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IN THIS ISSUE:

TORTURE, THE COURTS AND THE "WAR"ON TERROR

From the Editor

THE ROAD TO ABU GHRAIB: A TIMELINE

The story of the U.S. and the practice of torture has been everywhere these days: in the court martial of Abu Ghraib prison guard, Charles Graner, in Senate hearings on the nomination of Alberto Gonzales to the position of Attorney General, and in the reams of documents that the government has "dumped" or that the ACLU and others have discovered through lawsuits and leaks. Americans have gone from jaw-dropping disbelief at finding the word "torture" linked with their national identity, to denial, and beyond denial to an acceptance of the facts. With acceptance, correction can and may follow. But whatever the future, the record of the recent past on torture stands. A hunger for details and documents has nourished those with questions, yielding a chronological narrative, including persons, policy and behavior, that is now legible.

The story's prologue is set, not in the prisons themselves but in the corridors of the Department of Justice (DOJ). From as early as September 2001, U.S. Government lawyers were hard at work preparing the ground, not specifically for torture, but for exempting the President of the United States from the restrictions of the law and of Congress. Their reasoning was that September 11, unprecedented as an event in American history, demanded unprecedented legal leeway. The President could, his advisors reasoned, wage war and apprehend alleged terrorists with broad authority.

In late October, the United States invaded Afghanistan and began to take prisoners. In November, the President, cheered on by his legal team, declared that military commissions, as opposed to court martials, would be used in the matter of detainees. As 2002 thankfully cast a watershed year into the past, the U.S. Government turned its revisionism upon international law. In January, government lawyers declared the obsolescence of the Geneva Conventions; detainees from Afghanistan existed outside the protection of the Geneva Conventions. Secretary of Defense Donald Rumsfeld issued a directive on January 19 informing combatant Commanders, including the Commander at Guantánamo, "Al Qaeda and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of war status," and therefore not protected under the Geneva Conventions.

The stage was thereby set for the arrival of prisoners at Guantánamo Bay, Cuba. Opposition came readily on the part of Secretary of State Powell and his legal advisor William H. Taft, IV. Powell called for reconsideration of the conclusion that the Geneva Convention did not apply to the prisoners. Powell urged White House Counsel Gonzales to inform the President of the pros and cons of any decision to declare the Geneva Conventions invalid. Powell argued that reneging upon the Geneva Conventions would destabilize the traditionally strong position of the U.S. in the world arena; it would compromise U.S. expectations of reciprocity in the matters of extradition, law enforcement cooperation, foreign intelligence, human rights partners and general respect. Rumsfeld and the advisors to the President were not convinced. Alberto Gonzales made the final call; the detainees from Afghanistan were not "legal combatants," but rather "enemy combatants," a term without precedent and therefore, a group without legal standing.

Table of Contents

Minus legal standing, the prisoners had questionable rights regarding humane treatment. Following this line of reasoning, the Bush Administration defended the practice of torture in a memo written in August 2002 for Gonzales—now U.S. Attorney General—by Jay S. Bybee, then Assistant Attorney General, since promoted to the 9th Circuit Court of Appeals. Bybee's memo occupied the legal and moral territory that had been cleared by the earlier recommendations on Presidential authority and American independence from international law. He argued that 9/11 had initiated a brand new context, demanding new readings of the law. Re-interpreting U.S. criminal law, the Bybee memo narrowed the definition of cruel and inhumane treatment. The memo maintained that the law (Section 2340-2340A of the U.S. Criminal Code) "proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture… We further conclude that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A's proscription against torture." The memo further assures the government of the possibilities for avoiding criminal liability for torture, among them the self-defense argument. The memo concludes that torture "must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. …Because the acts inflicting torture are extreme, there is significant range of acts that though they might constitute cruel, inhumane, or degrading treatment or punishment fail to rise to the level of torture." In other words, other than the infliction of severe pain and death, torture was not prohibited.

As government officials in Washington debated the definitions and legal liabilities of torture, nearly 300 Guantánamo inmates were already being interrogated. Affidavits and pubic statements by prisoners and former prisoners have since alleged cruel and inhuman treatment. But the record on abuse came initially from Abu Ghraib.

In March 2003, the U.S. invaded Iraq. Iraqi prisoners, neither Taliban nor al Qaeda, and less likely at the time to have actionable information about terrorism, were put in a number of camps and prisons, including Camp Bucca, Camp Ashraf, Abu Ghraib and the High Value Detainee camp/Camp Cropper. By May, allegations of prisoner abuse and of repeated escape attempts warranted investigation. In August and in November, the military commissioned two investigations. In January, Major General Anthony Taguba began his now infamous report, made public in March 2004. Taguba described Abu Ghraib as a prison in chaos. Not only did he document extreme prisoner unrest—frequent escape attempts had resulted in the shooting deaths of several prisoners and the injury of many more—but unchecked prisoner abuse as well, including: punching, slapping and kicking; forced masturbation, forced nudity, forced arrangement of detainees in sexually explicit positions for photographing, attaching "wires to his fingers, toes, and penis to simulate electric torture," forced sex, using unmuzzled dogs to intimidate detainees, breaking chemical lights and pouring the phosphoric liquid on detainees, threatening detainees with a charged pistol, and sodomizing a detainee with a chemical light. Taguba faulted, among other factors, the control of prisoner treatment by military intelligence and the insufficient training of prison guards.

Taguba's report alerted the public to the record of abuse. His report was given additional credence by the work of *The New Yorker* reporter Seymour Hersh who made public startling photographs of prisoner mistreatment.

The response by the Administration and its defenders has relied heavily on the reasoning of the 2002 Bybee memos. Spokesmen for the administration and the camps have minimized the heinousness of the treatment insisting on a narrow definition of torture. They have continued to maintain that it is imperative that the U.S. be able to use every means possible to obtain information vital to the national security of the United States. Recently, the Bush Administration has backed away from its earlier embrace of re-reading the law to support prisoner abuse. A December 30, 2004 memo denounced torture. Yet, as Marty Lederman, Attorney Advisor in the DOJ's Office of Legal Counsel from 1994-2002, has pointed out, the memo did not repudiate the notion that it would be unconstitutional for Congress to prohibit torture, and it failed to discuss important anti-torture laws, including the Geneva Conventions.

Many questions remain. Who gave the order for military intelligence to have control over Abu Ghraib? What did members of the Administration, including Condoleeza Rice, the President's National Security Advisor, know about the use of torture prior to 2004? Did these interrogation techniques result in any actionable intelligence? What measures of accountability are now in place to guard against the future use of torture or of policies condoning torture? There are ethical questions as well. What should the role of government lawyers be? Is their role to justify policy? Or is it to uphold the Constitution, and beyond the Constitution, the pertinent international treaties to which the U.S. is a party?

Whatever the subsequent policy decisions, the U.S. has embarked upon a path of legal rethinking that will demand much soul-searching in the days and months to come.

- KAREN J. GREENBERG

Reconciling Torture With Democracy

BY DEBORAH PEARLSTEIN

Abu Ghraib prison, located on the outskirts of Baghdad, Iraq.
(AP Photo / World Wide Photos)

The debate in this country since September 11 about the use of torture or other forms of coercive interrogation has proceeded along two oddly irreconcilable tracks. On the one hand is the national reaction following the publication of actual photos of torture and humiliation committed by U.S. troops at Abu Ghraib—a reaction that was swift, uniform, and bipartisan in its revulsion. The Secretary of Defense called the conduct "unacceptable" and "un-American." John McCain, Republican Senator and former prisoner of war, emphasized that "history shows—and I know a little bit about this—that mistreatment of prisoners and torture is not productive…You don't get information that's usable from people under torture, because they just tell you what you want to hear." And John Warner, Republican Chair of the Senate Armed Services Committee, said the abuses, if true, were "an appalling and totally unacceptable breach of military conduct that could undermine much of the courageous work and sacrifice by our forces in the war on terror."

There remains, on the other hand, a vigorous abstract debate in academic and policy circles about the need to abandon some existing laws governing detention and interrogation, and to adopt new rules permitting the use of physical or mental coercion to extract intelligence information, our best weapon, it is argued, against a new and potentially devastating terrorist threat. Human rights scholar Michael Ignatieff has insisted that "defeating terror requires violence," and that "to defeat evil, we may have to traffic in evils," including indefinite detention and coercive interrogation. Harvard lawyer Alan Dershowitz is more specific, proposing the use of physical coercion in exceptional cases if a judge authorizes its use in advance. And Judge Richard Posner goes further still, writing that "only the most doctrinaire civil libertarians (not that there aren't plenty of them) deny [that] if the stakes are high enough, torture is permissible. No one who doubts that this is the case should be in a position of responsibility."

The apparent disconnect between our attraction to coercive interrogation in theory, and our repulsion from it in practice is mediated by a few (like Mark Bowden) who have argued that coercive interrogation "should be banned but also quietly practiced." We need to do it in the interest of national security, but we need to not know about it to preserve the appearance of public morality. Whatever the merits of such a view—and there is substantial question where the rule of law fits in to such a calculus—our ability to pursue it is soon to be overtaken by events. The incoming 109th Congress will almost certainly be asked to consider authorizing new powers for detaining and interrogating terrorist suspects. There will be a range of proposed circumstances—only in a state of emergency, only if there is a ticking bomb, only for suspected "terrorists"—along with a range of proposed procedural safeguards—right to counsel, to judicial supervision, to limited duration—and a range of proposed techniques—from prolonged solitary confinement and sleep deprivation to moderate physical force.

The good news, as it were, for Congress is that the past four years have produced substantial empirical data to guide its deliberations about how the theory of coercive interrogation plays out in the real world. As official investigations, press reports, and NGO studies beyond the photos at Abu Ghraib have now made clear, U.S. authorities have practiced various forms of torture and coercive interrogation from Iraq to Afghanistan to Guantánamo Bay. Since Fall 2001, the Pentagon has reported more than 300 allegations of abuse by U.S. officials (66 substantiated as of mid-August); there are some 30 pending investigations into detainee deaths in U.S. custody by torture or abuse; and there are currently underway about two dozen criminal prosecutions of military and civilian personnel. While public information about the effects of this practice remains incomplete, it is worth identifying some of what our experience has shown.

Take, for example, the argument that the use of coercive techniques could be limited to only the most exceptional circumstances – only where there was a real "ticking bomb" to be diffused – and real "torture" would not be authorized, but only lesser techniques like sleep deprivation, sensory deprivation, or uncomfortable "stress" positions – only "torture lite." The past few years have demonstrated our failure to

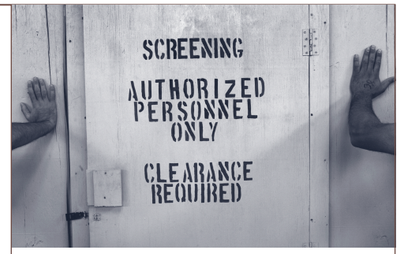
in the foreign press

FROM GERMANY

"European self-righteousness and German arrogance towards the U.S. are inappropriate. In Germany, awareness for civilization and humanity is beginning to erode…When the Vice President of the Police Office in Frankfurt thinks that torture is appropriate in special cases … apparently there are two kinds of torture—the one that is practiced elsewhere, like in Iraq or Israel or whenever Americans practice it, and the good one practiced in Germany."

Heribert Prantl, Suddeutsche Zeitung Newspaper*, May 20, 2004*
–Translated by Chia Lenhardt

> “THE PAST FEW YEARS HAVE SEEN MIXED REPORTS ABOUT THE VALUE OF INTELLIGENCE GLEANED AS A RESULT OF COERCIVE PRACTICES. SOME INSIST THAT GUANTÁNAMO, FOR INSTANCE, HAS PRODUCED VALUABLE INFORMATION, WHILE OTHER MILITARY AND INTELLIGENCE OFFICIALS CONTEND THAT THOSE HELD THERE HAVE YIELDED LITTLE OR NO INTELLIGENCE VALUE.”



Iraqi prisoners are frisked next to a door leading to an interrogation room at Abu Ghraib prison. (AP Photo / John Moore)

limit the use of coercion by circumstances or technique. A U.S. Army interrogator deployed to Afghanistan in 2001 wrote of one example, explaining that the stress positions that had been prohibited early in the war in Afghanistan were soon adopted by soldiers there as a means of prison discipline. By the time of the Iraq war (where, unlike in Afghanistan, the Administration had announced its intention to apply the Geneva Conventions), the use of stress positions, practiced in Afghanistan, had become an accepted interrogation technique. While the specific behavior at Abu Ghraib may not have been part of the rules of engagement, the former interrogator argues, they “represented the gravitational laws that govern human behavior when one group of people is given complete control over another in a prison. Every impulse tugs downward.”

What of the argument that the use of coercive interrogation in some form may be the only way to secure intelligence critical to saving lives? The past few years have seen mixed reports about the value of intelligence gleaned as a result of coercive practices. Some insist that Guantánamo, for instance, has produced valuable information, while other military and intelligence officials contend that those held there have yielded little or no intelligence value. But Senator McCain’s view that abusive tactics have long been understood as counterproductive has been echoed by many, including a group of retired admirals and generals, who wrote in a letter to the President that information gathered through coercion is “notoriously unreliable,” and has “a demoralizing, dehumanizing effect not only on those subject to violations, but also on our own troops.” The Army Field Manual itself reinforces this view, instructing that coercive techniques are not to be practiced not only because they are against the law, but because they are ineffective. Meanwhile, the negative consequences of such tactics for U.S. security interests are apparent. Polling in Iraq suggests that evidence of coercive practices by the United States helped galvanize public opinion in Iraq against U.S. efforts there. And the Pakistani Sunni extremist group Lashkar-e-Tayba has used the Internet to call for sending holy warriors to Iraq to take revenge for the torture at Abu Ghraib.

The opportunity to evaluate these and other lessons of the past few years in a semi-public forum in Congress is, to be sure, far closer to how a democracy should operate than the unilateral, unreviewable use of such techniques behind closed doors. But getting to the right result in the coming debate is tricky. And it depends critically on our willingness to hold our theory of coercion up against the reality of what makes us secure.

Deborah Pearlstein is Director of the U.S. Law & Security Program at Human Rights First (formerly the Lawyers Committee for Human Rights), and a visiting lecturer at Stanford Law School.

Opinion: Protecting National Security without Classifying Jose Padilla an “Enemy Combatant”: His Lawyer Speaks

BY ANDREW G. PATEL

On June 9, 2002, President George W. Bush signed an order as Commander-in-Chief declaring Jose Padilla, an American citizen, to be an enemy combatant. The President ordered the Secretary of Defense to take custody of Padilla. Pursuant to the President’s order, agents of the Department of Defense removed Padilla from his maximum security jail cell in New York where he had been detained as a grand jury material witness by order of a United States District Court Judge. Padilla was transferred to the Consolidated Naval Brig near Charleston, South Carolina. To this day, Padilla remains in solitary confinement in that brig. In ordering the military detention of Padilla without charging him with a crime or any form of judicial process, the President exercised a degree of executive power that had rarely been seen since King John reluctantly signed the Magna Carta in 1215.

Jose Padilla

At the time Padilla was transferred to military custody, James B. Comey was the United States Attorney for the Southern District of New York. In an interview with Ben Weiser of the *New York Times*, Comey was quoted as follows:

“What would you do,” he asked, “if you came to believe in your gut or in your heart of hearts that an American citizen was allied with Al Qaeda, and bent on doing something simply horrific here in this country? What do you suggest we do?”

For example, he said, suppose there was convincing evidence of a person’s “unspeakable evil intent,” but that evidence could not be used in court because it had come from intelligence sources, or it could be used but it was not strong enough to convict. “What would you do?” he asked.

This is a public statement from a senior Department of Justice official that appears to advocate the military incarceration of American citizens based on “gut” feelings formed on the basis of intelligence sources and evidence that would not support a conviction in a courtroom, thereby disregarding basic principles of Anglo-American law.

What Comey appears to be saying is that the government had information from intelligence sources that Padilla was going to do something bad but they could not prove it in a court of law. Military detention would permit the government to accomplish two goals—prevention and interrogation. These goals may well serve the interests of national security, but even a superficial examination of the facts of Padilla’s case reveal that those goals can be attained without sacrificing our nation’s respect for the rule of law.

From information then available, it appears that “intelligence sources” of unknown reliability had informed the government that Padilla was coming to the United States to detonate a “radiological dispersion device,” commonly known as a “dirty bomb.” A dirty bomb is a standard explosive surrounded by radioactive material. When the explosive is detonated, the radioactive material is disbursed by the power of the explosion. This is not a nuclear weapon. There has been some debate as to how dangerous such a device would be but we need not discuss that here. In more recent statements, the government appears to have abandoned its belief that Padilla intended to set off a dirty bomb notwithstanding that his military detention was based on that “intelligence.” The government still believes that Padilla intended to commit some form of terrorist act in the United States and thus, his military detention is necessary to protect national security.

A power once exercised and approved by the courts becomes readily susceptible to repetition. Here we are discussing the power of the President to order the indefinite military detention of a citizen, not on provable facts, but on the belief that he was going to commit a terrorist act. Was the exercise of such raw power necessary? Padilla was seized by FBI agents in Chicago on May 8, 2002 and he was incarcerated by order of a federal judge thereafter. No government official has ever suggested that Padilla was able to or even intended to commit a terrorist act while incarcerated in a maximum security federal facility. The government’s primary goal of protecting the security of the nation by preventing a possible terrorist had been accomplished weeks before the President ordered the military to take custody of Padilla. More importantly, the government had achieved this goal by following the rule of law, not disregarding it. The perceived threat was avoided by seeking a warrant from a judge. The warrant was executed. Padilla was brought before a judge who, after hearing from both counsel for the government and for Padilla, ordered Padilla to be detained.

The government’s second goal, interrogation, could also be accomplished by lawful means without the need for military detention. Padilla was originally detained as a grand jury material witness. The grand jury is an investigative body where Padilla would be required to answer questions that did not violate his Fifth Amendment privilege against self incrimination. Even if Padilla invoked his right to remain silent, the government would have the option of granting him immunity. The notion of granting a person believed to be a terrorist immunity may seem naive, but the government has always claimed that Padilla’s detention was not for the purpose of punishment. If Padilla’s incarceration were not punitive, there would be no reason not to give him immunity. There is one fact about Padilla that the government knew from the very beginning. Padilla was unwilling to become a martyr. This fact distinguishes Padilla from the al Qeada operatives described in numerous statements as being particularly dangerous because they were not only willing, but anxious, to die for their cause.

While the government claims that it wanted to interrogate Padilla, the facts show that he could have been interrogated before the grand jury. Questioning before the grand jury would have required Padilla to provide whatever information, if any, that he had. Interrogation before the grand jury would not, of course, permit questioning by unlawful means. A recent report by the International Committee of the Red Cross found that interrogation methods recently used by the United States were “tantamount to torture.” That is not to say that Padilla was tortured or that any particular method of interrogation was used on him. As his counsel, I am prevented by attorney client privilege and other limitations from discussing Padilla’s interrogation. What is clear

in the foreign press

FROM RUSSIA

“Everyone in war—well, almost everyone—is inclined to torture their enemies. In such scandals, those against one’s own arise seldom, and scandals of this scale rarely.”

Leonid Radzikovskiy, “Torture, Punishment, Political Correctness,” Versiia, May 17, 2004
—Translated by Justin Kitchens

Protesters outside the Supreme Court challenge President Bush's authority to detain American citizens suspected of terrorism and to deny them access to lawyers and courts. (AP Photo / Evan Vucci)

is that the transfer of Padilla to the military would permit him to be interrogated in secret.

It is clear that the government had already achieved its primary national security goal, the prevention of a possible terrorist attack, before Padilla was transferred to military custody. It is also quite possible that they could have obtained any information that Padilla possibly possessed without resorting to such a raw display of executive power. Comey contends that there was not enough evidence to convict Padilla of a crime. The implication is that if the military did not take custody of Padilla that he would be released to cause whatever harm he could. Initially, this shows an astounding lack of trust in law enforcement's seemingly ever expanding surveillance abilities.

Perhaps more importantly, the government has recently alleged that at the time Padilla entered the United States he possessed more currency then he had reported on the currency reporting form that he had completed. If that is true, Padilla would have violated a number of federal regulations and statutes including 18 U.S.C § 1001 which makes it a crime if someone "makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry..." A violation of 18 U.S.C § 1001 is punishable by up five years in federal prison. At a trial, the government could attempt to establish those facts to a jury without reference to "intelligence sources." It appears clear that long before the President ordered the military to literarily throw Mr. Padilla in the brig, the government claims to have been aware of evidence that appears to be sufficient to seek a criminal conviction without endangering, revealing or even referring to intelligence sources.

It does not require an in-depth review to realize that Comey's laudable concerns for national security do not justify the extraordinary power asserted against Padilla. The government had already prevented the act of terrorism about which they claimed to have been their primary concern; there was a lawful and secret means to question Padilla; and there was a way to seek a criminal conviction without jeopardizing intelligence assets. Why then go to all this trouble? Here I confess that I can only speculate. Jose Padilla is a young Latin man with a criminal record. He is alleged to have been the member of a gang in his youth and he is a convert to Islam. His family is neither wealthy nor influential. In short, he has no constituency and the government can and reportedly has used him as an example of what they can do to an individual who does not cooperate with the government. Jose Padilla is a living example of what can happen to a citizen in the face of unchecked executive power. Our constitution was designed to protect us against such blatant exercises of executive power. As an early legal scholar wrote, "confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government...." 1 W. Blackstone, Commentaries on the Laws of England 132-133 (1765).

Whatever else he may be, Jose Padilla is an American citizen. If the President can order the military to throw Jose Padilla into a brig without charging him with a crime, he can do the same to any of us. Our founding fathers knew that it would require courage and constant vigilance to protect our freedoms. Those freedoms need to be protected, not just from those with evil intent but also from those with the best of intentions. Now, as in the past, we look to the courts as the guardians of our liberty. Before Jose Padilla was called a terrorist, he was an American. Jose Padilla may be considered to be the least of us but he is one of us. The rights denied to him are rights that can be denied to any of us. It is in the greatest interest of our national security to protect Padilla's rights and the rights of all Americans not to be sent to prison on the whim of the President.

Andrew G. Patel is a lawyer in New York City and is serving as counsel for Jose Padilla.
An opposing point of view will appear in our next newsletter.

PADILLA V. HANFT

On March 1, 2005, U.S. District Judge Henry Floyd ruled that the Justice Department has 45 days to either charge Jose Padilla officially or release him. In his ruling, Judge Floyd stated "The court finds that the president has no power, neither express nor implied, neither consti-

THE CASE OF DAVID HICKS

David Hicks, 29, is an Australian citizen who has been detained at the U.S. Naval Station at Guantánamo Bay, Cuba, since early 2002. Mr. Hicks was seized by Northern Alliance forces in Afghanistan in late 2001, and subsequently transferred to the custody of the United States military. Mr. Hicks, who had been employed as a horse trainer in Australia and Japan, has two young children who live in Australia with their mother.

In July 2003, Mr. Hicks became the first person designated by the President for charge and trial by and under the military commission process established by the President's Military Order of November 13, 2001. In June 2004, Mr. Hicks became the first person charged by the military commission. Presently, he is among four persons charged under the commission system. However, proceedings before the commission are presently in abeyance pending the government's appeal of a decision by a federal District Court judge (in Washington, D.C.), Judge James Robertson, that declared the commission process invalid (in a habeas corpus petition instituted by another of the detainees charged by military commission).

Mr. Hicks faces three charges in the military commission process: (1) conspiracy to commit terrorism and other offenses; (2) attempted murder by an unprivileged belligerent; and (3) aiding the enemy. Mr. Hicks has denied all of the charges, and challenged each and all of those charges on legal and factual grounds. Those motions are pending before the commission.

In addition, Mr. Hicks is a named plaintiff in *Rasul v. Bush*, the lawsuit in which the U.S. Supreme Court, in June 2004, held that the U.S. courts possess jurisdiction over the habeas corpus petitions filed by Guantánamo detainees. That action is still pending in the federal district court in Washington, D.C., and presently the government is appealing a decision by Judge Joyce Hens Green that invalidated the government's Combatant Status Review Tribunals ("CSRT"), which were constituted to determine the detainees' status. A CSRT had previously declared Mr. Hicks an "enemy combatant."

In December 2004, the district court unsealed an affidavit filed by Mr. Hicks in which he outlined the physical abuse he has endured and witnessed during his detention and confinement in Afghanistan and at Guantánamo.

Excerpts from the Affidavit of David M. Hicks, August 5, 2004

- "I have been beaten before, after, and during interrogations."
- "I have heard beatings of other detainees occurring during interrogation, and observed detainees' injuries that were received during interrogations."
- "I have been beaten while blindfolded and handcuffed."
- "I have had my head rammed into asphalt several times (while blindfolded)."
- "I have had medication—the identity of which was unknown to me, despite my requests for information—forced upon me against my will. I have been struck while under the influence of sedatives that were forced upon me by injection."
- "I have been forced to run in leg shackles that regularly ripped the skin off my ankles. Many other detainees experienced the same."
- "Interrogators once offered me the services of a prostitute for fifteen minutes if I would spy on other detainees. I refused."
- "During Ramadan, food was withheld from detainees after the break of the daily fast in order to coerce cooperation with interrogators."

PROFILES
The Administration and the Treatment of Detainees

In January 2005, Cambridge University Press published *The Torture Papers: The Road to Abu Ghraib* edited by Karen J. Greenberg and Joshua L. Dratel. *The Torture Papers* is a collection of memos and reports written by key members of the Bush administration and others regarding issues such as the application of the Geneva Conventions and the use of coercive interrogation techniques on detainees at Abu Ghraib and Guantánamo. Below are profiles of some of the officials involved in the general conversation surrounding these issues, followed by excerpts from their memos or reports.

JAY S. BYBEE

Assistant Attorney General, Office of Legal Counsel at the U.S. Department of Justice (DOJ)

Bybee was first appointed to the position of Assistant Attorney General by President George W. Bush in 2001. On January 22, 2002, Bybee wrote a memo on "The Application of Treaties and Laws to al Qaeda and Taliban Detainees." Bybee has held the position of Assistant Attorney General since January, 2001. He joined the Department of Justice in 1984, where he worked in the Office of Legal Policy and the Appellate Staff of the Civil Division. From 1989 to 1991, he served in the White House as Associate Counsel to the President. From 1991 until his appointment in 2001, he taught law at Louisiana State University and the University of Nevada, Las Vegas.

Memo dated January 22, 2002
From: Jay S. Bybee
To: Alberto R. Gonzales and William J. Haynes
"[W]e conclude that neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions of al Qaeda prisoners. We also conclude that the President has the plenary constitutional power to suspend our treaty obligations toward Afghanistan during the period of the conflict. He may exercise that discretion on the basis that Afghanistan was a failed State. Even if he chose not to, he could interpret Geneva III to find that members of the Taliban militia failed to qualify as POWs under the terms of the treaty. We also conclude that customary international law has no binding legal effect on either the President or the military because it is not federal law, as recognized by the Constitution."

ALBERTO R. GONZALES

Assistant to the President and White House Counsel, Nominee for Attorney General of the United States.

First appointed as Counsel to President George W. Bush in January 2001, Gonzales authored memoranda in support of the claim that the Geneva Conventions not be applied to the conflict in Afghanistan. Prior to his position in the White House, Gonzales served as a Justice of the Supreme Court of Texas, a position he was appointed to in 1999. He also served as Texas's Secretary of State from December 1997 to January 1999 and was the General Counsel to then-Governor Bush for three years prior to becoming Secretary of State.


Alberto R. Gonzales

Memo dated January 25, 2002
From: Alberto R. Gonzales
To: President Bush
"As you have said, the war against terrorism is a new kind of war…. In my judgment, this new paradigm 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."

WILLIAM J. HAYNES II

General Counsel, U.S. Department of Defense

Haynes serves as the chief legal officer of the Department of Defense and the legal adviser to the Secretary of Defense, a position he has held since May 2001. In a November 27, 2002 memo written to Secretary of Defense Rumsfeld, Haynes recommended that the Defense Secretary approve the 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." On December 2, 2002 Rumsfeld approved the use of those techniques, only to rescind his approval on January 2, 2003 (see sidebar, page 9).

Memo dated November 27, 2002
From: William J. Haynes II
To: Donald Rumsfeld
"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."

WILLIAM H. TAFT IV

Legal Adviser, Office of the Legal Adviser, U.S. Department of State

Taft was appointed as the Legal Adviser to the Secretary of State in April 2001. While at the State Department, Taft argued that declaring the third Geneva Convention inapplicable would go against decades of policy and practice "and undermine the protections of the law of war for our troops." Taft was a litigation partner in the law firm Fried Franks prior to his position. From 1989 to 1992, he served as the U.S. Permanent Representative to NATO. He was the Deputy Secretary of Defense from January 1984 to April 1989 and Acting Secretary of Defense from January to March 1989. He also served as General Counsel for the Department of Defense from 1981 to 1984.

Memo dated February 2, 2002
From: William H. Taft, IV
To: Alberto R. Gonzales
"From a policy standpoint, a decision that the Conventions apply provides the best legal basis for treating the al Qaeda and Taliban detainees…. It demonstrates that the United States bases its conduct not just on its policy preferences but on its international obligations….A decision that the Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the Convention in the event they are captured and weakens the protections accorded by the Conventions to our troops in future conflicts."

ANTONIO M. TAGUBA (MAJOR GENERAL)

U.S. Army Commander

A career military man, Taguba is currently Deputy Assistant Secretary of Defense for Readiness, Training, and Mobilization. Author of a 53 page investigation into the 800th Military Police Brigade, Taguba reveals institutional failures of the Army prison system, namely the systematic and illegal abuse of detainees by soldiers of the 372nd Military Police Company, and also by members of the American intelligence community.


Antonio M. Taguba

The Taguba Report, March 2004
"[B]etween October and December 2003, at the Abu Ghraib Confinement Facility (BCCF), numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees. This systemic and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force…of the Abu Ghraib Prison (BCCF). The allegations of abuse were substantiated by detailed witness statements… and the discovery of extremely graphic photographic evidence."

"[S]everal detainees…described the following acts of abuse…

Breaking chemical lights and pouring the phosphoric liquid on detainees; Threatening detainees with a charged 9mm pistol; Pouring cold water on naked detainees; Beating detainees with a broom handle and a chair; Threatening male detainees with rape; Allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; Sodomizing a detainee with a chemical light and perhaps a broom stick; Using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee."

GTMO INTERROGATION TECHNIQUES

Approved by Secretary of Defense Rumsfeld in December 2002:

CATEGORY I
- Incentive
- Yelling at Detainee
- Deception
- Multiple Interrogator techniques
- Interrogator identity

CATEGORY II
- Stress positions for a maximum of four hours (e.g. standing)
- Use of falsified documents or reports
- Isolation up to 30 days (requires notice)
- Interrogation outside the standard interrogation booth
- Deprivation of light and auditory stimuli
- Hooding during transport and interrogation
- Use of 20-hour interrogations
- Removal of all comfort items
- Switching detainee from hot meal to MRE
- Removal of clothing
- Forced grooming (e.g., shaving)
- Inducing stress by use of detainee's fears (e.g., dogs)

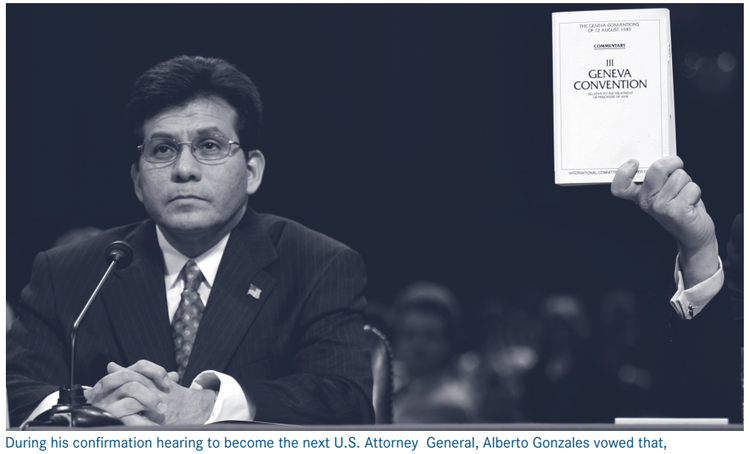
CATEGORY III
- Use of mild, non-injurious physical contact

Approved after January 15, 2003:

CATEGORY I
- Yelling (Not directly into ear)
- Deception (Introducing of confederate detainee)
- Role-playing interrogator in next cell

CATEGORY II
- Removal from social support at Camp Delta
- Segregation in Navy Brig
- Isolation in Camp X-Ray
- Interrogating the detainee in an environment other than standard interrogation room at Camp Delta (i.e., Camp X-Ray)
- Deprivation of light (use of red light)
- Inducing stress (use of female interrogator)
- Up to 20-hour interrogations
- Removal of all comfort items, including religious items
- Serving MREs instead of hot rations
- Forced grooming (to include shaving facial hair and head – also served hygienic purposes)
- Use of false documents or reports

Gonzales vs. Powell: The Debate within the Administration



During his confirmation hearing to become the next U.S. Attorney General, Alberto Gonzales vowed that, if confirmed, he would abide by international treaties on prisoner treatment. (AP Photo / Susan Walsh)

In January 2002, President Bush decided, based on an opinion from the Department of Justice, that the Geneva Convention III on the Treatment of Prisoners of War (GPW) did not apply to members of al Qaeda and the Taliban. Secretary of State Powell asked the President to reconsider his decision and to conclude that GPW does apply to both al Qaeda and the Taliban. In a January 25, 2002 memo, Alberto Gonzales outlined both the ramifications of Bush's decision and Powell's request for reconsideration. Powell and Gonzales differed on legal and strategic points. Below are excerpts from the Gonzales-Powell debate.

Gonzales: "Afghanistan was a failed State because the Taliban did not exercise full control over the territory and people, was not recognized by the international community, and was not capable of fulfilling its international obligations (e.g., was in widespread material breach of its international obligations).

Powell: "[A]ny determination that Afghanistan is a failed State would be contrary to the official U.S. government position. The United States and the international community have consistently held Afghanistan to its treaty obligations and identified it as a party to the Geneva Conventions."

Gonzales: "OLC's [Office of Legal Counsel, U.S. Department of Justice] interpretation of this legal issue is definitive. The Attorney General is charged by statute with interpreting the law for the Executive Branch. This interpretive authority extends to both domestic and international law. He has, in turn, delegated this role to OLC. Nevertheless, you should be aware that the Legal Adviser to the Secretary of State has expressed a different view."

Powell: "The [Gonzales] Memorandum should note that the OLC interpretation does not preclude the President from reaching a different conclusion. It should also note that the OLC opinion is likely to be rejected by foreign governments and will not be respected in foreign courts or international tribunals which may assert jurisdictions over the subject matter. It should also note that OLC views are not definitive on the factual questions which are central to its legal conclusions."

Gonzales: "The argument that the U.S. has never determined that GPW did not apply is incorrect. In at least one case (Panama in 1989) the U.S. determined that GPW did not apply even though it determined for policy reasons to adhere to the convention. More importantly, as noted above, this is a new type of warfare – one not contemplated in 1949 when the GPW was framed – and requires a new approach in our actions toward captured terrorists."

Powell: "The assertion in the first sentence is incorrect. The United States has never determined that the GPW did not apply to an armed conflict in which its forces have been engaged. With respect to the third sentence, while no one anticipated the precise situation that we face, the GPW was intended to cover all types of armed conflict and did not by its terms limit its application."

Gonzales: "In the treatment of detainees, the U.S. will continue to be constrained by (i) its commitment to treat the detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of GPW, (ii) its applicable treaty obligations, (iii) minimum standards of treatment universally recognized by the nations of the world, and (iv) applicable military regulations regarding the treatment of detainees."

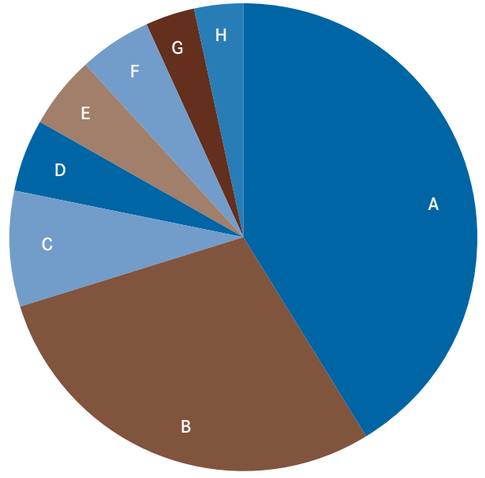
Powell: "The point is not clear. If we intend to conform our treatment of the detainees to universally recognized standards, we will be complying with the GPW."

> "THE UNITED STATES AND THE INTERNATIONAL COMMUNITY HAVE CONSISTENTLY HELD AFGHANISTAN TO ITS TREATY OBLIGATIONS AND IDENTIFIED IT AS A PARTY TO THE GENEVA CONVENTIONS." – COLIN POWELL

Report Card on Terrorist Trials

Since September 2001 the United States government has been waging a legal war on terror. The pie chart shows the alleged affiliations with foreign terrorist organizations of those individuals arrested on terrorism related charges. The chart entitled "Summary Report According to Individuals" shows the number of individuals indicted for crimes related to terrorism since 9/11. For a more in-depth analysis of the United States government's legal and judicial record on the war on terror, see the Center on Law and Security's publication, *Terrorist Trials: A Report Card*, available at www.law.nyu.edu/centers/lawsecurity/publications/index.html.

Alleged Affiliations with Foreign Terrorist Organizations, by FTO.



- **A**- No alleged ties: 41.2%
- **B**- al Qaeda: 29 %
- **C**- Islamic Jihad: 8%
- **D**- FARC (Columbian): 5%
- **E**- Taliban 5%
- **F**- Unwitting help to 9/11 hijackers: 5%
- **G**- AUC(Columbian): 3.4%
- **H**- Other: 3.4%

SUMMARY REPORT ACCORDING TO INDIVIDUALS

Type of Crime	Number of Individuals Indicted	Number of Convicted-No Plea	Number of Convicted-Pleas	Number of Cases Pending	Number of Cases Where Charges Dropped	Number of Cases Where Acquitted
Terrorism and Terrorism support	54	11 *(20.37%)*	16 *(29.63%)*	21 *(38.89%)*	5 *(9.26%)*	1 (1.85%)
National Security	35	4 *(11.43%)*	9 *(25.71%)*	15 *(42.86%)*	7 *(20.00%)*	0
Financial Crimes	21	1 *(4.76%)*	10 *(47.62%)*	9 *(42.86%)*	1 *(4.76%)*	0
Firearm and Violence	17	7 *(41.18%)*	6 *(35.29%)*	0	4 *(23.53%)*	0
Immigration Fraud	22	2 *(9.09%)*	4 *(18.19%)*	13 *(59.09%)*	2 *(9.09%)*	1 (4.54%)
Document Fraud	41	22 *(53.66%)*	5 *(12.19%)*	10 *(24.39%)*	3 *(7.32%)*	1 (2.44%)
False Statements	21	3 *(14.29%)*	1 *(4.76%)*	11 *(52.38%)*	6 *(28.57%)*	0
Other	9	0	1 *(11.11%)*	8 *(88.89%)*	0	0

The Courts

HAMDI V. RUMSFELD, 124 S.CT. 2633(2004)

Yaser Esam Hamdi was allegedly detained by U.S. forces on a battlefield in Afghanistan and transferred to Guantánamo Bay Naval Base. While there, his father filed a petition for a writ of habeas corpus on his behalf, which alleged that his detention was illegal. As an American citizen, it also violated his due process rights under the Fifth and Fourteenth Amendments of the Constitution. The Court, split into four different factions, upheld Hamdi's detention as an enemy combatant, but also held that he must be allowed to challenge the factual basis for the government's decision to designate him as an enemy combatant.

In the plurality opinion, Justice O'Connor stated that Congress had authorized the detention of enemy combatants in the Authorization for Use of Military Force (AUMF). This made Hamdi's place of capture, the battlefield, a turning point for the four justices that signed onto this opinion. Because Hamdi was captured on a battlefield, and battlefield detention of enemy combatants may last as long as there are ongoing hostilities, Hamdi's detention was lawful. The Court still found that Hamdi, as a U.S. citizen, must be given a fair opportunity to challenge the basis of his detention—that he was in fact an enemy combatant—in some sort of review process.

Justice Souter wrote a separate opinion, joined by Justice Ginsberg, dissenting in part but concurring in the judgment. Justice Souter would have found Hamdi's detention unlawful, because it was not supported by an act of Congress specific enough to satisfy the Non-Detention Act (18 U.S.C. § 4001(a)).

Justice Scalia dissented, joined by Justice Stevens. He argued that the government could not detain a U.S. citizen indefinitely without charging him or her with a crime. Justice Scalia stated that only if Congress suspended the writ of habeas corpus could a citizen be detained without charge, and, as that extraordinary measure had not been taken here, there was no justification for Hamdi's detention.

Justice Thomas also dissented with reasons differing from Justice Scalia's. He argued that the determination of enemy combatant status fell within the war power of the Executive Branch, and that the court should not second guess that determination.

RASUL V. BUSH, 124 S.CT. 2686 (2004)

Petitioners in this case were foreign nationals detained in Guantánamo Bay, Cuba. They wished to challenge the terms of their confinement in U.S. Courts. The government argued that Federal Courts lacked jurisdiction to hear petitions for a writ of habeas corpus from a foreign national captured abroad in the course of military hostilities.

A majority of the Court held that federal courts could hear these petitions; that the habeas statute did apply to foreign nationals and to those detained outside the territorial jurisdiction of the United States. In addition, as the United States exercised almost total control over Guantánmo Bay, there was no reason to exclude Guantánamo Bay from the jurisdiction of federal courts. Finally, in a brief coda, the Court said that because federal courts had jurisdiction over the detainees' custodians, in this case Donald Rumsfeld and President Bush, that the statute would allow those petitions. As the dissenters rapidly pointed out, that rationale would potentially mean that any person, anywhere, that was detained by the U.S. military may be able to petition federal courts for habeas relief.

HAMDAN V. RUMSFELD, 344 F. SUPP. 2D 152 (D.D.C. 2004)

The military established commissions to try some Guantamano Bay detainees for war crimes. Salim Ahmed Hamdan was scheduled to be tried for such crimes. He filed a petitions for a writ of habeas corpus challenging these commissions. The court held that unless the military commissions that were trying Hamdan met the standards for a trial in the Uniform Code of Military Justice, the law that applies to U.S. servicemen and women, it violated the Third Geneva Convention and was hence unlawful.

The court found that the power to establish rules and standards for trial by military commission was a power of Congress, not the Executive. Congress has generally provided for trial by military commission in the Uniform Code of Military Justice, which authorizes military commissions for violations of the law of war that are not ordinarily tried by court martial. The court held that the power of a military commission to try a detainee was limited by the Geneva Conventions, which are "part of the law of war." The court held that the Geneva Conventions were part of the law of war, and the Third Geneva Convention requires that a prisoner of war be given the same treatment as the armed forces of the detaining power, i.e., a court martial under the Uniform Code of Military Justice. The court did not find that Hamdan was a POW, only that his status was in doubt, and that the government must convene a competent tribunal, in accordance with Article 5 of the Third Geneva Convention, to decide it. The court rejected the government's argument that a U.S. court could not enforce the Geneva Convention as U.S. law. Finally, the court evaluated whether the military commissions established to try Hamdan met the standards set forth in the UCMJ. It found they did not. The court found that the military commissions' use of secret evidence violated the standards of the UCMJ and the U.S. constitution, and, therefore, they did not meet the necessary standard established by the Geneva Convention.

KHALID V. BUSH, 2005 U.S. DIST. LEXIS 749 (D.D.C. 2005)

After the Supreme Court's decision in *Rasul v. Bush*, detainees in Guantánamo began to challenge their detention through petitions for writs of habeas corpus. *Khalid v. Bush* was the first such petition to be decided, and it was denied.

Judge Leon first found, citing the majority in Hamdi, that the AUMF authorized the detention of enemy combatants in Guantánamo Bay. Judge Leon's next argument, however, was much more sweeping. The detainees had argued that their detention violated the constitution, but Judge Leon held that non-resident aliens captured and detained outside the U.S. have no constitutional rights. He found that the detainees were not located within the sovereign territory of the U.S. (seemingly in contradiction to Justice Stevens' decision in *Rasul v. Bush*), and that aliens outside the U.S. have no constitutional rights. Citing all

the cases that the Supreme Court had analyzed in *Rasul*, but not *Rasul* itself, he found that detained aliens could find no relief in U.S. courts. He argued that "the Supreme Court chose only to answer the question of jurisdiction, and not the question of whether these same individuals possess any substantive rights on the merits of their claims."

Judge Leon then stated that the petitioners could not identify a law or treaty violation that would provide a basis for granting a habeas petition. Because he found petitioners had no constitutional rights, to succeed a petitioner would have to base their petitions on a violation of a U.S. law. He stated that the petitioners had only stated generalized claims, under statutes and treaties with no private rights of action (including the Convention Against Torture), and hence had not stated any claim upon which he could grant habeas relief.

IN RE GUANTÁNAMO DETAINEE CASES, NOT YET REPORTED OR PUBLISHED ELECTRONICALLY, (D.D.C. 2005)

Except for the petition assigned to Judge Leon in *Khalid v. Bush*, the remaining petitions for writs of habeas corpus were combined into a single case, heard by Judge Green in the District of Columbia. Judge Green reached a very different conclusion than Judge Leon.

Judge Green's opinion includes a lengthy history of application of the Constitution to aliens. In what seems to be a direct refutation of the reasoning in Judge Leon's opinion, Judge Green held that the Supreme Court's decision in *Rasul v. Bush* included a finding that detainees in Guantánamo had at least some substantive rights under the Constitution.

In response to the government's argument that the Court could not apply the Constitution extraterritorially, Judge Green held, citing the majority and Justice Kennedy's concurrence in *Rasul*, that Guantánamo Bay was "special," and could be treated as the "equivalent of sovereign U.S. territory." She found that the application of the Constitution to Guantánamo would not create any impracticable problems for the government, and therefore, the imposition of Constitutional restrictions on the detentions in Guantánamo, specifically the due process protections of the Fifth Amendment, was warranted.

Judge Green went on to determine, by balancing the liberty interests of the detainees with the security interests of the government, exactly what due process protections must be granted the Guantánamo detainees. Judge Green's task was to review whether the Combatant Status Review Tribunals (CSRT), established after Hamdi, met Fifth Amendment due process requirements. Judge Green found they did not. First, the CSRT denied detainees access to the materials upon which their enemy combatant status was affirmed (her objections were similar to those of Judge Robertson in *Hamdan*). Second, the detainees were denied counsel during the process. In some cases, Judge Green found two additional problems: the CSRT possibly relied on statements that were obtained through torture and it used a vague and overly broad definition of enemy combatant. Finally, relying on Judge Robertson's decision in *Hamdan*, Judge Green also found that some detainees may be able to state a claim based on violations of the Third Geneva Convention. Those detainees were entitled to a review of their POW status by a competent tribunal.

(SEE ALSO THE OPINION ON PADILLA, PAGE 4)

Torture Related Laws and Conventions

Geneva Convention Relative to the Protection of Civilian Persons in Time of War

Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949. *Entry into force* 21 October 1950. Text available at: www.unhchr.ch/html/menu3/b/92.htm

Geneva Convention Relative to the Treatment of Prisoners of War

Adopted on12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949. *Entry into force* 21 October 1950. Text available at: www.unhchr.ch/html/menu3/b/91.htm

The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment

Ratified in November 1994. The U.S. took a reservation to Article 16 (the definition of torture) by deferring to the 8th Amendment's prohibition on cruel and unusual punishment. Thus, the U.S. is limited to no more than existing Constitutional restrictions. Text available at: www.unhchr.ch/html/ menu3/b/h_cat39.htm

The International Covenant on Civil and Political Rights

Ratified by the U.S. in 1992. The U.S. took reservations so that the treaty is not self-executing in the U.S. and so that the U.S. is bound no further than the 8th Amendment. Text available at: www.unhchr.ch/html/menu3/b/a_ccpr.htm

The American Convention on Human Rights

The American Convention on Human Rights—signed by the U.S. in June 1977 but never ratified. Text available at: www.oas.org/juridico/english/Treaties/b-32.htm

The Rome Statute establishing the International Criminal Court
The U.S. signed this statute, but failed to ratify it and later withdrew from it. Text available at: www.un.org/law/icc/

The United Nations Universal Declaration of Human Rights
U.N. declarations are not binding but may be evidence of customary international law. Text available at: www.un.org/Overview/rights.html

Eighth Amendment of the U.S. Constitution
The Eighth Amendment of the U.S. Constitution prohibits cruel and unusual punishment. For its application to confinement, see *Hudson v. McMillian*, 503 U.S. 1 (1992); *Whitley v. Albers*, 475 U.S. 312 (1986); *Ingraham v. Wright*, 430 U.S. 651 (1977). For its application to sleep deprivations, see *Ferguson v. Cape Girardeau County*, 88 F.3d 647 (8th Cir. 1996); *Green v. CSO Strack*, 1995 U.S. App. LEXIS 1445; *Singh v. Holcomb*, 1992 U.S. App. LEXIS 24790. Text available at: http://caselaw.lp.findlaw.com/data/ constitution/amendment08/

U.S. Torture Statute
18 U.S.C. § 2340 is the U.S. codification of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. It defines torture and establishes it as a federal crime, but does not create any private rights enforceable by any party in any civil proceeding. Text Available at: www4.law.cornell.edu/uscode/18/pIch113C.html

United States Code of Military Justice (UCMJ)
All U.S. Military personnel are subject to the UCMJ. The UCMJ criminalizes things such as cruelty and mistreatment (Article 93), murder (Article 118), maiming (Article 124), and assault (Article 128). If an interrogation rose to the level of torture, it is virtually certain that some articles of the UCMJ would also be violated. Text available at: http://usmilitary. about.com/library/milinfo/mcm/blmcm.htm

ORGANIZATIONS WORKING ON THE ISSUE OF TORTURE

American Bar Association (ABA)-www.abanet.org
The ABA released a report to the House of Delegates regarding the uses of torture. The site also contains a page on legal assistance for military personnel (www.abanet.org/legalservices/lamp).

The Association of the Bar of the City of New York (ABCNY)-www.abcny.org (see CHRGJ below)
ABCNY released a report on "International Human Rights, and on Military Affairs and Justice." The site also contains several reports, among them, reports on the laws pertaining to extraordinary renditions and the indefinite detention of enemy combatants.

American Civil Liberties Union (ACLU)-www.aclu.org
(follow links to the international civil liberties section)
The ACLU is monitoring military commissions at Guantánamo Bay. The site contains daily dispatches from ACLU observers posted at GTMO (www.aclu.org/gitmo).

Center for Constitutional Rights (CCR)-www.ccr-ny.org
CCR is a non-profit legal and educational organization that filed the first lawsuits on behalf of people detained as suspected terrorists in Guantánamo Bay, Cuba, as well as a lawsuit against Rumsfeld and other violations of torture conventions and laws.

Center for Human Rights and Global Justice (at NYU School of Law) (CHRGJ)-www.nyuhr.org
CHRGJ recently released a report, with ABCNY, called "Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions'."

Human Rights First (HRF)-www.humanrightsfirst.org
Human Rights First has initiated suit against Rumsfeld and others for violating laws against torture; has established EndTortureNow.org website.

Human Rights Watch (HRW)- www.hrw.org
Follow links to the United States section, where there are several articles on U.S. foreign policy and human rights.

International Committee of the Red Cross (ICRC)- www.icrc.org
The ICRC has been monitoring the U.S. detention facility at Guantánamo Bay since early 2002 to ensure that persons held there are treated in accordance with applicable international laws and standards. The ICRC also released a report on the "Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation."

International Rehabilitation Council for Torture Victims (IRCT)-www.irct.org
The IRCT is an international health professional organization that promotes and supports the rehabilitation of torture victims and works for the prevention of torture worldwide.

On Torture: Selected Readings

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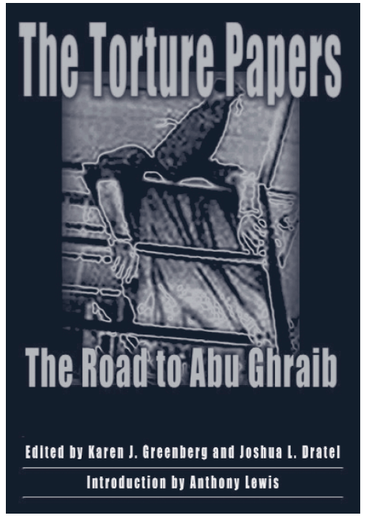

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From the Students' Corner

SHOULD ISREAL BE OUR GUIDE?

BY OMER ZE'EV BEKERMAN

"The Supreme Court took a decisive step toward placing Israel among the world's democratic nations when it ruled that interrogation methods among those regularly used by the General Security Service (GSS) are illegal and forbidden" claimed an Israeli Human Rights Center, relating to the Supreme Court of Israel's ruling on the application of the Public Committee against Torture in Israel. I would argue that there are nuances that need be heeded in this case, and would suggest that while the Supreme Court indeed took a step forward, it also took a step aside.

In its decision, the Israeli Supreme Court stated that, according to current law, the Executive Branch does not have the authority to torture interrogees, or to apply any means of interrogation that are cruel, inhuman or degrading, regardless of the circumstances. All such means were banned completely. However, a single sentence in the court's decision changed its operative meaning to a certain extent: "The Attorney General can instruct himself regarding the circumstances in which investigators shall not stand trial, if they claim to have acted from a feeling of 'necessity'." While there is no impunity to state officials in this respect, they might find shelter in a criminal defense to be appraised, primarily, by the Attorney General. Such a sentence would seem redundant, given that the Attorney General's discretion whether to indict a person or not was and remains an acceptable and vital characteristic of the position. It is also possible, of course, to petition against the Attorney General's decisions, but the considerations which the Court weighs are narrower and often deferential to the Attorney General.

Furthermore, the Court urged the Knesset (The Israeli Parliament) to properly address the issue through legislation, stating that, according to the principle of separation of powers, it was not within the competencies of the Court to outline a policy to greater

extent. The result is that, figuratively speaking, this ball is not in the Court anymore.

It is important to acknowledge the limitations of this judgment. Its subtleties are often overlooked when the case is referred to in any 'self-respecting' legal discourse relating to torture. It is equally important to acknowledge the decision's courage as it addressed this volatile issue, and stated in very clear terms the standards of legal investigation—a task which most courts around the world avoid or fail to do.

A notable progress in this matter is the recent approval by a subcommittee of the Knesset Foreign Affairs and Defense Committee of the rules and regulations which would enable the implementation of the GSS Act. The complete law now details what the GSS employees can and cannot do, inter alia during interrogations. The Attorney General has stressed that the law does not authorize the use of the controversial 'moderate physical pressure' measures which were struck down by the Supreme Court.

There are two important points that might prove to be a mixed blessing in the legislation: the first is the provision in the law which prevents employees of the GSS from being held criminally or otherwise liable for acts within their responsibilities if those were carried out in a reasonable manner. This is probably an incorporation of the Supreme Court's decision for these circumstances, which also incorporates the problems that flow from it, and its limitations. Time will tell what use will be made of this provision; Second, while increasing the transparency of the actions taken by the GSS by making the law and regulations public in the near future, the rules, which are the actual guidelines for GSS employees, will remain confidential.

The Israeli experience is characterized by a transformation from blind support of the security forces to public debate passing through the Supreme Court and resulting in a deliberative decision by the Knesset. The separation of powers in Israel finally played its role in this issue, as the legislature took possession of this fundamental question.

Israel appears to be heading in the exact opposite direction from most countries today in its attempt to combat terror organizations while it curbs administrative powers, as well as contemplates the abolishment of the state of emergency, which has been in effect since Israel was founded. This is not to say that Israel's solution is better or morally superior, but rather that the dilemma has not been left outside the scope of discussion and was not ignored. How will those attempts be translated to "the battlefield" and how effective will they be in "the war on terror"? Time will tell. It might prove useful to listen.

> "IN ITS DECISION, THE SUPREME COURT STATED THAT, ACCORDING TO CURRENT LAW, THE EXECUTIVE BRANCH DOES NOT HAVE THE AUTHORITY TO TORTURE INTERROGEES, OR TO APPLY ANY MEANS OF INTERROGATION THAT ARE CRUEL, INHUMAN OR DEGRADING, REGARDLESS OF THE CIRCUMSTANCES. ALL SUCH MEANS WERE BANNED COMPLETELY."

[1] *B'tselem, Legislation allowing the use of the physical force and mental coercion in interrogation by the general security service-Position paper 10 (2000).*

[2] *H.C. 5100/94, Public Committee against Torture in Israel v. The State of Israel, 43(4) P.D. 817.*

Omer Ze'ev Bekerman is a Master of Law Candidate at NYU School of Law.

CLS Summer Intern Reports

Last summer the Center on Law and Security sponsored several Public Interest Center student internships. The second year law students who participated have written about the organizations for which they worked and what they did while there.

INTERPOL: LYON, FRANCE
INTERN: JAMES MITRE

Interpol is the world's largest international police organization, with 181 member countries. It was established in 1923 to enhance and promote cross-border police cooperation. Interpol's mission is to help police and law enforcement officers from around the world—with different languages, cultures and national laws—to co-operate with one another and to work together to combat crime.

While at Interpol, I worked in the Office of Legal Affairs. I spent most of my time with the counterterrorism group—the Fusion Task Force, the largest project of which was to analyze patterns in terrorism financing mechanisms used to raise, move, store and "use" (as in an attack) their financial assets.

I also participated in daily management meetings with the Secretary General (and NYU School of Law Professor) Ronald Noble. I was allowed to sit in on any meeting he had under two conditions: (1) that I spoke the language it would be conducted in and (2) that I participated in the decision-making process, which usually meant being the first to offer up a proposed solution.


James Mitre

As the summer progressed, I worked on the formulation of INTERPOL's response to the *9/11 Commission Report* and at the end of the summer, I had a particularly extraordinary experience when I was asked to assist the Secretary General on his mission to the INTERPOL Sub-Regional Bureau in Zimbabwe.

RECENT NYU LAW FACULTY PUBLICATIONS OF NOTE

Noah Feldman

What We Owe Iraq: War and the Ethics of Nation Building. *Princeton University Press*, 2004.

"The Voidness of Repugnant Statutes: Another Look at the Meaning of *Marbury*," *Proceedings of the American Philosophical Society,* vol. 148 no. 1, p. 27, March 2004.

"The Best Hope," *Boston Book Review,* April/May 2003, at 14, republished in *Islam and the Challenge of Democracy*, eds. Cohen & Chasman, Princeton University Press 2004.

David Golove

"Guantánamo," *Sueddeutsche Zeitung,* May 2004.

Karen J. Greenberg

With Joshua L. Dratel, eds. *The Torture Papers: The Road to Abu Ghraib*. Cambridge University Press, 2005.

"The Torture Question," *Baltimore Sun*, February 20, 2005.

"U.S. Must Debate Abuse," *New York Daily News*, February 23, 2005.

With Joshua L. Dratel, "A Few Questions about Torture," *The San Francisco Chronicle,* January 23, 2005.

Stephen Holmes

"Le triomphe de L'Amerique irrationnelle," *Revue des Deux Mondes*, January, 2005.

"The National Insecurity State," *The Nation*, May 10, 2004.

"No Grand Strategy and No Ultimate Aim," *London Review of Books,* vol. 26 no. 9, May 6, 2004.

Richard Pildes

"Foreword: The Constitutionalization of Democratic Politics," *Harvard Law Review* 118 (1): 29, November 2004.

"Democracia Y Representacion De Intereses Minoritarios," *La Representacion Politica* (Caudernos mongraficos de Teoria del Estade, Derecho Publico e Historia Constitucional) vol. 3, 2004.

"Competitive, Deliberative, and Rights-Oriented Democracy," 3 *Election Law Journal* 685, 696, 2004.

Stephen Schulhofer

"Checks and Balances in Wartime: American, British, and Israeli Experiences," *Michigan Law Review* 102 (8): 1906-1958, August 2004.

JOINT PUBLICATIONS

David Golove and Stephen Holmes

"Terrorism and Accountability: Why Checks and Balances Apply Even in 'The War on Terrorism,'" *The NYU Review of Law and Security*, April 2004.

Karen J. Greenberg and Stephen Holmes

"Figures of Speech," *The American Prospect*, vol. 15 no. 11, November 2004.

THE U.S. DEPARTMENT OF JUSTICE: ROME, ITALY
INTERN: SOPHI JACOBS

The Department of Justice (DOJ) does not have a regular presence in foreign countries, and in fact places Assistant U.S. Attorneys in only a handful of embassies around the world. The primary purpose of these offices is the facilitation of efficient and effective international collaboration on criminal issues. The DOJ supervises the two principal mechanisms for formal cooperation in criminal matters between the United States and foreign nations: Mutual Legal Assistance Treaties (MLAT) and Extradition Treaties.

My internship at the Rome Embassy consisted of tasks relating to the MLAT and Extradition Treaty. Throughout the summer I reviewed incoming requests for assistance, recommended an appropriate course of action and drafted memorandums analyzing failed attempts at cooperation. I was also exposed to the work of other embassy agencies like the State Department, Customs and Immigration and many others. Finally, I shadowed my boss in informal cooperation between Italian law enforcement (most notably, in meetings with the Italian Anti-Mafia Prosecutor's Office), DOJ and other U.S. agencies.


Mordechai Slomich

THE CENTER ON LAW AND SECURITY: NEW YORK, NY
INTERN: MORDECHAI SLOMICH

This summer, I spent three weeks working as a research assistant at the Center on Law and Security. At the Center, I worked on multiple on-going projects and several short research assignments. Specifically, I helped the Center prepare for its annual conference in Florence, "Prosecuting Terrorism: The Global Challenge." In this capacity, I researched leading figures in counterterrorism their accomplishments over the years since 9/11.

After I finished my three weeks, I continued to work with the Center as a part-time research assistant. I focused on issues stemming from the scandal at Abu Ghraib prison.

One major issue that has been widely debated is how the Bush Administration reconciled its position that members of al Qaeda and the Taliban are not afforded the basic human rights set forth by the Geneva Conventions. I researched the laws and conventions relating to torture beginning with teh post WWII Geneva Conventions.

U.S. DEPARTMENT OF JUSTICE, DOMESTIC SECURITY SECTION: WASHINGTON, DC
INTERN: ANDREW PETERSON

This summer I worked in the Domestic Security Section (DSS) of the Criminal Division of the U.S. Department of Justice. DSS is a relatively new section, created during the government restructuring that created the Department of Homeland Security. DSS is primarily responsible for prosecuting violent crimes and alien smuggling.


Andrew Peterson

As a summer clerk, I received broad exposure to the work done by DSS attorneys and other attorneys in the Justice Department. While there, I did research for prosecuting attorneys at trial as well as research concerning longer term policy issues, such as information sharing between Department of Justice Headquarters and U.S. Attorneys' Offices. I also helped conduct research for a brief that was submitted to the U.S. Supreme Court,
and that case was argued this term.

DOJ also provided numerous opportunities for summer clerks to learn about the other work of the Department. A weekly Attorney General's lecture series, introduced by the Attorney General himself, invited high level officials (like White House chief of staff Andrew Card) to talk about career opportunities in government and the law. We also had weekly lunches with Chiefs of other Criminal Division sections, like Counterterrorism and Organized Crime, on the work that those sections did. It was an amazing summer.

The Listings: War and Culture in New York

The grainy digital photographs of Iraqi detainees being tortured by U.S. troops at Abu Ghraib prison in Iraq created the type of shocking impact on the public that many modern artists strive for. In fact, these very photographs were recently on exhibit at the International Center of Photography in New York City, a setting that allowed for an exploration of the relationship between art and war. (For information on the exhibit, see the ICP website at www.icp.org/exhibitions/abu_ghraib.) Meanwhile, a glimpse at event listings, playbills, and documentary screenings across the city show that Iraq and war in general is a topic being explored from many artistic perspectives. Among the many cultural events out there, here are some of the highlights:

THEATER

Guantánamo: "Honor Bound to Defend Freedom"

The Culture Project
45 Bleeker Street
Through December 19, 2004
San Francisco, CA from March 23 – 31, 2005
www.theatrebayarea.org/tix/dtl_tix.jsp?id=1165
Tucson, AZ from March 31 – April 10, 2005
www.borderlandstheater.org/shows/2004_2005/guantanamo.htm

Based on the spoken and written testimony of detainees, lawyers, and public officials at the American base in Guantánamo. Assembled by Victoria Brittain and Gillian Slovo; Directed by Nicholas Kent and Sascha Wares.

This documentary style play features the personal testimony of the captives, ex-inmates, their lawyers, families, civil liberty groups, and is also interspersed with official press conferences.

Nine Parts of Desire

Manhattan Ensemble Theater
55 Mercer Street
Through March 6, 2005

A play written and performed by Heather Raffo and directed by Joanna Settle.

This one-woman show explores the lives of a cross-section of Iraqi women and examines what it means to be a woman in Iraq, a country overshadowed by war.

FILM

Gunner Palace

Directed and produced by Michael Tucker
Opening in theaters March 6, 2005
For more information: www.gunnerpalace.com

For two months, filmmaker Michael Tucker lived in Baghdad with soldiers of the 2/3 Field Artillery. The barracks where the soldiers lived, nicknamed "Gunner Palace," were located in the bombed-out pleasure palace of Uday Hussein. While living in the barracks, Tucker gathered footage that provides a rare look at the daily existence of these soldiers, also known as "The Gunners." He captured everything from their swimming in Uday's pool and playing golf on his putting green to executing raids on suspected terrorists, and enduring roadside bombs, mortar attacks, RPGs and snipers.

Scene from "Nine Parts of Desire"

TV/VIDEO/DVD

Arna's Children

Written and directed by:
Juliano Mer Khamis and Danniel Danniel
For more information:
www.arna.info/Arna/movie.php

This Israeli film examines how a group of children living in Jenin grew up to become suicide bombers. It traces the origins of a theater group established to help children living in the midst of the Israeli occupation to express their everyday frustrations. Mer Khamis, the film's director, recorded the group's rehearsal periods from 1989 to 1996, and the documentary shifts back and forth, from their childhood to the present day, revealing a tragic and moving portrait of lives trapped by the circumstances of the Arab-Israeli conflict.

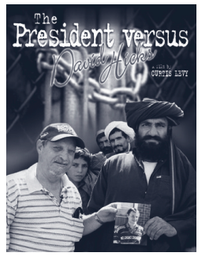
Voices of Iraq

Produced by: Eric Manes, Martin Kunert, Archie Drury
For more information: www.voicesofiraq.com

This documentary is a compilation edited from some 400 hours of images taken by 2,000 Iraqis who were given digital video cameras and allowed to film their surroundings. The filming began in April 2004 during the Fallujah uprising and continued through September of that year in an effort to capture the lives of everyday citizens.

The President Versus David Hicks

Directed by: Curtis Levy and Bentley Dean
For more information:
www.roninfilms.com.au/video/2395664200/0/2395132693



The President Versus David Hicks

This Australian documentary tells the story of how David Hicks went from a 26 year old rodeo-loving Australian citizen to a member of the Taliban in Afghanistan, where he was captured and placed in legal limbo as a Guantánamo detainee. This film was the winner of the 2004 Best Documentary Australian Film Intern Award.

The Power of Nightmares

A three-part series that aired on the BBC January 18-22, 2005
For more information: news.bbc.co.uk/1/hi/programmes/3755686.stm

This series explores the notion that the threat of terrorism as a hidden network constantly lurking below us is really an illusion that has spread through our society. It is a myth built by the American neo-conservatives and radical Islamists, and perpetuated by politics and the international media. The series explores how the radical Islamists and neo-conservatives, two groups with seemingly opposing ideologies came together, how they created such an illusion, and who has benefited from it.

Dirty War

HBO Films
For more information: www.hbo.com/films/dirtywar

This fictional thriller tells the story of a "dirty bomb" attack in London. After being warned that terrorists and materials used for radioactive weapons have entered England, members of Scotland Yard try but fail to stop the terrorists before the dirty bomb is constructed and detonated. The results are disturbing, and the population finds itself ill-prepared to understand or obey anti-contamination and quarantine orders.

Team America: World Police

Directed by: Trey Parker
For information: www.teamamerica.com

This action comedy tells the story of "Team America," a group of superhero-style adventurers who travel the world fighting terrorism. Produced and Directed by the creators of "South Park," this is a satire of the typical Hollywood action movie and uses a combination of wood marionette-driven action sequences and tongue-in-cheek musical numbers.

in the foreign press

FROM FRANCE

"Third Lesson: No one forgives democracies. There is not a Muslim country without tortures much crueler than those in the prison of Abu Ghraib. Where are the photographs of the prisons of Saudi Arabia, Egypt, Syria, or Pakistan? Where are the protests, the intellectuals, the court martials? Eight dead detainees overpowered the U.S. more than millions of corpses could Sudan. Two weights, two measures? Yes. One does not put themselves out on the world stage with impunity. It is a mark of respect among free countries to hold their secrets badly, even those most shameful."

Michel-Antoine Burnier, "Crimes of Torture," *Liberation*, June 1, 2004
—Translated by Justin Kitchens

ART EXHIBITIONS

Disappeared in America

Queens Museum of Art
Flushing Meadows, Queens, NY
February 27 to June 5, 2005
For more information: www.disappearedinamerica.org

Disappeared in America is a walk-through installation that uses a film trilogy, soundscapes, photos, objects, and the audience's interactions to humanize the faces of "disappeared" Muslims. Since 9/11, approximately 3,000 American Muslim men have been detained in a security dragnet To date, none have been prosecuted on terrorism charges. Already invisible in New York, after detention, they have become "ghost prisoners." Disappeared in America uses art in a museum space to deconstruct a global climate of Islamophobia.

Special Announcement

The Center on Law and Security is pleased to announce the appointment of ***Judge Baltasar Garzón*** *as a Distinguished Senior Fellow.*

Judge Garzón, best known for his attempt to have Chilean dictator Augusto Pinochet extradited to Spain to stand trial for crimes committed against Spaniards in Chile, holds the title of Investigating Magistrate in Madrid. He is one of the world's leading experts on counterterrorism and human rights violations.

Judge Garzón's visit is co-sponsored by the King Juan Carlos I of Spain Center at NYU's Faculty of Arts and Science, where he will hold the King Juan Carlos I of Spain Chair. He joins us at the Center on Law and Security from March 1 through December 1, 2005.

Thank You

Thanks go to our dedicated, tireless staff.

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