Woodrow Wilson
International
Center
for Scholars

Division of United States Studies
Latin American Program
Division of International Security Studies

Legal Standards and the Interrogation of Prisoners in the War on Terror

Edited by **Cynthia Arnson**
and **Philippa Strum**
with an introduction by **Adam Stubits**

Woodrow Wilson International Center for Scholars

Division of United States Studies
Latin American Program
Division of International Security Studies

Legal Standards and the Interrogation of Prisoners in the War on Terror

Edited by

Cynthia Arnson and Philippa Strum

with an introduction by Adam Stubits

Available from the Woodrow Wilson International Center for Scholars

One Woodrow Wilson Plaza
1300 Pennsylvania Avenue NW
Washington, DC 20004-3027

www.wilsoncenter.org

ISBN 1-933549-30-0

December 2007

Cover photo: © 2004, 2005, 2006, The Washington Post. Reprinted with Permission.
enShui/Odilon Dimier/Getty Images

The **Woodrow Wilson International Center for Scholars**, established by Congress in 1968 and headquartered in Washington, D.C., is a living national memorial to President Wilson. The Center's mission is to commemorate the ideals and concerns of Woodrow Wilson by providing a link between the worlds of ideas and policy, while fostering research, study, discussion, and collaboration among a broad spectrum of individuals concerned with policy and scholarship in national and international affairs. Supported by public and private funds, the Center is a nonpartisan institution engaged in the study of national and world affairs. It establishes and maintains a neutral forum for free, open, and informed dialogue. Conclusions or opinions expressed in Center publications and programs are those of the authors and speakers and do not necessarily reflect the views of the Center staff, fellows, trustees, advisory groups, or any individuals or organizations that provide financial support to the Center.

The Center is the publisher of *The Wilson Quarterly* and home of Woodrow Wilson Center Press, *dialogue* radio and television, and the monthly newsletter "Centerpoint." For more information about the Center's activities and publications, please visit us on the web at www.wilsoncenter.org.

Contents

Acknowledgments

The editors would like to thank our colleague Robert Litwak, director of the Division of International Security Studies, whose collaboration was indispensable to the organization of the June 2007 conference.

We are also grateful to Susan Nugent and Acacia Reed of the Division of U.S. Studies, and Kelly Albinak and Adam Stubits of the Latin American Program, for their organizational, editorial, and research assistance. Latin American Program intern Sheree Adams also provided research support. The credit for publication design goes to Michelle Furman.

Finally, we wish to thank the Woodrow Wilson Center for its support of this publication and the conference on which it was based.

Introduction

The years following the attacks of September 11, 2001 have witnessed an intense debate in the United States about the interrogation of terror suspects. Law professors, editorial page writers, policymakers, members of the Executive Branch and of the armed forces, and judges—in addition to many other American citizens—have participated in a discussion about whether the interrogation standards implicit in the American Constitution and codified in domestic as well as international law apply to people suspected of participating in or possessing information about terrorist activities. Among the questions that arise are, for example, whether the Constitution's Fourth Amendment prohibition against unreasonable searches and seizures and the Eighth Amendment prohibition against cruel and unusual punishment can be read to permit aggressive interrogation techniques when lives may be at stake; whether, should that not be the case, such prohibitions may nonetheless reasonably be suspended during a war on terror; whether the Geneva Convention and other international law instruments to which the United States is a signatory apply to such situations; and whether such practices are likely to result in usable and reliable information.

The administration of President George W. Bush has taken the position that aggressive interrogation techniques are both necessary and permissible in the fight against al-Qaeda and other terrorists. Just days after the September 2001 attacks, President Bush expanded the authority of the CIA, permitting it to capture, detain and use deadly force against al-Qaeda operatives around the world. In February 2002, President Bush "determined for the United States that members of al-Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war."[1] These protections include prohibitions on "mutilation, cruel treatment and torture" as well as "humiliating and degrading treatment" of detainees.[2] Months later, Jay S. Bybee, then Assistant Attorney General, counseled the White House that in order to fall within the definition of torture, "physical pain…must be equivalent in intensity to the pain accompanying serious organ failure, impairment of bodily function or even death."[3]

The debate both within the United States and abroad exploded when, in April 2004, the abuse of detainees at Iraq's Abu Ghraib prison became public. A month after the U.S. Army reported that seventeen soldiers had been charged with the mistreatment of Iraqi soldiers and subsequently removed from duty, CBS's *60 Minutes II* broke the details of the story, revealing for the first time photographs showing American soldiers abusing and humiliating Iraqi prisoners held at Abu Ghraib. Citing increased danger and fighting in Iraq, the Defense Department and General Richard Myers, the Chairman of the

Joint Chiefs of Staff, had requested that CBS delay its broadcast. CBS complied, delaying the broadcast for two weeks.

The related issue of extraordinary renditions, the extradition of suspects from one foreign state to another for interrogation and prosecution, came to the forefront of the public debate in November 2005 as a result of a front-page article published in *The Washington Post*.[4] *Washington Post* journalist Dana Priest reported on the existence of "black site" covert prisons used by the CIA and supported by congressionally appropriated funds. Individuals captured in Iraq and Afghanistan, as well as those suspected of involvement in terrorist activities, are held at such facilities because "it is illegal for the [United States] government to hold prisoners in such isolation in secret prisons in the United States."[5] On December 5, 2005, Secretary of State Condoleezza Rice said, "There have long been many other cases where, for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option. In those cases the local government can make the sovereign choice to cooperate in a rendition." She noted further that "[t]he United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured."[6]

In response to the uproar created by these images, the Justice Department rescinded the Bybee memo and issued a more stringent definition of torture.[7] In June 2006, the United States Supreme Court ruled that military commissions established by the Bush administration to try suspected members of al-Qaeda were unauthorized by federal law and violated international law.[8] The opinion for the Court held that Common Article 3 of the Geneva Conventions was applicable to individuals being held at Guantánamo, requiring that they be treated humanely and tried in "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[9]

Three months later, the Pentagon issued new rules of interrogation explicitly prohibiting the kinds of abusive tactics exposed in the Abu Ghraib scandal and subsequent press investigations.[10] In July 2007, President Bush issued an Executive Order designed to bring the CIA into similar compliance. The Order requires "that any CIA interrogation program that might go forward comply with all relevant federal statutes, including the prohibition on 'cruel, inhuman, or degrading treatment or punishment.'"[11] It further "prohibits 'willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts beyond the bounds of human decency.'"[12] At the same time, however, administration officials refused to indicate which "enhanced" interrogation techniques are still permitted, ostensibly to avoid giving terrorism suspects any information about the possible softening of the U.S. approach. The debate about limitations on interrogation techniques continued through 2007, as a number of Senators refused to vote to confirm Attorney General-designate Michael B. Mukasey because Mukasey declined to say whether the controversial practice known as waterboarding, which simulates drowning, constituted torture and was thus illegal.[13]

The question of exactly what happens to terror suspects who are in the custody of the United States or who have been subject to extraordinary rendition remains. On October 9, 2007, the Supreme Court of the United States refused to hear an appeal filed on behalf of a German citizen of Lebanese descent who claimed he was abducted by U.S. agents and then tortured by them while imprisoned in Afghanistan.[14] In so doing, according to one commentator, the Supreme Court "let stand an appeals court ruling that the state secrets privilege, a judicially created doctrine that the Bush administration has invoked to win dismissal of lawsuits that touch on issues of national security, protected the government's actions from court review."[15]

The question of the use of aggressive interrogation methods with prisoners suspected of terrorist activities is clearly an important one that will continue to be discussed by policymakers and the general public. In June 2007, in the hope of contributing to that discussion, the Woodrow Wilson International Center for Scholars' Division of United States Studies, Latin America Program, and Division of International Security Studies convened a conference on the subject.

The event consisted of two panels. The first was devoted to an exploration of the views within the U.S. government—the Congress as well as the executive branch—about the legalities and the utility of coercive techniques. William Taft IV, former Legal Advisor to the U.S. Department of State; Seth Stern, legal affairs reporter for *Congressional Quarterly*; and David Rivkin, former Legal Advisor to the Counsel to the President, discussed the evolution of views within their departments and current interpretations of U.S. and international law.

The second panel, featuring Amrit Singh, staff attorney at the American Civil Liberties Union; Tom Parker, a former counterterrorism official in the United Kingdom; and Juan Méndez, president of the International Center for Transitional Justice, examined views outside the government, including those from United States non-governmental organizations, Latin America, and England/Ireland.

What follows are the slightly edited presentations made at the conference. The comments and exchanges among the panelists themselves, as well as the discussions with the audience, are also included. These exchanges reflect the ongoing controversies generated by the issue of the treatment of detainees, as well as the passionately-held views on both sides of the debate.

Adam Stubits

NOTES

1. "Executive Order: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency," July 20, 2007, available at http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html.
2. Geneva Convention relative to the Treatment of Prisoners of War (adopted 1949, entered into force 1950), available at http://www.unhchr.ch/html/menu3/b/91.htm.
3. Jay S. Bybee, "Memorandum for Alberto R. Gonzales, Re: Standards of Conduct for Interrogation Under 18 U.S.C. 2340-2340A" (U.S. Department of Justice, Office of Legal Counsel, August 1, 2002), available at http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogation-memo20020801.pdf.
4. Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," *The Washington Post,* Nov. 2, 2005.
5. Op. cit.
6. Secretary Condoleezza Rice, "Remarks Upon Her Departure for Europe," Dec. 5, 2005, available at http://www.state.gov/secretary/rm/2005/57602.htm.
7. Daniel Levin, "Memorandum for James B. Comey, Re: Legal Standards Applicable Under 18 U.S.C. 2340-2340A" (U.S. Department of Justice, Office of Legal Counsel, Dec. 30, 2004), available at news.findlaw.com/hdocs/docs/terrorism/dojtorture123004mem.pdf.
8. *Hamdan v. Rumsfeld*, 126 S.C. 2749 (2006).
9. Op. cit., quoting the Geneva Convention relative to the Treatment of Prisoners of War. *See* note 2.
10. Alexandra M. Abboud, "Pentagon Releases New Rules for Treatment of Detainees: Humane treatment of detainees remains standard operating procedure," U.S. Department of State USINFO (Sept. 6, 2006), http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=September&x=20060906161407maduobbA0.5917627.
11. The White House, Office of the Press Secretary, Press Release, "President Bush Signs Executive Order," July 20, 2007, available at http://www.whitehouse.gov/news/releases/2007/07/20070720-5.html.
12. Op. cit.
13. Mukasey was confirmed as attorney general on November 8, 2007. The vote of 53-40 gave Mukasey the fewest number of "yes" votes accorded to any nominee for that position since 1952, reflecting discomfort over his refusal to condemn waterboarding. Dan Eggen and Paul Kane, "Senate Confirms Mukasey by 53-40; Historically Low Tally for New Attorney General," *The Washington Post*, Nov. 9, 2007. In December 2007, it became public knowledge that in 2005 the CIA had destroyed videotapes depicting harsh interrogations of key Al Qaeda prisoners in 2002. The destruction of the tapes apparently took place against the advice of top CIA and White House lawyers as well as members of Congress and other top U.S. officials. Attorney General Mukasey announced in early January 2008 that the Justice Department had opened a criminal investigation into the destruction of the videotapes. Mark Mazzetti and David Johnston, "U.S. Announces Criminal Inquiry Into C.I.A. Tapes," *The New York Times*, January 3, 2008.
14. *Khaled El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); No. 06-1613, cert. denied, Oct. 9, 2007.
15. Linda Greenhouse, "Supreme Court Refuses to Hear Torture Appeal," *The New York Times*, Oct. 10, 2007.

Panel 1
The Discussion within the U.S. Government

WILLIAM TAFT IV

The first question to be addressed here is what the law is with regard to torture, at least as it applies to the United States and the United States government; the second, the question of the efficacy of coercive interrogation techniques.

It is now settled that at least two provisions apply to the question of the lawfulness of using coercive interrogation techniques in wartime. One is the Convention against Torture, which the United States joined some years ago after careful consideration of some of the very difficult issues involved in that subject.[1] The second is Common Article 3 of the Geneva Conventions, which the Supreme Court found applied to the people whom we have taken into custody in the war that the terrorists have declared against us and to the conflict that is ongoing with those terrorist organizations.[2]

The Convention against Torture of course bans all things that are torture. There is a question of whether it applies to actions by the U.S. government outside of the United States, with some people arguing that the prohibition on torture is limited to what is prohibited by the Constitution and that the Constitution does not apply to aliens outside of the United States.[3] That is not a significant position, however. Most of the parties to the Convention, and I believe that includes all the signatories, except us, would say that it does apply everywhere to the actions of the U.S. government. That has been our government's position generally, notwithstanding this argument.

The question has often been raised about whether torture is prohibited under the Convention against Torture in the case of a ticking time bomb: whether you could torture a person when you want to find out where the bomb is from somebody who presumably knows. I think the answer is that the Convention against Torture makes no such exception. The issue is not a new one; it was before the Congress and the government when we signed and ratified the Convention against Torture. The exception simply is not there.

Common Article 3 is a little more extensive. It sets the minimal standard for treatment, and bans cruel treatment. It also prohibits torture of persons in your custody as well as humiliating and degrading treatment.

Of course, how to define "torture," "humiliating and degrading treatment," and "cruel" need to be elaborated. This was reflected in the discussions preceding passage of the Military Commissions Act last year.[4] There was an assertion by the government, in seeking to decriminalize violations of Common Article 3, that Article 3 contained too

vague and subjective a standard for deciding what was humiliating and degrading. I do not think that is a fair criticism. Until then, the government had taken a position in the *Army Field Manual* as to what could and could not be done, and as to what was humiliating or degrading.[5] In addition, over the years the United States has not had a great deal of difficulty identifying humiliating and degrading treatment when our own soldiers have been subjected to it.

It may be that these terms were too vague for a criminal statute, but I think that the *Army Field Manual* contains a fairly good set of guidelines as to which coercive techniques of interrogation are and are not permitted for prisoners detained under the law of war.

On the question of the efficacy of torture, I would like to share an anecdote. Last week, the temporary cap on one of my teeth came off and the dentist made a quick temporary repair. When he squirted some air on the nerve, I realized that there were things that I would be glad to tell him, if he agreed to stop doing that—things that I perhaps would not tell him if he were not doing it. That gave me some sense that coercion is effective, at least in my case, for eliciting information that I would not otherwise share.

It is also obviously true, however, that the use of torture is an extreme form of coercion. Its effectiveness is going to be highly dependent on the individual with whom you are dealing, on what he actually knows or does not know, and on the information that you are trying to elicit from him. Perhaps there are more sophisticated techniques available today, but I recall reading about Jesuits in the 16th and 17th centuries who suffered the most excruciating pain but never recanted or did whatever it was hoped that they would do. I am sure that there are people of that sort today for whom torture or the worst kind of coercion will not work. There are other people who give in immediately. I remember that in Bernard Shaw's play of the same name, St. Joan says, "If you hurt me I will say anything you like to stop the pain. But I will take it all back afterwards; so what is the use of it?" This was of course a declaration of faith rather than a providing of information.

These examples underscore the relevance of the particular individual with whom you are dealing and the high variability of the effectiveness of coercive techniques. The law does ban certain coercive techniques, and the *Army Field Manual* has over the years established the use of certain methods of interrogation that do not come to the level of coercion. These include methods such as deception (telling detainees that you know things that you do not know or you are not sure about), pretending to be a detainee's friend, and pretending to be annoyed with him or her. The *Manual* outlines all sorts of techniques that have proven to be effective over the years. The fact that the law does prohibit coercion suggests that there is a general feeling that torture and coercive methods are not effective. The *Army Field Manual* says as much in its preamble, stating that it is believed that coercive methods are less effective in obtaining important information from people in custody than the other methods it suggests should be used.

An obvious problem is that one cannot do it both ways with a single individual. You can never know what you would have gotten out of someone if you had tortured him when you did not, or had used a coercive method when you did not.

I have no doubt that there are some people who have information and will share it under torture, as I would have in the dentist's chair. There are some who will share false information, and there are some who have no information to share. How we deal with that is something that we resolved under the Geneva Conventions and under the *Army Field Manual* guidelines. My own preference would have been to leave things where they were and not look to new methods.

SETH STERN

I will focus on developments in U.S. legislation and on the political debate about this issue over the last few years. The year 2005 was critical. Congressional pressure to examine the treatment of detainees built up in the wake of revelations about ill treatment of prisoners at the naval base at Guantánamo Bay, where the United States had been holding detainees in the war on terror, and at Abu Ghraib, the prison in Iraq that in April 2004 produced the photographs of soldiers mistreating prisoners. There were media revelations of memos written by government attorneys, justifying various forms of interrogation and ill treatment. The result was a debate in the U.S. Congress about whether the United States should engage in torture. What was really at issue in the proposed legislation was the permissibility of lesser forms of coercive interrogations, such as cruel, inhuman and degrading treatment.

In December 2005, two important amendments were added to the Defense Authorization and Defense Appropriation Bills.[6] One provision prohibited cruel, inhuman and degrading treatment as defined by the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution.[7] The amendment applied to all U.S. personnel, whether in the military, CIA, or any other government agency. The second amendment stated that the military, but not CIA interrogators, were bound by the interrogation techniques laid out in the *Army Field Manual*.

The key player and most forceful advocate of both provisions was Senator John McCain (R-AZ). As a former prisoner of war who was subjected to torture after he was captured by North Vietnam, McCain has a unique moral authority in Congress on this issue. The language he wanted was attached to those bills in spite of resistance.

In June 2006, however, the Supreme Court said in *Hamdan v. Rumsfeld*[8] that the system of tribunals for trying the detainees at Guantánamo Bay violated U.S. law. The administration was then faced with the need to rewrite the rules and the legislation regarding how to try the detainees. In September 2006, President George W. Bush went before the public and, in a masterful performance, acknowledged the existence of the secret CIA detention facilities that had been reported in the press.[9] *The Washington Post* had written that the facilities might be based in Eastern Europe. Now the U.S. government, in the form of the President himself, acknowledged their existence. He said that the facilities were extraordinarily valuable in obtaining actionable intelligence that helped the United States prevent attacks, and that the facilities were using aggressive interrogation techniques.

President Bush also said that the government was transferring custody of some of the highest value detainees, including Khalid Sheikh Mohammad, to military custody at Guantánamo Bay.[10] They were detainees who had been interrogated and from whom the government believed it had obtained everything it could. These were the people who the President said were responsible for the terror attacks and who, he added, would be turned over to the military. He told the public, however, that providing justice for the victims of 9/11 necessitated rewriting and enacting rules that would allow the U.S. government to try the detainees from Guantánamo Bay. He very cleverly linked the need for coercive interrogation methods to the need for a system to try these detainees once they had been interrogated.

The President made his statements approximately six weeks before the November 2006 congressional elections. His allies in Congress submitted the Military Commissions Act of 2006.[11] Most Republicans were supportive of this initiative. Then, however, the President ran into a problem, in the form of a trio of Republican Senators: John Warner (R-VA), who at the time was chairman of the Senate Armed Services Committee; John McCain; and Lindsey Graham (R-SC). They in effect said, "Hold on a minute—we are very concerned about some of these provisions."

Each of them had unique military credentials. Senator Warner had been Secretary of the Navy;[12] Senator McCain, as previously mentioned, had been a POW; and Senator Graham is a colonel in the Air Force Reserves and an instructor at the Air Force Judge Advocate General School. They were referring to provisions that said that if the United States adhered to the language in the 2005 Detainee Treatment Act, it would satisfy American obligations under Common Article 3.[13] They were also very concerned about provisions that would block the detainees or their lawyers from access to secret evidence and that would allow some coerced testimony and hearsay evidence to be introduced in judicial proceedings.

Given the timing—as noted, this was roughly six weeks before the U.S. elections—the Democrats essentially backed away, letting the Republicans fight things out among themselves. It was a wise political calculation. Democrats knew they had a good shot at becoming the majority. The calculation seemed to be, "We're not going to jump in this fight. Let the Republicans duke it out."

There were then negotiations between the Bush administration and the trio of Republican senators. The result was the Military Commissions Act, which was enacted in October 2006.[14] The president had to give up some of what he wanted, but for the most part he got the provisions he sought. The Democrats were outraged, particularly about a provision that eliminated the right to *habeas corpus* review for those designated as enemy combatants. The Democrats did not put up much of a fight, however, and the bill went through.

That brings us to 2007, when the Democrats took control of Congress. The question to be considered now is what, if anything, will change with respect to the provisions governing the interrogation of prisoners or their ability to challenge their interrogation or detention in court. The answer is that so far, given certain political realities,

it appears that not a great deal will happen. One of those realities is that the Democrats in the Senate need 60 votes, a filibuster-proof majority, in order to change the legislation. They do not have those votes by themselves, and would therefore need to attract some Republicans. A second factor is that some of the newly-elected Democrats are fairly conservative and not necessarily inclined to support proposals for change.

There were nonetheless several initiatives under way as of mid-2007. One was a relatively narrow proposal by Senator Patrick Leahy (D-VT), chairman of the Senate Judiciary Committee, and Senator Arlen Specter (R-PA), which addresses the *habeas corpus* issue.[15] It will soon be considered by the Senate Judiciary Committee, and Majority Leader Harry Reid (D-NV) has promised that it will be brought to the Senate floor. But again, the Democrats need 60 votes, and it is not clear they will get them.[16]

A broader measure by Senator Christopher Dodd (D-CT), that would also bar all coersive evidence, marshaled even less support.[17]

The two places where there has been action so far are not encouraging for those who want any sort of change in the House Defense Authorization bill that was passed in May 2007.[18] The committee did not take up amendments that would have closed Guantánamo or restored the right to *habeas corpus*, because of a realization that those might have sunk the bill. It did include language that directs the Pentagon to report on the detainees, and that prompted a veto threat from the President.

In a separate initiative, Senator Carl Levin (D-MI), chairman of the Senate Committee on Armed Services, included language in the Defense Authorization bill that would require detainees to receive legal representation and bar the use of statements obtained through cruel or inhuman treatment.[19] It does not appear that the Democrats have the votes they would need to scale back the 2005 and 2006 laws.

DAVID RIVKIN

It is always tough to balance liberty and public safety, even in peacetime. Balancing liberty and safety in wartime is the most difficult task, and certain aspects of wartime policies, like aggressive interrogation techniques, are hard to address, both emotionally and intellectually. The progress of civilization is such that we have all become kinder and more genteel about such issues and do not take well to any forms of government-sponsored coercion, whether physical or psychological. These are not pleasant issues but we do have to talk about them, if only to arrive at the right policy balance and satisfy ourselves as citizens that we are doing the right thing.

I largely agree with what my friend and colleague Will Taft had to say about the law, with a couple of caveats. First, with all due respect, the Supreme Court did not definitely establish that Common Article 3 applies to and binds the United States for all purposes. I submit that the Supreme Court cannot issue such sweeping pronouncements anyway, given the fairly narrow ways in which judicial power operates in our constitutional system. What the Supreme Court actually decided in *Hamdan* is that Common Article 3 applies to the particular set of issues before it; namely, the legality

of the military commissions proposed by the president before the enactment of the Military Commissions Act. The Court came to this decision through a very tidy trick; namely, by stating that Congress, in its infinite wisdom, did not give the president authority to create military commissions unsanctioned by "the laws of war," as codified by Congress in the Uniform Code of Military Justice, and rejecting the government's arguments that its Military Commissions procedures were authorized by statute.[20]

Congress incorporated Common Article 3 into the Uniform Code of Military Justice (UCMJ), a kind of omnibus legislation that deals with many issues of military discipline and order (an earlier version of the Code was called the Articles of War), by very obscure reference.[21] The UCMJ did no more than that. Moreover, it is not the province of the judiciary to make broad and sweeping statements about what international obligations have been assumed by the United States and how they are to be construed across the board, as distinct from the context of a particular case or controversy before the courts. That is important. However, the administration unfortunately threw in the towel on this issue. In my opinion, there is a perfectly defensible legal way to read the *Hamdan* opinion differently.

Will and I may also disagree somewhat about how clear words like "torture," "cruel," "inhumane" and "degrading" are as a matter of law, along with other language in Common Article 3 that refers to humiliation. I think that they are very capacious. That does not mean that they are completely devoid of meaning, but they are certainly not crystal clear, especially not in the context of criminal law enforcement, where one has to worry about such things as the legal doctrine that laws can be struck down as void for vagueness. Under our constitutional system, before one can prosecute people, one must spell out clearly the acceptable parameters of their conduct.

Some of those words are pretty clear; others are less so. I think the meaning of "torture" is more or less clear. I think the meaning of "cruel, inhumane and degrading" is less clear. With all due respect to those who claim otherwise, what "humiliation" means is utterly unclear, because it is driven by the cultural context. There are cultures where, because of fairly demeaning views of women, men find it humiliating to work for women. In many cultures, being interrogated by a woman or somebody, let us say, of Jewish faith, is extremely humiliating. I tend to doubt that most of you would feel that these sentiments, probably genuinely felt by individuals who espouse these views, should be indulged. If we were interrogating a neo-Nazi who had a fanatical hatred of Jews we would not remove everybody who is interrogating him, no matter how pleasantly and gently, who looks Jewish or in fact is Jewish. Humiliation is very culturally driven.

It is also context-driven. There are fundamental differences between civilian and military life. If I went back to my office, for example, and told my secretary or one of the more junior associates in my law firm to drop down and give me fifty pushups, I would be in trouble with my firm.

In military life, things have gotten a little kinder and gentler in basic and advanced training. The drill sergeants are not as tough and sadistic-sounding, but people still stand for a couple of hours at parade rest in full kit, which is a form of stress position. People are given 100 pushups or some such number. People must run with full gear, which is quite unpleas-

ant and debilitating. Recruits experience being yelled at and told to scrub the floor with a toothbrush.

The whole essence of military life involves humiliating and degrading people, stripping away the soft layers of civilian identity and recasting them as warriors. I do not think many experts in military psychology and training would disagree with that. There is sleep deprivation and very bad nutrition; and, for those who go through more advanced training—pilots or Navy SEALs, for example—things that I don't think we've done to detainees, including the fact that some of our own people were waterboarded None of this is for sadistic purposes but, rather, to build resistance and to anticipate the possible use of those techniques by our enemies. You therefore have to understand the fundamental differences between the civilian and military spheres and realize that concepts like humiliation are context- and culture-specific.

It is also worth noting that there is plenty of coercion and humiliation in every criminal justice and penal system in the world, including even the most defendant-friendly systems like our own. In my view, being subjected to a custodial interrogation is inherently unpleasant and humiliating. You will have read stories about tough interrogators pressing detainees, and I am referring to not very sympathetic detainees, saying things like, "Look, unless you cooperate we're really going to go after your wife and she'll be in prison for the next fifteen years, but if you cooperate we'll cut her a deal and she's only going to do six years." I cannot imagine that this would not be extremely painful and very cruel from the perspective of the individual who is undergoing such an interrogation.

William Taft is correct that the old interrogation manual did not permit any discernable forms of coercion. That was a policy choice made by the United States. I see no evidence that the choice was made as a matter of law, after having analyzed the key legal strictures in international and domestic law. Frankly, since World War II and up until September 11, we were not very serious about unlawful combatants as a category. That does not mean, however, that we have given up the right to engage in conduct that is not prohibited, because customary international law changes in a rather glacier-like manner, and it requires more than a short-term absence of a given practice, before that practice becomes unavailable to a state.

An additional point about law is that the international law of war recognizes two categories of combatants, lawful and unlawful, and they receive vastly different privileges upon capture. Lawful combatants are honorable people, who upon capture should be treated with dignity, because all they have done is fight for their country or their cause, and they have simply suffered the misfortune of being caught. They are entitled to the gold standard level of treatment. They cannot be subjected to any humiliation. They cannot suffer any inducement to betray secrets; they have both the right and an obligation to protect their country's secrets. There can be no disadvantageous treatment of any kind.

Unlawful combatants are not entitled to receive anything approaching this gold standard level of treatment. They have to be treated humanely. They cannot be tortured. They cannot be subjected to cruel, inhumane and degrading treatment, but they can be interrogated aggressively. The question, again, is what constitutes an aggression.

Let me switch to some policy issues. Unfortunately, critics of our policies always use the "t" word, torture, to describe everything, but there are many unpleasant things that are not torture. People would not use words like cruel, inhumane, degrading, and humiliating if everything constituted torture. The use of the word torture has been cheapened in the sense that when everything is torture, nothing is torture.

I read statements by some of my European friends saying that the very fact that people are indefinitely in custody constitutes torture, because not knowing how long they will be there is a form of torture. With due respect, under that standard, every POW in every war has been tortured. I bet if you asked Winston Churchill, or a German POW in 1941, or an American or British POW following the Battle of Dunkirk, how long the war would last, he would not have been able to tell you. Those things are just unknowable. To call that torture is to devalue the word torture.

Now, is coercion necessary? We hear that if we are very clever, if we use the standard FBI techniques, if we appeal to people's good graces and talk about the fact that they are not going to see their families for a while and get into their psychological space, everything will be fine. I am not an interrogator. I have never been one, and I hope not to partake in this admittedly tough and unpleasant activity, but I will tell you one thing. In late 2001 and 2002, following our invasion of Afghanistan, we captured a number of al-Qaeda personnel. According to *The Washington Post, The New York Times* and various other newspapers that can hardly be accused of being sympathetic to the Bush administration, the FBI was singularly unsuccessful in eliciting information from the detainees by using traditional FBI interrogation techniques. The reason the CIA swung into action and the debate arose in the administration about the definitional issues is because the other approaches did not work.

Some Israeli and British colleagues tell me that if you are really clever, if you know the language, if you know the culture of the people you capture, you can get most of the needed information out of people slowly and without any use of coercive techniques. They may be right, but I submit to you that we do not have that capability. Right now we certainly do not have many interrogators who are expert in the cultures of the regions from which most of the people we're fighting come. Using the culture is not an option. The discussion reminds me of debates in the Cold War days about defense procurements. Some people argued that because we had waste, fraud and mismanagement in the Defense Department—they were thinking of $900 toilet seats—we should not spend any money on defense until that was fixed. My answer at the time was no, that's not how you do things. You try to minimize waste, fraud and mismanagement, but in the interim you spend as many defense dollars as necessary to buy what you need. So, while there are undoubtedly some efficacious alternatives, I do not know how easily obtainable they are right now or will be in the foreseeable future. However, it is at least a debatable proposition.

What is not a debatable proposition is the claim that stress techniques do not work. I am really tired of hearing that because, if it were so, there would be no need to debate this admittedly unpleasant set of issues. Unfortunately, coercive techniques work, with

all the caveats that William Taft mentioned. Yes, there is a small category of people who are so tough, so devout, so motivated that no matter what you do, you can literally pull them apart and they would not tell you anything. It is, however, a very small category.

Some of you may remember the movie *Marathon Man*. If you do not know anything, no matter how much you are tortured, you will not be able to tell anything. After a sadistic old Nazi-type drilled every single tooth Dustin Hoffman had to find out where the diamonds were hidden, he said, "I guess you really didn't know anything." But these are exceptions. I don't know what the statistical breakdown is but there are some people who will talk simply upon being captured. There is a fairly small category of people who will not talk no matter what you do to them. Then there is the vast middle of people who will talk if coercive techniques are applied.

I am also tired of hearing that people would lie if such techniques were used. Of course they would lie. If you capture people who want to fight to kill you, they would lie whether you interrogated them coercively or not. Unless you have the ability over time to cross-check what they tell you against what other people told you, and create a kind of mosaic-like complete intelligence picture, then interrogating people is useless. But if you do have enough time to cross-reference things, the fact that somebody lies is not a problem. In fact, once you figure out enough of a context, you can learn as much from the fact that somebody is lying to you as from somebody telling you the truth, as long as you are able to discern what is a lie and what is truth.

I do not know and I do not think any one of us knows how much intelligence we have gotten from people who were aggressively interrogated, but George Tenet, who certainly is not a big fan of this administration, has written that there were spectacular intelligence coups where information was obtained through aggressive interrogation techniques.[22] This has been mentioned by other people, including the President. The fact that as a general proposition throughout history, aggressive interrogation techniques have worked, suggests that it is a point worth exploring.

I will mention two other things briefly. First, I know there are people who chastise the administration for exercises like the John Yoo memo.[23] You may not like where he, the Office of Legal Counsel, the Department of Justice, and the White House counsels came out. There are some aspects of those memos with which I would not agree. What I ask you to appreciate, however, is how commendable it is that we, as a democratic society, faced with what was felt to be an extreme threat in the aftermath of September 11, actually asked legal questions. We wanted to understand not only what was right but what was legal. I would submit to you that most countries, including some of our democratic friends in Europe, would not have bothered asking legal questions. I doubt that the French Ministry of Defense or intelligence services obtained a legal opinion prior to having agents blow up the *Rainbow Warrior*, a ship protesting French nuclear tests in the Pacific, asking how they could avoid violating New Zealand law or international law. They just don't do those things. Their sense is that when you have something driven by *raison d'etat* you do what you have to do.

My bottom line on this issue is this. The legal matrix is not the driver as we address these questions. The laws, the Geneva Conventions, the torture conventions and such actually allow us more room for action. This is not a matter of a legal straitjacket but a policy-driven decision.

Finally, I am saddened by the fact that we as a body politic have not had a serious discussion about this in the last several years. We have had a lot of sloganeering. It does not take much courage to condemn torture and any inhumane or degrading treatment and all forms of coercions. If one wants to get confirmed by the Senate in the future, it is far safer to condemn all of that than to defend any aspect of coercion.

But by acting as if everything is torture, we fail to ask ourselves important questions. Are there degrees of coercion with which we as a society would be comfortable? I would submit to you that there should be at least some. I am not supportive of torture or cruel, inhumane, or degrading acts, but I find it difficult to imagine that we should not apply aggressive interrogation techniques—at least as aggressive as we use with regard to our own personnel—to unlawful enemy combatants. That would not include waterboarding, but it would include things like sensory deprivation, sleep deprivation, and moderate use of stress positions. I do not believe, if we do these things to our men and women who have joined up to wear a uniform, that we as a society should find it unacceptable to apply these techniques to unlawful enemy combatants. The notion that individuals volunteer for the armed services and are not prisoners is irrelevant because, as a matter of law, you cannot volunteer for things that are inherently illegal and against public policy. One cannot volunteer for prostitution; one cannot volunteer for torture. It is regrettable that we as a society have been unable at least to have a serious dialogue about these issues.

PANELISTS' DISCUSSION

Mr. Taft: I am not sure that David Rivkin and I are very far apart on the issue of legality. Should another case about regulating government conduct in the conflict we are now in go to the Supreme Court, I think it would be very surprising for the Court to rule that Common Article 3 is not applicable. The precedent would be the *Hamdan* case. I believe that is not what the Court found, and Congress essentially adopted the view that Common Article 3 applies when it passed the Military Commissions Act. There is a question as to who gets to interpret Common Article 3. As someone who worked in the Executive branch for many years, I have tended to the view that a great deal of deference has to be given to the executive branch's interpretation of our international treaty obligations. It could be, and the Military Commissions Act anticipates this, that the President would come up with a reinterpretation of Common Article 3 that people might find controversial. I do not think, however, that you would find the President walking away from the determination that Common Article 3 applies to the conduct of the government. That needs to be respected. Of course that idea is embedded in the Detainee Treatment Act as well, where the exact meaning of terms about humiliating and degrading treatment is again left open.

As to the question of policy versus reliance on the law, I agree with David Rivkin that the *Army Field Manual* was a policy choice, but it is not enough to simply say that it was a policy decision and so it was not legally required. Policy choices here are very important. They are the choices that we are asked to make, and they were the choices that the government did make and adhere to for forty years in all of the conflicts that we were involved in from the time the manual was established. The manual is a little older than forty years. It was revised and is being revised again now. It reflects the choices that we made. I think it is fair to say that they were made after an analysis not so much of what is required but after an analysis of what was in our interest overall, weighing both the effectiveness of our interrogations and other elements of our policy as to how we wanted our position in the world to be seen, how our own servicemen should be treated when captured, and what standard we should be promoting for application in conflicts around the world.

The question of the efficacy of various techniques went into the making of our policy choices, and while it may be that those choices were wrong, they were our choices. I do not think that there was a great deal of consideration of those issues when choices were made not to follow the *Army Field Manual*. It was not considered as part of the larger question of what the implications would be for our broader foreign policy and security interests around the world. It was a decision made by a very small group of people, the fact that it had been made was generally kept secret, and my impression is that a great many factors which should have been considered in reaching those decisions were not considered.

I agree that there is a risk to not using coercive measures. There are important things that you could find out that way. War is full of risks, and you weigh those risks against the benefits of whatever conduct you are considering. It is not an absolute that getting information from somebody is the only factor you should consider in deciding whether to use a particular coercive method or not. There are other factors involved.

Mr. Rivkin: I never suggested that the policy choices made in the aftermath of World War II on interrogation techniques and the broader lawful versus unlawful combatant paradigm were wrong. In a government of laws and not men, legal conclusions cannot be changed by policy fiat, but policy conclusions can be changed. What you think are the imperatives that drove policy earlier to arrive at a particular balance obviously tells you what you can do now.

I agree with William Taft that the decisions have been handled quite badly as a matter of institutional and bureaucratic politics. There was not a serious debate within the administration on the totality of those issues, but interrogation was not the only issue.

The overarching issue, of course, was whether or not the Geneva Conventions apply. This is an area where William Taft and I do fundamentally disagree. I think the notion that the Geneva Conventions apply to al-Qaeda or even to the Taliban is utterly inconsistent not only with the language of those conventions but also the entire fabric of international laws of war.

If you are a POW, international law entitles you to a real gold standard level of treatment. Among other things, it means that you cannot segregate POWs. If detainees in Guantánamo are POWs, you cannot keep them apart. They need to be with their fellows. They should be able to congregate. They should be able to do what prisoners did in *Hogan's Heroes*, a television series which was of course not a serious scholarly product, but which did accurately convey the way prisoner-of-war camps were run. They elected their own representatives. In fact, POWs are considered honorable people and are treated much better than criminals who are incarcerated in prison. If we really had to apply the Geneva Convention across the board, before long the prisoners in Guantánamo would have been able to have hockey sticks and banjos. Alberto Gonzales was criticized for referring to the Geneva Convention's "quaint provisions."[24] I wouldn't have used the word "quaint;" I would have used a word like "ample." POWs are permitted to use musical instruments under the Geneva Convention.

Let us be clear about what we have now. After all the process that Seth described accurately, we have a new *Army Field Manual* that basically enables interrogators in the armed forces to do absolutely nothing, so we have unlawful combatants who are treated better than muggers and rape suspects in many police stations in the United States. We have reached a level of moral absolutism. We treat these people perfectly. I would submit to you that when the CIA rules about interrogations finally come out, they will be very close to those in the *Army Field Manual*, because it is inherently impossible in our bureaucratic and political culture to have one agency operate under standards that are fundamentally different from those we have already set down. Even if it does not happen now, it will happen eventually. So without having a serious debate, by default we have gotten ourselves into a position in which nobody is going to be interrogated with any degree of coercion. Again, if you are a mugger who grabbed a purse from a little old lady, you can be treated more aggressively than if you are Osama bin Laden. With all due respect, that's insane.

Robert Litwak: I would like Seth to expand on his remarks. When the President signed the legislation to which you referred, he issued a signing statement in which he in effect took back everything implied by his signing the legislation. What is the gap between the prerogatives that the President was asserting in that signing statement and the interpretation of the legislation and the intent behind the legislation that McCain and Graham and Warner had signed onto?

Where are we now in terms of the intersection between policy and politics? This issue has come up in the early presidential debates and in proposals to double the size of Guantánamo.

Mr. Stern: I don't think the President won many friends on Capitol Hill with his signing statements. Members of Congress in both parties felt that he was interfering with their prerogatives. Certainly when the issue returned in 2006 there was a certain skepticism and concern about whether they could even take the President at his word

or whether he was just going to write another signing statement and bypass whatever they had done legislatively.

The 2008 presidential campaign is off to a very early start. Senator John McCain, one of the leading Republican candidates, has more or less absented himself from the U.S. Senate, essentially campaigning full time. That is a problem for Democrats who, if they do want to move forward on this issue in 2007, have lost one of their most important voices in the Republican Party.

McCain has a problem that was highlighted in the debate among Republican candidates a few weeks ago. The question, which involved the ticking time-bomb scenario, was along the lines of, "There have been a couple of attacks. You've got information that another one is coming. You capture detainees, you take them to Guantánamo, what do you do?"

Most of the Republican candidates had what amounted to a competition for who could beat the detainee the most completely. You had most of them saying, "I would do everything I could." One of the candidates said, "Oh, I'd like to double Guantánamo." McCain was again a forceful voice against torture, but he surely knows that in a race in which he must prove his conservative credentials, advocating less coercive interrogation techniques will not get him very far.

The same applies, though, on the Democratic side. Senator Dodd has introduced the most comprehensive bill addressing the detention and interrogation of detainees, but he is a second or third tier candidate. Neither of the leading Democrats, Senators Barack Obama and Hillary Clinton, has introduced legislation or taken this on as a big issue. Clearly, the leading Democrats do not see this as the road to getting elected as president in 2008. And on the Republican side, most of the candidates see more advantage in appearing tough than in speaking out on this issue.

Dr. Litwak: As the only member of the panel who is part of the media, perhaps you could comment on how the media has covered this and the impact of TV shows like "24," in which torture appears to be both legal and effective.

Mr. Stern: There is very little distinction in the debate. Some human rights activists say there should be no distinction made between torture and the lesser forms of coercive interrogation—that it is all bad, illegal, and not an option. There is an utter lack of nuance in the debate. The debate in Congress was seen as one about whether we should be allowed to torture suspects when what was really being debated wasn't torture at all.

The television show "24" has influenced public opinion more than anyone in Congress has. You get the sense watching its ticking time-bomb scenario that, if faced with a catastrophic attack, you let CIA operative Jack Bauer decapitate someone or do whatever he does to force the other guy to talk, and it works. That does fuel a public perception that torture is effective in the ticking time-bomb scenario.

Mr. Rivkin: I think the ticking time-bomb scenario is utterly irrelevant. It is just something that law professors talk about. I think it is useless to debate torture because I think we cannot do it as a civilized society. What is regrettable, however, is that we have gotten to the point that I mentioned earlier, where we cannot use any aggressive techniques, even at the level at which we interrogate criminal suspects. We are interrogating our worst enemies almost entirely without any serious reflection upon all these issues.

Mr. Taft: I think one of the points that David Rivkin made about the "gold standard" of the Geneva Conventions is a bit unfair. It is true that the Geneva Conventions provide POWs with musical instruments and scientific instruments and the right to be in touch with their broker and to manage their affairs back at home and get tobacco and so forth. And these provisions are quaint, but there are other provisions as well. What was unfortunate and disingenuous about the administration's approach was that, while they said the Geneva Conventions were quaint or out of date, they did not mention that the provisions that they were intending not to follow were not quaint at all. There is nothing quaint about Article 3. There is nothing quaint about saying that a judicial decision needs to be in accordance with standards of civilized society. Common Article 3 is not the gold standard in the sense that it provides people with greater rights than other prisoners get. It actually provides people with very basic, fundamental, minimal rights. What I found most disappointing was that pointing to the scientific instruments provisions was a bit of cover for what was actually being done: denying people the rights that they have under Common Article 3.

QUESTION AND ANSWER PERIOD

Question: My question is about outsourcing torture. We have heard a lot about it from the media. What is the legal background and the policy background behind outsourcing torture? Is it effective or not?

Mr. Rivkin: I have written about it quite a bit. We need to define rendition, which is nothing more than a process in which one person is transferred from one country to another one in which he or she is wanted. We have procedures like deportation and extradition. As a matter of process, there is nothing exceptional about rendition. It was used long before September 11, in cases like that of Carlos the Jackal.[25] Rendition is legal.

Sending somebody to be tortured is obviously illegal under the Convention against Torture and customary international law, but again I emphasize the point about rendition because I am frankly sick and tired of people commingling the two. If you lure somebody to a country where he will be tortured, that would not be defined as rendition, but it would still be illegal.

What is not illegal is sending captives to countries that have bad human rights records, provided that you obtain adequate assurances that they will be treated differently. Many

of our European friends do that. There are a number of decisions by various European courts, including fairly recent decisions by British courts, saying that it is legitimate to send people to Algeria against their will, because of arrangements reached by Prime Minister Tony Blair and President Abdelaziz Bouteflika, the president of Algeria, in 2006.

Of course you cannot be blind and deaf. If you worked out arrangements with a country that lied the first time, lied the second time, and lied the third time, you should not rely on it the fourth time. On the other hand, it is not true that you cannot rely on these arrangements just because it is a country with a bad human rights record.

Mr. Taft: This is not a new issue. It is constantly brought up in criminal cases where, for example, people are being sent to Mexico. When a suggestion is made that a person should be returned to Mexico to stand trial on a criminal charge, the possibility is raised that he will be tortured. There is a process by which the State Department looks into this possibility, and the process has been used with respect to some of the people in Guantánamo. This was the case with the Uighers from China, whom we declined to send back to China because of a determination that there was a likelihood that they would be abused.[26] At least at that level close attention has been paid, as there always is in criminal cases, to the possibility that there might be torture. We have people who go to talk to the government and assess the credibility of their assurances. Sometimes you get additional assurances that a human rights organization or some third party will be able to check on the prisoner every month to see how he is doing. There is a fairly long history and quite a lot of experience here. I think that wherever the possibility of rendition has been brought up in connection with the people in Guantánamo, it has been very carefully reviewed. There may be other cases where rendition has not been done correctly, but the policy I think is very clear.

Amrit Singh: I am an attorney with the ACLU Immigrants Rights Project. Mr. Rivkin, I found it very interesting that you thought that the ticking time-bomb hypothetical was actually not that helpful in informing the ongoing debate about torture, but what I found particularly disturbing about your account is that it is entirely divorced from the facts. Numerous government documents have been released under the Freedom of Information Act that show that torture did occur, perhaps not in Guantánamo—because of the way you would define torture—but it certainly occurred in Iraq and Afghanistan. We have autopsy reports that make clear that detainees in the prison at the Bagram Air Base in Afghanistan, and in Iraq at Abu Ghraib and elsewhere, were asphyxiated to death. We have other documents that discuss interrogation techniques such as SERE [Survival Evasion Resistance Escape], which I believe are the techniques you were referring to as the resistance techniques taught to our army officers. The documents show that what is known as a close confinement SERE technique was applied to detainees in Iraq, and the individuals were asphyxiated to death.

None of the panelists addressed the reality on the ground. In the end, the issue is not what you think is or is not torture. The fact is when you abandon four decades of laws

governing what people can and cannot do in treating detainees, you open the door to worse variations of what you authorize.

Mr. Rivkin: That is probably the most intellectually elegant and nuanced objection to aggressive interrogation techniques. I agree that there is evidence suggesting that individuals have been treated cruelly, inhumanely, tortured and in some instances killed. That occurred in Afghanistan, in Iraq, and for all we know in other places.

Having said that, let me add that you have to put things in context. You do not learn anything, if you are dealing with corporate misbehavior or governmental misbehavior, by saying there is sexual harassment or there are violations of securities law or worker safety standards. You have to ask how it compares with the relevant historical baseline in the same field. Are things getting better, are things getting worse? If things are getting worse, then you need to ratchet down the standards and tighten enforcement procedures. If things are getting better, that is not a reason to rest on your laurels, because you want to drive down the incidents of aberrant behavior as much as possible, but it is not a reason to pull your hair out.

Statistics are hard to come by but, based on many discussions with colleagues and others in the Defense Department and other places, I believe that relative to our experience in other wars, we are doing quite well. Obviously, to get the comparison right, we have to adjust the statistics to reflect the differences in the number of troops we have in the field and the number of people we have captured in this war relative to other wars. When all is said and done, today we have the best record of any war in which the United States has been involved—better than the Civil War, World War I, World War II, and certainly better than in Vietnam and Korea—as far as the incidence of mistreatment of prisoners, killing of civilians, and torturing people is concerned.

Our record of identifying the rule breakers in our own armed forces and punishing them is also not perfect but, again, better than in any war in which we have been involved before. So I do not buy the premise that there is a horrible problem that is festering out there. I think we've been dealing with this very effectively.

Now your other point is more conceptual, and basically suggests that relaxing the rules a bit runs the risk of promoting more violations. Indeed, in most spheres of life, where compliance with the rules is the key goal, the safest posture may be to ban everything and have very simple rules: just say no. Even this approach would not guarantee perfect compliance, however. Back in my Justice Department days I had the unpleasant task of visiting a few federal correctional facilities because there were complaints against the Bureau of Prisons. My general impression is that there is no prison facility in the world, including civilian facilities in the United States, in which bad things don't happen to prisoners, because some prison personnel are sadistic. They sodomize prisoners, they kill prisoners, they torture prisoners. There is absolutely no prison regulation that allows you to do that but those things happen.

So even total abolition would not result in zero bad conduct. But can we not do better as a society? In the military, nuanced compliance is the order of the day. Our people know

when to use and not to use live ammunition. They understand the difference between what is done in training and what can be done in combat; how to fight in a situation where the enemy is intermixed with civilians versus fighting in a situation where there are only enemy soldiers. The military lives for these kinds of nuanced compliance procedures in specific contexts. We should be able to come up with some balance. They use very modest degrees of coercion. I am not holding a candle here for waterboarding. But I do think we should look at the facts, put them in their proper historical perspective, look at the balancing involved, and ask ourselves if we should just abolish every degree of coercion or try to come up with something else and try to hold the line on that.

Question: Article 3 of the Geneva Conventions is generally considered to be a mini-human rights convention, and the United States under President Ronald Reagan did ratify the International Covenant on Civil and Political Rights (ICCPR).[27] Human rights advocates believe that it is applicable both in wartime and in peacetime. Mr. Rivkin's notion that there is a legal black hole that some people fall into, that they are not covered by any law, is challenged by this generally common belief in the field of international law.

My question for Mr. Taft has to do with the fact that under the Conventions and the Covenant, a state can derogate from certain rights during times of a state of emergency. The United States declared a state of emergency after 9/11. Why did it not file a formal derogation with the United Nations Human Rights Committee or the relevant body? Is that state of emergency still in force?

Mr. Rivkin, let us assume the validity of your general proposition that coercion or torture, whatever you choose to call it, does work. We have now used these practices for five years on an unknown number of detainees, with estimates of something like 17,000 detainees being held by American forces in Iraq, almost 400 in Guantánamo, and some 700 in Afghanistan. What is the nature of the information that we have received from these detainees? Is there any information coup that the administration can point to?

Mr. Taft: I have been away from this for a while but my recollection is that the government position is that the ICCPR does not apply outside the United States. This view has been rejected by some of the international courts that have considered the question, and by the people who review the operation of the ICCPR, but it remains the U.S. government view. I think that is the reason why there has not been any derogation filed.

Mr. Rivkin: I certainly agree with William Taft about this. I am not sure that the Covenant applies at a time of armed conflict. It is not a question of a legal black hole but of what body of law applies. I believe that in time of armed conflict, which is a term of art describing something that is not an emergency or an unpleasantness but a time of violence that reaches a certain threshold level, the Geneva Conventions and other instruments of international humanitarian law govern.

I did not suggest that there should be a law-free zone. International laws about war are not limited to the Geneva Conventions of 1949. There are predecessor Geneva Conventions, Hague Regulations, and much more.[28]

I have said three times, as I always say when I talk about these things, that I do not support or condone torture. I think torture is absolutely impermissible as a matter of law, and torture is indefensible as a matter of ethics. To emphasize, I am talking about degrees of coercion that fall far short of torture and far short of cruel, inhuman and degrading treatment. If you define torture otherwise, then we must be torturing our own soldiers as well as criminal suspects in every police station in the United States. I am talking about that level of coercion.

Every account proffered by some very unsympathetic observers in the media suggests that there have been a number of intelligence breakthroughs and a number of attacks have been stopped. It is very difficult to get perfect information on this for the obvious reasons that you do not want to tell the bad guys what you have learned. Moreover, things are not clear cut; they are often quite murky when it comes to intelligence. I know something about the business of intelligence, having been a consumer of intelligence products, and it is not a matter of your knowing something perfectly. You do not; there are degrees. Even people on the inside do not know how much this particular interrogation or that particular interrogation contributed, but you do know one thing: having information is better than not having information, and interrogations do produce information.

We are dealing with an enemy for which most of the traditional intelligence gathering techniques are utterly irrelevant, because these people do not operate the way the Soviet Union did, for example. They do not send signals that we can intercept and eventually decrypt. Unfortunately, we do not have moles penetrating al-Qaeda. One of the reasons we won the Cold War is that the Soviet system was so rotten that every other day there would be a defector coming in or somebody who was willing to work in place for you. We do not have many such people today. The only game we have is interrogating the people we capture. If we do not interrogate them, and if we do not talk to other people who interrogate them, our intelligence take would be zero. That is not a way to fight a war.

Question: It seems to me that in your analyses there is a common theme, of consistency by analogy. In your case, Mr. Rivkin, it is by analogy either to convicted prisoners or suspects in civilian custody, or to trainees in the American military context. In your case, Mr. Taft, it is a comparison to both our expectation of treatment of American personnel who are captured abroad and to the standards set out by international humanitarian law.

The arguments cut in opposite directions. In your case, Mr. Taft, the argument is that we have set out standards in the *Army Field Manual* for how we expect our armed personnel to be treated. It seems reasonable that we should treat people that we capture in that way. Mr. Rivkin, you argue that if we are already doing these things to people

whom we have picked up for shoplifting or such, we surely can do them to people we're picking up for suspicion of terrorism and who hold valuable information.

My question is, why does that comparison matter at all? Isn't this an entirely different category, from the standpoint of international humanitarian law? Mr. Rivkin made the point that this is not a state-to-state relationship situation. This is a relationship with non-state actors, with individuals, yet those individuals fall completely outside the traditional law enforcement categories. That makes this an entirely third category, perhaps in between, perhaps in a completely different category from the two that you set up.

Mr. Rivkin: My view is that legal issues do not drive the policy here; we make policy choices driven by policy. You are right that the Geneva Conventions and other instruments do not indicate that the State's conduct towards criminal suspects is the right way to treat individuals captured in an armed conflict. The reason I referred to the way we treat criminal suspects or prisoners or individuals in training, however, is because that tells us how we as a society balance considerations of effectiveness, perceived utility, and compassion. In that moral universe, the comparison is apropos. If we as a society are comfortable subjecting our young men and women who volunteer for the military to certain degrees of coercion to toughen them up, if we make that choice as a polity, I think it would be ludicrous not to say that it is relevant to how we make a moral choice regarding our enemies. Legally, it is irrelevant, but this is a matter of policy, not law.

Mr. Taft: David Rivkin and I spoke some days ago about the issue of whether *habeas corpus* rights should be extended to people in Guantánamo. That is a difficult constitutional question that will ultimately be decided by the Supreme Court, but my guess is that the *habeas corpus* right does not extend there as a matter of constitutional law. The Supreme Court held by a vote of 5-3 [in *Hamdan*], however, that it does as a matter of statutory law. I think it is obvious, as the administration often says, that we are dealing here with a third category. This is not quite the typical war and it is not the typical law enforcement model, which to me is why it made sense as a policy matter to leave in place the *habeas corpus* right for the people in Guantánamo, even though normally prisoners of war do not have that right no matter where they are. But this war is a little different. The prisoners in Guantánamo volunteered individually. A person bears some individual responsibility for joining al-Qaeda; more so than, for example, being drafted into the Japanese Army. In that sense, the individual is a bit more like a criminal, with individual responsibility for what he is doing. In addition, his situation looks more like a criminal situation because the internment of a POW is not a punishment but something else. It seemed to me to be a very sensible thing in that situation to leave the *habeas corpus* right there, simply so that we could determine that we are actually holding the right people and to add legitimacy to what we are doing.

We should be creative, not just in using this new situation to justify measures that are to the disadvantage of the people who are being detained, but in being willing to say that perhaps we need a slightly different approach than the one we would use under the law of war.

Mr. Stern: One thing we have not discussed is the thinking of military lawyers. I was struck in 2006 by the testimony of current and former military lawyers, in which they expressed their deep concern about the issue of reciprocity. For them it is not a theoretical issue. They are worried about what happens when U.S. servicemen and servicewomen are captured overseas, whether by the armed forces of a country or by an irregular force like al-Qaeda or insurgents in Iraq. They are deeply concerned about creating new categories or abandoning the legal structure that has been in place. They do not look at this issue from a theoretical or a political perspective. Theirs is a very practical perspective.

Mr. Rivkin: I have debated a number of JAGs [judge advocate generals; that is, military lawyers] and that argument does not hold water. The notion of reciprocity is bogus. American prisoners have been mistreated in every war since the Geneva Conventions were promulgated. They were horribly mistreated in Korea. Something like 60 percent of captives perished from ill treatment and torture. Vietnam was a little better, but not much. The notion that there will be any reciprocity in this war is nonsense. Virtually all American service personnel and some civilians who have been captured by the bad guys have been tortured too horribly even to discuss. We are not dealing with people who are going to be in any way swayed by reciprocity.

Cynthia Arnson: I have a question for Seth Stern. You mentioned that Republican candidates, with the exception of Senator McCain, refrained in their presidential debate from taking a strong stand against torture. Can you could tell us more about the nature of the influences on members of Congress, as they were debating these laws in 2005 and 2006? Was there a sense that public opinion was on one side or another? Were there groups equally mobilized in favor of and against the kinds of policies and issues to which Mr. Rivkin has referred? Was most of the advocacy on the part of organizations that opposed what were perceived as American excesses?

Mr. Stern: There was a sense that the public doesn't like torture; there is a widespread uneasiness about torture. At the same time, there is a fear among Democrats about appearing weak on defense or not giving the military all the tools it needs. The vote on the Military Commissions Act took place in mid-October 2006, with congressional elections just a few weeks away. The Democrats were getting very close to getting back majorities in the House and Senate and I don't believe many Democrats saw a lot to gain from pressing the issue, going to the mat by trying to filibuster and so on. In addition, the Democrats did not have the votes necessary to change or kill the legislation.

Today, most of the Democratic presidential contenders are not making this a big issue. There is a sense that the public does not like torture but that the public also wants to give the military all the tools that are legally possible. This puts the Democrats in something of a bind and keeps them from taking a strong stand.

NOTES

1. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987), available at http://www.unhchr.ch/html/menu3/b/h_cat39.htm. The Convention was signed by President Ronald Reagan in 1988 and ratified by the U.S. Senate in 1994.
2. Geneva Convention relative to the Treatment of Prisoners of War (adopted 1949, entered into force 1950), available at http://www.unhchr.ch/html/menu3/b/91.htm. The U.S. Supreme Court held in *Hamdan v. Rumsfeld*, 126 S.C. 2749 (2006), that Common Article 3 applies to the Guantánamo detainees and is enforceable in federal court for their protection.
   "Article 3:
   "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:
   "1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
   "To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
   (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
   (b) Taking of hostages;
   (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
   (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
   "2. The wounded and sick shall be collected and cared for.
   "An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
   "The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
   "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."
3. The Eighth Amendment to the U.S. Constitution says, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
4. The United States Military Commissions Act of 2006, P.L. No. 109-366 (Oct. 17, 2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930enr.txt.pdf, gives the President the authority to establish military commissions for alien unlawful enemy combatants. It denies them the right to invoke the Geneva Convention as well as the right of *habeas corpus* (the right to be brought before a court).
5. The Army Field Manual (September 2006), which is available at http://www.fcnl.org/pdfs/civ_liberties/Field_Manual_Sept06.pdf, includes the following:
   "HUMANE TREATMENT
   "M-15. All captured or detained personnel shall be treated humanely at all times and in accordance with DOD Directive 3115.09, 'DOD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning'; DOD Directive 2310.1E, 'Department of Defense Detainee Program,' and no

person in the custody or under the control of the DOD, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment as defined in US law, including the Detainee Treatment Act of 2005. All intelligence interrogations, debriefings, or tactical questioning to gain intelligence from captured or detained personnel shall be conducted in accordance with applicable law and policy.

"M-16. Any inhumane treatment—including abusive practices, torture, or cruel, inhuman, or degrading treatment or punishment as defined in US law, including the Detainee Treatment Act of 2005—is prohibited and all instances of such treatment will be reported immediately in accordance with paragraph 5–69 thru 5–72. Beyond being impermissible, these unlawful and unauthorized forms of treatment are unproductive because they may yield unreliable results, damage subsequent collection efforts, and result in extremely negative consequences at national and international levels. Review by the servicing SJA [Staff Judge Advocate] is required prior to using separation. Each interrogation plan must include specific safeguards to be followed: limits on duration, interval between applications, and termination criteria. Medical personnel will be available to respond in the event a medical emergency occurs."

6. National Defense Authorization Act for Fiscal Year 2006, P.L. 109–163, Jan. 6, 2006; Department of Defense Appropriations Act of 2006, P.L. 109-148, Dec. 30, 2005.
7. The relevant section of the Fifth Amendment says, "No person…shall be deprived of life, liberty, or property, without due process of law." The Fifth Amendment as originally written applied only to the federal government; a clause of the Fourteenth Amendment in effect made that provision binding on the states as well. Eighth Amendment: *see* note 3.
8. 126 S.C. 2749 (2006).
9. "President Discusses Creation of Military Commissions to Try Suspected Terrorists," Sept. 6, 2006, available at http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html.
10. The 9/11 Commission identified Khalid Sheikh Mohammad as "the principal architect of the 9/11attacks." Thomas H. Kean, Lee H. Hamilton et al., *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* (W.W. Norton & Co., 2004), p. 145.
11. Military Commissions Act of 2006. *See* note 4.
12. John Warner served as Secretary of the Navy from May 4, 1972 until April 8, 1974.
13. The Detainee Treatment Act of 2005, 109th Cong., 1st. sess., H.R. 2863 (Title X of the Department of Defense Appropriations Act of 2006, P.L. 109-148, 109th Cong., 1st. sess., Dec. 30, 2005), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h2863enr.txt.pdf.
14. *See* note 4, above.
15. Habeas Corpus Restoration Act (S. 185), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s185rs.txt.pdf.
16. The bill was placed on Senate Legislative Calendar under general orders on June 26, 2007. *See* http://www.thomas.gov/cgi-bin/bdquery/z?d110:S.185.
17. "Restoring the Constitution Act," S. 576, 110th Cong., Feb. 13, 2007, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s576is.txt.pdf.
18. The House of Representatives passed the Defense Authorization bill, H.R. 1585, on May 17, 2007. Roxana Tiron, "House Passes Defense Authorization Bill," *The Hill*, May 17, 2007, available at http://thehill.com/index2.php?option=com_content&task=view&id=66197&pop=1&page=0&Itemid=70_. As of October, 2007, the Senate had passed a somewhat different bill and a conference committee had not yet met to resolve the differences between the two versions. http://www.thomas.gov/cgi-bin/bdquery/z?d110:HR01585:@@@R:.

19. In May, 2007, Senator Levin announced that the National Defense Authorization Act for Fiscal Year 2008 that had been voted out of the Senate Armed Services Committee included language that would require detainees to receive legal representation and bar the use of statements "obtained through cruel and inhuman treatment of a detainee." Senator Carl Levin, Press Release, May 25, 2007, available at http://armed-services.senate.gov/press/08mark.pdf. The bill was placed on the Senate Legislative Calendar under general orders on June 29, 2007. *See* http://www.thomas.gov/cgi-bin/bdquery/z?d110:S.1547.
20. The reference is to Article 21 of the Uniform Code of Military Justice, available at http://www.loc.gov/rr/frd/Military_Law/pdf/morgan.pdf. The relevant statutes cited by the government, and rejected as sufficient authorization by the Court, are the Authorization for Use of Military Force, P.L. 107-40, 107 Cong. 1st sess., Sept. 18, 2001, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ040.107 and the Detainee Treatment Act (*see* note 13 above).
21. The "Articles of War" were revised by Congress from their 1806 version in 1920, and remained in force until the Military Code of Justice was adopted in 1951. They are available at http://www.loc.gov/rr/frd/Military_Law/pdf/RAW-vol2.pdf .
22. George Tenet, with Bill Harlow, *At the Center of the Storm: My Years at the CIA* (HarperCollins, 2007). *See*, e.g., p. 242.
23. In 2002, John C. Yoo, then Deputy Assistant Attorney General, sent a memo to the White House that has since been dubbed the "torture memo." John C. Yoo, "Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A," Aug. 1, 2002, available at http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr6.html and at http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.
24. In 2002, John C. Yoo and Robert J. Delahunty, then Special Counsel in the Justice Department, sent a memorandum to William J. Haynes II stating that al-Qaeda and the Taliban were not covered by either international law regulating armed conflict or the Geneva Conventions because al-Qaeda and the Taliban were non-state actors that were not signatories to international treaties. John Yoo and Robert J. Delahunty, "Memorandum for William J. Haynes II, General Counsel, Department of Defense," Jan. 9, 2002, available at http://www.msnbc.msn.com/id/5025040/site/newsweek/. A subsequent memorandum from the Office of Legal Counsel said in part that for an act to constitute torture as defined by the United States Code, it must cause pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Jay S. Bybee, "Memorandum for Albert R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A," Aug. 1, 2002, available at http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf. Alberto Gonzales, then White House counsel, advised President George W. Bush in a memorandum dated Jan. 25, 2002, "In my judgment, this new paradigm [the war against terrorism] renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms, and scientific instruments." Alberto R. Gonzales, "Memorandum for the President: Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban," available at http://www.msnbc.msn.com/id/4999148/site/newsweek and in Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005), pp. 118-121, at 119. The relevant excerpt is also quoted in "The Bush Cabinet; Excerpts from Gonzales's Legal Writings," *The*

New York Times, Nov. 11, 2004. In January 2005, during his confirmation hearings for the position of Attorney General of the United States, Gonzales stated, "Contrary to reports, I consider the Geneva Conventions neither obsolete nor quaint." Senate Judiciary Committee hearings, published as "The Cabinet Nominees; Excerpts From Judiciary Committee Hearing on Attorney General Nominee," *The New York Times*, Jan. 7, 2005.

25. Vladimir Ilich Ramirez Sanchez, nicknamed "Carlos the Jackal," is a convicted terrorist who was responsible for bomb attacks, kidnappings, and hijackings across Europe in the 1970s and 1980s. He was captured in 1994 in Sudan and transferred to Paris for imprisonment and trial, and is serving a life sentence for murder.
26. In 2006, five Uighurs (Chinese Muslims) were released from the detention facility at Guantánamo Bay and flown to Albania for resettlement.
27. President Jimmy Carter signed the International Covenant on Civil & Political Rights in 1978, and it was ratified by the Senate in 1992, when President Ronald Reagan was in office.
28. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, adopted at The Hague, 18 October 1907. Available at http://www.icrc.org/ihl.nsf/FULL/19. For the contracting parties, this replaced the convention adopted by the First Hague Peace Conference of 1899.

Panel 2
The View from the Outside the Government

AMRIT SINGH

In October 2003, the American Civil Liberties Union (ACLU) filed a request under the Freedom of Information Act (FOIA) to obtain government documents related to the treatment of individuals held in U.S. custody in Iraq, Afghanistan and Guantánamo Bay. The ACLU also sought documents relating to the rendition of individuals by the United States to countries known to employ torture. For six to seven months, the ACLU received almost nothing from the federal agencies with which it had filed the request. The release of the Abu Ghraib photographs in April 2004 made it clear to us that the government was withholding numerous records responsive to our FOIA request. In June of 2004, we filed a lawsuit against the government in federal district court in New York seeking the release of responsive documents. After the judge ordered the government to respond to our FOIA request, the ACLU received a large number of documents, most from the Department of Defense, that shed some light on what was taking place. As of June 2007, however, the government continued to withhold a large number of documents that are critical for providing a complete account of administration's policies relating to rendition, interrogation techniques and detainee treatment more generally.

Documents that have been released through the FOIA litigation, when viewed together with other publicly available documents, allow us to piece together the story of how the government's policies led to the widespread abuse of prisoners held in U.S. custody abroad.[1]

One recent source of information, not obtained through the FOIA request, is a Department of Defense (DOD) Inspector General's report that discusses the evolution of interrogation techniques for use on prisoners held in Guantánamo Bay.[2] The report demonstrates that by the summer of 2002, the Joint Personnel Recovery Agency (JPRA) and the Army Special Operations Command were jointly developing SERE (Survival, Evasion, Resistance, Escape) techniques for offensive purposes. SERE techniques were essentially developed by the DOD for defensive purposes, so that U.S. soldiers caught by enemy forces could withstand aggressive interrogation methods and protect intelligence that the United States did not want revealed. The techniques were never intended to be used offensively on enemy captives, but JPRA was developing these methods for offensive purposes.

It is still unclear exactly what these offensive methods included, because records relating to offensive SERE methods are still being withheld. What we do know is that SERE involves harsh interrogation techniques, and news reports suggest these methods include stress positions, forced nudity, prolonged isolation, and waterboarding.

One particularly significant document that sheds light on the government's interrogation methods is a December 2002 memorandum from William J. Haynes, General Counsel for DOD, to Secretary of Defense Donald Rumsfeld. The document shows that the methods at issue were vetted at the highest levels of the Pentagon, including by then-Chairman of the Joint Chiefs of Staff General Richard Myers, Deputy Secretary of Defense Paul Wolfowitz, and Douglas Feith, Under Secretary of Defense for Policy. The document shows that in December 2002, Secretary Rumsfeld endorsed many of the recommended techniques, including stress positions, forced nudity, extended isolation, and the use of individual phobias—such as the fear of dogs—to intimidate prisoners. (Document 1)

The administration has consistently taken the position that what happened at Abu Ghraib had nothing to do with policy decisions relating to detainee treatment. There is nonetheless an obvious connection between the techniques authorized by Secretary Rumsfeld in 2002 and the Abu Ghraib photographs that show Iraqi prisoners in U.S. custody devoid of any clothing and shackled in various stress positions, as well as prisoners cowering before growling dogs. While all the facts are not currently available, the FOIA documents confirm that interrogation methods authorized for use at Guantánamo spread to Iraq and Afghanistan.

The techniques approved for use in Guantánamo were adopted over the consistent objections of the FBI. Indeed, an FBI document obtained through the FOIA litigation states, "I am forwarding this EC [electronic communication] up the CTD [Collective Training Directorate] chain of command. MLDU [Military Liaison Detainee Unit] requested this information be documented to protect the FBI. MLDU has had a long standing and documented position against use of some of DOD's interrogation practices…These tactics have produced no intelligence of a threat neutralization nature to date and CITF [the Army's Criminal Investigations Task Force] believes that [these] techniques have destroyed any chance of prosecuting this detainee." The document concludes: "If this detainee is ever released or history made public in any way, DOD interrogators will not be held accountable because these torture techniques were done [by] the 'FBI' interrogators. The FBI will [be] left holding the bag before the public." (Document 2)

While the FBI was clearly concerned with protecting itself, there are numerous other documents that show that the FBI and the Army's Criminal Investigations Task Force began objecting to the harsh interrogation techniques applied in Guantánamo from late 2002 and through at least 2003.

According to one eyewitness account from an FBI agent at Guantánamo, "On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated on themselves, and had been left there for 18–24 hours or more. On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold…On another occasion…[t]he detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night." (Document 3)

DOCUMENT 1

UNCLASSIFIED

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

2002 DEC -2 AM 11: 03

OFFICE OF THE
SECRETARY OF DEFENSE

ACTION MEMO

November 27, 2002 (1:00 PM)

DEPSEC_____

FOR: SECRETARY OF DEFENSE

FROM: William J. Haynes II, General Counsel

SUBJECT: Counter-Resistance Techniques

- The Commander of USSOUTHCOM has forwarded a request by the Commander of Joint Task Force 170 (now JTF GTMO) for approval of counter-resistance techniques to aid in the interrogation of detainees at Guantanamo Bay (Tab A).
- The request contains three categories of counter-resistance techniques, with the first category the least aggressive and the third category the most aggressive (Tab B).
- I have discussed this with the Deputy, Doug Feith and General Myers. I believe that all join in my recommendation that, as a matter of policy, you authorize the Commander of USSOUTHCOM to employ, in his discretion, only Categories I and II and the fourth technique listed in Category III ("Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing").
- While all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint.

RECOMMENDATION: That SECDEF approve the USSOUTHCOM Commander's use of those counter-resistance techniques listed in Categories I and II and the fourth technique listed in Category III during the interrogation of detainees at Guantanamo Bay.

SECDEF DECISION

Approved DR Disapproved_____ Other_____

Attachments
As stated

cc: CJCS, USD(P)

However, I stand for 8-10 hours a day. Why is standard limited to 4 hours?

D.R DEC 0 2 2002

Declassified Under Authority of Executive Order 12958
by Executive Secretary, Office of the Secretary of Defense
William P. Marriott, CAPT, USN
June 18, 2004

UNCLASSIFIED

X04030-02

1

NO. 075 P. 4

~~UNCLASSIFIED~~

DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09360

JTF-J2

11 October 2002

MEMORANDUM FOR Commander, Joint Task Force 170

SUBJECT: Request for Approval of Counter-Resistance Strategies

1. ~~(S//NF)~~ PROBLEM: The current guidelines for interrogation procedures at GTMO limit the ability of interrogators to counter advanced resistance.

2. ~~(S//NF)~~ Request approval for use of the following interrogation plan.

a. Category I techniques. During the initial category of interrogation the detainee should be provided a chair and the environment should be generally comfortable. The format of the interrogation is the direct approach. The use of rewards like cookies or cigarettes may be helpful. If the detainee is determined by the interrogator to be uncooperative, the interrogator may use the following techniques.

(1) Yelling at the detainee (not directly in his ear or to the level that it would cause physical pain or hearing problems)

(2) Techniques of deception:

(a) Multiple interrogator techniques.

(b) Interrogator identity. The interviewer may identify himself as a citizen of a foreign nation or as an interrogator from a country with a reputation for harsh treatment of detainees.

b. Category II techniques. With the permission of the OIC, Interrogation Section, the interrogator may use the following techniques.

(1) The use of stress positions (like standing), for a maximum of four hours.

(2) The use of falsified documents or reports.

(3) Use of the isolation facility for up to 30 days. Request must be made to through the OIC, Interrogation Section, to the Director, Joint Interrogation Group (JIG). Extensions beyond the initial 30 days must be approved by the Commanding General. For selected

Declassify Under the Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
By William P. Marriott, CAPT, USN
June 23, 2004

~~SECRET//NOFORN~~ UNCLASSIFIED

2

~~SECRET//NOFORN~~ UNCLASSIFIED

JTF 170-J2
SUBJECT: Request for Approval of Counter-Resistance Strategies

detainees, the OIC, Interrogation Section, will approve all contacts with the detainee, to include medical visits of a non-emergent nature.

(4) Interrogating the detainee in an environment other than the standard interrogation booth.

(5) Deprivation of light and auditory stimuli.

(6) The detainee may also have a hood placed over his head during transportation and questioning. The hood should not restrict breathing in any way and the detainee should be under direct observation when hooded.

(7) The use of 20-hour interrogations.

(8) Removal of all comfort items (including religious items).

(9) Switching the detainee from hot rations to MREs.

(10) Removal of clothing.

(11) Forced grooming (shaving of facial hair etc..)

(12) Using detainees individual phobias (such as fear of dogs) to induce stress.

c. Category III techniques. Techniques in this category may be used only by submitting a request through the Director, JIG, for approval by the Commanding General with appropriate legal review and information to Commander, USSOUTHCOM. These techniques are required for a very small percentage of the most uncooperative detainees (less than 3%). The following techniques and other aversive techniques, such as those used in U.S. military interrogation resistance training or by other U.S. government agencies, may be utilized in a carefully coordinated manner to help interrogate exceptionally resistant detainees. Any or these techniques that require more than light grabbing, poking, or pushing, will be administered only by individuals specifically trained in their safe application.

(1) The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family.

(2) Exposure to cold weather or water (with appropriate medical monitoring).

(3) Use of a wet towel and dripping water to induce the misperception of suffocation.

JUN-22-2004 10:30 DOD GENERAL COUNSEL NO. 075 P. 6

~~SECRET//NOFORN~~ UNCLASSIFIED

JTF 170-J2
SUBJECT: Request for Approval of Counter-Resistance Strategies

(4) Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.

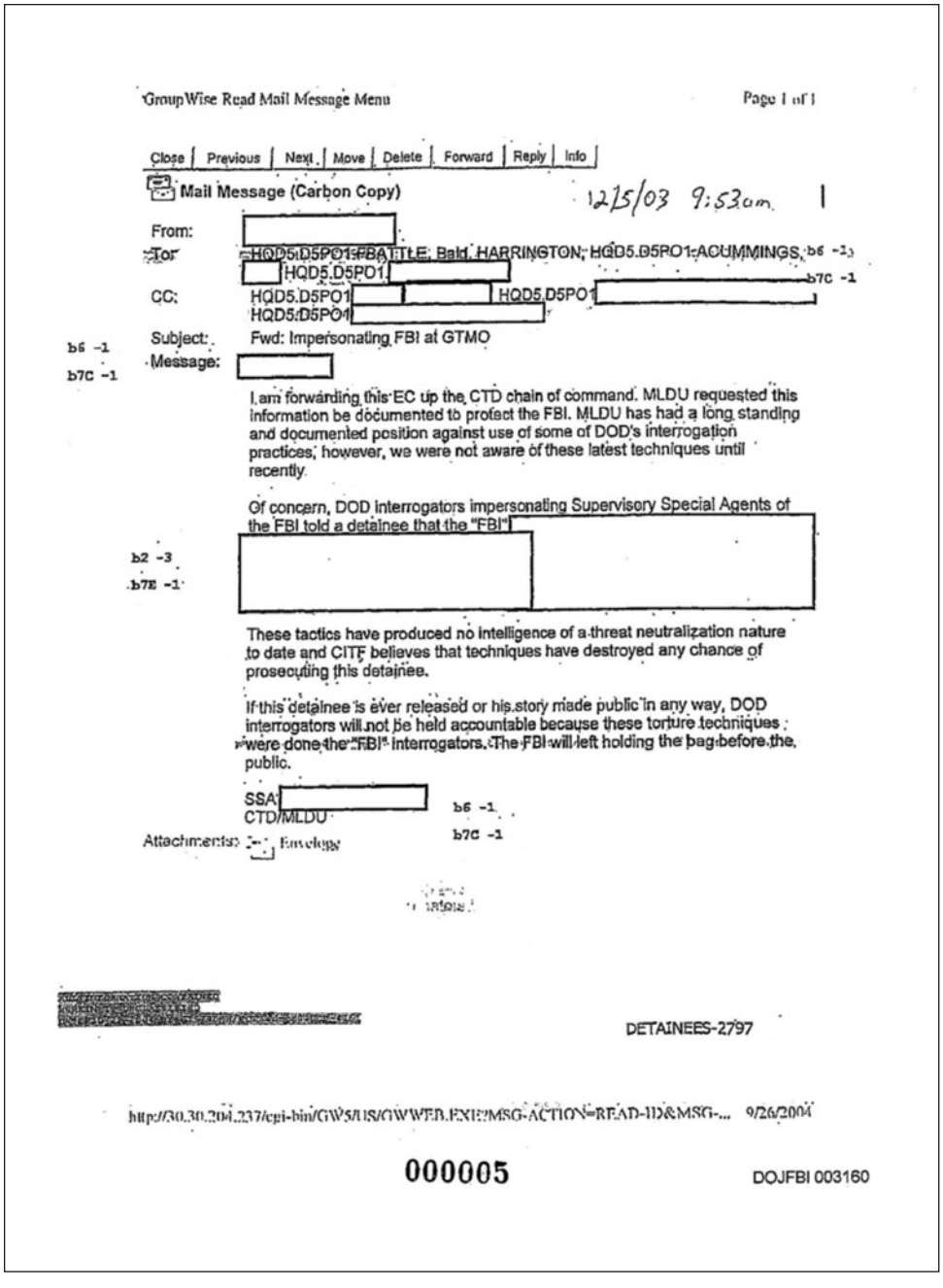
~~3. (U) The POC for this memorandum is the undersigned at 23476.~~

JERALD PHIFER
LTC, USA
Director, J2

~~SECRET//NOFORN~~ UNCLASSIFIED
3

4

DOCUMENT 2



GroupWise Read Mail Message Menu Page 1 of 1

Close | Previous | Next | Move | Delete | Forward | Reply | Info

Mail Message (Carbon Copy) 12/5/03 9:53am

From: [redacted]

To: HQD5.D5PO1:FBA TTLE, Bald, HARRINGTON, HQD5.D5PO1:ACUMMINGS, [redacted] b6 -1
[redacted] HQD5.D5PO1, [redacted] b7C -1

CC: HQD5.D5PO1 [redacted] [redacted] HQD5.D5PO1 [redacted]
HQD5.D5PO1 [redacted]

Subject: Fwd: Impersonating FBI at GTMO

b6 -1
b7C -1

Message: [redacted]

I am forwarding this EC up the CTD chain of command. MLDU requested this information be documented to protect the FBI. MLDU has had a long standing and documented position against use of some of DOD's interrogation practices; however, we were not aware of these latest techniques until recently.

Of concern, DOD interrogators impersonating Supervisory Special Agents of the FBI told a detainee that the "FBI"

b2 -3
b7E -1

[redacted]

These tactics have produced no intelligence of a threat neutralization nature to date and CITF believes that techniques have destroyed any chance of prosecuting this detainee.

If this detainee is ever released or his story made public in any way, DOD interrogators will not be held accountable because these torture techniques were done the "FBI" interrogators. The FBI will left holding the bag before the public.

SSA [redacted] b6 -1
CTD/MLDU b7C -1

Attachments: [redacted] Envelope

[redacted]

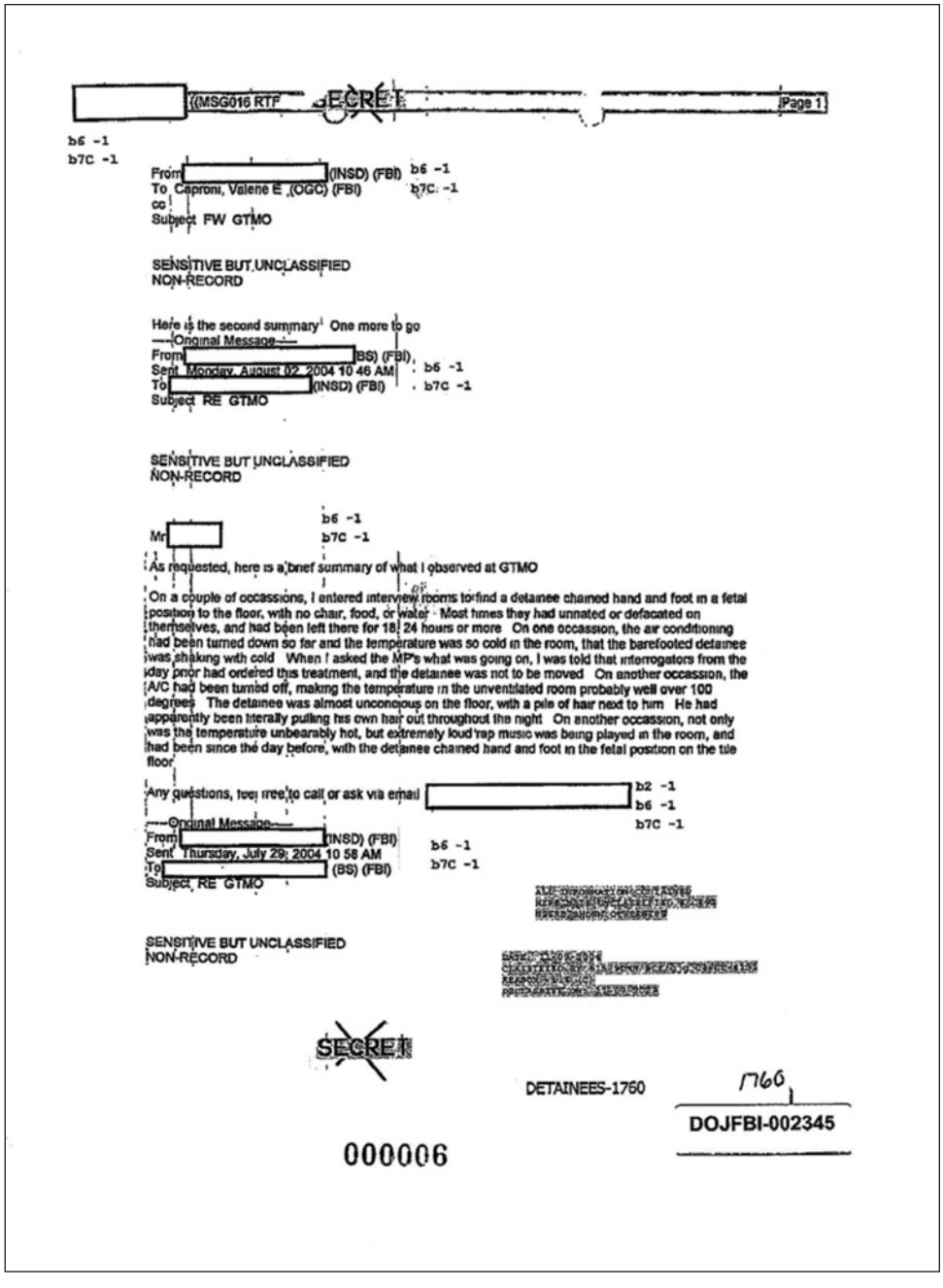
DETAINEES-2797

http://30.30.204.237/cgi-bin/GWS/IIS/GWWEB.EXE?MSG-ACTION=READ-ID&MSG-... 9/26/2004

000005

DOJFBI 003160

DOCUMENT 3



[redacted] ((MSG016.RTF - SECRET Page 1

b6 -1
b7C -1

From: [redacted] (INSD) (FBI) b6 -1
To: Caproni, Valerie E. (OGC) (FBI) b7C -1
cc:
Subject: FW: GTMO

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

Here is the second summary. One more to go.
-----Original Message-----
From: [redacted] (BS) (FBI)
Sent: Monday, August 02, 2004 10:46 AM b6 -1
To: [redacted] (INSD) (FBI) b7C -1
Subject: RE: GTMO

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

b6 -1
Mr. [redacted] b7C -1

As requested, here is a brief summary of what I observed at GTMO:

On a couple of occassions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defacated on themselves, and had been left there for 18-24 hours or more. On one occassion, the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MP's what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occassion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconcious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occassion, not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.

Any questions, feel free to call or ask via email [redacted] b2 -1 b6 -1 b7C -1

-----Original Message-----
From: [redacted] (INSD) (FBI) b6 -1
Sent: Thursday, July 29, 2004 10:58 AM b7C -1
To: [redacted] (BS) (FBI)
Subject: RE: GTMO

[redacted]

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

[redacted]

SECRET

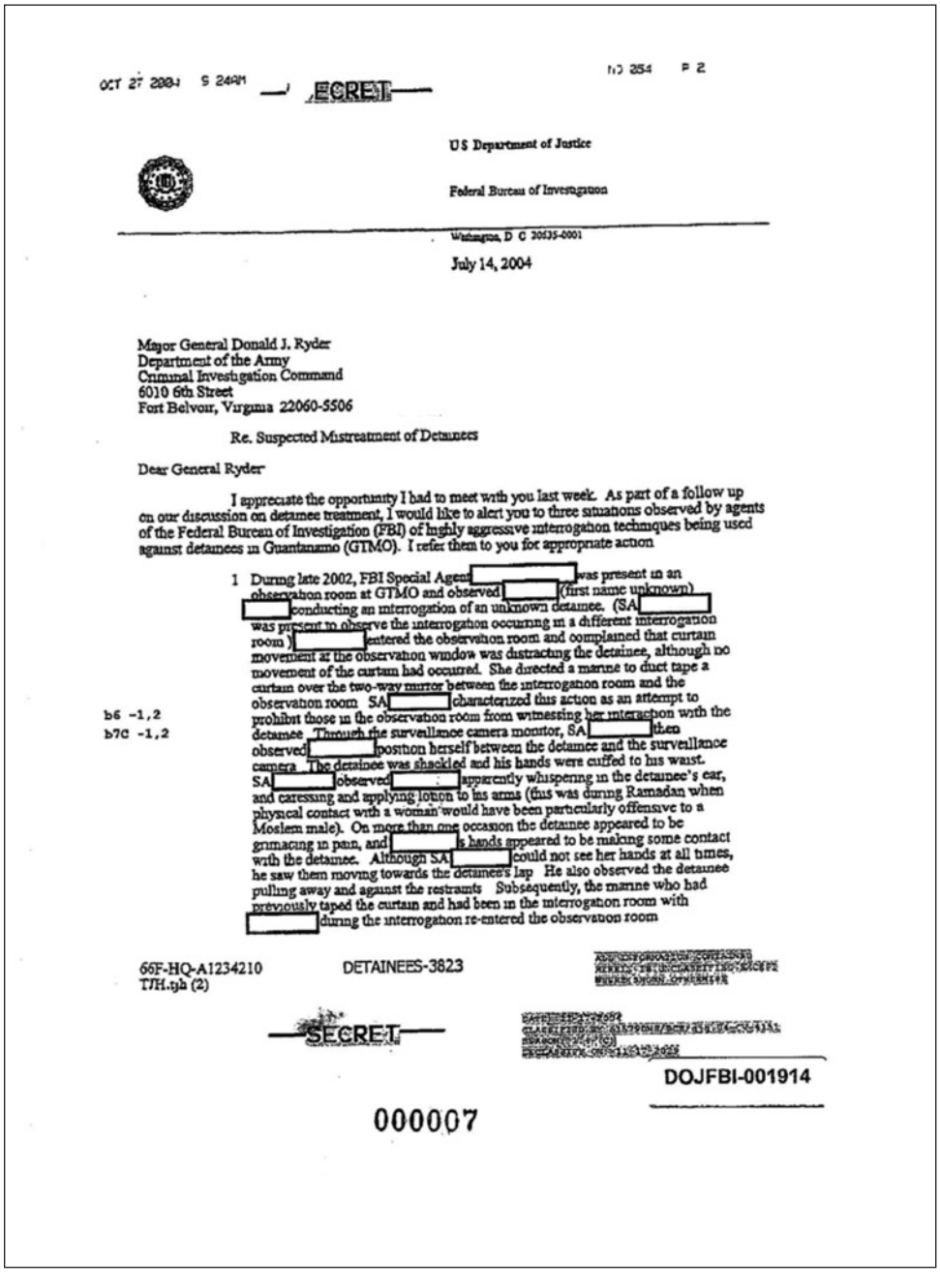
DETAINEES-1760

1760

DOJFBI-002345

000006

DOCUMENT 4



OCT 27 2004 9 24PM SECRET NO 254 P 2

US Department of Justice

Federal Bureau of Investigation

Washington, D C 20535-0001

July 14, 2004

Major General Donald J. Ryder
Department of the Army
Criminal Investigation Command
6010 6th Street
Fort Belvoir, Virginia 22060-5506

Re. Suspected Mistreatment of Detainees

Dear General Ryder

I appreciate the opportunity I had to meet with you last week. As part of a follow up on our discussion on detainee treatment, I would like to alert you to three situations observed by agents of the Federal Bureau of Investigation (FBI) of highly aggressive interrogation techniques being used against detainees in Guantanamo (GTMO). I refer them to you for appropriate action

1 During late 2002, FBI Special Agent [redacted] was present in an observation room at GTMO and observed [redacted] (first name unknown) [redacted] conducting an interrogation of an unknown detainee. (SA [redacted] was present to observe the interrogation occurring in a different interrogation room.) [redacted] entered the observation room and complained that curtain movement at the observation window was distracting the detainee, although no movement of the curtain had occurred. She directed a marine to duct tape a curtain over the two-way mirror between the interrogation room and the observation room. SA [redacted] characterized this action as an attempt to prohibit those in the observation room from witnessing her interaction with the detainee. Through the surveillance camera monitor, SA [redacted] then observed [redacted] position herself between the detainee and the surveillance camera. The detainee was shackled and his hands were cuffed to his waist. SA [redacted] observed [redacted] apparently whispering in the detainee's ear, and caressing and applying lotion to his arms (this was during Ramadan when physical contact with a woman would have been particularly offensive to a Moslem male). On more than one occasion the detainee appeared to be grimacing in pain, and [redacted]'s hands appeared to be making some contact with the detainee. Although SA [redacted] could not see her hands at all times, he saw them moving towards the detainee's lap. He also observed the detainee pulling away and against the restraints. Subsequently, the marine who had previously taped the curtain and had been in the interrogation room with [redacted] during the interrogation re-entered the observation room

b6 -1,2
b7C -1,2

66F-HQ-A1234210 DETAINEES-3823
T/H.ph (2)

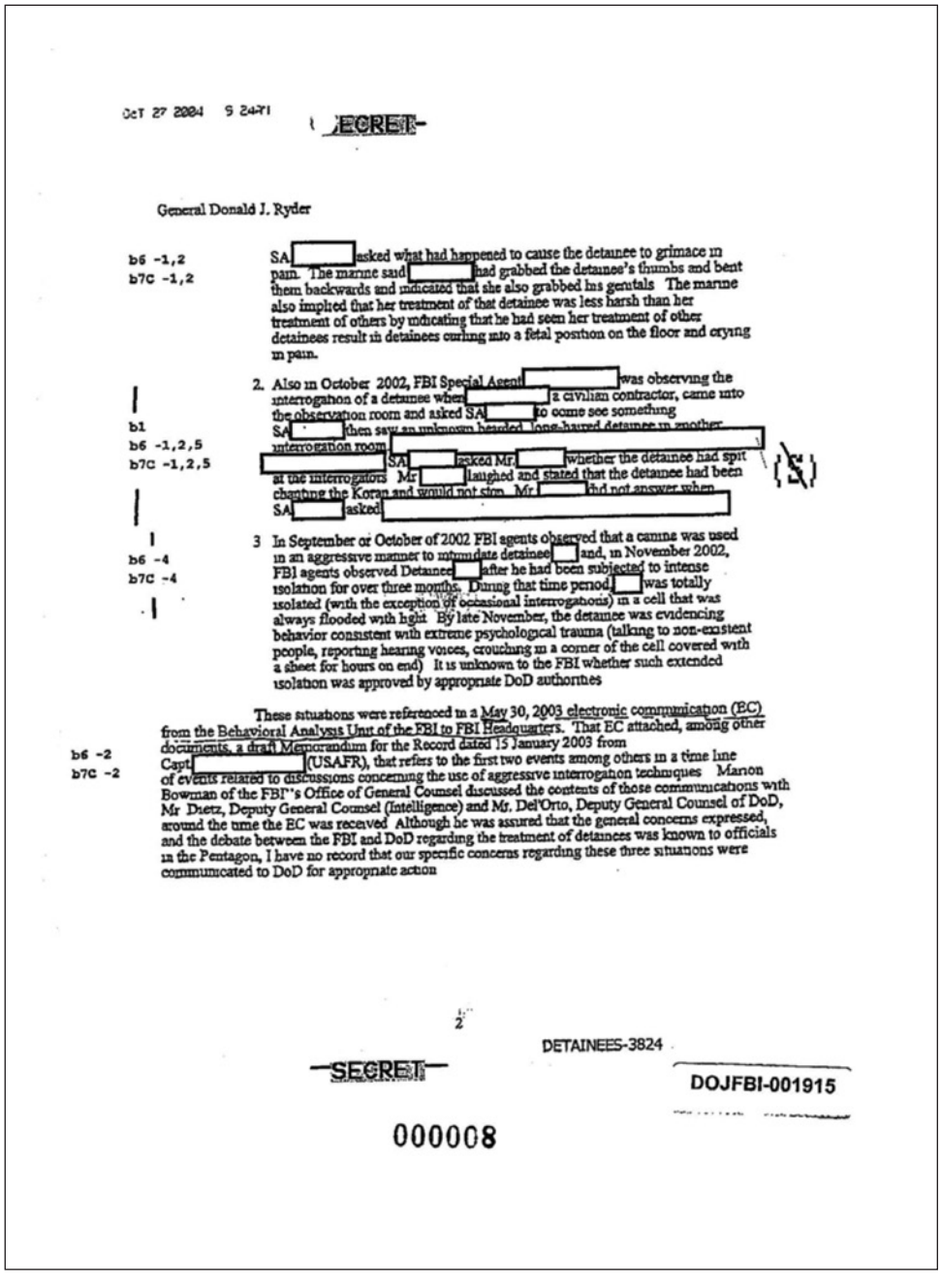
[redacted]

SECRET

[redacted]

DOJFBI-001914

000007



Oct 27 2004 9 24PM SECRET

General Donald J. Ryder

b6 -1,2
b7C -1,2

SA asked what had happened to cause the detainee to grimace in pain. The marine said had grabbed the detainee's thumbs and bent them backwards and indicated that she also grabbed his genitals. The marine also implied that her treatment of that detainee was less harsh than her treatment of others by indicating that he had seen her treatment of other detainees result in detainees curling into a fetal position on the floor and crying in pain.

b1
b6 -1,2,5
b7C -1,2,5

2. Also in October 2002, FBI Special Agent was observing the interrogation of a detainee when a civilian contractor, came into the observation room and asked SA to come see something. SA then saw an unknown bearded, long-haired detainee in another interrogation room. SA asked Mr. whether the detainee had spit at the interrogators. Mr. laughed and stated that the detainee had been chanting the Koran and would not stop. Mr. had not answer when SA asked. (S)

b6 -4
b7C -4

3. In September or October of 2002 FBI agents observed that a canine was used in an aggressive manner to intimidate detainee and, in November 2002, FBI agents observed Detainee after he had been subjected to intense isolation for over three months. During that time period, was totally isolated (with the exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a corner of the cell covered with a sheet for hours on end). It is unknown to the FBI whether such extended isolation was approved by appropriate DoD authorities.

These situations were referenced in a May 30, 2003 electronic communication (EC) from the Behavioral Analysis Unit of the FBI to FBI Headquarters. That EC attached, among other documents, a draft Memorandum for the Record dated 15 January 2003 from

b6 -2
b7C -2

Capt (USAFR), that refers to the first two events among others in a time line of events related to discussions concerning the use of aggressive interrogation techniques. Marion Bowman of the FBI's Office of General Counsel discussed the contents of those communications with Mr. Dietz, Deputy General Counsel (Intelligence) and Mr. Del'Orto, Deputy General Counsel of DoD, around the time the EC was received. Although he was assured that the general concerns expressed, and the debate between the FBI and DoD regarding the treatment of detainees was known to officials in the Pentagon, I have no record that our specific concerns regarding these three situations were communicated to DoD for appropriate action.

2

DETAINEES-3824

SECRET

DOJFBI-001915

000008

OCT 27 2004 9 29A1 SECRET FAX 854 P 4

General Donald J. Ryder

If I can provide any further information to you, please do not hesitate to call.

Sincerely yours,

T J. Harrington
Deputy Assistant Director
Counterterrorism Division

DETAINEES-3825

3

SECRET

DOJFBI-001916

000009

DOCUMENT 5

DEPARTMENT OF THE ARMY
66th Military Intelligence Company
3d Squadron, 3d Armored Cavalry Regiment
Camp Rifles Base
Al Asad, Iraq

Death was from asphyxiation!
I expect better adherence to standards in future!

AFZC-R-K-MI 11 February 2004

MEMORANDUM FOR Commander, 82d ABN DIV, Champion Base, Iraq 09320

SUBJECT: CW3 Welshofer, Lewis E. Jr., 292-58-7040, Rebuttal to General Letter of Reprimand

1. I take responsibility for all actions concerning the interrogation of MG Mowhoush on 26 November 2003. However, I do not believe that my actions led to the death of the General. I have served as an Interrogator for seventeen years, and the methods I have used have never been deemed excessive. Contrary to what one may believe based on autopsy photographs; I did not beat the General. I believe I used acceptable methods in conducting the interrogations. For the reasons set forth below, I respectfully request that you not place the Letter of Reprimand (LOR), dated 22 January 2004, in my Official Military Personnel File (OMPF). If you decide that a LOR is warranted, I ask that you place it in my local file. I also request that you consider setting aside the LOR.

2. MG Mowhoush was potentially a valuable intelligence source and his death set back our collection efforts. I have not been provided with a copy of the autopsy report concerning the death, so I cannot comment on what killed the General. However, I am aware that the General's body had bruises indicating he had been severely beaten during interrogation. Members of ODA and OGA were involved in this interrogation. However, considering the lack of command relationship between our organizations and circumstances that I was placed in, I did not believe that I had the authority to intervene. Although I truly want all the facts to be known, upon advice of my legal counsel, I am unable to further discuss the specifics of the OGA interrogation.

3. In my attempt to gather intelligence to protect the lives of soldiers, I used stress positions that included kneeling, standing, and placing the detainee in a close confinement stress position that I considered acceptable. This stress position previously aided intelligence collection that targeted anti-Coalition forces and helped further develop the threat picture. The "sleeping bag technique" is a stress position I considered authorized by CJTF-7 in their memo; "CJTF-7 Interrogation and Counter-Resistance Policy", dated 10 SEP 03 which allows "Stress Positions: Use of physical postures (sitting, standing, kneeling, prone etc)". Although a sleeping bag was sometimes used during interrogations, this sleeping bag was porous. The sleeping bag is of Iraqi manufacture and was not much thicker than an ordinary blanket. A cord was used to limit movement within the bag and help bring on claustrophobic conditions. The cord was never placed above the shoulder area. The zipper was broken so the bag was always open from the back allowing air into the bag. The bag is not used to prevent breathing.

000020

In fact, detainees would probably be able to breathe better in the sleeping bag than they would in the sandbag-hooded conditions in which they are frequently brought to the facility. This position is designed to see if a person is claustrophobic.

4. In SERE, this position is called close confinement and can be very effective. While stationed in Hawaii, I was part of a cadre that taught U.S. soldiers how to survive in captivity and what to expect during an enemy interrogation. We frequently used close confinement positions, both as a group and as an individual stress position. The sleeping bag had been used on prior occasions on other detainees without incident. This position capitalizes on the subject's fear of tight places. Anyone who is claustrophobic gives an almost immediate response. While using the sleeping bag technique, someone who squirms or screams and is obviously having an adverse reaction is allowed out as soon as they start to provide information (incentive). Those who are not claustrophobic are able to control their breathing. When the sleeping bag was used on the General, he was able to control his breathing. He was closely monitored and I opened the bag on several occasions to determine what the General was saying during the interrogation. He did not appear to be in any distress. I believe the technique used was acceptable. Again, while I have not examined the autopsy report, I do not believe that the sleeping bag was responsible for his death.

5. I do not believe interrogation guidelines set forth by CJTF-7 were written with sufficient understanding of the type of people we are interrogating in Iraq. While current guidelines do mimic rules set forth by the Geneva Convention for questioning Prisoners of War, these guidelines do not clearly address unlawful combatants who do not follow the Laws of Land Warfare. I always treated detainees humanely; keeping in mind that many detainees, such as the General, concealed information that could potentially save the lives of soldiers. Admittedly, that was my primary concern. It certainly was not my intent to harm the General.

6. Some detainees were questioned through vigorous methods. I always used my best judgment and seventeen years of experience, including what I learned during interrogation operations in Afghanistan, and weighed that against what was acceptable and necessary. I do not believe that I ever operated outside acceptable methods of intelligence collection. While an outside spectator may view the interrogation techniques as being tough, I would point out that these techniques were meant to elicit information from resistant sources.

7. I need to point out that I was in Qatar during the incident involving the death of LTC Jallel. After my return, I learned that LTC Jallel was accused of emplacing IED's. Subsequent questioning by ODA confirmed that suspicion. LTC Jallel took ODA to an IED site where there were three emplaced 155mm artillery shells daisy-chained together. Had LTC Jallel been able to detonate these powerful IEDs, there is no doubt that U.S. soldiers would have died. Additionally, LTC Jallel took ODA to a weapons cache where there were between 50-60,000 pieces of various types of explosives. This cache was capable of providing thousands of potential IEDs and was probably the origin of previous bombs. The bottom line is that what interrogators do is a dirty job but saves lives;

000021

interrogators obtain no pleasure in eliciting information using stress positions. However, I reiterate that these positions are not designed to end lives. They are used to acquire critical information.

8. I fully understand the need to try and bring a civility to this country after the years of oppression. However, I cannot overstate the General's complicity in crimes against humanity. From the intelligence that was set forth by the OGA and ODA during their interrogation, it was revealed that the General was involved with massacres in Basrah that killed thousands of Iraqis. Our own reporting indicated that the General was a leading anti-Coalition figure in the al Qaim area. He and members of his tribe and family were also responsible for calculated and deliberate attacks on U.S. soldiers; some of which cost the lives of U.S. Servicemen. I am aware of what techniques were used during the interrogation of the General. However, based on my own conduct, I will not take personal responsibility for his death. I do not think that a LOR is warranted and ask that you set it aside. Should you proceed with the LOR, I ask that you file it locally and not in my OMPF. I am proud to wear the uniform and want to continue to wear it, but I do not believe that the rights of anyone who poses a threat to American lives take precedence above my moral obligation to do everything I can to protect the lives of my fellow soldiers.

LEWIS E. WELSHOFER JR.
CW3, USA
3d Armored Cavalry Regiment

Another document, entitled "Suspected Mistreatment of Detainees," confirms the use of dogs to terrify a Guantánamo prisoner in late 2002, a practice witnessed by FBI agents. (Document 4) The agents' eyewitness accounts are particularly noteworthy in light of the administration's position that the allegations of prisoner abuse were fabricated, and that concerns in this regard amounted to what Secretary Rumsfeld referred to as "isolated pockets of international hyperventilation."[3] The eyewitness accounts of FBI agents cannot so easily be dismissed.

The documents show that prisoners in U.S. custody were also tortured and abused in Iraq and Afghanistan. An order from Lt. General Ricardo Sanchez, the topmost U.S. commander in Iraq, adopted many of the same techniques that Secretary Rumsfeld had authorized in December of 2002, including the use of dogs to intimidate detainees and the use of stress positions.[4]

Another important document shows that an Iraqi general was suffocated to death after being placed in a sleeping bag during an interrogation. The officer reprimanded for this incident defended himself by claiming that the sleeping bag technique was a "stress position" that was authorized by the U.S. command in Iraq, and that "[i]n SERE, this position is called close confinement and can be very effective." (Document 5) There are numerous government autopsy reports that demonstrate that prisoners in U.S. custody were tortured to death in Iraq and Afghanistan. The reports confirm that the deaths were homicides.

While much about the government's policies on prisoner treatment is still unknown, the government's own documents show that, contrary to its assertions, the abuse of prisoners in U.S. custody abroad was systemic and widespread. The documents show, moreover, that the abuse was attributable not just to the transgressions of a handful of rogue soldiers, as the administration has claimed, but that it can be traced to the policy decisions of high-level government officials.

TOM PARKER

I served for six years as a British security service officer, working primarily in the field of international counterterrorism. I also worked for four years as an international war crimes investigator, serving at the International Criminal Tribunal for the former Yugoslavia (ICTY). Subsequently, I served in the Coalition Provisional Authority (CPA) as a British representative to the Iraq High Tribunal. My time with the CPA coincides with the period in which the CJTF-7 memo referred to by Amrit Singh was written. (Document 5) In short, I am an investigator. What I do for a living and what I like to do for a living is put bad guys in jail. I have also been blown up twice by terrorists. I spend a lot of my time trying to arrest terrorists and trying to put them in jail, in order to win the war on terror.

My argument regarding torture has nothing to do with morality or ethics or the law but, rather, with torture's practical utility. The British experience combating terrorism in Northern Ireland in the 1970s, using many of the same techniques we have discussed in this forum, is particularly relevant.

In 1971 the security situation in Northern Ireland was bleak. Twenty-seven people had been killed in the first eight months of the year, the country seemed to be falling apart, and action needed to be taken. Brian Faulkner, then the prime minister of Northern Ireland, convinced the British government that the army had to intervene dramatically. In response, on August 9, 1971, the army launched "Operation Demetrius," a program of mass arrests and internment of suspects. The idea was to hold them, not prosecute them or put them on trial, for as long as necessary to re-impose security.

The army detained about 342 suspects of the Irish Republican Army (IRA) throughout the province of Northern Ireland. Unfortunately, most of this operation was planned and conducted on the basis of out-of-date intelligence that had been collected from 1956 to 1963, when the British military confronted the IRA in a cross-border campaign. Even worse, the British army deployed on the streets of Northern Ireland with anti-riot banners in Arabic, because the last time British soldiers had engaged in this kind of campaign they were fighting in Aden. The cultural insensitivity of using Arabic in Northern Ireland was striking, to say the least.

Just after the operation began, the IRA held a press conference in Belfast (not, as you might think, in Dublin). Joe Cahill, the chief of the IRA's general staff at the time, noted the arrest of 342 people and told journalists that he was fascinated by what the army was doing. (The British army was notably absent from the press conference.) Cahill said he believed that about thirty of the prisoners were probably members of the IRA.

Within forty-eight hours of the arrests the British released approximately a third of the people they had arrested. One of the men detained was in his nineties. After he was released, he told the media, in effect, that he was glad that the British still considered him a threat.

Simultaneously with the campaign of arrests, the British also introduced a series of interrogation techniques that had been used moderately successfully in previous colonial insurgencies in places such as Kenya and Cyprus. Using a euphemism, the British referred to the practices as "interrogation in depth" rather than highly coercive interrogation, which would have been a more accurate description. The techniques included the hooding of prisoners, wall standing, subjecting prisoners to white noise, and depriving them of sleep as well as food and water.

The practice of hooding involves forcing a prisoner's head into an opaque cloth bag with no ventilation. The hood is removed only after the interrogation or when the prisoner has been returned to his cell. Prisoners would often be stripped naked to enhance their feelings of vulnerability.

Wall standing consists of forcing prisoners to stand balanced against a cell wall for hours at a time, with their arms and legs spread in a search position. The point of the exercise is to put stress on the muscles and create cramping, which induces pain. The technique is not simply about standing; it is about producing muscle spasms and forcing prisoners to hold the position as the muscle spasms are induced. It is important to keep in mind that the time frame is not for just a few hours. One prisoner was held in a stress position in Northern Ireland for forty-three and a half hours. There are at least six other instances of people being held in stress positions for twenty hours.

And how are suspects kept in a stress position? They are not simply persuaded or politely encouraged to continue standing for another hour. They are hit and threatened if they move out of the position. Something that is frequently overlooked is that there is an element of coercive force to keeping a person in a stress position.

Before the era of rap music, the British army subjected prisoners to "white noise" produced by amplifying the hum of machinery. This might not seem so terrible, but one former prisoner, Jim Auld, told Amnesty International that he was driven to the brink of insanity after being subjected to white noise for four days. He tried to smash his head against the pipes of the cell to stop the noise.

Food and water deprivation means essentially limiting the prisoner's diet to bread and water for a period that can last for days, with no end in sight.

Sleep deprivation is one of the oldest interrogation tricks known. It is often used in tandem with other methods, so the prisoner suffers not just from sleep deprivation but from that combined with other practices such as the use of stress positions.

Detainees were usually subjected to these practices over the course of a week. It is not clear whether those using these methods were from the Royal Ulster Constabulary or the British army or both. The names of the individuals involved in the interrogations have never been revealed, nor have the units responsible been identified. It is a reasonable assumption, however, that the practices were carried out by the Irish and British forces acting in concert.

Not surprisingly, some creativity crept in around the edges. Detainees reported being forced to run over obstacle courses with smashed glass on the ground, so they would cut themselves when they fell down. Perhaps the most serious abuse of all was taking prisoners up in a helicopter and leading them to believe that they were about to be pushed out. In reality, the helicopter was hovering just off the ground, but the captors would throw someone out and everybody else would assume that he had fallen to his death.

While these abuses took place, they did not get wildly out of hand and were stopped remarkably quickly. It is not clear how many prisoners were subjected to these methods. There are details about twelve cases but there undoubtedly were more than that. Although the extent of abuse of the detainee population was relatively minor, the consequences were enormous.

Consider the following: Twenty-seven people were killed in Northern Ireland by sectarian violence during the first eight months of 1971. After the abusive methods were introduced, 147 more people died before the year was over. The most violent year of the Northern Ireland conflict was 1972, when 467 people died. Similarly, in 1970, there were 150 detonations of terrorist devices in Northern Ireland. In 1972 there were 1,382. Did the harsh methods actively help the British prevent insurgency in Northern Ireland? One always has to be careful about positing cause and effect, but it is not a huge intellectual leap to suggest that the abusive methods did not have a noticeably positive result.

The impact of these tactics on one's allies also needs to be taken into consideration. In the case of Northern Ireland, the Irish government is not usually thought of as being a natural ally of the British government—the Irish constitution called for the reunification

of the six counties of Northern Ireland with the rest of Ireland—but in many ways this was the case. The Irish government was no friend of the IRA, and the IRA did not recognize the Irish government. Rather, the latter was viewed by the IRA as an illegal government representing the side that won the Irish civil war (1922–1923), whereas the IRA was on the side that lost the civil war.

During the Second World War, the IRA carried out a terrorism campaign on the British mainland, aimed at securing British withdrawal from Northern Ireland. The Irish government helped the British authorities at the time stop the terrorist campaign by interning suspected IRA members. When IRA prisoners rioted in Dublin jails, the Irish government used live ammunition on IRA rioters imprisoned in Mountjoy Prison, killing one. Two other IRA prisoners died in Irish prisons on hunger strikes. The Irish government also helped British authorities arrest German agents who were working in Ireland to try and build up IRA operations.

During the cross-border campaign of 1956 to 1963, the Irish government as well as the British government interned people associated with the IRA. One would think, therefore, that the Irish government would have some natural sympathy with the British government in confronting IRA terrorism.

Once the British government started torturing Irish Catholics, however, it was very difficult for the government in Dublin to line up with the British. In 1971, the British alienated their most important security partner. They alienated the one government capable of preventing the IRA from retreating to safe areas, from training fighters in areas beyond the reach of the British military, and from storing weapons on Irish territory where the British army could not get to them.

Bloody Sunday in January 1972 also constituted a turning point. The British had troops on the streets; they opened fire in Londonderry, killing fourteen Catholic demonstrators. In response, a mob in Dublin burned down the British embassy. Having enraged public opinion in the South, the British could not get any security cooperation from the Irish. What the Irish government did instead was file a suit against the British in the European Court of Human Rights. While that may not sound terrible in the United States, it was the first time such a thing had ever happened: at that point no country in Europe had taken another country to the European Court of Human Rights.

The case before the Court primarily involved the coercive interrogation techniques used by the British in Northern Ireland. Whereas the European Commission on Human Rights initially described the techniques as torture, the European Court of Human Rights took a slightly more sympathetic view, describing them as cruel, inhuman and degrading. The Court stopped short of using the word torture, but still called the practices a breach of the European Convention on Human Rights and ordered the British government to pay compensation to the people whom it had abused.[5]

Imagine the end result: the British government ended up giving quite a lot of money to the very people it believed were members of a terrorist organization trying to overthrow it. Approximately 10,000–25,000 pounds sterling, or as much as $50,000 per victim, went straight into the IRA's coffers.

The British government responded by ending the practice of internment, by ending coercive interrogations and restricting the use of live ammunition. The British attorney general, who was summoned before the European Court of Human Rights, made a commitment that the British would never again use any of the five interrogation techniques described earlier anywhere. In Basra, Iraq, however, in 2003, the British army started hooding people during security sweeps. It took about three weeks before the practice was exposed and denounced in the House of Commons. The practice was discontinued and such matters are taken very seriously in the United Kingdom now.

It is worth noting that in the 1970s the British government argued that coercive interrogation techniques had some practical utility. Government officials argued that they had been able to identify 800 active members of the IRA. This would appear to be an implausible claim, given that it is commonly believed that the number of active IRA members was never higher than 200–300. The British government also claimed to have obtained information on about 1,600 different criminal incidents, but criminal incidents can range from obstructing a police inquiry to something much more serious. The statistics themselves suggest that most of the incidents were fairly minor, as the government certainly would have trumpeted truly significant breakthroughs much more widely.

Although the argument put forward at the time was that coercive techniques had value in producing useful information, those directly involved with such practices publicly said otherwise. The most significant person to have come forward was a Secret Intelligence Service (SIS) officer named Frank Steel, who was SIS's liaison to the counterterrorist effort in Northern Ireland. Steel told journalist Peter Taylor, author of *Provos*, that there was no practical utility to these methods and that he could not remember any actionable intelligence resulting from the use of coercive techniques.

Perhaps the truth lies somewhere in between. However, my professional experience indicates that there is a window of about forty-eight hours after someone is detained in which it is possible to obtain actionable intelligence. Holding someone for three or four years in Guantánamo has no practical utility in intelligence terms. It does, however, have a massive impact on a country's global reputation and its ability to build partnerships with governments that can help defeat terrorist organizations. The detentions also have a huge impact on the very population whose cooperation and assistance is needed to defeat terrorists.

Coercive techniques do not work, are not practical, and should be avoided. Good interrogators build rapport with their suspects to get information out of them. That is how professionals conduct themselves and that is how terrorist rings are broken. The people who use violence in interrogations are poor interrogators without much skill, who get frustrated and think violent tactics work. In fact, they are asinine. To get someone to help you, you have to build rapport with them.

Let's imagine how a coercive interrogation goes. The interrogator smacks the prisoner, demanding the answer to a question. The dynamic favors closed-only questions. The prisoner answers yes or no. The interrogator smacks him again, demanding the answer to the question. He again says yes or no. But the interrogator has to know the

right questions to ask before the answers can even be vaguely useful. Bear in mind that in the intelligence game, interrogators do not have one hundred percent of the picture, but rather, only a small bit of the picture. Frequently the questions asked during an interrogation are not the right questions. If an interrogator builds rapport with a prisoner, the prisoner may say, "You keep asking about X, why do you keep asking about X? It's Z that you want and that you want to be asking about. X isn't important." That's what happens when a rapport is established. If the interrogator is smacking the detainee with a baseball bat saying, "Tell me about X, tell me about X," he will never learn about Z. That is why a good interrogator builds a rapport, develops sympathy with his suspect, and persuades the suspect to cooperate. Does it work every time? Absolutely not. It works a small proportion of the time. But the intelligence obtained in this manner is gold dust and much, much better than anything I have ever seen come out of coercive interrogation. An excellent example of this can be found in Lawrence Wright's Pulitzer Prize-winning book *The Looming Tower*,[6] in which he describes how FBI Special Agent Ali Soufan appealed to USS Cole suspect Fahad al-Quso after the 9/11 attacks, using arguments drawn from al-Quso's own moral landscape, and gained crucial intelligence.

JUAN E. MÉNDEZ

My perspective on this topic is a very personal one, as I was a torture victim in Argentina in the 1970s, which is now, thankfully, a long time ago. My experience in Argentina led to a career in human rights, particularly campaigning against torture in many parts of the world, not only in Latin America.

From the perspective of a practitioner of international human rights law, I will address the question of whether exceptional circumstances allow for permissible derogations of otherwise well-recognized standards. International human rights law, particularly treaty law, is relevant to the conduct of the U.S. government. Many in Washington, however, do not believe that international law even applies to the United States.

Torture is absolutely prohibited in both U.S. domestic law, particularly constitutional law, and international human rights law. Cruel, inhuman and degrading treatment, even if it does not reach the severity of torture, is equally prohibited, even though there may be gray areas as to what one considers cruel, inhuman, and degrading treatment. Having honest definitions is important: it is not enough to say "We don't practice torture," if in fact we are making that statement dependent on how torture is defined. The Bush administration has tried to redefine torture in a way that is opposed to all widely accepted definitions, and has been less than candid with the American public about it. As a result, it has raised legitimate doubts about whether some of the things described in the documents referenced by Ms. Singh are policy or not.

International law allows states to derogate some very substantive provisions in times of war or emergency. Here again, war and emergency are terms of art; we cannot just redefine them or use them rhetorically. If we use the term "war on terrorism" in the same way that we use "war on poverty," then we are straying from the internationally

accepted definition of war. The question of whether international human rights law does or does not apply to the so-called "war on terror" is relevant to what we are discussing. There is no question that for people attacked or captured in combat anywhere in the world, the *lex specialis* principle[7] would dictate that the Geneva Conventions apply over international human rights norms. Even so, the Geneva Conventions clearly prohibit outrages against personal dignity, including torture, under all circumstances.

Outside of combat situations, the Geneva Conventions do not apply, and international human rights obligations as well as constitutional law dictate what State agents can and cannot do to individuals apprehended or subject to capture. If someone is arrested in Bosnia, for example, and then taken to Guantánamo after the Bosnian government has released him, it is a bit of a stretch to consider that person an unlawful combatant, because the latter category is a term of art of the laws of war. That person was never caught on the field of battle. The war on terror, if we try not to use the word rhetorically, includes actions and measures to which the Geneva Conventions apply—especially all those related to combat—as well as law enforcement activities to which international human rights law standards apply. It is not very complicated to apply them both as the circumstances dictate in each case.

There is a question about derogation standards in light of the fact that the United States never announced to other signatories of human rights treaties that emergency measures were in place after 9/11. Why no such announcement was made is an important question. More important than the bureaucratic announcement, however, is whether, in announcing the suspension of certain rights, the United States would have recognized that it was bound by the limitations and the standards that apply to those situations in which states are permitted to derogate certain provisions of human rights treaties. All such agreements, including those to which the United States is a party, state very clearly that in an emergency that threatens the life of the nation, it is permissible to derogate a variety of standards. However, one standard that it is completely impermissible to derogate is the use of torture under any and all circumstances. Additionally, it is impermissible to derogate guarantees in the domestic jurisdictions that exist precisely to prevent the possible incidence of such things as torture.

Participants in the first panel discussed whether *habeas corpus* should or should not apply to prisoners captured in the war on terror. As a matter of international law, the answer is very clear: there must be legal recourse to the independent courts of the nation for anyone who is captured and held under these circumstances. This is true even for the category of "unlawful combatant" as recognized by the laws of war.[8] The determination of status as a prisoner of war or as an unlawful combatant or as a protected civilian has to be made on a case-by-case basis by an impartial and independent adjudicator. This is a factual determination, and the standard under which it is made may vary; depending on circumstances it is legitimate to give great deference to the statements of the capturing agent, especially early on. This means that we need not fear that everyone—including highly dangerous types—will go free. It does mean, however, that the administration must have an independent, impartial adjudicatory body that decides

fundamental questions such as whether someone is a lawful or unlawful enemy combatant. Even the military commissions established by the Bush administration said exactly that in June 2007.[9]

In 2002, the Inter-American Commission on Human Rights came to the very same conclusion. In a little known case in which the ACLU and other organizations requested precautionary measures against the United States, the Commission informed the Bush administration that under its obligations and under international human rights law, it was obliged to give each person detained in Guantánamo a hearing by an independent adjudicator, to determine the conditions and the laws that would apply in each case.[10] Two years after the Inter-American Commission on Human Rights issued this precautionary measure, the United States Supreme Court reached the same conclusion: that the determination of the status of a prisoner held by the United States had to be made by an impartial and independent adjudicator.[11] In 2006, the Supreme Court again rebuffed the main tenets of the Bush administration's "global war on terrorism" when it ruled that military commissions "lack the power to proceed" since they violate both the Uniform Code of Military Justice and the Geneva Conventions.[12] The decision led to the enactment of the Military Commissions Act of 2006.[13] As for terminology, there is of course a severity requirement for deciding when something is considered torture. There is some ambiguity as well as to the cultural and contextual aspects regarding when something is severe enough to amount to torture, but it is not hard to determine that certain things simply shock the conscience of any person in any culture. We need to be careful not to cross that line.

Another question of terminology involves renditions. We neglected to say earlier today that the administration talks about "extraordinary rendition," not just "rendition." If it were a matter of the usual collaboration between law enforcement bodies across borders, then we would talk about rendition. The concept would still be problematic, however, especially when it is meant to circumvent the regular extradition process. It is nonetheless true that rendition is a regular procedure employed by many different countries and in general it is not illegal.

When the term "extraordinary rendition" is used, it signifies that there is something very different about this type of procedure. In fact, the one thing that is very different is that these renditions are conducted not for the purpose of bringing people to justice but rather to throw them into the shadows of illegal detention and interrogation under torture, perhaps even for elimination and extra-judicial execution. The United States sends prisoners to other countries so that they can be interrogated without the limitations imposed by U.S. and international law. It is therefore cynical to allege that the United States always seeks assurances from receiving countries that prisoners will not be tortured. Why would the United States send them to those countries if it wanted them to be treated respectfully? Frankly, it seems at least questionable that high-value prisoners with significant intelligence value are given over to countries under assurances that the prisoners will not be tortured, when the United States maintains its keen interest in the intelligence thus produced. Leaving aside the questionable nature of such intelligence, not just for possible court use but even for security uses, it is clear that

legally and ethically the United States cannot escape its complicity in the torture that this practice promotes.

Even more important is the question of clandestine detention centers. Many of the people subjected to extraordinary rendition are held secretly and in complete silence and denial. The practice comes very close to what in Latin America are called "disappearances," and once again I hark back to my personal experience. Military establishments in Latin America took these practices to grotesque levels, and their abuses were massive, systematic, and widespread. Nothing that occurred in Latin America in the 1970s and 1980s is comparable to what is occurring today in the context of the war on terror. There is, however, a slippery slope that did not start with General Jorge Videla in Argentina or General Augusto Pinochet in Chile. The abuses began when civilian leaders did not exercise their responsibilities and turned a blind eye to practices that they knew were occurring, hoping that perhaps the excesses would just go away and that everything would be all right in the end.

The consequences for Latin America are significant but not permanent. Democratic transitions began some twenty-five years ago, but military and police establishments have completely lost the confidence of the population they are supposed to serve. They have been so discredited that even after all these years members of the security forces do not wear their uniforms in the street. If we asked American soldiers and officers to engage in abusive practices, and if we let them do so more frequently and more assiduously in the future, then this is the kind of scenario that could develop. Even with the democracy that we now enjoy in Latin America, citizens find it very difficult to trust organizations like the police to deal with questions of crime and violence. People simply do not trust the police enough to cooperate with them; crime becomes a spiral and we have no effective way of addressing it.

What should be done regarding the standards for the treatment of detainees? Frank exchanges are important, but it is more critical to move quickly to undo some of the wrong that has been done. Some of the memos and internal documents have been disavowed or withdrawn by the Bush administration, but the cleanup needs to be more extensive. Legislation must be changed back to reflect the more enlightened human rights policies that distinguished the United States over a long period of time.

When practiced on a widespread or systematic basis, torture is a crime against humanity. It is incumbent on the courts and the prosecutors of the nation to investigate, prosecute, and punish every single instance of torture, make sure that victims are given a right to justice, and ensure that these practices are not condoned or tolerated.

It is also very important to deprive torture of its effects. The Supreme Court decision in *Mapp v. Ohio*[14] first established the "fruit of the poisonous tree doctrine" which is gradually making its way into international law. This doctrine makes evidence obtained in violation of due process, as well all other evidence that is obtained as a result of the violation of the rights of the defendant, inadmissible in court. The doctrine is slowly but surely being adopted in other jurisdictions and also as a matter of international law. It started in the United States and it should be reestablished and practiced here as well.

The final issue is whether these principles do or do not apply if the abuses take place in territory other than the United States. Under international human rights law, the answer is very easy. The treaties say specifically that all of these human rights standards apply to everyone who is under the jurisdiction of the party to the treaty, whether a person is in or outside a country's territory. There is perhaps no clearer indication of whether or not someone is under a country's jurisdiction than when he or she is arrested and held in custody by agents of that state. Whether or not in domestic constitutional law some distinctions may apply according to where the event or its effect took place, under international law it does not matter whether a person is mistreated in New York, California, Guantánamo, Bagram or wherever, as long as the agents who are conducting the mistreatment are part of the state apparatus of the United States. In that case, the United States is liable under international law.

PANELISTS' DISCUSSION AND AUDIENCE QUESTIONS

Mr. Rivkin: I would like to concentrate on the remarks of our British colleague, Tom Parker. He makes a persuasive case and goodness knows I am not an expert on Northern Ireland. The truth, as he said, is probably in-between. I have had British colleagues tell me that coercive interrogation techniques were indeed fruitful and helped to develop a pretty good intelligence picture, and others told me that these techniques were unnecessary, in that they could get all the information they needed through kindness and compassion, but as Parker says, it is probably somewhere in between.

One observation may be pedantic but it is important. I have read the relevant opinion of the European Court of Human Rights very carefully. It did not call individual techniques illegal; rather, it talked about all the techniques used together.[15] Even progressive bodies such as the European Court of Human Rights never said that hooding as such is impermissible.

As for Irish history: the IRA was not interested in destroying Britain; it was not interested in converting Britain. Do you not perceive a fundamental difference between the ability of the English to build a rapport with an IRA sympathizer, both products of a common Anglo Saxon-Scottish culture, whose grievances against Britain were real but limited in scope and, for example, the situation involving interrogating a communist rebel or guerilla in Latin America? We are now facing a situation where the ideological gap between the people who are doing the interrogating and the people who are being interrogated is vast. People who are willing to fly planes into buildings and die for their cause are extremely unlikely to be much persuaded by some Westerner, even the one who speaks Arabic or understands the culture. It is very unlikely that a Western interrogator will be able to build rapport with these chaps.

Of course there's a huge cost to our image, particularly the United States' image, to using stressful interrogation techniques. In some sense, perhaps we should now not use any stressful techniques because the cost has become so high. But why has the cost become so high? Is it inherently the problem of those techniques or is it the fault of the

people who drove the debate, who polarized the debate, who postured it in such a way that it is all horrible and inherently evil, that we're on a slippery slope and that there is no fundamental difference between the use of some hooding of detainees and pulling out their fingernails?

It is similar to the situation with renditions. I have written that renditions are legal and yet we probably should not do them anymore because we are paying too high a price. We are probably at a stage where we should not be doing stressful interrogations because we are paying too high a price. Most critics have made it impossible to have a rational debate. I despair because I cannot get anybody to answer a straightforward question: why is it that a civilized society that permits modest levels of coercion of prisoners in civilian penitentiaries and military recruits cannot morally stomach doing at least that much to the unlawful combatants that we capture? Nobody wants to talk about it.

It would be more honest if we just say, "Let's get rid of coercion entirely. We're too civilized in the 21st century; there should be no coercion, no yelling at school children, parents should not slap kids (and there are states in this country that actually ban that), prisoners should be treated with utmost courtesy, guards should say 'Sir, would you please march to your solitary confinement?' and there should be no drill sergeants." But that is not what we're doing; I don't understand why that makes any sense.

Mr. Parker: It is important to keep in mind that Britain lost its colonies, so the harsh tactics directed at the IRA and other national liberation movements were not wildly successful.

My personal experience with interrogations and working with counterterrorism officials in Iraq, Bosnia, Chad, Nepal, Lebanon, Thailand, Sri Lanka and elsewhere indicates that there are some commonalities in human experience. Whether you are talking to someone in a shelter, in a refugee camp in Chad, or in an upscale part of the Mansour district in Baghdad, there are basic human points of contact that allow for developing a rapport, even through an interpreter. This applies regardless of whether one is talking to soldiers, law enforcement officers, perpetrators of abuse, or victims.

A particularly apposite cartoon was published after the 2005 London Transport bombings, depicting a City of London commuter with his bowler hat at one end of the Underground train and a Muslim gentleman at the far end of the train. The caption was, "Mind the Gap."[16]

I do not believe that the gap is actually that large. It is possible to develop a rapport, even across cultures and in situations of great hostility. You can always challenge flawed reasoning and poor religious scholarship, try to persuade the interview subject that his or her attitude is misguided.

When I worked for ICTY, I was part of a team investigating Muslim crimes against Croats in Central Bosnia. The principal perpetrators were Mujahedin units of Islamic fundamentalist volunteers fighting with the Bosnian army. The people bankrolling that effort issued a booklet called "Instructions to the Islamic Fighter," indicating what could and could not be done in combat—supposedly according to Islamic law. The document

was a kind of anti-Geneva Convention, if you like, containing skewed interpretations of religious texts and Qur'anic references, and replete with errors about Islamic jurisprudence. The pamphlet was a perversion of what most mainstream Islamic thinkers would say on a variety of important subjects, including how to treat civilians, wounded soldiers and prisoners.

Take the time to learn something about the Koran, the teachings of Mohammed, and Islamic jurisprudence, and you can debate people on these points in the interview room. Some perpetrators are very well educated; some are not. Either way, if you can introduce an element of doubt where before there was certainty, it can be exploited. It is possible, in some cases, to persuade people that they are wrong. The book *The Looming Towers* tells the story of Fahad al-Quso, who was involved in the attack on the *USS Cole*, which he believed to have been a legitimate military target. He was in police custody in Yemen on 9/11. An Arabic-speaking FBI agent who was able to gain access to al-Quso immediately after the attacks was able to persuade him that al-Qaeda had gone too far by attacking civilians in New York, and to gain his cooperation. People's personal motivations differ.

I will concede, however, that we have to be very careful about analogies. Just because something works in Northern Ireland does not mean it will work in Baghdad. I am not arguing that the lessons of Northern Ireland can be applied willy-nilly to every other conflict. The case-by-case context matters.

As for the debate about the practical utility of slapping people, I think that to use violence to coerce a prisoner, the interrogator has to go a bit further than an angry parent. Detainees can be tough people. In the days when I interrogated terrorists, I was accompanied by a big heavy fellow who was in the room to protect me. These are scary people and I am frightened of them. Slapping them around is not going to make a great deal of difference. Using torture in an unfettered environment such as Baghdad—taking a Black and Decker drill to someone's knee caps or smacking them around with a baseball bat wrapped in barbed wire (which are, incidentally, techniques that have been used by terrorists in both Northern Ireland and Iraq)—might work. But do you want to be that person?

What also happens when you go down that path is what political scientists refer to as "frame amplification." Terrorism is about narrative—two conflicting narratives, if you like. Part of the al-Qaeda narrative is that people in the West are very bad; that we are hypocrites who talk about human rights but deny them to the peoples of the Middle East. To torture prisoners is to amplify and confirm that narrative.

Anti-terrorist campaigns require thinking about three points of a triangle: the state, the terrorist group, and the people for whose hearts and minds both sides are fighting and who, typically, the terrorists claim to represent. In most circumstances, it is impossible for either the state or the terrorist group to win unless it has the people—that third point of the triangle—on its side. The narrative of legitimacy is tremendously important, and that narrative cannot be enhanced by using coercive interrogation techniques.

Law enforcement typically has that legitimate narrative on its side. Most criminals know they are criminals. Someone arrested for robbing a bank might think that the capitalist system is rotten, but he still knows he's a crook who has robbed a bank: a discourse of legitimacy applies even in this circumstance. The same is true for terrorism. If the state and law enforcement lose the legitimacy they inherently possess, they play into the terrorists' hands. Such works as Sergei Nechayev's *Catechism of a Revolutionist* in the nineteenth century and Carlos Marighella's *Manual of the Urban Guerrilla*, republished in the 1960s, emphasize that point.[17] Both manuals advocate provoking the authorities into an overreaction, thereby eroding their legitimacy and alienating the population. Yet we fall into this trap again and again and again.

Mr. Rivkin: European examples do not work here. The people whom we are trying to impress are absolutely unfazed by the open use of torture. There have not been any protests from them about such things as beheadings. I have noticed zero outrage at the discovery of a really gruesome torture manual in al-Qaeda safe houses. All I am asking you to do is to think seriously about the validity of the argument that the use of modest interrogation techniques by us is going to inflame against us a vast body of people who seem to have no problems with torturing, mutilating, and maiming the infidels. When was the last time you heard any protest about the absolutely brutal medieval level of treatment of American soldiers who have been captured by Jihadis in Afghanistan and Iraq? You are right about the Russian nineteenth century precedent and about Ireland, but you are not necessarily right about this war.

Mr. Taft: I have two comments on the presentations. One relates to the situation in Iraq. I think it is a very unfortunate thing that it was not as clear as it should be that in Iraq, the conflict was governed by the Geneva Conventions and there was no argument about this. The conduct of our forces there was governed by the Geneva Conventions because Iraq was a high contracting party to the Conventions. All of the things that occurred there that were not consistent with the Conventions were in violation of our obligations under them. That was the policy. There were certainly problems of migration, of practices that were approved in situations to which it had been determined whether rightly or not that the Geneva Conventions did not apply, to Iraq. That was something that should not have happened because it was clear that the Geneva Conventions did apply.

The second point has to do with the subject of accountability about who is in detention. Mr. Méndez brought it to mind by mentioning the "disappearances" in Latin America. I think one of the things that was regrettable was the failure to notify a third party of the fact that we were detaining certain people. As soon as you start down the track of not acknowledging that people are in your custody, you begin to lose accountability for what happens to them. The temptations become extremely strong if something goes wrong for detainees, even if they should die of natural causes, simply not to bother to say that they were in your custody at the time. You also have set a very bad precedent for your own troops who are likely in many instances to be captured, such as

pilots who have been shot down. It is the easiest thing in the world for another government not to acknowledge that it has somebody in detention. It is not an acceptable practice, and we do not want to start down that road.

I was very glad when the President acknowledged that the people brought to Guantánamo last September were the only people who we had in custody who had not been identified so far. It seemed to me that that was a step in the right direction, although the administration did not commit to acknowledging in the future all the people that it might have in detention. It also did not account for people who were no longer in detention but had been released to one place or another. It was a step in the right direction, although I think that we really need to worry about the implications of holding people without any acknowledgment as to who they are; it is the way to disappearances.

Question: My question is for Ms. Singh and is about the narrative that Mr. Parker spoke about and the culture that it has created in this country in the aftermath of 9/11. I work for a newspaper which almost every week reports an instance of either racial profiling or hate crimes against South Asians, particularly Sikh Americans and Muslim South Asian Americans. Terms like "Islamofascists" do not help either in the sense that there is rising xenophobia among a populace which considers the South Asian community fair game, in spite of the fact that the community has been very law abiding.

Ms. Singh: What we have seen happening on the ground in Iraq and Afghanistan is soldiers operating in a very uncontrolled situation. We have documents showing that they have literally used techniques that they remembered from the movies on subjects who they thought were a threat or possessed actionable intelligence, when in fact they did not. I think it is the same sort of phenomenon, the same kind of uncontrolled situation, at home. People resort to stereotypes of all kinds when there is not actually any concrete information to rely on and the result is a massive infringement of the victim's rights. I think you are right in pointing out that there is a connection between the kinds of conduct that occurred in Iraq and Afghanistan and the kind of stereotyping that goes on in the United States with respect to people who are of certain colors and backgrounds.

Question: I find the suggestion that there is etiquette to the conduct of war questionable. As someone who has been an international law professor for forty years, I know that the Kellogg-Briand Pact of 1928[18] said that the use of war as an instrument of foreign policy is no longer lawful.

I would like to see a body of scholars like ourselves undertake a long-term commitment to outlaw the use of war itself. That would remove all questions of torture and all the fine points that may be raised about whether waterboarding is illegal or poking somebody in the chest is illegal.

Mr. Méndez: I agree that war as a means to pursue foreign policy objectives has been outlawed in Kellogg-Briand and also in the Charter of the United Nations, which is of

course a treaty. It does, however, recognize the exception of self defense. In this context, the argument was made that if al-Qaeda and Osama bin Laden were in Afghanistan, the attack on Afghanistan could be considered an act of self defense with respect to the September 11 attacks on the Twin Towers and the Pentagon.

But I do not think that applies to Iraq in any serious sense. I also think the whole doctrine of preemptive self defense turns the whole matter on its head and makes nothing of self defense, so I agree with the professor about that.

Question: People in Latin America don't realize how 9/11 affected Americans psychologically. I believe the United States was the first country to turn human rights into an instrument of foreign policy. I know Brazilians who are alive today, for example, because of the actions of the Carter administration on Latin America, and journalists in Brazil considered President Carter a hero for his human rights policies.

People in Latin America therefore cannot understand what has happened during the war on terror. They were particularly confused when, just before the 2006 elections, the Congress of the United States approved legislation that made a little torture acceptable. That is why I want to ask Juan Méndez about this. Could you be more specific? What are the things that need to be changed back by Congress so the United States can recover the credibility that it had?

Mr. Méndez: Time does not permit a full answer, but I would say briefly that going back to the interrogation manual of the *Uniform Code of Military Justice* would be a step in the right direction. We heard this morning how it prohibits these things. We should also withdraw the memos that were shown by Ms. Singh and other memos that blur the line and redefine and reinterpret words like torture. Those things have to be changed by the highest echelons of policymaking; in some cases they will have to be changed by Congress. Something else that has to be changed is surveillance of citizens.

None of this would be very radical. It basically would be going back to standards that were adhered to by the United States up until 2001, without anybody even thinking they were a problem. On the contrary, they were very useful in dealing not only with crime but also with security concerns of the United States. I think all of those things can be changed relatively easily.

Dr. Arnson: Juan Méndez referred to the importance of dialogue about these issues, and he just concluded by stressing the importance of changing and improving the laws. Our purpose here at the Wilson Center is not to advocate on behalf of particular legislation or legal outcomes but rather to enrich and elevate the level of debate. That is what we have sought to do today, and we appreciate the comments of both the panelists and the audience in enlarging our understanding of this very complex issue. We know the discussion will continue in this country and hope that we have now made a useful contribution to it.

NOTES

1. A fuller exposition of this story and key government documents is in Jameel Jaffer and Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia University Press, 2007).
2. Office of the Inspector General of the Department of Defense, *Review of DoD-Directed Investigations of Detainee Abuse* (Report No. 06-INTEL-10), Aug. 25, 2006, available at http://www.dodig.mil/fo/Foia/ERR/06-INTEL-10-part%201.pdf.
3. *See* "High Taliban official in U.S. custody," Associated Press, Feb. 9, 2002.
4. Ricardo S. Sanchez, "Memorandum for Commander," Sept. 14, 2003, available at http://www.aclu.org/FilesPDFs/september%20sanchez%20memo.pdf.
5. *Ireland v. The United Kingdom*, 5310/71 [1978] ECHR 1 (18 January 1978), available at http://www.worldlii.org/eu/cases/ECHR/1978/1.html.
6. Lawrence Wright: *The Looming Tower: Al-Qaeda and the Road to 9/11* (Knopf, 2006).
7. "*Lex specialis derogat legi generali*:" when two laws are in contradiction, the more specific law takes precedence over the more general one.
8. An unlawful combatant is one who does not respect the obligation to distinguish oneself clearly and to carry and use weapons visibly, standards which the Geneva Conventions impose as a means to prevent the violation known as *perfidy*. Spies, saboteurs and—depending on their behavior—some members of irregular fighting forces are unlawful combatants and therefore not entitled to the *combatant's privilege* nor to the full protection afforded to a *prisoner of war*. *See Ex Parte Quirin*, 317 U.S. 1 (1942); Marco Sassoli and Antoine Bouvier, *How Does Law Protect in War?* (Geneva: International Committee of the Red Cross, 1999), pp. 119–124.
9. *United States of America v. Omar Ahmed Khadr*, "Order on Jurisdiction," June 4, 2007, and *United States of America v. Salim Ahmed Hamdan*, "Order on Jurisdiction," June 4, 2007. In both these cases, charges were dismissed, since neither person had been determined to be an "unlawful enemy combatant," which was required for their prosecution under the Military Commissions Act of 2006. Instead, they were just "enemy combatants."
10. Inter-American Commission on Human Rights, "Resolution Nº 2/06, On Guantanamo Bay Precautionary Measures," Press Release No 27/06, "Inter-American Commission Urges to Close Guantanamo without Delay," July 28, 2006, available at http://www.iachr.org/Comunicados/English/2006/27.06eng.htm. *See also* Brian D. Tittemore, "Guantanamo Bay and the Precautionary Measures of the Inter-American Commission on Human Rights: A Case for International Oversight in the Struggle Against Terrorism," 6 *Human Rights Law Review* (2006), pp. 378–402.
11. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). This case dealt specifically with *habeas corpus* for a U.S. citizen declared an "unlawful enemy combatant."
12. *Hamdan v. Rumsfeld*, 126 S.C. 2749 (2006).
13. The United States Military Commissions Act of 2006, P.L. No. 109-366 (Oct. 17, 2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930enr.txt.pdf.
14. *Mapp v. Ohio*, 367 U.S. 643 (1961).
15. The Court held in *Ireland v. U.K.* that "recourse to the five techniques amounted to a practice of inhuman and degrading treatment, which practice was in breach of Article 3" and that the said use of the five techniques did not constitute a practice of torture within the meaning of Article 3. *See* note 5, above.

16. The words "Mind the Gap" are used in London Underground (subway) stations to warn passengers of gaps between a station platform and the train.
17. Sergei Nechayev, "Catechism of the Revolutionist" in Michael Confino, ed., *Daughter of a Revolutionary: Natalie Herzen and the Bakunin-Nechayev Circle* (tr. Hilary Sternberg and Lydia Bott) (LaSalle: Library Press, 1973; London: Alcove Press, 1974), pp. 221–230; available at http://www.uoregon.edu/~kimball/Nqv.catechism.thm.htm. The pamphlet was first published in 1869. Carlos Marighella, *Manual of the Urban Guerrilla* [*Minimanual do Guerrilheiro Urbano*] (ed. Gene Hanrahan) (Chapel Hill: Documentary Publications, 1985).
18. The Kellogg-Briand Pact of 1928, ratified by the United States in 1929, renounced war as an instrument of national policy. It is available at http://www.yale.edu/lawweb/avalon/imt/kbpact.htm.

Timeline

COMPILED BY SHEREE ADAMS AND ADAM STUBITS

June 21, 1995: President Bill Clinton authorizes policy directive PDD-39 to use rendition to disrupt terrorist cells abroad.[1]

May 22, 1998: President Clinton authorizes a policy directive that effectively reaffirms PDD-39.[2]

February 2, 2000: CIA Director George J. Tenet says that "renditions have shattered terrorist cells and networks, thwarted terrorist plans, and in some cases even prevented attacks from occurring."[3]

Before September 11, 2001: While the executive branch authorized the CIA to carry out renditions, the transfer of individual prisoners still requires White House review and approval. As of September 10, the United States has carried out 70 renditions, most of them during the Clinton years.[4]

September 17, 2001: President George W. Bush expands CIA authority to detain, capture, and use deadly force on al-Qaeda operatives worldwide, and to transfer prisoners to other countries for the purpose of detention and interrogation.[5]

October 26, 2001: President Bush signs the Patriot Act, expanding the authority of U.S. law enforcement agencies to fight terrorism in the United States and abroad by, among other things, increasing their ability to search electronic, oral, and wire communications, and financial records.[6]

November 13, 2001: President Bush issues a Military Order to allow special military tribunals to try foreigners charged with terrorism. The Justice Department asks law enforcement authorities to question 5,000 mostly Middle Eastern men who legally entered the country in the last two years.[7]

January 11, 2002: The first prisoners arrive at Guantánamo Bay, a U.S. naval base and detention center on Cuban soil, from overseas.[8]

January 25, 2002: White House counsel Alberto R. Gonzales writes a memorandum for the President calling the Geneva Conventions "quaint" and not suitable for the war against terrorism. *Newsweek* obtains and references the memo on May 17, 2004.[9]

February 7, 2002: President Bush signs an executive order that says members of al-Qaeda, the Taliban, and others are "unlawful enemy combatants" not entitled to protections under Common Article 3 of the Geneva Conventions for prisoners of war, which prohibits "mutilation, cruel treatment and torture" and "humiliating and degrading treatment" of detainees. In the memo, Bush says he believes he had "the authority under the Constitution" to deny protections of the Geneva Conventions to combatants captured during the war in Afghanistan but that he would "decline to exercise that authority at this time."[10]

March 2002: A team of administration lawyers accepts the Justice Department's view that President Bush was not bound by either the United Nations Convention against Torture or a federal anti-torture statute because he had the authority to protect the nation from terrorism.[11]

August 1, 2002: Assistant Attorney General Jay S. Bybee gives the CIA sweeping legal justification for the harshest interrogation techniques, in a memorandum declaring that no interrogation practices were illegal unless they produced pain equivalent to organ failure or "even death." A second memorandum spells out the approved interrogation practices and how often or how long they could be used.[12]

December 2, 2002: Defense Secretary Donald H. Rumsfeld approves a range of severe interrogation techniques for detainees in Guantánamo Bay, including stripping off their clothes, using dogs to threaten them, and forcing them to remain in "stressful positions."[13]

March 2003: The CIA captures Khalid Sheikh Mohammed, the chief planner of the September 11 attacks, and uses aggressive interrogation tactics on him about 100 times over two weeks. Agency officials eventually order a halt to the harsh interrogation, fearing that the combined assaults may have amounted to illegal torture.[14]

April 28 & 30, 2004: CBS' "60 Minutes II" and *The New Yorker* report the abuse of detainees held in Abu Ghraib, publishing graphic pictures showing American military personnel in the act of abusing prisoners.[15]

Spring 2004: The CIA issues a report reflecting its deep unease about some of its interrogation procedures, finding that they appear to constitute cruel, inhuman and degrading treatment under the Geneva Conventions.[16]

June 17, 2004: Jack Goldsmith, Bybee's replacement as head of the Justice Department's Office of Legal Counsel, rescinds the Bybee memo and submits his resignation on the same day.[17]

June 22, 2004: Following sinking public confidence in President Bush's handling of the war on terrorism, the White House releases several memoranda denying the use of torture. The President says, "I have never ordered torture. I will never order torture. The values of this country are such that torture is not a part of our soul and our being."[18]

July 7, 2004: In response to Supreme Court rulings, the Pentagon establishes the Combatant Status Review Tribunal, which lets detainees challenge their status as enemy combatants before a panel of officers.[19]

December 30, 2004: The Justice Department issues a memo declaring torture "abhorrent" and broadening the definition of acts that constitute torture, one week before the Senate holds confirmation hearings for Alberto R. Gonzales, nominee for Attorney General.[20]

January 6, 2005: Mr. Gonzales's testimony, in which he defends the 2002 Bybee memo, is released. It says that the Geneva Conventions "limit our ability to solicit information from detainees."[21]

February 2005: Soon after Alberto R. Gonzales's appointment as Attorney General, the Justice Department issues a secret opinion—an expansive endorsement of the harshest interrogation techniques ever used by the CIA—providing explicit authorization to use painful physical and psychological tactics, including head-slapping, simulated drowning and frigid temperatures.[22]

April 29, 2005: The U.S. Army issues a new interrogation manual that expressly bars the harsh techniques disclosed in the Abu Ghraib prisoner abuse scandal.[23]

November 2, 2005: *The Washington Post* features journalist Dana Priest's article that exposed how the Bush Administration's post-9/11 expansion of authority to the CIA resulted in the CIA practice of working outside of the U.S. legal system by detaining an increasing number of terrorism suspects in "black sites" overseas.[24]

December 30, 2005: President Bush signs into law the Detainee Treatment Act, which bans "cruel, inhuman or degrading treatment" of prisoners in American custody anywhere in the world. The Justice Department had already effectively exempted CIA techniques from this law.[25]

June 29, 2006: The U.S. Supreme Court rules that the Bush administration's plan to put Guantánamo detainees on trial before military commissions, the Authorization for Use of Military Force, is unauthorized by federal statute and violates international law.[26]

September 6, 2006: For the first time, President Bush acknowledges the CIA's secret jails and orders their inmates moved to Guantánamo Bay. The CIA halts its use of waterboarding.[27]

September 28, 2006: President Bush signs the Military Commissions Act of 2006 to outlaw "humiliating and degrading" treatment of detainees, making illegal several broadly defined abuses of detainees, while leaving it to the president to establish specific permissible interrogation techniques.[28]

December 2006: Researchers commissioned by the Intelligence Science Board say there is little evidence that harsh methods produce the best intelligence.[29]

January 4, 2007: Senator Arlen Specter introduces the Habeas Corpus Restoration Act, which would grant any detainee held by the United States the right to bring a legal challenge in U.S. federal court.[30]

May 2007: General David H. Petraeus, the top commander in Iraq since January 2007, sends a letter to troops warning that "expedient methods" using force violated American values.[31]

July 20, 2007: President Bush reaffirms his Feb. 7, 2002, executive order that allowed the CIA to use "enhanced" interrogation techniques, the details of which are secret, and the CIA continues to hold prisoners in "black sites" overseas.[32]

August 28, 2007: Lt. Col. Steven L. Jordan, an Iraq reservist and the only officer to be tried for the detainee abuse scandal at Abu Ghraib, is reprimanded for failing to obey an order not to discuss the Abu Ghraib case with other witnesses.[33]

September 28, 2007: U.S. allows key detainees at Guantánamo to request lawyers.[34]

October 9, 2007: The U.S. Supreme Court refuses to hear an appeal filed on behalf of a German citizen of Lebanese descent who claims he was abducted and tortured by U.S. agents while imprisoned in Afghanistan. This lets stand an appeals court ruling that the state secrets privilege, relied on by the Bush administration, can govern dismissal of lawsuits that touch on issues of national security. The government's actions are protected from court review.[35]

NOTES

1. Presidential Decision Directive-39 (PDD-39): "Terrorism Incident Annex to the Federal Response Plan," Feb. 7, 1997, available at http://www.fas.org/irp/offdocs/pdd39_frp.htm; Jim Hoagland, "Pricey Rendition," *The Washington Post*, July 3, 2005.
2. "The Clinton Administration's Policy on Critical Infrastructure Protection: Presidential Decision Directive-63," May 22, 1998, available at http://www.fas.org/irp/offdocs/paper598.htm.
3. Dana Priest, "Wrongful Imprisonment: Anatomy of a CIA mistake," *The Washington Post*, Dec. 4, 2005.
4. Douglas Jehl and David Johnston, "Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails," *The New York Times*, Mar. 6, 2005; Daniel Benjamin, "5 Myths about Rendition (and That New Movie)," *The Washington Post*, Oct. 20, 2007.
5. Dana Priest, "CIA Holds Terror Suspects in Secret Prisons, Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11," *The Washington Post*, Nov. 2, 2005.
6. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, P.L. 107–56, Oct. 26, 2001, available at http://www.govtrack.us/congress/bill.xpd?bill=h107-3162.
7. Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Nov. 13, 2001, available at http://www.state.gov/coalition/cr/prs/6077.htm; Matthew Purdy, "A Nation Challenged: The Law; Bush's New Rules to Fight Terror Transform the Legal Landscape," *The New York Times*, Nov. 25, 2001; Elisabeth Bumiller and David Johnston, "Bush Sets Option of Military Trials in Terrorist Cases," *The New York Times*, Nov. 14, 2001.
8. "Shackled detainees arrive in Guantanamo," CNN.com, Jan. 11, 2002, available at http://archives.cnn.com/2002/WORLD/asiapcf/central/01/11/ret.detainee.transfer/index.html.
9. Michael Isikoff, "Memos Reveal War Crimes Warnings," *Newsweek*, May 17, 2004; Neil A. Lewis, "Broad Use of Harsh Tactics Is Described at Cuba Base," *The New York Times*, Oct. 17, 2004. *See* note 24, p. 27 above.

10. Lewis, op. cit.
11. Neil A. Lewis, Eric Schmitt, and Kate Zernicke, "The Reach of War: Legal Opinions; Lawyers Decided Bans on Torture Didn't Bind Bush," *The New York Times*, June 8, 2004.
12. Office of Legal Counsel, "Memorandum for Alberto R. Gonzales, Counsel to the President Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A," August 1, 2002, available at http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf; Scott Shane, David Johnston, and James Risen, "Secret U.S. Endorsement of Severe Interrogations," *The New York Times*, Oct. 4, 2007.
13. Glenn Kessler, "State Dept. Study Cites Torture of Prisoners, Rumsfeld Approved Similar Practices," *The Washington Post*, Mar. 1, 2005.
14. Shane et al., "Secret U.S. Endorsement Of Severe Interrogations," *see* note 12 above.
15. Seymour M. Hersh, "Torture at Abu Ghraib: American soldiers brutalized Iraqis. How far up does the responsibility go?," *The New Yorker*, May 10, 2004, available at http://www.newyorker.com/archive/2004/05/10/040510fa_fact. *See* David Stout, "Bush Expresses 'Deep Disgust' Over Abuse of Iraqi Prisoners," *The New York Times*, Apr. 30, 2004.
16. Douglas Jehl, "Report Warned CIA on Tactics in Interrogation," *The New York Times*, Nov. 9, 2005.
17. Department of Justice Press Release, "Assistant Attorney General Jack Goldsmith to Step Down," June 17, 2004, available at http://www.usdoj.gov/opa/pr/2004/June/04_ag_418.htm.
18. Mike Allen and Susan Schmidt, "Memo on Interrogation Tactics Is Disavowed: Justice Document Had Said Torture May Be Defensible," *The Washington Post*, June 23, 2004; "Bush: 'I have never ordered torture': Administration releases memos on interrogation tactics," *CNN*, June 23, 2004.
19. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); U.S. Department of State, Office of the Assistant Secretary of Defense News Transcript, "Defense Department Background Briefing on the Combatant Status Review Tribunal," July 7, 2004, available at http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2751.
20. U.S. Department of Justice Office of Legal Counsel, Office of the Assistant Attorney General, "Memorandum for James B. Comey, RE: Legal Standards Applicable Under 18 U.S.C. 2340-2340A," Dec. 30, 2004, available at news.findlaw.com/hdocs/docs/terrorism/dojtorture123004mem.pdf.
21. "Senate confirmation hearings for Alberto Gonzales, Senate Judiciary Committee Confirmation Hearing," Jan. 6, 2005, available at http://www.nytimes.com/2005/01/06/politics/06TEXT-GONZALES.html.
22. Scott Shane, David Johnston, and James Risen, "Secret U.S. Endorsement Of Severe Interrogations," *The New York Times*, Oct. 4, 2007.
23. Eric Schmitt, "Army's New Rules Bar Harsh Interrogations," *International Herald Tribune*, Apr. 29, 2005.
24. Dana Priest, "CIA Holds Terror Suspects in Secret Prisons, Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11," *The Washington Post*, Nov. 2, 2005.
25. National Commission on Detainee Treatment Act of 2007 of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act 2006, P.L. 109-148, available at http://www.govtrack.us/congress/bill.xpd?bill=h109-2863; Doug Cassel, "Washington's 'War Against Terrorism' and Human Rights: The View from Abroad," 33 *Human Rights* (Winter 2006) pp.11-14, 22, available at http://www.abanet.org/irr/hr/winter06/cassel.html. Shane et al., "Secret U.S. Endorsement of Severe Interrogations," *see* note 12 above.

26. *Hamdan v. Rumsfeld*, 126 S.C. 2749 (2006); Authorization for Use of Military Force, P.L. 107–40. 107th Congress, Sept. 18, 2001, available at http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html; Charles Lane, "High Court Rejects Detainee Tribunals, 5 to 3 Ruling Curbs President's Claim Of Wartime Power," *The Washington Post,* June 30, 2006.
27. Shane et al., "Secret U.S. Endorsement of Severe Interrogations," *see* note 12 above.
28. 109th Congress, Military Commissions Act, P.L. 109–366, available at http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf; Charles Babington and Jonathan Weisman, "Senate Approves Detainee Bill Backed by Bush, Constitutional Challenges Predicted," *The Washington Post*, Sept. 29, 2006.
29. Scott Shane and Mark Mazzetti, "Advisers Fault Harsh Methods in Interrogation," *The New York Times*, May 30, 2007; *See* National Defense Intelligence College, Educing Information: Interrogation: Science and Art: Foundations for the Future (Dec. 2006), available at http://www.fas.org/irp/dni/educing.pdf.
30. 2007–2008 (110th Congress) S. 185: Habeas Corpus Restoration Act of 2007, Jan. 4, 2007, available at http://www.govtrack.us/congress/bill.xpd?bill=s110-185; Editorial, "Justice for Detainees: Congress can right a wrong in the war on terrorism," *The Washington Post*, Sept. 18, 2007.
31. Scott Shane and Mark Mazzetti, "Intelligence panel faults harsh interrogation methods," *The New York Times*, May 30, 2007.
32. Shane et al., "Secret U.S. Endorsement Of Severe Interrogations," *see* note 12 above.
33. Editorial, "Abu Ghraib Swept Under the Carpet," *The New York Times*, August 30, 2007; Adam Zagorin, "The Abu Ghraib Cases: Not Yet Over," *TIME*, Aug. 29, 2007.
34. Josh White and Joby Warrick, "U.S. to Allow Key Detainees to Request Lawyers, 14 Terrorism Suspects Given Legal Forms at Guantanamo," *The Washington Post*, Sept. 28, 2007.
35. *El-Masri v. United States,* 479 F. 3d 296, 312 (4th Cir. 2007), cert. denied Oct. 9, 2007, *see* Linda Greenhouse, "Supreme Court Refuses to Hear Torture Appeal," *The New York Times,* Oct. 9, 2007.

Participant Biographies

JUAN E. MÉNDEZ is President of the International Center for Transitional Justice. Until March 31, 2007, he was also, concurrently, the Special Advisor to the Secretary General of the U.N. on Prevention of Genocide. He directed the Americas division of Human Rights Watch (1982–1993) and was later General Counsel (1994–1996). He then became Executive Director of the InterAmerican Institute of Human Rights in Costa Rica (1996–1999). From 2000 to 2003, Mr. Méndez was a member—and in 2002 the President—of the Inter-American Commission on Human Rights, Organization of American States. He has taught at Georgetown Law Center and the Johns Hopkins School of Advanced International Studies (SAIS), as well as at the University of Notre Dame Law School (1999–2004), where he was also the Director of the Center for Civil and Human Rights.

TOM PARKER has served as the United Kingdom's Special Adviser on Transitional Justice to the Coalition Provisional Authority (CPA) in Baghdad and as Head of the CPA's Crimes against Humanity Investigation Unit. He has designed and executed transitional justice projects for the British Foreign and Commonwealth Office, the United States Agency for International Development, and the Darfur Peace and Development Organization. Mr. Parker also spent four years as a war crimes investigator with the United Nations International Criminal Tribunal for the Former Yugoslavia. Prior to joining the U.N., Mr. Parker served for six years as a counterterrorism official for the British government, working in the field of international terrorism. He is now Executive Director of the Iran Human Rights Documentation Center.

DAVID B. RIVKIN, JR. is a partner in the Washington office of Baker & Hostetler LLP, a Visiting Fellow at the Nixon Center, a Contributing Editor of *National Review* and a member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights. Mr. Rivkin held a variety of legal and policy positions in the Reagan and George H.W. Bush administrations, working with the Council on Competitiveness and the Department of Energy, in the Office of then-Vice President George Bush, as Legal Advisor to the Counsel to the President, and as Deputy Director of the Office of Policy Development (OPD), U.S. Department of Justice. He has published numerous papers, articles, book reviews, and book chapters on a variety of international, legal, constitutional, defense, arms control, foreign policy, environmental and energy issues.

AMRIT SINGH is a staff attorney with the American Civil Liberties Union's Immigrants Rights Project. At the ACLU, she has litigated various immigrants' rights cases with a special focus on post-September 11, 2001 issues. These include *ACLU v. Department of Defense,* in which she is counsel in the part of the case seeking records related to the treatment of detainees in U.S. custody abroad and lead counsel in the part of the case seeking disclosure of photographs of prisoner abuse by American forces in Iraq and Afghanistan; *Ali v. Rumsfeld*, brought on behalf of Iraqi and Afghan plaintiffs alleging torture while in U.S. custody abroad; and *Samadov v. Hogan*, in which she is lead counsel in a case challenging the indefinite detention of an Uzbek prisoner in immigration custody.

SETH STERN is the legal affairs writer for *Congressional Quarterly*. He received his B.S. in Industrial & Labor Relations from Cornell University, an M.P.A. from the Kennedy School of Government, and a J.D. from Harvard University. While at the Kennedy School, he was a research assistant for a *New York Times* reporter's book on welfare reform, and while at the Harvard Law School, he wrote case summaries and stories for the *National Law Journal* and the *Rhode Island Law Tribune*. He then worked for *The Christian Science Monitor* (2002–2004). He also freelanced for the *Boston Globe* and *Legal Times*. Mr. Stern moved in 2004 to the *Congressional Quarterly*, where he covers legal issues for *CQ*'s weekly magazine, daily newsletter and website, and focuses on crime, tort reform, intellectual property and Supreme Court nominations.

WILLIAM H. TAFT, IV has been Of Counsel resident at Fried Frank since 2005. He has served in various positions at the Federal Trade Commission, the Office of Management and Budget and the Department of Health, Education and Welfare, where he was appointed by President Ford in 1976 to serve as General Counsel. He was in private law practice in Washington, D.C. from 1977 to 1981, and then became General Counsel for the United State Department of Defense. In January 1984, Mr. Taft was named Deputy Secretary of Defense, a position he held until April 1989, serving simultaneously as Acting Secretary of Defense from January to March 1989. He was U.S. Permanent Representative to NATO from 1989 to 1992 and joined Fried Frank in 1992. In 2001, Mr. Taft was appointed by President George W. Bush as Legal Adviser to the Department of State.

CYNTHIA J. ARNSON directs the Wilson Center's Latin American Program. She is editor of *Comparative Peace Processes in Latin America*, co-editor of *Rethinking the Economics of War: The Intersection of Need, Creed, and Greed*, and author of *Crossroads: Congress, the President, and Central America, 1976–1993*. Dr. Arnson is author of several recent articles and book chapters on Colombia and a member of the advisory boards of *Foreign Affairs en Español*, Human Rights Watch/Americas, and the Open Society Institute's Latin American Program. She was formerly an assistant professor of international relations at American University, a foreign policy aide in the House of Representatives during the Carter and Reagan administrations, and an associate director of the Americas division of Human Rights Watch/Americas.

ROBERT S. LITWAK, Director of International Security Studies at the Wilson Center, is also an Adjunct Professor at Georgetown University's School of Foreign Service and a Consultant to the Los Alamos National Laboratory. He served on the National Security Council staff as Director for Nonproliferation in the first Clinton administration. His most recent books are *Rogue States and U.S. Foreign Policy: Containment after the Cold War* and *Regime Change: U.S. Strategy through the Prism of 9/11*. Dr. Litwak has held visiting fellowships at Harvard University's Center for International Affairs, the International Institute for Strategic Studies, the Russian Academy of Sciences, Oxford University, and the United States Institute of Peace. A member of the Council on Foreign Relations, he received a doctorate in international relations from the London School of Economics.

PHILIPPA STRUM, Director of the Division of U.S. Studies at the Wilson Center, is a political scientist specializing in U.S. government and constitutional law, civil liberties and human rights, and women, law and politics. A professor emerita of the City University of New York, she has taught and lectured widely in the United States and abroad, including in Turkey, Tunisia, Egypt, Israel and Palestine. Her books and articles include *Louis D. Brandeis: Justice for the People*; *Presidential Power and American Democracy*; *The Supreme Court and "Political Questions;" When the Nazis Came to Skokie: Freedom for the Speech We Hate*; and *Privacy: The Debate in the United States Since 1945*. She is the editor of Wilson Center publications such as *Muslims in the United States: Identity, Influence, Innovation*; *American Arabs and Political Participation*; and *Civil Rights, Politics and the Law*.

ADAM STUBITS is Program Assistant for the Wilson Center's Latin American Program. He received his B.A. in Political Science and M.P.A with an emphasis in international organizations from American University. His research interests include Latin American dark networks, informal international organizations and the role of public administration in development. Prior to coming to the Wilson Center, he was a special assistant for International Accounts with the Corporate Executive Board and before that a Development Officer with Partners of the Americas. Appointed in 2001, Mr. Stubits served for one year as Assistant to the President of Misión Perú Arequipa where he implemented an extensive regional hygiene and food handling training program and oversaw the organization's response to the destructive June 2001 earthquake and tsunami.

THE WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS
One Woodrow Wilson Plaza
1300 Pennsylvania Avenue, NW
Washington, DC 20004-3027

www.wilsoncenter.org