

The Question of Torture in the Bush Administration's War on Terror

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BOSTON COLLEGE

THE QUESTION OF TORTURE
IN THE BUSH ADMINISTRATION'S
WAR ON TERROR

A SENIOR HONORS THESIS

SUBMITTED TO

THE HONORS PROGRAM

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INTRODUCTION

“Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct” – President Barack Obama, “A Just and Lasting Peace,” Nobel Peace Prize Acceptance Speech, Oslo, Norway, December 10, 2009

Opening Remarks

The introduction of this thesis will be written in the style of a memoir. I wish to explain my reasons for choosing such a touchy and controversial topic and the process of personal growth that I have experienced in researching it. It has become an identity-exploration project, an attempt to reconcile my self-definition as a human rights activist and a student of Political Science. Perhaps it is not typical to bring in a personal take to an academic paper, but I feel that it will serve the reader well to understand from where I came and to where I have gone. After all, the purpose of the thesis is to shed light on a much misunderstood topic and better comprehend what really did happen and why, though I will admit right from the start that this paper will not solve the Abu Ghraib mystery nor provide a clear-cut definition of torture. The larger purpose of the paper is, as said above, to understand what happened and why. A discussion of what constitutes torture is vital to answering those questions, but what is most important is being able to understand all of the factors that contributed to the policy decisions and realities on the ground and of course, what we can learn from it. The research design, background, and literature review will be addressed as part of this personal introduction under the general heading of “Research Design”; any additional details I feel I have left out will be included in the subsequent “Background” section.

Research Design

Spring semester of 2009, I began planning my thesis topic and my interests in human rights, social services, food, nutrition, and politics coalesced into the idea of researching the history of hunger in the US and presenting policy prescriptions to tackle it. This all changed when I, as president of Boston College's Amnesty International Chapter, hosted an event in February based on Amnesty International's "Fight Terror with Justice" campaign. Father Hollenbach (theology professor and director of Boston College's Center for Human Rights and International Justice) served as the event speaker, and we followed his presentation with a screening of the Amnesty International documentary "Taxi to the Dark Side."

After the viewing, I felt so outraged that I was convinced that I had found my thesis topic. I did not like the Bush Administration anyway for a number of other policy matters quite removed from the war on terror and this just seemed to be unquestionable proof that the government was up to no good and was haphazardly disregarding our values, morals, and traditions in the name of fighting terrorism. As the description on the back of the documentary's jacket reads, "...[T]he torture and killing of an innocent Afghan taxi driver...symbolize the erosion of our civil rights and how what it means to be an American has changed forever."

I had seen the photographs. I had seen the hooding and noise-canceling headphones, nudity, chaining to walls and ceilings, mimicking of sexual acts, the placing of women's underwear over a detainee's head, prisoners put on leashes, un-muzzled dogs allowed to scare prisoners, the shackling and/or stacking of naked prisoners together, beatings, deaths, etc. I wanted to know why on earth someone thought that this was okay

to do. From the little I knew about military culture, I knew that soldiers followed orders; improvisation and freelancing are not tolerated. Thus I felt that, even if I could not find one explicit memo directly linking President Bush to the abuses that happened at Abu Ghraib, Bagram, Guantanamo Bay, and elsewhere, there had to be a better reason for these abuses than just a “few bad apples” who went crazy on the night shift.

So I began my research. In March, I attended Amnesty International’s Annual General Meeting at the Park Plaza Hotel in downtown Boston. One of the panels I attended was “Closing the Door on Guantanamo, Opening the Door to Justice.” The panelists included Matthew Alexander, former US military interrogator in Iraq and author of *How to Break a Terrorist: The US Interrogators who Used Brains, Not Brutality, to Take Down the Deadliest Man in Iraq*. His testimony was relevant not only because of his job, but also because he began his service in Iraq in March of 2006, at a time in which the enhanced interrogation techniques (EITs) approved for high-level al-Qaeda detainees had been (temporarily) revoked. Thus his stories of success accomplished without the use of EITs seemed to suggest their excessive and unnecessary nature.

The other speakers were Scott Horton, human rights attorney and visiting professor at Hofstra Law School, and Stephen H. Oleskey, attorney at WilmerHale and co-lead counsel in the case of *Boumediene vs. Bush*, who spoke less to interrogation techniques and more to (what they saw as) the denial of detainee due process of law rights and the importance of holding officials accountable for egregious breaches of the law.

By the end of the semester I had watched the documentary *Torturing Democracy*, whose bias is amply revealed by the title. A litany of new terminology and personnel was brought into my vocabulary: Office of Legal Counsel (OLC), KUBARK, SERE, Steven Bradbury, Major General Geoffrey Miller, stress positions, etc. were concepts and people

I had to begin to digest and comprehend. The vast and complicated nature of the topic I had chosen was beginning to hit me.

Over the summer, I read several works, ranging from *Monsterring: Inside America's Policy of Secret Interrogations and Torture in the Terror War* by the senior editor of the liberal political magazine *The American Prospect* Tara McKelvey to *War by Other Means: An Insider's Account of the War on Terror* by former Deputy Assistant Attorney General for the Office of Legal Counsel (Department of Justice) John Yoo. I was convinced by Yoo's arguments about the necessity of the wiretapping program and the dangerous stupidity of insisting on a warrant to spy on every email, text message, and phone call sent between terrorists. I agreed that terrorists did not deserve POW status and consequently, would not be afforded the same level of treatment or legal protections.

Yet I still felt a great level of unease, having seen indisputable proof that American soldiers had abused and tortured detainees. McKelvey's book is largely a psychological profile of the miscreants who were the main perpetrators of the Abu Ghraib scandal, but she also seeks to prove that Abu Ghraib was not an isolated incident, but rather that it was part of a deliberate system of abuse designed by top officials.

At this point, I felt I had my argument and just needed to find the additional data to back it up. I proposed to argue that programs and rules designed for a handful of high-profile al-Qaeda members – for reasons I had yet to fully comprehend – became standard practice for all detainees. Techniques and procedures originally limited to use by trained professionals were okayed for lower-ranking, untrained soldiers who, working within a permissive environment and under enormous pressure to provide “actionable intelligence,” let loose and went beyond formal guidelines. Because I knew that abuses were not limited to Abu Ghraib and that the abuses that happened at various prisons in Afghanistan, Iraq,

and Guantanamo resembled each other, I was convinced that there was simply no way that these instances of torture were solely the responsibility or product of the imagination of a handful of soldiers. Everything I read seemed to point to a lenient system that, in providing maximum flexibility to interrogators, was creating a permissive environment that turned into systemic abuse.

In November, I attended Amnesty International's annual Northeast Regional Conference at Boston University. One of the talks addressed the "Counter Terror with Justice" campaign and the panelists once again included Mr. Oleskey. The other speaker was Shayna Kadidal of the Center for Constitutional Rights. During his presentation, Mr. Oleskey referred to Guantanamo as a "legal black hole." The narrative put forth by Mr. Kadidal, one highly favored by the Left, is that Major General Geoffrey Miller, who was in charge of Guantanamo from November 2002 through March 2004, brought his abusive system of interrogation and detention from Guantanamo to Iraq, which led to Abu Ghraib.

For the fall semester of 2009, I also took a course on the American Presidency and was required to read *The Terror Presidency* by Jack Goldsmith, former Assistant Attorney General for OLC. Taken as a whole, Goldsmith's book is a defense of Bush Administration policies achieved by a detailed analysis of the US legal culture, with pointed criticisms of certain aspects of the administration's tactics, such as its go-it-alone approach that he argues has weakened the executive branch.

I recall one day in class when the professor mentioned that he had read the memo detailing the tactics used on high-level detainees and that he did not think they were that bad at all, that there were strict guidelines as to how the hand and fingers had to be placed if you were to slap a detainee and how detainees were thrown against a bouncy wall that made a lot of noise, but caused no real damage. I remember being thoroughly confused

and commenting in class that what had happened went far beyond that. I did not know what memorandum he was referring to, and in a lapse in my research, I did not investigate the matter. Only later did I realize that we were both right.

Over Christmas break, in an effort to compensate for what was a less-than-ideal commitment to my thesis during the first semester due to personal issues, I tackled my thesis as a whole, determining section headings and the flow of the paper, did more research, lots of editing, and by the end of the break, I felt much more reassured in my ability to produce a solid piece of scholarly work. I had done greater exploration on legal definitions of torture; I had determined what were the myriad factors I wanted to discuss to make my case for why torture happened and why it could continue to happen if policies were not changed; I did research on legislation that I had overlooked.

I came back from Christmas break prepared to spend the semester mainly refining my paper, without having to do much additional research. At the end of January, I was fortunate enough to meet Jack Goldsmith at Harvard University where he currently teaches and discuss my topic with him. The conversation made me realize that I had overlooked many, many aspects of the topic. Those techniques my professor had mentioned in class that I was so confused about, for example, were part of an officially sanctioned list that had been made public by the Obama Administration that same fall. There was more information out there now and I had not picked up on it.

He suggested I read Marc Thiessen's *Courting Disaster: How the CIA Kept America Safe and How Barack Obama is Inviting the Next Attack*, which had been published just weeks before. This is the type of book that, in most other circumstances, I would likely have written off as right-wing propaganda (which, granted, it may be, but the book has been enormously important to the writing of this thesis). My take would have been: How could

anyone possibly defend what happened at Abu Ghraib, Bagram, Camp Nama, and Guantanamo as morally and legally sound? Especially considering that many of the people who were subjected to abuse and torture were not valuable in terms of intelligence but had unfortunately been at the wrong place at the wrong time, I felt that there just could not be a justification for treating people in such a manner. I feel proud to be an American, but I could not reconcile these images and the fear-mongering rhetoric of the administration with the liberal, democratic ideals that this country so much stands for. I felt that in some bizarre twist of logic, the administration was trying to justify the discarding of our principles and values so as to save them in the long run.

The point is, I read the book and had to reconsider many parts of my thesis. Here was someone who lambasted both the Center for Constitutional Rights and WilmerHale for playing “lawfare” and undermining national security. Yet I had recently heard representatives from both speak at the Amnesty International events highlighted above. Who was right?

Before exploring further the impact of *Courting Disaster* on my research, I would like to clarify what this thesis is not about. It will not address questions regarding habeas corpus, military commissions, access to lawyers, and all of the other due process questions of that nature. This paper focuses only on detention and interrogation techniques, with an emphasis on the latter.

It would be a poor show of scholarship to let one book dominate my thesis and be convinced of one argument and set everything else aside. But that is not what I did; Thiessen did not provoke within me a complete reversal of my original perspective. His adamant defense of the CIA detention and interrogation program and other Bush Administration policies, however, did expose me to some powerful revelations.

First, I realized that no one (no one, obviously, except a few extremists) defends the use of torture, regardless of his or her political persuasion. The problem arises when it comes to defining torture and even more messily, defining “cruel, unusual, and inhumane” treatment which, depending on what laws you cite, is legal or illegal. Bush supporters (largely those on the right side of the political litmus test) believe that what the Bush Administration legalized and implemented was not torture and that cases like Abu Ghraib are instances of unauthorized and illegal abuse and torture; they are cases that strayed from sanctioned behavior. Bush naysayers (largely those on the Left) think that there must be a link between the top and bottom and are more wary of approving tactics that stray, for example, from the US Army Field Manual on Interrogation, for fear that flexibility can lead to abuse.

Whatever the interpretation, no one was or is trying to legalize torture. Take for example the May 10, 2005 memorandum issued by Steven Bradbury, then head of OLC, which, while simultaneously defending the CIA interrogation program, states on the first page: “Torture is abhorrent both to America law and values and to international norms.” It made me see that the Bush Administration was sincere in its public statements about the US’ commitment not to torture.

What is so important about realizing that no one is trying to authorize torture is that it neutralizes the arguments that critics (including myself) make about how torture is useless for intelligence purposes. Confessions made under torture are notoriously unreliable and, to use a classic line, a person will say anything to stop the torture. The point is, confessions that may have been extracted from those prisoners at places like Abu Ghraib who were paraded around naked, beaten, shackled together, etc. were probably full of holes and not useful in the slightest to intelligence officials. But what was

authorized was taken to not be torture and therefore whatever intelligence was gained from detainees who underwent EITs was considered reliable (although, of course, subject to verification).

Thiessen lists example after example of crucial intelligence we collected from detainees who underwent EITs. Those in the Bush Administration were not under the impression that it had to torture in order to get the information it needed; it did not try to make the case that torture can produce good intelligence. Using torture to extract confessions, after all, is illegal under US law. The argument it did make was that EITs made for good intelligence and it implemented strict guidelines for their use so as to adhere to US law.

That sincerity and thoroughness, however, does not take away from the reality of abuse and torture that has happened to those in US custody during the war on terror. Thiessen goes to great lengths to explain how the techniques employed by the US, and even the extent of the abuse where it did occur, are so minor in comparison to all of the unfair parallels critics draw to the Nazis, the Khmer Rouge, the Japanese during World War II, and various other cases of blatant state-sanctioning of torture. I never believed that the Bush Administration came anywhere near these dictatorial, hideous regimes.

Yet it is important for the US to maintain very high standards, particularly during crisis situations, for that is what distinguishes us from dictatorial regimes that use crises as excuses to impose martial law and subjugate the people. It is healthy that the American public is concerned with cases of abuse, even if they may be statistically insignificant when compared to the entire historical record. We are a democracy and that requires civic engagement and participation; it demands questioning of government policies and a constant striving for a commitment to the ideals and values that make us who we are.

The second major revelation from reading *Courting Disaster* is more of a question rather than a clarification of doubts I had. Thiessen chides Bush Administration critics as not understanding the stakes at hand, as not being realistic, as undermining national security by insisting on a level of detainee treatment that is better than those that criminals in US prisons receive. He lambasts President Obama for wanting to close Guantanamo and for eliminating the CIA's special detention and interrogation program for high-level al-Qaeda operatives. Critics, he argues, are hurting the US by throwing around the word "torture" and calling the Bush Administration evil, without knowing what really happened.

He quotes former Vice President Dick Cheney as describing critics' logic as follows: "Well, I think it was a dark period in American history, and I have these ideals, and in order to uphold my ideals I'm going to cancel these programs" (Thiessen 237). As I read that, I thought, is that me? Do I write off the Bush Administration as simply a black spot on the American record and that what needs to happen now is a thorough reversal to get us back on track? Thiessen's argument is that the US did not stray from that track at all; the Bush Administration simply had to make tough choices that any wartime president would have to make. He stayed within the law and did what he thought was best to save American lives and prevent another terrorist attack. We have remained true to our ideals and the soldiers who did commit abuses strayed from those ideals and were promptly punished.

But that analysis is not sufficient. The part that he does not adequately address is why those on the Left feel that certain measures taken by the Bush Administration were not necessary and why replacement measures had to be implemented in an attempt to correct what were perceived as grave mistakes. Most on the Left are not crazy and are not

using present circumstances for personal and political gain; at heart here are members of the Left like myself. There is a reason that I felt compelled to research the topic of torture and its relation to the Bush Administration. There is a reason why President Obama felt compelled to end the CIA program. Enough happened to make a significant segment of the population sufficiently suspicious to begin and sustain an anti-Bush campaign. I believe that it is a failure of the Bush Administration to adequately address people's criticisms that has led to the terrible backlash that Thiessen argues is jeopardizing national security.

This thesis will hopefully help illuminate some of the reasons why the Left feels so moved to criticize and question and wishes to limit our flexibility in fighting terrorism. Goldsmith argues that one of the primary reasons is the secrecy surrounding the Administration's work; it avoided collaboration with Congress and other relevant departments like the Department of State, thus arousing suspicion in others.

I argue further that much has to do with the tone and rhetoric of the administration; the constant fear-mongering, unaccompanied by public declarations of exactly how what we were doing was saving lives, made it seem as if the administration was intentionally trying to keep the American public in the dark as it went on a rampage around the Middle East to squash any and all signs of terrorist activity against the US. In addition, the Bush Administration talked frequently about how its efforts were creating a new, democratic, and peaceful Middle East. Yet it seemed that we were not capturing "hearts and minds" at all but were rather provoking more people to turn against us, thus making the US less safe rather than more.

Thiessen argues that a key reason why the Bush Administration did not reveal more information was for national security purposes. But that excuse, for as genuine as it

may be (and after reading his work, I believe the argument), is difficult to sustain for very long in a liberal democratic society and as Thiessen himself points out, silence allows the opposition to frame the story to its liking, which is what the Left did as time went on and the Bush Administration continued to keep all information under wraps. Too much secrecy for too long causes the public to begin to lose conviction in the efficacy of the government's efforts, and thus in their necessity as well. In addition, threats to national security do not give the president a "do-whatever-it-takes" mandate as long as he can retroactively defend it based on the keeping of the American people safe. Our ideals as well as our safety need defending.

So, in a sense, I finish where I began. The question is: is there a link between what the CIA was allowed to do to high-level detainees and what happened at places like Abu Ghraib? It seems doubtful (though not impossible) that, given military culture and history, soldiers at various locations would dream up the same sick things to do and have at it. There had to be a basis for it somewhere, though I knew I was not going to find some golden memo that showed a direct link between the two. Yet I hesitate to excuse top leadership of all responsibility for abuses that happened on the ground. Something went terribly wrong and low-level soldiers cannot alone be to blame. Please read further to see my argument as to what extent that link exists.

However, this thesis is designed to push further than that and to serve as a clarification piece for people who, like me, come into this topic with a mindset that grave abuses and torture must have been the product of executive policy. It is written for those who are angry that so many Afghan goat herders and Iraqi taxi drivers ended up in the mix when they had nothing to do with terrorist actions against the US. It is for those who still have lingering doubts about certain techniques and how close they come to being

torture. It is for those that question the sincerity and practicality of the administration's efforts to spread democracy across the Middle East. It is about asking one's self what defines patriotism. The Bush Administration was adamant in its rhetoric that the public – and the world – could either be supportive of its policies and be patriotic, or criticize it and thus be “un-American.” I argue that this is an unnecessary and dangerous dichotomy. The US can defend itself and preserve its values and principles concurrently. We do not have to surrender liberty in order to preserve it, nor ignore democratic norms so as to save them. This thesis, by analyzing the arguments of both the Bush Administration and its critics, is about that balancing act, so that both sides of the debate will be in a better position to produce future policy decisions that honor the American commitment to law, liberty, and security.

It is also to remind the reader of the unfortunate reality that terrorism is alive and well; there are people out there who have made it their life objective to kill Americans. There simply is no getting around that fact. The threat is real and for better or worse, the Bush Administration took the steps that it believed were necessary to keep Americans safe. I am scared, but I know that our country is capable of striking a balance between safety and ideals and I have realized that the Bush Administration struck a better balance than I had originally assumed.

Background

October 7, 2001, the US began military action in Afghanistan (Operation Enduring Freedom). On January 11, 2002, the first detainees (coming from Afghanistan and Pakistan) arrived at Guantanamo Bay. On March 20, 2003, the US invaded Iraq (Operation Iraqi Freedom). On April 28, 2004, CBS television network was the first to make public evidence of the Abu Ghraib abuses on its program *60 Minutes II*. A few days later, *The New Yorker* published the photos.

The government responded with several investigations and reports. The major ones come from the military, such as the Taguba, Fay-Jones, and Schlesinger reports, and understandably so, given that the people charged with crimes were largely military (specifically Army) personnel. However, the Red Cross also produced a report and several other internal reviews were conducted by the CIA and the FBI. Most of these reports, too, are now part of the public domain. Several of them, in fact, are quoted and reproduced in many of the major works of Bush Administration opponents. Two of the most well known are *The Torture Papers: The Road to Abu Ghraib* by Karen J. Greenberg and Joshua L. Dratel and Mark Danner's *Torture and Truth: America, Abu Ghraib, and the War on Terror*.

In terms of Supreme Court cases, there have also been several, such as *Hamdi vs. Rumsfeld* (2004), *Hamdan vs. Rumsfeld* (2006), and *Boumediene vs. Bush* (2008), which have attacked various aspects of war on terror policy. These cases will be addressed only nominally, for they tend to focus on other aspects of the war on terror, such as military commissions and habeas corpus.

Legislation surrounding the question of torture is also an important source of information, particularly in its ability to act as a political barometer of the general

sentiment of not only members of Congress, but also the public. The Patriot Act of 2001, the Detainee Treatment Act of 2005, and the Military Commissions Act of 2006 are just three examples of post-9/11 legislation that have shaped the US' handling of the terrorism threat.

In addition to the sources already mentioned, the body of literature addressing the topic at hand continues to grow daily, in part because of lobbying from groups like the American Civil Liberties Union that, through the Freedom of Information Act, are pushing for release of more and more previously confidential government documents. Several were released during the fall of 2009, including the second August 1, 2002 memo which listed the ten techniques approved for use by the CIA for high-level al-Qaeda operatives.

Furthermore, several people involved with the Bush Administration have since written memoirs and have done interviews detailing their experience (the examples already mentioned include John Yoo, Jack Goldsmith, Marc Thiessen, and Matthew Alexander). Particularly now that many Bush officials are no longer working for the White House (such as Vice President Dick Cheney), the slew of personal accounts about the Bush years are filling bookstore shelves.

CHAPTER I: WHAT IS INTERROGATION?

I.I: Why Intelligence is Crucial to the War on Terror

To be able to make judgments concerning the policies that the Bush Administration made in regards to detainee treatment during detention and interrogation, it is vital to first understand what interrogation is and what is its purpose. It is not as obvious as it may sound. Furthermore, it is probably fair to say that the idea of interrogation in and of itself makes the average person uncomfortable, with the vague notion played up in the media of a dark room with tough-looking men grilling their subject. This perception acts as a bias against seeing not only interrogation's usefulness, but also its necessity in certain contexts. This section will serve to clarify that necessity and the procedures related to interrogation.

In war¹, there are many strategies for spying on and attacking the enemy. However, the war on terror presents quite a dilemma to traditional war techniques because al-Qaeda and other terrorist organizations by definition do not follow standard military procedures. Concretely, that means that terrorists, "unlike previous enemies...do not have mass armies or flotillas of warships that can be observed by spies or tracked by satellites" (Thiessen 15). The paucity of visible traces places a heavy burden on gathering intelligence concerning the enemy's operations and plans.

Thiessen explains that there are essentially three avenues that intelligence officials can use to complete this mission. Those include penetration of the enemy (i.e. spies and double agents), "'signals intelligence' – using advanced technology to intercept and monitor the enemy's electronic communications," and interrogation (Thiessen 77). All three of these methods are being used, but this paper will focus solely on the use of interrogation as a means of gathering intelligence.

¹ This thesis will operate under the assumption that the war on terrorism is in fact a war and will thus be referred to as such. This thesis will not debate the merit of the war metaphor, but will touch briefly on the corresponding responsibilities that come with war in chapter IV.II.

The value placed on intelligence in the war on terror cannot be underestimated; the Bush Administration fervently believed that only by interrogating those within al-Qaeda's ranks could it possibly begin to 1) define such an amorphous enemy and 2) prevent further attacks. As President Bush said to the nation in his September 6, 2006 address, "To win the war on terror, we must be able to detain, question, and, when appropriate, prosecute terrorists captured here in America, and on the battlefields around the world" (qtd. in Thiessen 393).

Proponents of the Bush Administration's CIA interrogation plan (analyzed further in chapter III.II) emphasize that it has been an enormously important resource for not only learning about what particular plots the enemy has hatched, but also about al-Qaeda itself: its organization, its recruiting tactics, its financing, its methods of communication, etc. Thiessen goes so far as to assert that "[u]ntil the program was temporarily suspended in 2006...well over half of the information our government had about al Qaeda...came from interrogation of terrorists in CIA custody" (Thiessen 10). The more knowledge the US has about how al-Qaeda operates, the better US intelligence officials will be at knowing what to look for as they try to piece together scattered pieces of intelligence into a coherent lead that will allow the US to thwart terrorist actions.

I.II: CIA “Black Sites”

Part of the reason that the US has been able to gather so much information is because of its use of the highly controversial overseas “black sites” to conduct interrogations. Controversy has sprung forth because of the secretiveness surrounding these sites and the fact that some of them are located in countries with poor human rights records, which lead to accusations that the Bush Administration purposely selected them in order to avoid the law, both domestic and international.

In the eyes of the interrogator, however, “black sites” were crucial. CIA personnel had 24/7 access to detainees and took advantage of that by constantly comparing the stories of one detainee to another, playing them off of each other to discover the truth. After questioning one detainee, for example, a CIA official could immediately go over to the cell of another detainee and search for either confirmation or denial of the previous detainee’s statements.

The secure location also allowed the sharing of limited secret information, such as “asking them to explain the meaning of materials captured in terrorist raids, and to identity phone numbers, email addresses, and voices in recordings of intercepted communications” (Thiessen 48). This is a modern enemy without tanks and forts; the ability to trace the enemy through the cyber world is of the utmost importance. Being able to elicit confirmation of information like phone numbers and email addresses is a way in which US officials can use intelligence and security databases to look for patterns which might lead them to the capture of another al Qaeda member or to the placing of someone on the no-fly list so as to prevent his entrance into the United States. The sharing of certain information related to al Qaeda’s operations simply could not happen in less secure

locations, where the risk of leaks would be far greater. Anywhere that was in the battle zone, such as Afghanistan or Iraq, posed too much risk when determining where to house the most dangerous of those whom the US captured.²

² For an even more elaborate defense of the use of interrogation as an intelligence-gathering tool, see Thiessen 77-78.

I.III: Defining Interrogation

The 1992 US Army Field Manual on Interrogation³ defines interrogation as:

...the process of questioning a source to obtain the maximum amount of usable information. The goal of any interrogation is to obtain reliable information in a lawful manner, in a minimal amount of time, and to satisfy intelligence requirements of any echelon of command. (1-6&7)

The manual goes on further to explain that while there are different forms of interrogation (namely interviews, debriefings, and elicitations), all of them share three principles: “objective, the prohibition against use of force, and security” (1-7). As to the first principle, the interrogator must always have his objective in mind and only interrogate with the intention of fulfilling his objective.

While having a clear objective seems very straightforward, it is crucial in relation to the question of torture. As will be elaborated upon later, intention matters when determining if an act of abuse constitutes torture or not. If the interrogator’s objective is to cause severe suffering on the part of the detainee, then there are grounds for designating that treatment as torture. However, if the interrogator was acting solely on the intention of fulfilling his objective and had no alternative sadistic motive, even if the result of the interrogation is severe suffering, the treatment cannot constitute torture and the interrogator cannot, therefore, be prosecuted for torture. The objective defines the motive and it is that legally-defined motive that protects the interrogator, as well as making clear to him the specific duties of his job and that he may not stray from them under any circumstances, or he runs the risk of prosecution.

³ Since 1992, there has been an update to the manual, completed in 2006. The reason that the older version is used for this section is due to the fact that it was the version used during the first several years of the war on terror and thus the version available when many of the policies were made regarding detainee interrogation and treatment.

Contrary to popular belief, the process of gathering information from detainees is actually separate from the interrogation process, as reports Marc Thiessen.

Interrogation was not how we [intelligence officials] got information from the terrorists; it was the process by which we overcame the terrorists' resistance and secured their cooperation – sometimes with the help of enhanced interrogation techniques [explained in detail in chapter III.II]. Once the terrorists agreed to cooperate, interrogation stopped and 'de-briefing' began, as the terrorists were questioned by CIA analysts, using non-aggressive techniques, for information that could help disrupt attacks. (Thiessen 45)

This may seem a bit as if Thiessen were splitting hairs, since interrogation's ultimate objective is the extraction of information, but it is helpful in counteracting, to a certain extent, the common criticism levied against the Bush Administration that information confessed under torture or abuse is unreliable. As enhanced interrogation techniques were being employed, detainees were not being questioned for information the US needed; it was not the *24* scenario in which the interrogation continues until the detainee reveals the location of the ticking bomb. It is not a confession that will end interrogation; it is rather a judgment call on the part of the interrogators in determining when they feel that the detainee is now in a cooperative state and will be willing to share sensitive information.

Furthermore, using methods for the purpose of extracting information can run up against legal definitions of torture (see chapter II.V). An interrogator may not cause severe suffering on the part of the detainee for the purpose of extracting a confession; according to US and international law, this is not a legitimate objective. Securing cooperation and extracting information are seen as two different processes.

Thus the purpose of enhanced interrogation techniques is to give detainees an incentive to talk. Again, this may sound as if the detainee is motivated to talk only in order to stop the interrogation, but the argument set forth by Thiessen is that the interrogation

and de-briefing process tends to be a one-way street. First interrogation occurs, then de-briefing, with rare episodes of going back to interrogation. What is more, interrogators have means by which to verify and check the validity of detainee statements, thus helping them sort between false and true confessions. Keep in mind, however, that this is the argument put forth in defense of the CIA detention and interrogation program and does not, therefore, cover similar programs under military command.

CHAPTER II: WHAT IS TORTURE?

I want to be absolutely clear with our people, and the world: The United States does not torture. It's against our laws, and it's against our values. I have not authorized it – and I will not authorize it.

– President Bush, Sept. 6, 2006 speech, qtd. in Thiessen 400

II.I: The US Constitution

There are two matters addressed by the US Constitution that are relevant to this discussion. First is its role in clarifying the rights of the individual. The Fifth, Eighth, and Fourteenth Amendments are the most pertinent to interrogation and detention. The Fifth Amendment refers to the inability of a person to be denied their liberty “without due process of law.” In short, this means that a person must be found guilty of a crime before they can be punished. The Fifth Amendment is thus the basis for the American legal tradition of “innocent until proven guilty.”⁴

The meaning of liberty in the amendment, however, goes beyond its role as a symbol of the right to know with what crime one is charged and the opportunity to defend one’s case in court before being thrown in jail. Examining a certain understanding of torture (the one that this paper will defend) can also elucidate what defines liberty. Torture is a means of denying a person his⁵ liberty because it deprives him of free will, or in other words, a person’s ability to act and speak for himself, independent of the influence of others. When torture occurs, there is a gross asymmetry of power between the torturer and the tortured. The torturer has such overwhelming control over the tortured that the relationship is akin to that of master and slave, wherein the slave must always obey the will of the master and the master can compel the slave to do anything he so desires. The

⁴ Based on the war approach taken by the Bush Administration to address terrorism, the legal motto became “guilty until proven innocent.” The guilt of those in US custody was assumed and they would not be given legal recourse to challenge their detention. This changed beginning in 2004, when the Supreme Court compelled the administration to grant habeas corpus to non-US citizens held at Guantanamo (consolidated cases of *Rasul vs. Bush* and *al Odab vs. United States* on June 28, 2004) and habeas corpus to US citizens detained during the war on terror (*Hamdi vs. Rumsfeld* on June 28, 2004).

⁵ Throughout the paper, in the event that a singular subject should be needed, “he” will be employed to reflect the fact that the majority of detainees have been male, though there have also been female detainees whose stories have largely been ignored by the media.

one considered inferior becomes a tool for the gain of the superior and is no longer considered nor treated like a person.

Torture objectifies people, stripping them of their humanity and turning them into a pawn for the powerful. It is this dehumanizing element intrinsic to torture that makes it so offensive to the human conscience. What distinguishes humans from the rest of the animal world is agency: the capacity to control one's own life without being programmed to do so by nature or forced to do so by another person. Liberty is, among other things, mental and physical autonomy.

With torture, the objective is to break the victim into total submission. That external and internal breaking process destroys a person to the point that they are no longer able to act on their own will, but rather on the will of the torturer. What makes torture so repulsive is that by stripping the tortured of his natural right to liberty, he becomes subhuman. The denial of one's innate humanity is what makes torture wrong and so uncomfortable to discuss (Himes).

The application of the Fifth Amendment to the connection between liberty and humane treatment has legal precedence. In 1952, in the case of *Rochin vs. California*, the Supreme Court was asked to judge the methods used by three Los Angeles sheriff deputies in apprehending a suspect. The Court ruled that the deputies' behavior "shock[ed] the conscience" and was so "offensive to human dignity" that it indeed violated the suspect's Fifth Amendment right to due process of law.⁶ Before a person can be deprived of his liberty, there must be a guarantee of due process of law.

⁶ For more information on the case, see Honigsberg 23.

The Eighth Amendment refers to the ban on cruel and unusual punishment. As Professor Peter Jan Honigsberg of the University of California points out, this amendment refers not only to the illegality of certain punishments for any crime (i.e. beheading or burning at the stake) but also that “the punishment should fit the crime” (Honigsberg 23). The more serious the crime, the more severe the punishment should be. Some critics of the Bush Administration believe that this point holds enormous relevance for the treatment of those captured during the war on terror, for those that fell within US custody ranged from top Al-Qaeda operatives to innocent civilians who were mistakenly rounded up. The type of treatment each group deserved should have been contingent upon both their legal status according to US and international law, but also according to their crime. At first, policy regarding detainee treatment delineated between different types of detainees, but those distinctions gradually blurred, in part because of the US’ inability and unwillingness to employ the legal measures that would have helped determine who was guilty and who was not.⁷

This criticism, however, does not adequately address the central reason for having detainees in the first place: intelligence gathering, not criminal conviction, was the main purpose of detention and interrogation. The correct standard against which detainees should be judged in order to determine their legal status (with corresponding rights and privileges) is how critical the information they could plausibly impart is. Yet, even in

⁷ One aspect of the controversy related to the 8th Amendment is the debate over whether detainees deserve trials or not. For many years, this legal protection was denied, in deference to their being held within a war context and also because the Bush Administration felt that it needed to wait more time (and get all of the information that it could possibly get from the detainees) before bringing them to trial, either by military commission or through civilian courts. The Obama Administration has chosen to try five of the 9/11 terrorists in civilian courts and another five through military commissions. For more information, see Savage, Charlie. “Accused 9/11 Mastermind to Face Civilian Trial in N.Y.” *The New York Times*. 13 Nov. 2009. Web. 10 Jan. 2010 <<http://www.nytimes.com/2009/11/14/us/14terror.html>>.

recognizing the importance of the intelligence standard in determining legal status, it must also be recognized that a detainee's intelligence is probably closely tied to the "punishment should fit the crime" model because a high-level al-Qaeda operative will not only have extremely valuable intelligence, but will also be more likely to be guilty of involvement in anti-US actions. An Afghan goat herder, on the other hand, will likely have little useful information beyond village hearsay and will also probably not be guilty of any anti-US behaviors. Thus it is important to recognize that the criminal motto of "the punishment should fit the crime" cannot be perfectly implemented in an intelligence setting, but there is a very important association between intelligence capacity and guilt.

While the Fourteenth Amendment's original purpose was to redress racial inequality, its application since then has expanded sufficiently to be relevant to today's war on terror. The Fourteenth Amendment reiterates the Fifth Amendment's protection of due process, stating, "...nor shall any State deprive any person of life, liberty, or property, without due process of law." Furthermore, it grants "equal protection of the laws" for all people "within its [the state's] jurisdiction."⁸ Though the wording is of course directed towards states and their authority over those within their respective territories, the themes and values presented by the amendment are those of due process and equality before the law.

The relevance of these three Constitutional amendments finds support in legislative efforts post-Abu Ghraib to refine and clarify the steps the Bush Administration was taking to address the terrorist threat. One of those was the Military Commissions Act of 2006. The amendments played a central role in defining legal detainee treatment in the bill:

⁸ The National Archives and Records Administration. "Constitution of the United States: Amendment XIV." *Archives.gov*. Web. 6 Jan. 2009 <http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html>.

No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment...the term “cruel, inhuman, or degrading treatment or punishment” means cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment [CAT, see section II.V]

In deference to the Constitution, the Military Commissions Act of 2006 banned both torture and cruel, inhuman, or degrading treatment or punishment. As will be further addressed in chapter II.V, this uniform ban is a turning point in the course of the war on terror because for the first several years of the war, the Bush Administration did not apply the same principle to its policy decisions, which illegalized torture, but did not criminalize cruel, inhuman, or degrading treatment or punishment.

The second issue that the US Constitution addresses as pertains to the topic of torture is that of Congress’ role in foreign policy. The Constitution enumerates several powers that the legislative branch has when conducting foreign affairs, among them the power to declare war and to raise an army. During the Bush Administration, however, Congress’ constitutional rights were repeatedly cast aside in its handling of the war on terror. Elimination of this check on the executive branch had many consequences, among them detainee detention and interrogation policy.

A court case often cited by constitutional scholars on the topic of separation of powers, and now utilized by critics of Bush Administration policies, is that of another war and war president: President Harry Truman during the Korean War. The 1952 Supreme Court case of *Youngstown Sheet and Tube Co. vs. Sawyer* placed limitations on executive power during times of war. The Court ruled that President Truman did not have the authority to

seize a steel mill in order to prevent an imminent strike that would have closed down steel production needed for the war effort.

In his concurring opinion, Justice Robert H. Jackson talked about the direct relationship between congressional involvement in executive decisions and executive power. The president acts with the greatest amount of authority when he has the explicit or implicit approval of Congress. His power weakens when he ignores or acts deliberately in defiance of congressional wishes. *Youngstown* was a reminder to the chief executive that there are few instances in which he can act alone and that the American traditions of separation of powers and checks and balances cannot be discarded, even during a crisis. As will be developed in more detail later on, the Bush Administration handicapped these traditions in its execution of the war on terror,⁹ although it must also be said that there was a degree of reluctance on the part of Congress to be implicated in certain policy decisions and legislation such as the Military Commissions Act of 2006 demonstrates that Congress was on board with many of President Bush's strategies.

While the Constitution does not explicitly define the word "torture" and its protections do not extend beyond US borders, it is a fundamental text in illuminating American values and morals, such as a concern for human rights embodied in such traditions as due process of law and checks and balances. In addition, as the "supreme law of the land,"¹⁰ it must always serve as the most important source of standards for the federal government.

⁹ Further elaboration on the exclusion of the legislative branch (among other federal government entities) can be found in chapter III.II, "The Unitary Executive."

¹⁰ *Marbury vs. Madison*. No. 137. Supreme Ct. of the US. 24 February 1803.

II.II: The US Army Field Manual

The US Army Field Manual is the golden standard for Army operations. The 1992 US Army Field Manual on Interrogation (often referred to by its military shorthand, FM 34-52) defines torture as “the infliction of intense pain to body or mind to extract a confession or information, or for sadistic pleasure” (1-8). In accordance with the definition of torture provided in the previous section, FM 34-52 explains that “[p]hysical or mental torture and coercion revolve around *eliminating the source’s free will* [emphasis added]” (1-8). When a person’s capacity to act on his own accord is removed because his physical and/or mental faculties have been sufficiently broken, torture has taken place.

The Manual goes further to list specific examples of what it constitutes as physical torture:

- Electric shock
- Infliction of pain through chemicals or bondage (other than legitimate use of restraints to prevent escape)
- Forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time
- Food deprivation
- Any form of beating

Some examples of “mental torture” are:

- Mock executions
- Abnormal sleep deprivation
- Chemically induced psychosis

These techniques are listed in addition to more obvious prohibitions, such as murder, maiming, and assault.

The Field Manual also provides an interesting test of whether something constitutes torture or not, in recognition of the fact that the line between what is and is not torture is often gray.

In attempting to determine if a contemplated approach or technique would be considered unlawful, consider these two tests:

- Given all the surrounding facts and circumstances, would a reasonable person in the place of the person being interrogated believe that his rights, as guaranteed under both international and US law, are being violated or withheld if he fails to cooperate.
- If your contemplated actions were perpetrated against US PWs [prisoners of war], you would believe such actions violate international or US law. (1-9)

This test provides for a rather strict interpretation of torture (take, for example, the fact that the standard is set in accordance with the treatment of POWs, which, as will be debated in greater detail further on, is a point of serious contention in the war on terror as POW status was not afforded to detainees), for it implies that any hesitancy one may feel should be regarded as a sign to desist from or never use the approach in question.

Nevertheless, the Field Manual states:

Authority for conducting interrogations of personnel detained by military forces rests primarily upon the traditional concept that the commander may use all available resources and lawful means to accomplish his mission and to protect and secure his unit. (1-9)

This statement seems to compensate for the narrowness of the “torture test” detailed above by emphasizing that ultimate authority rests with the commander and what he feels is necessary to get the job done. It is recognition of the realities of war, whose intrinsically chaotic and dangerous nature means that the law cannot, unfortunately, predict and prepare for all potential scenarios.

The US Army Field Manual on Interrogation provides significant guidance as to the issue of torture and despite its ambiguities, its long-term use and history of effectiveness entitled it to play a vital part in developing detainee treatment policy.

II.III: The United States Military Code of Justice

Another relevant military document (and federal law) is the United States Military Code of Justice (UCMJ). It is the “bedrock of military law,” applying to all US military personnel (Powers). Articles 77 through 134 are known as the “punitive articles,” because they list “specific offenses, which, if violated, can result in punishment by court martial” (Powers). Thus UCMJ acts a rulebook for proper military conduct.

The crimes listed in Articles 77-134 constitute crimes whether they are carried out against another member of the military or those in US military custody, although many of the crimes would be, on the whole, irrelevant to detainee treatment, such as being drunk on duty or deserting. As for those articles that have the potential to impact detainee treatment, one is Article 93, which states:

‘Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.’ (Powers)

Thus a detainee, who is by his circumstances “subject to the orders” of his captor, would be protected from cruelty, oppression, and maltreatment. The incentive for compliance with this provision is high, as the punishment includes a dishonorable discharge from the military, forfeit of pay and allowances, and confinement (military prison) for one year. Military personnel and detainees are also protected from such abuses as murder (Article 118), rape and sexual assault (Article 120), maiming (Article 124), and assault (Article 134-3&4).¹¹ The UCMJ does not have a section on torture or provide a definition of

¹¹ The UCMJ also includes a protection (Article 97) against “unlawful detention,” in which military personnel are prohibited from, “except as provided by law, apprehend[ing], arrest[ing], or confin[ing] any person.” While this paper will not address the issue of whether or not the US lawfully detained persons, this provision certainly provides fodder for Bush Administration critics who use this article as the legal grounds for prosecution of US military personnel for what critics feel have been “unlawful detentions” of many people during the course of the war on terror.

torture, but its detailed list of offenses provides significant guidance as to what is proper military conduct.

Furthermore, the UCMJ reinforces the military tradition of utmost respect for and compliance with superiors' orders. Soldiers are to obey and to stay within delineated guidelines. Failure to do so is a crime, as detailed by Article 89 (disrespect towards a superior commissioned officer), Article 90 (assaulting or willfully disobeying superior commissioned officer), Article 91 (insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer), and Article 92 (failure to obey order or regulation). The corresponding punishments are not light; Article 92, for example, carries the cost of being discharged, having to forfeit all pay, and confinement between six months and two years.

The relevancy of this last group of articles to the larger discussion of detainee treatment during the war on terror revolves around the common accusation levied by Bush Administration critics that military personnel who committed such abuses as those at Abu Ghraib – contrary to the official position of the administration that they were just a “few bad apples” – were actually following out their superiors' orders, or at the very least, they believed that their actions were condoned by their superiors. Critics believe that the widespread nature of the abuse, combined with this very important aspect of military culture, means that higher officials are equally blameworthy for detainee abuse and torture. The UCMJ makes clear that soldiers must follow orders, so if enough soldiers were committing such acts, it does seem to raise questions as to how far up the chain of command such actions were approved and encouraged.

II.IV: The Geneva Conventions

The most relevant feature of the Geneva Conventions in regards to the war on terror is not its definition of torture, but rather its definition of legal identities during times of war and the corresponding legal rights and privileges associated with those identities. The Geneva Conventions, written in the aftermath of World War II, establish rules of warfare so as to prevent repetition of the types of atrocities witnessed in the 1930s and 1940s. They were “created to protect innocent civilians by deterring violations of the laws of war. They do this by offering certain protections to those who follow these laws – and denying such protections to those who do not” (Thiessen 29).

To delineate who receives which protections, the Geneva Conventions defines legal identities for everyone in the context of war, from soldiers to insurgents to civilians. There are two identities presented by the Geneva Conventions, prisoners of war and civilians, which over time have come to find legal synonyms in lawful (because they are permitted to be on the battlefield) and unlawful (those who are not) combatants. These labels designate the rights a person has if captured by the enemy.

The Third Geneva Conventions refer to the treatment of lawful combatants, or prisoners of war. The Fourth Geneva Conventions refer to the protection of civilians, which is a broad term for everyone else. This includes all who are not soldiers: civilians, terrorists, insurgents, guerrillas, etc. The Geneva Conventions are intended to cover everyone and leave no one in legal limbo. The International Committee of the Red Cross, “the protective body and foremost interpreter of the GC [Geneva Conventions],” (Honigsberg 20) explains the categories as follows:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by

the First Convention. 'There is no' intermediate status; nobody in enemy hands can be outside the law. [Convention (IV) relative to the Protection of Civilian Persons in Time of War]

The Geneva Conventions do not provide a standard definition of torture. Common Article Three includes a prohibition on "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture...outrages upon personal dignity, in particular humiliating and degrading treatment," but such wording certainly leaves much to interpretation.

Vague definitions of torture can have both positive and negative consequences. On the one hand, vagueness allows for broad application so that many techniques could be considered torture. A soldier operating under such an interpretation may be inclined to err on the side of caution so as not to be punished later for reading it too narrowly. This could happen with a soldier operating under the 1992 US Army Field Manual on Interrogation, whose broad "test" on what defines torture certainly suggests prudence, while still including the caveat about the commander's having of the final say. This take on vagueness falls in line with the values set forth by the US legal tradition of "innocent until proven guilty," mentioned earlier, in which the suspect is given the benefit of the doubt. A vague definition can be beneficial in encouraging caution in those who find themselves confronted with the issue of torture.

On the other hand, the definition could be interpreted as so vague as to be rendered meaningless and thus useless for determining detainee treatment policy. As President Bush remarked in a press conference, in regards to Common Article 3:

It's like...it's very vague. What does that mean? 'Outrages upon human dignity.' That's a statement that is wide open to interpretation and what I'm proposing is that there be clarity in the law so that our professionals will have no doubt that that which they're doing is legal. (Torturing Democracy)

President Bush was concerned that, although the US is a signatory to the Geneva Conventions, it was not written in precise enough language to meet what he felt were the US' current needs. Furthermore, there was serious concern about whether or not terrorists deserved any Geneva Convention protections at all, despite the fact that the Bush Administration had deliberately chosen to take a war approach to fighting terrorism, which necessitated an examination of domestic and international law regarding warfare. The Bush Administration, through the Department of Justice's Office of Legal Counsel (OLC), tried to remedy the vagueness of the various definitions of torture that it was subject to by defining it extremely narrowly – too narrowly, this paper will argue. The definition endorsed by the Bush Administration is presented and discussed in section II.VI.

*II.V: The United Nations Convention Against Torture and Other Cruel,
Inhuman, or Degrading Treatment or Punishment (CAT)*

and 18 U.S.C. § 2340-2340A

The attention that the Geneva Conventions have received on the subject of the war on terror, while understandable given their intimate connection with war policy, has overshadowed another crucial international treaty on torture. CAT, to which the US is a party, is considered to be the international standard as to what constitutes torture as well as the standard off of which the US based its definition of torture, as embodied in the US federal criminal code. Unsurprisingly therefore, CAT was the principle source from which the Bush Administration derived its definition of torture. CAT (Article 1) defines torture as:

...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. (Office of the United Nations High Commissioner for Human Rights)

18 United States Code Section 2340-2340A incorporates CAT into federal law.

While the Constitution protects citizens of the US from “cruel and unusual” treatment and torture within the geographical limitations of the US, §2340-2340A covers torture conducted by US personnel outside of US territory against US citizens and non-citizens alike. Thus it is particularly relevant for international conflict of any kind, including the wars in Afghanistan and Iraq.

The process of signing onto the treaty began during President Reagan’s second term, but was not confirmed by the Senate until the George H.W. Bush Administration.

Both presidents wrote in caveats so as to explain the US' interpretation of what they were signing up for. President Reagan added:

'The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering...The United States [also] understands the term 'cruel, inhuman, or degrading treatment or punishment,' as used in Article 16 of the Convention, to mean the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.' (qtd. in Bybee to Alberto Gonzales, 1 Aug. 2002, as reprinted in Danner 128-129)

During the H.W. Bush Administration, the following language was added to the US signing of CAT:

'The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.' (qtd. in Levin)

What became 18 U.S.C. § 2340-2340A, an almost verbatim copy of the George W. H.

Bush Administration's interpretation, was the following:

- (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from —
 - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
 - (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
 - (C) the threat of imminent death; or
 - (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; (Legal Information Institute)

In accordance with the definition of torture supported by this paper, the CAT definition addresses how torture can "disrupt profoundly the senses or personality."

Torture causes long-term or even permanent damage, resulting in a fundamental change of the identity of the tortured. Recognition of the impact that torture has on a person's personality or ability to process his surroundings reinforces the serious nature of torture and emphasizes how it differs from lesser forms of abuse which, although they may cause humiliation, pain, and/or short-term suffering, do not rise to the level of torture.

The additional language that the US added to its codification of the treaty defined torture more narrowly and suggested that the US would base what it saw as torture and cruel, inhuman, and unusual treatment on standing US law (i.e. the Constitution, specifically Amendments Five, Eight, and Fourteen). At the time, these caveats were included largely to protect the death penalty in the US, a practice most European countries had by then illegalized. Yet its implications for the war on terror are far graver.

The George W. Bush Administration took advantage of the US' version of CAT for its own purposes. Recall that the US federal laws that followed from the treaty only ban torture in regards to the treatment of persons outside of the US. Cruel, inhuman, and degrading treatment is not, creating a window of leverage that the Administration "pounced on" (Honigsberg 24). CAT requires that states "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" (Office of the United Nations High Commissioner of Human Rights). However, neither CAT nor its incorporation into federal law makes "cruel, inhuman or degrading" treatment a crime. The message seems to be that lesser forms of abuse, although highly discouraged, are not illegal. Here was a legal distinction that the Administration could use to its advantage to more clearly define which

of its actions were legal and which were not; as long as something was not torture, it technically did not violate US federal law according to 18 U.S.C. §2340-2340A.¹²

CAT also asserts that “[N]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Nor can torture be justified if carried out on the order of a superior officer or official.¹³ While it can be argued that CAT’s definition of torture is not perfectly clear, the rule concerning its use is black-and-white. Torture is never justifiable and thus must be avoided at all costs.

As discussed in chapter I.III, torture according to this definition occurs only in instances where the intent is to cause “severe physical or mental pain or suffering.” If those happened to be the byproducts, but not the desired result, then the techniques used do not qualify as torture. Thus a soldier, acting on his superiors orders and not for his own sadistic pleasure, cannot be found guilty of torture, even if the detainee suffers to the same degree as if he had been tortured and if the soldier did derive sadistic pleasure from it.

In addition, Article 15 of the treaty states that information derived from torture is not permissible as evidence in court. Thus if the US wanted to be able to use detainee confessions as proof of the efficacy of their methods, the Bush Administration had to be

¹² This stands in contrast to the UCMJ, discussed in chapter II.III, which bans cruelty, oppression, and mistreatment, and not just torture. Thus one can already begin to see some divergence in terms of what is considered legal and what is considered illegal.

¹³ This does not contradict the point made earlier about how a soldier would be protected from legal prosecution if, on a superior’s order, he were to commit an act that amounted to torture. The assumption is that the superior would never order torture or he would face prosecution himself. Torture can never be ordered and a soldier engaging in an act that he knows to be torture, even if his superior said to, would be in violation of the law. The point is that the superior’s and the soldier’s intentions matter; if neither of them aim to torture, but the impact is essentially equivalent to torture, neither of them would have to face criminal charges.

certain that those methods were not torture. Article 15 created additional pressure to be as specific as possible in defining torture.

18 U.S.C. § 2340-2340A is the US standard as to what defines torture. However, its most important contribution to the Bush Administration as it formulated detainee policy was not its definition of torture, but rather the fact that it criminalizes torture alone, and not lesser forms of abuse. It is this distinction that many Bush Administration critics fear was used as a sort of legal loophole to authorize grave abuse and mistreatment of those in US custody. As Honigsberg argues,

The administration thus asserts that since the statute only bars torture and says nothing about cruel, inhumane, and degrading treatment, American agents – such as the CIA – are not necessarily bound by any laws other than the requirement not to torture. Since the definition of torture is malleable, CIA agents have had lots of room to mistreat a detainee. The administration argued that although it conducted harsh, or ‘enhanced,’ interrogations, these interrogations did not constitute torture. (Honigsberg 24)¹⁴

Despite the rather narrow definition of what was barred, the US was still in compliance with CAT, thus the administration was able to send a message to the world that it was adhering to international law. Making CAT (18 U.S.C. § 2340-2340A) one of the foundational documents for defining torture in the war on terror was a way for the Bush Administration to present itself as respectful of both domestic and international law, while utilizing the law’s limitations to its advantage to maximize flexibility in terms of detainee treatment.

¹⁴ Honigsberg points to an important distinction between groups such as the CIA and the military in conducting overseas detentions and interrogations. The CIA is bound by many fewer layers of restrictions than is the military (the US Army Field Manual on Interrogation and the UMCJ are just two mentioned in this chapter), thus an official government position stating that torture alone is prohibited does seem to encourage a very flexible field in which the CIA can operate. This becomes an even more problematic situation when coupled with the fact that the CIA was often working alongside the military, and confusion about what rules and protocol governed whom was one factor that contributed to abuses. Chapter IV.V elaborates further on this point.

II.VI: The Bush Administration

On August 1, 2002, OLC issued a memo, under Assistant Attorney General Jay Bybee's name (but widely believed to have been written by Deputy Assistant General of the Department of Defense John Yoo) to White House Counsel Alberto Gonzales, providing the following definition of torture:

'We conclude that for an act to constitute torture as defined in Section 2340 [18 U.S.C. § 2340-2340A, the same section of the federal code discussed in the previous section], it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as *organ failure, impairment of bodily function, or even death*. For purely mental pain or suffering to amount to torture under Section 2340, it must result in *significant psychological harm of significant duration, e.g., lasting for months or even years*. We conclude that the mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual's personality; or threatening to do any of these things to a third party [emphasis added].' (qtd. in Danner 115)

There is some overlap between this definition of torture and that enshrined in US federal code. The three sources of psychological torture, for example, are the same. Yet in contrast to all of the previous definitions of torture, the one officially sanctioned by the Bush Administration is extremely narrow. Physical torture is nothing short of "organ failure, impairment of bodily function, or...death." Such qualifications are not present in 18 U.S.C. § 2340-2340A, which specifies only to the extent of saying "severe physical...pain or suffering."

The same narrow approach is taken with psychological torture, in which the suffering must cause long-term damage. As to how to determine whether a technique could have such a result, the definition provides no guidance. The definition of psychological torture is also linked to the physical, in that psychological torture constitutes being threatened with physical torture. Such linking tends to exclude other actions, such

as excessive sleep deprivation or waterboarding that, while not causing physical pain, can certainly add up to excessive abuse and even torture.

It is clear from looking at these various definitions of torture that there is much debate as to its definition. In an effort to concretize some of this rather vague and conflicting language, the following section will look at exactly which techniques were authorized, as well as detainee testimony of what it was like to endure them.

**CHAPTER III: WHAT TECHNIQUES
WERE AUTHORIZED?**

III.I: The US Army Field Manual on Interrogation

The US Army Field Manual on Interrogation was a baseline for determining interrogation tactics to be used on those captured during the war on terror. Several of its techniques were approved without question, largely because of their long history of use and effectiveness. Those methods, (with brief descriptions) are listed below:¹⁵

1. *Direct questioning*: As the name implies, this is straightforward questioning of the subject. It is often the first technique to be utilized.
2. *Incentive/Removal of Incentive*: Either rewarding something positive or removing something negative to encourage cooperation on the detainee's part. This technique specifically states that it cannot be used to deny a detainee of their rights under the Geneva Conventions (i.e. in the case of a prisoner of war, he cannot be denied or "rewarded" medical treatment as an incentive for cooperation).
3. *Emotional Love*: Appealing to their love of their family, friends, country, etc., such as suggesting to them that they can see their family sooner should they cooperate.
4. *Emotional Hate*: Playing on a detainee's desire for revenge, an interrogator may suggest that cooperation can lead to punishment of the people that caused the subject to be detained.
5. *Emotional Fear up Harsh/Mild*: The interrogator plays upon a fear held by the subject and links cooperation with elimination or reduction of the fear. The interrogator asserts that the person's fear may be tested if he does not cooperate.
6. *Emotional Fear Down*: The opposite technique, in which the interrogator tries to reduce a subject's fear if it seems as if their fear is preventing them from cooperating.
7. *Emotional Pride and Ego-Up*: Exploits a subject's low self-esteem by suggesting that the subject must be someone highly important with valuable information that the interrogator would love to have. A boost to the subject's ego may make them want to divulge information.
8. *Emotional Pride and Ego-Down*: The interrogator attacks a subject's pride or ego. "The source, in defending his ego, reveals information to justify or rationalize his actions."
9. *Emotional Futility*: Convince the subject that resistance is futile.
10. *We Know All*: Insinuate to the subject that the interrogator already knows all of the answers and all of the subject's history, which will allow him to tell when the subject is lying. Therefore, it is to the subject's advantage to tell the truth.

¹⁵ Department of the Army Headquarters. "Pt. 3, The HUMINT Collection Process, Chapter 8, Approach Techniques and Termination Strategies." *FM 2-22.3 (FM 34-52): Human Intelligence Collector Operations*. 6 Sept. 2006. Web. 18 Nov. 2009 <<http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf>>.

11. *File and Dossier:* A variation of *We Know All*. A dossier is prepared containing real and false documents pertaining to a subject's case to make it seem as if the interrogator knows a considerable amount about a subject to scare him into revealing information.
12. *Establish Your Identity:* The interrogator argues that the subject is a notorious individual that is wanted by the highest authorities and that the subject's claims that he is someone else must therefore be lies. In an effort to defend and disassociate himself from a high-profile criminal, he reveals other information about himself.
13. *Repetition:* In one variation, an interrogator will repeat the question and the subject's answer many times over, until the subject becomes so bored or agitated that they begin to disclose more candid and fuller answers to the questions.
14. *Rapid Fire:* Questions are asked so quickly that the subject does not have time to fully respond to one question before another is asked. He is then frustrated and may begin to contradict himself. The interrogator confronts the subject on these contradictions and in an effort to clear himself, the subject may answer fully and honestly.
15. *Silence:* The interrogator "says nothing to the source, but looks him squarely in the eye, preferably with a slight smile on his face." The subject may grow uncomfortable and thus easier for the interrogator to manipulate.
16. *Change of Scenery:* This requires a change in the subject and interrogator's location to somewhere where the subject may feel more comfortable speaking. This may include remaining in the same room, but changing the conditions of the room so as to make it less intimidating.

In contrast to the procedures for the CIA interrogation program outlined in Chapter I, these military techniques blur the line between interrogation and de-briefing, as they are meant to elicit both cooperation and information from the subject. This set-up is a reflection of their historical use, which has been largely confined to the questioning of POWs in traditional war contexts. It is also the result of the overall mild nature of these techniques; no physical contact with the detainee of any sort is involved nor is there excessive indulgence in psychological manipulation.

III.II: “Enhanced Interrogation Techniques” (EITs)

“The universal rejection of torture and the President’s unequivocal directive that the United States not engage in torture warrant great care in analyzing whether particular interrogation techniques are consistent with the requirements of sections 2340-2340A, and we have attempted to employ such care throughout our analysis.

We emphasize that these are issues about which reasonable persons may disagree.”

- Steven Bradbury, May 10, 2005, 47

Despite the long history of use and success related to FM 34-52, there were many within the administration who felt that FM 34-52, because it had been around for so long and was public information, would be insufficient in dealing with key al-Qaeda operatives who were trained to resist such techniques. One such operative who was trained in resisting FM 34-52 was Abu Zubaydah, “a top aide to Osama bin Laden and the first senior terrorist operative captured following” 9/11 (Thiessen 23). With such credentials, it was crucial that the US discover all he knew, and quickly.

As a result, Assistant Attorney General Bybee issued a memo on August 1, 2002, detailing ten additional techniques that could be used by CIA personnel against high-profile Al-Qaeda operatives such as Zubaydah. It is these techniques, among others, that the term “enhanced interrogation techniques” and the CIA interrogation program refer to. The memo provides detailed descriptions of how each technique is to be implemented, with what frequency, and what precautions need to be taken in order to ensure their effective use. For the sake of brevity, summary definitions are included below:¹⁶

1. *Attention grasp*: The interrogator places his hands on the sides of the detainee’s face and pulls the detainee toward him.
2. *Walling*: Detainees are pushed against a “flexible false wall” which creates a loud sound when hit, so as to make the detainee think that what he is experiencing is far more dangerous than what is actually happening (2).

¹⁶ All definitions are paraphrased from the document itself, as reprinted on the ACLU website. Bybee, Jay S. “Memorandum for John Rizzo, Acting General Counsel for the Central Intelligence Agency: Interrogation of al Qaeda Operative.” 1 Aug. 2002. *American Civil Liberties Union*. Web. 30 Jan. 2010 <http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_08012002_bybee.pdf>.

3. *Facial hold*: The interrogator cradles the detainee's face in his hands with a firm grip so as to make the detainee's face immobile.
4. *Facial slap (insult slap)*: This is a very specific, fingers-spread slap that is not meant to cause injury, but rather shock, surprise, and humiliation on the part of the detainee.
5. *Cramped confinement*: This space is "usually dark" (2). The length of time that a detainee can remain in such quarters depends on the size of the room. For larger spaces, up to 18 hours is considered appropriate. For smaller spaces, a maximum of two hours is allowed.
6. *Wall standing*: A detainee must stand with his arms raised, fingers touching a wall, with the objective of "induc[ing] muscle fatigue" (3). No time limit is given.
7. *Stress positions*: The memo suggests two positions. The detainee sits on the floor with legs straight out in front with his arms raised above his head. The detainee may also "kneel on the floor while leaning back at a 45 degree angle" (3). No time limit is given.
8. *Sleep deprivation*: The objective is to "reduce the individual's ability to think on his feet and, through the discomfort associated with lack of sleep, to motivate him to cooperate" (3). A detainee may not be deprived of sleep for more than 11 days at a time. The memo does not specify as to how the detainee is to be kept awake.
9. *Insects placed in a confinement box*: The detainee is told that a stinging insect will be placed in the box with him. A "harmless insect such as a caterpillar" is used instead (3).
10. *Waterboarding*: "The individual is bound securely to an inclined bench...A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth" (3-4). Note that waterboarding is still a part of Navy training today, meaning that members of the Navy are waterboarded.¹⁷

The techniques may be used for up to thirty days, with the hope that by the end of that thirty day period, the detainee will be willing to cooperate and thus there will be no further need for EITs. It is this creation of a second tier of techniques that produces a distinction between interrogation and de-briefing, a distinction that is not part of the military tradition of FM 34-52. The techniques utilized during the de-briefing process were largely limited to those of FM 34-52.

These techniques were taken from a military program known as SERE (Survival, Evasion, Resistance and Escape). SERE is torture resistance training, designed by the

¹⁷ For a defense of waterboarding's usefulness, see Thiessen 102-03.

Pentagon for Navy SEALs at the end of the Korean War to prepare them for abuse they might endure in the event of their capture by the Koreans. In fact, all ten techniques except for the one involving the insect have been part of and continue to be part of SERE training.

SERE tactics were authorized for Guantanamo and “black site” detainees because of their status as high-level al-Qaeda operatives. The link between SERE and EITs is reinforced by the requirement detailed in the memo that a “medical expert with SERE experience” be present for some of the techniques (Bybee to John Rizzo, 1 Aug. 2002, 4).

SERE included a version of waterboarding called “drown-proofing,” in which Navy SEALs “are placed in deep water, and their hands and feet are tied while they must accomplish certain tasks” (Honigsberg 98). The use of SERE during the war on terror is further confirmed by the fact that soldiers at Guantanamo also used the term “drown-proofing.” It is clear from the memo’s language, however, that the form of waterboarding approved for use by the CIA is different – and arguably milder – than the one used in SERE training.

It is, however, the great variety within the umbrella category of “waterboarding” that has elicited so much debate about its use, and helped prompt the publication of the US’ version of it. Waterboarding has been used for centuries and by many dictatorships, from the time of the Spanish Inquisition to the Japanese during the 1940s. Their horrible versions of waterboarding, as well as those experienced by US service members such as Senator John McCain, have created an image of waterboarding as the ultimate torture. What the US has authorized is considerably less harsh, but the amount of historical

examples of the use of waterboarding has generated considerable misconception and concern on the part of the public and among government officials.¹⁸

Furthermore, the fact that SERE was originally created as a torture resistance program unsurprisingly has evoked worry. What was once training against torture seemed to have morphed into training on how to torture. In the words of Malcolm Nance, a highly respected former US Navy security official who served as SERE chief of training, “We have recreated our enemies methodologies in Guantanamo.” For him, the use of SERE on the enemy jeopardizes the safety of US soldiers because by condoning and employing such tactics “we have authorized them for the world now” (*Torturing Democracy*).¹⁹ Such sentiment has been echoed by other officials, such as Senator John McCain, who fear that the US’ employing of such tactics – regardless of what version – is simply encouraging the enemy to do the same.

This is a tricky conclusion, as the obvious rebuttal to such an argument is that terrorists will mistreat their detainees anyway, regardless of what the US does. The filmed beheading of journalist Daniel Pearl is merely one example of their lack of scruples. By definition, terrorists do not comply with standards regarding warfare or detainee treatment and thus it will not be the US’ actions that will push them over the edge, so to speak, into using unconventional tactics. However, by employing SERE, the US is still sending out a message to the world about how changing circumstances are allowing for a

¹⁸ Even Thiessen supports the notion that some forms of waterboarding can be torture, but he vehemently defends the US’ version of it. He provides an analysis of various historical examples of waterboarding, particularly those that Bush Administration critics have used as parallels and comparisons to the US’ version of waterboarding. See Thiessen 127-52.

¹⁹ Mr. Nance, furthermore, has publicly declared that he views waterboarding as torture, regardless of what version. For more, see Nance, Malcolm. “I Know Waterboarding is Torture – Because I did it Myself.” *NY Daily News*. 31 Oct. 2007. Web. 12 Feb. 2010 <http://www.nydailynews.com/opinions/2007/10/31/2007-10-31_i_know_waterboarding_is_torture__because.html>.

changing of the rules, which undoubtedly provides fodder for others to make changes to their policies as well.

It is certainly confusing as to why the US would employ what it once referred to as torture. There are many factors at play here. One is the difference between what may have been legally and colloquially defined as torture in the 1950s when SERE was created and what became the standard for torture under US law decades later, with the 1994 ratification of CAT. Furthermore, it would be preposterous for the US to torture its own soldiers, so if it uses the techniques on its own people, then there must be a fundamental assumption that, while harsh and at times degrading and humiliating, the US version of these techniques do not constitute torture. This argument reinforces the notion that although the US is now employing techniques that were previously considered unlawful, the versions of those techniques that the US is using brings them within the legal fold.²⁰

The controversy surrounding rumors regarding exactly how the Bush Administration was tackling terrorism prompted President Bush to deliver a speech (September 6, 2006), which simultaneously acknowledged the CIA program for the first time and defended it, stating:

We knew that Zubaydah had more information that could save innocent lives, but he stopped talking. As his questioning proceeded, it became clear that he had received training on how to resist interrogation. And so the CIA used an alternative set of procedures. These procedures were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations. The Department of Justice reviewed the authorized methods extensively and determined them to be lawful. I cannot describe the specific methods used -- I think you understand why -- if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks on our country. But I can say the procedures were tough, and they were safe, and lawful, and necessary. (qtd. in Thiessen 395-96)

²⁰ A more minor debate concerning these techniques is where waterboarding occurred. There is ample proof that the US did waterboard certain detainees, but there is disagreement about whether or not anyone at Guantanamo Bay was waterboarded, or if waterboarding was limited solely to "black sites." Thiessen argues that no one was ever waterboarded at Guantanamo, period (see Thiessen 298). Others, like Honigsberg, provide soldier testimony to its occurrence there (see Honigsberg 99).

President Bush's defense of the program evokes the sentiment held by many within his administration that going beyond FM 34-52 was vital to procuring the type of information the US needed to prevent future attacks. The necessity to go beyond those standard techniques, however, also increased the pressure to ensure that they stayed within legal limits (i.e. did not constitute torture and thus did not constitute federal crimes).

Part of the process of creating legal versions of those techniques was ensuring, as the memo points out, that "no prolonged mental harm would result from the use of these proposed procedures," and would thus make them compliant with both the Bush Administration's definition of torture and 18 U.S.C. § 2340-2340A (Bybee to John Rizzo, 1 Aug. 2002, 4). The document analyzes each of the technique's impact on the detainee's physical and mental well-being.

A few months later, resistance from another important detainee, Mohammed al-Kahtani, prompted further requests for a broader range of techniques. The resulting techniques were divided into three categories, after initial remarks concerning the use of incentives such as cookies and cigarettes to elicit cooperation, in order of increasing severity for use on those at Guantanamo.²¹

- *Category I*
 - *Yelling*
 - *Techniques of deception*
 - *Multiple interrogator techniques.* One example is known as *Mutt and Jeff*. The objective is to make the subject identify with one of the interrogators so that he will trust him and cooperate. "This technique involves a psychological ploy that takes advantage of the natural uncertainty and guilt that a source [detainee] has as a result of being detained and questioned." One interrogator acts kindly towards the detainee, while

²¹ Paraphrased from the original document, Phifer, Lieutenant Colonel Jerald. "Memorandum for Commander, Joint Task Force 170, Subject: Request for Approval of Counter-Resistance Strategies." 11 Oct. 2002. *George Washington University*. Web. 21 Feb. 2010 <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>>.

another is to act in a cold and harsh manner, though never in a way as to “threaten or coerce” the detainee. The detainee will tend to gravitate towards the interrogator who is kinder and may divulge information in the process. This technique is taken from the US Army Field Manual on Interrogation.

- *Interrogator Identity.* This is the second of the two US Army Field Manual techniques that are considered appropriate under more restrictive circumstances. It is known as *False Flag*, which entails deceiving the detainee by having the interrogator present a false identity.²²

- *Category II*
 - Stress positions (such as standing) for a maximum of four hours
 - Falsified documents or reports
 - Isolation for up to thirty days (renewable with approval of military commanders)
 - Interrogation in an environment other than a standard interrogation booth
 - Deprivation of light and auditory stimuli (accomplished by the use of hoods, goggles, and noise-canceling headphones)
 - The use of a hood during transportation and questioning
 - Removal of all comfort items (including religious items)
 - 20-hour interrogations
 - Switching of detainee’s hot meal to “meals ready to eat” (MREs, or American military field rations)
 - Removal of clothing
 - Forced grooming (i.e. shaving of facial hair)
 - Exploitation of fear of phobias (such as dogs) to induce stress

- *Category III:* These techniques are to be used only by request and are to be used on less than three percent of detainees, meaning those that are the most non-cooperative.
 - Use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family
 - Exposure to cold weather or water (with appropriate medical monitoring)
 - Waterboarding
 - “Mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing”

On December 2, 2002, Secretary of Defense Donald Rumsfeld approved all Category I and II techniques. He approved only one Category III technique, that of “mild, non-injurious physical contact.” It was in reference to this memo that Rumsfeld hand-wrote his now infamous statement: “However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?” (Haynes, 27 Nov. 2002, 1). Despite Rumsfeld’s rejection of certain Category III techniques, this statement has been used by Bush Administration

²² Department of the Army Headquarters. “Pt. 3, The HUMINT Collection Process, Chapter 8, Approach Techniques and Termination Strategies.” *FM 2-22.3 (FM 34-52): Human Intelligence Collector Operations*. 6 Sept. 2006. Web. 18 Nov. 2009 <<http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf>>.

critics as proof of the callous nature of the administration in evaluating what is humane treatment and what is not. Of course politicians like Rumsfeld (and many people in other professions) are working on their feet for far longer than 4 hours at a time. Yet this is certainly very different from the circumstances of a detainee who, for one, is not doing so by choice and two, is not allowed to move around. His comment suggests that standing is viewed as a light technique and serves as an unofficial endorsement to make detainees stand longer than four hours, thus encouraging interpretation and bending of the rules.

This techniques tier was short-lived because of controversy that arose concerning al-Kahtani's treatment. January 15, 2003, Rumsfeld rescinded his approval of Category II techniques and the one Category III technique on mild physical contact. A new list was presented to him on April 4, 2003. Ultimately, 24 of the 35 recommended techniques were approved for use solely on those held at Guantanamo Bay. Those techniques were (Rumsfeld, 16 April 2003, 2-3):

- *FM 34-52* [including *Mutt and Jeff*, *False Flag*, and allowing the *change of scenery* technique to include a location that is less comfortable, but nevertheless does not “constitute a substantial change in environmental quality” (2)]
- *Dietary manipulation*: “changing the diet of the detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water, e.g. hot rations to MREs” (2)
- *Environmental manipulation*: suggested methods are altering the temperature or introducing an “unpleasant smell” (3).
- *Sleep adjustment*: It is specifically distinguished from sleep deprivation, to mean that the detainee will not be deprived of sleep but will rather sleep at abnormal times, such as having to sleep during the day and remain awake at night.
- *Isolation*: No more than 30 days.

On October 12, 2003, specific guidelines were issued for Combined Joint Task Force Seven, which was in charge of all military forces in Iraq. The memo begins by stating that the detainees in question are protected by “Articles 5 and 78 of the Geneva Convention Relative to the Protection of Civilian Persons [Fourth Geneva]” (Sanchez, 12 Oct. 2003, 1). FM 34-52 were the only techniques approved, to include *Mutt and Jeff* but

not including *False Flag*. The contrast between what was approved for Guantanamo and the CIA program and what was approved for Iraq differed in many ways, while sharing the same baseline. As discussed previously, the reason for this divide was 1) the threat level of the detainees at each location and 2) Geneva Convention protections applied in Iraq.

On May 10, 2005, another memorandum issued by the head of OLC, Steven Bradbury, detailed how EITs could be used in combination for terrorists and gave more specifics as to those techniques. It was issued in order to clarify that the CIA program was in compliance with 18 U.S.C. §§ 2340-2340A. As an initial safeguard, the memo requires that

[P]rior to interrogation, each detainee is evaluated by medical and psychological professionals from the CIA's Office of Medical Services ("OMS") to ensure that he is not likely to suffer any severe physical or mental pain or suffering as a result on interrogation. (4)

The idea is, if the detainee will not suffer in said ways, then he will not have been tortured and US personnel will have stayed within the law. The approved techniques are listed below. Several of them are consistent with techniques already described above, thus they will not be elaborated upon here.

1. *Dietary Manipulation*: It is thought that, when used in combination with other techniques, it is rendered more effective in securing the detainee's cooperation. Safeguards include weekly weigh-ins and cessation of the use of the technique if the detainee loses more than ten percent of his body weight.
2. *Nudity*: It is meant to cause "psychological discomfort...clothes can be provided as an instant reward for cooperation...During and between interrogation sessions, a detainee may be kept nude...No sexual abuse or threats of sexual abuse are permitted...the detainee is not intentionally exposed to other detainees or unduly exposed to the detention facility staff...interrogators can exploit the detainee's fear of being seen naked...female officers involved in the interrogation process may see the detainees naked" (9-10).
3. *Attention grasp*
4. *Walling*: It is suggested that this be used up to 30 times in one interrogation session. The objective is not to cause injury, but rather to "wear down the detainee and to shock and

surprise the detainee and alter his expectations about the treatment he will receive...[i.e.] to dispel a detainee's expectations that interrogators will not use increasing levels of force, and to wear down his resistance" (10).

5. *Facial hold*

6. *Facial slap or insult slap*

7. *Abdominal slap*: The interrogator slaps the detainee in the stomach with the back of his open hand. It is "used to condition a detainee to pay attention to the interrogator's questions and to dislodge expectations that the detainee will not be touched" (11).

8. *Cramped confinement*

9. *Wall standing*

10. *Stress positions*: In addition to the two suggestions made in the August 1, 2002 Bybee memo, a third stress position is included here. The detainee may be forced to lean "against a wall generally about three feet away from the detainee's feet, with only the detainee's head touching the wall, while his wrists are handcuffed in front of him or behind his back, and while an interrogator stands next to him to prevent injury if he loses his balance" (11).

11. *Water dousing*: "Cold water is poured on the detainee either from a container or from a hose without a nozzle" (11). Several safeguards concerning water temperature, ambient temperature, and how long the detainee is allowed to remain wet are in effect to prevent hypothermia. The memo discusses the version of water dousing used in SERE training, describing it as far more "extreme" than what is approved here. A lighter version of water dousing called "flicking" is also permitted. The interrogator wets his fingers and flicks water at the detainee. It is meant to "create a distracting effect, to awaken, to startle, to irritate, to instill humiliation, or to cause temporary insult" (12).

12. *Sleep deprivation*: Unlike the August 1, 2002 Bybee memo, this memo specifies the methods used to keep a detainee awake. The first method is shackling. "The detainee is standing and is handcuffed, and the handcuffs are attached by a length of chain to the ceiling. The detainee's hands are shackled in front of his body...The detainee's feet are shackled to a bolt in the floor" (13). The detainee's hands may be raised above his head but for no more than two hours at a time. It is viewed as a "passive means" for keeping the detainee awake because the shackles do all of the work, in the sense that if a detainee starts to fall asleep, he will start to lose his balance and the shackles will bring him back to the same standing position. This "passive" method "avoids the need for using means that would require interaction with the detainee and might pose a danger of physical harm" (13).

Another means of keeping a detainee awake is having him sit on and be shackled to a stool. "The stool supports the detainee's weight, but is too small to permit the subject to balance himself sufficiently to be able to go to sleep" (13).

To be used less frequently, and only in the case that the detainee must recover from edema (swelling) without interrupting the sleep deprivation technique, is shackling the detainee while he is in a horizontal position. He is placed on top of a thick towel or blanket. His hands are "manacled together and the arms placed in an outstretched position – either extended beyond the head or extended to either side of the body – and anchored to a far point on the floor in such a manner that the arms cannot be bent or used for balance or comfort. At the same time, the ankles are shackled together and the legs extended in a straight line with the body and also

anchored to a far point on the floor in such a manner that the legs cannot be bent or used for balance or comfort” (14). The objective is to return the detainee to the standing shackled position as soon as signs of edema have disappeared.

In discussing the simultaneous use of nudity and sleep deprivation, the memo says that the detainee will wear an adult diaper, which is “not used for the purpose of humiliating the detainee, and it is not considered to be an interrogation technique” (14).

The memo is also stricter in regards to how many hours sleep deprivation may be employed.

Recall that the August 1, 2002 memo authorized up to 11 consecutive days, constituting a total of 264 hours. The May 10, 2005 memo limits sleep deprivation to 180 hours (7.5 days), which must be followed with a minimum of eight hours of uninterrupted sleep.

13. *Waterboarding*: The distance from which the water is poured changes. In the August 1, 2002 memo, the height was 12 to 24 inches. For this memo, the height is 6 to 18 inches. This memo is also extremely detailed as to how often and to whom it can be applied. A detainee may be waterboarded only if “(1) the CIA has credible intelligence that a terrorist attack is imminent; (2) there are ‘substantial and credible indicators the subject has actionable intelligence that can prevent, disrupt or delay this attack’; and (3) other interrogation methods have failed or are unlikely to yield actionable intelligence in time to prevent the attack” (15). Waterboarding can only be used during one 30-day period and only on five of those days. In any 24-hour period, a detainee may not undergo a waterboarding “session” (being strapped to the table) more than twice and no session may exceed two hours. Within one session, “the number of individual applications of water lasting 10 seconds or longer may not exceed six...the total cumulative time of all applications of whatever length in a 24-hour period may not exceed 12 minutes” (15).

In a footnote, the memorandum explains that the previously approved method of placing a detainee in a “confinement box” with a harmless insect was never used but, nevertheless, has been removed from the official list of interrogation techniques (11). This list of techniques was issued after news of Abu Ghraib was made public and its influence can be seen in the restrictions placed on nudity, for example, but techniques such as shackling and stress positions were still allowed in certain circumstances.

Of extreme importance is the fact that the definition of torture against which the memorandum judges these techniques is not that issued by the Bush Administration, but rather that of CAT as incorporated into 18 U.S.C. §§ 2340-2340A. Perhaps it is a recognition of the flawed nature of the Bush Administration’s overly narrow outlook on torture, yet it still maintains a great deal of flexibility in terms of interrogation techniques.

After establishing the progression of EITs, it is worth keeping in mind that the CIA only has detained about one hundred persons and it is from those numbers that EITs could be implemented. Furthermore,

Two thirds of those brought into the CIA program did not require the use of any enhanced interrogation techniques whatsoever. Just the experience of being brought into CIA custody – the ‘capture shock,’ arrival at a sterile location, the isolation, the fact that they did not know where they were, and that no one else knew they were there – was enough to convince most of them to cooperate. (Thiessen 45)

Thiessen argues that EITs were used on a very small number of individuals and that EITs, regardless of on whom they were used, were legal. There are three potential problems with his analysis that the next section will seek to address. First, the CIA program encompasses, as Thiessen acknowledges, only a very small sampling of those taken into US custody. Thus discussion of the CIA program is not representative of detainee treatment as a whole during the Bush Administration years. Furthermore, evidence shows that it was more than just this small group that was subjected to EITs. Third, EITs work under a philosophy of fear-and-domination, whereby the interrogator makes clear to the detainee who is in charge and by inducing a sense of fear and helplessness, elicits his cooperation. This philosophy is problematic for the question of torture.

III.III: Reports and Testimony – A Case Study Comparison



As pertains the categories for Guantanamo detainees mentioned above, on June 22, 2004, the Bush Administration released a one-page summary detailing which of the techniques had actually been put into effect and with what variations, between December 2002 and January 15, 2003 (reprinted in *The Torture Papers* 1239):

- *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 MRE instead of hot rations
 - Forced grooming (to include shaving facial hair and head – also served hygienic purposes)
 - Use of false documents or reports

One of the prisoners at Guantanamo who was there during the time period in which the above techniques were employed was Mohammed al-Kahtani. To elaborate

²³ <http://www.spencersundell.com/blog/wp-content/uploads/2009/01/guantanamo_bound_prisoners_for_torture.jpg>.

some on exactly what the above techniques entailed, this section will present a case study comparison between the treatment al-Kahtani received and the abuses at Abu Ghraib.

Al-Kahtani is known as the “20th hijacker,” or the terrorist who attempted to participate in the 9/11 attacks but was denied entry into the US. Thiessen details the interrogation methods used on him:

He was forced to stand naked for five minutes with females present. He was forced to wear a woman’s bra, a thong was placed on his head, and he was shown pictures of women in bikinis. Once, a female interrogator straddled him without putting any weight on him and rubbed his shoulders. He was also forced to dance with a male interrogator, told that he had homosexual tendencies, and that his mother and sister were whores. In addition, an interrogator put a leash on him, showed him pictures of al Qaeda terrorists, and ordered Kahtani to growl at the terrorists. (Thiessen 303)

Thiessen justifies the use of these techniques by arguing that they are actually derived from FM 34-52 – the baseline for all interrogations – and not from any additional, more controversial EITs. Al-Kahtani was an “extreme misogynist” and in order to exploit such a disposition to elicit his cooperation, interrogators used the “Emotional Pride and Ego Down” and “Emotional Futility” techniques (techniques eight and nine as listed in chapter III.I). He quotes the 1992 US Army Field Manual on Interrogation, which describes “Emotional Pride and Ego Down” as involving “‘attacking the source’s sense of personal worth.’” As for “Emotional Futility,” the interrogator “‘convince the source that resistance to questioning is futile’ by exploiting ‘the source’s psychological and moral weaknesses, as well as weaknesses inherent in his society’” (303). Thus the sexual humiliation was a legitimate means of breaking down al-Kahtani’s resistance by hurting his pride and making clear to him that the best avenue would be cooperation.

Kahtani was also subjected to the following:

...Kahtani was isolated from the general population, and underwent 20-hour interrogations (with regular ten minute exercise and restroom breaks) and four hours’ sleep in between sessions. He was subjected to yelling and loud music. On one occasion, a military working dog was brought in to growl at him. When he refused to drink water to stay hydrated, the water was poured over his

head in a policy of ‘drink it or wear it’ (this is the closest Kahtani ever came to being waterboarded). He was forced to look at videos of the destruction of 9/11, and pictures of the victims were plastered on the walls of his interrogation room. He was made to look at photos of children who died in the attacks, and at one point the picture of one 3-year old victim was taped over his heart. He was forced to stand during the American national anthem and write letters of remorse to the families of 9/11 victims (the letters were never mailed). (Thiessen 303-04)

Thiessen cites an FBI report issued by Lieutenant General Randall Schmidt and Brigadier General John Furlow²⁴ stating that all of these techniques were legally sound. Thiessen chalks up the techniques as to nothing more than fraternity-style hazing which, although humiliating and even degrading, are certainly not torture. Bush Administration supporters such as Thiessen vehemently support the argument that “What happened in those photos [of Abu Ghraib] had nothing to do with CIA interrogations, military interrogations, or interrogations of any sort” (Thiessen 39). What happened was a case of “Military Police gone wild.”

Next is a listing of techniques employed at Abu Ghraib (many of which are depicted in the photographs), using the exact wording of the Taguba Report (as reprinted in Danner 292-93):

- Punching, slapping, and kicking detainees; jumping on their naked feet
- Videotaping and photographing naked male and female detainees
- Forcibly arranging detainees in various sexual positions for photographing
- Forcing detainees to remove their clothing and keeping them naked for several days at a time
- Forcing naked male detainees to wear women’s underwear
- Forcing groups of male detainees to masturbate themselves while being photographed and videotaped
- Arranging naked male detainees in a pile and then jumping on them
- Positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture
- Writing “I am a Rapist” on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and then photographing him naked;
- Placing a dog chain or strap around a naked detainee’s neck and having a female Soldier [Private First Class Lynndie England] pose for a picture [while holding onto the dog chain]

²⁴ This report, entitled “Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility,” can be accessed at <http://humanrights.ucdavis.edu/resources/library/documents-and-reports/schmidt_furlow_report.pdf>.

- A male MP guard having sex with a female detainee
- Using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee
- Taking photographs of dead Iraqi detainees
- 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 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 intimate detainees with threats of attack, and in one instance actually biting a detainee

It is blatant hyperbole to say that the only difference between what happened to al-Kahtani at Guantanamo and to those at Abu Ghraib is that the latter were photographed. However, it is equally erroneous to deny that there is no connection whatsoever between the techniques, particularly those surrounding sexual humiliation, used at Guantanamo and those that were used at Abu Ghraib. Recall that it was concerns about al-Kahtani's treatment that prompted a revision of EITs for Guantanamo; there was enough consensus of concern to elicit an investigation into the approved techniques.

Furthermore, both sets of techniques share an underlying philosophy of what Matthew Alexander terms "fear-and-control"⁽⁵⁾. Manipulation of the detainee's environment, sexual humiliation, and physical contact all work to induce a sense of fear and helplessness in the detainee. These techniques make clear to the detainee that the interrogator is in charge and by exploiting the detainee's anxieties and weaknesses, the detainee will realize that it is best to comply and not challenge his superior.

Even without making any moral judgments about the techniques themselves and without addressing the question of whether or not these techniques were torture, it is undeniable that there exists some overlap between these sets of techniques. Although there were certainly many instances of blatant violations of policy (such as the writing on

detainees' bodies or pouring chemical lights onto detainees), many other techniques were exaggerated or extreme versions of what was approved for Guantanamo detainees.

Take the technique of allowing the use of military dogs to exploit phobias. Under formal policy guidelines, the dogs were to be muzzled at all times and never to make contact with the prisoners. In a memorandum to Combined Joint Task Force Seven (stationed in Baghdad, Iraq), for example, Lieutenant General Ricardo S. Sanchez, Commander of all US forces in Iraq, specifies that "Should military working dogs be present during interrogations, they will be muzzled and under control of a handler at all times to ensure safety" (Sanchez, 12 Oct. 2003, 5). Obviously the use of dogs at Abu Ghraib went beyond those limitations, but the idea to use dogs did not come from solely the imagination of the soldiers working there.

The same applies to removal of clothing; it seems as if one of the original restrictions on this technique was preventing a naked detainee from being seen by any other detainees, although the interrogators could see him. Again, the soldiers at Abu Ghraib took the concept of nudity and ran with it.

Consider also the Category III technique approved for mild physical contact, as well as the August 1, 2002 Bybee memo approving the facial hold and facial slap. These physical EITs are meant to be mild and to startle rather than to harm the detainee. Yet they signaled a profound change; they offered a breaking of the taboo against touching detainees. Recall that FM 34-52 involves zero physical contact with the detainee. Now interrogators were allowed to breach that barrier. The beatings conducted by Abu Ghraib soldiers went far beyond what was legally proscribed, but it is certainly plausible that they had their basis in the idea that interrogators were now allowed to have physical contact with detainees.

There is, of course, not a perfect time line at hand. The broadest range of techniques approved for use at Guantanamo was from December 2, 2002 through January 15, 2003. The Abu Ghraib abuses occurred between October and December of 2003, when the shorter list of approved techniques was in effect. However, this paper still wishes to insist on a connection by analyzing the role of one particular individual, Major General Geoffrey Miller.

Major General Geoffrey Miller was in charge of Guantanamo from November 2002 through March 2004, thus he was present for part of the time that al-Kahtani was there.²⁵ From August 31, 2003 through September 9, 2003, shortly before the documented abuses at Abu Ghraib, MG Miller was sent to Iraq in order to replicate what was considered to be his success at Guantanamo. The Taguba Report admits to MG Miller's influence in the techniques used at Abu Ghraib:

'From 31 August to 9 September 2003, MG Miller led a team of personnel experienced in strategic interrogation to HQ [Headquarters], CJTF-7 [Combined Joint Task Force Seven] and the Iraqi Survey Group (ISG) to review current Iraqi Theater ability to *rapidly exploit internees for actionable intelligence*. MG Miller's team focused on three areas: intelligence integration, synchronization, and fusion; interrogation operations; and detention operations. *MG Miller's team used JTF-GTMO procedures and interrogation authorities as baselines* [emphasis added].' (qtd. in Danner 283)

It may seem unremarkable that MG Miller would use the strategies and interrogation techniques of Guantanamo Bay to help the war effort in Iraq. After all, he was seen as an expert in extracting information from detainees and the pressure for "actionable intelligence" was increasingly high, particularly because events in Iraq were not turning out quite as the Bush Administration had expected and the Iraqi insurgency was gaining in strength. To counteract the growing conflict and civil disorder in Iraq, the

²⁵ Al-Kahtani remains at Guantanamo Bay, thus MG Miller was not present for the entirety of al-Kahtani's detention.

US needed better intelligence and thus it turned to military professionals like MG Miller for assistance.

However, it was publicly voiced that the detainees at Guantanamo were “the worst of the worst.”²⁶ In his September 2006 speech justifying the CIA program and military commissions, President Bush argued,

It's important for Americans and others across the world to understand the kind of people held at Guantanamo. These aren't common criminals, or bystanders accidentally swept up on the battlefield – we have in place a rigorous process to ensure those held at Guantanamo Bay belong at Guantanamo. (qtd. in Thiessen 393-94)²⁷

EITs were approved for use at CIA “black sites” and Guantanamo Bay, which was run by both military and CIA personnel, because they held the most valuable and most dangerous detainees, such as al-Kahtani. A prison like Abu Ghraib would not have been an arena for EIT use for a variety of reasons, including its insecure location but above all because the

²⁶ Stating that the highest-profile terrorists would be placed at Guantanamo implies that there is some sort of vetting process that occurs to determine who is sent there. There is substantial evidence, however, that many who ended up there were not dangerous at all, but instead were given to the US in exchange for bounties paid to people who turned in Al-Qaeda or Taliban members. Of the first three hundred people to arrive at Guantanamo, for example, only five percent had been captured by US forces; the rest were turned over to the US by Pakistan or the Northern Alliance. The US’ ignorance of the people, culture, language, and religious sects allowed this system to be rampantly abused, whereby Afghans and Pakistanis would turn in the neighbor they did not like, the person they owed money to, a member of an enemy clan, etc. in exchange for \$5,000 to \$20,000 or more US dollars, which could support their family and their community for many years, if not for a lifetime. (Honigsberg 77-8)

The Fay-Jones Report, an inquiry into Abu Ghraib, confirms the insufficient vetting process that happened for many detainees in Iraq, particularly for those at Abu Ghraib: Soldiers “failed to perform the proper procedures at the point-of-capture and beyond with respect to handling captured enemy prisoners of war and detainees (screening, tactical interrogation, capture cards, sworn statements, transportation, etc.). Failure of capturing units to follow these procedures contributed to facility overcrowding, an increased drain on scarce interrogator and linguist resources to sort out the valuable detainees from innocents who should have been released soon after capture, and ultimately, to less actionable intelligence” (qtd. in Danner 32).

²⁷ There is no surprise that Thiessen, author of the speech, would also defend this position in his book *Courting Disaster*. “[T]he vast majority held at the facility were not common criminals or bystanders who were accidentally arrested. They were dangerous terrorists who had made it their life’s mission to kill Americans or America’s allies – and, if set free, would immediately return to fulfilling that mission (as some did)” (Thiessen 51). The qualifications, so to speak, of those who ended up at Guantanamo is one of the highly contested matters circumscribing the debate about detainee treatment.

detainees placed there were not high-level. EITs were originally intentioned for high profile detainees alone.

Furthermore, detainees at Guantanamo, in Afghanistan, and in CIA “black sites” were not granted Geneva Convention protections, as discussed earlier. In contrast, those in Iraq were. The only group in Iraq that was excluded from the Fourth Geneva Convention protections was “al Qaeda terrorists from foreign countries who entered Iraq after the [US] occupation began” (Goldsmith 40). The legal protections for these various groups were distinct.

What seems to have happened over the course of time, however, was that techniques approved for use on high-level detainees alone who received no Geneva Convention protections became acceptable for use on any prisoner, regardless if they were violent or not and regardless if there was substantial evidence as to their affiliation with either al-Qaeda or the Taliban. Thus General Miller’s appearance in Iraq, with the instructions to follow Guantanamo “procedures and interrogation authorities,” meant that interrogation techniques initially outlined for use on solely a few, key detainees – who were not protected by international law – were transported and adopted for detainees who were protected. EITs became standard, if not for all detainees, certainly for more than for whom they were originally limited to. The Fay-Jones Report, issued in response to the Abu Ghraib scandal, concurs:

‘Policies and practices developed and approved for use on Al Qaeda and Taliban detainees (in Afghanistan and Guantanamo) who were not afforded the protection of the Geneva Conventions, now applied to detainees who did fall under the Geneva Conventions’ protections...[these techniques included] removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation [emphasis added].’ (qtd. in Danner 27-8)

Recall the US Constitution’s Eighth Amendment and its principle concerning just punishment. The punishment should fit the crime; unfortunately, in many cases of the war

on terror, the punishment (in the form of interrogation techniques) was far more uniform than the types of detainees within US custody. Insufficient categorization of detainees led to the application of harsh techniques upon those that did not merit them.

The reader should note, too, that there is a certain level of confusion present as well about what was allowed and what was not. MG Miller was present for the end of August and the beginning of September of 2003. The next month, in October, Lieutenant General Ricardo Sanchez issued guidelines on interrogation to be applied to all forces in Iraq. There are competing theories at play and quick changes between who is in charge.

There is a link between the narrowly defined techniques for a very narrow category of detainees and their application and re-invention on a very large category of detainees. Some of the abuses committed on detainees clearly went beyond what was officially sanctioned, but many of the abuses were variations of approved techniques. Efforts were made, based on the success of EITs on certain detainees, to expand their application to others. This case study comparison is not meant to rest the blame of Abu Ghraib solely on the shoulders of Bush Administration officials nor does it seek to explain all of the myriad factors that contributed to producing the Abu Ghraib nightmare, but it is meant to encourage the reader to ponder more on the possibility of a connection between what was explicitly approved and what abuses did occur.

Thiessen argues that the “photos did enormous damage” (39). His concern echoes that of President Bush’s sentiment following the release of his photo op with the “Mission Accomplished” banner in the background, proclaiming what hindsight shows to be a far too premature victory in Iraq. President Bush was concerned that the photo was sending the wrong message to the American people. However, both cases fail to address the more fundamental point. Yes, the photos did enormous damage. The reason they did enormous

damage, however, was not the photographs themselves but the fact that their contents provided undeniable proof of detainee mistreatment at the hands of US personnel. The question that needs to be addressed is why what was depicted in the photos happened at all, and not why the photos exist. The following chapter seeks to elaborate further on both the rationale for the Bush Administration to approve the interrogation techniques it did and why abuses did occur, keeping always in mind the possibility of a connection between the two.

**CHAPTER IV: WHAT FACTORS WENT INTO
DETERMINING TECHNIQUES AND WHAT INFLUENCE
DID THEY HAVE ON ABUSES THAT OCCURRED?**

IV.I: Fear of Legal Prosecution

Although the sections to this chapter are meant to be presented in no particular order and thus do not constitute a ranking system of most to least important influencing factors, the decision to place “fear of prosecution” as the opening section was deliberate. Fear, unfortunately, is a large theme within the greater context of the war on terror. As will be explored in this section, fear of terrorists, fear of future attacks, fear of being blamed for attacks, fear of damage to one’s reputation, fear of going too far, fear of not going far enough, fear of prosecution, etc. all combined to create a very tense and scared administration that felt it had to stretch and blur the law as far as it could possibly go so as to accomplish its obligation to keep America safe.

On the one hand, the Bush Administration was terrified of the possibility of another terrorist attack.²⁸ The administration’s fear stemmed, of course, from a concern for the American people but also because it knew that it alone would be blamed should another attack occur. The conclusions of the 9/11 Commission made clear that the Bush Administration must do everything within its power to prevent another attack.²⁹

The consistent refrain from the Commission, Congress, and pundits of all stripes was that the government must be more forward-leaning against the terrorist threat: more imaginative, more aggressive, less risk-averse. (Goldsmith 74)

²⁸ Beyond the frightening nature of 9/11, the President and select other officials also receive a daily “threat matrix,” detailing all threats to the US. Being consistently bombarded with such information inevitably influences a person’s judgment by inducing a sense of terror, with the foregone conclusion that all measures must be taken to prevent any one of these threats from materializing, no matter how weak or tangential the evidence is. Jim Baker, former head of the Office of Intelligence Policy and Review, described the daily reading of the threat matrix as “like being stuck in a room listening to loud Led Zeppelin music’...After a while, you begin to ‘suffer from sensory overload’ and become ‘paranoid’ about the threat” (Goldsmith 72). The reader will certainly note the profound irony of Mr. Baker’s comment, for it describes perfectly one of the commonly used interrogation and detention techniques as discussed in chapter III.III.

²⁹ This conclusion had been made before in US history. President Roosevelt, for example, after Pearl Harbor, knew that the responsibility to prevent another Japanese attack rested on his shoulders. His determination to do so resulted in many controversial policies, above all the internment camps for Japanese-Americans.

It became a popular refrain that the United States government had failed to prevent the attack and the 9/11 Commission brought to light many instances in which the government had insufficiently followed up on leads that taken together, created the circumstances that allowed 9/11 to occur. The seemingly apocalyptic nature of the event injected a sense of terror into daily discourse, which, with the US being a democracy, naturally morphed into disillusionment with and protest against the federal government and vehement calls for policy changes to make sure that there would never again be a Ground Zero.

At the same time that pressure was at its peak to make changes and make the US less permeable to the terrorist threat, the US knew very little about al Qaeda. Intelligence wise, the US was at a serious disadvantage. Furthermore, as discussed in Chapter I, this was a highly sophisticated and scattered enemy as well, which utilized all means of modern technology to avert detection and be able to target civilian populations (i.e. blowing up commercial planes versus ambushing a military fort). As Goldsmith argues,

With the “chronic obscurity” that comes from facing a scattered enemy that employs all means of modern technology and does not engage in the normal rules of warfare, there developed a sense that the President would have to maintain a large degree of flexibility to effectively destroy the ever-changing target. (Goldsmith 73)

At the same time, Bush Administration officials feared that a subsequent administration, perhaps harboring differing views on how to conduct the war on terror and benefitting from hindsight, might be tempted to interpret that vital flexibility as war crimes under the US War Crimes Act (1996), the Torture Victim Prevention Act (1991), and other post-Vietnam legislation that had been implemented by Congress in light of what it saw as executive abuses of power. The Administration did not feel that it would be able to foresee all of the tools that it would need to face the enemy, but it knew that whatever was decided upon, sooner or later it would be called upon to explain and justify

those policy decisions. In order to have a strong case, the Bush Administration felt compelled to wrap itself in broad legal protections to cover the unexpected.

The result was the legalization of a whole host of new programs and entities – everything from the Department of Homeland Security to the techniques discussed in this paper. The legal rationale for these strategies were at times written in very broad language to prevent “retroactive discipline” for threats and situations that perhaps hindsight would not deem so noteworthy (Goldsmith 137).

To understand the extent to which the fear of legal reprisal loomed over administration officials – and how justified that fear was given recent legislation and efforts by various domestic interest groups – President Bush’s September 6, 2006 speech, in which he acknowledges the existence of the CIA program, is quoted at length:

Another reason the terrorists have not succeeded is because our government has changed its policies – and given our military, intelligence, and law enforcement personnel the tools they need to fight this enemy and protect our people and preserve our freedoms.

...There are two reasons why I’m making these limited disclosures [about the CIA program] today. First, we have largely completed our questioning of the men – and to start the process for bringing them to trial, we must bring them into the open. Second, the Supreme Court’s recent decision [*Hamdan vs. Rumsfeld*, decided June 29, 2006] has impaired our ability to prosecute terrorists through military commissions, and has put in question the future of the CIA program. In its ruling on military commissions, the Court determined that a provision of the Geneva Conventions known as “Common Article Three” applies to our war with al Qaeda. This article includes provisions that prohibit “outrages upon personal dignity” and “humiliating and degrading treatment.” The problem is that these and other provisions of Common Article Three are vague and undefined, and each could be interpreted in different ways by American or foreign judges. And some believe our military and intelligence personnel involved in capturing and questioning terrorists could now be at risk of prosecution under the War Crimes Act – simply for doing their jobs in a thorough and professional way.

This is unacceptable. Our military and intelligence personnel go face to face with the world’s most dangerous men every day. They have risked their lives to capture some of the most brutal terrorists on Earth. And they have worked day and night to find out what the terrorists know so we can stop new attacks. America owes our brave men and women some things in return. We owe them their thanks for saving lives and keeping America safe. And we owe them clear rules, so they can continue to do their jobs and protect our people.

So today, I’m asking Congress to pass legislation [what became the Military Commissions Act] that will clarify the rules for our personnel fighting the war on terror. First, I’m asking Congress to

list the specific, recognizable offenses that would be considered crimes under the War Crimes Act – so our personnel can know clearly what is prohibited in the handling of terrorist enemies. Second, I’m asking that Congress make explicit that by following the standards of the Detainee Treatment Act [2005] our personnel are fulfilling America’s obligations under Common Article Three of the Geneva Conventions. Third, I’m asking that Congress make it clear that captured terrorists cannot use the Geneva Conventions as a basis to sue our personnel in courts – in US courts. The men and women who protect us should not have to fear lawsuits filed by terrorists because they’re doing their jobs. (qtd. in Thiessen 392, 403-05)

The Bush Administration sincerely felt that what it had approved and was doing was vital to the safety of the nation. However, the war on terror, by its being a 21st century war, was perpetually in the public eye and much of what was happening, naturally enough, caused concern among the populace. Never before had the public had so much access to how war was being conducted; because the US is a democracy, it also meant that the public had never had so much influence over what was happening. It was public outcry, confusion, misunderstanding, and concern that prompted President Bush to give the speech.

At the same time that the war was being conducted in an increasingly public fashion, the US was struggling with the fact that it was facing a very different type of enemy whose tactics were a far cry from standard warfare procedure. Much needed to be changed and very quickly, but simultaneously there was a demand for accountability and transparency greater than the US had ever before faced during wartime.

In acknowledgement of these realities, the Bush Administration turned to the Office of Legal Counsel (OLC) within the Department of Justice as a way to protect administrators, CIA personnel, soldiers, and anyone else who might come into contact with detainees from the type of legal nightmares that President Bush discussed in his speech. OLC has a great deal of clout and anyone working under its memorandum would have a strong legal defense in case he or she was brought to court. “More than any agency

in the government, OLC could provide the legal cover needed to overcome law-induced bureaucratic risk-aversion” (Goldsmith 96). Furthermore,

[M]ost legal issues of executive branch conduct related to war and intelligence never reach a court, or do so only years after the executive has acted. In these situations, the executive branch determines for itself what the law requires, and whether its actions are legal. (Goldsmith 32)

Thus it was not unusual for the Bush Administration to turn to OLC for legal guidance; it was an established procedure.

Reliance on OLC, however, is not a perfect solution. First, OLC is supposed to simultaneously support and be a check on the executive branch, creating an inevitable source of conflict of interest. “OLC lives inside the very political executive branch, is subject to few real rules to guide its actions, and has little or no oversight or public accountability” (Goldsmith 33). Furthermore, although “OLC’s ultimate responsibility is to provide information about legality, regardless of what morality may indicate, and even if harm may result,” OLC must of course consider the needs of its clients, the most important being the president, whose number one responsibility is to keep the American people safe (Goldsmith 147-48). Thus the lawyers at OLC, lawyers for the CIA, lawyers for the FBI, and anyone else tasked with analyzing the legal foundations for war on terror policy found himself constantly facing competing demands. Goldsmith sums up this tension as it relates to the CIA:

The lawyers...in the CIA...[e]very day, they and their clients were exposed to a buzzsaw of contradictory commands: stay within the confines of the law, even when the law is maddeningly vague, or you will be investigated and severely punished; but be proactive and aggressive and imaginative, push the law to its limit, don’t be cautious, and prevent another attack at all costs, or you will also be investigated and punished. (162)

Such a situation should provoke what Professor Marc Landy has termed “constitutional empathy” for policymakers from the reader and the public in general (4).

The war on terror has provoked on a very large scale the ever-present conflict within

democracies between liberty and security. The president (and by extension the government) is supposed to keep the people safe and maintain public order. The foundation of a liberal democracy, however, is rooted in the rule of law and the liberties and rights of the individual. What takes precedence during wartime is up to considerable interpretation. The Bush Administration chose to prioritize security, but in recognition of the strong tradition to adherence to the rule of law within the US, it took steps to ensure that what it was doing fell within a legal framework, even if that meant first changing the law. Such changes, as this paper analyzes, include interrogation techniques, whereby the traditional techniques based on the US Army Field Manual on Interrogation were rendered inadequate for handling certain high-profile detainees and thus a second-tier of techniques, EITs, were created and implemented.

One of those techniques, as discussed previously, was hooding during interrogation and transportation (depicted in the photograph in chapter III.III). This technique reinforces the urgency surrounding the Administration's eagerness to create thorough legal protections against prosecution. Hooding is a form of sensory deprivation and is thus meant to cause disorientation but should not inhibit normal breathing, as specified by the Oct. 11, 2002 memo issued by Lieutenant Colonel Jerald Phifer authorizing hoods, although this did occur. The February 2004 International Committee of the Red Cross (ICRC) Report, covering US operations in Iraq, gives detail as to how exactly hoods were used there.

One or two bags, sometimes with an elastic blindfold over the eyes which, when slipped down,...impeded proper breathing. Hooding was sometimes used in conjunction with beatings thus increasing anxiety as to when blows would come. *The practice of hooding also allowed the interrogators to remain anonymous and thus to act with impunity.* Hooding could last for periods from a few hours to up to 2 to 4 consecutive days...[emphasis added]. (qtd. in Danner 261)

Beyond providing a means to render detainees passive and thus more cooperative, hooding also prevented detainees from recognizing or identifying their interrogators and guards. Hoods created a sense of anonymity and therefore served as an additional safeguard against responsibility should “retroactive discipline” occur. Fear of “lawfare”³⁰ was so rampant among Bush Administration officials, CIA personnel, and the military that even the techniques themselves helped build a legal shield. Hooding may not have been intentionally designed to have this benefit, but the result is the same.

Furthermore, the increased freedom from prosecution such a technique provided to interrogators encouraged further abuse. As the ICRC report details, if the detainee does not know whose control he is under, the interrogator may feel at greater liberty to let out whatever frustration, prejudice, boredom, or anxiety he may be feeling by abusing the detainee, such as through beatings.

As discussed in President Bush’s speech, the fear of prosecution also played into the purpose and final language of the Military Commissions Act of 2006. As President Bush said in his speech given at the signing ceremony,

‘This bill provides legal protections to ensure our military and intelligence personnel will not have to fear lawsuits filed by terrorists simply for doing their jobs. This bill spells out specific, recognizable offenses that would be considered crimes in the handling of detainees so that our men and women who question captured terrorists can perform their duties to the fullest extent of the law. And this bill complies with both the spirit and the letter of our international obligations. As I’ve said before, the United States does not torture. It’s against our laws and it’s against our values.’ (qtd. in Thiessen 56)

Some critics of the Military Commissions Act view it as a Congressional blessing of much of the Bush Administration’s counterterrorism policies and is thus a public acceptance of sincerely flawed strategies. However, the Military Commissions Act was in fact an attempt to correct some of the problems that both the press and the Bush Administration realized

³⁰ For further reading on the role of “lawfare,” see Goldsmith 58-63.

and acknowledged, such as unclear guidelines as to what was and what was not torture and what was and what was not legal to do, as well an attempt to put the entire counter-terrorism program on a more solid legal footing by gaining Congress' seal of approval. More straightforward rules would, ideally, satisfy all sides of the debate, for they would result in greater protections for both government personnel (by being more specific as to what and was not legal) and detainees (by being more specific as to what protections they had and what techniques could be used).

The war on terror is a new kind of war that demands new strategies. There existed within the Bush Administration a palpable fear of another attack and pressure to prevent another one. Yet in developing the means to do so, there inevitably were repeated clashes with existing law and tradition. Since the Administration felt that it had to stretch or even change the law in order to accomplish its mission, it also felt that it had to protect itself from the possibility of legal reprisal. It is telling of the times facing Americans that much of what is driving decisions and backlash against those decisions is mutual fear, which spawns suspicion and mistrust, doubt and discontent. In an effort to simultaneously keep the country safe, keep government personnel safe, and satisfy naysayers, the Bush Administration made many changes, adjustments, modifications, and breaks to existing law.

IV.II: The “Unitary Executive”

“Detention and interrogation policy are at the heart of the president’s commander-in-chief power to wage war, and long constitutional history supports the president’s leading role on such matters.”

-John Yoo, qtd. in McKelvey 241

The sentiment professed by Congress, the 9/11 Commission and the public about the urgency of being flexible and imaginative in the face of this new threat boded well with the philosophical underpinnings of many officials within the Bush Administration concerning executive power. Several key players in formulating war on terror policy were strong proponents of executive power. Some believed that the executive had very broad powers; others had a more personal agenda to see to it that the executive’s authority was expanded.

One group of executive power proponents, known as the “War Council,” was extremely influential in formulating antiterrorism policy. The “War Council” consisted of Legal Counsel to the President Alberto Gonzales, Gonzales’ first deputy Tim Flanigan, Legal Counsel to the Vice President David Addington, Department of Defense General Counsel William “Jim” Haynes, and Deputy Assistant General John Yoo. Along with Secretary of Defense Donald Rumsfeld, Vice President Dick Cheney, and President Bush, they believed that particularly in foreign affairs, the executive branch was “first among equals when it [came] to separation of powers” (Honigsberg 76-7).

Part of this fervor was due, as alluded to in the previous section, to what they felt had been an overreaction on the part of Congress during the 1970s, 80s, and 90s to actions taken by certain presidents, such as President Nixon (Watergate), President Johnson (Vietnam), and President Reagan (Iran-Contra). Congress had responded by imposing many legal restraints on the executive and many within the Bush Administration felt that these restraints were not only unconstitutional breaches of executive authority but also

would gravely impede the war effort in Afghanistan and Iraq, particularly in regards to the president's role as commander in chief.

The role of OLC was again central, as it articulated this belief through its memorandum. The August 1, 2002 memo by Yoo and Bybee, in discussing the effect that federal law concerning torture (18 U.S.C. § 2340-2340A) would have on executive power in executing the war on terror, reveals the Administration's adamancy concerning executive prerogative:

'Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign...Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional...Section 2340 must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority...Any effort by Congress to regulate the interrogation of battlefield detainees would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President...It may be the case that only successful interrogations can provide the information necessary to prevent the success of covert terrorist attacks against civilians...[it] would be unconstitutional to seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.'

(qtd. in Danner 142, 145, 149)

Goldsmith summarizes the conclusions of the memo as follows:

[V]iolent acts aren't necessarily torture; if you do torture, you probably have a defense; and even if you don't have a defense, the torture law doesn't apply if you act under color of presidential authority. (144)

The wording of the memo seems to suggest that the president is allowed to break the law if he believes it would interfere with his ability to protect the nation.

To suggest that the president is above the law is a dangerous breach of American law tradition. The memo's conclusion

...has no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law...It [also] implies that many other federal laws that limit interrogation – anti-assault laws, the 1996 War Crimes Act, and the Uniform Code of Military Justice – are also unconstitutional. (Goldsmith 149)

Unsurprisingly therefore, the memo raised concerns that the president could justify any action taken as within his commander-in-chief powers. That includes torture, because the memo argues that the president can violate the torture statute if he feels it is necessary for national security. It is no wonder that the label of “torture memo” has stuck so thoroughly.

Furthermore, the memo holds that Congress was absolutely powerless to provide any guidance or suggestions whatsoever on matters of interrogation and detainee treatment, again seemingly discarding legal traditions of checks and balances and separation of powers. As Goldsmith warns,

[W]hen one concludes that Congress is disabled from controlling the President, and especially when one concludes this in secret [these memos were originally internal, classified documents], respect for separation of powers demands a full consideration of competing congressional and judicial prerogatives, which was lacking in the interrogation opinions. (Goldsmith 149)

The broad interpretation of executive power had the corollary of viewing congressional input as potentially binding the executive’s hands. In David Addington’s opinion, “...[P]residential power was coextensive with presidential responsibility. Since the President would be blamed for the next homeland attack, he must have the power under the Constitution to do what he deemed necessary to stop it, regardless of what Congress said” (Goldsmith 79). Although it is Congress’ responsibility and right to create law, there are times when the pressing nature of a threat or the necessity for secrecy can compel the executive to forego debate with Congress and make decisions on its own. For the Bush Administration, however, that notion was pushed even farther to the point where, in general, it believed that there was rarely a reason to consult Congress. In place of congressional affirmations, OLC opinions were treated as law.

Goldsmith also argues that “their [Bybee and Yoo’s] legal arguments were wildly broader than was necessary to support what was actually being done,” specifically in

reference to the ten techniques outlined in the other August 1, 2002 Bybee memo (Goldsmith 150). However, this was likely Bybee and Yoo's intention. Remember that the Bush Administration, in trying to protect Americans, tried to accomplish two tasks simultaneously: create broad, expanded powers and programs to eliminate the enemy and protect itself from legal prosecution, also by making the law broad. These ten techniques went through many phases and morphed, for example, into twenty-four techniques on May 10, 2005, based on what the Administration had learned in the mean time about what was effective and what was not, who the enemy was and what its level of resistance was, etc. The memo was broad as a protective measure for future, unforeseen needs.

Although Thiessen argues that the "president never relied on this authority [the August 1, 2002 memo] for any interrogations," that did not mean that someone else would not or did not. Its broad language provoked anxiety within the administration, to the extent that Bybee's successor, Jack Goldsmith, withdrew the memo in 2004. His rationale?

My main concern upon absorbing the opinions was that someone might rely on their green light to justify interrogations much more aggressive than ones specifically approved and then maintain, not without justification, that they were acting on the basis of OLC's view of the law. (Goldsmith 151)

Goldsmith's fears reflect the same reasoning behind those who have labeled the memo as the "torture memo." It is so broad that it could potentially provide legal cover for any technique because it could always be justified as being within the president's constitutional authority to protect the nation. In this memorandum, the national security argument granted legal cover for seemingly anything.

The Bush Administration deliberately decided to view the fight against terrorism as a war instead of a criminal matter. The president could invoke his commander in chief powers, affording himself greater leverage than that allowed during peacetime. However,

choosing war also implies that the US would act in accordance with the laws of war. The benefits of a war metaphor must be balanced with the responsibilities it also encompasses. To a certain extent, the Bush Administration utilized OLC to get around those responsibilities and create its own rules of warfare.

The message of executive privilege was supported by public statements issued by the administration. Less than a week after 9/11, on September 16th, 2001, Vice President Dick Cheney did an interview on *Meet the Press with Tim Russert* in which he declared his now infamous “dark side” comment:

‘We also have to work, though, sort of the dark side, if you will. We’ve got to spend time in the shadows of the intelligence world. A lot of what needs to be done here will have to be done quietly, *without any discussion*, using sources and methods that are available to our intelligence agencies, if we’re going to be successful. That’s the world these folks operate in, and so it’s going to be vital for us to *use any means at our disposal*, basically, to achieve our objective [emphasis added].’ (qtd. in Honigsberg 247-48)³¹

Cheney’s comment reflects the belief that the US government and its personnel were taking the necessary risks so that the American people could sleep peacefully at night.

What was required was dark and nasty because the enemy was dark and nasty; all

Americans should be grateful that someone else was doing the dirty work for them.

Furthermore, only the executive branch had the capacity to adequately face the threat and thus any restraints on its power meant an increased likelihood of American deaths.

Further proof of the administration’s go-it-alone attitude comes from the process of drafting the August 1, 2002 memo.

OLC normally circulates its draft opinions to government agencies with relevant expertise. The State Department, for example, would normally be consulted on the questions of international law implicated by the interrogation opinions. But the August 2002 opinion, though it contained no

³¹ Vice President Cheney’s role in all matters of the presidency, but particularly in foreign policy, was quite unusual. During “...no previous administration was the Vice President’s Counsel so integrated into the operations of the powerful [President’s] Counsel Office...The new arrangement reflected Vice President Cheney’s enormous influence on President Bush” (Goldsmith 76). Thus Cheney’s sentiments as regards war on terror policy are highly relevant to understanding the tone of the Bush Administration.

classified information, was treated as an unusually 'close hold' within the administration...under directions from the White House, OLC did not show the opinion to the State Department, which would have strenuously objected. (Goldsmith 166-67)

Not only Congress, but also other government agencies were excluded from the decision-making process surrounding detainee treatment policy.

The rhetoric of the CIA supported and reinforced the anything-goes attitude as well. In testifying before the Senate Intelligence Committee on September 26, 2002, Joseph Cofer Black, Director of the CIA's Counterterrorist Center from 1999 through May 2002, made clear that in the eyes of the CIA, there was a distinct difference between the pre-9/11 world and the post 9/11 world. "After 9/11 the gloves come off" (Unclassified: Testimony of Cofer Black). Gloves evoke polite manners, gentlemanliness, and respect. To suggest that the gloves are coming off is to suggest that refinement, manners, and culture are being discarded, too. It is to say that the values and principles of social civility no longer apply. This is an extremely powerful metaphor for the deeply held belief among Administration officials that all methods were needed to tackle this war and thus no limits could be imposed upon the executive's command-in-chief authority, and by extension, upon the interrogation methods used. The rhetoric is consistently of zero limitations, for the war was viewed by the Bush Administration as indisputably zero-sum; any limitation on the US' side allowed the enemy to advance.

The concept of "gloves coming off" was also supported by members of Military Intelligence. In mid-August of 2003, as pressure was mounting to gather "actionable intelligence" from detainees, an MI captain in Iraq sent out an email to his colleagues asking for their input on creating an "[i]nterrogation techniques wish list" [internal quotations removed] that would be used against "unlawful combatants" or those not protected by the Geneva Conventions. He writes:

'The gloves are coming off gentlemen regarding these detainees, Col Boltz [the Army's V Corps deputy chief of staff of intelligence] has made it clear that *we want these individuals broken*. [American] [c]asualties are mounting and we need to start gathering info to help protect our fellow soldiers from any further attacks [emphasis added].' (qtd. in Danner 33)

The MI captain's objective is clear: destroy the enemy by "breaking" them emotionally and physically so that they are no longer able to attack US troops.

Avid supporters of Bush Administration policies like Thiessen make the argument that the choices made by the Bush Administration were the morally superior choices and that the US has acted in accordance with its tradition of civility and respect for human rights. It is better to make the enemy suffer than to run the risk of more Americans dying in another terrorist attack; that is true respect for human rights. Yet it is inevitable that the public would express concern when top officials talk about "gloves coming off" and publicly acknowledging that the US will be breaking from past procedures and traditions. With the wording of the August 1, 2002 memorandum supported by the rhetoric of the administration, CIA officials, and military leadership, one can begin to see how the "gloves off" mentality trickled down to individual soldiers who felt that they could do as they pleased because the high-ups said they could.

When questioned about the CIA's role in controversial interrogation techniques, CIA spokesman Paul Gimigliano, interviewed by CNN, said:

'The CIA in no way endorsed behavior – no matter how infrequent – that went beyond formal guidance. This has all been looked at; professionals in the Department of Justice decided if and when to pursue prosecution. That is how the system was supposed to work, and that's how it did work.' (Benson)

What he says may in fact be true. The Bush Administration made sure that OLC memoranda, as discussed earlier, would provide legal protection for all parties involved and included a wide range of tactics and procedures for CIA use. The point that the Bush Administration missed, however, was that they changed the law in order to protect

themselves. The Bush Administration seemed very comfortable with lowering itself down to the level of its enemy in order to get what it wanted. The US was willing to get dirty, dark, and uncivilized if that meant protecting national security.

IV.III: Resistance to the “Unitary Executive”

There has been some backlash against President Bush’s claims of executive privilege. On December 30, 2004, Goldsmith’s successor Daniel Levin issued a replacement memo for the one Goldsmith had rescinded (the August 1, 2002 Bybee/Yoo memo). Levin writes:

Because the discussion in that memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was – and remains – unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture.

The message of the replacement memo was clear: the President’s Commander-in-Chief power cannot override the law. The commander-in-chief’s powers do not extend to approving torture, even if he may feel it necessary given the context of the war.

Beginning in 2004 with *Hamdi vs. Rumsfeld*, the Supreme Court began to rule against aspects of the Bush Administration’s counter-terror plan. According to Goldsmith, these rulings “gave the administration the perfect opportunity to go to a Congress controlled by Republicans to get the entire terrorism program on a stronger and more explicit legal footing” (135). The Bush Administration chose to ignore this option, however, and more and tougher rulings followed.

In the 2006 case *Hamdan vs. Rumsfeld*, the Supreme Court ruled that the Bush Administration could not create and operate its own system of military commissions to try detainees without congressional authorization. Both the Uniform Code of Military Justice (see chapter II.III) and the Geneva Conventions, particularly Common Article 3, would be violated otherwise. Justice Breyer, in a concurring opinion, wrote:

The dissenters say that today’s decision would ‘sorely hamper the President’s ability to confront and defeat a new and deadly enemy.’...They suggest that it undermines our Nation’s ability to ‘preven[t] future attacks’ of the grievous sort that we have already suffered...The Court’s

conclusion ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check.’...Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.

Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.

Goldsmith argues that this legal analysis is “erroneous,” for the US’ compliance with Common Article 3 would have been “a matter of customary international law” and not “a treaty obligation” as the Court ruled (136).

Goldsmith’s comment points to the fact that there is enormous debate about Common Article 3. In the original interpretation of its application, Common Article 3 solely covered civil wars. However, it is part of (“common” to) all Geneva Conventions and its use since its inception to encompass more than civil wars suggests a more expansive reading of its application. Thus there are many individuals and groups, like the Supreme Court, who believe it should apply to all conflict, whether intra or international.

That debate aside, Goldsmith acknowledges that the Supreme Court’s ruling concerning Common Article 3 was enormously powerful, if legally problematic.

It meant that a small portion of the Geneva Conventions *did* apply in the war on terrorism, and it provided detainees with more elaborate legal rights of humane treatment and legal process than the administration had ever acknowledged. And more ominously, the Court’s holding implied that the 1996 War Crimes Act, which the independent counsel-fearing executive branch had tried to neuter since 2002, was in play and applicable to many elements of the administration’s treatment of detainees. (136)

Hamdan, therefore, had much broader implications than for solely the matter of military commissions. The ruling that Common Article 3 of the Geneva Conventions applied had the potential to impact detainee treatment during interrogation and detention as well. The Supreme Court was imposing a higher standard upon the Bush

Administration's conduct of the war, in reaction to what it felt had been a sweeping usurpation of power on the part of the president to conduct the war on terror.

The criticism reached such a level that the Bush Administration felt compelled to address the nation and reveal its CIA program and attempt to justify it. The speech was delivered on September 6, 2006 and sections of it have already been quoted.

Unfortunately, a single speech was not sufficient to either properly educate the American people about what was at stake nor to restore credibility for the administration. Thiessen admits to the belatedness of this public plea for support. "[I]f there was a cardinal sin of the Bush administration, it was a failure to explain and defend our actions against the criticisms of a hostile press" (51). While some limitations on what is made public are of course necessary for national security, disclosure to a certain extent is absolutely vital because the US is a liberal democracy. It is both the beauty and tragedy of such a society; some security must be sacrificed in order to have freedom of information and to be informed, engaged citizens who are aware of the facts, instead of being spoon-fed state-sponsored propaganda.

Furthermore, the passage of the Military Commissions Act of 2006 on October 17, 2006, which granted the Bush Administration much of what it wanted,³² proved that Congress was not a roadblock to be avoided at all costs. Congress was even willing to support enhanced interrogation techniques. Goldsmith argues, however, that "[m]easured against the baseline of what it could have gotten from a more cooperative Congress in 2002-2003, the administration had lost a lot" (139). The Bush Administration lost on a

³² These gains included "a broadened definition of 'unlawful enemy combatant'; implicit approval for aggressive interrogations short of torture; immunity from prosecution for those who participated in past interrogations that crossed the prohibited line; narrowing interpretations of the Geneva Conventions and amendments to the War Crimes Act that minimized the impact of the Supreme Court's decision; elimination of judicial habeas corpus review over Guantanamo; and a prohibition on the judicial use of the Geneva Conventions to measure the legality of the Guantanamo detentions" (Goldsmith 138).

large scale because it was not willing to compromise; it felt that it had no need to compromise because the president was entitled to do everything possible to prevent future terrorist attacks.

The immense secrecy and go-it-alone attitude of the Bush Administration impeded deeper evaluation of interrogation techniques. It must be recognized, however, that there was resistance on the part of Congress as well concerning how much they wished to be informed about the techniques. Congress held the same fears of legal prosecution as White House officials did; Congress was aware that the more information it knew about what exactly was happening, the more it would be held accountable if anything went wrong. The debate recently circulating in the newspapers about how much or how little Speaker of the House Nancy Pelosi knew about techniques such as waterboarding gives credence to this point.

Despite congressional hesitation, the Bush Administration's unwavering commitment to the executive's sole control over foreign policy matters produced a hubris that impeded a more thorough analysis and development process of interrogation and detention policy.

IV.IV: “Enemy Combatants” and the Geneva Conventions

“Yes, Common Article 3 is vague in some sense, I suppose, but life, and particularly law, are replete with vague terms: obscenity, probable cause, torture. If we need to explain what we believe those terms mean, then we should do it. We’re just using vagueness as an excuse to avoid Common Article 3 and the Geneva Conventions.”

-Former Navy Judge Advocate General Hutson qtd. in Katel 678

The role of fear in determining the outlook of Bush Administration officials has already been mentioned. Fear was also relevant to the decisions the Bush Administration made regarding the applicability of the Geneva Conventions to detainees. Post-9/11 policy was created out of tremendous fear of the capability that only a handful of radicals had to inflict utter terror and destruction upon Americans. The general sentiment was that the people who had caused 9/11 had not acted humanely and thus were not deserving of the fullest level of humane treatment as provided under domestic and international law.

The manifestation of this conclusion within the Bush Administration came with its declaration that the Geneva Conventions would not apply in fighting the war against al-Qaeda and the Taliban in Afghanistan. In a January 25, 2002 memorandum to President Bush, Alberto Gonzales argued that the War on Terror was

‘...a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for GPW [the Third Geneva Conventions on Prisoners of War]...the 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, athletic uniforms, and scientific instruments.’ (qtd. in Danner 84)

The US, therefore, would not hold itself accountable to the Geneva Conventions in fighting al-Qaeda and the Taliban.

That the US was disqualifying them was a shocking change; never before had the US declared the Geneva Conventions irrelevant to its conduct in foreign wars. Such a dramatic step required significant legal support. Again OLC was able to provide it. The Bush Administration concluded that Al Qaeda and Taliban members were not entitled to

the protections afforded under the Third Geneva Conventions (that concerning POWs or lawful combatants) because of their failure, among other reasons, to comply with Article Four, which defines what a POW is and presents two categories of qualification.

The Bush Administration harped on the fact that Taliban soldiers, insurgents, and terrorists did not comply with the second category, which includes such requirements as a uniform and openly carrying one's arms. Yet failure to comply with these measures does not automatically exclude a combatant from lawful combatant status. Article 4 specifically states that a lawful combatant must fall into “*one* of the following categories [emphasis added]” and not both. The first category, “Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces” would seem to apply to Taliban soldiers who were paid by the Afghan government (International Committee of the Red Cross). Yet the Bush Administration dismissed this logic on the grounds of such arguments as that Afghanistan was a “failed state” at the time of the invasion (Danner 84).

It makes sense that “giving terrorists such [POW] protections would undermine the very purpose of the Geneva Conventions,” which is to create incentives for adherence to the laws of war (Thiessen 29). The decision to not grant terrorists POW status, furthermore, was not controversial and received support from all sides of the political spectrum.

To elaborate briefly on this point, soldiers who are captured by the enemy are effectively divested of their ability to hurt the enemy because they have been removed from the battlefield. A terrorist, on the other hand, once in custody has not necessarily “laid down his arms.” There is no literal battlefield from which he has been removed and his ability to influence events outside of his prison cell is much greater than that of a foot

soldier. Furthermore, a POW “is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information” to his captors (International Committee of the Red Cross, Art. 17 of the Third Geneva Conventions). In a war where intelligence is the key variable, US personnel must be able to demand more of detainees than their name and date of birth.

The necessity of using “enhanced interrogation techniques” against certain detainees and denying POW status to captured Taliban and al-Qaeda members was reinforced by episodes such as the following:

In late November 2001, a group of recently captured Arab Taliban fighters at Qala Jangi [Northern Afghanistan] used concealed weapons to kill CIA agent Johnny Spann and others and took over the facility for a week until they were subdued in one of the most brutal battles in the Afghanistan campaign [to date]...It was becoming clear that the fanatical volunteer fighters in this war were not like World War II conscripts who were thrilled to be off the battlefield and in safe POW camps. The Islamist fighters would not stop fighting once captured, but would instead use any means at their disposal to kill their enemies. (Goldsmith 107)

Denying POW status to such fighters seemed to be a logical conclusion based on the danger they posed.

It is another matter, however, to say that no part of the Geneva Conventions applies. As discussed earlier, the Geneva Conventions were written in a way as to afford everyone some form of legal protection. If no one qualified as a POW, everyone qualified under the Fourth Geneva Conventions (all unlawful combatants). As the ICRC reports, “the GC apply to all the detainees ‘regardless of how such persons are called’” (qtd. in Honigsberg 20).

Yet the Bush Administration felt that the Geneva Conventions, beyond not applying to terrorists, imposed dangerous limitations on their ability to effectively face the enemy. The result of the disqualification of this long-standing treaty was the creation of a new legal term, the “enemy combatant.” The fact that “enemy combatant” had no legal

precedent created the impression that the US' intention in coining the term was to skirt international law and avoid prosecution. Some critics believe that such legal twisting “provide[d] cover to mistreat and torture detainees” (Honigsberg 8).

Furthermore, the desire to protect one's self from legal prosecution also impacted the decision to disqualify Geneva. In the words of Attorney General John Ashcroft, in a memorandum sent to President Bush on February 1, 2002,

‘A Presidential determination against treaty [i.e. the Geneva Conventions] applicability would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees.’ (qtd. in Honigsberg 21)

Excluding the Geneva Conventions kept the fear of legal retribution at bay.

The first time that the term “enemy combatant” appeared in official records was in the February 2002 federal district court decision in *Coalition of Clergy vs. Bush*, which addressed what type of legal rights were afforded to Guantanamo Bay detainees.³³ As mentioned before, the State Department was largely excluded from deliberations on interrogation and detention policies. Not surprisingly, therefore, members of State Department became vocal once they were informed of those policies. Secretary of State (and General) Colin Powell and other members of the State Department urged the president to designate Taliban soldiers as lawful combatants, but he instead decided to first designate them as unlawful combatants and later as unlawful enemy combatants, with little attempt at explaining the change in terminology.

By the spring of 2002, the term “enemy combatant” was applied to anyone within the “enemy” camp. That Congress did not legalize the term until 2006, under the Military

³³ For more on this case, see Honigsberg 22

Commissions Act, points to both its controversial nature and the persistent exclusion of Congress from foreign policy decisions.

Some of the loudest critics of the “enemy combatant” identification came from those with deep connections to the military, such as General Colin Powell, who, in a January 26, 2002 memorandum to Alberto Gonzales, argued that adopting such a position would

‘...reverse over a century of US policy and practice in supporting the Geneva conventions and undermine the protections of the law of war for our troops, both in the specific conflict and in general...It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy...It will undermine public support among critical allies.’ (qtd. in Danner 89)

It is telling that someone of Powell’s military rank would question such a pivotal decision in the post 9/11 era. General Powell recognized the importance of adhering to international standards because if the US failed to, it could not expect the rest of the world to treat American soldiers according to the standards the US had rejected.³⁴

Powell also recognized the damaging effect this policy could have on military culture. A fundamental part of basic military training is instruction on the Geneva Conventions and how they constitute the standard of conduct for all armed conflict. This is so that soldiers know not only how they are to treat those in US hands, but what their rights are as well, should they be captured by the enemy. According to Chairman of the Joint Chiefs of Staff General Richard Myers, “the Geneva Conventions were ‘ingrained in U.S. military culture,’ that ‘an American soldier’s self-image is bound up with the Conventions,’ and that ‘as we want *our* troops, if captured, treated according to the

³⁴ In addition, what the latter part of Colin Powell’s argument points to is a crucial feature of the fight against terrorism: it is a global problem that the US will not be able to solve on its own. It will need the cooperation of many other governments, in terms of intelligence sharing and military action, among other matters of mutual support. The US must be careful not to alienate those that it will need to achieve its objectives. The question of Geneva is one among many that has divided the US from its European allies, although the US has managed to maintain close ties with Britain.

Conventions, we have to encourage respect for the law by our own example” (qtd. in Goldsmith 113-14).

To say that these nearly golden standards are not applicable may convince soldiers that the enemy is not their equal but is instead their inferior, since they do not “deserve” the same legal protections as US soldiers or any previous enemy that the US has fought since ratifying the Geneva Conventions. Disqualifying the Geneva Conventions dehumanized the enemy, opening the way for abuse and torture.³⁵

Frustration over this policy decision was voiced by other military personnel as well. Captain Ian Fishback (US Army), who served tours in both Afghanistan and Iraq and later reported incidents of abuse he had witnessed, testified on what he felt was unclear and insufficient guidance as to the application of the Geneva Conventions where he was stationed. When he saw abuse for the first time, “his commanders left the impression that the United States did not have to follow the Geneva Conventions when dealing with prisoners in Iraq, so he did not report the incidents” (Schmitt). Those abuses included ...beatings of Iraqi prisoners, exposing them to extremes of hot and cold, stacking prisoners in human pyramids, and depriving them of sleep at Camp Mercury, a forward operating base near Falluja. The abuses reportedly took place between September 2003 and April 2004, before and during the abuses at the Abu Ghraib prison near Baghdad.

Confusion over whether the Geneva Conventions applied, including which Conventions where and when and to whom, abounded and played a role in the case of Abu Ghraib as well. Captain Fishback argued that the Bush Administration was unfairly blaming low-

³⁵ There is an interesting twist to the story concerning the exclusion of the Geneva Conventions. One of the supposed benefits of creating new rules was to give the US government full reign over where, how, and for how long it kept detainees. Yet the Geneva Conventions state that until hostilities cease, a nation may continue to have custody over those it has captured. With the indefinite nature of the war on terror, the US could have technically held its prisoners indefinitely (as it has done anyway with countless numbers of them) while still adhering to international law, putting the US tradition of rule of law and the US’ international reputation (not to mention its moral fiber) at much less risk.

ranking individuals for policy decisions made at the top. In the same *New York Times* article quoted above, Fishback reports,

'We [Fishback and two sergeants with whom he was stationed] came forward because of the larger issue that prisoner abuse is systemic in the Army. I'm concerned...they'll try to scapegoat some of the younger soldiers. This is a leadership problem.'

Fishback's concerns reflect the hierarchical nature of the military. Any actions taken by those at the bottom of the chain of command ultimately reflect upon those at the top. With those at the top changing the rules, it does not seem that surprising that confusion and mistakes would be prevalent at the bottom.

IV.V: Detention vs. Interrogation, Army vs. CIA

The confusion expressed by Captain Fishback concerning protocol and his frustration over what he felt was scapegoating of low-ranking soldiers, can partly be explained by the presence of a variety of groups working side by side at these detention facilities. Civilian contractors – ranging from maintenance workers to interpreters – worked alongside the military and the CIA. The confluence of groups created confusion about protocol.

In the case of Abu Ghraib, there was a minimum of four groups responsible for detainees. There were military police (MPs), military intelligence (MIs), the CIA, and civilian contractors. Military intelligence and the CIA were to be in charge of interrogation; military police had authority over detention, i.e. monitoring the prisoners when they were not being interrogated. Civilian contractors filled in and supplemented many roles. As analyzed earlier, the Army and CIA operated under separate guidelines, but oftentimes these two branches worked side by side.

The CIA was granted greater flexibility because it was assumed that what was appropriate and necessary within the context of interrogation went beyond what was appropriate and necessary for detention alone. Furthermore, the types of detainees that came into contact with the CIA were supposed to be higher-profile characters with correspondingly more interrogation techniques at the CIA's disposal to elicit their cooperation. This distinction highlights again the value that was placed on intelligence and thus the looser guidelines assigned to interrogation sessions.

At Abu Ghraib, however, there appeared to be an understanding that one of the tasks of the Army personnel (i.e. MPs) was to “soften up” the detainees for the

interrogations. This led to use of the imagination and bending and breaking of the rules.

As Sabrina Harman, 372nd MP Company stationed at Abu Ghraib prison, testified for the Taguba Report regarding the incident, captured on photograph, in which a detainee was hooded, made to stand on a box, and had wires attached to his toes, penis, and fingers,

‘that her job was to keep detainees awake...MI wanted to get them to talk. It is Graner and Frederick’s³⁶ job to do things for MI and OGA [other government agencies, i.e. the CIA] to get these people to talk.’ (qtd. in Danner 294)

Her statements are supported by the testimony of several of her peers, including the following testimony from another MP, discussing what MI told him and the other MPs in regards to how to treat detainees:

‘Loosen this guy up for us.’ ‘Make sure he has a bad night.’ ‘Make sure he gets the treatment.’ (qtd. in Danner 295)

The interpretation of what it meant to “soften up” a detainee was what the world saw in the photos. Sergeant Javal S. Davis testified to the explicit approval and collusion that MIs provided to MPs to carry out the abusive treatments:

The MI staffs, to my understanding, have been giving Graner compliments on the way he has been handling the MI holds [prisoners being held by military intelligence]. Example being statements like ‘Good job, they’re breaking down real fast’; ‘They answer every question’; ‘They’re giving out good information, finally’; and ‘Keep up the good work’ – stuff like that.’ (qtd. in Danner 19)

Sergeant Samuel Provance concurs with Sergeant Davis’ account, stating:

‘Military intelligence was in control. Setting the conditions for interrogations was strictly dictated by military intelligence. They weren’t the ones carrying it out, but they were the ones telling the MPs to wake the detainees up every hour on the hour...’ (qtd. in Danner 20)

Recall from chapter I that, according to the CIA, interrogation was actually a two-step process, consisting of interrogation followed by de-briefing. The former could involve the use of EITs and the latter was when questions were asked and intelligence collected.

Both steps, however, are to be carried out by CIA personnel. The behavior of the soldiers

³⁶ Corporal Graner and Sergeant Frederick were two of the main perpetrators of the Abu Ghraib scandal. They appear in many of the photos that were released.

at Abu Ghraib, however, shows a dangerous misinterpretation of the interrogation/de-briefing process. Here they are told to “soften up” detainees in order to increase their cooperativeness during the interrogations and de-briefings that followed. Yet these soldiers were not trained the way CIA personnel were and were not given the strict boundaries that CIA personnel were. “Softening up” became whatever they came up with. Interrogation became part of daily detention procedure, so that detainees were subjected to a three-step system: interrogation while in detention, interrogation during actual interrogation sessions, and finally de-briefing.

The level of training and expertise that differentiated CIA personnel from MIs and MPs was vast. In describing the former, President Bush explained,

‘All those involved in the questioning of the terrorists are carefully chosen and they're screened from a pool of experienced CIA officers. Those selected to conduct the most sensitive questioning had to complete more than 250 additional hours of specialized training before they are allowed to have contact with a captured terrorist.’ (qtd. in Thiessen 399)

Furthermore,

[I]nterrogations involved strict oversight. There was no freelancing allowed – every technique had to be approved in advance by headquarters, and any deviation from the meticulously developed interrogation plan would lead to the immediate removal of the interrogation. (Thiessen 46)

The CIA had its own set of very strict protocol and had been thoroughly trained on what that meant. Unfortunately, it often found itself working alongside new, young, and poorly trained soldiers who were easily influenced. Guantanamo Bay had a similar problem, for although run by the Army, it housed many CIA detainees, with the result of two different groups working from two different backgrounds and two sets of protocol in charge of the same group of detainees.

On the subject of torture and cruel, inhumane, and unusual punishment, who committed such abuses is of little relevance. Torture is torture, whether carried about by

MPs, MIs, the CIA, or anyone else. However, proof of the involvement of MI in what happened is crucial for making the case that the abuse at Abu Ghraib was not an isolated incident of aberrant behavior, but was instead linked to those much higher up on the chain of command. The expansion of responsibility beyond low-ranking MPs to include MIs suggests that the Abu Ghraib scandal was orchestrated by far more than just a handful of soldiers on the night shift.

Furthermore, it is telling that the reports issued in the wake of Abu Ghraib avoid placing blame on MI, despite the evidence in those same reports that they were actively involved. Acknowledging that the abuses were the result of someone other than the lowest members of the chain of command insulates those further up. It is somewhat ironic that the Bush Administration, in justifying many of its controversial policies, argued that they were necessary in order to protect American soldiers from being prosecuted later on. The objective was to keep troops safe. Soldiers, after all, are to follow orders, not issue them, thus whatever they do ultimately goes back to the chain of command – all the way to the commander in chief himself. Recall from chapter II.III that it is a federal crime for a soldier to disobey an order or regulation, according to Article 92 of the UCMJ.

In the wake of Abu Ghraib, however, it seems as if the administration was content with insulating those at the top by scapegoating those at the bottom. It is an example of officials “who quail at the notion of ‘getting their hands dirty’” and put as much distance as possible between themselves and those that must carry out their orders (Danner 22, 32).³⁷

Here one sees Captain Fishback’s fears once again. The debate concerning the Military

³⁷ Another way in which soldiers suffered at the hands of officials – which also contributed to the abuses at Abu Ghraib, among other Iraqi prisons – was the consistent underfunding of operations. The administration wished to conduct the war on the cheap, and the result was a lack of staff (at one point, the prisoner-to-guard ratio at Abu Ghraib was 75 to 1), supplies, and leadership. The inadequate funding created a chaotic and stressful environment at the expense of both soldiers and detainees.

Commissions Act of 2006, for example, focused heavily on ensuring legal protection for the men and women in uniform. Yet when things went awry, only they were held responsible.

The anything-goes rhetoric of the Administration, coupled with the close working conditions between the Army and the CIA led to the belief among some soldiers that they were free to do as they pleased to the detainees, for they were defending their country and the enemy was undeserving of the types of protections that had been granted in previous conflicts anyway. As explains John D. Hutson, the Navy's top lawyer from 1997 to 2000, "I know that from the military that if you tell someone they can do a little of this for the country's good, some people will do a lot of it for the country's better" (Shane 5).

Members of the military are trained to follow orders. Questioning their superiors is not part of the job description. Soldiers would not have "taken the gloves off" on such a scale had they not believed that what they were doing would not only be condoned, but would also be encouraged.

IV.V: Physical vs. Psychological Torture



As discussed previously, the Navy's SERE program was once source of inspiration for the creation of EITs. The CIA also contributed through its manual *KUBARK Counterintelligence Interrogation*, which was written in 1963 and was also developed as a Cold War strategy, particularly against the Soviet threat. KUBARK provides much of the logic as to why EITs are so effective in securing detainee cooperation and thus is useful to be quoted as length:

'...[A]ll coercive techniques are designed to induce regression...The result of external pressures of sufficient intensity is the *loss of those defenses most recently acquired by civilized man*... 'Relatively small degrees of homeostatic derangement, fatigue, pain, sleep loss, or anxiety may impair these functions'...The circumstances of detention are arranged to enhance within the subject his feelings of being *cut off from the known and the reassuring, and of being plunged into the strange*...Control of the source's environment permits the interrogator to determine his diet, sleep pattern, and other fundamentals. Manipulating these into irregularities, so that the subject becomes disoriented, is very likely to create feelings of fear and helplessness...[the interrogator] is able to manipulate the subject's environment, to create unpleasant or intolerable situations, to disrupt patterns of time, space, and sensory perception...Once this disruption is achieved, the subject's resistance is seriously impaired. He experiences a kind of psychological shock, which may only last briefly, but during which he is far...likelier to comply...Frequently the subject will experience a feeling of guilt. If the 'questioner' can intensify these guilt feelings, it will increase the subject's anxiety and his urge to cooperate as a means of escape [emphasis added].' (qtd. in Danner 17)

KUBARK follows the philosophy, mentioned in chapter III.III, of fear-and-control. Make a detainee feel helpless and he will cooperate. Make clear to him that he is the inferior in

the situation and that his only hope of returning to the “known” is cooperation with his superior.

To be more specific, KUBARK techniques generally fall within the broad categories of sensory deprivation and environmental manipulation. The main purpose of these techniques is to cause disorientation, as the person is thrown out of sync with his natural rhythms and is “plunged into the strange,” losing the ability to exert control over his surroundings. KUBARK clearly states that one of its purposes is to do away with detainees’ civility, depriving them of their fundamental human functions so as to become wholly dependent upon the interrogator for mercy and sanity. They are to be deprived of their will so as to be rendered fully docile and compliant. It is for this reason – the intentional denial of a person’s will – that sensory deprivation and environmental manipulation become problematic in terms of a discussion on torture.

Sensory deprivation has been known to go so far as to prohibit detainees from using their sense of touch, in the form of gloves or mittens, for prolonged periods of time. According to Shayana Kadidal, senior managing attorney for Guantanamo Global Justice Initiative at the Center for Constitutional Rights, one of his clients was forced to wear gloves on his hands for the several years that he was there. As a result, he never felt human contact. Such extreme circumstances can lead to Stockholm syndrome, in which the detainee becomes so deranged as to begin identifying with his interrogator. The development of said syndrome is a clear instance in which a person’s free will has been shattered; his identity has become so entwined with that of his interrogator that he defends the person who has abused him. Prolonged deprivation of one’s senses can produce psychological damage.

Lieutenant General Ricardo Sanchez³⁸, the overall commander in Iraq from June 2003 to June 2004, was in favor of utilizing KUBARK. On October 12, 2003, shortly after Major General Miller's visit to Iraq, Lt. Gen. Sanchez signed a classified memorandum "calling for interrogators at Abu Ghraib to work with military police guards to 'manipulate an internee's emotions and weaknesses' and to assume control over the 'lighting, heating...food, clothing, and shelter' of those they were questioning" (qtd. in Danner 12). Yet it seems as if, although the power of such psychological tricks was recognized and taken advantage of, a premium was still placed on physical techniques; psychological techniques were perceived as lighter and less harmful. This bias created leeway for abuse to occur.

To elaborate on this point, a case study will be used. Camp Nama, a US military base at Baghdad International Airport in Iraq, was one such place that routinely utilized psychological interrogation methods.³⁹ Camp Nama was established for the purpose of collecting information on the US' then number one target in Iraq, Abu Musab al-Zarqawi.⁴⁰ The pressure for procuring "actionable intelligence" from detainees that would lead to al-Zarqawi's capture was enormous. "By the spring of 2004, the demand on interrogators for intelligence was growing to help combat the increasingly numerous and

³⁸ Lt. Gen. Sanchez retired in November of 2006, "calling his career a casualty of the Abu Ghraib prison scandal." Sanchez was never directly charged with any crimes, but he claims that he was essentially refused further work because of his association with the incidents at Abu Ghraib. For more see Serrano, Alfonso. "November Off to Bloody Start in Iraq." *CBSNews*. 2 Nov. 2006: n. pg. Web. 26 Feb. 2010 <<http://www.cbsnews.com/stories/2006/11/02/iraq/main2143888.shtml>>.

³⁹ Camp Nama is actually only a few miles away from Abu Ghraib. Many detainees were first sent to Camp Nama and then transferred to Abu Ghraib.

⁴⁰ Al-Zarqawi was killed on June 7, 2006 by a US air strike. For more information on the circumstances of his death, see finer, Jonathan and Ellen Knickmeyer. "Insurgent Leader Al-Zarqawi Killed in Iraq." *The Washington Post*. 8 June 2006: n. pg. Web. 8 Jan. 2010 <<http://www.washingtonpost.com/wp-dyn/content/article/2006/06/08/AR2006060800114.html>>.

deadly insurgent attacks” on US personnel (Marshall). The high stakes of Nama’s objective encouraged the use of more and harsher tactics in an effort to follow any lead – however tangential – that could help the US to locate al-Zarqawi.

As to what those tactics were, the message “NO BLOOD, NO FOUL,” posted on placards located throughout the facility (the image at the opening of this section is a copy of the placard), provides much insight. This seemingly strange slogan summarizes a policy adopted by the US Army unit in charge of the base, Task Force 6-26: “If you don't make them bleed, they can't prosecute for it” (Marshall).

As the slogan points out, there was considerable fear that in the process of interrogating detainees, military personnel might engage in or be witness to behaviors and actions that they could later be prosecuted for as war crimes. To be court marshaled could spell the end of a person’s military career, not to mention the emotional and financial devastation that accompanies preparing for and participating in a trial. The fear of prosecution at the top, as discussed in chapter IV.I, was pervasive throughout all levels of authority, from the White House to the Army privates at the bottom of the military hierarchy.

Assurances were thus made to protect the soldiers in the form of changed laws and policies. For Task Force 6-26, as long as soldiers did not cause detainees to physically show distress through bleeding, any technique they employed to extract information was valid and legally sound. The slogan of “no blood, no foul” was taken so literally that detainees were even used as paintball targets (hence the placard’s reference to the “High Five Paintball Club,” the name adopted by a group of the soldiers); potentially bruises, but no blood, would be the only physical evidence of this cruel entertainment.

Furthermore, when someone was first brought to Camp Nama, they arrived shackled and “[d]ressed in blue jumpsuits with taped goggles covering their eyes.” The importance of depriving detainees of their vision was integral to the full Camp Nama experience. Prisoners were also required to wear hoods whenever they left their cells. After the abuses at Abu Ghraib became public, in an attempt to concede to public petitions for better detainee treatment, detainees at Camp Nama were able to trade in their hoods for “cloth blindfolds with drop veils that allowed detainees to breathe more freely but prevented them from peeking out” (Marshall).

This slight concession had the same effect however; detainees became disoriented and were dependent upon their captors in order to see and to move about their surroundings. The use of blindfolds instead of hoods still provides the interrogator with anonymity as well. As mentioned in chapter IV.I, both are visual shields against being identified later by a detainee reporting on the conditions of his captivity. Hoods are certainly an effective psychological interrogation technique, but the built-in autonomy they provide to the interrogator also makes it unavoidable to wonder if soldiers knew that what they would be doing could potentially be construed as abuse or torture, and thus eliminating witnesses to their behavior was vital.

Hoods were used not only as an interrogation technique, but also as a symbolic parting gift for high-performing personnel within Task Force 6-26. The “the task force leaders established a ritual for departing personnel who did a good job...The commanders presented them with two...mementos: a detainee hood and a souvenir piece of tile from the medical screening room that once held Mr. [Saddam] Hussein” (Marshall).⁴¹ The hood served as a symbol of the interrogator’s power over the detainee; it suggests a smug

⁴¹ After his capture, Saddam Hussein was brought to Camp Nama for medical review.

satisfaction with rendering detainees incapacitated, docile, and compliant. That it was a standard feature of the parting ceremony demonstrates a sense of pride that pervaded Task Force 6-26 about its work. Yet this pride also suggests a slight sadism, which is very problematic for the question of torture, because abuse committed for sadistic pleasure fits the proper intention for an action to constitute torture. The centrality of hoods at Camp Nama raises serious concerns about the type of attitude towards detainees that American personnel brought into their work as interrogators and what influence this had on the type of treatment detainees received.

Camp Nama also had what was referred to as the “Black Room,” a window-less detention facility in which all of the walls and the ceiling were painted black. At first glance, a room painted black may seem no more serious than a teenager experimenting with a gothic lifestyle. Yet the “Black Room” became a playground for a variety of psychological techniques. The use of strobe lights, sleep deprivation, stress positions, blasting of loud music, and extreme temperatures, in combination with the perpetual absence of natural light, were among the non-physical techniques used on those who were kept in the room (McKelvey 158).

Such techniques of sensory deprivation and environmental manipulation often went hand in hand with stress positions. A few documented cases from Guantanamo, recorded on July 29, 2004 and later collected during an FBI investigation, provide clear examples:

‘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. When I asked the MPs 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 occasion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The 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. On another occasion, 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.’ (qtd. in Honigsberg 98-9)

This case shows the use of solitary confinement, shackles, stress positions, dietary manipulation/deprivation, temperature manipulation, and the blasting of loud music to render the detainee docile and compliant.

To analyze the first technique, recall that it was a category II technique approved for a maximum of 30 days. The detainees referred to above were not kept isolated for more than a day or so (according to one witness), but there were cases of isolation that far exceeded the 30-day limitation. Steve Oleskey, a WilmerHale lawyer, asserts that one of his clients was held in solitary confinement for 16 months. In addition, the light was always on in his room, depriving him of the ability to distinguish between night and day, interfering with his ability to sleep and thus causing disorientation, fatigue, and depression. The conditions of his cell were such that his legs began to atrophy. This one anecdote is not meant to suggest that exceeding the isolation time limit was a widespread phenomenon, but it is a potentially dangerous technique because if done long enough, the detainee can become mentally unhinged and suffer severe physical problems.

The power of prolonged isolation to drive a person to insanity is quite strong, but placed next to a slogan of “No blood, no foul,” isolation seems unremarkable, even childish, as if you are sending the “bad” detainee to his time-out. The Camp Nama motto represented the belief that only physical abuse could ever amount to torture and that only severe physical abuse was serious enough to be worth prosecuting. In fact, those at Camp Nama who were charged with crimes were overwhelmingly condemned for physical abuses: electric shocks with stun guns, beatings, etc. Task Force 6-26’s slogan fell in line with the Administration’s official position of torture constituting only “serious physical

injury, such as organ failure, impairment of bodily function, or even death.” The potential damage that psychological abuse could cause was grossly underestimated.

Recall the three-tier interrogation system approved by Secretary of Defense Donald Rumsfeld detailed in chapter III.II. Category III included “mild, non-injurious physical contact, e.g., grabbing, poking or light pushing,” yet hooding and isolation for up to thirty days fell under Category II and thus were considered less harmful and less subject to restrictions as to their use. Physical contact and pain of any sort is the most controversial; psychological pain is useful, but not nearly as problematic.

Psychological abuse and torture do have visible side effects, even if they are not as clear as physical ones. Several examples of the former are detailed in the February 2004 ICRC report. When the ICRC did inspections at Abu Ghraib in mid-October 2003, they encountered prisoners

‘...presenting signs of concentration difficulties, memory problems, verbal expression difficulties, incoherent speech, acute anxiety reactions, abnormal behavior and suicidal tendencies. These symptoms appeared to have been caused by methods and duration of interrogation.’ (qtd. in Danner 7)

The observations of the Red Cross emphasize that torture is sometimes not just a technique within itself, but that the way it is used and how often and for how long are compounding factors that can make something that on the surface seems merely uncomfortable become torture.

Several of the memoranda did take into account the impact of using multiple techniques simultaneously and with what frequency. Secretary of Defense Rumsfeld, for example, recognized the need for strict guidelines as to isolation as he approved techniques for Guantanamo. He qualifies his approval by saying,

Caution: The use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and

psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command. (Rumsfeld, 16 April 2003, 3)

He goes on further to note that other countries might find isolation for more than 30 days in violation of the Geneva Conventions and even though the Geneva Conventions did not apply in this case, this international perspective – held by US allies, among others – was worth bearing in mind.

Furthermore, the ten techniques outlined in the August 1, 2002 memo were also to be used for a maximum of 30 days. The memo admits to the limitations of the effectiveness of their repeated use as well: "...although some of the techniques may be used more than once, that repetition will not be substantial because the techniques generally lose their effectiveness after several repetitions" (Bybee to John Rizzo, 1 Aug. 2002, 2).

Yet these nuances clearly did not reach those on the ground in all cases and it is far harder to make judgment calls concerning psychological techniques than it is for physical techniques. Department of Defense specialists who worked with Task Force 6-26 conceded that "[c]ases of detainee abuse attributed to Task Force 6-26 demonstrate both confusion over and, in some cases, disregard for approved interrogation practices and standards for detainee treatment..." (Marshall). Beating a detainee has clear limits; the evidence is visible to the naked eye and an interrogator can, on the whole, see where further beating might fall within the Bush Administration's definition of torture. Yet psychological torture is simply much more difficult to measure and the standard imposed by the Bush Administration, "significant psychological harm of significant duration, e.g., lasting for months or even years," is essentially impossible to evaluate without being an expert in mental health. Such professionals were present at some locations, but certainly not to the extent required.

Recall from the discussion on torture about how vague definitions can potentially render them useless. The Bush Administration's definition of psychological torture was not vague, but rather so strict that it effectively produced the same result; little or no limitation was placed on psychological techniques because of the difficulty associated with evaluating how it was affecting the detainee's mental health. An interrogator likely would have observed the same problems that the ICRC did, but remember that the definition requires damage lasting months or years. Interrogators would potentially have to wait that long in order to be able to make such calls, if they did at all.

Take for example the EIT concerning confined space. At Guantanamo, when the first detainees began to arrive in January of 2002, the facility was not adequately outfitted yet. Detainees were placed in eight-by-eight metal cages reminiscent of "dog kennels" (Honigsberg 76-7). Confining someone to a small space does not constitute torture, but it is arguably degrading. Furthermore, the analogy to dog housing also brings up a common theme among interrogation techniques, that of equating detainees with dogs.

In McKelvey's book *Monsterring*, she quotes Brigadier General Janis L. Karpinski (commander of the 800th Military Police Brigade, which worked at Abu Ghraib) who in turn quotes MG Miller as saying,

'[A] detainee never leaves the cell if he's not escorted by two MPs in leg irons, and hand irons, and a belly chain. And there was no mistake about who was in charge. And you have to treat these detainees like dogs.' (qtd. in McKelvey 12)

There are three assumptions evident in MG Miller's concluding statement. Military personnel should have no doubt in their minds that the detainees are not their equals; they are not fully human. Subhuman status requires subhuman treatment. Second, detainees must be made to understand that they are subhuman through their treatment. Third, this

type of treatment is necessary in order to elicit cooperation and thus intelligence from detainees.

MG Miller's sentiment about the dog status of detainees did not fall on deaf ears. Though this was never the wording used by top officials such as Rumsfeld or Cheney, the behavior of the soldiers at Abu Ghraib points to an adoption of Miller's attitude. What follows are several excerpts from sworn statements made by Abu Ghraib detainees, made public by *The Washington Post*:

'...[T]hey treated us like animals not humans...they left us for the next two days naked with no clothes, with no mattresses, as if we were dogs.'
'[T]hey forced us to walk like dogs on our hands and knees. And we had to bark like a dog and if we didn't do that, they started hitting us hard on our face and chest with no mercy.'
'Some of the things they did was make me sit down like a dog, and they would hold the string from the bag [placed over his head] and they made me bark like a dog and they were laughing at me.'
'Q: Did the guards force you to crawl on your hands and knees on the ground? A: Yes...Q: What were the guards doing while you were crawling on your hands and knees? A: They were sitting on our backs like riding animals.'

Recall that al-Kahtani (Guantanamo), too, was asked to growl and a leash was placed around his neck (chapter III.III). One of the most infamous Abu Ghraib photos is that of Private First Class Lynndie England holding a leash that had been placed around the neck of a detainee, who is lying naked on the floor. Unmuzzled dogs were used at Abu Ghraib. The motive surrounding the dog techniques seems to go beyond the securing of cooperation so as to extract vital information; it is as if there was an a priori assumption that the detainees were inferior creatures. Such an attitude, combined with the more relaxed attitude towards psychological tools over physical ones, made abuse more likely at Abu Ghraib.

Also worth further examination is the popularity of sexual techniques, which were derived from the original EIT of nudity. The way in which this technique was applied – in the presence of multiple US personnel who were not trained interrogators, involving

multiple detainees, the imitation of sexual acts, and recorded through photographs and video – goes far beyond the necessities that interrogation requires and are unquestionably sadistic. They were a form of sick entertainment for those in charge and served to humiliate and degrade the detainees. They induced a sense of shame and guilt in the detainees. Yet these are psychological side effects and are thus more difficult to quantify and therefore put strict limitations on them. In addition, guides such as KUBARK support the inducing of psychological harm; the objective is to remove all levels of comfort and of the known and make the detainee feel helpless.

Danner discusses how KUBARK's logic explains what was seen in the Abu Ghraib photographs.

Viewed in this light, the garish scenes of humiliation pouring out in the photographs and depositions from Abu Ghraib...begin to be comprehensible; they are in fact staged operas of fabricated shame, intended to 'intensify' the prisoner's 'guilt feelings, increase his anxiety and his urge to cooperate...(Danner 18)

KUBARK's contribution parallels Thiessen's justification of the techniques used against al-Kahtani (chapter III.III), in an "ends justify the means" kind of attitude. The sexual humiliation that al-Kahtani experienced, Thiessen argued, was a creative application of some of the psychological interrogation techniques outlined in FM 34-52. Psychological manipulation is okay because it quickly breaks the detainee down and as for permanent or lasting mental scarring, that is difficult to measure and unlikely anyway. As Lt. Gen. Sanchez said, it is about taking advantage of a detainee's weaknesses and emotions and exploiting them to gain his cooperation.

As the techniques demonstrate, one such weakness was the Arab culture's sensitivity to sexuality. "[S]ome of the techniques seem clearly designed to exploit the particular sensitivities of Arab culture to public embarrassment, particularly in sexual

matters” (Danner 18). The refrain from the administration goes, these methods are no worse than those used in American college fraternity hazing – and they are so useful for gaining detainee compliance – that any concerns about abuse or torture seem misplaced. Such a stance reflects well the tone of the August 1, 2002 “torture memo,” reflecting everything from the assertion that no limitations could be placed on interrogation techniques if the president thought it was necessary for national security to making the definition of torture so narrow.

There were, of course, differing opinions on the topic of sexual and public humiliation among US personnel. In the fall of 2003, the Marine Corps, in an attempt to help them better understand the population they would be working with and thus to help foster cooperation with them, was given the following guidelines, among others, for its operations in Iraq:

‘Do not shame or humiliate a man in public. Shaming a man will cause him and his family to be anti-[US] Coalition.
The most important qualifier for all shame is for a third party to witness the act. If you must do something likely to cause shame, remove the person from view other others.
Shame is given by placing hoods over a detainee’s head. Avoid this practice.
Placing a detainee on the ground or putting a foot on him implies you are God. This is one of the worst things we can do.
Arabs consider the following things unclean:
Feet or soles of feet.
Using the bathroom around others. Unlike Marines, who are used to open-air toilets, Arab men will not shower/use the bathroom together.
Bodily fluids...’ (qtd. in Danner 18)

These recommendations reflect an entirely different philosophy as to how to make detainees compliant than that espoused by KUBARK. As opposed to the fear-and-control strategy, the Marine Corps guidelines intentionally eschew humiliating and shameful situations. The objective is to foster cooperation and rapport through trust and not through domination.

These guidelines were released either slightly prior to or simultaneously with the occurrence of the Abu Ghraib abuses. They were not released years later as retroactive finger-wagging and knowledge based on lessons learned. The US knew enough about Arab culture to exploit it; interrogators and other personnel took advantage of Arab cultural sensitivities, particularly to sexual and public humiliation, to create an interrogation plan particular to the Arab world. A detainee will often say whatever he believes his interrogator wants to hear in order to stop the pain. It is also to stop the shame. Particularly in the case of photographs and videos, that meant that the suffering occurring within the prison could easily extend beyond the prison walls and serve as a permanent reminder of such a traumatizing experience. The photographs broadcasted the detainees' shame to the world.

Some might be tempted to say that the comparison with Marine Corps policy demonstrates that abuses were by and large a product of military rank. As states The Taguba Report in regards to Army personnel at Abu Ghraib:

'...[P]rior to its deployment to Iraq for Operation Iraqi Freedom, the 320th MP Battalion and the 372nd MP Company had received no training in detention/internee operations. I also find that very little instruction or training was provided to MP personnel on the applicable rules of the Geneva Conventions Relative to the Treatment of Prisoners of War...' (qtd. in Danner 295)

Many of those serving at Abu Ghraib had never before left the US and were in their late teens or early twenties. Low-ranking Army personnel, poorly trained, perhaps not very intelligent, and as yet not well integrated into Army culture, let their prejudiced imaginations run loose under the combined stress, fear and boredom of their jobs.

Yet there are holes to this argument. Task Force 6-26 at Camp Nama, for example, was in fact an elite Special Operations forces unit, considered to be one of the military's "most highly trained counterterrorism units" (Marshall). Furthermore, "Twice daily at

noon and midnight military interrogators and their supervisors met with officials from the CIA, FBI and allied military units to review operations and new intelligence.” Many highly trained and disparate groups worked together at Camp Nama. The truth is that many of the repulsive tactics used at Abu Ghraib were implemented at many different locations and by high-ranking as well as low-ranking military personnel. Furthermore, objections were raised about Camp Nama procedures on multiple occasions. At separate times, both the CIA and the Defense Intelligence Agency (DIA) stopped operating at the camp over objections to detainee treatment.⁴² Camp Nama, Abu Ghraib, and Guantanamo were run by very different personnel, but there are many parallels in the ways in which they handled detainees.

To return to the issue of shame, EIT-induced shame can be so strong as to produce many of the same consequences that torture does. False confessions are one example. Three British men held at Guantanamo Bay confessed to appearing in a 2000 video with Osama bin Laden after undergoing beatings, hooding, stripping, being photographed naked, sleep deprivation, drug injection, being shown pornography, shaving, and shackled into stress positions. It is certainly possible that their stories could have involved some hyperbole; it is well-known that one of al-Qaeda’s training techniques is to teach its men to claim abuse because it will inevitably evoke the sympathy of the international community and make the US look like the bad guy. However, their stories seem to pass muster because when authorities realized that the confessions were false, all three were flown back to London and released without charge, with no explanation given. Had they truly

⁴² These concerns potentially contributed to the relocation of Camp Nama. “In the summer of 2004, Camp Nama closed and the unit moved to a new headquarters in Balad, 45 miles north of Baghdad. The unit's operations are now shrouded in even tighter secrecy” (Marshall).

been important detainees, they probably would not have been released and been free to talk with the media.⁴³

Torture induces false confessions for two reasons. On the one hand, the pain and shame is so profound that the subject will want to do anything simply to make it stop. On the other, torture has a fundamentally dehumanizing effect, whereby the subject is broken emotionally, mentally, and physically. Thus anything he says is highly questionable as he is not in full control of his senses.

Thiessen argues that this common critique spouted by Bush Administration opponents is false because interrogation techniques are utilized separately from the questioning period (de-briefing). The techniques approved and implemented by the CIA would not result in the total destruction of the person. Yet it is clear that this division of stages was not a uniform practice and the way in which EITs were implemented in many other instances – and particularly on the many detainees who did not fall under the category of those who qualified for EITs – demonstrates the breaking of detainees and thus their fecklessness in providing information to stop the next terrorist attack.

There are those, furthermore, who argue that none of the EITs were necessary. Among them is Matthew Alexander, a former military interrogator who performed 300 interrogations himself and supervised 1000. His philosophy is that to be an effective interrogator, what you need is a “chair, brain, and a heart” (Amnesty International USA Annual General Meeting). Most importantly, the interrogator must gain the trust of the detainee. The interrogator must not come in with a spirit of dominance, which contrasts sharply with the attitude of Camp Nama and Abu Ghraib personnel. The interrogator

⁴³ For more details, see Ward, Jonathan. “British Men Report Abuse from Guantanamo.” *CNN.com*. 4 Aug. 2004: n.pg. Web. 12 Jan. 2010 <<http://www.cnn.com/2004/LAW/08/04/guantanamo.abuse.accusations/>>.

must sympathize with the detainee in order to get him to cooperate. Sympathy acts as a restraint on interrogators; it reminds them of the purpose of their job and reminds them of the essential humanity of their subject.

It seems as if, in the cases where abuse occurred, there was a whole-scale absence of such sympathy. Personnel who abused came in with an attitude that detainees were inferior beings, aided by public statements of government officials regarding the dangerous and nasty nature of the enemy and the language of such manuals as SERE and KUBARK, as well as the confusion regarding which techniques when, on whom, with what frequency, etc. The casual attitude towards psychological manipulation also played an important role; it is a side effect of not seeing the enemy as one's equal. The lack of an appreciation for what mental manipulation can do to a person – evident from the White House down to the Army privates – greatly contributed to the occurrence of abuse.

Chapter IV.VII: Other Personnel (interpreters)

As mentioned before, several groups operated together at the various US detention facilities located in Afghanistan, Iraq, Guantanamo Bay, and CIA “black sites.” One group consisted of civilian contractors, including interpreters. Lacking sufficient bilingual (English and Arabic) speakers within its ranks, the US military searched desperately both within the US and throughout parts of the Middle East for interpreters, who were vital to facilitating interrogations. Desperation resulted in a lowering of standards. Those lower standards meant that many of the interpreters had personal biases against the prisoners, biases that military personnel, unfamiliar with the culture, customs, language, religion, or history of the Middle East, would not be able to detect.⁴⁴ These biases translated into intentional and unintentional mistranslation of detainee’s statements and at times encouragement of harsher treatment.

Several of the interrogators at Abu Ghraib, for example, were Iraqi Chaldeans, many of whom, because of their position as a religious minority that was persecuted under Saddam, had a “personal stake in overthrowing” Saddam’s regime (McKelvey 50). Should they come across a prisoner who they knew or learned was sympathetic to the regime, they could use that to misconstrue what the prisoner said, resulting in prolonged interrogation sessions, more beatings, etc.

Ex-patriots now living in the US who were hired had their own scores to settle. “[S]ome US Arabic speakers, acting as interpreters, were responsible for assisting individuals who once had been their oppressors and were now detainees in US custody”

⁴⁴ This situation is very similar to that of the US’ use of bounties to round up Al-Qaeda and Taliban members, analyzed in footnote 26.

(McKelvey 52). Many of the interpreters from the US had fled Iraq to escape Saddam's regime. Facilitating the abuse of a regime sympathizer was a way to exact revenge.

Marwan Mawiri, who worked for a private military contractor as an interpreter from 2003 to 2004, has testified to how personal prejudice played a role in the abuses.

'When they [the interpreters] got there, the Kurdish linguists became lobbyists for the Kurdish cause. The Shia linguists became linguists for the Shia cause. Kurds were turning in Arabs...Shia were turning in Sunnis...And who got burned? American soldiers...' (qtd. in McKelvey 52)

The US' unfamiliarity with the enemy contributed not only to inhumane treatment, but also produced many unintentional consequences, too, like that of interpreters who manipulated both prisoners and guards for their own personal gain.

Mawiri's comment also illuminates the often non-discussed flipside to torture: it affects the interrogator, too. In depriving another of his will, there is an inevitable psychological weight that falls on the shoulders of the interrogator. Shame and guilt can be felt by both detainee and interrogator.

Shannon P. Meehan, formerly an Army lieutenant stationed in Iraq, wrote for the *New York Times* about the impact that killing has had on her.

Killing enemy combatants comes with its own emotional costs. On the surface, we feel as soldiers that killing the enemy should not affect us – it is our job, after all. But it is still killing, and on a subconscious level, it changes you. You've killed. You've taken life...The feelings of disbelief that initially filled me quickly transformed into feelings of rage and self-loathing...What I found, though is that you feel the shock and weight of it only when you kill an enemy for the first time, when you move from zero to one. Once you've crossed that line, there is little difference in killing 10 or 20 or 30 more after that.

War erodes one's regard for human life. Soldiers cause or witness so many deaths and disappearances that it becomes routine. It becomes an expected part of existence. After a while, you can begin to lose regard for your own life as well. (Meehan, A23)

Although killing can be the outcome of certain tortures, the purpose of the above quote is not to equate death and torture. Nor is it to suggest that Ms. Meehan is the ultimate authority on what it is like to fight in a war. The quote was chosen because it explains

quite well the problems associated with torture. It is the job of the interrogator to interrogate; it is his job to make the detainee cooperate. Yet once he has tortured, he can never quite be the same person again. In robbing another of his will and humanity, the interrogator has lost some of his right to his own will and humanity. This realization produces a sense of “self-loathing,” in which the interrogator asks himself: What gave him the right to deprive another of his humanity? It begs the question of whether or not humans are fundamentally equal and are deserving of a bare minimum of treatment. Torture happens when the subject is not considered one’s equal; it is this flawed logic that can haunt the interrogator afterwards, as it did Ms. Meehan.

Furthermore, she points out that this regret is strongest only after the first death. Again, there are parallels with torture. Recall the discussion about how the EITs provoked a fundamental change by breaking the physical barrier; interrogators were allowed to make physical contact with detainees. That was the seed that sparked all of the other physical abuses that followed; once the gate was opened, some took it upon themselves to run with it, for they were defending their country, after all. Once physical contact was allowed and encouraged – whether by White House memos or the wink and nod of a superior or from peer pressure from fellow soldiers – the sense of taboo associated with it had been removed, allowing it to become a more routine practice. Abuse can quickly escalate and a person’s sensitivity to what constitutes abuse decreases the more they are engaged in it. As was the case with Abu Ghraib, once one soldier began to abuse a detainee and no reprimand was issued by a superior, peer pressure and a sense of camaraderie would kick in and soon all would partake in the abuse.

It is these realities that contributed to the war on terror abuses. Detainees did get “burned,” but so did American soldiers, and not just those who faced criminal charges.

Anyone involved will have been changed and his sense of respect for human life will have undoubtedly been challenged because of the lack of respect for human life extended to those within his custody.

IV.VIII: The Problem of Torture – A Summary of Key Findings

In the First Amendment Supreme Court case *Jacobellis vs. Ohio* (1964), Justice Potter Stewart, in defining what he believed to be “hard-core pornography” (and thus not protected by the First Amendment right to freedom of speech), he argued, “I shall not today attempt further to define the kinds of material I understand to be embraced within [said category]...But I know it when I see it.” Some would argue that the same sentiment could be applied to the discussion of torture and once and for all clarify its definition.

Yet this view is overly simplistic, for if simply seeing a technique employed is enough to determine its classification, then how could soldiers believe that stripping detainees, chaining them hand and foot to the floor, and beating them was okay to do? Some of the personnel at Abu Ghraib felt that their behavior was so in accord with military policy that they used the photos as the background image (wallpaper) on their laptops.⁴⁵ Such a casual attitude towards the abuses cannot be blamed solely on the work of the soldier. This concluding section seeks to reiterate some of the major pieces of evidence that led to the abuse and torture of war-on-terror detainees, with a special emphasis on making the connection between policy decisions and rhetoric from the top and what happened on the ground.

Certainly many at Abu Ghraib were untrained and very young. Former Air Force officer Matthew Alexander argues that in fact most military interrogators (at least in Iraq, where he was stationed) were outside of the US for the first time in their lives. Many had never before seen a Muslim. Once they arrived, they encountered a “wink and a nudge” attitude about doing whatever it took to accomplish the mission – and such an attitude was

⁴⁵ McKelvey 25

particularly potent for such a young crowd. It does not seem to be very enlightening that low-ranking military personnel, placed in a permissive and dangerous environment with an unclear chain of command and guidelines, are at considerably increased risk of engaging in such immoral behavior. Vague rules are an invitation for the worst tendencies within the human being to come out. But as this paper has also sought to highlight, it is not just Army privates that are to blame; abuse was more pervasive and thus the analysis of many more contributing factors.

First, the Bush Administration changed the definition of torture as enshrined in international (CAT) and federal law (18 U.S.C. § 2340-2340A) for a variety of reasons, among them fear of legal reprisal and a sincere belief that this was a new war that demanded new standards. The result was a very narrow interpretation of torture that, furthermore, only illegalized torture and not cruel, inhuman, and degrading treatment or punishment. This was a departure from the standards of the Constitution, the US Army Field Manual on Interrogation, and the US Military Code of Justice.

In addition, the August 1, 2002 Bybee/Yoo memo stated that the president was allowed to break the torture statute if it interfered with his commander-in-chief responsibilities. The memo also effectively silenced Congress, the State Department, the Supreme Court, and any other government body that wanted to have its two cents in forming detainee policy by placing all power over detainee treatment policy into the hands of the executive and keeping a tight hold on information regarding exactly what the administration was doing.

Geneva Convention protections were also rendered invalid in Afghanistan, Guantanamo Bay, and CIA “black sites,” but remained for Iraq, causing confusion for soldiers trained to view GC as the standard for all international wars. New terminology

such as “unlawful enemy combatant” provoked further changes in the rules of warfare and thus complicated the situation even more.

In developing the actual list of interrogation techniques, the Bush Administration implemented a second tier of interrogation techniques (EITs) on top of those provided by FM 34-52, creating a break with past military protocol that caused great confusion in the many instances in which the CIA and the military were working alongside of each other. EITs were originally designed for use against the most high-profile detainees, but over the course of the war, they became standard procedure for a majority of detainees, some of whom were protected by the Geneva Conventions. Furthermore, EITs broke the taboo against physical contact with detainees by authorizing such techniques as slapping, which opened up the way for the use of even harsher physical methods.

SERE and KUBARK also provided considerable guidance in developing EITs, and their focus on psychological manipulation (i.e. through nudity and sensory deprivation) contributed to the abuses. Their philosophy of fear-and-control also pervaded the atmosphere of interrogations, and encouraged soldiers to view detainees in an inferior and alien light. Abuse was thus more easily justified, since the enemy was not perceived as fully human. Such a perception was reinforced by the “gloves coming off” rhetoric of top officials in the White House, CIA, and military. Interpreters with their own personal biases added fuel to the flame.

Perhaps many of the techniques, by themselves and done infrequently, would not constitute torture. However, they were not employed in such a manner. Many were done simultaneously and repeatedly. Determining what constituted torture during the Bush Administration years was complicated by many factors, as this thesis has tried to prove, not least of them being the extensive use of psychological torture which, to the naked eye,

may not seem like torture or even particularly damaging, but merely uncomfortable (i.e. prolonged solitary confinement or sleep deprivation).

There is no simply right way to torture; the ends, for however compelling they may be, never justify the means (torture) because it deprives the tortured of the most fundamental aspect of his identity, his humanity.

[T]he problem of torture is...a particular case of what is sometimes called the problem of dirty hands: that is, a species of moral dilemma, where, in doing what appears to be the right or the best thing in the circumstances, we cannot avoid doing wrong. (Lukes 2)

Soldiers, CIA personnel, and civilian contractors are all told that what they do is in defense of the motherland; thus it can be easy to fall into “the ends justify the means” way of thinking. However, condoning torture introduces a profoundly dangerous moral relativity about what is an acceptable way to treat others and what the value of one human’s life versus another is.

At the 2000 Republican National Convention, President Bush talked about the need for both parties to end “politics of fear.” Yet this is exactly the means by which President Bush led his administration, constantly impressing the message that stakes were so high that everything and anything had to be allowed. This was a new war with a new enemy and the US had to be permitted to do whatever it believed necessary – even if it broke the law – to win the war. That meant, for example, discarding the US Army Field Manual on Interrogation’s labeling of such techniques as prolonged stress positions and abnormal sleep deprivation as torture. It meant using fear as the main weapon against the enemy; creating a sense of fear and helplessness in detainees was considered the most effective way of rendering them compliant. What was authorized by the Bush Administration raises questions about the necessity of changing standards and whether what constitutes torture is a relative term based on the perception of the threat level.

Admittedly, the Bush Administration had much to fear as it tried to balance adherence to the law, an amorphous enemy, and saving American lives. Yet the extent of the terror felt by the highest officials rapidly dissipated among the populace and allies as the passing of time brought no more attacks and no clear military victories. What was seen within parts of the administration as a “better safe than sorry” strategy was perceived as fear mongering in order to scare the American public into surrendering civil liberties and military traditions in the name of a new enemy.

...[M]uch of the country and most of our allies didn't think we were (or should be) at war with Islamist terrorists...they simply did not trust the administration's claim that the threat of terrorism warranted a wholesale military response. Public judgments about the legality of presidential actions are colored by public perceptions of the stakes. When a nation is unambiguously at war and believes its future is at risk, practices that would have seemed wrong in peacetime are viewed as necessary and thus legitimate. (Goldsmith 115)

Had the Bush Administration been more sensitive to public criticism, it would have had many opportunities to correct itself, particularly if it had included Congress more in its policy making. For the first several years of the war however, the Bush Administration never toned down its rhetoric and was never willing to admit to mistakes. It was not willing to throw itself at the mercy of Congress and/or the public as it navigated the war on terror.

The Bush Administration did not conduct itself in a manner that inspired trust. It emphasized secretiveness and an almost authoritarian control over information and its policy decisions. Again, the attitude at the top reflected what occurred on the ground; the government was not trying to gain the American people's trust in the same way that interrogators were not trained to gain the trust of detainees. The objective was to keep the opposition in the dark and make very clear who was in charge. To the American public, that meant public declarations of executive prerogative and national security arguments.

To the detainees, that meant employing interrogation tactics that blatantly suggested that the detainee was inferior and subhuman in comparison to his captors.

There are certainly those who will not be persuaded by the argument that the abuse and torture that detainees suffered was the result of policy decisions made at the top and that, therefore, the President and other high officials were aware of and equally guilty of what happened. The argument concerning systemic abuse has many critics. However, this thesis hopes to demonstrate that US engagement in inhumane and degrading practices is possible given the way that the administration approached its antiterrorism policy and if changes are not made now, what were (some argue) isolated incidences of abuse could become a part of a much larger problem. That torture and abuse have not been more rampant is more of an accident rather than a matter of policy, for the policy was written in such a way as to dehumanize the enemy and thus make inhumane treatment more justifiable. Changes need to happen if Americans wish to prevent more Abu Ghraibs.

CHAPTER V: CHANGES AND IMPLICATIONS

“[T]orture should remain anathema to a liberal democracy and should never be regulated, countenanced, or covertly accepted in a war on terror. For torture, when committed by a state, expresses the state’s ultimate view that human beings are expendable. This view is antithetical to the spirit of any constitutional society whose raison d’être is the control of violence and coercion in the name of human dignity and freedom.”

-Michael Ignatieff, qtd. in Lukes 4

V.I: Torture and Democracy

Terrorism, particularly suicide bombing, relies on the notion that human life is expendable in the name of a greater goal. Terrorists rely on targeting civilian populations to produce the greatest human loss for the least amount of money. The more deaths, the more news coverage there will be. The more news coverage, the farther their message can spread. The farther the message spreads, the more members they can have and the greater likelihood of achieving their aims. Humans are necessary collateral damage.

Torture is another way to view human life as a means to an end. Human life is considered secondary to the greater purpose; in the case of the US, it would be to collect information to prevent future deaths in another terrorist attack. It is as if the US has adopted a version of the terrorist's own view towards life. Torture goes beyond the battlefield reality of enemy soldiers shooting each other. Torture is a denial of the other person's essence.

It seemed that what the Bush Administration endorsed was the sacrifice of democratic rules for the preservation of them. As Michael Ignatieff suggests, there should be a "‘lesser evil morality’ according to which ‘necessity may require us to take actions in defence of democracy which will stray from democracy’s own foundational commitments to dignity’" (qtd. in Lukes 4). If the US temporarily sacrifices its principles now, they will be preserved in the long run. Furthermore, there is an understanding of greater and lesser evils, where some things are permissible in certain circumstances.

This logic has been dismissed by certain pieces of legislation and policy changes that have happened since the Abu Ghraib scandal became public. Beginning in 2005, the administration began to compromise on many aspects of its counter-terror program in an

effort to address the concerns of the public. Some of those compromises are addressed in this section, namely the replacement of the August 1, 2002 Bybee/Yoo memo, the Detainee Treatment Act of 2005, the 2006 update to the US Army Field Manual on Interrogation, and finally, President Obama's efforts.

V.II: 18 U.S.C. § 2340-2340A

As discussed previously, the qualifications made by OLC to the section of the United States criminal law code that prohibits torture were so controversial that OLC (specifically former Assistant Attorney General Jack Goldsmith) rescinded the August 1, 2002 memo interpreting the law. The replacement memo states:

Questions have...been raised, both by this Office and by others, about the appropriateness and relevance of the non-statutory discussion in the August 2002 Memorandum, and also about various aspects of the statutory analysis, in particular the statement that 'severe' pain under the statute was limited to pain 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.' (Levin, 30 Dec. 2004)

In essence, the memo concludes that the US must adhere to Section 18 U.S.C. § 2340-2340A as it stood before the August 1, 2002 memo.

However, it bestows its approval upon all of the techniques previously authorized, judging none of them to be illegal. In a footnote, Levin writes:

While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.

This fact points to a very important reality of circumstances that greatly influenced the narrative on the Left as to the true story of the war on terror. The legal rhetoric was very broad, much broader than that needed for many of the specific techniques approved. It is thus easy to make the leap to believing that the US was trying to create a window of flexibility for itself so that it would be legally protected to go far beyond those specific techniques and in that gray area of unspecified creativity operated those soldiers and personnel who did abuse detainees.

V.III: The Detainee Treatment Act of 2005

The Detainee Treatment Act of 2005 helped to counteract the power of the terms “enemy combatant” or “unlawful enemy combatant” because it proscribed uniform interrogation techniques for all detainees, “regardless of status or characterization” [FM 2-22.3 (FM 34-52): Human Intelligence Collector Operations vi]. As discussed in chapter III.III, there was serious confusion as to which were valuable detainees and which were not and what treatment each should receive. The Detainee Treatment Act sought to eliminate that ambiguity by creating one standard for all detainees. However, some exceptions were still made for the CIA, allowing it to continue with certain techniques such as waterboarding (Eggen).

The potential impact of this bill was also tempered by the importance of the philosophy of executive privilege amongst members of the Bush team. In signing the act into law, President Bush included a signing statement “banning cruel, inhumane, and degrading treatment of detainees but reserved the right to ignore the ban under his power as commander in chief” (Honigsberg 33). The Detainee Treatment Act of 2005 attempted to erase the previous distinction the Bush Administration had made between cruel, inhumane, and degrading treatment (legal) and torture (illegal) by banning both. Bush’s signing statement, however, effectively maintained the legal distinction implemented by the Bush Administration in which torture alone was illegal.

The signing statement reveals two important themes of the Bush Administration years. One is the belief that the president’s commander in chief authority is so broad and so vital to national security that anything that could potentially interfere with it is illegal. Secondly, the Bush Administration seemed concerned only with banning torture. There

did not seem to be any qualms about cruel, inhumane, and degrading techniques. Taken together, these points strongly suggest that the Bush Administration wanted legal protection to engage in cruel, inhumane, and degrading techniques, believing that not only was it within the commander in chief's authority to authorize such techniques but also that these techniques were necessary for winning the war on terror.

Goldsmith analyzes this signing statement in legal terms:

...[A] signing statement serves no formal legal purpose. If President Bush later felt he needed to act in a way contrary to the McCain law [the Detainee Treatment Act of 2005, sponsored by Senator John McCain], he could have made and acted upon and published the decision at that time without any prior signing statement. The only thing achieved by the statement at the time the President signed the bill was to spoil the tentative consensus and goodwill that had been reached with Capitol Hill on the issue, and further enflame mistrust of the President. (Goldsmith 211)

Once again, the circumstances of the war and of the Bush Administration compelled President Bush to include exceptions which did not provide sufficient reassurance to the American public about what exactly the US was doing and why.

V.IV: The US Army Field Manual on Interrogation (2006 Revision)

In direct response to what had been done by Army personnel post 9/11 (particularly in regards to Abu Ghraib), an overhaul of the Field Manual on Interrogation was undertaken. The update explicitly addressed the issues concerning the role of the Army versus the CIA between detention and interrogation.

The MPs will not take any actions to set conditions for interrogations (for example, 'softening up' a detainee). Additionally, in accordance with DOD [Department of Defense] Directive 3115.09, military working dogs, contracted dogs, or any other dog in use by a government agency shall not be used as a part of an interrogation approach nor to harass, intimate, threaten, or coerce a detainee for interrogation purposes...The only authorized interrogation approaches and techniques are those authorized by and listed in this manual, in accordance with the Detainee Treatment Act of 2005. Two approaches, Mutt and Jeff and False Flag, require approval by the first O-6 in the interrogator's chain of command. The restricted interrogation technique 'Separation' [solitary confinement or isolation] requires COCOM [or UCC, Unified Combat Command, a US joint military command] commander approval for use, and approval of each interrogation plan using 'Separation' by the First General Officer/Flag Officer (GO/FO) in the chain of command...use of all techniques at all locations must carefully comply with this manual and additional instructions contained in the latest DOD and COCOM policies. [FM 2-22.3 (FM 34-52): Human Intelligence Collector Operations 3-8-1]

In bold it states:

All captured or detained personnel, regardless of status, shall be treated humanely, and in accordance with the Detainee Treatment Act of 2005 and DOD Directive 2310.1E, "Department of Defense Detainee Program," and no person in the custody or under the control of DOD, regardless of nationality or physical location, shall be subject to torture or cruel, inhuman, or degrading treatment or punishment, in accordance with and as defined in US law. [FM 2-22.3 (FM 34-52): Human Intelligence Collector Operations 2-5-20]

The revised Field Manual applies to all branches of the military. This effort at uniformity is an important step in making clear what is legal and what is not – and much of what had been approved over the course of the first years of the Bush Administration was banned. The first sixteen techniques outlined in chapter III.I (FM 34-52) remained. Three additional techniques were added, justified given what has been learned since beginning the war on terror. The first two are techniques 17 and 18 from chapter III.II (Mutt and Jeff and False Flag). The third technique is isolation. However, all three of

these techniques require additional approval before being used, reinforcing the importance of the military chain of command (which also places responsibility for detainee treatment on other military personnel above MPs, perhaps in belated recognition of the fact that Abu Ghraib abuses were not just the product of MP behavior).

However, as was the case with the Detainee Treatment Act, the Field Manual on Interrogation is not applicable to the CIA. Remember that besides the different requirements and needs of the military versus the CIA, the military is bound up in a completely different tradition than is the latter. The military lives and breathe by its code and by its chain of command. The United States Military Code of Justice, the US Army Field Manual on Interrogation, and the Geneva Conventions have long overseen military policy and operations.

With the birth of the war on terror, the Bush Administration was asking the military to make significant changes to the way it had previously conducted itself and naturally, it had difficulty adjusting. It is in part due to its tradition and history of high standards why the wording of the 2006 revision to the Army Field Manual is so precise and detailed – and why both torture and cruel, inhuman, and degrading punishment are prohibited, in contrast with the original Bush Administration declaration on detainee treatment, the August 1, 2002 memo which banned torture alone.

Lt. Gen. John Kimmons, Army Deputy Chief of Staff for Intelligence, when interviewed by CBS, qualified the additional three techniques added to FM 34-52 by stating that they were to be used “only on unlawful combatants, not POWS, only as an exception and only with permission of a high-level commander” (Alfano). A clear and orderly chain of command and clear legal distinctions among detainees are the key objectives of the new standards.

The 2006 revision also mentions such techniques as nudity and hooding for the first time, an acknowledgement of both their novelty and their recent use in military operations. It bans “forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner [and] placing hoods or sacks over the head of a detainee; [nor can military personnel use]...duct tape over they eyes” [FM 2-22.3 (FM 34-52): Human Intelligence Collector Operations 2-5-21]. These are unquestionably judgment calls based on lessons learned from the abuses.

Despite these reassurances, however, it must be remembered that similar restrictions were originally placed on these techniques, yet they still were abused and ended up becoming standard procedure for all detainees. This is important, concrete policy change but allowances and exceptions were made before; what will stop them from happening again? The next, and final, section serves to argue that one vital way of preventing further abuses lies in presidential leadership.

V.V: Final Thoughts – The Obama Administration

“[O]ur constitutional democracy will not be preserved by better laws and institutional structures, but rather...by leaders with a commitment to the consent of the governed who have checks and balances stitched into their breasts. In the permanent emergency we face, the best hope for preserving both our security and our liberty is to select leaders who will be beholden to constitutional values even when they are forced to depart from constitutional traditions.” -Goldsmith 216

Torture is never publicly defensible in a constitutional, liberal democracy, regardless of who is in US custody or what their crime may be. This is an argument of principle; there are no circumstances in which torture is permissible in such a society, for it opens up the dangerous possibility of a quiet, slippery slope whereby the US moves more and more in the direction of the tyrannies it so reviles, leaving behind the values and morals that define the American tradition. As Professor Steven Lukes argues, torture ...cannot be rendered liberal-democratically accountable, in the sense that it will sometimes be legitimate and, when not, punished, because its practice cannot be publicly recognized without undermining both the democratic and liberal components of liberal democracy. (1)

The options seem to be to either continue to torture and ignore it or stop torturing completely and permanently out of recognition of its fundamental incompatibility with the values, beliefs, and morals of a liberal democratic society.

One such belief is intricately tied to the topic of torture, namely, equality among men. Torture involves an assumption of the inferiority of the subject to an extreme; one cannot believe in a shared human essence – an absolute bare minimum of standards that all humans are deserving of – if one condones and engages in torture.

It was this message that the Bush Administration tried to put forth in its Middle East policy. The rhetoric of bringing free societies to the Afghani and Iraqi people seemed to present a message of viewing them as equals to the Americans, as equally deserving of what Americans view as the best form of government – their government: a peaceful, liberal democratic society where legitimate, elected governments regularly hand over

power to subsequent administrations and individual rights and liberties are protected and preserved. Yet abuse and torture are the products of viewing the other in an unequal light, as one's inferior, as subhuman. Instances of abuse on the ground were not in accord with the political message being sent from the top.

Part of what happened is that the rhetoric made a point of distinguishing between civilians (those whose "hearts and minds" the US tried to win and saw as its equal) and terrorists (not equal and thus not deserving of democracy). But the way policy was designed and the way it was implemented in the field erased most distinctions between those categories, and in the end, anyone who came into US custody faced the risk of being abused and tortured in the gruesome ways detailed throughout this paper. The US is supposed to be a liberator, spreading its values of freedom and equality. Yet the US has played a role in spreading terror as well.

The US must be careful to do everything within its power to maintain a pristine reputation, because otherwise it is likely that some of those "hearts and minds" will turn "anti-coalition," and instead fall into the arms of the insurgents and terrorists.

In fighting a guerrilla war, the essential weapon is not tanks or helicopters but intelligence, and the single essential tool to obtain it is reliable political support among the population. [The US' strategy] means not only that the occupier lacks the political support necessary to find and destroy the insurgents but that it has been forced by the insurgents to adopt tactics that will further lessen that support and create still more insurgents. It is, in short, a strategy of desperation and, in the end, a strategy of weakness. (Danner 33)

The Bush Administration failed to establish an adequate level of trust with the American people about what it was doing, and it fueled much of the anger and backlash that occurred once evidence did start leaking to the press. The Bush Administration has also failed to earn the trust of the countries that it has occupied, which is a threat to US national security that Bush supporters such as Thiessen do not adequately address.

At the same time, this thesis has sought to show that the question concerning whether the US has engaged in systematic torture is far more nuanced than either the Left or the Right paints the situation. No officials explicitly tried to approve torture, but disagreements about how far one could go was highly contentious, hence the ever-changing guidelines regarding interrogation techniques. That constant debate produced mass confusion on the ground, which increased the likelihood of abuse and torture.

The debates stemmed, in part, out of the question that any democracy must ask itself in wartime: security or freedom, one or both, and to what extent? Francis Biddle, FDR's Fourth Attorney General, spoke to this question in response to the attack on Pearl Harbor:

'The war would test whether our freedoms could endure...[a]nd although we had fought wars before, and our personal freedoms had survived, there had been periods of gross abuse, when hysteria and fear and hate ran high, and minorities were unlawfully and cruelly abused. *Every man who cares about freedom must fight for it for the other man with whom he disagrees* [emphasis added].' (qtd. in Goldsmith 44)

Biddle warned against the possible loss of civil liberties that might accompany the impending war, favoring freedom over security, while making it evident that it is human freedom that makes life worth living. Human equality is the fundamental mantra of any democracy and departing from this must always necessitate a serious public debate, if not always right away, at the very least soon after the fact. This paper is meant to contribute to that much needed debate.

President Obama has certainly asked himself the same question of security vs. freedom and his actions are quite telling of where he stands. On his second day in office, he signed an executive order ordering the closing of Guantanamo Bay within a year. He also signed an order stating that interrogations performed on anyone in US custody must

conform to the US Army Field Manual (the 2006 version).⁴⁶ That meant elimination of the CIA's "enhanced interrogation techniques" program.

First, by emphasizing that all personnel must adhere to the Field Manual, President Obama is erasing the previous distinction between the CIA and the military, a distinction that the Detainee Treatment Act of 2005, the Military Commissions Act of 2006, and the 2006 update to the Army Field Manual on Interrogation left in place. Furthermore, limiting techniques to those delineated in the Field Manual eliminates many of the most controversial techniques, such as waterboarding, nudity, physical contact, and the use of military dogs. The argument could certainly be made that erasing the distinction between the CIA and the military could actually be counter-productive. It will limit the CIA's flexibility and thus potentially result in less and poorer quality intelligence used to prevent future terrorist attacks.

Furthermore, the release of relevant documents shortly after this executive order had the potential to damage US efforts, while satisfying critics who had denounced the secrecy surrounding Bush Administration operations. Thiessen warns that "al-Qaeda will now use the information...to train its operatives to resist interrogation, and thus withhold information about planned attacks. Americans could die as a result" (13). Knowing that the enemy is becoming better trained in US interrogation techniques might encourage the CIA and the military to continue to push the envelope anyway, which could potentially lead to interrogation techniques even more questionable and dangerous than the ones already prohibited, as the US tries to keep pace with the enemy. If the US were to reinstate some plan of interrogation that went beyond the Army Field Manual, then it

⁴⁶ For more information, see Pickert, Kate. "The Army Field Manual." *Time.com*. 26 Jan. 2009: n. pg. Web. 18 Nov. 2009 <<http://www.time.com/time/nation/article/0,8599,1873897,00.html>>.

might have to implement even harsher techniques than those used before in order to maintain an element of surprise over the enemy – which would seem to produce the entirely opposite effect of the intention of eliminating the techniques in the first place. That the techniques were made public makes it difficult to simply reinstate the program and it is naïve to believe that it would still exert the same effectiveness.

Although making public certain previously classified documents can be a potentially dangerous move, the American government must be fully aware that all future military campaigns will be done publicly. The role of mass media has transformed warfare; leaders must assume that what happens in an obscure prison like Abu Ghraib could become tomorrow's headlines. Technology, from photographs to Twitter, cell phones to instant messaging, can broadcast the smallest incident to the world in the span of a few seconds.

After the news of Abu Ghraib was made public, even the Bush Administration underwent a change in tone in regards to how much it would reveal about its methods. There suddenly developed an urgency to set the record straight. As National Security Advisor Steve Hadley put it,

'We all knew when we were doing this program in 2002 to 2003, even though it was classified and was not public, that at some point it would become public and we would have to explain our actions...The president, after 2004, basically says: Look, we need to take all these tools we're using, and we need to bring them out of the shadows. We need to make them public. We need to frame them, we need to explain them, and then work with Congress to get a legislative basis for them, as a way of getting acceptance from the public, so that programs will endure and be available to me and my successor. We need to institutionalize the tools for fighting the war on terror.' (qtd. in Thiessen 39)

Yet why was this not done from the very beginning? Why not preempt the supposedly predictable process of leaking by taking the sense of unity that developed immediately following 9/11 and throw one's self at the mercy of the American people and be honest

with them about the kinds of methods and tactics the US would need to employ to face such a formidable enemy? As Thiessen admits, “disclosing the [CIA] program” in 2006 was done “in order to save it” (44). Those reasons ranged from fear of lawfare to dedication to a broad understanding of executive privilege to concern that divulging information would harm national security.

While the Bush Administration did have some legitimate reasons for wanting to keep certain information under wrap, it failed to acknowledge that

[t]he Terror Presidency’s most fundamental challenge is to establish adequate trust with the American people that enables the President to take the steps needed to fight an enemy that the public does not see and in some respects cannot comprehend. (Goldsmith 192)

Goldsmith is true to point out that the distance the average American feels from the conflict makes it easier to view the stakes as not so high and criticism more likely. The war on terror

...ha[s] brought no draft, little mobilization, relatively few casualties, and no shortages, rationing, or economic controls. Nor have we seen alarming army divisions, or decisive public victories. (Goldsmith 187)

It is easy and tempting to paint the administration’s behavior as paranoiac exaggeration, which has the unavoidable corollary of provoking additional suspicion about the government’s intentions. The fact that this was a modern war that kept the public very distant from what was happening on the ground – which can easily feed misperception – did not bode well with the tight-lipped attitude of the administration.

The Bush Administration, furthermore, for all of its efforts to aggrandize executive privilege,

...borrowed against the power of future presidencies – presidencies that...will be viewed by Congress and the courts, whose assistance they need, with a harmful suspicion and mistrust because of the unnecessary unilateralism of the Bush years...a president’s authority is not measured primarily by his hard power found in the Constitution, statutes, and precedents, but rather by his softer powers to convince the other institutions of our society to come around to his point of view. (Goldsmith 140, 205)

Presidents will face the threat of terrorism for many, many years, if not for the rest of the US' existence. Interrogations are simply one tool for facing that threat and any tool used must be placed on a foundation of trust and legality, which, while it certainly may take time and can be quite chaotic in a democracy, is necessary to remain a democracy.

As to critics of Obama's executive orders, it is necessary to understand why he felt compelled to do so. As this thesis has sought to demonstrate, President Obama's decisions were a reflection of much of the public's concern about the entire torture debate. The move was in response to what was perceived as mistakes made during the Bush years. One of his objectives was to regain the trust of the public, to wield that soft power that Goldsmith praises and which was often cast aside by the Bush Administration. Obama was trying to counter the secretive nature in which the Bush Administration conducted itself by issuing orders and releasing classified documents. Guantanamo Bay, for example, had become so synonymous in the public and international mind with torture and abuse that it would be good for public relations to close it.

The fact is that allowing anyone to practice EITs provoked anxiety because of scandals like Abu Ghraib. No one was keen on allowing this to happen again and certainly not President Obama, since everything that happened from now on would be on his watch. President Obama took the opposite "better safe than sorry" approach of the Bush Administration. The Bush Administration approved almost everything to prevent further attacks; the Obama Administration has approved very little in order to prevent further abuse. Which is the morally superior choice?

Thiessen criticizes Obama for making a move towards using more drones, whereby the US is killing terrorists, rather than capturing and interrogating them. He does not

believe that this is the morally superior choice because it deprives the US of critical intelligence that is forever lost with the death of the al-Qaeda operative. It is as if the US has gone as a nation from one extreme to the other: from permitting anything short of death (i.e. torture is limited to “organ failure, impairment of bodily function, or even death”) to now permitting only death so as to avoid torture. Yet the point is that interrogation makes the average human uncomfortable; it brings with it the possibility of bringing out the worst in humans and opens up the possibility of depriving someone of their humanity. It is a slippery slope that some would rather avoid all together rather than make gradual steps with a clear cut off line. Death in wartime is accepted; it is certainly easier for the public to digest the deaths of terrorists, rather than having to face the reality of the messy and harsh business that detention and interrogation can be.

Hopefully, it will not have to be a choice for very long and a middle ground can be found between the two strategies, as is already evident by President Obama’s continuation of much of President Bush’s policies. An extreme reaction on either end will inevitably cause the US to sacrifice some of its good policies with its bad ones, which will simply produce more mistakes, albeit different ones.

The president’s number one priority is to keep the American people safe. Yet making conscious efforts to prevent abuse is a testament to the strength of the values and principles that make the US an exceptional country and are the bedrock of American liberty. What the US needs right now is serious reflection, acknowledgment of failures and successes, and implementation of a strategy that does a better job of balancing liberty and security than either the Bush Administration did or the Obama Administration has up to now. As Danner puts it,

Like other scandals that have erupted during the Iraq war and the war on terror, it is not about revelation or disclosure but about the failure, once wrongdoing is disclosed, of politicians, officials, the press, and ultimately, citizens to act. The scandal is not about uncovering what is hidden, it is about seeing what is already there – and acting on it. (Danner xiv)

The failure of the Bush and Obama Administrations to flesh out the faults of both of their poor policy decisions may doom the US to repeat them.

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