Testimony of
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"What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration"

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The purpose of this testimony is to provide information from a legal perspective on the issue of "enhanced interrogation practices" used on certain al-Qa'eda operatives by CIA interrogators during the Bush Administration as approved in the recently released memorandums from the Office of the Legal Counsel, Department of Justice. In the context of the approved interrogation methodologies, the primary concern is associated with the CIA's use of "waterboarding" on at least three al-Qa'eda high value detainees.

Since the al-Qa'eda detainees are not entitled to prisoner of war status, international law does not forbid interrogation. The American position - both in the Bush Administration and the Obama Administration - on the question of torture is that the United States does not engage in torture, either in questioning or housing detainees. One matter is fundamentally certain: if al-Qa'eda is to be kept at bay, the United States must rely on detainee interrogation as an integral antiterrorist tool. The need for the interrogator to get information to protect the lives of innocents is a legitimate and perfectly

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lawful exercise. By its very nature, even the most reasonable interrogation places the detainee in emotional duress and causes stress to his being—both physical and mental.

On September 6, 2006, the DOD issued its new military detainee and terror suspect treatment guidelines. The DOD Directive 2310.01E is entitled: The Department of Defense Detainee Program. In announcing the new rules, President Bush also informed the public that 14 "high value" terror suspects had been transferred from undisclosed CIA locations to Guantanamo Bay. This speech was the first official acknowledgement of the existence of the previously secret CIA detainee program. President Bush said that the CIA program had been authorized by a secret presidential directive issued on September 17, 2001. Relating that the program was subject to internal legal review by the Department of Justice, the Bush Administration promoted the legal view that the CIA detainees were wartime detainees held under the law of war. Believing that the CIA program had "saved lives," President Bush confirmed that with the transfer of the 14 there were "now no terrorists in the CIA program." Further, the Bush Administration denied that any of the CIA detainees were subjected to interrogation techniques that violated international or domestic law. The "waterboarding" interrogation technique used on a handful of detainees in the CIA program was viewed as constituting a level of force that did not rise to the level of torture under the Torture Convention.

Allegations of "torture" role off the tongue with ease. Recognizing that not every alleged incident of interrogation or mistreatment necessarily satisfies the legal definition of torture, it is imperative that one view such allegations with a clear understanding of the applicable legal standards set out in law and judicial precedent. In this manner, allegations or claims of illegal interrogation practices, e.g., waterboarding, can be properly measured as falling above or below a particular legal threshold. In my legal opinion, the so-called enhanced interrogation practices detailed in the subject legal memorandums did not constitute torture under international law or U.S. domestic law.

Torture as an instrument of the State to either punish or extract information from certain individuals has a long and dark history which need not be fully recounted here. Suffice it to say that in the West, the practice can be traced to the Romans who codified the use of torture as part of the Roman criminal law. In the modern era, by fixed law and customary

practice, the prohibition on torture is now universal in nature. Nevertheless, even though no State allows torture in its domestic law, the practice continues to flourish. It is estimated that one in four States regularly engages in the torture of various prisoners and detainees. Added to this paradox is the dilemma that some of the acts that should clearly constitute torture do not enjoy a uniformity of definition within the international community. As one legal commentator rightly pointed out, "The prohibition of torture … is not, itself, controversial. The prohibition in application, however, yields endless contention as each perpetrator [State actor] seeks to define its own behavior so as not to violate the ban."

Before exploring the common international legal definition of torture, it is useful to survey the general understanding of the term. Torture comes from the Latin verb "torquere" (to twist) and is defined in leading dictionaries as follows: "Infliction of severe physical pain as a means of punishment or coercion;" "[t]he act of inflicting excruciating pain, as punishment or revenge, as a means of getting a confession or information, or for sheer cruelty;" "[t]he infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure."

Certainly the red thread in these definitions is a combination of two essential elements: (1) the infliction of severe physical pain to the body or mind used to; (2) punish or obtain information. International law adopts this formula but sharpens it by stipulating that a State actor must carry out the act of torture. Thus, one may describe certain criminals as torturing their victims during the commission of a particularly gruesome murder, but such criminal acts carried out by non-State actors are not violations of the international law on torture. In addition, international law expands the prohibition of torture to include other less abusive acts commonly designated in the world community as "other acts of cruel, inhuman, or degrading treatment or punishment," which is shortened simply to "ill-treatment."

Currently, the 1984 United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) is the primary international agreement governing torture and ill-treatment. As suggested by the title, the point which had served as a source of controversy in earlier international treaties and agreements was more fully addressed in the Torture Convention—the distinction between "torture" and "other acts of cruel, inhuman, or degrading treatment or punishment."

While both acts were previously prohibited in other documents and conventions, for the first time the Torture Convention spelled out the obligations and consequences attendant to each type of act. Still, the Torture Convention did not exhibit the same care in defining what it meant by ill-treatment as it did with regard to torture. Without question, the Torture Convention devoted far more attention to crafting the meaning of the term torture, which it defined as:

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

According to the Torture Convention, for torture to exist in the context of an interrogation the following criteria must be present: (1) the behavior must be based on an intentional act; (2) it must be performed by a State agent; (3) the behavior must cause severe pain or suffering to body or mind; and (4) it must be accomplished with the intent to gain information or a confession. In adopting the Torture Convention, the United States Senate provided the following reservations which require specific intent and better define the concept of mental suffering:

> [T]he United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be 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.

Since Article 2 of the Torture Convention absolutely excludes the notion of exceptional circumstances to serve as an excuse to the prohibition of torture. Indeed, if any of the CIA's enhanced interrogation techniques are deemed to be torture, the United States must prosecute those who ordered the acts, those who approved the acts, and well as those who performed the acts. Article 2 states: "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 for torture."

As noted, the phrase "other acts of cruel, inhuman, or degrading treatment or punishment," e.g., "ill-treatment," is not defined in the Torture Convention. It is just stated. Nevertheless, the Torture Convention certainly obliges each State party to the document to "undertake to prevent … other acts of cruel, inhuman, or degrading treatment or punishment." Article 16 of the Torture Convention is the only part of the treaty that addresses ill-treatment.

Since the Torture Convention desires to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world," the distinction rests in the fact that torture and ill-treatment are viewed as two limbs of the same formula with torture, quite understandably, being predominant. Thus, while all acts of torture must necessarily include ill-treatment, not all acts of ill-treatment constitute torture. Clearly, a greater stigma is associated with the insidious evil of torture so that all intuitively realize that international law forbids torture, even if few are cognizant of the fact that ill-treatment is also prohibited. In turn, interrogation practices that do not rise to the level of ill-treatment may be repugnant by degree, but would be perfectly legal under the Torture Convention (such conduct may still be a violation of other national or international laws such as Common Article 3 of the Geneva Conventions which prohibits "humiliating and degrading treatment").

Article 4 of the Torture Convention requires each State Party to ensure that torture is a criminal offense under its domestic criminal law. Currently, torture is defined in 18 U.S.C. § 2340 as:

> [A]n act committed by a person acting under the color of the 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.

18 U.S.C. § 2340A makes it a federal offense for an American national to either commit or attempt to commit torture outside the United States. Unfortunately, case law on this statute is so lacking that there exists no firm guidance as to which techniques would be considered torture.

Article 12 dictates that each State Party investigate any allegations of torture under its jurisdiction when reasonable grounds exist to believe that such acts have occurred. Article 7 further requires the State Party to either extradite the alleged torturer or "submit the case to competent [domestic] authorities for the purpose of prosecution." Also, Article 15 excludes all statements elicited through torture from evidence, while Article 14 requires the State Party to make compensation to the victims of torture.

In contrast, Article 16 has no similar requirements mandating that ill-treatment be criminalized in domestic penal codes, requiring the prosecution of individuals charged with ill-treatment, or limitations on "illegal rendition." In addition, Article 16 has no requirement that victims of ill-treatment be compensated or that statements obtained as the fruit of ill-treatment must be excluded from evidence at a criminal trial. According to commentator Matthew Lippman, "[t]he failure to strengthen article [sic] 16 appears to have been based on a belief that the concept of cruel, inhuman or degrading treatment or punishment was too vague a legal standard upon which to base legal culpability and judgments."

Real world enforcement mechanisms to ensure compliance with the Torture Convention's prohibition of torture and ill-treatment are weak. This is because the individual State Party is expected to police itself and, if this fails, the only remaining hope for meaningful pressure is international condemnation from the court of world opinion. While the Torture Convention did create an investigatory body called the Committee Against Torture, its responsibilities revolve around a complex maze of reports and recommendations which, as one might anticipate, have generally accomplished very little. In fact, the biggest stick that the Committee Against Torture wields is the threat that it may provide an unfavorable

summary of a particular country in its yearly report. As always, the chief enforcement tool in a democracy is the rule of law coupled with the judgment of its citizens - civilized peoples are repulsed by the concept of torture.

In the Anglo-Saxon legal tradition, we generally look to authoritative judicial decisions to define key terms in treaty and legislation. Perhaps the leading international case in the realm of defining "severe pain or suffering" in the context of interrogation practices against suspected "terrorists" comes from the often cited European Court of Human Rights ruling, *Ireland v. United Kingdom*.[2] By an overwhelming majority vote (16-1), the *Ireland* court found certain interrogation practices (called the "five techniques") by English authorities to investigate suspected terrorism in Northern Ireland to be "inhuman and degrading," i.e., ill-treatment, under the European Convention on Human Rights, but not severe enough to rise to the level of torture (13-4). According to the Court, the finding of ill-treatment rather than torture "derives principally from a difference in the intensity of the suffering inflicted." In *Ireland*, the Court considered the use of five investigative measures known as "the five techniques" which were practiced by British authorities for periods of "four or five" days pending or during interrogation sessions.

- Wall-standing: Forcing the detainees to stand for some period of hours in a stress position described as "spreadeagled against the wall, with their fingers put high above their head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers." Wall-standing was practiced for up to 30 hours with occasional periods for rest.
- Hooding: Placing a dark hood over the head of the detainee and keeping it on for prolonged periods of time except during interrogation.
- Subjection to noise: Holding the detainees in a room where there was a continuous loud and hissing noise.
- Deprivation of Sleep: Depriving detainees of sleep for prolonged periods of time.
- Deprivation of Food and Drink: Reducing the food and drink to suspects pending interrogations.

[2] *Ireland vs. United Kingdom*, 2 EHRR 25 (1978).

To the reasonable mind, considering the level of interrogation standards set out in the *Ireland* case, the conclusion is clear. Even the worst of the CIA techniques authorized by the Department of Justice legal memorandums – waterboarding – would not constitute torture (the CIA method of waterboarding appears similar to what we have done hundreds and hundreds of times to our own military special operations soldiers in military training courses on escape and survival).

Another source of guidance to distinguish a lawful interrogation from an interrogation that crosses the line into ill-treatment or torture is found in the 1999 Israeli High Court decision entitled *Public Committee Against Torture v. State of Israel.*[3] In the context of outlawing certain interrogation practices by Israeli officials, the High Court considered how otherwise reasonable interrogation practices could become illegal if taken to an extreme point of intensity. Playing music to disorient a subject prior to questioning is not illegal per se, but if the music is played in a manner that causes undue suffering, it is arguably a form of ill-treatment or torture. Depriving subjects of sleep during a lengthy interrogation process may be legitimate, but depending on the extent of sleep deprivation, could also constitute ill-treatment or torture. The use of handcuffing for the protection of the interrogators is a common and acceptable practice, so long as the handcuffs are not unduly tightened so as to cause excess pain. Similarly, the use of blindfolds is acceptable if done for legitimate security reasons, while the use of sacks over the head without proper ventilation is unacceptable.

The Supreme Court of Israel found that the primary techniques used by the Israeli General Security Service (GSS) involved the following:

- Shaking: The practice of shaking was deemed to be the most brutal and harshest of all the interrogation methods. The method is defined as "the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly."
- Shabach Position: The practice of binding the subject in a child's chair "tilted forward towards the ground, in a manner that causes him real pain and suffering." Other reports amplify the method and add that the subject's head is "covered in a hood while powerfully deafening music is emitted within inches of the suspect's head."

[3] *Public Committee Against Torture v. Israel*, H.C.J. 5100/94 (1999).

- Frog Crouch: The practice of making the subject crouch on the tips of their toes for five-minute intervals.
- Excessive Tightening of Handcuffs: The practice of inflicting injury to a suspect by excessive tightening of handcuffs or through the use of small handcuffs.
- Sleep Deprivation: The practice of intentionally keeping the subject awake for prolonged periods of time.

In ruling that there existed an absolute prohibition on the use of torture as a means of interrogation, the Israeli Supreme Court held some of the practices of the GSS violated Israel's Basic Law—Human Dignity and Liberty. Specifically, the Court found that shaking, the use of the shabach, the use of the frog crouch, and, in certain instances, the deprivation of sleep, were all illegal and prohibited investigation methods.

In tandem with international law, U.S. domestic law prohibits torture. The American experience has not been guiltless in terms of the sanctioned use of torture and ill-treatment to elicit confessions in criminal investigations, particularly in the early part of the last century. By 1931, the appalling practice of torture by local law enforcement had become so common throughout the nation that a special government fact-finding commission was set up to investigate the matter. The Wickersham Commission issued a report on abusive police interrogation practices that not only educated the public, but also energized the United States Supreme Court to hand down a string of cases in which police interrogation abuses that "shocked the conscience" of the Court were equated with torture. The developed case law employ the subjective "shock the conscience" standard, taken from the 1952 case of *Rochin v. California*,[4] for determining when the police cross the threshold for conduct that violates the Fourteenth Amendment. In *Rochin*, police officers witnessed the defendant swallow two capsules which they suspected were illegal substances. Rochin was handcuffed and taken to a hospital where a doctor forced an emetic solution through a tube into Rochin's stomach and against Rochin's will. Rochin vomited two morphine capsules and was subsequently convicted. Overturning the conviction, the Supreme Court held that obtaining evidence by methods that are "so brutal and so offensive to human dignity" stands in violation of the Fourteenth Amendment's due process clause:

[4] *Rochin v. California*, 342 U.S. 165 (1952).

> [W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that *shocks the conscience* …. They are methods too close to the rack and screw to permit of constitutional differentiation [emphasis added].

In the 2003 case of *Chavez vs. Martinez*,[5] which dealt with the interrogation of a suspect who had just been shot in the face numerous times by a police officer and was receiving emergency medical treatment, at least five of the justices apparently were not "shocked" that Sergeant Chavez engaged in a repetitive interrogation even though Martinez was suffering "excruciating pain." Writing for the majority, Justice Thomas wrote that "we cannot agree with Martinez's characterization of Chavez's behavior as egregious or conscience shocking." The fact that Chavez did not interfere with medical treatment and did not cause the pain experienced by Martinez (the bullet wounds to Martinez occurred prior to and totally apart from the questioning process) were certainly important factors which influenced some, but not all, of the justices. Expressing an opposite view on the matter, Justice Stevens saw the interrogation conducted by Sergeant Chavez as tantamount to torture and a clear violation of the Fourteenth Amendment:

> As a matter of fact, the interrogation of respondent was the functional equivalent of an attempt to obtain an involuntary confession from a prisoner by torturous methods. As a matter of law, that type of brutal police conduct constitutes an immediate deprivation of the prisoner's constitutionally protected interest in liberty.

Interestingly, the *Chavez* Court refused to even acknowledge the existence of the Torture Convention and its place in the matter of coercive interrogations.

In discussing the threshold for shocking the conscience, the Court in *County of Sacramento v. Lewis*[6] "made it clear that the due process guarantee does not entail a body of constitutional law imposing liability

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[5] *Chavez v. Martinez*, 538 U.S. 760 (2003).
[6] County of Sacramento v. Lewis, 523 U.S. 833 (1988).

whenever someone cloaked with state authority causes harm." Indeed, "[i]n a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."

An equally important aspect of *Lewis* centered on the Court's view that not only does the conduct have to be egregious, but that "conduct intended to injure in some way unjustifiable by any government interest is the sort of an official action most likely to rise to the conscience-shocking level." This means that the Court will provide greater deference if the government can demonstrate a justification for its conduct based on the totality of the circumstances. The stronger the justification, the more flexibility allowed.

This deference factor certainly played out in a 1966 Ninth Circuit case entitled *Blefare v. United States*.[7] In a fact pattern similar to *Rochin*, the appellants were suspected of swallowing narcotics which were lodged in their rectums or stomachs. Appellants were searched by U.S. officials at a border crossing from Mexico into the United States where they consented to a rectal probe by a doctor. When the rectal probe found no drugs, a "saline solution was … given the appellants to drink to produce vomiting." Blefare, one of the suspects, "was seen by the doctor to have regurgitated an object and reswallowed it." Then, without Blefare's consent the doctor forcefully passed a soft tube into the "nose, down the throat and into the stomach," through which fluid flowed in order to induce vomiting. This resulted in the discovery of packets of heroin and the subsequent conviction of Blefare.

Unlike *Rochin*, the Ninth Circuit refused to hold that the involuntary intrusion into Blefare's stomach shocked the conscience. Arguably, the ruling hinged on the fact that the State had an important governmental interest in keeping heroin from entering the United States. In the Court's view, it would have been shocking had they overturned the conviction based on the due process clause. On the contrary, the Court felt that it would "shock the conscience" if Blefare's conviction were set aside:

> It would shock the conscience of law abiding citizens if the officers, with the knowledge these officers had, were frustrated in the recovery and use of this evidence. It is shocking to know that these appellants swallowed narcotics to smuggle it into and

[7] *Blefare v. United States*, 741 F.2d 870 (9th Cir. 1966).

> through the United States for sale for profit …. If we were mechanically to invoke Rochin to reverse this conviction, we would transform a meaningful expression of concern for the rights of the individual into a meaningless mechanism for the obstruction of justice.

To be sure, there are a number of cases that proponents of coercive questioning techniques can cite to buttress the view that in exigent circumstances the police may be obliged to use force to get life saving information. For instance, in *Leon v. Wainwright*[8] the Eleventh Circuit brushed aside the fact that police officers had used "force and threats" on kidnap suspect Jean Leon in order to get the suspect to reveal the location of his victim. When apprehended by a group of police officers in a Florida parking lot, Leon refused to reveal the location of his kidnap victim (the victim, Louis Gachelin, had been taken by gunpoint to an apartment where he was undressed and bound). In order to get the suspect to talk, police officers then physically abused Leon by twisting his arm and choking him until he revealed where the kidnap victim was being held. In speaking to the use of brutal force to get the information needed to protect the victim, the Court deemed that the action of the officers was reasonable given the immediate concern to find the victim and save his life.

> We do not by our decision sanction the use of force and coercion by police officers. Yet this case does not represent the typical case of unjustified force. We do not have an act of brutal law enforcement agents trying to obtain a confession in total disregard of the law. This was instead a group of concerned officers acting in a reasonable manner to obtain information they needed in order to protect another individual from bodily harm or death.

Finally, many legal scholars who understand the threat of al-Qa'eda-styled terrorism often paraphrase with approval former Supreme Court Justice Jackson's observation that "the Constitution is not a suicide pact." One issue that gains a tremendous amount of attention in this debate is how to deal with a suspected terrorist in a "ticking time bomb scenario." Even noted civil rights advocates like Harvard law professor Laurence Tribe

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[8] *Leon v. Wainwright*, 734 F2d 770 (11th Cir. 1984).

understand that the landscape has changed. After 9/11 he wrote: "The old adage that it is better to free 100 guilty men than to imprison one innocent describes a calculus that our Constitution—which is no suicide pact—does not impose on government when the 100 who are freed belong to terrorist cells that slaughter innocent civilians, and may well have access to chemical, biological, or nuclear weapons."

Different commentators have varying turns on the theme of the ticking time bomb, but it commonly goes something like this. Suppose a terrorist suspect is taken into custody in a major city and is found to be in possession of bomb-making materials and detailed maps of the downtown area. The terrorist blurts out to police that he is a member of al-Qa'eda and that a car bomb is on a timer set to detonate in ten hours (the time he had estimated he could safely get away from the blast). The suspect then demands a lawyer and refuses to answer any more questions. Of course, law enforcement may legitimately ignore his demands and conduct a reasonable interrogation as long as they do not engage in torture. But what if reasonable interrogation techniques yield no information—the suspect refuses to talk? This Hobson's choice poses one of the strongest arguments for the use of non-lethal torture.

Given the premise of the ticking time bomb scenario, it is difficult to portray oneself as a centrist—either one uses whatever means necessary to get the information to stop the blast or one simply allows the slaughter of innocent civilians. Should a reasonable law enforcement officer with a spouse and children residing in the blast zone simply resign himself to the fact that they are all going to perish since it is unlawful under both international and domestic law to use torture? Or is it more likely that the law officer faced with this scenario would in fact engage in torture and argue the defense of necessity at a subsequent criminal trial?

Indeed, despite its absolute stance rejecting the legality of moderate physical pressure and the associated administrative directives promulgated to regulate the use of moderate physical pressure *vis a vis* the interrogation of terrorist suspects, the Supreme Court of Israel in *Public Committee* went on to recognize the defense of necessity if individual GSS investigators were charged with employing such prohibited interrogation techniques in the case of a ticking time bomb scenario. Citing Israeli penal law regarding necessity—engaging in illegal conduct in order to promote a greater good—the Court recognized that GSS interrogators would have the right to raise the defense of necessity in a subsequent prosecution. The Court stated that

"[o]ur decision does not negate the possibility that the 'necessity' defense be available to GSS investigators [in ticking time bomb scenarios] … if criminal charges are brought against them, as per the Court's discretion." The Court said that "if a GSS investigator—who applied physical interrogation methods for the purpose of saving human life—is criminally indicted, the 'necessity' [defense] is likely open to him in the appropriate circumstances."

Actually, the Israeli High Court seemed to anticipate that any reasonable GSS investigator, charged with protecting innocent lives, would apply "physical interrogation methods for the purpose of saving human life" when confronted with a ticking time bomb terrorist. In other words, GSS investigators would use whatever means necessary to avert the explosion of the bomb. The Court noted, however, that the threat of the explosion must be a "concrete level of imminent danger:"

> [The] "necessity" exception is likely to arise in instances of "ticking time bombs," and that the immediate need … refers to the imminent nature of the act rather than that of the danger. Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, provided the danger is certain to materialize and there is no alternative means of preventing its materialization. In other words, there exists a concrete level of imminent danger of the explosion's occurrence.

The defense of necessity is a doctrine well-known to the common law. It is defined as "[a] justification defense for a person who acts in an emergency that he or she did not create and who commits a harm that is less severe than the harm that would have occurred but for the person's actions." Professor Wayne Lafave's criminal law text amplifies this definition by explaining that "the harm done is justified by the fact that the action taken either accomplished a greater good or prevented a greater harm."

The general understanding of the necessity defense at common law was that it was in response to circumstances emanating from the forces of nature and not from people. "With the defense of necessity, the traditional view has been that the pressure must come from the physical forces of nature (storms, privations) rather than from human beings." When the pressure is from human beings, the defense, if applicable, is duress, not necessity.

In the modern era, the distinction between the pressure coming from nature or human beings has merged. According to Lafave, defense of necessity extends to both instances.

> [T]he reason is of public policy: the law ought to promote the achievement of high values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law …. The matter is often expressed in terms of choice of evils: when the pressure of circumstances presents one with a choice of evil, the law prefers that he avoid the greater evil by bringing about the lesser evil.

Prior to *Public Committee*, the government of Israel had taken the unusual step of trying to regulate the use of torture if not by means of a judicial torture warrant, then by administrative rules. In short, the government directives had provided a justification defense to an interrogator who engaged in torture. This practice was struck down as unlawful. A similar move to regulate torture in the United States would certainly meet the same end—a democracy cannot sanction torture. Once it does, it has abandoned the moral high ground; it is no longer a democracy. Whether justification flows from the legislative, executive, or judicial branch, it is anathema to a freedom loving people.

Drawn from the Israeli approach in *Public Committee*, a defense of necessity would require the defendant to satisfy a four pronged test: (1) the investigator had reasonable grounds to believe that the suspect had direct knowledge which could be used to prevent the weapon from detonating; (2) that the weapon posed an imminent danger to human life; (3) that there existed no alternative means of preventing the weapon from exploding; and (4) that the investigator was acting to save human life.

In conclusion, those who order, approve, or engage in torture must be criminally charged. If the United States determines that waterboarding as practiced by the CIA is torture, there is no option. Under the Torture Convention violators must be prosecuted. Similarly, lawyers at the Department of Justice who approved the practice must also be prosecuted. As discussed, however, the CIA enhanced interrogation techniques approved in the subject legal memorandums puts one in an ambiguous zone, a zone

unknowable without firm judicial guidance. As foreboding as the term enhanced interrogation techniques may sound, there are many techniques that involve acts which are clearly permissible under any analysis. For example, one would be hard pressed to argue that the reported use of female interrogators, trickery, or a day long interrogation session would constitute a prima facie case of torture or even ill-treatment as some have suggested. Further, based on the majority decision in the *Ireland* case, one cannot simply conclude that the use of waterboarding, or bugs, or positioning of a particular detainee violates legal norms. In short, in my legal opinion, the subject waterboarding technique used on the al-Qa'eda operatives did not constitute torture and requires no binding obligation to prosecute.

The War on Terror provides Americans an opportunity to reexamine much of what this nation represents to the world. The War on Terror is not simply about putting steel on target, it is a propaganda war as well. While it is necessary to assess the decisions related to the use of enhanced interrogation of certain al-Qa'eda operatives, it is not useful to drag the process out. Nevertheless, those who believe that the United States can defend freedom by subverting the rule of law are as misguided as those who demand that the government fight the War on Terror with our heads in the sand. As such, I applaud the work of this committee and look forward to assisting in the process.

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