

No Sleep for the Wicked: A Study of Sleep Deprivation as a Form of Torture

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**NO SLEEP FOR THE WICKED: A STUDY OF SLEEP
DEPRIVATION AS A FORM OF TORTURE**

DEENA N. SHARUK*

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INTRODUCTION

On December 17, 2002, Mohammed Jawad, an Afghan juvenile,¹ allegedly threw a grenade at a passing U.S. Special Forces vehicle in Kabul, Afghanistan.² The grenade injured two U.S. soldiers and an Afghan interpreter.³ Mohammed Jawad was arrested the same day by Afghan Forces. While his accounts of what happened leading up to his arrest varied, Mohammed Jawad asserted that while in the custody of local Afghan police, he was tortured.⁴ He further claimed that Afghan officials coerced him, through beatings and threats against his life, to apply his fingerprint to a written confession declaring that he had thrown the explosive device at the American military vehicle.⁵ Notably, Mohammed Jawad was illiterate at the

1. Mohammed Jawad does not know his birthday. He believes himself to have been sixteen at the time of his arrest, although the U.S. military asserted that he was seventeen. *See Releasing Jawad: A Boy’s Life at Guantanamo*, HUM. RTS. WATCH (Jan. 11, 2010, 10:23 AM), <https://www.hrw.org/news/2010/01/11/releasing-jawad-boys-life-guantanamo#> [hereinafter *Releasing Jawad*]. Family members of Mohammed Jawad suggested he was between the ages of twelve and seventeen when he was arrested. *Mohammed Jawad*, HUM. RTS. WATCH (Oct. 26, 2012, 4:27 PM), <https://www.hrw.org/news/2012/10/26/mohammed-jawad>.

2. Memorandum from Major Gen. Jay W. Hood to Commander, U.S. S. Command 3 (Sept. 30, 2005) [hereinafter *Memo from Jay W. Hood*].

3. Jamil Dakwar, *Guantánamo’s Frequent Flyer Program*, ACLU (June 20, 2008, 4:45 PM), <https://www.aclu.org/blog/national-security/guantanamos-frequent-flyer-program>.

4. Off. for the Admin. Review of the Det. of Enemy Combatants at U.S. Naval Base Guantanamo Bay, Summary of Administrative Review Board Proceedings for ISN 900 21151 (2005), <https://int.nyt.com/data/documenttools/77546-isn-900-mohamed-jawad-administrative-review/4a8d7364bad2d32e/full.pdf>.

5. *Id.*; see also Darrel J. Vandeveld, *I Was Slow to Recognize the Stain of Guantanamo*, WASH. POST (Jan. 18, 2009), <https://www.washingtonpost.com/wp-dyn/content/article/2009/01/14/AR2009011402319.html>.

time.⁶ He was soon after delivered to U.S. custody and transferred to Guantanamo Bay, Cuba, on February 6, 2003.⁷

While in detention at Guantanamo Bay, Mohammed Jawad was subjected to targeted sleep deprivation through a program referred to as the *Frequent Flyer Program*.⁸ The euphemism denotes the practice of repeatedly and systematically moving a detainee from cell to cell in order to disrupt the detainee's sleep.⁹ In Mohammed Jawad's case, he was moved between cells every three hours for fourteen consecutive days, totaling 112 moves.¹⁰ Each transfer was made more time-consuming by his shackled hands and feet.¹¹ Following his stint in the Frequent Flyer Program and efforts to isolate the teen, Jawad's already declining mental health took a turn for the worse. On December 25, 2003, Jawad attempted suicide.¹²

The Frequent Flyer Program was one of several *enhanced interrogation techniques* employed against foreign combatants in the wake of 9/11. The interrogation methods ranged from slaps to forced standing positions to waterboarding to various forms of sleep deprivation and sleep interruption.¹³ The sleep deprivation techniques varied in form, including keeping detainees constantly awake for seven consecutive days or frequently interrupting a detainee's sleep for months on end.¹⁴ Methods of keeping detainees awake included shackling them in stress positions, dousing them with cold water, and exposing them to loud music or flashing lights.¹⁵ But despite careful legal maneuvering and creative interpretations of both domestic and international definitions of torture, the enhanced interrogation techniques were ultimately widely condemned by both foreign and domestic players as torture.¹⁶

6. David J.R. Frakt, *Mohammed Jawad and the Military Commissions of Guantanamo*, 60 DUKE L.J. 1367, 1368 (2011); *The Forgotten Kid of Guantánamo*, HUM. RTS. WATCH (May 27, 2008, 8:00 PM), <https://www.hrw.org/news/2008/05/27/forgotten-kid-guantanamo>.

7. Memo from Jay W. Hood, *supra* note 2, at 3.

8. David J.R. Frakt, *Closing Argument at Guantanamo: The Torture of Mohammed Jawad*, 22 HARV. HUM. RTS. J. 1, 5 (2009) [hereinafter Frakt, *Closing Argument*]; *see also* Vandeveld, *supra* note 5.

9. Dakwar, *supra* note 3.

10. Frakt, *Closing Argument*, *supra* note 8, at 5.

11. *Id.*; *see also* Vandeveld, *supra* note 5.

12. *Releasing Jawad*, *supra* note 1.

13. *See generally* Mark P. Denbeaux et al., *How America Tortures* (Dec. 2, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3494533>.

14. *Id.* at 25 (citing INT'L COMM. RED CROSS, REPORT ON THE TREATMENT OF FOURTEEN "HIGH-VALUE DETAINEES" IN CIA CUSTODY 15 (2007)).

15. *Id.* at 25 (citing RANDALL MARK SCHMIDT & JOHN FURLOW, ACLU-RDI 4998, INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTANAMO BAY, CUBA DETENTION FACILITY 10-1 (2005)).

16. *See generally* Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES (Nov. 30, 2004) <https://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in->

At the outset of the Obama Administration, the use of enhanced interrogation techniques was banned and intelligence gathering from enemy combatants was limited to those authorized in Army Field Manual 2-22.3 on Human Intelligence Collector Operations.¹⁷ Yet, an artifact of the old program remains: By its own language, the Army Field Manual allows for a detainee to have as little as four hours of sleep a night for up to thirty days, with the opportunity to extend the period of restricted sleep.¹⁸

A considerable amount of scholarship has analyzed the enhanced interrogation techniques through the torture framework.¹⁹ This Article applies the domestic torture analysis to the version of sleep deprivation currently permitted by the Army Field Manual and demonstrates the ongoing weaknesses of domestic law and guidance pertaining to foreign detainees and torture. This Article does so by discussing the permissible use of sleep deprivation presently available to U.S. interrogators of foreign enemy combatants on foreign soil and analyzes it under the domestic federal anti-torture framework.²⁰ It argues that given medical research on the impacts of sleep deprivation, this permissible version of sleep deprivation can profoundly disrupt the personality of its subjects for prolonged periods, rising

guantanamo.html; Tom Miles, *U.N. Expert Says Torture Persists at Guantanamo Bay; U.S. Denies*, REUTERS (Dec. 13, 2017, 8:44 AM), <https://www.reuters.com/article/us-usa-guantanamo-torture-idUSKBN1E71QO>; AMNESTY INT'L, *Torture*, <https://www.amnesty.org/en/what-we-do/torture/> (last visited Dec. 6, 2021); Douglas A. Johnson, Alberto Mora & Averell Schmidt, *The Strategic Costs of Torture: How "Enhanced Interrogation" Hurt America*, FOREIGN AFFS., Sept./Oct. 2016, <https://www.foreignaffairs.com/articles/united-states/strategic-costs-torture>; *Obama: "We Tortured Some Folks" After 9/11*, CBS NEWS (Aug. 1, 2014, 4:15 PM), <https://www.cbsnews.com/news/obama-we-tortured-some-folks-after-911/>.

17. Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009).

18. Army Field Manual 2-22.3 is vague with respect to the permissible number of nights of the four hour a night sleep restriction. It is framed as a safeguard for the *separation* technique (discussed *infra* notes 132–144 and accompanying text), which is restricted to thirty-day periods with the option of renewal. For the purposes of the torture analysis, the author has elected to read the manual in a light more favorable to the drafters and will assume an *actus reus* of four hours of sleep each night for thirty nights. That being said, the vagueness of the language in the Army Field Manual leaves detainees susceptible to even longer periods of chronic sleep deprivation and is demonstrative of the ongoing weaknesses of U.S. safeguards intended to proscribe torturous behavior. See U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS A-30, M-10 (2006) [hereinafter FIELD MANUAL 2-22.3].

19. See, e.g., Mary Hunter Morris McDonnell, Loran F. Nordgren & George Loewenstein, *Torture in the Eyes of the Beholder: The Psychological Difficulty of Defining Torture in Law and Policy*, 44 VAND. J. TRANSNAT'L L. 87 (2011); Claire Finkelstein & Michael Lewis, *Should Bush Administration Lawyers Be Prosecuted for Authorizing Torture?*, 158 U. PA. L. REV. PENNUMBRA 195 (2010); David Luban & Katherine S. Newell, *Personality Disruption as Mental Torture: The CIA, Interrogational Abuse, and the U.S. Torture Act*, 108 GEO. L.J. 333 (2019); David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. 823 (2012); Parisa Zangeneh, *'The Gloves Came Off': Torture and the United States After September 11, 2001*, 2 INT'L HUM. RTS. L. REV. 82 (2013); Joseph L. Falvey, Jr. & Brian D. Eck, *Holding the High Ground: The Operational Calculus of Torture and Coercive Interrogation*, 32 CAMPBELL L. REV. 561 (2010).

20. See *infra* Part IV.

to the level of mental torture.²¹ And while unverified reports have emerged suggesting that the United States continues to interrupt or deprive detainees of sleep at Guantanamo Bay, what is certain is that Army Field Manual 2-22.3's guidelines still allow for a form of sleep deprivation. This Article argues that despite the lessons of enhanced interrogation, the language of the Army Field Manual's guidelines pertaining to detainee sleep allows for conduct that rises to the level of torture under U.S. federal law. It is imperative to identify and address the vulnerabilities in the domestic torture framework because so long as threats to national security are ongoing, so too is the risk that decision-makers will exploit these limitations and engage in torture.

In exploring the United States' use of targeted sleep deprivation as a form of torture, this Article considers current guidelines and practices through the lens of a domestic legal framework. This Article proceeds in five parts. Part I of this Article explores definitions of torture and their international origins. Further, it discusses the systems through which anti-torture legislation is enforced. Part II discusses the post-9/11 evolution of U.S. practices of interrupting and denying detainees opportunities to sleep as interrogational or punitive methods. Part III discusses the clinical types of sleep deprivation as well as their physiological and psychological impact. Part IV analyzes whether the current permissible form of sleep deprivation constitutes torture within the domestic legal framework. Finally, Part V discusses recommendations for changes to both domestic law and the Army Field Manual's permitted practice of denying a detainee sleep.

I. DEFINING TORTURE

Historically, the stated policy of the United States has been that it does not torture.²² Indeed, it was George Washington who famously wrote:

21. See *infra* Part IV.

22. Beyond U.S. assent to the Geneva Conventions and the Convention Against Torture, multiple presidents have been outspoken on U.S. policies against torture. George Washington and John Adams famously decried and prohibited the use of torture during the American Revolution. See Robert F. Kennedy Jr., *America's Anti-Torture Tradition*, L.A. TIMES (Dec. 17, 2005), <https://www.latimes.com/archives/la-xpm-2005-dec-17-oe-kennedy17-story.html>. Abraham Lincoln promulgated a code of war, stating, "military necessity does not admit of cruelty . . . nor of torture." Charles Fried & Gregory Fried, *Torture Apologists Stain Triumph Over Bin Laden*, WASH. POST (May 5, 2011), https://www.washingtonpost.com/opinions/torture-apologists-stain-triumph-over-bin-laden/2011/05/05/AF17881F_story.html. In 2007, President George W. Bush asserted that "[t]his government does not torture people." *Bush Says U.S. 'Does Not Torture People'*, NBC NEWS (Oct. 5, 2007, 10:25 AM), http://www.nbcnews.com/id/21148801/ns/us_news-security/t/bush-says-us-does-not-torture-people/#.Xu5nyJNKjOQ. In 2009, President Barack Obama asserted the same. Frances Kerry, *America Does Not Torture*, *Obama Tells Congress*, REUTERS (Feb. 24, 2009, 9:27 PM), <https://www.reuters.com/article/us-obama-torture-sb/america-does-not-torture-obama-tells-congress-idUSTRE51O0RY20090225>.

Should any [American Soldier be so base] and infamous as [to injure] any [prisoner] . . . I do most earnestly enjoin you to bring him to such severe & exemplary Punishment as the Enormity of the Crime may require. Should it extend to Death itself, it will not be disproportionate to its Guilt at such a Time and in such a Cause. . . . [For by such conduct they bring] [Shame & Disgrace] and Ruin to themselves & Country²³

Yet, the term “torture” was often left undefined. In modern American history, the domestic definition of torture underwent a genesis from its conceptualization in international treaties to its crystallization in federal law.

A. *The Geneva Conventions*

While the practice of torture is neither new in custom nor endemic to one culture, modern definitions of torture grew from arduous international deliberation, which first gained broader consensus with the Geneva Conventions. The impetus for their creation came in 1859 when a businessman from Geneva, Jean-Henri Dunant, traveled to Northern Italy for a meeting with Emperor Napoleon III.²⁴ On his journey, he bore witness to the Battle of Solferino.²⁵ Dunant, horrified by the brutality that he observed, penned *Un Souvenir de Solferino (A Memory of Solferino)*.²⁶ The piece, published in 1862, was an account of the mêlée he observed,²⁷ along with recommendations for the formation of international committees comprised of volunteer medical professionals to tend to wounded warriors on the battlefield and in hospitals.²⁸ Among his more revolutionary recommendations, Dunant argued for all European nations to organize these

23. Letter from George Washington to Colonel Benedict Arnold (Sept. 14, 1775), <https://founders.archives.gov/documents/Washington/03-01-02-0355> (first, second, and fifth alterations in original).

24. *Geneva Convention*, HISTORY (Oct. 18, 2018), <https://www.history.com/topics/world-war-ii/geneva-convention>; *Henri Dunant*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Henri-Dunant#info-article-history> (last visited Feb. 9, 2022).

25. The Battle of Solferino was the final battle in the second War of Italian Independence. *See Battle of Solferino*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Battle-of-Solferino> (last visited Feb. 9, 2022). The engagement took place on June 24, 1859, in Lombardy, Italy, where combat raged between the Austrian army and the Franco-Piedmontese army. *Id.* In total, 40,000 men lost their lives. *Id.*; *see also Geneva Convention*, HISTORY, *supra* note 24.

26. HENRY DUNANT, *UN SOUVENIR DE SOLFERINO* (David H. Wright trans., The John C. Winston Company 1911).

27. Among many remarkable descriptions, Dunant noted:

Sometimes the fighting becomes more terrible on account of the arrival of rushing, galloping cavalry. The horses, more compassionate than their riders, seek in vain to step over the victims of this butchery, but their iron hoofs crush the dead and dying. With the neighing of the horses are mingled blasphemies, cries of rage, shrieks of pain and despair.

Id. at 8.

28. *Id.* at 80.

committees dedicated to treating the wounded and to provide relief without distinction of the nationality of the wounded.²⁹ A year later, in 1863, delegates from sixteen countries and military medical personnel traveled to Geneva to draw up terms of a wartime humanitarian agreement, later known as the first Geneva Convention.³⁰ The first Geneva Convention, which was dedicated to providing wartime protections for the wounded and sick, was updated multiple times subsequent to its inception, but laid the groundwork for further advances in international humanitarian law.³¹

In the wake of World War II and the trials at Nuremburg, the Geneva Convention was expanded to four conventions that enshrined, among other protections, the prohibition of torture, the creation of rules for dealing with prisoners of war, and the extension of safeguards to civilians in wartime.³² Specifically, in Geneva Convention III, the signatories agreed that with respect to “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause,” torture shall remain prohibited “at any time and in any place whatsoever,”³³ which necessarily includes torturing for the purposes of interrogation.³⁴ Remarkably, while the conventions proscribe torture, they do not explicitly define the term.³⁵ The United States signed the third Geneva Convention on August 12, 1949, and ratified it on August 2, 1955.³⁶

B. The Convention Against Torture

It has historically been the U.S. government’s stated policy not to engage in torture, not only to uphold American exceptionalism and values of liberty and justice, but also to ensure the safety of its citizenry and servicemen and women abroad.³⁷ Decades after signing the third Geneva Convention,

29. *Id.* at 79, 89–90. These committees would come to be known as the International Committee of the Red Cross (“ICRC”). *History of the ICRC*, INT’L COMM. RED CROSS, <https://www.icrc.org/en/history> (last visited Dec. 6, 2021).

30. *Geneva Convention*, HISTORY, *supra* note 24.

31. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114; 75 U.N.T.S. 31.

32. *Geneva Convention*, HISTORY, *supra* note 24.

33. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

34. *Id.* art. 17.

35. *See generally id.*

36. *Treaties, State Parties and Commentaries, Convention (III) Relative to the Treatment of Prisoners of War*, INT’L COMM. RED CROSS, <https://ihl-databases.icrc.org/ihl/NORM/D6B53F5B5D14F35AC1256402003F9920?OpenDocument> (last visited June 20, 2020).

37. The Department of Defense’s Law of Wars begins with a foreword from DoD General Counsel, Stephen Preston, stating:

the United States committed to an internationally recognized definition of torture, but did so with reservations. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), a treaty ten years in the making,³⁸ prohibited the practice of torture, and more specifically defined the term.³⁹ Under the CAT, torture is defined as:

The law of war is a part of our military heritage, and obeying it is the right thing to do. But we also know that the law of war poses no obstacle to fighting well and prevailing. Nations have developed the law of war to be fundamentally consistent with the military doctrines that are the basis for effective combat operations. . . . Similarly, the law of war’s prohibitions on torture and unnecessary destruction are consistent with the practical insight that such actions ultimately frustrate rather than accomplish the mission.

DEP’T OF DEFENSE, LAW OF WAR MANUAL ii (2016). The same work’s section on “Reciprocity and Law of War Rules” further describes the strategic decision not torture, stating:

Considerations of reciprocity – *i.e.*, the degree of confidence as to whether an adversary will, in fact, abide by a certain rule – may be a critical factor in the willingness of States to enter into treaty obligations.

Similarly, various treaty provisions also reflect, to varying degrees, the principle that whether a rule is legally binding on a party depends on whether its opponent has accepted and applied that same rule. For example, some law of war treaties have a “general participation clause” – *i.e.*, a clause specifying that the treaty only applies to an armed conflict if all the parties to the armed conflict are also Parties to the treaty.

Id. at 89; *see also* Memorandum from Sec’y of State Colin L. Powell to the Couns. to the President & Assistant to the President for Nat’l Sec. Affs. (Jan. 26, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 122–25 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Memo from Colin Powell]; Memorandum from Deputy Sec’y of Def. William H. Taft IV to Couns. to the President (Feb. 2, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, *supra*, at 129–33; Julian Borger, *U.S. Military in Torture Scandal*, GUARDIAN (Apr. 30, 2004, 6:44 AM), <https://www.theguardian.com/media/2004/apr/30/television.internationalnews>.

38. The United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was a precursor to the Convention Against Torture. The Declaration defined torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

G.A. Res. 3452 (XXX), art. 1 (Dec. 9, 1975). The Declaration was adopted by the United Nations General Assembly on December 9, 1975; however, the instrument was not legally binding on the parties. *Id.*

39. Hans Danelius, *Introductory Note on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. AUDIOVISUAL LIBR. INT’L L., <https://legal.un.org/avl/ha/catcidtp/catcidtp.html> (last visited Feb. 9, 2022); *see also* G.A. Res. 39/46, art. 1 ¶ 1 (Dec. 10, 1984) [hereinafter CAT]. The Declaration on Human Rights also proscribes torture (without definition) as does the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171 (providing in Article 7 that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” with an accompanying non-derogation clause in Article 4). The United States of America signed the International Covenant on Civil and Political Rights on

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁴⁰

The CAT definition of torture can be broken into four elements: (1) infliction of severe pain or suffering (physical or mental); (2) with intent; (3) for the purpose of obtaining third person information, obtaining a confession, punishment, intimidating or coercing a third person, or for any reason based on discrimination; (4) by a public official or with a public official's acquiescence.⁴¹ The definition, while more precise than the language provided in previous treaties, allows for a wide breadth of interpretations. Indeed, it fails to designate any particular acts—such as sleep deprivation—as torture, and it lacks an explanation as to what severe pain or suffering signifies in either the physical or mental spheres.

The United States became a signatory to the CAT on April 13, 1988, but did not ratify the convention until October 21, 1994, and only did so with several reservations and understandings.⁴² The lack of specificity in the CAT torture definition allowed for the United States to produce a narrower reading of mental pain or suffering. Specifically, one of the United States' stated understandings was that:

[I]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened

October 5, 1977, but did not ratify the treaty until June 8, 1992. *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

40. CAT, *supra* note 39, art. 1, ¶ 1.

41. See Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 30, U.N. Doc. A/HRC/13/39/Add.5 (Feb. 5, 2010); see also Oona A. Hathaway, Aileen Nowlan & Julia Spiegel, *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT'L L. 791, 799 (2012).

42. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf> (last visited Feb. 9, 2022).

infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.⁴³

The purported rationale for limiting the scope of the definition of mental torture was because of the subjectivity of the term “mental pain and suffering.” More specifically, when the Committee on Foreign Relations held a public hearing on the CAT, they noted in their subsequent report to the Senate that mental pain and suffering was more subjective than physical suffering, and that in determining when the severity of mental pain and suffering rises to the level of torture, one should look to objective criteria such as the degree of cruelty or inhumanity of the conduct causing the pain and suffering.⁴⁴ Moreover, the Committee expressed that the divergence from the CAT’s torture definition was “intended to guard against the improper application of the Convention to legitimate U.S. law enforcement actions and thereby would protect U.S. law enforcement interests.”⁴⁵

The Committee did hear objections to the understandings and reservations proposed by the George H.W. Bush Administration. Among them, Amnesty International USA argued that the U.N. Committee Against

43. *Id.* (Declarations and Reservations of the United States of America).

44. S. REP. NO. 101-30, at 13 (1990).

45. *Id.* at 15. The Committee further sought to clarify their understanding of the specific intent requirement for torture, highlighting that police brutality does not amount to torture and that the term is reserved for “deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.” *Id.* at 14. During the Committee’s public hearing, the concern that ratifying the convention would negatively impact law enforcement in the United States was highlighted by Mark Richard, the Deputy Assistant Attorney General in the Criminal Division of the Department of Justice. In his statement, he argued that the definition of torture lacked precision with respect to mental anguish and that this could lead to “unwarranted litigation in numerous areas of law enforcement.” *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 12–13 (1990) [hereinafter *Hearing*] (statement of Mark Richard, Deputy Assistant Att’y Gen., Crim. Div., U.S. Dep’t of Just.). He went on to explain:

[The] proposed understanding [relating to mental torture] encompasses conduct calculated to generate severe and prolonged mental suffering of the type which can properly be viewed as rising to the level of torture. As such, it properly condemns as torture intentional acts such as those designed to damage and destroy the human personality. In contrast, it does not encompass the normal legal compulsions which are properly a part of the criminal justice system interrogation, incarceration, prosecution, compelled testimony against a friend, etc.—notwithstanding the fact that they may have the incidental effect of producing mental strain.

Id. at 17.

Torture should arbitrate a uniform definition of the term “torture” in order to hold every state party to the same standard.⁴⁶ Human Rights Watch expressed grave concerns regarding the understanding related to the definition of torture. The organization argued that the Administration’s definition of torture was too narrow. They noted that regardless of the form torture takes, its purpose is to cause severe mental suffering. As if reading the tea leaves, Human Rights Watch argued:

In addition to failing to recognize the serious psychological impact of torture, the administration’s mental suffering reservation is short-sighted. The range of acts that constitute torture is limited only by the imaginations of those who seek to perpetrate them. In recent years governments that practice torture increasingly have sought to devise methods that cause intense pain but leave no marks. The era of psychological torture appears to be ahead of us. It would be a mistake for the U.S. to interfere with the Committee Against Torture’s ability to respond effectively to these new and ever more cruel torture techniques.⁴⁷

The subject of sleep deprivation as an interrogation tactic was tangentially raised at the Committee’s hearing on the CAT.⁴⁸ In the hearing, sleep deprivation was discussed as an act that was considered to fall short of torture.⁴⁹ More specifically, the practice was framed as a form of “inhuman or degrading treatment.”⁵⁰

46. *Hearing, supra* note 45, at 57 (letter from Amnesty Int’l USA).

47. *Id.* at 94 (statement of Hum. Rts. Watch).

48. Sleep deprivation was raised as an example of inhuman or degrading treatment, not torture, when discussing the United States’ reservation with regard to Article 16 of the CAT. The United States’ reservation with respect to Article 16 was that:

[T]he United States considers itself bound by the obligation under article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’, only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 42.

49. *Hearing, supra* note 45, at 80 (statement of David Weissbrodt on behalf of the Center for Victims of Torture, the Minnesota Law International Human Rights Commission). The Commission further considered but dismissed evidence that sleep deprivation constituted torture, referring to it as “relatively mild coercion.” *Id.* at 166.

50. *Id.* at 80. The Committee reviewed evidence discussing a 1978 case from the European Court of Human Rights, *Case of Ireland v. The United Kingdom*, 2 Eur. Ct. H.R. 25 (1978), which applied articles of the European Convention on Human Rights (which proscribes torture yet fails to define the term) to the question of whether hooding, wall standing, subjection to continuous loud noise, sleep deprivation, and deprivation of food and drink rose to the level of torture. *Case of Ireland*, 2 Eur. Ct. H.R. 25. Notably, the case did not apply the CAT definition of torture. *Hearing, supra* note 45; *see also Case of Ireland*, 2 Eur. Ct. H.R. 25.

*C. Incorporating the CAT Definition into U.S. Law: 18 U.S.C.
§§ 2340–2340A*

The United States incorporated the language from the CAT definition and its own reservations to that definition in federal anti-torture legislation, which came into effect on November 20, 1994.⁵¹ The statute, 18 U.S.C. § 2340A, criminalizes torture occurring outside the United States at the hands of U.S. nationals or by an offender who enters the United States.⁵² 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 (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”⁵³ The statute further defined “severe mental pain or suffering” as:

[T]he prolonged mental harm caused by or resulting from—(A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.⁵⁴

The differences between the CAT definition of torture and the definition under the criminal anti-torture law in the U.S. federal code may appear minor at first blush, but they are not without consequence. The U.S. Code removes the CAT language regarding the *purpose* of the harm inflicted (i.e., the act no longer has to be an act seeking punishment or information collection) and ultimately rearranges the language of intent. While the CAT definition of torture (and negotiating history of the Convention) suggest that the intent requirement for torture is that the act be inflicted for a prohibited purpose,⁵⁵ the language in 18 U.S.C. § 2340 left the specifics of intent more ambiguous when it removed the language of purpose.⁵⁶ And though the Senate Executive Report that accompanied the federal anti-torture statute

51. 18 U.S.C. §§ 2340–2340A.

52. The federal criminal torture statute punishes acts of torture with up to twenty years in prison and/or fines. 18 U.S.C. § 2340A. If the torture results in death, the offender will be punished by death or up to life in prison. *Id.* Similarly, there are civil penalties for acts of torture under the Torture Victims Protection Act which bears a nearly identical definition of torture as the federal criminal statute. 28 U.S.C. § 1350.

53. 18 U.S.C. § 2340.

54. *Id.*

55. Hathaway et al., *supra* note 41, at 803–05.

56. *Id.* at 809.

specifically noted that the “requirement of intent is emphasized in Article 1 [of the Convention] by reference to illustrative motives for torture,” the lack of clarity in the written federal statute allowed for the more dubious interpretations of intent adopted in the early days of the War on Terror.⁵⁷

While the element of intent was made more ambiguous by the domestic anti-torture statute, the element of “severe mental pain and suffering” became exceedingly narrow.⁵⁸ Where the Convention failed to define severe mental pain or suffering, the United States’ reservations to the treaty narrowed the scope of severe mental pain or suffering to four limited scenarios: (1) mental pain associated with severe physical pain or suffering or threatened infliction of severe pain or suffering; (2) threatening to or applying mind-altering drugs or procedures to profoundly disrupt one’s senses or personality; (3) the threat of imminent death; or (4) threatening to subject a third person to any of the above.⁵⁹ Moreover, the United States interprets mental pain and suffering to require “prolonged mental harm.”⁶⁰ Therefore, while CAT forbids inflicting all acts of mental torture, the United States punishes a narrower scope of actions so long as the results are a prolonged effect on the victim.⁶¹ In fact, the United Nations’ Committee Against Torture has objected to the U.S. definition of mental torture, noting that acts of psychological torture are not limited to those yielding prolonged mental harm.⁶²

D. The Torture Memos and the Rise of Enhanced Interrogation Tactics

Perhaps the most notorious interpretations of the modern U.S. definition of torture arose in 2002, in the shadows of the September 11th attacks and the War on Terror. The “Torture Memos,” as they would come to be known, were a series of memoranda issued by John Yoo and Jay Bybee, then attorneys for the Department of Justice’s Office of Legal Counsel.⁶³ The

57. *Id.* at 808 (quoting S. EXEC. REP. NO. 101-30, at 14 (1990)).

58. See 18 U.S.C. § 2340(2)(A)–(D).

59. See *id.*

60. See *id.*

61. Luban & Shue, *supra* note 19, at 846.

62. U.N. Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture*, ¶ 13, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006); see also U.N. Committee Against Torture, *Concluding Observations on the Third to Fifth Periodic Reports of United States of America*, ¶ 9, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014) [hereinafter *Concluding Observations*].

63. W. Bradley Wendel, *The Torture Memos and the Demands of Legality*, 12 LEGAL ETHICS 107, 109 (2009) (reviewing HAROLD H. BUFF, *BAD ADVICE: BUSH’S LAWYERS IN THE WAR ON TERROR* (2009); JACK L. GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008); PHILIPPE SANDS, *THE TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008); JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* (2006)).

Memoranda devised legal arguments to frustrate protections against torture for foreign fighters from al Qaeda and the Taliban and ultimately paved the way for the enhanced interrogation techniques.

Some of the torture memos attempted to excuse the Bush Administration from its duties with respect to detainees from the War on Terror under the Geneva Conventions.⁶⁴ On January 25, 2002, Alberto R. Gonzales, the White House Counsel who would later be named the U.S. Attorney General, submitted a memorandum to the President supporting Yoo's memo, which argued that the Geneva Convention III's Prisoner of War protections would not apply to al Qaeda and the Taliban.⁶⁵ He argued that the War on Terror was a new type of war requiring swift intelligence collection and the ability to try suspected terrorists.⁶⁶ Consequentially, he argued "this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms, and scientific instruments."⁶⁷ President Bush ultimately agreed.⁶⁸

On August 1, 2002, Assistant Attorney General, Jay S. Bybee, submitted to White House Counsel Alberto Gonzales a memorandum advising on the standards of conduct for interrogation under the federal anti-torture statute.⁶⁹ The conclusions effectively reinterpreted the definition of torture to a far

64. Specifically, a January 9, 2002, Memorandum from Deputy Assistant Attorney General John Yoo and Special Counsel Robert Delahunty to General Counsel for the Department of Defense William J. Haynes II argued that because Al Qaeda and the Taliban were not nation states, they were not signatories to the Geneva Conventions, and, moreover, they were not included in non-international forms of armed conflict to which some provisions of the Geneva Conventions might apply. Memorandum from Deputy Assistant Att'y Gen. John Yoo & Special Couns. Robert J. Delahunty to Dep't of Def. Gen. Couns. William J. Haynes II (Jan. 9, 2002) (on file with Dep't of Just.). Additionally, the memo argued that even if the Taliban were an arm of the government of Afghanistan, the nation's status as a failed state rendered its military ineligible for Geneva Convention protections. *Id.*

65. Memorandum from Couns. to the President Alberto R. Gonzales to President George W. Bush (Jan. 25, 2002) (on file with NSA) [hereinafter Memo from Gonzales to Bush].

66. *Id.*

67. *Id.*

68. On February 7, 2002, President George W. Bush submitted a Memorandum to the Vice President, Secretary of State, Secretary of Defense, Director of the CIA and other members of the executive branch agreeing that the Taliban and Al Qaeda were not entitled to protections under the Geneva Conventions. Memorandum from President George W. Bush to the Vice President, the Sec'y of State, the Sec'y of Def., the Att'y Gen., Chief of Staff to the President, Dir. of Cent. Intel., Assistant to the President for Nat'l Sec. Affs., & Chairman of the Joint Chiefs of Staff (Feb. 7, 2002) (on file with the White House). Further, President Bush wrote that "[a]s a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." *Id.*

69. Memorandum from Assistant Att'y Gen. Jay S. Bybee to Couns. to the President Alberto R. Gonzales (Aug. 1, 2002) (on file with U.S. Dep't of Just.) [hereinafter Standards of Conduct Memo].

more limited and extreme version of the federal anti-torture statute. The memo concluded that 18 U.S.C. § 2340 required that those acts “be of an extreme nature” in order to amount to torture as defined by 18 U.S.C. § 2340 and the Convention on Torture.⁷⁰ It acknowledged that “certain acts may be cruel, inhuman, or degrading,” but still not cause the level of intense pain and suffering required for inclusion in the “proscription against torture.”⁷¹

The memo focused its limited vision of the definition of torture on the severity of the pain for physical torture and the severity and duration of the effects for mental torture. Bybee argued that physical pain that reaches the level of torture “must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”⁷² Whereas, in Bybee’s vision, mental pain or suffering rises to the level of torture when it results in “significant psychological harm of significant duration, e.g., lasting for months or even years.”⁷³

The Torture Memos reshaped the definition of torture and blazed the path for the enhanced interrogation techniques.⁷⁴

With the Bush Administration’s blessing, the enhanced interrogation techniques made their way into CIA Black Sites (secret prisons on foreign

70. *Id.*

71. *Id.*

72. *Id.* This interpretation of the word “severe” was derived from a health benefits statute. *Id.*; see also Dahlia Lithwick, Opinion, *The Worst Ideas of the Decade: The Torture Memos*, WASH. POST, <https://www.washingtonpost.com/wp-srv/special/opinions/outlook/worst-ideas/torture-memos.html> (last visited Nov. 11, 2021).

73. Standards of Conduct Memo, *supra* note 69.

74. The Enhanced Interrogation Program was crafted by psychologists Bruce Jessen and James Mitchell. Bill Chappell, *Psychologists Behind CIA ‘Enhanced Interrogation’ Program Settle Detainees’ Lawsuit*, NPR (Aug. 17, 2017, 2:52 PM), <https://www.npr.org/sections/thetwo-way/2017/08/17/544183178/psychologists-behind-cia-enhanced-interrogation-program-settle-detainees-lawsuit>. The tactics, meant to “condition detainees into a state of helplessness,” were inspired by the training program Survival, Evasion, Resistance and Escape (“SERE”). *Id.*; see also Memorandum from Principal Deputy Assistant Att’y Gen. Steven G. Bradbury to Senior Deputy Gen. Couns. John A. Rizzo 3 (May 30, 2005) (filed with U.S. Dep’t of Just.) [hereinafter Article 16 CAT Memo]. SERE training was a simulation program that prepared U.S. military personnel for potential capture. Chappell, *supra*. The enhanced interrogation techniques included the following methods: abdominal slap; attention grasp (an interrogator grabs the detainee by the collar with two hands and pulls him close); cramped confinement (often in a box, sometimes large enough to stand, for up to eighteen hours or a smaller box for up to two hours); dietary manipulation (switching from solid foods to liquid); the facial hold (an interrogator holds a detainee’s head so they cannot move and puts one hand on each side of the detainee’s face); the facial slap/insult slap; nudity; stress positions; sleep deprivation; wall standing (a detainee faces a wall, standing around four feet away, and is forced to touch the wall with his fingers); walling (slamming a detainee against a wall); waterboarding; and water dousing (naked detainees were held down on a tarp on the floor, the tarp would be lifted, and cold water would be poured on the detainee). Associated Press, *These Are the 13 ‘Enhanced Interrogation Techniques’ the CIA Used on Detainees*, BUS. INSIDER (Dec. 10, 2014, 5:15 AM), <https://www.businessinsider.com/the-13-enhanced-interrogation-techniques-the-cia-used-on-detainees-2014-12>.

soil) and later to Guantanamo Bay. On October 2, 2002, a team of psychologists and lawyers from multiple U.S. agencies met to devise a framework of “‘psychological stressors’ and environmental manipulation to ‘foster dependence and compliance’” in the detainees in Guantanamo Bay.⁷⁵ According to minutes from the October 2nd meeting, Jonathan Fredman, a senior CIA lawyer, reportedly remarked, “[t]orture has been prohibited by international law, but the language of the statutes is written vaguely It is basically subject to perception. If the detainee dies, you’re doing it wrong.”⁷⁶

That same month, military attorney Diane Beaver wrote legal justifications for various interrogation methods and “‘the use of scenarios designed to convince the detainee that death’ was ‘imminent.’”⁷⁷ The memorandum dictated that the detainees held in Guantanamo Bay were not protected by the Geneva Conventions because they were not considered “‘Enemy Prisoners of War,’” and that Department of Defense interrogators, who had been trained to apply Geneva Convention standards, had been using commonly approved methods of interrogation including rapport building through direct approach, rewards, and the use of deception.⁷⁸ Beaver argued, however, that the detainees at Guantanamo had cultivated “‘sophisticated’” interrogation resistance strategies because of their ability to communicate amongst themselves.⁷⁹ The memorandum recommended a series of “‘more aggressive interrogation techniques.’”⁸⁰ With regard to sleep deprivation, Beaver wrote:

There is no legal requirement that detainees must receive four hours of sleep per night, but if a U.S. Court ever had to rule on this procedure, in order to pass Eighth Amendment scrutiny, and as a cautionary measure, they should receive some amount of sleep so that no severe physical or mental harm will result.⁸¹

On December 2, 2002, the proposed enhanced interrogation techniques, which included forced nudity, manipulation of diet, daily twenty-four hour interrogations, waterboarding, freezing temperature exposure, withholding of medical care, and sleep deprivation were submitted for Secretary of Defense

75. Ben Taub, *Guantánamo’s Darkest Secret*, NEW YORKER (Apr. 15, 2019), <https://www.newyorker.com/magazine/2019/04/22/guantanamos-darkest-secret>.

76. *Id.* Jonathan Fredman has disputed the accuracy of the meeting minutes. *See id.*

77. *Id.*

78. Memorandum from Staff Judge Advoc. Diane E. Beaver to Commander, Joint Task Force 170 (Oct. 11, 2002) (on file with U.S. Dep’t of Def.) [hereinafter Proposed Strategies Memo].

79. *Id.*

80. *Id.*

81. *Id.*

Donald Rumsfeld's approval.⁸² He authorized the request, jotting a note in the margin in reference to a proposed stress position: "I stand for 8–10 hours a day. Why is standing limited to 4 hours?"⁸³

II. U.S. EMPLOYMENT OF SLEEP DEPRIVATION AS A TOOL OF INTERROGATION AND PUNISHMENT

A. Sleep Deprivation in the Wake of 9/11

Sleep deprivation as an interrogative and punitive technique took on a particularly grizzly form in the wake of the 9/11 attacks. A May 30, 2005 memorandum from the Office of Legal Counsel ("OLC") to John Rizzo, then Senior Deputy General Counsel for the Central Intelligence Agency, described sleep deprivation as subjecting a detainee to an extended period of sleeplessness in order to weaken the detainee's resistance.⁸⁴ The memorandum stated that up to 180 hours (or 7.5 days) of continuous sleep deprivation was permitted with authorization.⁸⁵ It further described a technique that deprived a detainee of sleep for more than ninety-six hours:

[A] detainee undergoing this technique is shackled in a standing position with his hands in front of his body, which prevents him from falling asleep but also allows him to move around within a two- to three-foot diameter. The detainee's hands are generally positioned below his chin, although they may be raised above the head for a period not to exceed two hours.⁸⁶

The memorandum noted that some detainees may experience physiological reactions as a result of such sleep deprivation, but dismissed those concerns because subjects would "generally return to normal neurological functioning with as little as one night of normal sleep."⁸⁷ The only sources cited by the OLC for this conclusion were its own "review of the literature on the physiology of sleep" and statements made by the CIA's own Office of Medical Services.⁸⁸ Additionally, the only specific source cited from the OLC's "review of the relevant medical literature" is sleep

82. Memorandum from U.S. Dep't of Def. Gen. Couns. William J. Haynes II to Sec'y of Def. Donald Rumsfeld (Dec. 2, 2002) (on file with U.S. Dep't of Def.) [hereinafter Proposed Techniques Memo]; Taub, *supra* note 75; Proposed Strategies Memo, *supra* note 78.

83. Proposed Techniques Memo, *supra* note 82; Taub, *supra* note 75.

84. Article 16 CAT Memo, *supra* note 74.

85. *Id.*

86. *Id.* at 13.

87. *Id.*

88. *Id.*

neuroscientist James Horne's 1988 book, *Why We Sleep: The Functions of Sleep in Humans and Other Mammals*.⁸⁹

Another memorandum discussing sleep deprivation pertained to the interrogation of Zayn al-Abidin Muhammad Husayn (also known as: Abu Zubaydah), a high-level detainee who was previously held in a CIA black site in Afghanistan and later transferred to Guantanamo Bay.⁹⁰ In the leaked 2002 memorandum from the OLC to the Acting General Counsel of the CIA, ten enhanced interrogation techniques were approved for use on Abu Zubaydah.⁹¹ One of the methods submitted for consideration was sleep deprivation.⁹² In its approval, the memorandum preemptively hedged against criticisms regarding the potential effects of sleep deprivation, stating:

Sleep deprivation may be used. You have indicated that your purpose in using this technique is to reduce the individual's ability to think on his feet and, through the discomfort associated with lack of sleep, to motivate him to cooperate. The effect of such sleep deprivation will generally remit after one or two nights of uninterrupted sleep. You have informed us that your research has revealed that, in rare instances, some individuals who are already predisposed to psychological problems may experience abnormal reactions to sleep deprivation. Even in those cases, however, reactions abate after the individual is permitted to sleep. Moreover, personnel with medical training are available to and will intervene in the unlikely event of an abnormal reaction. You have orally informed us that you would not deprive Zubaydah of sleep for more than eleven days at a time and that you have previously kept him awake for 72 hours, from which no mental or physical harm resulted.⁹³

Abu Zubaydah memorialized his experiences at Guantanamo in notes and writings for himself and his lawyers.⁹⁴ He described his sleep deprivation:

I was deprived from sleep for a long period of time; I don't even know for how long: maybe two or three weeks or even more and it felt like an eternity to the point that I found myself falling asleep despite the water being thrown at me by the guard who found

89. *Id.* (citing JAMES HORNE, *WHY WE SLEEP: THE FUNCTIONS OF SLEEP IN HUMANS AND OTHER MAMMALS* 23–24 (1988)); *see also* PROFESSOR JIM HORNE, <http://jimhorne.co.uk/> (last visited July 31, 2020).

90. Denbeaux et al., *supra* note 13, at 14.

91. Memorandum from Off. Of Legal Couns. Assistant Att'y Gen. Jay S. Bybee to Acting Gen. Couns. of the CIA John Rizzo 1–2 (Aug. 1, 2002) (on file with U.S. Dep't of Just.) [hereinafter Memo from Bybee to Rizzo].

92. *Id.* at 2.

93. *Id.* at 3.

94. Denbeaux et al., *supra* note 13, at 25–26.

himself with no choice but to strongly and constantly shake me in order to keep me awake. So I couldn't even sleep for a short second. Then I got used to the shaking just as I got used to the water being thrown at me, so I was able to sleep for a second.⁹⁵

Forced sleep deprivation was pervasive at Guantanamo Bay as well as at CIA black sites. In fact, in a Department of Justice review of the FBI's involvement in and observations of detainee interrogations in Guantanamo Bay, Afghanistan, and Iraq, the Department of Justice found that FBI agents most frequently reported witnessing sleep deprivation and sleep disruption as the techniques employed by military interrogators in black sites in Afghanistan and Iraq.⁹⁶ Many agents described the use of loud music or flashing lights as the mode for interfering with a detainees' sleep.⁹⁷

The International Committee of the Red Cross ("ICRC") was granted limited access to Guantanamo Bay by the U.S. government in order to confidentially report its findings regarding detainees.⁹⁸ Despite the U.S. government's desire to keep any reporting confidential, a 2007 ICRC report detailing the treatment of fourteen "High Value Detainees" at Guantanamo Bay during their time in CIA custody was leaked. The report detailed the ICRC's grave concerns about violations of international law and revealed that the CIA employed sleep deprivation techniques.⁹⁹ The report specifically covered the detainees' time in CIA black sites.¹⁰⁰ Eleven of the fourteen detainees alleged that they had been deprived of sleep through days of constant interrogation, forced stress positions, dousing in cold water, or by exposure to loud noises or music.¹⁰¹ The duration and nature of the sleep deprivation varied; some detainees alleged seven continuous days while others alleged intermittent sleep deprivation that continued up to two or three months.¹⁰² One detainee described being exposed to loud music for twenty-four hours a day, every day, for one year.¹⁰³

Meanwhile, it was also reported that at the Guantanamo Bay detention camp, detainees experienced various enhanced interrogation techniques,

95. *Id.*

96. See generally U.S. DEP'T OF JUST., A REVIEW OF THE FBI'S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN, AND IRAQ (2009) [hereinafter FBI INVOLVEMENT REVIEW].

97. *Id.* at 61–62.

98. *Guantanamo Bay: Overview of the IRC's Work for Internees*, INT'L COMM. OF THE RED CROSS (Mar. 1, 2004), <https://www.icrc.org/en/doc/resources/documents/update/5qrc5v.htm>; see also Lewis, *supra* note 16.

99. INT'L COMM. OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN "HIGH VALUE DETAINEES" IN CIA CUSTODY (2007).

100. *Id.* at 3.

101. *Id.* at 15.

102. *Id.*

103. *Id.*

including protracted periods of sleep deprivation.¹⁰⁴ Between 2002 and 2004, more than 200 FBI agents who served at Guantanamo Bay reported to the Department of Justice that they had “observed or heard about various rough or aggressive treatment of detainees, primarily by military interrogators. The most frequently reported techniques included sleep deprivation or sleep disruption”¹⁰⁵ In a confidential 2004 ICRC report to the United States (that was subsequently leaked to *The New York Times*), the humanitarian organization accused the United States of applying psychological and physical coercion “tantamount to torture” to detainees at Guantanamo Bay.¹⁰⁶ The report further alleged that doctors and medical workers at Guantanamo participated in the planning of interrogations.¹⁰⁷ The report highlighted, among other tactics, detainee exposure to persistent loud noise and music, cold temperatures, and beatings.¹⁰⁸ The U.S. government adamantly rejected the accusations.¹⁰⁹ In response to the allegations, a Pentagon spokesman commented, “[t]he United States operates a safe, humane and professional detention operation at Guantánamo that is providing valuable information in the war on terrorism.”¹¹⁰

Sleep deprivation was not improvised at Guantanamo Bay. It was systematically planned and executed in various forms, including through the Frequent Flyer Program, which was the punitive or interrogative tactic by which detainees were constantly and methodically moved between cells in order to disrupt their sleep.¹¹¹ The Frequent Flyer Program existed in two forms: an official version and an unofficial version.¹¹² The official program was explicitly approved for the use by the military at Guantanamo to “disrupt detainees’ sleep in an effort to lessen their resistance to questioning and to undermine cell block relationships among detainees.”¹¹³ Unofficially, the Frequent Flyer Program was used as a disciplinary tactic at Guantanamo, which was the case for Mohammed Jawad.¹¹⁴

One did not have to be “enrolled” in the Frequent Flyer Program to be subjected to sleep deprivation at the Guantanamo Bay detention camp. FBI agents described a variety of tactics employed by military interrogators in

104. AMNESTY INT’L, GUANTÁNAMO: A DECADE OF DAMAGE TO HUMAN RIGHTS (2011).

105. *Id.* at 24 (citing FBI INVOLVEMENT REVIEW, *supra* note 96).

106. Lewis, *supra* note 16.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Dakwar, *supra* note 3.

112. *Id.*

113. FBI INVOLVEMENT REVIEW, *supra* note 96, at xxi.

114. Dakwar, *supra* note 3.

order to keep detainees awake.¹¹⁵ These methods included the use of bright flashing strobe lights, extreme temperatures, and loud rock music.¹¹⁶ Mohamedou Salahi, a Mauritanian detained for his alleged ties to Al Qaeda, experienced enhanced interrogation, and, more specifically, sleep deprivation at Guantanamo.¹¹⁷ He described his experience:

The cell—better, the box—was cooled down to the point that I was shaking most of the time. I was forbidden from seeing the light of the day; every once in a while they gave me a rec-time at night to keep me from seeing or interacting with any detainees. I was living literally in terror. For the next seventy days I wouldn't know the sweetness of sleeping.¹¹⁸

B. Interrogation From 2009–Present

Soon after his inauguration, President Barack Obama, through executive order, limited the use of interrogation techniques employed against foreign combatants to those expressly permitted in the Army Field Manual on collecting Human Intelligence.¹¹⁹ In Executive Order 13,491, “Ensuring Lawful Interrogations,” the President did away with the enhanced interrogation techniques, ordering that:

Effective immediately, an individual in the custody or under the effective control of an . . . agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3 (Manual).¹²⁰

The language of the Executive Order identified its purpose:

[It attempted] to improve the effectiveness of human intelligence-gathering, to promote the safe, lawful, and humane treatment of individuals in United States custody and of United States personnel

115. FBI INVOLVEMENT REVIEW, *supra* note 96, at xxi.

116. *Id.*

117. Taub, *supra* note 75.

118. *Id.* In addition to sleep deprivation, Salahi was subjected to beatings, sensory deprivation, sexual assault, and being made to believe his mother was going to be transferred to Guantanamo and raped. *Id.* His physical and emotional vulnerabilities were exploited, his sciatica a guide for selecting forced stress positions. *Id.* Interrogators decorated the walls with photos of genitalia and Salahi's insecurity regarding his childlessness inspired guards to erect a crib in a room where he was held. *Id.* Salahi began hearing voices. *Id.* He wrote in his diary, “[t]o be honest I can report very little about the next couple of weeks . . . because I was not in the right state of mind.” *Id.*

119. Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009).

120. *Id.* Army Field Manual 2-22.3 and Executive Order 13,491 remain current and have, to date, not been superseded. See *Executive Orders*, Federal Register, NAT'L ARCHIVES, <https://www.federalregister.gov/presidential-documents/executive-orders> (last visited July 30, 2021); FIELD MANUAL 2-22.3, *supra* note 18.

who are detained in armed conflicts, to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions, and to take care that the laws of the United States are faithfully executed¹²¹

This language of intent intimated that the previous framework, which included the enhanced interrogation techniques, was in violation of the Geneva Conventions, and perhaps the laws of the United States. But one need not read between the lines of the executive order to understand the impetus for its creation. In an August 1, 2014 press conference discussing the release of the Senate Select Committee on Intelligence’s study of the CIA’s Detention and Interrogation Program, President Obama stated:

[I]n the immediate aftermath of 9/11, we did some things that were wrong. . . . [T]he character of our country has to be measured in part not by what we do when things are easy, but what we do when things are hard. And when we engaged in some of these enhanced interrogation techniques, techniques that I believe and I think any fair-minded person would believe were torture, we crossed a line.¹²²

Army Field Manual 2-22.3, last issued in 2006, describes Human Intelligence (“HUMINT”) Collector Operations, including eighteen approved interrogation approaches.¹²³ The manual provides relevant information on treating prisoners of war humanely including discussion of the Convention Against Torture and the Geneva Conventions.¹²⁴ The manual explicitly proscribes certain interrogation methods, including forced nudity, forcing sexual acts or poses, hooding, using duct tape over the eyes, beatings, burns, electric shocks, waterboarding, using military working dogs, inducing hypothermia or heat injury, mock executions, and deprivation of necessary food, water, or medical care.¹²⁵

The vast majority of the approaches used for interrogation in the Army Field Manual involve incentives, emotions, and silence to encourage cooperation.¹²⁶ For example, the “emotional love approach” is a tactic in which the subject is made to believe that something he loves will be made

121. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

122. The President’s News Conference, 2014 PUB. PAPERS 1050, 1058 (2014).

123. FIELD MANUAL 2-22.3, *supra* note 18, at 8-6-8-19; *see also* THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 34 (2016), <https://www.refworld.org/docid/5847db914.html> [hereinafter THE WHITE HOUSE REPORT].

124. FIELD MANUAL 2-22.3, *supra* note 18, at 5-18-5-21, A-1.

125. *Id.* at 5-21.

126. *Id.* at 8-6-8-19; *see also* THE WHITE HOUSE REPORT, *supra* note 123.

accessible to him if he is to provide the HUMINT collector with adequate information.¹²⁷

The 2006 Army Field Manual on HUMINT Collector Operations does not explicitly discuss sleep deprivation as part of intelligence gathering methodology. This is a departure from the manual's immediate predecessor, Army Field Manual 34-52 on Intelligence Interrogation, issued in September of 1992.¹²⁸ Remarkably, Army Field Manual 34-52 defined torture and went so far as to give examples of what would constitute mental torture, including "abnormal sleep deprivation," although it never defined the term.¹²⁹

It has been reported that the 2006 Army Field Manual was accompanied by a separate training document that provided interrogation scenarios and went into detail on what procedures could or could not be used in certain circumstances.¹³⁰ This document is said to be classified.¹³¹ The Manual does, however, describe one restricted interrogation technique termed "separation" that includes one cryptic reference to sleep requisites for detainees.¹³² The stated purpose of the separation technique is to prevent the detainee from communicating "with other detainees in order to keep [the subject] from learning counter-resistance techniques or gathering new information to support a cover story, decreasing the detainee's resistance to interrogation."¹³³ There are two types of separation. Physical separation, the preferred method of separation, involves physically isolating the detainee away from others. However, where not feasible, one may use "field expedient separation," employing the use of goggles, blindfolds, and/or earmuffs in order to "generate a perception of separation . . . and foster a feeling of futility."¹³⁴

127. FIELD MANUAL 2-22.3, *supra* note 18, at 8-9.

128. *Id.* at 5-20, 5-21, 5-26; U.S. DEP'T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION 1-8 (2006) [hereinafter FIELD MANUAL 34-52].

129. FIELD MANUAL 34-52, *supra* note 128, at 1-8.

130. Eric Schmitt, *In New Manual, Army Limits Tactics in Interrogation*, N.Y. TIMES (Apr. 28, 2005), <https://www.nytimes.com/2005/04/28/politics/in-new-manual-army-limits-tactics-in-interrogation.html>. Prior to the release of 2006 Army Field Manual 2-22.3, *The New York Times* reported that officials said that the new manual will specifically prohibit "sleep deprivation as a tool to get [detainees] to talk." *Id.* That language does not exist in the field manual. FIELD MANUAL 2-22.3, *supra* note 18, at M-1-M-10.

131. Schmitt, *supra* note 130.

132. FIELD MANUAL 2-22.3, *supra* note 18, at M-1-M-10.

133. *Id.* at M-8. The manual also makes clear that separation is not to include sensory deprivation, "defined as an arranged situation causing significant psychological distress due to a prolonged absence, or significant reduction, of the usual external stimuli and perceptual opportunities." *Id.* Further, it explains that "[s]ensory deprivation may result in extreme anxiety, hallucinations, bizarre thoughts, depression, and anti-social behavior." *Id.*

134. *Id.*

Because the two separation methods are restricted, there are authorization and oversight measures built in place to regulate their usage.¹³⁵ The approval process for applying the separation tactic requires an interrogator to develop an interrogation plan and submit it to an interrogation supervisor.¹³⁶ The supervisor ensures safeguards and reviews the interrogation plans for necessity and appropriateness.¹³⁷ Either a general officer or flag officer approves any plans, extensions, or additional rounds of separation use.¹³⁸ The combatant commander approves overall use of interrogation approach techniques.¹³⁹ All levels of command in the chain have access to staff judge advocates, behavioral science consultants, and analysts for guidance.¹⁴⁰ To extend the approved usage of the separation techniques past thirty days, a staff judge advocate must review the request for the extension and the same general officer or flag officer must give his or her approval.¹⁴¹

In the separation context, there is some oversight guidance that appears to protect a detainee's access to sleep. Namely, the Army Field Manual 2-22.3 charges that care be taken to protect detainees from excessive noise, dampness, and inadequate heat, light, ventilation.¹⁴² The manual also requires that detainees be provided adequate bedding and blankets.

Most notable with regard to sleep, however, is that when describing the oversight conditions for the separation method, Appendix M of Army Field Manual 2-22.3 states that “[u]se of separation must not preclude the detainee getting four hours of continuous sleep every 24 hours.”¹⁴³ This is the only reference to detainee sleep in the entire field manual. It informs the reader that the minimum amount of continuous sleep that a detainee is allotted is only four hours within a twenty-four-hour period.¹⁴⁴

135. *Id.* at M-2.

136. *Id.* at M-2–M-3.

137. *Id.* at M-3.

138. *Id.*

139. *Id.* at M-3–M-4.

140. *Id.* at M-3.

141. *Id.* at M-9.

142. *Id.* at M-10.

143. *Id.*

144. The manual is silent on whether a detainee may be given the opportunity to sleep for only four hours at the start of one twenty-four-hour period and four hours at the end of the next twenty-four-hour period (thus allowing for a forty-hour interval between sleep). That being said, a White House report on the United States' use of military force and national security measures indicates that this is not permitted. *See* THE WHITE HOUSE REPORT, *supra* note 123, at 58 n.205.

C. Reports of Current Practices

Despite Army Field Manual 2-22.3 being accessible to the public, evidence of the actual interrogative and punitive practices of the United States' military and intelligence agencies is scant and cloaked in secrecy. While Executive Order 13,491 shuttered CIA black sites, the U.S. military maintains its own carceral facilities on bases abroad, including Guantanamo Bay.¹⁴⁵ Additionally, there are opportunities for U.S. investigators to interrogate detainees held in third country-operated facilities.¹⁴⁶ Despite accessibility obstacles, multiple unverified reports of sleep interruption and sleep deprivation have emerged from Guantanamo Bay Detention Center. Notably, these reports do not suggest adherence to the guidelines of Army Field Manual.

In 2013, British Detainee Shaker Aamer reported that a Guantanamo guard admitted to him that he was following orders by making as much noise as possible as detainees tried to sleep.¹⁴⁷ In a letter, Aamer wrote: "They crashed the doors maybe 250 to 300 times in the night, keeping us awake, and continued until around 9am – then quiet."¹⁴⁸

In 2016, Ramzi bin al Shibh, a Yemini national accused of taking part in the September 11th plot, reported that he had been the continuous target of a sleep deprivation campaign.¹⁴⁹ On February 24, 2016, Bin al Shibh testified that he was subjected to constant noises and vibrations, including fence-banging from the recreation yard, buzzing sounds, vibrations from his bed when he was trying to sleep, vibrations on the floor when he stood to pray, and vibrations in his seat when he tried to read.¹⁵⁰ During questioning, Bin al Shibh's attorney elicited testimony from his client that he also heard "bird noises" and moved to enter into evidence a memorandum stating that Guantanamo Bay Detention Camp had been fitted with devices enabling the camp to broadcast artificial bird noises.¹⁵¹ Bin al Shibh described the vibrations as "like sitting in the car while the . . . engine machine is on . . . it

145. Mark Urban, *The Nature of President Obama's Rendition Programme*, BBC NEWS (Sept. 9, 2011), <https://www.bbc.com/news/world-14862161>.

146. *Id.*

147. Mark Townsend, *Guantánamo Guards 'Forcing Inmates to Stay Awake,'* GUARDIAN (July 6, 2013), <https://www.theguardian.com/world/2013/jul/07/guantanamo-guards-inmates-stay-awake>.

148. *Id.*

149. Carol Rosenberg, *Alleged 9/11 Plotter Testifies: Guantánamo Noises, Vibrations are Real, They Drugged Me for Protesting*, MIA. HERALD (Feb. 24, 2016, 6:15 PM), <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article62287467.html>.

150. *Id.*

151. *Id.*; Helen Klein Murillo, *2/24 Session: The "Bird Noises and Vibrations" Edition*, LAWFARE (Mar. 3, 2016, 3:51 PM), <https://www.lawfareblog.com/224-session-bird-noises-and-vibrations-edition>.

is very annoying, very destructive . . . if they just do it in very low level, it's bad. If they put it up, you can . . . go crazy."¹⁵² He further reported that the constant sound rendered him unable to sleep, unable to focus, and unable to work with his defense team on his case.¹⁵³ During cross-examination he indicated that he never had more than four to six hours of sleep without disruption.¹⁵⁴

In December of 2017, the United Nations Special Rapporteur on Torture, Nils Melzer, rebuked the United States government in no uncertain terms, stating that the ban on torture is absolute and without exception.¹⁵⁵ He highlighted the case of Guantanamo detainee Ammar al-Baluchi, stating that “[h]is torture and ill-treatment are reported to continue.”¹⁵⁶ He continued, “[i]n addition to the long-term effects of past torture, noise and vibrations are reportedly still being used against him, resulting in constant sleep deprivation and related physical and mental disorders, for which he allegedly does not receive adequate medical attention.”¹⁵⁷

III. THE EFFECTS OF SLEEP DEPRIVATION

Indications of Mohammed Jawad's declining mental health presented themselves prior to his subjugation to sleep deprivation but became considerably worse after he was denied requisite sleep. On September 3, 2003, seven months into his detention at Guantanamo Bay, Jawad was seen talking to a poster on the wall.¹⁵⁸ When an interrogator consulted a psychologist from the Behavioral Science Consultation Team (“BSCT”),¹⁵⁹ the psychologist noted that Jawad appeared frightened and looked “as if he could easily break.”¹⁶⁰ In an effort to exploit his vulnerabilities, the psychologist recommended that Jawad be made as uncomfortable as

152. Murillo, *supra* note 151.

153. *Id.*

154. *Id.*

155. “*US Must Stop Policy of Impunity for the Crime of Torture*” – UN Rights Expert, U.N. HUM. RTS., OFF. OF THE HIGH COMMISSIONER (Dec. 13, 2017), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22532&LangID=E>.

156. Miles, *supra* note 16.

157. *Id.* Pentagon spokesman, Major Ben Sakrisson, asserted that the allegation of forced sleep deprivation was untrue, stating “[t]hese claims have been investigated on multiple occasions in the past and no credible evidence has been found to substantiate his claims.” *Id.*

158. Matt Apuzzo, Sheri Fink & James Risen, *How U.S. Torture Left a Legacy of Damaged Minds*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html>.

159. The Behavioral Science Consultation Team, or “BSCTs” (pronounced as ‘biscuit’), engineered camp experiences using detainees’ psychological profiles to yield more fruitful interrogations. M. Gregg Bloche & Jonathan H. Marks, *Doctors and Interrogators at Guantanamo Bay*, 353 NEW ENG. J. MED. 6, 7 (2005).

160. Apuzzo et al., *supra* note 158.

possible.¹⁶¹ After thirty days in isolation, Jawad was subjected to the Frequent Flyer Program.¹⁶² On December 25, 2003, he attempted suicide.¹⁶³

The physical and emotional effects that Mohammed Jawad suffered as a result of sleep deprivation in Guantanamo Bay are difficult to disentangle from multiple factors and variables, including being placed in isolation in Guantanamo, his adolescence, the stresses of indefinite detention, as well as prior traumas he suffered during his childhood while at a refugee camp¹⁶⁴ and at Bagram Prison.¹⁶⁵ Furthermore, it is important to note that while associations (e.g., that Jawad attempted suicide after prolonged sleep deprivation) can certainly suggest causation (e.g., that Jawad's prolonged sleep deprivation *caused* his mental decline and suicide attempt), they are not conclusive.

Moreover, it is difficult to discern the empirical physiological and psychological impact of forced sleep deprivation when confounded with other interrogation tactics. In 2009, Susan Crawford, the Bush Administration's appointed authority of the Military Commission, criticized the interrogation tactics applied on Mohammed Al-Qahtani, a Saudi Arabian citizen alleged to be an al-Qaeda operative, as torture.¹⁶⁶ Crawford remarked:

You think of torture, you think of some horrendous physical act done to an individual. This was not any one particular act; this was just a combination of things that had a medical impact on him, that hurt his health. It was abusive and uncalled for. And coercive. Clearly coercive. It was that medical impact that pushed me over the edge" to call it torture.¹⁶⁷

161. *Id.*

162. *Id.*

163. Prison logs described two different accounts of Mohammed Jawad's suicide attempt on the evening of December 25, 2003. Frakt, *Closing Argument*, *supra* note 8, at 9 n.32. One indicates that he was banging his head on metal structures inside his cell. *Id.* Another entry indicates that he attempted to use the collar of his shirt to hang himself. *Id.* Mohammed Jawad reportedly attempted suicide on more than one occasion per his detainee records. Vandeveld, *supra* note 5.

164. Mohammed Jawad's father reportedly died in the Afghan Civil War after the Soviet occupation. AMNESTY INT'L, AMR 51/091/2008, FROM ILL-TREATMENT TO UNFAIR TRIAL: THE CASE OF MOHAMMED JAWAD, CHILD 'ENEMY COMBATANT' (2008). As a result, his family was forced to flee to a refugee camp in Pakistan. *Id.* He was later reportedly kicked out of his mother's home by his stepfather when he was still a child. *Id.*

165. After being turned over to U.S. Special Forces on December 17, 2002, Mohammed Jawad was transported to a U.S. airbase in Bagram for seven weeks. *Id.* There, he was interrogated and subjected to isolation, sleep deprivation, use of restraints, hooding, forced standing, stress positions, and physical assaults. *Id.*

166. Bob Woodward, *Guantanamo Detainee Was Tortured, Says Official Overseeing Military Trials*, WASH. POST (Jan 14, 2009), <https://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>.

167. *Id.*

Sleep deprivation and interruption presented themselves in varying durations, through a range of means, and as part of a combination of enhanced interrogation tactics employed in Guantanamo Bay and at CIA black sites. But the medical impact on its subjects was notable.

Scientists have yet to find a satisfying answer to the question of why human beings sleep.¹⁶⁸ But the value of sleep is clear. One need only have one bad night of sleep to recognize physiological and cognitive effects. The average adult is said to require around eight hours of sleep a night¹⁶⁹ and the Center for Disease Control recommends that adults from the ages of eighteen through sixty get at least seven hours of quality sleep each night.¹⁷⁰ More recently, the broader medical community has studied some of the psychological and physiological effects and associations of insufficient sleep in order to quantify and qualify the impact.

A. Sleep Deprivation Defined

The term *sleep deprivation* is used to describe a failure to obtain the necessary amount or quality of sleep.¹⁷¹ The recommendation for sufficient sleep has both quantitative and qualitative aspects. Normal and healthy sleep requires an adequate duration, good quality, appropriate timing, regularity, and the absence of sleep disturbances and disorders.¹⁷² One night without any sleep is termed *total deprivation*, whereas *disrupted sleep* describes interrupted periods of sleep.¹⁷³ Clinically, disrupted sleep can be used to

168. *Why Do We Sleep?*, 3 NATURE NEUROSCI. 1225, 1225 (2000) [hereinafter *Sleep*, NATURE NEUROSCI.]; Div. of Sleep Med. at Harvard Med. Sch., *Why Do We Sleep Anyway*, HEALTHY SLEEP (Dec. 18, 2007) <https://healthysleep.med.harvard.edu/healthy/matters/benefits-of-sleep/why-do-we-sleep>; Pallab Ghosh, *Why Do We Sleep?*, BBC NEWS (May 15, 2015), <https://www.bbc.com/news/science-environment-32606341>; Stephanie Pappas, *Why Do We Sleep?*, LIVE SCI. (Jul 18, 2017), <https://www.livescience.com/32469-why-do-we-sleep.html>.

169. *Sleep*, NATURE NEURO., *supra* note 168, 1225. There are Natural Short Sleepers (individuals who biologically require only four to six hours a night) and Natural Long Sleepers (individuals who biologically require nine to ten hours a night). Ying-Hui Fu, *Investigating Genetics of Human Natural Short Sleepers (IGHNSS)*, https://www.ncbi.nlm.nih.gov/projects/gap/cgi-bin/study.cgi?study_id=phs001270.v1.p1. Natural Short Sleepers, or as they're called "super sleepers," make up only 1–3% of the population. Michael J. Breus, *Could You Be a Super Sleeper?*, PSYCH. TODAY (Apr. 19, 2011), <https://www.psychologytoday.com/us/blog/sleep-newzzz/201104/could-you-be-super-sleeper>.

170. *How Much Sleep Do I Need?*, CTNS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/sleep/about_sleep/how_much_sleep.html (Mar. 2, 2017) (citing Nathaniel F. Watson et al., *Recommended Amount of Sleep for a Healthy Adult: A Joint Consensus Statement of the American Academy of Sleep Medicine and Sleep Research Society*, 38 SLEEP 843, 843 (2015)).

171. Goran Medic, Micheline Wille & Michiel EH Hemels, *Short- and Long-Term Health Consequences of Sleep Disruption*, 9 NATURE & SCI. SLEEP 151, 152 (2017).

172. *Id.* at 151 (citing Nathaniel F. Watson et al., *supra* note 170, at 843–44).

173. *Id.* at 152; *see also* Carol A. Everson, Bernard M. Bergmann & Allan Rechtschaffen, *Sleep Deprivation in the Rat: III. Total Sleep Deprivation*, 12 SLEEP 13, 13 (1989).

describe sleep fragmentation, difficulty maintaining sleep, or insomnia.¹⁷⁴ *Sleep disturbances* include disorders of falling or staying asleep, excessive sleep, an abnormal sleep-wake schedule, dysfunctions of sleep, sleep stages, or parasomnias (sleep disorders resulting in abnormal physical or verbal behavior during sleep).¹⁷⁵ *Chronic short sleep* is frequently sleeping six hours or less a night.¹⁷⁶ *Chronic sleep restriction* is defined as habitually sleeping more than four but less than seven hours a night.¹⁷⁷ Where one does not meet the nightly requisite of sleep over periods of time, they are said to accumulate *sleep debt*.¹⁷⁸

A complete sleep cycle involves passing through various sleep stages. Sleep stages have historically been divided into one stage of rapid eye movement (“REM”) and four stages of non-rapid eye movement (“NREM”).¹⁷⁹ Each stage of NREM is characterized by an increase in sleep depth.¹⁸⁰

B. The Cognitive and Psychological Effects of Sleep Deprivation

A wide range of research demonstrates that there is a “complex bidirectional relationship between chronic insomnia and . . . psychiatric disorders.”¹⁸¹ For example, this relationship exists between sleep disturbance and depression (e.g., evidence suggests that sleep disturbance is a symptom of depression, but also that sleep deprivation affects the course and clinical

174. Medic et al., *supra* note 171, at 152.

175. René E. Cormier, *Sleep Disturbances*, in SLEEP DISTURBANCES, CLINICAL METHODS: THE HISTORY, PHYSICAL, AND LABORATORY EXAMINATIONS 398, 398 (H. Kenneth Walker, W. Dallas Hall & J. Willis Hurst eds., 1990); *Parasomnias & Disruptive Sleep Disorders*, CLEVELAND CLINIC (Apr. 29, 2021), <https://my.clevelandclinic.org/health/diseases/12133-parasomnias—disruptive-sleep-disorders>.

176. Zhengqing Zhao, Xiangxiang Zhao & Sigrid C. Veasey, *Neural Consequences of Chronic Short Sleep: Reversible or Lasting?*, 8 FRONTIERS NEUROLOGY (May 31, 2017), [https://www.frontiersin.org/articles/10.3389/fneur.2017.00235/full#:~:text=on%20neurobehavioral%20performance,-,Chronic%20Short%20Sleep%20\(CSS\)%20in%20Humans%20is%20Commonly%20Observed,40%20million%20individuals%20\(1\)](https://www.frontiersin.org/articles/10.3389/fneur.2017.00235/full#:~:text=on%20neurobehavioral%20performance,-,Chronic%20Short%20Sleep%20(CSS)%20in%20Humans%20is%20Commonly%20Observed,40%20million%20individuals%20(1)).

177. Christopher A. Magee et al., *Examining the Pathways Linking Chronic Sleep Restriction to Obesity*, J. OBESITY (Feb. 16, 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2925323/#:~:text=Chronic%20sleep%20restriction%20is%20generally,nor%20chronic%20condition%20in%20humans>.

178. *Countering the Effects of Chronic Sleep Loss*, HARV. HEALTH PUBL'G: HARV. MED. SCH. (July 2, 2007), https://www.health.harvard.edu/press_releases/repaying-sleep-debt.

179. Medic et al., *supra* note 171, at 152.

180. *Id.*

181. PHYSICIANS FOR HUM. RTS. & HUM. RTS. FIRST, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY 23 n.193 (2007) [hereinafter LEAVE NO MARKS].

outcome of the depression).¹⁸² Additionally, sleep deprivation is associated with an increased risk of suicidal ideation and suicide.¹⁸³

Sleep deprivation that occurred in Guantanamo prior to 2009 was associated with severe psychological harm.¹⁸⁴ A 2011 study of nine Guantanamo detainees' medical records, client affidavits, attorney-client notes, and legal affidavits of medical experts concluded that both the physical and psychological maladies suffered by the nine detainees evidenced torture as a result of the enhanced interrogation techniques.¹⁸⁵ All nine detainees in the study reported being subjected to sleep deprivation.¹⁸⁶ None of the detainees in the study had any past history of psychological issues or family history of psychological problems prior to detention at Guantanamo Bay.¹⁸⁷ Eight of the nine detainees displayed significant psychological symptoms including: nightmares (five), suicidal ideation (four), depression (two), audiovisual hallucinations (three), suicide attempts (two), anxiety or claustrophobia (two), memory and concentration difficulties (one), and dissociative states (two).¹⁸⁸ In each case, the onset of these symptoms was contemporaneous with allegations of abuse.¹⁸⁹ Department of Defense mental health providers evaluated six of the nine detainees and diagnosed them with the following: depression (four), passive aggressive personality (four), borderline personality (two), adjustment disorder (three), routine stressors of confinement (two), narcissistic traits (one), psychosis or depression with psychotic features (two), and anxiety (two).¹⁹⁰ Seven of the nine detainees had symptoms supporting a diagnosis of post-traumatic stress disorder.¹⁹¹ "The medical evaluations in this case series revealed evidence

182. *See id.* at 23 n.194 (explaining that the authors of a study "suggest that insomnia in young men is indicative of a greater risk for subsequent clinical depression and psychiatric distress that persists for at least 30 years").

183. *Id.*; *see also* Michael Billiard & Alison Bentley, *Is Insomnia Best Categorized as a Symptom or a Disease?*, 5 SLEEP MED. SUPP. 1, S1, S35 (2004); *see generally* Naomi Breslau et al., *Sleep Disturbance and Psychiatric Disorders: A Longitudinal Epidemiological Study of Young Adults*, 39 BIOLOGICAL PSYCHIATRY 411 (1996); Mehmed Yücel Ağargün, Hayrettin Kara & Mustafa Solmaz, *Sleep Disturbances and Suicidal Behavior in Patients with Major Depression*, 58 J. CLINICAL PSYCHIATRY 249 (1997); P.P. Chang et al., *Insomnia in Young Men and Subsequent Depression, The Johns Hopkins Precursors Study*, 146 AM. J. EPIDEMIOLOGY 105 (1997).

184. Vincent Iacopino & Stephen N. Xenakis, *Neglect of Medical Evidence of Torture in Guantanamo Bay: A Case Series*, 8 PLOS MED. Apr. 2011, at 1, 1.

185. *Id.* at 3–4. The investigators of the study rely on both the CAT definition of torture as well as the interpretation of torture memorialized in the August 1, 2002 Bybee memorandum. *Id.*

186. *Id.* at 4.

187. *Id.* at 3.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

of . . . severe and prolonged psychological pain as stipulated in the Bybee definition of torture.”¹⁹²

The study is suggestive of the effects that more extreme versions of sleep deprivation can have on a detainee, but it is not conclusive. The detainees in this study were subjected to a variety of enhanced interrogation techniques, so any effects of sleep deprivation could be confounded by any one or a combination of the enhanced interrogation methods. That being said, sleep deprivation was the only enhanced interrogation technique that every detainee in this study experienced and was thus a common variable across the nine detainees. And there are several studies that demonstrate the effects that a lack of sleep alone can have on one’s psyche.¹⁹³

The effects of total deprivation are understood to be particularly detrimental.¹⁹⁴ But experts in sleep medicine have come to study the effects that sleep debt and chronic sleep restriction, or chronic short sleep, yield over time. For example, a 2003 study tracked the effects of forty-eight healthy adults’ neurobehavioral and cognitive performances when their sleep was restricted to eight hours, six hours, or four hours of sleep a night for fourteen days.¹⁹⁵ The study also tested what the effects of total sleep deprivation would be for three nights.¹⁹⁶ While subjects sleeping eight hours a night remained essentially behaviorally alert over the course of fourteen days, “subjects in the [four-hour] sleep period condition displayed escalating numbers of lapses in behavioral alertness and decreasing cognitive accuracy and speed across the 14 days.”¹⁹⁷ Subjects in the six-hour sleep period demonstrated a magnitude of negative changes in performance each day that was more than the eight-hour sleepers, but less than the four-hour sleepers.¹⁹⁸ Additionally, after fourteen days, the four-hour sleepers demonstrated lapses in behavioral alertness and reductions in working memory performance at levels equivalent to those observed after two nights without any sleep and their cognitive performance was equivalent to that of one night without

192. *Id.*

193. See, e.g., Zhao et al., *supra* note 176; Breslau et al., *supra* note 183; Aargun et al., *supra* note 183; Chang et al., *supra* note 183; Amy Reynolds & Siobhan Banks, *Total Sleep Deprivation, Chronic Sleep Restriction and Sleep Disruption*, in 185 PROGRESS IN BRAIN RESEARCH 91 (Gerard A. Kerkhof & Hans P.A. van Dongen eds., 2010).

194. For example, a seminal 1989 study subjected ten lab rats to total sleep deprivation which led to the death or imminent death of all ten rats within eleven to thirty-two days. Everson et al., *supra* note 173, at 13.

195. Hans P.A. Van Dongen et al., *The Cumulative Cost of Additional Wakefulness: Dose-Response Effects on Neurobehavioral Functions and Sleep Physiology from Chronic Sleep Restriction and Total Sleep Deprivation*, 26 SLEEP 117, 117 (2003).

196. *Id.*

197. *Id.* at 120.

198. *Id.*

sleep.¹⁹⁹ The six-hour sleepers demonstrated impairment of behavioral alertness and working memory performance equivalent to one night of total sleep loss.²⁰⁰ The study suggested that “even relatively moderate sleep restriction—if sustained night after night—can seriously impair waking neurobehavioral functions in healthy young adults.”²⁰¹ It further concluded that “the effects of sleep chronically limited to [four hours] and [six hours] per night on cognitive performance appear to reflect progressive neurocognitive dysfunction in systems underlying sustained attention and working memory.”²⁰²

The effects of chronic restricted sleep are psychological and physiological in nature. After one week of shortened sleep (six hours or less), a healthy adult’s cumulative impairments in vigilance, or alertness, are so profound that even three consecutive nights of full recovery sleep is insufficient.²⁰³ Further, an incomplete recovery in vigilance increases the likelihood of long-term injury.²⁰⁴ A 2018 study found that chronic short sleep in mice in early adulthood sped up the onset of motor impairment and yielded a greater loss of neurons in the locus coeruleus (the brain region critical for optimal cognitive performance and brain health) and the lateral amygdala.²⁰⁵ The damage to these neurons and disfunctions in these areas of the brain is implicated in depression and Alzheimer’s disease.²⁰⁶ Notably, even with an extended opportunity for recovery after chronic short sleep, the mice showed a toxic and sustained increase in a protein (pathogenic tau) associated with Alzheimer’s disease.²⁰⁷ More simply, even after the chronic sleep restriction ended, the tau protein continued to accumulate in the mouse’s brain.²⁰⁸ This study is not only suggestive of the dangerous impact of frequently sleeping six hours a night or less, but that the effects are long-lasting. Even intermittent short sleep (short sleep over the course of four days a week) has yielded lasting consequences on neurons essential for alertness, mood, brain health, optimal cognitive performance, and goal-driven behaviors even with extended sleep recovery periods.²⁰⁹

199. *Id.*

200. *Id.*

201. *Id.* at 124.

202. *Id.*

203. Zhao et al., *supra* note 176, at 2.

204. *Id.*

205. Yan Zhu et al., *Chronic Sleep Disruption Advances the Temporal Progression of Tauopathy in P301S Mutant Mice*, 38 J. NEUROSCI. 10255 (2018).

206. Zhao et al., *supra* note 176, at 4.

207. *Id.*; Zhu et al., *supra* note 205.

208. Zhu et al., *supra* note 205.

209. Yan Zhu et al., *Intermittent Short Sleep Results in Lasting Sleep Wake Disturbances and Degeneration of Locus Coeruleus and Orexinergic Neurons*, 39 SLEEP 1601, 1601–11 (2016).

Theoretically, one can “pay back” certain forms of sleep debt with recovery sleep.²¹⁰ However, there is a “point of no return,” so to speak, where the effects of sleep deprivation will have a lasting negative impact regardless of the amount of recovery sleep.²¹¹ Furthermore, a lack of sleep need not last a lifetime to be destructive in the long-term. Specifically, in a 1996 study on sleep disturbances and psychiatric disorders in young adults, the authors argue that complaints of insomnia nearly every night for two weeks or more may be a useful indicator of a later onset of major depression.²¹² Additionally, a 1997 long-term study on insomnia in men in medical school found a greater risk of clinical depression for those who reported insomnia compared with those who did not.²¹³ Notably, “[t]he authors suggest that insomnia in young men is indicative of a greater risk for subsequent clinical depression and psychiatric distress that persists for at least 30 years.”²¹⁴ While forced sleep deprivation and insomnia are different bases for a lack of sleep, the conditions are likely to cause similar effects on the human body.²¹⁵ When interviewed in the course of this Article’s research, Dr. Sigrid Veasey, Professor of Medicine at the Perelman School of Medicine at the University of Pennsylvania, remarked that:

To date the long-term effects of chronic partial sleep loss for 30 days of short sleep (4 hours/day) have not been studied in humans and thus are not known. However[,] based on previous studies, such a pattern would lead to significant impairment in vigilance and mood across the month of sleep loss, leaving as a larger unknown how reversible these impairments are long-term. From animal model studies there are indeed lasting effects on the brain, including memory impairments and loss of select neurons critical for memory.²¹⁶

The research on sleep deprivation, sleep debt, and disrupted sleep is, understandably, of particular interest to the U.S. military, which itself has a

210. A 1997 study concluded, among other findings, that recovery from the effects of sleep restriction to nearly five hours a night for seven days required two nights of recovery sleep. David F. Dinges et al., *Cumulative Sleepiness, Mood Disturbance, and Psychomotor Vigilance Performance Decrements During a Week of Sleep Restricted to 4–5 Hours per Night*, 20 *SLEEP* 267, 276 (1997); Molly Webster, *Can You Catch Up on Lost Sleep?*, *SCI. AMERICAN* (May 6, 2008), <https://www.scientificamerican.com/article/fact-or-fiction-can-you-catch-up-on-sleep/>.

211. See Van Dongen et al., *supra* note 195, at 124.

212. LEAVE NO MARKS, *supra* note 181, at 23 (citing Breslau et al., *supra* note 183).

213. *Id.* at 23 n.194 (citing Chang et al., *supra* note 183).

214. *Id.*

215. *Id.*

216. E-mail from Sigrid Veasey, M.D., Professor of Med., Univ. of Pa., to Deena N. Sharuk, Clinical Teaching Fellow & Supervising Att’y, Ctr. for Applied Legal Stud. (CALs), Geo. Univ. L. Ctr. (July 24, 2020, 6:25 PM) (on file with author).

culture of insufficient sleep amongst its personnel.²¹⁷ The implications of insufficient sleep with respect to maintaining the health and performance of soldiers has led leadership to challenge this sleep-restricted culture.²¹⁸ A 2000 study conducted at the Walter Reed Army Institute of Research found that short-term total sleep deprivation produces a global decrease in brain activity with reductions in activity mediating attention and other “higher-order cognitive processes.”²¹⁹ In 2013, the Uniformed Services University, the National Intrepid Center of Excellence, and Walter Reed National Military Medical Center sponsored a symposium on Psychiatry and Sleep Disorders.²²⁰ During Dr. Christopher Lettieri’s remarks on sleep issues in the military population, he discussed sleep debt in military personnel.²²¹ He explained how chronic sleep restriction leads to attention deficit disorder and deactivates the prefrontal cortex, stating:

The prefrontal cortex overlaps a bit with our personality. This is why chronic sleep debt or even acute sleep debt leads to irritability and moodiness. It impacts who we are and how we function. Chronic sleep restriction decreases your ability to perform complex mental operations leading to a decreased quality of life. Sleep deprivation impacts both mood and health. . . . Inadequate sleep is associated with an increased risk of psychiatric disorders especially depression, irritability, anxiety, and alcohol disorders.²²²

As part of its campaign to encourage more sleep in military personnel, Walter Reed Army Institute of Research released a piece on fighting soldier

217. Christopher Lettieri, *Sleep Issues in the Military Population*, in ARTISS SYMPOSIUM 2013: PSYCHIATRY AND SLEEP DISORDERS 29 (2013), https://www.cstsonline.org/assets/media/documents/Artiss_Report_2013.pdf; see generally Cameron H. Good et al., *Sleep in the United States Military*, 45 NEUROPSYCHOPHARMACOLOGY 176 (2020).

218. See Good et al., *supra* note 217.

Cognitive dominance is critical for success in the battlefield of today and tomorrow. Sleep is ammunition for the brain, necessary for the maintenance of sustained vigilance and cognitive dominance,” [Army Lt. Col. (Dr.) Vincent] Capaldi said. “We would never send service members into the field and say they don’t need to bring water along with them, so we have to reverse the culture within our military that views sleep as a liability instead of an asset to help service members keep their brains in the fight.

Mil. Health Sys. Commc’ns Off., *MHS Addresses Sleep in the Military Through Sleep Studies*, HEALTH.MIL (July 20, 2020), <https://www.health.mil/News/Articles/2020/07/20/MHS-addresses-sleep-in-the-military-through-sleep-studies>.

219. Maria Thomas et al., *Neural Basis of Alertness and Cognitive Performance Impairments During Sleepiness. I. Effects of 24 h of Sleep Deprivation on Waking Human Regional Brain Activity*, 9 J. SLEEP RSCH. 335, 335, 349 (2000).

220. ARTISS SYMPOSIUM 2013: PSYCHIATRY AND SLEEP DISORDERS, *supra* note 217.

221. *Id.* at 29. Christopher J. Lettieri M.D. is an Assistant Deputy Commander for Medicine and the Director of the Sleep Medicine Fellowship Program at Walter Reed National Military Medical Center. *Id.* at 63.

222. *Id.* at 30–31.

fatigue and “enhancing cognitive dominance.”²²³ The publication noted that 62% of soldiers are chronically sleep restricted, averaging less than six hours of sleep per night.²²⁴ Further, it also found that five nights with less than five hours of sleep creates a 20% cognitive deficiency equivalent to a .08 blood alcohol level (or five alcoholic drinks in a 180-pound male).²²⁵ Additionally, the report explained that soldiers who averaged less than six hours of sleep every twenty-four hours are 4.7 times more likely to develop PTSD and 11.4 times more likely to develop depression than soldiers who average more than six hours of sleep.²²⁶

The 2016 Army Technique Publication ATP-6-22.5, “A Leader’s Guide to Soldier Health and Fitness,” developed by the Office of the Army Surgeon General, has an entire section dedicated to sleep as part of the “Performance Triad.”²²⁷ The authors note the insufficiency of four hours of sleep per night, writing:

It is commonly thought that adequate levels of performance can be maintained with only 4 hours of sleep per 24 hours. In fact, after obtaining 4 hours of sleep per night for 5 to 6 consecutive nights a Soldier experiences the same impairment as if he had stayed awake continuously for 24 hours.²²⁸

The authors note that “[s]leep loss may result in the impairment of mental and physical activities”²²⁹ and further instructs leadership that the “best way to evaluate a Soldier’s sleep status is to observe his behavior. Indications of sleep loss include, but are not limited to, increased errors, irritability, . . . difficulty understanding information, attention lapses, decreased initiative and motivation, and decreased attention to personal hygiene.”²³⁰ In fact, studies have shown that combat effectiveness, evidenced by cognitive performance, marksmanship decrements, and musculoskeletal symptoms, is reduced to 15% total effectiveness for soldiers who get only 4 hours of sleep per night.²³¹

223. *Fighting Soldier Fatigue & Enhancing Cognitive Sleep Dominance*, WRAIR’S INVESTIGATOR’S DISPATCH, https://www.wrair.army.mil/sites/default/files/2019-06/Behavioral_Health_and_Sleep.pdf (last visited Feb. 16, 2020).

224. *Id.* at 3.

225. *Id.*

226. *Id.*

227. DEP’T OF THE ARMY, ATP 6-22.5, A LEADER’S GUIDE TO SOLDIER HEALTH AND FITNESS 2-1 (2016) [hereinafter ATP 6-22.5]; *see also* Good et al., *supra* note 217, at 176–91.

228. ATP 6-22.5, *supra* note 227, at 2-6.

229. *Id.* at 2-5.

230. *Id.* at 2-6.

231. Good et al., *supra* note 217, at 184 (citations omitted).

C. Physiological Effects

When discussing sleep deprivation, much of the attention is dedicated to its psychological effects, however the consequences of sleep deprivation include physiological burdens in addition to cognitive and emotional costs. Sleep is a necessary component for brain function and systemic physiology including the immune, hormonal, and cardiovascular systems.²³²

Sleep restriction of four hours per night for less than a week can result in hypertension, cardiovascular disease, altered glucose tolerance, and insulin resistance.²³³ Further, four hours of sleep a night can aggravate conditions like hypertension. In a 1999 study, researchers in Italy monitored thirty-six patients with hypertension during a night where they only slept for four hours and again one week later.²³⁴ They found that blood pressure and heart rate were higher during the sleep deprivation periods than they were during a routine night of sleep and that those readings remained elevated at noon the day after a sleep-deprived night.²³⁵ Additionally, short sleep durations (defined as five hours or less a night) are independently associated with coronary events in women.²³⁶ Finally, sleep duration under six hours was associated with high blood pressure, dyslipidemia, impaired glucose tolerance and diabetes, being overweight or obese, impaired immune function, heart disease, stroke, certain cancers, Alzheimer's disease, and death.²³⁷

232. Medic et al., *supra* note 171, at 151 (citing Nathaniel F. Watson et al., *Joint Consensus Statement of the American Academy of Sleep Medicine and Sleep Research Society on the Recommended Amount of Sleep for a Healthy Adult: Methodology and Discussion*, 38 SLEEP 1161 (2015)); *see also* INST. OF MED. OF THE NAT'L ACADEMIES, SLEEP DISORDERS AND SLEEP DEPRIVATION: AN UNMET PUBLIC HEALTH PROBLEM (Harvey R. Colten & Bruce M. Altevogt eds., 2006).

233. LEAVE NO MARKS, *supra* note 181, at 23 (citing G.G. Alvarez & N.T. Ayas, *The Impact of Daily Sleep Duration on Health: A Review of the Literature*, 19 PROGRESS IN CARDIOVASCULAR NURSING 56 (2004)).

234. Rebecca Voelker, *Sleep and Hypertension*, 281 JAMA 889 (1999).

235. *Id.*

236. *See generally* Najib T. Ayas et al., *A Prospective Study of Sleep Duration and Coronary Heart Disease in Women*, 163 ARCHIVES OF INTERNAL MED. 205 (2003).

237. *See generally* Sayuri Katano et al., *Relationship Between Sleep Duration and Clustering of Metabolic Syndrome Diagnostic Components*, 4 DIABETES, METABOLIC SYNDROME AND OBESITY: TARGETS & THERAPY 119 (2011); Dolores Buscemi et al., *Short Sleep Times Predict Obesity in Internal Medicine Clinic Patients*, 3 J. CLINICAL SLEEP MED. 687 (2007); *Fighting Soldier Fatigue & Enhancing Cognitive Sleep Dominance*, *supra* note 223.

IV. SLEEP DEPRIVATION AS A FORM OF TORTURE

By its language alone, the Army Field Manual 2-22.3 permits a level of sleep deprivation that rises to the level of torture under the domestic definition of the word.²³⁸

A. The Army Field Manual's Permissible Form of Sleep Deprivation Is Likely to Yield Severe Mental Pain and Suffering

In Mohammed Jawad's hearing on his motion to dismiss the charges brought against him, the military commission found that while it was not necessary to determine whether Mohammed Jawad had been tortured, the Frequent Flyer Program, to which Jawad had been subjected from May 7–20, 2004, was “calculated to profoundly disrupt his mental senses.”²³⁹ The commission, however, offers little in the way of analysis to explain what it is to “profoundly disrupt the senses.” That being said, even with scant official interpretation of 18 U.S.C. § 2340, the language in the Army Field Manual permits restricting a detainee's sleep to four hours a night for thirty nights (with the opportunity for renewal or repeating) and that *actus reus* undoubtedly meets the definition of torture.²⁴⁰

David Luban and Katherine Newell divide the mental torture requirements of 18 U.S.C. § 2340 into six elements: (1) specific intent to cause (2) prolonged mental harm (3) resulting from (4) the administration or application, or threatened administration or application, of procedures (5) calculated (6) to disrupt profoundly the senses or personality.²⁴¹ In this analysis, element four refers to the restriction of detainee sleep to four hours a night for thirty nights. Luban and Newell argue that of the remaining five elements, numbers five and six are the most critical because once they are satisfied, so too are the first three elements.²⁴² This is because once one has proven profound disruption of the personality (6), they argue that one has thus proven prolonged mental harm (2) and causation (3).²⁴³ Furthermore, by proving the fifth element, “calculated,” one has proven specific intent (1).²⁴⁴

238. FIELD MANUAL 2-22.3, *supra* note 18.

239. Frakt, *Closing Argument*, *supra* note 8, at 21 (citing Ruling on Defense Motion to Dismiss—Torture of the Detainee ¶ 13, Jawad (Mil. Comm'n, Guantanamo Bay, Cuba, filed Sept. 24, 2008)).

240. FIELD MANUAL 2-22.3, *supra* note 18, at A-30, M-10.

241. Luban & Newell, *supra* note 19, at 377.

242. *Id.*

243. *Id.*

244. *Id.*

To establish that one has committed psychological torture, the *actus reus* must *profoundly* disrupt the senses or personality.²⁴⁵ The term “profound” is a qualitative measure of such a disruption.²⁴⁶ But there is no modern case law that delves into what types of acts are calculated to profoundly disrupt the senses or personality. That being said, the language of the statute does shed light on what a profound disruption of the personality means by its own construction. 18 U.S.C. § 2340 proscribes “the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality.”²⁴⁷ The implication is that the procedures calculated to profoundly disrupt the senses or the personality could be somehow analogous to threatening to administer a mind-altering substance.

18 U.S.C. § 2340 offers no guidance on the meaning of “prolonged” with respect to “prolonged mental harm” and there is scant guidance or case law on how modern courts should interpret the term. With respect to prolonged mental harm, the now repudiated Bybee Memorandum made clear that mental disorders including chronic depression or post-traumatic stress disorder, which could last for months or years, would meet such a requirement of prolonged mental harm.²⁴⁸ This suggestion was also revised to include developing mental disorders such as chronic depression or post-traumatic stress disorder that lasted for a term less than “months.”²⁴⁹

The harm caused by sleep deprivation by its very design disrupts profoundly the senses and the personality. Medical studies demonstrate that chronic sleep restriction (between four to six hours a night) for periods as short as days, let alone weeks, negatively impact behavioral alertness, the ability to pay attention, and decreased cognitive accuracy and memory performance in its subjects.²⁵⁰ In fact, sleeping for less than five hours a night for five consecutive nights yields the same effects of a .08 blood alcohol content²⁵¹ (the blood alcohol content at which it is illegal to drive in the United States).²⁵² Moreover, extended restricted sleep of this nature has fostered toxic levels of proteins implicated in Alzheimer’s Disease and

245. *Id.* at 380.

246. *Id.* at 382.

247. 18 U.S.C. § 2340(2)(B).

248. Standards of Conduct Memo, *supra* note 69; *see also* Luban & Shue, *supra* note 19, at 333–87.

249. Linda M. Keller, *Is Truth Serum Torture*, 20 AM. U. INT’L L. REV. 521, 554 (2005) (citing Memorandum from Dep’t of Just. Acting Assistant Att’y Gen. Daniel Levin to Dep’t of Just. Deputy Att’y Gen. James B. Comey (Dec. 30, 2004)).

250. *See supra* Part III.

251. *Fighting Soldier Fatigue & Enhancing Cognitive Sleep Dominance*, *supra* note 223, at 3.

252. 36 CFR § 4.23(a)(2).

provoked regional neuron death implicated in depression.²⁵³ Provoking this type of neurocognitive dysfunction is more than a disruption of the senses; it blunts the subject's senses and ability to function.

Chronic sleep restriction, even over limited periods, is further associated with enduring psychiatric disorders including depression, irritability, anxiety, and alcohol disorders.²⁵⁴ Impairing a subject with a mood disorder, such as depression, is a profound disruption to the personality and prolonged mental harm by even the lofty Bybee Memo's standards. Depression causes severe symptoms that affect how one thinks, feels, and handles daily activities such as sleeping, eating, or working.²⁵⁵ An impact to emotional functioning and mood is a clear disruption to the personality.

The medical studies on chronic sleep deprivation, discussed *supra*, suggest that the aftereffects of days, let alone weeks, of chronic sleep are likely to yield ongoing and prolonged mental harm for a subject. The OLC's assertion in its May 30, 2005, memorandum that the physiological reactions as a result of sleep deprivation would "generally return to normal" with only a night of sleep are unfounded. The OLC's sources are a non-descript literature review, representations from the CIA, and neuroscientist James Horne's 1988 book, *Why We Sleep: The Functions of Sleep in Humans and Other Mammals*. In fact, even British sleep neuroscientist James Horne himself took issue with the representation of his research.²⁵⁶ Horne stated, "[t]o claim that 180 hours [of sleep deprivation] is safe in these respects, is nonsense."²⁵⁷ Horne and his colleagues who conducted the referenced sleep study also took issue with the context in which subjects were being denied sleep by the CIA, noting that prolonged stressors combined with sleep deprivation would lead to physiological exhaustion of the body's defense mechanisms, physical collapse, and the potential for various ensuing illnesses.²⁵⁸ Advances in sleep medicine and recent studies suggest that chronic sleep restriction can cause lasting impacts such that the resulting mental harm has not only the likelihood of existing for a prolonged period,

253. See Zhao et al., *supra* note 176, at 4; Telephone interview with Sigrid Veasey, M.D., Professor of Med., Univ. of Pa. (July 24, 2020).

254. ARTISS SYMPOSIUM 2013: PSYCHIATRY AND SLEEP DISORDERS, *supra* note 217, at 31.

255. Depression, NAT'L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/topics/depression/index.shtml> (last visited Feb. 16, 2021).

256. Zachary Roth, *Sleep Expert 'Surprised and Saddened' to Find Research Twisted in Torture Memo*, TALKING POINTS MEMO (Apr. 17, 2009, 10:03 AM) <https://talkingpointsmemo.com/muckraker/sleep-expert-surprised-and-saddened-to-find-research-twisted-in-torture-memo>; Noah Shachtman, *Sleep Scientists: Research Twisted to Justify Torture (Updated)*, WIRED (Apr. 22, 2009, 11:44 AM), <https://www.wired.com/2009/04/in-a-2005-memo/>.

257. Shachtman, *supra* note 256 (alteration in original).

258. *Id.*

but that the effects may be permanent.²⁵⁹ Studies of chronic short sleep in mice even demonstrated a point of no return in cognitive decline.²⁶⁰ Chronic restricted sleep for periods as short as two weeks are indicators for later onset of major depression.²⁶¹

Furthermore, sleep deprivation is destructive physiologically as well as psychologically and causes harm that rises to the level of torture. An individual subjected to sleep deprivation risks damage to the individual's physical health in various forms including elevated blood pressure, cardiovascular disease, high cholesterol levels, weight gain, and obesity.²⁶² More specifically, sleep restriction to just four hours a night—the precise minimum dictated by Army Field Manual 2-22.3—for less than seven days risks cardiovascular disease.²⁶³ Thus, four hours of sleep a night for thirty days with the possibility of extension permits an interrogative or punitive tactic that threatens one's heart function. It is by its very nature severe in the harm it produces.

B. The Army Field Manual's Permitted Form of Sleep Deprivation Meets the Specific Intent Requirement to Inflict Severe Physical and Mental Pain and Suffering on a Detainee in U.S. Custody

A specific intent crime is one where an act is committed voluntarily and purposefully with the *mens rea* to do something that the law forbids.²⁶⁴ With regard to 18 U.S.C. § 2340, the act of torture requires that the actor specifically intend to cause prolonged mental harm resulting from the administration of procedures calculated to disrupt profoundly the senses or personality.²⁶⁵ As Luban and Newell have addressed, where one has proven that the procedure is calculated to disrupt profoundly the senses or personality, one has proven specific intent.²⁶⁶

The argument that the psychological harm and profound disruption of the senses are unintended outcomes of imposed partial sleep deprivation is without merit. The drafters of the Army Field Manual 2-22.3 updated the language to explicitly permit chronically restricting the sleep of detainees and removed references to “abnormal sleep deprivation” as an example of mental

259. See generally Zhao et al., *supra* note 176; Zhu et al., *supra* note 209; Van Dongen et al., *supra* note 195.

260. See generally Zhao et al., *supra* note 176; Zhu et al., *supra* note 209; Van Dongen et al., *supra* note 195.

261. LEAVE NO MARKS, *supra* note 181, at 23.

262. See *supra* note 237.

263. FIELD MANUAL 2-22.3, *supra* note 18, at M-10.

264. United States v. Blair, 54 F.3d 639, 642 (10th Cir. 1995).

265. Luban & Newell, *supra* note 19, at 377.

266. *Id.*

torture. Furthermore, the actor need not intend mental harm to have specific intent.²⁶⁷ Newell and Luban note:

An interrogator who intentionally breaks a subject's arm cannot defend herself by saying, "I intended to break his arm, but I didn't intend to harm him." Breaking his arm *is* harming him. The defense is mere wordplay: it denies specific intent to cause harm solely on the basis that the actor does not call it harm.²⁶⁸

Even if the ends are to encourage compliance in interrogation or punish alleged harms, the means are inflicting sleep deprivation that is calculated to produce prolonged mental harm.²⁶⁹

The government would be hard-pressed to demonstrate that chronic restricted sleep of four hours a night for thirty nights does not produce mental harm or that they are somehow unaware of the likelihood. The U.S. military's own research on sleep deprivation demonstrates the destructive outcomes of chronic restricted sleep and specifically advises against restricting sleep to four hours a night.²⁷⁰ The Department of Defense knew, and knows, that sleep deprivation would cause profound harm, yet it has drafted guidance permitting the practice. The Department of Defense has extensively studied and relied upon the research on the effects of chronic sleep restriction.²⁷¹ Thus, this manner of imposed harm is not incidental to the process of interrogation; it is a calculated choice to permit its usage.

Additionally, sleep deprivation has no discernable connection to the separation method's suggested purpose of denying "the detainee the opportunity to communicate with other detainees in order to keep him from learning counter-resistance techniques or gathering new information to support a cover story."²⁷² In the absence of a plausible stated purpose, one should consider the historic purpose of sleep deprivation: It is either intended to punish the subject or it is intended to coerce cooperation in interrogation.

1. The U.S. Government's Historical Criticism of Sleep Deprivation as Torture

Speaking broadly, the U.S. government has not always regarded sleep deprivation as permissible. In fact, the Department of Defense has

267. *Id.* at 381. Indeed, it is absurd to suggest that specific intent in the torture statute was in regard to the reason for torturing someone. If that were the case, nearly every torturer would be able to evade prosecution by suggesting that the intent was to encourage cooperation or to punish the subject.

268. Luban & Newell, *supra* note 19, at 381.

269. *See id.*

270. *Fighting Soldier Fatigue & Enhancing Cognitive Sleep Dominance*, *supra* note 223.

271. ATP 6-22.5, *supra* note 227; *see also* Good et al., *supra* note 217, at 176-91; *see generally* ARTISS SYMPOSIUM 2013: PSYCHIATRY AND SLEEP DISORDERS, *supra* note 217.

272. FIELD MANUAL 2-22.3, *supra* note 18, at M-8; *see infra* Section IV.B.3.

historically cataloged the practice as a form of torture. Perhaps the most discouraging demonstration of the United States' variable view on forced sleep deprivation is the language in Army Field Manual 34-52 on Intelligence Interrogation, the manual immediately preceding Army Field Manual 2-22.3. Army Field Manual 34-52, issued in September of 1992, was superseded by Army Field Manual 2-22.3 on Human Intelligence Collector Operations when the latter was issued on September 6, 2006 (nearly five years into the War on Terror).²⁷³ Army Field Manual 34-52 defined torture and went so far as to give examples of what would constitute torture:

Physical or mental torture and coercion revolve around eliminating the source's free will, and are expressly prohibited by [the Geneva Conventions] Torture is defined as the infliction of intense pain to body or mind to extract a confession or information, or for sadistic pleasure. . . . Examples of mental torture include . . . [a]bnormal sleep deprivation."²⁷⁴

Four years into the War on Terror, army interrogators were permitted to engage in interrogative tactics that were, by the terms of their own field manual, designated as methods of torture.²⁷⁵

The Department of State has also decried the use of sleep deprivation as torture. Each year, since 1977, the United States composes Country Reports on Human Rights Practices, detailing the individual, civil, political, and workers' rights (as set forth in the Universal Declaration of Human Rights and other international agreements) in nations around the world.²⁷⁶ The United States' policy has been that it is fundamental to its interests to "support a just peace around the world—one in which individuals, and not just nations, are granted the fundamental rights they deserve."²⁷⁷ In each country's report, freedom from torture is among the rights explored. Paradoxically, the Department of State human rights reports prior to, during, and since the War on Terror publicized the use of sleep deprivation as a

273. FIELD MANUAL 2-22.3, *supra* note 18, at i.

274. FIELD MANUAL 34-52, *supra* note 128, at 1-8. The term "abnormal sleep deprivation" was never defined in Army Field Manual 34-52 or prior versions of the Manual. *Id.*; see also DEP'T OF THE ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION (1992); DEP'T OF THE ARMY, FIELD MANUAL 30-15, INTELLIGENCE INTERROGATION (1978); DEP'T OF THE ARMY, FIELD MANUAL 30-15, INTELLIGENCE INTERROGATION (1969); DEP'T OF THE ARMY, FIELD MANUAL 30-16, TECHNICAL INTELLIGENCE (1953).

275. See generally FIELD MANUAL 2-22.3, *supra* note 18; see also HUM. RTS. WATCH, GETTING AWAY WITH TORTURE: THE BUSH ADMINISTRATION AND MISTREATMENT OF DETAINEES 57 (July 12, 2011), <https://www.refworld.org/docid/4e1c0c0b2.html>.

276. *Human Rights Reports*, U.S. DEP'T OF STATE, <https://2009-2017.state.gov/j/drl/rls/hrrpt/index.htm> (last visited Feb. 9, 2022); see also *Country Reports on Human Rights Practices*, ONLINE BOOKS PAGE, <https://onlinebooks.library.upenn.edu/webbin/serial?id=crhrp> (last visited Feb. 9, 2022).

277. *Human Rights Reports*, *supra* note 276.

method of torture when used by countries including Egypt (in the 2009, 2010, and 2011 reports), Iran (in the 1999–2014 and 2016 reports), Jordan (in the 1993–2006 reports), Libya (in the 2002, 2003, and 2011 reports), Oman (in the 1996, 1997, 2012–2016 reports), Peru (in the 1993–2000 reports), Tunisia (in the 1996–2007, 2009, and 2010 reports), Turkey (in the 1993–2005, and 2007–2010 reports), Western Sahara (in the 2009 report), Yemen (in the 2004–2009 reports), and Zimbabwe (in the 2011–2016 reports).²⁷⁸ For example, in the 2005 Human Rights Report on Jordan, sleep deprivation was broadly classified as a form of torture: “The most frequently reported methods of torture included . . . sleep deprivation”²⁷⁹ Notably, none of the reports explicitly define the term “sleep deprivation.”

This double standard did not go unnoticed by the Department of Justice. In 2005, the Department of Justice submitted a classified memorandum to the CIA, writing:

Each year, in the State Department’s Country Reports on Human Rights Practices, the United States condemns coercive interrogation techniques and other practices employed by other countries. Certain of the techniques the United States has condemned appear to bear some resemblance to some of the CIA interrogation techniques . . . nudity, water dousing, sleep deprivation, and food deprivation²⁸⁰

Courts in the United States have also acknowledged that sleep deprivation can be considered torture. In deciding whether an immigrant respondent is entitled to protections under the CAT, the Board of Immigration Appeals found in 2002 that G-A-, an Iranian Christian of Armenian descent, would likely face torture if he was deported to Iran.²⁸¹ The court found, “that, if the respondent were arrested and detained upon his return, his fate would likely include torture, as ‘there are numerous, credible reports that security forces and prison personnel continue to torture detainees and prisoners.’ Common methods of torture include ‘. . . sleep deprivation’”²⁸² The court did not elaborate on the circumstances surrounding the respondent’s sleep deprivation.

The inconsistencies between U.S. policy, practice, and diplomacy not only have the undesirable effect of appearing disingenuously sanctimonious on a global stage but are also demonstrative of the fact that the United States

278. *Id.*

279. U.S. Dep’t of State, *U.S. Department of State Country Report on Human Rights Practices 2005 – Jordan*, REFworld (Mar. 8, 2006), <https://www.refworld.org/docid/441821a334.html>.

280. AMNESTY INT’L, *supra* note 104, at 37 (alteration in original) (citing Article 16 CAT Memo, *supra* note 74).

281. *In re G-A-*, 23 I&N Dec. 366, 370 (BIA 2002).

282. *Id.* (citation omitted).

has historically identified sleep deprivation as a tool of torture and tacitly permits its usage.

2. Sleep Deprivation Does Not Serve the Separation Method

It is disingenuous at best to argue that chronic sleep deprivation is an unforeseen or incidental effect of the separation method. The separation technique is employed for the purpose of preventing a detainee from consorting with other detainees, exchanging information, and developing counter-resistance strategies that could make interrogation less effective.²⁸³ Denying a detainee access to sufficient sleep does nothing in furtherance of those goals. In fact, sleep deprivation and sleep disruption are counterproductive to intelligence gathering.²⁸⁴ So, what then is the purpose of sleep deprivation in human intelligence collection? One need not hypothesize for long as to the intent of an agent denying a detainee requisite sleep. Prior usage of sleep deprivation techniques has been for the explicitly stated purposes of reducing a detainee's ability to think on their feet and to coerce them to cooperate.²⁸⁵ Incentivizing cooperation or punishing an individual with threatened or actual harm is the hallmark of torture.²⁸⁶ In cases like Mohammed Jawad's, where sleep deprivation was used without any intelligence gathering, the act was punitive as opposed to coercive. Additionally, if one were to give credence to the post-2009 reports from Guantanamo, detainee statements make current practices of sleep deprivation unlikely to be unintentional or incidental.²⁸⁷ Shaker Aamer's complaint regarding doors "crashing" up to three hundred times a night was reportedly met with candor by a guard at Guantanamo who admitted that he was following orders by making as much noise as possible as detainees tried to sleep.²⁸⁸

3. The Implications of Reports of Sleep Deprivation in Guantanamo After 2009

There are limited unverified reports suggesting that sleep deprivation is ongoing in Guantanamo.²⁸⁹ If these reports are to be taken at face value, they suggest a culture emboldened to employ sleep deprivation on detainees in a punitive fashion. The detainees of Guantanamo are represented by counsel and interrogation has largely ceased. As such, the intent behind sleep

283. FIELD MANUAL 2-22.3, *supra* note 18, at M-8.

284. *See infra* Section V.B.3.

285. *See* Memo from Bybee to Rizzo, *supra* note 91.

286. *See* 18 U.S.C. §2340(2)(A); *see also* CAT, *supra* note 39, at ¶ 1.

287. *See supra* Section II.C.

288. *See supra* note 147 and accompanying text.

289. *See supra* Section II.C.

depriving detainees such as Ramzi bin al Shibh would have to be punitive. Nevertheless, because the language of the Army Field Manual 2-22.3 renders sleep deprivation permissible, it fosters a culture approving of a form of torture.²⁹⁰

The argument that sleep deprivation in the form of chronic restricted sleep of four hours a night for thirty nights is not currently practiced is irrelevant. The current manual's guidance is vulnerable to abuse. In its 2014 report to the United States, the U.N. Committee Against Torture stated:

[T]he Committee is concerned about certain aspects of Appendix M of Army Field Manual No. 2-22.3, Human Intelligence Collector Operations, of 6 September 2006, in particular the description of some authorized methods of interrogation, such as the interrogation techniques of “physical separation” and “field expedient separation”. While noting the information provided by the delegation that such practices are consistent with the State party's obligations under the Convention, the Committee remains concerned over the possibilities for abuse that such techniques may entail (arts. 1, 2, 11 and 16).²⁹¹

The Committee goes on to urge the United States to review Appendix M of Army Field Manual No. 2-22.3 and, in particular, to abolish the Separation Method, stating:

In particular . . . “use of separation must not preclude the detainee getting four hours of continued sleep every 24 hours”. Such provision, applicable over an initial period of 30 days, which may be extended upon due approval, amounts to authorizing sleep deprivation—a form of ill-treatment—, and is unrelated to the aim of the “physical separation technique”, which is preventing communication among detainees.²⁹²

History demonstrates that threats to national security allow for exploitation of poorly defined laws and safeguards. Army Field Manual 2-22.3's permissive regard for sleep deprivation is ripe for such exploitation and, given its language regarding sleep restriction tactics, invites it.

V. RECOMMENDATIONS FOR REFORM

Despite stated values to the contrary, the United States has a history of engaging in torture.²⁹³ And while codifying anti-torture legislation, signing

290. See Field Manual 2-22.3, *supra* note 18, at M-10.

291. *Concluding Observations*, *supra* note 62, at ¶ 17.

292. *Id.*

293. *USA and Torture: A History of Hypocrisy*, HUM. RTS. WATCH (Dec. 9, 2014, 9:04 AM), <https://www.hrw.org/news/2014/12/09/usa-and-torture-history-hypocrisy> (listing examples of when the United States engaged in tactics considered torture); Alfred W. McCoy, *The U.S. Has a History of Using Torture*, HIST. NEWS NETWORK (Oct. 19, 2007),

on to international conventions interdicting torture, and offering guidance limiting interrogation practices of foreign detainees are all steps toward aligning those stated values with general practice, the risk remains that torture will be an ongoing part of American legacy so long as safeguards remain elusive and national security threats remain pervasive. Two conditions have fostered an environment that continues to permit a practice that amounts to torture: (1) a misguided belief that sleep deprivation is an effective tool in human intelligence collection; and (2) a definition of torture so diluted and narrow that when confronted with even rough-hewn argument, it yielded to the weight of the enhanced interrogation techniques. As such, remedying this failing requires: (1) doing away with any restriction on detainee sleep as described in Army Field Manual 2-23.3;²⁹⁴ and (2) defining torture with language and spirit that is more faithful to the Convention Against Torture.²⁹⁵

A. Doing Away with Restrictions on Detainee Sleep and, Instead, Applying Efficient and Humane Intelligence Techniques

Because restricted sleep of even six hours a night for thirty nights has the potential of yielding irreversible and severe cognitive, psychological, and physiological damage, and because by its very nature, it has the likelihood of yielding unreliable intelligence, sleep deprivation of any form should be explicitly proscribed, as should any code or official guidance permitting it.

Eliminating sleep deprivation from the cache of interrogative methods will not hinder intelligence collection (especially because sleep deprivation's effectiveness in interrogation is dubious at best). Army psychiatrist Major Paul Burney and psychologist Major John Leso were both deployed to Guantanamo where they were assigned to devise interrogation techniques including manipulation of sleep.²⁹⁶ They warned that the techniques may lead to physical and/or emotional harm.²⁹⁷ They added that the most effective interrogation strategy was developing a bond with the subject.²⁹⁸

<https://historynewsnetwork.org/article/32497> (same); *The American Tradition of Torture*, HARV. UNIV. PRESS BLOG (May 11, 2018), https://harvardpress.typepad.com/hup_publicity/2018/05/the-american-tradition-of-torture-fitzhugh-brundage.html (same); John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L.J. 1001, 1003–04, 1016 (2008) (same).

294. See *infra* Section V.A.

295. See *infra* Section V.B. For the sake of brevity, this Article does not wade into the debate of whether a nation-state should engage in torture. It operates under the assumption that torture is an ineffective means for interrogation, reputationally destructive, and morally repugnant, and as such, the United States has no interest in engaging in torture.

296. Sheri Fink, *Where Even Nightmares Are Classified: Psychiatric Care at Guantánamo*, N.Y. TIMES (Nov. 12, 2016), <https://www.nytimes.com/2016/11/13/world/guantanamo-bay-doctors-abuse.html>.

297. *Id.*

298. *Id.*

Outside of Appendix M of Army Field Manual 2-22.3, the eighteen Human Intelligence Collection techniques are effective tools for intelligence collection.²⁹⁹ The Human Intelligence techniques include general approaches such as the *direct* and *incentive* approaches, where the interrogator engages in straightforward questioning or offers incentives to encourage cooperation respectively.³⁰⁰ Field Manual 2-23.3 also contains seven emotional approaches constructed to arouse strong negative or positive emotions from the potential source in order to encourage cooperation. For example, the *emotional hate* approach encourages the source's hatred or desire for revenge against others as a motivator for cooperation.³⁰¹ There are nine additional approaches including the *we-know-all* approach where the interrogator pretends to already possess all of the relevant facts and gives the subject the impression that he or she will only confirm or deny the information.³⁰² In a 2014 study, participants were induced to cheat on a test and were later accused of cheating and interrogated using Field Manual 2-22.3's unrestricted methods.³⁰³ Participants in both the negative emotional approaches and the positive emotional approaches provided more information and were more likely to confess than participants questioned with the direct approach.³⁰⁴ Additionally, the negative and positive emotional approaches yielded comparable results.³⁰⁵

Ultimately, Field Manual 2-22.3 possesses fruitful interrogational approaches that do not risk the subject's physical or mental health in the process of intelligence collection, as discussed *infra*. Eliminating sleep deprivation as a permitted practice will not compromise intelligence collection efforts, just as the group of military and intelligence interrogators highlighted in their November 16, 2010, letter to Secretary of Defense Robert M. Gates.³⁰⁶

299. See Misty C. Duke, et al., *The Effectiveness of Army Field Manual Interrogation Approaches for Educating Information and Building Rapport*, 42 L. & HUM. BEHAV. 442, 455–56 (2018).

300. FIELD MANUAL 2-22.3, *supra* note 18, at M-6–M-7.

301. *Id.* at 8-10; See Duke et al., *supra* note 299, at 443.

302. FIELD MANUAL 2-22.3, *supra* note 18, at 8-14.

303. Jacqueline R. Evans et al., *An Empirical Evaluation of Intelligence-gathering Interrogation Techniques from the United States Army Field Manual*, 28 APPLIED COGNITIVE PSYCH. 867, 869–70 (2014).

304. *Id.* at 873.

305. *Id.*

306. Letter from Frank Anderson et al., to U.S. Sec'y of Def. Robert M. Gates (Nov. 16, 2010).

B. Defining Torture with Fidelity to the Convention Against Torture

Of the eighty-three signatories, the United States presented the most reservations to the Convention Against Torture.³⁰⁷ Further, in its reservations, the United States diluted the definition of torture and refused to criminalize cruel, inhuman, or degrading treatment or punishment.³⁰⁸ The United States reportedly made these reservations as a protective measure to shield domestic law enforcement from prosecution and to avoid constitutional challenges for vagueness.³⁰⁹ Nonetheless, statutory language that holds up against constitutional challenges and adheres to the internationally recognized definition of torture are not mutually exclusive. To remedy the shortcomings of the U.S. federal torture statute, this Article proposes the following changes to the definition of torture: (1) clarify the specific intent language—that an individual accused of torture must knowingly inflict pain or suffering for a proscribed purpose; and (2) eliminate the narrow definition of mental torture. Both recommendations can be accomplished by redefining torture with language that is more faithful to the Convention’s Article 1 definition.³¹⁰

Though since repudiated,³¹¹ the OLC, through the Bybee memorandum, attempted to obfuscate the required *mens rea* of 18 U.S.C. § 2340 by exploiting its ambiguous specific intent language.³¹² This was made possible by the elimination of the language describing the Convention’s list of purposes for which one causes harm. The Convention specifies that torture is perpetrated when the act of severe pain or suffering is intentionally inflicted on another *for such purposes* as, for example, obtaining from him or a third person information or a confession.³¹³ As Hathaway, Nowlan, and Spiegel highlight, the U.N. Committee Against Torture and U.S. courts have historically presumed intent based on the facts and circumstances:

Put simply, where the facts show that severe pain or suffering was knowingly inflicted on a person with the acquiescence of a public official for a purpose prohibited by the Convention, the Committee concludes that the intent requirement is satisfied. In no instance has the Committee considered it necessary to conduct an intent analysis separate from its examination of these facts and

307. See note 48 and accompanying text.

308. See note 48 and accompanying text.

309. *Hearing*, *supra* note 45, at 12–13 (statement of Deputy Assistant Att’y Gen. Mark Richard).

310. See *infra* Section I.B.

311. Memorandum from Dep’t of Just. Acting Assistant Att’y Gen. Daniel Levin to Dep’t of Just. Deputy Att’y Gen. James B. Comey 2 (Dec. 30, 2004).

312. See Standards of Conduct Memo, *supra* note 69, at 3. The Bybee memo stated, “a defendant [must] act with the specific intent to inflict severe pain” and added that “the infliction of such pain must be the defendant’s precise objective.” *Id.*

313. CAT, *supra* note 39, at ¶ 1.

circumstances. The Committee has applied a similar approach in its concluding observations to country reports and country-specific inquiries. In this context, the Committee has detailed a list of acts that constitute torture, such as prolonged sleep deprivation and violent shaking, from which intent can be inferred.³¹⁴

By relying on a definition of torture that is more faithful to the U.N. Convention Against Torture, the ambiguous language of specific intent as it stands in 18 U.S.C. § 2340 is more difficult to manipulate and does not deviate from the modern American understanding of torture. The language of the CAT and its subsequent interpretations by the U.N. Committee Against Torture makes clear that harmful conduct is intended for a proscribed purpose associated with torture. Put another way, a state actor who whips a subject until he confesses to a crime cannot evade criminal prosecution of torture by simply shifting the narrative of his intent to intelligence collection as opposed to physical harm.

While the language of intent is ambiguous in 18 U.S.C. § 2340, its definition of mental torture is particularly narrow. It reduces mental torture to four limited categories and contains an impact-duration requirement that physical torture does not.³¹⁵ It was purportedly tailored in this fashion to shield U.S. law enforcement from accusations of torture and hedge against due process concerns.³¹⁶ While it is true that the Convention does not define mental torture, or mental pain or suffering, in such detail, the U.S. definition “of mental torture is so narrow that the lawyers had to add only the slightest dash of interpretive exaggeration to reach their conclusions [that sleep deprivation and other forms of psychological torture were in fact permitted].”³¹⁷ Luban and Shue argue that it is “materialist bias” that physical torture is somehow more real than mental torture and a “forensic fallacy” that due process requirements of specificity in criminal law are incorrectly identified with defining characteristics of the crime.³¹⁸ More specifically, because 18 U.S.C. § 2340 does not provide a narrowly-tailored definition for physical pain or suffering, it implies that psychological distress is not as legitimate as physical pain or suffering.³¹⁹ Further, concerns about false accusations against law enforcement or the subjectivity of the term “mental pain or suffering” do not explain why psychological torture is reduced to four limited categories or a requirement of “prolonged” duration.³²⁰ The language does not proscribe the full range of psychological

314. Hathaway et al., *supra* note 41, at 796 (footnotes omitted) (citations omitted).

315. See 18 U.S.C. § 2340(2)(A)–(D).

316. *Hearing*, *supra* note 45, at 12–13 (statement of Deputy Assistant Att’y Gen. Mark Richard).

317. Luban & Shue, *supra* note 19, at 826.

318. *Id.* at 842, 853.

319. *Id.* at 849–50.

320. *Id.* at 852.

torture; it simply makes it harder to prosecute. To use Luban and Shue's term, it is a "forensic fallacy" to use a desire for specificity to constrain the definition of psychological torture.³²¹

In U.S. criminal law, factfinders are frequently tasked with making subjective determinations. Consider the U.S. federal stalking statute, which requires the adjudicator to assess whether a defendant engaged in conduct that "causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress" to another.³²² The terms "reasonably expected" and "substantial emotional distress" are arguably as subjective as "mental pain or suffering." Yet, just as the term "mental pain or suffering" is an adequate term for the international community, the language is sufficient for a factfinder to interpret and make a determination.

Applying the Convention's definition of mental torture allows for the broad range of psychological torture to be prosecuted and encourages an internationally recognized understanding (and ban) of psychological torture. If it is the United States' intent to have an absolute prohibition on torture (regardless of who commits it), using a broader definition of mental torture and allowing for informed interpretation by the courts is a stronger means to achieving those ends.

CONCLUSION

Mohammed Jawad was ultimately released from Guantanamo Bay following a successful habeas corpus suit.³²³ The United States failed to produce reliable evidence that Jawad had thrown the explosive device at the American convoy in Afghanistan.³²⁴ Jawad's confession in Afghanistan was deemed to be coerced through torture and subsequent interviews in Guantanamo were viewed as unreliable because they were tainted by his treatment there.³²⁵ And while he was ultimately able to return to his family

321. *Id.* at 855. Indeed, the Office of the United Nations High Commissioner for Human Rights shared concerns that deviations in domestic definitions of torture would risk creating "loopholes" for committing torture. Accordingly, the Office recommended that the United States reconsider "withdrawing its interpretative understandings and reservations," and in particular, ensure that acts of psychological torture are not qualified as "prolonged mental harm." *Concluding Observations*, *supra* note 62, at 3.

322. 18 U.S.C. § 2261A.

323. *Bacha v. Obama*, No. 05-2385, 2009 WL 2149949 (D.D.C., July 17, 2009); *see also Mohammed Jawad – Habeas Corpus*, ACLU (Aug. 24, 2009), <https://www.aclu.org/cases/mohammed-jawad-habeas-corpus>.

324. *Mohammed Jawad – Habeas Corpus*, *supra* note 323 (explaining that the judge found "no credible evidence to continue holding" Jawad).

325. *Bacha*, 2009 WL 2149949; *see also Mohammed Jawad – Habeas Corpus*, *supra* note 323; *Court Found Inadequate Case Against ACLU Client Mohammed Jawad*, ACLU (July 28, 2009), <https://www.aclu.org/press-releases/gitmo-detainee-should-be-sent-home-after-torture-and-illegal-detention>.

in Afghanistan, the ramifications of losing the better part of a decade of his life in detention and repeated torture started to show.³²⁶ Despite a military panel of physicians repeatedly documenting that Jawad had “no psych issues,” Jawad was diagnosed with post-traumatic stress disorder in 2009 by New York University psychologist Katherine Porterfield.³²⁷ In a 2016 interview with *The New York Times*, Jawad declined to discuss his mental health, but instead remarked, “[t]hey tortured us in jails, gave us severe physical and mental pain,” adding, “[o]f course we have’ flashbacks, panic attacks and nightmares.”³²⁸

Mohammed Jawad was tortured at Guantanamo Bay when U.S. officials subjected him to sleep deprivation. And while some may dismiss enforced sleep deprivation in its current form as abuse, “torture-lite,” or only as one piece in a moving torture puzzle, sleep deprivation in its current permitted form undoubtedly rises to the level of torture by the United States’ own anemic definition. Moreover, the permissive nature of the Army Field Manual 2-22.3, coupled with a watered-down domestic definition of torture, fosters a culture that downplays the implications of torturing enemy combatants. In fact, unverified reports suggest that the practice of sleep deprivation and sleep interruption continue at Guantanamo Bay.³²⁹ But those reports need not be proven true to encourage reform. History has demonstrated that when legal safeguards against torture are feeble, threats to national security will serve as the impetus to exploit them.³³⁰

In Alberto Gonzales’s January 25, 2002, Memorandum to President George W. Bush, he made an effort to persuade the President that the Geneva Conventions did not apply to al Qaeda and Taliban fighters.³³¹ Anticipating

326. See Apuzzo et al., *supra* note 158; Transcript of Hearing on Motion to Suppress, *Bacha*, 2009 WL 2149949.

327. See Apuzzo et al., *supra* note 158.

328. *Id.*

329. See *supra* Section II.C.

330. More recently, former President Donald Trump advocated for enhanced interrogation methodology. On January 26, 2017, during his first week in office, he appeared on “Hannity,” a Fox News television program to discuss his policies on various topics including national security. There, he advocated for a return to enhanced interrogation methodology, stating that waterboarding was effective and “just short of torture.” Interview with Donald Trump, President, in Washington, D.C. (Jan. 26, 2017), <https://www.foxnews.com/transcript/cable-exclusive-president-trump-sits-down-with-sean-hannity-at-white-house>. That same week, *The Washington Post* reported on and made available a draft executive order, reportedly from the Trump Administration, that would revoke Executive Order 13,491. No such executive order was enacted by President Trump during his term in office and no reports indicated a return to employing CIA black sites or enhanced interrogation techniques. See Greg Miller, *White House Draft Order Calls for Review on Use of CIA ‘Black Site’ Prisons Overseas*, WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/world/national-security/white-house-draft-order-calls-for-review-on-use-of-cia-black-sites-overseas/2017/01/25/e4318970-e310-11e6-a547-5fb9411d332c_story.html.

331. Memo from Gonzales to Bush, *supra* note 65.

pushback, the White House Counsel listed some supportive arguments and potential counter-arguments to conclude that the Geneva Conventions did not apply to al Qaeda and Taliban detainees.³³² The last counter-argument Gonzales listed was that the decision that the Geneva Conventions did not apply “could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat.”³³³

Before President Bush made a decision regarding whether to apply the Geneva Convention protections to detainees, then Secretary of State Colin Powell sent a memorandum to the Counsel to the President and the Assistant to the President for National Security Affairs.³³⁴ The Secretary of State saw two options for President Bush, but both included “treat[ing] all detainees consistent with the principles of the [Geneva Conventions].”³³⁵ He argued that deciding that the Geneva Convention did not apply to the conflict would be incongruous with the United States’ historic policy and practice of supporting the Geneva Conventions and endanger U.S. troops adding that “[i]t has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy.”³³⁶

In 2009, during a visit to the CIA, President Obama defended the release of memoranda describing the end of enhanced interrogation:

[He] added that he ended the controversial interrogation techniques mentioned in the memos because the United States “is stronger and more secure” when it can deploy both power and the “power of our values, including the rule of law.” “What makes the United States special . . . is precisely the fact that we are willing to uphold our values and our ideals even when it’s hard, not just when it’s easy, even when we are afraid and under threat, not just when it’s expedient to do so”³³⁷

The prohibition of torture should be absolute in the United States of America. American law in letter and practice demonstrates the very nature of American values. And where a state uses torture or brute force in its governance, it loses any moral standing before the international community and weakens its legitimacy before its own citizenry.³³⁸ Furthermore, by

332. *Id.*

333. *Id.*

334. Memo from Colin Powell, *supra* note 37; see also *A Guide to the Memos on Torture*, N.Y. TIMES, <https://archive.nytimes.com/www.nytimes.com/ref/international/24MEMO-GUIDE.html>? (last visited Feb. 9, 2022).

335. Memo from Colin Powell, *supra* note 37, at 1.

336. *Id.* at 2.

337. In *CIA Visit, Obama Defends Interrogation Memo Release*, CNN (Apr. 20, 2009), <https://www.cnn.com/2009/POLITICS/04/20/obama.cia/index.html>.

338. Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87, 91 (2001).

setting the example that every player on the international stage can redefine the word “torture,” the United States effectively renders all commitments to proscribe torture meaningless, endangering its servicemembers and citizens abroad. In all likelihood, threats to national security will continue. A more robust definition of torture matching the spirit and letter of the Convention Against Torture and an explicit prohibition against the use of sleep deprivation as an interrogative or punitive tool will better protect the United States from compromising its values when facing future threats.