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## Torture and Cruel Treatment: Prohibitions Under Domestic Law and International Commitments

The so-called “enhanced interrogation techniques” used in the CIA’s rendition, detention, and interrogation program<sup>1</sup> constitute torture or other cruel treatment,<sup>2</sup> and are illegal under both U.S. and international law. Throughout the election campaign, President Trump repeatedly expressed his support for using these unlawful means to interrogate terrorism suspects, saying he would bring back waterboarding and “much worse.”<sup>3</sup>

Recently President Trump has appeared to be reconsidering his position. After meeting with his choice for Secretary of Defense, retired Marine General James Mattis, Trump said he was “very impressed” with General Mattis’ view on waterboarding. According to Trump, General Mattis opposed the practice, saying, “I’ve never found it to be useful … I’ve always found, give me a pack of cigarettes and a couple of beers and I do better with that than I do with torture.”<sup>4</sup>

Professional interrogators agree with General Mattis that torture is ineffective as an interrogation technique.<sup>5</sup>

Lawyers in the Bush Administration sought to evade the prohibition on torture and other cruel treatment by using loophole lawyering to authorize treatment

that is categorically prohibited under U.S. criminal law, the law of armed conflict, and human rights law.

This document sets out the prohibitions on torture and other cruel treatment under U.S. domestic law and the United States’ international legal obligations.

### U.S. Domestic Law

Torture and other cruel treatment are prohibited under U.S. law. As stated in the 2013 U.S. report to the United Nations Committee Against Torture, “All acts of torture are offenses under criminal law in the United States.”<sup>6</sup>

**Constitution:** As the U.S. government has stated, “Protection against torture and cruel, inhuman or degrading punishment or treatment is provided by the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution.”<sup>7</sup> The Supreme Court has affirmed that the Fifth Amendment’s right against self-incrimination prohibits “torture or other abuse” to obtain confessions.<sup>8</sup> The Court also recognized that the “use of torture or its equivalent … violates an individual’s fundamental right to liberty of the person,” contrary to the requirements of the Fifth

<sup>1</sup> For more on the CIA’s EIT program, see <http://www.humanrightsfirst.org/sites/default/files/Enhanced-Interrogation-Fact-Sheet.pdf> and <http://www.humanrightsfirst.org/senate-report-cia-torture>.

<sup>2</sup> <https://www.humanrightsfirst.org/wp-content/uploads/pdf/07801-etn-leave-no-marks.pdf>.

<sup>3</sup> <https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much->

[worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425\\_story.html?utm\\_term=.b97190c61ce3](http://worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html?utm_term=.b97190c61ce3).

<sup>4</sup> <http://www.nytimes.com/2016/11/28/us/politics/trump-waterboarding-torture.html>.

<sup>5</sup> <http://www.humanrightsfirst.org/topics/interrogators>.

<sup>6</sup> <http://www.state.gov/j/drl/rls/213055.htm>.

<sup>7</sup> <http://www.state.gov/documents/organization/251864.pdf>.

<sup>8</sup> *Chavez v. Martinez*, 123 S. Ct. 1994 (2003).

Amendment's Due Process clause.<sup>9</sup> The Supreme Court has also held that the Eighth Amendment's prohibition on "cruel and unusual punishments" bans "torture" and other "barbarous" methods of punishment<sup>10</sup> and that excessive police force violates the Fourth Amendment's prohibition of "unreasonable searches and seizures."<sup>11</sup> The Fourteenth Amendment extends the constitutional prohibitions on torture and other cruel treatment to state governments.<sup>12</sup>

- Executive Order 13491 – Ensuring Lawful Interrogations.**<sup>13</sup> Requires that all persons detained by the United States during armed conflict are treated humanely, and prohibits (among other things) "violence to life and person," "cruel treatment," "torture," "outrages upon personal dignity," and "humiliating and degrading treatment." It specifically bars U.S. officials from subjecting anyone in their custody or effective control to so-called "enhanced interrogation techniques" by requiring all U.S. officials to only use interrogation techniques listed in the Army Field Manual.<sup>14</sup> This manual explicitly prohibits torture and cruel, inhuman, or degrading treatment.<sup>15</sup> The executive order also required the CIA to close all secret detention

facilities or "black sites" and barred the CIA from opening any new detention facilities.<sup>16</sup>

- Detainee Treatment Act.**<sup>17</sup> Prohibits the Department of Defense (DOD) from using "cruel, inhuman, or degrading treatment or punishment" against any "individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location."<sup>18</sup> Requires DOD personnel to only use techniques in the Army Field Manual—which explicitly prohibits torture and cruel, inhuman, or degrading treatment—when conducting interrogations.<sup>19</sup> Also known as the "McCain Amendment,"<sup>20</sup> the Detainee Treatment Act was passed by the Senate in 2005 by a vote of 90-9<sup>21</sup> as an amendment to the Department of Defense Appropriations Act.
- McCain-Feinstein Amendment.**<sup>22</sup> Codifies parts of Executive Order 13491 (see above) by requiring all government departments and agencies conducting interrogations outside a law enforcement context to only use the interrogation techniques in the Army Field Manual, which explicitly prohibits torture and cruel, inhuman, or degrading treatment.<sup>23</sup> It also requires prompt access by the International

<sup>9</sup> *Id.*

<sup>10</sup> *Gregg v. Georgia*, 428 U.S. 153, 169-70, 96 S. Ct. 2909, 2923, 49 L. Ed. 2d 859 (1976) (citing *Trop v. Dulles*, supra, 356 U.S., at 100, 78 S. Ct., at 597).

<sup>11</sup> *Graham v. Connor*, 490 U.S. 386, 390, 109 S. Ct. 1865, 1869, 104 L. Ed. 2d 443 (U.S. 1989); *Missouri v. McNeely*, 133 S. Ct. 1552, 1556, 185 L. Ed. 2d 696 (2013).

<sup>12</sup> *Robinson v. California*, 370 U.S. 660 (1962).

<sup>13</sup> <https://www.whitehouse.gov/the-press-office/ensuring-lawful-interrogations>.

<sup>14</sup> Sec. 3(b), EO 13491. See Army Field Manual on Human Intelligence Collector Operations (2-22.3), available at: <https://fas.org/irp/doddir/army/fm2-22-3.pdf>.

<sup>15</sup> *Id.*, including at viii, 4-17, 5-20, 5-21, 5-26, and 6-9. The Army Field Manual also explicitly prohibits (among other things) forcing the detainee to be naked, applying beatings, electric shock, burns, or other forms of physical pain; waterboarding; using military working dogs; inducing hypothermia or heat injury;

conducting mock executions; and depriving necessary food, water, or medical care, see 5-21.

<sup>16</sup> Sec. 4(a), EO 13491.

<sup>17</sup> 42 U.S.C. §2000dd, available at: <https://www.law.cornell.edu/uscode/text/42/chapter-21D>

<sup>18</sup> 42 U.S.C. §2000dd(a).

<sup>19</sup> See above note 16 for more on practices explicitly prohibited by the Army Field Manual.

<sup>20</sup> <https://fpc.state.gov/documents/organization/76919.pdf>.

<sup>21</sup> <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/05/AR2005100502062.html>.

<sup>22</sup> National Defense Authorization Act for Fiscal Year 2016, § 1045, available at: <https://www.congress.gov/bill/114th-congress/senate-bill/1356/text>.

<sup>23</sup> See above note 16 for more on the prohibition of torture and cruel, inhuman, or degrading treatment in the Army Field Manual.

Committee of the Red Cross to all individuals in U.S. custody detained in armed conflict. The amendment was passed in the Senate in 2015 by a vote of 78-21 as an amendment to the National Defense Authorization Act.

- 18 U.S.C. 242 – Deprivation of rights under color of law.**<sup>24</sup> Provides that individuals cannot be deprived of “any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” The U.S. government has repeatedly affirmed that “most, if not all, acts that would qualify as torture ... could be prosecuted under 18 U.S.C. 242.”<sup>25</sup>
- U.S. Torture Act.**<sup>26</sup> Prohibits torture or attempted torture by U.S. nationals and non-U.S. nationals who are in the United States. Allows the United States to prosecute those who commit acts of torture outside the United States. The statute defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering.”
- Torture Victim Protection Act.**<sup>27</sup> Allows individuals in the United States to obtain civil remedies through U.S. courts for torture by foreign nationals. Victims must show that they have exhausted all available remedies where the crime occurred.
- Foreign Sovereign Immunities Act.**<sup>28</sup> Provides an exception to the immunity from civil suits

<sup>24</sup> <https://www.law.cornell.edu/uscode/text/18/242>.

<sup>25</sup> <http://www.state.gov/j/drl/rls/213055.htm>; See also U.S. periodic reports to the Committee Against Torture from 2005, available at: <http://www.state.gov/j/drl/rls/45738.htm>; and from 1999, available at: <https://2001-2009.state.gov/documents/organization/100296.pdf>.

<sup>26</sup> 18 U.S.C. § 2340A et seq., <https://www.law.cornell.edu/uscode/text/18/2340A>.

<sup>27</sup> H.R.2092, <https://www.congress.gov/bill/102nd-congress/house-bill/2092>.

<sup>28</sup> <https://www.law.cornell.edu/uscode/text/28/1605A>.

granted to foreign governments, allowing individuals to sue these entities in U.S. courts to obtain civil remedies for torture.

- War Crimes Act.**<sup>29</sup> Prohibits all war crimes, including “torture” and “cruel and inhuman treatment,” wherever they are committed.<sup>30</sup>

## International Commitments

Torture is absolutely prohibited by international law. The prohibition on torture is recognized as a *jus cogens* norm,<sup>31</sup> meaning it is a fundamental principle of international law, which is binding on all nations and cannot be derogated from at any time, for any reason. In addition to this customary norm, the United States is a party to several international treaties that prohibit torture.

- Convention Against Torture (CAT).**<sup>32</sup> Prohibits both torture and cruel, inhuman, and degrading treatment. Defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession.”<sup>33</sup> The CAT also provides that no exceptional circumstances, including war or other public emergency, may be invoked to justify torture.<sup>34</sup> Indeed, the U.S. government has confirmed that “the obligations to prevent torture and cruel, inhuman, and degrading treatment or punishment...remain applicable in times of armed conflict.”<sup>35</sup>

<sup>29</sup> 18 U.S.C. §2441, available at: <https://www.law.cornell.edu/uscode/text/18/2441>

<sup>30</sup> 18 U.S. Code § 2441(d)(1)(A) and (B).

<sup>31</sup> *Prosecutor v. Furundžija*, International Criminal Tribunal for the Former Yugoslavia 1998 IT-95-17/1-T, at 58-61, <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

<sup>32</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

<sup>33</sup> Article 1 CAT.

<sup>34</sup> Article 2 CAT.

<sup>35</sup> <http://www.state.gov/j/drl/rls/250342.htm>.

President Ronald Reagan signed the CAT in 1988 and President George H.W. Bush submitted it to the Senate for advice and consent in 1990. The United States became a party to the CAT in 1994.

- Geneva Conventions.**<sup>36</sup> The United States became a party to the Geneva Conventions—which form the basis of the law of armed conflict—in 1955. All four Geneva Conventions include provisions prohibiting torture and other cruel treatment.<sup>37</sup> Further, Common Article 3 of the Conventions provides minimum baseline protections for members of non-state groups who are detained during war or are otherwise not taking an active part in hostilities. It prohibits “cruel treatment and torture” as well as “outrages upon personal dignity, in particular humiliating and degrading treatment.”<sup>38</sup> The Supreme Court confirmed that Common Article 3 applies to the U.S. conflict with al Qaeda in its 2006 ruling in *Hamdan v. Rumsfeld*.<sup>39</sup> The United States has also recognized the humane treatment protections in Article 75 of the Geneva Conventions’ first Additional Protocol as legally binding.<sup>40</sup> Article 75 protects people detained in conflicts between states by prohibiting (among other things) “torture of all kinds, whether physical or mental,” “outrages upon personal dignity, in particular humiliating and degrading treatment,” and threats to commit any of these.<sup>41</sup>

<sup>36</sup> <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

<sup>37</sup> See Article 12, First Geneva Convention; Article 12, Second Geneva Convention; Articles 17, 83, and 89 Third Geneva Convention; and Article 32, Fourth Geneva Convention.

<sup>38</sup> Common Article 3(a) and (c), Geneva Conventions, <https://ihl-databases.icrc.org/ihl/WebART/375-590006>.

<sup>39</sup> *Hamdan v. Rumsfeld* (No. 05-184) 415 F. 3d 33, at 67.

<sup>40</sup> <https://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

<sup>41</sup> Article 75(2)(a)(ii), (b), and (e) Additional Protocol 1, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=086F4BB140C53655C12563CD0051E027>.

- International Covenant on Civil and Political Rights (ICCPR).**<sup>42</sup> Provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>43</sup> The United States became a party to the ICCPR under President George H.W. Bush in 1992.

## Duty to Disobey

While service members of the U.S. Armed Forces must generally follow the lawful orders given by their superior officers,<sup>44</sup> service members must disobey orders that are manifestly unlawful.<sup>45</sup> Because torture and other cruel treatment are clearly prohibited under both domestic and international law, an order to torture or otherwise abuse or mistreat a detainee would be manifestly unlawful and must be disobeyed and reported.<sup>46</sup> Carrying out such an unlawful order could result in criminal responsibility for war crimes under international and domestic law. “I was just following orders” is not a defense.<sup>47</sup> ●

<sup>42</sup> International Covenant on Civil and Political Rights (ICCPR), available at:

<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>43</sup> Article 7, ICCPR.

<sup>44</sup> <http://www.ucmj.us/sub-chapter-10-punitive-articles/890-article-90-assaulting-or-willfully-disobeying-superior-commissioned-officer>.

<sup>45</sup> <https://www.lawfareblog.com/can-us-service-members-disobey-order-waterboard-terrorist>.

<sup>46</sup> *Id.*

<sup>47</sup> <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/390-550004?OpenDocument>.