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Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment

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“ . . . nor cruel and unusual punishments inflicted. ”¹

I. INTRODUCTION

Courts have overlooked the best and most appropriate protection against interrogation torture that the Constitution provides: the Eighth Amendment's prohibition against cruel and unusual punishment. Analysis of this Amendment's "lost" history, the jurisprudence surrounding the Amendment, and its potential application to two current cases will underscore this dramatic failure to protect liberty in the manner intended by the Framers of our Constitution.

On May 8, 2002, Jose Padilla, a.k.a. Abdullah Al Muhajr, stepped off a plane at Chicago's O'Hare airport.² Federal agents were there to greet him.³ They arrested him on a warrant issued pursuant to Title 18, United States Code Section 3144,⁴ alleging that he was a material witness. He was transported to New York and appointed counsel.⁵ On June 9, 2002, the government dismissed the material witness warrant against him. That same day, Mr. Padilla was transferred from the Metropolitan Correctional Center in New York to a military brig in South Carolina. He is presently being held "without formal charges against him or the prospect of release after the giving of testimony before a grand jury."⁶ Mr. Padilla, according to the government, is being detained in order to interrogate him.⁷ Since his transfer

1. U.S. Const. amend. VIII.

2. See Writ of Habeas Corpus at ¶ 3, *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2003) (No. 02 Civ. 4445 (MBM)), available at <http://news.findlaw.com/hdocs/docs/padilla/padillaus61102pet.pdf> [hereinafter *Padilla Writ*].

3. See *id.*

4. 18 U.S.C. § 3144 states:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

5. See *Padilla Writ*, *supra* note 2, at ¶ 2.

6. *Padilla v. Bush*, 233 F. Supp. 2d 564, 569 (S.D.N.Y. 2002), *aff'd* in part, *rev'd* in part, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 2004 WL 95802 (Feb. 20, 2004).

7. See Respondent's Brief at 50-51, *Padilla v. Rumsfeld*, No. 03-2235, 2003 U.S. App. LEXIS 25616, at *1 (2d Cir. Dec. 18, 2003), available at <http://news.findlaw.com/hdocs/docs/padilla/padillarums72203gbrf.pdf>. The Government cites to the Declaration of vice Admiral Lowell E. Jacoby of the U.S. Navy, Director of the Defense Intelligence Agency as an explanation of the interrogative purposes of the detention. *Id.* [hereinafter *Jacoby declaration*]; see also Amended Petition for Habeas Corpus at ¶ 31, *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2003) (No. 02

to military custody, no one, aside from his captors and interrogators, has spoken to, seen or had access to Mr. Padilla.⁸ In pleadings challenging his detention, Mr. Padilla has argued that his Due Process rights under the Fifth Amendment have been violated.⁹

On November 28, 1997, Oliverio Martinez was riding a bicycle on a darkened path in Oxnard, California.¹⁰ He approached two police officers who were questioning an individual.¹¹ Martinez was ordered “to dismount, spread his legs, and place his hands behind his head. [He] complied.”¹² After a patdown in which a knife was found, an “altercation”¹³ ensued.¹⁴ During that altercation, one of the officers “shot Martinez several times, causing severe injuries that left Martinez permanently blinded and paralyzed from the waist down.”¹⁵ Another officer, Chavez, accompanied Martinez to the hospital and while Mr. Martinez was being treated for his injuries, Chavez interviewed him.¹⁶ Martinez was never charged with a crime,¹⁷ but later brought a 1983 action alleging a violation of his Fifth Amendment right to remain silent.¹⁸ He argued that the Fifth Amendment’s reference to a “criminal case” should include police interrogation.¹⁹ The Court rejected this argument.²⁰ Noting that the Fifth Amendment is “a fundamental trial right,”²¹ the Court concluded that “*mere coercion* does not violate the text of

Civ. 455) (“Respondent Rumsfeld has stated publicly that it is the Government’s intention to detain Mr. Padilla indefinitely to interrogate him.”), available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush61902apet.pdf> (last visited Jan. 16, 2004).

8. See AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA, THREAT OF A BAD EXAMPLE: UNDERMINING INTERNATIONAL STANDARDS AS “WAR ON TERROR” DETENTIONS CONTINUE, available at <http://web.amnesty.org/library/Index/ENGAMR511142003> (last visited Feb. 2, 2004). On February 11, 2004, the Pentagon announced that it would permit Mr. Padilla access to his lawyers under limited conditions. See Department of Defense, *Padilla Allowed Access to Lawyer*, February 11, 2004, available at <http://www.defenselink.mil/releases/2004/nr20040211-0341.html> [hereinafter DOD News Release]. The Pentagon asserts that it has “no legal duty to permit access to a lawyer.” Lyle Denniston, ‘Enemy Combatant’ Gets Lawyer Pentagon Lifts Curb on US Citizen Held in ‘Dirty Bomb’ Case, BOSTON GLOBE, February 12, 2004, at A3, available at LEXIS, News Library, Most Recent 90 Days. Rather, the Pentagon has explained that it is permitting such access “as a matter of discretion and military authority.” *Id.*

9. See *Padilla*, 233 F. Supp. 2d at 600. The author takes no position on the validity of Mr. Padilla’s claims arising under the Fifth Amendment.

10. *Chavez v. Martinez*, 123 S. Ct. 1994, 1999 (2003).

11. *Id.*

12. *Id.*

13. There is some dispute as to what occurred during this altercation, with each side blaming the other. *Id.* at 1999 n.1.

14. *Id.*

15. *Id.* at 1999.

16. *Id.*

17. *Id.* at 2000.

18. *Id.*

19. *Id.*

20. The Court remanded the case for a determination of whether Mr. Martinez could “pursue a claim of liability for a substantive due process violation.” *Id.* at 2008.

21. *Id.* at 2001 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)).

the Self-Incrimination Clause absent use of the compelled statements in a criminal case.”²²

Cases like those of Padilla and Martinez are usually not analyzed under the Eighth Amendment. However, given the genesis of the Eighth Amendment and its subsequent application and interpretation by United States courts, it appears that the cruel and unusual punishment clause was designed to provide protection or relief in these two situations.

The Eighth Amendment states that “[e]xcessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²³ This clause, “like the other great clauses of the Constitution, is not susceptible to precise definition.”²⁴ As noted by Chief Justice Burger in his dissent in the landmark case of *Furman v. Georgia*, “of all our fundamental guarantees, the ban on ‘cruel and unusual punishments’ is one of the most difficult to translate into judicially manageable terms.”²⁵ This sentiment has been echoed by numerous commentators and courts.²⁶ In spite of this ambiguity and the paucity of interpretations and applications of this clause during the first one hundred years of our nation,²⁷ it appears that the amendment was specifically intended to cover not only legislative pronouncements of post-conviction punishment but also interrogations that are barbarous.²⁸ While the primary intent of the amendment was to prohibit cruel and unusual post-conviction punishment, a careful reading of the history of this amendment and interpretations by the Supreme Court of the concept of “punishment” suggest that it should apply more broadly than previously accepted and, in fact, was meant to protect against coercive and barbarous interrogations.

22. *Id.* at 2002 (emphasis added).

23. U.S. Const. amend. VIII.

24. *Furman v. Georgia*, 408 U.S. 238, 260 n.2 (1972) (Brennan, J., concurring).

25. *Id.* at 376 (Burger, C.J., dissenting).

26. *See, e.g.*, *Wilkerson v. Utah*, 99 U.S. 130, 135-136 (1878) (“Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.”); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE STATES OF THE AMERICAN UNION 402 (n.p., Little, Brown, and Co. 1890) (“It is certainly difficult to determine precisely what is meant by cruel and unusual punishments.”); ROBERT A. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791, at 11 (Northeastern Univ. Press 1955) (“Exactly what the prohibition of cruel and unusual punishment forbade was also a questionable point.”).

27. *See, e.g.*, Pressly Millen, Note, *Interpretation of the Eighth Amendment—Rummel, Solem, and the Venerable Case of Weems v. United States*, 1984 DUKE L.J. 789, 792 (1984) (“[B]ecause of the infrequency with which eighth amendment claims have arisen and because of the often bizarre nature of the few cases which reach the Supreme Court, the judicial gloss on the clause is meager.”). Perhaps the best explanation for the infrequency of its application in the first century after its adoption is that the Court did not apply it to the actions of the states. *See Pervear v. Commonwealth*, 72 U.S. 475 (1866). However, that changed with the Court’s ruling in *Robinson v. California*, 370 U.S. 660 (1962), which made its application to the states clear.

28. *See* Millen, *supra* note 27.

Though seldom applied during the century after enactment, since the Eighth Amendment's application to the states, the courts have been faced with numerous challenges and have attempted to refine its definition and application.²⁹ These cases have misguidedly limited the application of the protections of this amendment to post-conviction punishments.³⁰ However, this limitation is unjustified given the history and concerns of the Framers of the Constitution and the Bill of Rights, which led to the adoption of this amendment.

In this article, I will analyze the origins of the language of the Eighth Amendment and the process that led to its inclusion by the Framers in the Bill of Rights. I will also discuss the meaning of the Eighth Amendment language prohibiting cruel and unusual punishment. Through this analysis and discussion, I will demonstrate that the proscription against cruel and unusual punishment was intended to protect against coercive interrogation. Finally, I will discuss the ramifications of this conclusion for those detained for the purposes of information gathering by the government and those interrogated but against whom criminal charges are not brought.

II. COERCIVE INTERROGATIONS AND THE PROSCRIPTION AGAINST CRUEL AND UNUSUAL PUNISHMENT

The historical underpinnings of the Eighth Amendment make clear that when the framers of the Bill of Rights were considering the Eighth Amendment's proscription against cruel and unusual punishments, among their traditionally recognized concerns,³¹ they were equally concerned with and intended the clause to protect against "the use of torture for the purpose of eliciting confessions. . . ."³²

The ideals which were eventually embodied in the Eighth Amendment can be traced back to "as early as 1042 in the laws of Edward the Confessor, and also in the Magna Carta."³³ It is universally acknowledged that the specific language of the Eighth Amendment was drawn from Article 10 of

29. In *Robinson*, the Court applied the protections of the Eighth Amendment to the states through the Due Process Clause of the Fourteenth Amendment. *Robinson*, 370 U.S. at 666-68. Since that time, the frequency of challenges arising under the Eighth Amendment has risen dramatically. See Arthur B. Berger, Note, *Wilson v. Seiter: An Unsatisfying Attempt at Resolving the Imbroglia of Eighth Amendment Prisoners' Rights Standards*, 1992 UTAH L. REV. 565, 570-71 ("It was not until 1962, when the Supreme Court applied the Eighth Amendment to state action through the Fourteenth Amendment in *Robinson v. California*, that Eighth Amendment litigation began booming.").

30. See, e.g., *Ingraham v. Wright*, 430 U.S. 651 (1977).

31. In this article, I am not asserting that application of the Eighth Amendment is inappropriate to evaluate the constitutionality of the penalty imposed for a criminal offense. Rather, I believe that courts and commentators have erroneously and unjustifiably limited the application of this Amendment to those circumstances.

32. *Furman*, 408 U.S. at 260 n.2 (Brennan, J., concurring).

33. Recent Cases, *Constitutional Law—Cruel and Unusual Punishment Provision of Eighth Amendment as Restriction Upon State Action Through the Due Process Clause*, 34 MINN. L. REV. 134, 135 (1950).

the English Bill of Rights of 1689,³⁴ which stated, “[t]hat excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.”³⁵ The prohibition contained in that provision, however, was known to influential colonial thinkers much earlier than 1689.³⁶

A. *The Origins of the Prohibition on this Continent*

The origins of the prohibition against cruel and unusual punishment on this continent took root as early as 1641, in the Massachusetts Body of Liberties.³⁷ Language reminiscent of the Eighth Amendment was first introduced into the laws of Massachusetts by Reverend Nathaniel Ward.³⁸ Ward, a minister, had also been trained in the law.³⁹ After being “suspended, excommunicated and deprived of his benefice” in England, Ward came to Massachusetts.⁴⁰ While he was there, a period of political unrest ensued. Following some of this upheaval in the Massachusetts colony, a series of committees was established. The purpose of these committees was to develop or “frame a body of grounds of laws, in resemblance to a Magna Charta, which . . . should be received for fundamental laws.”⁴¹ Reverend Ward was appointed to one of these committees. In 1641, a proposed code which Reverend Ward drafted was circulated and ultimately enacted “under the title *Body of Liberties*.”⁴² This

34. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (“There is no doubt that the Declaration of Rights is the antecedent of our constitutional text.”); see also *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta.”); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 636 (1966) (“The ban on cruel and unusual punishments found in the eighth amendment and almost all state constitutions was drawn from the English Declaration of Rights of 1688.”). The English Declaration of Rights of 1688 became the Bill of Rights of 1689. See RICHARD L. PERRY, SOURCES OF OUR LIBERTY 222-23 (American Bar Foundation 1959).

35. Bill of Rights (1689), reprinted in PERRY, *supra* note 34, at 247.

36. See generally *Recent Cases*, *supra* note 33; Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*,” *The Original Meaning*, 57 CAL. L. REV. 839, 848 (1969).

37. *Massachusetts Body of Liberties* (1641), reprinted in BERNARD SCHWARTZ, I THE BILL OF RIGHTS, A DOCUMENTARY HISTORY 71 (Chelsea House 1971); see also *Recent Cases*, *supra* note 33, at 135 (“It appears as early as 1641 in the Massachusetts Body of Liberties and was given the force of law in the Laws and Liberties of 1648.”). See also Granucci, *supra* note 36, at 848.

38. F.C. Gray, *Remarks on the Early Laws of Massachusetts Bay*, reprinted in COLLECTION OF THE MASSACHUSETTS HISTORICAL SOCIETY 193 (n.p., 3d Series 1843); R. Carter Pittman, *The Colonial Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 768 (1935) (noting that the draftsman of this document was Nathaniel Ward); see also Granucci, *supra* note 36, at 850.

39. Granucci, *supra* note 36, at 850 (“Ward soon abandoned the law for ministry.”).

40. *Id.* at 850.

41. I WINTHROP’S JOURNAL “HISTORY OF NEW ENGLAND” 1630-1649 151 (J. Hosmer ed., Scribner’s Sons 1908).

42. Granucci, *supra* note 36, at 851.

code has been recognized as “the most important as a forerunner of the federal Bill of Rights.”⁴³ The Body of Liberties prohibited “Barbarous and inhumane” torture⁴⁴ and “bodilie punishments.”⁴⁵

The prohibition that Ward drafted for this code can be traced back to the writings of Englishman Robert Beale.⁴⁶ This is well documented in Anthony Granucci’s groundbreaking article on the subject.⁴⁷ Sir Robert Beale had been a member of the High Commission which had been turned into an ecclesiastical court and had used “torture to extract confessions.”⁴⁸ The High Commission was the court set up to try certain types of ecclesiastical offenses.⁴⁹ Beale resigned from this court because of its inquisitorial methods and because of his Puritan beliefs.⁵⁰ Beale objected to the use of torture “when authorized by the royal prerogative” and other inquisitorial methods.⁵¹ Later Beale published a manuscript in which, among other things, he condemned the use of torture by the High Commission.⁵² In

43. SCHWARTZ, *supra* note 37, at 69.

44. *Id.* at 77 (quoting the *Body of Liberties*, *supra* note 37). This document permitted the use of torture under certain limited circumstances. These circumstances were apparently rejected by Mason in his subsequent drafting of the Eighth Amendment which he viewed as prohibiting all torture, whether barbarous or inhumane and whenever inflicted. See 3 JONATHAN ELLIOT, *DEBATES* 452 (n.p., 2d ed. 1836).

45. See PERRY, *supra* note 34, at 153. As noted, this code allowed torture to induce a confession so long as the person subjected to such tortured was “first fullie convicted by cleare and sufficient evidence to be guilty. . . [and] that “it is very apparent there be other conspiratours, or confederates with him. . . yet not with such Tortures as be Barbarous and inhumane.” *Id.*

46. Granucci, *supra* note 36, at 851. Granucci noted that “Ward was nearly 23 when Beale died and he must surely have had access to Beale’s work during his schooling. Certainly Beale was well known among Puritan law students and attorneys.” *Id.*

47. *Id.* A search of the Westlaw Federal Court case database reveals 219 cases which refer to this article. It has been cited by Supreme Court Justices of such divergent views of the Eighth Amendment as Justice Marshall in *Furman v Georgia*, 408 U.S. 238, 316 (1972), and Justice Scalia in *Harmelin v. Michigan*, 501 U.S. 957 (1991). It appears safe to say that virtually every scholar who has written on the Eighth Amendment’s original meaning since 1969 has cited Granucci’s work. See, e.g., Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1785 n.55 (1970) (“On the intentions of the framers, see Granucci . . .”); but see Stephan T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 44-45 (2000) (criticizing Granucci’s conclusion that proportionality was intended to be covered by Article 10 of the English Bill of Rights of 1689).

48. Granucci, *supra* note 36, at 848; see also DAWLEY, JOHN WHITGIFT AND THE ENGLISH REFORMATION 165 (Scribners 1954) (describing the activity of this High Commission, Dawley noted that “chroniclers of dissent have called the ‘violent and illegal methods’ of a ‘despotic regime of tyranny,’ directed by ‘the Jeffreys of the ecclesiastical bench,’ [which was operated by] a man who ‘embodied the worst passions of an intolerant state-priest, and stood out in the history of protestant non-conformity as worthy of especial reprobation.’”).

49. DAVID OGG, ENGLAND IN THE REIGNS OF JAMES II AND WILLIAM III 175 (Oxford Univ. Press 1955) (discussing the reformed High Commission established by James in 1868, Ogg noted that the Ecclesiastical Commissioner had the power “to exercise all manner of jurisdiction in all cases touching any spiritual or ecclesiastical matter. . .”).

50. Granucci, *supra* note 36, at 848.

51. *Id.* at 849; see also Robert Beale, in THE DICTIONARY OF NATIONAL BIOGRAPHY (Oxford Univ Press 1921-27).

52. See DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 51 (“Thus, we know that he published a work impugning the right of the crown to fine or imprison for ecclesiastical offenses,

response to this, Whitgift, the architect of the High Commission, had a “Schedule of Misdemeanors” drawn up against Beale for condemning such things as the use of the rack as “cruel, barbarous, [and] contrary to law.”⁵³

Given the influence Beale had on Ward, it appears that Ward’s language, used in the Massachusetts Body of Liberties, was motivated by concerns about torture that was used to extract confessions in the absence of a conviction⁵⁴ and bodily punishments that were “inhumane Barbarous or cruel.”⁵⁵ The meaning of this document is made clearer when considered along with the interpretations of the government officials attempting to implement it at the time.

In explaining the meaning of the proscriptions contained in the Body of Liberties, ministers to then Massachusetts governor Bradford specifically used the word “punishment” when referring to torturous interrogation.⁵⁶ Mr. Partich explained:

A magistrate is bound—to sifte ye accused and by force of argument to draw him to an acknowledmente of ye truth; but he may not extracte a confession—by any violent means—by any **punishmente inflicted** or threatened to be inflicted for so he may draw forth an acknowledmente of a crime from a fearful inocente.

John Reynor explained, “To inflicte some **punishment** meerly for this reason, to extracte a confession of a capitall crime, is contrary to ye nature of vindictive justice. . . .”⁵⁷

Based on this historical record, it is clear that the Body of Liberties was motivated by and intended to prevent conduct that included such punishment as torturous interrogations.

B. The Birth of the Words—English Bill of Rights Article 10

In the late 17th century, England was at the end of the “shaky reign of King James II.”⁵⁸ Abuses during “[t]he reign of James II, and to a lesser extent that of Charles II, provided the historical background of the

and condemning the use of torture to induce confession, and followed it up at a later date with a second treatise upon the same subject.”); *see also* Granucci, *supra* note 36, at 849.

53. 1 JOHN STRYPE, *THE LIFE AND ACTS OF JOHN WHITGIFT* 402 (n.p., Franklin Publisher 1822); *see also* Granucci, *supra* note 36, at 849-850 (“Beale’s objections to the use of torture and inquisitorial methods became more and more strident—one of his contemporaries described Beale as ‘homo vehemens, et autere acerbus’ and he was eventually banished from the Royal Court in 1592.”).

54. *See* PERRY, *supra* note 34.

55. *See id.* at 153.

56. Pittman, *supra* note 38, at 778.

57. *Id.* (emphasis added).

58. Granucci, *supra* note 36, at 852.

provisions of the Bill of Rights.”⁵⁹ After James II fled England, parliament drew up a declaration of rights “which the new monarchs, William and Mary, would ratify.”⁶⁰ This document was designed “to prevent a recurrence of recent events” in England.⁶¹ As noted above, Article 10 of the Bill of Rights stated “[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.”⁶² Less than one hundred years later, this language would be “transcribed verbatim into the Virginia Declaration of Rights of 1776 and, with the substitution of ‘shall’ for ‘ought,’”⁶³ it became the Eighth Amendment. Because of this clear link, when interpreting the meaning of the Eighth Amendment, historians and courts alike have tried to discern the meaning of the phrase in England at the time it was adopted there.⁶⁴

The debate about the meaning of these words at the time when the English Bill of Rights was adopted centers around whether the provision was a reaction to the “Bloody Assizes”⁶⁵ or to the trial of Titus Oates.⁶⁶ Justice Scalia has asserted that the “best historical evidence suggests” that it was the trial of Titus Oates that gave rise to the language in the English Bill of Rights.⁶⁷ In so concluding, Justice Scalia suggested that the prohibition was limited to illegal post-conviction sentences. The resolution of this historical

59. PERRY, *supra* note 34, at 224; *see also* Bill of Rights (1689), Preamble, *reprinted in* SCHWARTZ, *supra* note 37, at 41 (specifically identifying King James II as the cause of the troubles that gave rise to the document).

60. Granucci, *supra* note 36, at 852; *see also* SCHWARTZ, *supra* note 37, at 41.

61. OGG, *supra* note 49, at 241. Unfortunately, historians are unclear exactly which events it was designed to prevent from recurring.

One of the most serious grievances which the document sought to correct was the use of the royal prerogative for the purpose of suspending and dispensing with laws. In the past English kings had often exercised without question a rather vague dispensing power, that is, a power of making exceptions to the laws in particular cases.

PERRY, *supra* note 34, at 224.

62. *Harmelin*, 501 U.S. at 966.

63. Granucci, *supra* note 36, at 853.

64. *See, e.g.*, Granucci, *supra* note 36; *see also* Note, *What is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54 (1910); Steve Bachman, *Starting Again with the Mayflower... England's Civil War and America's Bill of Rights*, 20 QUINNIPIAC L. REV. 193 (2000); *Harmelin*, 501 U.S. 957.

65. *See* PERRY, *supra* note 34, at 236 n.103. The Bloody Assizes refers to the commission set up “following the Duke of Monmouth’s abortive rebellion in 1685.” *Harmelin*, 501 U.S. at 968. This “special commission led by Jeffreys tried, convicted, and executed hundreds of suspected insurgents.” *Id.* *See generally* SIR EDWARD PARRY, *THE BLOODY ASSIZE* (Dodd, Mead & Co. 1929).

66. Granucci, *supra* note 36, at 853-860. The Trial of Titus Oates refers to the trial for perjury of Titus Oates. *See* T.B. Howell, *The Second Trial of Titus Oates*, in *A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 1227* (William S. Hein & Co. 2000). Oates had testified as to the “‘Popish Plot’ to overthrow King Charles II in 1679.” *Harmelin*, 501 U.S. at 969. His testimony was later discredited and he was convicted of perjury in a trial presided over by Jeffreys. His judgment and sentence were later criticized by members of the House of Lords as being “cruel, barbarous and illegal.” *Id.* at 971. In this author’s review, the Bill of Rights of 1689 was likely not a result of either the Bloody Assizes or the Trial of Titus Oates, but rather the combination of both.

67. *Harmelin*, 501 U.S. at 968. This debate is important in that if Article 10 was born of broader concerns than the irregularities that occurred in the Trial of Titus Oates, it was designed to protect against broader harms.

debate is not as clear as Justice Scalia suggested in *Harmelin*.⁶⁸ While it seems likely true that the first usage of similar phraseology appeared in debates relating to Titus Oates in the House of Lords, wherein the statement of dissenting judges uses the phrase “cruel, barbarous, and illegal judgments,”⁶⁹ the actual language in the Bill of Rights of 1689 suggests its roots are broader than this narrow focus on Titus Oates indicates.

To begin with, the objection can be traced back to the concerns of Sir Robert Beale, which included both the use of torture and inquisitorial methods.⁷⁰ Furthermore, the preamble to the Bill of Rights of 1689 speaks in the plural when listing the complaints that gave rise to it.⁷¹ The preamble refers to “prosecutions in the court of the King’s bench, for matters and causes cognizable only in parliament; and by divers other arbitrary and illegal courses.”⁷² Finally, the same language used in the English Bill of Rights was understood at the time to include more than just post-conviction punishments that were beyond that authorized by Parliament.

This latter point becomes evident when one considers that the same year that the English Bill of Rights was enacted, the Scottish Parliament also enacted a similar measure to address the excesses of the same King. That document, the Scottish Claim of Right, specifically used the word punishment when referring to torturous interrogation.⁷³ The Claim of Right of 1689 stated “[t]hat the forcing of Leiges to depone against themselves in capital crimes, however the punishment be restricted is contrary to law.”⁷⁴ It further stated “[t]hat the using of torture without evidence or in ordinary crimes, is contrary to law.”⁷⁵

There is no doubt that in the years before the enactment of the Bill of Rights of 1689, torture had been widely used by courts to extract confessions.⁷⁶ This is exemplified by Lord Jeffreys who bore responsibility

68. Though Scalia is correct that Granucci concluded that it was the Oates affair that gave rise to the notion that it was barbarous post-trial penalties sentences that were at issue, this conclusion does not account for the fact, as Granucci noted, that the concept can be traced back to Sir Robert Beale’s “objections to the use of torture and inquisitorial methods.” Granucci, *supra* note 36, at 849.

69. *Harmelin*, 501 U.S. at 971.

70. See Granucci, *supra* note 36, at 848-49.

71. Bill of Rights (1689), Preamble, reprinted in PERRY, *supra* note 34, at 245.

72. *Id.* This clearly refers to multiple actions by the bench, rather than the one trial of Titus Oates.

73. Claim of Right (1689), reprinted in GORDON DONALDSON, SCOTTISH HISTORICAL DOCUMENTS 252-258 (Barnes & Noble, Inc. 1970) [hereinafter Claim of Right].

74. *Id.* This author has reviewed three sources for the Scottish Claim of Right. See Pittman, *supra* note 38, at 764 n.3; Claim of Right Act 1689, available at <http://www.rahbarnes.demon.co.uk/clai1689.htm>. Each of these documents contains different punctuation; however, the language remained the same. Given the language of this provision, its meaning does not change as a result of those punctuation variations.

75. Claim of Right, *supra* note 73, at 256.

76. See DAVID JARDINE, A READING ON THE USE OF TORTURE IN THE CRIMINAL LAW OF ENGLAND (n.p. Baldwin & Cradock 1837). Jardine states that the last record of a torture warrant

for many of the excesses of the court of King James.⁷⁷ Of the notorious Lord Jeffreys, it has been said “his methods of dragging the evidence he wanted out of an unwilling witness, would have inspired admiration among the modern professors of ‘the third degree.’”⁷⁸ Significantly, unlike the other “barbarous” punishments which occurred during the Bloody Assizes, and which continued after the Bill of Rights of 1689,⁷⁹ inquisitorial proceedings ceased around this time.⁸⁰ By the turn of the eighteenth century, compelled confessions had largely disappeared.⁸¹ In spite of this, scholars have relied upon the Oates case to conclude that the phrase “seems to have meant a severe punishment unauthorized by statute and not within the jurisdiction of the court to impose”⁸² and a “reiteration of the English policy against disproportionate penalties.”⁸³

Since there is no clear limitation as to which harms gave rise to the concerns expressed in the English Bill of Rights of 1689, and there were concerns about the “arbitrary and illegal courses”⁸⁴ used in prosecutions by these courts, which in the past had turned to torture to extract confessions, the historical record does not support Justice Scalia’s assertion in *Harmelin*. The English drafters of the Bill of Rights of 1689 were likely also reacting against and attempting to limit cruel and unusual punishments that involved the use of torture to extract confessions.⁸⁵

issued under royal prerogative in England was in 1641. *Id.* at 57. However, torture clearly appears to have been occurring under the same King, during this time period in Scotland. *See* Claim of Right *supra* note 73.

77. *See* PERRY, *supra* note 34, at 236 n.103. “Jeffreys is best known for presiding over the ‘Bloody Assizes’ following the Duke of Monmouth’s abortive rebellion in 1685; a special commission led by Jeffreys tried, convicted, and executed hundreds of suspected insurgents.” *Harmelin*, 501 U.S. at 968.

78. PARRY, *supra* note 65, at 195. This reputation is interesting in that there appears to be no specific record of torture warrants being issued by royal prerogative after the High Commission was re-established in 1661. *See generally* JARDINE, *supra* note 76.

79. This fact is important in that it is this continued use of such post-conviction punishments that has given rise to the belief that it was not the Bloody Assizes, but rather the trial of Titus Oates that was the impetus for Article 10. *See Harmelin*, 501 U.S. at 968.

80. *See, e.g.*, M. Macnair, *The Early Development of the Privilege Against Self-Incrimination*, 10 OXFORD J. LEGAL STUDIES 66, 72 (1990).

81. *See* Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part 1)*, 53 OHIO ST. L. J. 101, 147 (1992); *United States v. Gecas*, 120 F.3d 1419, 1450 (1997).

82. Granucci, *supra* note 36, at 859.

83. *Id.* at 860.

84. Bill of Rights (1689), Preamble, *reprinted in* PERRY, *supra* note 34, at 245.

85. Scholars have suggested that the failure to specifically mention torturous and compulsory interrogation is evidence that this practice was no longer a concern by the time of the enactment of the Bill of Rights of 1689. *See, e.g.*, Pittman, *supra* note 38, at 774 (quoting MACAULEY, 3 HISTORY OF ENGLAND 265) (asserting that any reference to torture was unnecessary in the Bill of Rights which was already considered a “distinguishing feature of the English jurisprudence.”). The notion that coerced confessions were no longer a problem in the late 1600s has been discounted by recent scholars. *See, e.g.*, Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 316-317 (1998); Macnair, *supra* note 80. This assertion is also contradicted by the fact that the same year this document was drafted, 1689, the Scottish Claim of Right was drafted to prohibit torture in most interrogations. Claim of Right, *supra* note 73, at 256. A possible explanation for the lack of specific reference to torture may be that the drafters anticipated that the

C. *The Framers Understood the Eighth Amendment to Include a Ban on Interrogation Torture*

Whatever the meaning of the language of Article 10 of the Bill of Rights of 1689, to the Framers, the Eighth Amendment certainly was designed to prevent torturous interrogations. As is well known, when originally proposed for ratification, the Constitution contained no bill of rights.⁸⁶ One of the key states in the ratification of the proposed new constitution was Virginia.⁸⁷ Given the position of the Virginia delegates at the Constitutional Convention and the post-convention pamphleteering, there was concern that Virginia would not pass the constitution without a bill of rights.⁸⁸

Virginia became a key state in this ratification process because it was both one of “the most powerful of the American colonies”⁸⁹ and it was the first of the colonies to draft its own bill of rights.⁹⁰ This earlier bill of rights drafted in Virginia was promulgated in 1776.⁹¹ At that time, George Mason and Patrick Henry were appointed to a committee that was formed following the Virginia convention that resolved to send delegates to the Continental Congress.⁹² That committee’s purpose was to propose the declaration of independence from Great Britain and to prepare a declaration of rights for the Virginia colony.⁹³ Though the committee proposed many bills of rights and constitutions, “[t]he declaration of rights and constitution proposed by George Mason . . . ‘swallowed up all the rest, by fixing the grounds and plan, which after great discussion and correction, were finally ratified.’”⁹⁴

language of the Bill of Rights taken as a whole would prohibit it. Specifically, Article 3, which prohibited the High Commission and Article 10 which prohibited barbarous punishments, when taken together eliminated the offending court and the offending practice, respectively.

86. IRVING BRANT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 39 (Bobbs-Merrill Co. 1965).

87. *Id.* at 40. The other state was New York. *Id.*

88. RUTLAND, *supra* note 26, at 159-178.

89. *Id.* at 39.

90. *Id.*; see also HELEN HILL MILLER, *GEORGE MASON CONSTITUTIONALIST* 138 (Harvard University Press 1939) (Mason wrote, “This Declaration of Rights was the first in America. . . .”); ROBERT RUTLAND, “WELL ACQUAINTED WITH BOOKS”: THE FOUNDING FATHERS OF 1787, at 11 (Lib. of Cong. 1987).

91. MILLER, *supra* note 90, at 129-151; B. Wright, Jr., *Written Constitutions in America*, reprinted in *ESSAYS IN HISTORY AND POLITICAL THEORY* 364-365 (Harv. Univ. Press 1936).

92. RUTLAND, *supra* note 26, at 32.

93. H. B. GRIGSBY, *THE VIRGINIA CONVENTION OF 1776*, at 18 (n.p., J.W. Randolph 1855) (quoting from the Journal of Convention 1776, “Resolved, unanimously, That a committee be appointed to prepare a Declaration of Rights, and such a plan of government as will be most likely to maintain peace and order in this Colony, and secure substantial and equal liberty to the people.”); RUTLAND, *supra* note 26, at 33 (“A sister resolution to the independency instructions called for a committee to prepare a declaration of rights and a plan of government.”); Granucci, *supra* note 36, at 840.

94. Edmund Randolph’s Essay on the Revolutionary History of Virginia, reprinted in SCHWARTZ, *supra* note 37, at 247; see also MILLER, *supra* note 90, at 144 (quoting from a letter written by James Madison which confirmed that both the Virginia Constitution and its Declaration of

Thus, George Mason's proposals were ultimately adopted in Virginia.⁹⁵ These "forward looking"⁹⁶ proposals included a verbatim copy of the English Bill of Rights Article 10 prohibition against cruel and unusual punishments.⁹⁷ Other colonies followed suit, drawing up their own bills of rights.⁹⁸ Many of these other bills of rights contained provisions that addressed the prohibition against cruel and unusual punishment in some form or another.⁹⁹ Such a proscription was also included in the Northwest Ordinance.¹⁰⁰ The inclusion of a bill of rights, including its proscription against cruel and unusual punishment, in this piece of national legislation, has been cited as an example that "the bill of rights introduced in revolutionary Virginia had run a full course through the Union and was in effect passed on to those states yet to come."¹⁰¹

It is against this backdrop that the delegates to the Philadelphia convention met to draw up the plan for the formation of a federal government. In preparation for this Constitutional Convention, James Madison compiled a list of suggested reading for the delegates. Included in Madison's suggested reading list for members of the Continental Congress was "the Italian Beccaria, who did more than any other man to arouse Europe to the monstrous nature of torture and other forms of compulsory self-incrimination."¹⁰²

Also included in Madison's list was Blackstone's *Commentaries on the Laws of England*.¹⁰³ It has been said that "almost two-thirds of the delegates had cut their eyeteeth" on this book.¹⁰⁴ Furthermore, "[e]very lawyer on the Convention floor knew [Blackstone] as well as his own handwriting."¹⁰⁵ This becomes important when analyzing the meaning of the Eighth Amendment because the word "punishment" is used in Blackstone's

Rights were "from the same hand," that of George Mason.).

95. See MILLER, *supra* note 90, at 139 (stating that the clause whose language ultimately became the Eighth Amendment was "derived from the catalogue of British abuses which [Mason] drew up as part of the Fairfax Resolves").

96. See *id.*

97. Granucci, *supra* note 36, at 841; see also RUTLAND, *supra* note 26, at 38-39. Given this link to the Bill of Rights of 1689, it is interesting to note that George Mason's grandfather "was one of the most outspoken against the doctrines of James II." MILLER, *supra* note 90, at 6.

98. RUTLAND, *supra* note 26, at 79.

99. See, e.g., Del. Decl. of Rights 16 (1776); Berger, *supra* note 29, at 569 ("Eight other states subsequently adopted the clause before it was eventually embraced in 1791 as the Eighth Amendment to the United States Constitution.").

100. The Ordinance of 1787, III, Art. II, reprinted in JAY AMOS BARRETT, EVOLUTION OF THE ORDINANCE OF 1787, at 87 (n.p., G. P. Putnam's Sons 1891). See also RUTLAND, *supra* note 26, at 103. George Mason played an important role in the admission of the Northwest Territory. It was his draft settlement that "became the basic document upon which . . . the American Congress, under Jefferson's leadership, framed the Northwest Ordinance and provided for the constitution and admission to the Union of Indiana, Ohio, Illinois, Michigan, Wisconsin and part of Minnesota." MILLER, *supra* note 90, at 166.

101. RUTLAND, *supra* note 26, at 105.

102. BRANT, *supra* note 86, at 32-33.

103. *Id.* at 33; RUTLAND, *supra* note 26, at 11, 12.

104. RUTLAND, *supra* note 26, at 11.

105. *Id.* at 12. Thirty four of the fifty-five delegates were lawyers. *Id.* at 11-13.

Commentaries on the Law in reference to pretrial torture to secure statements. In discussing arraignments and the history of torture to secure statements, it states: “It hath been doubted, whether this punishment subsisted at common law. . . .”¹⁰⁶ Thus, it appears that the word “punishment” was understood at the time to include torturous interrogation.

This definition does not contradict the definition of “punishment” in legal dictionaries from the eighteenth century. Justice Thomas has asserted in his dissent in *Helling v. McKinney*, that as a legal term of art, the word “punishment” was limited to post-conviction punishment because it was defined at the time as those actions undertaken as a “penalty for transgressing the Law.”¹⁰⁷ However, this definition, on its own terms, is not limited to post-adjudication punishment, but rather to those penalties used against transgressors. Justice Scalia has suggested that the definition of “punishment” at the time of the adoption of the Eighth Amendment was broader than that stated by Justice Thomas. In *Wilson v. Seiter*,¹⁰⁸ Justice Scalia stated that “[t]he infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century.”¹⁰⁹ Neither of these definitions limits the application of this amendment to those adjudicated guilty of a criminal offense.¹¹⁰ In fact, any suggestion that these definitions limit the application of the Eighth Amendment to post-conviction punishment is proven to be an

106. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765-1769, at *322 (emphasis added) (In discussing the arraignment procedures, Blackstone referred to the use of such things as the use of the rack and the torture of penance to extract confessions. In discussing the history of these tortures, Blackstone stated, “It hath been doubted whether this punishment subsisted at the common law, or was introduced in consequence of the statute . . . which seems to be the better opinion.”).

107. *Helling v. McKinney*, 509 U.S. 25, 38 (1993) (Thomas, J., dissenting); see also V THE LAW DICTIONARY 343 (J. Riley N.Y. 1811). Justice Thomas also included two other definitions including “[a]ny infliction imposed in vengeance of a crime and [a]ny pain or suffering inflicted on a person for a crime or offense.” *Helling*, 509 U.S. at 38. None of these definitions required a judgment to be entered before such punishment could occur.

108. 501 U.S. 294 (1991).

109. *Id.* at 300 (citing *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)). *Duckworth* follows this quote with a definition from Samuel Johnson’s *Dictionary of the English Language* of 1755 which defines “punishment” as “[a]ny infliction or pain imposed in vengeance of a crime.”

110. Furthermore, a question of relevance is raised by reliance on legal dictionaries, given that a number of the Framers, though learned men, were not trained lawyers. This includes both James Madison, the proponent of the Eighth Amendment, and George Mason, the drafter of the wording of the Eighth Amendment. See RUTLAND, *supra* note 26, at 14. See also MILLER, *supra* note 90, at 12 (“[T]here is no record that [George Mason] went away even to college.”). However, Mason’s education included training by the lawyer John Mercer. *Id.* Should the definition from legal dictionaries control over the intent of the Framers and the common understanding of the word punishment? It is perhaps this lack of legal training that accounts for the expansive and common use of the word punishment by the Framers. While a lawyer may mean only those actions that are taken as a result of a criminal conviction, a layperson might believe punishment encompassed the common meaning and believe it applied to such things as torturous interrogation.

anachronistic distinction of history when one considers Blackstone's use of the term "punishment."

Because there is ample evidence that the Framers intended the clause to apply more broadly than simply to post-conviction punishment,¹¹¹ and this is supported by the usage of the word "punishment" at the time and the definition of punishment in common language dictionaries,¹¹² "punishment" should be construed more broadly than simply penalties inflicted as the result of a criminal adjudications.

In any event, the exact meaning of the word punishment was not discussed during the Constitutional convention because there was no need, given the absence of a bill of rights in the Constitution. Instead, during the convention, the "overriding topic . . . was the powers of the federal government—not individual liberty,"¹¹³ as contained in the bills of rights. It was not until late in the convention that the delegates' attention was brought to the need for a bill of rights.¹¹⁴ Not surprisingly, this call to "attend to the rights of every class of the people"¹¹⁵ came from George Mason.

When, at Mason's request, a motion was made to form a committee to draft a bill of rights, the only opposition stated that such was not necessary because the state constitutions already included these protections.¹¹⁶ Mason pointed out that given the federal Constitution and the supremacy of federal law over state law, that would no longer be true.¹¹⁷ However, ultimately, Mason's request for a bill of rights and his attempts to interject some of these principles into the constitution during the convention were unsuccessful.¹¹⁸ As a result, he was so concerned that the "powerful federal government being created would become oppressive"¹¹⁹ that he said he "would sooner chop off his right hand than put it to the Constitution as it [then stood]."¹²⁰ After the debates ended, the constitution passed unanimously with three members, including George Mason, abstaining.¹²¹

The proposed constitution was then passed on to the individual states to vote on its adoption. During the ratification process, a fight ensued between the Federalists and the Anti-federalists, the latter raising the lack of a bill of rights as their primary complaint about the proposed constitution.¹²² When it

111. See *supra* notes 104-110 and accompanying text.

112. See *infra* Part III(A)(1).

113. RUTLAND, *supra* note 26, at 107.

114. *Id.* at 115-16.

115. 1 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 49, available at <http://memory.loc.gov/ll/fr/001/0000/00790049.tif>.

116. RUTLAND, *supra* note 26, at 116; FARRAND, *supra* note 115 ("Mr. Sherman was for securing the rights of the people where requisite. The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient.").

117. FARRAND, *supra* note 115 ("The Laws of the U.S. are to be paramount to the State Bills of Rights.").

118. RUTLAND, *supra* note 26, at 117.

119. *Id.*

120. *Id.* at 115.

121. *Id.* at 118.

122. *Id.* at 126-158.

came time for Virginia to ratify the constitution, there was a great concern that it would not be approved due to the strength of the opposition on a number of issues, most notably, its lack of a bill of rights.¹²³

There was extensive debate on the need for a bill of rights with Patrick Henry as one of the most vocal objectors to the adoption of the Constitution as drafted.¹²⁴ When the Virginia delegates met to debate the proposed Constitution, Henry, fearing among other things, the use of “torturing to extort a confession” complained about the lack of a prohibition on cruel and unusual punishments in the federal constitution.¹²⁵ Henry stated:

In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—**of torturing, to extort a confession of the crime.** They will say that they might as well draw examples from those countries as from Great Britain, and **they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity.** We are then lost and undone.¹²⁶

George Nicholas then responded that a bill of rights “provided no security against torture . . . for it has been repeatedly infringed and

123. *Id.* at 165-74. Virginia was a critical state in the ratification process for “[w]ithout the concurrence of Virginia and New York, however, no permanent union or government could be maintained.” *Id.* at 162.

124. *Id.* at 167-68.

125. 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447-448, available at <http://memory.loc.gov/ll/1led/003/0400/04590447.tif>. Patrick Henry’s views as to the meaning of the Eighth Amendment are especially important given the Court’s demonstration of Patrick Henry as the “paradigm for those who favored adoption of the eighth amendment.” See Millen, *supra* note 27, at 801.

126. ELLIOT, *supra* note 125, at 447-48 (emphasis added). It is interesting to note that Professor Wigmore, who was long considered the “final authority” in discussing the Fifth Amendment privilege against self-incrimination, has stated that although there was agitation then going on in France against the inquisitorial feature[s] of French law in 1789, “[t]here appears no allusions, in Elliott’s Debates on the Constitution to the contemporary French movement but the delegates who had been over there must have known about it.” Pittman, *supra* note 38, at 764 (quoting IV WIGMORE ON EVIDENCE § 2250). As the Patrick Henry quote makes clear, the Framers were aware of the French practices. However, they discussed the relevance of these practices in terms of the application of the Eighth Amendment.

disregarded.”¹²⁷ Mason, seeming to misunderstand the meaning of Nicholas’ response to Henry, assured him, expressing “his interpretation of the cruel and unusual punishments clause.”¹²⁸ Mason replied:

[T]he worthy gentleman was mistaken in his assertion that the bill of rights did not prohibit torture; for that one clause expressly provided that no man can give evidence against himself; and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.¹²⁹

These statements provide some evidence of Mason’s and Henry’s view of the protections provided by the provisions of the Fifth and Eighth Amendments, as including protection from interrogation torture.¹³⁰ Given that the language incorporated into the Eighth Amendment is so similar to the language used in this discussion, it also provides some indication of what informed participants in the debates would have understood the language of the Eighth Amendment to encompass.

To ensure Virginia’s ratification of the Constitution, a compromise was reached by which Madison agreed to recommend the amendments sought by Patrick Henry which were reasonable, if the Anti-federalists would vote to support the constitution as it was.¹³¹ With this concession in place, Virginia voted to approve the proposed constitution, without formal reservation.¹³²

To determine which amendments Virginia would propose, a committee was formed that included both Patrick Henry and George Mason.¹³³ Again, Mason played a critical role in these proposed amendments.¹³⁴ Mason inserted the prohibition against cruel and unusual punishments into the proposed amendments, which consisted of twenty articles.¹³⁵ Not surprisingly, given his role in drafting Virginia’s earlier Declaration of Rights, fourteen of the twenty articles which Mason drew up were taken from the Virginia Declaration of Rights.¹³⁶

127. ELLIOT, *supra* note 125, at 451.

128. Granucci, *supra* note 36, at 841.

129. ELLIOT, *supra* note 125, at 452.

130. See Jeffrey Bukowski, Comment, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 422 n.19 (1994) (noting that according to Granucci, “decapitation, the rack, or any other torturous means of extorting a confession were among the methods of punishment that concerned those who supported the Eighth Amendment.”).

131. RUTLAND, *supra* note 26, at 173. James Madison promised that he would “help secure any amendments that would give satisfaction and were not harmful.” BRANT, *supra* note 86, at 41.

132. BRANT, *supra* note 86, at 41.

133. RUTLAND, *supra* note 26, at 174.

134. BRANT, *supra* note 86, at 41 (“George Mason itemized the guarantees to be asked for by Virginia.”).

135. *Id.*

136. *Id.*

When Congress met in the spring of 1789, Madison kept his word and submitted his proposal for amendments to the House. “His proposals covered all of the ten articles which eventually formed the federal Bill of Rights,”¹³⁷ including the Eighth Amendment originally drafted by Mason. “In drafting the proposals, Madison had leaned heavily on the Virginia Declaration of Rights. . . .”¹³⁸ Thus it is not surprising that George Mason, one of the principal authors of the Virginia Declaration of Rights, was pleased with Madison’s efforts.¹³⁹

Very little was said concerning the meaning of the Eighth Amendment during the Congressional debates. Indeed, there were only two comments.¹⁴⁰ One comment noted that it was troublesome because it might prohibit certain acceptable forms of punishment for crimes¹⁴¹ and the other that the meaning of the amendment was so vague as to mean nothing.¹⁴² However, the congressional debates support the proposition that the Eighth Amendment’s reach is beyond criminal cases.

In these debates, a discussion of the reach of the Fifth Amendment immediately precedes the discussion of the Eighth Amendment. Mr. Lawrence believed that the self-incrimination clause “ought to be confined to criminal cases, and moved an amendment for that purpose. . . .”¹⁴³ The clause was so amended and “unanimously agreed to by the committee.”¹⁴⁴ After this agreement, the committee “then proceeded to” consideration of the Eighth Amendment. No proposals were suggested or adopted limiting the application of the Eighth Amendment to criminal cases.¹⁴⁵ As such, it does not appear to be so limited.

In any event, the amendment was passed, with nothing said or done to contradict the broad meaning of the language as previously articulated by Mason and Henry.

D. What the History Reveals

This recitation of the history and meaning of the Eighth Amendment specifically and the Bill of Rights generally demonstrates the direct links

137. RUTLAND, *supra* note 26, at 202.

138. *Id.*

139. *Id.* at 210 (“George Mason declared that he had received the news of the proposed amendments with great satisfaction.”).

140. 1 *Annals of Cong.* 782-783 (John Gales, ed. 1789). Mr. Smith and Mr. Livermore were the only two to comment on the Eighth Amendment.

141. *Id.* (Mr. Livermore expressed concern about the limitation placed on the legislature by the amendment.); *see also* PERRY, *supra* note 34, at 237; RUTLAND, *supra* note 26, at 208.

142. 1 *Annals of Cong.* 782-783 (Joseph Gales, ed. 1789) (Mr. Smith expressed concern that its import was “too indefinite.”).

143. *Id.* at 782; *United States v. Gecas*, 120 F.3d 1419, 1456 (11th Cir. 1997).

144. 1 *Annals of Cong.* 782 (Joseph Gales, ed. 1789).

145. *Id.*

between concerns for interrogation torture and the belief that the Eighth Amendment proscription against cruel and unusual punishments provided some measure of protection against this form of oppressive conduct. When originally expressed on this continent, the prohibition appears to have drawn its life from concerns that included the use of torture in interrogation.¹⁴⁶ The exact language is drawn from the English Bill of Rights, which was certainly concerned with post-conviction punishments. However, the use of torture to extract confessions was also a likely concern to the English drafters.

As noted, the English Bill of Rights, Article 10, was a reaction to the ecclesiastical courts, which in the past had used torture to extract confessions from those appearing before them.¹⁴⁷ Thus, it is likely that the offensive conduct that provoked Article 10 included concerns about the potential of these courts to use torture to extract confessions, not just that it was concerned with extreme post-conviction punishments.¹⁴⁸ Tellingly, this author could find nothing in the historical record in England which conclusively limited the intended application of this phrase to post-conviction punishments.¹⁴⁹

Furthermore, although some commentators have concluded that when this language was included in the English Bill of Rights of 1689, it was primarily directed at post-conviction punishment, “it is clear that the American Framers read into the phrase the meaning of Beale and Ward.”¹⁵⁰ That meaning included an intent to protect against torturous interrogation.¹⁵¹ When considered by some of the principal actors in the adoption of the Bill of Rights, it appears that those who called for protection of individual rights

146. See *supra* Part II(A).

147. Article 3 of the Bill of Rights of 1689 specifically prohibited the reinstatement of the ecclesiastical courts. These courts had been outlawed previously, in 1641. In spite of this fact, in 1661, ecclesiastical jurisdiction was restored. In 1686, the Ecclesiastical Court, known as the High Commission, was restored. James dissolved the High Commission in 1688 in an attempt to appease opponents. However, its prohibition was nonetheless included in the Bill of Rights.

148. See *Harmelin*, 501 U.S. at 967-68 (“Most historians agree that the ‘cruel and unusual Punishments’ provision of the English Declaration of Rights was prompted by the abuses attributed to the infamous Lord Chief Justice Jeffreys of the King’s Bench during the Stuart reign of James II. . . . They do not agree, however, on which abuses.”).

149. On the contrary, the preamble to the Declaration of Rights plainly states that it was in reaction to the “Prosecutions in the Courts of the Kings Bench for Matters and Causes cognizable only in parliament; and by *divers other arbitrary and illegal courses.*” Bill of Rights (1689), reprinted in PERRY, *supra* note 34, at 245 (emphasis added). This language suggests that the source of the drafters’ concern was broader than simply post-conviction punishment. Rather, they were concerned with the entire process engaged in by these courts. Nothing in the text of the document illuminates to what the authors referred to with the phrase “*divers other arbitrary and illegal courses.*” Justice Scalia in his opinion in *Harmelin* says that this preamble “specifically referred to illegal sentences.” *Harmelin*, 501 U.S. at 969. This is simply not borne out by the text of the document itself, which no where refers to “sentences” of any kind, illegal or otherwise.

150. Granucci, *supra* note 36, at 860.

151. “From every indication, the Framers of the Eighth Amendment intended to give the phrase a meaning far different from that of its English precursor. The records of the debates in several of the state conventions called to ratify the 1789 draft Constitution submitted prior to the addition of the Bill of Rights show that the Framers’ exclusive concern was the absence of any ban on tortures. The later inclusion of the ‘cruel and unusual punishments’ clause was in response to these objections.” *Furman*, 408 U.S. at 377 (Burger, J., dissenting).

intended for the Eighth Amendment proscription against cruel and unusual punishments to protect against torturous interrogation.¹⁵² As Justice Brennan has noted, when discussing the meaning of the Eighth Amendment, “It is obvious that [Patrick] Henry was referring to the use of torture for the purpose of eliciting confessions from suspected criminals.”¹⁵³ Thus, from a historical perspective, there is support for the notion that the Eighth Amendment was intended to cover such conduct by government.

Acceptance of this conclusion is also prudent given the policy considerations that motivated the Framers to adopt the Eighth Amendment. As has been recognized by the Court, at its core, the Amendment is about human dignity.¹⁵⁴ The Framers were clearly concerned that government might be “tempted to cruelty.”¹⁵⁵ When the government was so tempted, the Framers intended the protections of the Eighth Amendment to safeguard citizens against such governmental cruelty. Given this, the question arises: what would application of the Eighth Amendment mean for someone like Jose Padilla or Oliverio Martinez? To answer these questions, we must consider what has occurred in those cases and look to the meaning and application of the phrase cruel and unusual punishment as used in the Eighth Amendment.

III. MODERN INTERPRETATIONS OF THE EIGHTH AMENDMENT AND ITS POSSIBLE APPLICATION TO THE CASES OF JOSE PADILLA AND OLIVERIO MARTINEZ

Mr. Padilla has been detained incommunicado by the military for over a year.¹⁵⁶ This detention is the result of a deliberate decision by the executive branch. According to statements of the government in court documents, Mr. Padilla, labeled an enemy combatant, is being detained for the purpose of

152. See ELLIOT, *supra* note 125, at 447-448 (Patrick Henry Comments); *id.* at 451 (George Mason Response) (1836).

153. *Furman*, 408 U.S. at 260 n.2 (Brennan, J., concurring). Justice Marshall echoed this conclusion stating that from his review of the history of the amendment, “there is no doubt whatever that in borrowing the language and in including it in the Eighth Amendment, our Founding Fathers intended to outlaw torture and other cruel punishments.” *Furman*, 408 U.S. at 319.

154. *Trop v. Dulles*, 356 U.S. 86, 99-100 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (“The Amendment embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency. . . .’”).

155. *Furman*, 408 U.S. at 267 (Brennan, J., concurring).

156. It bears noting that Mr. Padilla is not the only such “enemy combatant” being detained incommunicado. See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004). The focus here is on Jose Padilla’s case because he is a United States citizen who was arrested within the United States. However, in analyzing the propriety of such conduct, the author will refer to the government’s justifications for its actions when discussing other detainees.

interrogating him.¹⁵⁷ For more than a year, he has seen no one but his interrogators and those detaining him. Indeed it is the interrogation that the government gives as reason for this complete isolation.¹⁵⁸ It asserts that contact with his lawyer would inhibit the “trust” bond between the interrogators and their subject.¹⁵⁹

Given that interrogation has been used to justify the purpose, nature and length of incommunicado detention, it seems that an amendment designed to act as a limit on torturous governmental interrogation would be particularly relevant.¹⁶⁰ The government, however, has stated that the executive has enhanced authority to engage in such conduct during wartime.¹⁶¹ Though this article is not intended to be a full exploration of the applicability of the Eighth Amendment during wartime, there are a number of points, relating to the origins and the application of the Amendment, that must be noted. The first involves the English origins to the Amendment. The English Bill of Rights, Article 10, whether a reaction to the Bloody Assize or the trial of Titus Oates, was drafted in response to actions taken by the King of England during a time of rebellion.¹⁶² Thus, the Amendment’s genesis arose out of actions by the executive (the Crown) during wartime.¹⁶³ The second point is that one of the seminal Eighth Amendment cases in American jurisprudence held that a penalty that had been justified by and applied as the result of wartime desertion, violated the Eighth Amendment.¹⁶⁴ Nothing in the

157. Secretary of Defense Donald Rumsfeld has stated that “Padilla ‘will be held by the United States government through the Department of Defense and be questioned.’” *Padilla*, 233 F. Supp. 2d at 573. Through detaining accused enemy combatants, the government has also stated that it hopes to deter others. See Eric Lichtblau, *Bush Declares Student an Enemy Combatant*, N.Y. TIMES, June 24, 2003, at A15.

158. “DIA’s approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and interrogator. Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time.” Jacoby Declaration, *supra* note 7, at 4.

159. Jacoby asserts that “[e]ven seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship.” Jacoby Declaration, *supra* note 7, at 5. “Providing him access to counsel now would create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process. This would break—probably irreparably—the sense of dependency and trust that the interrogators are attempting to create.” *Id.* at 8.

160. Because nothing is known of the conditions of confinement or the nature and extent of the interrogation other than its length, we must confine our analysis to the fact that the detention is incommunicado and has lasted over a year. However, given the recent decision by the Pentagon to allow Mr. Padilla limited access to his lawyer, this analysis may change. See DOD News Release, *supra* note 8. In any event, any true analysis of whether the Eighth Amendment has been violated by the interrogation of Mr. Padilla must necessarily involve consideration of the realities of his interrogation, which can only be accomplished if the government lifts the veil of secrecy that has surrounded its actions in these cases.

161. See generally President Bush’s Order [to hold Padilla as an enemy combatant], June 9, 2002, available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush60902det.pdf>.

162. *Harmelin*, 501 U.S. at 968.

163. There is some dispute as to whether the current “war on terrorism” is the equivalent of a declared war. See Matt J. O’Laughlin, Comment, *Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11*, 70 UMKC L. REV. 707, 714 (2002).

164. *Trop*, 356 U.S. at 86.

history of this Amendment limits its application to peace time.¹⁶⁵ As such, its application to Mr. Padilla seems to be appropriate.

In contrast, Mr. Martinez's case involves injury that occurred during an altercation with law enforcement and the subsequent interrogation conducted by an individual officer, which occurred at a hospital treating him for his injuries.¹⁶⁶ His interrogation lasted approximately ten minutes of his forty-five minute treatment by doctors.¹⁶⁷ However, because his complaint involved an allegation of coercive interrogation,¹⁶⁸ an analysis of the applicability of the Eighth Amendment seems warranted.¹⁶⁹ To thoroughly analyze application of the Eighth Amendment to these two situations, we must first examine the jurisprudence and then assess these cases in that light.

A. Torturous Interrogation and Punishment Under the Eighth Amendment

The most obvious question as to the applicability of the Eighth Amendment to anything but post-conviction punishment centers on the meaning of word "punishment" in that amendment.¹⁷⁰ To analyze this question, one must consider two things. First, one must consider any evidence that exists as to the intent of the Framers in including the word punishment in the clause, including consideration of the definition and usage of the word "punishment" in the time leading up to the adoption of the

165. In *Loving v. United States*, 517 U.S. 748 (1996), the Court was faced with a question of whether a death sentence imposed as the result of a court martial required proof of aggravating circumstances which established a higher culpability on the part of the offender. In analyzing this question, the Court assumed that the Eighth Amendment was applicable to court martial proceedings, citing *Furman* and its progeny. *Id.* at 755. The Court cited *Trop* as supporting this assumption by analogy, though Justice Thomas, in his concurrence, expressed uncertainty about this assumption. *Id.* at 755, 777. Padilla, of course, is not a member of the United States military who faces court martial. He is a United States citizen facing indefinite detention and interrogation, based upon his designation as an enemy combatant by the Executive. While some may question whether the Eighth Amendment should be applied at all when the executive branch asserts it is acting pursuant to its war power or whether the Eighth Amendment should be construed differently in such instances, full exploration of those questions will be saved for another day. However, given the history of the Amendment as a reaction to war time abuses by the executive, the authority noted *supra* supporting application of the Amendment to military proceedings, and the absence of any authority limiting the reach of this Amendment to cases such as Padilla's, the case for applying the Eighth Amendment in this context is compelling. In light of these factors, the onus to refute such application is placed squarely upon those who contend that the Eighth Amendment should not so apply.

166. *Chavez*, 123 S. Ct. at 1999.

167. *Id.*

168. *Id.* at 2000.

169. Application of the Eighth Amendment to the cases of Mr. Padilla and Mr. Martinez is somewhat difficult in that the Court has never before applied the Eighth Amendment to interrogations. Given this fact, this author will focus on the component parts of the amendment and consider the principles underlying the tests articulated by the Court in other circumstances to guide this analysis.

170. To break apart the amendment and consider the component parts is of only limited assistance in understanding the meaning of the amendment as a whole.

Eighth Amendment.¹⁷¹ Additionally, one must analyze the use of the term as the Court has applied it, including its attempts to clarify the definition of this word.

1. How the Court Has Interpreted the Word “Punishment.”

Even though the Framers did not specify the exact meaning of the word punishment, on occasion, the Court has attempted to define this one word in the Eighth Amendment. The Court’s interpretation of “punishment” has not been limited to dictionary definitions of this term. Definitions cannot be the ending point when construing a word in the constitution. Due attention must be given to the intent of the Framers in adopting that provision and its relation to the other words in the document.¹⁷²

In any event, the plain meaning of the word punishment must be addressed. Punishment is defined in the American Heritage Dictionary as “1. a. An act of punishing. b. The condition of being punished. 2. A penalty imposed for wrongdoing. 3. Informal. Rough handling; mistreatment.”¹⁷³ This definition is echoed in a number of other common dictionaries. For example, the Merriam-Webster’s Collegiate Dictionary defines punishment as an “1: the act of punishing 2 a: suffering, pain, or loss that serves as retribution b: a penalty inflicted on an offender through judicial procedure 3: severe, rough or disastrous treatment.”¹⁷⁴ The American Edition of the Oxford Essential Dictionary defines it as “1. act or instance of punishing; condition of being punished. 2 loss or suffering inflicted in this. 3 *colloq.* severe treatment or suffering.”¹⁷⁵ What each of these definitions reveals is that the word, as used in the common vernacular,¹⁷⁶ encompasses two

171. See *supra* Part II.

172. See generally Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT 411 (1998); James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 3 (1991) (“the principal task of judges called upon to interpret the Constitution is to ascertain and give effect to the original intentions of the [F]ramers and ratifiers.”).

173. See also Thomas Landry, “Punishment” and the Eighth Amendment, 57 OHIO ST. L. J. 1607, at 1609 n.11 (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1060 (1976)). While such definitions are of little help in determining the original intent of the Framers, courts and commentators have cited to modern definitions for guidance in applying the Eighth Amendment. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 854 (1994) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1843 (1961)). This reliance on modern definitions is perhaps more appropriate when it comes to a constitutional provision such as the Eighth Amendment which has been construed to evolve with the societal standards. *Weems v. United States*, 217 U.S. 349 (1909).

174. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 945 (10th ed.). “Punish” is defined in this dictionary as “to impose a penalty on for a fault, offense, or violation . . . to inflict a penalty for the commission of (an offense) in retribution or retaliation . . . to deal with roughly or harshly . . . to inflict injury on.” *Id.*

175. OXFORD ESSENTIAL DICTIONARY 485 (10th ed.). “Punish” is defined as to “cause [an offender] to suffer for an offense. . . inflict a penalty for [an offense]. . . tax severely . . . hurt, abuse, or treat improperly.”

176. *Black’s Law Dictionary* seems to define the term punishment more narrowly, limiting its application to a penalty “inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him. . . .” BLACK’S LAW DICTIONARY 1234 (6th ed. 1990). However, it does include a “deprivation of property or some right.” *Id.* This

distinct sets of conduct: that which is inflicted in response to an offense and one that involves rough or severe treatment, neither necessarily following judicial procedure.¹⁷⁷

That the definition of punishment is broader than post-adjudication penalties was recognized in the statements of Justice Blackmun, in his concurrence in *Farmer v. Brennan*.¹⁷⁸ Objecting to the “unduly narrow definition of punishment”¹⁷⁹ adopted by the Court, Justice Blackmun referred to the common usage definition of punishment, noting that a “prisoner may experience punishment when he suffers ‘severe, rough, or disastrous treatment.’”¹⁸⁰

Given the limited benefit gleaned by looking to dictionaries or even legal dictionaries in determining whether something qualifies as punishment under the Eighth Amendment, the Court has considered a number of things in making this determination. It considers the nature of the government action in question and in analyzing this, has been driven by more than a facial acceptance of the stated purpose of the act in question. For example, in determining whether an act authorized by statute qualifies as punishment, the Court will look to the actual nature of the act, rather than the label given it.¹⁸¹ Additionally, the Court will look to its precedent in other areas, such as those cases dealing with “the constitutional prohibitions against bills of attainder and ex post facto laws. . . .” to determine whether something is “punishment.”¹⁸²

An example of this arose in *Trop v. Dulles*.¹⁸³ In *Trop*, the Court addressed the question raised by a statute that on its face appeared “to be a regulation of nationality.”¹⁸⁴ In spite of this, the Court noted that the form of the statute did not answer the question of whether it was actually penal in nature. “In deciding whether or not a law is penal, [the] Court has generally based its determination upon the purpose[s] of the statute.”¹⁸⁵ In answering this question, the Court considers whether “the statute imposes a disability

narrow view of the definition of punishment is not surprising given the lack of real analysis of the term in the court precedent.

177. The only exception to this is the third definition from Merriam-Webster’s. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1009 (11th ed. 2003).

178. 511 U.S. 825 (1994).

179. *Id.* at 855 (Blackmun, J., concurring).

180. *Id.* at 854 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1843 (1961)).

181. *See Trop*, 356 U.S. at 94 (“How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by the inspection of the labels pasted on them.”).

182. *Id.* at 95-96; *see also infra* Part III (A)(3)(a) (discussing the case of *In re Medley*, 134 U.S. 160 (1890)).

183. 356 U.S. 86.

184. *Id.* at 95. In *Trop*, the Court considered whether the punishment of denationalization as a penalty for wartime desertion was a violation of the Eighth Amendment. *See id.* The Court, in a plurality decision, held that it was. *Id.*

185. *Id.* at 96.

for the purposes of punishment—that is, [if the purpose] [is] to reprimand the wrongdoer, to deter others, etc., it has been considered penal.”¹⁸⁶ A statute may have both penal and non-penal effects.¹⁸⁷ “The controlling nature of such statutes normally depends on the evident purpose of the legislature.”¹⁸⁸

While informative, *Trop* did not definitively answer the question of what is “punishment.” *Trop* requires the Court to look at the purposes behind the governmental action.¹⁸⁹ “[E]ven a clear legislative classification of a statute as ‘non-penal’ would not alter the fundamental nature of a plainly penal statute.”¹⁹⁰ This analysis is to be done by considering the traditional goals of punishment. The more a governmental action furthers those goals, the more likely it is to be considered punishment for purposes of the Eighth Amendment.¹⁹¹ In determining the nature of governmental action, the Court has “always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment.”¹⁹² Thus, the universally accepted goals of punishment include deterrence and isolation.¹⁹³

2. *Ingraham v. Wright*

Any discussion of the Court’s interpretation of punishment under the Eighth Amendment would be incomplete without addressing the holding in *Ingraham v. Wright*.¹⁹⁴ In *Ingraham*, the Court analyzed the application of the Eighth Amendment to the discipline of a student in the school setting.¹⁹⁵ It held that the Eighth Amendment did not apply to such a setting.¹⁹⁶ This case has been cited as the basis for the seemingly universal assumption that

186. *Id.*

187. *Id.*

188. *Id.* In *Trop*, the examples given by the Court to demonstrate these principles were loss of right to liberty and to vote. *Id.* In analyzing these, the Court reasoned that “because the purpose of the latter statute is to designate a reasonable ground of eligibility, this law is sustained as a nonpenal exercise of the power to regulate the franchise.” *Id.* at 96-97. In reaching this conclusion, the Court noted that “[o]f course, the severity of the disability imposed as well as all the circumstances surrounding the legislative enactment is relevant to this decision.” *Id.* at 96 n.18.

189. See also *Hawker v. New York*, 170 U.S. 189, 196 (1898) (analyzing whether something qualified as punishment under the ex post facto clause, and noting that the court looks “at the substance and not the form . . .” of a particular statute).

190. *Ingraham v. Wright*, 430 U.S. 651, 686 (1977) (White, J., dissenting) (citing *Trop*, 356 U.S. at 95).

191. “The relevant inquiry is not whether the offense for which [the] punishment is inflicted has been labeled criminal, but whether the purpose of the deprivation is among those ordinarily associated with punishment, such as retribution, rehabilitation, or deterrence.” *Ingraham*, 430 U.S. at 686-87.

192. *Furman*, 408 U.S. at 343.

193. See also *Hope v. Pelzer*, 536 U.S. 730, 737 n.5 (2002) (concluding that the actions of the executive qualified as punishment, the Court stated, “[i]t is more likely that the guards left Hope on the post until his work detail returned to teach the other inmates a lesson”).

194. 430 U.S. 651 (1977).

195. *Id.*

196. *Ingraham*, 430 U.S. at 651.

the Eighth Amendment is inapplicable absent a criminal conviction.¹⁹⁷ The implication is that something is “punishment” under the Eighth Amendment only if it occurs after a criminal process.¹⁹⁸ This reading of *Ingraham* is incorrect, for it is broader than the Court’s analysis or holding. To the extent that this is an accurate assessment of the *Ingraham* decision, the decision is erroneous. In any event, *Ingraham* is uninformative as to the parameters of what constitutes punishment under the Eighth Amendment aside from criminal convictions.

The *Ingraham* Court was faced with determining “whether the paddling of students as a means of maintaining school discipline constitutes cruel and unusual punishment in violation of the Eighth Amendment.”¹⁹⁹ To answer this question, the Court looked at the “well known”²⁰⁰ history of the Eighth Amendment, the types of cases in which it had previously applied the Amendment, and the differences between the settings in which the allegedly offensive acts took place.²⁰¹

In addressing the history, the Court reiterated the link to the English Bill of Rights of 1689.²⁰² The Court noted that the language limiting this protection to “criminal cases” was eliminated from the final version of the English Bill of Rights’ proscription against cruel and unusual punishment.²⁰³ The Court then asserted that such deletion was “without substantive significance.”²⁰⁴ To support this interpretation of the English Bill of Rights, the Court noted that the preamble to this document still makes reference to criminal cases.²⁰⁵ However, that reference is in relation to excessive bail—notably, *not* the punishment’s clause.²⁰⁶

197. See *Graham v. Connor*, 490 U.S. 386, 398 n.6 (1989); ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 135, 247 n.5 (Yale U. Press 2002); see also Chanterelle Sung, *Torturing the Ticking Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism*, 23 B.C. THIRD WORLD L.J. 193, 197-98 (2003) (book review) (“Moreover, Dershowitz notes that the Eighth Amendment prohibition against, ‘cruel and unusual punishment’ does not apply in this situation because the ticking bomb terrorist has not yet been convicted.”).

198. *Ingraham*, 430 U.S. at 651.

199. *Id.* at 653.

200. Though the history is “well known,” that history’s meaning has been debated by historians, legal scholars and the bench since the Court began considering it.

201. See generally *Ingraham*, 430 U.S. at 651.

202. *Id.* at 664-66.

203. *Id.* at 665.

204. *Id.*

205. *Id.*

206. *Id.* at 665 n.33. As the Court stated,

[t]he preamble reads in part: ‘WHEREAS the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavor to subvert and extirpate . . . the laws and liberties of this Kingdom. . . . 10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects. 11. And excessive fines have been imposed; and illegal and cruel punishments inflicted. . . .’

The *Ingraham* Court then considered the intent of the Framers in including the cruel and unusual punishment clause. Focusing on who the clause was intended to limit, the Court stated that “the principal concern of the American Framers appears to have been with the legislative definition of crimes and punishments.”²⁰⁷ The historical record appears to support this assertion. However, implicit in the Court’s recognition that this was the Framers’ principal concern is the acknowledgment that it was not their sole concern.

Additionally, the Court overstated the import of the statement made during the First Congress on the Eighth Amendment that expressed concern about limiting the authority of the legislature to determine what punishments would apply to crime.²⁰⁸ Furthermore, the Court ignored the history of this proscription in the colonies, which was broader than that described.²⁰⁹ In any event, the Court in no way suggested that even if the “principal concern” of the Framers was legislatively enacted punishments, that they were not also concerned with punishments inflicted at the direction of the executive or judicial branch.²¹⁰ In fact, the Eighth Amendment has been recognized to have been intended to act as a check on all branches of government.²¹¹ To assert that the Framers would have permitted cruel and unusual punishment so long as done by the Executive instead of the legislature, strains credulity.²¹²

The Court then noted that during the ratification process, the Constitution had been criticized for failing to “provide protection for persons convicted of crimes,”²¹³ suggesting that this limited the Eighth Amendment’s application to those convicted of crimes. To support this suggestion, the Court referred to comments made during the Massachusetts and Virginia Conventions.²¹⁴ It is instructive to understand the context of

Id. (quoting R. PERRY & J. COOPER, SOURCES OF OUR LIBERTIES 245-46 (1959)).

Certainly the fact that it was specifically included in one clause would suggest the drafters of this document did not intend to so limit the other in which it was not included. A similar conclusion is suggested by the fact that when discussing the Fifth and Eighth Amendments in the First Congress, the choice was made to specifically limit the Fifth Amendment to criminal cases and not to so limit the Eighth. 1 *Annals of Cong.* 782 (Joseph Gales, ed. 1789).

207. *Ingraham*, 430 U.S. at 665.

208. Mr. Livermore, noting the “humanity” of the clause, expressed concern that the clause might limit the authority of the legislature to do such things as hang a man. 1 *Annals of Cong.* 783 (Joseph Gales, ed. 1789). However, as the *Ingraham* Court noted, this concern was “not heeded.” *Ingraham*, 430 U.S. at 666. Nothing in the Livermore discussion limits the application of the Eighth Amendment to the actions of the legislature.

209. *See supra* Part II.

210. As Justice Scalia pointed out in *Harmelin*, the drafters of the Bill of Rights of 1698 were concerned with the actions of the Crown. *Harmelin v. Michigan*, 501 U.S. 957, 974 (1991).

211. *See, e.g.*, *Weems v. United States*, 217 U.S. 349, 397 (1910) (White, J., dissenting).

212. It is true that the Framers seemed very concerned about the expansive nature of legislative power. However, that is because they viewed it as the more powerful branch vis-à-vis the executive branch.

213. *Ingraham*, 430 U.S. at 666.

214. *Id.*

the short quotes included by the Court in analyzing the protections intended by the Framers to be covered by this amendment.

The Court is correct that in the Massachusetts Convention, Abraham Holmes did indeed complain of a Congress with the unchecked power to invent “the most cruel and unheard-of punishments, and annexing them to crimes.”²¹⁵ However, he did this after expressing concern for a “Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean the diabolical institution, the *Inquisition*.”²¹⁶ It bears noting that the *Inquisition* was one of the most disgraceful periods for Christendom precisely due to practices such as the use of torture to elicit information from the accused.²¹⁷

The Court also quoted from Patrick Henry’s opposition to the Constitution in the Virginia ratification debates.²¹⁸ Again, the Court did not include the entire quotation.²¹⁹ Instead, it focused on the portion of his statement expressing concern about the extensive power of Congress relating to the definition of crimes.²²⁰ Left off was the portion of the debates wherein Patrick Henry specifically linked the cruel and unusual punishment clause to his concerns about the power to extort confessions.²²¹ Patrick Henry’s comment was followed shortly by that of George Mason, who confirmed Henry’s understanding that the Eighth Amendment would prohibit torturous interrogation conduct.²²²

215. ELLIOT, *supra* note 125, at 111.

216. *Id.*

217. See Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 30 n.108 (noting that the “term ‘inquisitorial’ has, particularly in the past, ‘conjure[d] up the excesses of the Star Chamber or the haunting memories of the Spanish Inquisition’”) (quoting G.E.P. Brouwer, *Inquisitional and Adversary Procedures – A Comparative Analysis*, 55 AUSTRALIAN L.J. 207, 208 (1981)).

218. *Ingraham*, 430 U.S. at 666 n.35.

219. *Id.*

220. *Id.*

221. Henry stated:

In the business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishments. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone.

ELLIOT, *supra* note 125, at 447-48.

222. Mason replied that:

[T]he worthy gentleman was mistaken in his assertion that the bill of rights did not prohibit torture; for that one clause expressly provided that no man can give evidence

This historical record, while truly not supporting application of the Amendment to the discipline of school children, at issue in *Ingraham*, in no way suggests the proposition for which it has been cited, namely that punishment under the Eighth Amendment can only occur after a criminal conviction is entered.

The Court noted that in every case in which it found the Eighth Amendment applicable, the case “dealt with a criminal punishment.”²²³ The Court then asserted that in those cases involving a claim “that impositions outside the criminal process constituted cruel and unusual punishment, it has had no difficulty finding the Eighth Amendment inapplicable.”²²⁴ The Court primarily focused on the cases of *Fong Yue Ting v. United States*²²⁵ and *Uphaus v. Wyman*,²²⁶ to support its limitation of the Eighth Amendment to post-conviction punishments.²²⁷ Neither of these cases, however, provide the unequivocal support for the proposition stated by the Court.²²⁸

In *Fong Yue Ting*, the Court was faced with a Due Process challenge²²⁹ to the arrest and deportation of Chinese Nationals for failing to have “certificates of residence.”²³⁰ Contrary to the Court’s assertion in *Ingraham*, it did not hold the Eighth Amendment inapplicable to aliens in deportation.²³¹ Rather, it stated in *dicta*, and without any substantive analysis of the Eighth Amendment question, that a proceeding under the statute at issue was “simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which congress has enacted that an alien of this class may remain within the country.”²³² Based on the *Fong Yue Ting* Court’s conclusion that the order of deportation was not the equivalent of a punishment for a crime, the Court stated that the

against himself; and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted: therefore, torture was included in the prohibition.

Id. at 452.

223. *Ingraham*, 430 U.S. at 666. This statement is later controverted in this very opinion at note 37 wherein the Court admitted that “[s]ome punishments, though not labeled ‘criminal’ . . . , may be sufficiently analogous to criminal punishments in the circumstances in which they were administered to justify application of the Eighth Amendment.” *Id.* at 669 n.37.

224. *Id.* at 667-68.

225. 149 U.S. 698 (1893).

226. 360 U.S. 72 (1959).

227. *Ingraham*, 430 U.S. at 668.

228. The Court also cited, without discussion, to the cases of *Mahler v. Eby*, 264 U.S. 32 (1924) and *Bugajewitz v. Adams*, 228 U.S. 585 (1913). These cases are equally uninformative on the exact parameters of what constitutes punishment under the Eighth Amendment. In *Mahler*, the Court quickly dismissed any comparison between a deportation order and a criminal conviction, stating that *Fong Yue Ting* had answered the question of whether a deportation was a punishment. *Mahler*, 264 U.S. at 39. Similarly in *Bugajewitz*, the Court stated without any discussion that a deportation is neither a conviction for crime nor punishment. *Bugajewitz*, 228 U.S. at 591.

229. *Fong Yue Ting*, 149 U.S. at 703.

230. *Id.* at 699 (statement of Facts by Mr. Justice Gray). Certificates of residence were required under section 6 of the act of May 5, 1892, c. 60. *Id.*

231. *Ingraham*, 430 U.S. at 668.

232. *Fong Yue Ting*, 149 U.S. at 730.

constitutional prohibition against cruel and unusual punishment has “no application,” and denied the due process claim.²³³

Uphaus provides an even thinner reed for the Court to have relied upon in *Ingraham*.²³⁴ In *Uphaus*, the Court analyzed in depth the “sole question” before it: whether a contempt order issued by the New Hampshire state court for production of certain documents was valid.²³⁵ Though it is true as the Court asserted, that the appellant raised a claim that his indefinite sentence for contempt would constitute “cruel and unusual punishment as to be a denial of due process.”²³⁶ This claim was raised for the first time on appeal and is summarily analyzed and dismissed without any reference to the Eighth Amendment whatsoever.²³⁷ Instead, in rejecting the claim, the Court quoted from the dissent of a case, *Green v. United States*,²³⁸ dealing with a summary contempt.²³⁹ The *Green* case was cited for the proposition that because the “defendant carries the keys to freedom in his willingness to comply with the court’s directive”²⁴⁰ imprisonment of the contemtor was a valid civil remedy, and therefore presumably not a violation of the Eighth Amendment.²⁴¹

Neither of these cases provides the definitive answer of whether the Eighth Amendment applies outside of the instances wherein a criminal conviction has been secured.

Finally, the *Ingraham* Court addressed the appellants’ contention that given the compulsory nature of schooling in the United States, the Eighth Amendment should be “extended to ban the paddling of schoolchildren.”²⁴² In rejecting this claim, the Court compared the circumstances faced by prisoners and schoolchildren.²⁴³ It noted that a prisoner’s conviction entitles the state to classify the person a “criminal,” and to incarcerate him and deprive him of his “freedom to be with his family and friends and to form the other enduring attachments of normal life.”²⁴⁴ In contrast, the Court placed particular emphasis on its observation that a public school is an “open institution.”²⁴⁵ In explaining why the Eighth Amendment does not extend to schools, the Court noted:

233. *Id.*

234. See generally *Uphaus v. Wyman*, 360 U.S. 72 (1959).

235. *Uphaus*, 360 U.S. at 75-76.

236. *Id.* at 76.

237. *Id.* at 81-82.

238. 356 U.S. 165 (1958).

239. *Uphaus*, 360 U.S. at 81.

240. *Id.* at 81.

241. *Id.* at 81-82.

242. *Ingraham*, 430 U.S. at 668.

243. *Id.* at 669-70.

244. *Id.* at 669 (citing *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)).

245. *Id.* at 670.

The child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.²⁴⁶

The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.²⁴⁷

In sum, the Court in *Ingraham* did not define the parameters of the application of the term punishment under the Eighth Amendment.²⁴⁸ Instead, the Court addressed the narrow question before it, that being, does the Eighth Amendment apply to the paddling of school children.²⁴⁹ Its discussion in *Ingraham* does little to illuminate, and certainly does not conclusively answer the question concerning the extent to which the Eighth Amendment applies absent a criminal conviction.²⁵⁰ Neither its analysis nor holding forecloses the Eighth Amendment's application to torturous interrogation.²⁵¹ Therefore, consistent with the history and meaning of the Amendment, it should be used to analyze allegations of torturous interrogations.

This discussion of the Court's interpretations of the meaning of "punishment," demonstrates that there is no clearly defined test for determining whether particular actions by the government are punishments or not.²⁵² To answer this question, the Court seems to focus on two things. First, the Court considers the nature of the action involved to determine whether it is by its nature "punishment."²⁵³ Second, the Court considers the purposes behind the government's action to see if it is motivated by goals commonly associated with punishment.²⁵⁴ This author will use this framework to analyze the cases involving Mr. Padilla and Mr. Martinez.²⁵⁵

246. *Id.* at 666.

247. *Id.* at 670. Comparing the nature of the detention of enemy combatants with the imprisonment of those convicted of criminal offenses would likely reach a different conclusion than that reached in comparing school children to convicted prisoners. According to the government, the designation of someone as an enemy combatant entitles the government to detain him for as long as it wishes, and to deny the person classified as an enemy combatant access to anyone and under conditions subject to no oversight.

248. *See generally Ingraham*, 430 U.S. at 651.

249. *Id.* at 665-66.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 660.

254. *Id.* at 667.

255. As noted above, no court has applied the Eighth Amendment to interrogations. Thus, the specific tests identified and applied by the Court in other circumstances do not fully answer the question of how the Court would analyze these cases. As such, this author will focus the concepts underlying the amendment and will discuss their possible applicability to and impact on the analysis.

3. Has Punishment Been Inflicted on Mr. Padilla or Mr. Martinez?

a. *Is the Incommunicado Detention of Jose Padilla for Interrogation Punishment by Its Nature?*

Though segregated confinement alone has been uniformly held not to be a violation of the Eighth Amendment absent some other aggravating fact,²⁵⁶ the Court has stated that “[c]onfinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.”²⁵⁷ This conclusion is supported by the Supreme Court case of *In re Medley*.²⁵⁸

Medley analyzed whether a legislative change which added solitary confinement for a prisoner condemned to death for an offense that occurred before this change amounted to an *ex post facto* violation.²⁵⁹ In concluding that it did, the Court analyzed the nature of solitary confinement to determine whether it was punishment by its nature.²⁶⁰ Tracing the history of solitary confinement and its fall from favor, the Court concluded that the solitary confinement at issue “was an additional punishment of the most important and painful character.”²⁶¹

In analyzing whether Mr. Padilla’s incommunicado detention qualifies as punishment, the differences between his detention and that of James Medley are important. James Medley was allowed access to “his attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family . . . in accordance with prison regulations.”²⁶² In Mr. Padilla’s case, to date, he has been allowed access to no one aside from his interrogators and military detention personnel.²⁶³ Even with this heightened

256. See, e.g., *Hutto v. Finney*, 437 U.S. 678 (1978); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

257. *Hutto*, 437 U.S. at 685.

258. 134 U.S. 160 (1890).

259. *Id.* at 162-63. As noted above, in *Trop*, the Court looked to cases involving “bills of attainder and ex post facto” violations for guidance on how to determine whether something qualifies as “punishment.” *Trop*, 356 U.S. at 95-96.

260. *Medley*, 134 U.S. at 167-68.

261. *Id.* at 171.

262. *Id.* at 164.

263. See AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA, THREAT OF A BAD EXAMPLE: UNDERMINING INTERNATIONAL STANDARDS AS “WAR ON TERROR” DETENTIONS CONTINUE, available at <http://web.amnesty.org/library/Index/ENGAMR511142003> (last visited Feb. 2, 2004). As noted above, the Pentagon has now agreed to permit limited access to Mr. Padilla by his lawyers. DOD News Release *supra* note 8. These limitations will likely mirror those imposed on Yaser Esam Hamdi and his lawyers, which include limitations on both the form of the access, in that it is monitored and recorded, and the content of the access, in that no conversation about the condition of his confinement or the methods of interrogation is permitted. See Toni Locy, *Accused combatant allowed to see lawyers*, USA TODAY, February 4, 2004, available at 2004 WL 58550731; *All Things Considered, Analysis: US Citizen Yaser Esam Hamdi Allowed to Meet with His Lawyers for the first*

accessibility to others, the *Medley* Court found the isolated confinement a “punishment.”²⁶⁴

In *Medley*, the Court described a legislative experiment in solitary confinement that involved “complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction.”²⁶⁵ Noting that such solitary confinement had been found “too severe” and had fallen out of use, the Court described the consequences of this forced isolation system.²⁶⁶

A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.²⁶⁷

Thus, this confinement would amount to severe treatment which causes disastrous results. In Mr. Padilla’s case, it is unknown how much contact he has with anyone, and the exact conditions of his confinement. However, what is known is that the executive is holding him pursuant to its policy to implement incommunicado detention, denying him access to lawyer, family or friend. It, therefore, qualifies as “punishment.”²⁶⁸

b. Is the Government Motivated by Goals Commonly Associated With Punishment in Detaining Mr. Padilla Incommunicado for Interrogation?

The reasons for Mr. Padilla’s confinement must be analyzed to determine if the government’s actions qualify as punishment. In pleadings to the Court, the government has stated that this type of isolated detention is necessary to facilitate the interrogation. It would be remarkable if such a justification would override the unmistakable character of this detention as punishment.²⁶⁹ Given that the Court has recognized isolation as a goal of punishment,²⁷⁰ the isolated detention qualifies as punishment.

time since being put into US custody more than two years ago (NPR radio broadcast, February 3, 2004), available at 2004 WL 57376475.

264. *Medley*, 134 U.S. at 169.

265. *Id.* at 168.

266. *Id.*

267. *Id.*

268. Isolation was also used in England under the High Commission Court to extract information. Under the High Commission established by Whitgift, if witnesses were not forthcoming with information, “the clause, all other ways and means you can devise” enabled the Commission to “make use of the rack, ‘little ease,’ . . . and the solitary dungeon.” JAMES HERON, *A SHORT HISTORY OF PURITANISM* 131 (T. and T. Clark 1908).

269. To put it another way, it would be akin to saying that the ends justify the means. Merely because torture produces statements does not mean that it is constitutionally permissible. “The

It has been reported that the government spokesperson when announcing the designation of another man as enemy combatant told reporters the decision to drop the criminal charges and designate the man as an enemy combatant was done “in an effort to deter terrorist attacks.”²⁷¹ Thus, deterrence appears to be factoring into the decision to detain enemy combatants.²⁷² Deterrence has always been considered a function of punishment.²⁷³ Thus, it appears that even by the government’s own statements, Mr. Padilla’s detention qualifies as punishment.

c. Was the Interrogation of Mr. Martinez While Being Treated for Injuries Punishment by Its Nature?

Mr. Martinez’s case does not involve detention, rather it involves interrogation after being shot by officers and during medical treatment.²⁷⁴ There is little doubt that Mr. Martinez was in pain during this interrogation. He is reported to have said things like, “I am dying,” and “I am choking.”²⁷⁵ Continuing to interrogate someone who is experiencing such pain could easily be described as severe treatment. Justice Stevens seems to agree with this assessment. In his dissent, he characterized this interrogation as torturous.²⁷⁶ Thus, by its nature it appears to be punishment.

d. Was the Government Motivated by Goals Commonly Associated With Punishment in Questioning Martinez During Medical Treatment?

The Court’s decision does not indicate what motivated the government to engage in this interrogation. It is difficult to see how such interrogation could further the goals of deterrence, isolation, and rehabilitation. If it was done for punitive reasons, however, it might qualify as punishment. Given

dominant theme of the Eighth Amendment debates was that the ends of the criminal laws cannot justify the use of measures of extreme cruelty to achieve them.” *Furman*, 408 U.S. at 392 (Burger, C. J., dissenting).

270. *Id.* at 343.

271. Susan Schmitt, *Qatari Man Designated An Enemy Combatant*, WASH. POST, June 24, 2003, at A01, available at 2003 WL 56501204. The author attempted to get tapes of this announcement exchange from both the government and reporters present at the time. She was told that the government did not permit taping of this announcement.

272. There have also been reports that in criminal cases brought in the war on terrorism, the government has “implicitly threatened” the use of the designation of someone as an enemy combatant in order to secure guilty pleas. See Michael Powell, *No Choice but Guilty; Lackawanna Case Highlights Legal Tilt*, WASH. POST, July 29, 2003, at A01, available at 2003 WL 56509164.

273. See *Trop*, 356 U.S. at 95.

274. The act of being shot is certainly “severe, rough or disastrous.” See *Farmer*, 511 U.S. at 854 (Blackmun, J., concurring). Indeed, in Mr. Martinez’s case, it led to his blinding and paralysis. *Chavez*, 123 S. Ct. at 1999.

275. *Chavez*, 123 S. Ct. at 1999.

276. *Id.* at 2010 (Stevens, J., dissenting).

the limited information available, it is difficult to meaningfully assess whether this prong has been met.

e. Conclusion on the Punishment Question

In Mr. Padilla's case, it seems clear that the interrogation qualifies as punishment, as contemplated by the Framers in adopting the Eighth Amendment, as both the nature of the action and the purpose behind it suggest it qualifies as punishment. It is less clear in the case of Mr. Martinez. While his interrogation seems by its nature to qualify as punishment, the purpose behind it is not clear. The next question is whether, even if punishment, the actions of the government in these cases were cruel and unusual as required by the Eighth Amendment.

B. The Term "Cruel and Unusual" as It Relates to Torturous Interrogation Under the Eighth Amendment.

The notion of what punishments are "cruel and unusual" within the meaning of the Eighth Amendment has been the subject of much discussion by jurists and scholars.²⁷⁷ However, there is no greater clarity as to the exact parameters of the limitation placed on the term "punishment" by the modifiers "cruel and unusual," than there is on what constitutes punishment.²⁷⁸ As the Court stated in *Trop*, "[t]he exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court."²⁷⁹

There has been considerable disagreement concerning the meaning of this phrase. The debate seems to center on two questions. First, there is the question of whether the phrase is backward looking, i.e., does it only proscribe those things which were considered "cruel and unusual" by the Framers, or is it forward looking, using as a litmus test the mores of contemporary society. Second, the debate looks at what it means to be both "cruel" and "unusual" as those words are used in the amendment.²⁸⁰

277. See, e.g., *Harmelin*, 501 U.S. at 979-85 (discussion of Justice Scalia).

278. In many cases, the Court does not specifically identify on which part of the clause it bases its analysis. Rather, the Court simply talks of the clause as a whole. Though not stated, the cases do suggest an emphasis on whether something is "cruel and unusual" and whether something qualifies as punishment in itself.

279. *Trop*, 356 U.S. at 99. Although *Trop* was decided in 1958, the intervening years have done little to clarify the scope of these words.

280. A great deal of scholarship and discussion in judicial opinions considers the question of proportionality, i.e. whether the punishment is proportional to the offense committed. See, e.g., *Harmelin*, 501 U.S. 957; *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003). However, this debate is only relevant to this discussion to the extent that it illuminates the answers to the primary questions of what constitutes cruel and unusual punishment within the meaning of the Eighth Amendment.

The first question seems to have been resolved.²⁸¹ In determining whether something is considered a violation of the “cruel and unusual” provisions of the Eighth Amendment, the Court has held that the clause is forward looking, not frozen in the Eighteenth century.²⁸² To answer whether something is cruel and unusual, the Court will consider the “evolving standards of decency that mark the progress of a maturing society.”²⁸³ Though the oft repeated phrase “evolving standards of decency” was first penned in the case of *Trop*²⁸⁴ the concept which it captured was first articulated by the Court much earlier, in *Weems v. United States*.²⁸⁵ *Weems*, a “venerable” case in Eighth Amendment history, marked the turning point in Eighth Amendment jurisprudence on this issue.²⁸⁶

Before *Weems*, the Court generally looked backward to determine what constituted cruel and unusual punishment, limiting its application to only those punishments which were considered sufficiently barbarous at the time of the adoption of the Amendment to warrant prohibition.²⁸⁷ The *Weems* Court eliminated this constraint on the Amendment.²⁸⁸ Additionally, the *Weems* Court “rejected the concept of a precise substantive scope [to the Amendment] because the adopters’ understanding was itself too indeterminate.”²⁸⁹ To demonstrate the indeterminate nature of the phrase, the Court discussed the competing concerns raised by the Framers of the Constitution in debating the Bill of Rights.²⁹⁰ The Court identified the competing views of Mr. Wilson expressed in the Pennsylvania debates on the ratification of the Constitution, and those of Patrick Henry in the Virginia debates.²⁹¹ As the Court noted, “Wilson, and those who thought like Wilson, felt sure that the spirit of liberty could be trusted.”²⁹² Thus, they did not believe a bill of rights was necessary and it might even present a

281. Though this issue appears to have been resolved, that resolution may be short lived given statements of Justices Scalia and Thomas in such cases as *Helling*, wherein they suggest that the only relevant inquiry in Eighth Amendment analysis is the specific meaning of each word as defined in legal dictionaries of the time of the enactment. *Helling v. McKinney*, 509 U.S. 25, 37-42 (1993) (Scalia & Thomas, JJ., dissenting).

282. *Weems v. United States*, 217 U.S. 349, 373 (1909).

283. *Trop*, 356 U.S. at 101 (“The words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

284. 356 U.S. 86 (1958).

285. 217 U.S. 349 (1910).

286. See Millen, *supra* note 27, at 789 (stating that *Weems* allowed courts “to decide what is ‘cruel and unusual,’ as the eighth amendment’s adopters intended, without the scope of review being bound by narrow historical constraints”).

287. See, e.g., *Wilkerson v. Utah*, 99 U.S. 130 (1878).

288. *Weems*, 217 U.S. at 373.

289. Millen, *supra* note 27, at 800.

290. *Id.*

291. *Weems*, 217 U.S. at 372.

292. *Id.*

problem in that it might suggest that the listed rights were the only rights protected.²⁹³ In contrast, Patrick Henry was the chief spokesman for many whose “predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse.”²⁹⁴

Ultimately, “[t]he Court considered Patrick Henry the paradigm for those who favored adoption of the eighth amendment.”²⁹⁵ Given that the Bill of Rights was adopted over the objections of those who held Wilson’s view, the Court resolved that it was the belief that “power might be tempted to cruelty,” which was the controlling sentiment in adopting the Eighth Amendment.²⁹⁶ The Court noted:

[I]f we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts’, or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. **We say ‘coercive cruelty,’ because there was more to be considered than the ordinary criminal laws.** Cruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister.²⁹⁷

Noting that for a principle to be vital, it “must be capable of wider application than the mischief which gave it birth,”²⁹⁸ the Court concluded that the sentence imposed in *Weems* violated the Eighth Amendment.²⁹⁹ Since *Weems*, courts and scholars have struggled to determine the appropriate test to be applied in assessing whether something violates the evolving standards of decency embedded in the Eighth Amendment.³⁰⁰ Though the “words of the Amendment are not precise” and the “scope is not static,” the Court has repeatedly stated that the “basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”³⁰¹ In

293. See Millen, *supra* note 27, at 801.

294. *Weems*, 217 U.S. at 372.

295. Millen, *supra* note 27, at 801.

296. *Weems*, 217 U.S. at 373.

297. *Id.* at 373 (emphasis added).

298. *Id.*

299. *Id.* The sentence at issue was one of *cadena temporal*, imposed under the Philippine Code. The Court in *Weems* was actually construing a provision of the Philippine Bill of Rights forbidding the infliction of cruel and unusual punishment. This provision was found to have been taken from the U.S. Constitution and had the same meaning. *Weems*, 217 U.S. at 367.

300. For example, in *Furman*, Justice Powell, writing in dissent pointed out that ‘cruel and unusual punishments’ and ‘due process of law’ are not “static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and to gain meaning through application to specific circumstances, many of which were not contemplated by their authors.” *Furman v. Georgia*, 408 U.S. 238, 420 (1972) (Powell, J., dissenting).

301. *Trop*, 356 U.S. at 100; see also *Furman*, 408 U.S. at 245, 281 (Brennan, J., concurring) (“But the Eighth Amendment is our insulation from our baser selves. The ‘cruel and unusual’ language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty and the return to the rack and other tortures would be possible in a given case.”) (“The primary principle, which I believe supplies the essential predicate for the application of the others, is

considering how the evolving standards of decency protect human dignity, the Court will look to the context of each situation to determine whether the clause has been violated.³⁰²

Given the contextual nature of the phrase, the Court has identified different tests to determine whether a particular punishment is cruel and unusual. For example, when the Court is analyzing the provisions of a sentencing statute, the test is objective, considering whether the terms of the punishment are cruel and unusual in light of the evolving standards of decency.³⁰³ In such cases, the Court does not require a showing of subjective intent on the part of the legislature to cause the harm.³⁰⁴

In cases involving allegations of misconduct by prison officials, the Court has identified different tests, based on the alleged harm involved. In these cases, the offending branch of government is different. Rather than complaining about the actions of the legislature, the administration of prisons falls under the executive branch.³⁰⁵ Additionally, often the complaint is not with a regulation or a statute per se, but rather with the actions of prison administrators that may or may not comply with administrative regulations.³⁰⁶

To address these contextual differences, “the Court has divided such post-confinement challenges into three broad categories: (1) isolated instances of mistreatment; (2) conditions of confinement; and (3) instances of ill-treatment during emergency situations.”³⁰⁷ For each of these instances, the Court has established different tests to determine whether the actions of the officials qualify as “cruel and unusual.”³⁰⁸

In conditions of confinement cases, the Court focuses on whether the condition resulted in the “unnecessary and wanton infliction of pain.”³⁰⁹ To determine whether this has occurred, the Court applies a two-pronged analysis.³¹⁰ First, the Court considers the objective component of an Eighth Amendment claim. This involves a determination of whether a particular

that a punishment must not by its severity by degrading to human dignity.”).

302. See *Hudson v. McMillian*, 503 U.S. 1, 5 (1992).

303. See, e.g., *Weems*, 217 U.S. at 349.

304. See *id.*

305. The application of this amendment to the actions of the executive branch harkens back to its English origins which were directed at the actions of the English quasi-equivalent of the executive, the King. See *Harmelin*, 501 U.S. at 974 (noting that the focus was on punishments inflicted “by the Crown (or the Crown’s judges).”).

306. As noted in *Furman*, “[j]udicial findings of impermissible cruelty have been limited, for the most part, to offensive punishments devised without specific authority by prison officials, not by legislatures.” *Furman*, 408 U.S. at 384 (Burger, C.J., dissenting) (citing *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968); *Wright v. McMann*, 387 F.2d 519 (2d Cir.1967)).

307. *Berger*, *supra* note 29, at 566.

308. *Id.*

309. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

310. See, e.g., *Estelle*, 429 U.S. at 102-03.

punishment offends “contemporary standards, examining objective indicia that reflect the public attitude toward a given sanction.”³¹¹ In so doing, the Court determines if the punishment violated the concept of the “dignity of man.”³¹² Secondly, the Court requires a showing of subjective intent, i.e., deliberate indifference,³¹³ on the part of prison officials, which the Court has defined as a reckless disregard for the harm caused.³¹⁴

Within the range of prison conditions cases, the Court has finessed this test to deal with the differences in the alleged harm because of the “contextual” nature of claims arising under the Eighth Amendment.³¹⁵ For example, when a prison official injures a prisoner during a prison emergency, the Court applies an even higher standard than the deliberate indifference standard mentioned above. In such cases, a prisoner must show that the prison official acted sadistically and maliciously, “for the very purpose of causing harm.”³¹⁶

While the Court has developed these fairly nuanced tests, very few opinions have specifically addressed the distinction between the words “cruel” and “unusual,” as used in the Eighth Amendment. *Trop* was one of the first to do so.³¹⁷ In *Trop*, the Court addressed whether the “word ‘unusual’ has any qualitative meaning different from ‘cruel’”³¹⁸ Without resolving the question, the Court noted that “if” the words differ in meaning, “the meaning [of ‘unusual’] should be the ordinary one, signifying something different from that which is generally done.”³¹⁹

Such analysis would be supported by the historical definitions of the terms. “The word ‘unusual,’ in common use from about 1630, meant ‘uncommon’ or ‘exceptional.’ . . . The word ‘cruel,’ while it meant ‘merciless’ in the seventeenth century, also had in common usage a less onerous significance as ‘severe’ or ‘rigorous.’”³²⁰ More recently, the Court stated that given the use of the word “unusual,” rather than “illegal,” the clause forbids “cruel methods of punishment that are not regularly or

311. Jeffrey L. Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 625 (2000) (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

312. *Id.* (citing *Gregg*, 428 U.S. at 173).

313. *Wilson v. Seiter*, 501 U.S. 294 (1991) (holding that in challenging conditions of confinement, a prisoner must show deliberate indifference on the part of prison officials).

314. *Farmer v. Brennan*, 511 U.S. 825 (1994) (holding that prison officials may be held liable for deliberate indifference by knowing the inmate “faces a substantial risk of serious harm” and disregarding the risk).

315. *See Hudson v. McMillian*, 503 U.S. 1, 8 (1992).

316. *Id.* at 6 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (1972)).

317. A distinction between these words was made much earlier by the Virginia Supreme Court in applying its version of the Eighth Amendment in the case of *Commonwealth v. Wyatt*, 1828 WL 860 *5 (Va. Gen. Ct. 1828) (“The punishment of offences by stripes is certainly odious, but cannot be said to be *unusual*.”).

318. *Trop*, 356 U.S. at 101 n.32.

319. *Id.*

320. LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS*, 1689, at 92 (Johns Hopkins U. Press 1981).

customarily employed.”³²¹ To determine whether a government action qualifies as unusual, the Court has looked to such things as international standards.³²² We will now explore how these tests might apply to the cases of *Padilla* and *Martinez*.

I. Are the Government’s Actions “Cruel and Unusual” in the Cases of Mr. Padilla and Mr. Martinez?

a. *Padilla*

In analyzing whether Mr. Padilla’s detention is “cruel and unusual” under the Eighth Amendment, an initial question that must be answered is which, if any, of the Court’s tests would be appropriate to use. It bears repeating that in order to fully determine the extent of objective harm, the government must open the doors to its conduct in detaining people as enemy combatants. As it stands, the only fact that is indisputable is that Mr. Padilla is being held incommunicado for the express purpose of establishing a “relationship” between him and his interrogators.³²³ Though there are a number of reasons to be concerned about what other interrogation conditions the government may be subjecting Mr. Padilla to, this author will confine her analysis to the known facts.³²⁴

321. *Harmelin*, 501 U.S. at 976. Commentators have stated that the inclusion of the word “unusual” in the amendment was due to sloppy draftsmanship. See, e.g., Granucci, *supra* note 36, at 855.

322. See *Wilkerson*, 99 U.S. at 134; *Atkins v. Virginia*, 536 U.S. 304 (2003).

323. See Jacoby Declaration, *supra* note 7.

324. These concerns arise given reports of the possible torture deaths of two Afghan men during interrogation at Bagram Air Base. Pathologists have concluded that these deaths were homicides and “blunt-force injuries” were found in both.” AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA, THREAT OF A BAD EXAMPLE: UNDERMINING INTERNATIONAL STANDARDS AS “WAR ON TERROR” DETENTIONS CONTINUE 12, available at <http://web.amnesty.org/library/Index/ENGAMR511142003> (last visited Feb. 2, 2004). These deaths are not the only reports of interrogation misconduct. It has been alleged that the government has been keeping prisoners “standing or kneeling for hours, in black hoods or spray-painted goggles.” Prisoners also have reportedly been “bound in awkward, painful positions,” and deprived of sleep and necessary medications. Paul Valley, *The Invisible*, THE INDEPENDENT, June 26, 2003, at 2; see also AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA, THREAT OF A BAD EXAMPLE: UNDERMINING INTERNATIONAL STANDARDS AS “WAR ON TERROR” DETENTIONS CONTINUE 13, available at <http://web.amnesty.org/library/Index/ENGAMR511142003> (last visited Feb. 2, 2004); Defendant’s Notice of Motion and Motion to Suppress Involuntary Statements and Proffer in Support of Motions to Suppress, *United States v. Lindh*, Crim. No. 02-37-A (2002), available at <http://news.findlaw.com/legalnews/us/terrorism/cases/index.html> (alleging “incommunicado detention, food, sleep and sensory deprivation, denial of a timely presentment before a magistrate; denial of clothing and proper medical care; humiliation; and failure to inform Mr. Lindh of his rights, to name just a few”). There is also reason for concern given what is known of the treatment of other people detained as material witnesses and those arrested for immigration offenses since 9/11, who have been kept in severe conditions. See U.S. DEPT. OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION

The purely objective analysis that is applied to those questions involving statutorily enacted sentences seems to be the test that should be applied to Mr. Padilla's situation. This test appears most appropriate because, though not done pursuant to specific legislative authorization,³²⁵ the confinement and interrogation are being done as the result of a deliberate executive policy.³²⁶ Therefore, it is more analogous to cases such as *Weems*, which focused on the validity of a statute, than *Whitley*, which focused on the actions of an individual prison official.³²⁷ This is consistent with the intent of the Framers, who specifically intended interrogation to be limited by the amendment, in much the same way that they intended legislatures to be limited in enacting post-conviction punishments.

However, because there is no statute that specifically authorizes this conduct, the Court may look to the prison conditions cases for guidance. Such reliance would be misplaced given the history of the Amendment and the difference between a prison conditions case and one involving incommunicado detention for the purpose of interrogation.³²⁸ The history of the clause and the definitions of the terms support the application of the Amendment to detention when used to secure confessions.³²⁹ As such, analysis of whether the punishment is cruel and unusual should depend not on the mindset of the person inflicting the harm, but rather on the character of the punishment involved.³³⁰ Under either test, however, the result in Mr. Padilla's case would likely be the same.

To determine the objective character of this punishment, the Court would focus on whether the punishment offends "contemporary standards, 'examining objective indicia that reflect the public attitude toward a given sanction.'"³³¹ This examination considers such things as the extent of the harm³³² and the national and international norms on such questions.³³³

CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003), available at <http://news.findlaw.com/wp/docs/ins/usdojig060203rpt.pdf>.

325. The executive does assert it is permitted to do so pursuant to the Authorization for Use of Military Force, Pub. L. No. 107-40 (2001).

326. *Padilla*, 233 F. Supp. 2d at 564 (noting that on June 9, 2002, the President signed an order designating Mr. Padilla as an enemy combatant). "[T]he June 9 Order directs Secretary Rumsfeld to detain Padilla." *Id.* at 572.

327. Compare *Weems v. United States*, 217 U.S. 349 (1909), with *Whitley v. Albers*, 475 U.S. 312 (1985).

328. It has been suggested that there is no basis for applying the Eighth Amendment to prison conditions cases, either in the history of the Amendment or under the definition of punishment. See *Helling*, 509 U.S. at 37-42 (Thomas, J., dissenting); Bukowski, *supra* note 130.

329. See *supra* Parts II & IV.

330. *Whitley*, 475 U.S. 312.

331. Kirchmeier, *supra* note 311, at 625 (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

332. *Hudson*, 503 U.S. at 9.

333. *Id.* (discussing "society's expectation").

The objective harm of solitary confinement³³⁴ has long been recognized.³³⁵ “[E]ven in 1842, people concerned about medical problems of prisoners wondered ‘does total isolation drive convicts insane?’”³³⁶ Since that time, the psychological effects of solitary confinement have been well documented.³³⁷ Literature dating back to the late 1800s documents such things as a “‘hallucinatory, paranoid, confusional psychosis’ with certain characteristic symptoms including, *inter alia*, hallucinations, agitation, and delusions.”³³⁸ A study on the “psychopathological effects of solitary confinement” conducted on prisoners in the Massachusetts Correctional Institute at Warpole, revealed that the “psychiatric symptoms . . . were strikingly consistent among the inmates.”³³⁹ “[I]nmates [in this study] experienced a variety of symptoms including generalized hypersensitivity to external stimuli, perceptual distortions, hallucinations, derealization experiences, anxiety, difficulties with thinking, concentration and memory,

334. We must look to scholarship and cases dealing with “solitary confinement” because the extent of Padilla’s contact with others is unknowable given the government’s insistence that not even his lawyer can have contact with him. Should the actual facts of his confinement become known, as well as their impact, such conditions would themselves need to be analyzed.

It is important to note that even though the Pentagon has agreed to permit Mr. Padilla’s lawyers to meet with him, the conditions that are likely to be placed on those meetings will prevent any meaningful oversight of the interrogation process. As an initial matter, it is unclear how long it will take to arrange these visits. It took approximately two months to work out the conditions for attorney visits with Yaser Esam Hamdi. Kevin Bohn, ‘Dirty Bomb’ Suspect Gets Conditional Lawyer Access, CNN.COM, February 11, 2004, at <http://www.cnn.com/2004/LAW/02/11/padilla.attorney.access/index.html>. Additionally, Mr. Hamdi’s lawyers were not permitted to talk to him about the conditions of his confinement or the way the government has been treating or interrogating him since his arrest. See Toni Loey, *Accused combatant allowed to see lawyers*, USA TODAY, February 4, 2004, available at 2004 WL 58550731; *All Things Considered, Analysis: US Citizen Yaser Esam Hamdi Allowed to Meet with His Lawyers for the first time since being put into US custody more than two years ago* (NPR radio broadcast, February 3, 2004), available at 2004 WL 57376475. Finally, because the government asserts that such visits are purely discretionary, it can prohibit those visits at any time.

335. See Nan D. Miller, Comment, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT’L L.J. 139, 155 (1995) (citations omitted).

336. *Id.* (citations omitted).

337. See *id.* In this instance, there is no way to know the extent to which Mr. Padilla is given contact with those ‘humans’ with whom he can have contact. Even assuming he meets with his lawyers, as noted above, it is unlikely he will be permitted to discuss the conditions of his confinement as the government has so limited discussions between Mr. Hamdi and his lawyers. Where, as here, the government prohibits the detainee’s counsel from obtaining information to present evidence on this question, it is reasonable that the government bear the burden of demonstrating that it is not utilizing the adverse psychological consequences of isolation in a way that violates norms of society.

338. See *id.* at 161 (citing Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, AM. J. OF PSYCH. (1983)), available at <http://www.prisoncentral/mental%20Illness/Grassian/Psych%20Effects%20of%20Solitary/Index.htm>; see also *In re Medley*, 134 U.S. 160, 168 (1890).

339. Stuart Grassian, M.D., *Psychopathological Effects of Solitary Confinement*, AM. J. OF PSYCH. (1983), available at <http://www.prisoncentral/mental%20Illness/Grassian/Psych%20Effects%20of%20Solitary/Index.htm>.

and impulse control.”³⁴⁰ Other researchers have stated that “[t]he evidence appears overwhelming that solitary confinement alone, even in the absence of physical brutality or unhygienic conditions, can produce emotional damage, declines in mental functioning and even the most extreme forms of psychopathology, such as depersonalization, hallucination and delusions.”³⁴¹ These effects are not limited to those inmates who have no contact with others.³⁴² They have been shown to occur even in prisoners who are confined in “small group isolation.”³⁴³

Thus, if these effects are present in Mr. Padilla or are sufficiently imminent for him,³⁴⁴ it would likely be recognizable as a violation of the Eighth Amendment. As Justice Blackmun has noted, the Eighth Amendment’s prohibition against the infliction of “unnecessary and wanton” pain necessarily includes psychological harm.³⁴⁵ “[T]he Framers also knew ‘that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. . . .’ Even though ‘[t]here may be involved no physical mistreatment, no primitive torture, severe mental pain may be inherent in the infliction of a particular punishment.’”³⁴⁶

This recognition within the United States of the impact of solitary confinement suggests that this treatment is “cruel” within the meaning of the Eighth Amendment. Though solitary confinement may not be unusual in that it does occur in the United States, its use in Mr. Padilla’s case appears to be unusual in its intent and implementation.³⁴⁷ Rarely, if ever, has the government asserted the power to indefinitely detain its citizens incommunicado for the express purposes of interrogation.

Additionally, solitary confinement is unusual under international norms.³⁴⁸ The Court has a long history of looking at the practices of other countries to determine whether our governmental practices are unusual.³⁴⁹ This practice was re-affirmed by the Court last year in *Atkins v. Virginia*.³⁵⁰

340. Miller, *supra* note 335, at 162 (citations omitted).

341. Thomas B. Benjamin & Kenneth Lux, *Solitary Confinement as Psychological Punishment*, 13 CAL. W. L. REV. 265, 268 (1977).

342. See *Madrid v. Gomez*, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995).

343. *Id.* “[S]imilar effects have been observed in hostages, prisoners of war, patients undergoing long-term immobilization in a hospital, and pilots flying long solo flights.” *Madrid*, 889 F. Supp. 2d at 1230.

344. *Helling v. McKinney*, 509 U.S. 25 (1993) (holding that a prisoner’s Eighth Amendment claim could be based on future harm).

345. *Hudson v. McMillian*, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring).

346. *Furman*, 408 U.S. 238, 271 (1972) (citations omitted).

347. It is being done to secure information and has been going on for over a year.

348. See generally Miller, *supra* note 335.

349. See, e.g., *Patterson v. Texas*, 536 U.S. 24 (2002) (Stevens, J., dissenting) (noting the international consensus against executing juveniles); *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., mem. regarding denial of certiorari) (noting the decisions of the highest courts of other countries); *Trop v. Dulles*, 356 U.S. 86 (1958) (noting that no other “civilized nations of the world” imposed the punishment at issue in that case). But see *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (stating that it is “American conceptions of decency that are dispositive.”).

350. 536 U.S. 304, 316 n.21 (“Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”).

Given both the extent of and intent in imposing this detention, and international norms which also suggest it is unusual, a court could conclude that Mr. Padilla's detention satisfies the objective requirement under the Eighth Amendment analysis.

Subjectively, it is clear that the executive branch is acting intentionally in detaining Mr. Padilla incommunicado. There is nothing inadvertent or reckless in its actions. The government has stated that it specifically intends, through its incommunicado detention of Mr. Padilla to create conditions that will result in dependence upon his interrogators and the eventual release of information.³⁵¹ The incommunicado detention is intended to break his will so as to obtain information from him.³⁵² The government appears to intend the harm that results from incommunicado detention to secure a benefit. Thus, subjectively the government is acting in a manner that satisfies the requirement that punishment be cruel and unusual. Because both the objective and subjective components of a claim appear to be present here, Mr. Padilla may well have a valid claim that his detention for interrogation is cruel and unusual punishment and thus a violation Eighth Amendment to the United States Constitution.

b. Martinez

In Martinez's case, there is even less information to analyze than exists in *Padilla*. Unlike Padilla, whom we know has been held incommunicado and interrogated for over fourteen months, for the express purposes of obtaining information and deterring terrorist attacks, we have very little information concerning the reasons for interrogating Martinez in the manner done. Given this dearth of information, we can raise the important questions concerning the Eighth Amendment analysis of Martinez's interrogation, but these questions would necessarily require further factual development to be answered.

From what is known, it is clear that Mr. Martinez's situation presents different challenges under the Eighth Amendment. Unlike Mr. Padilla's case, there was no objective indication that the police had a policy to shoot suspects and then interrogate them during medical treatment in order to facilitate the interrogation process. Instead, what is at issue are the actions of an individual officer who decided to interrogate a suspect who had been shot by law enforcement, while the suspect was being treated for those

351. In its request for reconsideration of the court's order allowing counsel access to Mr. Padilla, the government argued that such consultation would "jeopardize the two core purposes of detaining enemy combatants—gathering intelligence about the enemy, and preventing the detainee from aiding in any further attacks against America" That is, consultation would interfere with questioning, and present the opportunity to use counsel as intermediaries to send messages to others." *Padilla*, 243 F. Supp. 2d at 44.

352. *Id.*

injuries.³⁵³ As such, Mr. Martinez's situation is more analogous to cases arising in the prison context which look to the subjective intent of the actor in engaging in the allegedly offensive conduct, such as where prison officials' actions during an emergency were alleged to be a violation of the Eighth Amendment.³⁵⁴ Thus, the application of the subjective component seems appropriate for Mr. Martinez.

In this instance, the objective component appears to be met. As Justice Stevens stated, in his view, the interrogation "was the functional equivalent of an attempt to obtain an involuntary confession from a prisoner by torturous methods."³⁵⁵ Thus, if Justice Stevens' reaction is indicative of a societal reaction to this conduct, it is likely to be viewed as offensive to human dignity.

An analysis of the subjective component in this instance is likely to turn on evidence not presented in the Court's decision. Because there are no cases in the Eighth Amendment jurisprudence that are analogous to this, it is unclear which subjective standard the Court would adopt. The Court could find the conditions of confinement cases appropriate for comparison because it was the physical condition of Mr. Martinez in this instance that gave rise to the problem.³⁵⁶ In such an instance, the standard adopted would be the reckless disregard of the harm caused. If the Court determines, instead, that the malicious and sadistic standard should apply because the injuries arose as the result of the emergency situation,³⁵⁷ the standard would obviously be higher.

In any event, it is unclear what motivation the officer had in continuing to question Mr. Martinez when he was in such obvious pain. There could be any number of reasons for this, including that it was malicious and sadistic. However, because of the limited information on the subjective intent of the officer, whether Mr. Martinez's interrogation violated the "cruel and unusual" component of the Eighth Amendment is an open question.

It bears noting that in answering the claim raised by Martinez, i.e., whether the Fifth Amendment is offended by coercive interrogation, the Court held that "[t]he text of the Self-Incrimination Clause simply cannot support the . . . view that the *mere use of compulsive questioning*, without more, violates the Constitution."³⁵⁸ This is not true of the Eighth Amendment. The Eighth Amendment is offended by such questioning and the courts should acknowledge the history of the Amendment and analyze similar claims under its protection.

353. *Chavez v. Martinez*, 123 S. Ct. 1994, 2010-11 (2003).

354. *See, e.g., Whitley v. Albers*, 475 U.S. 312 (1986).

355. *Chavez*, 123 S. Ct. at 2010. (Stevens, J., concurring in part and dissenting in part). This conclusion is not surprising given Justice Stevens' view that objective standards should be applied to evaluate alleged violations of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 116 (1976) (Stevens, J., dissenting).

356. *See Farmer v. Brennan*, 511 U.S. 825 (1994).

357. *See Hudson v. McMillian*, 503 U.S. 1, 1 (1992).

358. *Chavez*, 123 S. Ct. at 2001 (emphasis added).

IV. CONCLUSION

Human dignity is at the core of the Eighth Amendment protection against cruel and unusual punishment. “[T]he Eighth Amendment is our insulation from our baser selves. The ‘cruel and unusual’ language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case.”³⁵⁹ As the above analysis demonstrates, the origins of the Eighth Amendment reveal that it was intended to protect against more than post conviction punishments. It is rooted not only in concerns about post-conviction punishment, but also in the fear that the government might use torture to extract information from its citizens. Given this concern, and the realities of cases such as those of Mr. Padilla and Mr. Martinez, the Eighth Amendment’s lost origins must be explored and applied to prevent the tortures of the past from being applied to the citizens of the present.

359. *Furman*, 408 U.S. at 345.

