

# Waterboarding and the Legacy of the Bybee-Yoo “Torture and Power” Memorandum: Reflections from a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist

M. Katherine B. Darmer\*

## INTRODUCTION

It is commonly said that we are a nation of laws, not men. And we are. But beyond the laws, we are also a nation of men and women with a common ethic. Some things are not American. Torture, for damned sure, is one of them.<sup>1</sup>

This essay argues that waterboarding is torture and that torture is illegal and wrong. It strikes me as unfortunate that these are really debatable propositions in 2009,<sup>2</sup> but we know all too well that our country has engaged in waterboarding and that prominent academics and lawyers continue to defend such tactics today.<sup>3</sup>

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\* Professor of Law, Chapman University. I thank all of the current and former colleagues who provided helpful comments on earlier drafts. I especially thank Deepa Badrinaryana; Marisa Cianciarulo, Roman Darmer, II; Kurt Eggert, Francine Lipman; Mark Osler and Lawrence Rosenthal. Thanks are also due to the editors and staff of the Chapman Law Review.

<sup>1</sup> Richard Cohen, *A Plunge From the Moral Heights*, in CIVIL LIBERTIES VS. NATIONAL SECURITY IN A POST-9/11 WORLD 317, 319 (M. Katherine B. Darmer, Robert M. Baird & Stuart E. Rosenbaum, eds., 2004) [hereinafter, “CIVIL LIBERTIES”].

<sup>2</sup> More than seventy years ago, a unanimous Supreme Court held that the use of confessions extracted through torture violated the Due Process Clause. *See Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (describing procedures used as “revolting to the sense of justice”). For a poignant discussion of the case, *see* Morgan Cloud, *Torture and Truth*, 74 TEX. L. REV. 1211 (1996); *see also* M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J. L. & PUB. POL’Y 319, 329–30 (2003).

<sup>3</sup> *See, e.g.*, Thomas P. Crooker, *Torture, with Apologies*, 86 TEX. L. REV. 569 (2008) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007) and RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006) as books that “eschew the practice of principle, articulating instead consequentialist apologies on behalf of official actions ranging from the suppression of dissent to the practice of torture.”); *cf.* Alan M. Dershowitz, *Should the Ticking Bomb Terrorist Be Tortured? A Case Study in how a Democracy Should Make Tragic Choices*, in CIVIL LIBERTIES, *supra* note 1, at 189–214 (advocating availability of “torture warrants” in some situations). For a thorough critique of the “ticking bomb” scenario, *see* Alan Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT’L L. REV. 1, 21–28 (2008) (pointing out that reasoning is “fallacious” and has no “practical significance”) and David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1444 (“in a world of uncertainty and imperfect knowledge, the ticking-

When I first read the August 1, 2002 Department of Justice Memorandum by Jay Bybee and John Yoo regarding torture,<sup>4</sup> my reaction was one that occurs “[t]oo often in the academy.”<sup>5</sup> We “talk in muted voices, hushed, pseudo-intellectual whispers, unsure whether we should take a stand . . .”<sup>6</sup> Despite my initial reticence, the memorandum was roundly, almost uniformly condemned in the academic community.<sup>7</sup> While I did join the choir of condemners, my voice was not among the early, courageous voices of criticism.<sup>8</sup>

Perhaps I was over-awed by the credentials of those who produced the memorandum<sup>9</sup> and felt enduring ties of loyalty to a Justice Department I had only recently left. Perhaps I noted

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bomb scenario should not form the point of reference”). Ordinary citizens also seem willing to condone torture. *See id.* at 1425–26 (noting that “American abhorrence to torture . . . appears to have extraordinarily shallow roots” after September 11 and that support for torture “runs independent of progressive or conservative ideology.”). Following this article’s submission to Chapman Law Review, new allegations surfaced regarding the extent to which waterboarding had been used on particular detainees. *See* note 53, *infra*. These allegations and related subjects were topics of a debate on executive power held at Chapman University on April 21, 2009. John Yoo and John Eastman were on one side of the debate and Lawrence Rosenthal and I were on the other. *See generally* Webcast: Presidential Power Debate (Chapman University School of Law April 21, 2009) (<http://www.chapman.edu/law/webcasts/>). Because former Administration memoranda regarding the details of waterboarding and other interrogation techniques were released after this article was drafted, those new details are beyond the scope of this article. They will be addressed in more detail in my forthcoming article, *What Can (Should?) Be Done with Waterboarded Confessions?*

<sup>4</sup> Regarding the memo’s authorship, *see infra* nn.27–32 and accompanying text.

<sup>5</sup> Email from Kurt Eggert dated 3/11/09 (on file with author; sent regarding issue unrelated to torture).

<sup>6</sup> *Id.*

<sup>7</sup> *See, e.g.,* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1231 & n.182 (2006) (“In the two years since it was leaked to the public, the Bybee Memorandum has been withered by criticism for the poor quality of its legal analysis (citing sources of criticism, including statement by Yale Law School Dean Harold Hongju Koh that it was “perhaps the most clearly erroneous legal opinion I have ever read.”); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1703–09 (2005) (analyzing memo and concluding that the quality of legal work reflected therein “is a disgrace”); Luban, *supra* note 3, at 1455 (noting “near consensus that the legal analysis in the . . . Memo was bizarre”); *cf.* Erwin Chemerinsky, *Civil Liberties and the War on Terror: Seven Years After 9/11 History Repeating: Due Process, Torture and Privacy During the War on Terror*, 62 SMU L. REV. 3, 12 (2009) (calling for investigation and prosecution of Bybee, Yoo and others for war crimes).

<sup>8</sup> As an edited book I was working on regarding civil liberties and national security went to press (*see* CIVIL LIBERTIES, *supra* note 1) the Abu Ghraib scandal came to light, as did the August 1, 2002 memorandum regarding interrogation techniques, which I included in the book more than five years ago without “weighing in” as to the memo’s merits. *See id.* at 17 (describing Abu Ghraib and development regarding the memo).

<sup>9</sup> John Yoo, who has acknowledged an important role in drafting the memorandum, is a professor of law at Berkeley and former law clerk to the Honorable Clarence Thomas. He is widely published in leading law reviews. At the time this article was drafted, Professor Yoo held a distinguished visiting professorship at Chapman University School of Law. Jay Bybee, the memorandum’s signatory, is now a judge on the United States Court of Appeals for the Ninth Circuit.

that, beyond the memorandum's authors, there were other serious lawyers and academics (including at my own institution)<sup>10</sup> who defended the Administration as taking prudent, defensive measures. Having lived and worked in Manhattan, I was deeply affected by the tragedy of September 11<sup>11</sup> and was reluctant, even within the academy and far removed from real-world decision making, to be "on record" opposing any legitimate tactic that *might* make us safer. I failed to appreciate that what the Memo was defending were tactics like waterboarding.<sup>12</sup> I was not yet willing to believe that the Justice Department—in which I had substantial faith—was actually defending *torture*. Rather, I noted the Administration's disavowal of the Memo, assumed the Memo was not broadly representative of Administration views, and accepted the explanation that Abu Ghraib was perpetrated by a "few bad apples."<sup>13</sup> I was unwilling to accept the notion that the Memo reflected and sought to justify a "torture culture." The term "waterboarding" was not yet in the popular lexicon.

In the immediate aftermath of the attacks, moreover, I was fully supportive of what appeared to be appropriate law enforcement responses. I was impressed with President Bush's declaration that hate crimes against Muslims would not be tolerated and by his Administration's swift move against the perpetrators of hate crimes. Aggressive use of material witness

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<sup>10</sup> See David Glenn, *Torture Memos' vs. Academic Freedom*, CHRON. HIGHER EDUC. (Wash., D.C.), March 20, 2009, at A12 (noting that Chapman's Law School Dean John C. Eastman is one of Professor Yoo's "staunchest advocates;" "After September 11, we were in unchartered territory, Mr. Eastman says . . . [A]nd I think John actually got it right most of the time").

<sup>11</sup> The World Trade Center was for me, like all New York residents, both symbol and guidepost. I worked in the shadow of the towers, in lower Manhattan, as an Assistant United States Attorney for four years. In my early days in the office, respected senior colleagues were prosecuting those responsible for the first attacks on the Towers, which attacks occurred in 1993. Other colleagues became involved later in the investigation of the attacks on the U.S.S. Cole. The name Osama bin Laden was familiar to me even before September 11, and it was the first name that crossed my mind when the terrorists struck. When the towers collapsed, I felt an acute sense of "survivor's guilt." Having left Manhattan for the comparative safety of Chapman's academic halls in 1999, I listened raptly to the tales of former colleagues' stories of escape from lower Manhattan. I broke down in a faculty meeting when a cousin's wife could not at first be located in New York City on the day of the attacks. A well-respected FBI agent whom I had briefly worked with died at the Towers. Visiting Manhattan now is disorienting, with the lack of the landmark as a point of reference a constant reminder of the horror of how it was lost.

<sup>12</sup> See CIVIL LIBERTIES, *supra* note 1, at 303–15 (excerpted copy of the memorandum).

<sup>13</sup> See Luban, *supra* note 3, at 1452 (noting that "Abu Ghraib is not a few bad apples—it is the apple tree."); see also Statement of Senator Patrick Leahy on Abuse of Foreign Detainees, Oct. 1, 2004, available at <http://leahy.senate.gov/press/200410/100104C.html> (noting that the Bush Administration has maintained that the abuses that occurred at Abu Ghraib were a result of "a few bad apples").

warrants and other temporary detentions<sup>14</sup> struck me as prudent.

As time went on, however, unease set in, and then alarm. Those of Middle Eastern descent were targeted for questioning. Detentions at Guantanamo continued, with minimal process for detainees.<sup>15</sup> Even more troubling, it became plain that tactics such as waterboarding had been used by our country in interrogating suspects.<sup>16</sup> Those who had read the August 1, 2002 Memo with a more jaundiced view than I had were already on record with dire warnings regarding the Memo's implications.<sup>17</sup> Their concerns were realized.

This short essay, thus, is largely simply an acknowledgment of the important role played in this debate by voices more forceful and prescient than my own. Because the August 1, 2002 Memo and related memoranda have been so thoroughly and effectively addressed by others,<sup>18</sup> I will draw heavily on that work to address the question whether waterboarding is torture and then turn to a January 29, 2009 *Wall Street Journal* op-ed published by Professor John Yoo on the eve of this symposium.<sup>19</sup>

Professor Yoo himself has defended waterboarding quite recently. In his January 29, 2009 op-ed, for example, Yoo decried the Obama Administration's decision to terminate the CIA's "special authority to interrogate terrorists" and suggested that "coercive interrogation methods," including waterboarding, were appropriately used in the prior Administration.<sup>20</sup> In light of this continued debate, I believe it is important to acknowledge the

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<sup>14</sup> See Michael Greenberger, *Indefinite Material Witness Detention Without Probable Cause: Thinking Outside the Fourth Amendment* 3 (Univ. of Md. Sch. of Law Research Paper No. 2004-01, 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=494763](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=494763).

<sup>15</sup> See JOHN TEHRANIAN, *WHITEWASHED: AMERICA'S INVISIBLE MIDDLE EASTERN MINORITY* 134–35 (2008).

<sup>16</sup> See, e.g., Marjorie Cohn, *Trading Civil Liberties for Apparent Security is a Bad Deal*, 12 *CHAP. L. REV.* at 623–24 (detailing abuses, including torture at both Guantanamo Bay and Abu Ghraib); see also generally Ernesto Hernández-López, *Boumediene v. Bush and Guantanamo, Cuba: Does the "Empire Strike Back"?*, 62 *SMU L. REV.* 117 (2009) (placing detentions at Guantanamo Bay in historical, post-colonial context).

<sup>17</sup> See W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 *CORNELL L. REV.* 67, 75–85, 98–100 & n.110 (2005) (discussing the torture memo controversy and noting several articles criticizing the memos).

<sup>18</sup> See, e.g., Waldron, *supra* note 7, at 1703–09.

<sup>19</sup> I acknowledge the inelegance of a focused piece on waterboarding given the contemporaneity of Yoo's brief visitorship at Chapman, but with issues related to memoranda written by Yoo being addressed almost daily in the press, it is impossible to ignore them.

<sup>20</sup> John Yoo, *Obama Made a Rash Decision on Gitmo*, *WALL ST. J.*, Jan. 29, 2009, at A15.

extensive and thorough extant criticism of Yoo's role in developing a "torture culture" during the War on Terror.

This paper is an outgrowth of my Symposium presentation on a panel entitled *Civil Liberties for Civil Rights: Justifying Wartime Decline of Civil Liberties by a Gain of Civil Rights*, a title that reflects some ambiguity.<sup>21</sup> In the context of this symposium addressing wartime, however, it strikes me that those who framed this discussion had in mind that we have given up certain freedoms in order to gain more safety. Indeed, Yoo himself subscribes to this view, rejecting as "naïve" and "high-flying rhetoric" President Obama's inaugural speech statement "that we can 'reject as false the choice between our safety and our ideals.'"<sup>22</sup> This essay subscribes to our new president's vision, however, that holding certain ideals as sacrosanct can be done consistent with making us safer, particularly in the long run.<sup>23</sup> While some minor inconveniences such as longer lines at airports and greater scrutiny of luggage may have made us marginally safer, the fundamental transgressions of civil liberties that are the topic of this particular paper have not, I submit, made us more secure. Instead, they have resulted in a "plunge from the moral heights"<sup>24</sup> with no demonstrable increase in our safety. Indeed, torture arguably makes us less safe because it makes it

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<sup>21</sup> In grappling with the title of the symposium panel, I started with my office copy of Black's Law Dictionary in an effort to illuminate the understood difference between the juxtaposed terms. Black's Law Dictionary formerly defined "civil liberties" as "Personal, natural rights guaranteed and protected by Constitution . . ." And for "civil rights," it said simply "see Civil liberties." BLACK'S LAW DICTIONARY (5th ed. 1979). Sometimes I think we think of "civil liberties" in terms of negative liberties, or freedom *from* governmental interference with, e.g., free speech, whereas "civil rights" sometimes connotes positive rights. "Civil rights" is often also a term associated with the attainment of right by minority groups. See, e.g., WEBSTERS II NEW RIVERSIDE DICTIONARY (1984) (defining "civil liberty" as "[f]reedom from governmental infringement of such individual rights as freedom of speech and action"). Indeed, the more current version of Black's Law Dictionary reflects this distinction, with civil liberty defined as "freedom from undue governmental interference or restraint . . . also termed civil right." Civil right is then separately defined as "the individual rights of personal liberty guaranteed by the Bill of Rights and by the 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, and 19<sup>th</sup> Amendments, as well as by legislation such as the Voting Rights Act. Civil Rights Include especially the right to vote, the right of due process, and the right of equal protection under the law" BLACK'S LAW DICTIONARY 263 (8th ed. 2004).

<sup>22</sup> Yoo, *supra* note 20.

<sup>23</sup> I acknowledge concerns that the reality of our new president's policies regarding civil liberties may not live up to campaign rhetoric. See Remarks of Nadine Strossen, Chapman University Dean's Dialogue Series (March 13, 2009) (available at <http://www.chapman.edu/law/webcasts/>); William Glaberson, *U.S. Won't Label Terror Suspects as 'Combatants'*, N.Y. TIMES, March 14, 2009, at A1 (noting the current Justice Department's argument "that the president has the authority to detain terrorism suspects [in Guantanamo] without criminal charges . . .").

<sup>24</sup> Richard Cohen, *A Plunge from the Moral Heights* in CIVIL LIBERTIES, *supra* note 1, at 317.

more likely that our own troops will be tortured in return<sup>25</sup> and also inflames anti-American sentiment. Perhaps more important, even if waterboarding *has* made us safer, it is an abandonment of core principles to engage in it and thus we should reject it categorically, Yoo's past and current arguments notwithstanding.<sup>26</sup>

#### I. THE BYBEE-YOO TORTURE AND POWER MEMORANDUM

The August 1, 2002 memorandum, prepared for Alberto R. Gonzalez, counsel to the President, was prepared by the United States Department of Justice Office of Legal Counsel ("OLC") and signed by Jay S. Bybee, then Assistant Attorney General<sup>27</sup> and now a Ninth Circuit judge. John Yoo, a professor of law at Berkeley who served in the OLC when the memorandum was prepared, drafted and defended the memo,<sup>28</sup> which is sometimes referred to as the "Yoo Memorandum," sometimes as the "Bybee Memorandum,"<sup>29</sup> and sometimes as the "Torture Memorandum."<sup>30</sup> Because Yoo is widely acknowledged as the

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<sup>25</sup> See Chemerinsky, *supra* note 7, at 12 (noting concerns raised by military personnel and their loved ones that other countries will not follow international law when dealing with American prisoners).

<sup>26</sup> In his dissenting opinion in *Olmstead v. United States*, Justice Brandeis stated that "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). I re-read this passage recently in a context unrelated to the subject of torture, but it resonated in this context and I note that Nadine Strossen, in a recent article, referred to Brandeis's warning in the context of discussing Yoo and other Bush Administration lawyers. See Nadine Strossen, *Freedom and Fear Post-9/11: Are We Again Fearing Witches and Burning Women?*, 31 NOVA L. REV. 279, 287 (2007); see also Cohn, *supra* note 16, at 623 (also citing to Brandeis's *Olmstead* dissent in the context of the War on Terror). Dean Erwin Chemerinsky has also cited to Brandeis's dissent in the context of the War on Terror. See Chemerinsky, *supra* note 7, at 15.

<sup>27</sup> See CIVIL LIBERTIES, *supra* note 1, at 303–15 (excerpted copy of OLC memorandum) [hereinafter "BYTAP Memo"].

<sup>28</sup> See *id.* at 321–23; Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture In U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468, 469–70 (2007) (noting that Yoo drafted the memo).

<sup>29</sup> Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 36 (noting that the "Bybee Memo" . . . "was actually authored by John Yoo, and eventually withdrawn by Jack Goldsmith") and n.167 (noting that author refers to memo as "Yoo Memo" for clarity); cf. Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1229 & n.179 (2006) (referring to memorandum as the "Bybee Memorandum" while noting that many have ascribed the writing to Yoo and that the memo has been described as "Yoo's most famous piece of advice"); Waldron, *supra* note 7, at 1703–04 (referring to memorandum as the "Bybee Memorandum"); Luban, *supra* note 3, at 1454–55 (also referring to the document as the "Bybee Memorandum").

<sup>30</sup> See Glenn, *supra* note 10, (referring to various Yoo Memoranda as the "Torture Memos").

primary author but Bybee, who was Yoo's superior, actually signed the memo and bears ultimate responsibility for its contents, I believe it more appropriate to refer to the memorandum as the "Bybee-Yoo Memorandum." Moreover, the memorandum is as astonishing for its arrogation of virtually unlimited executive powers as it is for its narrowly circumscribed definition of "torture,"<sup>31</sup> and so I will refer to the memorandum as the "Bybee-Yoo Torture and Power Memorandum," or BYTAP Memo.<sup>32</sup>

Two provisions of the BYTAP Memo have come under the most sustained attack: (1) the narrow definition of "torture," which evidence suggests was solicited in order to justify waterboarding tactics the Administration was already using when the Memo was written;<sup>33</sup> and (2) the claim of unlimited executive power to engage in *any* tactic, including torture.<sup>34</sup>

With regard to the narrow definition, the BYTAP Memo starts with the statutory prohibition on torture, which forbids the infliction of "severe physical or mental pain or suffering."<sup>35</sup> The full definition of "torture" is as follows:

"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;

"severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—

the intentional infliction or threatened infliction of severe physical pain or suffering;

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<sup>31</sup> See Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 16 (2006).

<sup>32</sup> As an aside, there is something unsettling about the degree of opprobrium faced by Professor Yoo when contrasted with the relative quiet regarding Judge Bybee. I have read no reports of protests at the Court of Appeals where Judge Bybee sits, whereas Yoo has been the target of a number of protests (including a very loud one outside the building where this is being written). I also note that Alberto Gonzalez seems to have faced more vilification than others equally complicit in the failings at the Justice Department. Is it a coincidence that Yoo and Gonzalez, who seem to have faced the sharpest criticism, are Asian and Latino, respectively, whereas Jay Bybee is a white man? I think this is a troubling question, but one that I will leave aside for now while acknowledging its existence.

<sup>33</sup> MARJORIE COHN, COWBOY REPUBLIC: SIX WAYS THE BUSH GANG HAS DEFIED THE LAW 36 & n.19 (2007) (noting that memo was written after Attorney General Gonzalez met with lawyers for the Defense Department and for Vice President Dick Cheney "to discuss specific interrogation techniques") (citing Michael Hirsh, John Barry, & Daniel Klaidman, *A Tortured Debate Amid Feuding and Turf Battles, Lawyers in the White House Discussed Specific Terror-Interrogation Techniques Like "Water-Boarding" and "Mock Burials,"* NEWSWEEK, June 21, 2004, at 50).

<sup>34</sup> See Chemerinsky, *supra* note 31, at 16.

<sup>35</sup> See 18 U.S.C. §§ 2340–2340A (2006) (discussed in BYTAP Memo, *supra* note 12, at 305).

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;

the threat of imminent death; or

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 . . . .<sup>36</sup>

The BYTAP Memo then borrows from language contained in a statute addressing medical care and concludes that those statutes suggest that “severe pain” as used in the anti-torture statute “must rise to a similarly high level—the level that would ordinarily be associated with a sufficiently serious physical condition or injury *such as death, organ failure, or serious impairment of bodily functions*—in order to constitute torture.”<sup>37</sup>

But even this narrowed definition would not limit the President, according to the BYTAP Memo. Rather, “[i]n order to respect the President’s inherent constitutional authority to manage a military campaign against al Qaeda and its allies, Section 2340A must be construed as *not applying to interrogations undertaken pursuant to his Commander in Chief authority*.”<sup>38</sup> In other words, despite the constitutional command that the executive branch execute the laws (including those categorically forbidding torture), the BYTAP Memo concludes that, simply by invoking the term “Commander in Chief,” the president could authorize any interrogation technique, including torture.<sup>39</sup> In short, the BYTAP Memo permitted the conclusion that *waterboarding isn’t torture, but even if it is, the President can do it. He can do anything.*

The BYTAP Memo has been harshly criticized for, among other things, failing to construe the torture ban in a way that would avoid conflict with international law, using an unrelated medical statute in order to reach a narrow definition of “severe pain,” failing to recognize that the statutory ban on torture does *not* admit of exceptions,<sup>40</sup> and asserting the view that the President has a “blank check,” despite the fact that such a position “is against the great weight of precedent.”<sup>41</sup> The BYTAP

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<sup>36</sup> 18 U.S.C. § 2340.

<sup>37</sup> BYTAP Memo, *supra* note 12, at 305 (emphasis added).

<sup>38</sup> *Id.* at 311 (emphasis added).

<sup>39</sup> Dawn E. Johnsen, *What’s A President To Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 403 (2008); *see also* Chemerinsky, *supra* note 31, at 16.

<sup>40</sup> *See, e.g.*, Margulies, *supra* note 29, at 37–40.

<sup>41</sup> *Id.* at 39.

Memo has also been criticized for starting from the premise that international and domestic laws wrongly frustrate the ability of United States officials to act with flexibility,<sup>42</sup> while ignoring long-term consequences of acting unilaterally.<sup>43</sup> The BYTAP Memo is premised on “the epic assertions of executive power proclaimed by Yoo.”<sup>44</sup>

The conservative Jack Goldsmith, who succeeded Yoo at OLC, found that Yoo’s memoranda were not only one-sided but contrary to law.<sup>45</sup> “The idea that Congress could not oversee the interrogation of detainees . . . has no foundation in prior OLC opinions, judicial decisions, or in any other source of law.”<sup>46</sup> The BYTAP Memo does not acknowledge the President’s constitutional obligation to take care that the laws are “faithfully executed,” nor does it acknowledge Congress’s delegated powers to make rules and regulations for the conduct of the armed forces and for “captures.”<sup>47</sup>

Dean Harold H. Koh of the Yale Law School has described the August 1, 2002 BYTAP Memo as “perhaps the most clearly erroneous legal opinion I have ever read.”<sup>48</sup> Yet the BYTAP Memo has “proved to be enormously influential.”<sup>49</sup> Although the Justice Department formally withdrew the BYTAP memo shortly after it was leaked, the Administration adhered to many of its premises even while issuing a new memorandum (the “Levin Memo”) that embraced the unequivocal rhetoric that “torture is abhorrent.”<sup>50</sup> As Professor Margulies points out, “Levin deserves substantial credit for clear and resonant language that accurately represented the consensus on this issue. If one reads the [Levin] memo more carefully, however, loopholes appear, justifying what the Administration had already done.”<sup>51</sup> One of

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<sup>42</sup> *Id.* at 22.

<sup>43</sup> *See id.* at 47–48.

<sup>44</sup> *Id.* at 82.

<sup>45</sup> Glenn, *supra* note 10, at A12 (citing JACK L. GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007)).

<sup>46</sup> *Id.* Goldsmith ultimately resigned over concerns regarding the BYTAP Memo. *See* Johnsen, *supra* note 39, at 403.

<sup>47</sup> U.S. CONST. art. II, § 3; U.S. CONST. art. I, § 8.

<sup>48</sup> *See* Morrison, *supra* note 7, at n.182.

<sup>49</sup> Luban, *supra* note 3, at 1454.

<sup>50</sup> *See* Margulies, *supra* note 29, at 40–41 (citing Memorandum from Daniel Levin, Acting Asst. Att’y Gen., to James B. Comey, Deputy Att’y Gen. (Dec. 30, 2004)).

<sup>51</sup> *Id.* at 41; *see also* Luban, *supra* note 3, at 1456 (“Although the Levin Memo condemns torture and repudiates [the BYTAP Memo’s] narrow definition of ‘severe pain,’ a careful reading shows that it does not broaden it substantially.”); *cf.* Chemerinsky, *supra* note 31, at 16 (“The significance of the Torture Memo in terms of the Bush Administration’s views of executive power cannot be overstated.”).

the tactics the Administration sought to justify was waterboarding.<sup>52</sup>

## II. WATERBOARDING AND TORTURE

The United States admits to having “waterboarded” suspects under the auspices of the CIA and continued to claim the authority to use the technique as recently as 2005.<sup>53</sup> The BYTAP memo’s narrow definition of torture may well have been designed to allow for this particular procedure.<sup>54</sup>

Professor Jeremy Waldron’s article, *Torture and Positive Law: Jurisprudence for the White House*<sup>55</sup> is a powerful indictment of the BYTAP Memo and other lawyerly efforts to justify coercive interrogation techniques in the wake of September 11. Waldron disagrees with the argument that we should be more sympathetic to the use of torture in circumstances presented after 9/11. Rather, “the various municipal and international law prohibitions on torture are set up precisely to address the circumstances where torture is likely to be most tempting. If the prohibitions do not hold fast in these circumstances, then they are of little use in any circumstance.”<sup>56</sup> In his view, the torture prohibition “operates in our law as an *archetype*—that is, as a rule which has significance not just in and of itself, but also as the embodiment of a pervasive principle.”<sup>57</sup> This principle was violated by the use of waterboarding.

The history of water torture has been thoroughly laid out in a recent article by Evan Wallach, a judge on the United States Court of International Trade.<sup>58</sup> Judge Wallach traces the use of the technique throughout history, including by the Japanese against Allied prisoners of war in World War II, by the United States during its occupation of the Philippines and in one instance, domestically, by a sheriff in Texas.<sup>59</sup> “In all cases,

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<sup>52</sup> See Margulies, *supra* note 29, at 41.

<sup>53</sup> See Clarke, *supra* note 3, at 2, 39–40 & n.195 (noting that waterboarding was used on at least three detainees); see also Cohn, *supra* note 16, at 624 (noting that United States has admitted to waterboarding); Margulies, *supra* note 29, at 41 (noting that waterboarding was used “at least for three high-level al Qaeda detainees”). New details have now emerged regarding the extent to which waterboarding was used: 183 times on one detainee and 83 times on another. See Memorandum from Steven G. Bradbury for John A. Rizzo, Senior Deputy General Counsel, CIA, 37 (May 30, 2005).

<sup>54</sup> See COHN, *supra* note 33, at 36 (describing Newsweek account).

<sup>55</sup> Waldron, *supra* note 7.

<sup>56</sup> See *id.* at 1686.

<sup>57</sup> *Id.* at 1687.

<sup>58</sup> Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture In U.S. Courts*, 45 COLUM. J. TRANSNAT’L L. 468 (2007).

<sup>59</sup> *Id.* at 476–77.

whether the water treatment was applied by Americans or to Americans, or simply reviewed by American courts, it has uniformly been rejected as illegal, often with severely punitive results for the perpetrators.”<sup>60</sup>

Judge Wallach recounts the description provided by a United States aviator subjected to the practice by Japanese captors:

I was put on my back on the floor with my arms and legs stretched out, one guard holding each limb. The towel was wrapped around my face and put across my face and water poured on. They poured water on this towel until I was almost unconscious from strangulation, then they would let up until I'd get my breath, then they'd start over again.<sup>61</sup>

Similarly, in the Texas case, law enforcement officers were charged with “handcuffing prisoners to chairs, placing towels over their faces, and pouring water on the cloth until they gave what the officers considered to be confessions.”<sup>62</sup> The sheriff was convicted and received a ten-year prison sentence; other defendants also received significant prison sentences.<sup>63</sup> At sentencing, the judge noted that the Texas law enforcement operation would embarrass even a “dictator.”<sup>64</sup>

Wallach noted that the “water torture” or “water boarding” technique has long been prized as an interrogation method because it imposes “severe mental trauma and physical pain but no traces of physical trauma that would be discoverable without an autopsy.”<sup>65</sup>

During the height of the debate about waterboarding as used by the United States against terrorist suspects, the journalist Christopher Hitchens chose to voluntarily undergo the experience.<sup>66</sup> As he describes it: “I was pushed onto a sloping board and positioned with my head lower than my heart . . . . Then my legs were lashed together so that the board and I were

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<sup>60</sup> *Id.* at 477. For example, one defendant received a ten-year sentence. *See id.* at 504 & n.159.

<sup>61</sup> *Id.* at 476 (quoting Excerpts from testimony of Cpt. Chase Jay Nielsen, Trial Record at 55, United States v. Sawada, 5 L. Rep. Trials of War Criminals 1 (1948)). Nielsen was one of ten U.S. B-25 bombers captured by the Japanese during a raid. The Japanese tried the men before a Japanese Army Tribunal and executed three of the men. The U.S. Army later prosecuted the trial's participants. *See id.* at n.1 (citing CRAIG NELSON, *THE FIRST HEROES* (2002)).

<sup>62</sup> *Id.* at 502.

<sup>63</sup> *See id.* at 504 & n.159.

<sup>64</sup> *Id.* at 504.

<sup>65</sup> *Id.* at 474.

<sup>66</sup> Christopher Hitchens, *Believe Me, It's Torture*, VANITY FAIR, August 2008 (available at <http://www.vanityfair.com/politics/features/2008/08/hitchens200808>).

one single trussed unit.”<sup>67</sup> Hitchens was already wearing a hood, and three layers of “enveloping towel” were applied.<sup>68</sup> Then,

In this pregnant darkness, head downward, I waited for a while until I abruptly felt a slow cascade of water going up my nose. Determined to resist . . . I held my breath for a while and then had to exhale and—as you might expect—inhalation in turn. The inhalation brought the damp cloths tight against my nostrils, as if a huge wet paw had been suddenly and annihilatingly clamped over my face. Unable to determine whether I was breathing in or out, and flooded more with sheer panic than with mere water, I triggered the pre-arranged signal and felt the unbelievable relief of being pulled upright and having the soaking and stifling layers pulled off me.<sup>69</sup>

After being checked by a paramedic and taking a break, Hitchens endured a second episode:

I fought down the first, and some of the second, wave of nausea and terror but soon found that I was an abject prisoner of my gag reflex. The interrogators would hardly have had time to ask me any questions and I would quite readily have agreed to supply any answer.<sup>70</sup>

Hitchens took strong issue with the “official lie” that waterboarding “simulates’ the feeling of drowning.”<sup>71</sup> In his words, “You feel that you are drowning because you *are* drowning—or, rather, being drowned, albeit slowly and under controlled conditions and at the mercy (or otherwise) of those who are applying the pressure.”<sup>72</sup> Even after the ordeal, Hitchens has experienced feelings of panic upon awakening or in circumstances where he is short of breath.<sup>73</sup> He concludes that “if waterboarding does not constitute torture, then there is no such thing as torture.”<sup>74</sup>

A majority of Americans share Hitchens’ view that waterboarding constitutes torture.<sup>75</sup> Judge Wallach, too, concludes that waterboarding is torture *even under the narrow BYTAP Memo definition*.<sup>76</sup> However, the fact that the BYTAP Memo seems to have been designed to exclude tactics such as

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<sup>67</sup> *Id.* at 2.

<sup>68</sup> *Id.* at 2–3.

<sup>69</sup> *Id.* at 3.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2.

<sup>72</sup> *Id.* at 2–3.

<sup>73</sup> *Id.* at 3.

<sup>74</sup> *Id.* at 3.

<sup>75</sup> Clarke, *supra* note 3, at 2 & n.4 (citing results of 2007 CNN poll).

<sup>76</sup> Wallach, *supra* note 58, at 506.

waterboarding from the definition of torture illustrates BYTAP's biggest problem. Surely waterboarding, under any reasonable definition of torture, *is* torture.

Torture is illegal, and given our country's (historic) moral stature,<sup>77</sup> we have a "special responsibility" to enforce the prohibition, as noted by the journalist Eyal Press.<sup>78</sup> We lead by example, and, without condemning torture ourselves, we cannot expect others to do so.<sup>79</sup> That condemnation must be more than rhetorical. Insisting that the United States does not torture is empty rhetoric if we make the claim while inflicting waterboarding on suspects.

Equivocating on torture not only causes us to lose moral standing on the international stage but also places our own soldiers at risk. As Professor Philip B. Heymann points out, if we approve torture in particular circumstances, other countries will do the same.<sup>80</sup> It was that concern that led us to accept Geneva Convention prohibitions on torture, despite the cost of obtaining information that "might save dozens of American lives."<sup>81</sup>

### III. YOO'S RECENT OP-ED

Yoo continues to view the Geneva Convention restrictions and other limits on the president's use of coercive techniques as wrong-headed and dangerous.<sup>82</sup> In his recent op-ed, Yoo laments that President Obama will likely "declare terrorists to be prisoners of war under the Geneva Convention," whereas the Bush Administration classified terrorists "like pirates, illegal combatants who do not fight on behalf of a nation and refuse to obey the laws of war."<sup>83</sup>

Alan Clarke argues that the demonization of an enemy, and the claim that some people are just "outside of the law," are

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<sup>77</sup> Cf. Chemerinsky, *supra* note 7, at 11 (noting our country's long history of condemning torture).

<sup>78</sup> Eyal Press, *In Torture We Trust?* in CIVIL LIBERTIES, *supra* note 1, at 228.

<sup>79</sup> *Id.*

<sup>80</sup> Philip B. Heymann, *Torture Should Not Be Authorized* in CIVIL LIBERTIES, *supra* note 1, at 217; *see also* Chemerinsky, *supra* note 31.

<sup>81</sup> *Id.* The notion that torture will save lives is a dubious proposition, moreover. "Torture subjects typically know less than what we think we know, and often tell us what we want to hear." Margulies, *supra* note 29, at 34; *see also* Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1173 (2001) ("In *Brown [v. Mississippi]*, involving torture] and other early cases, the Court clearly believed that innocent persons had been convicted, and that their confessions were unreliable"); cf. M. Katherine B. Darmer, *Miranda Warnings, Torture, the Right to Counsel and the War on Terror*, 10 CHAP. L. REV. 631, 654 (2007) (noting that the criminal justice system has taught us much "about the dangers and unfairness of coerced confessions").

<sup>82</sup> Yoo, *supra* note 20.

<sup>83</sup> *Id.*

elements of the creation of a torture culture.<sup>84</sup> “We inhabit a world of ‘us’ against ‘the evil doers’ which permits a torture culture to take hold. Al-Qaeda becomes equated with pirates and slave traders to be dealt with or extirpated at will.”<sup>85</sup> And as Eyal Press argues, torture is “a function not of brute sadism but of the willingness to view one’s enemies as something less than human.”<sup>86</sup>

Moreover, while some of those classified as “enemy combatants” have in fact been terrorists, others have not been.<sup>87</sup> In demonizing the enemy and acting as though we are justified in treating such a class of persons as “outside the law,” we run the grave risk that innocents will be victims, as they have been in the past. As Clarke points out, “[e]xperts estimate that eighty percent of people tortured by our forces and our South Vietnamese allies during the Vietnam War were wholly innocent people who were in the wrong place at the wrong time.”<sup>88</sup>

Clarke illustrates in his recent article, *Creating a Torture Culture*, that the use of torture is not easily cabined.<sup>89</sup> Rather:

Once started, torture and other abusive practices spread. Their logic cannot be easily contained. If it is right to torture in the extreme situation, what about a slightly less extreme case? . . . In every case, harsh practices can be justified on the ground that the person being questioned may harbor information that could save innocent lives.<sup>90</sup>

Relying on history and behavioral science studies, Clarke also points out that torture is a “true slippery slope.”<sup>91</sup> Most of us are capable of torture and, “in the absence of enforced prevention rules, systemic abuses become prevalent.”<sup>92</sup>

Even after Abu Ghraib and revelations about the extent to which waterboarding was used,<sup>93</sup> Yoo acknowledges no such risk of systemic abuse, focusing instead only on the risk attendant to

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<sup>84</sup> Clarke, *supra* note 3, at 18.

<sup>85</sup> *Id.*

<sup>86</sup> Press, *supra* note 78, at 223–24; *cf. generally* Hernández-López, *supra* note 16, at 139–41 (pointing out European and Western structures’ tendency to see non-Westerns as “others,” savages, or barbarians” and how this tendency excludes non-Westerners).

<sup>87</sup> See Chemerinsky, *supra* note 7, at 8 (noting mistakes made at Guantanamo Bay).

<sup>88</sup> Clarke, *supra* note 3, at 24.

<sup>89</sup> *Id.* at 21.

<sup>90</sup> *Id.* See also Luban, *supra* note 3, at 1445–46 (noting that torture is not limited to “one-off” decisions” and discussing the “normalization of torture”).

<sup>91</sup> Clarke, *supra* note 3, at 13.

<sup>92</sup> *Id.*

<sup>93</sup> Regarding recent new information about the extent of the use of waterboarding against two detainees, see note 53, *supra*.

foregoing harsh interrogation tactics.<sup>94</sup> With regard to waterboarding specifically, Professor Yoo adheres steadfastly to the view that it is a legitimate practice, acknowledging that President Bush authorized the practice three times and suggesting that President Obama acted precipitously and foolishly in terminating the CIA's "special authority to interrogate terrorists."<sup>95</sup> Yet even before Obama's inauguration, the Department of Justice OLC had "conceded that waterboarding [was] no longer legal" after the passage of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, albeit still claiming that the president could authorize waterboarding and other such techniques "in special circumstances."<sup>96</sup> In eschewing any authority for such practices, the new president is doing nothing more than agreeing to follow the law.

President Obama is also reclaiming some of the moral high ground lost when it was revealed that the United States had engaged in torture. While Yoo predicts that "Mr. Obama may have opened the door to further terrorist acts on U.S. soil by shattering some of the nation's most critical defenses,"<sup>97</sup> we can hope that he has instead begun the laborious process of reclaiming the country's moral standing on the international stage. As *Washington Post* columnist Richard Cohen wrote five years ago in response to the BYTAP Memo:

The Bush administration constantly reminds us that there's a war on. That's wrong. There are two. One is being fought by soldiers in combat, and the other is being fought for the hearts and minds of people who are not yet our enemies. However badly the administration has botched the first war . . . it has done even worse with the second. It has juted its chin to the world, appeared pugnacious and unilateralist, permitted the abuse of POWs and others at Abu Ghraib, and now toyed in some fashion with torture. The Bush administration has shamed us all, reducing us to the level of those governments that also have wonderful laws forbidding torture, but condone it anyway.<sup>98</sup>

It is notable that Yoo's opinion piece adhering to the view that waterboarding is an indispensable tool in the War on Terror was written more than eight years after the tragic events of 9/11;

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<sup>94</sup> Yoo, *supra* note 20. At the Chapman debate held April 21, 2009, at which time it was known that waterboarding had been used against one detainee 183 times and against another, 83 times, *see* note 53, *supra*, Yoo remained sanguine regarding its use.

<sup>95</sup> *Id.*

<sup>96</sup> Clarke, *supra* note 3, at 3.

<sup>97</sup> Yoo, *supra* note 20.

<sup>98</sup> Cohen, *supra* note 1, at 318–19.

it was not written under the same pressures that Yoo and others faced when they first advocated a narrow definition of “torture” when advising the Administration.<sup>99</sup> In other words, even after considerable reflection and presumably after considering the virtual cottage industry that has developed to criticize Yoo’s wartime memos, Yoo remains strident in defense of his first instincts.

#### CONCLUSION

Fortunately, the majority of academics and lawyers acted quickly and decisively to illustrate the dangers of instincts that would act to grab power and inflict torture in the name of making us safer. Not only was the BYTAP Memo formally withdrawn by the Justice Department, but it has been thoroughly deconstructed and criticized by an army of academics.

In the opening quote of his piece, *In Torture We Trust?*, Eyal Press quotes from John-Paul Sartre: “If patriotism has to precipitate us into dishonour, if there is no precipice of inhumanity over which nations and men will not throw themselves, then, why in fact do we go to so much trouble to become, or to remain, human?”<sup>100</sup> Indeed.

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<sup>99</sup> Yoo, *supra* note 20.

<sup>100</sup> Press, *supra* note 78, at 219.