Excluding Torture: A Comparison of the British and American Approaches to Evidence Obtained by Third Party Torture

John Duberstein

Follow this and additional works at: http://scholarship.law.unc.edu/ncilj

Recommended Citation
Available at: http://scholarship.law.unc.edu/ncilj/vol32/iss1/5

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
Excluding Torture: A Comparison of the British and American Approaches to Evidence Obtained by Third Party Torture

Cover Page Footnote
International Law; Commercial Law; Law

This note is available in North Carolina Journal of International Law and Commercial Regulation: http://scholarship.law.unc.edu/ncilj/vol32/iss1/5
Excluding Torture:
A Comparison of the British and American Approaches to Evidence Obtained by Third Party Torture†

TABLE OF CONTENTS

I. Introduction ................................................................. 159
II. The Holding .............................................................. 162
III. Background Law ....................................................... 165
   A. International Agreements ........................................ 165
      1. The U.N. Covenant on Civil and Political Rights ... 165
      2. The U.N. Convention against Torture .................. 166
      3. The European Convention on Human Rights ...... 166
   B. UK Sources of Law .................................................. 167
      1. Special Immigration Appeals Commission Act of 1997 (SIAČ) .................................. 167
      3. Prevention of Terrorism Act 2005 ........................ 168
   C. British Common Law ................................................. 169
   D. American Sources .................................................. 171
      1. Case Law ............................................................... 171
      2. U.S. Anti-Torture Statutes .................................... 175
   E. The House of Lords v. The United States Supreme Court ....................................................................... 179
IV. Analysis ............................................................................. 180
   A. The Current Approach to Torture in the United States ................................................................. 180
   B. The Role of the Exclusionary Rule ......................... 187
V. Conclusion ........................................................................... 191

I. Introduction

Since September 11, 2001, people have broached the subject of torture with increasing regularity as the United States and its

† I would like to thank the editorial staff and board of the North Carolina Journal of International Law and Commercial Regulation vol. 32 for all their hard work. I would also like to thank my wife, Nina, for putting (up with) me through law school.
allies prosecute the war on terror around the globe. A long history of legal opinions and thought attends the subject of torture, but the issue has particular relevance in the context of the ongoing global war on terror. The goal of this war is to root out suspected terrorists before they strike. Naturally, such an initiative relies upon collaboration by the intelligence and security services of many nations. Because of the international scope of anti-terrorism efforts, it is not enough to deal with torture in the modus operandi of domestic police, intelligence, or military forces. At present, a suspect detained and interrogated in Southeast Asia may stand trial in the United Kingdom, and someone arrested by intelligence agents in the Middle East may face justice in the United States of America. Governments must concern themselves not just with their own agents, but also with the practices of those in other nations involved in the capture, incarceration, and interrogation of suspected terrorists.

In December of 2005, the British House of Lords held that evidence obtained by torture is inadmissible regardless of who performed the torturous act.\(^1\) \textit{A and others v. Secretary of State for the Home Department} (\textit{A and others II})\(^2\) was an appeal from the decision of a special commission charged with removal proceedings under the Anti-Terrorism Crime and Security Act of 2001 (ATCSA)\(^3\) This piece of legislation was a British response to the attacks of September 11, 2001.\(^4\) Like the Patriot Act in the United States,\(^5\) the ATCSA was designed to give greater protection to the public against international terrorism.\(^6\) Also like the Patriot Act, the ATCSA has generated controversy regarding certain of its provisions. One of the gravest concerns surrounding the ATCSA is the extensive power granted to intelligence and

---


\(^2\) \textit{Id.}

\(^3\) Anti-Terrorism, Crime, and Security Act, 2001, c. 24 (U.K.), [hereinafter ATCSA].

\(^4\) \textit{A and others II}, [2005] 3 W.L.R. at 1256.


\(^6\) \textit{See ATCSA, 2001, c. 24 (U.K.).}
security officials to detain and interrogate suspects.  

This note will compare the approach taken by the House of Lords with the prevailing legal trends regarding torture in the United States. Particular attention will be given to the effect of applying the exclusionary rule to evidence obtained by torture and the role of courts in enforcing a ban on torture techniques. This note posits that the contrasting approaches of the United States and Britain reveal a strange irony. Typically in the United States, violations of a suspect's constitutional rights by investigators can lead to the exclusion of the evidence obtained. But the American approach to using evidence obtained by torture seems to avoid the strictures normally imposed by the Constitution—specifically the exclusionary rule for evidence triggered by the Fourth Amendment as well as the Due Process Clauses of the Fifth and Fourteenth Amendments, which might also lead to the exclusion of such evidence as unconstitutionally obtained. By avoiding the normal sanctions of the criminal justice system, the American approach does not risk losing evidence obtained by torture to exclusion. In contrast, the British, who have no per se exclusionary rule for evidence, have adhered to a relatively more stringent standard for excluding torture-tainted evidence. This note will explore this seemingly counterintuitive result to the use of torture-obtained evidence.

The importance of this inquiry is highlighted by recent U.S. Supreme Court decisions to allow federal courts to hear at least some habeas corpus petitions by detainees who, up to that point, were interrogated extraterritorially in completely extra-judicial proceedings. The U.S. courts have yet to decide the issue that was presented to the House of Lords in A and others II. Now that some detainees may have their day in court, the United States' policy on evidence obtained by torture deserves more scrutiny. The comparison with the British approach to torture-induced evidence may be instructive in predicting how American courts will react. The current approach of the American government, however, seems to indicate a willingness to subvert longstanding practices.

---

7 See id. § 23.

principles of law in order to serve what are admittedly very pressing expediencies of national security in the war on terror.

The paper will begin with an examination of the holding of the principal case, *A and others II*, in Part II. Part III will set forth some relevant background law on torture, first in the United Kingdom and then the United States. Finally, Part IV analyzes the current approaches to torture in the United States and Britain. Part V is a conclusion.

II. The Holding

The central holding of *A and others II* was announced by Lord Bingham of Cornhill. Though each of the seven Law Lords sitting on the panel wrote separately in the case, all agreed that evidence obtained through torture by officials of a foreign state without the complicity of British authorities must be excluded from use at trial.9 In Britain, torture is illegal, but evidence obtained unlawfully by British officials is not excluded unless it can be proven that admission would make the trial unfair.10 Broadly speaking, the British system does not rely on an exclusionary rule for illegally obtained evidence. However, the Law Lords still found that the use of evidence tainted by torture was *per se* inadmissible.11 The Law Lords’ decision was based on English common law, the European Convention on Human Rights,12 as well as various components of public international law.13 The Law Lords split as to the proper burden of proof for evidence alleged to

---


13 *A and others II* [2005] 3 W.L.R. at 1267 et. seq.
be obtained by torture, with a majority holding to a less-exacting "balance of the probabilities" standard rather than the "real risk" standard advocated by Lord Bingham.\textsuperscript{14}

The case involved ten foreign nationals who had been residing in Britain.\textsuperscript{15} Each of the appellants had been "certified" by the Secretary of State for the Home Department as threats to national security under the ATCSA, meaning they were subject to removal from the country.\textsuperscript{16} The appellants challenged their certification under the ATCSA.\textsuperscript{17} The ATCSA indicates that such appeals for certifications are heard by the Special Immigration Appeals Commission (SIAC).\textsuperscript{18} Appeals from SIAC determinations are taken by the British courts of appeal, and the House of Lords in turn took this appeal from a lower appeals court's rejection of the petitioners' case.\textsuperscript{19} Among the issues the appellants raised before SIAC was the admissibility of certain evidence used against them.\textsuperscript{20} They challenged the evidence because they believed it was obtained from sources outside the U.K. through the use of torture by foreign intelligence or security forces.\textsuperscript{21} SIAC upheld the use of such evidence and this became the primary issue on appeal to the House of Lords.\textsuperscript{22}

The Secretary of State argued that evidence should be excluded only where British agents were complicit in committing torture.\textsuperscript{23} The Secretary's argument was founded on the idea that reliance on evidence that "has or may have been obtained by

\textsuperscript{14} A and others II, [2005] 3 W.L.R. at 1301-02 (L. Hope of Craighead, concurring in the judgment). Lord Bingham does not clearly state what it would take to meet the "real risk" burden. \textit{Id.} at 1285.

\textsuperscript{15} Id. at 1258.

\textsuperscript{16} See ATCSA, \textit{supra} note 3, § 21 (detainees would be placed in deportation proceedings).

\textsuperscript{17} A and others II, [2005] 3 W.L.R. at 1255.

\textsuperscript{18} ATCSA \textit{supra} note 3, § 25.

\textsuperscript{19} For the appeals court decision, see A and others v. Sec'y of State for the Home Dep't., [2004] EWCA Civ 1123, [2005] 1 W.L.R. 414 (U.K.).


\textsuperscript{21} See \textit{id.} at 1255-56.

\textsuperscript{22} See \textit{id.} at 1258.

\textsuperscript{23} Id. at 1281.
torture inflicted in a foreign country without British complicity” is necessary for the efficient functioning of security and intelligence services.24 These services often rely, according to the Secretary, upon information gathered by foreign agents in nations with a less progressive stance on the use of torture.25 Without the ability to rely on those services, an important stream of information would run dry.26

While offering some deference to the vital importance of the national security interests asserted by the Secretary of State for the Home Department, Lord Bingham clearly stated that the admission of evidence obtained by torture went against the overwhelming weight of the British common law tradition and would not constitute merely an evidentiary problem, but an abuse of process.27 As he put it: “The principles of common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency[,] and incompatible with the principles which should animate a tribunal seeking to administer justice.”28 In addition, Lord Bingham found ample evidence in the European Convention on Human Rights and the United Nations Torture Convention to support his position.29

On the issue of whether evidence obtained by torture is admissible, Lord Bingham spoke for the majority of the panel.30 On the question of the burden of proof, however, the Lords differed.31 Lords Bingham, Nicholls of Birkenhead, and Hoffman, would all have held SIAC to a “real risk” standard.32 This would mean that unless SIAC is able to determine that there is no “real risk” the evidence has been obtained by torture, the evidence is inadmissible.33 Lord Bingham did not make clear the exact burden

24 Id.
25 Id.
27 Id. at 1259.
28 Id. at 1283.
29 Id. at 1284.
30 Id. at 1286.
31 Id.
33 Id. at 1285.
of proof for proving a "real risk," stating that it "[a]ll will depend on the facts and circumstances of a particular case."  

A majority, composed of Lords Hope of Craighead, Rodger of Earlsferry, Carswell, and Brown of Eaton-under-Heywood, ruled in favor of a different standard. They found, according to Lord Hope, that the SIAC should exclude evidence only if it finds "on a balance of probabilities that it was obtained by torture." This balance of probabilities standard is less exacting, meaning that if "[the] SIAC is left in doubt as to whether the evidence was obtained in this way [using torture], it should admit it." The balance of probabilities standard is essentially a preponderance of the evidence burden; the occurrence of torture should be more likely than not in order to exclude the evidence obtained.

III. Background Law

A. International Agreements

I. The U.N. Covenant on Civil and Political Rights

The United Nations created the International Covenant on Civil and Political Rights (the ICCPR) in 1966, and the treaty entered into force in 1976. The ICCPR was created as one of two supplements to the Universal Declaration of Human Rights. Article 7 of the ICCPR reads as follows: "No one shall be subjected to torture or to cruel, inhuman[, or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." The ICCPR serves, in Lord Bingham's opinion, as evidence of the

34 Id.
35 Id. at 1296-1319.
36 A and others II. [2005] 3 W.L.R. at 1301-02 (L. Hope of Craighead, concurring in the judgment).
37 Id.
40 The ICCPR, supra note 38, art. 7.
established nature of the prohibition on torture in international law.\textsuperscript{41} The ICCPR is regarded as taking a strong normative stance against torture, but has little in the way of enforcement possibilities.\textsuperscript{42}

2. \textit{The U.N. Convention against Torture}

The text of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the UN Convention) is fairly straightforward in regard to evidence obtained by torture. Article 15 of the UN Convention states simply that “[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”\textsuperscript{43} Thus, the Convention not only establishes a prohibition on torture, but also explicitly mandates an exclusionary rule for evidence obtained by torture.\textsuperscript{44} Both the U.K. and United States are signatories, but the U.S. signed with certain reservations that limit the enforceability of the UN Convention.\textsuperscript{45}

3. \textit{The European Convention on Human Rights}

The European Convention on Human Rights (the European Convention) was established in 1950 under the auspices of the Council of Europe.\textsuperscript{46} The European Convention guarantees substantive rights as well as the possibility of legal redress for the violation of those rights in the European Court of Human Rights in Strasbourg.\textsuperscript{47} Article 3 of the European Convention prohibits the subjection of any person to torture.\textsuperscript{48} There is no listed exception...
to this provision of the European Convention. The provisions of the European Convention have been expressly incorporated into British law by the Human Rights Act 1998 Chapter 42.  

B. UK Sources of Law

1. Special Immigration Appeals Commission Act of 1997 (SIAC)

SIAC was established by statute in 1997 as "a superior court of record" whose purpose was "to reconcile the competing demands of procedural fairness and national security in the case of foreign nationals whom it was proposed to deport on the grounds of their danger to the public." The Lord Chancellor appoints the members of SIAC; also, under sections 5 and 8 of the SIAC Act, he can promulgate rules of procedure for SIAC, subject to parliamentary approval. The rules may include proceedings in which the appellant is not given the details of the decision, and even for proceedings to take place in the appellant's absence. In the latter case, a "special advocate" is to be appointed by the presiding officer to report a summary of the proceedings to the appellant.  

50 Special Immigration Appeals Commission Act, 1997, c. 68, (Eng.) [hereinafter SIAC Act].
52 The Lord Chancellor is a cabinet level appointment (actually called the Secretary of State for Constitutional Affairs and Lord Chancellor) in Britain whose current responsibilities include: "the resourcing of his Departments; major constitutional issues; appointments, including all judicial appointments; Royal, Church and Hereditary issues, and Lord Lieutenants; making or approving rules of court; Privy Counsellors (other than Cabinet Ministers) who have addressed their query to the Secretary of State personally. Where a Privy Counsellor writes to another Minister by name that Minister may respond personally; correspondence with Cabinet Ministers, and the higher Judiciary." Department for Constitutional Affairs, http://www.dca.gov.uk/dept/depconmin.htm (last visited Oct. 23, 2006).
53 SIAC Act, supra note 50, §§ 5-8.
54 Id. § 5.
55 Id. § 5.

The ATSCA was originally passed in the wake of September 11, 2001 to increase the government's power to protect against terrorist threats. One provision of the ATSCA allowed the Secretary of State for the Home Department to "certify" foreign nationals considered to be a threat to national security (those with ties to international terrorism). Under the original terms of the 2001 act, this "certification" essentially provided the government with the ability to detain the suspect indefinitely, without criminal charges. The process afforded under the ATSCA was an appeal heard by SIAC. Because of the potential sensitivity of the matters involved, SIAC could invoke their rulemaking power to exclude the appellant or keep certain evidence secret. This meant that a suspect could be detained indefinitely, with no formal charges and no knowledge of the evidence being used against him.

3. Prevention of Terrorism Act 2005

In 2005, after a House of Lords decision in an earlier stage of the present litigation held that the ATSCA was incompatible with Britain's obligations under the European Convention on Human Rights, section 4 of the ATSCA was replaced by the Prevention of Terrorism Act. The 2005 version replaced the indefinite detention provision with "control orders," which allow the Home Department Secretary to impose extensive conditions on the movements of the suspected person with restrictions approaching a

56 See generally ATCSA, supra note 3 (establishing procedures for confronting the threat of terrorism).
57 Id. § 21.
58 Id. § 23.
59 Id. § 25.
60 Id. § 27.
61 See id.
63 Prevention of Terrorism Act 2005, c. 2 (U.K.).
form of house arrest.\(^{64}\)

\textit{C. British Common Law}

The Court detailed an array of British common law sources in weighing against the use of torture, which as one source stated, "always had been illegal by the common law."\(^{65}\) According to another source, "the crimes of murder and robbery are not more distinctly forbidden by our criminal code than the application of the torture to witnesses of accused persons is condemned by the oracles of the Common law."\(^{66}\) After listing these historical sources of support, Lord Bingham cite case law supporting the prohibition of torture-induced evidence.\(^{67}\)

One of the more important precedents is the House of Lords decision from an earlier stage of the current litigation: \textit{A and others I}.\(^{68}\) This case arose from challenges to Section 23 of the original ATSCA.\(^{69}\) On December 16, 2004, the Law Lords ruled that the powers of detention granted by section 23 of the ATSCA were contradictory to the United Kingdom's obligations under the European Convention on Human Rights.\(^{70}\) An 8-1 majority held that the derogation from the Convention written into the ATSCA conflicted with articles 5 and 14 of the European Convention.\(^{71}\) As a result, the Court quashed the derogation from the European Convention and issued the following declaration:

\[\text{[U]nder section 4 of the Human Rights Act 1998 ... section 23 of the Anti-terrorism, Crime and Security Act 2001 is incompatible with articles 5 and 14 of the European Convention insofar as it is disproportionate and permits detention of}\]

\(^ {64}\) \textit{Id.} § 1.

\(^ {65}\) \textit{A and others v. Sec'y of State for the Home Dep't, (A and others II)} [2005] UKHL 71, [2005] 3 W.L.R. at 1255, 1260 (U.K.) (quoting \textit{SIR WILLIAM HOLDSWORTH, 5 A HISTORY OF ENGLISH LAW} 194-95 (1945)).

\(^ {66}\) \textit{Id.}, (quoting D. \textit{JARDINE, A READING ON THE USE OF TORTURE IN THE CRIMINAL LAW OF ENGLAND PREVIOUSLY TO THE COMMONWEALTH} 13, (1837)).

\(^ {67}\) \textit{Id.} at 1261-68.

\(^ {68}\) \textit{A and others v. Sec'y of State for the Home Dep't, (A and others I)} [2004] UKHL 56, [2005] 2 W.L.R. 87 (UK).

\(^ {69}\) \textit{Id.} at 88.

\(^ {70}\) \textit{Id.}

\(^ {71}\) \textit{Id.} (the nine judge panel was unprecedented for the House of Lords).
suspected international terrorists in a way that discriminates on
the ground of nationality or immigration status.\textsuperscript{72}

In other words, the Court found the ATSCA wanting in two
important respects: it was not proportionally tailored to the threat
and it discriminated unjustifiably based on nationality.

The Court in \textit{A and others II} also cited precedent for their
holding that evidence obtained by torture is inadmissible,
regardless of whether or not the evidence later proves to be
reliable. Lord Bingham cited a case in which a different court
held:

\begin{quote}
the more recent English cases established that the rejection of an
improperly obtained confession is not dependent only upon
possible unreliability but also upon the principle that a man
cannot be compelled to incriminate himself and upon the
importance that attaches in a civilised society to proper
behaviour by the police towards those in their custody.\textsuperscript{73}
\end{quote}

The Court cited a series of cases in which the actions of British
authorities had resulted in questions of due process.\textsuperscript{74} The Court
also looked at cases dealing with the possibility of unfairness that
would result from the failure of a foreign government to adhere to
principles of due process after extradition from Britain.\textsuperscript{75} Finally,
the Court cited the British trial of Chilean dictator Augusto
Pinochet, in which it was established that the \textit{jus cogens}
nature of
the international crime of torture justifies states in taking universal
jurisdiction over torture wherever committed.\textsuperscript{76}

\textsuperscript{72} \textit{Id.} at 130.

\textsuperscript{73} \textit{A and others v. Sec'y of State for the Home Dep't, (A and others II)} [2005]
UKHL 71, [2005] 3 W.L.R. at 1255, 1262 (U.K.) (quoting Lam Chi-ming v. The Queen
[1991] 2 A.C. 212, 220 (U.K.)).

\textsuperscript{74} \textit{Id.} at 1263-64 (citing \textit{R v. Horseferry Road Magistrates' Court, ex parte Bennett,

\textsuperscript{75} \textit{Id.} at 1266 (citing \textit{R (Ramda) v. Sec'y of State for Home Dep't. [2002] EWHC
1278 (Admin.)}.

\textsuperscript{76} \textit{Id.} at 1272; see \textit{R v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet
D. American Sources

1. Case Law

In justifying the use of the exclusionary rule in A and others II, Lord Bingham cited Justice Felix Frankfurter, who wrote for the Supreme Court of the United States in *Rochin v. California* that due process may be violated by "conduct that shocks the conscience" even though the evidence obtained through that conduct is accurate and relevant to a conviction.77 *Rochin* is a Fourth, Fifth, and Fourteenth Amendment case, but it is also more generally a case at the heart of the United States Supreme Court’s jurisprudence dealing with torture and cruel, degrading, or inhuman treatment.78 The case involved a suspect who swallowed illegal drugs.79 In order to recover them, the police forced a tube down his throat and pumped his stomach.80 The Court held that this violated the Due Process Clause of the Fourteenth Amendment.81 As Justice Frankfurter wrote:

> Regard for the requirements of the Due Process Clause inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.82

*Rochin* proscribes brutality as a tactic by American law enforcement officers, not because evidence extracted by such measures is unreliable, but because the measures are themselves offensive to the justice system.83

An earlier Supreme Court case, *Brown v. Mississippi,*

---

77 *Id.* at 1262 (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952), "we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience.").

78 *Rochin*, 342 U.S. at 167.

79 *Id.* at 166.

80 *Id.*

81 *Id.* at 168, 174.

82 *Id.* at 169 (quoting *Malinski v. New York*, 324 U.S 401, 416-17 (1945)).

83 *See id.* at 173-74.
established that the Due Process Clause protections of the federal Constitution are incorporated and apply to the states. In that case, Mississippi police officers had tortured confessions out of black suspects who were convicted using no other evidence than their confessions. Chief Justice Hughes wrote that "it would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." 

The Supreme Court has expressed concern not only for illegal tactics of obtaining evidence, but also for unfair methods of getting such evidence admitted at trial. Two cases from the mid-20th Century dealt with what came to be known as the "silver platter" doctrine. The "silver platter" is used to describe a questionable law enforcement technique in which officials would "serve up" evidence illegally obtained under the rules of state jurisdictions and hand it over to officials in federal jurisdiction, or vice versa, so it could be used against a defendant. The Court invalidated this practice through two different cases. In one case, the Court disallowed States from using material that federal agents seized unconstitutionally. In another case, the Court held against the use in federal courts of material that State agents had seized unconstitutionally.

In the 1980 case Filartiga v. Pena-Irala, the Court of Appeals for the Second Circuit addressed the issue of American jurisdiction over foreign torturers who were present in the United States. In Filartiga, the plaintiff brought suit under the Alien Tort Statute (ATS) against a Paraguayan citizen, who was in New York at the time, for torture committed in Paraguay under the

85 Id. at 287.
86 Id. at 286.
88 Id.
91 630 F.2d 876 (2d Cir. 1980).
dictatorial regime of Alfredo Stroessner. The ATS was passed in 1789 but lay essentially dormant until 1980, when it began to be used as a way for victims seeking restitution to bring foreign torturers into federal court in the United States. In allowing the suit to go forward the Second Circuit held that “the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind. Our holding today... is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”

In another case, the Second Circuit found that due process requires “a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government’s deliberate, unnecessary[,] and unreasonable invasion of the accused’s constitutional rights.” However, in that same case the Court noted that constitutional protection, “applies only to the conduct abroad of agents acting on behalf of the United States” and not to acts of foreign governments or individuals acting without American complicity.

In 1990, the Supreme Court held in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), that certain constitutional protections extended only to citizens and those with sufficient ties to our “national community” to be considered part of “the people.” Specifically, this was the case for the First, Second, Fourth, Ninth, and Tenth Amendments, whose language specified protection for ‘the people’ and not, for example ‘the accused,’ as in the Fifth or Sixth Amendments. This contrast suggests that the Fifth and Sixth Amendments might have broader applicability, but the Court also held that the Fifth Amendment is not applicable...

---

92 Id. at 877-79.
93 28 U.S.C.S. § 1350 (2005) [hereinafter ATS] (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).
94 Filartiga, 630 F.2d at 890.
95 United States v. Toscanino, 500 F.2d 267, 275 (2d Cir. 1974).
96 Id. at 280 n.9.
98 Id.
99 Id. at 266.
to aliens outside the sovereign territory of the United States.\textsuperscript{100} Justice Brennan wrote a vigorous dissent in the case, arguing that the rule of law should be applied to anyone who is subject to our laws, regardless of their citizenship, residence, or ties to the country.\textsuperscript{101} He warned that “as our Nation becomes increasingly concerned about the domestic effects of international crime, we cannot forget that the behavior of our law enforcement agents abroad sends a powerful message about the rule of law to individuals everywhere.”\textsuperscript{102}

In a case related to Verdugo-Urquidez, Sosa v. Alvarez-Machain, 542 U.S. 693 (2004), the Court held that the abduction and detention of a Mexican doctor suspected of involvement in the murder at issue in Verdugo-Urquidez was not a violation of international law and so could not be the basis for a claim under the Alien Tort Statute (ATS).\textsuperscript{103} The ATS has an exception to the waiver of immunity for government liability for foreign countries,\textsuperscript{104} which the Court found applied in this case.\textsuperscript{105} Under the supervision of the Drug Enforcement Agency (DEA), the suspect was arrested in Mexico by foreign agents, transported to the United States, and taken into custody by American law enforcement agents.\textsuperscript{106} The Court rejected the idea that American agents were the proximate cause of Alvarez’s abduction and refused to apply the “headquarters doctrine,” which the Ninth Circuit Court of Appeals held would get around the foreign country exception.\textsuperscript{107} Ultimately, the Court held that Alvarez’s claim was simply not substantial enough to constitute a breach of international law.\textsuperscript{108} His single complaint was an illegal detention lasting only the day he was abducted in Mexico (once he was in

\textsuperscript{100} Id. at 269; see also Johnson v. Eisentrager, 339 U.S. 763, 776 (1950) (“the nonresident enemy alien . . . does not have even . . . qualified access to our courts.”).

\textsuperscript{101} Verdugo-Urquidez, 494 U.S. at 279 (Brennan, J. dissenting).

\textsuperscript{102} Id. at 285.


\textsuperscript{105} Sosa, 542 U.S. at 694.

\textsuperscript{106} Id. at 702.

\textsuperscript{107} Id. at 702-12.

\textsuperscript{108} Id. at 736.
EXCLUDING TORTURE

the U.S. his treatment was held to be lawful). The Court held that this complaint lacked any substantial support in international law, including the ICCPR. The Court’s holding, while clearly denying liability in this case, does seem to imply that a well-established violation of a norm of international law might indeed serve as the basis for a valid claim under the ATS.

2. U.S. Anti-Torture Statutes

The United States has enacted legislation that makes it a crime punishable by up to twenty years in prison for a person subject to U.S. jurisdiction to commit an act of torture outside the United States. If a person dies as a result of the act of torture, then the offense is punishable by death. The statute includes a definition of 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 (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”

Recently, Senator John McCain (R-AZ) attached an amendment to the Department of Defense appropriations bill in order to clarify and strengthen the American torture statute. The McCain Amendment added the language of a prohibition on “cruel, inhuman, or degrading treatment” to the prohibition on torture found in the torture statute. McCain supported his amendment by insisting that it was merely making official what

109 Id. at 698.
110 Id. at 735.
111 Sosa, 542 U.S. at 732-34.
113 Id. § 2340 A(a)(c).
114 Id. § 2340(1).
were already established norms. As the Senator put it, "if that doesn’t sound new, that’s because it’s not—the prohibition has been a longstanding principle in both law and policy in the United States."\(^{117}\) McCain’s goals were to send a signal to the world that the United States does not torture, to protect U.S. soldiers abroad by giving the soldiers clear guidelines, and to discourage their torture at the hands of foreign captors.\(^{118}\) But McCain’s amendment did not include any enforcement provision, so it served only as a normative or policy statement. Also, in the very same appropriations bill that carried the McCain Amendment, Congress passed the Graham-Levin Amendment.\(^{119}\) This Amendment allowed the use of evidence obtained by “coercion” by the Department of Defense for detainees in Guantánamo Bay and restricted detainee access to federal courts.\(^{120}\)

In October of 2006 Congress passed a new bill titled the Military Commissions Act of 2006 (MCA), which deals with—among other things—the use of torture-obtained evidence by U.S. military tribunals.\(^{121}\) The MCA was the result of a compromise between the President and Congress, in which the White House sought to create a bill that would grant fewer detainee rights and grant greater executive discretion in detainee treatment, and several members of Congress fought to include provisions strengthening the prohibitions on torture and reinforcing the due process afforded detainees.\(^{122}\)


\(^{118}\) See id.


\(^{120}\) Id. at 3476, 3479.


\(^{122}\) For a description of the compromise that holds the bill was not a middle ground but a capitulation to the President by Congress, see Michael Dorf, Why the Military Commissions Act is no Moderate Compromise, FindLaw’s Writ, Oct. 11, 2006, http://writ.news.findlaw.com/dorf/20061011.html (“prior to reaching an agreement with the President, four prominent Republican Senators—Susan Collins, Lindsey Graham, John McCain, and John Warner—had drawn a line in the sand, refusing to go along with a measure that would have redefined the Geneva Conventions’ references to ‘outrages upon personal dignity’ and ‘humiliating and degrading treatment.’ . . . ”).
Under the MCA, statements obtained before enactment of the Detainee Treatment Act (before Dec. 30, 2005) "in which the degree of coercion is disputed may be admitted only if the military judge finds that (1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and the interests of justice would be served by admission into evidence." Statements obtained on or after December 30, 2005 may be admitted if: the totality of the circumstances renders the statement reliable; the interest of justice would be served by admission, and the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by the Detainee Treatment Act. In other words, there is a prohibition on using torture-obtained evidence, but it can be overcome by a sufficient showing of reliability for evidence obtained before December 30, 2005.

The MCA's restrictions on torture and cruel, inhuman, or degrading treatment are tempered by some of the Act's other provisions. Most important, perhaps, is the way the MCA redefines torture in amending the War Crimes Act (WCA), which is the only statute offering actual enforcement possibilities for torture violations. The MCA changes the WCA to say that only "grave breaches" of the Geneva Convention's Common Article III as defined under the MCA will constitute criminal offenses under the act. The MCA lists the acts that constitute grave breaches, but then goes on to say that "the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations . . . which

123 Military Commissions Act § 3(III)(948R)(c)(1-2).
124 Id. § 3(III)(948R)(d)(1-3).
125 18 U.S.C 2441. The amended sections are § 2441 (c) and (d). The WCA is the statute under which criminal prosecutions for abuses in wartime would be prosecuted. See id.
127 Military Commissions Act § 6(b)(1)(B).
128 Id. § 6(b)(1)(B) (torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages).
are not grave breaches of the Geneva Conventions."\footnote{129} The MCA also states that "[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions [of the amended WCA]."\footnote{130} So while it purports to fulfill the treaty obligations of the Geneva Conventions, the MCA itself defines the "grave breaches" without reference to international norms and reserves for the President the absolute right to interpret all other infractions under the Act. Therefore, anything falling short of a grave breach might not be implicated.

This is vital because of the redefinition of some of the grave breaches operated by the MCA. The definitions are found in Section 6 of the Act: "Torture: The act of a person who commits, or conspired to commit, an act specifically intended to inflict severe physical or mental pain and suffering . . . upon another person within his custody or physical control for the purposes of obtaining information or a confession . . . ."\footnote{131} The requirement of specific intent changes the definition of torture so that an interrogator could conceivably say they had no specific intent to torture, but only to obtain information. Similarly, the MCA redefines cruel or inhuman treatment. The MCA states that this is the "act of a person who commits or conspires to commit, an act intended to inflict severe or serious physical or mental pain or suffering . . . ."\footnote{132} The term "serious physical pain or suffering" is defined as "a substantial risk of death; extreme physical pain; a burn or physical disfigurement of a serious nature; significant loss or impairment of the function of a bodily member, organ, or mental faculty."\footnote{133} The DTA, in contrast, defines cruel, inhuman, or degrading treatment with reference to the Fifth, Eight, and Fourteenth Amendments to the U.S. Constitution, which would implicate a broader range of actions.\footnote{134}

Finally, the MCA limits the access of detainees to judicial

\footnote{129} Id. § 6(a)(3)(A).
\footnote{130} Id. § 6(a)(2).
\footnote{131} Id. § 6(d)(1)(A) (emphasis added) (this section will be codified as 18 U.S.C. 2441(d).
\footnote{132} Id. § 6(b)(1)(B).
\footnote{133} Military Commissions Act § 6(b)(1)(B).
\footnote{134} 42 U.S.C. 400dd(d) (2005).}
review, so that even if a suspect was tortured while detained, and
the military commission erred in allowing torture-obtained
evidence, there would be only limited judicial review by federal
courts.\textsuperscript{135} The MCA allows only review for purposes of the
determination of enemy combatant status.\textsuperscript{136} The MCA is also
made retroactive, erasing any pending habeas claims already in
federal courts.\textsuperscript{137} The result of this jurisdiction stripping is
obviously to further limit the application of the exclusionary rule
to any evidence obtained by torture that might be used against a
detainee, since federal courts are unlikely to hear such claims
under the MCA.

\textbf{E. The House of Lords v. The United States Supreme Court}

The United States Supreme Court’s invalidation of a statute or
action voids the law.\textsuperscript{138} To put it another way, a law declared
unconstitutional is no longer a law.\textsuperscript{139} This long-established
principle is known as judicial review.\textsuperscript{140} As Chief Justice John
Marshall wrote in \textit{Marbury v. Madison}, “it is emphatically the
province and duty of the judicial department to say what the law
is.”\textsuperscript{141} In contrast, decisions of the House of Lords, while
controlling for lower courts, do not carry the same force of law as
in the United States.\textsuperscript{142} Parliament is supreme in the United
Kingdom and may choose to uphold or repeal statutes rejected by

\textsuperscript{135} Military Commissions Act § 7(a). The D.C. Circuit is given exclusive appellate
jurisdiction and all other claims are explicitly forbidden. \textit{See id} § (3)(950G)(a),
(950J)(a)-(b).
\textsuperscript{136} Id.
\textsuperscript{137} Id § (b).
\textsuperscript{138} \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 177-80 (1803).
\textsuperscript{139} \textit{Id.} at 177-78.
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{Id.} at 177.
\textsuperscript{142} Further, although the U.K. is going to create a Supreme Court functioning
separately from Parliament, the principle of parliamentary supremacy shall remain. \textit{See}
Constitutional Reform: A Supreme Court for the United Kingdom Consultation Paper
(Department for Constitutional Affairs), July 2003, at 20-21, http://www.dca.gov.uk/
consult/supremecourt/supreme.pdf (“In our democracy, Parliament is supreme. There is
no separate body of constitutional law which takes precedence over all other law. The
constitution is made up of the whole body of the laws and settled practice and
convention, all of which can be amended or repealed by Parliament.”).
the Law Lords.\textsuperscript{143}

**IV. Analysis**

Some have argued that the House of Lords decision in December 2005 has had a substantial impact around the world as a condemnation of torture.\textsuperscript{144} Observers have also voiced reservations about the potential limitations of the holding.\textsuperscript{145} One commentator who analyzed the opinion found the central holding of discrimination to be far too limited, almost a "technicality," instead of a broad condemnation of torture.\textsuperscript{146} The aim of this note is to examine the potential impact of the case by comparing it with the treatment of evidence obtained by torture in the United States. The comparison is important because the issue has not yet been decided by the U.S. Supreme Court, and because the British decision may help to clarify the likely trajectory of this issue in American courts. Also, the decision helps bring into relief the contrasting effects of the exclusionary rule in the British and American systems of justice in the context of the war on terror.

\textbf{A. The Current Approach to Torture in the United States}

The U.S. Supreme Court has not had the opportunity to hear a case comparable to \textit{A and others II} on the subject of third-party torture.\textsuperscript{147} The United States government has given some indications of how the topic of third-party torture is viewed by the executive branch. In a series of now-infamous memoranda\textsuperscript{148} (the

\textsuperscript{143} Id. at 21.

\textsuperscript{144} See Roger Smith, \textit{The Pain Game}, LAW GAZETTE, Jan. 5, 2006, available at http://www.lawgazette.co.uk/features/view=feature.law?FEATUREID=262854 (arguing that the decision by the House of Lords that evidence obtained by torture is inadmissible in British courts has reverberated around the world).

\textsuperscript{145} Paul Mendelle, \textit{No Detention Please, We're British?}, 156 NEW. L.J. 77 (2005).

\textsuperscript{146} Id. In other words, rather than condemning the legislation because torture is wrong under all circumstances, the court condemned differential treatment of foreign and British subjects under the statute.

\textsuperscript{147} See supra text accompanying notes 20-25.

\textsuperscript{148} Memoranda, while lacking precedential value, they often address issues that have not been adjudicated. "OLC [Office of Legal Counsel] is often asked to address constitutional issues that will never to make it to court—what lawyers call non-justiciable political questions. In these circumstances, the formal advice of OLC may be the only sort of 'precedent' that exists." Michael C. Dorf, \textit{The Justice Department's
"Torture Memos"), the George W. Bush Administration set forth a view on torture that contrasts starkly with past condemnations enunciated by the Supreme Court. Those memoranda, if used as a blueprint for United States policy, would lead to executive actions that violate both American jurisprudence and international standards on torture-obtained evidence. In January 2002, Deputy Attorney General John Yoo, in order to allow interrogation techniques that would otherwise violate the Geneva Conventions, wrote a memo defining captured members of Al-Qaeda and the Taliban as outside the Geneva Conventions. Then, in August of the same year, deputy Attorney General (now 9th Circuit Judge) Jay Bybee wrote another memo in which he attempted to narrow the definition of torture to actions that result in organ failure or death.

What is striking about these "Torture Memos" is their seemingly sanguine approach to the topic of torture. It is important to note that these memoranda did not concern something as remote as the use of evidence obtained by third-party torture. The memos addressed the use of torturous techniques by American agents themselves. The Bybee and Yoo memos

---


150 Memorandum from John Yoo, Deputy Assistant Att'y Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def., 1 (Jan. 9, 2002), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf [hereinafter Yoo Memorandum].

151 See generally, Convention (III) relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Geneva Conventions].

152 Id.


154 Yoo Memorandum, supra note 150; Bybee Memorandum, supra note 153.
represent an alternative not considered in the British case. The British Secretary of State argued in A and Others II, as a justification for allowing evidence that may have been obtained by third-party torture, that SIAC should be able to hear all relevant material relied upon by the Secretary of State’s office in the certification of foreigners suspected of terrorism. In the “Torture Memos” the U.S. is taking a position on torture that is substantially different from that evinced by the British. Rather than simply questioning the ability of U.S. agents to acquire third-party information under norms of international law, the authors fundamentally redefined international law to exclude tortuous interrogation methods used by U.S. agents from the realm of torture.

The Torture Memos were such an abrogation of the normal approach to torture that the Justice Department later issued a superseding memorandum renouncing some of the more controversial positions taken in the Yoo and Bybee memos. The new memo retracted the extreme position taken on what constitutes “severe” pain under the torture statute, and also recanted the prior statement that the President’s commander in chief power could serve as a defense to liability. The superseding of the Torture Memos by the White House is a significant acknowledgement that the administration’s policies had gone too far in defining executive actions outside the reach of torture sanctions.

The language of these memos also needs to be read in conjunction with the holdings of the Supreme Court. Recall that in Sosa the Court seemed to hold that a clear violation of international law norms might well lead to liability under the Alien Tort Statute. The question, if it ever came before the Court,

156 Yoo Memorandum, supra note 150; Bybee Memorandum, supra note 153.
159 Levin Memo, supra note 157, at 2.
would then be what constituted a norm of international law. In *Sosa*, the Court made reference to the ICCPR and the Universal Declaration of Human Rights, but failed to find either applicable to the petitioner's case.\(^{161}\) The Court also made the point that “although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”\(^{162}\)

Given the reservations frequently articulated by the U.S. as a condition of signing any international agreement\(^{163}\) and the redefinition of torture currently underway in the “war on terror,” there seems to be every indication that the Supreme Court, if confronted with the issue, might allow considerably more than what the “norms” of international law recognize as legal. In addition, there is the matter of extraterritoriality described above in relation to *U.S. v. Verdugo-Urquidez*. In that case the Court held that the protections of the U.S. Constitution do not extend to foreigners outside of the United States.\(^{164}\) Given this opinion, it seems plausible to imagine the Court allowing evidence obtained illegally from foreign persons outside the United States.

Even if the Court were to find the actions of American agents or their proxies to be in violation of the norms of international law, the U.S. has engaged in a strategy of avoidance when it comes to the structures of domestic and international law that might keep any torture claims out of American courts altogether.\(^{165}\) By placing detainees in extraterritorial detention, such as Guantánamo Bay in Cuba, or prisons in Iraq and Afghanistan, the United States can “retain maximum control over the conduct of interrogations and torture while simultaneously minimizing the potential for legal oversight.”\(^{166}\)

The Supreme Court did seem to limit the ability of the White House to conduct an extra-judicial campaign of interrogation and

\(^{161}\) *Id.* at 734-45.

\(^{162}\) *Id.* at 735.


\(^{164}\) *Verdugo-Urquidez*, 494 U.S. at 269.


\(^{166}\) *Id.* at 516.
intelligence gathering by requiring some due process for detainees in the war on terror. But the White House has found other ways of expanding executive authority to interpret the law in its own fashion. The McCain Amendment, as mentioned above, was intended to create a stronger message about the prevention of torture by U.S. agents. However, President Bush, in signing the amendment into law, put forth language in his "Signing Statement" that sent a different message, indicating the executive branch intends to continue to define what constitutes torture for itself:

The Executive Branch shall construe [the Amendment] . . . in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander-in-Chief and consistent with the constitutional limitations on judiciary power, which will assist in achieving the shared objective of the Congress and the President . . . of protecting the American people from further terrorist attack.

Presidents have long used signing statements to add some executive clarification or input into a piece of legislation. They do not carry the force of law, but their legitimate purposes have been enumerated as:

(1) explaining to the public, and particularly to constituencies

---


169 President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1917, 1919 (Jan. 2, 2006) [hereinafter Signing Statement].

170 Walter A. Dellinger, Asst. Attorney General, The Legal Significance of Presidential Signing Statements, Memorandum for Bernard N. Nussbaum, Counsel to the President (Nov. 3, 1993) ("Examples of signing statements of this kind can be found as early as the Jackson and Tyler Administrations, and later Presidents, including Lincoln, Andrew Johnson, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Lyndon Johnson, Nixon, Ford and Carter, also engaged in the practice.") http://www.usdoj.gov/olc/signing.htm.

171 See, e.g., Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (striking down use of military tribunals for Guantánamo detainees). In Hamdan the Supreme Court considered the Detainee Treatment Act and failed to take the Signing Statement into account at all.
interested in the bill, what the President believes to be the likely effects of its adoption, (2) directing subordinate officers within the Executive Branch how to interpret or administer the enactment, and (3) informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain of its applications, or that it is unconstitutional on its face, and that the provision will not be given effect by the Executive Branch to the extent that such enforcement would create an unconstitutional condition.\footnote{172}

There is an argument that President Bush has gone further by employing the signing statement to defy the legislative and judicial branches, upsetting the balance of power.\footnote{173}

The Bush signing statement does not explicitly indicate the President’s intentions, but given the context of the torture memos, the redefinition of torture under the MCA, and the practices employed by the Bush Administration to retain extra-judicial control over detainees, its purpose seems clear enough. The statement is intended to give the executive branch wide latitude in employing interrogation techniques that may violate international norms.\footnote{174} The “unitary executive” has become a buzzword, used to indicate the augmentation of executive authority that some accuse the George W. Bush Administration of undertaking.\footnote{175}

Also, the fact that the administration felt it needed to add a specific caveat to an anti-torture measure is telling.

The use of the Signing Statement indicates that the White House intended to interpret the amendment’s provisions on \textit{habeas corpus} as withdrawing federal jurisdiction over cases involving

\addtocounter{footnote}{1}

\begin{footnotesize}
\begin{itemize}
\item \footnote{172}{Id.}

\item \footnote{173}{See, e.g., Dahlia Lithwick, \textit{Sign Here}, \textit{Slate}, Jan. 30, 2006, http://www.slate.com/id/2134919/. It should be noted that President Bush has made more frequent use of the signing statement than any other president for the purpose of challenging the constitutionality of a bill. See id. For a detailed table giving the actual count of signing statements by President George W. Bush, see Christopher Kelly, \textit{Number of New Statutes Challenged}, \textit{Boston Globe}, Apr. 30, 2006, http://www.boston.com/news/nation/washington/articles/2006/04/30/statutes_challenged/}.\footnote{174}{See, e.g., ICCPR, \textit{supra} note 38, § 7 (taking a strong normative stance against the use of torture); European Convention, supra note 12, art. 3.}

\end{itemize}
\end{footnotesize}
foreign "enemy combatants." Since at that time there were several habeas petitions pending in the D.C. Circuit, this language is intended to strip the petitioners of judicial review for their treatment, inhumane or otherwise. In spite of laws that ostensibly forbid the use of torture in the United States, a relatively complex and sophisticated system has been created to enable the executive branch to avoid the judicial sanction of exclusion for evidence obtained by torture, regardless of who commits the torturous act.

The George W. Bush Administration met a setback in early 2006 when the Supreme Court heard one of the pending habeas cases of a Guantánamo Bay prisoner in Hamdan v. Rumsfeld. Hamdan was Osama Bin Laden's driver and was being held pending a hearing before a military tribunal convened by the administration to deal with Guantánamo detainees. The Supreme Court struck down the use of the military tribunals in Hamdan and held that the petitioner had the right to be heard by federal courts. The Court found no authorizing Congressional language in the Detainee Treatment Act or any of the other statutes that the government contended allowed them to use the military tribunals. Hamdan could be read as a victory for those who believe detainees deserve at least a modicum of judicial process, but it also highlights the administration's opposition to generally accepted norms of international law in such cases.

Further, whatever the judicial opinion expressed in Hamdan

---

180 Id. Hamdan was a 5-3 decision, with Justice Stevens writing the majority opinion. Justice Breyer wrote a separate concurring opinion. Justices Scalia, Thomas, and Alito all dissented. Justice Kennedy concurred in part and in the judgment, making portions of the Stevens opinion a plurality. The Chief Justice recused himself, having sat on the panel that originally decided the case in the D.C. Circuit.
181 Id. at 2775.
182 The Court did not forbid the use of military tribunals; it merely found no congressional authorization for them. See id.
may have been, the passing of the MCA has superseded, for the time being, the Court’s ruling on military commissions. The MCA, as mentioned above, reduces judicial review of detainee treatment, and redefines the meaning of “torture” and “cruel, inhuman, or degrading treatment,” in such a way as to assure that the decisions of military commissions will not receive much federal judicial scrutiny.\(^{183}\)

### B. The Role of the Exclusionary Rule

Traditionally the primary sanction imposed by American judges for evidence tainted by torture or other illegal methods is the exclusion of all illegally obtained evidence.\(^{184}\) In contrast, the British do not have a broad exclusionary rule.\(^{185}\) In the British system, evidence is presumed to be admissible unless it can be proven that its admission would make the proceedings unfair.\(^{186}\)

In the United States, there is a fairly robust exclusionary rule, which not only prohibits the admission of illegally obtained evidence, but also excludes any further evidence obtained as a result of an initial illegal search or seizure: this is known as the “fruit of the poisonous tree” doctrine.\(^{187}\) Given this basic framework, one would expect the British to be more likely to admit evidence obtained by torture. But as A and Others II illustrates, the British Law Lords have decided that third-party torture will trigger the exclusion of evidence.\(^{188}\)

One reason for this is that the British are more clearly bound by international law proscribing the use of evidence obtained by

---

\(^{183}\) See supra notes 119-133 and accompanying text.

\(^{184}\) See generally Mapp v. Ohio, 367 U.S. 643 (1961) (holding that evidence gathered during an illegal search is not admissible and applying the exclusionary rule to the states).

\(^{185}\) See Samiloff, Interrogating Evidence, supra note 10.

\(^{186}\) Id.


\(^{188}\) Even Lord Hope of Craighead, who supported the less-stringent burden of proof standard of “balance of the probabilities” was stridently opposed to the use of evidence obtained by third party torture, writing that “the admission of any statements obtained by this means against third parties is absolutely precluded in any proceedings as evidence.” A and others II, [2005] 3 W.L.R. 1249, 1300.
torture. The European Convention is clear on this point, and the British have codified the Convention's anti-torture provisions under domestic law. In contrast, the United States, while signing the U.N. Convention, did so with reservations that allow American courts the flexibility to interpret what constitutes torture under U.S. law. Even taking these differing approaches to international treaty obligations into account, it is difficult to escape the irony that Britain is enforcing the exclusionary rule more stridently than the United States. By bringing this evidentiary irony into relief, this note seeks to examine the problems of using evidence obtained by torture.

One of the primary arguments advanced for the exclusionary rule is that it deters law enforcement agents from violating the rules, lest they be deprived of the evidence gathered at trial. In support of the exclusionary rule, Professor William Stuntz has argued that the exclusion of evidence provides the perfect deterrence: "suppression is restitutionary: the officer loses the very thing he gained from the illegal search, and no more. That largely takes care of overdeterrence. And because the rule does not seriously overdeter, courts need not reserve it for the worst constitutional violations." Stuntz was writing primarily about police searches under the Fourth Amendment, but as the Supreme Court's decision in Brown v. Mississippi indicates, evidence obtained by torture may be even more likely to be subject to exclusion. This is simply because an allegation of torture is far

189 European Convention, supra note 12, art. 3.
191 U.N. Convention, supra note 43, n. 43. (stating that "[o]n 3 June 1994, the Secretary-General received a communication from the Government of the United States of America requesting, in compliance with a condition set forth by the Senate of the United States of America, in giving advice and consent to the ratification of the Convention, and in contemplation of the deposit of an instrument of ratification of the Convention by the Government of the United States of America, that a notification should be made to all present and prospective ratifying Parties to the Convention to the effect that: ' . . . nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.'").
192 See ALLEN, ET. AL., supra note 87, at 345.
194 297 U.S. 278 (1936); see also supra text accompanying notes 84-86.
more serious than the violations normally predicate for exclusion under Fourth Amendment doctrine.

Another argument for exclusion is that it discourages use of the previously mentioned "silver platter" technique.\textsuperscript{195} This doctrine has a ready application to the issue at hand. One of the sources of concern over the George W. Bush Administration's torture policies has been the phenomenon of "extraordinary rendition," in which a suspect is sent overseas by the United States to be interrogated by foreign agents who are not subject to United States laws or norms governing cruel, inhuman, or degrading treatment.\textsuperscript{196} Extraordinary rendition is a kind of international application of the "silver platter" doctrine, a sophisticated attempt to avoid the potential strictures of the exclusionary rule. Even where rendition is used only for intelligence gathering, and will not likely implicate the exclusion of evidence, it is ultimately a mechanism for the avoidance of judicial review. In another controversial memo generated by the Department of Justice's Office of Legal Counsel, the Bush Administration explicitly stated that this technique is not a violation of the Geneva Convention.\textsuperscript{197}

The final argument usually made for the exclusionary rule is "judicial integrity."\textsuperscript{198} The argument is that a judicial process that employs illegally obtained evidence simply lacks fundamental integrity.\textsuperscript{199} But opponents of the rule point out that "integrity" can be read another way.\textsuperscript{200} Even if evidence is excluded from trial, it remains in the consciousness of the judge, attorneys, and defendant. The only people who do not know about it are the jurors, who sit as triers of fact while the judge, lawyers, and

\textsuperscript{195} See \textsc{Allen, et. al., supra} note 87, at 345. As previously mentioned, under the "silver platter" doctrine, law enforcement agents bound by a rule hand over evidence to court systems in which that rule is not applied, or law enforcement agents not bound by the rule gather evidence illegally and hand it over to prosecutors in systems governed by an exclusionary principle. \textit{Id.}

\textsuperscript{196} \textsc{Ruth Jamieson & Kieran McEvoy, State Crime by Proxy and Juridical Othering, 45 Brit. J. Criminology} 504 (2005).


\textsuperscript{198} \textsc{Allen, et. al., supra} note 87, at 345.

\textsuperscript{199} \textit{Id.}

\textsuperscript{200} \textit{Id.}
parties pretend they do not know the excluded evidence exists (with one side all the while hoping to find a way to bring it in).\textsuperscript{201} Another way to view the judicial integrity argument is to look at it from the perspective of law enforcement. The exclusionary rule gives police or other agents the incentive to lie about the procedures they employed. They have greater credibility than most suspects or detainees, and can avoid losing valuable evidence simply by pitting their word against that of a suspected criminal.\textsuperscript{202}

In spite of the ambiguity of the "judicial integrity" arguments, this—and not deterrence or the "silver platter" argument—is what the House of Lords explicitly relied upon in \textit{A and others II}. Lord Bingham makes an extensive statement about the effect of evidence tainted by torture on the judicial process, noting the unreliability of evidence obtained by torture, but also the "belief that it degraded all those who lent themselves to the practice."\textsuperscript{203} Lord Hope of Craighead wrote that "the law will not lend its support to the use of torture for any purpose whatever. It has no place in the defence of freedom and democracy, whose very existence depends on the denial of the use of such methods to the executive."\textsuperscript{204} Lord Hoffman stated explicitly that "I have no doubt that the purpose of this rule is not to discipline the executive, although this may be an incidental consequence. It is to uphold the integrity of the administration of justice."\textsuperscript{205} This view contrasts sharply with the outlook of the George W. Bush Administration. The Bybee and Yoo memos\textsuperscript{206} and the President’s Signing Statement\textsuperscript{207} indicate that their primary concern is not preventing actions that may degrade the judicial process, but maintaining wide latitude for state action that might otherwise fall under judicial sanction.

President Bush’s policies beg the question: is the exclusionary rule partly responsible for the United States’ questionable

\textsuperscript{201} Id.


\textsuperscript{204} \textit{Id.} at 1300 (Lord Hope of Craighead).

\textsuperscript{205} \textit{Id.} at 1294 (Lord Hoffman).

\textsuperscript{206} See supra text accompanying notes 150-153.

\textsuperscript{207} See Signing Statement, supra note 169.
approach to torture? Potential flaws with the exclusionary rule are that it is infrequently applied and invariably results in the loss of valuable evidence. While there is probably not a direct cause-and-effect relationship, it does seem likely that the American approach to redefining and avoiding international norms of torture is motivated at least in part by the potential loss of vital information to the exclusionary rule. As Professor Christopher Slobogin has pointed out, the exclusionary rule only comes into play if incriminating evidence is found. This means that law enforcement agents are generally free to do whatever they wish, as long as they don’t need to use the evidence in a courtroom.

This argument highlights what is at stake in the Bush Administration’s torture policy in the war on terror. The battle against terrorism is difficult and the price for failure is extraordinarily high. These high stakes seem to have pushed the United States to avoid possible failure by circumventing the exclusionary rule. The Administration has not only sought to avoid the exclusionary rule by having its agents apply illegal techniques in non-evidence gathering situations, it has also sought to remove the potentially illegal fruits of its agents interrogations from judicial review altogether. By denying U.S. courts jurisdiction over claims by detainees—either through jurisdiction stripping legislation, extraordinary rendition, or he redefinition of torture itself—the current administration is removing the exclusionary rule entirely from the calculus of those conducting interrogations. No matter what guidelines or limitations are placed on interrogation techniques, this elimination of judicial review and exclusionary sanction will lead to greater potential for abuse.

V. Conclusion

The House of Lords’ condemnation of torture may not be as robust a protection as it sounds in the opinion. As previously mentioned, there is skepticism that accompanied the decision in some circles. It is important to remember in this regard that—although it is the highest court in Britain—the House’s decisions

209 Id. at 372.
210 See Mendelle, supra note 145.
are not binding upon Parliament, which retains the ultimate say in the legality or illegality of British laws. But the House's decision in the earlier stages of A and others led directly to the replacement of Section 4 of the ATSCA with the Prevention of Terrorism Act 2005, so the Law Lords' decisions clearly can have a significant impact. Still, it is possible that Parliament could feel no such compulsion to change the law and ban evidence obtained by third party torture.

Whatever the domestic legal effect of the Law Lords' decision in the United Kingdom, it serves as an important foil to the American approach to third-party torture. The British condemnation of third-party torture highlights subtle, yet important, differences in the judicial systems of Britain and the United States, probably the two closest allies in the war on terror. In Britain, where no broad exclusionary rule applies, the highest court in the land saw fit to apply the exclusionary rule and limit the executive's power to use evidence tainted even indirectly by torture. In the United States, illegally obtained evidence is routinely excluded from judicial proceedings. Yet in the U.S. the executive branch has waged a successful campaign to avoid the illegality of its evidence gathering by redefining torture itself, and has also attempted to prevent the judiciary from reviewing questionable methods of interrogation altogether.

The exclusionary rule may be part of the impetus behind this seemingly counterintuitive situation. The Law Lords in Britain may have felt more able to condemn torture knowing that exclusion is the exception rather than the rule. In other words, knowing that agents retain the advantage of the presumption of admissibility, the Law Lords may simply have felt that their decision would not be overly impactful, particularly given the relatively light "balance of probabilities" standard imposed by their holding in A and others II. Conversely, the President of

211 See supra text accompanying note 115.
212 See supra text accompanying notes 63-64.
214 See supra text accompanying note 184.
215 See supra text accompanying notes 150 & 153.
216 See A and others, [2005] 3 W.L.R. at 1301-02 (Lord Craighead).
the United States may have felt a stronger imperative to circumvent the judicial system in the war on terror because of the potential loss of vital evidence to exclusion.

But the exclusionary rule is not necessarily to blame. As Professor Slobogin points out, the exclusionary rule only comes into play where evidence has been gathered for use at trial.\footnote{See Slobogin, supra note 209, at 372.} In spite of the challenges from Guantánamo prisoners and others detained in the "war on terror," there is not likely to be frequent use of evidence obtained from terror suspects at trial. Such evidence is more useful operationally than judicially.

In fact, there is much more at play in this scenario than the exclusion of evidence. Anytime illegal methods are used, there may be a question of exclusion. But where the illegality at issue is torture, and the methods are employed in preventing terrorism, exclusion actually seems a relatively minor concern. Torture is a hideous and undignified act for anyone to commit, let alone the government of a free, democratic society. But the exigencies of the war on terror may push the boundaries of law enforcement to the very edge of the known legal universe. The strength of the Law Lords' decision was in recognizing both these competing requirements of justice. Their words may not carry binding legal force, and their decision may have limited application, but the message is clear: even in the high-stakes world of terrorism prevention, torture defiles whatever it touches, however indirectly. Because of the repeated attempts to avoid possible sanction for torture, the United States—or at least the executive branch—is on a collision course with this simple but powerful message.

JOHN DUBERSTEIN