

# POWs Versus Torturers: Forensic Evaluation of Military Personnel

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In April 2002, 17 American prisoners of war (POWs) and 37 of their family members brought an action in federal district court in Washington, D.C., against the Republic of Iraq, Saddam Hussein, and the Iraqi Intelligence Service for torture the POWs alleged they endured in 1991, following their capture during Operation Desert Storm. This action was the first in which prisoners of war sued a sovereign state for torture. As part of their case, the plaintiffs claimed psychological damage, and presented forensic evaluations of the POWs and their families in support. This article will address the novel questions and problems in this case, including: the legal context of the action; the logistical difficulties in evaluating a large number of plaintiffs in diverse locations; the challenges of establishing psychological injury in military personnel; the relationship between the forensic findings and the literature on POWs; the potential bias and secondary trauma experienced by the examiners; and the outcome of the action and prospects for similar actions in the future.

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On April 4, 2002, U.S. Marine Corps Colonel Clifford Acree, along with 16 other POWs and 37 of their family members, brought suit in Washington, D.C. federal district court against the Republic of Iraq, Saddam Hussein, and the Iraqi Intelligence Service, alleging that the defendants were responsible for torture inflicted on the American POWs in 1991 during Operation Desert Storm. This action, *Acree v. Republic of Iraq*,<sup>1</sup> was the first in which prisoners of war sued a sovereign state for torture. The case was brought under United States law—specifically, the “terrorism exception” to the Foreign Sovereign Immunities Act<sup>2</sup> (FSIA) passed by Congress in 1996.

The plaintiffs’ attorneys sought psychiatric evaluations of all the plaintiffs to determine the effects of alleged torture and captivity on the POWs and their family members. Although there has been extensive experience in evaluating torture victims clinically<sup>3</sup>

and as part of actions related to seeking asylum,<sup>4</sup> there have been no prior civil actions in which military personnel have sought damages for injuries incurred during hostilities as the result of alleged torture while in captivity. In this article we will address the novel questions and problems presented by this case as well as our findings, including: the legal context of the action; the logistical difficulties in evaluating a large number of plaintiffs in diverse locations and on active duty; the challenges of establishing psychological injury in military personnel; the relationship between our findings and those in the literature on the psychological outcomes of POWs; and the potential bias and secondary trauma experienced by the examiners. In conclusion, we will describe the outcome of the action and prospects for similar actions in the future.

## ***Acree v. Republic of Iraq:* The Legal Context**

On August 2, 1990, Iraq invaded and occupied Kuwait. Following U.N. Security Council authorization, an international coalition of 33 nations joined active hostilities against Iraq on January 16, 1991, to enforce the international rule of law and compel Iraq to leave Kuwait. Beginning on January

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17, 1991, the first night of hostilities in Operation Desert Storm, American pilots fell into Iraqi hands. Over the course of the ensuing seven weeks of war, 21 American service personnel were captured. Based on the reports of torture and executions in Kuwait and Iraq's announcement over Radio Baghdad and international television that the POWs would be deployed as human shields, grave fears regarding the fate of the American service personnel were expressed in an editorial in the *Journal of the American Medical Association*,<sup>5</sup> as well as in the press at large.

In 2002, 17 of these POWs joined together in a suit alleging that they were subjected to systematic torture during their captivity. Specifically, these American POWs alleged beatings, starvation, electrocution, whippings, mock executions, threats of dismemberment, broken bones, and confinement in unsanitary conditions. Five POWs reported that they were forced to appear in propaganda films broadcast on international television. In addition to the allegations of direct maltreatment while being held as POWs, the plaintiffs contended that the Iraqi government did not release information regarding the condition of the prisoners to their families as required by the Geneva Conventions,<sup>6</sup> to which Iraq is a signatory. When the POWs were first released in March 1991, sovereign governmental entities, including the three defendants ultimately named in this case, generally enjoyed the privileges of sovereign immunity afforded by the United States. Under United States law, civil suits could not be brought against sovereign entities for personal injury torts. However, in 1996, Congress passed 28 U.S.C. § 1605(a)(7), the terrorism exception to the FSIA.<sup>2</sup> This law provided an avenue for civil litigation against the nations on the State Department's list of state sponsors of terrorism (at the time, Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria), and was specifically intended by Congress to deter acts of terror against Americans. The terrorism exception<sup>2</sup> and the related Flatow Amendment,<sup>7</sup> permit the revocation of immunity where: (1) "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency. . ."; (2) the com-

plainant is a U.S. national; (3) the foreign sovereign is afforded a "reasonable opportunity to arbitrate the claim"; and (4) the "terrorist state" was on the State Department's list of state sponsors of terrorism at the time the unlawful events occurred.<sup>2</sup> Thus, the U.S. POWs, who sought money damages from Iraq and offered arbitration to the Iraqi defendants, could bring suit against Iraq for claims of torture in 1991 because that country had been officially deemed a terrorist state by the United States in 1990, following Iraq's invasion of Kuwait.

The plaintiffs' action asserted that the Iraqi government's treatment of the POWs and the information blackout violated United States law as well as the Third Geneva Convention, the international treaty concerning the treatment of prisoners of war subscribed to by 194 nations globally, including the United States and Iraq.<sup>6</sup> Specific allegations included torture of prisoners, captivity in unsanitary conditions, starvation, mock executions, threats of castration and dismemberment, detention of prisoners "as human shields" in military targets (including one target destroyed by four 2,000 pound bombs dropped by Coalition forces), broadcasting of forced confessions, and withholding of information regarding the prisoners' health and condition from family members. Although the Geneva Conventions are frequently invoked as standards of treatment of prisoners of war, the Conventions themselves do not specify remedies, nor do they generally provide a cause of action in U.S. courts; rather, in *Acree*, the Conventions served as a relevant backdrop to the lawful treatment of POWs. Thus, before the 1996 passage of the terrorism exception to FSIA<sup>2</sup> and the Flatow Amendment,<sup>7</sup> victims could not bring an action against foreign sovereign entities for injuries suffered as a result of torture, bombings, kidnappings, and murder, because those governments and their officials and the groups materially supported by those governments were shielded from claims by the immunity accorded by the United States.

Following the 1996 amendment to the FSIA,<sup>2</sup> and before *Acree*, multiple plaintiffs availed themselves of the terrorist exception legal remedy against state-sponsored terrorism, although none of the other cases involved torture of military prisoners of war. These included, for example, the families of the "Brothers to the Rescue" pilots shot down by the Cuban Air Force<sup>8</sup>; victims of bombings in Israel and elsewhere by Hezbollah/Islamic Jihad/Hamas

backed by Iran<sup>9</sup>; victims of the 1983 embassy and Marine barracks bombing in Beirut<sup>10</sup>; 1980s kidnapping victims such as Terry Anderson<sup>11</sup>; the 1998 embassy bombing victims in Tanzania and Kenya<sup>12</sup>; and the families of Pan Am 103 victims.<sup>13</sup> In each case, the victims or their families were able to win a judgment against their kidnappers, torturers, and murderers, but in most cases were unable, at least at first, to satisfy those judgments, often due to interference from the executive branch of the U.S. government. Although that discussion is beyond the scope of this article, suffice it to say that many victims and their families found achieving a measure of justice against the perpetrators to be difficult.

### Challenges in Evaluation of Plaintiffs: Logistics

At the outset, plaintiffs' counsel contacted the lead author (A.L.) to perform an evaluation of all 54 plaintiffs (the 17 POW plaintiffs and their 37 family members who joined the suit) to establish the immediate and long-term psychological effects of alleged torture on the POWs and their families. Counsel indicated that the psychological findings represented only a part of their documentation of damages, given that there were extensive military records from repatriation evaluations documenting both physical and psychological injuries. In addition, because of the time pressures imposed by the relatively late involvement of psychiatrists in the case, plaintiffs' counsel requested that evaluations occur in an eight-week period and be conducted by only one or two psychiatrists. The lead author (A.L.) immediately enlisted a second psychiatrist (L.G.) to participate. Both of the psychiatrists had more than 10 years of clinical and forensic experience with trauma in civilian populations and to a lesser extent with torture survivors. Experience with military personnel was solely in clinical and not forensic settings and neither author had experience with prisoners of war.

In ensuing discussions with plaintiffs' counsel, it became clear that the time and resource limitations of the action necessitated that most of the evaluations be conducted by telephone, because only four of the plaintiffs were within a day's drive of either of the experts. The psychiatrists indicated to plaintiffs' counsel that in-person interviews were the generally accepted evaluation standard and that telephone interviews would limit the certainty of opinions proffered. Despite these warnings, plaintiffs' counsel

wished to proceed. The authors conferred and decided that although in-person evaluations would have been ideal, given the extensive military records available for each individual documenting psychological state and physical status during the first year following repatriation and the opportunity to corroborate their psychological complaints by interviewing family members, credible opinions could be developed. Within this framework they agreed to perform psychiatric evaluations and offer opinions, as discussed herein, commensurate with the nature of the examinations.

In addition to the logistical challenges posed by the large number of plaintiffs and the scattered locations, the psychiatrists recognized the need to develop joint standards for the examinations and statement of opinions. The evaluators initially agreed on a format for the reports that included a general review of the known effects of capture and torture followed by sections devoted to each plaintiff and his family member(s), based on available information. To reduce the large mass of information collected to a concise format, each report included a half-page summary for the POW and his family member(s) that presented the diagnostic findings, both current and during the year following repatriation, as well as the severity of impairment and level of function during those time frames. The evaluators reviewed each other's reports before final submission.

As noted, because the plaintiffs and families were scattered across the country, with six of the men in active service in the second Gulf War, only four of the POWs, their four wives, and one couple's adult son were interviewed in person. Interviews of these four POWs lasted a mean of 3.4 hours (median, 3.5; range, 3.0–3.5), and interviews of the family members lasted a mean of 2.6 hours (median, 3.5; range, 1.3–4.5). In addition to establishing the impact of the POWs' captivity and postcaptivity impairment on the family members themselves, interviews of family members were used to corroborate the psychological symptoms and impairment of the POWs.

Of the remaining plaintiffs, 11 POWs and 24 family members were interviewed by phone, one POW and five family members were reached only by e-mail, and one POW was unavailable because he was on active duty in the Gulf, necessitating reliance on information gathered from a family member. The duration of telephone interviews of the 11 POWs was a mean of 1.5 hours (median, 1.5; range,

1.0–2.0) and of the 24 family members was a mean of 1.2 hours (median, 1.0; range, 0.3–1.3). Three remaining family members were not available for evaluation.

All the interviews, whether performed in person or by telephone, included a review of personal history, prior psychiatric symptoms and treatment, and pre-captivity health and personal and professional functioning. At the heart of the evaluation was a review of the captivity and subsequent symptoms and impairment related to the treatment received by the POWs.

Additional sources of information regarding all the POWs included records of repatriation evaluations performed on the Navy hospital ship *Mercy* immediately following release and subsequent treatment at stateside service-connected hospitals. Follow-up service-connected evaluations performed during the first year after repatriation were available in 9 of 17 cases under the Operation Desert Storm Repatriated Prisoner of War Program, a military program specifically designed to assess the physical and psychological effects of captivity. Four of 17 cases also included records of non-service-connected treatment. The evaluators also had access to videotapes of statements made by three of the POWs that were aired on network television during the period of their captivity, statements the plaintiffs alleged had been coerced by their Iraqi captors. During the spring of 2003 in the months before the filing of plaintiffs' evidence in the legal action, which coincided with the start of Operation Iraqi Freedom, three of the POWs appeared on television to recount their captivity and maltreatment. Finally, one of the POWs and his spouse produced a written memoir of their experiences.

The authors decided that the use of telephone interviews required a deviation from standard language in expressing opinions. Where based on phone interviews, opinions were rated as "highly probable" whereas opinions based on personal interviews were rated as having a "reasonable degree of medical certainty." For the two plaintiffs who could not be reached in person or by phone, reports provided narratives but did not offer opinions. In considering the ethics-related implications of the evaluation procedure and the language used to express opinions, the authors relied on the American Academy of Psychiatry and the Law's "Ethics Guidelines for the Practice of Forensic Psychiatry" that state that an opinion may be rendered in the absence of a personal exami-

nation based on other information if, under these circumstances, the examiner clearly states the absence of a personal examination and the resultant limitations.<sup>14</sup> The reports proffered clearly stated the sources of information and the nature of the interviews. In addition, the evaluators explicitly indicated that opinions based on telephone interviews could only be stated as highly probable rather than to a reasonable degree of medical certainty. Given the extent of records and the additional information provided by spouses and family members, highly probable may in fact have represented an overly conservative statement of the findings. Nevertheless, the authors thought that asserting greater degrees of certainty may have increased the avenues for rebuttal and that the opinions proffered, even with modified language indicating limitations, would be viewed by the court as probative.

Ultimately the psychiatric findings were not subject to rebuttal or cross-examination because the defendants did not respond to the suit. However, under FSIA, in default cases against sovereigns, the courts are still required to demand that the claimant "establish his claim or right to relief by evidence satisfactory to the court."<sup>15</sup>

Regarding the extent of damages, the functional impact of symptoms on the POW and his family during the year following captivity and in the most recent year were rated as mild, moderate, or severe, according to Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) definitions.<sup>16</sup> Although plaintiffs' counsel requested an evaluation of the impact on family members who were plaintiffs in the action, quantifying this impact proved difficult, and it necessarily paled in comparison to the impact on the POW himself. Except in the two instances in which a family member had a previously diagnosed psychiatric condition that was exacerbated by the loved ones' captivity, estimates of family impact were limited to general, nondiagnostic descriptions of symptoms such as anxiety and depression quantified on the mild to severe spectrum.

### **Challenges in Evaluation of Plaintiffs: Military Personnel in a Civil Action**

Assessment by civilian psychiatrists of military personnel and their families for damages pursuant to injuries during wartime presented multiple challenges for the evaluators. Military culture has tradi-

tionally stigmatized the identification of mental health problems and treatment seeking. Greene-Shortridge *et al.*<sup>17</sup> have hypothesized that stigmatization of mental health problems in the military is linked to the convergence of societal stigmatization reinforced by specific elements of military culture. A 2004 survey of service personnel in Afghanistan and Iraq revealed that although 78 to 86 percent of the soldiers and Marines who met screening criteria for depression, generalized anxiety disorder, or PTSD acknowledged that they had a problem, only 38 to 45 percent were interested in treatment and only 13 to 27 percent received care from a mental health professional.<sup>18</sup> Assessment of attitudes toward mental illness among these soldiers and Marines revealed that 38 percent did not trust mental health professionals and more than 50 percent endorsed that seeking treatment would harm their careers, cause them to be perceived as weak, and/or result in differential treatment from their commanding officers.

These findings contrast with the Vietnam literature that delineates a subset of veterans who sought to exaggerate symptoms and falsify experiences to obtain benefits for PTSD.<sup>19</sup> Unlike the Vietnam veterans seeking disability support, the majority of POWs in *Acree* were elite fliers who took great pride in their accomplishments and did not see themselves as psychiatrically impaired or disabled. Instead, the POWs were highly focused on their physical injuries such as dysentery and neuropathy<sup>20</sup> and tended to minimize the psychological effects of captivity and torture. This pattern was similar to those found in civilian victims of torture who frequently present for care related to physical injuries rather than psychological sequelae of torture.<sup>21</sup> In a similar vein, several of the men stated that they had undertaken the legal action to protect future servicemen who fell into captivity, rather than to seek reparation for their own injuries.

Despite this sense of mission related to the suit, the men engaged in *Acree* expressed concerns like those found by Hoge *et al.*<sup>18</sup> about revealing psychological symptoms during service-connected evaluations and particularly the potential impact on their careers. As one POW succinctly stated, "Doctors are the natural enemies of fliers." As a result, the documentation from the military sources tended to underestimate the extent of and disability related to psychological symptoms such as PTSD, depression, and substance abuse. Many of the plaintiffs told us that they suffered in silence to preserve careers and avoid stressing

their families. Others refused to acknowledge psychological problems even though they were no longer in the military. Given these tendencies to minimize psychological symptoms and avoid treatment, reports from spouses and family members in addition to available medical records provided the clearest picture of the POWs' ongoing struggles with PTSD, depression, anxiety, isolation, and insomnia. These collateral reports and additional materials were invaluable in the evaluation of symptom severity and disability.

### Findings: POW Plaintiffs

Overall the group was super-normal in many ways. As became clear during the interviews, the pilots were elite and highly successful members of their service branches. They told us that the privilege of flying combat missions at the start of the war represented their reward for years of training. Only two of the POWs had symptoms consistent with a psychiatric disorder prior to the war: one had a history of alcohol abuse for which he received treatment and a second had a history consistent with attention deficit hyperactivity disorder identified and treated in childhood and persisting into adulthood. Both of these individuals developed PTSD related to their captivity, and the former individual experienced a relapse in his alcohol abuse. Regarding prior trauma, only one of the POWs had seen combat in Vietnam, and he did not suffer symptoms from these experiences.

Characteristics of the POWs, length of captivity, weight loss, and types of alleged torture are enumerated in Table 1. As in any civil action, the credibility of the plaintiffs' allegations must be assessed by examiners but the ultimate judgment of their veracity rests with the fact finder. Several factors led the evaluators to assign a high level of credibility to the POWs' accounts. First, the combination of psychological tactics and physical conditions allegedly employed by the Iraqis closely resembled tactics that had been reported worldwide in both political and military-related torture.<sup>22</sup> Second, although the POWs were interviewed separately, they related highly similar accounts of treatment, consistent with the assertion in their complaint that they had been interrogated and imprisoned by the Iraqi intelligence services. Further, the descriptions of both psychological symptoms and physical injuries provided by the plaintiffs during our evaluations in 2003 were essentially identical with accounts contained in the repa-

**Table 1** Characteristics of 17 POWs and Details of Captivity

Status at Captivity, <i>n</i>	
Officers	14
Enlisted	3
Fighter/bomber pilots	14
Helicopter pilot/crew	2
Army (driver)	1
On active duty in 2003	6
Length of Captivity (days)	
Mean	32.0
Median	36.0
Range	7–47
Weight loss (lb)	
Mean	29.1
Median	30.0
Range	14–45
Interrogational beatings	16
Mock executions	11
Systematic starvation	14
Coerced video statements	5
Prolonged handcuffing	8
Threats to harm families	4

triation evaluations shortly after their release in 1991. Finally, accounts from family members of the POWs' psychological and physical symptoms were consistent with the men's accounts, and when they varied, were in a direction consistent with the tendency of these military men to minimize their symptoms.

Most of the men were captured during the initial air campaign in the opening weeks of Operation Desert Storm. Immediately following capture, the POWs reported that they were subjected by the Iraqi Intelligence Service to three to four days of round-the-clock interrogation in which they were blindfolded, tightly bound at the wrists, and beaten in a controlled, nonlethal fashion. Psychological tactics included isolation from comrades, efforts to extract information about and then issue threats toward families back in America, coerced videotaped confessions, mock executions, and overhearing torture of other men. The POWs reported that the physical conditions of captivity involved cold, starvation, lack of bedding requiring sleeping on concrete floors, and contaminated food. Physical injuries were established during the repatriation examinations and were documented in a report by Cook,<sup>20</sup> who cataloged injuries for all 21 American POWs. These included, in descending order of frequency: fractures, anemia, giardiasis, ligamentous knee injuries (attributable to parachute landings) compression neuropathy, perforated tympanic membranes, diarrhea, and closed head injury.

rated tympanic membranes, diarrhea, and closed head injury.

Recurrent psychological responses described by all the POWs during interrogation included fear, uncertainty, and self-blame, particularly when they felt they had given up any information, accurate or not.

Regardless of the techniques employed, the central goal of torture is destruction of the victim's will and sense of hope.<sup>22</sup> Although several of the POWs felt they had been psychologically broken at particular points during captivity, all maintained hope, were largely successful in withholding information, and at several points engaged in a battle of wills with their captors. Factors that the men identified as contributing to their resistance included identification with their country and comrades, their high level of physical conditioning at the time of capture, and specific precombat training to resist torture, including briefings from captured Vietnam pilots. All of these elements have been identified as protective factors in resisting torture for both civilian and military prisoners.<sup>22</sup>

Upon repatriation, the POWs received medical stabilization on the U.S. Navy hospital vessel *Mercy* and at service-connected military hospitals consisting of weight restoration, treatment of acute injuries such as fractures, lacerations, perforated eardrums, and medical attention to dysentery and giardiasis.<sup>20</sup> Long-term physical sequelae of captivity included chronic diarrhea and nerve injury in the upper extremities, resulting in severe paresthesias and hyperesthesia.<sup>20</sup> Similar nerve injuries have been described in Vietnam POWs subjected to binding.<sup>23</sup> In addition, all underwent psychological evaluation and debriefing. These results provided the database for determinations of psychiatric symptoms during the first year after repatriation.

Results of the authors' diagnostic evaluations are summarized in Table 2. Findings for the two POWs who were not interviewed were included based on the repatriation reports and the narrative of their symptoms in 2003. Full PTSD indicates fulfillment of DSM-IV criteria and subthreshold PTSD indicates either symptoms that fulfill criteria from two of the three symptom clusters (i.e., re-experiencing, avoidance and withdrawal, and hyperarousal), or symptoms in all three groupings but of insufficient number to meet the criteria.<sup>24</sup> Available data permit-

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**Table 2** Diagnostic Findings for 17 POWs in *Acree v. Republic of Iraq*

	PTSD	Subthreshold PTSD	No PTSD	Major Depression	Alcohol Abuse
Immediate, 12 months after repatriation	8 (47%)	7 (41%)	2 (12%)	3 (18%)	3 (18%)
Diagnosis in 2003	5 (29%)	8 (47%)	4 (24%)	2 (12%)	3 (18%)

Data are *n* (percentage of total group).

ted opinions about symptoms during the first year after repatriation and at the time of the evaluations.

Fully 12 years after repatriation, 13 (76%) of the POWs continued to suffer PTSD or subthreshold PTSD symptoms that were clinically significant, resulting in impairment in at least one sphere of function. Although their captivity was shorter in duration and less severe than that of WWII POWs, the rates of symptoms were similar, with approximately 53 percent of WWII POWs experiencing a lifetime diagnosis of PTSD and 29 percent continuing to meet PTSD criteria five decades after captivity.<sup>25</sup> Rates of PTSD in Israeli POWs of the 1973 Yom Kippur War were 23 percent following repatriation and 13 percent 18 years after their captivity.<sup>26</sup> The lower rates of PTSD among Israeli POWs compared with World War II POWs may be attributable to different conditions and the shorter duration of captivity,<sup>27</sup> the Israelis being held only 1.5 to 8.0 months, whereas the World War II POWs suffered years of captivity and a high mortality rate due to starvation and injury. Of interest, although the length of captivity was longer and conditions were equally as harsh, the rates of PTSD among the Israeli POW group were considerably lower than those in the *Acree* group. This result may have been attributable to earlier and more consistent treatment of the Israeli POWs, as well as cultural pressures toward Israeli troops to suppress trauma-related symptoms and to reintegrate quickly with social norms and functioning (Neria Y, personal communication, November 2007). Compared with the *Acree* group, Vietnam era POWs demonstrated similar high rates of symptomatology but the measures utilized were not directly comparable with the current diagnosis of PTSD.<sup>28,29</sup>

At the time of evaluation in 2003, 11 of the *Acree* POWs had not received any psychological or psychiatric treatment beyond the evaluations provided by the military, 4 had received partial treatment with medication and psychotherapy, and only 2 were in continued treatment at the time of our evaluations. None of the POWs received an exposure-based cognitive therapy although this was the recommended

evidenced-based treatment for PTSD in 2003.<sup>30</sup> As noted, recent surveys of returning veterans from the Middle East show low utilization of mental health services in response to identified mental disorders.<sup>18</sup>

In addition to offering opinions about diagnosis, the expert evaluations rated severity of impairment in career and social and interpersonal function. Literature on the family life of former POWs documents increased verbal aggression, marital strife, and diminished intimacy.<sup>31,32</sup> Aggression and strife correlated with the presence of PTSD symptoms but not with length of captivity or severity of conditions.<sup>31</sup> For the *Acree* POWs, principal causes of impairment included physical symptoms, such as chronic diarrhea or persistent nerve injury, and the psychological symptoms of PTSD, depression, and substance abuse. The plaintiffs reported that physical symptoms often triggered flashbacks of captivity and precipitated feelings of demoralization due to the limitations imposed by the symptom (e.g., hypersensitivity neuropathy limiting physical contact with loved ones). As a result of this type of interaction, it was not possible to separate the contributions of physical versus psychological symptoms to overall impairment.

Seven of the POWs experienced significant career disruption, including premature retirement (*n* = 5), problems with discipline (*n* = 1), and limited duty (*n* = 1). Six of those men experienced significant disruption in their marital lives, including divorce or separation (*n* = 3), or severe tensions causing painful distance from spouses (*n* = 3). One of the officers maintained his military functioning but his marital life was severely impaired due to his obsessional focus on his captivity.

Eight were rated with severe impairment in occupational and/or social functioning using the DSM-IV definition,<sup>16</sup> with two of the men being disabled (i.e., unable to work). Four were rated mild or moderate, and five were deemed to suffer no impairment. Men in this latter group either continued their careers in the military or retired from active duty to assume civilian aviation jobs or unrelated

work. These survivors related that they had worked through the experiences in Iraq and were free of PTSD symptoms.

### Findings: Family Member Plaintiffs

*Acree* also alleged an impact on families in two main areas: distress resulting from the violations of the Geneva Conventions for treatment of POWs,<sup>6</sup> including withholding of information about the condition of the POWs, forced confessions aired on television, and placement of the POWs in areas subject to bombing by Coalition forces; and long-term impact of the physical and emotional sequelae of captivity on family life.

Two-thirds of the 15 spouses evaluated developed symptoms of anxiety and depression either during the captivity and/or in response to the long-term sequelae suffered by their husbands. Parents and siblings also developed anxiety, most prominently at the time of the captivity. Two of the family members experienced exacerbations of pre-existing conditions. As discussed, given the paucity of interview information and records regarding family members, opinions offered were nondiagnostic descriptions of symptoms and their impact.

### Challenges in Evaluation of Plaintiffs: Impact on the Evaluators

Current literature on evaluation of torture survivors has focused on evaluations of asylum seekers and victims of massive human rights violations.<sup>3,33</sup> Those authors focused on barriers to proper evaluation including cultural differences, memory impairment, the emotional nature of the material, and the lack of well-standardized measurement tools, but they provided no guidance regarding the special demands of civil litigation stemming from torture. *Acree v. Republic of Iraq* highlighted several challenges for the forensic evaluator: the political context in this high-profile torture case, bias generated by the horrific nature of the torture experiences, and effects of secondary trauma on the examiners.

At the time of the *Acree* evaluations, performed in February and March 2003, the United States and its allies had initiated Operation Iraqi Freedom, the second Gulf War. During the initial bombing campaign in Operation Iraqi Freedom, three of the *Acree* plaintiffs appeared on television to describe their experiences during the early air campaign of Desert Storm.

This super-heated atmosphere promoted bias toward and identification with the POWs, who were portrayed in the media as victims of the same evil enemy again under attack by the United States. Evaluators of victims in future high-profile cases of torture or abuse (e.g., prisoners alleging maltreatment at Abu Ghraib or Guantanamo Bay), would also be subject to the intense media coverage of these situations with the accompanying highly polarized responses voiced in the public debate making them vulnerable to what Gold<sup>34</sup> has labeled sociopolitical bias. Similarly, Resnick<sup>35</sup> has noted that evaluators of Vietnam veterans were subject to bias toward diagnosing symptomatology in response to a sense of moral responsibility for the veterans as victims.

The political allegiance of the evaluator could also become a source of bias and might be subject to cross-examination by the defendants. The ideal examiner may be a national from an unaffected or neutral country. In the *Acree* matter, the evaluators attempted to avoid making politically tinged statements in reports, instead focusing on the details of symptomatology and impairment. Findings that a third of the plaintiffs were free of symptoms and impairment at the time of the evaluation, a finding consistent with those in the literature, suggest that the psychiatrists were successful in resisting current political pressures.

In addition to biases generated by the prevailing political atmosphere, forensic evaluators of torture victims must grapple with their own responses to horrific descriptions of torture and abuse. A growing body of literature has documented that professionals working with survivors of multiple types of trauma ranging from domestic violence to postwar reconstruction,<sup>36,37</sup> and, specifically, torture,<sup>38</sup> develop responses that have been labeled compassion fatigue,<sup>36</sup> vicarious traumatization,<sup>37</sup> and burnout.<sup>39</sup>

Although a complete review of the literature is beyond the scope of this article, common elements of these syndromes include PTSD-like symptoms, such as recurrent intrusive recollections of the material, avoidance of reminders, and hyperarousal<sup>36</sup>; depressive symptoms such as fatigue and social withdrawal<sup>39,40</sup>; and a change in world view in response to recognizing the depth of cruelty than can be waged by human beings.<sup>37</sup> Risk factors include a personal history of trauma, the nature and extent of the material, and inadequate opportunity to process material.<sup>19,36-38</sup> In the forensic arena, Gold<sup>34</sup> has observed that a



history of personal trauma creates a risk for bias in evaluation of victims of sexual harassment. Atkinson *et al.*<sup>19</sup> warn the evaluator of veterans to be alert to the impact of gruesome material. They recommend limiting the number of evaluations per week and seeking regular consultation and support.

The authors experienced a mixture of these secondary trauma responses during the intensive six to eight weeks of gathering material and then committing it to report form. A particularly potent element of this process was exposure to repeated reports of similar torture methods that were utilized in a routinized fashion by the Iraqi Intelligence Service with most of the POWs. The time demands of the action prevented the evaluators from processing the material between themselves and with colleagues familiar with torture. The evaluators experienced a sequence of initial horror, periods of intrusive thoughts and dreams about the material, and subsequent desensitized detachment. Their families observed these changes during the two-month period of the evaluation. Further, their families developed mild vicarious trauma responses such as intrusive thoughts in response to learning the details of the material. Forensic experts charged with evaluating victims of extreme treatment such as torture and captivity are likely to experience similar responses. Future evaluators of multiple torture victims should limit the number of evaluations and seek out other professionals to assist them in processing the material. In addition, according to the recommendations in the vicarious trauma literature, evaluators should be vigilant in maintaining self-care including exercise, proper nutrition, and quality time with intimates.<sup>36,37</sup>

The development of vicarious trauma may also complicate forensic evaluations by fostering identification with the victims, a wish to punish the abuser, or, conversely, anger at the victim or a level of detachment that diminishes effectiveness in evaluation and reporting of findings. All of these various countertransference responses have been described in therapists working with victims of childhood trauma<sup>37</sup> and overlap with the concept of advocacy bias identified by Gold<sup>34</sup> and others.<sup>41-43</sup> The authors attempted to counter these biases by conferring frequently about their experiences in performing the evaluations and their findings.

## Outcome of *Acree* and Prospects for Future Actions

On July 7, 2003, during the first phases of reconstruction in Iraq following Operation Iraqi Freedom, the district court found that the *Acree* POWs had valid causes of action under § 1605(a)(7) of the FSIA,<sup>2</sup> the Flatow Amendment,<sup>7</sup> and that they had also satisfied the elements of the state common law torts of assault, battery, and intentional infliction of emotional distress. State law causes of action have traditionally formed the basis for claims against foreign sovereigns in, for example, the commercial context, and it is the official position of the United States (as stated by the Department of Justice in other FSIA cases) that state law provides a cause of action under the FSIA. Although the suit was initiated in April 2002, one year before the fall of the Iraqi government in the spring of 2003, and the plaintiffs offered Iraq international arbitration of their claims, the defendants never responded to the action and did not appear in the district court. Following a full review of the relevant law and the sworn facts and testimony, the court entered a final judgment in favor of the POWs, finding all three Iraqi defendants jointly liable for \$653 million in compensatory damages, and Saddam Hussein and the Iraqi Intelligence Service liable for \$306 million in punitive damages.

Two weeks after the entry of the final judgment, the United States contested the judgment, moving to intervene in the case and to vacate the district court's decision. The Justice Department asserted that the plaintiffs could not access Iraqi frozen assets confiscated by the administration at the start of Operation Iraqi Freedom in March 2003 to satisfy their judgment and that the United States should be permitted on policy grounds to intervene in the case to challenge the court's jurisdiction at the time it entered judgment. The district court denied the motion to intervene as untimely and without merit because policy considerations typically do not form a valid basis for seeking intervention, and the United States appealed. On appeal, the issue presented to the Court of Appeals for the D.C. Circuit was whether the United States should have been permitted to intervene and whether the courts had been divested of jurisdiction in cases against Iraq by a piece of 2003 wartime appropriations legislation.<sup>44</sup>

Following the United States' appeal and six months after the POWs' judgment was rendered, the

D.C. Circuit held in a January 2004 case, *Cicippio-Puleo v. Islamic Republic of Iran*,<sup>45</sup> that federal law did not provide a cause of action against foreign state sponsors of terrorism. Three months later and 48 hours before oral argument in April 2004 in *Acree*, the D.C. Circuit sent a fax indicating that it wished to discuss *Cicippio*. Thus, the court *sua sponte* raised the issue of cause of action. Despite stating to the court that plaintiffs had a cause of action under federal law as well as under state law and despite clearly pleading causes of action under both, the appeals court ultimately held that the POWs lacked a cause of action because the district court had relied on federal law. The district court, in fact, had found liability under both federal and state law (assault and battery).

The motivation of the D.C. Circuit can be surmised from at least two facts. First, the court remanded in *Cicippio* (and in another case that went to the court after *Acree*: *Kilburn v. Socialist People's Libyan Arab Jamahiriya*<sup>46</sup>) to permit those plaintiffs to amend their pleadings and essentially do it over in the district court because of the acknowledged uncertainty as to the state of the law and the fact that many plaintiffs before 2004 had relied on both federal law and state law, owing to that uncertainty. That the court did not remand *Acree* under identical circumstances as those in *Cicippio* and *Kilburn* suggests that policy considerations outweighed other legal considerations. Second, further evidence that policy concerns influenced the court was found in the *Acree* opinion where the court wrote:

The circumstances of this case are even more extraordinary when one considers the stakes: Appellees have obtained a nearly billion dollar default judgment against a foreign government whose present and future stability has become a central preoccupation of the United States' foreign policy. In these circumstances, it would be utterly unseemly for this court to ignore the clear implications of our holding in *Cicippio*. We therefore find it appropriate to exercise our discretion to determine whether appellees' case must be dismissed for failure to state a cause of action [Ref. 47, p 58].

Notwithstanding that the issue of cause of action was not on appeal and had not been briefed and that plaintiffs had pled and proven state law causes of action, the D.C. Circuit vacated the *Acree* judgment. The POWs then sought rehearing from the D.C. Circuit and *certiorari* from the Supreme Court. Both the petitions for rehearing and for *certiorari* were denied.<sup>1</sup> As a result of the ruling, the power of FSIA,<sup>2</sup>

the terrorism exception, as a tool to deter torture was lessened.

Subsequent cases have muddled through the confusion created by *Acree* and generally relied on state law (for instance, asserting a torture claim under state laws covering assault and battery).<sup>48</sup> As for the success of future actions, the outlook is mixed. As noted, a federal statutory cause of action has been rejected in *Cicippio*<sup>45</sup> and *Acree*,<sup>1</sup> and the district courts have been reluctant to recognize other causes of action (e.g., those in federal common law). Specifically, in *Sosa v. Alvarez-Machain*,<sup>49</sup> the Supreme Court considered when a claim for a violation of an international legal norm is cognizable under federal common law. The Court endorsed the view that "actionable violations of international law must be of a norm that is specific, universal, and obligatory," and that "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind" (Ref. 49, p 732). State-sponsored torture should therefore be actionable under federal common law (in addition to state law) as a violation of clearly established international legal norms.

Despite *Sosa*,<sup>49</sup> asserting claims in this area of law is becoming more difficult for several reasons, including:

Of the remaining terrorist states only Sudan, Syria, and Iran are active targets for litigation.

Application of other related legislation is problematic. For example, the Torture Victim Protection Act<sup>50</sup> applies only to individuals, and identifying the individual perpetrators can be difficult, as can be identifying assets. Also, the Antiterrorism Act of 1991<sup>51</sup> applies only, in general, to amorphous terrorist groups that are elusive targets.

The courts are inclined to give substantial deference to the government thereby favoring executive flexibility and policies related to national security. Claims against foreign sovereigns may conflict with policy considerations and could trigger opposition from the administration as occurred in *Acree*.

That said, and although the appellate decision in *Acree* blocked the claims of those POWs and families, other civil suits based on allegations of injury or torture in the context of war have since arisen. For ex-

ample, in 2006, U.S. Army Special Forces Sgt. Layne Morris and the family of Sgt. Christopher Speer were awarded a judgment under the Anti-Terrorism Act<sup>51</sup> against Ahmed Said Khadr based on a July 27, 2002, attack in Afghanistan that killed Speer and wounded Morris. The court ruled that while the law excludes wars between nations, attacks intended to coerce civilians or governments are subject to “the full reaches of traditional tort law.”<sup>52</sup> Also in 2007, the D.C. district court issued multiple rulings awarding damages under FSIA, including \$2.65 billion in *Peterson v. Islamic Republic of Iran*,<sup>10</sup> to the families of the 241 U.S. service members killed in the 1983 bombing of the U.S. Marine barracks in Beirut.

Neither these wartime precedents, nor other non-war-related cases under FSIA appear to have spawned civil litigation for money damages against the United States in other countries under their laws. However, the United States Supreme Court has been active in the area of foreign detainees’ rights, recently ruling in *Rasul v. Bush*<sup>53</sup> that foreign nationals imprisoned without charge at the Guantanamo Bay interrogation camps were entitled to bring a legal action challenging their captivity in U.S. federal civilian courts. In addition, in June 2006, in *Hamdan v. Rumsfeld*,<sup>54</sup> the Supreme Court ruled that the military commissions established to try Guantanamo Bay detainees violated both U.S. law and the Geneva Conventions, although subsequent congressional action was taken that was designed to permit military tribunals to try the cases of “unlawful enemy combatants.”<sup>55</sup> Most recently, the Supreme Court in *Boumediene v. Bush*<sup>56</sup> struck down parts of the 2006 Military Commissions Act<sup>55</sup> that stripped U.S. courts of jurisdiction over the *habeas* petitions filed by foreign nationals detained at Guantanamo Bay.

In December 2007, in response to the *Acree* decision and other efforts by the Administration to block recompense for the victims of terrorist state acts, Congress passed a set of provisions as part of the National Defense Authorization Act for Fiscal Year 2008.<sup>57</sup> The provisions would have made it easier to bring suit against foreign terrorist states under § 1605 of the FSIA<sup>7</sup> by giving plaintiffs additional rights including explicitly creating a federal cause of action and making it easier to satisfy judgments. Nine days later, the President vetoed the Act because of concerns over the new FSIA provisions. On January 16, 2008, Congress passed a revised version of the original Act. The only difference between the origi-

nal and revised versions was that under the revised Act, the President was given the authority to waive all of the supplemental rights conferred in the National Defense Authorization Act<sup>57</sup> (i.e., the cause of action and the rights that made it easier to attach foreign states’ property) as those rights relate to Iraq only. On January 28, 2008, the President signed the bill and that same day issued the waiver.

Following the President’s waiver, the Court of Appeals for the District of Columbia Circuit decided *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008).<sup>58</sup> The court rejected Iraq’s argument that the President in 2003 and 2008 had stripped the courts of jurisdiction over claims against Iraq. The Supreme Court then agreed to hear Iraq’s appeal (supported by the United States) in the consolidated case of *Republic of Iraq v. Beaty*.<sup>59</sup>

In *Beaty*,<sup>59</sup> the Court held that Iraq is no longer subject to suit in federal court despite its previous designation as a state sponsor of terrorism. The Court determined that the President, pursuant to § 1503 of the 2003 Emergency Wartime Supplemental Appropriations Act (EWSAA),<sup>44</sup> had waived the terrorism exception to the FSIA with respect to Iraq, thus restoring Iraq’s immunity. The Court further held that § 1083(c)(4) of the 2008 NDAA,<sup>57</sup> which provided that “[n]othing in section 1503 of the [EWSAA] has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States,” did not alter the Court’s analysis because the President waived all provisions of section 1083 as to Iraq.

As a result, it appears the courthouse doors are now closed to victims of Iraqi torture and hostage taking, including the *Acree* plaintiffs. However, plaintiffs against the remaining terrorist states—Syria, Sudan, Cuba, and Iran—can avail themselves of new FSIA § 1605A and its enhanced plaintiff provisions (e.g., new federal cause of action; barring of certain legal defenses; a lien of *lis pendens* on an expanded class of properties; and enhanced attachment and execution provisions),<sup>57</sup> thus encouraging victims of terrorist acts by terrorist states to continue to seek redress in U.S. courts.

## Conclusions

*Acree v. Republic of Iraq* was a unique case that presented special challenges for forensic psychiatric

evaluation. The action represented the first suit brought by military personnel for damages inflicted during captivity. During the time frame of the forensic evaluations, the case played out on a larger legal, political, and social stage involving the courts, the media, and the Bush administration. Further, the evaluators were forced to confront challenges posed by the military culture of the plaintiffs, logistical obstacles to access, and limitations imposed by the brief time frame allowed to complete evaluations. The impact of the highly charged material provided additional stress on the experts, creating secondary trauma and conditions that promoted bias toward the plaintiffs. Despite the limitations, the findings of the evaluations were consistent with the prior military reports and also the frequency and severity of PTSD in POWs described in the literature. In addition, findings that a third of the plaintiffs were free of symptoms and impairment at the time of the evaluation provide some reassurance that the authors resisted political and emotional pressures to paint a sympathetic picture for each plaintiff. In future actions of this type, use of psychiatric evaluators from a third country not aligned with either party might diminish the political and emotional pressures on the experts, although given the extensive news coverage of an event such as the Gulf War, it is unlikely that any examiner would be free of emotional bias.

An ideal scheme for future evaluations of the impact of trauma would include extensive personal interviews, use of standardized self-report and interview assessments, and incorporation of corroborating data such as health records and prior examinations. With greater access to plaintiffs and a less pressured schedule, the evaluators could have employed standardized interview and self-report instruments as suggested by Keane *et al.*<sup>60</sup> Although these instruments have been used extensively in research on PTSD, there are no data examining their use in the forensic setting. Their forensic applicability may be limited by the high face validity of the questions, which could facilitate exaggeration or malingering of symptoms. Use of standardized instruments in future cases alleging torture will also be complicated by language and cultural barriers because potential plaintiffs, such as individuals held at Guantanamo Bay or Abu Ghraib, do not share the language and cultural frame of reference built into the instruments.<sup>3</sup> Despite these potential pitfalls, it may still be useful to

employ these systematic approaches to documenting PTSD symptoms.

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