

COMMENT

POLITICS AND THE TORTURED QUESTION OF DIGNITY: MAINTAINING THE SEPARATION OF POWERS IN TIMES OF EMERGENCY*

I. INTRODUCTION

Each branch of the United States government has, on multiple occasions throughout the late twentieth century, emphatically declared the United States' commitment to the right to be free from torture.¹ Throughout the early twenty-first century, however, the United States' commitment to that right has been repeatedly cast into doubt by revelations of what has been going on behind the walls of our military detention centers abroad.² Systematically simulated drowning, sleep and food deprivation, sexual exploitation establishing learned helplessness³—whether referred to as torture or as enhanced interrogation, tactics like these belie any pretension that the United States is the champion of a global order oriented by humanist universalisms such as the right to be free from torture.⁴

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1. See, e.g., 18 U.S.C. §§ 2340, 2340A (2018) (criminalizing torture abroad by implementing legislation for the Convention Against Torture); Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2018) (enacting a law symbolizing Congress's condemnation of torture); *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (allowing a torture case brought by an alien plaintiff because "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind"); Presidential Statement on Signing H.R. 2092, 28 WEEKLY COMP. PRES. DOC. 465, 465 (Mar. 12, 1992) ("Today I am signing into law H.R. 2092, the 'Torture Victim Protection Act of 1991,' because of my strong and continuing commitment to advancing respect for and protection of human rights throughout the world. The United States must continue its vigorous efforts to bring the practice of torture and other gross abuses of human rights to an end wherever they occur.").

2. See Thom Shanker, *Horrific Scenes from Abu Ghraib*, N.Y. TIMES (May 2, 2004), <http://nyti.ms/2UzmGrz> [<http://perma.cc/RF3N-88A6>].

3. See *infra* notes 20–30 and accompanying text for a discussion of how these tactics were used at Abu Ghraib.

4. Compare Martti Koskenniemi, *International Law as Political Theology: How To Read Nomos der Erde?*, 11 CONSTELLATIONS 492, 505 (2004) ("This would be empire, and the only remaining

Of those who were harmed by the CIA's interrogation practices during the early 2000s, some have had their claims dismissed,⁵ some have settled,⁶ and some have bounced up and down federal courts for over a decade,⁷ but not one of these victims has won a civil action for damages in any U.S. court.⁸

The alien torture plaintiff faces a litany of barriers to entry to U.S. courts.⁹ These barriers include the state secrets privilege, the Alien Tort Statute's (ATS) territoriality and well-established cause of action requirements, and immunities of all sorts.¹⁰ Even once a torture plaintiff's foot is in the courthouse door, he faces the difficult task of establishing that the conduct at issue meets the torture standard and that the defendant is legally responsible for the conduct.¹¹ This Comment, however, will focus on just one of the obstacles faced by the torture plaintiff: the political question doctrine (PQD).

question would be whether it is a 'rational empire,' inspired by genuine confidence in the universality of the moral truth for which Washington decision-makers see themselves as carriers . . . or whether the right characterization would be of a 'cynical empire,' lacking such faith though still using its language."), with *Filartiga*, 630 F.2d at 890 (declaring that "the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind").

5. See, e.g., *Padilla v. Yoo (Padilla II)*, 678 F.3d 748, 768–69 (9th Cir. 2012).

6. See, e.g., *On Eve of Trial, Psychologists Agree to Historic Settlement in ACLU Case on Behalf of Three Torture Victims*, ACLU (Aug. 17, 2017), <http://www.aclu.org/news/cia-torture-psychologists-settle-lawsuit> [<http://perma.cc/LE5T-VFTP>] [hereinafter ACLU, *Eve of Trial*].

7. See, e.g., *Al Shimari, et al. v. CACI*, CTR. FOR CONST. RTS.: ACTIVE CASES, <http://ccrjustice.org/home/what-we-do/our-cases/al-shimari-v-caci-et-al> [<http://perma.cc/HWY5-MPJR>] (last visited Apr. 14, 2019) [hereinafter *Active Cases: Al Shimari*] (noting that the most recent development in this litigation is that the "April 23, 2019 trial date was suspended while the parties brief CACI's emergency appeal").

8. See Dror Ladin, *After Years of Slammed Doors, Torture Survivors Finally End Impunity Streak*, ACLU (Aug. 17, 2017, 10:30 AM), <http://www.aclu.org/blog/national-security/torture/after-years-slammed-doors-torture-survivors-finally-end-impunity> [<http://perma.cc/67WT-TH6B>] (noting that in order to appreciate the significance of a settlement favorable to torture plaintiffs in the summer of 2017, "it's important to look back at the much longer story of torture accountability[which], until today, has been one of total impunity").

9. See generally Susan N. Herman, *Ab(ju)dication: How Procedure Defeats Civil Liberties in the "War on Terror,"* 50 SUFFOLK U. L. REV. 79 (2017) (detailing the gamut of doctrinal stumbling blocks that threaten the litigation prospects of alien victims of the U.S. War on Terror, such as the policy bar on *Bivens* actions, the practice of extraordinary rendition, the state secrets privilege, and the political question doctrine).

10. See generally *id.* For a detailed discussion of how federal courts have relied on these and other procedural devices to avoid applying the law in the broad category of terrorism litigation, see generally *id.*

11. See Michael W. Lewis, *A Dark Descent into Reality: Making the Case for an Objective Definition of Torture*, 67 WASH. & LEE L. REV. 77, 82 (2010) ("[T]here is a generally agreed upon definition for the term that prohibits the intentional infliction of 'severe pain or suffering, whether physical or mental.' However, there is very little consensus on what that definition actually means."); Mary-Hunter Morris McDonnell et al., *Torture in the Eyes of the Beholder: The Psychological Difficulty of Defining Torture in Law and Policy*, 44 VAND. J. TRANSNAT'L L. 87, 90 (2011) (finding that countries faced with allegations of torture will often deny that it occurred, deny "personal responsibility," or deny that the act fits the definition of torture); see also Sheri Fink, *Interrogation, Torture and Personal Responsibility*, N.Y. TIMES (June 22, 2017), <http://nyti.ms/2tRLmhC> [<http://perma.cc/27DT-GNCK>] ("Virtually all the legal cases seeking to hold top officials and participants accountable for the prisoners' treatment had been dismissed from court.").

PQD—according to which the judicial voice box falls silent with respect to questions of politics—is a necessary feature of the separation of powers.¹² It is a corollary of the judiciary’s authority to say what the law is.¹³ The judiciary is denied the opportunity to say what the law is when doing so would violate the separation of powers,¹⁴ either by usurping the power of some political branch or by straying beyond the judicial comfort zone of principled adjudication.¹⁵ Where PQD applies, United States federal courts have no jurisdiction, and so there is no domestic remedy for the arguably wrongfully caused harm.¹⁶ PQD analysis first requires the identification of the particular question at issue.¹⁷ While there are no doubt other questions that arise in the course of torture litigation, the particular question with which this Comment is concerned is whether the treatment of an alien torture plaintiff in a given case satisfies the requirement that torture involves “severe pain or suffering, whether physical or mental, . . . intentionally inflicted.”¹⁸

Importantly, when this Comment refers to torture claims, it is identifying only more typical varieties of torture claims.¹⁹ In particular, this Comment has in mind only those claims arising from treatment belonging under one of two models. The first model this Comment calls *manifestly brutal treatment*. This model of treatment is exemplified by the facts in *Al Shimari v. CACI Premier*

12. See *Baker v. Carr*, 369 U.S. 186, 209, 217 (1962).

13. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

14. *Id.* at 164 (noting that the judiciary recognizes the existence of a class of “political act[s], belonging to the executive department alone, for the performance of which entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy”).

15. See *Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky I)*, 566 U.S. 189, 195 (2012).

16. See *Marbury*, 5 U.S. at 164.

17. *Zivotofsky I*, 566 U.S. at 208 (Sotomayor, J., concurring) (“In order to evaluate whether a case presents a political question, a court must first identify with precision the issue it is being asked to decide.”).

18. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, ¶ 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

19. As a corollary of this focus on the more typical varieties of torture claims, when this Comment refers to torture claims, it is not referencing torture claims based on an interference with humanitarian aid deliveries to disaster-stricken populations. See *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 775 (9th Cir. 2011) (Pregerson, J., concurring in part and dissenting in part) (lamenting the majority’s exclusion of interferences with humanitarian aid deliveries from the torture standard), *vacated on other grounds*, 569 U.S. 945 (2013). Relatedly, this Comment is also not focusing on contextually unique torture claims in which the discrete political goal is so intimately related to the particular means by which the goal is pursued that it would be impossible for the court to pass judgment on the means without incidentally also passing judgment on the ends. See *Schneider v. Kissinger*, 412 F.3d 190, 191–92 (D.C. Cir. 2005) (deciding a case in which the disputed conduct was a covert extrajudicial killing of a Chilean general who was viewed as an impediment to American interests in promoting a military coup against the then-President-elect of Chile, a socialist). For more on this latter distinction, see *infra* Parts II.B and III.B.1.

Technology, Inc.,²⁰ a case about the treatment of detainees at Abu Ghraib, treatment that the Department of Defense has since described as “sadistic, blatant, and wanton criminal abuse[.]”²¹ In addition to being regularly beaten, the plaintiffs were “‘shot in the leg,’ ‘repeatedly shot in the head with a taser gun,’ ‘subjected to mock execution,’ ‘threatened with unleashed dogs,’ ‘stripped naked,’ ‘kept in a cage,’ ‘beaten on [the] genitals with a stick,’ ‘forcibly subjected to sexual acts,’ and ‘forced to watch’ the ‘rape[]of a female detainee.’”²² The court noted that “[m]any of the acts allegedly were perpetrated ‘during the night shift’ in order to ‘minimize the risk of detection by nonparticipants’” and attempts were made to “‘cover up’ the misconduct.”²³ At least one (but possibly all) of the plaintiffs in *Al Shimari* was never designated an enemy combatant.²⁴ In the end, CACI—a private interrogation firm retained to implement the United States’ enhanced interrogation program—“collect[ed] payments in excess of \$19 million” for its work at Abu Ghraib.²⁵ Yet the case against CACI remains pending, having not yet fully moved past the possibility that a political question renders it nonjusticiable.²⁶

The second model, which this Comment calls *subtly and scientifically dehumanizing treatment*, is more methodologically precise but may be no less overwhelmingly agonizing and cruel. This model is exemplified in *Salim v. Mitchell*,²⁷ where plaintiffs were subjected to techniques designed by military psychologists allegedly to reduce suspects to a state of “learned helplessness” on account of which suspects would lose the autonomy necessary to resist the will of

20. 840 F.3d 147 (4th Cir. 2016). The *Al Shimari* litigation has been long and complex. It has elicited many opinions at both the federal district and appellate levels. For an overview of the case history, see *Active Cases: Al Shimari*, *supra* note 7.

21. *Al Shimari v. CACI Premier Tech., Inc.* (*Al Shimari I*), 758 F.3d 516, 521 (4th Cir. 2014) (quoting ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 16 (2004), <http://fas.org/irp/agency/dod/taguba.pdf> [<http://perma.cc/4YLK-F2QD>]).

22. *Id.* (alterations in original).

23. *Id.* at 521–22.

24. *Id.* at 521 n.2. The designation that a captive is an “enemy combatant” as opposed to a “civilian” or an “unlawful enemy combatant” has legal consequences for the rights of the prisoner. See *Customary IHL: Practice Relating to Rule 3. Definition of Combatants*, INT’L COMM. OF THE RED CROSS, http://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule3 [<http://perma.cc/ED2M-GXLJ>] (last visited Apr. 15, 2019).

25. *Al Shimari I*, 758 F.3d at 522.

26. *Al Shimari v. CACI Premier Tech., Inc.*, 320 F. Supp. 3d 781, 786 (E.D. Va. 2018) (“In February, this Court applied the Fourth Circuit’s political question framework to plaintiffs’ claims and concluded that plaintiffs’ claims should not be dismissed under the political question doctrine because plaintiffs have adequately alleged that CACI personnel engaged in conduct that was unlawful when it was committed. Accordingly, the Court has already determined, and it is the law of the case, that adjudication of plaintiffs’ claims does not impermissibly infringe on the political branches.” (citing *Al Shimari v. CACI Premier Tech., Inc.*, 300 F. Supp. 3d 758, (E.D. Va. 2018))).

27. 268 F. Supp. 3d 1132 (E.D. Wash. 2017). The *Salim* litigation, while less byzantine than that of *Al Shimari*, was likewise complex and elicited many opinions. The parties settled in August 2017. For an overview of the case history, see *Salim v. Mitchell—Lawsuit Against Psychologists Behind CIA Torture Program*, ACLU, <http://www.aclu.org/cases/salim-v-mitchell-lawsuit-against-psychologists-behind-cia-torture-program> [<http://perma.cc/S9CX-JTCU>] (last updated Aug. 17, 2017).

their interrogators.²⁸ On paper, the techniques—dietary manipulation, nudity, attention grasp, walling (throwing the suspect into a flexible wall constructed to disorient the suspect by affecting the inner ear), facial hold, insult slap, abdominal slap, cramped confinement, wall standing, stress positions, water dousing, sleep deprivation (chaining the suspect to the ceiling so as to force the suspect to always stand up straight), and water boarding (simulated drowning)—were systematic, often detailing requirements concerning medical examinations before and after interrogation sessions, how long techniques could be used, and which techniques could be used in combination or succession with others.²⁹ In practice, however, these scripted interrogations occasionally took a darker turn. For Suleiman Abdullah Salim personally, this included injecting him with mind-altering substances, leaving him alone in a cramped and constantly illuminated cage, and not letting him outside for four years.³⁰

Although all of the plaintiffs in *Salim* had been designated enemy combatants, all but one (who froze to death while in custody) were eventually released as posing no risk to national security.³¹ The detention of at least one of the suspects had been a case of mistaken identity.³² Over the course of their four-year contract with the Department of Defense, the defendant psychologists in *Salim* received at least \$72 million for their services.³³ Although the district court rejected the defendants' arguments that the case presented a nonjusticiable political question,³⁴ the court neglected to analyze this issue in any serious detail, barely even attempting to apply the long-established tests for PQD analysis. Because the *Salim* plaintiffs settled their claims in August 2017, there remains room for justifiable doubt as to whether the application of PQD in *Salim* could have withstood scrutiny on appeal.³⁵

Throughout the forthcoming analyses of PQD as it relates to aliens' torture claims, it is useful to keep these models in mind—those of manifestly brutal treatment and of subtly and scientifically dehumanizing treatment. Doing so will help the reader to not only remain aware of the limited scope of this Comment but also to understand the otherwise abstract torture standard and appreciate the stakes when courts apply PQD to torture claims.

28. *Salim II*, 268 F. Supp. 3d at 1138, 1148.

29. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency (May 10, 2005), 2005 WL 6334005, at *4–11.

30. *Salim II*, 268 F. Supp. 3d at 1136–37.

31. *See id.* at 1138, 1143–44.

32. *See* Brian Bennett, *Lawsuit Against Two Former Contractors May Shed Light on CIA's Use of Torture*, L.A. TIMES (Apr. 22, 2016, 3:00 AM), <http://www.latimes.com/nation/la-na-cia-torture-20160422-story.html> [<http://perma.cc/T7HD-GM27>] (asserting that it was Gul Rahman whose identity was mistaken); Barry Grey, *Trump Administration Invokes "State Secrets" in CIA Torture Case*, WORLD SOCIALIST WEB SITE (Mar. 11, 2017), <http://www.wsws.org/en/articles/2017/03/11/tort-m11.html> [<http://perma.cc/LB55-T8DH>] (asserting that it was Salim whose identity was mistaken).

33. *See Salim II*, 268 F. Supp. 3d at 1144.

34. *See id.* at 1145–47.

35. *See* ACLU, *Eve of Trial*, *supra* note 6.

This Comment's analysis of the intersection between PQD and the interrogation of aliens illuminates the obscure and heretofore seemingly unintelligible jurisprudence of PQD both generally and as it relates to the particular national security issue of interrogation practices. Because no appellate court has explained the relation between PQD and torture, and because district courts' political question analyses of this issue have deviated from established doctrine and proven woefully unconvincing,³⁶ it is generally unknown what impact PQD will have on the claims of future torture plaintiffs. This uncertainty has fostered conditions corruptive to the rule of law. This doctrinal mystery may not only be appropriated by "war hawks" as they cherry-pick precedents and dicta that seem to support their causes but also tempt more sympathetic "activist" judges to substitute alternative and unconvincing PQD analyses for established law, thereby undercutting the predictability and integrity of our legal system.

Relatedly, questions surrounding the meaning and legality of torture are more pressing today than at any other point in the past decade. The new Director of the CIA, Gina Haspel, oversaw a black site prison where torture was committed.³⁷ President Trump announced in his first official State of the Union address that, going forward, captured terrorists would "in many cases" be kept at Guantanamo Bay, thereby reversing an Obama-era policy that burdened executive discretion with ordinary procedures such as those prohibiting the indefinite detention of suspects without any legal basis.³⁸ Furthermore, he has declared his belief that torture is useful,³⁹ rather than take the less controversial approach of endorsing certain compelling interrogation techniques that most would call torture but then interpreting torture narrowly so as not to encompass those techniques.⁴⁰ Just over a month after taking office, President Trump publicly contemplated invoking the state secrets privilege—which would have been a first for torture litigation—in *Salim*.⁴¹ While President Trump had stated that he would defer to former Secretary of Defense James Mattis's judgment that

36. See *infra* Part III.A.

37. Julian E. Barnes & Scott Shane, *Cables Detail C.I.A. Waterboarding at Secret Prison Run by Gina Haspel*, N.Y. TIMES (Aug. 10, 2018), <http://nyti.ms/2Oq0ZqL> [<http://perma.cc/YMC2-EG66>].

38. See *Trump Reverses Obama Policy on Guantanamo Bay*, CNN, <http://www.cnn.com/videos/politics/2018/01/31/trump-terrorists-guantanamo-bay-state-of-the-union-sot.cnn> [<http://perma.cc/N7TZ-JPJA>] (last visited Apr. 15, 2019); see also Exec. Order No. 13,823, 83 Fed. Reg. 4831 (Jan. 30, 2018).

39. Daniel W. Drezner, *The Orwellian Foreign Policy Statements of the Trump Campaign*, WASH. POST (Feb. 18, 2016), <http://www.washingtonpost.com/posteverything/wp/2016/02/18/the-orwellian-foreign-policy-statements-of-the-trump-campaign/> [<http://perma.cc/4UZM-LDP4>] ("You know, I have these guys—'Torture doesn't work!'—believe me, it works. And waterboarding is your minor form. Some people say it's not actually torture. Let's assume it is. But they asked me the question, 'What do you think of waterboarding?' Absolutely fine. But we should go much stronger than waterboarding.").

40. See *infra* notes 162–70.

41. Dror Ladin, *In a First, the Trump Administration Moves To Invoke Secrecy Claims in Torture Lawsuit*, ACLU (Mar. 9, 2017, 12:30 PM), <http://www.aclu.org/blog/national-security/torture/first-trump-administration-moves-invoke-secrecy-claims-torture> [<http://perma.cc/T5LN-TT9U>].

resorting to torture would not be in the best interest of the United States, President Trump eventually “essentially” fired Mattis⁴² and formally expedited efforts to replace him.⁴³ In light of these recent events, never since the manic height of the War on Terror have the questions posed by this Comment been of such practical significance.

Seeking better to understand and explain PQD and its particular relation to the question of whether some treatment of alien detainees constitutes torture, this Comment proceeds as follows. Section II provides an overview of the steps involved in PQD analysis along with the features of the torture standard necessary to apply this doctrine to our question in the context of litigation under the ATS. Next, Section III begins by highlighting the inadequacies of the PQD analyses in both *Al Shimari* and *Salim*,⁴⁴ then it undertakes a fresh political question analysis of the models of treatment in those cases,⁴⁵ and finally it contemplates inherent features of PQD so as to aid in the equitable construction of that doctrine by better understanding its jurisprudential spirit.⁴⁶ Ultimately, Section IV concludes that PQD, properly applied, cannot render nonjusticiable the question of whether treatment like that in *Al Shimari* or *Salim* constitutes torture.⁴⁷

II. OVERVIEW

This Section lays out the steps in PQD analysis and explains the relevant doctrinal features of torture. First, it provides a general explanation of PQD and

42. Maggie Haberman, *Trump Says Mattis Resignation Was ‘Essentially’ a Firing, Escalating His New Front Against Military Critics*, N.Y. TIMES (Jan. 2, 2019), <http://nyti.ms/2RqcKmu> [<http://perma.cc/X429-EF9Q>].

43. J. Kael Weston, Opinion, *Jim Mattis Kept His Country from the ‘Dark Side,’* N.Y. TIMES (Dec. 20, 2018), <http://nyti.ms/2R64Sq0> [<http://perma.cc/BYQ6-XX4L>] (“Torture is apparently popular not just among many of the troops, it has a big fan in the White House. During the 2016 campaign, Donald Trump pledged to reinstate ‘enhanced interrogation techniques’ like waterboarding. That he never did is largely because of one man: Secretary of Defense Jim Mattis, a retired four-star Marine general who [left] the administration in February [2019].”).

44. See *infra* Part III.A.

45. See *infra* Part III.B.

46. See *infra* Part III.C.

47. See *infra* Section IV. Importantly, this Comment will frame its thesis as a *discovery* rather than as an *argument*. This is not because this Comment would dare call into doubt the dominance of positivism over the American jurisprudential scene. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (“[T]he accepted conception was of the common law as ‘a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.’ Now, however, in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.” (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))). Still less does this Comment hope to rebalance the separation of powers. Rather, this Comment calls its thesis a discovery rather than an argument because the Comment seeks to emphasize that it has, as much as possible, endeavored only to come to know the law and to articulate its yet unexpressed features. This Comment seeks as its sole guiding star the preservation and protection of the rule of law and hopes, therefore, to be seen as a report on the status of law rather than a prescription about what law ought to be.

a warning about the preliminary perils of question framing in the context of PQD analysis.⁴⁸ Next, it discusses the first real step of PQD analysis—determining whether the Constitution commits to a political branch the authority to determine the question presented⁴⁹—and the role played by both ordinary⁵⁰ and functionally necessary powers in addressing this first step of PQD analysis, especially as relates to the context of torture litigation.⁵¹ Finally, it explains the second real step of PQD analysis—determining whether there exist judicially manageable standards by which to resolve the question in the case⁵²—before detailing the international⁵³ and domestic⁵⁴ sources of law necessary to discern the subtleties of the torture standard.

A. *PQD and the Art of Question Framing*

PQD is “essentially a function of the separation of powers.”⁵⁵ The theoretical underpinnings of PQD were announced alongside those of judicial review in *Marbury v. Madison*.⁵⁶ With time, PQD proved applicable with special force to foreign policy determinations,⁵⁷ such as the propriety of using lethal force against an enemy combatant⁵⁸ or of interfering in another state’s democratic processes.⁵⁹

Contemporary PQD jurisprudence is based on the standard announced in *Baker v. Carr*.⁶⁰ Organizing various disparate “threads” of precedential case law,⁶¹ *Baker* articulated not only a list of arenas like foreign policy wherein PQD

48. See *infra* Part II.A.

49. See *infra* Part II.B.

50. See *infra* Part II.B.1.

51. See *infra* Part II.B.2.

52. See *infra* Part II.C.1.

53. See *infra* Part II.C.2.a.

54. See *infra* Part II.C.2.b.

55. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

56. 5 U.S. 137 (1803). Compare *Madison*, 5 U.S. at 177 (“It is emphatically the province and duty of the judicial department to say what the law is.”), with *id.* at 164 (noting that the judiciary recognizes the existence of a class of “political act[s], belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy”).

57. See *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (“The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—‘the political’—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”).

58. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (“If the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President’s decision to launch an attack on a foreign target . . .”).

59. *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005) (“[I]n order to determine whether the covert [assassination of then-President-elect Allende] which allegedly led to the tragic death of General Schneider [was] wrongful, the court would have to define the standard for the government’s use of covert operations in conjunction with political turmoil in another country.”).

60. 369 U.S. 186 (1962).

61. *Baker*, 369 U.S. at 211.

would predominate⁶² but also a series of independent but overlapping PQD tests.⁶³ Of these tests,⁶⁴ the Supreme Court today applies only the first two: it asks (1) whether there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department” and (2) whether there is “a lack of judicially discoverable and manageable standards for resolving it.”⁶⁵ Since before *Baker*, these have been the “dominant considerations” in PQD analysis.⁶⁶ *Baker* emphasized that “[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question’s presence.”⁶⁷ Nonetheless, *Baker* many times insisted that PQD analyses must ultimately rest on case-by-case determinations guided not just by this series of tests but by threads of factual precedent.⁶⁸

Before asking whether the question is political, however, a court must first come to know the scope of the question presented.⁶⁹ Unfortunately, PQD

62. *Id.* at 211–18 (discussing the impact of PQD on “[f]oreign relations,” “[d]ates of duration of hostilities,” “[v]alidity of enactments,” “status of Indian tribes,” and the guaranty of a “[r]epublican form of government”).

63. *Id.* at 226 (“A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present.”).

64. *Id.* at 217 (listing the other four *Baker* tests, which concern, respectively, “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question”).

65. *Zivotofsky I*, 566 U.S. 189, 195 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker*, 369 U.S. at 217)).

66. *See Baker*, 369 U.S. at 210 (quoting *Coleman v. Miller*, 307 U.S. 433, 454–55 (1939)).

67. *Id.* at 217.

68. *See, e.g., id.* at 210–11 (“Much confusion results from the capacity of the ‘political question’ label to obscure the need for case-by-case inquiry.”); *id.* at 211–12 (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.”); *id.* at 213 (“[D]eference rests on reason, not habit.”); *id.* at 217 (“The doctrine of which we treat is one of ‘political questions,’ not one of ‘political cases.’ . . . The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.”). This view of PQD aligns with that put forward by Professor Erwin Chemerinsky. *See* ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 149–50 (5th ed. 2007) (describing the *Baker* criteria as “useless in identifying what constitutes a political question” and adding that PQD “can be understood only by examining the specific areas where the Supreme Court has invoked” the doctrine); *see also* *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45 (D.D.C. 2010) (“[I]t is perhaps for this reason that the political question doctrine ‘continues to be the subject of scathing scholarly attack.’” (quoting *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1514 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985))); *id.* (“[T]he category of political questions is more amenable to description by infinite itemization than by generalization.” (quoting *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 933 (D.C. Cir. 1988))).

69. *Zivotofsky I*, 566 U.S. at 208 (Sotomayor, J., concurring) (“In order to evaluate whether a case presents a political question, a court must first identify with precision the issue it is being asked to decide.”).

analysis is subject to corruption when the question is framed—while questions framed broadly tend to end up political and render the case nonjusticiable, questions framed narrowly tend to be resolvable without intruding upon the political branches' authorities.⁷⁰

The Supreme Court gave an indication of how it would handle problems of question framing early in the post-*Baker* era when it declined to rely on PQD to vacate the D.C. Circuit's en banc opinion in *Ramirez de Arellano v. Weinberger*.⁷¹ In that case, the D.C. Circuit reversed the district court's holding that the question presented was nonjusticiable as a "direct challenge to the propriety of the United States' military presence in Central America."⁷² In so doing, the court reinstated part of then-Circuit Judge Scalia's previously vacated opinion, holding that the plaintiffs' Fifth Amendment claim was justiciable because the plaintiffs were not asking the court to evaluate the propriety of the "United States military presence in Honduras or in Central America, nor [did] they object to United States sponsorship of a Regional Military Training Center in Honduras. Plaintiffs' claim, properly understood, [was] narrowly focused on the lawfulness of the United States defendants' occupation and use of the plaintiffs' cattle ranch."⁷³

Ramirez limited the scope of its review to the means by which an unquestioned foreign policy was effectuated,⁷⁴ and kept out of mind the propriety of that underlying foreign policy. As a result, it confronted only the perfectly justiciable question of whether the effective seizure of land violated the plaintiffs' Fifth Amendment protection against uncompensated takings.⁷⁵ The resolution of *this* question, *Ramirez* pointed out, is not committed to a

70. See *id.* at 195–97 (majority opinion). *But see* *Gilligan v. Morgan*, 413 U.S. 1, 3 (1973) (holding that the question was nonjusticiable no matter how framed, given that the plaintiffs demanded "that the District Court establish standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard . . . [and] that thereafter the District Court must assume and exercise a continuing judicial surveillance over the Guard"); *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) (citing *Gilligan* and arguing that unlike actions seeking injunctions, actions seeking damages are justiciable when properly framed).

71. 745 F.2d 1500 (D.C. Cir. 1984) (en banc) (deciding a case in which the United States effectively seized a cattle ranch in Honduras, which was owned by a United States citizen, so as to set up a facility to train soldiers from El Salvador), *vacated on other grounds*, 471 U.S. 1113 (1985). The Supreme Court vacated the circuit decision in light of a statute that Congress enacted shortly after that decision, one that is unrelated to the PQD issue for which this case is examined here. See *Weinberger v. Ramirez de Arellano (Ramirez II)*, 471 U.S. 1113, 1113 (1985).

72. *Ramirez*, 745 F.2d at 1511.

73. *Id.* at 1512 ("This is a paradigmatic issue for resolution by the Judiciary."); see also *id.* at 1512–13 (comparing the nonjusticiability of the claims attacking foreign policy in *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950), with the justiciability of the Fifth Amendment claims implicating foreign policy in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and concluding that "[t]he issues in the instant case are well within the traditional bounds of justiciability by the federal Judiciary").

74. *Id.* at 1512–13.

75. *Id.*

coordinate political department, nor does it defy judicially manageable standards.⁷⁶

More recently, *Schneider v. Kissinger*⁷⁷ rejected the notion that the en banc *Ramirez* opinion remains an expression of good law⁷⁸ and relied instead on a view expressed in *Aktepe v. United States*,⁷⁹ which in some respects serves as an expansion of PQD's scope of nonjusticiability.⁸⁰ *Aktepe* held nonjusticiable the wrongful death and personal injury claims of 301 sailors in the Turkish Navy against the United States for the negligent firing of a live missile at our Turkish ally's vessel during practice naval exercises.⁸¹ *Schneider* emphasized that "[w]e agree with . . . *Aktepe* . . . that recasting foreign policy and national security questions in tort terms does not provide standards for making or reviewing foreign policy judgments."⁸² *Schneider* thereby rejected *Ramirez*'s underdeveloped question-narrowing technique—of focusing on the underlying legal issue and ignoring its foreign policy implications, without any principled regard for circumstance—as akin to willful blindness.⁸³ In so doing, *Schneider* seemed to express the view that PQD is triggered so long as judicial review of the question at issue would impose any burden on even the least significant foreign policy determinations,⁸⁴ such as *Aktepe*'s nonjusticiable political discretion to disregard a safe level of care in practice naval exercises.⁸⁵

Nonetheless, in *Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky I)*,⁸⁶ the most recent Supreme Court case addressing PQD, the Court allowed the case to

76. *Id.*; cf. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (“[PQD renders nonjusticiable claims] revol[ving] around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. . . . But . . . one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.”).

77. 412 F.3d 190 (D.C. Cir. 2005) (deciding a case in which the disputed conduct was a covert extrajudicial killing of a Chilean general who was viewed as an impediment to the American interest of promoting a military coup against the then-President-elect of Chile, a socialist).

78. *Schneider*, 412 F.3d at 196 (“[T]hat case stands for nothing at all, as it was vacated by the Supreme Court . . .”). Even so, *Ramirez* was vacated not for this holding but on other grounds. See *Ramirez II*, 471 U.S. 1113, 1113 (1985) (“The judgment is vacated and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for reconsideration of its opinion and judgment in light of the Foreign Assistance and Related Programs Appropriations Act . . .”).

79. 105 F.3d 1400 (11th Cir. 1997).

80. *Schneider*, 412 F.3d at 196–97 (citing *Aktepe*, 105 F.3d at 1404).

81. *Aktepe*, 105 F.3d at 1401 (finding a nonjusticiable political question when “[a]pproximately 300 Turkish Navy sailors . . . [brought] claims for death and personal injury suffered when two missiles fired from the USS SARATOGA (Saratoga) struck their vessel during North Atlantic Treaty Organization (NATO) training exercises”).

82. *Schneider*, 412 F.3d at 197 (citing *Aktepe*, 105 F.3d at 1404).

83. *Id.*

84. *Id.* at 195 (“[A]t the height of the Cold War, officials of the executive branch, performing their delegated functions concerning national security and foreign relations, determined that it was in the best interest of the United States to take such steps as they deemed necessary to prevent the . . . spread of communism This decision may have been unwise In any event, that decision was classically within the province of the political branches, not the courts.”).

85. *Aktepe*, 105 F.3d at 1404.

86. 566 U.S. 189 (2012).

proceed to trial precisely because the Court framed the question narrowly.⁸⁷ Unfortunately, however, in so doing the Court neglected to address the case law on question framing or even to defend its framing of the question against opposing views.⁸⁸ Instead, the Court flatly rejected that the question concerned the propriety of the executive's longstanding policy of remaining silent on the issue of sovereignty over Jerusalem, framing it so as to ask only about the validity of a statute directing the executive to permit persons born in Jerusalem to list Israel as their passport place of birth.⁸⁹ Having made only conclusory question-framing determinations like this one since its tacit approval of the reasoning in *Schneider*, the Court has failed so far to offer lower courts any principled way of handling the often outcome-determinative threshold issue of question framing. It will be necessary, therefore, to address this uncertainty and retroactively to reconcile apparent disconnects within the jurisprudence of PQD question framing before applying any of the particular tests of PQD analysis.⁹⁰

B. Test #1: Constitutional Commitment to a Coordinate Political Department

Once a court has determined whether the scope of the question presented can or cannot properly be limited, *Baker* instructs a court to begin its multi-test PQD analysis.⁹¹ The first test asks whether there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”⁹² This first PQD test is satisfied if the question to be determined would require the court to resolve some issue that is either expressly or implicitly committed to one or both of the political branches to the exclusion of the judiciary.⁹³ Although the express foreign policy and national security powers of the President are far less detailed in the Constitution than are those of Congress, the meager foreign

87. See *Zivotofsky I*, 566 U.S. at 189, 195–97.

88. See *id.*

89. *Id.*

90. See *infra* Part III.B.1.

91. *Baker v. Carr*, 369 U.S. 186, 226 (1962) (“A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present.”). Unfortunately, the *Baker* opinion offers no useful model for how to apply its tests. See *id.* (speeding through all six *Baker* tests in no more than four sentences, without even clarifying which arguments address which specific tests). Rather, although *Baker* is famous for providing the PQD tests, it expressly relies much more heavily on precedent and deductive reasoning than on inductive reasoning grounded in the legally formal tests it provides. See *id.* at 217 (“The doctrine of which we treat is one of ‘political questions,’ not one of ‘political cases.’ . . . The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.”).

92. *Zivotofsky I*, 566 U.S. at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker*, 369 U.S. at 217)).

93. *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (“[C]ourts lack jurisdiction over political decisions that are by their nature ‘committed to the political branches to the exclusion of the judiciary’” (quoting *Antolok v. United States*, 873 F.2d 369, 379 (D.C. Cir. 1989) (Sentelle, J., concurring))); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1511 (D.C. Cir. 1984) (“The first of these formulations requires the court to determine whether the text of the Constitution implicitly or explicitly commits the stated claim to the political branches. According to the Supreme Court, this necessitates a close textual analysis of specific provisions of the Constitution.”).

affairs authority expressly committed to the judiciary pales in comparison to those of either political branch.⁹⁴ Ultimately, however, the bulk of foreign affairs authority rests in the implied powers of the political branches, especially—regarding national security authority, at least—in those of the executive.⁹⁵

1. Constitutional Commitments: Ordinary Powers

Faced with this first PQD test, courts have relied on a variety of methods for determining whether adjudication of the question presented would require judicial interference with political authority from which it is excluded.⁹⁶ Although sometimes courts will address this test by looking to see whether power to resolve the question is expressly committed to the judiciary,⁹⁷ most courts resort instead to interpretations of the political branches' implied powers.⁹⁸

94. See *Schneider*, 412 F.3d at 194–95 (providing a comprehensive list of the foreign policy authorities of the political branches and a brief notation about the only express power of the judiciary touching upon foreign affairs: the grant of adjudicative jurisdiction over “[c]ases affecting Ambassadors, other public Ministers and Consuls” (quoting U.S. CONST. art II, § 2)).

95. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936) (“It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.”).

96. As discussed above, some courts seek to dispose of this question in advance by broadening or narrowing the scope of the question presented. See, e.g., *Zivotofsky I*, 566 U.S. at 195–97 (“The Secretary contends that ‘there is ‘a textually demonstrable constitutional commitment’” to the President of the sole power to recognize foreign sovereigns and, as a corollary, to determine whether an American born in Jerusalem may choose to have Israel listed as his place of birth on his passport. Perhaps. But there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute.” (citations omitted) (quoting *Nixon*, 506 U.S. at 228 (quoting *Baker*, 369 U.S. at 217))); *Ramirez*, 745 F.2d at 1512 (“Unlike the claim addressed by the Court in *Johnson v. Eisentrager*, the plaintiffs do not seek to adjudicate the lawfulness of the United States military presence abroad. Instead, they seek adjudication of the narrow issue whether the United States defendants may run military exercises throughout the plaintiff’s private pastures when their land has not been lawfully expropriated.”). Still, this route to resolving the issue is appropriate only under the narrow circumstances illuminated in *Schneider*, and so it is not available in many cases. See, e.g., *Schneider*, 412 F.3d at 191–92 (deciding a question that could not be framed more narrowly because the disputed conduct was a covert extrajudicial killing of a Chilean general who was viewed as an impediment to American interests, and therefore it was inextricable from foreign policy objectives); *Gilligan v. Morgan*, 413 U.S. 1, 6–8 (1973) (deciding a question that could not be framed more narrowly because the disputed conduct was the ongoing and future operations of the National Guard generally, supervision of which would functionally usurp the political branches’ role of determining policies toward the fulfillment of which the Guard would work).

97. See *Boumediene v. Bush*, 553 U.S. 723, 2247 (2008) (“The [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (discussing courts’ “time-honored and constitutionally mandated roles of reviewing and resolving claims” of the unlawful military detention of citizens).

98. *Zivotofsky I*, 566 U.S. at 193–95; *McCulloch v. Maryland*, 17 U.S. 316, 353 (1819) (“The power to establish such a corporation is implied, and involved in the grant of specific powers in the

Schneider, for example, interpreted the penumbral overlapping of express foreign policy powers to imply that the political branches alone enjoy authority in that arena, despite the lack of any precedent directly concerning the specific conduct at issue in that case.⁹⁹ *Ramirez*, on the other hand, made no mention of the concentration of foreign policy powers committed to the political branches and relied instead on precedential cases where courts enjoyed jurisdiction over analogous fact patterns with even weightier implications for foreign affairs.¹⁰⁰ Other courts have concluded that the first *Baker* test renders a question nonjusticiable when the question would require *ex ante* judicial interference with the decisionmaking of congressionally bolstered executive authority regarding issues that call for functional determinations relative to the exigencies of the moment.¹⁰¹

Some courts have considered the possibility that, in light of the disparity between the functional need for a nimble authority in the foreign sphere and the general lack of expressly provided foreign policy powers for that purpose, one or both of the political branches should be understood as enjoying inherent powers in the context of foreign affairs.¹⁰² Still, others have sought to address this disparity by interpreting certain vague provisions—like Article II’s Vesting

constitution; because the end involves the means necessary to carry it into effect. A power without the means to use it, is a nullity.”).

99. *Schneider*, 412 F.3d at 194–95; *cf.* *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”).

100. *Ramirez*, 745 F.2d at 1512 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (deciding, much like in *Ramirez*, that a controversy over the federal seizure of property was justiciable even though it was undisputed that the executive action was necessary to avoid grave risks to our soldiers in Korea)); *see also id.* (“This is a paradigmatic issue for resolution by the Judiciary. The federal courts historically have resolved disputes over land”); *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring) (“In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”).

101. *See, e.g., Gilligan*, 413 U.S. at 6–8; *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 47–48 (D.D.C. 2010).

102. *See, e.g., United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936) (discussing the “plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power . . . which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution”); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889) (arguing that although the Constitution separates power domestically, it is on account of our declaration of independence and territorial sovereignty that with regard to foreign affairs the United States enjoys “powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security . . . [and can be] restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations”). *But see Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076, 2089 (2015) (quoting *Curtiss-Wright’s* “sole organ” dictum and explaining that “[t]his Court declines to acknowledge that unbounded power”).

Clause¹⁰³—prescriptively rather than descriptively, as fountains of authority over foreign policy.¹⁰⁴

2. Constitutional Commitments: Powers for Necessity

Most importantly, some have argued that the Constitution affords the political branches no *definite* range of powers, but any power that, under the circumstances, is determined to be necessary to meet some particular national emergency. Advocates of the unlimited authority of necessity sometimes explain this authority as being grounded in some inherent feature of sovereignty,¹⁰⁵ such as a “war power.”¹⁰⁶ Others have attempted to infer it from ambiguous constitutional provisions like the Vesting Clause¹⁰⁷ or the Take Care Clause.¹⁰⁸

103. U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

104. *See, e.g., Zivotofsky II*, 135 S. Ct. at 2096–97 (Thomas, J., concurring in part and dissenting in part) (arguing that the Constitution “vests the residual foreign affairs powers of the Federal Government—*i.e.*, those not specifically enumerated in the Constitution—in the President by way of Article II’s Vesting Clause”). Justice Thomas provides a structural argument for this view, one observed by John Yoo as well, based on the Article II Vesting Clause’s omission of any terminology limiting the executive powers vested in the President only to those “herein granted,” despite such terminology being included in the Article I Vesting Clause. *See id.* at 2097–98; U.S. Dep’t of Justice, Office of Legal Counsel, Opinion Letter on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), at 37, <http://www.justice.gov/olc/file/886061/download> [<http://perma.cc/N8WU-5TMA>] [hereinafter Opinion Letter on Standards of Conduct for Interrogation]. The Article II Vesting Clause has also been interpreted as the source of a less expansive set of implied powers: those supported by historical practice. *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring) (“In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”).

105. *See The Chinese Exclusion Case*, 130 U.S. at 606 (“To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come”); *see also* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 84 (C.B. Macpherson ed., 1980) (1690) (“This power to act according to discretion, for the public good, without prescription of the law, and sometimes even against it, is that which is called *prerogative*.”).

106. *See, e.g., Korematsu v. United States*, 323 U.S. 214, 224–25 (1944) (Frankfurter, J., concurring) (“[T]he validity of action under the war power must be judged wholly in the context of war. . . . To recognize that military orders are ‘reasonably expedient military precautions’ in time of war and yet to deny them constitutional legitimacy makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war.”), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *id.* at 225 (“[B]eing an exercise of the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts.”); *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (“The war power of the national government is ‘the power to wage war successfully.’ It extends to every matter and activity so related to war as substantially to affect its conduct and progress.” (citation omitted) (quoting Charles Evans Hughes, *War Powers Under the Constitution*, 42 A.B.A. REP. 232, 238 (1917))). Subsequent opinions have relied on this Hughes quote. *See, e.g., Lichter v. United States*, 334 U.S. 742, 767 n.9 (1948)

Another watering hole of implied presidential powers frequented by utilitarians¹⁰⁹ anxious about necessity is the Commander in Chief Clause.¹¹⁰ John Yoo, one of the most infamous defenders of torture, has relied on this implied power more than once.¹¹¹ In one of the earliest of what would come to be known

(quoting former Chief Justice Hughes on the “power to wage war successfully”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 586 (2004) (Thomas, J., dissenting) (echoing the Chief Justice Hughes quote once more).

107. U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); *see also Youngstown*, 343 U.S. at 681–82 (Vinson, C.J., dissenting) (“[E]xecutive Power’ is vested in the President. . . . [T]he Framers created no autocrat capable of arrogating any power unto himself at any time. But neither did they create an automaton impotent to exercise the powers of Government at a time when the survival of the Republic itself may be at stake.”). *But see id.* at 588 (majority opinion) (arguing that the Vesting Clause must be limited at least by the Take Care Clause, in that the President has executive prerogative to enforce but not to make law); *id.* at 640–41 (Jackson, J., concurring) (“Lest I be thought to exaggerate, I quote the [Solicitor General’s expansive] interpretation which his brief puts upon [the Vesting Clause]: ‘In our view, this clause constitutes a grant of all the executive powers of which the Government is capable.’ If that be true, it is difficult to see why the forefathers bothered to add several specific items The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.” (footnote omitted)).

108. U.S. CONST. art. II, § 3, cl. 5 (“[The President] shall take Care that the Laws be faithfully executed”); *see also Youngstown*, 343 U.S. at 703–04 (Vinson, C.J., dissenting) (“Whatever the extent of Presidential power on more tranquil occasions, . . . the single Presidential purpose disclosed on this record is to faithfully execute the laws by acting in an emergency to maintain the status quo, thereby preventing collapse of the legislative programs until Congress could act.”); *id.* at 704 (“The Framers knew, as we should know in these times of peril, that there is real danger in Executive weakness. There is no cause to fear Executive tyranny so long as the laws of Congress are being faithfully executed [such as when] the Executive acts, as he did in this case, only to save the situation until Congress could act.”). *But see Zivotofsky II*, 135 S. Ct. at 2125 (Scalia, J., dissenting) (rejecting, at the peak of his “analytic crescendo,” the key premise of Thomas’s concurring opinion, that the Article II Vesting Clause is unbounded by the Take Care Clause and arguing instead that any source of plenary foreign power for the President must be limited by the Take Care Clause (first citing *Little v. Barreme*, 2 Cranch 170, 178–79 (1804); then citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring))); *Youngstown*, 343 U.S. at 587 (majority opinion) (“[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”); *id.* at 646 (Jackson, J., concurring) (arguing that the Take Care Clause “signif[ies] about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules”).

109. When using the term “utilitarian” this Comment does not intend to refer specifically to the formal school of utilitarianism, but rather to a way of thinking according to which the pursuit of compelling ends can justify resort to supposedly impermissible means. Compare with *infra* note 283, which makes a similar point with respect to Locke’s understanding of the sovereign’s prerogative to ensure the wellbeing of the commonwealth.

110. *See* U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States”); *see also Youngstown*, 343 U.S. at 587 (arguing that examples of “military commanders engaged in day-to-day fighting in a theater of war” lend no support to interpretations of the outer limits of the Commander in Chief Clause as applied domestically, “[e]ven though ‘theater of war’ be an expanding concept”); *id.* at 642 (Jackson, J., concurring) (“But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed forces to some foreign venture.”).

111. *See infra* notes 113–19 and accompanying text for more information on Yoo’s interpretation of the Commander in Chief Clause.

as the torture memos, Yoo, who served in the Department of Justice's (DOJ) Office of Legal Counsel (OLC), argued that given the United States' dangerously uncertain situation in the wake of September Eleventh,¹¹² any criminal statute apparently limiting the President's exercise of war powers under the Commander in Chief Clause would have to be interpreted so as not to reach the exercise of those war powers.¹¹³ Yoo added that even if a criminal torture statute expressed an intent to apply to the President's wartime discretion concerning the treatment of prisoners, such a statute would be invalid as violating the separation of powers by intruding on the executive's Commander-in-Chief authority.¹¹⁴

112. Opinion Letter on Standards of Conduct for Interrogation, *supra* note 104, at 31–33 (referring to a specific interrogation that led to the capture of Jose Padilla before he was able to carry out a suspected attack in the United States as an example of how domestic insecurity justifies interpreting the President's powers through the lens of the war time context). Although this letter was signed by Jay Bybee, it is widely understood to have been authored by John Yoo. *See, e.g.*, Claire Oakes Finkelstein & Michael Lewis, *Should Bush Administration Lawyers Be Prosecuted for Authorizing Torture?*, 158 U. PA. L. REV. 195, 201 (2010) (identifying this source as “the now-infamous memorandum dated August 1, 2002,” and the author as “John Yoo, though the memorandum was signed by James Bybee”).

113. Opinion Letter on Standards of Conduct for Interrogation, *supra* note 104, at 33–35 (explaining that such a narrowing interpretation would be necessary on the basis of both the AUMF expressing Congress's broad deference to the executive in responding to the 9/11 attacks and the principle of interpreting statutes so as to avoid Constitutional problems).

114. *Id.* at 39 (“Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President.”); *see also id.* at 38 (arguing that “[i]n wartime, it is for the President alone to decide what methods to use to best prevail against the enemy,” and that the Supreme Court has found nonjusticiable a dispute that would have required the Court to evaluate the appropriateness of Lincoln's response to the southern rebellion even though the appropriateness of this response, “in fulfilling his duties as Commander in Chief,” was a political question constitutionally committed to the President (citing *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863))); *id.* at 36–37 (“[B]ecause ‘the circumstances which may affect the public safety’ are not ‘reducible within certain determinate limits . . . it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any manner essential to its efficacy.” (quoting *THE FEDERALIST* No. 23, at 147–48 (Alexander Hamilton) (Jacob E. Cooke ed., 1961))). *But see* Definition of Torture Under 18 U.S.C. §§ 2340–2340A, 28 Op. O.L.C. 297, 298 (2004) [hereinafter Opinion Letter on Definition of Torture] (“This memorandum supersedes the August 2002 memorandum in its entirety.”); U.S. Dep't of Justice, Office of Legal Counsel, Opinion Letter on Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005), 2005 WL 6334005, *2 [hereinafter Opinion Letter on Application of § 2340 to the Interrogation of a High Value al Qaeda Detainee] (“We do not rely on any consideration of the President's authority as Commander in Chief under the Constitution, any application of the principle of constitutional avoidance (or any conclusion about constitutional issues), or any arguments based on possible defenses of ‘necessity’ or self-defense.”). Although Yoo followed up his discussion of the Commander in Chief Clause by considering whether the President's agents could invoke necessity or self-defense to avoid criminal conviction, it is important to understand that these necessity defenses are not the same as the necessity-inspired interpretations of the Constitution with which we are presently concerned. As was distinguished by the Supreme Court of Israel, the rationale for a court recognizing the post hoc defense of necessity does not necessarily support the conclusion that there should be some ex ante administrative authority to engage in the otherwise forbidden conduct. H.C.J. 5100/94 Pub. Comm. Against Torture in Israel v. State of Israel 53(4) PD 817 ¶¶ 32–35 (1999) (Isr.).

Yoo's view did not, however, go unquestioned. Declassified memos reveal that within months, military authorities attacked Yoo's necessity-driven Commander-in-Chief argument, and the DOJ officially rescinded Yoo's reading less than two years into his interpretation's tenure.¹¹⁵ Yoo raised his Commander-in-Chief theory again almost a decade later, however, as a defense by which to deny his liability for the torture of Jose Padilla.¹¹⁶ At trial, Yoo invoked the Commander in Chief Clause specifically for his argument that the Constitution commits wartime discretion to the executive branch in such a way that, for example, courts have no jurisdiction over the means by which suspected terrorists may be interrogated.¹¹⁷ Yoo hoped to bolster this argument by citing, among other things, bipartisan congressional support for executive discretion in this arena as expressed by the 2001 Authorization of the Use of Military Force (AUMF) and the fact that the executive conduct at issue in the case pertained not only to foreign affairs but also to national security, both of which lie squarely within the traditional ambit of the executive.¹¹⁸ The district court rejected these arguments and held Yoo liable.¹¹⁹ Although the Ninth Circuit reversed, it did so on other grounds and without specifically addressing the validity of either Yoo's or the district court's interpretations of how the Commander in Chief Clause bears upon judicial review of the treatment of torture plaintiffs.¹²⁰

C. Test #2: Judicially Discoverable and Manageable Standards

The second *Baker* test denies courts jurisdiction over issues for which there are no "judicially discoverable and manageable standards."¹²¹ Despite appearances, this expresses a single requirement, under which discoverability and manageability constitute a single inquiry.¹²²

115. Opinion Letter on Definition of Torture, *supra* note 114, at 1; see 151 CONG. REC. 17,235–38 (2005) (introducing JAG memos into the record).

116. See *Padilla v. Yoo (Padilla I)*, 633 F. Supp. 2d 1005, 1027 (N.D. Cal. 2009), *as amended* (June 18, 2009), *rev'd*, 678 F.3d 748 (9th Cir. 2012). Yoo referred to Padilla by name in his August 2002 memo as an exemplary case of when enhanced interrogation can be justified by necessity under the Commander in Chief Clause. Opinion Letter on Standards of Conduct for Interrogation, *supra* note 104, at 33.

117. See *Padilla I*, 633 F. Supp. at 1027.

118. See *id.* at 1025–30; see also Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

119. *Padilla I*, 633 F. Supp. at 1025–30.

120. See *Padilla II*, 678 F.3d 748, 760–62 (9th Cir. 2012) (specifically addressing only the issue of qualified immunity for official conduct that allegedly violated a norm that was not, at the time of the conduct, clearly established).

121. *Zivotofsky I*, 566 U.S. 189, 195 (2012).

122. Justin Driver, *Rules, the New Standards: Partisan Gerrymandering and Judicial Manageability After Vieth v. Jubelirer*, 73 GEO. WASH. L. REV. 1166, 1167 n.7 (2005) ("Although one might contend that the quest for 'judicially discoverable and manageable standards' contains two distinct steps, the Court has—even at the inception—collapsed discoverability and manageability into one inquiry, as *Baker v. Carr* itself uses the term 'judicially manageable standards' to describe the second prong of the political question doctrine." (citing *Baker v. Carr*, 369 U.S. 186, 223 (1962))).

1. Learning the Marks by Which To Identify a Manageable Standard

A plurality of the Supreme Court initially interpreted the manageable standard requirement narrowly to mean that “[j]udicial action must be ‘governed by *standard*, by *rule*’—or, put differently, federal courts must be able to proceed in a ‘principled, rational, and . . . reasoned’ fashion.”¹²³ More recently, six Supreme Court Justices, while stopping short of rejecting the prior interpretation, appeared to broaden this standard by emphasizing that the second *Baker* test is satisfied when the question would demand of the court only a “familiar judicial exercise,” such as interpreting a textual source of law.¹²⁴ This textual-interpretation fast track to satisfying the second *Baker* test is not, however, without exception: some textual sources of law might employ such vague language that courts will be helpless to resolve even questions that would seem at first to be questions of law.¹²⁵ Beyond these issues of textual interpretation, a further institutional specialty for courts is their expertise in post hoc review of disputes, as opposed to real-time or ex ante judgments without the luxury of a thorough finding of the actual facts.¹²⁶

123. *Al Shimari v. CACI Premier Tech., Inc. (Al Shimari II)*, 119 F. Supp. 3d 434, 449 (E.D. Va. 2015) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion)), *vacated and remanded* 840 F.3d 147 (4th Cir. 2016).

124. *Zivotofsky I*, 566 U.S. at 196 (“The existence of a statutory right, however, is certainly relevant To resolve his claim, the Judiciary must decide if Zivotofsky’s interpretation of the statute is correct This is a familiar judicial exercise.”). *But see id.* at 209–10 (Sotomayor, J., concurring) (arguing that a manageable standard need not be one that courts apply commonly, so long as courts can apply it meaningfully). The Supreme Court has for decades recognized this special place for textual interpretation in the context of the second *Baker* test. *See, e.g., Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (“As *Baker* plainly held, however, the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts.”).

125. *Nixon v. United States*, 506 U.S. 224, 229–30 (1993) (“The word ‘try,’ both in 1787 and later, . . . lacks sufficient precision to afford any judicially manageable standard of review of the Senate’s actions”); *see also Zivotofsky I*, 566 U.S. at 191 (Sotomayor, J., concurring) (observing that the majority seems to ignore the blemish the *Nixon* precedent has left on the general rule that textual interpretation is manageable for the courts).

126. *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) (“[B]ecause the framing of injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other branches, such suits are far more likely to implicate political questions. . . . [I]f plaintiffs seek only damages, the granting of relief will not draw the federal courts into conflict with the executive branch. Damage actions are particularly nonintrusive.” (citations omitted)). Regarding courts refusing to engage in ex ante evaluation of prospective executive branch activities, *see, for example, Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45, 47 (D.D.C. 2010) (refusing to interfere ex ante with the executive’s real-time authority to choose military targets on the basis of intelligence, because “[t]hese types of decisions involve ‘delicate, complex’ policy judgments with ‘large elements of prophecy,’ and ‘are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility’” (quoting *Chicago & S. Air Lines v. Waterman Corp.*, 333 U.S. 103, 111 (1948))). Regarding courts refusing to engage in ongoing supervision of executive activities, *see, for example, Gilligan v. Morgan*, 413 U.S. 1, 8 (1973) (refusing to entertain the plaintiff’s demand that the district court engage in ongoing supervision of the National Guard’s activities), or *Al-Aulaqi*, 727 F. Supp. 2d at 45 (“Courts are thus institutionally ill-equipped ‘to assess the nature of battlefield decisions.’” (quoting *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973))). *But see Brown*

Upon disentangling the various threads of PQD precedents, as recommended by *Baker* itself, it appears that judicially manageable standards require some principled basis for judicial decisionmaking, and while courts operate at the zenith of their institutional competencies when applying an unambiguous textual source of law post hoc to the full scope of relevant facts, questions are generally justiciable when their resolution depends upon a familiar exercise like textual interpretation.¹²⁷ In order to apply these precepts to the torture standard, however, it is first necessary to articulate this standard and to understand the sources of law from which it derives.

2. The Torture Standard in Alien Tort Statute Litigation

The torture plaintiffs with whom this Comment is concerned are those forced to litigate under the ATS, which grants federal courts jurisdiction over aliens' civil torture claims.¹²⁸ The ATS provides for federal jurisdiction over a cause of action upon a prima facie showing that (1) the plaintiff is an alien, (2) the defendant's tortious conduct caused the plaintiff's damages, and (3) the tortious conduct violated either a U.S. treaty or the law of nations¹²⁹ (the latter of which is alternatively known as customary international law, an unwritten corpus of law informed by states' practices and articulated understandings of international custom).¹³⁰ Conduct violates customary international law when it breaks with an established customary international norm that is sufficiently "specific, universal, and obligatory,"¹³¹ which requires at a minimum that the

v. Bd. of Educ., 349 U.S. 294, 298 (1955) (expressing a willingness that federal courts engage in ongoing supervision of local school boards for decades).

127. See *supra* notes 123–26 and accompanying text for a discussion of this approach to identifying a judicially manageable standard.

128. 28 U.S.C. § 1350 (2018) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). Although the ATS raises a variety of issues, the present Comment discusses it only insofar as is necessary to demonstrate the problems specifically aggravated by torture's inherent ambiguity. Recent Supreme Court rulings have whittled the ATS down so far—with respect to the causes of action to which it might apply, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004), the territorial relations such causes of action should bear, see *Kiobel ex rel Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013), and, most recently, the types of defendants to which it might pertain, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1406 (2018)—that it is nothing but a shadow of what it used to be at its zenith in the wake of *Filartiga*.

129. 28 U.S.C. § 1350; see also *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 116 (2d Cir. 2008) ("The ATS confers federal subject matter jurisdiction when three independent conditions are satisfied: (1) an alien sues, (2) for a tort, (3) committed in violation of the law of nations or a treaty ratified by the United States.").

130. See JEFFREY DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 74–75 (2015).

131. *Hilao v. Estate of Fernidand Marcos (In re Estate of Ferdinand Marcos, Human Rights Litig.)*, 25 F.3d 1467, 1475 (9th Cir. 1994); see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."); *United States v. Smith*, 18 U.S. 153, 163 (1820) (exemplifying, in an early case, one way to gauge the degree to which other civilized nations have accepted Blackstone's paradigmatic norms). Plaintiffs seeking to convince the court to recognize a cause of action under the ATS must further demonstrate that the court need not be seriously

norm not be one “with less definite content and acceptance among civilized nations than the historical paradigms” of customary international law prohibitions identified by Blackstone—violations of safe conducts, infringement of the rights of ambassadors, and piracy.¹³² It is beyond dispute that torture, as such, violates both United States treaty obligations and customary international law.¹³³ The key question, then, is whether treaties or customary international law furnish a standard that is sufficiently manageable to determine whether some particular form of cruel treatment does or does not constitute torture.¹³⁴ As will become clear, because no U.S. treaty provides a torture standard applicable to the civil actions of torture plaintiffs, it is necessary to consider whether the law of nations might offer such a standard; but because international and domestic law

concerned about any of five cautionary factors: (1) that customary international law, like common law, is now understood through a positivist, not transcendentalist lens; (2) that federal courts recognizing private rights of action at common law are today perceived not as finding law but as creating law; (3) the creation of a private right of action is something best left to the legislature, not the courts; (4) the risk that recognizing a cause of action brought by a foreign national in a particular case might interfere with the attainment of the political branches’ foreign policy goals should give courts pause; (5) courts have no authority to create causes of action that are only disputably supported by customary international law. *Sosa*, 542 U.S. at 725–28.

132. *Sosa*, 542 U.S. at 732 (citing *United States v. Smith*, 18 U.S. 153 (1820)).

133. *Padilla II*, 678 F.3d 748, 763 (9th Cir. 2012) (“We agree with the plaintiffs that the unconstitutionality of torturing a United States citizen was ‘beyond debate’ by 2001.” (quoting *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011))); *Filartiga*, 630 F.2d at 882 (“[A]lthough there is no universal agreement as to the precise extent of the ‘human rights and fundamental freedoms’ guaranteed to all by the Charter, there is at present no dissent from the view that the guaranties include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights”); see also, e.g., International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171; G.A. Res. 3452 (XXX), annex, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 9, 1975) (passed unanimously); G.A. Res 217 (III) A, Universal Declaration of Human Rights, art. 5 (Dec. 10, 1948); FRANCIS LIEBER, U.S. WAR DEP’T, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES art. 16 (1863), <http://archive.org/details/governarmies00unitrich> [<http://perma.cc/ZR9A-W3UV>] (providing, in one of the earliest articulations of the customary laws of war expressly endorsed by the United States, that “[m]ilitary necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions”). The International Court of Justice has described the right to be free from torture as a “peremptory norm.” *Questions Relating to Obligation To Prosecute or Extradite (Belg. v. Senegal)*, Judgment, 2012 I.C.J. 422, ¶ 99 (July 20); see also *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992). This right is also nonderogable. See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2 ¶ 2, Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85 [hereinafter CAT]; International Covenant on Civil and Political Rights, *supra*, art. 4(2).

134. Compare *Padilla II*, 678 F.3d at 764 (arguing that although at the time it was undisputed that torture was unlawful, “it was not clearly established in 2001–03 that the treatment to which Padilla says he was subjected amounted to torture”), with *Filartiga*, 630 F.2d at 883 (“These U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter. Since their adoption, ‘[m]embers can no longer contend that they do not know what human rights they promised in the Charter to promote.’” (alteration in original) (quoting Louis B. Sohn, *A Short History of United Nations Documents on Human Rights*, in THE UNITED NATIONS AND HUMAN RIGHTS: EIGHTEENTH REPORT OF THE COMMISSION 39, 71–72 (Comm’n to Study the Org. of Peace ed., 1968))).

on torture is thin, it is necessary to survey a wide range of relevant but independently inconclusive sources of law in order to discern the law of nations on this topic.

a. International Sources of Law

The United Nations' Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to which 165 sovereign states are bound as of March 2019,¹³⁵ defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, 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.¹³⁶

The part of this definition with which this Comment is concerned is the beginning: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted.”¹³⁷

The CAT standard—being a human rights standard binding on states in international fora rather than individuals in domestic fora¹³⁸—is not, however, the standard applicable in ATS litigation. Indeed, no U.S. treaty provides a torture standard that, in itself, is applicable in ATS litigation.¹³⁹ Nonetheless, as this Comment shows, international jurisprudence on torture gravitates around the CAT—the source of the paradigmatic torture standard upon which the

135. See *Status of Ratification Interactive Dashboard*, OFF. HIGH COMMISSIONER FOR HUM. RTS., <http://indicators.ohchr.org/> [<http://perma.cc/FZL5-XA94>] (last visited Apr. 15, 2019) (select “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” from the “Select a treaty” dropdown menu).

136. CAT, *supra* note 133, art. 1, ¶ 1.

137. *Id.*

138. See *id.*; see also *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 470–92 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (emphasizing how the CAT's human rights standard for torture may be helpful in interpretation of torture standards in other legal contexts, but it should not be blindly and insensitively transposed from its human rights context to other contexts).

139. Other treaties beyond the CAT provide torture standards that are likewise inapplicable in ATS litigation, and, moreover, they have not proved as influential for customary international law applicable to ATS litigation. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 32, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (including torture as one action that would violate the broader prohibition against “any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands”); Preparatory Comm'n for the Int'l Criminal Court, Rep. of the Preparatory Comm'n for the International Criminal Court: Addendum, Part II, Finalized Draft Text of the Elements of Crimes, 7, 14, 32–33 U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) (defining, with respect to an international criminal law treaty signed but not ratified by the United States, the international crime of torture in the context of crimes against humanity and in the context of war crimes in international and non-international armed conflicts, in such a way as substantially resembles the CAT standard).

various international and domestic practices and understandings with respect to torture that together constitute customary international law applicable in ATS litigation are modeled.¹⁴⁰ Accordingly, it is necessary to consider international and domestic interpretations of customary international law's torture standard in order to discern the standard applicable in ATS cases.¹⁴¹

International case law interpreting this standard is thin but illuminating. In *Ireland v. United Kingdom*,¹⁴² the European Court of Human Rights held that although the combined use of five “interrogation in depth” techniques—wall standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink¹⁴³—constituted cruel, inhuman, and degrading treatment (CIDT),¹⁴⁴ this treatment nonetheless lacked the “special stigma” of torture.¹⁴⁵

In *Public Committee Against Torture in Israel v. State of Israel*,¹⁴⁶ the Supreme Court of Israel observed that, consistent with Israel's treaty obligations,¹⁴⁷ the prohibitions on torture and CIDT are “‘absolute.’ There are

140. See *infra* notes 143–205 and accompanying text; see also *Kunarac*, ¶ 472 (observing, with respect to precedent on the international criminal law definition of torture applicable under the Statute for the International Criminal Tribunal for Former Yugoslavia, that “the definition contained in the Torture Convention ‘reflects a consensus which the Trial Chamber considers to be representative of customary international law.’” (quoting *Prosecutor v. Delacic*, Case No. IT-96-21-T, Judgment, ¶ 459 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998))).

141. See DUNOFF ET AL., *supra* note 130, at 74–75.

142. 2 Eur. Ct. H.R. (ser. A) (1978). Although the court in *Ireland* relied not on the CAT but on the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the definition of torture with which it was operating while interpreting those instruments was identical, in relevant part, to that employed by the CAT. See G.A. Res. 130/3452 (XXX), annex, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1) (Dec. 9, 1975) (defining torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted”).

143. *Ireland*, 2 Eur. Ct. H.R. at 34–35.

144. CIDT is a separate cause of action recognized under customary international law. While it is also recognized under U.S. law in connection with ATS litigation as a lesser included offense under torture, it is of no more than tangential interest for the purposes of the present Comment. See, e.g., *Al Shimari v. CACI Premier Tech., Inc. (Al Shimari IV)*, 324 F. Supp. 3d 668, 692 (E.D. Va. 2018) (“Having determined that plaintiffs’ allegations sufficiently describe severe physical and mental pain and suffering to constitute torture, it is clear that they have also sufficiently alleged CIDT and war crimes. In the War Crimes Act, CIDT is defined as the ‘act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.’ Accordingly, any mistreatment that rises to the level of torture—or severe physical or mental pain or suffering—must definitionally also constitute CIDT—which only requires severe or serious physical or mental pain or suffering. Moreover, the War Crimes Act includes both torture and CIDT as war crimes.” (citation omitted) (quoting 18 U.S.C. § 2441(d)(1)(B) (2018))).

145. *Ireland*, 2 Eur. Ct. H.R. at 59 (explaining that torture’s “distinction derives principally from a difference in the intensity of the suffering inflicted”).

146. HCJ 5100/94 *Public Committee Against Torture in Israel v. State of Israel* 53(4) PD 817 (1999).

147. *Israel*, 53(4) PD 817 ¶ 23. By the time of this case, Israel had already ratified the CAT. See *Status of Ratification Interactive Dashboard*, *supra* note 135 (select “Convention against Torture and

no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice. . . . [Nonetheless, even] a reasonable investigation is likely to cause discomfort."¹⁴⁸ The Supreme Court of Israel held that the combinations of techniques on the facts before it—shaking the suspect's torso,¹⁴⁹ making the suspect wait in the "Shabach" position¹⁵⁰ or the "frog crouch,"¹⁵¹ using excessively tight handcuffs,¹⁵² and employing various methods of sleep deprivation¹⁵³—were impermissible. It did not, however, explain whether these constituted only CIDT or whether they displayed the special stigma of torture.¹⁵⁴ Still, the *Israel* precedent, like that from *Ireland*, helps give some concrete meaning to the otherwise empty and relatively unhelpful abstract terminology of the torture standard, and thereby it reveals in some small way how that standard has been interpreted under customary international law.

b. Domestic Sources of Law

The content and existence of customary international law is contingent not only on how many states engage in a practice or express a particular view but also on which states engage in the practice or express that view.¹⁵⁵ In discerning customary international law, the international customs that are most important to take into account are those surrounding the states upon whom the question of customary international law at issue bears most directly.¹⁵⁶ The torture standard applicable as a customary international norm in ATS cases is, therefore, likewise informed by domestic sources of U.S. law beyond those international sources described above.¹⁵⁷

Still, U.S. domestic sources of torture law have, in turn, been informed in part by the above international sources, especially the definition of torture articulated in the CAT. Although the United States signed the CAT in 1988, debates in the Senate about the scope of the United States' obligations under the CAT postponed its ratification until 1994.¹⁵⁸ President George H.W. Bush, upon

Other Cruel, Inhuman or Degrading Treatment or Punishment" from the "Select a treaty" dropdown menu).

148. *Israel*, 53(4) PD 817 ¶ 23.

149. *Id.* ¶ 9.

150. *Id.* ¶ 10 (seating suspect in a tiny chair tilted forward, hooded and with hands tied, for long periods while loud music plays).

151. *Id.* ¶ 11 (forcing suspect to keep repeating a crouched position, supported only by the toes, for five minutes at a time).

152. *Id.* ¶ 12.

153. *Id.* ¶ 13 (using, among other methods, the Shabach position or back-to-back interrogations for days with alternating interrogators).

154. *See id.* ¶¶ 24–32.

155. *See DUNOFF ET AL.*, *supra* note 130, at 74–75.

156. *See id.*

157. *See id.*

158. *See Status of Ratification Interactive Dashboard*, *supra* note 135 (select "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" from the "Select a treaty" dropdown menu). In the meantime, Congress passed the Torture Victim Protection Act

advice from the Senate, interpreted the CAT's torture standard to be satisfied only if there is a specific intent to inflict extreme pain or suffering. He added that pain or suffering that is mental, rather than physical, satisfies the torture standard only if it inflicts prolonged mental harm that results from certain specified predicate acts, such as intentional or threatened infliction of death or severe pain or suffering.¹⁵⁹ In accordance with its CAT obligations,¹⁶⁰ Congress implemented this understanding of the CAT by enacting 18 U.S.C. §§ 2340 and 2340A, which criminalize torture outside of the territory of the United States.¹⁶¹

In the panic following September Eleventh, President George W. Bush—
anxious to learn the breadth of his new powers under Congress's AUMF within
the limits of the CAT and of Section 2340¹⁶²—determined it necessary to obtain

(TVPA), on the basis of which aliens could bring torture claims against foreign sovereigns in federal courts if they meet a torture standard substantially similar to that laid out in the CAT. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, 74 (1992) (defining torture differently than the CAT mainly just by defining mental pain or suffering as “prolonged mental harm” resulting from certain predicate acts, such as the intentional or threatened infliction of death or severe pain or suffering).

159. Opinion Letter on Standards of Conduct for Interrogation, *supra* note 104, at 16–20. Prior to ratification, President Reagan articulated a still higher standard for torture in his own understanding upon signing the CAT: “[A] deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating or agonizing physical or mental pain or suffering.” *Id.* at 16 (quoting S. TREATY DOC. NO. 100-20, at 4–5 (1988)); *see also* S. EXEC. REP. NO. 101-30, at 14 (1990) (identifying “sustained systematic beatings, application of electric currents to sensitive parts of the body and tying up or hanging in positions that cause extreme pain” as sufficient to meet the physical torture standard).

160. CAT, *supra* note 133, arts. 2–5; *see also* U.S. v. Belfast, 611 F.3d 783, 802–03 (11th Cir. 2010) (“Because the resolution of advice and consent from the Senate specified that the CAT was not self-executing, Congress passed [Section 2340] . . . pursuant to Articles 4 and 5 of the CAT.”); *id.* at 802 nn.1–2.

161. 18 U.S.C. §§ 2340, 2340A (2018) (defining 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” where “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from” certain predicate acts, such as intentional or threatened infliction of death or severe pain or suffering); *cf. id.* § 2441 (criminalizing war crimes generally, including torture); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (providing a definition of torture substantially similar to that in under Section 2340, but not requiring specific intent).

162. *See, e.g.*, U.S. Dep’t of Justice, Office of Legal Counsel, Opinion Letter on Legality of Interrogation Methods To Be Used During the Current War on Terrorism (Aug. 1, 2002), <http://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/020801.pdf> [<http://perma.cc/8HXM-NR5S>] [hereinafter Opinion Letter on Legality of Interrogation Methods] (interpreting, in a then-classified memo, the scope of the torture prohibition under the CAT); Opinion Letter on Standards of Conduct for Interrogation, *supra* note 104 (interpreting, in a then-classified memo, the scope of torture prohibition under Section 2340); U.S. Dep’t of Justice, Office of Legal Counsel, Opinion Letter on Interrogation of al Qaeda Operative (Aug. 1, 2002) [hereinafter Opinion Letter on Interrogation of al Qaeda Operative] (approving, in a then-top-secret memo, the application of ten specific interrogation techniques for use on a particular prisoner); *see also* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 § 2(a) (2001) (codified as amended at 50 U.S.C. § 1541) (“President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on

an interpretation of the definitions of torture laid out in those texts,¹⁶³ each of which his father had ardently advocated just a decade earlier.¹⁶⁴ John Yoo responded to this apparent need in August 2002 by issuing interpretations of those texts in perhaps the most infamous installment of the notorious torture memos.¹⁶⁵

Yoo interpreted the CAT's human rights standard for torture as coextensive with Section 2340's standard for criminal torture, because the latter, he argued, serves merely to clarify and implement the former.¹⁶⁶ Yoo argued that this was true even though civil torture actions—such as those brought under the Torture Victim Protection Act (TVPA), which defines torture in substantially

September 11, 2001, . . . in order to prevent any future acts of international terrorism against the United States.”).

163. See Opinion Letter on Legality of Interrogation Methods, *supra* note 162, at 1; Opinion Letter on Standards of Conduct for Interrogation, *supra* note 104, at 31–32; Opinion Letter on Interrogation of al Qaeda Operative, *supra* note 162, at 1.

164. 1992 U.S.C.A.N. 91, 91 (taking this position in the TVPA signing statement).

165. See Opinion Letter on Legality of Interrogation Methods, *supra* note 162, at 1; Opinion Letter on Standards of Conduct for Interrogation, *supra* note 104, at 31–32. Another memo issued alongside these—albeit not one attributed to Yoo—applied the principles articulated in Yoo's memos to the particular case of a specific prisoner. Opinion Letter on Interrogation of al Qaeda Operative, *supra* note 162, at 1. The prisoner identified in this last memo—which was made public consequent only to an investigation by the Senate Select Committee on Intelligence—was Abu Zubaydah, the first detainee upon whom Drs. Jessen and Mitchell, psychologist-defendants in *Salim v. Mitchell*, applied their enhanced interrogation techniques. SENATE SELECT COMMITTEE ON INTELLIGENCE, 114TH CONG., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATIONS PROGRAM 3–5 (2014), <http://www.intelligence.senate.gov/sites/default/files/press/findings-and-conclusions.pdf> [<http://perma.cc/NLV8-VZGX>] (“On the same day, a second OLC opinion approved, for the first time, the use of 10 specific coercive interrogation techniques against Abu Zubaydah—subsequently referred to as the CIA's ‘enhanced interrogation techniques.’ . . . The CIA's representations to the OLC about the techniques were . . . inconsistent with how the techniques would later be applied.”); see also *Salim II*, 268 F. Supp. 3d 1132, 1138 (E.D. Wash. 2017) (“In July 2002, the CIA and Mitchell believed Zubaydah was being ‘uncooperative’ and decided to pursue a more ‘aggressive’ phase of interrogation, and contracted with Defendant Jessen to assist Mitchell.”). The techniques ultimately approved for use on Zubaydah were referred to as follows: (1) attention grasp (grabbing Zubaydah by the collar and pulling him close); (2) walling (slamming him into a plywood wall to discombobulate him via his inner-ear); (3) facial hold; (4) facial slap or insult slap; (5) cramped confinement (confining him to a small space and then, if he had room only to stand, forcing him to stand for up to eighteen hours per day, or if he had room only to sit, forcing him to sit for up to two hours at a time); (6) wall standing (forcing him to stand with his legs apart, five feet from wall, leaning against wall on only his fingertips); (7) stress positions (forcing him to remain in various positions intended to induce temporary muscle fatigue); (8) sleep deprivation (shackling his hands to the ceiling for between 48 and 180 hours, making it impossible to rest); (9) placing insects in a confinement box; and (10) water boarding (simulating drowning by pouring water on his face for up to forty seconds while he was lying down on a declining board with a cloth over his face, making it impossible to breathe). See Opinion Letter on Interrogation of al Qaeda Operative, *supra* note 162, at 2–4. Concerning water boarding, the opinion letter observed that there was a risk that this technique could support a claim of mental torture under Section 2340, unless medical professionals were careful to ensure that no prolonged mental harm actually resulted. *Id.* at 15–16.

166. See Opinion Letter on Legality of Interrogation Methods, *supra* note 162, at 3–5; Opinion Letter on Standards of Conduct for Interrogation, *supra* note 104, at 15–16.

the same terms as do the CAT and Section 2340,¹⁶⁷ or those brought under the ATS—are held to what Yoo asserted is a less rigorous torture standard than would apply in criminal prosecutions.¹⁶⁸ Concerning Section 2340’s severity requirement for physical pain or suffering, Yoo argued that because the federal common law of medical emergencies defines “severe physical pain” as analogous to the pain of organ failure, this should be the standard used in the context of torture as well.¹⁶⁹ Likewise, Yoo interpreted the “prolonged” requirement of mental torture to mean “the harm must be one that is endured over some period of time. Put another way, the acts giving rise to the harm must cause some lasting, though not necessarily permanent, damage.”¹⁷⁰

Yoo’s readings of the CAT and of Section 2340 guided the executive branch until the OLC withdrew this interpretation in June 2004,¹⁷¹ after which it issued a new reading of these prohibitions in December 2004.¹⁷² The December 2004 memo, issued by then-acting Assistant Attorney General Daniel Levin, rejected many of Yoo’s impertinent arguments¹⁷³ expressed in the August 2002 memos and broadened Yoo’s narrow reading of the torture standard.¹⁷⁴ In particular, Levin denied that pain or suffering is only sufficiently “severe” if it is agonizing or excruciating¹⁷⁵ and emphasized that Yoo was wrong to treat “pain or suffering” as a unified concept rather than as alternative concepts.¹⁷⁶ Instead,

167. See Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, 74 (defining torture differently than the CAT mainly just by defining mental pain or suffering as “prolonged mental harm” resulting from certain predicate acts, such as the intentional or threatened infliction of death or severe pain or suffering); see also Opinion Letter on Standards of Conduct for Interrogation, *supra* note 104, at 22 (“The TVPA contains a definition similar in some key respects to the one set forth in Section 2340. Moreover, as with Section 2340, Congress intended for the TVPA’s definition of torture to follow closely the definition found in CAT.”); *id.* at 22 n.11 (collecting sources that noted that the definitions were similar).

168. Opinion Letter on Standards of Conduct for Interrogation, *supra* note 104, at 27.

169. *Id.* at 5–6.

170. *Id.* at 7–8.

171. Opinion Letter on Definition of Torture, *supra* note 114, at *1–2.

172. *Id.* (opening with the line “[t]orture is abhorrent both to American law and values and to international norms” and continuing by emphasizing that “[t]his memorandum supersedes the August 2002 Memorandum in its entirety”).

173. Opinion Letter on Application of § 2340 to the Interrogation of a High Value al Qaeda Detainee, *supra* note 114, at *2 (“We do not rely on any consideration of the President’s authority as Commander in Chief under the Constitution, any application of the principle of constitutional avoidance (or any conclusion about constitutional issues), or any arguments based on possible defenses of ‘necessity’ or self-defense.”).

174. See *id.* One argument of Yoo’s that did last, however, was that CIDTs are coextensive with the “shocks the conscience” standard under the Fifth Amendment of the Constitution. Compare Opinion Letter on Standards of Conduct for Interrogation, *supra* note 104, at 17, with U.S. Dep’t of Justice, Office of Legal Counsel, Opinion Letter on Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005) [hereinafter Opinion Letter on Application of Article 16 of the CAT to the Interrogation of High Value al Qaeda Detainees].

175. See Opinion Letter on Definition of Torture, *supra* note 114, at *2 (rejecting President Reagan’s original understanding of the CAT prior to the CAT’s ratification).

176. See *id.* at *7.

Levin argued, one might suffer for a sufficient duration and intensity as to satisfy the physical torture standard even without any severe physical pain at all.¹⁷⁷

Likewise, Levin interpreted “mental harm” to require something more like mental injury than severe pain¹⁷⁸ and to be sufficiently “prolonged” when it involves some “lasting duration” beyond the duration of the actual implementation of the interrogatory technique.¹⁷⁹ Finally, Levin rejected Yoo’s argument that the “specific intent” requirement could be satisfied only by a deliberate and calculated attempt to achieve the pain or suffering, and he explained that while he would not provide a rigid definition of specific intent, this requirement would be satisfied by knowledge or notice of the likelihood of the severely painful consequence.¹⁸⁰ In the end, while these torture-memo debates lend some clarity to the torture standard under Section 2340 (and, indirectly, the CAT), that clarity pales in comparison to the uncertainty left in the wake of these nonbinding executive interpretations of the torture standard in those documents.

The only precedential clarification of the CAT’s torture standard as implemented under Section 2340—in a case so uncontroversially sufficient for the torture standard that it proves unhelpful for discriminating between what does and does not constitute torture in borderline cases—was the prosecution of Roy Belfast, “a/k/a Chuckie Taylor, II,” son of former President of Liberia Charles Taylor.¹⁸¹ The court had no difficulty finding Section 2340 fulfilled in the case of Chuckie Taylor, who had brutally beaten, burned, electrocuted, amputated, and decapitated several prisoners whom he kept in “prison pits” that were “approximately two-and-a-half feet deep, covered with metal bars and barbed wire, [and] lined with cement [One prisoner’s] pit contained a rotting corpse and chin high water.”¹⁸²

Beyond this lonely and unhelpful precedent of the CAT’s torture standard as criminally codified under Section 2340, the precedents of civil torture claims illuminate the torture standard slightly further.¹⁸³ *Mehinovic v. Vuckovic*,¹⁸⁴ for example, held that even an occasion where an interrogator merely “hit plaintiff . . . and kicked him in the stomach with his military boots while [the plaintiff] was forced into a kneeling position” may under the right circumstances

177. *Id.*

178. *Id.* at *9.

179. *Id.*

180. *Id.* at *11–12.

181. *United States v. Belfast*, 611 F.3d 783, 793 (11th Cir. 2010).

182. *Id.* at 795.

183. See Opinion Letter on Standards of Conduct for Interrogation, *supra* note 104, at 24 (“In suits brought under the TVPA, courts have not engaged in any lengthy analysis of what acts constitute torture. . . . Despite the limited analysis engaged in by courts, a recent district court opinion provides some assistance in predicting how future courts might address this issue.” (citing *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002))).

184. 198 F. Supp. 2d 1322 (N.D. Ga. 2002).

satisfy the torture standard under the TVPA,¹⁸⁵ which defines torture in substantially the same terms as does the CAT.¹⁸⁶ Unfortunately, *Mehinovic*, like other TVPA cases, neglects to explain its interpretation of the torture standard when applying it.¹⁸⁷

Although courts discussing torture under the ATS have likewise tended not to articulate how they are interpreting the torture standard, factual precedents and dicta from these cases provide still more insight into the requirements of the torture standard.¹⁸⁸ For example, *Filartiga v. Pena-Irala*¹⁸⁹—the case credited with blowing 200 years of dust off of the ATS¹⁹⁰—provides no factually useful precedent because the court never found the particular facts of the alleged torture but proceeded instead only from an understanding that three independent autopsy reports indicated that the decedent had been subjected to “professional methods of torture.”¹⁹¹ Even so, *Filartiga* provides relevant

185. *Mehinovic*, 198 F. Supp. 2d at 1346–47 (noting that a given occasion of such treatment is sufficient for the TVPA’s torture standard at least if it occurs after but in the same general series as previous incidents of similarly harsh treatment).

186. See *supra* note 167 for an explanation of how the TVPA standard differs only superficially from the CAT’s standard or the CAT-based standard from Section 2340.

187. See Opinion Letter on Standards of Conduct for Interrogation, *supra* note 104, at 24. (“In suits brought under the TVPA, courts have not engaged in any lengthy analysis of what acts constitute torture. . . . Despite the limited analysis engaged in by courts, a recent district court opinion provides some assistance in predicting how future courts might address this issue.” (citing *Mehinovic*, 198 F. Supp. 2d 1322)).

188. While other torture plaintiffs have proceeded under the ATS, many of these have either settled or been dismissed before reaching the merits. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 117 (2013) (dismissing the complaint on account of the presumption against the extraterritorial application of the ATS); *Al Shimari v. CACI Premier Tech., Inc. (Al Shimari III)*, 840 F.3d 147, 152 (4th Cir. 2016) (remanding the case in litigation that has been bounced back and forth between district and circuit courts for a decade and has yet to reach a stage where it would be necessary to interpret the torture standard); *Salim II*, 268 F. Supp. 3d 1132, 1161 (E.D. Wash. 2017) (dismissing cross-motions for summary judgment with respect to jurisdictional issues such as PQD and thereby prompting defendants to return to settlement negotiations and reach an agreement weeks before trial was scheduled to begin).

189. 630 F.2d 876 (2d Cir. 1980).

190. Mara Theophila, “Moral Monsters” Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute After *Kiobel v. Royal Dutch Petroleum Co.*, 79 *FORDHAM L. REV.* 2859, 2864 (2011) (“Despite this decree, the ATS lay nearly dormant for the next 200 years. . . . [*Filartiga*] ushered in the modern era of ATS litigation.” (footnote omitted)).

191. *Filartiga*, 630 F.2d at 878. Perhaps importantly, however, *Filartiga*’s analysis of torture under the ATS occurred before the advent of *Sosa*’s Blackstone categories and cautionary factors requirements. Compare *Filartiga*, 630 F.2d 876 (issuing its opinion in 1980), with *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (holding that for actions brought under the ATS, “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized”).

Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011), vacated on other grounds, 569 U.S. 945 (2013), where the court rejected that the torture standard under the ATS can be satisfied when the intentional infliction of severe pain or suffering takes the form of blockading a community from desperately needed food or medical supplies, is another example of torture litigation where the torture standard was never addressed. See *Sarei*, 671 F.3d at 775.

precedent to the effect not only that the ATS holds a special place for torture plaintiffs¹⁹² but also that the torture standard “specif[ies] with great precision the obligations of member nations” so that they “can no longer contend that they do not know what human rights they promised” and that this “prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens.”¹⁹³

Nonetheless, the court in *Padilla v. Yoo*¹⁹⁴—in which a U.S. citizen raised an ordinary civil tort claim for torture in connection with the enhanced interrogation program, independently of any of the above special jurisdictional statutes—dismissed the plaintiff’s claims in light of defendant Yoo’s qualified immunity, a doctrine demanding legal clarity of claims not unlike that required under the ATS.¹⁹⁵ The *Padilla* court explained this holding by reference to the fact that there was “considerable debate, both in and out of government, over the definition of torture as applied to specific interrogation techniques. In light of that debate . . . we cannot say that any reasonable official in 2001–03 would have *known* that the specific interrogation . . . however appalling, necessarily amounted to torture.”¹⁹⁶ The *Padilla* court proposed an assumption for which “[r]ecent decisions may offer support”¹⁹⁷: that even if the law were not so clearly established in 2003 that any reasonable official would have known the interrogation techniques in *Padilla*—many of which were the same as those later used on the *Salim* plaintiffs¹⁹⁸—constituted torture, those techniques did

192. *Filartiga*, 630 F.2d at 890 (“[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.”).

193. *Id.* at 883–84 (quoting Louis B. Sohn, *A Short History of the United Nations Documents on Human Rights*, in THE UNITED NATIONS AND HUMAN RIGHTS: EIGHTEENTH REPORT OF THE COMMISSION, *supra* note 134).

194. 678 F.3d 748 (9th Cir. 2012).

195. *Padilla II*, 678 F.3d at 750, 768.

196. *Id.* at 768 (emphasis added).

197. *Id.* at 767 & n.15.

198. See *supra* note 165 (describing the methods used on Abu Zubaydah by Dr. Mitchell, one of the psychologist defendants in *Salim*). Compare *supra* note 22 and accompanying text (describing the methods used in *Al Shimari III*, 840 F.3d 147 (4th Cir. 2016)), and *supra* note 29 (describing the methods used in *Salim*), with *Padilla I*, 633 F. Supp. 2d 1005, 1013–14 (N.D. Cal. 2009) (“(a) extreme and prolonged isolation; (b) deprivation of light and exposure to prolonged periods of artificial light, sometimes in excess of 24 hours; (c) extreme and deliberate variations in the temperature of his cell; (d) sleep adjustment; (e) threats to subject him to physical abuse resulting in severe physical pain and suffering, or death, including threats to cut him with a knife and pour alcohol into the wounds; (f) threats to kill him immediately; (g) threats to transfer him to a location outside of the United States, to a foreign country or Guantanamo, where he was told he would be subjected to far worse treatment, including severe physical and mental pain and suffering; (h) administering to him or making believe that he was being administered psychotropic drugs against his will; (i) shackling and manacled for hours at a time; (j) forcing him into markedly uncomfortable and painful (or ‘stress’) positions; (k) requiring him to wear earphones and black-out goggles during movement to, from, and within the brig; (l) introduction into his cell of noxious fumes that caused pain to the eyes and nose; (m) lying to him about his location and the identity of his interrogators; (n) loud noises at all hours of the night, caused by government agents banging on the walls and bars of his cell or opening and shutting the doors to nearby empty cells; (o) withholding of a mattress, pillow, sheet or blanket, leaving him with nothing to sleep or rest on except a cold steel slab; (p) forced grooming; (q) sudden and unexplained

nonetheless constitute torture under the established law in 2003.¹⁹⁹ Furthermore, the *Padilla* court added, the torture standard had by 2009 already become more clear than it had been in 2003, suggesting that by 2009 the torture standard may have overcome the lack of clarity on account of which it was unable in 2003 to penetrate Yoo's immunity.²⁰⁰

The torture standard relevant to the plaintiffs' claims under the ATS must be distilled out of the disparate international and domestic practices and understandings with respect to torture that together make up the customary international law of torture.²⁰¹ The relevant standard is based on the definition of torture in the CAT and on international and domestic legislative, administrative, and judicial interpretations of that definition.²⁰² It is this standard that must be scrutinized under the second *Baker* test, which asks whether there is a judicially manageable standard for the resolution of the question presented.²⁰³ Case law suggests that application of various iterations of the torture standard to manifestly brutal treatment involves no real uncertainty.²⁰⁴ Although some clouds of uncertainty once surrounded the torture standard's application to the more subtle and scientific interrogation techniques used in *Padilla* and *Salim*, those clouds have to some extent lifted over the years as courts have developed the ability to make sense of the legal status of those techniques and as the torture standard has been clarified.²⁰⁵

Having by now examined each stage of PQD analysis—from question framing to both the first and second *Baker* tests—as well as the sources of law influencing the standard to be applied in ATS torture litigation, this Comment proceeds by bringing together these various threads. As the following Section

suspension of showers; (r) sudden and unexplained removal of religious items; (s) constant surveillance, including during the use of toilet facilities and showers; (t) blackening out of the interior and exterior windows of his cell; (u) deprivation of access to any form of information about the outside world, including radio, television, and newspapers from the time of his imprisonment in the military brig until summer 2004, at which time he was allowed very limited access to such materials; (v) denial of sufficient exercise and recreation and, when permitted intermittently, only in a concrete cage and often at night; (w) denial of any mechanism to tell time in order to ascertain the time for prayer in keeping with the Muslim practice; (x) denial of access to the Koran for most of his detention; and (y) complete deprivation or inadequate medical care for serious and potentially life-threatening ailments.”), *as amended* (June 18, 2009), *rev'd*, 678 F.3d 748 (9th Cir. 2012).

199. *Padilla II*, 678 F.3d at 767 & n.15; *see also, e.g., id.* at 750 (“[T]hat such treatment was torture was not clearly established in 2001–03.”); *id.* at 767–68 (“That it was torture was not, however, ‘beyond debate’ in 2001–03.”).

200. *Id.* at 764 (“The meaning of ‘severe pain or suffering,’ however, was less clear in 2001–03.”).

201. *See supra* notes 129–34 and accompanying text for a discussion of the ATS torture standard and the sources of law from which it derives.

202. *See supra* notes 135–200 and accompanying text discussing domestic and international application of the torture standard.

203. *Zivotofsky I*, 566 U.S. 189, 195 (2012).

204. *See supra* notes 181–82 and accompanying text for a discussion of the extreme brutality in the Chuckie Taylor case. *See also supra* notes 183–87 and accompanying text for an explanation of *Mehinovic v. Vuckovic*, in which the treatment was still violent but much less intensely so.

205. *See supra* notes 194–200 and accompanying text.

reveals, the question of whether the models of treatment in *Al Shimari* and *Salim* constitute torture is never a political question.

III. DISCUSSION

Whether some treatment—be it manifestly brutal treatment as in *Al Shimari*²⁰⁶ or subtly and scientifically dehumanizing treatment as in *Salim*²⁰⁷—constitutes torture is never a political question. This is because this question is not committed to a political branch, it does not call for standardless judicial action, and an equitable construction of PQD reveals that its separation of powers spirit is offended by the doctrine's application to the context of torture.²⁰⁸

Before mounting that argument, however, the present Section begins by explaining the inadequacies of the PQD analyses in both *Al Shimari* and *Salim*.²⁰⁹ This Section raises the possibility that those courts resorted to their respective unconventional and less convincing PQD analyses in response to a perceived threat that a more typical application of the jurisprudentially messy *Baker* tests would render credible torture claims nonjusticiable.²¹⁰ Following this, the Section undertakes a fresh analysis of PQD's application to cases like *Al Shimari* and *Salim* by framing the question at issue,²¹¹ asking whether that question is constitutionally committed to a political branch,²¹² and asking whether the resolution of that question would be judicially manageable.²¹³ This Section concludes by arguing that the spirit of PQD is offended by its application to the question of whether certain forms of treatment violate the torture standard.²¹⁴

A. *Fear of PQD Tempts Courts To Betray the Rule of Law so as To Avoid Risking the Manifest Injustice of Refusing Even To Hear Credible Torture Claims*

The courts in both *Al Shimari* and *Salim* suspiciously sidestepped the PQD tests this Comment has examined. While it is not totally clear why these courts avoided applying the standard *Baker* tests, this Comment suggests that the jurisprudential disorder and opacity of PQD, combined with a concern that the real PQD tests might force shut the courthouse doors on torture plaintiffs regardless of their merits, may have influenced these courts, even if unconsciously.

206. See *supra* note 22 and accompanying text for a description of the treatment Al Shimari received.

207. See *supra* notes 27–30 and accompanying text for a description of the treatment of Salim and other plaintiffs.

208. See *infra* Parts III.B and III.C.

209. See *infra* Part III.A.

210. See *infra* Part III.A.

211. See *infra* Part III.B.1.

212. See *infra* Part III.B.2.

213. See *infra* Part III.B.3.

214. See *infra* Part III.C.

Although the court in *Salim* recited the *Baker* tests, it attempted at best only a symbolic pretension of actually applying those tests.²¹⁵ In the first pretrial opinion in *Salim*, regarding the first *Baker* test, the court merely observed that while the judiciary generally is barred from review of military decisions, there have been some cases in which courts have reviewed such decisions.²¹⁶ The court mounted this important argument in a total of two sentences.²¹⁷ Hurriedly turning to the second *Baker* test, the court simply ignored the defendants' argument that there exists no manageable definition of torture, and instead it merely noted that there have been some articulations of torture standards and that there have been cases where courts applied these standards without concern for PQD.²¹⁸ Significantly, however, none of the cases cited in support of this holding even inquired about PQD or the manageability of the torture standard, and only one of those cases so much as considered a definition of torture.²¹⁹ Likewise, in a later pretrial opinion in the *Salim* proceedings, the discussion of the *Baker* tests extended no further than a brief recitation of each test.²²⁰

In both *Salim* opinions' discussions of PQD, the court concluded—following a token recognition of *Baker*'s tests—that PQD must not be problematic for torture plaintiffs because some torture plaintiffs have received their day in court.²²¹ Importantly, however, none of the cases cited in support of this repeated assertion involved both PQD and a torture claim.²²² Largely ignoring the *Baker* tests and focusing instead on loosely analogous factual precedent where the claims of civilians harmed by military decisions were justiciable, the *Salim* court inadvertently undercut the rule of law in an attempt to circumvent the risk that application of the *Baker* tests might result in a finding of nonjusticiability.²²³

215. See *Salim v. Mitchell (Salim I)*, 183 F. Supp. 3d 1121, 1127–28 (E.D. Wash. 2016).

216. *Id.* at 1128 (denying the defendants' first motion to dismiss).

217. *Id.*

218. *Id.*

219. See *id.*; see also *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 51–52 (2d Cir. 2014) (analyzing the TVPA's definition of torture, in a case where PQD was not at issue); *Padilla II*, 678 F.3d 748 (9th Cir. 2012) (lacking any analysis of the torture standard, in a case where PQD was not an issue); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (same).

220. *Salim II*, 268 F. Supp. 3d 1132, 1145–46 (E.D. Wash. 2017) (dismissing cross-motions for summary judgment in the court's last opinion in the proceedings prior to the settlement).

221. *Salim II*, 268 F. Supp. 3d at 1146–47; *Salim I*, 183 F. Supp. 3d at 1129–30 (citing *Rasul v. Bush*, 542 U.S. 466 (2004)); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004); *Padilla II*, 678 F.3d at 760; *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992). In both of these *Salim* opinions, the court also took a moment to reject the defendants' request that the Fourth Circuit's new alternative PQD test be applied rather than the Supreme Court's *Baker* tests, noting that only the latter is binding authority. See *Salim II*, 268 F. Supp. 3d at 1145–46; *Salim I*, 183 F. Supp. 3d at 1129. For more on the Fourth Circuit's unique PQD standard, see *infra* notes 224–31 and accompanying text.

222. See generally *Rasul*, 542 U.S. 466 (regarding the exercise of PQD over a habeas corpus claim); *Hamdi*, 542 U.S. 507 (same); *Padilla II*, 678 F.3d 748 (regarding the dismissal of a torture claim based on a government official's qualified immunity); *Koohi*, 976 F.2d 1328 (regarding the exercise of PQD over a negligence claim against the United States).

223. See *supra* notes 215–22 and accompanying text for a discussion of the *Salim* court's analysis of PQD in the torture claim context.

Regarding the PQD analysis in *Al Shimari*, the Fourth Circuit boasted that it had “distilled the [original six] *Baker* factors into two [of its own] questions”²²⁴ that may be applied for PQD analyses in actions against government contractors—a context of frequent relevance for PQD issues, which often implicate government action that is exposed to liability only where government immunities fail to extend. The first question under the Fourth Circuit’s unique test, “whether the acts occurred while the government contractor was under the direct control of the military,” is satisfied “only to the extent that those acts (1) were committed under actual control of the military; and (2) were not unlawful.”²²⁵ The second question asks “whether a decision on the merits of the claim would require the court to ‘question actual, sensitive judgments made by the military.’”²²⁶ For the Fourth Circuit, if either of these questions is answered affirmatively, the question is political and nonjusticiable.²²⁷

Without wading in too deep, it is clear from afar that these are doctrinally muddy waters. For one thing, this alternative PQD test seems to be conflating derivative sovereign immunity (the tenets of which are encapsulated in both parts of the first question)²²⁸ and PQD (expressed in part by the second question).²²⁹ Furthermore, the first question’s “not unlawful” subprong indulges in the absurdity of asking the court to get to the merits before deciding whether the case may be heard, a logical infelicity that has not been lost on other circuits.²³⁰ In effect, the Fourth Circuit’s alternative PQD test requires the court to peer out the courthouse window so as to size up the plaintiffs before deciding whether to let them in and hear what they have to say.

Like in *Salim*, the court in *Al Shimari* engaged in a PQD analysis that simply ignores the Supreme Court’s doctrinal position on PQD.²³¹ The *Al Shimari* court crafted a PQD test tailored specifically so as not to exclude the manifestly brutal treatment on the facts before it through its requirement that

224. *Al Shimari III*, 840 F.3d 147, 155 (4th Cir. 2016).

225. *Id.* at 156–57.

226. *Id.* at 158 (quoting *Al Shimari I*, 758 F.3d 516, 533–34 (4th Cir. 2014)).

227. *Id.* at 155.

228. *See* *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672–74 (2016), *as revised* (Feb. 9, 2016); *see also* *L-3 Commc’ns Corp. v. Serco Inc.*, 39 F. Supp. 3d 740, 751–52 (E.D. Va. 2014) (“To be protected by derivative sovereign immunity, a federal contractor must (1) be performing a ‘discretionary function’ under the FTCA; and (2) have been authorized by the government to commit the specific acts of which the plaintiff complains.”). “A discretionary function involves an element of judgment or choice that is grounded in considerations of public policy. *Id.* (citing *Berkovitz ex rel Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988)).

229. *Cf. Zivotofsky I*, 566 U.S. 189, 195 (2012) (articulating the two *Baker* tests).

230. *See, e.g., bin Ali Jaber v. United States*, 861 F.3d 241, 247 n.1 (D.C. Cir. 2017) (noting that *Al Shimari*’s “analysis—hinging upon whether the conduct of defendants was ‘lawful’ or ‘unlawful’—puts the cart before the horse, requiring the district court to first decide the merits of a claim and, only thereafter, determine whether that claim was justiciable”).

231. Compare *supra* notes 215–23 and accompanying text, which describe *Salim*’s handling of the PQD issue), with *supra* notes 224–30 and accompanying text, which describe *Al Shimari*’s handling of the PQD issue).

the conduct not be facially unlawful.²³² Like *Salim*, *Al Shimari* indulged the illiberal tendency to ignore PQD jurisprudence so as not to risk the manifest injustice of having to deny credible torture claims the mere chance to be heard.²³³

Doctrinally, PQD is unusually messy. This lack of clarity contributes to the risk not only that judicial war hawks might improperly deny jurisdiction and duck their duty to keep the political branches within their proper spheres but also (as exemplified by *Al Shimari* and *Salim*) that decidedly sympathetic activist judges might undermine the rule of law by disregarding doctrine in their pursuit of substantively just outcomes. This jurisprudential confusion surrounding PQD, especially as it relates to the context of torture, highlights the importance of this Comment's discovery that it is never the case that PQD renders nonjusticiable a question of whether some treatment constitutes torture.

B. *The Application of PQD to the Torture Standard*

Broadly understood, the models of treatment in *Al Shimari* and *Salim*—manifestly brutal treatment and subtly and scientifically dehumanizing treatment, respectively—encompass the majority of torture cases.²³⁴ In the present Part, this Comment analyzes the application of PQD to the question of whether treatment falling under the models exemplified in *Al Shimari* and *Salim* constitutes torture. To that end, this Comment begins by (1) framing the question, (2) asking whether resolution of the question is constitutionally committed to a political branch, and (3) asking whether there exist judicially manageable standards by which to resolve the question given the types of facts that arise under the umbrellas of these models.

1. Identifying and Framing the Non-Political Question

The claim of an alien torture plaintiff presents many questions, regarding, for example, applicability of the state secrets privilege, sovereign or derivative sovereign immunity, or the ATS. Whether questions relating to these issues may sometimes be political is beyond the scope of this Comment. Rather, the only question with which this Comment is concerned, and which this Comment argues lies beyond the reach of PQD, is as follows: whether the facts in a case satisfy the requirement under customary international law that a successful ATS torture claim must involve “severe pain or suffering, whether physical or mental, . . . intentionally inflicted.”²³⁵

A strong executive theorist might protest that to frame the question in this narrow way is to indulge in willful blindness regarding the impact that judicial review of such a question may have on the ability of the executive branch to

232. *Al Shimari III*, 840 F.3d at 157.

233. Compare *supra* notes 215–23 and accompanying text, which describe *Salim*'s handling of the PQD issue, with *supra* notes 224–30 and accompanying text, which describe *Al Shimari*'s handling of the PQD issue.

234. See *supra* notes 19–35 and accompanying text.

235. CAT, *supra* note 133, art. 1, ¶ 1; see also *supra* notes 9–18 and accompanying text.

achieve its foreign policy goals.²³⁶ This was the principal argument in *Schneider*, with regard not only to the facts before it but also to those in *Ramirez* and *Aktepe*.²³⁷ Such a theorist might argue that the question presented in the case of a torture plaintiff—regardless of whether that question may be recast in the apparently legal terms of the torture standard or the ATS—is irreducibly political: After September Eleventh, did national security require that the United States obtain intelligence and fast? Or, put still more broadly, was the War on Terror a good idea in the first place? This question is political regardless of whether it may be recast in the apparently legal terms of the torture standard or the ATS. But to read *Schneider* as supporting this question-broadening technique whenever a dispute has to do with foreign affairs would be to miss the important reality that *Schneider* left slightly ajar the PQD door for international claims to enter into federal courts.²³⁸

Although *Schneider* reaffirmed *Aktepe*'s precedent that the court will frame the question broadly even when the conduct at issue purportedly served only an insignificant foreign policy decision, it left room for an exception to this question-broadening tendency when the conduct in dispute can be isolated from the earlier pronounced foreign policy determination toward which the conduct is supposed to tend.²³⁹ The district court in *Schneider* opined that “[w]hile the plaintiffs are correct that the Court might be able to avoid evaluating the merits of a potential Allende Government in 1970, it would nonetheless be forced to pass judgment on the means used by the United States to keep that government from taking power.”²⁴⁰ Responding to this, the D.C. Circuit explained:

While we are not at all convinced that we would be able to avoid evaluating the merits of the potential Allende government in 1970, . . . [we agree] that we would be forced to pass judgment on the policy-based decision of the executive to use covert action to prevent that government from taking power.²⁴¹

By rejecting that the question before it could be limited in scope to the lawfulness of the means employed to effectuate the indisputably nonjusticiable underlying foreign policy, *Schneider* declined to endorse the lower court's implication that the question of the legality of the conduct itself becomes nonjusticiable even when the conduct under review could be isolated from the nonjusticiable foreign policy question.²⁴²

Schneider's distinction here is clarified by its reappearance in the opinion's rejection of the plaintiff's reliance on *DKT Memorial Fund, Ltd. v. Agency for*

236. See *supra* notes 69–89 and accompanying text for an explanation of how narrow question framing typically reduces the likelihood that the question will be held political and nonjusticiable.

237. See *supra* notes 77–85 and accompanying text.

238. See *infra* notes 239–62 and accompanying text.

239. *Schneider v. Kissinger*, 412 F.3d 190, 197–98 (D.C. Cir. 2005).

240. *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 263 (D.D.C. 2004), *aff'd*, 412 F.3d 190 (D.C. Cir. 2005).

241. *Schneider*, 412 F.3d at 197.

242. *Id.*

International Development,²⁴³ which declared that “whereas attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs.”²⁴⁴ Successfully distinguishing *DKT Memorial* from its own facts, *Schneider* argued that “*DKT Memorial* concerned not the executive’s making of a policy decision and implementing that decision, but rather a challenge to the constitutionality of the manner in which an agency sought to implement an earlier policy pronouncement by the President.”²⁴⁵ Further emphasizing the narrowness of *DKT Memorial*’s holding, *Schneider* pointed out that in the same case, after remand and upon second appeal, the circuit court held:

In the present case, where the President acted under a congressional grant of discretion as broadly worded as any we are likely to see, and where the exercise of that discretion occurs in the area of foreign affairs, we cannot disturb his decision *simply* because some might find it *unwise*²⁴⁶

Schneider’s treatment both of the lower court’s ruling on the facts before it and of the *DKT Memorial* opinions reveals an exception to its otherwise PQD-expanding holding: even though, as in *Aktepe*,²⁴⁷ a means exclusively ordered to implement directly even a minor foreign policy objective is nonjusticiable as inextricable from that discrete objective, the means employed will be justiciable if they are nothing more than particular applications of a general administrative authority guided by an earlier policy pronouncement, whether or not that policy is itself justiciable.²⁴⁸

243. 810 F.2d 1236 (D.C. Cir. 1987).

244. *DKT Mem’l*, 810 F.2d at 1238.

245. *Schneider*, 412 F.3d at 198.

246. *Id.* (emphasis added) (quoting *DKT Mem’l*, 887 F.2d at 281–82).

247. *Aktepe v. United States*, 105 F.3d 1400, 1401 (11th Cir. 1997) (finding a nonjusticiable political question when “[a]pproximately 300 Turkish Navy sailors . . . [brought] claims for death and personal injury suffered when two missiles fired from the USS SARATOGA (Saratoga) struck their vessel during North Atlantic Treaty Organization (NATO) training exercises”).

248. See *supra* notes 239–46 and accompanying text; see also *Baker v. Carr*, 369 U.S. 186, 217 (1962) (“Unless one of these formulations is *inextricable* from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question’s presence.” (emphasis added)); *Marsh. Is. v. United States*, 865 F.3d 1187, 1200 (9th Cir. 2017) (observing that if “claims present *inextricable* political questions [they] must be dismissed” (emphasis added)). The means employed to neutralize discrete military targets are some of the most consistent examples of cases posing nonjusticiable questions on account of the inextricability of these means from the foreign policy goals they were designed to obtain. See, e.g., *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (“If the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President’s decision to launch an attack on a foreign target”); *Schneider*, 412 F.3d at 197 (comparing the assassination of then-President-elect Allende to the use of a missile in *Aktepe*, saying that “in order to determine whether the covert operations which allegedly led to the tragic death of General Schneider were wrongful, the court would have to define the standard for the government’s use of covert operations in conjunction with political turmoil in another country”); *Aktepe*, 105 F.3d at 1404 (“In the present context [where a US battleship inadvertently destroyed an allied ship and killed or injured 300 allied sailors], such an inquiry might require the judiciary to determine whether members of the Sea Sparrow

This distinction, originally framed in *Ramirez*²⁴⁹ but not clarified until *Schneider*,²⁵⁰ is found tacitly at work throughout the Supreme Court's post-*Baker* PQD jurisprudence, and it has been key to some of its most influential cases.²⁵¹ Consider, for example, *Gilligan v. Morgan*²⁵²—an early but extreme post-*Baker* example of the model into which cases like *Schneider* and *Aktepe* fit—in which Kent State University students sought an injunction against the Ohio National Guard in the form of ongoing district court supervision of the Guard's operations following an incident in which several Kent State students were injured or killed by the Guard's response to civil unrest in connection with Vietnam War protests.²⁵³ In that case, the Supreme Court dismissed as nonjusticiable the broadly framed question of how the National Guard should handle day-to-day issues relating to training, weaponry, and orders, holding this question to require ongoing supervision of the Guard in such a way that would exceed the Court's competency and jurisdiction.²⁵⁴ By contrast, in *Japan Whaling Ass'n v. American Cetacean Society*²⁵⁵—a Supreme Court opinion that followed shortly after *Ramirez*—the Court found justiciable its narrowly framed question concerning the legality of one of the Secretary of Commerce's routine decisions

missile team should have demanded confirmation of their superior's apparent instruction to fire a live missile. Such judicial intrusion into military practices would impair the discipline that the courts have recognized as indispensable to military effectiveness.”); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45, 47 (D.D.C. 2010) (refusing to interfere *ex ante* with the executive's authority in real-time to choose military targets on the basis of intelligence, because “[t]hese types of decisions involve ‘delicate, complex’ policy judgments with ‘large elements of prophecy,’ and ‘are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility.’” (quoting *Chicago & S. Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948))); *id.* at 45 (“Courts are thus institutionally ill-equipped ‘to assess the nature of battlefield decisions.’” (quoting *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973))); *cf.* *Gilligan v. Morgan*, 413 U.S. 1, 8 (1973) (“Trained professionals . . . necessarily must make comparative judgments on the merits as to evolving methods of training, equipping, and controlling military forces with respect to their duties under the Constitution. . . . It would be inappropriate for a district court judge to undertake this responsibility.”). *But see* *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992) (finding a negligence suit involving the use of a guided missile to be justiciable on the basis of a variety of particular facts in the case, although there appears to be no way to reconcile that opinion with more recent PQD holdings on targeted strikes).

249. See *supra* notes 71–76 and accompanying text for a discussion of *Ramirez*.

250. See *supra* notes 239–48 and accompanying text for a discussion of *Schneider*.

251. See *infra* notes 252–56 and accompanying text.

252. 413 U.S. 1 (1973).

253. *Gilligan*, 413 U.S. at 3.

254. *Id.* (“Trained professionals, subject to the day-to-day control of the responsible civilian authorities, necessarily must make comparative judgments on the merits as to evolving methods of training, equipping, and controlling military forces It would be inappropriate for a district judge to undertake this responsibility”); see also *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 9 (D.D.C. 2010) (holding that PQD barred the plaintiff's request for an injunction on the targeted killing of his son, a United States citizen who had become a leader of al Qaeda and was then hiding in Yemen, because “[a]lthough ‘attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs’” (internal quotation marks omitted) (quoting *Schneider*, 412 F.3d at 198)); *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973) (arguing that courts are constitutionally unable “to assess the nature of battlefield decisions”).

255. 478 U.S. 221 (1986).

regarding certification of whaling corporations pursuant to the United States' obligations under the International Convention for the Regulation of Whaling.²⁵⁶ As these cases show, the tradition of distinguishing between cases calling for narrowly or for broadly framed questions on the basis of whether the foreign affairs means under consideration in the cases are inextricable from the foreign policy ends they serve predates the *Schneider* opinion through which it finally came to the fore.

Eight Supreme Court Justices tacitly seized on this distinction between means inextricable from or independent of the foreign policy ends they serve in *Zivotofsky I*,²⁵⁷ where the Court held that PQD is not violated by judicial review of the executive's refusal to comply with a legislative directive to let United States citizens born in Jerusalem designate Israel on their passport as their place of birth.²⁵⁸ Like *DKT Memorial* and *Japan Whaling*,²⁵⁹ but unlike *Gilligan*, *Aktepe*, or *Schneider*,²⁶⁰ the dispute in *Zivotofsky* was not about the political wisdom of a foreign policy determination nor even about the lawfulness of some foreign policy means inextricable from the foreign policy end it purported to effectuate. Rather, the question in *Zivotofsky* concerned only the lawfulness of executive branch activity that served, but could be isolated from, its long-established and judicially undisturbed foreign policy declared more than half a century earlier.²⁶¹

256. *Japan Whaling Ass'n*, 478 U.S. at 225–28; see also *id.* at 230 (“[PQD renders nonjusticiable claims] revolv[ing] around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive [But] one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.”).

257. Justice Roberts, writing for a six-Justice majority, capitalized on this distinction throughout his opinion. See, e.g., *Zivotofsky I*, 566 U.S. 189, 195–97 (2012) (“[The complaint does not ask the court to] supplant a foreign policy decision of the political branches with the courts’ own unmoored determination of what United States policy toward Jerusalem should be. Instead, . . . the Judiciary must decide if *Zivotofsky*’s interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.”). Sotomayor’s opinion, concurring in part and concurring in the judgment, echoed the majority on this point. See, e.g., *id.* at 208 (Sotomayor, J., concurring) (“[The question presented requires the court to] determine whether the statute is constitutional Resolution of that issue is not one ‘textually committed’ to another branch; to the contrary, it is committed to this one. In no fashion does the question require a court to review the wisdom of the President’s policy toward Jerusalem”). Alito, concurring in the judgment, argued that the question of the case, properly conceived, did not ask the court to contemplate foreign policy at all. See *id.* at 210 (Alito, J., concurring) (“This case presents a narrow question, namely, whether the statutory provision at issue infringes the power of the President to regulate the contents of a passport. This case does not require the Judiciary to decide whether . . . the statutory provision in question represents an attempt by Congress to dictate United States policy regarding the status of Jerusalem.”).

258. *Id.* at 191–94 (majority opinion).

259. See *supra* notes 243–46 and accompanying text for information on *DKT Memorial*. See *supra* notes 255–256 and accompanying text for information on *Japan Whaling*.

260. See *supra* notes 252–54 and accompanying text for information on *Gilligan*. See *supra* notes 77–85 and accompanying text for information on *Aktepe*. See *supra* notes 77–85, 238–48 and accompanying text for information on *Schneider*.

261. *Zivotofsky I*, 566 U.S. at 195–97.

This line of PQD precedents reveals that, far from constituting judicial interference in the political branches' arenas of exclusive authority, judicial review of means intended by state actors to serve earlier pronounced foreign policies—as opposed to means which are inextricable from the policies they implement—is not just constitutionally tolerable but is, in fact, appropriate and conducive to a healthy system of separated powers. Judicial scrutiny of, for example, executive support for extrajudicial killings of foreign politicians might constitute a challenge to the political branches' exclusive authority over foreign policy determinations.²⁶² Once a foreign policy is up and running, by contrast, the earlier authority of the political branches to express that nonjusticiable foreign policy must be protected against the impassioned whims of those purporting to apply that foreign policy by means of judicial review limited only to the lawfulness of the means chosen to serve that policy. By refusing—in contexts like the latter, not like the former—to tolerate the tendency to broaden the question presented in a case so as to encompass foreign policy determinations, the implied PQD question-framing jurisprudence has managed to accommodate this subtle and principled distinction in the separation of powers.

Even so, a further issue remains: Might it be impossible to inquire into the legality of the interrogation techniques employed at Abu Ghraib or Guantanamo without thereby passing judgment on the admittedly nonjusticiable political questions of whether, after September Eleventh, the United States needed intelligence (and fast) or, more generally, of the propriety of the War on Terror? Is the form of treatment employed in terrorism interrogations inextricable from some nonjusticiable foreign policy goal it aims to serve—as with the movement of troops on the battlefield or a narrowly targeted tactical strike²⁶³—such that to pass judgment on this means is to pass judgment on the end it was crafted to obtain?

262. *Schneider v. Kissinger*, 412 F.3d 190, 195 (D.C. Cir. 2005).

263. See *Gilligan v. Morgan*, 413 U.S. 1 (1973); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (“If the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President’s decision to launch an attack on a foreign target”); *Schneider*, 412 F.3d at 197 (comparing the assassination of then-President-elect Allende to the use of a missile in *Aktepe*, saying that “in order to determine whether the covert operations which allegedly led to the tragic death of General Schneider were wrongful, the court would have to define the standard for the government’s use of covert operations in conjunction with political turmoil in another country”); *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997) (“In the present context [where a US battleship inadvertently destroyed an allied ship and killed or injured 300 allied sailors], such an inquiry might require the judiciary to determine whether members of the Sea Sparrow missile team should have demanded confirmation of their superior’s apparent instruction to fire a live missile. Such judicial intrusion into military practices would impair the discipline that the courts have recognized as indispensable to military effectiveness.”); *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973) (contending that courts are institutionally ill-equipped “to assess the nature of battlefield decisions”); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45, 47 (D.D.C. 2010) (refusing to interfere ex ante with the executive’s real-time authority to choose military targets on the basis of intelligence, because “[t]hese types of decisions involve ‘delicate, complex’ policy judgments with ‘large elements of prophecy,’ and ‘are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility’” (quoting *Chicago & S.*

Regarding alien torture litigation, whether some treatment constitutes torture is a question no less severable from the question of the propriety of the War on Terror than are the earlier raised questions about the implications of the plaintiff's alien status or about the possibility that a contractor might enjoy derivative sovereign immunity. Judicial resolution of *none* of these questions could, on its own, shut down a foreign policy means inextricable from the executive's foreign policy interests.²⁶⁴ Although judicial resolution of *all* the questions constituting the constellation of a plaintiff's torture claim might foreclose one drawer in the executive's toolshed of foreign affairs, it is not the case that answering one of many questions about the lawfulness of some particular interrogation necessarily answers the enormous question of whether the United States should be involved in the Middle East and northern Africa.²⁶⁵

As *Baker* told us, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."²⁶⁶ "The doctrine of which we treat is one of 'political questions,' not one of 'political cases.'"²⁶⁷ Like the routine activity of the Secretary of Commerce in the administration of the United States' obligations under the International Convention for the Regulation of Whaling, though the choice of method in the interrogation of a particular suspect is not altogether unrelated to foreign policy, judicial review of a particular exercise of this administrative authority—far from usurping the political branches' power over foreign policy—is controlled by and aims to protect the earlier pronouncement of U.S. foreign policy in the CAT.²⁶⁸ Unlike judicial interference with the decision to conduct a targeted tactical strike, judicial interference with decisions about interrogation methods does not effectively deny the executive the opportunity to achieve the foreign policy goals for the sake of which those methods were developed.²⁶⁹ Rather, by reviewing

Air Lines v. Waterman Corp., 333 U.S. 103, 111 (1948)). *But see* *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992) (holding—in an older opinion and on the basis of a variety of particular facts in the case—that whether the use of a guided missile constituted negligence was a justiciable question).

264. See *infra* notes 266–69 and accompanying text for a discussion of the effect of judicial intervention into specific interrogation tactics on broader foreign policy.

265. See *infra* notes 266–69 and accompanying text for a discussion of the effect of judicial intervention on broader U.S. foreign policy.

266. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

267. *Id.* at 217 ("The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."); see also *Zivotofsky I*, 566 U.S. at 196 ("That duty [to say what the law is] will sometimes involve the '[r]esolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility merely 'because the issues have political implications.'" (second alteration in original) (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983))); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("[PQD renders nonjusticiable claims] revolv[ing] around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive [But] one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.").

268. CAT, *supra* note 133, art. 1, ¶ 1.

269. Compare, e.g., *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) ("If the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack

such actions the judiciary merely insists that if the executive wants to achieve that foreign policy goal, it will have to do so by one of the lawful alternatives available.²⁷⁰

Having identified the question under consideration—whether the facts in a case satisfy the requirement that a successful ATS torture claim must involve “severe pain or suffering, whether physical or mental, . . . intentionally inflicted”²⁷¹—it is now possible to consider whether this question is nonjusticiable on account of any of the *Baker* tests for PQD.

2. This Question Is Not Constitutionally Committed to a Political Branch

The first *Baker* test asks whether there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”²⁷² In light of the above, “the issue” in question is whether some particular conduct satisfies the requirement under customary international law that a successful torture claim involve “severe pain or suffering, whether physical or mental, . . . intentionally inflicted.”²⁷³ The resolution of this issue is not *expressly* committed under the Constitution to either political branch because nothing of the sort appears expressly in the Constitution.²⁷⁴ Nor can it be argued that the constitutional authority to resolve this issue is among the political branches’ *implied* powers under ordinary circumstances²⁷⁵ because, among other things, no general inference to such a power can be made from the penumbral overlapping of foreign affairs powers within the political branches.²⁷⁶ This theory of implied powers arising out of the penumbral overlapping of the political branches’ foreign affairs powers sufficed in *Schneider* to establish that the authority to resolve the question presented in that case was constitutionally committed to a coordinate political department only because the question in that case was properly framed in terms of the political propriety of the targeted killing of a socialist President-elect during the Cold War, rather than in terms of the legal

on a foreign target . . .”), and *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45, 47 (D.D.C. 2010) (refusing to interfere *ex ante* with the executive’s real-time authority to choose military targets on the basis of intelligence, because “[t]hese types of decisions involve ‘delicate, complex’ policy judgments with ‘large elements of prophecy,’ and ‘are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility” (quoting *Chicago & S. Air Lines v. Waterman Corp.*, 333 U.S. 103, 111 (1948))), with, e.g., *Japan Whaling Ass’n*, 478 U.S. at 225–28, and *DKT Mem’l Fund., Ltd. v. Agency for Int’l Dev.*, 810 F.2d 1236, 1238 (D.C. Cir. 1987).

270. See *supra* notes 248–68 and accompanying text for a discussion of the severability of foreign affairs means from the foreign affair ends they serve and judicial review of those means.

271. CAT, *supra* note 133, art. 1, ¶ 1.

272. *Zivotofsky I*, 566 U.S. at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker*, 369 U.S. at 217)).

273. CAT, *supra* note 133, art. 1, ¶ 1.

274. See U.S. CONST. art II.

275. See *supra* notes 98–104 and accompanying text for a discussion of the Court’s interpretation of the political branches’ implied powers.

276. Cf. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (discussing how the implied doctrinal significance of some legal protections can be inferred from “penumbras, formed by emanations from those guarantees that help give them life and substance”).

standard to be applied had the case reached the merits.²⁷⁷ Here, too, the question framing proves key; whatever may be implied by the fact that the President of the United States is vested with executive powers, including that of commanding the armed forces, it does not necessarily imply that the Constitution vests the President with the authority to interpret legal standards expressed in ratified treaties and statutes to the exclusion of the judiciary.²⁷⁸ This is strikingly similar to the Supreme Court's most recent position on this issue:

The Secretary contends that “there is ‘a textually demonstrable constitutional commitment’” to the President of the sole power to recognize foreign sovereigns and, as a corollary, to determine whether an American born in Jerusalem may choose to have Israel listed as his place of birth on his passport. Perhaps. But there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute. The Judicial Branch appropriately exercises that authority²⁷⁹

Even if, however, the authority to resolve this issue does not belong to the executive under ordinary circumstances, perhaps the context of emergency serves as a wellspring of indefinite authority from which the executive might drink in order to meet the apparent demands of necessity. Before responding to this appeal to necessity powers, it is useful at the outset to note two general observations. First, even if such a functionalist reading of the Constitution were a valid way to understand the breadth of executive powers generally, it is doubtful whether these supposed powers of necessity may inform a court's application of the first *Baker* test, which asks whether there is “a *textually demonstrable* constitutional commitment of the issue to a coordinate political department.”²⁸⁰ Second, if, arguendo, necessity can validly inform courts' analyses under the first *Baker* test, then the question-framing argument modeled above—by which the torture plaintiff might dodge the threat of political branches' implied powers excluding the judiciary from review of the question presented—would prove impotent with respect to the political branches' necessity powers.²⁸¹ This would be the case given that, for example, executive authority to do anything that appears necessary for national security logically entails the possibility of

277. See *supra* notes 77–85, 238–48 and accompanying text for a discussion of the Court's reasoning in *Schneider*.

278. See *supra* notes 248–68 and accompanying text for a discussion of Supreme Court cases that touch upon this issue.

279. *Zivotofsky I*, 566 U.S. 189, 197 (2012) (citation omitted) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962))).

280. *Id.* at 195 (emphasis added) (quoting *Nixon*, 506 U.S. at 228 (quoting *Baker*, 369 U.S. at 217)). Although there may be an argument and precedential support for the notion that the political branches' ordinary implied powers can inform the application of the first *Baker* test, this argument becomes tenuous and enjoys no support from precedent concerning some generally inaccessible wellspring of emergency powers, given the language of the *Baker* test. *Id.* (asking whether there is “a *textually demonstrable* constitutional commitment of the issue to a coordinate political department” (emphasis added) (quoting *Nixon*, 506 U.S. at 228 (quoting *Baker*, 369 U.S. at 217))).

281. See *supra* notes 278–79 and accompanying text for a discussion of the question-framing argument. See also *supra* notes 239–62 and accompanying text for a discussion of post-*Baker* PQD jurisprudence.

executive authority to apply the torture standard to specific cases to the exclusion of the judiciary.

The Constitution does not, however, support such an absolutist conception of necessity powers—that at some point of absolute necessity, the executive has absolutely unlimited power—upon which this latter argument would have to rely. Even those cherry-picked dicta that seem to support such an absolutist view of the executive’s authority in times of necessity are inevitably followed by qualifying language, such as, “[w]ithin the limits that the Constitution itself imposes.”²⁸²

The logic of necessity, with its utilitarian undertones, has played a role in American legal discourse since before the Constitution itself, having made prominent appearances in the works of our jurisprudential ancestors²⁸³ and rearing its ugly head from time to time since then as well.²⁸⁴ For example, politicians invoked necessity with remarkable frequency around the time of the Second World War. Among the most famous of these was, of course, the invocation of necessity in *Korematsu v. United States*²⁸⁵ to round up and forcibly intern over one hundred thousand Japanese persons (of whom sixty-five thousand were U.S. citizens) for three years following the attack on Pearl Harbor.²⁸⁶ In that case, once the relevant military authorities declared the

282. Opinion Letter on Standards of Conduct for Interrogation, *supra* note 104, at 37 (“[T]here can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy.’ Within the limits that the Constitution itself imposes” (citation omitted) (quoting THE FEDERALIST No. 23, *supra* note 114, at 147–48 (Alexander Hamilton))); *see, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 580–84 (2004) (Thomas, J., dissenting) (“The power to protect the Nation ‘ought to exist without limitation’ To be sure, the Court has at times held, in specific circumstances, that the military acted beyond its warmaking authority.” (quoting THE FEDERALIST No. 23, *supra* note 114, at 147–48 (Alexander Hamilton))); *Korematsu v. United States*, 323 U.S. 214, 224–25 (1944) (Frankfurter, J., concurring) (“[T]he war power of the Government is ‘the power to wage war successfully.’ . . . But within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs.” (quoting the former Chief Justice, Charles Evans Hughes, *supra* note 106, at 238)).

283. *See* LOCKE, *supra* note 105, at 84 (“This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called *prerogative*.”). This is not to say that Locke was a utilitarian in a formal sense; however, his understanding of the sovereign’s relationship toward the public good ensnared him in the relentless logic of utilitarian hypotheticals of necessity. Nor is it to say that utilitarian logic is inevitably ugly; rather, it speaks only to the character of such logic in analyses of necessity. Still, some true utilitarians, like Jeremy Bentham, occasionally indulged in the unyielding logic of hypothetical necessity. *See* 9 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 766 (John Bowring ed., Edinburgh: William Tait 1843) (ebook http://lf-oll.s3.amazonaws.com/titles/1999/Bentham_0872-09_EBk_v6.0.pdf [<http://perma.cc/R4V7-2GCA>] (acknowledging the possibility of “the necessity of giving by law to military functionaries authority to produce, on each occasion, in any shape whatsoever, whatsoever evil may be at the same time sufficient and necessary to the exclusion of greater evil”). Thank you to Ryan Smith for help clarifying this.

284. *See, e.g.*, *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889).

285. 323 U.S. 214 (1944).

286. *Korematsu*, 323 U.S. at 242 (Murphy, J., dissenting); *see also id.* at 224 (Frankfurter, J., concurring) (“[T]he war power of the Government is ‘the power to wage war successfully.’” (quoting *Hirabayashi v. United States* 320 U.S. 81, 93 (1943))).

internment program necessary, President Franklin Roosevelt deferred to those authorities, Congress deferred to the President, and the Supreme Court deferred to all three.²⁸⁷ In the end, however, it turned out that none of the evidence cited as establishing necessity had any factual basis,²⁸⁸ and decades later, the United States afforded those who suffered internment a modest compensatory payment as an apology.²⁸⁹

The United States was not, however, the only part of the world where the logic of necessity ran wild at that time. Not long before internment in the United States, Carl Schmitt published his *Constitutional Theory*, wherein he lauded Article 48 of Germany's newly crafted Weimar Constitution,²⁹⁰ by recourse to which the chief executive had the power not only to declare a "state of exception" to the rule of law but also to wield unbounded authority within that exception.²⁹¹ Article 48 was invoked more than 250 times over thirteen years.²⁹² The last time Article 48 was invoked, however, the executive, Adolf Hitler, never relinquished his necessity powers and used them to orchestrate perhaps the most notorious genocide in history.²⁹³

After the Second World War, back in the United States—where anxieties were already mounting as the United States entered the Cold War—national security concerns surrounding the war in Korea, compounded by threats of labor unrest at home, set the stage for yet another invocation of necessity.²⁹⁴ President Truman, who was desperate to prevent the armed forces from suffering a shortage of crucial resources after labor unions and steel mill owners failed to reach a new collective bargaining agreement, invoked necessity to justify his temporary seizure of domestic steel mills.²⁹⁵ In *Youngstown Steel & Tube Co. v. Sawyer*,²⁹⁶ the Supreme Court rejected President Truman's view that the perceived necessities of war afford the executive unbounded authority beyond

287. *Id.* at 223.

288. PETER IRONS, *JUSTICE AT WAR* 286 (1983) ("The recital of the circumstances justifying the evacuation as a matter of military necessity [is] in conflict with information in the possession of the Department of Justice.")

289. *Korematsu v. United States*, 584 F. Supp. 1406, 1416 (N.D. Cal. 1984) (confirming, in a coram nobis proceeding, that "at the time of [internment] there was substantial credible evidence . . . contradicting the report . . . that military necessity justified exclusion").

290. CARL SCHMITT, *CONSTITUTIONAL THEORY* 104–11, 255–303 (Jeffrey Seitzer trans., Duke Univ. Press 2008) (1928) [hereinafter SCHMITT, *CONSTITUTIONAL THEORY*].

291. *Id.* at 80. In his book *Political Theology*, Schmitt analogized the sovereign's power over exceptions to a divinity's power over miracles. CARL SCHMITT, *POLITICAL THEOLOGY* 31–36, 42 (George Schwab trans., MIT Press 1985) (1922). Schmitt even argued that, as a matter of both logic and practice, a constitution that neglects to accommodate the potential for absolute necessity is not, in fact, a constitution at all but rather a dilatory compromise. SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 290, at 78–79, 82–88, 105–108, 114.

292. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 651 (1952) (Jackson, J., concurring) (observing this statistic while juxtaposing the emergency clauses under the systems of the United States, Britain, and France to that under Article 48 of Germany's Weimar Constitution).

293. *Id.*

294. *Id.* at 582–84 (majority opinion).

295. *Id.*

296. 343 U.S. 579 (1952).

the battlefield.²⁹⁷ Interestingly, out of the four Justices who had signed onto the *Korematsu* opinion's necessity argument and were still presiding over the Court, none maintained their support for that argument in the context of *Youngstown*, even though the cost of the wartime necessity in that case would presumably have been much lower than the cost of wartime necessity in *Korematsu*.²⁹⁸

Justice Jackson was the only one who rejected the argument of necessity in both *Korematsu* and *Youngstown*,²⁹⁹ and he specifically discussed the extent and limitations of the political branches' abilities to respond to the apparent demands of necessity in his concurrence in the latter case.³⁰⁰ There, Justice Jackson began by observing the constitutional resources available to political branches in times of necessity under the genuinely liberal U.S., French, and British legal systems.³⁰¹ He found that under those systems the legislature has the power to declare an exception to the rule of law, and, if the legislature were to exercise that power, the executive would acquire enhanced, but not boundless, authority.³⁰² Justice Jackson then contrasted those genuinely liberal systems with the facially liberal but functionally authoritarian system of the Weimar Republic.³⁰³ He found that Article 48 of the Weimar Constitution authorized the chief executive not only to declare an exception to the rule of law but also to enjoy absolute and unchecked

297. *Youngstown*, 343 U.S. at 587–89.

298. Compare *id.* at 579, with *Korematsu v. United States*, 323 U.S. 214 (1944); see also Richard E. Berg-Anderson, *Justice of the United States Supreme Court (by Term of Court)*, GREEN PAPERS (last updated Oct. 6, 2018), <http://www.thegreenpapers.com/Hx/JusticesUSSC.html> [<http://perma.cc/4YWH-Q7MN>].

299. Compare, *Youngstown*, 343 U.S. at 649–51 (Jackson, J., concurring) (“The appeal, however, that we declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. . . . [T]hey suspected that emergency powers would tend to kindle emergencies. . . . I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so Their experience with emergency powers may not be irrelevant to the argument here that we should say that the Executive, of his own volition, can invest himself with undefined emergency powers.”), with *Korematsu*, 323 U.S. at 244–45 (Jackson, J., dissenting) (“[I]f we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. . . . How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court.”); see also Berg-Anderson, *supra* note 298.

300. *Youngstown*, 343 U.S. at 651 (Jackson, J., concurring).

301. *Id.* at 649–55.

302. *Id.* In the American system this is done by suspending the writ of habeas corpus. U.S. CONST. art. I, § 9, cl. 2 (“The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”); see also, e.g., *Youngstown*, 343 U.S. at 650 (Jackson, J., concurring) (“Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis.” (footnotes omitted)); *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (“I [Justice Taney] certainly listened to [President Lincoln’s declaration suspending the writ of habeas corpus in fear that Confederate troops might try to take the District of Columbia] with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion . . . [that] congress is, of necessity, the judge of whether the public safety does or does not require [suspension of the writ]; and their judgment is conclusive.”).

303. *Youngstown*, 343 U.S. at 649–55 (Jackson, J., concurring).

authority within such an exception.³⁰⁴ Justice Jackson concluded that although the liberal spirit of a system of separated powers can tolerate some exceptional authority in times of necessity, it is both practically dangerous and anathema to U.S. jurisprudence for any power to have the absolute authority to suspend ordinary legal procedures and rule by decree upon unilaterally declaring such a state of necessity.³⁰⁵

This history shows that feelings of necessity are often hysteric, impassioned, and unwarranted, as with the unjustified internment of Japanese persons in the United States or Jewish persons in Europe, or the seizure of private property in order to guard against an apparent risk that ultimately proved inconsequential.³⁰⁶ It also shows that an impulsive submission to the logic of necessity, with its irrefutably compelling extreme hypotheticals, can reduce a constitution of separated powers to a set of stipulated provisionary powers that might disappear as soon as the sovereign element determines the rule of law to be too great of an inconvenience.³⁰⁷ A constitution admitting the least necessity has available no principle by which to resist absolute necessity, at which point it is not so much a constitution as it is merely “Plan A.”³⁰⁸

Regarding the specific application of necessity arguments to the context of interrogation methods and torture, the concern is that if one recognizes necessity arguments as justifying modest constitutional sacrifices, there will be no principled basis by which to reject them as invalid as the cost of necessity grows greater and slowly deconstructs the Constitution by positing more and more imaginative extremes. For example, when, during the Cold War, anxieties were taking on new shapes altogether,

304. *Id.*; see also SCHMITT, CONSTITUTIONAL THEORY, *supra* note 290, at 80.

305. *Youngstown*, 343 U.S. at 649–50 (Jackson, J., concurring). In his opinion, Justice Jackson stated:

The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so

Id. (footnotes omitted).

306. See *supra* notes 282–88 and accompanying text for a discussion of the Supreme Court’s *Korematsu* decision, which dealt with the issue of the internment of Japanese persons during World War II. See *supra* notes 293–304 for a discussion of the Court’s decision in *Youngstown*, which addressed the issue of whether President Truman had the authority to seize privately owned steel mills that ceased operations due to a labor dispute during the Korean War.

307. See *supra* notes 282–88 and accompanying text for a discussion of the Court’s decision in *Korematsu* and notes 293–304 for a discussion of the Court’s decision in *Youngstown*.

308. See *supra* notes 283–305 and accompanying text for a discussion of the effect that admitting the existence of necessity can have on constitutions. See also *infra* notes 308–11 and accompanying text for further discussion of the lack of limiting principles inherent in the logic of necessity.

[t]he story is told that Justice Hugo Black, the quintessential “absolutist” in favor of civil rights, was asked whether, if a terrorist who was known to have planted a nuclear device in New York City were captured, and if the only way to locate and disarm the device before detonation were to torture the person, he would allow it. His response allegedly was, “Yes—but we could never say that.”³⁰⁹

The logic of necessity knows no limiting principle and has the power to induce even those most committed to the rule of law to abandon its most cherished principles of procedural regularity and personal dignity when they are faced with hypotheticals like that which even Justice Black was willing to submit to.³¹⁰ This lack of any limiting principle has long been the refrain to which the chorus of torture critics return when confronted with necessity arguments, as manifest even in the torture-memo debates on the heels of which the events underlying *Al Shimari* and *Salim* shortly followed.³¹¹ While the Constitution tolerates some wiggle room by means of which to meet reality’s exigencies, interpretations of executive power that rely on arguments of necessity lack any limiting principle and so are constitutionally dangerous as they cater to political whims of passion and justify an ever-increasing sacrifice of personal freedoms.³¹²

No interpretive theory can demonstrate a constitutional commitment of our focal question to a political branch. The first *Baker* test does not, then, render nonjusticiable the question of whether some treatment satisfies the torture standard under customary international law.

309. FRANCK ET AL., U.S. FOREIGN RELATIONS LAW 74 (4th ed. 2012); cf. H CJ 5100/94 Pub. Comm. Against Torture in Israel v. State of Israel 53(4) PD 817 ¶¶ 35–38 (1999) (Isr.) (arguing that even if the necessity defense to criminal liability for torture might be justified in the context of absolute necessity, this doctrinal variety of necessity as an ex post defense against criminal liability cannot ground an administrative power ex ante to engage in torture).

310. Cf. FRANCK ET AL., *supra* note 309, at 74.

311. See, e.g., Opinion Letter on Definition of Torture, *supra* note 114, at *1 (rejecting Yoo’s arguments concerning necessity and the Commander in Chief Clause as impertinent to the executive’s authority to engage in the interrogation practices at issue and rescinding that view as official U.S. policy); 151 CONG. REC. 17,236 (2005) (statement of Thomas J. Romig, Major General, U.S. Army) (“[T]he ‘bottom line’ defense proffered by OLC is an exceptionally broad concept of ‘necessity.’ This defense is based upon the premise that any existing federal statutory provision or international obligation is unconstitutional per se, where it otherwise prohibits conduct viewed by the President, acting in his capacity as Commander-in-Chief, as essential to his capacity to wage war. I question whether this theory would ultimately prevail”); HUMAN RIGHTS WATCH, *The Legal Prohibition Against Torture*, <http://www.hrw.org/press/2001/11/TortureQandA.htm> [<http://perma.cc/97P5-9W8A>] (last updated June 1, 2004) (“There are practical as well as moral reasons for not permitting a ‘ticking bomb’ . . . exception to the ban on torture. Although such an exception might appear to be highly limited, experience shows that the exception readily becomes the standard practice.”).

312. The application of necessity to torture does not, however, suffer only from this logical problem. Rather, this application is undercut by epistemological problems as well: To what extent can we treat the testimony of those subjected to enhanced interrogation as useful intelligence as opposed to the noise inevitably produced by an accord when squeezed? See generally M. Gregg Bloche, *Toward a Science of Torture?*, 95 TEX. L. REV. 1329 (2017) (arguing that the question of whether torture “works” cannot be proven scientifically); Lisa Hajjar, *Does Torture Work? A Sociolegal Assessment of the Practice in Historical and Global Perspective*, 5 ANN. REV. L. & SOC. SCI. 311 (2009) (finding that torture largely yields false information rather than useful intelligence).

3. There Are Manageable Standards for the Resolution of This Question

Turning, then, to the second *Baker* test—whether there is “a lack of judicially discoverable and manageable standards for resolving” the question as to whether some treatment falls within the definition of torture³¹³—we must begin by identifying the standard that may or may not be manageable. Under the ATS, which applies in the contexts of *Al Shimari* and *Salim* given the plaintiffs’ alien status,³¹⁴ one must look to customary international law, which is informed by relevant international and domestic sources of law, in order to determine whether the applicable torture standard is manageable.³¹⁵ Customary international jurisprudence on torture—the constitutive interpretations of which each are modeled more or less precisely upon the paradigmatic standard in the CAT³¹⁶—defines torture as requiring, among other things, “severe pain or suffering, whether physical or mental, . . . intentionally inflicted.”³¹⁷

Whether this standard is judicially manageable depends on a variety of factors crafted to determine whether the judicial determination would “be ‘governed by *standard*, by *rule*’—or, put differently, . . . [would] proceed in a ‘principled, rational, and . . . reasoned’ fashion.”³¹⁸ Case law under the torture standard, though somewhat thin and devoid of any more concrete rule than that provided in the CAT, offers some guidance as to how this standard can be interpreted and applied in a principled, rational, or reasoned way.³¹⁹ Unfortunately, ATS case law provides neither interpretive guidance as to the meaning of the torture standard’s key terms³²⁰ nor any useful factual precedent.³²¹ International case law has interpreted this standard as requiring a “special stigma”³²² by which it is distinguished from CIDT, and both *Public*

313. *Zivotofsky I*, 566 U.S. 189, 195, 197 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962))).

314. See *Al Shimari I*, 758 F.3d 516, 520–21 (4th Cir. 2014); *Salim I*, 183 F. Supp. 3d 1121, 1123–25 (E.D. Wash. 2016).

315. See *supra* notes 130–41, 155–57, 201–03 and accompanying text for an explanation of how customary international law can be discerned.

316. See *supra* Part II.C.2 and accompanying text for a detailed discussion of how the CAT’s torture standard has been interpreted.

317. CAT, *supra* note 133, art. 1, ¶ 1.

318. *Al Shimari II*, 119 F. Supp. 3d 434, 449 (E.D. Va. 2015) (second alteration in original) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion)), *vacated and remanded*, 840 F.3d 147 (4th Cir. 2016).

319. See *supra* Part II.C.2 and accompanying text for a detailed discussion of how the CAT’s torture standard has been interpreted.

320. See *supra* note 188 for information on ATS torture claims that never reached the merits. Those cases that did reach the merits omitted any interpretation of the torture standard. See *supra* notes 188–93 and accompanying text.

321. See, e.g., *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 775 (9th Cir. 2011) (providing no guidance as to how the standard would be applied to the contexts of *Al Shimari* and *Salim*, in a case about deliberate interference with disaster relief), *vacated*, 569 U.S. 945 (2013); *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (accepting the stipulated fact that three autopsy reports indicated that the decedent had been subjected to professional torture).

322. *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. (ser. A) at 59 (1978).

Committee Against Torture in Israel v. State of Israel and *Ireland v. United Kingdom* held that the particular interrogation methods before them—some of which resembled those more moderate ones at issue in *Al Shimari* and *Salim*, respectively³²³—were unlawful, although only the court in *Ireland* clarified that the treatment before it was unlawful as CIDT rather than torture.³²⁴

Domestic law likewise may offer some guidance as to the parameters of the customary international prohibition on torture.³²⁵ The authoritative United States interpretation of the CAT is spelled out in Section 2340,³²⁶ which provides: “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering” where “‘severe mental pain or suffering’ means the prolonged mental harm caused by or resulting from” one of four predicate acts, including “(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.”³²⁷ The judiciary’s sole opportunity to apply Section 2340 was in the prosecution of Chuckie Taylor, where the torture standard was so obviously satisfied that the court felt no need to articulate its interpretation of the standard.³²⁸ Any factual comparison to the Chuckie Taylor case would be similarly unhelpful in understanding how the torture standard could be applied in *Al Shimari* and *Salim*, because the facts in that case are too extreme to be illuminating.³²⁹

After some debate in the DOJ, the authoritative executive branch interpretation of Section 2340 was expressed in Levin’s torture memo, which argued that “suffering” need not imply severe pain, “prolonged” meant longer than the treatment itself, “mental harm” meant mental injury, and “specific intent” could be satisfied by knowledge of the likelihood that severe pain or suffering might result.³³⁰ Although international law provides only modest guidance as to how to manage the application of the torture standard to facts like those in *Al Shimari* and *Salim* in a principled, rational, or reasoned way, U.S. law has defined the torture standard’s terminology with the level of detail characteristic of a rule.³³¹

323. Cf. Opinion Letter on Application of Article 16 of the CAT to the Interrogation of High Value al Qaeda Detainees, *supra* note 174, at 7–14.

324. *Ireland*, 2 Eur. Ct. H.R. (ser. A) at 59; HCJ 5100/94 Public Committee Against Torture in Israel v. State of Israel 53(4) PD 817 ¶¶ 24–32 (1999) (Isr.).

325. See *supra* Part II.C.2.b for a discussion of the interplay between domestic and international prohibitions on torture.

326. Opinion Letter on Legality of Interrogation Methods, *supra* note 162, at 3–5; Opinion Letter on Standards of Conduct for Interrogation, *supra* note 104, at 15–16.

327. 18 U.S.C. § 2340 (2018).

328. See *supra* notes 181–82 and accompanying text for details from the Chuckie Taylor case.

329. See *supra* notes 181–82 and accompanying text for details from the Chuckie Taylor case. See also Section I for a discussion of the *Al Shimari* and *Salim* cases.

330. Opinion Letter on Definition of Torture, *supra* note 114, at *6–10.

331. See *supra* notes 315–29 and accompanying text for a description of the defined terminology in the United States for torture.

Even if the torture standard falls short of a rule or other such device by means of which judicial consideration might proceed in a principled, rational, or reasoned way, the Court walked back the strictness of that standard more recently, requiring today only that application of the standard be a “familiar judicial exercise,” such as textual interpretation.³³² While technically customary international law, not the CAT itself, provides the standard that applies for the *Al Shimari* and *Salim* plaintiffs’ ATS claims,³³³ the customary standard in this context is essentially just textual interpretation of the CAT informed by some precedent.³³⁴ Application of the customary torture standard to ATS torture cases would, therefore, be little more than the “familiar judicial exercise” of textual interpretation recently described as unproblematic by the Court.³³⁵ Although the Court has held cases calling for textual interpretation to present a political question when they involved unusually vague language,³³⁶ and while “severe pain or suffering” is notably difficult to define, the Court’s recent holdings have ignored that isolated blemish on the textual-interpretation fast track to demonstrating that a standard is manageable.³³⁷ Furthermore, courts have several times held that they are most expert at reviewing disputes *ex post*, rather than contemplating possibilities *ex ante*, especially when, as with ATS torture litigation, the action seeks damages rather than an injunction.³³⁸

The CAT’s torture standard—supplemented by international case law on and the United States’ detailed interpretation of that standard—satisfies even the strict but generally ignored requirement that the judicial determination be governed by a “standard [or] rule.”³³⁹ Even if this were not the case, however, because these torture plaintiffs bring damages actions calling for *ex post* review of disputes hinging to a large extent on textual interpretation, precedent reveals that courts can apply the torture standard to their cases in a principled, rational, reasoned, and, most importantly, manageable way.³⁴⁰

The foregoing suffices to show that whether the treatment constituted torture is never a political question within the models of treatment with which this Comment is concerned—manifestly brutal treatment and subtly and scientifically dehumanizing treatment. Even at factual extremes where the treatment seems most necessary or where application of the torture standard

332. *Zivotofsky I*, 566 U.S. 189, 196 (2012).

333. *See Al Shimari I*, 758 F.3d 516, 525 (4th Cir. 2014).

334. *See supra* notes 139–41 and accompanying text.

335. *See supra* notes 124–26 and accompanying text.

336. *See, e.g., Nixon v. United States*, 506 U.S. 224, 229–30 (1993) (“The word ‘try,’ both in 1787 and later, . . . lacks sufficient precision to afford any judicially manageable standard of review of the Senate’s actions . . .”).

337. *See Zivotofsky I*, 566 U.S. at 209–10 (Sotomayor, J., concurring) (observing that the majority seemed to cavalierly ignore the blemish the *Nixon* precedent left on the general rule that textual interpretation is always manageable for courts).

338. *See supra* note 127 and accompanying text.

339. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) (emphasis omitted). *See also supra* notes 318–31 and accompanying text for a discussion of ATS case law and judicially created standards.

340. *See supra* notes 332–38 and accompanying text.

seems least manageable, whether the treatment constituted torture is never a political question.

C. *The Spirit of PQD Is Offended by Its Application to This Question*

PQD does not render nonjusticiable the question of whether manifestly brutal treatment like that in *Al Shimari* or subtly and scientifically dehumanizing treatment like that in *Salim* constitute torture. Even in cases where the treatment seems most necessary and so committed to the executive, and even in cases to which the application of the torture standard is the least manageable, it remains true that the question of whether the treatment constituted torture is a legal one, and so it is a justiciable one. But deductive reasoning from the examples of *Al Shimari* and *Salim* alone might leave the rigorous logician wanting. In this last Part, therefore, this Comment reverses its approach. Rather than inferring something about the nature of PQD by recourse to particular examples of its application, it begins instead from the jurisprudential spirit inherent in PQD, drawing inferences therefrom so as better to understand how this doctrine relates to the identification of torture.

PQD is “essentially a function of the separation of powers.”³⁴¹ Recognizing the history of interpreting the Constitution as authorizing the executive with plenary powers in the arena of foreign policy, for example, it has long been understood that generally, but not always, questions of foreign policy are nonjusticiable political questions.³⁴² Assertions about PQD’s domination of certain arenas of questions tend, like this, to be qualified.³⁴³ Contrastingly, this Comment makes the unqualified claim regarding two broad categories of torture cases that, under any set of facts, the question of whether some conduct constitutes torture is never nonjusticiably political. This asymmetry between PQD’s positive relationship to certain arenas of law (which is always conditional) and its negative relationship to other areas of law (which this Comment has found can be absolute) may be explained on the bases of both the contemporary and the classical liberal principles embodied in, and bolstered by, our system of separation of powers.³⁴⁴

It is uncontroversial both that the Constitution authorizes the Commander in Chief to protect the nation³⁴⁵ and that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”³⁴⁶ When law pertains to the protection of the nation, it is not uncommon for these powers to conflict. In *Dellums v. Bush*,³⁴⁷ for example, the President argued that Congress’s power to

341. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

342. *Id.* at 211 (“There are sweeping statements to the effect that all questions touching foreign relations are political questions.”).

343. *See, e.g., Dellums v. Bush*, 752 F. Supp. 1141, 1145 (D.D.C. 1990) (rejecting the position that “only the political branches are able to determine whether or not this country is at war . . . [because] [t]his claim on behalf of the Executive is far too sweeping to be accepted by the courts”).

344. *See infra* notes 345–92 and accompanying text.

345. U.S. CONST. art. II, § 2, cl. 1 (the Commander in Chief Clause).

346. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

347. 752 F. Supp. 1141 (D.D.C. 1990).

declare war, an antecedent to the President's power to conduct war, had nothing to do with the President initiating "an offensive entry into Iraq by several hundred thousand United States servicemen" in response to Saddam Hussein's invasion of Kuwait.³⁴⁸ The court flatly rejected this argument, noting that "[i]f the Executive had the sole power to determine that any particular offensive . . . does not constitute war-making . . . [other powers' authorities] will be at the mercy of a semantic decision by the Executive. Such an 'interpretation' would evade the plain language of the Constitution."³⁴⁹ Nonetheless, the court admitted in dicta that although in that case the number of troops clearly exceeded what could be allowed absent congressional authorization, because there is no useful standard as to which offensives are permissible absent congressional authorization, the court will defer to the political branches regarding the gray areas of what would then constitute a political question.³⁵⁰

Even regarding these authorities to declare and to wage war—authorities expressly constitutionally committed to political branches and regarding the use of which there is an absolute absence of any legal standard—courts in the D.C. Circuit have held that they are not necessarily disabled from interpreting and applying law regarding what constitutes war.³⁵¹ Unlike the standardless determination for what counts as war, however, there is an established and manageable standard by which to determine what is or is not torture.³⁵²

The interplay between the judiciary's authority "to say what the law is"³⁵³ and that class of "political act[s], belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive"³⁵⁴ is still more clearly manifest in the *Zivotofsky* decisions.³⁵⁵ The Court in *Zivotofsky II* held that the power of recognition belonged to the executive exclusively and conclusively, such that the Constitution withholds power over such determinations from all other branches of government.³⁵⁶ The executive's exclusive power in this arena—the only foreign policy power the Court has ever identified as exclusively belonging to the executive within the context of the *Youngstown* framework³⁵⁷—presumably serves as the exemplar "political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which,

348. *Dellums*, 752 F. Supp. at 1146.

349. *Id.* at 1145.

350. *Id.* at 1145–47.

351. *See supra* notes 345–50 and accompanying text.

352. *See supra* Part III.B.3 for an explanation of the legal standard applicable in ATS torture litigation.

353. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

354. *Id.* at 164.

355. *See infra* notes 356–60 and accompanying text.

356. *Zivotofsky II*, 135 S. Ct. 2076, 2084–85, 2096 (2015).

357. *Id.* at 2113 (Roberts, J., dissenting) ("Today's decision is a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs. . . . For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs.").

the injured individual has no remedy.”³⁵⁸ Nonetheless, *Zivotofsky II* maintained *Zivotofsky I*'s position that PQD did not disable the Court from resolving the questions at hand: given that “[i]t is emphatically the province and duty of the judicial department to say what the law is,”³⁵⁹ neither political branches’ authority in this arena, no matter how exclusive, could preclude the Court from authoritatively interpreting legal texts bearing upon activity in this arena.³⁶⁰

One must be realistic about this. Of course it would be unconstitutional for courts to usurp the executive’s role of determining interrogation practices by supervising the development and implementation of those practices at all times.³⁶¹ Importantly, however, this Comment’s observations about PQD do not report that the judiciary has ongoing authority over interrogation practices. Rather, this Comment highlights only the judicial authority after the fact to resolve discrete disputes within a narrow legal arena, doing so by means of its institutional expertise in textual interpretation. While it would be unconstitutional for the judiciary to usurp the executive’s interrogation authority—a usurpation that this Comment has argued is not the case in torture litigation—it is, by the same token, unconstitutional for the executive to usurp the judicial authority to say what the law is.

It would be preposterous to characterize the judiciary as unrestrained in the context of torture litigation. Federal judges are thoroughly accustomed to submissively biting their tongues when, on account of the ATS, the state secrets privilege, or sovereign or derivative sovereign immunity, for example, it is legally mandated.³⁶² Furthermore, the vagaries of the torture standard, while not rendering it unmanageable for the purposes of PQD, exacerbate the ATS and sovereign immunity jurisdictional barriers to entry for torture plaintiffs.³⁶³ The context of torture is one regarding which the judiciary is already extraordinarily deferential.³⁶⁴

358. *Marbury*, 5 U.S. at 164.

359. *Id.* at 177.

360. *Zivotofsky II*, 135 S. Ct. at 2096 (Breyer, J., concurring) (observing that the Court has consistently rejected that the question presented in *Zivotofsky* was political and nonjusticiable).

361. *Cf. Gilligan v. Morgan*, 413 U.S. 1, 8 (1973) (“Trained professionals, subject to the day-to-day control of the responsible civilian authorities, necessarily must make comparative judgments on the merits as to evolving methods of training, equipping, and controlling military forces It would be inappropriate for a district judge to undertake this responsibility.”); *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973) (arguing that courts are constitutionally unable “to assess the nature of battlefield decisions”).

362. *See Herman, supra* note 9, at 82–100 (detailing various doctrines on account of which federal courts may be hampered in or even denied the chance fairly to adjudicate torture claims).

363. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (holding that for actions brought under the ATS, “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized”); *Padilla II*, 678 F.3d 748, 761–62 (9th Cir. 2012) (rejecting that the torture standard was sufficiently clearly established between 2001 and 2003 to penetrate the defendant’s qualified immunity).

364. *See supra* notes 362–63 and accompanying text.

Furthermore, and importantly, the powers were separated among the branches not ultimately to protect these branches from one another but rather to mitigate the risk that the individual will be exposed to unchecked power.³⁶⁵ There remain areas in which the executive, for example, wields exclusive and conclusive power by which the individual may be injured.³⁶⁶ However, to allow that the determination of whether some treatment constitutes torture lies within the executive's exclusive power—such that the executive could subject detainees to any treatment and avoid accountability by means of semantic sleight of hand—would eviscerate the classically liberal jurisprudential spirit of our system of dignified individuals and separated powers.³⁶⁷

The classically liberal jurisprudential goals of separation of powers theories generally is oriented primarily by the often-repeated observation that humans are unique in this world insofar as they encounter the world in an interested way, with a particularly strong interest in the exercise of their potential autonomy, and are dehumanized when forcibly denied the opportunity to actualize this potential.³⁶⁸ Aristotle, one of the earliest advocates of deliberately separated powers,³⁶⁹ explained that the master relates to a true slave the way a craftsman relates to its tools: because the latter has a purpose but no rational capacity to realize it, it is good for the latter to be used by the former for its purpose.³⁷⁰ Aristotle observed, however, that many actual slaves are not true slaves but are dignified individuals—complete with their own rational purposes³⁷¹—who have wrongfully been made into slaves.³⁷² In cases like these, the false slaves suffer the

365. See THE DECLARATION OF INDEPENDENCE (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”); see also U.S. CONST. pmbl. (“WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”).

366. *Zivotofsky II*, 135 S. Ct. 2076, 2084–85, 2096 (2015).

367. See *infra* notes 368–91 and accompanying text.

368. See *infra* notes 368–91 and accompanying text.

369. ARISTOTLE, POLITICS bk. II, at 71 (H.W.C. Davis ed., Benjamin Jowett trans., Oxford: At the Clarendon Press 1920) (c. 384 B.C.E.) [hereinafter ARISTOTLE, POLITICS] (“[T]he state is better which is made up of more numerous elements.”).

370. ARISTOTLE, THE NICOMACHEAN ETHICS bk. VIII, at 157 (Lesley Brown ed., David Ross trans., Oxford University Press 2009) (c. 384 B.C.E.) [hereinafter ARISTOTLE, THE NICOMACHEAN ETHICS] (“[T]he slave is a living tool and the tool a lifeless slave.”); ARISTOTLE, POLITICS, *supra* note 369, bk. I, at 26 (“[T]here must be a union of natural ruler and subject For he who can foresee with his mind is by nature intended to be lord and master, and he who can work with his body is a subject, and by nature a slave; hence master and slave have the same interest.”).

371. ARISTOTLE, THE NICOMACHEAN ETHICS, *supra* note 370, bk. X, at 194, 196 (“[H]appiness is activity in accordance with virtue . . . [and] this activity is contemplative [F]or man, therefore, the life according to reason is best and pleasantest, since reason more than anything else is man.”).

372. ARISTOTLE, POLITICS, *supra* note 369, bk. I, at 34–35.

gravest of indignities,³⁷³ being denied everything that makes them human: the chance to live out their rational purposes.³⁷⁴ Aristotle noted that whereas the relation between master and true slave is like that between a divine ruler and its subjects,³⁷⁵ the relation between master and false slave is like that between a tyrant and the oppressed.³⁷⁶ Where there is no divine ruler to be found,³⁷⁷ the most just arrangement is typically one of separated powers, such that no one is undeservedly made the tool of his rational equal.³⁷⁸

Hegel, too, discussed a master and slave.³⁷⁹ He argued that by nature, each individual is driven by a strong desire to be recognized by others, not just as an animated object but as a subject capable of self-determination.³⁸⁰ When two such individuals meet, however, each attempts to dominate the other so as to obtain the recognition sought.³⁸¹ Whichever of these individuals is weaker will value his survival over recognition and so will acquiesce to the other's dominance and forgo his distinctly human capacity for self-determination.³⁸² For societies rising above this primitive relation, Hegel recommends a system of separated powers³⁸³ structured so as to uphold universally citizens' capacities for rational self-determination.³⁸⁴

373. *See id.*

374. *See* ARISTOTLE, THE NICOMACHEAN ETHICS, *supra* note 370, bk. X, at 194, 196 (“[H]appiness is activity in accordance with virtue . . . [and] this activity is contemplative . . . [F]or man, therefore, the life according to reason is best and pleasantest, since reason more than anything else is man.”).

375. ARISTOTLE, POLITICS, *supra* note 369, bk. III, at 131–32.

376. *Id.* at 114; *cf. id.* at 117–18 (“But a state exists for the sake of a good life, and not for the sake of life only: if life only were the object, slaves and brute animals might form a state, but they cannot, for they have no share in happiness or in a life of free choice.”).

377. *Id.* at 128–29.

378. ARISTOTLE, THE NICOMACHEAN ETHICS, *supra* note 370, bk. VIII, at 154 (“[T]he tyrant looks to his own advantage, the king to that of his subjects.”); ARISTOTLE, POLITICS, *supra* note 369, bk. III, at 139 (“[The] rule of a sovereign over all the citizens, in a city which consists of equals, is . . . quite contrary to nature . . .”); *id.* bk. V, at 211 (advising his reader that where the rulers are not godlike and so cannot be trusted, “[t]he proper remedy for this evil is always to give the management of affairs and offices of state to opposite elements”); *id.* bk. V, at 227–28 (observing that “there is no wickedness too great for” the tyrant, that among his aims are “the humiliation of his subjects,” and “that his subjects shall be incapable of action”).

379. *See* GEORG WILHELM FRIEDRICH HEGEL, PHENOMENOLOGY OF SPIRIT 111–19 (A. V. Miller trans., Oxford Univ. Press 1977) (1807).

380. *Id.* at 109–10 (“Self-consciousness achieves its satisfaction only in *another* self-consciousness. . . . Only so is it in fact self-consciousness; for only in this way does the unity of itself in its otherness become explicit for it.”).

381. *Id.* at 111–15.

382. *Id.* at 113–19.

383. GEORG WILHELM HEGEL, PHILOSOPHY OF OBJECTIVE SPIRIT, *in* THE HEGEL READER 319, § 273 (Stephen Houlgate ed. Trans., Blackwell 1988) (1830).

384. *Id.* § 260 (“The state is the actuality of concrete freedom. But concrete freedom requires that personal individuality [Einzelheit] and its particular interests should reach their full development and gain recognition of their right for itself . . .”). *But see* Paul Franco, *Hegel and Liberalism*, 59 REV. POL. 831, 856–60 (1997) (identifying ways in which Hegel's philosophy diverged from traditional liberalism).

Similarly, Kant—one of the most influential modern liberal philosophers³⁸⁵—understood personhood to be significant primarily on account of the autonomy it entails.³⁸⁶ Kant sought to articulate a legal blueprint under which no citizen could be made the means to another’s end—instead, each would be an end in itself.³⁸⁷ Accordingly he proposed as the ideal condition of right a pure system of formal law constituted out of separated powers.³⁸⁸

These theorists’ high estimation of actualized persons—as not just rational but also autonomous—led them to articulate the inviolable classically liberal tenet that conventional arrangements of power between dignified persons are unnatural and dehumanizing when asymmetrically structured such that properly autonomous persons are reduced to tools to be used unilaterally for the purposes of others.³⁸⁹ When persons in positions of conventional power authorize the torture of their natural equals—reducing a subject capable of self-rule to something like a computer to be hacked—they violate this classically liberal commitment.³⁹⁰ When systems of properly separated powers are interpreted according to a theory of necessity so as to tolerate the absolutism implied by torture, the logic of necessity’s relentless erosion of individual autonomy rapidly becomes malignant and threatens to infect those systems’ other institutional checks on the unilateral exercise of absolute authority over others.³⁹¹

385. Gerald Gaus et al., *Liberalism*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/liberalism/> [<http://perma.cc/2NRX-K7Z2>] (last updated Jan. 22, 2018) (“This ideal of freedom as autonomy has its roots not only in Rousseau’s and Kant’s political theory, but also in John Stuart Mill’s On Liberty. And today it is a dominant strain in liberalism . . .”).

386. Kant’s view of the human is summarized in a prominent commentary as follows:

The human being in the system of nature is, as are other animals, nothing more than a thing. . . . [But insofar as humans are aware of moral law, they] are autonomous beings because their own pure practical reason imposes the Categorical Imperative on them (just as their own pure understanding imposes the rules of geometry on them). The [human’s moral aspect] is pure legislating reason itself. With my awareness of the moral law, I see myself as free.

B. SHARON BYRD & JOACHIM HRUSCHKA, *KANT’S DOCTRINE OF RIGHT: A COMMENTARY* 280, 284 (2010).

387. IMMANUEL KANT, *Fundamental Principles of the Metaphysics of Morals*, in *BASIC WRITINGS OF KANT* 142, 220 (Allen W. Wood ed., Thomas K. Abbott trans., 2001) (1788) (describing his preferred political system as inspired by “the noble ideal of a universal kingdom of *ends in themselves* (rational beings)”).

388. See Byrd & Hruschka, *supra* note 386, at 25–28 (explaining how Kant is effectively the theoretical forefather of the rule of law ideal of a system of separated powers known today as the *rechtstaat* or law state).

389. See *supra* notes 367–88 and accompanying text.

390. See *supra* notes 367–88 and accompanying text.

391. See *supra* notes 306–12 and accompanying text. Admittedly, this liberal theme’s focus on protecting the dignity of rational humans seems to suggest more of a direct connection to CIDT than to torture, which is defined more in terms of severity of pain or the quality of suffering. Compare CAT, *supra* note 133, art. 1, ¶ 1 (defining torture), with *id.* art. 16, ¶ 1 (defining CIDT). However, CIDT is a lesser included offense encompassed under torture, suggesting that torture would actually involve still greater indignations than would CIDT. See *Al Shimari IV*, 324 F. Supp. 3d 668, 692 (E.D. Va. 2018) (“Having determined that plaintiffs’ allegations sufficiently describe severe physical and mental pain and suffering to constitute torture, it is clear that they have also sufficiently alleged

The separation of powers is not absolute. There are arenas in which the executive, for example, wields exclusive and conclusive authority.³⁹² Nonetheless, it is intolerable to the classically liberal jurisprudential spirit of our Constitution to banish to such an arena the authority to determine whether some treatment constitutes torture.

IV. CONCLUSION

The question of whether treatment like that in *Al Shimari or Salim* is torture is a legal one subject to judicial determination, not a political one withheld from courts as unmanageable or constitutionally committed to a political branch. Nonetheless, there has long been a risk of war hawks taking advantage of PQD's question-framing opportunity, or its precedential and jurisprudential messiness, so as to defer to the executive's strong-handed action.³⁹³ There has likewise been a risk of sympathetic activist judges similarly deviating from established law by resorting to alternative and unconvincing PQD analyses out of a misguided concern that a typical application of PQD to a torture context might reveal the question to be political.³⁹⁴ Both of these risks should subside, to the relief of the rule of law, in view of this Comment's discovery: whether some treatment constitutes torture is never a political question.

CIDT. . . [A]ny mistreatment that rises to the level of torture . . . must definitionally also constitute CIDT. . . "). Furthermore, whether the claims of torture plaintiffs turn out to demonstrate torture or only CIDT matters not for the argument at hand: plaintiffs claiming torture cannot be denied their chance to be heard on account of PQD, even if their claims would have turned out to be CIDT, because to do so would be to afford a conventional power absolutely unchecked discretion to treat individuals as tools for political ends. This is how psychologist interrogation strategists approached Salim and his co-plaintiffs: crafting techniques by which to instill a sense of learned helplessness in detainees so that they would be unable to resist the will of their interrogators; administering mind-altering substances to them so that they would lose self-control; and, when they could not think of anything else to do with them, leaving detainees alone in a cramped cage without ever letting them out for years at a time. *Salim II*, 268 F. Supp. 3d 1132, 1135–38 (E.D. Wash. 2017). This is how the interrogators and guards at Abu Ghraib treated Al Shimari and others detained there, as they were treated like animals, sexually humiliated while photographed, and forced to watch the rape of other detainees. *Al Shimari I*, 758 F.3d 516, 521 (4th Cir. 2014).

392. See, e.g., *Zivotofsky II*, 135 S. Ct. 2076, 2084–85, 2096 (2015).

393. See Opinion Letter on Standards of Conduct for Interrogation, *supra* note 104, at 39.

394. See *supra* Part III.A for information on *Al Shimari* and *Salim*'s unconvincing alternative PQD analyses.