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The Example of America

The fight against terrorism is not yet over. It predated the Bush presidency, and will continue long after. President Obama has openly assumed the burden of the fight. He has assured us that swift and decisive action will be taken against terrorists, although he also insisted that this action will be in accordance with the Constitution. In his inaugural address he declared, “[a]s for our common defense, we reject as false the choice between our safety and our ideals,”¹ and as the first order of business issued Executive Orders addressing some of the abuses of his predecessor.² Our task, as lawyers and as citizens, is to identify these abuses with some specificity and then to describe the action that is needed to put the Constitution right.

In this lecture, I focus on one of the most egregious of all abuses—the policies and practices of the Bush years that put into doubt the American commitment to prohibiting torture. This prohibition is embodied in a number of international instruments, most notably the 1984 Convention Against Torture³ and the criminal statute that we enacted to implement that treaty.⁴ Yet it is important to understand, so that we can be clear about the magnitude of the wrong, that the rule against torture did not await the arrival of the 1984

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1. President Barack Obama, Inaugural Address (Jan. 20, 2009).
 2. *See* Exec. Order No. 13,491, 74 Fed. Reg. 16 (Jan. 27, 2009); Exec. Order No. 13,492, 74 Fed. Reg. 16 (Jan. 27, 2009); Exec. Order No. 13,493, 74 Fed. Reg. 16 (Jan. 27, 2009).
 3. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.
 4. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (codified at 8 U.S.C. § 1231 note (2006)).

Convention and its implementing statute; it is rooted in the Constitution itself.⁵

The Eighth Amendment prohibits cruel and unusual punishments, and torture would surely meet the standard of cruel and unusual.⁶ Although some may claim that torture inflicted for the purpose of extracting information from a person held in custody might not be deemed a “punishment” and thus is beyond the scope of the Eight Amendment, I insist that such conduct is prohibited by an implicit premise of the Eighth Amendment. Certainly, if we cannot torture someone who has been judged to have broken the law, we cannot torture someone who we only suspect has broken the law or who we believe is in possession of information that might enable us to prevent or punish unlawful acts. Immanent in the Eighth Amendment is a principle—let us call it the dignity principle—that denies state officers the power to treat inhumanely anyone in their custody.

A similar regard for human dignity can be found in the Fifth Amendment. In the broadest of terms, that amendment denies the state the authority to deprive any person of “life, liberty, or property without due process of law.”⁷ This norm has been construed to prohibit not just unfair procedures, but any state action that “shocks the conscience” or offends an elemental regard for the humanity of persons in state custody. The phrase “shocks the conscience” was used by the Supreme Court to denounce police action that consisted of pumping the stomach of a suspect.⁸ The substantive dimensions of due process have also been manifest in decisions striking down laws that denied parents the right to send their children to private schools⁹ and more recently, the decision that denied consenting adults the right to engage in intimate sexual conduct.¹⁰

As an expression of the dignity principle, the constitutional ban on torture of the Fifth and Eighth Amendments is an absolute. It focuses on the intrinsic quality of the state practice—its sheer inhumanity—and does not vary according to the putative value of the information sought. The constitutional ban on torture cannot be overridden or relaxed because the interrogator believes he might be able to extract information that will save an innocent life, or for that matter, countless lives. The harm to our cherished values would be

5. For a general overview of the Constitution’s prohibitions against torture, see Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003).

6. U.S. CONST. amend. VIII.

7. U.S. CONST. amend V.

8. *Rochin v. California*, 342 U.S. 165, 172 (1952).

9. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

10. *Lawrence v. Texas*, 539 U.S. 558 (2003).

far greater than the benefit that might possibly be obtained. At issue is nothing less than the ideals that define us as a nation.

President Bush declared that he was opposed to torture, yet he governed in a way that put his underlying commitment in doubt. He declared his opposition to torture in 2004,¹¹ almost three years after he announced the War on Terror, and did so in a most defensive manner—in response to a public outcry, initially provoked by the publication of the Abu Ghraib photographs and then compounded by the leak of internal memoranda of the Department of Justice and the Department of Defense that took the proverbial gloves off government interrogators.¹²

The first of these memoranda was prepared by John Yoo and signed by Jay Bybee, then Assistant Attorney General in charge of the Office of Legal Counsel, and was sent to the White House in August 2002.¹³ The infliction of physical pain, Yoo and Bybee said, amounted to torture only when it was “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of a bodily function, or even death.”¹⁴ This requirement was derived not from an understanding of judicial doctrine regarding the range of permissible interrogation techniques, but rather from an extraneous source—social insurance regulations defining the conditions for paying medical benefits.¹⁵

The Department of Defense memorandum, prepared by William Haynes, then General Counsel of the Department, and dated November 27, 2002, sought to establish guidelines for interrogating prisoners being held at Guantánamo Bay.¹⁶ It divided a broad range of interrogation techniques into

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11. See Statement on United Nations International Day in Support of Victims of Torture, 1 PUB. PAPERS 1141 (June 26, 2004).
 12. For an overview of the various officials who referenced this phrase, see Mark Danner, *US Torture: Voices from the Black Sites*, N.Y. REV. BOOKS, Apr. 9, 2009. Danner cites the widespread use of this language and specifically quotes Cofer Black, former head of the CIA’s Counterterrorism Center. See *Joint Investigation into September 11th: Hearing Before the J.H.-S. Intelligence Comm.*, 109th Cong. (2002) (statement of Cofer Black, former Dir., CIA Counterterrorism Ctr.).
 13. Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice, to Alberto Gonzales, Counsel to the President, Executive Office of the President (Aug. 1, 2002) [hereinafter Yoo-Bybee Memorandum], available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.
 14. *Id.*
 15. *Id.*
 16. Memorandum from William Haynes, Gen. Counsel, U.S. Dep’t of Def., to Donald Rumsfeld, Sec’y of Def. (Nov. 27, 2002) [hereinafter Haynes-Rumsfeld Memorandum], available at <http://f1.findlaw.com/news.findlaw.com/hdocs/docs/dod/gcrums1127120202mem.pdf>.

three categories. The practices in the first two categories, which included round-the-clock interrogations lasting up to twenty hours and the use of stress positions such as standing for up to four hours, were deemed lawful and available to the Guantánamo interrogators. The third category included practices often understood to be torture,¹⁷ including waterboarding, a technique that used a wet towel and dripping water to induce the perception of suffocation or drowning. Haynes said that the practices in this third category were forbidden “as a matter of policy . . . at this time,” though he was quick to add that they “may be legally available.”¹⁸ Secretary of Defense Rumsfeld approved Haynes’s recommendations with a handwritten note on the memo indicating, “I stand for 8-10 hours a day. Why is standing limited to 4 hours?”¹⁹

The announcement of the guidelines proposed by Haynes and approved by Rumsfeld provoked controversy within the military. As a result, a high level working group was assembled in the Department of Defense, and on April 16, 2003, Secretary Rumsfeld issued a new directive identifying the interrogation techniques that would be allowed at Guantánamo. Seventeen of those techniques were allowed by the Army Field Manual then in force. Seven techniques went beyond the Manual and in so doing once again put the rule against torture in doubt.²⁰ To further confuse the matter, the directive acknowledged at various points that some had contended that the techniques authorized were inconsistent with protections afforded to POWs under the Third Geneva Convention.²¹ The Secretary instructed the interrogators to take into consideration such contentions, while at the same time insisting that the Guantánamo detainees were not POWs, but rather unlawful enemy combatants whose treatment was governed not by the Third Geneva

17. See, e.g., *Confirmation Hearing of Eric Holder Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (including the statements of Eric Holder and multiple members of the Senate declaring that waterboarding and other “shameful” techniques are torture).

18. Haynes-Rumsfeld Memorandum, *supra* note 16.

19. *Id.*

20. Memorandum from Donald Rumsfeld, Sec’y of Def., to Gen. James T. Hill, Commander, U.S.S. Command (Apr. 16, 2003), available at <http://www.torturingdemocracy.org/documents/20030416.pdf> (noting in Tab A that techniques “A-Q” authorized in the memo, are authorized by the Army Field Manual 34-52, but that “[f]urther implementation guidance with respect to techniques R-X will need to be developed by the appropriate authority”).

21. Geneva Convention Relative to the Treatment of Prisoners of War art. 12, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

Convention but only by the lesser requirement of humane treatment imposed by the Fourth Geneva Convention.²²

Torture is not self-defining, and for that reason, disagreement will inevitably arise as to whether a particular interrogation technique constitutes torture. The abuse of the Constitution implicit in the Defense and Justice memoranda that I just described arose not from the very understandable need to provide guidelines for interrogators, but from the content of those guidelines and a desire to allow aggressive, indeed coercive, treatment of prisoners, without any regard for their dignity. Although our knowledge of the actual practices employed by government interrogators during the Bush years remains fragmentary, in no small part due to the Administration's own actions,²³ the available evidence indicates that they fully understood the message being conveyed as no holds barred.²⁴

In the case of the CIA—which is not covered by the Army Field Manual or even Rumsfeld's guidelines for Guantánamo but only by the Yoo-Bybee memorandum—the offense to the Constitution was especially blatant. According to a December 2007 television interview with an agent who had been on the scene, the CIA used waterboarding—a technique often condemned as torture²⁵—against a high-level al Qaeda operative, and did so under circumstances that made it clear that this was not the unruly action of agents under stress.²⁶ The CIA interrogators in the field were in constant and immediate communication with the Deputy Director for Operations in Washington, and it was the Deputy Director who determined whether so-called “enhanced techniques” were to be used, against whom, and with what degree of intensity.²⁷ No wonder Michael Mukasey refused, in his confirmation hearings to be Attorney General, which occurred shortly before this public disclosure, to say whether waterboarding was torture.²⁸ Had he done so, he might have politically committed himself to prosecuting some CIA agents and their supervisors.

22. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

23. According to a government letter, the CIA destroyed ninety-two interrogation tapes. See Letter from Lev L. Dassin, Acting U.S. Att'y, S.D.N.Y., to Alvin K. Hellerstein, Judge, S.D.N.Y. (Mar. 2, 2009), available at http://www.aclu.org/pdfs/safefree/lettertohellerstein_ciainterrogationtapes.pdf.

24. See Danner, *supra* note 12.

25. See, e.g., *Confirmation Hearing of Eric Holder*, *supra* note 17.

26. *Nightline: Inside the CIA; Inside the Secret Prisons* (ABC television broadcast Dec. 10, 2007).

27. *Id.*

28. *Confirmation Hearing of Michael Mukasey Before the S. Comm. on the Judiciary*, 110th Cong. (2007).

Not only did the Administration seek to narrow the scope of the rule against torture by manipulating the definition of the practices covered, it also denied that the President is bound, as a matter of law, by the prohibition against torture, and in doing so harked back to a conception of presidential power long identified with the Nixon White House. In the late 1970s, President Richard Nixon, in an effort to defend the action that led to his impeachment and eventual resignation, publicly maintained that the President is entitled to disobey the law whenever he determines it is for the good of the nation. If the President does an act, he said, it is not illegal. History judged this view harshly, but it was taken as an article of faith in certain circles, which included Vice President Dick Cheney, and it became an organizing theme of the Bush presidency, most remarkably, even in the debates over torture.²⁹

This conception of almost unlimited presidential power was defended by the Department of Justice and its Office of Legal Counsel. The 2002 Yoo-Bybee memorandum not only offered a contrived definition of torture, but also put into question whether the President, acting as Commander-in-Chief, was bound by the prohibition against torture.³⁰ In making this claim, Yoo and Bybee treated the rule against torture as nothing more than a congressional command.

Such a characterization of the ban on torture is a grave mistake, for it gives no effect to the Fifth and Eighth Amendments; yet this view of presidential power is wanting on its own terms. Although the President, as Commander-in-Chief, might be deemed to have whatever authority is needed to prosecute a war successfully, account must also be taken of the constitutional grant of authority to Congress over military matters. Article I grants Congress the power to define and punish “[o]ffenses against the Law of Nations,” “[t]o make Rules concerning Captures on Land and Water,” and “[t]o make Rules for the Government and Regulation of the land and naval Forces.”³¹ The making of such rules would surely include the power to determine how individuals who are detained in a military situation should be treated or interrogated. The constitutional vision is one of shared powers. Of course, conflicts between those who share power may sometimes arise. The error of Yoo and Bybee, however, was to assume that in the case of such conflicts, the

29. See, e.g., Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice, to William Haynes, Gen. Counsel, U.S. Dep’t of Def. 1 (Mar. 13, 2002), *available at* <http://www.usdoj.gov/opa/documents/memorandumpresidentpower03132002.pdf> (providing the Office of the Attorney General’s opinion on “[t]he President’s power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations”).

30. Yoo-Bybee Memorandum, *supra* note 13.

31. U.S. CONST. art. I, § 8.

President as Commander-in-Chief should prevail over Congress. They gave no reason for that view, nor is one readily apparent.

The inadequacy of Yoo and Bybee's view of presidential power is even more apparent once we acknowledge the Fifth and Eighth Amendments' roots of the prohibition against torture, for all exercises of the powers of the President, like those of any branch of government, must comply with the Bill of Rights. This basic proposition of constitutional law is implicit in the very institution of judicial review, which empowers the judiciary to set aside measures of the President or Congress that might be within their enumerated powers but inconsistent with the Bill of Rights.

The understanding of presidential power propounded by Yoo and Bybee even survived the repudiation of their contrived definition of torture. In December 2004, in the wake of the public outcry surrounding the leak of the Yoo-Bybee memorandum, the Department of Justice issued another memorandum on torture.³² This new memorandum explicitly repudiated Yoo and Bybee's definition of torture, stating that all that is required to constitute torture is severe or extreme pain; however, it did not withdraw or in any way modify the Yoo-Bybee view of presidential power. The new memorandum said it was unnecessary to address the issue of presidential power because the President had publicly declared, as a matter of policy, his opposition to torture.

In fact, the President's actions regarding the Detainee Treatment Act of 2005 put his policy very much into question.³³ He fiercely resisted the enactment of the provision, spearheaded by John McCain, which codified the constitutional ban on torture.³⁴ Upon signing the Act into law, the President explained that he was signing the measure with the understanding that the statute did not create or confer a private right of action on victims of torture.³⁵ He also said that he intended to construe the statute in a way that was consistent with his constitutional powers as Commander-in-Chief and his duty to protect against future terrorist attacks.³⁶ The legal effect of this so-called

32. Memorandum from Daniel Levin, Acting Assistant Att'y Gen., to James B. Comey, Deputy Att'y Gen. (Dec. 30, 2004), *available at* http://www.humanrightsfirst.org/us_law/etn/pdf/levin-memo-123004.pdf.

33. Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd (Supp. V 2005).

34. *See* President George W. Bush, Press Conference at the White House (Sept. 15, 2006), *available at* http://www.boston.com/news/nation/washington/articles/2006/09/15/bushs_speech_on_terror_legislation (objecting to the "vague standards" of the Geneva Convention as a basis for codified interrogation rules).

35. President George W. Bush, President's Statement on Signing of H.R. 2863 (Dec. 30, 2005), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=65259>.

36. *Id.*

signing statement was unclear, but not its political implications. It was widely understood to indicate that President Bush did not believe himself bound by the Act and that, if military necessity dictated, he would allow prisoners to be tortured as part of an interrogation process.³⁷

In keeping with its expansive view of executive power, the Administration further diminished the Constitution by engaging in a practice—known as extraordinary rendition—that involved torture, though by foreign nations. Extraordinary rendition is distinguishable from the more common form of rendition, in which the Executive, acting outside of a formal judicial proceeding, delivers an individual to another nation to stand trial. In extraordinary rendition, the Executive, also acting outside a judicial process, sends an individual to a foreign nation not for purposes of putting that person on trial, but rather for interrogating that person and extracting information of use to the United States. The predicate of such a transfer is that the nation receiving the prisoner will use aggressive and brutal interrogation techniques—torture—that United States agents are not prepared to use. Although this practice antedates the Bush Administration and the global War on Terror, it was used with notable frequency in the Bush years—there are some indications that it has been used between one hundred and one thousand times during this period.³⁸

The element of “outsourcing,” to use Jane Mayer’s term,³⁹ that is entailed in extraordinary rendition is of no legal or moral significance. If the Constitution prohibits United States officials from engaging in a certain practice, then it also prohibits those officials from creating an arrangement whereby officials of another nation do the prohibited action. Imagine prison officials who do not actually torture prisoners in their custody, but turn the prisoners over to other inmates to do what is denied them. These prison officials can be faulted not just for the transfer, but also for the torture that occurred through the arrangement they created. The dignity principle immanent in the Fifth and Eighth Amendments binds the United States and all those who act on its request and in its interest.

37. See, e.g., Charlie Savage, *Bush Could Bypass New Torture Ban: Waiver Right Is Reserved*, BOSTON GLOBE, Jan. 4, 2006.

38. JANE MAYER, *THE DARK SIDE* 108 (2008); see also Eur. Parl. Ass., *Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States*, Res. No. 1507 (2006), available at <http://assembly.coe.int/Main.asp?link=/documents/AdoptedText/tao6/ERES1507.htm> (estimating that “hundreds of persons” had been “entrapped” in a U.S. system of secret detentions and extraordinary rendition).

39. MAYER, *supra* note 39, at 121.

A more difficult legal question presented by extraordinary rendition – and one that might be lurking beneath all the torture debates of the Bush era – concerns the territorial reach of the constitutional ban against torture. Americans are fully protected by the Constitution no matter where they reside. Yet they have not been the target of extraordinary rendition, nor have aliens who are residents of the United States. With one possible exception, extraordinary rendition has only been used against foreign nationals living abroad – for example, a German citizen traveling in Macedonia was seized by CIA officials and taken to Afghanistan, and an Egyptian citizen was kidnapped by CIA agents on the streets of Milan and taken to Egypt.

The one possible exception to this rule concerns the extraordinary rendition of Maher Arar, who was seized by immigration officials on September 26, 2002, at JFK airport, held virtually incommunicado for thirteen days in nearby detention facilities, and then sent to Syria via Jordan for the specific purpose of interrogation under conditions of torture. Arar brought a suit in federal court to test the legality of his rendition, which, due to the involvement of immigration officials, was implemented under the auspices of the Department of Justice rather than the CIA. Arar's suit was dismissed by the district court. A panel of the Second Circuit affirmed that decision, and the matter is now pending before the Second Circuit sitting en banc.⁴⁰ The case was argued on December 9, 2008, in the closing days of the Bush Administration, and is of special significance for me and the nation.

Arar had only the most fleeting connections to the United States. He was born in Syria and by virtue of that birth is a citizen of Syria. He moved to Canada with his family as a teenager and resided there ever since. At the time of his arrest in 2002 he was thirty-three years old and had become a naturalized citizen of Canada.⁴¹

Arar had been vacationing with his family in Tunisia and was arrested when he was returning to Canada for business. His itinerary took him from Tunisia to Switzerland and then on to JFK, where he was to take a flight to Montreal. Transit passengers at JFK need to clear customs and while in line waiting to present his passport to an immigration official, Arar was arrested.⁴² The arrest was based on a tip (which was later proved to be false) from the Royal Mounted Police of Canada that identified Arar as a member of a terrorist organization.⁴³

40. Arar v. Ashcroft, 532 F.3d 157, 164 (2d Cir. 2008), *reh'g en banc granted*, Arar v. Ashcroft, No. 06-4216 (2d Cir. Aug. 12, 2008), *available at* http://www.ccrjustice.org/files/8.12.08_Order_for_Rehearing_EnBanc.pdf.

41. *Id.* at 194.

42. *Id.* at 195.

43. *Id.* at 162, 203.

After his brief detention in the United States, Arar was flown to Syria, where he was imprisoned for ten months in a grave-like cell measuring six feet long, seven feet tall, and three feet wide. He alleged that during the first twelve days he was interrogated for some eighteen hours a day and severely beaten.⁴⁴ The interrogation ceased when Canadian officials interceded on his behalf, but Arar remained incarcerated for nine more months, at which time Canadian officials were able to secure his release.⁴⁵

From my perspective, Arar's imprisonment and interrogation violated the United States Constitution. This conclusion is not derived from the fact that he, unlike the German or Egyptian citizens, was arrested on United States soil, specifically JFK Airport, and imprisoned in the United States for a number of days before being sent to Syria. His entitlement to the protection of the Constitution derives not from his brief and guarded presence on United States soil, but from the notion that the Fifth and Eighth Amendments and their ban on torture are applicable to the officers of the United States and their agents wherever they act and against whomever they act.

The Fifth Amendment purports to protect any "person."⁴⁶ The Eighth Amendment is cast as a flat prohibition with no effort to delineate the group of persons protected and should be understood as defining the authority of American officials.⁴⁷ More fundamentally, this reading of the Fifth and Eighth Amendments derives from the underlying value at issue—a just and proper regard for the dignity of each person held in state custody. Human dignity is violated whenever someone is tortured, regardless of where the torture takes place. A violation of the United States Constitution and the basic charter of this nation occurs when the persons responsible for the torture are United States officials.

This broad understanding of the Constitution is reflected in the provisions of the Detainee Treatment Act of 2005,⁴⁸ which prohibits torture by United States officials wherever they act and against whomever they act. So does the federal statute criminalizing torture; it specifically prohibits torture by United States officials acting outside of the country.⁴⁹ Of like import is the recent decision of the Supreme Court invalidating the statute denying habeas corpus

44. *Id.* at 166, 197.

45. *Id.* at 197-98.

46. U.S. CONST. amend. V.

47. U.S. CONST. amend. VIII.

48. Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd (Supp. V 2005).

49. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (codified at 8 U.S.C. § 1231 note (2006)).

to the Guantánamo prisoners (all foreign nationals).⁵⁰ Admittedly, the Court in that case did not determine what substantive rights the Guantánamo prisoners had, but the very act of extending the constitutional protection of habeas corpus to these prisoners necessarily implies that they had some constitutional rights—the most basic—for otherwise the writ would be of no utility.

This interpretation of the recent Supreme Court decision accords with a constitutional tradition reaching all the way back to the Insular Cases of the early 1900s. One of these cases posed the question whether the Sixth Amendment guarantee to trial by jury was applicable in the Philippines, which was then being held as a colony.⁵¹ The Supreme Court concluded that the Bill of Rights was not in its entirety applicable to the administration of an unincorporated territory such as the Philippines.⁵² Yet the Court qualified that holding by declaring that United States officials were always bound to respect the fundamental rights of all persons living in the territory.⁵³ Among the most basic or fundamental of all rights is the right against torture.

In an unincorporated territory, such as the Philippines, the United States is sovereign. Similarly, the United States could be deemed to exercise a *de facto* sovereignty over Guantánamo. No such claim could be made about Syria, where Arar had been transferred and interrogated. Yet it is difficult to understand why the geographic site of the torture—whether it took place on American soil or in Syria—has any significance in determining the applicability of the Fifth and Eighth Amendments’ ban on torture. What makes the constitutional ban on torture applicable is the fact that the torture is inflicted by American officials or others acting on their behalf. The dignity principle that drives the interpretation of the Fifth and Eighth Amendments is person-, not place-, oriented.

Pressed, I am unable to point to a Supreme Court decision that clearly and authoritatively announces such a rule. I must therefore acknowledge that the willingness of the Bush Administration to engage in extraordinary renditions may reflect not an indifference to the Constitution, but rather a genuine dispute over its territorial reach. Such a lawyerly disagreement, if that is all that is at stake, would surely have made the need for a judicial determination of the lawfulness of the practice all the more appropriate. Yet rather than defending on the merits the extraordinary rendition of Arar and others, thereby obtaining a judicial resolution of this issue, the Bush Administration invoked a number of doctrines—some very technical—that called for the dismissal of the suit

50. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

51. *Dorr v. United States*, 195 U.S. 138 (1904); *accord Balzac v. Porto Rico*, 258 U.S. 298 (1922).

52. *Dorr*, 195 U.S. at 149.

53. *Id.* at 148.

without ever reaching the merits of the substantive claim, either as a matter of fact or law.

At this point, the judiciary could have stood up for the Constitution and discharged its most elemental responsibility, but it chose another course altogether. It sustained the government's motion to dismiss, and in so doing became complicit in the Administration's assault on the Constitution. Vice President Dick Cheney and his assistant, David Addington, may have been at the helm of a small cabal directing that assault, as some have contended, but they would not have been able to achieve their purposes and diminish the Constitution in the ways that they did if other institutions, including the judiciary, had not allowed them to have their way for as long as they did.

The lower federal courts based their reluctance to examine the legality of the extraordinary rendition program on a number of grounds. One related to the remedy sought. An injunction would not have been appropriate because the victim of the rendition, such as Arar, who miraculously secured his freedom and brought suit in federal court, could not demonstrate the likelihood of recurrence. So Arar asked for a declaratory judgment and damages—a declaration that he was wronged, and compensation for that wrong.

Every lawsuit rests on a legal claim. When an injunction is sought, the Constitution itself provides the claim, without the need for any congressional authorization. The same rule applies to declaratory judgments. Although a congressional statute passed in the 1930s made the declaratory remedy available to federal courts,⁵⁴ the cause of action or claim underlying the request for that remedy arises, much like that for an injunction, from the Constitution itself and does not need congressional authorization.

In the 1971 *Bivens* decision,⁵⁵ the Supreme Court extended this same principle to damage actions, though with one qualification. The Court held that a claim or cause of action underlying a request for damages for a constitutional wrong arises from the Constitution itself, unless there are some “special factors” that might make it appropriate to require congressional authorization.⁵⁶ In the *Arar* case, a panel of the Second Circuit treated the foreign policy and military ramifications of extraordinary rendition as such a “special factor” and on that ground disallowed Arar's claim for damages. The court said that it lacked congressional authorization to award damages.⁵⁷

Such a ruling seems odd in the extreme. Congress, unlike the judiciary, is a political body, but that does not give it any expertise or special competence in

54. Declaratory Judgment Act, 28 U.S.C. § 2201 (2006).

55. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

56. *Id.* at 396.

57. *Arar v. Ashcroft*, 532 F.3d 157, 164 (2d Cir. 2008).

matters of foreign or military policy. Moreover, unless the “special factors” exception to the *Bivens* rule is going to degenerate into a free floating “political question” doctrine, long discredited by the Supreme Court, it is not clear why the characterization of Congress as a political institution constitutes a reason for the judiciary to await congressional authorization before allowing damages for the violation of a constitutional right. Although there is a longstanding tradition of the judiciary deferring to the Executive in matters of foreign and military policy, that deference does not belong to Congress and does not in any way depend on the nature of the remedy sought. In fact, this deference might be due to the Executive even if Congress passes a statute authorizing suits for damages.

Wholly apart from the question of whether a statute is needed under the terms of *Bivens* to create a claim for damages, the government sought to defeat Arar’s claim for damages by invoking what has become known as the “qualified privilege.” According to this privilege, damages will only be awarded if it can be shown that the officials being sued violated a right that had been clearly articulated at the time they had acted. In the *Arar* case, the Bush Administration did not deny that the right against torture in some general sense had the requisite clarity, but only that it was uncertain that the right extended to foreign nationals who were tortured on foreign soil by foreign officials.⁵⁸ Accordingly, there would be no point, the government argued, in judging the constitutionality of the extraordinary rendition because, even if it were unconstitutional, damages could not be recovered by Arar due to the qualified privilege.⁵⁹

The qualified privilege invoked by the government serves two purposes. It avoids the unfairness of holding the government liable for damages for conduct that was not understood to be unlawful at the time it was undertaken. It also avoids creating disincentives for taking forceful and innovative action in a context where the legality of the proposed action was uncertain. I am doubtful that either purpose would be furthered by a ruling that put extraordinary rendition within the protection of the qualified privilege. Granted, there has been no clear ruling on the legality of extraordinary rendition, but given the universality and force of the norms and laws against torture, it should be clear to government officials acting in good faith that the practice runs afoul of the Constitution. This is especially true in light of the fact that the Convention Against Torture prohibits the United States from sending any alien back to his country of origin if there is any chance that he might be tortured.⁶⁰

58. *Id.*

59. *Id.*

60. Convention Against Torture, *supra* note 3.

More importantly, even if the claim for damages must be dismissed without reaching the merits, either because of the qualified privilege or because of the *Bivens* exception, the claim for a declaratory judgment remains unaffected. The declaratory judgment does not require any congressional authorization and does not penalize any past act. It simply declares the law. It is an exercise of the core judicial function. It enables the judiciary to remove any lingering uncertainty as to the legality of extraordinary rendition, and in that way, restore the sovereignty of the Constitution.

The Second Circuit panel held otherwise and dismissed Arar's claim for a declaratory judgment on the theory that he lacked standing required by Article III. There was no doubt that Arar suffered concrete injury. The question was whether the declaration—in contrast to damages—would confer a concrete benefit. Worried about this issue, Arar's lawyers artificially defined the declaration sought. The complaint did not seek a declaration of the unconstitutionality of the rendition to which Arar was subjected, but rather the invalidity of the removal order that was issued against him (in order to effectuate the rendition). Such a declaration, they reasoned, would confer a concrete benefit. The Second Circuit panel denied, however, that a declaration of the invalidity of the removal order could in fact be of any benefit to Arar. He had been designated as a member of a terrorist organization, and as long as that designation stood, the panel held, he could be denied permission to enter the country, and if so, a judgment invalidating the removal order would not confer a concrete benefit on him.⁶¹

Arar's lawyers fell into a trap of their own creation. The focus of the declaratory judgment should not have been on the removal order, but rather on the constitutionality of the practice of extraordinary rendition—the torture of a foreign national by a foreign government at the behest of American officials. Rule 54(c) of the Federal Rules of Civil Procedure gives a court the authority to enter any order that is just,⁶² and Arar's claim should not be precluded by the strategic decision—possibly a blunder—of his lawyers.

The concrete harm that Arar suffered should be sufficient to give him Article III standing to obtain a declaratory judgment on the legality of his rendition. We all suffer when someone is tortured, because the basic law of the nation is compromised, but the victim of the rendition suffers in a distinct and very particularized way. His personal suffering constitutes an injury in fact and as such should entitle him to invoke the power of the federal judiciary. As a purely formal matter, such a declaratory proceeding would constitute a “case”

61. *Arar*, 532 F.3d at 164.

62. FED. R. CIV. P. 54(c).

or “controversy” within the meaning of Article III.⁶³ The policy objectives served by the standing requirement are also satisfied. Arar has every incentive to make certain that the contentions of law and fact are vigorously presented. The claim tendered is the same as would be presented in any injunctive proceeding—the government acted in violation of the Constitution—and respects the inherently legal function of the judiciary: to say what the law is.

Concrete benefits should not also be required, but even if they are, they can be found in Arar’s case. The declaratory judgment does not contain the material component of a damages award, but much like a damages award, it speaks both to the world and to the victim. It says to all the world that the government violated basic norms of the legal order—the Fifth and Eighth Amendments. It also addresses the rendition victim and tells him in a direct and personal way that he has been wronged—high American officials violated the basic law of their nation in sending him to Syria for interrogation under conditions of torture. Such a statement may have as much meaning to the victim and give him as much satisfaction as an award of damages. It helps restore his self-worth. It speaks to his soul, not his pocketbook, but there is nothing in Article III that prioritizes the material over the spiritual.

Other suits brought by victims of extraordinary rendition have been dismissed on the basis of a principle—the state secret doctrine—that honors the very understandable need to conduct some of the business of government in the dark. The doctrine was first announced in a case involving a tort suit against the United States for a death arising from the crash of a military airplane.⁶⁴ As part of the discovery process, the plaintiff sought internal government documents relating to the construction of the plane, and the Supreme Court upheld the refusal of the government to surrender those documents. The plaintiff was allowed to continue his litigation, though without the benefit of certain information in the possession of the government.

As originally crafted, the state secret doctrine operated only as an evidentiary privilege, but it has been transformed during the Bush years into a de facto grant of immunity. In another lawsuit regarding extraordinary rendition, this one brought against a private contractor that the CIA allegedly had engaged to transport the prisoner to the site where he was to be interrogated under conditions of torture, the state secret doctrine was used not to withhold some evidence from the plaintiff but to dismiss the suit in its entirety. The district court reasoned that any inquiry into the rendition would compromise the secrecy of the CIA.⁶⁵ In so transforming the state secret

63. U.S. CONST. art. III, § 2.

64. *United States v. Reynolds*, 345 U.S. 1 (1953).

65. *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1134-36 (N.D. Cal. 2008).

doctrine from an evidentiary privilege into a de facto grant of immunity, the court threatened the rule—long the hallmark of our legal system—that subjects all government officials, even the CIA, to the Constitution, and entrusts the judiciary with the task of determining whether these officials have followed the Constitution.

This use of the state secret doctrine overlooks the distinctly public purposes of the suit before it—in this instance, to determine the legality of extraordinary rendition. The request for damages may make the suit similar to the run-of-the-mill tort suit, such as one seeking the damages for a death resulting from a plane crash, inasmuch as it has both a private and public dimension. On the other hand, the request for a declaratory judgment—absent in the ordinary tort suit—accentuates the essentially public purpose of the suit and thus must be weighed against the government's claim of secrecy. If the damage claim is precluded by either the qualified privilege or the exception to the *Bivens* rule, then the court should begin its analysis of the state secret doctrine by acknowledging the essentially public character of the suit and the danger of dismissal. Honoring the state secret doctrine any time a clandestine agency such as the CIA or one of its instrumentalities is charged with violating the Constitution would, in effect, place that agency beyond the reach of the Constitution.

Claims of secrecy are commonplace in criminal prosecutions—the paradigmatic public lawsuit. In that context, the government is given two options: (a) make the evidence (or its equivalent) available to the defendant or (b) drop the prosecution altogether. In the civil context, especially when a request for a declaratory judgment is at issue and the public nature of the lawsuit is clear, a similar procedure can be followed. The judge should determine, in camera if necessary, the legitimacy of the need for secrecy. If it is determined that the need for secrecy is legitimate, the judge must then determine how central the information or evidence is to the plaintiff's case. If it is not central, and the claim for secrecy is well-grounded, then the information can be withheld and the plaintiff will be allowed to move forward with the trial if he so chooses. If the information is determined to be central, then the judge should provide the government with an option: (a) disclosure or (b) allowing the entry of a default judgment against it, provided the plaintiff establishes a prima facie case. As in a criminal case, the judge will respect the government's insistence on secrecy, but at the same time require it to bear the consequences of its action and thus prevent the state secret doctrine from becoming a de facto grant of immunity.

Finally, apart from the state secret doctrine, and regardless of what remedy is sought, account must be taken of the reluctance of the judiciary to second guess the Executive on foreign and military issues. Courts labor under a constitutional tradition that calls for judicial deference in such matters and for

that reason will be hesitant to inquire into the merits of the rendition victim's claim.

Admittedly, the Executive possesses a special competence in defining the foreign policy objectives of the nation and how those objectives might be pursued. The Executive also has special competence in determining how a war should be fought—what military action is required for a victory. Yet the Executive has no special competence when it comes to determining whether the challenged action, even if it is of a military nature or implicates foreign policy, comports with the fundamental values of the nation.⁶⁶ Indeed, such a determination is the essence of the judicial function—to determine whether extraordinary rendition, even if fully required by foreign policy or military objectives, is consistent with the dictates of the Fifth and Eighth Amendments. On that issue, the Executive is likely to have a view, as the Bush Administration most certainly did, but it is owed no deference. The authority of the judiciary over such questions of value arises not from the personal virtues of those who happen to sit on the bench, but rather from the strictures of public reason that govern all exercises of the judicial power—the need to listen to all those aggrieved, to try questions of the law and facts in a open courtroom, and to justify its decision on the basis of principle.

On January 20, 2009, the Bush presidency was brought to a close, and we seemed to have entered a new era. President Obama immediately issued Executive Orders addressed to some of the abuses of the previous Administration. He confined the CIA, at least until further study, to interrogation techniques set forth in the Army Field Manual;⁶⁷ closed the secret prisons, the so-called “black sites” maintained by the CIA;⁶⁸ and required the closing of Guantánamo in a year's time.⁶⁹ All of this action should be applauded because it has the inevitable effect of minimizing the risk of torture. “Black Sites” and “Guantánamo” entered the legal lexicon as prisons in which foreign nationals were abused and maybe even tortured. Moreover, having the CIA governed by the Army Field Manual will, at least nominally, place the “enhanced interrogation” techniques they had used off limits.

Following this initial flurry, the signals sent by the new Administration have been decidedly more mixed. To his credit, President Obama declared at his first press conference, as he did throughout his campaign, that he is

66. See AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 246-47 (2006).

67. See Exec. Order No. 13,491, *supra* note 2.

68. See Exec. Order No. 13,492, *supra* note 2.

69. See Exec. Order No. 13,493, *supra* note 2.

opposed to torture.⁷⁰ In his first address to a joint session of Congress he spoke inspirationally of the example of America and once again declared his opposition to torture.⁷¹ His nominee for Attorney General, Eric Holder, in a clear attempt to distance himself from Bush's last Attorney General, Michael Mukasey, declared in his confirmation hearing, without the least hesitation, that waterboarding is torture.⁷²

On the other hand, no order was issued by President Obama barring the practice of extraordinary rendition, and at his confirmation hearing, Leon Panetta, Obama's choice to head the CIA, equivocated on whether extraordinary rendition would be used by his agency in the future.⁷³ He was unprepared to send someone to another country "for the purpose of torture or actions by another country that violate our human values," but he also said that he might be prepared to return the person seized "to another country where they prosecute them under their laws."⁷⁴ He failed to guarantee that the person subject to the rendition would have judicial procedures available to make certain that he would not be tortured, and this failure may have rendered the distinction he drew illusory in practice.

Only time will tell whether these concerns about the future practices of the new Administration are justified. Even deeper misgivings relate to the past and to the reluctance of the new Administration to take appropriate corrective action for the constitutional wrongs that occurred over the last seven years. At his first press conference, the President, when asked to comment on Senator Patrick Leahy's proposal for the establishment of a truth commission, said that he was more concerned with the future than the past.⁷⁵ Fully in accord with this sentiment, Leon Panetta announced at his confirmation hearing that CIA agents that engaged in torture, including waterboarding, in the early phases of the war against terrorism, would not be criminally prosecuted.⁷⁶ Nor has there been any indication that the new Administration would disavow the many strategies used by the Bush Administration to avoid a ruling on the merits on any of the suits brought by victims of extraordinary rendition. To the contrary,

70. President Barack Obama, Press Conference at the White House (Feb. 9, 2009), *available at* <http://www.nytimes.com/2009/02/09/us/politics/09text-obama.html>.

71. President Barack Obama, Address to Joint Session of Congress (Feb. 24, 2009), *available at* http://www.whitehouse.gov/the_press_office/remarks-of-president-barack-obama-address-to-joint-session-of-congress.

72. *Confirmation Hearing of Eric Holder*, *supra* note 17.

73. See *Panetta: No "Extraordinary Rendition,"* CBS NEWS, Feb. 5, 2009, <http://www.cbsnews.com/stories/2009/02/05/politics/main4777980.shtml>.

74. *See id.*

75. President Barack Obama, Press Conference at the White House, *supra* note 70.

76. See *Panetta: No "Extraordinary Rendition,"* *supra* note 73.

in an argument before the Ninth Circuit last month in the suit against a CIA contractor, lawyers for the government once again relied on the state secret doctrine and thus seem prepared to confer de facto immunity on the CIA for constitutional wrongs as gross as those entailed in extraordinary rendition.⁷⁷

A willingness to speak only to the future is not sufficient. Not only must the new Administration establish policies that preclude torture in the future, it must also account for the wrongs of the past. It must prosecute those who engaged in practices clearly understood to be torture and provide civil remedies to those who were in fact tortured. In the civil context, the government is entitled to defend on the merits suits by victims of torture such as Arar, but should not hide behind the technical doctrines that have enabled the judiciary to avoid adjudicating the claims before it. The judiciary may have its own reasons for avoiding judgment on the merits, but it is doubtful that they would be sufficient in the face of the announced policy of the Administration.

Such a stance would provide a measure of justice to the victims of torture, and not so incidentally, lend credence to the lofty rhetoric of President Obama about the future. It would bring to light the way the Constitution had been abused and enable the public to confront and acknowledge the violations of the Constitution committed in their name. The public would have an opportunity to say “Nunca Más.” These proceedings would also allow the judiciary to affirm the dignity principle and the constitutional norms to which it gives life, and to declare—in bold and clear terms—that these norms apply to American officials and their instrumentalities wherever they act and against whomever they act.

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77. Audio Recording: Oral Argument, *Mohamed v. Jeppesen Dataplan, Inc.*, No. 08-15693 (9th Cir. 2009), http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002777.