

USAWC STRATEGY RESEARCH PROJECT

**POLICY FOR TREATMENT OF DETAINEES BY THE UNITED STATES MILITARY**

by

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## ABSTRACT

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Public Law No: 109-148 was enacted in December 2005. This law prohibits torture and cruel, inhumane, and degrading treatment of detainees held by officials of the United States. Does this law establish the correct position on treatment of detainees? What should the policy be for treatment of persons detained by the United States military during the war on terrorism, and how does it affect the larger war on terrorism? This paper will provide historical background, analyze the implications of this background information, review United States policy for treatment of detainees, and recommend a policy for the treatment of detainees.



## POLICY FOR TREATMENT OF DETAINEES BY THE UNITED STATES MILITARY

...our values as a nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.<sup>1</sup>

- President George W. Bush,  
February 7, 2002

My most solemn duty as the President is to protect the American people.<sup>2</sup>

- President George W. Bush,  
September 14, 2004

Anti-Americanism has increased in recent years, and the United States' soft power -- its ability to attract others by the legitimacy of U.S. policies and the values that underlie them -- is in decline as a result...The Cold War was won with a strategy of containment that used soft power along with hard power. The United States cannot confront the new threat of terrorism without the cooperation of other countries. Soft power, therefore, is not just a matter of ephemeral popularity; it is a means of obtaining outcomes the United States wants. When Washington discounts the importance of its attractiveness abroad, it pays a steep price.<sup>3</sup>

- Joseph Nye,  
Foreign Affairs, May/June 2004

The United States is in its fifth year of the war on terrorism. The United States military has learned and implemented many lessons related to accomplishing its missions and protecting its troops; however, despite several high-level investigations into allegations of detainee abuse over the past few years, the United States government did not definitively state its position on the treatment of detainees until December 2005. As late as October 2005 comments by Senator John McCain concerning a letter he received from Captain Ian Fishback indicated that this senior senator saw the policy on treatment of detainees as an unresolved matter.<sup>4</sup> Senator McCain spearheaded the passage of Public Law No: 109-148<sup>5</sup> to prohibit torture and cruel, inhumane, and degrading treatment of detainees held by officials of the United States.<sup>6</sup> Does this law establish the correct position on treatment of detainees? What should the policy be for treatment of persons detained by the United States military during the war on terrorism, and how does it affect the larger war on terrorism? This paper will provide historical background,

analyze the implications of this background information, review United States policy for treatment of detainees, and recommend a policy for the treatment of detainees.

### Current Situation

In analyzing the United States policy for how the military treats detainees one must consider the greater issues of national security, the war on terrorism, and the national values of the United States. The two quotes at the beginning of this paper point to the tension the President and other senior members of the United States administration must feel between upholding America's national value of humane treatment and the ultimate requirement of protecting the nation. The terrorist attacks against the United States on September 11, 2001 demonstrated that a non-state actor could inflict significant damage on the United States, its citizens, and citizens of allied and friendly countries. Based in part on the July 9, 2005 letter from al-Zawahiri to al-Zarqawi,<sup>7</sup> the radical Islamic threat may be similar in some ways to the description of the Soviet threat in "NSC-68, A Report to the National Security Council." This report indicated that the Soviet Union "is animated by a new fanatic faith, antithetical to our own, and seeks to impose its absolute authority over the rest of the world."<sup>8</sup> Unlike the Soviet threat, the radical Islamic terrorist threat is not controlled by a government that can be deterred or influenced by traditional methods. These terrorists appear unconstrained by international laws and norms. Additionally, they are not limited to specific governments or countries. They operate in a dispersed manner, sometimes even within the United States and within the countries of friends and allies of the United States. This threat also views any non-Muslim target, including civilians, as legitimate. As evidenced by the significant number of attacks on Shia Muslims<sup>9</sup> in Iraq and the November 9, 2005 attack in Amman, Jordan, this terrorist network appears to view even some Muslim targets, as legitimate.<sup>10</sup>

### National Strategy

The President articulated his strategy for addressing this terrorist threat in the *National Strategy for Combating Terrorism* (NSCT)<sup>11</sup> and his broader strategy for national security in *The National Security Strategy of the United States of America* (NSS).<sup>12</sup> In the NSS, President Bush makes numerous references to the importance of other nations, alliances, and coalitions in efforts to maintain national security.<sup>13</sup> He specifically notes that there is "little of lasting consequence that the United States can accomplish in the world without the sustained cooperation of its allies and friends in Canada and Europe."<sup>14</sup> In order to maintain the full and willing cooperation of these allies and friends, America should consider their positions on what constitutes acceptable treatment of detainees.

In the NSCT the President stresses the importance of working with allies and friends to stop terrorism. This strategy for combating terrorism addresses fighting this war against terrorism on four fronts: “defeat terrorist organizations of global reach;” “deny further sponsorship, support, and sanctuary to terrorists;” “diminish the underlying conditions that terrorists seek to exploit;” and “defend the United States, our citizens, and our interests at home and abroad.”<sup>15</sup> On each front the President identifies associated goals and objectives and explains the importance of cooperation with other countries and the international community in accomplishing these objectives. The objectives include “locate terrorists and their organizations,” “destroy terrorists and their organizations,” end the state sponsorship of terrorism,” “strengthen and sustain the international effort to fight terrorism,” “interdict and disrupt material support for terrorists,” “eliminate terrorist sanctuaries and havens,” and “win the war of ideas.”<sup>16</sup> The President does not view this as a war the United States can win by waging it independently.<sup>17</sup> In addressing the ways and means to achieve these objectives the President highlights the importance of using various elements of national power in cooperation with other nations.

Cooperation at the international level plays an important role across the national elements of power. Multinational cooperation in employing the military element of power is most apparent in Afghanistan and Iraq, but is also important, if even only in an indirect manner, in some African, Eastern European, Central American, Asian, and South American countries. These military means support every objective identified above. International law enforcement cooperation is vital to these same objectives. Employment of the finance and economic instruments of power in cooperation with allies can contribute to ending state sponsorship of terrorism, disrupting material support to terrorists, and winning the war of ideas. The diplomatic and information elements are most important in ending state sponsorship, strengthening and sustaining the international effort to fight terrorism, and winning the war of ideas. The intelligence instrument contributes to achieving all of the objectives and to employing all of the other elements of power in waging the war on terrorism.

#### National Values and Interests

Prosecution of the war on terrorism, including treatment of detainees, must be consistent with national values and interests. Unfortunately the war on terrorism potentially brings some of the most basic values of the United States and its vital interest of physical security into conflict. The beliefs that all men are created equal and are endowed with certain unalienable rights rest not only in the *Declaration of Independence*, but also throughout much of United States' history.

Respect for human dignity is a core American value. Respect for the rule of law is also a national value, with a strong foundation in the *Constitution of the United States*. Recent key documents such as *The National Security Strategy of the United States of America* highlight the nation's "respect for human dignity" as a national goal.<sup>18</sup> This presidential document also specifically indicates the rule of law is one of the "nonnegotiable demands of human dignity."<sup>19</sup> United States' national values are also reflected and interpreted by domestic politics, human rights organizations, and public opinion. Successfully waging the war on terrorism could prove difficult if not impossible without sufficient domestic political and public support. So waging this war in a manner inconsistent with national values could erode vital political and public support. Absence of this support could deny the war effort the domestic resources, most notably the funding and manpower, necessary to stop terrorism. On the other hand, not preventing significant terrorist attacks could erode confidence in the administration's ability to fight the war and could cause considerable damage to the United States' economy.

Since American military forces are central to the war on terrorism, considering the values of these military personnel is also vital. For decades United States' soldiers have been taught to treat captives humanely even if they do not meet the criteria for protection under the Geneva Conventions. For example, the 1967 version of Field Manual (FM) 31-23, *Stability Operations-U.S. Army Doctrine* established treatment standards for insurgents. Although insurgents did not meet the criteria for protection as belligerents, this FM used language from the *Geneva Convention Relative to the Treatment of Prisoners of War* (GPW) in describing the standards for treatment of insurgents.<sup>20</sup> Requiring or even allowing soldiers to treat detainees inhumanely places these soldiers in a situation where they might be torn between performing their duty in fighting terrorism and acting in a manner consistent with their training, history, and values. The United States cannot require its soldiers to resolve what they might view as a conflict between protecting their nation and its citizens on the one hand and upholding national values of abiding by the rule of law and respecting the dignity of all human beings on the other hand. Ultimately this situation might discourage soldiers from remaining in the military and discourage civilians from entering the military in the first place. The national leadership of the United States must provide clear policy for the prosecution of the war on terrorism, specifically for the treatment of detainees.

#### Historical Background on Treatment of Captives

In addition to national values, accepted international standards for the treatment of detainees and the history and logic of those standards must be considered in determining a

national policy for treatment. The idea that the treatment of detainees may be important to the successful conduct of war has existed for centuries.<sup>21</sup> Sun Tzu stated, "The reason troops slay the enemy is because they are enraged."<sup>22</sup> In Samuel Griffith's translation of *On War*, Ho Yen-hsi (commentator from mid twelfth century) elaborates on this statement by Sun Tzu. Ho Yen-hsi relates a lesson from a battle in 297 B.C. in which the Yen army surrounded Chi Mo in Ch'i. The Yen army cut off the noses of all the Ch'i prisoners, enraging the Ch'i men who defended their city.<sup>23</sup> The infuriated Ch'i then "inflicted a ruinous defeat on Yen."<sup>24</sup> This example is used to show the one "reason troops slay the enemy is because they are enraged."<sup>25</sup> This example also seems to demonstrate that over 2200 years ago a military leader (T'ien Tan) considered the effect treatment of captives could have on the outcome of a battle. Sun Tzu more directly addresses this issue when he says, "Treat the captives well, and care for them."<sup>26</sup> Chang Yu further elaborates on this statement by indicating "all soldiers taken must be cared for with magnanimity and sincerity so they may be used by us."<sup>27</sup> While these references tend to suggest consideration for the treatment of captives was for practical purposes, they do show detainee treatment was viewed as important to successfully waging war.

These references from *The Art of War* indicate the Chinese gave some consideration to the humane treatment of captives, but throughout history captives were generally killed or forced into slavery up until the development of the European state system during the seventeenth century.<sup>28</sup> Lawrence Malkin notes, "The Enlightenment fostered the idea of the dignity of the individual during the eighteenth century."<sup>29</sup> During the eighteenth and nineteenth centuries proper treatment of captives began to reflect this idea. In the middle to late nineteenth century and into the twentieth century, rules for the proper treatment of captives were formally codified in international treaties.<sup>30</sup> Today the Geneva Conventions of 12 August 1949 and the Protocols Additional to the Geneva Conventions of 12 August 1949 include the internationally recognized standards for humane treatment of captives, including enemy prisoners of war.

Generally United States policy and doctrine relative to the treatment of captives have been congruent with the Geneva Conventions. Even in situations where the United States' adversary has failed to apply the Geneva Conventions, the United States has extended the protection of the Geneva Conventions to captives. For example, during the war in Vietnam the North Vietnamese refused to comply with the Geneva Conventions. The North Vietnamese asserted that the Geneva Conventions did not apply because war had not been declared. Despite this refusal by North Vietnam to afford captured Americans the protections of the Geneva Conventions, the United States applied the Geneva standards to its captives. Members of the International Committee of the Red Cross were allowed to visit the prisoner of war camps

in South Vietnam to assess compliance.<sup>31</sup> Even detainees determined ineligible for enemy prisoner of war status were treated in accordance with Article 3 of the Geneva Convention Relative to the Treatment of Enemy Prisoners of War. This minimum standard for treatment was reflected in command directives and field manuals from 1966-1967. The standard prohibited cruel treatment, torture, and humiliating and degrading treatment (among other things)<sup>32</sup> and was even applied to insurgents.<sup>33</sup> The United States also afforded the Geneva Conventions protections to captives during the conflicts in Grenada, Panama, Iraq (Operation DESERT STORM), and Haiti.<sup>34</sup>

Additionally, in 1994 the United States ratified the United Nations Convention against Torture and Other Cruel, Inhuman<sup>35</sup> or Degrading Treatment or Punishment. This recognized international standard involving 140 parties clearly prohibits torture and defines it 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.<sup>36</sup>

While the language of this convention seems straightforward, the United States included significant reservations in its ratification<sup>37</sup> and later considered an interpretation of the term “torture” many would consider extreme. In August 2002 the United States Department of Justice (DOJ), Office of Legal Counsel concluded “for an act to constitute torture...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.”<sup>38</sup> The Department of Justice rendered this interpretation after considering the reservations the Senate had included when it recommended ratification of the convention, the negotiating and ratification history of the convention, and United States Code relevant to torture.<sup>39,40</sup>

#### Occupying the Moral High Ground

In developing and assessing possible options for the treatment of detainees, the United States should identify the desired objectives of detention in the war on terrorism with due regard for the strategy for the war on terrorism. In this war the objectives of detention are to exclude certain individuals from conducting or supporting further hostile action, to obtain information of intelligence value primarily to prevent attacks, and in some cases to prosecute individuals for

criminal acts. Detention must be conducted in a manner that contributes to achieving success in the war on terrorism, not in a manner that detracts from these efforts. The major tension that must be addressed is the potentially competing interests of obtaining useful information that contributes to the protection of America and treating detainees in a manner consistent with American values and in a manner that contributes to maintaining legitimacy and high moral standing in the eyes of the citizens of the United States and the world. Loss of the latter could result in the loss of critical support from the domestic and international realms and strengthen the resolve and support for adversaries.

The President and Congress of the United States seem to have clearly indicated policy by passing Public Law No: 109-148, but is this law in the best interest of the United States and its struggle against terrorism? At least two distinct possible options exist for the treatment of persons detained in the war on terrorism. The first option is essentially what Public Law No: 109-148 requires: affording all detainees humane treatment and the protection of the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. An alternative might involve excluding selected detainees in the war on terrorism from international protections under specific circumstances and allowing some lesser standard as required to obtain information from these captives.

The second option would allow selected detainees in very specific circumstances to be treated cruelly and inhumanely and even tortured to obtain critical information of intelligence value. While this option might seem ineffective, unacceptable, in great conflict with national values and detrimental to building and maintaining the national and international support needed to win the war on terrorism, might limited use of torture or cruel and inhumane treatment have applicability in certain clearly defined situations? For example, might torture be warranted if a detainee had information that could prevent an imminent attack that would kill thousands of innocent civilians? Sanford Levinson discusses this idea in his book entitled *Torture*.<sup>41</sup> This type of hypothetical situation presents several problems. For example, how does one know this detainee really has critical information, how does one know a catastrophic event is imminent, how does one define a catastrophic event, and what are the limits of the actions one would take to obtain information from the detainee? In the extreme, would this approach support “threatening death or injury to the innocent child of a suspected terrorist as a means of procuring the relevant information?”<sup>42</sup>

Alan Dershowitz suggests a refinement of this first option by limiting torture to non-lethal means when authorized by competent authority such as a judge by means of a torture warrant. Dershowitz argues that his proposal has at least two benefits. This approach would move the

decision to torture to a disinterested party and would reduce the cases of torture. Furthermore, this proposal would free security officials from the terrible dilemma of deciding between applying torture and possibly being punished for doing so or not applying torture and possibly having to live with the consequences of a catastrophic attack.<sup>43</sup>

This option, even when very carefully bounded, is not recommended for several reasons. Allowing the United States military to treat captives in a cruel or inhumane manner might detract from obtaining reliable intelligence, erode domestic and international support, and strengthen the resolve of and support for adversaries. This option is feasible to the extent that given intelligence and security personnel would apply prescribed techniques. Even if the United States government rescinded Public Law No: 109-148, this option is not acceptable because its legality is seriously questioned by the American public and such international organizations as the International Committee of the Red Cross and the United Nations. If public, military, and political support could be maintained this option might be suitable (achieve the desired objective of gaining intelligence). The following paragraphs will address in more detail why this option is not recommended.

Some reasons for not recommending this option are very practical ones. Law enforcement, military, and diplomatic agencies of some other nations might be reluctant to cooperate with the United States in the war on terror if the United States condones abuse of detainees. They would almost certainly deny or limit access to their detained terrorists.<sup>44</sup> Additionally, the reliability of information obtained through torture or cruel and inhumane treatment is questionable and secondarily could detract from prosecution of terrorists by military tribunals or civil courts. John H. Langbein explains how legal torture was used in some European countries from the 1200s to the 1700s. Langbein describes the numerous safeguards the countries employed and how these safeguards failed.<sup>45</sup> He concludes, "History's most important lesson is that it has not been possible to make coercion compatible with truth."<sup>46</sup> Further indication that coerced statements may not be reliable is provided by Anthony F. Milavic. Milavic uses data from the Benjamin N. Cardozo School of Law at Yeshiva University to suggest that "duress, coercion, and violence (threatened or performed) have led innocent Americans to confess to crimes they did not perpetrate."<sup>47</sup> Milavic specifically notes, "33 of the first 123 postconviction (sic) DNA exonerations involve false confessions or admissions."<sup>48</sup>

Obtaining and using information that is highly suspect could result not only in wasting resources and in degrading domestic and international confidence in the United States government's intelligence, but more importantly could erode the United States government's credibility. This loss of credibility could hamper efforts across all elements of national power.

Even if information acquired by torture proves useful in the short term, the United States might learn the lesson the French learned in Algeria in the late 1950s and early 1960s. The brutal methods the French used resulted in a short-term victory, but these actions “discredited France in the eyes of the world” and forced it to the negotiating table.<sup>49</sup> Obtaining information through torture or cruel and inhumane treatment could degrade domestic and international support for the war on terrorism and other matters of national security.

Sanctioned use of torture or cruel and inhumane treatment could also erode vital domestic public support for the war on terrorism. Accepted practices in the United States prohibit torture or cruel and inhumane treatment even in extreme criminal cases. The criminal justice system in the United States does not allow mistreatment of convicts even though they might be able to provide information valuable for such desirable purposes as saving lives, destroying child sex rings, and defeating drug distribution networks that provide illegal drugs to minors. Despite the fact that child sex rings and drug distribution networks destroy thousands of lives in the United States every year, the American people have not condoned brutal treatment of prisoners who might have information of value in preventing these crimes. A November 2005 CNN/*USA Today*/Gallup poll addressing the use of torture against terrorists indicates a majority of Americans oppose the use of torture even in cases where the terrorists “may know details about future terrorist attacks against the U.S.”<sup>50</sup>

By using torture or inhumane treatment the United States could influence neutral parties negatively and also strengthen radical Islamic terrorist organizations and support for them. These radical Islamic terrorists and some of their supporters appear to view their battle as one between good and evil, between those of the true Islamic faith and the infidels. By treating detainees badly the United States might reinforce the belief that Americans are evil and immoral. Randy Borum indicates that Islamic terrorists held by Israelis told interviewers that their experience while detained by the Israelis reinforced their negative perceptions of Israelis.<sup>51</sup> While some detainees may be held for many years, many have or will be released. When these individuals return to their homes they will leave with their personal perception of Americans and will convey information about their treatment by the Americans to others. If they were treated inhumanely as a detainee their negative perception of Americans will likely be reinforced and further solidify their belief that Americans are evil. If, however, their experience was humane they might leave with a slightly different view, or at least begin to consider if their original negative view is valid. This seed of doubt might benefit the fight against terror by wearing away at one of the three general conditions Borum argues are “necessary for an ideology to support terrorism,”<sup>52</sup> namely a set of beliefs that are “inviolable and must be neither questionable nor

questioned.<sup>53</sup> Borum clearly states that terrorists ignore facts and reality and view questioning their beliefs as heresy;<sup>54</sup> however, might there be a small possibility that humane treatment from one's enemy might plant a feeling of doubt about the professed evil nature of that adversary? Additionally, these former detainees will relate their detention experience to others. How they were treated might in some small way influence others as well. These former detainees and those they relate their experiences to might write off the humane treatment as an anomaly or even a trick, but if they do begin to question the validity of their extreme beliefs, they might reduce support for radical Islamic terrorism.

Zeyno Baran suggests another reason for avoiding cruel, inhumane, and degrading treatment of detainees. Baran asserts that there is a "clash of two competing ideologies within the Islamic world."<sup>55</sup> This clash is between those Muslims who "believe that Islam is compatible with secular democracy and basic civil liberties" and those Muslims who "are committed to replacing the current world order with a new caliphate."<sup>56</sup> This second group includes the radical Muslim terrorists groups and many of their supporters, such as Hizb ut-Tahrir (HT, or Party of Liberation). Bassam Tibi refers to this second group as Islamic fundamentalists and asserts they are "far more dangerous as ideologues of power than as extremists who kill, cut throats ..., and throw bombs."<sup>57</sup> This transnational movement serves to indoctrinate many Muslims to a radical variant of Islam and provide candidates for terrorist organizations. Baran states, "HT has provided Muslims with a compelling explanation for why the Islamic world has fallen behind the West in recent centuries. It also offers a simple remedy: close the gap by destroying the existing order."<sup>58</sup> HT teaches that the United States is the main obstacle to realizing the caliphate and that the United States war on terrorism is really a war on Islam. Baran further indicates that a growing number of Muslims, not just the terrorists, believe they "will always be looked down on in a U.S.-led world order."<sup>59</sup> He asserts that the United States should stress justice and dignity in dealing with Muslims and avoid appearing arrogant. The abuse of detainees in United States custody, including degrading and illegal treatment, plays into the hands of those attempting to "discredit the United States and its ideals."<sup>60</sup> Perhaps some Muslims might view the disparity in treatment of the many Muslim detainees in the war on terrorism and other detainees such as enemy prisoners of war and convicted felons as a clear sign that Americans view Muslims as deserving some lesser level of treatment. In some Muslims' minds America might be promoting the belief that the war on terrorism is in fact a war on Islam.

Richard Bulliet contends that the situation is much more complex than whether Muslims agree or disagree with American policies. While many Muslims do not agree with America's

policies, hundreds of millions of Muslims see no justification in their faith for the acts of terrorism committed on September 11, 2001.<sup>61</sup> Bulliet asserts there is a leadership crisis within the Muslim community that has resulted in the majority of Muslims remaining silent even when they disagree with certain acts such as the attacks on the United States in September 2001.<sup>62</sup> This crisis, with origins as far back as the early 19<sup>th</sup> century, has resulted in a loss of influence by traditional religious leaders and institutions and a rise in power of new authorities. These new authorities include such extremists as Osama Bin Laden.<sup>63</sup> Scholars like Bulliet assert that resolving the radical Islamic terrorist problem will require much more than capturing terrorists and preventing their attacks. A lasting solution to radical Islamic terrorism will come only when the Islamic community addresses the problem from within.<sup>64</sup> Perhaps the United States should expend more effort encouraging and supporting this internal change.

The risk involved in the option to allow less than humane treatment would involve losing key domestic and international support and increasing the opposition's ability to discredit the United States among more Muslims throughout the world. Clearly the United States Congress opposes inhumane treatment of detainees as do such international organizations as the United Nations, the International Committee of the Red Cross and Human Rights Watch. Loss of congressional support could equate to loss of vital resource support. Loss of support of international organizations such as those mentioned might have little direct influence, but indirectly they could undermine the efforts of the United States. Failure to comply with the United Nations Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment might be viewed by other member nations as a disregard for the values and interests of other nations and thus lessen the chance they would support future efforts of the United States in the United Nations. In general, appearing not to comply with the United Nations and drawing the scorn of humanitarian organizations might harm the ability of the United States to effectively promote human rights and humane treatment throughout the world.

This idea of focusing on humane treatment suggests the course consistent with Public Law No: 109-148. This option involves affording all detainees humane treatment and the protections of the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. This option is the best alternative. It is feasible since the United States has the resources to treat and interrogate detainees humanely. The option is acceptable, since it is in compliance with American and international laws and has broad domestic and international support as evidenced by development and ratification of the applicable domestic and international laws. The risk in this option potentially lies primarily in its suitability. This option will promote achieving two objectives, but might not fully achieve the

third. It will exclude certain individuals from conducting or supporting further hostile action and facilitate the prosecution of individuals for criminal acts. It might not fully allow the obtaining of information of intelligence value from some detainees to prevent terrorist attacks. For example, depending on how these detainees are classified they might be obligated only to give their basic identifying information such as name and identification number. Additionally, the detaining country might be obligated under Article 122, Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949 to report immediately the capture of the individual to make it possible to advise the next of kin. While these requirements seem appropriate for traditional enemy prisoners of war, they could detract significantly from prosecuting the war on terrorism. Certainly one needs more than a detainee's name and identification number to develop the intelligence to prevent future attacks. Giving immediate notice of capture could nullify any information obtained from the detainee. Additionally, revisiting current international law could allow for further clarification of the definitions of such terms as "torture" and "cruel and inhumane treatment." While this option may not adequately address the intelligence objective, it clearly achieves the objective of removing the detainee from the conflict and it does not endanger the potential objective of criminal prosecution.

This option would contribute to domestic and international support in the war on terrorism by demonstrating that the United States lives by its national values by respecting the rule of law and human dignity, is consistent, and treats detainees from other nations in the manner it expects its soldiers to be treated if taken captive. The major weakness of this alternative is its effectiveness in obtaining timely, reliable intelligence, a previously identified weakness of the alternative approach as well. Certainly humane interrogation techniques may not get every detainee to provide useful intelligence; however, even if one sets aside legal and moral obligations, history has shown that coerced statements are often not reliable. Especially if the detainees who might have useful information are likely the detainees most committed to a radical religious ideology, chances of forcing them to provide useful information are slim. By coercing these people America might reinforce their belief that Americans are truly evil and that they must resist at all costs. By providing information these individuals might feel as if they had betrayed not only their fellow believers, but also their faith. The risk of not being able to obtain important intelligence from certain detainees might be mitigated through improving human intelligence, continuing to enhance international cooperation, and by aggressively improving homeland security.

Secretary of State Condoleezza Rice stated on December 7, 2005 that "the United States obligations under the CAT [Convention against Torture] ... extend to U.S. personnel wherever

they are, whether they are in the United States or outside of the United States.”<sup>65</sup> This statement and the passage of Public Law No: 109-148 prohibiting cruel, inhumane, and degrading treatment seem to clarify policy and reaffirm that the United States respects the rule of law.<sup>66</sup> Unfortunately, the lack of definitions for such terms as “cruel,” “inhumane,” and “degrading” leaves room for interpretation and misunderstanding.<sup>67</sup> For example, does segregation constitute cruel, inhumane, or degrading treatment? Segregation is important in some situations to conducting effective interrogations, but is it prohibited by international law? The CAT defines torture, but does not explain all of the terms used to define torture. The United States should make a good faith effort to interpret and apply not only the letter, but also the intent of international law. Such interpretations as provided in the August 2002 DOJ memorandum defining torture only erode the moral basis of the United States.

President Bush stated that his “most solemn duty as the President is to protect the American people.”<sup>68</sup> Protecting America from terrorism requires much more than the direct actions of capturing terrorists and thwarting their operations. The United States must approach the problem of terrorism with a long-term and broad view. Considering and applying some of the recommendations of such scholars as Richard Bulliet may contribute more to a lasting solution than some of the offensive operations the United States has been conducting against terrorists. Unfortunately these offensive actions are probably essential to mitigating terrorist attacks in the short run. Two important aspects of these operations are how these operations contribute to preventing acts of terrorism and how the United States military treats people they detain. The United States can recover from grave tragedies inflicted by terrorists; however, America cannot afford to alter its core values and allow its moral basis to be eroded further by treating detainees inhumanely. For practical and moral reasons America must treat detainees in accordance with international humanitarian law.

#### Endnotes

<sup>1</sup> United States President George Bush, “Humane Treatment of Al Qaeda and Taliban Detainees,” memorandum for the Vice President, the Secretary of Defense, et al., Washington, D.C., 7 February 2002, available from [http://www.lawofwar.org/Bush\\_memo\\_Genevas.htm](http://www.lawofwar.org/Bush_memo_Genevas.htm); Internet; accessed 5 February 2006.

<sup>2</sup> President George Bush, Remarks to the General Conference of the National Guard Association of the United States, Las Vegas Convention Center Las Vegas, NV, 14 September 2004, available from <http://www.whitehouse.gov/news/releases/2004/09/20040914-23.html>; Internet; accessed 5 February 2006.

<sup>3</sup> Joseph Nye, “The Decline of America’s Soft Power: Why Washington Should Worry,” *Foreign Affairs* (May/June 2004): 16-17.

<sup>4</sup> Charles Babington and Shailagh Murray, "Senate Supports Interrogation Limits," *Washington Post*, 6 October 2005, sec. A, p. 1.

<sup>5</sup> *Department of Defense Appropriations Act, 2006*, available from <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.02863>; Internet; accessed 15 February 2006.

<sup>6</sup> Liz Sidoti, "House Approves Sweeping Defense Bill," *San Francisco Chronicle*, 19 December 2005 [newspaper on-line]; available from <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/12/19/national/w022615S76.DTL>; Internet; accessed 21 December 2005.

<sup>7</sup> An English translation of this letter is available at the Director of National Intelligence webpage: [www.dni.gov/release\\_letter\\_101105.html](http://www.dni.gov/release_letter_101105.html); Internet; accessed 26 November 2005. Some experts believe the letter from al-Zawahiri to al-Zarqawi may not be authentic. Dr. Bernard Haykel, Associate Professor of Middle Eastern Studies, New York University and Dr. Juan Cole, Professor of History, University of Michigan assert that the letter was likely written by someone other than al-Zawahiri. The logic supporting this assertion is explained on Dr. Cole's webpage available on the Internet at [http://juancole.com/2004\\_03\\_01\\_juancole\\_archive.html](http://juancole.com/2004_03_01_juancole_archive.html) and in a *Science Daily* article available on the Internet at <http://www.sciencedaily.com/upi/?feed=TopNews&article=UPI-1-20051018-08451500-bc-us-us-alqaidaletter.xml>.

<sup>8</sup> "NSC-68: A Report to the National Security Council," *Naval War College Review* 27 (May/June 1975): 51.

<sup>9</sup> In *The Straight Path* (New York, N.Y.: Oxford University Press, 1998) John L. Esposito provides a history of Islam, including a description of the various sects and an explanation of their origins. He also looks at the conflicts between these sects over time. His work provides useful insight in understanding why conflict exists between some groups of Muslims.

<sup>10</sup> In a November 14, 2005 interview on the NewsHour with Jim Lehrer, Robert Pape of the University of Chicago offered some insight into the motivations for the bombings in Amman and for suicide bombings in general. Based on the study of 462 suicide terrorists from around the world, Professor Pape asserted the four Iraqis involved in the bombing of the hotel in Amman did so to attack the rear area of American operations in Iraq in an attempt to drive the Americans out of Iraq and the Arabian Peninsula. Pape states that his research shows that 95 percent of suicide terrorist attacks since 1980 have as their goal to force modern democracies to withdraw forces from prized territory. The full transcript of this interview is available on the Internet at: [www.pbs.org/newshour/bb/terrorism/july-dec05/bombers\\_11-14.html](http://www.pbs.org/newshour/bb/terrorism/july-dec05/bombers_11-14.html). Pape detailed his research in his book *Dying to Win: The Strategic Logic of Suicide Terrorism* (New York: Random House, 2005). In late November 2005, some news media reported that Abu Musab al-Zarqawi had rendered a tape recorded statement stating he did not intend to attack a Muslim wedding. In the same recording, however, he threatened to kill the King Abdullah II and attack tourist sites in Jordan. One such report is available in the Internet version of *The Age* at <http://theage.com.au/news/world/amman-bomb-apology/2005/11/19/1132017026165.html>.

<sup>11</sup> Published in February 2003.

<sup>12</sup> Published in September 2002.

<sup>13</sup> George W. Bush, *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, September 2002), 6-8 and 25-28.

<sup>14</sup> *Ibid.*, 25.

<sup>15</sup> George W. Bush, *National Strategy for Combating Terrorism* (Washington, D.C.: The White House, February 2003), 11-12.

<sup>16</sup> *Ibid.*, 16-24.

<sup>17</sup> Some may view President Bush's actions as contradicting his words in the NSS and the NSCT. Additionally, his doctrine of preemption described in the NSS and the NSCT might be viewed as inconsistent with his arguments in the same documents for international cooperation. Perhaps the crux of the issue is the tension between working in a cooperative manner with international partners which may require considerable time and the perceived or actual need to respond quickly to defend national interests. This author's interpretation is that President sees the advantages of working with allies and friends, but he will respond unilaterally and in a preemptive manner if he believes such action is necessary to protect the nation. Certainly many may disagree with his interpretation of when unilateral or preemptive action is required.

<sup>18</sup> George W. Bush, *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, September 2002), 1.

<sup>19</sup> *Ibid.*, 3.

<sup>20</sup> James F. Gebhardt, *The Road to Abu Ghraib: US Army Detainee Doctrine and Experience* (Fort Leavenworth, KS: Combat Studies Institute Press, 2005), 51.

<sup>21</sup> Maria Trombly, "A Brief History of the Laws of War," available from <http://www.globalissuesgroup.com/geneva/history.html>; Internet; accessed 25 October 2005. Maria Trombly does not specifically address the treatment of captives; however, her discussion on the laws of war in general prompted me to look to such authors as Sun Tzu and Clausewitz for their thoughts relative to the treatment of captives.

<sup>22</sup> Sun Tzu, *The Art of War*, trans. Samuel B. Griffith (Oxford: Oxford University Press, 1971), 75.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, 76.

<sup>27</sup> *Ibid.*

<sup>28</sup> Lawrence Malkin, "Murderers of Koje-do!," *MHQ: The Quarterly Journal of Military History* 5: (Summer 1993): 88-97.

<sup>29</sup> *Ibid.*

<sup>30</sup> Ibid.

<sup>31</sup> American Enterprise Institute for Public Policy Research, *The Prisoner of War Problem* (Washington: American Enterprise Institute, 1970), 18-28.

<sup>32</sup> International Committee of the Red Cross, *The Geneva Conventions of August 12 1949* (Geneva: International Committee of the Red Cross, n.d.), 75-76.

<sup>33</sup> Gebhardt, 45-52.

<sup>34</sup> Gebhardt, 69-107.

<sup>35</sup> The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment uses the term "inhuman" in its title and throughout the document instead of the term "inhumane." Although these words are synonyms, the author of this paper has used the word "inhuman" when quoting the United Nations Convention. Otherwise the author has used the term "inhumane" since it is more commonly used in American English.

<sup>36</sup> United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Part I, Article 1.

<sup>37</sup> See the declarations and Reservations Section of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the reservations included by the United States Senate available from <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp#N20>; Internet; accessed 7 February 2006.

<sup>38</sup> U.S. Department of Justice, Office of Legal Counsel, "Standards for Conduct of Interrogation under 18 U.S.C. sec. 2340-2340A," memorandum for Alberto R. Gonzales, Counsel to the President, Washington D.C., 1 August 2002; available from <http://www.washingtonpost.com/wp-rv/nation/documents/dojinterrogationmemo20020801.pdf>; Internet; accessed 30 January 2006.

<sup>39</sup> Ibid., 1-2.

<sup>40</sup> John Yoo (sometimes spelled Woo), the author of this Department of Justice interpretation, also rendered a controversial opinion on the National Security Agency eavesdropping program.

<sup>41</sup> Sanford Levinson, *Torture* (Oxford: Oxford University Press, 2004), 31-33.

<sup>42</sup> Ibid., 32. This example may seem a bit artificial; however, it does help demonstrate the potential consequences of pursuing an option that allows illegal or immoral conduct to obtain intelligence information. In addition to discounting the experts who assert that torture does not yield reliable information, this approach also ignores the importance and benefits of maintaining high moral standards in this current war.

<sup>43</sup> Alan M. Dershowitz, "The Case for Torture Warrants," available from <http://www.law.harvard.edu/faculty/dershowitz/Articles/torturewarrants.html>; Internet; accessed 9 October 2005.

<sup>44</sup> In contrast, some countries have supported and might continue to support the extraordinary rendition program regardless of the U.S. position on treatment of detainees. Such countries as Jordan, Egypt, and Afghanistan have been strong allies in combating terrorism and have participated in the extraordinary rendition program. An American Civil Liberties Union fact sheet provides further discussion of the extraordinary rendition program. This fact sheet is available from <http://www.aclu.org/safefree/extraordinaryrendition/22203res20051206.html>; Internet; accessed 5 March 2006.

<sup>45</sup> John H. Langbein, "The Legal History of Torture," in *Torture*, ed. Sanford Levinson (Oxford: Oxford University Press, 2004), 93-101.

<sup>46</sup> *Ibid.*, 101.

<sup>47</sup> Anthony F. Milavic, "The Use of Torture in Interrogation," 31 May 2005; available from [http://www.cdi.org/friendlyversion/printversion.cfm?documentID=3143&from\\_page=../pr...](http://www.cdi.org/friendlyversion/printversion.cfm?documentID=3143&from_page=../pr...); Internet; accessed 9 October 2005.

<sup>48</sup> *Ibid.*

<sup>49</sup> Martin Evans, "Algeria: Thirty Years On," *History Today* 42 (July 1992): 4 [database online]; available from ProQuest; accessed 9 October 2005.

<sup>50</sup> "CNN/USA Today/Gallup Poll," 11-13 November 2005, linked from the *Polling Report Homepage* at "Terror," available from <http://www.pollingreport.com/terror.htm>; Internet; accessed 31 November 2005. These poll results show 56% oppose, 38% support, and 6% were unsure about the use of torture in the situation described. The margin of error of this survey was 5%.

<sup>51</sup> Randy Borum, *Psychology of Terrorism* (Tampa, FL: University of South Florida, 2004), 39.

<sup>52</sup> *Ibid.*, 41.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> Zeyno Baran, "Fighting the War of Ideas," *Foreign Affairs* 84 (November-December 2005): 68.

<sup>56</sup> *Ibid.*

<sup>57</sup> Bassam Tibi, *The Challenge of Fundamentalism* (Berkeley and Los Angeles: University of California Press, 1998), xi and 138-178.

<sup>58</sup> Baran, 75.

<sup>59</sup> *Ibid.*, 75.

<sup>60</sup> *Ibid.*, 76.

<sup>61</sup> Richard W. Bulliet, "The Crisis within Islam," *The Wilson Quarterly* 26 (Winter 2002): 11-12.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, 12-14.

<sup>64</sup> *Ibid.*, 11-19.

<sup>65</sup> David Holley, "Rice: UN torture ban does apply to the U.S.," *Chicago Tribune*, 8 December 2005 [newspaper on-line]; available from <http://www.chicagotribune.com/news/nationworld/chi-0512080253dec08,1,7561865.story?coll=chi-newsnationworld-hed&ctrack=1&cset=true>; Internet; accessed 12 December 2005.

<sup>66</sup> When President Bush signed H.R. 2863 he rendered a statement providing his understanding of portions of the Act. Among other topics, he addressed interrogation and treatment of detainees and indicated he would interpret the Act in a manner consistent with the objective of "protecting the American people from further terrorist attacks" and consistent with his constitutional authority. This statement is available from <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>; Internet; accessed 14 March 2006. Some legal experts argue that by signing this statement President Bush has acknowledged the prohibition against cruel, inhumane, and degrading treatment, but he has indicated if national security is at risk he retains the authority to waive this prohibition. Charlie Savage provided one of the earliest discussions of this view in an article entitled "Bush Could Bypass New Torture Ban: Waiver Right is Reserved," *Boston Globe*, 4 January 2006 [newspaper on-line]; available at [http://www.boston.com/news/nation/articles/2006/01/04/bush\\_could\\_bypass\\_new\\_torture\\_ban/](http://www.boston.com/news/nation/articles/2006/01/04/bush_could_bypass_new_torture_ban/); Internet; accessed 13 March 2006.

<sup>67</sup> Neither the United Nations Convention against Torture nor Public Law No: 109-148 defines these terms.

<sup>68</sup> President George Bush, Remarks to the General Conference of the National Guard Association of the United States, Las Vegas Convention Center Las Vegas, NV, 14 September 2004, available from <http://www.whitehouse.gov/news/releases/2004/09/20040914-23.html>; Internet; accessed 5 February 2006.