

# ON “WATERBOARDING”: LEGAL INTERPRETATION AND THE CONTINUING STRUGGLE FOR HUMAN RIGHTS

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**Abstract:** While some aspects of the “waterboarding” debate are largely political, the practice also implicates deeply normative underpinnings of human rights and law. Attorney General Michael Mukasey has steadfastly declined to declare waterboarding illegal or to launch an investigation into past waterboarding. His equivocations have generated anguished controversy because they raise a fundamental question: should we balance “heinousness and cruelty” against information that we “might get”? Mr. Mukasey’s approach appears to be careful lawyering. However, it portends a radical and dangerous departure from a fundamental premise of human rights law: the inherent dignity of each person. Although there is some lack of clarity about the precise definition of torture, all is not vagueness, or reliance on “circumstances,” and *post hoc* judgments. We have clear enough standards to conclude that waterboarding is and was illegal. Official legal equivocation about waterboarding preserves the potential imprimatur of legality for torture. It substitutes a dangerously fluid utilitarian balancing test for the hard-won respect for human dignity at the base of our centuries-old revulsion about torture. That is precisely what the rule of law (and the best lawyers) ought not to do.

*This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit . . .*<sup>1</sup>

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<sup>1</sup> HCJ 5100/94, Pub. Comm. Against Torture v. State of Israel [1999], 7 B.H.R.C. 31, available at [elyon1.court.gov.il/files\\_eng/94/000/051/a09/94051000.a09.pdf](http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf).

## INTRODUCTION: WHAT IS “WATERBOARDING”?

The selection of Attorney General Michael Mukasey as this year’s commencement speaker has prompted serious, thoughtful, respectful, and wide-spread discussions at Boston College Law School and beyond. As the Director of Boston College Law School’s Human Rights Program, I was pleased to be asked to write a short analysis of what I believe to be at stake in this debate. Although it is clearly not intended to be a complete treatment of all the complex legal issues, I hope this brief review will be of some use and may help focus future conversations.

The questions are basic: Is “waterboarding” torture? Is it “cruel” and “inhuman treatment”?<sup>2</sup> Does it “shock the conscience”?<sup>3</sup> If the answer to any of these is yes then what ought we to do about it? While some of the debate surely derives from political disagreements, the waterboarding questions also involve core ideas and methodologies of human rights and law.

Let us be clear about what we are discussing. Although the word, “waterboarding,” is of recent vintage, the practice is one of the oldest and most widely recognized forms of torture.<sup>4</sup> This is its essence: a person is forcibly seized and restrained. He or she is then immobilized, face up, with the head tilted downward. Water is then poured into the breathing passages.<sup>5</sup> The exact methods recently used by the Central Intelligence Agency (CIA) are still unknown, but likely have involved placing a cloth or plastic wrap over or in a person’s mouth, then pouring the water.<sup>6</sup> As you first think of it, the practice might seem rather mild compared to other forms of torture. But the effects are dramatic and severe. The inhalation of water causes a gag reflex, from which the victim experiences what amounts to drowning and feels that death is imminent.<sup>7</sup>

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<sup>2</sup> See Universal Declaration of Human Rights. G.A. Res. 217A, art. 5, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html>; International Covenant on Civil and Political Rights, art. 7, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>3</sup> See *Hearing on Oversight of the U.S. Dep’t of Justice Before the S. Comm. on the Judiciary*, FED. NEWS SERV. (LEXIS), Jan. 30, 2008 (statement of Michael B. Mukasey, Att’y Gen. of the United States) [hereinafter *Jan. 30, 2008 Hearing*].

<sup>4</sup> See William Safire, *On Language: Waterboarding*, N.Y. TIMES, Mar. 9, 2008, (Magazine), at 16 (“If the word torture, rooted in the Latin for ‘twist,’ means anything (and it means ‘the deliberate infliction of excruciating physical or mental pain to punish or coerce’), then waterboarding is a means of torture. The predecessor terms for its various forms are water torture, water cure and water treatment.”).

<sup>5</sup> See Evan Wallach, *Waterboarding Used to Be a Crime*, WASH. POST, Nov. 4, 2007, at B1.

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

Waterboarding is a viscerally effective, coercive interrogation technique designed to overcome the will of the individual. It causes severe physical suffering in the form of reflexive choking, gagging, and the feeling of suffocation. Indeed, if uninterrupted, waterboarding can cause death by suffocation. The victim immediately realizes this on the most basic level. By producing an experience of drowning, and eliciting a visceral panic response, it causes severe mental pain and suffering, distress, and the terror of imminent death. A medical expert on torture has testified that waterboarding "clearly can result in immediate and long-term health consequences. As the prisoner gags and chokes, the terror of imminent death is pervasive, with all of the physiologic and psychological responses expected . . . . Long term effects include panic attacks, depression and PTSD."<sup>8</sup>

Waterboarding has long been understood as torture, from its earliest incarnations during the Spanish Inquisition through its systematic use by the Khmer Rouge.<sup>9</sup> It has been called torture by modern authorities ranging from the tribunals that tried Japanese war criminals in the aftermath of the Second World War to Senator John McCain, who has stated that waterboarding a detainee is torture—"no different than holding a pistol to his head and firing a blank."<sup>10</sup> Similarly, former Secretary of Homeland Security Tom Ridge has said, "There's just no doubt in my mind—under any set of rules—waterboarding is torture."<sup>11</sup>

The vast majority of experts in the field concur in this view—and by this I do not only mean human rights scholars and activists, among

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<sup>8</sup> U.S. *Interrogation Policy and Executive Order 13440: Hearing Before the S. Select Comm. on Intelligence*, Sept. 25, 2007 (statement of Allen S. Keller, Director, Bellevue/NYU Program for Survivors of Torture), available at <http://intelligence.senate.gov/070925/akeller.pdf>.

<sup>9</sup> See GEORGE RYLEY SCOTT, *THE HISTORY OF TORTURE THROUGHOUT THE AGES 171–72* (2003) (describing the "torture of water" ("[s]ometimes referred to as *tormento de toca*") which was used "when the racking, in itself, proved ineffectual. The victim . . . was compelled to swallow water, which was dropped slowly on a piece of silk of fine linen placed in his mouth. . . . A variation of the water torture was to cover the face with a piece of thin linen, upon which the water was poured slowly, running into the mouth and nostrils and hindering or preventing breathing almost to the point of suffocation."); Dana Milbank, *Logic Tortured*, WASH. POST, Nov. 2, 2007, at A2.

<sup>10</sup> See *Waterboarding: Interrogation or Torture?*, CBS NEWS, Nov. 1, 2007, available at <http://www.cbsnews.com/stories/2007/11/01/national/main3441363.shtml>; Wallach, *supra* note 5.

<sup>11</sup> *Former Bush Official: Waterboarding is Torture*, MSNBC, Jan. 18, 2008, available at <http://www.msnbc.msn.com/id/22735168/>. "One of America's greatest strengths is the soft power of our value system and how we treat prisoners of war, and we don't torture. . . . And I believe, unlike others in the administration, that waterboarding was, is—and will always be—torture. That's a simple statement." *Id.*

whom I am sure there is unanimity.<sup>12</sup> Waterboarding is explicitly barred by the new Army Field Manual.<sup>13</sup> Indeed, in a November 2007 letter to the Senate, four retired U.S. Judge Advocates General stated: “Waterboarding is inhumane, it is torture, and it is illegal. . . . [I]t is not, and never has been, a complex issue, and even to suggest otherwise does a terrible disservice to this nation. . . . This must end.”<sup>14</sup>

However, CIA director, General Michael Hayden, has admitted that the CIA used waterboarding on three prisoners during 2002 and 2003.<sup>15</sup> As is now well-known, the CIA had been advised by the Justice Department Office of Legal Counsel (OLC) that the practice was not illegal.<sup>16</sup> We now know that certain OLC lawyers, responding to immense political pressure and engaging in shockingly poor legal technique, gave incorrect legal advice to interrogators.<sup>17</sup> Depending on how one interprets the Nuremberg precedents, this could amount to what Jack Goldsmith has called “get-out-of-jail-free cards” for the inter-

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<sup>12</sup> See, e.g., HUMAN RIGHTS FIRST & PHYSICIANS FOR HUMAN RIGHTS, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY 17–18 (2007) (examining ten interrogation techniques, including waterboarding, and noting that doctors have documented that survivors of water torture suffer from long lasting-trauma and, even more than a decade after the event, physical pain), available at <http://physiciansforhumanrights.org/library/documents/reports/2007-phr-hrf-summary.pdf>.

<sup>13</sup> U.S. Dep’t of the Army, Field Manual 2-22.3: Human Intelligence Collector Operations 5-21 (2006), available at <http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf>; U.S. Dep’t of Army, Field Manual 3-24: Counterinsurgency D-5 (2006), available at <http://www.fas.org/irp/doddir/army/fm3-24.pdf> [hereinafter FM 3-24]. The new counterinsurgency manual, much of which was written by Lt. Gen. David Petraeus and retired Col. Conrad Crane, was released in December 2006. See FM 3-24.

<sup>14</sup> Letter from Donald J. Guter et al., Retired Judge Advocate General, to Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary (Nov. 2, 2007), available at <http://leahy.senate.gov/press/200711/110207RetGeneralsOnMukasey.pdf>. In 2006, the Senate Judiciary Committee held hearings on the authority to prosecute terrorists. *Id.* The sitting Judge Advocates General of the military services were asked to respond to a series of questions regarding “the use of a wet towel and dripping water to induce the misperception of drowning (i.e., waterboarding).” *Id.* They *unanimously* and *unambiguously* agreed that such conduct is inhumane and illegal and would constitute a violation of international law, particularly Common Article 3 of the 1949 Geneva Conventions. *Id.*

<sup>15</sup> See *Hearing on Worldwide Threats Before the S. Select Comm. on Intelligence*, FED. NEWS SERV. (LEXIS), Feb. 7, 2008 (statement of Michael Hayden, Director, Central Intelligence Agency).

<sup>16</sup> See *infra* text accompanying notes 80–83. The job of the OLC is to interpret federal law within the executive branch. See U.S. Dep’t of Justice, Office of Legal Counsel, <http://www.usdoj.gov/olc/index.html> (last visited Apr. 24, 2008).

<sup>17</sup> See generally JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007). As Jack Goldsmith reports being told by David Addington, “The President has already decided that terrorists do not receive Geneva Convention protections. . . . You cannot question his decision.” *Id.* at 41.

rogators.<sup>18</sup> Perhaps that is fair. But the lawyers themselves may not escape unscathed.<sup>19</sup>

### I. IS WATERBOARDING LEGAL?

Mr. Mukasey has maintained a strikingly equivocal approach to waterboarding. He has admitted that he would view waterboarding as torture, were it done to him.<sup>20</sup> He properly has criticized the disgraceful "Bybee Memo" of August 2002—which, among other flagrant errors, re-defined the legal standard for torture as: "equivalent to the pain that would be associated with serious physical . . . injury so severe [as to cause] death, [or] organ failure. . . ."<sup>21</sup> He called it "worse than a sin."<sup>22</sup> Perhaps more to the point, he said it was "a mistake" and "unnecessary."<sup>23</sup>

But he still has declined steadfastly to declare waterboarding illegal. He sometimes has adopted a sophisticated judicial posture, befitting his past role as a well-respected judge: "one should refrain from addressing difficult legal questions in the absence of concrete facts and

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<sup>18</sup> *Id.* at 97; see Report of the International Law Commission to the General Assembly, 5 U.N. GAOR Supp. (No. 12), at 11–14, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int'l L. Comm'n 375, U.N. Doc. A/CN.4/34 (Principle IV provides that "the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."); *United States of America v. Alstötter et al. (The Justice Case)* 6 L.R.T.W.C. 1 (1948) (trial of sixteen defendants, from the Reich Ministry of Justice or People's and Special Courts, raising the issue of what responsibility judges have for the enforcement of alleged war crimes and crimes against humanity that were authorized by arguably binding laws); *In re Yamashita*, 327 U.S. 1 16–17 (1946) (recognizing the doctrine of command responsibility, under which commanding officers are liable if they exercised effective control over subordinates who engaged in torture in violation of the law of nations or knew or had reason to know of their subordinates' unlawful conduct but failed to take reasonable measures).

<sup>19</sup> See Press Release, Sen. Sheldon Whitehouse, Durbin and Whitehouse: Justice Department is Investigating Torture Authorization: Senate Judiciary Democrats Called for Inquiry into DOJ's Role in Overseeing CIA's Use of Waterboarding (Feb. 22, 2008). In February 2008, the Justice Department revealed that its internal ethics office was investigating the department's legal approval for waterboarding by the CIA. See *id.*

<sup>20</sup> *Jan. 30, 2008 Hearing*, *supra* note 3. "Would waterboarding be torture if it was done to you?" Senator Kennedy asked. "I would feel that it was." Mr. Mukasey answered. *Id.*

<sup>21</sup> Memorandum from the Office of Legal Counsel on Standards of Conduct for Interrogation under §§ 2340–2340A to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at [http://www.humanrightsfirst.org/us\\_law/etn/gonzales/memos\\_dir/memo\\_2002\\_0801\\_JD\\_%20Gonz\\_.pdf](http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_2002_0801_JD_%20Gonz_.pdf) [hereinafter Bybee Memo].

<sup>22</sup> *Nomination of Michael Mukasey to be the Attorney General of the United States: Hearing of the S. Comm. on the Judiciary*, FED. NEWS SERV. (LEXIS), Oct. 17, 2007 [hereinafter *Oct. 17 Nomination Hearing*].

<sup>23</sup> *Oct. 17 Nomination Hearing*, *supra* note 22.

circumstances.”<sup>24</sup> He finds the legality of waterboarding to be a “difficult” legal question “about which reasonable minds can and do differ.”<sup>25</sup> He says that “it is not an easy question” and that assessing the legality of the practice depends upon an evaluation of “circumstances.”<sup>26</sup>

As to the consequences of *past* waterboarding, Mr. Mukasey has said that because Justice Department lawyers concluded that the CIA’s use of waterboarding was legal, the department cannot investigate whether a crime had occurred.<sup>27</sup> “That,” he stated, “would mean that the same department that authorized the program would now consider prosecuting somebody who followed that advice.”<sup>28</sup> Before the Senate, Mr. Mukasey put it this way: “I start investigations out of some indication that somebody might have had an improper authorization. I have no such indication now.”<sup>29</sup> But one might well ask, if the 2002 memo was “worse than a sin” and “a mistake” how can it not have been an “improper authorization?”<sup>30</sup>

The answer, as we shall see, is that Mr. Mukasey apparently does not believe that waterboarding necessarily was or would be illegal. He likely believes that clarity is a simplistic virtue—indeed only one among many professional virtues required of an Attorney General—and that he has powerful ethical and institutional constraints in this matter, including OLC morale, and protection against civil lawsuits and criminal

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<sup>24</sup> Letter from Michael B. Mukasey, Att’y Gen. of the United States, to Patrick Leahy, Chairman, S. Comm. on the Judiciary (Jan. 29, 2008) at 2, *available at* <http://www.usdoj.gov/ag/speeches/2008/letter-leahy-013008.pdf>; *see also* *Nomination of Michael Mukasey to be the Attorney General of the United States: Hearing of the S. Comm. on the Judiciary*, FED. NEWS SERV. (LEXIS), Oct. 18, 2007 (“I don’t know what’s involved in the technique. If waterboarding is torture, torture is not constitutional.”)

<sup>25</sup> Letter from Michael B. Mukasey to Patrick Leahy, *supra* note 24, at 2.

<sup>26</sup> *Id.* At times, though, his tone has been more that of the executive branch and notably consequentialist: “any answer that I could give could have the effect of articulating publicly and to our adversaries the limits and the contours of generally worded laws that define the limits of a highly classified interrogation program.” *Id.*

<sup>27</sup> *See Justice Department Oversight: Hearing of the H. Comm. on the Judiciary*, FED. NEWS SERV. (LEXIS), Feb. 7, 2008 [hereinafter *Feb. 7 Oversight Hearing*]

<sup>28</sup> *Id.* He also opined, “For me to use the occasion of the disclosure that that technique was once part of the CIA program, an authorized part of the CIA program, would be for me to tell anybody who relied, justifiably, on a Justice Department opinion that not only may they no longer rely on that Justice Department opinion, but that they will now be subject to criminal investigation for having done so. That would put in question not only that opinion, but also any other opinion from the Justice Department. . . . And that’s not something that I think would be appropriate, and it’s not something I will do.” *Id.*

<sup>29</sup> *Jan. 30, 2008 Hearing, supra* note 3.

<sup>30</sup> *Id.*; *Oct. 17 Nomination Hearing, supra* note 22.

prosecutions.<sup>31</sup> There is surely truth to this, but I do not think it is the deepest truth.

To my mind, perhaps the most interesting testimony given by Mr. Mukasey was the following rather simple exchange:

SEN. BIDEN: When you boil it all down . . . it appears as though whether or not waterboarding is torture is a relative question, where it's not a relative question whether or not you hung someone by their thumbs from, you know, or you stuck someone, you know, hung them upside down by their feet. . . .

ATTY GEN. MUKASEY: With respect, I don't think that that's what I'm saying. I don't think I'm saying it is simply a relative issue. There is a statute under which it is a relative issue. . . . [E]ssentially a balancing test of the value of doing something as, against the cost of doing it.

SEN. BIDEN: When you say against the cost of doing it, do you mean the cost in—that might occur in human life if you fail to do it? Do you mean the cost—

ATTY GEN. MUKASEY: No.

SEN. BIDEN: —in terms of our sensibilities, in what we think is appropriate and inappropriate behavior as a civilized society? What do you mean?

ATTY GEN. MUKASEY: I chose—I chose the wrong word. I meant the heinousness of doing it, the cruelty of doing it balanced against the value.

SEN. BIDEN: Balanced against what value?

ATTY GEN. MUKASEY: The value of what information you might get.<sup>32</sup>

Why have Mr. Mukasey's equivocations generated such anguished controversy, even though the practice is, according to him, not "authorized for use" in the current CIA interrogation program?<sup>33</sup> The answer, I believe, is revealed by the above dialogue. Waterboarding implicates the very deepest values of our legal system. This includes a basic methodological question: do we balance "heinousness and cruelty" against

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<sup>31</sup> See Pedro Ruz Gutierrez, *Mukasey Shoring Up Morale at Main Justice*, LEGAL TIMES, Apr. 21, 2008, available at <http://www.law.com/jsp/article.jsp?id=1208774503039>.

<sup>32</sup> Jan. 30, 2008 Hearing, *supra* note 3.

<sup>33</sup> Letter from Michael B. Mukasey to Patrick Leahy, *supra* note 24, at 2 (explaining that the CIA Director, Attorney General, and President would all have to approve use of a currently unauthorized technique).

information that we “might get”?<sup>34</sup> Or should we demand forceful and clear statements of principle about certain practices? Do we rely on the hidden judgments of OLC lawyers, on *post hoc* assessments by reviewing courts after a future detainee is waterboarded, or can we put the issue to rest once and for all?

Certain legal words, such as genocide, slavery, and torture, carry unusually deep resonance and weight. They are the embodiments, the crystallizations and, one would hope, the points of repose of once contentious but now settled political, legal, and moral disputes. Thus, much is at stake when Mr. Mukasey states that he believes there are circumstances in which waterboarding would not be torture and could be legal: “There are some circumstances where current law would appear clearly to prohibit the use of waterboarding. Other circumstances would present a far closer question.”<sup>35</sup>

I respectfully, but fundamentally, disagree. On first blush, Mr. Mukasey’s approach might appear to be the prudent reasoning of a careful lawyer, steeped as we all are, in the broad realist tradition. However, to many observers, and especially to a human rights lawyer such as myself who has counseled and represented many torture victims, it appears to be something quite different.<sup>36</sup> It portends a radical and dangerous departure from the fundamental premises of human rights law: the inherent dignity of each person and the basic ideal of inalienable rights.<sup>37</sup>

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<sup>34</sup> Jan. 30, 2008 Hearing, *supra* note 3.

<sup>35</sup> Letter from Michael B. Mukasey to Patrick Leahy, *supra* note 24, at 2.

<sup>36</sup> Mr. Mukasey also said that he has concluded that other current methods used by the CIA to interrogate terror suspects “comply with the law.” *Id.* at 2. Elisa Massimino, Washington Director of Human Rights First, responded, “If Attorney General Michael Mukasey thinks there are circumstances under which waterboarding is legal, that’s all the more reason Congress should not defer to his judgment on the legality of any other interrogation technique used in the CIA’s enhanced interrogation program.” Press Release, Leading Rights Group Rejects AG’s Testimony On Waterboarding, Legality of CIA Program (Jan. 30, 2008), available at <http://www.humanrightsfirst.org/media/usls/2008/alert/411/>.

<sup>37</sup> See generally Oscar Schachter, Editorial Comment, *Human Dignity as a Normative Concept*, 77 AM. J. INT’L L. 848, 848 (1983). For an interesting discussion of the grounding of the human dignity principle, see generally Eric Blumenson, *Who Counts Morally?*, 14 J.L. & RELIGION 1–40 (1999–2000). The Preamble of the Charter of the United Nations states that “we the peoples of the United Nations” are “determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.” U.N. Charter pmbl. Article 1 of the Universal Declaration of Human Rights states: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” G.A. Res. 217A, *supra* note 3, art. 1.



It therefore implies a deep disagreement over what Felix Cohen once called "the social ideals by which the law is to be judged."<sup>38</sup>

## II. THE ICONIC ABHORRENCE OF TORTURE

To see why this is so, we must understand that torture is a special case, iconically abhorred by our law.<sup>39</sup> The nascent idea of the modern legal system, the rule of reason in law—and indeed the very idea of rights—were all linked to the abolition of torture.<sup>40</sup> Rejection of torture has been accurately described as "a distinguishing feature of the common law," admired by authorities ranging from William Blackstone to Voltaire.<sup>41</sup> Lord Hoffmann has recently noted that "the rejection of torture by the common law has a special iconic significance as the touchstone of a humane and civilised legal system."<sup>42</sup>

The objections to torture were always of two types. First, in the Anglo-American tradition, torture came to be seen as "totally repugnant to the fundamental principles of English law" and "repugnant to reason, justice, and humanity."<sup>43</sup> Many also abhor it on moral grounds. As Bishop Thomas G. Wenski has written, "the question of how we treat detainees" is a "profound moral question" that "has a major impact on

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<sup>38</sup> Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935) ("When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged."). Moreover, it raises ethical concerns as "lawyering." See Richard B. Bilder & Detlev F. Vagts, Editorial Comment, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689, 691–95 (2004) (considering the ethical requirements of the ABA Model Rules of Professional Conduct as "professional qualities that protect against legal advice or advocacy that might undermine the national interest in respect for law, or subvert or erode the international legal order").

<sup>39</sup> See generally Harold Hongju Koh, *A World Without Torture* 43 COLUM. J. TRANSNAT'L L. 641, 642 (2005) ("The right to be free from torture is an indelible part of the American experience.").

<sup>40</sup> See generally Karen J. Greenberg, *Introduction: The Rule of Law Finds Its Golem: Judicial Torture Then and Now to THE TORTURE DEBATE IN AMERICA* 1 (2006) (Karen J. Greenberg, ed.).

<sup>41</sup> A. v. Sec'y of State for the Home Dep't, [2005] UKHL 71 [11]; WILLIAM BLACKSTONE, 4 COMMENTARIES \*318, \*320–32; Voltaire (attributed), *Commentary on CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS* xxxix–xlili (London, 1770).

<sup>42</sup> [2005] UKHL 71, at [83].

<sup>43</sup> See *id.* at [12] (quoting DAVID JARDINE, *A READING ON THE USE OF TORTURE IN THE CRIMINAL LAW OF ENGLAND PREVIOUSLY TO THE COMMONWEALTH* 6, 12 (London, Baldwin & Cradock 1837); see also Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1719 (2005).

human dignity.”<sup>44</sup> [P]risoner mistreatment compromises human dignity. A respect for the dignity of every person, ally or enemy, must serve as the foundation of security, justice and peace.”<sup>45</sup>

Torture was also frequently viewed as forensically unreliable, though this argument was generally linked to the fundamental condemnation.<sup>46</sup> We should also, perhaps recall, in light of recent debates about the power of the U.S. president, that the abolition of torture in English history was part of the struggle to determine the limits of Royal prerogative as against the common law.<sup>47</sup> This connects to yet another concern about torture: its tendency to spread; what Henry Shue has called its “metastatic tendency.”<sup>48</sup> As William Holdsworth wrote, “Once torture has been acclimatized in a legal system it spreads like an infectious disease. It saves the labour of investigation. It hardens and brutalizes those who have become accustomed to use it.”<sup>49</sup>

In this broad tradition, I hold to a view about torture that is rather simple, straightforward and, I believe, apolitical and non-ideological. To paraphrase Justice Robert Jackson, if there is any fixed star in our constitutional and human rights constellation, it is that *torture is illegal*.<sup>50</sup> There are simply no exceptions to this rule under the corpus of human rights law. There can be no balancing, no utilitarian calculus, no “torture warrants,” and no “ticking bomb” hypotheticals.<sup>51</sup> We simply

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<sup>44</sup> Letter from Thomas Wienski, Chairman, Comm. on Int’l Pol’y, U.S. Conference of Catholic Bishops (Sept. 15, 2006), *available at* <http://www.usccb.org/sdwp/international/2006septemberlettertosenate.pdf>.

<sup>45</sup> *Id.*

<sup>46</sup> *See, e.g.,* BECCARIA, *supra* note 41, at 57–69. There is a potential distinction between the use of torture evidence in judicial-type proceedings versus its use for security-based or investigative purposes. David Hume once described the latter practice as “a barbarous engine.” 2 DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING CRIMES 324 (Edinburgh, Bell & Bradfurte 1844).

<sup>47</sup> 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 194–95 (2d ed. 1937). For a time, torture—though illegal under the common law—was “justified by virtue of the extraordinary power of the crown which could, in times of emergency, override the common law.” *Id.* at 194. Coke, who initially accepted the existence of this power, later saw it as “incompatible with the liberty of the subject” and concluded “that all torture is illegal.” *Id.*

<sup>48</sup> Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 143 (1978).

<sup>49</sup> HOLDSWORTH, *supra* note 47, at 194 (citation omitted).

<sup>50</sup> *See* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

<sup>51</sup> Space limitations preclude complete repetition of the persuasive de-bunking of this facile trope here. As Jeremy Waldron has pointed out, among other defects,

[t]he hypothetical asks us to assume that the power to authorize torture will not be abused, that intelligence officials will not lie about what is at stake or about the availability of the information, that the readiness to issue torture warrants in one case (where they may be justified by the sort of circumstances Dershowitz stipulates) will not lead to their extension to other cases (where

do not legally torture people under any circumstances.<sup>52</sup> As Jeremy Waldron writes, "We can all be persuaded to draw the line somewhere, and I say we should draw it where the law requires it, and where the human rights tradition has insisted it should be drawn."<sup>53</sup>

Fortunately, the rejection of torture, grounded in a respect for human dignity, has long been a foundational legal principle for the United States. Although U.S. statutory and constitutional law may use different phrasing than certain international legal instruments, I believe that the ultimate rule is and must be the same.<sup>54</sup>

To cite just a few brief examples, Common Article 3 of the Geneva Conventions, long accepted by the United States, clearly prohibits "cruel treatment and torture" as well as "outrages upon personal dignity."<sup>55</sup> Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, which the United States has ratified, each state simply and absolutely that: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."<sup>56</sup> And of course there is the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading

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the circumstances are somewhat less compelling), that a professional corps of torturers will not emerge who stand around looking for work, that the existence of a law allowing torture in some cases will not change the office politics of police and security agencies to undermine and disempower those who argue against torture in other cases, and so on.

Waldron, *supra* note 43, at 1716; *see also* David Luban, Essay, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1440 (2005) ("The idea is to force the liberal prohibitionist to admit that yes, even he or even she would agree to torture in at least this one situation. Once the prohibitionist admits that . . . all that is left is haggling about the price."); ASS'N FOR THE PREVENTION OF TORTURE, DEFUSING THE TICKING BOMB SCENARIO: WHY WE MUST SAY NO TO TORTURE, ALWAYS (2007).

<sup>52</sup> Waldron, *supra* note 43, at 1714–15.

<sup>53</sup> *Id.* at 1715.

<sup>54</sup> *See* Wallach, *supra* note 5.

<sup>55</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>56</sup> G.A. Res. 217A, *supra* note 3, art. 5; International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, S. EXEC. DOC. NO. E, 95–2 (1978), 999 U.N.T.S. 171. The ratification was accompanied by the following reservation: "The United States considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." S. EXEC. REP. NO. 102–23, at 22 (1992). The Vienna Convention on the Law of Treaties, generally accepted in the United States as authoritative, holds that a reservation is neither valid nor effective if it purports to defeat the "object and purpose" of the treaty. *See* Vienna Convention on the Law of Treaties, art. 19, *done on* May 23, 1969, 1155 U.N.T.S. 331.

Treatment or Punishment (CAT), which the United States has ratified.<sup>57</sup> The CAT not only prohibits torture but it also requires states to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction,” and to “ensure that all acts of torture are offences under its criminal law.”<sup>58</sup>

Let us pause on this point for a moment. Not only is torture definitively rejected under *any* circumstances, but states are affirmatively obliged to prohibit it, to punish it, and to prevent it.<sup>59</sup> As the former U.N. Special Rapporteur on Torture observed more than twenty years ago, “If ever a phenomenon was outlawed unreservedly and unequivocally it is torture.”<sup>60</sup> To carry out the United States’ obligations under the CAT, Congress enacted the Torture Convention Implementation Act (the Torture Act) which provides that:

[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.<sup>61</sup>

Thus, if the waterboarding, now admittedly conducted by CIA agents, was “torture” and was committed outside the United States there are very serious potential criminal consequences.<sup>62</sup>

The prohibition against torture is also widely recognized as *jus cogens* (that is, a “peremptory norm”) and a “non-derogable” principle, as fundamental a rule as law can sustain.<sup>63</sup> It is clearly an obligation of the

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<sup>57</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

<sup>58</sup> *Id.* arts. 2(1), 4(1).

<sup>59</sup> See *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgment, ¶ 155 (Dec. 10, 1998).

<sup>60</sup> Special Rapporteur on Torture, Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, ¶ 3, U.N. Doc. E/CN.4/1986/15 (Feb. 19, 1986) (prepared by Peter Kooijmans).

<sup>61</sup> Torture Convention Implementation Act of 1994, Pub. L. No. 103-236, § 506(a), 108 Stat. 463 (1994) (codified at 18 U.S.C. §§ 2340-2340A); see H.R. CONF. REP. NO. 103-482, at 229 (1994). The statute took effect on Nov. 20, 1994, the date that the United States became a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>62</sup> Conduct constituting “torture” occurring within the United States is also clearly prohibited by various federal and state criminal statutes. See 18 U.S.C. §§ 113, 114, 2261A (2000) (describing assault, maiming, and interstate stalking).

<sup>63</sup> See Vienna Convention on the Law of Treaties, *supra* note 56, art. 53; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 & n.6 (1987); Erika de Wet, *The Prohibition of Torture as an International Norm of jus cogens and Its*

type recognized by the Nuremberg Tribunals as the "very essence," pursuant to which "individuals have international duties which transcend the national obligations of obedience imposed by the individual State."<sup>64</sup>

Human rights law recognizes that certain rights may be suspended by governments during a "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed."<sup>65</sup> But the prohibition against torture—like those against slavery and genocide—is exempted from this provision.<sup>66</sup> Such actions may *never be done to anyone under any circumstances*. Article 2 of the CAT provides: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."<sup>67</sup>

Article 15 of the CAT makes clear that statements made as a result of torture are inadmissible in any proceedings.<sup>68</sup> Put simply, these principles are the clear embodiment of what many deem the most important achievement of human rights law: the crystallization of legal norms to protect the basic dignity of the individual. At base, we do not torture because:

torture's object is precisely not just to damage but to destroy a human being's power to decide for himself what his loyalty and convictions permit him to do . . . to reduce its victim to a screaming animal for whom decision is no longer possible—the most profound insult to his humanity, the most profound outrage of his human rights.<sup>69</sup>

As one court has noted, "the torturer has become like the pirate and slave trader before him, *hostis humani generis*, an enemy of all mankind."<sup>70</sup>

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*Implications for National and Customary Law*, 15 EUR. J. INT'L L. 97, 98 (2004). This means it is a principle of international law so fundamental that no nation may ignore it or attempt to contract out of it in any way. A treaty that violates *jus cogens* is void. *Id.*

<sup>64</sup> See Judgment, Monday, Sept. 30, 1946 in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL WAR TRIBUNAL 223 (1947).

<sup>65</sup> International Covenant on Civil and Political Rights, *supra* note 2, art. 4.

<sup>66</sup> See *id.* arts. 4, 6–8 (barring derogation from prohibitions on genocide, torture, and slavery).

<sup>67</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 57, art. 2.

<sup>68</sup> See *id.* art. 15 (except "against a person accused of torture as evidence that the statement was made").

<sup>69</sup> RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 38–39 (2006).

<sup>70</sup> *Filartiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

If an Attorney General endorses or fails to clearly condemn the use of torture, we are on the dangerous road described so well by Justice Jackson in his *Korematsu* dissent.<sup>71</sup> The rationalization of such conduct “to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that [it] sanctions such an order, [validates the principle which then] lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”<sup>72</sup>

For all these reasons, Mr. Mukasey has vigorously and properly condemned torture in the abstract. This is where the complexity arises. The clarity with which torture is rejected is not matched by similar clarity in its definition. Indeed, there is a well-recognized definitional problem regarding torture, the full complexities of which are beyond the scope of this short essay.<sup>73</sup> Still, all is not vagueness and reliance on “circumstances” and on *post hoc* judgments. If that were the case, then the abhorrence of torture would be meaningless. We have clear enough definitions for many purposes, including to conclude that waterboarding, even if perhaps not the worst of tortures, is and was clearly illegal.

### III. THE INTERPRETATION DILEMMA: UNDERLYING VALUES AND THE “SHOCKING” OF CONSCIENCE

*I think it would be very difficult to be a Kantian and to have any responsibility in the government.*<sup>74</sup>

Torture is formally defined by the CAT as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession . . . .”<sup>75</sup>

The Torture Act defines the term “severe mental pain or suffering” in relevant part as “the prolonged mental harm caused by or resulting

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<sup>71</sup> See *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

<sup>72</sup> *Id.*

<sup>73</sup> See generally GAIL H. MILLER, *DEFINING TORTURE* (2005).

<sup>74</sup> Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2005/04/waldronyoo-debate-on-torture.html> (Apr. 26, 2005) (quoting John Yoo during 2005 debate with Jeremy Waldron at Columbia University).

<sup>75</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 57, art. 1. The Convention entered into force with respect to the United States on Nov. 20, 1994. S. TREATY DOC. 100-20 (1994).

from—(A) the intentional infliction or threatened infliction of severe physical pain or suffering; . . . [or] (C) the threat of imminent death . . . .”<sup>76</sup>

How should these standards be interpreted? The disgraceful and now repudiated outer limit of the interpretive exercise regarding torture was the so-called “Bybee Memo” of August 1, 2002.<sup>77</sup> Written by John Yoo, the memo argued that torture required that “[t]he victim experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in loss of significant body function will likely result.”<sup>78</sup> This interpretation was expressly reversed by a memo written by Daniel Levin on December 30, 2004, which concluded that “severe” pain under the statute is not limited to such “excruciating or agonizing” pain.<sup>79</sup> But the OLC still declined to conclude that waterboarding was torture.<sup>80</sup>

It is beyond the scope of this essay to consider why OLC lawyers may have acted as they did. However, as one reviews the description of waterboarding with which this essay begins, recall that the ultimate question is not only whether waterboarding is torture. It is whether it is *clearly illegal*. As to this, I do not think there can be any doubt.

Consider the War Crimes Act (WCA), which criminalizes “war crimes” whether they occur inside or outside the United States.<sup>81</sup> From 1997 until 2006, the WCA defined “war crimes” to include grave breaches of any of the Geneva Conventions or conduct that constituted a violation of Common Article 3 of the Geneva Conventions.<sup>82</sup> The Supreme Court’s *Hamdan* decision made clear that Common Article 3 of

<sup>76</sup> Torture Convention Implementation Act of 1994, Pub. L. No. 103-236, § 506(a), 108 Stat. 463 (1994) (codified at 18 U.S.C. §§ 2340–2340A).

<sup>77</sup> See Bybee Memo, *supra* note 21; Memorandum from Daniel Levin, Acting Assistant Att’y General, on Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A for James B. Comey, Deputy Att’y General (Dec. 30, 2004), *available at* [news.findlaw.com/hdocs/docs/terrorism/doj\\_torture123004mem.pdf](http://news.findlaw.com/hdocs/docs/terrorism/doj_torture123004mem.pdf) [hereinafter Levin Memo].

<sup>78</sup> Bybee Memo, *supra* note 21, at 13; see GOLDSMITH, *supra* note 17, at 142.

<sup>79</sup> Levin Memo, *supra* note 77, at 2.

<sup>80</sup> See *id.* at 2 n.8. Levin further determined that the statute also prohibits certain conduct specifically intended to cause “severe physical suffering” as distinct from “severe physical pain.” *Id.* at 10–12. In a footnote, however, Levin maintained, that “we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.” *Id.* at 2 n.8.

<sup>81</sup> See War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended at 18 U.S.C. § 2441 (2000)).

<sup>82</sup> *Id.*; see Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 55, art. 3.

the Geneva Conventions *does* apply to suspected al-Qaeda detainees, requiring that they be “treated humanely,” and prohibiting “outrages upon personal dignity, in particular humiliating and degrading treatment.”<sup>83</sup> The 2006 Military Commissions Act (MCA) retroactively narrowed the WCA to a “grave breach” of Common Article 3.<sup>84</sup> The category, however, still includes both torture and “cruel or inhuman treatment.”<sup>85</sup> Indeed, under the MCA, mental harm need not be “prolonged” as required by the Torture Act, but may be “serious and non-transitory.”<sup>86</sup>

“Cruel, inhuman or degrading” conduct that does not quite rise to the level of “torture” is also prohibited by the CAT.<sup>87</sup> The Detainee Treatment Act of 2005 (DTA) specifically prohibited “cruel, unusual and inhuman treatment or punishment” against any individual in U.S. custody regardless of location or nationality.<sup>88</sup> The DTA, however, states that “the term ‘cruel, inhuman, or degrading treatment or punishment’ means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States . . . .”<sup>89</sup>

It was in regard to this statute that Mr. Mukasey testified: “There is a statute under which it is a relative issue . . . which is a shocks-the-

<sup>83</sup> Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2973 (2006).

<sup>84</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b)(1)(A), (2), 120 Stat. 2600, 2633–35 (2006) (to be codified in scattered sections of at 10, 18, 28, 42 U.S.C.) (making changes retroactive to November 26, 1997).

<sup>85</sup> § 6 (b) (1) (B) (d) (1) (A)–(B), 120 Stat. at 2633. The definition is essentially the same as that of the Torture Act, except that the WCA requires that the act be “for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.” See § 6 (b) (1) (B) (d) (1) (A), 120 Stat. at 2633.

<sup>86</sup> § 6(b)(2)(E), 120 Stat. at 2634–35. The MCA also authorized the potential admission of coerced testimony (but not torture evidence) in military trials. § 3(a)(1), 120 Stat. at 2607. Put simply, it is now possible that Guantánamo defendants could receive the death penalty based on evidence obtained from witnesses who were subjected to waterboarding, if it is not considered to be torture. Therefore, in that regard at least, the question of whether waterboarding is torture could have profound significance. See § 3 (a) (1), 120 Stat. at 2607.

<sup>87</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 57, pmb1.

<sup>88</sup> Detainee Treatment Act of 2005, Pub. L. 109-163, § 1403, 119 Stat. 3136, 3475 (2006) (to be codified at 42 U.S.C. § 2000dd).

<sup>89</sup> *Id.* The United States added the following to its instrument of ratification of the CAT: “The United States understands the term, ‘cruel, inhuman or degrading treatment or punishment,’ as used in Article 16 of the Convention, to mean the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.” S. TREATY DOC. No. 100–20, at 15–16.



conscience standard, which is essentially a balancing test of the value of doing something as, against the cost of doing it."<sup>90</sup>

One may well differ about how far this balancing test can legitimately go. But note, first, that the shocks-the-conscience analysis only becomes necessary if one concludes that waterboarding is not necessarily torture. Further, we might recall that the very DTA language relied upon by Mr. Mukasey to invoke the shocks-the-conscience test was part of an amendment offered by Senator John McCain, who has specifically called waterboarding a form of torture and clearly illegal.<sup>91</sup> The shocks-the-conscience test is one formulation of a due process standard. It is sometimes—incorrectly, in my view—cited by supporters of harsh interrogation tactics as authorizing a utilitarian balance between the nature of the conduct and the government's interest in doing such things.<sup>92</sup> Clearly, the test tends towards the subjective and the retrospective. But can it be, when applied to waterboarding, "essentially a balancing test of the value of doing something as, against the cost of doing it"? I do not think so. Indeed, I believe that this balancing approach is as fundamental an error as one can make in this setting because it replaces what should be primarily a "dignity-based" analysis with an impermissible and dangerously utilitarian one.<sup>93</sup>

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<sup>90</sup> Jan. 30, 2008 Hearing, *supra* note 3.

<sup>91</sup> See *infra* note 11. Indeed, Senator McCain has taken a clear position on the relationship between the DTA standard and waterboarding:

[T]he President and his subordinates are . . . bound to comply with Geneva. That is clear to me and all who have negotiated this legislation in good faith. . . .

. . . .

. . . We expect the CIA to conduct interrogations in a manner that is fully consistent not only with the Detainee Treatment Act and the War Crimes Act but with all of our obligations under Common Article 3 of the Geneva Conventions.

Press Release, Sen. John McCain, McCain Urges Final Passage of the Military Commissions Act of 2006 (Sept. 28, 2006) (emphasis added).

<sup>92</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). In a substantive due process analysis, a court must first determine if a statute infringes upon a fundamental right and then whether such infringement is "narrowly tailored to serve a compelling state interest." In *County of Sacramento v. Lewis*, the Court stated that "conduct deliberately intended to injure in some way unjustifiable by any government interest is the sort of official action *most likely* to rise to the conscience-shocking level." 523 U.S. 833, 834 (1998) (emphasis added). More recently, in *Chavez v. Martinez*, Justice Thomas, in a plurality opinion, wrote "the need to investigate whether there had been police misconduct constituted a justifiable government interest . . ." 538 U.S. 760, 775 (2003). However, as Justice Kennedy wrote, "[a] constitutional right is traduced the moment torture or its close equivalents are brought to bear." *Id.* at 789–90 (Kennedy, J., concurring in part and dissenting in part).

<sup>93</sup> See Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 525–26, 531 (1986).

The shocks-the-conscience test (in this context) derives from the 1952 case of *Rochin v. California*, in which the police had unsuccessfully attempted to remove suspected capsules of morphine from a suspect's mouth.<sup>94</sup> They later took him to a hospital and ordered doctors to pump his stomach. In his majority opinion for the Court, Justice Frankfurter noted that the due process question implicated “canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.”<sup>95</sup> The Court derived from this a resonant holding that explicitly used the prohibition against torture as its touchstone: “the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism . . . . They are methods too close to the rack and the screw to permit of constitutional differentiation.”<sup>96</sup>

The *Rochin* Court also specifically recognized the role played by human dignity in its analysis: noting that its decision related to “force so brutal and *so offensive to human dignity* in securing evidence from a suspect as is revealed by this record.”<sup>97</sup> Although there have been intimations by some justices in recent cases that a review of all the circumstances is required before a court declares a particular practice to shock-the-conscience, this is not necessary or proper as to waterboarding.<sup>98</sup> The inquiry always requires a determination of what the United States has traditionally considered to be out of bounds. In short, there are—indeed, there must be—some acts that are prohibited regardless of the surrounding circumstances. Imagine if the question were whether cutting off the toes of a detainee shocks-the-conscience. Do we balance? Does it depend upon the circumstances? To be sure, none of these definitions and standards are completely clear nor generally thought to be immutable. The question is: to which principles should one turn to as interpretive guides? And, in the waterboarding context, do those principles counsel vagueness and reliance on *post hoc* judgments or prophylactic clarity? Justice Frankfurter's reasoning appears to be vastly superior in this regard to that of John Yoo. Let us look to canons of decency and fairness, to abhorrence of torture, and to human dignity.

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<sup>94</sup> 342 U.S. 165, 166, 172 (1952).

<sup>95</sup> *Id.* at 169 (citing *Malinski v. New York*, 324 U.S. 401, 417 (1945)).

<sup>96</sup> *Id.* at 172.

<sup>97</sup> *Id.* at 174 (emphasis added).

<sup>98</sup> See *infra* note 93.

## CONCLUSION

Official legal equivocation about waterboarding is not merely a technical matter. It is wrong and it is dangerous. It preserves the imprimatur of legality for torture and it shields the wrongful conduct of the past from proper scrutiny and judgment. Perhaps even worse, it substitutes a dangerously fluid utilitarian balancing test for the hard-won respect for human dignity at the base of our centuries-old revulsion about torture. That, in my view, is precisely what the rule of law (and the best lawyers) ought not to do.

Even if one were inclined to quibble about the precise definition of torture, surely there can be no doubt—and surely a responsible government official ought to be able to say—that waterboarding is illegal.<sup>99</sup> As the editors of the Los Angeles Times put it: “[Mukasey’s] statements . . . set a dangerous and hypocritical standard of convenience for torturers. Such repugnant equivocation will be mimicked and distorted in dark corners around the world . . . .”<sup>100</sup>

I would never presume to interpret for others the deep values that I believe have long sustained Boston College and its law school. I certainly do not think that those values mandate or support any kind of ideological litmus test. I am completely comfortable with the general proposition that a range of ideological viewpoints among commencement speakers is a healthy and necessary practice. But, in my view, this matter of waterboarding is not an essentially political question. Nor is it an especially close call as a matter of law. It does, however, cut to the heart of the most profound legal and ethical questions of our time.

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<sup>99</sup> See KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 338–58 (1997); Bilder & Vagts, *supra* note 38, at 693.

<sup>100</sup> Editorial, L.A. TIMES, *It's Torture; It's Illegal*, Feb. 2, 2008, at A20, available at <http://www.latimes.com/news/opinion/editorials/la-ed-mukasey2feb02,0,5132906.story>.