

Can the President Be Torturer in Chief?

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It is a very great honor to be back in Bloomington, which I last visited when I delivered the 1998 Addison Harris Lecture on the subject of how international human rights law is enforced.¹

As I prepared to return today, I was struck—despite the passage of time—by how closely connected are my topics then and now. In the Harris Lecture, I asked a simple question: How should we understand the process of international human rights enforcement? I argued that there are not one, but two human rights enforcement stories. For shorthand purposes, I call these the “horizontal story” of human rights enforcement and the story that more people should understand: the “vertical” or “transnational story” of human rights enforcement.

I. THE TRANSNATIONAL STORY OF HUMAN RIGHTS ENFORCEMENT

The traditional horizontal story is told at the level of the nation-state and focuses on how human rights rules are enforced by nations against other nations on an intergovernmental plane. It is concerned with how nations and intergovernmental organizations pressure one another to comply with human rights norms. In this horizontal story, the key actors are nation-states and intergovernmental organizations. The rules are largely declaratory or peremptory and the few mechanisms that are created generally have very little enforcement bite. So despite occasional successes, this horizontal story of human rights enforcement is largely a tale of impotence and ineffectiveness.

This traditional story should be contrasted with a vertical or transnational enforcement story, which focuses on what I call “transnational legal process.” This story includes a different set of actors, fora, and transactions. Transnational legal process highlights the interactions among both private citizens, whom I call “transnational norm entrepreneurs,” and governmental officials, whom I call “governmental norm sponsors.” The interaction among transnational norm entrepreneurs and governmental norm sponsors create transnational networks and law-declaring fora, which create new rules of international law. Gradually those international law rules trickle down from the international level and become

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1. Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999).

internalized into governmental operations, usually through bureaucratic compliance procedures.

Perhaps the paradigmatic example of vertical enforcement is the recent creation of a rule against anti-personnel landmines.² Before 1990, there was neither a mechanism to prevent the spread of anti-personnel landmines nor any norm against it. But in the early nineties, a group of private citizens, non-governmental norm entrepreneurs, led by Jody Williams, now a Nobel Peace Prize winner, decided to create a transnational network, the International Campaign to Ban Landmines, whose goal was the global elimination of landmines. This organization then enlisted the support of two governmental actors: Senator Patrick Leahy, who introduced a bill in Congress to prohibit for a specified period the export of landmines by the United States, and then-Canadian Foreign Minister Lloyd Axworthy, who convened a new law-declaring forum known as the Ottawa Process.³ Over time, a number of other prominent private individuals and organizations, such as Princess Diana, Pope John Paul II, and the International Committee of the Red Cross, joined the anti-landmine campaign. Through the Ottawa Process, an agreement was created—the new Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction.⁴ This Convention has come to be signed by more than 120 countries and the United States itself was soon forced to address it. In time, the global norms of the anti-landmine campaign trickled down into U.S. domestic law and policy. So, through this vertical story, these international norms were internalized into American policy and practice. As of today, the U.S. landmine policy calls for the United States to “eliminate all persistent landmines from its arsenal; . . . seek a worldwide ban on the sale or export of all persistent landmines; get rid of its non-detectable mines . . . [and commit not to] use any landmines—anti-personnel [or] anti-vehicle—anywhere [in the world] after 2010.”⁵ This evolution in U.S. landmines policy, I submit, is a triumph of international human rights enforcement.

In short, the horizontal story of human rights enforcement gives only part of the picture. But when you combine the horizontal story (norms being created at the intergovernmental level) with the vertical story (norms trickling down and becoming internalized into domestic law), you see that the glass is at least half-full. Casual observers tend to conclude that international human rights law is not well enforced, because they miss the vertical story. They overlook what I call a story of “interaction, interpretation, and internalization”—whereby a party who wants a human rights norm

2. For a fuller discussion of the Landmines Convention episode, from which this discussion derives, see Harold Hongju Koh, *1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

3. See Raymond Bonner, *How a Group of Outsiders Moved Nations to Ban Land Mines*, N.Y. TIMES, Sept. 20, 1997, at A5; Francis X. Clines, *28-Year Quest to Abolish Land Mines Pays off for Veteran, Who Fights On*, N.Y. TIMES, Dec. 3, 1997, at A10 (stating that Senator Leahy’s initiative placed the United States in the forefront of the landmine debate); Dana Priest, *56 in Senate to Press for Law Banning Use of Land Mines by U.S.*, WASH. POST, June 12, 1997, at A12 (recording the lengths Senator Leahy went in lobbying for the anti-landmine legislation).

4. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507.

5. See U.S. Dep’t of State, Office of Weapons Removal & Abatement, U.S. Landmine Policy, <http://www.state.gov/t/pm/wra/c11735.htm> (last visited Mar. 25, 2006).

to be enforced triggers an interaction, forces an interpretation of the law, and then persuades a nation-state to internalize that interpretation as a matter of domestic law.

Take another “vertical” example—the example that first inspired my own understanding of this transnational legal process—when the Reagan Administration was supporting the Nicaraguan Contras in their struggle against the Sandinistas in the 1980s. It came to light that the U.S. government was secretly mining the harbor of the Port of Corinto. If Nicaragua had objected to this at the intergovernmental level, namely through diplomatic protest or other kinds of protests at the United Nations or other fora, its objections would have very likely been ignored and nothing would have come of it. Instead Nicaragua triggered a legal interaction—it filed a lawsuit against the United States at the International Court of Justice⁶—in an effort to generate an interpretation that the United States was in violation of the law, which then could be internalized into the laws of the United States.⁷

Nicaragua asked for and the I.C.J. indicated provisional measures, a kind of interim order, which interpreted international law to direct the United States to stop mining the harbors. Although the order was not legally binding, the interpretation “trickled down,” and the U.S. Congress eventually included in its aid package provisions that made future aid to the Contras contingent upon obedience to the World Court’s ruling.⁸ In effect, Congress internalized the World Court’s ruling into U.S. law. Almost immediately, the Reagan Administration stopped mining the harbors.⁹ In short, this vertical story is another tale of how private citizens and governmental norm sponsors can work together to create networks, and to generate interpretations of law in law-declaring fora, which can then become internalized into domestic law rules which nations will obey.

II. TORTURE: FROM ZERO TOLERANCE TO ZERO ACCOUNTABILITY

Almost immediately after I gave the Harris Lecture, I became Assistant Secretary of State for Democracy, Human Rights and Labor in the Clinton Administration. In that capacity, as the State Department’s top human rights official, I spent the next few years traveling around the world to some fifty-five countries promoting the cause of human rights. In 2000, I went to Geneva to present to the Committee Against Torture the United States’ first report about its compliance with the Convention Against Torture.¹⁰ In the parlance I have used above, we went to a horizontal forum to make a presentation to an intergovernmental agency. Previously we had received reports from

6. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 16 (June 27), reprinted in 25 I.L.M. 1023, 1024 (1986).

7. Nicaragua’s suit was filed by Abram Chayes, a professor of international law at Harvard Law School and a former Legal Advisor at the State Department. For a complete discussion of this incident, see generally Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985).

8. See David Rogers, *House Adopts Resolution to End U.S. Role in Mining of Nicaraguan Ports, Waters*, WALL ST. J., Apr. 13, 1984, at 62.

9. Reportedly, upon being told of the aid cutoff, Professor Chayes said, “We just got our provisional measures from Congress.”

10. *Convention Against Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment*, Dec. 10, 1984, 14 U.N.T.S. 85, 23 I.L.M. 1027 (entered into force June 26, 1987).

almost every U.S. governmental agency reporting that the United States does not torture and opposes torture unequivocally as an instrument of state policy. With the agreement of all interested agencies of the U.S. government, I told the Committee Against Torture that “as a country we are unalterably committed to a world without torture.”¹¹ With the concurrence of all interested agencies of the United States government, I told the Committee:

Our country was founded by people who sought refuge from severe governmental repression and persecution and who, as a consequence, insisted that a prohibition against the use of cruel or unusual punishment be placed into the Bill of Rights. As our report today notes, ‘Torture is [now] prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. In every instance, torture is a criminal offense. No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification for torture.’¹²

In short, if asked what the United States’ policy was on torture in 2000, I would have answered that ours was a “zero-tolerance” policy.

But today, sadly, the U.S. government seems to have not one, but two policies, on torture. On the one hand, as President Bush said in June 2004:

Today . . . the United States reaffirms its commitment to the world-wide elimination of torture. . . . Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law.

. . .

To help fulfill this commitment, the United States has joined 135 other nations in ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction. American personnel are required to comply with all U.S. laws, including the United States Constitution, Federal statutes, including statutes prohibiting torture and our treaty obligations with respect to the treatment of all detainees.¹³

At least in public rhetoric, then, our policy regarding torture remains one of zero tolerance.

But how, then, do we account for Abu Ghraib? How shall we understand the daily reports of torture emerging from the media? Something very different seems to be

11. Statement of Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights and Labor, On-the-Record Briefing on the *Initial Report of the United States of America to the UN Committee Against Torture*, Washington, D.C., Oct. 15, 1999, available at http://www.state.gov/www/policy_remarks/1999/991015_koh_rpt_torture.html.

12. *Id.*

13. President George W. Bush, Statement on the U.N. International Day in Support of Victims of Torture, June 26, 2004, available at <http://whitehouse.gov/news/releases/2004/06/20040626-19.html>.

happening in the shadowy areas of U.S. foreign policy. Torture is being committed in our name.

Human Rights Watch, for example, has chronicled that the U.S. Army's 82nd Airborne Division regularly engaged in acts of torture and cruel treatment.¹⁴ Reports from foreign legal experts allege that U.S. officials are using or supporting the extraordinary rendition of detainees to other countries where they are allegedly subjected to torture.¹⁵ Guantánamo is a place in which allegations of torture and cruel and inhuman or degrading treatment are rampant. And even more shocking is the fact that lawyers trained at law schools across America are providing legal justifications for these activities.

We all know now, for instance, of the now infamous August 1, 2002 memorandum opinion sent from then-Assistant Attorney General Jay S. Bybee of the Office of Legal Counsel (OLC) to then-Counsel to the President Alberto R. Gonzales regarding coercive interrogation tactics ("Bybee Opinion" or "Opinion").¹⁶ The OLC of the United States Department of Justice is the most important legal office in the United States government, for it authoritatively determines the executive branch's legal position on matters not in litigation.¹⁷ The Bybee Opinion, which was apparently requested in early summer 2002 by Mr. Gonzales as White House Counsel, explores the question whether U.S. officials can use tactics tantamount to torture against suspected terrorists, without being held liable under a federal statute that criminalizes torture.¹⁸

The Bybee Opinion effectively answers that question "yes." The Opinion essentially concludes that American officials, despite the standing zero-tolerance policy against torture, can use tactics that are tantamount to torture without being held liable. It took more than two years for the Bybee Opinion to be withdrawn by the Office of Legal Counsel, despite having sparked a firestorm of criticism when it was leaked to the press in response to Abu Ghraib.¹⁹ For at least two years, then, the Bybee Opinion stood as

14. HUMAN RIGHTS WATCH, LEADERSHIP FAILURE: FIRST HAND ACCOUNTS OF IRAQI DETAINEES BY THE U.S. ARMY'S 82ND AIRBORNE DIVISION (2005), available at <http://hrw.org/reports/2005/us0905/>.

15. See, e.g., COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF PROFESSOR STEPHEN J. TOOPE, FACTFINDER (2005), available at http://www.ararcommission.ca/eng/ToopeReport_final.pdf (reporting on the alleged torture of a Canadian citizen in Syria following extraordinary rendition by U.S. officials).

16. Memorandum of August 1, 2002 from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2004) [hereinafter Bybee Opinion], available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>.

17. For a discussion of the appropriate role of the Office of Legal Counsel, see Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513 (1993).

18. See 18 U.S.C. §§ 2340–2340A (2000) (person who commits torture is eligible for a fine or imprisonment for up to twenty years, or both, and if the victim should die from the torture, the torturer may be sentenced to life imprisonment or death). Furthermore, the USA PATRIOT Act makes conspiracy to commit torture a crime. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (amending generally 18 U.S.C. §§ 3121–3127).

19. Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal

the official executive branch interpretation of federal officials' liabilities with regard to torture and cruel treatment.

I have elsewhere analyzed and criticized the Bybee Opinion,²⁰ so let me here mention just the three most glaring errors. The first and most well known is the Opinion's absurdly narrow definition of torture—"[inflicting] physical pain . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."²¹ Common sense and experience tell us the Bybee Opinion cannot possibly define torture correctly. This definition is so appallingly narrow that

branding, electric shocks administered to the genitals and other areas, beating, pulling out of fingernails, burning with hot irons, and blowtorches, suspension from rotating ceiling fans, dripping acid on the skin, rape, breaking of limbs, denial of food and water, extended solitary confinement in dark and extremely small compartments, and threats to rape or otherwise harm family members and relatives,²²

among other torture techniques, would in most instances not be counted as "torture" under the Bybee Opinion. But as should be obvious, these punishments constitute torture long before they result in organ failure, bodily impairment, or death. In fact one of the sadly ironic parts of all this is that these acts—all committed by Saddam Hussein's regime—were invoked by the Bush Administration to justify, *ex post facto*, the invasion of Iraq.²³ Although we all know that Hussein was a brutal leader, many of his acts of torture would not be deemed such under our government's own definition.

Second, the Bybee Opinion declared that criminal prohibitions against torture do not apply to the President or to the interrogation of enemy combatants pursuant to the commander-in-chief authority.²⁴ Even more broadly, the Opinion asserted that "[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief power in the President."²⁵ Any congressional statute that regulates interrogations of suspects, so says the Opinion, is unconstitutional because it violates the President's commander-in-chief power. To make matters worse, the opinion goes on to claim lower executive officials can escape prosecution for illegal torture on the ground that "they were carrying out the President's Commander-in-Chief powers."²⁶ The Opinion asserts that this would preclude the application of the valid federal statute which criminalizes torture "to

Counsel, to James B. Comey, Deputy Attorney General, Regarding Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004) [hereinafter Levin Opinion], available at <http://www.justice.gov/olc/dagmemo.pdf>.

20. See Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641 (2005).

21. Bybee Opinion, *supra* note 16, at 1.

22. See THE WHITE HOUSE, *Saddam Hussein's Repression of the Iraqi People, in A DECADE OF DECEPTION* (2002), available at <http://www.whitehouse.gov/news/releases/2002/09/20020912.html>.

23. See, e.g., David E. Sanger, *The State of the Union: Diplomacy; Emphasis on Iraq Remains, but from a Different Angle*, N.Y. TIMES, Jan. 21, 2004, at A17.

24. Bybee Opinion, *supra* note 16, at 35.

25. *Id.* at 39.

26. *Id.* at 35.

punish officials for aiding the President in exercising his exclusive constitutional authorities.”²⁷

If we accept these two rationales—that Congress cannot interfere in the President’s commander-in-chief power with regard to the interrogation of battlefield combatants being interrogated, and that anyone who carries out the President’s orders to torture cannot be prosecuted—we are left with the conclusion that the Constitution immunizes from criminal prosecution those underlings who torture in the President’s name. In short, the Constitution licenses the President to be “torturer in chief.”

Now note that although the Levin Memorandum of December 2004 withdrew this part of the Bybee Opinion, it did not formally repudiate the Opinion’s reasoning. Informally, it stated only that the reasoning was unnecessary and left open the question whether the withdrawal was prompted because the reasoning was wrong or because it was not necessary for the purpose of the original opinion.²⁸

So three years after Abu Ghraib, it could be said that human rights enforcement against the United States on this issue has utterly failed. Instead of having a zero-tolerance policy, we are, as Mark Danner put it, all torturers now.²⁹ Before we thought that, for U.S. officials, the use of torture and cruel, inhuman, or degrading treatment was forbidden completely. But now the policy has been stood on its head: everyone seems to acknowledge that the U.S. government continues to torture or use other kinds of shadowy, cruel practices all the time. Before, we treated torture as absolutely forbidden. Now, we accept that even as we speak, our government is engaged in a widespread set of shadowy cruel practices on ghost detainees held abroad.

How did this happen? How did the world get turned so totally upside-down? How did we move from a policy of zero tolerance toward torture to a policy of zero-accountability? On examination, the Bush Administration has executed a very simple and effective strategy: First, to try to block public release of more Abu Ghraib type pictures.³⁰ Second, to engage in low-level prosecutions against “small fry bad apples,” like Specialist Charles Graner or Lynndie England.³¹ Third, to authorize multiple military investigations, such as the Schlesinger, Fay/Jones, Jacoby, Furlow/Schmidt, and Church reports, that place little or no blame on higher-ups or civilian officials.³² Fourth, the Administration draws a line between torture, which is nominally forbidden,

27. *Id.* at 35.

28. Levin Opinion, *supra* note 19, at 2.

29. See generally MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR (2004).

30. Only recently, through releases in the Australian press, have new Abu Ghraib photos come to light. David Stout, *The Struggle for Iraq: Prisoner Abuse; More Abu Ghraib Pictures Broadcast on Australian TV*, N.Y. TIMES, Feb. 16, 2006, at A18.

31. See David S. Cloud, *Private Gets 3 Years for Iraq Prison Abuse*, N.Y. TIMES, Sept. 28, 2005, at A20.

32. *E.g.*, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS (2004) [“THE SCHLESINGER REPORT”], available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>; AR 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE AND AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE (2004) [jointly, “THE FAY/JONES REPORT”], available at <http://files.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>.

and cruel practices, like waterboarding and extraordinary rendition, which they now effectively permit.³³ And the Administration's zero accountability strategy has been accompanied by an effective strategy of public rhetoric. When questioned, the government answers: "Don't you see that we are in a new paradigm? This is war, not crime."³⁴ And the Administration never uses the word "torture," but rather uses euphemisms for torture, with terms like "extreme interrogation," "migration of extreme practices," and "extraordinary rendition," being the most obvious examples.

The result: the CIA has acquired a *de facto* license to be cruel. We have effectively licensed a regular system of unreviewed cruel and inhuman interrogations, so long as they are committed by private contractors or civilian officials like the CIA and so long as they are committed outside U.S. soil. And understand what has happened—our own government has effectively nullified the most basic principles that we ourselves conducted trials at Nuremberg to establish: command responsibility and a rejection of the "just following orders" defense for crimes against humanity.

If you care about human rights, there is a great deal wrong with this picture. By adopting the doctrine of "just following orders" as a valid defense, the Bybee opinion sought to undermine the very underpinnings of individual criminal responsibility, principles set forth in the landmark judgments at Nuremberg. Nuremberg changed the valence of personal responsibility. Before the Nuremberg trials, lax rules of responsibility had created conditions under which gross atrocities could be committed and yet nobody would be held responsible. Street-level officials who had committed torture and genocide could claim that they were "just following orders." Yet at the same time, their commanders could claim that they were so high in the chain of command that they did not know what was going on, and therefore should not bear command responsibility for illegal acts committed by their subordinates. After Nuremberg, the law recognized that commanders bore command responsibility to know what atrocities were being committed in their names,³⁵ and that street-level officials could not escape accountability by saying that they were "just following orders."³⁶ These principles are now embodied in the basic instruments of international

33. See, e.g., Tim Golden & Eric Schmitt, *Detainee Policy Sharply Divides Bush Officials*, N.Y. TIMES, Nov. 2, 2005, at A1; Eric Schmitt, *Senate Moves to Protect Military Prisoners Despite Veto Threat*, N.Y. TIMES, Oct. 6, 2005, at A22.

34. Between crime and war, the Administration has tried to create a *third* zone, in which people essentially have no rights or can be placed in places where they are not protected either by the laws of crime or by the laws of war. This zone contains somebody like Jose Padilla, for example, an American citizen who has been detained now for nearly four years, who was captured on U.S. soil, held for years, and now has finally been indicted for a crime. See Linda Greenhouse, *Justices to Rule on a Challenge to U.S. Tribunals*, N.Y. TIMES, Nov. 8, 2005, at A1. But is he subject to the protection of the laws of war or criminal law, or is the only protection to which he is entitled that given at the discretion of the U.S. government?

35. In *In re Yamashita*, 327 U.S. 1 (1946), the U.S. Supreme Court recognized the doctrine of command responsibility, under which commanding officers are liable if they exercised effective control over subordinates who engaged in torture and other mistreatment of detainees in violation of the law of nations, knew or had reason to know of their subordinates' unlawful conduct; but failed to take reasonable measures to prevent their subordinates' conduct. *Id.* at 14–16.

36. See, e.g., Report of the International Law Commission to the General Assembly on the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the

criminal law.³⁷ Yet the Bybee Opinion sought to reverse half a century of history by declaring the “superior orders” defense presumptively legal.

Given this depressing story, international human rights enforcement could be seen as utterly ineffective. It could easily be concluded that the mightiest nation in the world does not have to obey any human rights rules.³⁸ At the horizontal level, other states have virtually failed to hold the United States accountable. There have been no suits against the United States at the International Court of Justice. Inter-governmental organizations, like the U.N. Human Rights Commission, which have protested, are themselves badly compromised by their own membership, which includes a number of countries that are gross human rights violators. The picture seems very bleak. But when you add in the vertical, transnational story, a more complex picture emerges.

In late 2005, a governmental norm sponsor, Senator John McCain, introduced the McCain Amendment to the Defense Authorization Act, prohibiting the use of cruel, inhuman, or degrading treatment against any individual in the custody or physical control of the United States. The Amendment sought to ban cruel, inhuman, or degrading treatment or punishment of people in U.S. custody or under the effective control of the U.S. Department of Defense. In addition, the McCain Amendment required all U.S. troops to follow Army Field Manual procedures when they detain and interrogate military prisoners.

The McCain Amendment soon became an example of vertical, transnational human rights enforcement. Against the vigorous objections and lobbying efforts of the Bush Administration, a transnational network arose, consisting of private citizens and some twenty-eight retired generals, led by former Secretary of State Colin Powell, who came forward to speak in favor of the Amendment. At the same time, numerous human rights NGOs, such as Human Rights First,³⁹ and Human Rights Watch vigorously pressed the

Judgment of the Tribunal, 5 U.N. GAOR, Supp. No. 12, at 11–14, U.N. Doc. A/1316 (1950) (Principle IV provides that “[t]he 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.”).

37. See, e.g., Statute of the International Tribunal art. 7(4), May 25, 1993, 32 I.L.M. 1192, 1194 (1993) (“The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility”), available at <http://www.un.org/icty/basic/statut/statute.htm>.

38. From 1945 until 2001, the United States helped to build an international system of institutions and norms that promoted a vision of human rights, democracy, and global cooperation, which the United States saw as serving its national interest. Since 2001, we have, in a variety of ways, adopted positions which have made us a deliberate outlier from rules that we enforce on others. We have pushed for double standards. Put another way, the United States has two kinds of power, hard power (military power, armories, etc.) and soft power, which flows from our moral authority. If we squander our moral authority, then we are fighting a War on Terror based on hard power alone, which is strikingly limited in what it can do. As the war stretches on, we find that we cannot accomplish our goals without diplomacy and international law—soft power tools that were developed precisely so that countries would not have to rely exclusively on force all the time. In short, we built this system to work in our favor, and then we turned around and squandered our soft power assets, allowing our “bad exceptionalism” (propensity for double standards) to diminish our capacity for “good exceptionalism” (moral leadership on human rights). For elaboration, see generally Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003).

39. See Human Rights First, *Congress Puts Bush Administration on Notice to Stop Using*

case for the Amendment.⁴⁰ The federal courts also weighed into the general debate as Judge Hellerstein of the Southern District of New York ordered the release of dozens of more pictures of prisoners being abused at Abu Ghraib.⁴¹

The Bush Administration went so far as to threaten to veto the entire \$440 billion military budget if the McCain Amendment were not removed.⁴² But despite vigorous lobbying from the White House, both the Republican-controlled Senate and House overwhelmingly voted to strengthen the guidelines governing the treatment of prisoners in U.S. military custody.⁴³ On the day after the House overwhelmingly approved the McCain Amendment, the White House reversed itself and President Bush accepted a compromise that Senator McCain had been offering for weeks.⁴⁴ On December 30, 2005, President Bush finally signed the 2006 Defense Appropriations Bill, which included the McCain Amendment. On its face, the McCain Amendment applies to all U.S. personnel everywhere, without regard to whom they are interrogating. Thus, a transnational network against torture provoked an interaction, which led to an interpretation of law, which promoted the internalization of a norm against torture and cruel, inhuman, or degrading treatment into U.S. law.

Unfortunately, the same appropriations bill that included the McCain Amendment also contained an additional amendment by Senators Graham, Levin, and Kyl that sought to limit the courts' independent role in checking the legality of executive detention. As finally enacted, that amendment would also allow review boards to consider evidence obtained through coercion. Meanwhile, even after the President accepted the law, his presidential signing statement accompanying the Act made only a qualified commitment to follow the new law "in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch."⁴⁵ But more recently, under intense public pressure, President Bush has now backed off such extreme claims, recently telling an interviewer: "I don't think a president can . . . order torture, for example. . . . Yes, there are clear red lines"⁴⁶

Abusive Interrogation Methods; but Struggle Continues to Keep Torture Evidence Out of Court, http://www.humanrightsfirst.org/us_law/etn/misc/tort_court.htm (last visited Mar. 25, 2006).

40. See Human Rights Watch, *U.S.: Landmark Torture Ban Undercut*, <http://hrw.org/english/docs/2005/12/16/usdom12311.htm> (last visited Mar. 9, 2006).

41. See *A.C.L.U. v. Dep't of Defense*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005).

42. As of this writing, President Bush has not vetoed a single bill since he has been President.

43. Eric Schmitt, *House Defies Bush and Backs McCain on Detainee Torture*, N.Y. TIMES, Dec. 15, 2005, at A14 (reporting that the House voted 308 to 122 and that the Senate voted 90 to 9 to support the McCain Amendment).

44. Eric Schmitt, *Bush Will Support McCain on Torture: Bipartisan Support Leads to Reversal*, S.F. CHRONICLE, Dec. 16, 2005, at A7 (reporting it was a "stinging defeat" for Bush that both chambers had defied his threatened veto to resoundingly support McCain's measure, especially considering that his party controls both houses of Congress).

45. Statement on Signing H.R. 1815, the National Defense Authorization Act for Fiscal Year 2006, 42 WEEKLY COMP. PRES. DOC. 23 (Jan. 6, 2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2006_presidential_documents&docid=pd16ja06_txt-3.pdf.

46. Interview by Bob Schieffer, CBS News, with President George W. Bush, in Washington, D.C. (Jan. 27, 2006), available at http://www.cbsnews.com/stories/2006/01/27/eveningnews/main1248952_page3.shtml.

In short, the norm against torture is rhetorically internalized into U.S. law, as a matter of both legislation and executive policy. But with the President's ambiguous signing statement, the constitutional issue is now squarely posed: Does the U.S. President have constitutional power to authorize torture and cruel, inhuman, or degrading treatment by U.S. officials against detainees in the face of an explicit legislative determination to the contrary? To put it another way, under our Constitution, can the President be torturer in chief?

III. CAN THE PRESIDENT BE TORTURER IN CHIEF?

Let me suggest that the answer to that question must be "no." To reach that answer, we must explore three questions. First, can the President constitutionally override a legislative enactment that embodies a prohibition against torture? Second, can the President, on his own authority, authorize a violation of a norm of law that under international human rights law is known as "jus cogens," a peremptory norm, such as the norms against torture, genocide or slavery? Third, what about the so-called "Ticking Time Bomb" scenario? In a grave national crisis, can the President, on his own authority, order a subordinate to torture someone to protect the United States and if the order is given, must the subordinate obey? Let me address each of these questions in turn.

Can the President override a legislative enactment that incorporates a prohibition against torture? Today, a battle rages between two constitutional visions, which Neil Kinkopf calls, in his contribution to this volume, the "reciprocity model" and the "exclusivity model."⁴⁷ I prefer the "shared power" view of the Constitution in foreign affairs, symbolized by Justice Jackson's canonical concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,⁴⁸ versus a view of "exclusive executive prerogative" in the War on Terror, bottomed on Justice Sutherland's sweeping dicta in *United States v. Curtiss-Wright Export Corp.*⁴⁹

What I believe to be the correct constitutional vision has three elements. First, the simple, constitutional notion of checks and balances: that our Constitution requires that the Congress, Executive, and Judiciary share powers over national security issues. Second, human rights norms are universal: they belong to everyone, they protect everyone, and there are neither law-free places, nor law-free people. Third, when national security authority bumps up against civil liberties and human rights, that authority should be strictly construed and, in order to justify these civil liberties and human rights being overridden, there should be a clear statement by the political branches that the constraint being imposed is narrowly tailored to serve a compelling governmental interest.

Against this three-part view—shared power, human rights universalism, and clear statement and strict construction of executive authority—stands an opposing vision, which first views executive power as absolute,⁵⁰ relying on *U.S. v. Curtiss-Wright*

47. Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169, 1170 (2006).

48. 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring). I discussed this clash of constitutional visions at length in HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

49. 299 U.S. 304, 319 (1936).

50. For an exorbitant view of executive power by a key architect of the Bush

*Export Corp.*⁵¹ Second, it does not require human rights universalism; instead, it holds that the executive branch can unilaterally create law-free zones such as Guantánamo; extra-legal courts such as military commissions; extra-legal persons such as enemy combatants; and extra-legal practices such as extraordinary rendition. Our commitment to human rights universalism falls away and is replaced by a world where human rights norms are selectively applied. Third, this vision asserts that any delegation of power or statutory authorization to the President should be broadly construed, even if it impinges on civil liberties and human rights.

I firmly believe that this first view—of shared power, human rights universalism, and clear statements or strict construction—is the correct constitutional view. Competing schools of constitutional interpretation all accept that the Constitution does not authorize the President to be Torturer-in-Chief. Take, for example, Originalism. The Declaration of Independence instructs us to pay “decent respect to the opinions of mankind,”⁵² a mandate, in effect, to respect international law. The Declaration also condemns the King for engaging in circumstances of cruelty totally unworthy of the head of a civilized nation.⁵³ It would be amazing if the same Framers who wrote those words were, at the same time, somehow authorizing their new leader, as head of an enlightened civilized nation, to engage in such cruel practices against detainees. During the infamous Andersonville Trial, for example, no serious defense was made that the Civil War’s Andersonville death camps were legitimate because they were authorized by the President as commander in chief.⁵⁴

Turning to the text of the Constitution itself, the Eighth Amendment does not read “nor shall cruel and unusual punishments be inflicted, *except when the Commander-in-Chief orders.*”⁵⁵ Nor does the Constitution mandate due process of law before deprivation of “life, liberty, or property, *except when the Commander-in-Chief orders otherwise.*”⁵⁶ Relying only on the original text and history of the Constitution, it is clear that no warrant exists for a commander in chief to override the basic constitutional protections of due process and freedom from cruel and unusual punishment.

What about the idea that the President has sole constitutional authority to sanction torture and that Congress has no power to interfere? If that were true, why shouldn’t

Administration’s legal strategy in the War on Terror, see JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

51. 299 U.S. 304 (1936). “Among government attorneys, Justice Sutherland’s lavish description of the president’s powers [as ‘the sole organ of the federal government in the field of international relations’] is so often cited that it has come to be known as the ‘*Curtiss-Wright-so-I’m-right*’ cite”—a statement of deference to the president so sweeping as to be worthy of frequent citation in any government foreign-affairs brief.” KOH, *supra* note 48, at 94.

52. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

53. *Id.* para. 27.

54. See generally N.P. CHIPMAN, *THE TRAGEDY OF ANDERSONVILLE: TRIAL OF CAPTAIN HENRY WIRZ, THE PRISON KEEPER* (1911).

55. In relevant part, the Eighth Amendment reads: “[N]or [shall] cruel or unusual punishment [be] inflicted.” U.S. CONST. amend. VIII. A key function of the Eighth Amendment is “to proscribe ‘torture[s]’ and other ‘barbar[ous]’ methods of punishment.” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (alteration in original).

56. In relevant part, the Fifth and Fourteenth Amendments read: “[N]or [shall any person] be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V; U.S. CONST. amend XIV.

the President have sole constitutional authority to engage in genocide without congressional interference? Or why shouldn't the President have the sole constitutional power to impose a system of apartheid over congressional protest? Does the Constitution envision that the President alone could determine or engage in any kind of conduct without congressional interference?

As Justice Jackson wrote in *Youngstown*, "the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and inhabitants."⁵⁷ Congress undeniably has power "To make Rules for the Government and Regulation of the land and naval Forces"⁵⁸ and to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."⁵⁹ Under these authorities, Congress has enacted the Uniform Code of Military Justice, which prohibits torture of interrogatees.⁶⁰ As stated in the U.S. Army Field Manual: "U.S. policy expressly prohibits acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. . . . Such illegal acts are not authorized and will not be condoned by the U.S. Army."⁶¹

When offenses against the law of nations are involved, Congress holds broad powers. Article I, Section 8 of the Constitution provides Congress with the power to define and punish offenses against the law of nations and the power to make rules for the government and regulate land and naval forces.⁶² Indeed, Congress and the courts have exercised this power to punish torture as often as any offense against the law of nations, excepting piracy.⁶³ Moreover, since the 1980s, when the Second Circuit declared in *Filaritiga v. Pena-Irala* that the torturer, "like the pirate and slave trader

57. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 643–44 (1952) (Jackson, J., concurring).

58. U.S. CONST. art. I, § 8, cl. 14.

59. U.S. CONST. art. I, § 8, cl. 18.

60. In 1950, Congress passed the Uniform Code of Military Justice (UCMJ) in order to ensure fairness and openness in the trials and treatment of military defendants. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950). The unambiguous text of Articles 49 and 50 applies not just to defendants in court-martial, but also to defendants before military commissions. 10 U.S.C. § 849(d) (explicitly covering "any military court or commission"); 10 U.S.C. § 850(a) (explicitly referring to "a court-martial or military commission"). Article 31 of the UCMJ, 10 U.S.C. § 831(a), further requires that "[n]o person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."

61. U.S. DEP'T OF ARMY, FIELD MANUAL 34-52, at 1–8 (1992), available at <http://www.fas.org/irp/doddir/army/fm34-52.pdf>. This manual describes the legal standards governing interrogations by U.S. military personnel and specifically defines "physical torture" to include "infliction of pain through chemicals or bondage," "forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time," "food deprivation," and "any form of beating." *Id.*

62. U.S. CONST. art. I, § 8, cl. 10.

63. See Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113–14; Act of Apr. 30, 1790, ch. 9, § 28, 1 Stat. 112, 118. See generally G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT'L L. 727, 727 (1989).

before him[, is] *hostis humanis generis*, an enemy of all mankind,”⁶⁴ Congress has regularly prohibited torture and cruel, inhuman, or degrading treatment. We have seen, for example, the Torture Victim Protection Act,⁶⁵ the ratification of the Convention Against Torture,⁶⁶ and the War Crimes Statute.⁶⁷ Pursuant to its own constitutional authority, Congress has repeatedly prohibited torture and cruel, inhuman, or degrading treatment and defined them as offenses against both the law of nations and U.S. law, most recently by enacting the McCain Amendment.⁶⁸ Congress has also exercised those powers to forbid executive torture in such statutes as that of the criminal prohibition against torture.⁶⁹ Indeed, if it were true that Congress, by regulating the use of the military interrogations, was unconstitutionally invading the President’s commander-in-chief power, then any number of other statutes, such as the Posse Comitatus Act, which bars the President from using the armed forces for domestic law enforcement, would also be unconstitutional.⁷⁰

Finally, and perhaps most important, the early history of our Constitution demonstrates that checks and balances do not stop at the water’s edge. To the contrary, the system of checks and balances was created specifically with foreign affairs in mind. As I document in *The National Security Constitution*, the early, legislative Neutrality Acts demonstrate that the Congress and the President together controlled foreign affairs.⁷¹ In the 1800s, the courts regularly participated in the delineation and delimitation of executive power. In 1804, for instance, Chief Justice John Marshall held in the famous case of *Little v. Barreme*⁷² that a military officer who executes a presidential order during an undeclared war is still liable to those he injured if he acted contrary to a Congressional statute.⁷³ The opinion nowhere suggested that the statute might be unconstitutional, or that contrary presidential orders could legalize official acts that are inconsistent with congressional statutes. Two years later, Justice Paterson wrote in *United States v. Smith*⁷⁴ that “[t]he president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a

64. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

65. Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)).

66. 136 CONG. REC. S17, 486–01, 1990 WL 168442 (1990).

67. 18 U.S.C. § 2441 (2000).

68. Pub. L. No. 109-148, Div. A, tit. X, § 1003, 119 Stat. 2680, 2739–40 (2005) (“No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”). The previous Defense Authorization Act stated that “[i]t is the policy of the United States to—(1) ensure that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.” Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091(b)(1), 118 Stat. 1811, 2068 (2004).

69. 18 U.S.C. §§ 2340–40A (1997).

70. Posse Comitatus Act, 18 U.S.C. § 1385 (2004). I am grateful to Professor Kim Lane Schepele for this observation.

71. KOH, *supra* note 48, at 82–83.

72. 6 U.S. (2 Cranch) 170 (1804).

73. *Id.* at 179.

74. 27 F. Cas. 1192 (C.C.D.N.Y. 1806).

person to do what law forbids.”⁷⁵ In *Ex parte Milligan*,⁷⁶ the Court held that the Executive had violated the Habeas Corpus Act by failing to discharge from military custody a petitioner charged, inter alia, with violation of the laws of war.⁷⁷

This trend has continued in the Court’s more modern jurisprudence. In *Youngstown* itself, the Court invalidated the President’s seizure of the steel mills where Congress had previously “rejected an amendment which would have authorized such governmental seizures in cases of emergency.”⁷⁸ And in two recent War on Terror cases, *Hamdi v. Rumsfeld*⁷⁹ and *Rasul v. Bush*,⁸⁰ the Court again firmly rejected the President’s claim that he may invoke his commander-in-chief power to disregard an Act of Congress designed specifically to restrain executive conduct. In *Hamdi*, the Court denied the President’s claim that courts may not inquire into the factual basis for detention of a U.S. citizen “enemy-combatant,” with a plurality reasoning that “[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”⁸¹ Similarly, in *Rasul*, the first Supreme Court case involving Guantánamo detainees, the Court rejected the President’s claim that it would be an unconstitutional interference with the President’s commander-in-chief power to interpret the habeas corpus statute to encompass actions filed on behalf of Guantánamo detainees.⁸²

It might be argued that one difference between today and the Founding is that we now have more statutes on the books that might give the President the authority he claims. As Neil Kinkopf points out, we now effectively have a “statutory commander in chief” who is invoking all kinds of statutory authorities, not just the rare Article II constitutional authority.⁸³ The statute most frequently cited is the Authorization of Use of Military Force Act (AUMF), enacted one week after September 11, 2001,⁸⁴ which authorizes the President to use “all necessary and appropriate force” against “nations, organizations, or persons” associated with the terrorist attacks of September 11, in order to protect the nation from the recurrence of such attacks.⁸⁵ If this law authorizes the President to kill terrorists, why should it not also authorize the President to use torture as “necessary and appropriate” force to extract information from terrorists?

The obvious answer is because it is never “necessary or appropriate” to use torture in a War on Terror. When the AUMF was being discussed, no member of Congress argued for specifically authorizing the President to order torture and cruel treatment of detainees a part of the overall strategy for prosecuting a War on Terror. Had this been the rationale, the various soldiers prosecuted for Abu Ghraib, such as Private Lynndie

75. *Id.* at 1230.

76. 71 U.S. (4 Wall.) 2 (1866).

77. *Id.*

78. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 586 (1952).

79. 542 U.S. 507 (2004).

80. 542 U.S. 466 (2004).

81. *Hamdi*, 542 U.S. at 535–36 (O’Connor, J., for the plurality).

82. *Rasul*, 542 U.S. 466.

83. Kinkopf, *supra* note 47.

84. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2 (a), 115 Stat. 224, 224 (2001).

85. *Id.*

England, could have invoked it in defense of their conduct, saying that what they did to Iraqi prisoners was authorized by this statute. Instead, by convicting Private England, the court reaffirmed that torture and cruel treatment fell outside of the valid scope of what she had been authorized to do. To read this law as the President's lawyers would now do would recreate another Gulf of Tonkin Resolution: a law construed after the fact to give him a blank check to engage in broad activities never contemplated at the time of enactment.⁸⁶ To accept that reading, Congress would now have to conclude that in September 2001, it silently repealed the various absolutist statutory prohibitions against torture it had previously enacted. But as the Supreme Court has made clear, repeals by implication should not happen, absent "overwhelming evidence" of an "irreconcilable conflict" between the earlier and the later statutes, neither of which exist here.⁸⁷

At bottom, the statutory debate reflects the contrast between *Youngstown* as written and *Youngstown* as the executive power advocates would rewrite it.⁸⁸ When the President acts in a field in which Congress has legislated so comprehensively, the acknowledged touchstone for constitutional analysis is *Youngstown*, in which the Supreme Court invalidated an attempted presidential takeover of the steel mills in the name of national security during the Korean War.⁸⁹ In his landmark concurring opinion in that case, Justice Jackson wrote: "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."⁹⁰ Justice Jackson famously described three levels of the President's power in relation to Congress.⁹¹ First, when the President acts pursuant to a congressional authorization, his powers are at their apogee. When Congress has expressly or implicitly approved his actions, it brings the matter into Justice Jackson's first category: where the President's "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."⁹² Second, when the President acts alone and Congress is silent, his powers fall into an intermediate, "twilight zone," where the distribution of power between the President and Congress is uncertain.⁹³ Third, when the President "takes measures incompatible with the express or implied will of Congress, his *power is at its lowest ebb*, for then he can rely only on his own constitutional powers minus any constitutional powers of Congress over the matter."⁹⁴ Applying this matrix, Justice

86. When American ships were attacked in the Gulf of Tonkin in 1964, President Johnson asked Congress for a resolution that gave him broad freedom to conduct a controversial undeclared war in Indochina. See Joint Resolution of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384. To eliminate the use of the Gulf of Tonkin Resolution as a blank check, Congress finally repealed it by the Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055.

87. *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141-42 (2001) ("[T]he only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." (citing *Morton v. Mancari*, 417 U.S. 535, 550 (1974))).

88. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

89. *Id.* at 579.

90. *Id.* at 635 (Jackson, J., concurring).

91. *Id.* at 635-38 (Jackson, J., concurring).

92. *Id.* at 635.

93. *Id.* at 637.

94. *Id.* at 638 (emphasis added).

Jackson famously found the President's steel mill seizure an unconstitutional encroachment upon power retained solely by Congress.

In 1981, however, *Youngstown* was rewritten in *Dames & Moore v. Regan*,⁹⁵ which raised the question whether the President could conclude the Iranian hostage deal and suspend various claims by American citizens against the Iranian government. Writing for the Court, Justice Rehnquist, invoking his former boss Justice Jackson, held that the President could indeed settle the claims by executive agreement. Justice Rehnquist began by stating that the three-part *Youngstown* test was the test the Court should apply.⁹⁶ Justice Rehnquist, however, proceeded effectively to ignore the legislative history of the statute at issue in finding that Congress had authorized rather than limited the President's power. Second, he did not apply the Clear Statement Doctrine even though individual rights were clearly at stake.⁹⁷ Third and most importantly, Justice Rehnquist characterized the President's power as at its maximum (presidential act plus congressional authorization) rather than at an intermediate level (presidential act without legislative authority). Justice Rehnquist inferred congressional authorization by noting that there had been other congressional activity and historical practice in that area that elevated what was at best a Category Two case into a Category One case.⁹⁸ One might even conclude in light of explicit congressional approval in the past, Congress's failure to authorize the executive agreements should be read as congressional disapproval, putting the act not in Category One, but in Category Three.⁹⁹ Justice Rehnquist nonetheless concluded that because Congress had acted *in the general area*, Congress had given its implicit authorization, raising the President's power to its highest.

As I have argued elsewhere, *Dames & Moore* marked a dramatic de facto expansion of Categories One and Two and a constriction of Category Three—the only category where the President might be overruled.¹⁰⁰ So why should this matter? Because the *Dames & Moore* opinion was drafted in part by Justice Rehnquist's very able law clerk that term, who is now Chief Justice John Roberts! *Dames & Moore* gives the Court discretion to interpret a vague statute broadly so as to authorize presidential power. It is correct, then, to understand our President as the statutory commander in chief, because the Court endorses the President's exercising certain powers not as commander in chief or pursuant to either constitutional or congressional command, but

95. 453 U.S. 654 (1981).

96. Justice Rehnquist embraced Justice Jackson's view as "bring[ing] together as much combination of analysis and common sense as there is in this area." *Id.* at 661.

97. Under the Clear Statement Doctrine, courts must carefully scrutinize statutes cited by the Executive for signs not only that Congress has consented to the President's actions, but also to determine whether the President and Congress acting together have made a clear determination to infringe on individual rights. In an area fraught with individual rights, the Court should "construe narrowly all delegated powers that curtail or dilute them." *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *accord Greene v. McElroy*, 360 U.S. 474, 507–08 (1959).

98. See KOH, *supra* note 48, at 138–39.

99. Generally, however, it is incorrect to conclude from silence or nonaction that Congress has rejected the legislation. For example, when a bill fails to make it through, it is sometimes because Congressmen believe the legislation is a redundant replication of statutes already enacted.

100. See KOH, *supra* note 48, at 138–39.

because Congress has legislated in the area and a sympathetic Court has construed the general tenor of the legislative activity so as to give him the authority he seeks.

In response to a question from Senator Lindsey Graham about *Youngstown* at his confirmation hearing, Chief Justice Roberts said,

I do know that when you are in the middle area where it's difficult to determine whether Congress is supporting the President's action or is opposed to the President's action, that the Court often has to try to read the tea leaves of related legislation. If you look at the *Dames and Moore* decision coming out of the Iranian hostage crisis, what the Court did in that case, applying the middle tier, was look at a vast array of legislation. And it was a very difficult enterprise to try to figure out what Congress's view was.¹⁰¹

But he neglected to fill in the blank: that it is disturbing to read the tea leaves and look to an array of legislation, only to construe that evidence to confer congressional authorization and thereby to raise the President's power to its highest peak. In my own view, this misreading of *Youngstown* pays too much deference to a *Curtiss-Wright* view of exclusive executive power, a view that permits the denigration of human rights and civil liberties.

That brings us to a second question: can the President on his own authority violate a jus cogens norm? Can the President by himself violate the most basic and fundamental, preemptory human rights norms? To my knowledge, only one case has addressed this question: *Committee on U.S. Citizens Living in Nicaragua v. Reagan*,¹⁰² decided by the D.C. Circuit in 1988. Then-Circuit Judge (and former Congressman and later White House Counsel) Abner Mikva wrote in dictum:

Such basic norms of international law [(jus cogens)] . . . as the proscription against murder and slavery [and torture] . . . may well restrain our government in the same way that the Constitution [does]. If Congress adopted a foreign policy that resulted in the enslavement of our citizens or of other individuals [(non-citizens)] that policy might well be subject to challenge in domestic court under international law.¹⁰³

In other words, if the executive branch of the U.S. government violates a jus cogens norm, that violation should be actionable in a U.S. court under international law. Recently, in *Sosa v. Alvarez-Machain*,¹⁰⁴ the Supreme Court by a vote of six to three decided that when there is "a norm of international character accepted by the civilized world and defined with a specificity comparable to [historically recognized] paradigms," an alien can sue for that violation under the Alien Tort Claims Act (ATCA) for a tort in violation of the law of nations.¹⁰⁵ In so saying, the Court clearly contemplated that ATCA actions would remain available for torture claims.¹⁰⁶ And in

101. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 370 (2005).

102. 859 F.2d 929 (D.C. Cir. 1988).

103. *Id.* at 941.

104. 542 U.S. 692 (2004).

105. *Id.* at 725.

106. *Id.* at 732–33 ("This limit upon judicial recognition is generally consistent with the

Rasul v. Bush,¹⁰⁷ which was decided just one day before *Alvarez-Machain*, Justice Stevens's majority opinion noted that people held on Guantánamo may also invoke the ATCA under *Alvarez-Machain*.¹⁰⁸ Again, the implications are clear: Under U.S. law, the President may not, on his own constitutional authority, violate a jus cogens norm such those against torture or slavery or genocide. In the event that the President does, he as well as his subordinates can be sued under the ATCA.

This brings me to the third and final question: the so-called "Ticking Time Bomb" scenario. Can the President, on his own authority, order a subordinate to torture someone, claiming self-defense or necessity or some other kind of defense?

Notwithstanding the Bybee Opinion, it strikes me as self-evident that no individual or nation should be allowed to torture by invoking a claim of self-defense. First, the affirmative act of torture, with the invasion of bodily integrity that it entails, is completely disproportionate to the notion of self-defense. When defending oneself or another, your goal is to protect yourself against an attacker, but once the detainee is immobilized or in custody, to go further to acts of torture, would be overreaching. The Model Penal Code standard, for example, allows violence in self-defense only when it is "immediately necessary . . . on the present occasion."¹⁰⁹

Second, the very concept of "torturing in self-defense" is an oxymoron. By its nature, a jus cogens violation is not a permissible mode of governmental action at any time, and should therefore never serve as a permissible form of self-defense. Genocide, slavery, and torture are prohibited mechanisms or means for doing anything, including defending oneself.

Third, torture is by definition an offensive, not defensive, act. The Bybee Opinion argues that we must torture someone to get information to defend the country, so we are, in effect, acting in preemptive self-defense.¹¹⁰ In other words, the Bush Administration claims we may validly be driven to torture by the defense of

reasoning of many of the courts and judges who faced the issue before it reached this Court. See *Filartiga, supra*, at 890 ('[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind') And the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts."); *id.* at 762 (Breyer, J. concurring) ("Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. See Restatement § 404, and Comment *a*; International Law Association, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences 2 (2000). That subset includes *torture*, genocide, crimes against humanity, and war crimes.") (emphasis added).

107. 542 U.S. 466 (2004).

108. *Id.* at 485 ("[I]ndeed, 28 U.S.C. § 1350 explicitly confers the privilege of suing for an actionable 'tort . . . committed in violation of the law of nations or a treaty of the United States' on aliens alone. The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims.").

109. MODEL PENAL CODE § 3.04(1) (1962) (use of force in self-protection); *accord id.* § 3.05 (use of force for the protection of others). See generally *id.* art. 3 (general principles of justification).

110. Bybee Opinion, *supra* note 16, at 42–46.

necessity.¹¹¹ But there is a three-fold problem with this. First, it is extremely difficult to show, let alone prove, necessity. Even if one could demonstrate torture to be necessary, such a showing would be a defense that would have to come after-the-fact. Because one cannot show the necessity of torture until one tortures, the claim of necessity, then, can never serve to preauthorize torture. Indeed, according to Israeli Chief Justice Barak:

The “necessity defense” does not constitute a source of authority The defense deals with cases involving an individual reacting to a given set of facts. . . . [T]he very nature of the defense does not allow it to serve as the source of authorization. Authorization . . . is based on establishing general, forward looking criteria [rather than defenses to criminal liability].¹¹²

In short, the necessity defense can never be a source of authority for torture, even in the most extreme circumstances.

Second, claiming a right to engage in preemptive torture seriously misunderstands the way in which torture and cruel, inhuman, and degrading treatment are really used. As Assistant Secretary of State for Democracy, Human Rights and Labor, I learned about torture dens in Kosovo, in Turkey, in the People’s Republic of China, and in North Korea. Through that experience, I came to understand that torture rarely, if ever, yields reliable information. People being tortured do not necessarily tell the truth; instead, as one might expect, a person being tortured will say whatever he thinks he must say to stop or minimize the torture. Doug Johnson, the courageous Executive Director of the Center for the Victims of Torture, sees uncounted torture victims a year. In his testimony to the Senate Judiciary Committee regarding the confirmation of Alberto Gonzales as Attorney General, he said “[n]early every client at our center when subjected to torture confessed to a crime that they did not commit, gave up extraneous information, the names of innocent friends or colleagues in order to get them to stop.”¹¹³ Mr. Johnson also testified that torture is almost always a slow, calculated process. So torture is not as it seems on the popular television show “24,” where each week, U.S. counter-terrorist unit agent Jack Bauer seems successfully to torture someone to extract crucial national security information from one commercial break to the next. In fact, as Doug Johnson points out, successful torture almost never happens that quickly. It takes months. It takes a strategy. It takes a philosophy of understanding how to break someone’s will over time. And that is why more subtle means of eliciting information tend to work better than torture, because they are more likely to actually elicit the truth.

111. *Id.* at 39–46.

112. AHARON BARAK, ISRAEL SUPREME COURT, JUDGMENTS OF THE ISRAEL SUPREME COURT: FIGHTING TERRORISM WITHIN THE LAW 51–52 (2005) (internal citations omitted), available at <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Fighting+Terrorism+within+the+Law+2-Jan-2005.htm> (follow “PDF version (407KB)” hyperlink).

113. *Testimony of Douglas A. Johnson, Executive Director, The Center for Victims of Torture: Hearing on the Nominations of the Honorable Alberto R. Gonzales to be Attorney General of the United States Before the Senate Comm. on the Judiciary*, 109th Cong. 154–56 (2005), available at http://judiciary.senate.gov/testimony.cfm?id=1345&wit_id=3939.

Finally, and most importantly, what I have learned from my sad experiences is that once torture is authorized, it is soon no longer the exception. Authorized torture tends to become the rule. It becomes the strategy of first choice, not the instrument of last resort. In many of my visits to countries where torture is routinely used, once torture became a permitted interrogation tactic, it soon became a standard detention tactic, which captors routinely used against their captives, not to interrogate or to acquire information, but simply to show the detainee who is in charge.

And so a painful reality emerges: there is no noble ticking time bomb scenario. The reality of torture is the banality of torture¹¹⁴—captors torture and act cruelly toward other human beings because they can: because they have the power to do so, and the freedom to do so. And from that banality, it is a short step to scenarios like the one we saw at Abu Ghraib—where human beings are led around on leashes and forced to engage in feigned sexual acts and other humiliating acts, which are sure to inflame their countrymen, and to motivate future acts of terrorism. Whatever the original rationale may have been for treating detainees this way—whether interrogation or the securing of valuable national security information—by the end, the purpose was naked power, torture for its own sake.

As I have noted elsewhere, the Bybee Opinion is a stain on our national reputation.¹¹⁵ A legal opinion that offers a definition of torture so narrow that it would exculpate Saddam Hussein; that reads the commander-in-chief power so broadly as to remove Congress and the courts as meaningful checks on torture; and that nullifies Nuremberg by giving government officials a license to be cruel must be the most clearly erroneous legal opinion that I have ever read.¹¹⁶

To me, the saddest part of this entire episode is not how the President's lawyers failed, but how they failed to understand how they had failed. In everyday life and literature, we see hard cases all the time, where lawyers are forced to choose between law and morality: the drumhead court in Herman Melville's *Billy Budd* or the German judges who chose to enforce the Nazi laws in Stanley Kramer's film *Judgment at Nuremberg*.¹¹⁷ But here, sadly, morality and law pointed in the same direction. Nor was this just government lawyers doing their job. If someone asks a lawyer, "How do I break the law and get away with it?" the government lawyer must not say, "Here is how." As an officer of the court, a lawyer's job extends only so far as telling her clients what is lawful and unlawful, not aiding them in doing something which is unlawful. You are under no obligation as a government lawyer to tell your boss how to violate the law, particularly since a government lawyer's prime obligation is not to his or her

114. Cf. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963) (asking whether radical evil is simply a function of banality).

115. See Koh, *supra* note 20.

116. It is now said that the Justice Department's Office of Legal Counsel, as a result of the huge furor caused by the leak of the Bybee Opinion, is resorting increasingly to draft opinions and oral advice. But oral advice is not worth the paper it's written on. Frankly, it is non-advice, because it binds neither the person who gives nor the person who receives the oral opinion. It offers deniability, not certainty, and so cannot seriously serve as the basis for internal legal opinions authorizing action by the U.S. government. For further discussion of how the Office of Legal Counsel should function, see Koh, *supra* note 17.

117. HERMAN MELVILLE, *BILLY BUDD* (1924); *JUDGMENT AT NUREMBERG* (Metro-Goldwyn-Mayer Studios 1961).

boss, but rather, to uphold and protect the Constitution and laws of the United States of America.

The lawyers at the Justice Department's Office of Legal Counsel (OLC) were asked a very simple question: Will you uphold just laws as written, or will you interpret them to give your clients maximum freedom to violate values key to our national identity? A prohibition against torture lies at the very heart of our national identity. The OLC lawyers distorted these laws to permit governmental conduct that is fundamentally un-American.

Fortunately, the zero accountability strategy of the Administration may finally now be fraying. Congress, the media, NGOs, and the courts must monitor the executive's activities. In recent months, the McCain Amendment has passed. Enhanced oversight is coming from the NGOs and the media, as well as through private litigation by the ACLU and Human Rights First against Secretary Rumsfeld.¹¹⁸ With luck, we will see more careful judicial analysis of the Administration's claims of presidential authority. Internal checks within the executive branch have been strengthened, particularly through the work of career J.A.G. lawyers and military officials, many of whom have objected to the extreme claims of executive power.¹¹⁹

So in a grave national crisis, can the President, on his own authority, order a subordinate to torture someone to protect the United States, and if the order is given, must the subordinate obey? Some like to cite President Harry Truman's difficult decision to drop an atomic bomb on innocent civilians in Nagasaki as a decision that was necessary to end World War II. I personally have serious questions about whether the Nagasaki bomb was in fact necessary, but surely, the Geneva Conventions and international developments in the humanitarian law of war came after that decision was made. Even if that decision was lawful under international law at the time, an intentional decision to bomb a civilian population in wartime would plainly not be considered lawful today.

So suppose you are an American intelligence officer today, expressly ordered by the President of the United States to torture a suspect to get information about a ticking time bomb? Should you obey the direct command of the President? Again, I believe that the answer is no. There is no guarantee that the torture will work. Most important, the subordinate should say, "As a government official, an oath to obey the President is not the oath I swore. The only power I have comes from law and the only power I have as a government servant is to act in conformity with the law." As a government servant,

118. *A.C.L.U. v. Dep't of Defense*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005). The ACLU and Human Rights First are also litigating *Arkan Mohammed Ali et al. v. Pappas*, No. 05-cv-1377 (D.D.C. Jan. 5, 2006); *Arkan Mohammed Ali et al. v. Rumsfeld*, No. 05-cv-1378 (D.D.C. Jan. 5, 2006); *Arkan Mohammed Ali et al. v. Karpinski*, No. 05-cv-1379 (D.D.C. Jan. 5, 2006); *Arkan Mohammed Ali et al. v. Sanchez*, No. 05-cv-1380 (D.D.C. Jan. 5, 2006), available at <http://www.humanrightsfirst.info/pdf/06105-etn-rums-complaint.pdf>.

119. See, e.g., Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted*, NEW YORKER, Feb. 27, 2006 (profiling former General Counsel of the Army Alberto Mora). We also recently learned that President Bush's NSA eavesdropping program was approved at times over the objections of high senior officials within his own Justice Department. Daniel Klaidman, Stuart Taylor, Jr. & Evan Thomas, *Palace Revolt*, NEWSWEEK, Feb. 6, 2006, available at <http://www.msnbc.msn.com/id/11079547/site/newsweek/>.

you take an oath to support, protect, and defend the Constitution and the laws of the United States of America. Your oath includes protecting the Due Process Clause, protecting the Eighth Amendment, obeying treaties like the Convention Against Torture, and following lawfully enacted statutes such as the McCain Amendment, and the War Crimes Act.

Of course, your oath is to follow the order of the President when he gives a lawful directive as commander in chief, but even when the President acts as commander in chief, he carries the solemn constitutional duty to “take Care that the[se] Laws be faithfully executed.”¹²⁰ Even loyal government officials have no duty to obey the unlawful and unauthorized orders of a torturer in chief.

In short, my answer to the Ticking Time Bomb scenario is simple. We should never preauthorize torture. If the President believes he must for the good of the country order torture, and if that order is carried out by a lower official, that official must be prepared to face the legal, political, and moral consequences of his actions. Perhaps they will not be impeached, prosecuted, convicted, or morally condemned. But that is the risk they must assume when making such use of their governmental power. Anyone, even the President of the United States, who decides he must torture or order torture, because he feels it is absolutely imperative, should do so at his own peril. The President should never be “permitted,” even when he believes grave circumstances require it, to order a subordinate to torture. If he does so, it should be because he feels that it is vitally important to the survival of our country. And after the President delivers such an order, he should, as soon as possible, resign and accept prosecution for his acts, acknowledging that when the commander in chief becomes torturer in chief, his orders have crossed the line from legal to illegal conduct.

CONCLUSION

We *can* enforce a policy against torture, even against the most powerful country in the world, and even against the most powerful person in the world, the President of the United States. But to do this, our strategy must be less focused on horizontal enforcement at the nation-state level and more focused on vertical enforcement through transnational legal process. We must also reject the effort of any nation, including our own, to nullify Nuremberg’s precedent with regard to command responsibilities or the no-superior-orders defense. Most of all, we need to resist the claims that in time of terror, the President can constitutionally override legislative enactments enforcing norms against torture. The President cannot, on his own constitutional authority, authorize violations of jus cogens norms. And even in the gravest national circumstances, the Constitution does not preauthorize the President, his subordinates, or anyone else, to torture someone in U.S. custody using either a rationale of self-defense or a defense of necessity. In short, as lawyers and citizens, we should resist the claim that a War on Terror permits the commander in chief’s power to be expanded into a wanton power to act as torturer in chief.

120. U.S. CONST. art. II, § 3.