

# The US War Crimes Act, the Geneva Convention against Torture and the Infamous “Torture Memos”

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Region: [USA](#)

Theme: [Crimes against Humanity](#), [Law and Justice](#)

*The War Crimes Act, 18 U.S.C. § 2441, makes it a crime for any person, “whether inside or outside the United States” to commit a “war crime.” War Crimes are defined as any grave breach of the Geneva Conventions, and in particular, any conduct that violates common Article 3. In Hamdan v. Rumsfeld, the Supreme Court explicitly ruled that common Article 3 applies to alleged Al Qaeda members and the so-called war on terror.*

The crimes of torture, cruel or inhuman treatment and murder — all acts that are documented by the Senate Torture Report — are specifically prohibited by common Article 3 and the War Crimes Act.

In 2006, the government enacted the Military Commissions Act of 2006, which severely curtailed the reach of the War Crimes Act, limiting its application well short of the protections of common Article 3. It also passed a provision that provided for retroactive immunity for certain government personnel who were following orders in implementing what they thought were lawful directives from the President (this section can be found at 42 U.S.C. § 2000dd-1). The Washington Post [noted at the time](#) that the intent of these changes was to reduce the threat of future prosecutions when the day came when such abuses would be revealed to a shocked public. These provisions remain untested.

It is my belief that any person involved in the chain of command that authorized the crimes detailed in the Senate Torture Report should be indicted for war crimes and conspiracy to commit war crimes under the War Crimes Act. This includes George W. Bush, Richard Cheney, Donald Rumsfeld, CIA officials who condoned or engaged in such practices, and attorneys who authorized such practices, including Alberto Gonzales, Jay Bybee and John Yoo.

**Memorandum for Alberto R. Gonzales  
Counsel to the President**

*Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A*

You have asked for our Office's views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340–2340A of title 18 of the United States Code. As we understand it, this question has arisen in the context of the conduct of interrogations outside of the United States. We conclude below that Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention. We further conclude that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A's proscription against torture. We conclude by examining possible defenses that would negate any claim that certain interrogation methods violate the statute.

In Part I, we examine the criminal statute's text and history. We conclude that for an act to constitute torture as defined in Section 2340, it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years. We conclude that the mental harm also must result

## The Convention Against Torture

The United States is a signatory to the Convention Against Torture, and its implementing legislation is at 18 U.S.C. § 2340A. This statute was the famous subject of the "Torture Memos," a series of legal opinions written by John Yoo and Jay Bybee regarding the limitations of this law.

[Bybee famously concluded](#) that "torture" under the law only referred to "the most egregious conduct," "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." "Purely mental pain or suffering" had to result in "significant psychological harm of significant duration, lasting for months or even years." Bybee even thought that the Convention Against Torture might be unconstitutional because it would infringe the "President's authority to conduct war." Today, Jay Bybee has a lifetime tenure-ship as a judge on the United States Court of Appeal for the Ninth Circuit. John Yoo is a law professor at UC Berkeley School of Law.

As with the War Crimes Act, the Convention against Torture provides a second basis for criminal prosecutions against people who authorized, engaged in, or ratified torture. President Obama repudiated the Torture Memos in 2009, but he also refused to issue indictments or discuss whether such conduct was actually criminal. He — or someone more brave — would do well to consider that decrying illegal conduct but then refusing to prosecute such conduct is a silent pardon at best, and complicity at worst.

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