Moral Integrity*, 31
[142] Julianne Harper, "Defining Torture: Bridging the Gap Between Rhetoric and Reality," *Santa Clara Law Review* 47, No. 893 (January 2009): 906.
[143] *CAT*, Part 1, Article 2 1984.
[144] Kenny, Meaning of Torture, 136.
[145] Harper, "Defining Torture," 900.
[146] Ibid.
[147] *CAT*, Part 2, Article 16.
[148] Ibid.
[149] *CAT*, Part 1, Article 2.
[150] Kramer, *Torture and Moral Integrity*, 32.

problem of listing possible or actual purposes to torture, perhaps a solution to this problem in other definitions of torture would be to prohibit torture for any reason at all.

Scholarly debate

There is clearly a variety of legal definitions of torture, either in domestic or international law, or from international NGOs. Their wording and focus differ somewhat, but they all share the same function, which is to define torture in law. This section moves away from the legal sphere of defining torture, looking for definitions outside of a legal purview. As such, the views of different academics are explored here.

Two of the definitions are given, one by Political scientist Paul Kenny, and one from philosopher Derek Jeffreys. Their definitions are contrasted with one another in respect to specific language and concepts used, some of which have already been discussed and some of which are now introduced. Both contain merits and some potential gaps. It is held that the Jeffreys' definition of torture is perhaps the most all-encompassing and usable definition of torture, avoiding the pitfalls of other definitions.

Academics have identified some general problems in definitions of torture. Kenny and Rodley identify these features as the severity of pain, the status of the actor, and the purpose of the torture, as typifying most torture definitions.[151] The status of the actor requirement blurs the lines between state and non-state torture. Kenny uses the example of dissident groups in Northern Ireland and knee-capping, deliberate shooting of the kneecap for intimidation, punishment, or many other reasons. As the Irish Republican Army or the Ulster Defence Association were paramilitary groups only tacitly associated with a state, state-centric definitions of torture would ignore this.[152] Equally so, purpose can infinitely vary. As already discussed, sadistic torture by a state official is a muddy area in torture prohibitions. The Bybee memo famously stated that torture only happened when pain was the specific and only intent, discussed in chapter 3.

What these features suffer from is the lack of definition or clarity in legal definitions, particularly the concept of pain. The centrality of pain in torture definitions is obvious. But distinctions in law draw differences between, say, mental or physical pain, or between the pain of torture and the pain of inhuman treatment. Some studies suggest the scale of pain created in torture definitions draws disparagingly little on the science of pain, finding that threats of rape or threats of harm unto family members can be just as harmful as physical pain.[153]

[151] Kenny, "The Meaning of Torture," 136; Nigel Rodley, "The Definition(s) of Torture in International Law," 468.
[152] Kenny, "The Meaning of Torture," 138.
[153] Metin Basoglu, Maria Livanou and Cvetana Crnobaric, "Torture vs Other Cruel, Inhuman, and Degrading Treatment – Is the Distinction Real or Apparent?," *Arch Gen Psychiatry* 64, No. 3 (March 2007): 283.

Broadening the scope of torture definitions outside of those in law, some promising options are given. Kenny defines torture as written in the note.[154] Kenny introduces some new concepts compared to the previous definitions. Firstly, doing away with the 'official status' requirement, he defines the perpetrator of the torture needing physical control. As previously discussed, control is far broader and more inclusive than the requirement of a state agent. Kenny also explains that the definition requires physical control instead of psychological or mental control, using the hypothetical of an abusive husband, and if that scenario qualifies as torturing his wife.[155] For Kenny, the torturer must have complete control, while it may be difficult or impractical for the abused wife to leave her situation, it is still physically possible.[156]

Another novelty to Kenny's definition is the requirement that the torture be 'to induce a behavioural response.' This means more than response to the pain, but responding in other ways, he uses the example of a verbal admission of guilt or writing down information.[157] On the surface, this seems to do away with the problem of listing the purposes to torture, a catch-all phrase. But how reliable is the torturer in recognizing this. Professor Darius Rejali, in his insightful Torture and Democracy (2007), reports on the case of a woman who escaped from a prison compound in Chile, during the Pinochet regime. After torture, the woman reveals that priests and nuns helped her escape her compound, but upon learning this, the torturers could not believe that the nuns and priests would've helped her and the torture continued.[158] Clearly, the torturer is perhaps not always qualified to know if he or she has attained the desired behavioural response.

Approaching the definition of torture from a philosophical background, Derek Jeffreys defines torture as.[159]

Jeffrey's definition contains some familiar definitional features. He covers the intentionality, severe mental and physical pain, and a purpose requirement. As Kenny does, Jeffreys didn't include any requirement of official status. In fact, Jeffrey's definition says little of the torturer. Some elements differ drastically from other definitions, however. Firstly, he introduces the concept of the helpless victim. He argues that the discrepancy in knowledge of what is happening places the victim utterly at the hands of his captor, and that he has no recourse to end what is happening.[160] As previously mentioned in Rejali's story from Chile, even if the victim provides information that her captors want, can't always end the torture with compliance. What distinguishes torture from say, killing in war, is that torture is not a fair fight. On a battlefield, the soldier at least can defend himself, or put his arms up to

[154] *the systematic and deliberate infliction of severe pain or suffering on a person over whom the actor has physical control, in order to induce a behavioral response from that person*. Kenny, "The Meaning of Torture," 136.
[155] Ibid, 138.
[156] Ibid.
[157] Ibid, 141.
[158] Relaji, *Torture and Democracy*, 456.
[159] *Torture…is voluntarily and intentionally inflicting severe mental or physical suffering on a helpless victim for the purpose of breaking his will.* Derek S. Jeffreys, *Spirituality and the Ethics of Torture* (Basingstoke: Palgrave Macmillan, 2009), 34.
[160] Ibid, 39.

surrender.[161] Some have taken issue with this on the basis that torture should not require, by definition, the victim to be helpless.[162] Philosopher Matthew Kramer imagines a scenario where the victim can defend themselves, but it seems like such an inadequate response to something that innately feels necessary for defining torture.

Jeffreys also introduces a new purpose for torturing, the most important he argues, the torturer must break the will of their victim.[163] The 'severe pain' is a necessary component for any definition of torture for Jeffreys, but insufficient without the purpose. This crucial aspect involves the disruption of the self, the disharmony between the body, the mind, and cognition.[164] He compares this to imprisonment. The prisoner may be robbed of his liberty, but he still maintains a "psycho-bodily unity," which might be disrupted if his head is dunked in water daily.[165] But can it be said that all torture involves this? What about, for example, intimidation torture? This kind of torture involves torturing an individual in order to intimidate the group that individual belongs to, or perhaps to intimidate the broader community.[166] Imagine, say, the mafia beating a man to a pulp to send a message to rival gangs. But this can also be done by breaking the will of the victim. A broken mind could arguably send a similar message as broken bones or savage cuts to the body.

It is for these reasons that one can argue that Jeffreys' definition of torture is the most encompassing and useful for defining torture. The legal definitions have their own loopholes and some vast gaps between defining key terms and applying those terms to reality. The scholarly definitions are apt because they can, at any time, be given without the problematic language of the law. Their definitions are at least argued with reason and are not subject to negotiations by states 'compromising' between the wording in the definition of torture. As such, this thesis will use Jeffreys definition of torture when the words is used in this thesis.

[161] Henry Shue, Torture, *Philosophy and Public Affairs* 7, No. 2 (Winter 1978), 130.
[162] Kramer, *Torture and Moral Integrity*. 39.
[163] Jeffreys, *Spirituality and the Ethics of Torture*, 41.
[164] Ibid.
[165] Ibid.
[166] William Gorman & Sandra G. Zakowski, "The Many Faces of Torture: A Psychological Perspective," in *Confronting Torture*, eds. Anderson & Nussbaum, 51.

-Chapter Two-

A history of American torture

Some of the earliest history of torture in America dates back to its slave-colonial past. The growth of the slave trade in the America's corresponded to a growing reliance on slave labour in colonial societies. Between 1510 and 1800, of the 5.7 million slaves that were detained to the Americas (North, South, and Caribbean), some 550,000 arrived to mainland North America.[167] Slave labour produced a variety of valuable commodities in the Americas, such as sugar, cocoa, gold, silver, and in the context of North America, tobacco and cotton.[168] The conditions endured on the voyages from East African coastal 'depots' to the Americas were inhuman. Captives were packed in ships "like books on a shelf," where blood covered the floor "like a slaughterhouse."[169] Slaves commonly attempted suicides on these voyages, some by jumping off the boat mid voyage and drowning, others attempted to starve themselves to death. Slave-boat captains took measures to prevent such attempts by deploying netting around the boat and violently force feeding slaves.[170] They were after all required to survive the journey, to be sold at a profit. But the conditions of the ships, the disease, suicides, and executions resulted in an average loss of twenty percent of all Africans carried around the Atlantic.[171]

But the economic value of slavery required social control to ensure slave labour continued to produce economic benefits, an order that was maintained by torture. This was particularly true as slavery expanded in the United States in the late eighteenth and nineteenth centuries. Punishments for slaves that broke slave society rules, which could be anything from running away to talking back to a master, were as vicious as they were varied. Branding was a punishment reserved particularly for runaway slaves, although if returned and re-sold, the burns would be advertised.[172] Slaves were after all an economic commodity, masters were aware that the more scarred and abused slaves were not as valuable, or outright unsellable.[173] But slave masters utilized a variety of tortures as punishments, castration, flogging, and even traditional tortures, such as pillories (stockades).[174] Flogging was by far the most popular of these punishments. Between 1755 and 1850, the state of Georgia issued flogging as the second most used punishment for black slaves, behind regular penal activities such as imprisonment.[175] Such outright violence and torture utilized fear to

[167] Thomas Benjamin, *The Atlantic World: Europeans, Africans, Indians and Their Shared History 1400-1900* (Cambridge: Cambridge University Press, 2009), 342.
[168] Jane Burbank & Frederick Cooper, *Empires in World History: Power and the Politics of Difference* (Princeton: Princeton University Press, 2010), 255.
[169] Daniel P. Mannix, *The History of Torture* (Sutton History Classics: 2014), 175.
[170] Ibid, 176.
[171] Stephanie E. Smallwood, *Saltwater Slavery: A Middle Passage from Africa to American Diaspora* (Cambridge: Harvard University Press, 2007), 150.
[172] Mannix, *The History of Torture*, 177.
[173] Rejali, *Torture and Democracy*, 9.
[174] Ibid, 178.
[175] G. Geltner, *Flogging Others: Corporal Punishment and Cultural Identity from Antiquity to the Present* (Amsterdam: Amsterdam University Press, 2014), 74.

maintain social control over slaves in a context within which their economic value required submission.

The methods of social control changed after the American Civil War as slavery was abolished and millions of slaves gained their freedom. The development of scientific racial theories justified a continued social order with whites squarely at the top. The transition from slavery as a form of social control to Jim Crow segregation reflected these new contemporary racial theories.[176] Lynchings were the predominant method of punishment in the post-civil war era. Typically they involved not just the hanging, but usually beatings both before and after death. Their use, like flogging and other slave tortures, were intended to induce fear in the minds of blacks again breaches of the social norms and institutions established post-Civil War.[177] After a lynching, the body would be publicly displayed, in its full morbidity and mutilation, a symbol of both intimidation to black minds and superiority over black bodies. The frequency of lynching's accelerated between 1889 and 1931, within which time at least 3290 people were lynched according to the National Association for the Advancement of Colored People (NAACP).[178] They were by no means limited to blacks, 15% of the NAACP's cases investigated involved lynching of whites.[179] Lynching started out as an ad hoc and chaotic form of control, but by the late nineteenth-century became more organized, attracting thousands of spectators, and operated without hindrance from police or government.[180]

In terms of American torture that most resembles that which occurred in the WoT, the use of the 'third degree' is the prime example. The third degree was judicially sanctioned torture carried out by the police in order to extract confessions or information. Its meaning is derived from old terminology used by the criminal justice system in the United States, the first degree is the arrest, the second degree is transportation to police detention, and the third degree being an interrogation.[181] But nonetheless it involved brutal torture, methods that resembled the 'enhanced interrogation techniques' of the WoT. These methods included sleep deprivation, beatings, electric shocks, and stress positions, amongst others.[182] The first public reckoning with the third degree torture by police came in 1931, with the release of the Wickersham Report. Released in light of new prohibition laws, the report concluded that "the inflicting of pain, physical or mental, to extract confessions or statements is widespread throughout the country."[183] The Chicago Police Department were one of the more notorious police forces that carried out this kind of judicial torture, a city in which, long after the

[176] David Garland, "Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America," *Law & Society Review* 39, No. 4. (December 2005): 779.
[177] Jerome H. Skolnick, "American Interrogation: From Torture to Trickery," in *Torture: A Collection*, ed. Sanford Levinson, (Oxford: Oxford University Press, 2004), 106.
[178] Stewart E. Tolnay et al, "Black Lynchings: The Power Threat Hypothesis Revisited," *Social Forces* 67, No. 3 (March 1989): 605.
[179] Ibid, 606.
[180] Christopher C. Meyers, ""Killing Them by the Wholesale": A Lynching Rampage in South Georgia," *The Georgia Historical Quarterly* 90, No. 2 (Summer 2006): 228.
[181] Skolnick, "American Interrogation," 112.
[182] Rejali, *Torture and Democracy*, 72.
[183] John Conroy, *Unspeakable Acts: Ordinary People and the Dynamics of Torture* (Berkeley: University of California Press, 2001), 32.

Wickersham Report, systemic police violence continued.[184] But the third degree was not restricted to particular ethnic groups, even though it was predominantly used against blacks and non-white minorities. For example, police torture was widespread during the hysteria over the 'Bolshevik threat' in Chicago, around 1918-1920. In one day alone over 20,000 suspected Bolsheviks were arrested, some of whom endured the third degree.[185]

American interest in torture, in terms of its military utility, started in the 1940s with pursuit of psychological torture techniques by the CIA. In the late 1940s and 1950s, the CIA conducted secretive projects investigating "special" interrogation methods, Project BLUEBIRD and Project Artichoke.[186] The aims of these programs were deemed "defensive," in respect of the prevailing fear over Soviet mind-control methods.[187] American intelligence agencies were worried about the potential repercussions of advanced Soviet mind control in their emerging conflict with the Soviet Union. The prospect of secret information being released, divulgence of military positions, and perhaps even, it was feared, sleeper agents, was too great. In light of the cold war hysteria in this period, the U.S. government was particularly sensitive to technologies and methods that the Soviets were developing.

The projects studied a variety of behavioral and psychological studies, but also conducted their own human experiments on U.S. military personnel and student volunteers.[188] Of particular concern to the U.S. Air Force (USAF) was the prospect of their pilots being captured if their planes were shot down, as happened at times in the 1950's. In response to this problem, the USAF developed a program, based on the human behavior and psychology research, called SERE (Survival, Evasion, Resistance, Escape).[189] SERE trained military personnel how to survive off the land, evade capture, and if ultimately caught, resist torture.[190] The program's design was initially intended to train pilots, but later in the twentieth-century, was applied to the training program of special forces units. The studies of the 1950's also culminated in other science that could have military applicability. One such achievement was the KUBARK interrogation manual in 1963, a guide to effective methods of interrogation for both the military and the CIA. Both the SERE program and elements of the KUBARK manual were 'reverse engineered' in the WoT as a means of effective information extraction from detainees.[191]

Clearly then, there is a long history of torture in U.S. society and for a variety of purposes. Torture has been used to uphold a racist social order, produce results within the

[184] Flint Taylor, *The Torture Machine: Racism and Police Violence in Chicago* (Chicago: Haymarket Books, 2019), 44.
[185] Mannis, *The History of Torture*, 183.
[186] Alfred McCoy, *Torture and Impunity: The U.S. Doctrine of Coercive Interrogation* (Madison: University of Wisconsin Press, 2012), 17.
[187] Ibid, 18.
[188] Michael Otterman, *American Torture: From the Cold War to Abu Ghraib and Beyond* (London: Pluto Press, 2007), 42.
[189] McCoy, *Torture and Impunity*, 21.
[190] Otterman, *American Torture*, 99.
[191] Peter Jan Honigsberg, *Our Nation Unhinged: The Human consequences of the War on Terror* (Berkeley: University of California Press, 2009), 25.

criminal justice system, and as a tool of security policy. But why does torture emerge at different intervals and for different purposes in American history, especially given its perception as medieval or uncivilized conduct, the stuff of 'backwards' societies. In modern memory, many people associate torture with the extreme totalitarian regimes of the twentieth-century, with Nazism and Stalinism.[192] But as has been seen, torture has reappeared frequently in American history. It seems, in a U.S context, that some institutions and cultural traditions are more receptable to torture than is widely believed or understood.[193] But why is this so? Historians differ on the answer to this question, but there are perhaps more areas of agreement than believed.

Political Scientist, and author of the influential *Torture and Democracy*, Darius Rejali, finds, as the title suggests, that torture and democracy have an entwined history. While many contemporaries hold that torture is the tool of oppressive and totalitarian regimes, it has flourished in democratic societies also, and perhaps more so. Rejali argues that most many of today's modern tortures are tortures of 'stealth,' torture that leaves no visible wounds.[194] Waterboarding is one such technique that does not display visible injury, its pain cannot be seen or photographed after the fact, but there are others such as electrocution and stress positions. States that employ these types of tortures, democratic or otherwise, fear the vision of others, the eyes of other states or their own peoples and institutions.[195]

The modern interpretation of torture as the conduct of uncivilized and backwards nations, reinforces this fear of what others can see. In states that are, actually or perceived to be, democratic, the price of torture is extremely high, so more advanced and sophisticated stealth techniques are used, if torture is used at all. Stealth techniques allow societies to publicly repudiate torture and reaffirm their democratic legitimacy. But why torture at all, particularly for societies in which democratic institutions are developed. For Rejali, states in the midst of crisis are more likely to employ torture because of fears over radical political or social changes.[196] Some examples of this have already been discussed. The master disciplining a slave's disobedience, using the third degree to quell perceived Bolshevik revolution, and even in responding to threats posed by the USSR. If states decide to use torture in a crisis, which Rejali argues does not always happen, they will use stealth torture.

Historian W. Fitzhugh Brundage argues that torture re-emerges in U.S. history because of the United States' perception of itself. For Brundage, torture is something that, contrary to Rejali, takes place in public view.[197] This is because only certain kinds of people will be tortured. This chapter has described some of the 'groups' of people that have been tortured, slaves, Bolsheviks, and spies for example. Brundage argues that only certain types of people, and at different times, are treated with torture because they are seen to deserve it.[198] Slaves

[192] Rejali, *Torture and Democracy*, 67.
[193] W. Fitzhugh Brundage, *Civilizing Torture: An American Tradition* (Cambridge: The Belknap Press of Harvard University, 2018), 7.
[194] Rejali, *Torture and Democracy*, 8.
[195] Ibid, 9.
[196] Ibid, 23.
[197] Brundage, *Civilizing Torture*, 2.
[198] Ibid, 11.

have been tortured when their disobedience defies the ruling social order and spies perform a variety of tasks that are ultimately meant to weaken or threaten the target society. Most obviously of all, the Bolsheviks were threatening a complete revolution of the socio-economic system, or at least perceived to be.[199] This line follows closely to Rejali in understanding torture is typically to be used when there is a perception of threat.

But for Brundage, American torture involves a specific belief that certain 'outsiders' in the society are deemed deserving of such treatment. Slaves, free blacks, Native Americans, Mexicans and immigrant populations were the more likely to receive torture than the dominant white population. This fed into institutions and traditions in U.S. society that excluded others, as in the justice system. Brundage argues that American torture, lynching and the third degree, were supplements to the legal system rather than attempts to circumvent it.[200] Torture in the U.S. has typically had the acquiescence or approval of the police and agents of the law. Brundage then sees Torture as more visible and open than suggested by Rejali, by the mere existence of these 'others' that aren't part of white intuitions and traditions.

[199] Ibid, 60.
[200] Ibid, 222.

-Chapter Three-

Justifying torture in the Bush administration

Legal justifications

Habeas corpus, military courts and Guantanamo

"Freedom-loving people understand that terrorism knows no borders, that terrorists will strike in order to bring fear, *to try to change the behavior of countries that love liberty,*" was the proclamation President Bush gave on 19th September 2001.[201] Two months later, one might suggest that the terrorists had won according to Bush's logic, upon the Congressional approval for Bush's Military Order of 13th November 2001, 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.' Drastic changes were underway. The military order contained a variety of provisions and proclamations, most importantly of which declared that the United States was now engaged in a conflict with Al Qaeda.[202] Further provisions in the military order gave the authority for the Secretary of Defense to detain any non-U.S. citizens who were members of Al Qaeda and hold them anywhere in the world.[203]

Most controversially of all, the military order gave the president the authority to establish military commissions, essentially military courts. Those believed to be members of Al Qaeda would be subject to these commissions to determine their guilt, with punishments potentially including life imprisonment or even the death penalty.[204] These tribunals were to take place anywhere at any time, at the discretion of the Secretary of Defense, moreover these military commissions would have exclusive jurisdiction. There would be no civilian oversight, and no time frame for which the trials would be conducted.[205]

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[201] The Washington Post, "President Bush on Building Global Coalition to Fight Terrorism," *The Washington Post*, 19 September, 2001. https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushtext1_091901.html Accessed on 30/04/2020.

[202] "International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces." President George W. Bush, "Military Order – Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 13 November, 2001. Section 1, A.

[203] "Any individual subject to this order shall be --
(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States." Bush, "Military Order," 13 November, 2001. Section 3, A.

[204] "Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death." Bush, "Military Order," 13 November, 2001. Section 4, A.

[205] "(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide." Bush, "Military Order," 13 November, 2001. Section 4, C, 1; Bush, "Military Order," 13 November, 2001. Section 7, B.
"(b) With respect to any individual subject to this order--
(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and
(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal."

The sweeping provisions of the Military Order would curtail some of most basic principles of presumed innocence. Principally, the suspects detained would be denied the right of *habeas corpus*, or the right know their reasons of imprisonment, to be brought before a judge in person, and that the imprisonment must follow a court order.[206] The Military Order frequently makes reference to the sense of national emergency. The Bush administration argued that these were necessary wartime measures in an unprecedented situation.[207] But political justifications for the administration's conduct is the subject of the second section of this thesis, discussed later.

Many of the provisions of the military order had already been given a green light by members of the Department of Justice (DoJ). Patrick Philbin, a Deputy Assistant to the Department, authored some legal advice for the then Attorney General, John Ashcroft. This is the first of what would become some of the most controversial legal advice any American president has entertained. The 6th November memo asserted that all the provisions that would form the Military Order were well within the legal powers of the President in a state of war.[208]

Detainees were legally not afforded the protections of the Constitution.[209] Among other recommendations in Philbin's memorandum was the legal opinion that detained members of Al Qaeda should be classified as unlawful combatants and not as prisoners of war, as per requirements of the Geneva Conventions.[210] How this determination was arrived at, is not explicitly stated in the memorandum,[211] but the incentives to reach this view were surely there considering the protections lawful combatants (prisoners of war) receive. Finally, Philbin recommended holding the detainees outside of the United States, where guaranteed rights and constitutional protections would not apply.[212]

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[206] Leonard W. Levy, *Origins of the Bill of Rights* (New Haven: Yale University Press, 2001): 44.

[207] George W. Bush, "Declaration of National Emergency by Reason Of Certain Terrorist Attacks," 17 September, 2001.

[208] "We explain that a declaration of war is not required to create a state of war or to subject persons to the laws of war, nor is it required that the United States be engaged in armed conflict with another nation. The terrorists' actions in this case are sufficient to create a state of war de facto that allows application of the laws of war.
The Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. §§ 801-946, authorizes military commissions to try "offenders or offenses that by statute or by the law of war may be tried by military commissions." Deputy Attorneys General for the Office of Legal Counsel Patrick Philbin and John Yoo, *Memorandum for General Counsel for the Department of Defence, William Haynes II, Subject: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba,* 6 November, 2001, 1.

[209] "We conclude, as has the Supreme Court, that offenses charged under the laws of war before military commissions are outside the provisions of Article III and the Fifth and Sixth Amendments and thus that the rights to grand jury indictment and jury trial do not apply to such offenses." Philbin-Yoo Memorandum, *Possible Habeas Jurisdiction*, 3.

[210] "Acknowledging that the laws of armed conflict may be applied to the present conflict does not mean in any way acknowledging the terrorists as legitimate combatants with any rights under the laws of armed conflict. To the contrary, based on their actions to date, the terrorists are all unlawful combatants stripped of any protection under the laws of armed conflict and are subject to trial for their violation." Philbin-Yoo Memorandum, *Possible Habeas Jurisdiction*, 24

[211] Edelson, *Emergency Presidential Power*, 156.

[212] "We believe that if a particular use of military commissions to try offenses against the laws of war is constitutionally permissible within the United States, it follows a fortiori that such a use is permissible to deal

This last issue would later be addressed in another memo published by Philbin and John Yoo, deputy in the Office of Legal Counsel. The opinions, published 28th December 2001, looked at where the detainees could be held, based on possibility of habeas corpus writs in detainees' favor.[213] The principal concern in the 28th December memo was finding a suitable location, but with the requirement that detainees be unable to request habeas corpus writs. More precisely, they would be located outside the jurisdiction of a court that could legally consider their writ. Guantanamo, however, was the "legal equivalent of outer space," because of the lack of federal court jurisdiction there.[214] Camp X-Ray, infamous for its outdoor mesh cages and florescent orange jumpsuits, began construction at Guantanamo Bay after the 28th December memo.[215] The first detainees arrived in Guantanamo in January 2002.

Based on the reasoning above, harsh interrogation techniques were approved for detainees at Guantanamo by Secretary of Defense Donald Rumsfeld. A series of memos and legal advice would justify Rumsfeld's decision. Firstly, a memorandum for the Department of Defense (DoD) titled "Counter-Resistance Strategies" in October 2002, from DoD legal advisor Diane Beaver. The memorandum detailed three categories of techniques to be used in interrogations, Category I being the mildest techniques and Category III being the harshest.

For instance, Category I lists such techniques as yelling and deception,[216] Category II lists stress positions, such as forced standing for four hours, and removal of clothing.[217] finally Category III includes techniques such as waterboarding and threats of imminent and painful death.[218] The justifications for approving these techniques are actually rudimentary forms of more complete legal arguments that were later published by the Office of Legal Counsel. Category I techniques, such as yelling, are legal, as long as it is not done "…with intent to cause severe physical damage or prolonged mental harm."[219] Category II techniques were legally permissible as "no severe physical pain is inflicted and prolonged mental harm intended," intent and severity of pain are discussed later in this chapter.[220] Category III techniques are

with enemy belligerents overseas, where many constitutional protections would not apply in any event." Philbin-Yoo Memorandum, *Possible Habeas Jurisdiction,* 11.

[213] "This memorandum addressed the question whether a federal district court would properly have jurisdiction to entertain petition for a writ of habeas corpus filed on behalf of an alien detained at the U.S. naval base at Guantanamo Bay, Cuba (GBC).
We conclude that the great weight of legal authority indicates that a federal court could not properly exercise habeas jurisdiction over an alien detained at GBC." Deputy Attorneys General for the Office of Legal Counsel Patrick Philbin and John Yoo, *Memorandum for General Counsel for the Department of Defence, William Haynes II, Subject: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba,* 28 December, 1.

[214] Barton Gellman, *Angler: The Cheney Vice Presidency* (London: Penguin Books, 2009), 171.

[215] Andy Worthington, *The Guantanamo Files: The Stories of the 774 Detainees in America's Illegal Prison* (London: Pluto Press, 2007), 126.

[216] Lieutenant Colonel Diane Beaver, *Memorandum for Commander, Joint Task Force 170, Subject: Request for Approval of Counter-Resistance Strategies*, 11 October, 2002, 9.

[217] Ibid, 10.

[218] Ibid.

[219] Ibid, 7.

[220] Ibid, 8.

only permissible "for a very small percentage of the most uncooperative detainees (less than 3%),"[221] but legal, conditional on there being "appropriate medical monitoring."[222]

On the 27th of November, Rumsfeld signed a blanket approval for all Category I and II techniques at Guantanamo. His signature was followed by a hand-scrawled comment accompanying it "I stand for 8-10 hours a day. Why is standing limited to 4 hours?"[223] A blank approval for Category III techniques was deemed unwarranted due to their severity.[224] The legal advice given by Beaver was eventually deemed heavily flawed, potentially violating the Torture statute. Subsequently, the memorandum's advice was withdrawn in April 2003, but many of the techniques would be approved by a DoD report same year.

Classified by military commissions as unlawful combatants, with drastically reduced civil protections and legal rights, and located in the legal equivalent to outer space, the legal stage was set for American torture in the War on Terror (WoT). The interrogation techniques approved by Rumsfeld would develop beyond their categorization in the legal advice he received. The legal arguments would develop too, and the role of the Office of Legal Counsel was paramount in this regard.

The 'Torture Memos' and the OLC

As will be shown by certain declassified and released documents from the Bush administration, a major concern was the effect of the War Crimes Act 1996 (WCA). The WCA was implemented in order to define the penalties in U.S. law for grave breaches of the Geneva Conventions,[225] meaning such acts as willful killing, human experimentation, and of course, torture.[226] What concerned the administration was the potential prosecutions that could arise from the WCA for CIA interrogators.[227] The problem soon became clear for the administration: remove the legal threat of the Geneva Conventions, or interrogators could be exposed to action in U.S. and foreign courts for war crimes.

To this aim, the Office of Legal Council (OLC) played a paramount role. The role of the OLC is to provide the executive branch with legal advice, when sought, for whatever actions it plans to take.[228] This advice is then usually taken as the conclusive legal position of the executive branch.[229] This little known section of the DoJ has had influential alumni, two of which, William Rehnquist and Antonin Scalia, went on to serve on the Supreme Court. The

[221] Ibid, 10.
[222] Ibid, 8.
[223] General Counsel of the Department of Defense William Haynes II, *Memorandum for Secretary of Defence, Donald Rumsfeld, Subject: Counter-Resistance Techniques*, 27 November, 2002.
[224] Ibid.
[225] Patrick Hagopian, *American Immunity: War Crimes and the Limits of International Law* (Cambridge: University of Massachusetts Press, 2013), 127.
[226] ICRC, *Geneva Conventions*, Article 50.
[227] Honigsberg, *Our Nation Unhinged*, 21.
[228] Harvard Law Review, "The Immunity-Conferring Power of the Office of Legal Counsel," *Harvard Law Review* 121, No. 8 (June 2008): 2087.
[229] Randolph D. Moss, "Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel," Administrative Law Review 52, No. 4 (Autumn 2000): 1305.

office itself has a considerable influence over legal interpretations in the White House and would be staffed by sophisticated legal minds, but also Bush loyalists.

Together, these lawyers would author and approve a series of memoranda that have become known as the "Torture Memos,"[230] a series of legal opinions that shaped American conduct in fighting the WoT. These are the individuals that were tasked with providing legal opinions that would 'unshackle' the administration in its fight against terrorism. Escaping the confines of the Geneva Conventions required considerable legal creativity, especially given the clear prohibition of torture in domestic American law, but also the *jus cogens* nature of torture in international law.

Escaping Geneva

Chapter One detailed the United States' commitments to prohibiting torture, both through domestic law and its international treaty obligations, the Torture Statute, the Convention Against Torture (CAT), and the Geneva Conventions. In order to justify the tactics U.S. interrogators intended to use during interrogations, they had to be legal. As previously stated, the implications of the WCA and grave breaches of the Geneva Conventions could pose serious trouble for U.S. interrogators. The task for the OLC was to devise a legal position that circumvented this possibility. The first of these legal opinions, on the inapplicability of the Geneva Conventions, was published 9th January 2002 by OLC Deputy John Yoo, although would not become public knowledge until leaked in a May 2004 *Newsweek* article.[231] In the memorandum, he asserts that members of Al Qaeda and the Taliban are in fact not protected by the Geneva Conventions and the laws of war.[232] The memorandum justifies this position on three grounds:

Al Qaeda's status as a non-state actor renders it ineligible to claim the protections of the Geneva Conventions.[233]

This first argument asserts that as a non-state actor, Al Qaeda does not qualify for the protections of Geneva, as the Conventions are agreements between signatory states. Further to this, Convention 4, Article 2 of the Conventions, regulating treatment of detainees, only applies to cases of declared war between two or more "High Contracting Parties" (meaning two states whom have signed the GC's). Yoo severely limits the implications of Article 2, firstly by ignoring that it concerns "all cases of declared war or any other armed conflict which may arise."[234] Yoo's analysis would also imply that the United States is also not engaged in a war at all, if the U.S. is the only contracting party to the GC's. In claiming the connections between

[230] Nancy V. Baker, "Who was John Yoo's Client? The Torture Memos and Professional Misconduct," *Presidential Studies Quarterly* 40, No. 4 (December 2010): 750.
[231] Michael Isikoff, "Double Standards?," *Newsweek*, 22 May, 2004. http://thereitis.org/justice-department-memo-advocates-double-standards/. Accessed 05/04/2020.
[232] Deputy Assistant Attorney General John Yoo, *Memorandum for General Counsel for the Department of Defence, William Haynes II, Subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees*, 9 January, 2002. 11.
[233] Ibid.
[234] ICRC, *Geneva Conventions*, Article 2.

the Taliban and Al Qaeda,[235] the Articles on the Responsibility of States, representing customary international law, Al Qaeda could be protected by the Conventions through association with a state,[236] albeit one that is only loosely controlled by the leading authority, the Taliban.

The Nature of the conflict precludes application of Common Article 3 of the Geneva Conventions.[237]

Yoo argues that the Geneva Conventions only apply to traditional wars between nation states and civil wars, of which he claims the U.S. conflict is neither.[238] Yoo describes the conflict as between a nation state, the U.S., and a non-state actor, Al Qaeda. Yet in distinguishing the conflict from the two described in Geneva Convention 4, Article 2, Yoo was inventing a new category of warfare. This merely implies what has been written here already, and will be touched on again, that the concern was to avoid prosecution. In establishing the nature of the U.S. conflict in a legal 'grey zone', the administration sought to wrangle itself free of constrains in obtaining information.

Al Qaeda members fail to satisfy the eligibility requirements for treatment as POW under Geneva Convention III.[239]

According to Yoo's legal opinion, Al Qaeda detainees do not qualify for the status of Prisoners of War (PoW). He rightly points out that even though PoW status is typically reserved for those forces of a High Contracting Party, the Conventions also include members of militias, volunteer forces and other organized resistance groups.[240] To attain the status of a PoW, these militia and other groups must meet four conditions, as stipulated by Article 4.[241]

Yoo asserts that even if Article 4 of the Third Convention does apply, the fact that the conflict fails to reach the defined status outlined in Article 2 of Convention 4 (as mentioned above) means the protections of Article 4 would not apply.[242] Regardless, he argues that Al Qaeda meets none of these requirements to be classified as PoW:[243] they do not wear insignia or uniform, attack civilian targets of no military value, take and kill hostages, and generally do

[235] Washington Post, "Bush Announces Strikes Against the Taliban," *The Washington Post*, 7 October, 2001. https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_100801.html. Accessed 30/04/2020.
[236] Geneva Academy, *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Security Council* (Geneva: Geneva Academy of International Humanitarian Law and Human Rights, 2016): 13.
[237] Yoo Memorandum, *Application of Treaties*, 11.
[238] Ibid, 12.
[239] Ibid.
[240] IRIC, *Geneva Convention Three*, Article 4.
[241] (a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war. Ibid.
[242] Yoo Memorandum, *Application of Treaties*, 13.
[243] C.L. Lim, "Inter Arma Silent Leges? Black Hole Theories of the Laws of War," in *Emergencies and the Limits of Legality* (Cambridge: Cambridge University Press, 2008), ed. Victor Ramraj, 391.

not adhere to the laws of war themselves.[244] A glaring omission is made by Yoo in asserting such, principally because the very next provision, Article 5, stipulates that until the status of a detained person is determined, they must be considered as PoW.[245] To that end, 'competent tribunals' must be used to establish the status of someone captured in war.[246] This is perhaps one of the more radical positions to come out of the torture memos, and would controversially also be applied to detained members of the Taliban.

Turning to the treatment of members of the Taliban detained in Afghanistan, Yoo argues that the Geneva Conventions do not apply based on two arguments, firstly: *Afghanistan is a failed state, and so unable or unwilling to meet its international treaty obligations*.

The first argument rests on few separate aspects. Firstly, Yoo asserts that the president has the constitutional authority to determine if Afghanistan ceased to be an operating state. He argues that Article II of the Constitution vests the president with this power, and so if a president makes this determination, regardless of which state it is, he or she would be acting legally.[247] This case is then made in claiming Afghanistan is in fact a failed state, defining such a condition as characterized "by the collapse or near-collapse of state authority."[248] A variety of sources are used to back up this claim, including official DoD reports, interviews with government officials such as Donald Rumsfeld, and some academic and journalist reports in the media. Yoo makes the assertion that the area of Afghanistan has been stateless for some time, precluding American intervention and even the rise of the Taliban itself.[249] Furthermore, no government beside Pakistan ever recognized the Taliban regime in Afghanistan, including the UN, and only ever had diplomatic relations with Saudi Arabia and the United Arab Emirates.[250]

Many of these argument are perfectly logical, and in some cases correct, in asserting Afghanistan as a failed state. The extreme step taken was to declare that, due to its failed state status, members of the Taliban would not be subject to Geneva protections. While few would debate the former, the jump between this position and the Yoo's conclusions, that Afghanis would not be afforded the Geneva Conventions, was unprecedented. Afghan society was, overnight, legally stripped of the most basic protections it had. Yoo's argument simply continues the underlying goal of these memos and legal opinions, a self-serving mission to side-step the U.S. legal and treaty obligations, something this very memo accuses the Taliban of.

The second argument follows: *The leadership of the Taliban are indistinguishable from Al Qaeda and so application of the Geneva Conventions must treat both as equal*.

[244] Ibid.
[245] IRIC, *Geneva Convention Three*, Article 5.
[246] Ibid.
[247] Yoo Memorandum, *Application of Treaties*, 15.
[248] Ibid, 17.
[249] Ibid, 19.
[250] Ibid, 22.

The second justification for the inapplicability of the Geneva Conventions is perhaps the most audacious, if not the least argued (covering just two paragraphs of the forty two page memorandum). This argument uses a scarce number of sources to back up this claim, including an unsubstantiated note that one of Osama Bin Laden's daughters married the then leader of the Taliban, Mullah Omar.[251] Yoo asserts that the material, personnel, financial, and security assistance between the two organizations shows that "The two movements had long since melded together as one…"[252] Therefore, if Al Qaeda is ineligible for Geneva Convention protections and the PoW status, the same also applies to the Taliban. This argument is so contrived that Yoo doesn't attempt to back up these claims with much effort, whereby the Taliban and Al Qaeda are basically the same organization based on three media reports; one each from Toronto's *Globe* and *Mail*, *The Boston Globe* and *Newsweek*.[253] This is remarkable given many of the other arguments in this memorandum are based on more official channels.

Overall, Yoo's reading and understanding of the Geneva Conventions is problematic. The most glaring problem here is the assumption that those not designated PoWs have absolutely no rights. The strict textual reading of the Conventions implies, in a sense, that if it is not written down then it is allowed. He follows a strange reasoning whereby only what is written specifically in the text is forbidden, beyond that, we can do as we wish.[254] This logic reared its head in public for the first time when one month after the first Yoo memorandum, president Bush declared in a press release that the United States would "as a matter of policy….continue to treat detainees humanely, and to the extent appropriate and consistent with military necessity…"[255] The administration was essentially saying that it would follow the application of the Conventions 'as a matter of policy' and not as its actual legal obligation.

Torture by any other name

The Bush administration sought to legally justify its interrogation methods by asserting that its techniques did not amount to torture. Two OLC memorandums, submitted on the 1st August 2002, detail this reasoning with reference to Section 2340A of the U.S. Code (the Torture Statute) and the Convention Against Torture.

The first of these memoranda justifying harsh interrogations to be analyzed is titled "Standards of Conduct for Interrogation under 18 U.S.C 2340-2340A" for Counsel to the President Alberto Gonzales, from OLC Assistant Director Jay Bybee. Bybee asserts a narrow reading of torture as defined by the Torture Statute and the CAT, and the proscriptions against CIDT. Other legal justifications are made alongside, relating to constitutionally granted

[251] Ibid, 23
[252] Ibid.
[253] Ibid, notes 59-63.
[254] Jeremy Waldron, *Torture, Terror and Trade-Offs: Philosophy for the White House* (Oxford: Oxford University Press, 2010), 197.
[255] Office of the Press Secretary, Fact Sheet: Status of Detainees at Guantanamo, *White House Archives*, 7 February, 2002. https://georgewbush-whitehouse.archives.gov/news/releases/2002/02/20020207-13.html. Accessed 30/03/2020.

powers to the President in war-time, and self-justifying arguments based on necessity and self-defense. Each will be expanded upon in turn.

Specifically intended

The Bybee Memo interpreted the definition of torture within the Torture Statute narrowly. This interpretation rested upon several aspects of the Statute. Firstly, Bybee asserted that for an act to violate the Statute "...severe pain and suffering must be inflicted with specific intent."[256] Essentially, he argued that the "severe pain and suffering" had to be the specific intent for an act to constitute torture, and thus violate the Statute. The problematic nature of the specific intent was discussed in Chapter One. The argument is largely self-serving in that the memo broadens, exponentially, the kinds of treatment a detainee can be subjected to so long as the pain and suffering itself wasn't specifically intended. This understanding states that if the specific intent was say, information, any act to retrieve this information wouldn't be torture, as the intent was to gain information. By this logic, an interrogator simply cannot commit torture.[257] This interpretation also diverged in the wording from the Statute, replacing 'intentional'[258] with 'specifically intended,'[259] which is difficult to prove of an interrogator.[260]

Severe pain

The Bybee Memo correctly asserts that the Statute requires "severe physical or mental pain or suffering" for an act to constitute torture.[261] He focuses on the word severe and points out that the Statute does not define it. Using a variety of medical statutes, he concludes that severe should be interpreted as damage to the body that "must rise to the level of death, organ failure, or the permanent impairment of a significant body function."[262] Acts are only torture if the detainee dies or suffers from organ failure. This astounding conclusion was based on statutory provisions that were not even defining the term 'severe' but 'emergency condition,' which invalidates its basis to define 'severe.'[263] Furthermore, the context within which the medical statutes were defining 'emergency condition' was entirely different from the Statute's.[264] Scientific investigation has since contested this claim, asserting instead that many, merely coercive, acts constitute impairment of bodily function and organ failure.[265] Why such a high threshold for torture was established, and under such dubious evidence and

[256] Assistant Attorney General Jay S. Bybee, *Memorandum for Counsel to the President, Alberto Gonzales, Subject: Standards of Conduct for Interrogation under 18 U.S.C 2340-2340A*, 1 August, 2002, 3.
[257] Wisnewski, *Understanding Torture*, 209.
[258] 18 U.S.C 2340, Section 2-A, Definitions, "the *intentional* infliction or threatened infliction of severe physical pain or suffering," (Emphasis added).
[259] Bybee Memorandum, "*Standards of Conduct*," 3.
[260] Otterman, *American Torture*, 110.
[261] 18 U.S. Code 2340. Section 2, Definitions.
[262] Bybee Memorandum, "*Standards of Conduct*," 1 August, 6.
[263] Waldron, *Torture, Terror, and Trade-Offs*, 212.
[264] Ibid, 211.
[265] Shane O'Mara, *Why Torture Doesn't Work: The Neuroscience of Interrogation* (Cambridge: Cambridge University Press, 2015), 4.

arguments, serves to underline the legal creativity involved in attempting to evade the Torture Statute.

Psychological pain

The same intent thresholds are held for psychological harm from torture, in that it would have to be the *specific intent* to cause mental harm, "A defendant must specifically intend to cause prolonged mental harm for the defendant to have committed torture."[266] Added to this, prolonged mental harm must result from one of the four categories in the Torture Statute[267] and nothing else, to be considered torture. Such treatment would fall under the category of CIDT and thus not in breach of the WCA. Narrowing this scope even further, the mental harm would need to 'prolonged' in length, seen in conditions such as post-traumatic stress disorder.[268]

What has been shown about the Torture Statute culminates in Bybee's conclusion that "…reading the definition of torture as a whole, it is plain that the term encompasses only extreme acts."[269] This conclusion is also reached in regards to the CAT itself: "In Sum, CAT's text, ratification history and negotiating history all confirm that Section 2340A reaches only the most heinous acts."[270] In reaching such a conclusion, the legal advice raised the threshold of torture to such a level that would severely limit what could legally be punished under the WCA and the CAT.

Commander-In-Chief

Other justifications are also given in the Memo, apart from of the textual interpretation of the Torture Statute and the CAT. Bybee asserts that the President, as Commander-in-Chief, "has the constitutional authority to order interrogations of enemy combatants to gain intelligence information…"[271] Taking this argument further, he states: "Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign."[272] This sweeping argument reappears in many of the memoranda in different ways, but always asserting extensive powers for the president as Commander-in-Chief.[273] This justification is discussed later.

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[266] Bybee Memorandum, "*Standards for Conduct,*" 8.
[267] (A)the intentional infliction or threatened infliction of severe physical pain or suffering;
(B)the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
(C)the threat of imminent death; or
(D)the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;
[268] Bybee Memorandum, "*Standards for Conduct*," 8.
[269] Ibid, 13.
[270] Ibid, 22.
[271] Ibid, 31
[272] Ibid.
[273] Wisnewski, *Understanding Torture*, 217.

Enemy combatants

The final legal justification for the Bush administration's treatment of detainees in the WoT was to invent a new status of detainee, the "enemy combatant." Both Chapter One and the beginning of this chapter have discussed the implications of the Geneva Conventions and the protections offered by Prisoner of War status. The administration initially declared detainees as unlawful combatants as per the requirements of the Conventions. As already noted, even if someone is not a PoW but instead an unlawful combatant, they were still required to be treated 'humanely' and that until a detainee's status was determined by a competent court, must be considered a PoW anyway.[274] The term enemy combatant placed detainees in a new kind of legal limbo, not quite PoW and not quite unlawful combatants. As such, the protections of either status would not apply.

Firstly, the term itself was an entirely novel creation of the Bush administration.[275] The Geneva Conventions only describe two categories of combatant, lawful (whom when captured become a prisoner of war) and unlawful (everyone else). The term 'enemy combatant' was first officially used in a 2002 federal district court case *Coalition of Clergy v Bush*.[276] The case was the first attempts to gain habeas corpus rights for detainees at the Guantanamo Bay facility, but Los Angeles Federal Judge A. Howard Matz threw the case out. He found that the detainees had no rights to issue habeas corpus writs because they were "aliens" and "enemy combatants."[277] The term was first used by a member of the administration a month later, by William Haynes, General Counsel to the DoD, in a Pentagon briefing.[278]

Issues with this designation and the role it played in denying protections of the Geneva Convention soon came to the administration's doorstep in 2004. Two American citizens, Yasser Hamdi[279] and Jose Padilla,[280] had been designated as enemy combatants by the administration in 2002. A third individual, Shafiq Rasul, who was not an American citizen, had also been designated as such shortly after capture in 2001.[281] All three cases involved the right to habeas corpus while in detention, something the administration had denied to all those labeled as enemy combatants. Up until 2004, the administration had been successful in having all three cases thrown out of court until appeals reached the Supreme Court. Some have suggested that the release of the now infamous images of abuse at Abu Ghraib in May

[274] Darren A. Wheeler, *Presidential Power in Action: Implementing Supreme Court Detainee Decisions* (New York: Palgrave Macmillan, 2008), 24.
[275] Jonathan Hafetz, *Habeas Corpus After 9/11: Confronting Americas New Global Detention System* (New York: New York University Press, 2012), 18.
[276] Honigsberg, *Our Nation Unhinged*, 22.
[277] Coalition of Clergy, et al. v. George W. Bush, et al., 02-570. February 2002.
[278] Peter Jan Honigsberg, "Chasing "Enemy Combatants" and Circumventing International Law: A License for Sanctioned Abuse," *UCLA Journal of International Law and Foreign Affairs* 12, No. 1, (Spring 2007): 48.
[279] Wheeler, *Presidential Power in Action*, 27.
[280] Ibid, 53.
[281] Ibid, 93.

2004 may have affected the decision making in these cases, some images were released hours after oral statements began, although it is not certain.[282]

The decisions of the Supreme Court were made on the same day in all three cases, on the 28th June 2004. In all three cases, Rumsfeld v Padilla, Hamdi v Rumsfeld, and Rasul v Bush, the Supreme Court did not accept the administration's arguments. In the Rasul v Bush case, the Court found that foreign nationals could raise writs of habeas corpus. They rejected the administration's notion that non-citizens could be held at Guantanamo without access to courts.[283] For the Hamdi and Padilla cases, the Court found that both individuals were entitled to some form of challenge to their detention, and that they could not be held without trial.[284] These cases represent the first efforts to reign in the excessive overreach of power by the administration in relation to treatment of detainees. In reaction, the administration sought to legally buttress their novel creation, the enemy combatant, with the establishment of Combatant Status Review Tribunals (CSRT) in July 2004.[285] The role and function of CSRT is described in the note.[286]

At the very least, these tribunals were intended to satisfy the 'competent tribunals' requirement of the Geneva Conventions, although they would only apply to detainees at Guantanamo.[287] The tribunals would, in effect, make previously illegal detentions legal. However, the tribunals were heavily flawed, by design. Firstly, the tribunals had already made their determinations that a suspected terrorist was an enemy combatant, the burden of proof lay with the defendants in disproving the DoD's determination.[288] For the hearings themselves, detainees were not permitted access to lawyers, but instead provided with a 'personal assistant,' who in most cases only met their client once.[289] As these individuals were not lawyers, there was no guarantee of attorney-client privilege. In terms of evidence, the panels adjourning the tribunals would allow the inclusion of unreliable information and hearsay against a defendant. Furthermore, some evidence could not be seen by the defendants because it was deemed to have national security implications.[290] Detainees were of course able to submit evidence. For example, detainees could call witnesses in their

[282] Baker, "The Law: Who Was John Yoo's Client?" 764.
[283] Edelson, *Emergency Presidential Power*, 159.
[284] Ibid, 160.
[285] Secretary of the Navy Gordon England, *Memorandum for Deputy Secretary of Defense, Paul Wolfowitz, Subject: Order Establishing Combatant Status Review Tribunal*, July 2004.
[286] "a one-time administrative process designed to determine whether each detainee under the control of the Department of Defense at Guantanamo meets the criteria to be designated as an enemy combatant. Each detainee has the opportunity to contest such designation. It is not a criminal trial and is not intended to determine guilt or innocence; rather, it is an administrative process structured under the law of war to confirm the status of enemy combatants detained at Guantanamo as part of the Global War on Terrorism." Department of Defense, Combatant Status Review Tribunals, *Department of Defense,* 2004, 1. https://archive.defense.gov/news/Oct2006/d20061017CSRT.pdf. Accessed on 24/04/2020.
[287] Robert A. Peal, "Combatant Status Review Tribunals and the Unique Nature of the War on Terror," *Vanderbilt Law Review* 52 (October 2005): 1651.
[288] Edelson, *Presidential Power*, 181.
[289] Honigsberg, *Our Nation Unhinged*, 114.
[290] Edelson, *Emergency Presidential Power*, 180.

defense but only other detainees, many of whom had already been determined enemy combatants and their testimonies doubted on that basis.[291]

In rare cases where a CSRT would find a detainee not to be an enemy combatant, panels were asked to reconsider their verdicts, referred to as a 'do-over.'[292] This was the case of a Mr. Al-Ghizzawi, who in his first ever appearance before a CSRT was determined not an enemy combatant.[293] Six weeks later, the government had 'found' new evidence, impressive after four years of detention in Guantanamo, and found that Al-Ghizzawi was in fact an enemy combatant. [294] The administration claimed in 2009, 38 of 558 detainees had been found not to be enemy combatants and released, yet no records of these releases exists. Suggestions have been made of possible triple or quadruple 'do-overs.'[295] What the nature of the CSRTs shows is that they were never intended to make new, accurate determinations about a detainee's status, but rather, rubber stamped predetermined decisions. The CSRT and enemy combatant cases show how the government sought to justify its actions relating to detainee treatment and rights, and when legal proceedings turned against them, re-justify it. The justifications and conditions of the CSRTs would prove egregious enough that they were deemed to violate both military law and the Geneva Conventions, in a 2006 Supreme Court ruling in Hamdan v Rumsfeld.[296]

Political justifications

As has been shown, the torture program was argued to be legally justified. One could argue that this assertion itself constitutes a political justification, as it legitimizes what is being done in the eyes of the public and civil society. This argument underlined much of the political justifications for the torture program, as for all the political justifications can ultimately fall back to the default position that it's all legal. Regardless of this position, the political justifications for the interrogation of detainees were both novel and familiar. The administration argued that the conflict was unique and different from previous wars on two fronts, the unprecedented situation and a new kind of enemy from previous conflicts. Finally, the justification for torture rested upon defenses of necessity and saving the lives of Americans, by retrieving intelligence that foiled attacks.

A new kind of war, a different kind of enemy

The administration declared that it was involved in a 'new kind of war' in the aftermath of the 9/11 terrorist attacks.[297] The President declared in a radio address that it was engaged in a

[291] Mark P. Denbeaux, P. Mark et al, *The Guantanamo Lawyers: Inside a Prison Outside the Law* (New York: New York University Press, 2009): 149.
[292] Honigsberg, *Our Nation Unhinged,* 124.
[293] Denbeau et al, *The Guantanamo Lawyers*, 152.
[294] Ibid.
[295] Honisberg, *Out Nation Unhinged*, 126.
[296] Edelson, *Emergency Presidential Power*, 183.
[297] Donald H. Rumsfeld, "A New Kind of War," *The New York Times*, 27 September, 2001. https://www-nytimes-com.eur.idm.oclc.org/2001/09/27/opinion/a-new-kind-of-war.html. Accessed 16/04/2020.

"different kind of conflict against a different kind of enemy."[298] The new war and different enemy typified the death of traditional features of 'old wars' such as taking place between nation states, with uniformed armies, with formal declarations, and a clear distinction between the civilian and military spheres.[299] The new kind of war centered on non-government or quasi-governmental groups, Al Qaeda and their protectors, the Taliban. These claims assert the unique and unprecedented nature of the 9/11 attacks that triggered this new war. A war blurred the civilian and military distinction, or the distinction between the home front and the battlefield.[300] But this general feeling of a fundamental change was not limited to statements from the administration. *The Philadelphia City Paper* ran the headline "Nothing Will Ever be the Same," while the *Detroit News* ran with "America Savaged, Forever Changed."[301] This unprecedented situation would require new tactics. Vice President Cheney stated two weeks after the attacks that "it's going to be vital for us to use any means at our disposal, basically, to achieve our objective."[302]

This narrative shaped the trajectory of the WoT and justified the administration's interrogation policies. But how accurate is this narrative, of a new kind of war? The United States had certainly experienced terrorist attacks before. For example, in 1995 Timothy McVeigh bombed a federal building in Oklahoma City, killing 168 people. Terrorist attacks by Islamic extremists were also not something new to the United States, such as the first attack on the World Trade Center in 1993, or the 2000 USS Cole Bombings. In the months prior to 9/11, the CIA notified National Security Advisor Condoleezza Rice of an increased likelihood that the Al Qaeda would attack the U.S.[303] It would seem the threat was at least familiar to the security and intelligence community in Washington. The U.S. has also been involved in conflicts in which distinguishing civilian from combatant was difficult, such as in Vietnam.[304] The WoT contains other familiar features to previous conflicts with the U.S. Some comparisons have been made to the treatment of terrorism to that of Communism during the Cold War.[305] In both cases the United States sought to couch the conflicts in terms of good versus evil, against an amorphous and homogenous 'other.'[306] The 9/11 attacks were massive in scale and loss of life, but the attacks themselves and the 'new war' against terror that followed had familiar aspects to previous conflicts.

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[298] CNN, "Bush Radio Address Text," *CNN*, 15 September, 2001. http://edition.cnn.com/2001/US/09/15/bush.radio.transcript/. Accessed 16/04/2020.
[299] Mary Kaldor, New and Old Wars: Organized Violence in a Global Era (Cambridge: Polity Press, 2012), 22.
[300] Dorte Huhnert, New Kind of War – New Kind of Detention (Hamburg: Lit Verlag, 2016), 92.
[301] Lee Jarvis, "Newspaper Headlines," in *September 11th in Popular Culture: A Guide* (Santa Barbra: Greenwood, 2010), eds. Sara E. Quay & Amy M. Damico, 77.
[302] Richard Cheney, "Text: Vice President Cheney on NBC's 'meet the Press,'" *The Washington Post*. 16 September, 2001. https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/cheney091601.html. Accessed 16/04/2020.
[303] The Washington Post, "Two Months Before 9/11, an Urgent Warning to Rice," *The Washington Post*, 1 October, 2006. https://www.washingtonpost.com/wp-dyn/content/article/2006/09/30/AR2006093000282.html. Accessed on 16/04/2020.
[304] Wisnewski, *Understanding Torture*, 202.
[305] Elaine Tyler May, "Echoes of the Cold War: The Aftermath of September 11 at Home," in *September 11th in Popular Culture: A Guide* (Santa Barbra: Greenwood, 2010), eds. Sara E. Quay & Amy M. Damico, 37.
[306] Ibid, 52.

The 9/11 attacks signified an enemy which did not respect the laws of war and did not care for the protection of civilians. Obviously in contrast to the U.S., whom wrapped the WoT in 'just war' principles.[307] The torture memos frequently invoked this argument in denial of Geneva protections: if the enemy does not respect the laws of war as stipulated, then they should not also be offered its protections. As inmates started arriving in 2002, DoD head Donald Rumsfeld declared those detained were "the worst of the worst."[308] The Taliban and Al Qaeda were illegitimate actors according to the Bush administration, but more than that, they were considered dangerous animals.[309] General Richard Myers, Chairman of the Joint Chiefs of Staff, declared in early 2002 that inmates at Guantanamo were "people that would gnaw hydraulic lines of a C-17 to bring it down."[310] Clearly these people were Bush's 'different kind of enemy.'

However, this description of detainees at Guantanamo, and other detention facilities in the WoT, was not accurate even by the administration's own evidence. A 2006 Report for the DoD found very few actual fighters for either Al Qaeda or the Taliban. CSRT reports split detainees relationships to terrorist groups into three categories, 'fighters for,' 'members of,' and 'associated with.'[311] Of the 514 completed CRST reports, it was determined only 8% were 'fighters of' either Al Qaeda or the Taliban.[312] The majority of the detained were simply there under the category of 'association,' 57% were associated with Al Qaeda and 36% associated to the Taliban, while 30% were identified as 'members of' either group.[313] The CSRTs had a broad understanding of how detainees fit into any particular category. For example, simply being told someone is a member of Al Qaeda was enough to justify their designation as a 'member of.'[314] If the CRST panels believed someone had ever spoken to an Al Qaeda member, they too were members. The CSRT reports show many were likely detained without cause, many were in fact just low to mid-level participants, if participant at all.[315]

"Most of these guys weren't fighting. They were running," was the summary of the Guantanamo detainees by Brig Gen Martin Lucenti, deputy commander of the joint task force that controlled the base at the time.[316] Luitenant Colonel Thomas Berg, a Pentagon official working on prosecutions at Guantanamo said, "in many cases, we had simply gotten the slowest guys on the battlefield. We literally found guys who had been shot in the butt."[317]

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[307] Helen Dexter, "The 'New War' on Terror, Cosmopolitanism and the 'Just War' Revival," *Government and Opposition* 43, No. 1 (January 2008): 65.
[308] Honigsberg, *Our Nation Unhinged*, 77.
[309] Hunhert, *New Kind of War*, 92.
[310] Michel Paradis, "The Illiberal Experiment: How Guantanamo Became a Defining American Institution," *In Reimagining the National Security State: Liberalism on the Brink* (New York: Fordham University Press, 2019), ed. Karen J. Greenberg, 80.
[311] Denbeaux et al, "Report on Guantanamo Detainees,"1217
[312] Ibid, 1218.
[313] Ibid.
[314] Ibid.
[315] Hinigsberg, *Our Nation Unhinged*, 77.
[316] Mark Huband, "US Officer Predicts Guantanamo Releases," *The Financial Times*, October 2004. https://www-ft-com.eur.idm.oclc.org/content/192851d2-163b-11d9-b835-00000e2511c8. Accessed 17/04/2020.
[317] Joseph Marguiles, Guantanamo and the Abuse of Presidential Power (New York: Simon & Schuster, 2006), 70.

These statements paint a dim picture of the value of those held at Guantanamo for intelligence purposes, but also many simply were not involved in the conflict.

The United States, in its quest for terrorists with valuable intel, established a system of bounties to incentivize capturing people in Afghanistan and Pakistan.[318] Typical bounties could range from $5000 to $20,000, which in an impoverished society like Afghanistan, could amount to winning the lottery. This system soon had members of tribes and ethnic groups 'selling' rivals and adversaries to the Americans, many of which were taken from homes and places of work, usually with no involvement in militant activities.[319] The bounties system allowed some to get very wealthy, according to then President Pervez Musharraf.[320] Overall, it seems that contrary to Rumsfeld, those in Guantanamo and other torture facilities were not the worst of the worst. Many were of little or no intelligence value, their associations with any terror group tenuous, and perhaps only there as a result of a local tribal dispute.

Necessity, self-defense and "saving lives"

As eluded to earlier in this chapter, the defenses of necessity and self-defense evoked by the administration would justify the CIA's torture program. Ultimately, interrogators were saving lives by foiling attacks on Americans. In these cases, a variation of the Ticking-Time Bomb Scenario (TBS) arguments are given. TBSs are thought experiments designed to question our moral opposition to torture, essentially through saving many lives in a deadly emergency situation. Philosopher Henry Shue describes the typical TBS.[321]

They are in essence, a cost-benefit analysis of torture. The thought experiment is writ large within the self-defense and necessity arguments justifying CIA and military actions in potential criminal proceedings, but also invoked generally as justification for the program.[322] TBSs usually rely on a few assumptions about torture, principally that it works.[323] This seemingly innocuous assumption has served to justify all the of torture program, but upon what basis is this claim substantiated? Representation of torture in mass media, such as TV

[318] Isambard Wilkinson, "Bounty Hunters 'selling terror war suspects to America,'" *The Telegraph*, September, 2006. https://www.telegraph.co.uk/news/worldnews/1530120/Bounty-hunters-selling-terror-war-suspects-to-America.html. Accessed 17/04/2020.
[319] Honigsberg, *Our Nation Unhinged*, 78.
[320] "We have captured 689 and handed over 369 to the United States. We have earned bounties totaling millions of dollars. Those who habitually accuse us of "not doing enough" in the war on terror should simply ask the CIA how much prize money it has paid to the government of Pakistan." Perez Musharraf, In the Line of Fire: A Memoir (New York: Free Press, 2006), 237.
[321] "... suppose a fanatic, perfectly willing to die rather than collaborate in the thwarting of his own scheme, has set a hidden nuclear device to explode in the heart of Paris. There is no time to evacuate the innocent people or even the movable art treasures—the only hope of preventing tragedy is to torture the perpetrator, find the device, and deactivate it." Henry Shue, "Torture," *Philosophy and Public Affairs* 7, No. 2 (Winter 1978), 141.
[322] Yuval Ginbar, *Why Not Torture Terrorists?: Moral, Practical, and Legal Aspects of the "Ticking Bomb" Justification for Torture* (Oxford: Oxford University Press, 2010), 225.
[323] Marcia Baron, "The Ticking Bomb Hypothetical," in *Confronting Torture: Essays on the Ethics, Legality History, and Psychology of Torture Today*, eds. Scott A. Anderson and Martha Nussbaum (Chicago: University of Chicago Press, 2018), 184.

series *24* or Hollywood film *Zero Dark Thirty*, depict torture as something that, eventually, works, although films such as *The Report* show the more ineffectual side of torture. On the face of it, it seems intuitive to suggest that everyone has a breaking point, a point at which they will divulge anything required to stop the pain.[324] But the seduction of intuition can be wrong, as a body of scientific and academic work has recently disputed these claims.[325] In the 2014 Senate Intelligence Select Committee Report, the claims of the Bush administration, that it was getting good intelligence from 'enhanced interrogation,' were rubbished.[326] The report is discussed in depth in the next chapter, but a quote should suffice to sum the efficacy of the CIA's torture program.[327]

TBS also rely on other assumptions that will produce the desired outcome of the thought experiment, that torture is sometimes morally permissible. Not only does the TBS assume that torture works, but that it works quickly, to foil an imminent and massive attack. But again, the intuition we all share in regards to pain can be deceptive. It's perfectly reasonable to assume a stalwart fanatic would endure torture for thirty minutes in order to achieve his sacred goals. But this issue is beside the point in regards to American torture, because they had months and years with which to speak to prisoners in detention facilities. Conversely, if there is enough time to torture in a smarter way, surely there is time to try other strategies besides torture?[328] The TBS justifications for torture, as an effective way to obtain information that saves lives, are clearly ill-founded.

[324] John W. Schiemann, *Does Torture Work?* (Oxford: Oxford University Press, 2015), 33.
[325] Steven J. Barela et al. *Interrogation and Torture: Integrating Efficacy with Law and Morality* (Oxford: Oxford University Press, 2020); O'Mara, *Why Torture Doesn't Work*, 2015.
[326] Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, 2014. xi.
[327] "The Committee finds, based on a review of CIA interrogation records, that the use of the CIA's enhanced interrogation techniques was not an effective means of obtaining accurate information or gaining detainee cooperation." Ibid.
[328] Baron, "The Ticking Bomb Hypothetical," 186.

-Chapter Four-

Obama: Promise and Reality

Promise

Obama's campaign: the promise of a new president

Senator Barack Obama declared his campaign for the Presidency of the United States on 10th February 2007, at speech given in Springfield, Illinois. His speech contained embryotic forms of the broader message he wanted his campaign to centre on, a message of hope and change. The "failure of leadership" is shown in "mounting debts," "rising healthcare costs," and "ill-conceived war," which would become central campaign issues.[329] The economy, Washington, and the country itself "must change" to overcome these challenges. Realizing such a change will only happen in "a more hopeful America" where "dreams still live" and where there is still "power in hope."[330] These are the core themes upon which Obama would stake his presidential campaign message, and in turn energize support for it. Change was needed and only hope could grasp it.

The campaign's message helped to galvanized black and poorer demographics, but especially the young. The specter of four more years of unpopular Bush-era policies and the optimistic messaging from the Obama campaign energized the young in ways the Hillary and McCain campaigns didn't.[331] Many of the Obama campaign slogans that trumped despair were based on historic campaigns for the rights of workers, youth, and ethnic minorities. "Yes we can" had been the slogan of the United Farm Workers, the song by Sam Cooke "A change is gonna come" was commonly associated with the civil rights movement.[332] The message was powerful enough to resonate strongly with international audiences, equally antagonistic to the Bush doctrine, as Obama became an international image of hope.[333] The Obama campaign crafted an image of Obama as a representative of disparate groups of Americans. Combined with his perceived 'freshness,' what he came to represent seemed to matter less. For "*He's multi-colored. He's everyone's candidate*" and could be "*whatever you want him to be*."[334]

While Obama's campaign spread a message of new hope, the policy changes were also intended to signify a stark contrast between himself, his predecessor, and his contenders. Healthcare was a major issue for voters in 2008. The Bush government had left a bleak legacy for his successor, never quite addressing the millions of uninsured Americans and the rising

[329] Obama Barack, "Official Announcement of Candidacy for US President," *American Rhetoric*, February 2007. https://www.americanrhetoric.com/speeches/barackobamacandidacyforpresident.htm. Accessed 27/04/2020.
[330] Ibid.
[331] Horace Campbell, *Barack Obama and Twenty-First-Century Politics: A Revolutionary Moment in the USA* (London: Pluto Press, 2010), 120.
[332] Ibid, 124.
[333] Laurie E. Gries, *Still Life with Rhetoric: A New Materialist Approach for Visual Rhetorics* (Logan: Utah State University Press, 2015), 3.
[334] Robert Singh, *Barack Obama's Post-American Foreign Policy: The Limits of Engagement* (London: Bloomsbury Academic, 2012), 29.

cost of healthcare.[335] McCain's proposed healthcare reforms did little to convince, let alone inspire, voters that his tax exemption-based proposals would fundamentally address the crisis.[336] In the democratic primaries, both Clinton and Obama offered slightly differing visions for healthcare but both were fundamentally based on increased state regulatory involvement in healthcare.[337] As Obama won the Democratic primaries, healthcare would prove to be a contrasting feature between himself and McCain in the election.[338]

In other policy areas Obama sought to distinguish himself from McCain. In economic policy, McCain's plan for economic recovery centered on increased oil drilling and large tax cuts.[339] Many of McCain's policies seemed like slight tweaks to Bush-era policies, particularly in the environment[340] and science.[341] In some respects Obama may not have needed to differ too radically in policy from McCain, even if he did in the areas just described. General perceptions based on even just the age of the candidates had a role. McCain was 71-year-old white man going up against a 46-year-old black nominee. Obama's campaign presented Obama as a young 'breath of fresh air' compared to the 'too old' McCain, Obama was young, new and 'cool.'[342]

The Obama Campaign: promise of a new foreign policy

Where candidate Obama diverged most from his predecessor, and indeed his opponents in both the primary and presidential races, was in foreign policy. One of the main attack lines from both Clinton and McCain in 2008 centred on Obama's lack of foreign policy experience and ideas. Clinton used this line of attack to conflate Bush and Obama ,she argued that the U.S. had already had eight years of leadership that lacked "*the experience or wisdom to manage our foreign policy and safeguard our national security*" and that America simply

[335] The New York Times, "Mr. Bush's Health Care Legacy," *The New York Times*, January 2009. https://www-nytimes-com.eur.idm.oclc.org/2009/01/03/opinion/03sat1.html. Accessed 02/05/2020.
[336] Michael Cooper & Kevin Sack, "McCain Offers Details of His Health Plan," *The New York Times*, April 2008. https://www-nytimes-com.eur.idm.oclc.org/2008/04/30/us/politics/29cnd-mccain.html. Accessed 02/05/2020.
[337] Scott Gottlieb, "The Clintonian Roots of Obamacare," *National Affairs*, Summer 2015. https://www.nationalaffairs.com/publications/detail/the-clintonian-roots-of-obamacare. Accessed 02/05/2020.
[338] Antonia Maioni, "Health Care Reform in the 2008 US Presidential Election," *International Journal* 64, No. 1 (Winter 2008/2009): 141.
[339] George L. Amedee, "Obama vs. McCain: Economic Proposals in Search for Change," *Race, Gender & Class* 15, No. 3-4 (2008): 107; Michael Cooper, "Tax Cuts at Centre of McCain's Economic Plan," *The New York Times*, April 2008. https://www-nytimes-com.eur.idm.oclc.org/2008/04/16/us/politics/15cnd-mccain.html. Accessed 02/05/2020.
[340] Michael B. Gerrard, " McCain vs. Obama on Environment, Energy, and Resources," *Natural Resources & Environment* 23, No. 2 (Autumn 2008): 7.
[341] American Association for the Advancement of Science, "In Brief: Where They Stand on Science Policy," *Science: New Series* 322, No. 5901 (October 2008).
[342] Kate Kenski, & Kathleen Hall Jamieson, "The Effects of Candidate Age in the 2008 Presidential Election," *Presidential Studies Quarterly* 40, No. 3 (September 2010): 462; Shaun Ossei-Owusu, "Barack Obama's Anomalous Relationship with the Hip-Hop Community," in *The Obama Phenomenon: Toward a Multiracial Democracy* (Chicago, University of Illinois Press, 2011), eds. Charles P. Henry, et al, 223.

"*can't let that happen again.*"[343] For McCain, Obama lacked "*experience and judgement*" and was someone who couldn't "*understand the implications of failure in Iraq*" with his "simple *views*."[344] The McCain campaign utilized this line of attack when it compared Obama to Paris Hilton and Brittney Spears.[345] This lack of experience attack wasn't necessarily wrong. As of 2008, Obama had only limited experience with foreign policy as a Senator. His experience included some official visits abroad, to Eastern Europe and the Middle East, and his short stint in the Senate Foreign Relations Committee.[346] But the campaign had little to gain from challenging the superior foreign policy experiences of both Clinton and McCain.

Obama stood apart on a foreign policy in other ways. One element of his record that he could emphasize was his long opposition to the Iraq war. Commenting on Iraq at a 2002 anti-war rally in Chicago, he famously referred to it as a "dumb war."[347] Although he frequently pointed out during the 2008 campaign he didn't mean all wars. On the Democratic side in 2008, both Clinton and Biden had supported the Senate Resolution supporting the Authorization for Use of Military Force 2002 against Iraq.[348] This made Obama quite unique amongst a field of Democratic Primary candidates that had all supported the Iraq War. Obama on the other hand could claim purity on the issue, of which was now a costly and unpopular war. In contrast to the Hillary campaign, which attempted to cast her as a masculine American Thatcher, tough and determined to fight.[349] For McCain it was worse, he was an emphatic proponent of the war from the beginning and throughout.[350]

What candidate Obama represented in foreign policy, more than his opponents, was a clear break with the Bush doctrine. Aside from the Iraq War, this was seen in his clear commitment to hold talks with members of Bush's 'Axis of Evil,' such as Iran, without preconditions like suspending its nuclear program.[351] A position would eventually culminate in the 2015 Iran Nuclear Deal of Obama's second term. Similar proposals were given regarding Cuba and North Korea. Candidate Obama moved away from the 'all-stick' approach of the

[343] Patrick Healy & Julie Bosman, "Clinton Campaign starts 5-Point Attack on Obama," *The New York Times*, February 2008. https://www-nytimes-com.eur.idm.oclc.org/2008/02/26/us/politics/26clinton.html. Accessed 03/05/2020.
[344] Tom Curry, "McCain Assails Obama for Lack of Experience," *NBC News*, December 2007. http://www.nbcnews.com/id/22326360/ns/politics/t/mccain-assails-obama-lack-experience/#.Xs0fBEQzapo. Accessed 03/05/2020.
[345] David Usborne, "Controversial McCain Campaign Likens Obama to Paris Hilton," *The Independent*, August 2008. https://www.independent.co.uk/news/world/americas/controversial-mccain-campaign-likens-obama-to-paris-hilton-882630.html. Accessed 03/05/2020.
[346] Singh, *Barack Obama's Post-American Foreign Policy*, 30.
[347] Rosa Brooks, "Dumb Wars: A Tragedy in Three Acts," *Foreign Policy*, November 2015. https://foreignpolicy.com/2015/11/11/dumb-wars-obama-afghanistan-us-military-iraq-syria/. Accessed 01/05/2020.
[348] C-Span, "Sen. Hillary Clinton Supporting AUMF Against Iraq," *C-Span*, October 2002. https://www.c-span.org/video/?c4579045/sen-hillary-clinton-supporting-aumf-iraq. Accessed 01/05/2020; Robert Farley, "Biden's Record on Iraq War," *FactCheck.org*, September 2019. https://www.factcheck.org/2019/09/bidens-record-on-iraq-war/. Accessed 01/05/2020.
[349] Campbell, *Barack Obama and 21st Century Politics*, 125.
[350] Associated Press, "McCain Says Iraq Should be Next Target in War," *Fox News*, January 2002. https://www.foxnews.com/story/mccain-says-iraq-should-be-next-target-in-war. Accessed 03/05/2020.
[351] Jay Solomon, "Campaign '08: Obama's Foreign-Policy Ideas Fire Up Rivals," *Wall Street Journal*, March 2008.

Bush era to include some carrot in its dealings with authoritarian regimes.[352] In dealing with traditional U.S. allies, candidate Obama also departed from Bush, shown in comments on Israel. In March of 2007, Obama declared that "Nobody is suffering more than the Palestinian people" and that Israelis "are going to have some stones to carry in the road to peace."[353] In the first Democratic Primary debate, Obama went as far as to question Israeli settlements in the West Bank, something quite radical in American political discourse.[354] The era of the Bush doctrine was to be coming to and end, according to Obama's foreign policy positions, but so too on his counter-terrorism policy and torture.

Candidate Obama had long framed his opposition to Bush-era counter-terrorism policies around the law and values, he was after all a constitutional legal scholar. In his 2008 pre-election memoir, *The Audacity of Hope*, he stated legitimacy is a "force multiplier," something that had been neglected during the Bush years.[355] Campaign statements suggested a broad investigation into torture and other crimes during the Bush years. If criminality could be proven then "nobody is above the law."[356] But beyond its illegality, torture was "an outrageous betrayal of our core values."[357] Clinton and McCain had only been recent converts to the torture-prohibition camp. They had supported Bush-era Ticking Time Bomb arguments and opposed legislation limiting violent interrogation techniques.[358]

After two days in office, Obama issued a series of Executive Orders (EO) surrounded by the top military brass and decision makers. Firstly, EO 13491, which effectively ended the Bush administration's position on the inapplicability of the Geneva Conventions to detainees in the WoT and mandated that all interrogations stick to the regulations in the Field Army Manual. EO 13491 also required the CIA to "close any detention facilities under its control as expeditiously as possible.'[359] EO 13492 declared the aim of closing the Guantanamo Bay facility within a year and undertake "a prompt and thorough review" of the continued

[352] Clarence Lusane, "Multicultural Hegemony: Globalization and the Obama Doctrine," in The Obama Phenomenon: Toward a Multiracial Democracy ed. Charles P. Henry, 268.
[353] Des Moines, "Obama Under Fire for Comment on Palestinians," *NBC News*, March 2007. http://www.nbcnews.com/id/17631015/ns/politics-decision_08/t/obama-under-fire-comment-palestinians/#.Xs4tUEQzapo. Accessed 03/05/2020.
[354] Gregory Orfalea, "Obama and the Middle East," *The Antioch Review* 66, No. 4 (Autumn 2008): 719.
[355] Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* (Danvers: Crown Publishing, 2008), 366.
[356] Will Bunch, "Obama Would Ask His AG to "immediately review" Potential of Crimes in Bush White House," *The Philadelphia Inquirer*, April 2008. https://www.inquirer.com/philly/blogs/attytood/Barack_on_torture.html#c20hJVSVMQ2f23r9.99. Accessed 03/05/2020.
[357] Barack Obama, "Statement: Torture and Secrecy Betray Core American Values," *VoteSmart.org*, 2007. https://votesmart.org/public-statement/296210/obama-torture-and-secrecy-betray-core-american-values&speechType=6#.Xs49EEQzapo. Accessed 03/05/2020.
[358] Michael Smerconish, "Head Strong: Torture Must Remain an Option of Last Resort," *The Philadelphia Inquirer*, January 2009. https://www.inquirer.com/philly/opinion/currents/20090125_Head_Strong__Torture_must_remain_an_option_of_last_resort.html. Accessed 04/05/2020.
[359] Barack Obama, "Executive Order 13491 of January 22, 2009, Ensuring Lawful Interrogations," *The White House Archive*, January 2009, https://obamawhitehouse.archives.gov/the-press-office/ensuring-lawful-interrogations. Accessed 06/05/2020.

detention at Guantanamo.[360] Lastly, EO 13493 mandated a sweeping review of detention polices both at home and abroad.[361] In his first few days in office, President Obama had given real life to the promises of candidate Obama. At an address to a Joint Session of Congress in February 2009, Obama would claim in earnest that "*In words and deeds, we are showing the world that a new era of engagement has begun*."[362]

Reality

Reality: continuing detention policies

Obama had mandated the closure of the Guantanamo Bay Prison facility in EO 13492 "as soon as practicable" and "no later than 1 year from the date of this order," signed 22nd January 2009.[363] It contained other mandates as well, such as the revocation of the Bush administration's legal position, set out in EO 13440, on Article 3 of the Geneva Conventions, justifying the torture of detainees.[364] But most importantly, the EO mandated the conduction of a "prompt and thorough review of the factual and legal basis" upon which Guantanamo inmates had been detained.[365] In determining such, the review would conclude whether detainees should be transferred home or to a third country, prosecuted in federal court, released, or subject to other "lawful means." The principle consideration was establishing which detainees could be returned to their country of origin or third country, or failing that, which could be sent to the U.S. and face prosecution in federal courts, or in a regular court-marital.[366]

The administration first established the authority under which the president could detain people, which it laid out in a March 2009 respondent's memorandum.[367]

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[360] Gary A. Issac, "The Wrong Person: How Barack Obama Abandoned Habeas Corpus," in *Obama's Guantanamo: Stories from an Enduring Prison* (New York: New York University Press, 2016), ed. Hafetz, Jonathan, 32.

[361] Barack Obama, "Executive Order 13493 – Review of Detention Policy Options," *The White House Archive*, January 2009. https://obamawhitehouse.archives.gov/the-press-office/2009/01/22/executive-order-13493-review-detention-policy-options. Accessed 06/05/2020.

[362] Barack Obama, "Remarks of President Barack Obama – Address to Joint Session of Congress," *The White House Archive*, February 2009. https://obamawhitehouse.archives.gov/the-press-office/remarks-president-barack-obama-address-joint-session-congress. Accessed 06/05/2020.

[363] Barack Obama, "Executive Order 13492 of January 22," 22 January, 2009, 4898. https://www.govinfo.gov/content/pkg/FR-2009-01-27/pdf/E9-1893.pdf. Accessed 08/05/2020.

[364] Mark L. Shneider, "Human Rights and U.S. Foreign Policy: The Use of Torture," in Human Rights in a Shifting Landscape: Recommendations for Congress (Washington: Centre for Strategic and International Studies (CSIS), 2019), eds. Lehr, L. Amy et al, 36.

[365] Obama, "EO 13492," 4898.

[366] Edelson, *Emergency Presidential Power*, 235.

[367] "The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces." In re Guantanamo Bay Detainee

A notable contrast to the Bush administration's authority to detain people in the WoT, is the dropping of the term enemy combatant for those properly detained. For the Bush administration, the designation as such determined whether or not the Geneva Conventions applied to a detainee, and therefore whether they could be tortured or detained indefinitely. But the Obama administration's scope mirrored the previous administration's. This 'new' interpretation of the president's authority established, like its predecessor, that members of Al Qaeda, the Taliban, or "associated forces," and including those who had "supported hostilities," could be detained. The Obama administration asserted this authority from the Authorization for Use of Military Force (AUMF) 2001, that the Bush administration declared in response to the 9/11 attacks.

An important difference between this and Bush's was that it did "not rely on the President's authority as Commander-in-Chief."[368] But the devil is in the details, the authority echoed the broad scope the Bush government had asserted previously in detentions. While the term enemy combatant would no longer be used, the conditions within which one could be detained remained exactly the same.[369] The government still asserted the right to detain people indefinitely, without charge, even individuals there were not seized on a or near a battlefield.[370] In the next year, in 2010, the Obama administration declared it would apply the term "unprivileged belligerent" to those it had detained.[371]

But its definition of such was immensely similar to the 'enemy combatant' designation. "Unprivileged belligerent" was defined as someone who has "engaged in hostiles against the United States," or someone who "purposely and materially supported hostilities," or finally "was a part of al Qaeda at the time of capture."[372] Hostilities were defined awkwardly, as both a conflict "subject to the laws of war" but also "includes a deliberate attack upon civilians."[373] By contrast, a "privileged belligerent" was someone who belonged "to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War."[374] The phrasing chosen echoes the *Ex Parte Quirin* (1941) case, discussed in chapter 3, where the supreme court found German saboteurs to be "enemy belligerents." But like his predecessor, Obama was unwilling to stick to the defined terms of the Geneva Conventions, lawful and unlawful combatants, and opted to create new legal categories of detention. Compared to his predecessor, the changes were largely cosmetic.

Litigation (Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held At Guantanamo Bay), 08-0442, March 2009, 2.

[368] Department of Justice, "Press Release: Department of Justice Withdraws "Enemy Combatant" Definition for Guantanamo Detainees," *Department of Justice, Office of Public Affairs*, March 2009. https://www.justice.gov/opa/pr/department-justice-withdraws-enemy-combatant-definition-guantanamo-detainees. Accessed 07/05/2020.

[369] Walter L. Perry & David Kassing, *Toppling the Taliban: Air-Ground Operations in Afghanistan, October 2001-June 2002* (Santa Monica: Rand Corporation, 2015), 78.

[370] Jonathan Hafetz, *Habeas Corpus after 9/11: Confronting America's New Global Detention System* (New York: New York University Press, 2011), 239.

[371] 111 Session of Congress, S.3081 – Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, 2010.

[372] Ibid, Section 6: Definitions, Section 9: Unprivileged Enemy Belligerent.

[373] Ibid, Section 6: Definitions, Section 7: Hostilities.

[374] Ibid, Section 6: Definitions, Section 8: Privileged Belligerent.

Having established its authority to detain unprivileged belligerents, Obama had also to assert the power to prosecute them, and in reaffirming his campaign pledge, to try some of Guantanamo's detainees in civilian courts. Fears over the detainees walking free prompted the bipartisan rejection of Obama's plan. Problems for the Obama administration increased with its declaration in November 2009 that Khalid Shaikh Mohammed (KSM), one of the 9/11 masterminds, would face a civilian trial in the U.S.[375] Not only would it be in the U.S. but, in a move to emphasise the trial's symbolic importance, in New York City, just block from the former World Trade Centre. The plan was attacked immediately from all directions. Mostly from the belief from some quarters that much of the evidence against him, gained through torture or other harsh methods, would be inadmissible, echoing arguments made earlier in the year.[376]

The administration acquiesced to the pressure and declared that they would not try the 9/11 plotters in federal courts, and were instead "considering other options."[377] The decision is surprising given that the administration had already achieved some success in trying terrorist cases in federal courts, as in the case of Ali Saleh Kahlah al-Marri.[378] Held as an enemy combatant by the Bush administration for years, and also subjected to torture, al-Marri successfully won his habeas corpus appeal in December 2008.[379] The incoming administration opted not to defend the Bush administration's position in his case, that he should be indefinitely detained. Instead they charged al-Marri with material support for terrorism, he pled guilty and he received eight years in prison. Al-Marri's case was unique, he was a legal resident of the United States, spending his detainment in a naval brig instead of Guantanamo, he was also physically in the U.S. when he was detained. But this only served to underline that the criminal justice system was capable of handling the more difficult cases.[380] The Obama administration did not use the al-Marri case to press for trying KSM and the 9/11 plotters in New York although it would have supported their argument. But in acquiescing, the Obama administration decided to fall back onto Bush's infamous military commissions, discussed in chapter 3, as a means of trying KSM and other detainees. Obama declared he would instead use criminal courts when individuals violate American criminal law and use military commissions when the laws of war are breached.[381]

The final report of the Guantanamo Review Task Force (GRTF) was released exactly a year after it was established in Obama's EO 13492. Of the 240 detainee cases the review studied,

[375] Charlie Savage, "Accused 9/11 Mastermind to Face Civilian Trial in N.Y," *The New York Times*, November 2009. https://www-nytimes-com.eur.idm.oclc.org/2009/11/14/us/14terror.html. Accessed 08/05/2020.
[376] Terry Frieden & Chris Kokenes, "Accused 9/11 plotter Khalid Sheikh Mohammed Faces New York Trial," *CNN*, November 2009. https://edition.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed/. Accessed 08/05/2020.
[377] Scott Shane & Benjamin Weiser, "U.S. Drops Plan for a 9/11 Trial in New York City," *The New York Times*, January 2010. https://www-nytimes-com.eur.idm.oclc.org/2010/01/30/nyregion/30trial.html. Accessed 08/05/2020.
[378] Honigsberg, *Our Nation Unhinged*, 57.
[379] American Civil Liberties Union, Al-Marri V. Gates| Al-Marri V. Spagone, *ACLU*, N.D. https://www.aclu.org/other/al-marri-v-gates-al-marri-v-spagone. Accessed 08/05/2020.
[380] Hafetz, *Habeas Corpus After 9/11*, 239.
[381] Anna Elazan, "Bringing Our Enemies to Justice: Terrorism and the Court," Legislation and Policy Brief 2, No. 2 (January 2010): 7.

126 detainees were approved for transfer to countries outside the United States, 44 were referred to trial by either federal courts or military commissions, and 30 detainees from Yemen were cleared for release "conditional" on the security situation there.[382] The final 48 could not be released or charged, and these cases are discussed later. But of the 44 detainees referred for some kind of trial, 24 were still under review pending a decision "regarding whether or in what forum these detainees will be prosecuted."[383] The 6 detainees to be tried in federal court were KSM and the other 9/11 plotters, on which the Obama administration subsequently performed a U-turn. 6 of the men were to be tried by military commission per the Attorney General's request. The final 8 detainees included al-Marri and a further detainee to be released, but the remaining 6 were "approved for continued detention under the AUMF without criminal charges."[384] With so many detainees due for trials by military commission, the administration had to ensure they were not seen repeating the process initiated under the Bush government.

Indefinite detention

The final review of Guantanamo Review Task Force, as previously mentioned, concluded that of its 240 case reviews, 48 were not to be released or convicted in any kind of trial, federal or military commission. These individuals satisfied three criteria that determined their continued detention.[385]

The threat posed by these detainees ranged from alleged "significant organizational roles" in Al Qaeda, the Taliban or associated groups, expressing "intent to reengage in extremist activity," to just have a mere "history of associations with extremist activity."[386] Their detention was lawful within "the bounds of the Government's detention authority under the AUMF."[387] Most incredulously of all, the reason they could not be prosecuted in either federal or military courts was either because "there is presently insufficient admissible evidence to establish a detainees guilt beyond a reasonable doubt" or "the detainees conduct does not constitute a chargeable office in either federal court or military commission."[388]

What the Final Report determined was that individuals whom the government believed they had a credible case against were nonetheless unable to submit the evidence, likely gained through torture. The government's evidence wouldn't meet the standard of either kind of court. In any case, even if they had inadmissible evidence, these individuals had committed no prosecutable offence and so the government could not bring a coherent case. This argument culminated in a category of inmate that was "too difficult to try but too

[382] Guantanamo Review Task Force (GRTF), "Final Report," January 2010, II.
[383] Ibid, 21.
[384] Ibid, 22.
[385] "First, the totality of available information—including credible information that might not be admissible in a criminal prosecution—indicated that the detainee poses a high level of threat that cannot be mitigated sufficiently except through continued detention; second, prosecution of the detainee in a federal criminal court or a military commission did not appear feasible; and third, notwithstanding the infeasibility of criminal prosecution, there is a lawful basis for the detainee's detention under the AUMF." GRTF, "Final Report," 23.
[386] Ibid, 24.
[387] Ibid.
[388] Ibid.

dangerous to release."[389] What this implied for these individuals was clear, indefinite detention. For this segment of those detained by the U.S., the prospect for transfer would never materialize either. The contradiction between asking third countries to take detainees, those that the U.S. had deemed too dangerous for their own criminal justice system, wasn't apparent to the administration. But Obama was in effect institutionalizing another of the Bush administration's flagrant breaches of the law in perpetuating this category of inmate. The names of these inmates only became public in 2013 by a FOIA request, by which time two had died in custody.[390]

New measures were imposed in March of 2011, under EO 13567. The administration was to conduct an "interagency review" of those held at Guantanamo Bay, in order to ensure detention "continues to be carefully evaluated and justified, consistent with the national security and foreign policy interests."[391] This would be for the 48 inmates who were essentially indefinitely detained, those that could pose the most "significant threat to the security of the United States."[392] But it also included those that had already been designated enemy combatants under the previous administration. The government would establish Periodic Review Boards (PRB) to hear an initial review, triennial reviews, and any interim reviews.[393] The main consideration was the potential security threat posed by these individuals should they be released. But the PRBs contained similar flaws to Bush's Combatant Status Review Tribunals (CSRT), established in the wake of the 2004 *Hamdi* decision. Particularly in terms of evidence, whereby the PRBs would "consider the reliability of any information provided to it in making a determination," which didn't explicitly rule out information or confessions gained through torture or hearsay.[394] Also like the CSRT, the PRBs would not appoint legal defenders for detainees, but a "personal representative," who had no legal obligation to client-attorney confidentiality.[395] Detainees could still hire their own defenders, but at their own expense.

During the Obama administration, a total of seventy-two initial reviews and eight full reviews were conducted, approving only 38 men for release.[396] But as of 2019, some forty individuals are still imprisoned in Guantanamo, confined within the "too difficult to try but too dangerous to release" paradigm.[397] The administration had repeatedly claimed it intended to end the

[389] Edelson, *Emergency Presidential Power*, 236.
[390] David Usborne, "Revealed: The 44 Guantanamo Bay Inmates too Dangerous to Release," *The Independent*, June 2013. https://www.independent.co.uk/news/world/americas/revealed-the-44-guantanamo-bay-inmates-too-dangerous-to-release-8664046.html. Accessed 09/05/2020.
[391] White House, "Executive Order 13567 of 7 March, 2011, Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force," March 2011. https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/executive-order-13567-periodic-review-individuals-detained-guant-namo-ba. Accessed 09/05/2020.
[392] Ibid, Section 2.
[393] Ibid, Section 3, 8(b).
[394] Ibid, Section 3, A(6).
[395] Ibid, Section 3, A(1).
[396] Benjamin R. Farley, "Who Broke Periodic Review at Guantanamo Bay?" *Lawfare*, October 2018. https://www.lawfareblog.com/who-broke-periodic-review-guantanamo-bay. Accessed 08/05/2020.
[397] Elise Swain, "It's Still Open: Will the Guantanamo Bay Prison Become a 2020 Issue?" *The Intercept*, March 2019. https://theintercept.com/2019/03/03/guantanamo-bay-carol-rosenberg-intercepted/. Accessed 09/05/2020.

legally dubious and politically dangerous prison facility. Obama had repudiated the detentions system of his predecessor, but ended up institutionalizing both the military commissions and a category of prisoner that could face detention for the rest of their lives without a charge.

Release to country of origin or third country

The final report of the GRTF approved 126 of the reviewed cases for release. Sixty-three of the cases had been "had been cleared for transfer by the prior administration, ordered released by a federal district court, or both."[398] Of which, forty-four had already been transferred by the time of the report's release, to either their "home countries" or "third countries for resettlement." Eighty-two remained at Guantanamo at the time of the report. What is surprising at all about the reports finding is that those who had been cleared for release long before the GRTF final report. A series of the supreme court decisions had invalidated detentions based on writs of habeas corpus in 2008, disputing the Bush administration's arguments for continued detention.[399] Lakhdar Boumediene, who was the lead petitioner in one such case, was not resettled in a third country for six months after his detention had been found unlawful, after seven years in Guantanamo.[400]

But the Obama administration had more direct failures in transferring detainees out Guantanamo. One such example is the case of seventeen Uighurs that had been captured in 2002 by the Northern Alliance in Afghanistan, and were then sent to Guantanamo. All of the captured Uighurs had never engaged in any terrorist acts against the U.S, and have been cleared of any wrong doing. The Bush administration had found difficulty relocating the Uighurs in third countries, over fears of enraging China.[401] An initial suggestion from Robert Gates in 2009 that some of the Uighurs would be released into the U.S., a furious backlash from Congressional Republicans and Democrats alike erupted.[402] Once again the Obama administration backed down over political pressure. It reverted to Bush's position that, although the Uighurs had been found to be held illegally by the courts, the courts did not have the power to order their release into the U.S. Some of the Uighurs were eventually settled in the remote islands of Bermuda and Palau. Without a third-country to send them and with both administrations refusing to shelter them, there were few alternatives.[403] The last of the Uighurs wouldn't be released until 2014, five years into Obama's presidency.[404]

[398] GRTF, "Final Report," 10.
[399] Hafetz, *Habeas Corpus After 9/11*, 248.
[400] France 24, "Algerian Ex-Detainee Arrives in France," *France 24* May 2009. https://www.france24.com/en/20090515-algerian-ex-detainee-arrives-france-. Accessed 09/05/2020.
[401] Hafetz, *Habeas Corpus after 9/11*, 249.
[402] Charles Stimsom, "Obama Backpedals on the Uighurs," *The Heritage Foundation*, June 2009. https://www.heritage.org/defense/commentary/obama-backpedals-the-uighurs. Accessed 09/05/2020.
[403] J. Wells Dixon, "President Obama's Failure to Transfer Detainees From Guantanamo," in *Obama's Guantanamo: Stories from an Enduring Prison*, ed. Hafetz, 2016, 46.
[404] Shannon Tiezzi, "US Releases Last Uyghur Chinese Prisoners From Guantanamo Bay," *The Diplomat*, January 2014. https://thediplomat.com/2014/01/u-s-releases-last-uyghur-chinese-prisoners-from-guantanamo-bay/. Accessed 09/05/2020.

The administration managed to transfer some of the detainees, but again bowed to political pressure against its Guantanamo policies. The long detained Uighurs are a case in point of Obama's general failures to get as many transferred as possible. But ultimately, some detainees were consigned to status under which they could be indefinitely detained. Around forty such individuals are still being held at the facility, apparently unable to escape the immense gravity of that "legal black hole."

Reality: protecting torturers

Candidate Obama had frequently promised throughout his campaign to reign in the secretive and abusive practices of the previous administration, he promised to "create a transparent and connected democracy."[405] This commitment was made in light of the Bush administration, which "one of the most secretive, closed administrations in history."[406] The context in which these statements were made was conductive to this interpretation of the Bush administration. Many of Bush's military and counter-terrorism policies remained shrouded in secrecy. Chapter 3 discussed many of these elements in the context of torture and other counter-terror policies, such as extraordinary rendition and the existence of CIA 'black sites.' Commentators described the Bush administration as "The Secrecy President,"[407] that "clamped a lid on public access across the board."[408] But by the end of Obama's presidency, he too had placed great importance on secrecy and hiding information from the public. This took the form most obviously of all in his defence of torturers, a position he took repeatedly throughout his administration.

Efforts to hold the architects and participants in the torture program to account seemed to be making advances in Obama's first year with the declassification of several documents. Although it should be noted that the administration was forced to release the documents under a FOIA request by the American Civil Liberties Union.[409] One of these declassified, but still heavily redacted, documents was a 2004 report by the CIA's Office of Inspector General. Covering the period between 2001-2003, the report described the widespread use of "Unauthorized, improvised, inhuman and undocumented detention and interrogation techniques."[410] The report describes staging mock executions, threats to kill a

[405] Barack Obama, "Connecting and Empowering All Americans Through Technology and Innovation," *Wired*, 2007. https://www.wired.com/images_blogs/threatlevel/2009/04/obamatechplan.pdf. Accessed 09/05/2020.
[406] Ibid.
[407] David C. Vladeck, *quoted in*, United states House of Representatives, Committee on Government Reform, Secrecy in the Bush Administration, United States House of Representatives Committee on Government Reform – Minority Staff Special Investigations Division, September 2004. 31
[408] Bill Moyers, "Bill Moyers on the Freedom of Information Act," *PBS: Politics and Economy*, April 2002. http://www.pbs.org/now/commentary/moyers4.html. Accessed 09/05/2020.
[409] ACLU, Torture Documents Released 8/24/2009, *American Civil Liberties Union*, 2009. https://www.aclu.org/torture-documents-released-8242009. Accessed 09/05/2020.
[410] Central Intelligence Agency Inspector General, Special Review: Counterterrorism detention and Interrogation Activities, September 2001 – October 2003, *Central Intelligence Agency*. 2004. http://graphics8.nytimes.com.eur.idm.oclc.org/packages/pdf/politics/20090825-DETAIN/2004CIAIG.pdf, 102.

detainees family, and a variety of physical tortures. The explosive report clearly detailed illegal and quite sadistic methods of torture carried out by the CIA in the early Bush years.

In a shocking reversal of his repeated campaign pledges and commitments, president-elect Obama declared that when it comes to Bush's extensive torture program, the U.S. needs to "look forward as opposed to looking backward."[411] This stance would set the tone for many efforts throughout the Obama administration to hold those involved in the torture program accountable. The administration even rebuked modest efforts to this end, such as Senator Leahy's proposals for a South African-style truth commission.[412] While there were further calls for such a proposal on torture from within the Democratic party,[413] Obama's own advisors argued truth commissions "have a tar-pit quality to them: you step foot in them and they have a way of becoming all consuming."[414] The administration was seemingly unwilling to approach, or afraid of, the far reaching consequences that real accountability would entail.

Even if senior officials like Bush or Cheney wouldn't face criminal action, the administration backed away from pursuing specific CIA interrogators for crimes. The White House Press Secretary confirmed as much in April of 2009, when asked why no interrogators were being held accountable, he responded "The president is focused on looking forward, That's why."[415] The looking forward applied to ongoing litigation as well. For example, a 2007 case brought by the ACLU against Jeppesen DataPlan, Inc., a subsidiary of Boeing, charged that the company had aided the U.S. government in the special rendition of the five plaintiffs.[416] The Bush government successfully argued, despite the fact it was not listed as a defendant, that the case be thrown out over state secret privilege.[417] The plaintiffs appealed the decision as Obama came into office, but his legal team stuck to the same defence as the previous administration. Even when the defendants weren't even employed by the U.S. government, the Obama administration continued to "look forward" by refusing to hold anyone involved to account.

This position eventually culminated in the decision by the Justice Department in 2012 not to prosecute CIA interrogators that had detainees die in their custody. The deaths of two inmates, one in 2002 at a secret CIA prison near Kabul, the other in 2003 while in CIA custody at Abu Ghraib, resulted in the only criminal investigations the Obama administration

[411] David Johnston & Charlie Savage, "Obama Reluctant to Look Into Bush Programs," *The New York Times*, January 2009. https://www-nytimes-com.eur.idm.oclc.org/2009/01/12/us/politics/12inquire.html. Accessed 09/05/2020.
[412] Philip Rucker, "Leahy Proposes Panel to Investigate Bush Era," *The Washington Post*, February 2009. https://www.washingtonpost.com/wp-dyn/content/article/2009/02/09/AR2009020903221.html. Accessed 09/05/2020.
[413] Ibid.
[414] Josh Gerstein, "Obama's Long Arc on Torture," *Politico*, August 2014. https://www.politico.com/story/2014/12/obama-cia-torture-report-113404. Accessed 09/05/2020.
[415] Robert Gibbs, "Gibbs Confirms: No Torture Prosecutions By Obama Administration," *TalkLeft.com*, April 2009. http://www.talkleft.com/story/2009/4/20/19221/2215/obamaadmin/Gibbs-Confirms-No-Torture-Prosecutions-By-Obama-Administration. Accessed 09/05/2020.
[416] ACLU, "Mohamed et al. V Jeppesen Dataplan, Inc." *American Civil Liberties Union*, 2011. https://www.aclu.org/cases/mohamed-et-al-v-jeppesen-dataplan-inc. Accessed 09/05/2020.
[417] Edelson, *Emergency Presidential Power*, 251.

conducted into the torture program.[418] After a three year investigation, Attorney General Eric Holder declared "the Department (of Justice) had decided not to initiate criminal charges in these matters."[419] After such a long investigation and a "tremendous volume of information," the governments supposed justice department "had declined prosecution." Even in the cases of torture that resulted in deaths in U.S. custody, the Obama administration refused to take the necessary steps in fostering genuine accountability. The Obama administration tacked to this "looking forward" narrative to escape from the difficult task of coming to terms with the entire torture program, and indeed difficult it was.

Nowhere is this seen more than in the 2014 Senate Select Committee on Intelligence's (SSCI) Report, and here too Obama stymied efforts towards establishing justice or accountability. The report was to study the CIA's interrogation and detention policies. A possible report was discussed in 2007 by the SSCI, predominantly in response to reports that the CIA had destroyed hundreds of video tapes of CIA interrogations that they had not been privy to access.[420] Written documents of the tapes' contents were available however, and by 2009 a summary of the content of these reports was prepared for the SSCI. The SSCI then reviewed these documents and "as a result, I think its fair to say the entire committee was considered, and it approved the scope of an investigation by a vote of 14-1, and the work began"[421] In all some 6.3 million documents were provided by the CIA for the committee, and between 2009 and 2012 these documents were reproduced into a 6,700 page report, commonly referred to as the Torture Report.

The report was damming in its critique of the entire CIA program, its justifications and results. The report made twenty overall conclusions about the program, based on its review. The most damning of which stated.[422]

The report was perhaps the most critical review of its kind in finding faults with the CIA's program. More than that, however, it was perhaps the best attempt at producing any justice for the violent and illegal system put in place after 9/11. Chairman of the SSCI, Diane Feinstein, described the release of the report as a "commitment to a just society governed by

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[418] Glenn Greenwald, "Obama's Justice Department Grants Final Immunity to Bush's CIA Torturers," *The Guardian*, August 2012. https://www.theguardian.com/commentisfree/2012/aug/31/obama-justice-department-immunity-bush-cia-torturer. Accessed 09/05/2020.

[419] Eric Holder, "Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees," *Department of Justice*, August 2012. https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees. Accessed 09/05/2020.

[420] U.S. Senate Select Committee on Intelligence, "Committee Study of the Central Intelligence Agency's Detention and Interrogation Program," 2014, 8.

[421] Dianne Feinstein, "Sen. Feinstein's Full Remarks on CIA Torture Report," *USA Today*, December 2014. https://eu.usatoday.com/story/news/politics/2014/12/09/dianne-feinstein-cia-torture-report-full-remarks/20151977/ Accessed 10/05/2020.

[422] "*The CIA's use of its enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees.*

The CIA's justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness.

The interrogations of CIA detainees were brutal and far worse than the CIA represented to policymakers and others."

The CIA has actively avoided or impeded congressional oversight of the program

SSCI, "Study of CIA Detention and Interrogation," xi-xiv.

law and the willingness to face an ugly truth."[423] These comments were wise in light of the Obama administration's persistent unwillingness to look at this "ugly truth" and hold some kind of truth commission. A major success of the report was its ability to inform the public. For so long the torture program had been shrouded in secrecy, first during the Bush administration, and then by Obama's notion that we continually "look forward."

But in spite of its virtues, the Obama administration stymied efforts to release or improve the report. Firstly, by ensuring that only the executive summary of the report would be released. The entire report is some 6,700 pages long, with the public only being able to view the 550-page executive summary, and even then, many important details, like names and places, of the executive summary are redacted.[424] The administration had gone to great lengths to protect CIA operatives that had spied on SSCI members computers and email servers.[425] The only action prompted from this was a 'sorry' from CIA director John Brennan. Some of Obama's last moves in the White House were to place his personal copy of the full, 6,700 page, report into his presidential library, under the Presidential Records Act.[426] While this dead mean it would avoid destruction, it simultaneously meant that "the report would remain out of public view for at least 12 years and probably longer."[427] Although, how much this holds true is unknown, the CIA claimed in 2017 to have mistakenly shredded its copy of the document.[428]

In 2019, Amazon Studios released Scott Burns' film *The Report*, a film revolving around the SSCI's report. The film follows Daniel Jones, lead investigator of the SSCI report, in his task in reviewing the millions of documents that would be complied into the SSCI's executive summary of the torture report. The film should be praised for its accuracy in describing many of the torture programs features, justifications, and main antagonists. But one scene in particular seemed prescient, an exchange between Jones and an (fictional) official from the CIA.[429]

The exchange highlights the competing narratives at work in the entire torture story that started in 2001. These were the competing interests that Obama described in statements about not trading our values for security. But the fictional CIA official's argument is, in real

[423] Carl Hulse, "For Dianne Feinstein, Torture Report's Release Is a Signal Moment," *The New York Times*, December 2014. https://www-nytimes-com.eur.idm.oclc.org/2014/12/10/us/politics/for-dianne-feinstein-cia-torture-reports-release-is-a-signal-moment.html. Accessed 10/05/2020.
[424] Gerstein, "Obama's Long Arc," 2014.
[425] Spencer Ackerman, "CIA Admits To Spying On Senate Staffers," *The Guardian*, July 2014. https://www.theguardian.com/world/2014/jul/31/cia-admits-spying-senate-staffers.
[426] Spencer Ackerman, "Senate Torture Report to be Kept from Public for 12 Years After Obama Decision," *The Guardian*, December 2016. https://www.theguardian.com/us-news/2016/dec/12/obama-senate-cia-torture-report-september-11-classified. Accessed 11/05/2020.
[427] Ibid.
[428] Patricia Zengerle, "CIA Says Mistakenly 'Shredded' Senate Torture Report Then Did Not," *Reuters*, October 2017. https://www.reuters.com/article/us-usa-cia-torture/cia-says-mistakenly-shredded-senate-torture-report-then-did-not-idUSKBN1CM2ZT. Accessed 10/05/2020.
[429] "Gretchen: You may not realize, but we were trying to protect this country from people who wanna destroy everything we believe in.
Daniel Jones: You may not realize it, but we are trying to do the exact same thing." *The Report*, 2019, Scott Z. Burns. Quoted speech starts at 47:57.

life, taken up by the Obama administration in justifying its repeated refusals to prosecute, or even hold accountable, those that built and participated in the torture program.

Reality: from torture to drones

As was mentioned earlier this chapter, Obama fully believed in the necessity of fighting the war on terror, or as he described it "combating violent extremism."[430] The president reaffirmed this position when responding to a failed terrorist plot to blow up an airliner on Christmas day 2009. In a speech reminiscent of Bush's early rhetoric in the WoT, Obama declared "We are at war. We are at war against al Qaeda, a far-reaching network of violence and hatred that attacked us on 9/11, that killed nearly 3,000 innocent people, and that is plotting to strike us again."[431] But the fight had to be fought on his terms, as shown through the early EO Obama signed days after taking office. Torture and increasing detainments were out, Guantanamo was intended to be closed, and the administration suffered heavy costs for defending torturers, once entering the White House.

But a variety of other tools and strategies were inherited from the previous administration with which to pursue this conflict. Mostly notably of all, drones, or in military parlance, Unmanned Aerial Vehicles. The first use of targeted drones in the WoT took place in Afghanistan in February of 2002, under the Bush administration. The mission was targeting three men, including what intelligence had described as a "tall man," and that others he was travelling with were "acting with reverence" towards him.[432] Someone at the CIA believed the man was Osama bin Laden. All three men were killed by hellfire missile, but the military was quick to report after the strike that it had in fact not been bin Laden, which was partially confirmed by journalists on the ground that learned that the men were scrap collectors.[433] The justification given for the attack was ambiguous, a spokeswoman for the pentagon declared "we're convinced that it was an appropriate target" but also that "we do not know exactly who it was."[434]

As this thesis has shown, the Bush administration's preferred policy was to capture individuals and extract information. This information would, in theory, prevent attacks and disrupt terrorist networks, saving American lives. Long before Obama's inauguration, the policy was already deeply unpopular. Obama made many comments during the campaign about the level of moral damage done to the U.S. by torture and Guantanamo. His administration had continued what had started under the Bush administration in terms transferring detainees from Guantanamo bay, around five-hundred by the end of Bush's

[430] Lofflmann, *American Grand Strategy*, 182.
[431] Barack Obama, "Presidential Remarks on Bombing Attempt Report," *C-span*, January 2010. https://www.c-span.org/video/?291121-1/presidential-remarks-bombing-attempt-report#. Accessed 10/05/2020.
[432] John Sifton, "A Brief History of Drones," *The Nation*, February 2012. https://www.thenation.com/article/archive/brief-history-drones/. Accessed 11/05/2020.
[433] Ibid.
[434] John F. Burns, "A Nation Challenged: The Manhunt; U.S. Leapt Before Looking, angry Villagers Say," *The New York Times*, February 2002. https://www-nytimes-com.eur.idm.oclc.org/2002/02/17/world/a-nation-challenged-the-manhunt-us-leapt-before-looking-angry-villagers-say.html. Accessed 11/05/2020.

presidency.[435] A core group of "too difficult to try but too dangerous to release" detainees would remain at the detention facility for some time, and Obama had no intention of adding to that tally.

So too had Obama, and much of the nation, derided the loss of American lives in pursuing Bush's counter-terrorism policies. Obama wanted a "cleaner" war, one with less American physical presence, fewer troops involved, and fewer costs.[436] The implication was clear, and CIA acting general counsel, John Rizzo, confirmed as much during the transition "Once the interrogation was gone, all that was left was the killing."[437] Bush's kill or capture directive was now unofficially just kill, Obama rarely authorized a capture. And oh did he kill. In the first two years of Obama's presidency there was an explosive increase in the number of targeted drone killings. As of May 2009, twenty of these targeted killing operations were being carried out per month, yet by the summer of 2010 there were around six-hundred a month, a thirty-fold increase.[438] Obama truly accelerated the program, on the logical basis that produced the same outcome as Bush's detain and interrogate model had. While for Bush national security was enhanced through the intelligence gained from torture, reliance on drones followed the argument that killing the terrorist threat enhanced security outright.[439]

Leon Panetta, Obama's director of the CIA, declared that drones were "the only game in town" against Al Qaeda and affiliated terrorist networks.[440] But the Obama administration stuck closely to Bush's legal justifications for the drone program, relying on the 2001 AUMF for its legal authority to carry out drone strikes. Principally, the 2001 AUMF is broad in scope, allowing "all necessary and appropriate force," but also defined the WoT in elastic terms, something that victory or defeat were hard to determine.[441] But the Obama administration broadened the interpretation of what constituted an imminent threat. The administration determined that the U.S. "does not require…clear evidence" of an imminent attack, but instead need only rely on an "informed, high-level" government official.[442] The official would determine if individuals had "recent" involvement with "activities," and act appropriately,

[435] HRW, Facts About the Transfer of Guantanamo Detainees, *Human Rights Watch,* October 2018.
[436] Kevin J. Lasher & Christine Sixtra Rinehart, "The Shadowboxer: The Obama Administration and Foreign Policy Grand Strategy," *Politics & Policy* 44, No. 5 (October 2016): 852.
[437] Kathryn Olmsted, "Terror Tuesdays: How Obama Refined Bush's Counterterrorism Policies", in *The Presidency of Barack Obama: A First Historical Assessment* (Princeton: Princeton University Press, 2018), ed. Julian E. Zelizer, 215.
[438] Gareth Porter, "How McChrystal and Patraeus Built an Indiscriminate "Killing Machine," *Truthout*, September 2011. https://truthout.org/articles/how-mcchrystal-and-petraeus-built-an-indiscriminate-killing-machine/. Accessed 11/05/2020.
[439] Lisa Hajjar, Drone Warfare and the Superpower's Dilemma, *Jadaliyya*, September 2015. https://www.jadaliyya.com/Details/32500/Drone-Warfare-and-the-Superpower%E2%80%99s-Dilemma-Part-1. Accessed 03/04/2020.
[440] Noah Shachtman, "CIA Chief: Drones 'Only Game in Town' for Stopping Al Qaeda," *Wired,* April 2009. https://www.wired.com/2009/05/cia-chief-drones-only-game-in-town-for-stopping-al-qaeda/. Accessed 12/05/2020.
[441] Hajjar, "Drone Warfare," 2015.
[442] Michael Isikoff, "Justice Department Memo Reveals Legal Case for Drone Strikes on Americans," *NBC News*, February 2013. http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans. Accessed 11/05/2020.

neither term was defined.[443] The most obvious justification for the use of drone killings was the net security gain from outright killing of people, the administration argued, were in some way involved with Al Qaeda and its affiliates.

In expanding the number of strikes and where they can happen, the Obama administration caused severe civilian casualties as a result of its policy choices. Between January 2009 and January 2017, the Obama administration conducted five-hundred and fifty strikes around the world, in comparison to Bush's forty-nine.[444] The casualty numbers are even grimmer, the administration acknowledged killing between 2800 and 3100 'combatants' throughout Obama's presidency but only between 60 and 120 civilians.[445] The total figure is likely to be far higher, and include some of those claimed 'combatants.' Interestingly, the administration still referred to those killed in the 'periphery' as combatants despite for declaration of war. The 2001 AUMF provides a global legal blanket approval for the president's authority to use drone strikes. The moral damage that Obama claimed had been brought against the United States was perilous and lasting, yet its abuses and excesses pale in comparison to the drone program. This is even more peculiar given his unusual level of personal involvement in deciding who lives and who dies, personally authorizing all strikes outside of Afghanistan and Pakistan.[446] Obama had proclaimed to want to end torture, and in the end chose a strategy that caused far greater human toll, surely the basis of his opposition to torture in the first place?

[443] Ibid.

[444] Rachel Stohl, *An Action Plan on U.S. Drone Policy: Recommendations for the Trump Administration* (Washington: Stimson Centre, 2018), 7.

[445] Murtaza Hussain, "U.S. Had Only Acknowledged a Fifth of its Lethal Strikes, New Study Finds," *The Intercept*, June 2017. https://theintercept.com/2017/06/13/drone-strikes-columbia-law-human-rights-yemen/. Accessed 12/05/2020.

[446] Cora Currier, "The Kill Chain: The Lethal Bureaucracy Behind Obama's Drone War," The Drone Papers, *The Intercept*, 2015. https://theintercept.com/drone-papers/the-kill-chain/. Accessed 11/05/2020.

-Chapter Five-

Conclusion

The aim of this thesis, as stated in the introduction, is to explore the role of torture in the foreign policy of the Bush and Obama administrations. Particular emphasis has been placed on the role of the Obama administration in the torture story that unfolded in the twenty-first century. The popular narrative that his 2008 campaign generated in the presidential election, of hope and change, has given rise to an inaccurate perception of his administration's implication in torture. A perception that his administration effectively ended torture and prevented it from happening again. This thesis has shown that this narrative forgets key parts of the torture story.5

Chapter one sought to explore how torture is defined and prohibited. Many prohibitions against torture exist in the domestic legal system in the U.S. such as the Constitution's fourth, fifth, eighth and fourteenth amendments. Other legal instruments, developed in the twentieth century, expanded the rights of citizens to take the federal government to court such, as the FTCA and the ATCA. These legal provisions lay the foundations upon which torture was challenged in the courts during the WoT. More direct legislation, such as the TVPA and DTA prohibited torture and regulated detainee treatment. Internationally, torture is prohibited by the Geneva Conventions and the CAT. Both of these provisions were challenged by the Bush administration in justifying its detainee polices. Defining torture is much harder to do than prohibiting it, however. Chapter one explored how torture has been defined by international and domestic legal instruments, the CAT and its American domestic interpretation, the Torture Statute. Conceptually, both of their definitions are problematic in a variety of aspects such as their use of the term 'severe' and the public-agent requirement. Chapter one also explored the definitions offered by academics, and argued their definitions avoid the pitfalls of the legal definitions.

Chapter two explored the history of torture in American society, placing the torture of the WoT in a broader historical context. This history of torture is long, and stretches back to before the founding of the nation. Torture was used as a tool to ensure adherence to the slave society rules, rules that protected slavery as a social and economic system. Torture also functioned as a tool of social control after slavery, used to instil fear in a newly free population. In the twentieth century, torture becomes utilized in the justice system to ensure convictions for crimes but also to supress political movements. The third degree was used against differentiated populations and was not restricted by race, but was wide practised in local police systems, such as in Chicago. Why torture has re-emerged in the U.S. so frequently is subject to debate. Considerations over democratic legitimacy and the perception that some in society consist as an 'outside' population and deserve this kind of treatment. Torture has typically been used in crisis situations and when there is a threat, perceived or real, such as threats to the social order or national security.

Chapter three analysed the legal and political justifications for torture given by the Bush administration. The Bush administration was, from the beginning, concerned with the illegality of torture, as stipulated by the Geneva Conventions, the Torture Statute and the

Convention Against Torture. To circumvent these prohibitions against torture, the administration deployed a series of strategies and arguments that would achieve this end. The administration decided to try terrorist suspects in newly created military tribunals (commissions), as opposed to civilian courts or regular courts-martial. The tribunals lacked the most basic judicial standards, particularly in regards to evidence obtained through torture and harsh interrogation. Guantanamo was chosen as the location for detainees because it existed outside the reach of U.S. federal courts, and potential writs of habeas corpus. A series of legal memoranda justified these actions and provided further legal arguments that permitted torture. The Geneva Conventions would not apply to detainees capture in the WoT, the Taliban and Al Qaeda were argued to lack the prerequisite qualities that were required to receive their protections. The Taliban were not a real government and Al Qaeda were no government at all. Furthermore, Afghanistan itself was a failed state that couldn't or wouldn't fulfil its international legal requirements to uphold treaties and laws.

The administration's lawyers argued that the President, as Commander-in-Chief, had a wide range of powers in war time, as stipulated in the Constitution. The powers legally justified a wide range of tools in fighting the WoT, such as extraordinary rendition, but generally underlined all of the administration's arguments. These lawyers also attempted to narrow the definition of torture in the Torture Statute and the CAT. They argued that they only covered the most 'severe' acts and that they had to be specifically intended. Moreover, for an act to amount to torture, it must result in physical pain comparable to death and psychological pain that lasts months and years. Organizations, like the CIA, were able to torture because detainees were deemed 'enemy combatants.' The term was a novel creation of the Bush administration that had no precedent in international law, it placed detainees in a legal limbo between lawful and unlawful combatants, denied the protections of either.

The Bush administration asserted a radical new role for the United States in the world in response to the 9/11 attacks, the leader in a new war against a different kind of enemy. The WoT raised the threat of terrorism to the highest priority for national security. The aggressive "you're either with us or against us" rhetoric signified a new path for the United States, and them alone. The U.S. would unilaterality secure itself in the world, relying less on the international institutions and rules that it helped create, and more on its military superiority. The Bush administration belived that organizations like the UN and a variety of international treaties restricted how the U.S. could protect itself, and this was revealed in the memorandums justifying torture, and the fear of breaching its international obligations to the CAT and Geneva Conventions. Torture was a necessity that saved lives, because the information gained from these interrogations foiled terrorist plots, and kept America safe. This logic was deeply flawed, relying on hypothetical terrorist attacks to justify actual torture.

Chapter four outlined how the 2008 Obama campaign generated and utilized a narrative of hope and change to win the presidential election. The American public was widely receptive to this messaging in light of deeply unpopular policies, particularly the seemingly endless wars and interventions, but towards the end of Bush's presidency, a collapsing economy. Obama promised to be a new kind of president in what he represented and what policies he was going to pursue. He promised an end to the wars in Iraq and Afghanistan, but

particularly the war on terror and its associated practises. In terms of torture, it had damaged U.S. standing and moral power in the world. Obama argued that the U.S. lost legitimacy when it refused to work within the rules, and legitimacy was a crucial "force multiplier." Obama would also abandon the Bush doctrine and forge a new strategy of engagement and multilateralism, reorienting the U.S. role in the world.

But the reality of who he was, what he believed, and the policies he would pursue became apparent after his election, and throughout his presidency. Obama fundamentally believed in the necessity of fighting against terrorism, even if he would not utilize the WoT language of his predecessor, preferring to fight a conflict against violent extremism. Obama ordered the closing of Guantanamo Bay prison and prohibited torture by the CIA and the military within his first days in office. Closing Guantanamo meant dealing with the legacy of Bush's detainee polices, particularly the problem of getting people out of the prison. The detainees had to be tried, released, or transferred and the Obama administration was either woefully inept, or in some cases failed drastically, to fulfil this promise. This failure led to the creation and institutionalization of a category of detainee that was too difficult to try but too dangerous to release. Too difficult to try in federal or military courts because the evidence was tainted by torture and inhuman treatment. No other country would take these individuals and they would not be permitted to enter the mainland United States, and around 40 detainees remain there do this day, having been charged with no crimes.

After promising to end torture and close Guantanamo, Obama also decided to protect those that had practised it. He asked Americans to look forwards and not backwards in whether or not people would face prosecutions for what they had done or what they had sanctioned. Not only would torturers not be held accountable, but even when detainees died in CIA custody, the administration chose not to prosecute. Failing to hold those accountable for torture is a familiar and recurrent aspect of torture in American history. Chapter two described how torture re-emerges once it has been forgotten, ready to be used as tool again in face of a perceived threat. The Obama administration may have left the door open to future presidents and administrations to consider torture as a tool of policy.

In pursuing other tools in the necessary fight against violent extremists, the Obama administration chose to use drones instead of Bush's detain and interrogate model. Obama chose to kill suspected terrorists instead of capturing them, which had become a politically costly model for fighting the WoT. Killing terrorists would eliminate the terrorist threat directly, ending plots and disrupting terrorist networks. Obama argued that, like Bush, he had the presidential power to pursue terrorist groups globally and that he also had to authority to do so with drones. Obama did not start using drones in Afghanistan and the wider Middle East, but he did accelerate their use. The civilians killed as a result of this policy far outweigh the casualties and suffering produced by the torture program, where they are deemed collateral damage in what is a necessary and winnable fight.

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