

TRUTH BE TOLD: TRUTH SERUM AND ITS ROLE IN THE WAR ON TERROR

INTRODUCTION

It is a terrifying scenario: a terrorist group has acquired numerous canisters of deadly poison gas and has threatened to unleash these weapons of mass destruction upon American civilians. A valiant counter terrorism agent has apprehended an individual who possesses valuable information that could thwart the impending attack, but the individual is immune to traditional methods of “information extraction.” To facilitate a more effective interrogation, the counter terrorist agent transports the subject to agency headquarters and injects him with a chemical compound, which inhibits the subject’s psychological defenses and makes him more responsive to questioning. Fortunately, this scenario is the product of popular Hollywood fiction, and not a description of a real-life occurrence.¹

The events of September 11th fundamentally altered America’s awareness concerning the threat of devastating terrorist attacks. The al-Qaeda terrorists who perpetrated the September 11th attacks used commercial airliners as weapons,² but the specter of an attack employing radiological, chemical, or biological weapons looms over American cities.³ Furthermore, the likelihood that a nuclear, chemical, or biological attack will occur has increased due to the emergence of Iran and North Korea as nations that are currently producing, or could have the potential to produce, nuclear weapons.⁴ The level of insecurity and anxiety is only

¹ *24: Day 5: 5 pm–6 pm* (FOX television broadcast Mar. 6, 2006).

² THE 9/11 COMM’N REPORT: FINAL REPORT OF THE NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S. 1–14 (authorized ed. 2004) (describing how nineteen al-Qaeda terrorists hijacked four commercial airliners, carried out attacks against the World Trade Center and the Pentagon, and crashed Flight 93 in Pennsylvania).

³ *Goss Warns of Terror Threat to U.S.*, CNN.COM, Feb. 17, 2005, <http://www.cnn.com/2005/ALLPOLITICS/02/16/intelligence/threats/index.html?iref=newsearch> (quoting CIA Director Porter Goss that it “may be only a matter of time before al-Qaeda or other groups attempt to use chemical, biological, radiological, or nuclear weapons”); *Terror Attack ‘A Matter of Time,’* BBC.CO.UK, June 17, 2003, <http://news.bbc.co.uk/1/hi/uk/2997146.stm> (reporting that intelligence sources suggest it is only a matter of time before a terrorist group unleashes a chemical, biological, or radiological attack against a Western city).

⁴ See Graham Allison, Editorial, *Deterring Kim Jong Il*, WASH. POST, Oct. 27, 2006, at A23 (examining what course of action the U.S. would take if North Korea or Iran sold nuclear weapons to terrorist groups); Michael Barone, *Uneasy for a Reason*, U.S. NEWS & WORLD REP., Oct. 30, 2006, at 46 (arguing that Iran and North Korea have the potential to manufacture weapons of mass destruction and are both state sponsors of terrorism).

heightened amidst reports that al-Qaeda is actively seeking to acquire chemical and biological weapons.⁵

To combat the dangerous threat posed by terrorist organizations, the United States has engaged in a war on terrorism aimed at apprehending and detaining individuals suspected of engaging in or aiding terrorist activity.⁶ According to the latest accessible data, United States forces are currently holding 270 detainees at Guantanamo Bay, Cuba, in addition to the individuals detained at various military installations surrounding active combat zones.⁷ The interrogation of detainees has been vital to the War on Terror⁸ and according to President Bush “has given us information that has saved innocent lives by helping us stop new attacks—here in the United States and across the world.”⁹ Agreeing with this assertion, former defense secretary James R. Schlesinger stated, “It is essential in the war on terror that we have adequate intelligence and that we have effective interrogation.”¹⁰

Yet, to the chagrin of intelligence officials, some captured terrorists have not been willing to divulge information during interrogation.¹¹ In response, several columnists have argued that intelligence officials should consider the use of truth serum as a possible way of forcing suspected terrorists to divulge sensitive and possibly life saving information.¹² The former director of the CIA and FBI, William Webster,

⁵ *Pentagon: al-Qaeda Pursuing Bio Weapons*, USATODAY.COM, May 24, 2003, http://www.usatoday.com/news/washington/2003-05-23-us-wmd_x.htm.

⁶ Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

⁷ Press Release, U.S. Dep’t of Def., Detainee Transfer Announced (May 2, 2008), <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=11893>. Previous data indicates that between 2002 and 2006, United States forces detained as many as 500 individuals at Guantanamo Bay. The Office of the Sec’y of Def. and Joint Staff Reading Room, Complete list of individuals detained at Guantanamo Bay, Cuba from January 2002 through May 15, 2006, <http://www.dod.mil/pubs/foi/detainees/detaineesFOIarelease15May2006.pdf> (last visited May 2, 2008).

⁸ H.R. REP. NO. 109-175, at 81–82 (2005).

⁹ Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569, 1570–71 (Sept. 6, 2006).

¹⁰ Bradley Graham, *Abuse Probes’ Impact Concerns the Military; Chilling Effect on Operations is Cited*, WASH. POST, Aug. 29, 2004, at A20.

¹¹ Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST, Oct. 21, 2001, at A6 (describing how intelligence officials have become increasingly frustrated by the continued silence of several terror suspects).

¹² Jonathan Alter, *Time to Think About Torture: It’s a New World, and Survival May Well Require Old Techniques That Seemed Out of the Question*, NEWSWEEK, Nov. 5, 2001, at 45 (contemplating the use of truth serum in the War on Terror due to the change in conditions caused by September 11th); Paulette Cooper, Op-Ed., *Telling the Truth Isn’t Torture; But Should Terrorists Be Given Truth Serums*, WASH. TIMES, Aug. 15, 2002, at A19, available at 2002 WL 397782 (describing how author was administered sodium amytol to prove innocence in a criminal investigation, and arguing that interrogators could use the same procedure to gain valuable information from terrorists); Frank J. Murray,

acknowledged that the United States is justified in using truth serum to acquire information that “would save lives or prevent some catastrophic consequence.”¹³ Even one prominent legal scholar has argued that the administration of truth serum on a captured terrorist would be acceptable.¹⁴

At this point, it is unclear where truth serum fits into the government’s framework for the interrogation of captured terrorists.¹⁵ However, President Bush recently admitted that CIA officials have subjected some detainees to “an alternative set of procedures. These procedures were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations.”¹⁶ Recent media reports have described which tactics U.S. officials have used during interrogation in order to make captured terrorists divulge information.¹⁷ Although the techniques highlighted by the latest media reports do not include the use of truth serum, at least one detainee, Jose Padilla, has alleged that he “was given drugs against his will, believed to be some form of lysergic acid diethylamide (“LSD”) or phencyclidine (“PCP”), to act as a sort of

Using Truth Serum an Option in Probes; Court OK Likely to Keep Public Safe, WASH. TIMES, Nov. 8, 2001, at A1 (arguing that courts would likely permit the use of truth serum on captured terrorists on account of the life saving information that interrogators could obtain).

¹³ Ann Scott Tyson, *U.S. Task: Get Inside Head of Captured bin Laden Aide*, THE CHRISTIAN SCI. MONITOR, Apr. 4, 2002, at 1, 11.

¹⁴ Alan M. Dershowitz, Commentary, *Is There a Torturous Road to Justice?*, L.A. TIMES, Nov. 8, 2001, at 19, *quoted in* ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS* 247–49 (2002) (asserting that the use of truth serum would not violate the Constitution if an individual were granted “use immunity” but still refused to answer questions).

¹⁵ See Clarence Page, Editorial, *Wicked Ways to Make Them Talk*, JEWISH WORLD REV., Nov. 2, 2001, *available at* <http://www.newsandopinion.com/1101/page110201.asp> (stating that the FBI has denied reports that it has considered and used truth serum during the interrogation of captured terrorists); *60 Minutes II: Truth Serum: A Possible Weapon* (CBS television broadcast Apr. 23, 2003), *available at* <http://www.cbsnews.com/stories/2003/04/07/60II/main548221.shtml>. When asked if intelligence agents were using truth serum during the interrogation of al-Qaeda prisoners the former undersecretary of defense, Jed Babbin, stated, “I can’t say that there are A lot of other folks in and around the military are saying, “This is something we ought to at least try and determine if it can work reliably.” *Id.* (internal quotation marks omitted).

¹⁶ Remarks on the War on Terror, *supra* note 9, at 1571.

¹⁷ See, e.g., Michael Hirsh & Mark Hosenball, *The Politics of Torture*, NEWSWEEK, Sept. 25, 2006, at 32 (describing the technique known as waterboarding which “is an interrogation method that involves strapping a prisoner face up onto a table and pouring water into his nose . . . to create the sensation of drowning so that the panicked prisoner will talk”); Walter Pincus, *Waterboarding Historically Controversial*, WASH. POST, Oct. 5, 2006, at A17 (explaining how one senior intelligence official reported that waterboarding was used successfully against captured terrorist Khalid Sheik Mohammed to make him talk to interrogators); Sheryl Gay Stolberg, *Experts Say Bush’s Goal in Terrorism Bill Is Latitude for Interrogators’ Methods*, N.Y. TIMES, Sept. 19, 2006, at 20 (stating that techniques used by interrogators include sleep deprivation and “playing ear-splittingly loud music”).

truth serum during his interrogations.”¹⁸ Indeed, the use of truth drugs persists as an important legal and social issue, but the question as to whether truth drugs are permitted or prohibited has not yet been resolved. Government agencies deny claims that they administer truth drugs during interrogations,¹⁹ while at the same time they urge that intelligence officials should use truth serum on captured terrorists.²⁰ Although recognized as invasive, the use of truth serum is deemed to fall short of the level requisite for torture.²¹ In fact, in his discussion concerning truth serum and torture, Professor Dershowitz advocates for the use of truth serum before discussing the idea of employing physical torture to force a subject to respond to questioning.²² Similarly, *Newsweek* columnist, Jonathan Alter, remarked that “[s]hort of physical torture, there’s always sodium pentothal (‘truth serum’). The FBI is eager to try it, and deserves the chance.”²³

Additionally, individuals who have analyzed whether the use of truth serum constitutes torture have arrived at conflicting results.²⁴ The lack of consensus within the legal community and the conflicting interpretations of the applicable United States torture laws led John Yoo, former deputy assistant attorney general in the Justice Department’s Office of Legal Counsel, to remark “a much-fabled truth serum that did not cause pain . . . might be legal.”²⁵

As the opinions of the aforementioned authors indicate, whether the use of truth serum during interrogation constitutes torture is not a black and white issue that is easily resolved, but instead resides in a gray area. This Note analyzes whether the use of truth serum constitutes torture under the applicable United States provisions that prohibit torture. Part I explores the concept of truth serum, detailing the history

¹⁸ Defendant’s Motion to Dismiss For Outrageous Government Conduct at 5, *United States v. Padilla*, No. 04-60001 (S.D. Fla. Oct. 4, 2006).

¹⁹ Page, *supra* note 15.

²⁰ *Use of Truth Serum Urged*, CHI. TRIB., Apr. 26, 2002, § 1, at 2.

²¹ See Dershowitz, *supra* note 14.

²² *Id.*

²³ Alter, *supra* note 12.

²⁴ See Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 237–39 (2004) (arguing that the use of truth serum, which is minimally invasive and creates virtually no pain or discomfort, does not constitute torture); Jason R. Odeshoo, Note, *Truth or Dare?: Terrorism and “Truth Serum” in the Post-9/11 World*, 57 STAN. L. REV. 209, 253 (2004) (arguing that the use of truth serum during interrogation of terror suspects is not absolutely prohibited under United States and international law). *But see* Linda M. Keller, *Is Truth Serum Torture?*, 20 AM. U. INT’L L. REV. 521, 602–03 (2005) (arguing that the threatened administration of truth serum is torture, but the actual application of truth serum is not, but should be considered torture).

²⁵ JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 176 (2006).

behind the quest for an effective truth serum, describing which substances have been used by individuals as a possible truth serum, and discussing the possibility that a new and more effective truth serum may exist. Part II analyzes the existing domestic laws that prohibit torture and how the courts have interpreted those provisions in determining what conduct rises to the level of torture. Part III turns to the question of truth serum and analyzes whether the Military Commissions Act of 2006 prohibits its use as a form of torture. Finally, Part IV examines several aspects of constitutional law, specifically, what invasive procedures the Constitution permits and prohibits.

I. TRUTH SERUM: HISTORY, REALTY, AND POPULAR CULTURE

When one refers to truth serum, one probably imagines a chemical substance that bends the mind of the subject to the will of the interrogator and compels the affected individual to tell the truth. This conception of truth serum is incorrect in several aspects. First, there is no substance known as a truth serum, but instead that term has been applied to a group of barbiturate drugs, most notably sodium pentothal, sodium amytal, and scopolamine.²⁶ Second, contrary to popular belief, the name truth serum is a misnomer since truth serum is not a serum and does not compel the subject to respond to questions truthfully.²⁷ Instead, truth drugs lower inhibitions and increase talkativeness.²⁸ Although references to truth serum in Hollywood movies abound, any reference is usually to one of the barbiturate drugs commonly called truth serum.²⁹

A. Truth Serum: A Brief History

In the beginning of the twentieth century, German doctors first discovered the truth eliciting properties of barbiturate drugs when they administered a combination of scopolamine and morphine to young mothers to reduce labor pains during childbirth.³⁰ During these procedures “it was noted that one of the after effects of the anesthetics was that patients made candid and uninhibited remarks about their personal life or about others which they normally would not have

²⁶ Andre A. Moenssens, *Narcoanalysis in Law Enforcement*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 453, 453 (1961).

²⁷ See John M. Macdonald, *Truth Serum*, 46 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 259, 259 (1955).

²⁸ Scott Martelle, *The Truth About Truth Serum: It May Make for Loose Lips but Not Necessarily Elicit Honest Answers*, L.A. TIMES, Nov. 5, 2001, at E1.

²⁹ See, e.g., MEET THE FOCKERS (Universal Studios 2004); RED DRAGON (Universal Studios 2002); TRUE LIES (Twentieth Century-Fox 1994).

³⁰ See Moenssens, *supra* note 26.

revealed.”³¹ In 1922, Dr. Robert House, considered by many to be the father of truth serum, was the first to use truth serum in a criminal context, a procedure commonly referred to as narcoanalysis.³² Dr. House administered scopolamine to two suspected criminals and asked them a series of questions to determine their guilt or innocence.³³ Based on this interview, Dr. House concluded that the two individuals were innocent.³⁴

Drawing upon the use of truth serum in law enforcement, United States intelligence agencies began actively pursuing an effective truth serum. In 1942, the Office of Strategic Services, the predecessor to the CIA, was directed to develop a chemical substance that would breach the psychological defenses of enemy spies and POW’s and compel them to disclose intelligence information.³⁵ The U.S. military first attempted to manufacture an effective truth serum in 1947 when it initiated project Chatter, which included laboratory experiments entailing the administration of scopolamine and mescaline to humans and animals.³⁶

The first CIA foray into the development of an effective truth drug, conducted under the name project BLUEBIRD, commenced in 1950.³⁷ One objective of the project was to investigate the potential of extracting information from individuals via specialized interrogation techniques.³⁸ In 1951, project BLUEBIRD was renamed project ARTICHOKE, and experiments included the use of sodium pentothal and hypnosis during interrogation of subjects.³⁹ Project ARTICHOKE was reportedly abandoned in 1956, but evidence suggests that officials conducted experiments for several more years.⁴⁰ In 1953, the CIA launched its most comprehensive program in the quest to develop an effective interrogational truth serum.⁴¹ Known as MKULTRA, the program’s

³¹ *Id.* (citing Gilbert Geis, *In Scopolamine Veritas: The Early History of Drug-Induced Statements*, 50 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347, 347–57 (1959)).

³² *Id.*

³³ George H. Dession et al., *Drug-Induced Revelation and Criminal Investigation*, 62 YALE L.J. 315, 318 (1953).

³⁴ *Id.*

³⁵ Martin A. Lee, *Truth Serums & Torture*, THE CONSORTIUM, June 11, 2002, <http://alternet.org/story/13341/>; see also, Odeshoo, *supra* note 24, at 217–21 (describing how the U.S. government spent over twenty years attempting to manufacture an effective truth serum).

³⁶ *Project MKULTRA, The CIA’s Program of Research in Behavioral Modification: J. Hearings Before the Select Comm. on Intelligence and the Subcomm. on Health and Scientific Research of the S. Comm. on Human Resources*, 95th Cong. 67, 70–72 (1977) [hereinafter *MKULTRA Hearings*].

³⁷ *Id.* at 67.

³⁸ *Id.*

³⁹ *Id.* at 67–68.

⁴⁰ *Id.* at 68.

⁴¹ *Id.* at 69–70.

objective was to study the effect of biological and chemical agents in altering human behavior.⁴² The second phase of the program involved the testing of designated substances on voluntary human subjects.⁴³ The CIA implemented the second phase of MKULTRA by giving LSD to prisoners in order to observe the effect the drug had on the subjects.⁴⁴ Due to reports that LSD had been administered to non-voluntary human subjects, the MKULTRA program was eventually abandoned in the late 1960s.⁴⁵

B. How Truth Serum Works

Thiopental Sodium, otherwise known as sodium pentothal, is probably the drug most commonly referred to as truth serum. Sodium pentothal is “an ultra-short-acting barbiturate, administered . . . to produce general anesthesia of brief duration”⁴⁶ When used as a truth serum “[t]he drug is injected slowly into a vein in order to induce a relaxed state of mind in which the suspect becomes more talkative and has less emotional control.”⁴⁷ Moreover, sodium pentothal and sodium amytol “act as a central nervous system depressant, primarily on the cerebral cortex—the highest level of the nervous system—and on the diencephalon or ‘between-brain,’ and their pathways.”⁴⁸ As a result, truth serum tends to make an individual become more loquacious while at the same time reducing psychological inhibitions.⁴⁹ Furthermore, subjects injected with truth serum experience reduced levels of fear and anxiety.⁵⁰

Interestingly, the mental state produced in an individual injected with truth serum is similar to the mental state produced after the consumption of alcohol.⁵¹ Knowledge concerning the truth-telling properties associated with the imbibing of alcoholic beverages is not a novel discovery. The ancient Romans understood that the consumption of wine had the secondary effect of loosening the tongue, and making the

⁴² *Id.* at 69.

⁴³ *Id.* at 70–71.

⁴⁴ *Id.* at 71.

⁴⁵ *Id.* at 72.

⁴⁶ DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 1903 (30th ed. 2003).

⁴⁷ Macdonald, *supra* note 27.

⁴⁸ Dession, *supra* note 33, at 317.

⁴⁹ See Martelle, *supra* note 28. Martelle explains that barbiturates, like sodium pentothal, “help channels in the neurotransmitters stay open longer, and in the ensuing flow of gamma-amniobutyric acid, or GABA, personal inhibitions fall away.” *Id.*

⁵⁰ Dession, *supra* note 33, at 317.

⁵¹ Macdonald, *supra* note 27.

unwilling individual more willing to disclose sensitive secrets.⁵² Due to this similarity, the use of traditional truth drugs has been criticized because “[t]he intravenous injection of a drug by a physician in a hospital may appear more scientific than the drinking of large amounts of bourbon in a tavern, but the end results displayed in the subject’s speech may be no more reliable.”⁵³ Despite claims that truth serum is ineffective, reports indicate that skilled interrogators have been able to obtain truthful information when interrogating individuals under the influence of truth serum.⁵⁴

C. Truth Serum of the Twenty-First Century

What if, however, a more reliable and effective truth serum were developed? No reports have surfaced to date indicating that a new truth serum exists⁵⁵ Yet, even if a more effective truth serum does not yet exist, in light of recent scientific discoveries it may only be a matter of time before a new and more effective truth serum is created. Using enhanced brain mapping technology, scientists at the University of Pennsylvania have discovered that truth telling involves different neurological processes than telling a lie.⁵⁶ The researchers discovered that telling a lie activates the areas of the brain corresponding to inhibition, memory, and fabrication which were different than the areas involved in truth-telling.⁵⁷ In light of this research, a new and more effective truth serum may exist or may be developed because “scientific discoveries in biology . . . have led to the development of new

⁵² See PLINY, 4 NATURAL HISTORY, book XIV, 278 (H. Rackham trans., Harvard Univ. Press 1968) (1945). The exact Latin phrase “volgoque veritas iam attributa vino est” translates to “and truth has come to be proverbially credited to wine.” *Id.* However, the more familiar form of this proverb is rendered as “in vino veritas,” which means “in wine there is truth.” *Id.* at 278 n.a; C.W. Muehlberger, *Interrogation Under Drug Influence: The So-Called “Truth Serum” Technique*, 42 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 513, 513 (1951).

⁵³ Macdonald, *supra* note 27.

⁵⁴ See generally Muehlberger, *supra* note 52.

⁵⁵ See Martelle, *supra* note 28, at E4. When asked about the existence of a government developed truth serum one professor of psychiatry responded “[w]hether some secret CIA lab has something, I have no idea. They don’t share with me their pharmacological stuff.” *Id.*

⁵⁶ Daniel D. Langleben et al., *Telling the Truth From Lie in Individual Subjects With Fast Event-Related fMRI*, 26 HUMAN BRAIN MAPPING 262, 269 (2005), available at http://repository.upenn.edu/cgi/viewcontent.cgi?article=1012&context=neuroethics_pubs (noting that one significant way in which telling a lie differs from telling the truth is the person must first prevent themselves from answering truthfully before concocting a lie).

⁵⁷ *Id.* at 271.

drugs”⁵⁸ As discussed earlier, traditional truth drugs have the effect of lowering personal inhibitions and thus increase the likelihood of a truthful response.⁵⁹ Perhaps a new and more effective truth serum would specifically target the areas of the brain involved in telling a lie; a cocktail of sodium pentothal or sodium amytol combined with other chemical substances that suppress the areas of the brain involved in telling a lie could function as a powerful and effective truth serum. This new truth serum would retain the pain killing properties and relaxing effects of traditional barbiturate drugs, but would also have the additional effect of affecting the areas of the brain involved with telling a lie. Indeed, if this substance does or will exist in the future, it would be a powerful weapon to use in interrogations in the War on Terror. But would the use of such a substance constitute torture?

II. UNITED STATES OBLIGATIONS CONCERNING TORTURE

Despite familiarity with the word torture, a precise definition of the term torture is difficult to articulate.⁶⁰ The United States’s domestic legislation dealing with torture represents a crazy quilt of statutory enactments, which were enacted pursuant to obligations arising under international treaties and agreements. The most prominent and respected international agreements are the Geneva Convention Relative to the Treatment of Prisoners of War (“Geneva Convention”),⁶¹ and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment (“CAT”).⁶²

A. *United States Torture Statutes*

To implement the provisions of CAT domestically, the United States enacted legislation designed to fulfill its obligations and provide a definition of torture.⁶³ Section 2340 defines torture as “an act committed by a person acting under the color of law specifically intended to inflict

⁵⁸ See generally Roger N. Beachy, Editorial, *IP Policies and Serving the Public*, 299 SCIENCE 473 (2003) (beginning discussion with proposition that many scientific discoveries result in the development of new drugs).

⁵⁹ See Martelle, *supra* note 28.

⁶⁰ See Strauss, *supra* note 24, at 208–09 (stating that confusion over what conduct amounts to torture stems from sensational media reports and judicial decisions that describe a wide array of conduct as torture).

⁶¹ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (consented to by the U.S. Senate on July 6, 1955, with reservations) [hereinafter Geneva Convention].

⁶² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 (1988) [hereinafter CAT].

⁶³ See 18 U.S.C. § 2340 (2000) (CAT, not a self-executing treaty, required the U.S. to implement the provisions of the treaty through enacting legislation.).

severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control⁶⁴ With a few exceptions, the definition of torture spelled out in section 2340 resembles the definition of torture in the text of the CAT treaty.⁶⁵ However, unlike CAT, section 2340 elaborates further as to what constitutes severe mental harm. The U.S. legislation defines severe mental pain or suffering as:

the prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality⁶⁶

If the use of a truth serum that interacted with an individual's brain chemistry were administered that made him or her divulge the truth, and resulted in no pain, it may nonetheless constitute torture under the definition of severe mental harm laid out in subsection (B). However, the effects of the truth serum would have to result in a "prolonged" mental harm.

Furthermore, in light of the Supreme Court's recent ruling in *Hamdan v. Rumsfeld*,⁶⁷ Congress recently re-examined the issue of torture as it relates to terrorists apprehended and detained by U.S. forces fighting in the War on Terror. Responding to reports that U.S. officials had engaged in interrogation techniques of questionable legality,⁶⁸ Congress enacted the Military Commissions Act of 2006 ("MCA").⁶⁹ The MCA empowers the President to issue executive orders which "interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations

⁶⁴ *Id.* § 2340(1).

⁶⁵ Compare CAT, *supra* note 62, at 3–4 at; 1465 U.N.T.S. at 113–14 (requiring that the infliction of physical or mental harm be for the purpose of acquiring information or securing a confession and be carried out with authority or under color of law), *with* 18 U.S.C. § 2340(1) (requiring only that severe physical or mental pain be inflicted without requirement of a specific purpose).

⁶⁶ 18 U.S.C. § 2340(2).

⁶⁷ 126 S. Ct. 2749, 2755 (2006) (holding that the provisions of Common Article 3 of the Geneva Convention apply to enemy detainees captured during the War on Terror).

⁶⁸ See Hirsh & Hosenball, *supra* note 17.

⁶⁹ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 [hereinafter MCA].

which are not grave breaches of the Geneva Conventions.”⁷⁰ The President's interpretative authority under the MCA allows the President to construe the provisions of Article 3 of the Geneva Convention, which vaguely proscribes "violence to life and person . . . cruel treatment and torture.”⁷¹ Furthermore, the MCA clarifies what conduct would rise to the level of torture, and in doing so gives guidance to interrogators who were not cognizant of the types of conduct that were prohibited.⁷² The MCA defines torture as:

The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.⁷³

The definition of torture provided in the MCA differs from the definition of torture stated in section 2340 in two key respects. First, an individual violates section 2340 if the individual actually commits an act that causes severe physical or mental pain or suffering; but an individual commits torture under the MCA if they commit, conspire, or attempt to commit an act that results in severe physical or mental pain or suffering.⁷⁴ Second, the definition of torture spelled out in the MCA requires that the severe physical or mental pain or suffering be “for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.”⁷⁵ The definition of torture in Section 2340 omits this requirement.⁷⁶ Nevertheless, despite these differences, the drafters of the MCA adopted the same definition for “severe mental pain or suffering” as the one established in Section 2340(2).⁷⁷ Therefore, conduct

⁷⁰ MCA, § 6(a)(1)(3)(A), 120 Stat. at 2632.

⁷¹ See Geneva Convention, *supra* note 61, at 3320, 75 U.N.T.S. at 138.

⁷² See Warren Richey, *Torture of Detainees? No. 'Coercion'? It Depends.*, THE CHRISTIAN SCI. MONITOR, Oct. 19, 2006, at 2 (explaining that the MCA establishes procedures for the interrogation of enemy combatants in order to comply with the provisions of the Geneva Convention); Scott Shane & Adam Liptak, *Shifting Power to a President: Bill Creates Legal Basis for Policy on Detainees*, N.Y. TIMES, Sept. 30, 2006, at A1, A11 (stating that the MCA elucidates U.S. obligations under Article 3 of the Geneva Conventions by allowing the President to issue authoritative interpretations of select provisions of the Geneva Conventions).

⁷³ MCA § 6(d)(1)(A), 120 Stat. at 2633 (codified as amended at 18 U.S.C. § 2441).

⁷⁴ Compare 18 U.S.C. § 2340(1) (2000), with MCA § 6 (d)(1)(A), 120 Stat. at 2633 (codified as amended at 18 U.S.C. § 2441).

⁷⁵ MCA, § 6(d)(1)(A), 120 Stat. at 2633 (codified as amended at 18 U.S.C. § 2441 (Oct. 17, 2006)).

⁷⁶ 18 U.S.C. § 2340(1).

⁷⁷ MCA § 6(d)(2)(A), 120 Stat. at 2634 (codified as amended at 18 U.S.C. § 2441).

that results in severe mental harm under Section 2340(2) also constitutes a violation under the provisions of the MCA because both statutes have provisions providing identical definitions.⁷⁸ If the use of truth serum violated the United States CAT torture statutes found in section 2340, then it would also violate the MCA and vice versa.

B. Torture as Understood by United States Courts

Before analyzing whether the use of truth serum constitutes torture, it is helpful to examine how U.S. courts have understood torture in construing U.S. torture statutes. To date, no court has provided an extensive interpretation of U.S. torture legislation. Instead, courts have opted to analyze torture claims on a case-by-case basis and usually base their decision on the gruesomeness, intensity, or shock value of the treatment alleged. As one court stated, the term torture is reserved for “extreme, deliberate and unusually cruel practices”⁷⁹ The court went on to state that examples of torture include “sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.”⁸⁰ Although the list provided by the court is by no means exhaustive, it does indicate that “only acts of a certain gravity shall be considered to constitute torture.”⁸¹ As a result, under this conception of torture “[n]ot all police brutality, not every instance of excessive force used against prisoners, is torture”⁸² Thus, for certain conduct to rise to the level of torture it must meet a high threshold in terms of intensity, brutality, and pain.

For instance, in *Price v. Socialist People’s Libyan Arab Jamahiriya* the plaintiffs alleged that Libyan officials tortured them by beating and clubbing them with weapons while they were held hostage.⁸³ The court determined that these allegations were insufficient to establish a claim of torture because the plaintiffs omitted details relating to the frequency,

⁷⁸ I will analyze whether the use of truth serum constitutes torture under the provisions of the MCA because it was, arguably, enacted in response to questions concerning the interrogation of captured terror suspects. Additionally, the MCA interprets the provisions of Article 3 of the Geneva Convention, which now apply to terror suspects detained by U.S. military forces.

⁷⁹ *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002) (quoting S. EXEC. REP. NO. 101-30, at 14 (1990)).

⁸⁰ *Id.* at 92–93.

⁸¹ *Id.* at 92 (quoting J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE 117 (1988)).

⁸² *Id.* at 93.

⁸³ *Id.*

duration, and intensity of the beatings.⁸⁴ On remand, however, the court found that the plaintiffs did allege sufficient facts to plead a valid claim for mental torture.⁸⁵ The plaintiffs' amended complaint included allegations that they were forced to witness the beatings of several prisoners and were told they would receive similar treatment if they did not confess to being American spies.⁸⁶ The court indicated that the facts alleged in the amended complaint satisfied the high standard required to establish a claim for mental torture.⁸⁷ Thus, under the court's analysis in *Price*, claims that one witnessed the severe beating of another and was threatened with similar treatment are sufficient to at least establish a claim for mental torture. Similarly, in *Doe v. Qi*, the court held that the plaintiff suffered physical torture after she was kicked, beaten, knocked unconscious, and subjected to having liquid pumped into her body through a tube inserted in her nostrils.⁸⁸ In addition, the plaintiff claimed that prison officials subjected her to mental torture by forcing her to watch the sexual assault of a close friend.⁸⁹ Courts have also acknowledged that rape and sexual assault or the threatened rape of either oneself or another can constitute mental torture because such offenses represent extreme violations of dignity and humanity.⁹⁰

Several courts have also found credible claims of prolonged mental pain and suffering when individuals survived harrowing experiences in which their captors threatened them with death.⁹¹ In one particular case,

⁸⁴ *Id.* at 93–94 (holding that the claim under the Foreign Sovereign Immunities Act was not specific enough to determine whether the facts alleged amounted to police brutality or torture).

⁸⁵ *Price v. Socialist People's Libyan Arab Jamahiriya*, 274 F. Supp. 2d 20, 25 (D.D.C. 2003).

⁸⁶ *Id.* (stating that one prisoner was beaten until he was unconscious; a Libyan journalist was beaten because he had spoken to and assisted the plaintiffs; and another prisoner was beaten to death with a hammer because he shared food with the plaintiffs).

⁸⁷ *Id.*

⁸⁸ 349 F. Supp. 2d 1258, 1317 (N.D. Cal. 2004) (analyzing claim under the Torture Victim's Protection Act, whose provisions are very similar to the torture provisions found in the MCA and 18 U.S.C. § 2340).

⁸⁹ *Id.* at 1318 (describing how the plaintiff was subjected to mental torture after watching the physical and sexual assault of her friend and watching her friend's assaulters refuse medical treatment after her friend started hemorrhaging).

⁹⁰ *Namo v. Gonzales*, 401 F.3d 453, 455 (6th Cir. 2005) (explaining how the plaintiff was forced to witness the rape of a woman and threatened with the rape of his wife during his two week detention); *see also* *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003) (stating that the emotional effects of rape can be severe and such conduct is recognized as activity prohibited as torture under the law of nations).

⁹¹ *See* *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242, 1252 (11th Cir. 2005) (explaining how several individuals were held captive and told they would soon be killed); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1333–40 (N.D. Ga. 2002) (describing how Serbian police officers physically assaulted four Bosnian prisoners and threatened them with death in a game-like fashion).

seven Guatemalan citizens were threatened with death and recorded messages on a video camera because they were told they would be “giving their last messages.”⁹² The seven individuals were also photographed because one guard indicated that he wanted a picture of their faces before they were killed.⁹³ Based on those allegations, the court concluded that the allegations could constitute torture based upon intentionally inflicted emotional pain and suffering.⁹⁴ In another case, the individuals were also threatened with imminent death as police officials forced them to play a game of Russian roulette.⁹⁵

In both cases, the alleged conduct rose to a high enough level to constitute both physical and mental torture. Moreover, in *Mehinovic* the court indicated that the psychological after-effects from which the victims suffered satisfied the requirements of a long-term mental harm.⁹⁶ In contrast, other courts have not found the requisite mental torture in other cases for a variety of reasons.⁹⁷ For example, in *Jo v. Gonzales* the court stressed that although the definition of torture includes both physical and mental suffering, the definition of mental suffering encompasses suffering that results from conduct towards a person and does not encompass mental suffering that arises from the anguish caused by the destruction of a home or personal property.⁹⁸ Thus, one is able to conclude that the mental harm accompanying extreme physical abuse manifested by “anxiety, flashbacks, and nightmares” is sufficient to constitute torture,⁹⁹ but the mental harm caused by the deprivation or destruction of personal property is insufficient.¹⁰⁰

Although illustrative, these cases provide little insight in determining whether the use of truth serum is torture. First, the claims set forth in these cases allege torture under every statutory provision except the provision defining severe mental pain or suffering as the mental harm caused by the administration or threatened administration

⁹² *Aldana*, 416 F.3d at 1252 (internal quotation marks omitted).

⁹³ *Id.*

⁹⁴ *Id.* at 1252–53.

⁹⁵ *Mehinovic*, 198 F. Supp. 2d at 1346. In *Mehinovic*, the victims also testified that they feared they would be killed during the beatings. *Id.*

⁹⁶ *See id.* at 1333–40 (specifying that all four victims suffered from nightmares, anxiety, insomnia, and flashbacks).

⁹⁷ *See, e.g., Jo v. Gonzales*, 458 F.3d 104, 109 (2d Cir. 2006) (claiming mental harm and pain ensued from the destruction of property); *see also Dushi v. Gonzales*, 152 F. App'x 460, 469 (6th Cir. 2005) (stating that rough and abusive treatment at the hands of police officials was not sufficient to constitute torture).

⁹⁸ 458 F.3d at 109.

⁹⁹ *See Mehinovic*, 198 F. Supp. 2d at 1333–40.

¹⁰⁰ *Jo*, 458 F.3d at 109.

of mind-altering substances.¹⁰¹ The claims in *Mehinovic* alleged physical torture at the hands of police officials,¹⁰² while the claims in *Price*, *Aldana*, and *Namo* alleged mental torture resulting from conduct that satisfies the definitions of severe mental pain or suffering spelled out in 18 U.S.C. §§ 2340(2)(A), (C), and (D) respectively.¹⁰³ As of this date, only one court has analyzed a claim where the complainant alleged mental torture resulting from the administration or threatened administration of mind-altering substances.¹⁰⁴ Second, one could argue that the use of truth serum does not rise to the level of the shocking, outrageous, and brutal conduct described in these cases. The use of truth serum would not result in the subject feeling any pain; on the contrary, truth serum would diminish pain and ease tension and anxiety.¹⁰⁵ Moreover, the physical intrusion involved with the administration of truth serum does not resemble the physical intrusion involved with rape or sexual assault.¹⁰⁶ Truth serum, including an advanced version of the drug, is designed to be fast acting and the effects of the drug would dissipate quickly. The subject injected with such a substance would not lose complete control or become unaware of surrounding events, but would respond to questions truthfully while under the influence of the drug. As one commentator stated, if such a substance did exist it “might be legal.”¹⁰⁷

¹⁰¹ See 18 U.S.C. § 2340(2)(B) (2000).

¹⁰² 198 F. Supp. 2d at 1333–40.

¹⁰³ See *Namo v. Gonzales*, 401 F.3d 453, 455 (6th Cir. 2005) (threatening individual with the rape of his wife if he did not cooperate with Iraqi authorities); *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242, 1252 (11th Cir. 2005) (threatening captives with imminent death); *Price v. Socialist People’s Libyan Arab Jamahiriya*, 274 F. Supp. 2d 20, 25 (D.D.C. 2003) (threatening captives with similar abuse as that suffered by other prisoners).

¹⁰⁴ *Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601–02 (E.D. Pa. 2003) (alleging severe mental pain and suffering caused by the forced consumption of alcohol, marijuana, and cocaine). Another case making such allegations is still within the course of litigation. See Motion of Defendant to Dismiss For Outrageous Government Conduct at 18, *United States v. Padilla*, No. 04-60001 (S.D. Fla. Oct. 4, 2006) (claiming that Mr. Padilla was tortured by the administration of mind-altering substances, including LSD and PCP). *But see* Order Denying Defendant Padilla’s Motion to Dismiss for Outrageous Government Conduct, *United States v. Padilla*, No. 04-60001, 2007 WL 1079090 (S.D. Fla. Apr. 9, 2007).

¹⁰⁵ See *Dession*, *supra* note 33, at 319; *DORLAND’S*, *supra* note 46.

¹⁰⁶ Compare *Strauss*, *supra* note 24 at 238 (stating that the injection of truth serum is not a severe bodily intrusion because it is minimally invasive and causes no pain or negative side effects), and *Rana Lehr-Lehnardt*, Note, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 B.Y.U. J. PUB. L. 317, 330 (2002) (describing rape as conduct that attacks the integrity of the person and is intended to intimidate, degrade, and humiliate the victim), with *Keller*, *supra* note 24, at 587–88 (arguing that the administration of truth serum would constitute mental rape due to feelings of helplessness and loss of control).

¹⁰⁷ See *YOO*, *supra* note 25.

III. TRUTH SERUM AND TORTURE

Although the language of the MCA does not prohibit the use of truth serum outright, the Act may nonetheless prohibit its use under one of the enumerated torture provisions. If the MCA does exclude the use of truth serum in the War on Terror, then one must show that its use satisfies all of the requisite elements in order to rise to the level of either physical or mental torture. Under the MCA's definition of torture, if an individual were to assert that the administration of truth serum was torture, that person would have to satisfy several requirements, including: (1) that the person who administered the truth serum acted with specific intent; (2) to inflict severe physical or mental pain or suffering; (3) that the person was within the custody or physical control of the one who administered the drug; and (4) that the drug was administered in order to obtain a confession, or information, or to punish, intimidate, coerce, or "based on discrimination of any kind."¹⁰⁸ A detainee would most likely be able to show (3) because that individual would be within the custody and control of U.S. military forces. Furthermore, requirement (4) would probably be satisfied because interrogators would administer the truth serum in order to acquire information about terrorist operations or the threat of future attacks. Therefore, questions concerning whether the administration of truth serum constitutes torture under the MCA would hinge on a resolution of elements (1) and (2).

A. Physical Torture

Because there is little case law or congressional material specifying exactly what the phrase "severe physical suffering" means, analysis must necessarily focus on the language of the statute. In interpreting a federal statute "it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.'"¹⁰⁹ Moreover, in drafting a statute "Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning."¹¹⁰

The administration of truth serum would most likely not constitute torture in a physical sense under the MCA because the truth serum would not cause severe physical pain. In a 2002 legal memo, the Justice Department's Office of Legal Counsel examined what conduct would rise

¹⁰⁸ See MCA 6(d)(1)(A).

¹⁰⁹ *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189 (1985)).

¹¹⁰ *Beanal v. Freeport-McMoRAN, Inc.*, 969 F. Supp. 362, 381 (E.D. La. 1997) (quoting *United States v. Gray*, 96 F.3d 769, 774 (5th Cir. 1996)).

to the level of torture.¹¹¹ Examining the severity requirement, the Memo asserted that the word “severe” conveys that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure.”¹¹² The Memo also posited that severe pain would be pain of such a high caliber that it would result in “death, organ failure, or serious impairment of body functions”¹¹³ However, the Office of Legal Counsel subsequently retreated from several of the arguments made in the 2002 Memo, including that severe physical pain means the pain accompanying “organ failure, impairment of bodily function, or even death.”¹¹⁴ Nevertheless, the Revised Memo did confirm the 2002 Memo’s assertions that the word “severe” meant that pain must be “intense [and] . . . [h]ard to sustain or endure.”¹¹⁵

Under this understanding, the administration of truth serum would not constitute torture because it would not result in “severe physical pain.” The simple injection of truth serum with a medical syringe would not cause severe pain, but would only result in momentary and fleeting discomfort. In fact, the Supreme Court has upheld involuntary medical procedures involving the use of a medical syringe.¹¹⁶ Furthermore, the effect of truth serum on the subject does not cause pain but in fact reduces pain and also creates feelings of relaxation.¹¹⁷ Thus, the administration of truth serum would not constitute physical torture. This conclusion does not foreclose the possibility that it may cause severe mental pain or suffering.

B. Severe Mental Pain or Suffering

Instead of providing a new definition of the term “severe mental pain or suffering,” the MCA adopts the definition established by Congress in 18 U.S.C. § 2340(2).¹¹⁸ Section 2340(2)(B) defines “severe

¹¹¹ Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Memo], *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

¹¹² *Id.* at 5.

¹¹³ *Id.* at 6.

¹¹⁴ Memorandum from Daniel Levin, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, to James B. Comey, Deputy Att’y Gen. 2 (Dec. 30, 2004) [hereinafter Revised Memo], *available at* <http://news.findlaw.com/hdocs/docs/terrorism/doj torture123004mem.pdf> (quoting Memo, *supra* note 111, at 1).

¹¹⁵ *Id.* at 5 (internal quotation marks and citations omitted).

¹¹⁶ *See* Schmerber v. California, 384 U.S. 757, 771 (1966) (holding involuntary extraction of blood permissible because the procedure involves no trauma or pain).

¹¹⁷ *See* discussion *supra* Part II.B.

¹¹⁸ *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(d)(2)(A), 120 Stat. 2600, 2634 (adopting the definition of severe mental pain or suffering found in 18 U.S.C. § 2340(2) (2000)).

mental pain or suffering” as “the prolonged mental harm caused by or resulting from . . . the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality”¹¹⁹

1. Truth Serum as a Mind-Altering Substance

The MCA does not define “mind-altering substances.” The Justice Department Memo, relying on a few cases and state statutes, stated that drugs, alcohol, and psychotropic drugs are mind-altering substances.¹²⁰ One court implicitly affirmed this designation in determining that alcohol, marijuana, and cocaine were mind-altering substances.¹²¹ Truth serum is most likely a mind-altering substance since the most common drug recognized as a truth serum, sodium pentothal, is a barbiturate class drug.¹²² Even a new and improved truth serum would probably qualify as a mind-altering substance, especially if, as specified earlier, one component of the new truth serum was a barbiturate drug, such as sodium pentothal or sodium amytol.¹²³

Even if truth serum qualifies as a mind-altering substance, it would also have to result in a profound disruption of the senses or the personality. This language, the Justice Department Memo asserted, also applied to the term “mind-altering substances” as well as the term “other procedures.”¹²⁴ The Memo stated that a profound disruption would occur when acts “penetrate to the core of an individual’s ability to perceive the world around him, substantially interfering with his cognitive abilities”¹²⁵ Such a disruption could manifest itself in a myriad of ways, such as “a drug-induced dementia [where] the individual suffers from significant memory impairment . . . deterioration of language function, [or] impaired ability to execute simple motor activities”¹²⁶ In addition, a profound disruption could occur with “the onset of ‘brief psychotic disorder’ [when] . . . the individual suffers . . . delusions, hallucinations, or even a catatonic state.”¹²⁷

¹¹⁹ 18 U.S.C. § 2340(2)(B) (definition adopted by MCA § 6(d)(2)(A)).

¹²⁰ Memo, *supra* note 111, at 9–10.

¹²¹ *See* Sackie v. Ashcroft, 270 F. Supp. 2d 596, 602 (E.D. Pa. 2003).

¹²² *See* discussion *supra* Part II.B.

¹²³ *See* discussion *supra* Part I.C.

¹²⁴ Memo, *supra* note 111, at 10 (stating that the use of the word “other” to pair mind-altering substances with procedures signifies that the mind-altering substances must also cause a profound disruption).

¹²⁵ *Id.* at 11.

¹²⁶ *Id.*

¹²⁷ *Id.*

Although not dispositive, the Memo's arguments are helpful in determining what constitutes a profound disruption of the senses or personality. Analyzed under this standard, truth serum would probably not cause such a severe effect. Instead, truth serum has quite the opposite effect by placing the subject in a relaxed and uninhibited state.¹²⁸ The effects of truth serum do not impair language ability and do not substantially impair cognitive function. To do so would make truth serum entirely ineffective for its purpose. On the contrary, an individual under the influence of truth serum is able to understand questions and answer those questions with verbal responses, albeit with less inhibitions. The only time a court has ruled that severe mental pain or suffering resulted from the administration of mind-altering substances, the individual consumed alcohol, cocaine, and marijuana over a period of three to four years.¹²⁹ However, the court did not provide specific analysis and did not indicate whether the severe mental pain or suffering stemmed from the consumption of drugs and alcohol or the repeated death threats and brutal treatment that the plaintiff suffered at the hands of his superiors.¹³⁰ If the plaintiff's severe mental pain or suffering did stem from the drugs and alcohol, it could be the case that the severe mental trauma was caused by prolonged and repeated use.¹³¹ Viewed from that vantage point, it appears unlikely that a one-time dose of truth serum would cause severe mental pain or suffering.

2. Prolonged Mental Harm

The drafters of the MCA and section 2340 did not elaborate on the requirement of prolonged mental harm, but the use of the word "prolong" mandates that the mental harm persist for some duration. The Justice Department Memo states that the harm "must be one that is endured over some period of time."¹³² The Memo went on to state that the harm "must cause some lasting, though not necessarily permanent, damage."¹³³ Furthermore, the Revised Memo states that the use of the word "harm" "suggests some mental damage or injury."¹³⁴ The Justice Department Memo posited that the mental strain produced by an extended and intense police interrogation would not satisfy the statute, but that the onset of "posttraumatic stress disorder" ("PTSD") or "chronic

¹²⁸ See Dession, *supra* note 33, at 319.

¹²⁹ See Sackie v. Ashcroft, 270 F. Supp. 2d 596, 601–02 (E.D. Pa. 2003).

¹³⁰ *Id.* at 602.

¹³¹ *Id.* at 601 (testifying that drug and alcohol consumption occurred over the span of three to four years while plaintiff was a member of a Liberian rebel force).

¹³² Memo, *supra* note 111, at 7.

¹³³ *Id.*

¹³⁴ Revised Memo, *supra* note 114, at 14.

depression” would satisfy the prolonged harm requirement.¹³⁵ The Memo noted that both of these disorders can last for months or even years and thus would meet the prolonged harm requirement.¹³⁶ Evidence of prolonged mental harm can manifest itself by way of depression, insomnia, nightmares, anxiety, and flashbacks.¹³⁷

It is unlikely that the administration of truth serum would cause a prolonged mental harm. The effects of the drug would dissipate within hours and would not cause any negative lasting side effects.¹³⁸ Furthermore, the experience of undergoing an injection and interrogation in no way resembles the traumatic and harrowing events that resulted in prolonged mental harm in situations where a court did find the requirement satisfied.¹³⁹ On the other hand, one could argue that an individual who receives an involuntary injection of truth serum would suffer prolonged mental harm on account of feelings of helplessness, loss of control, and fear.¹⁴⁰ The onset of a serious mental disorder would not be the result of the administration of the drug, but instead would be an unintended consequence based upon feelings of guilt and remorse caused by statements made while under the influence of truth serum. The same onset of a serious mental disorder could be caused by the simple act of a voluntary confession and does not require the administration of truth serum.¹⁴¹

3. Specific Intent

In order to satisfy the requirement for mental harm an individual must specifically intend that the conduct cause severe mental pain or

¹³⁵ Memo, *supra* note 111, at 7.

¹³⁶ *Id.* This interpretation of “prolonged” comports with a reasonable understanding of the word. See *Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 875 (D.C. Cir. 1996) (holding the EPA’s construction of the word “prolonged” to mean “at least three months” was reasonable under *Chevron, U.S.A., Inc., v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984)).

¹³⁷ See *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1333–40 (N.D. Ga. 2002) (indicating that all four victims suffered from these mental conditions ten years after the traumatic events occurred).

¹³⁸ See *supra* note 46 and accompanying text.

¹³⁹ See *Mehinovic*, 198 F. Supp. 2d at 1333–40 (maintaining that the prolonged mental harm resulted from the severe beatings, death threats, degrading treatment, and physical injuries suffered by the plaintiffs at the hands of Serbian police officials).

¹⁴⁰ See *Keller, supra* note 24, at 586 (arguing that an individual injected with truth serum would suffer emotional trauma resulting in PTSD because of feelings of guilt and anguish associated with divulging truthful information that leads to the death of others).

¹⁴¹ See Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-At-Law: Lessons from Dostoyevsky*, 35 HOUS. L. REV. 327, 367–68 (1998) (illustrating that a confession can cause stress, guilt, and damage to personal reputation and family relationships).

suffering.¹⁴² The Justice Department Memo adopted the specific intent requirement stating that the infliction of pain must be the “precise objective.”¹⁴³ Although the Revised Memo did retreat somewhat from the assertions of the original Memo, it did say that the specific intent requirement would be satisfied if an individual “consciously desired” to inflict severe pain and suffering, but the requirement would not be met if the individual acted in “good faith.”¹⁴⁴ Thus, an unintended mental disorder suffered as a result of the administration of truth serum would not satisfy the requirement of the statute because the individual who administered the drug would not have the requisite intent to specifically cause that particular mental harm.¹⁴⁵ The development of PTSD or chronic depression due to the experience of undergoing a truth serum interrogation or feelings of guilt and anxiety would not constitute torture because the interrogator did not specifically intend to cause that emotional trauma. One court has expanded this narrow requirement and concluded that the specific intent requirement “distinguishes between suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted or the foreseeable consequence of deliberate conduct.”¹⁴⁶ Even under a foreseeability standard, the development of a serious mental disorder would probably not satisfy the statutory requirement because the disorder would likely be an accidental result of the intentional act of administering a truth serum. Nevertheless, such speculation is unnecessary as the reference to a foreseeability standard was dicta, and the Third Circuit has since retreated from this position.¹⁴⁷

C. *The Threatened Administration of Truth Serum*

If the actual administration of truth serum does not constitute torture, would the threat of its administration? The question seems to present a paradox. Yet, the threatened administration may cause the same mental trauma as the actual administration of truth serum with the only difference being the fact that the interrogator intended to cause the mental harm.¹⁴⁸ In threatening to use truth serum, the interrogator is not seeking to inflict severe mental pain or suffering or to cause the

¹⁴² See Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(d)(1)(A), 120 Stat. 2600, 2633; see also 8 C.F.R § 208.18(a)(5) (2007).

¹⁴³ Memo, *supra* note 111, at 3.

¹⁴⁴ Revised Memo, *supra* note 114, at 17 (internal quotation marks omitted).

¹⁴⁵ *Id.* The regulation states that “[a]n act that results in unanticipated or unintended severity of pain and suffering is not torture.” 8 C.F.R § 208.18(a)(5) (2007).

¹⁴⁶ *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003).

¹⁴⁷ See *Toussaint v. Att’y Gen.*, 455 F.3d 409, 415 (3d Cir. 2006).

¹⁴⁸ See *Keller*, *supra* note 24, at 601–03 (arguing the precise objective of threatening to use truth serum is to cause mental anguish and anxiety so that the subject divulges the desired information).

subject to develop a serious mental disorder. Instead, the interrogator's aim is to use coercive pressure in order to convince the subject to willingly divulge the desired information. Although not with the use of truth serum, interrogators sometimes do use threats as a coercive tactic to convince an individual to disclose valuable information. As one commentator stated, "[i]f attempting to gain intelligence by breaking the 'will of the prisoners' and making them 'wholly dependent on their interrogators' constitutes torture, then virtually all interrogation is torture and illegal, including what goes on in U.S. police stations every day."¹⁴⁹ Viewed in this light, the threatened administration of truth serum is less likely to be construed as torture.

IV. THE CONSTITUTION DOES NOT PROHIBIT USING TRUTH SERUM

Does the Constitution prohibit the use of truth serum? The Supreme Court has interpreted the Constitution as prohibiting confessions procured under the influence of truth serum from being introduced against the accused in a criminal proceeding.¹⁵⁰ No Supreme Court ruling has prohibited the use of truth serum as a general matter. Rather, in *Townsend v. Sain*, the defendant, a heroin addict, was a murder suspect and began suffering withdrawal symptoms during police questioning.¹⁵¹ To ease the defendant's symptoms, a doctor administered a dose of scopolamine and shortly thereafter the defendant confessed to the murder.¹⁵² The Court ruled that the confession was inadmissible because it was not "the product of a rational intellect and a free will . . ."¹⁵³ Thus, the Supreme Court's holding only bars the admission of truth serum-induced confession at trial, but says nothing about prohibiting outright the use of truth serum in other contexts. Indeed, other procedures deemed permissible might provide some leeway for the use of truth serum during the interrogation of terror suspects.

A. Involuntary Blood Tests

The Supreme Court has regularly upheld the practice of involuntary blood testing as a reasonable search and seizure under the Fourth Amendment.¹⁵⁴ In *Schmerber v. California*, the Court stressed several

¹⁴⁹ Yoo, *supra* note 25, at 173.

¹⁵⁰ See *Townsend v. Sain*, 372 U.S. 293 (1963), *overruled on other grounds by* Keeney v. Tamayo-Reyes, 504 U.S. 1, 5 (1992).

¹⁵¹ *Id.* at 298.

¹⁵² *Id.* at 298–99.

¹⁵³ *Id.* at 307 (quoting *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960)).

¹⁵⁴ See *Schmerber v. California*, 384 U.S. 757 (1966) (holding that the involuntary withdrawal of blood against the defendant's will did not violate the Fourth Amendment); see also *Breithaupt v. Abram*, 352 U.S. 432 (1957) (holding that the withdrawal of blood from the defendant while he was unconscious did not offend the Fourth Amendment).

factors including: the effectiveness of the procedure, the absence of risk and pain to the subject, and the fact that the procedure was performed in a hospital setting under medical supervision.¹⁵⁵ Analyzed under these factors, the Court concluded that the involuntary withdrawal of blood was not an unreasonable search and seizure under the Fourth Amendment.¹⁵⁶ More recently, several courts have upheld the involuntary withdrawal of blood required under the Federal DNA Analysis Backlog Elimination Act of 2000,¹⁵⁷ which requires parolees to submit a blood sample, even against their will.¹⁵⁸ In contrast, in *Winston v. Lee*, the Supreme Court held that a surgical procedure to recover a bullet lodged in the defendant's body was an unreasonable search and seizure under the Fourth Amendment.¹⁵⁹ To determine whether a surgical procedure was reasonable, the Court applied a balancing test weighing "the individual's interests in privacy and security . . . against society's interests in conducting the procedure."¹⁶⁰ The Court held that the risk of surgery to the defendant and the intrusion of anesthetics outweighed the state's interest in collecting evidence since other evidence was available.¹⁶¹

Furthermore, in *Rochin v. California*, the Court held that the use of emetics to recover drug evidence swallowed by the defendant violated the Due Process Clause of the Fourteenth Amendment.¹⁶² The Court stated that the use of such procedures "shocks the conscience" because "[t]hey are methods too close to the rack and the screw to permit of constitutional differentiation."¹⁶³

The framework provided by such cases suggests that the Constitution permits the use of truth serum. First, the use of truth serum is unlike the emetics used in *Rochin* and does not "shock[] the conscience."¹⁶⁴ Rather, it more closely resembles an involuntary withdrawal of blood. The administration of truth serum, like the withdrawal of blood, subjects the individual to the minor intrusion of a

¹⁵⁵ 384 U.S. at 771.

¹⁵⁶ *Id.* at 772.

¹⁵⁷ 42 U.S.C. § 14135a(a)(4)(A) (2000).

¹⁵⁸ See *United States v. Kincade*, 379 F.3d 813, 832 (9th Cir. 2004) (holding that the state interest in requiring an involuntary blood sample outweighed the privacy interests of the defendant); *Velasquez v. Woods*, 329 F.3d 420, 421–22 (5th Cir. 2003) (same); *Jones v. Murray*, 962 F.2d 302, 306–07 (4th Cir. 1992) (same).

¹⁵⁹ 470 U.S. 753, 758–67 (1985).

¹⁶⁰ *Id.* at 760.

¹⁶¹ *Id.* at 764–66.

¹⁶² 342 U.S. 165, 166–174 (1952).

¹⁶³ *Id.* at 172.

¹⁶⁴ *Id.*

needle prick, and the effects are not harmful or long lasting.¹⁶⁵ Moreover, applying the use of truth serum to a Fourth Amendment reasonableness analysis will likely generate the same result.¹⁶⁶ The government has an interest in preventing another terrorist attack; national security is a compelling state interest.¹⁶⁷ On the other hand, the Supreme Court has allowed minimal intrusions into privacy so long as the results are reliable, the procedure involves little pain or risk, and the procedure is conducted under medical supervision.¹⁶⁸ Thus, as long as medical personnel administer truth serum under appropriate medical conditions, the invasion of privacy may be acceptable if the procedure is reliable and could allow intelligence officials to procure information that would thwart a catastrophic terrorist attack.

B. Forced Administration of Psychotropic Drugs

The forced administration of psychotropic drugs may provide further justification for the forced administration of truth serum in limited circumstances. Both truth serum and psychotropic drugs are mind-altering substances, so if the government may administer one type of mind-altering substance to a person against his or her will, the same could hold true for truth serum as well. The Supreme Court has stated that “a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment”¹⁶⁹ In certain contexts the government may forcibly administer psychotropic drugs against an individual’s will.¹⁷⁰ In a prison environment, officials may administer psychotropic drugs against an inmate’s will “if the inmate is dangerous to . . . others and the treatment is in the inmate’s medical interest.”¹⁷¹ A government’s power to forcibly administer psychotropic drugs is rooted in its “police power”; thus, a government must determine that “the need to prevent violence in a particular situation outweighs the possibility of harm to the medicated individual.”¹⁷² Furthermore, a government must rule out other alternatives before it resorts to the forced administration

¹⁶⁵ See Odeshoo, *supra* note 24 (noting that the effects of truth serum are confined to the period of administration).

¹⁶⁶ See E.V. Kontorovich, Op-Ed., *Make Them Talk*, WALL ST. J., June 18, 2002, at A16 (arguing that the use of truth serum more closely resembles a search under the Fourth Amendment than torture).

¹⁶⁷ See *Doe v. Gonzales*, 126 S. Ct. 1, 3 (2005) (acknowledging that national security can be a compelling state interest).

¹⁶⁸ See *Schmerber v. California*, 384 U.S. 757 (1966).

¹⁶⁹ *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990).

¹⁷⁰ See *Washington v. Harper*, 494 U.S. 210, 227 (1990).

¹⁷¹ *Id.*

¹⁷² *Rogers v. Okin*, 634 F.2d 650, 656 (1st Cir. 1980).

of psychotropic drugs.¹⁷³ The government does not face as stiff an obligation to pursue reasonable alternatives when administering one application of a drug because “it would appear that treatment for a limited period is not as likely to have as intrusive an effect upon the patient as administration for an extended time.”¹⁷⁴ Because a government is able to forcibly administer psychotropic drugs, the same could hold true for the administration of truth serum. A terrorist planning to carry out an attack against American civilians represents a dangerous threat to others. In that situation, perhaps the government could use truth serum so long as it was a one-time application, which represents less harm to the subject, and it is reasonably believed that the use of truth serum may result in the acquisition of intelligence to prevent a devastating attack. Although the forcible administration of psychotropic drugs pertains mainly to correctional facilities, it does illustrate that the forcible administration of mind-altering substances against another’s will is not an alien concept to American constitutional jurisprudence.

CONCLUSION

The events of September 11th fundamentally altered our attitude and made us aware of the dangerous new enemy that threatened innocent civilian lives. After September 11th, people began to reconsider which tactics the government should employ to keep America safe from another deadly and terrifying attack. One such tactic is the use of truth serum. This Note has argued that the use of truth serum would not constitute torture because it does not comport with the more brutal and violent practices that have been considered to be torture. Furthermore, the U.S. definition of torture, although covering the use of mind-altering substances, is not broad enough to cover the use of truth serum. Finally, while the Constitution does not explicitly permit the use of truth serum, the Supreme Court has upheld practices that, by analogy, should permit the use of truth serum in limited circumstances.

Seth Lowry

¹⁷³ *Id.*

¹⁷⁴ *Rennie v. Klein*, 653 F.2d 836, 847 (3d Cir. 1981).