

USAWC STRATEGY RESEARCH PROJECT

**VOYAGE TO THE DARK SIDE: THE TORTURED PATH OF UNITED STATES'
DETAINEE INTERROGATION POLICY**

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ABSTRACT

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This paper examines the development of the United States' detainee interrogation policy during the conduct of Global War on Terrorism (GWOT). This paper asserts that the President's statements concerning the inapplicability of the Geneva Conventions to Al Qaeda and Taliban personnel in Afghanistan created an environment of uncertainty of proper standards for the treatment and interrogation of detainees. The decision to not apply the Geneva Conventions was driven by tactical gain at the expense of great strategic loss and retreat in the critical war of ideas. The discovery of the abuse of detainees at Abu Ghraib subjected interrogation techniques to greater scrutiny, prompting the enactment of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 by Congress and intervention by the U.S. Supreme Court, all disruptive to the President's efforts in the war against terror. The President's reaction to the Congress' actions and the Supreme Court decision of *Hamdan v. Rumsfeld* indicates that there will be instances where enhanced interrogation techniques are employed by agencies outside of the Department of Defense. While the U.S. military has embraced the Rule of Law with its revised interrogation policy, a different set of rules apply for enhanced interrogations conducted by the CIA. This paper will suggest that the inconsistency in the United States' interrogation policy is unacceptable and that a single policy advancing the Rule of Law will allow the United States to once again fight from the moral high ground and win the critical war of ideas.

VOYAGE TO THE DARK SIDE: THE TORTURED PATH OF UNITED STATES' DETAINEE INTERROGATION POLICY

We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. . . . and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective.

—Vice President Dick Cheney, 16 September 2001¹

On 22 June 2004, a remarkable development occurred related to the treatment of detainees captured during the Global War on Terrorism (GWOT). Pressured by Congress,² troubled by leaks to the media³ and beleaguered by the growing furor over the abuses at Abu Ghraib,⁴ the Bush Administration decided to release to the public 14 documents, many previously classified, concerning the development of United States' policy concerning the treatment of captured detainees.⁵ The purpose of the White House's release was to clearly state United States policy and to "set the record straight" that the United States did not engage in practices of torture prohibited by domestic and international law.⁶ On that same day, the Department of Defense released nine documents related primarily to the interrogation of detainees at Guantanamo Bay, Cuba (GTMO).⁷ According to the Department of Defense press release, the documents were being "made available to demonstrate that the actions of the U.S. Defense Department are bound by law and guided by American values."⁸

What was truly extraordinary about this disclosure was not the decision to release these sensitive documents, but what the documents revealed. What was now exposed in print was a flawed process of policy development that pursued tactical gain at the expense of great damage inflicted on critical long-term strategic goals in the United States' war against terrorism.⁹ The process to determine detainee interrogation policy began as an internal struggle within the Executive Branch and, with the public exposure of the abuses occurring at Abu Ghraib, eventually prompted the intervention of the United States Supreme Court and Congress.

Post- 9-11 – Off Come the Gloves

On 11 September 2001, a series of terrorist attacks destroyed the World Trade Center in New York City, caused the crash of United Airlines Flight 93 in Shanksville, Pennsylvania, and severely damaged the Pentagon, killing thousands of people. As a result of those devastating events occurring on that day, "the United States became a nation transformed."¹⁰ As stated by J. Cofer Black, former director for the Central Intelligence Agency's counter-terrorist center, ". . . there was a before 9/11 and there was an after 9/11. After 9/11, the gloves came off."¹¹

One week after the attacks, Congress, seeking to provide the President with support for his actions to eliminate the terrorist threat, passed a joint resolution authorizing the President to use “all necessary and appropriate force” against those individuals or organizations identified as having “planned, authorized, committed, or aided” in the attacks occurring on September 11, 2001.¹² On September 20th, in an address to a joint session of Congress and the American public, the President declared a global war against terror, aimed first at those responsible for the September 11th attacks and not ending “until every terrorist group of global reach has been found, stopped and defeated.”¹³ Thus, from its inception, a critical part of the war on terror was the elimination or capture of terrorists and those who aided them.

On 7 October 2001, the United States launched Operation Enduring Freedom (OEF) to destroy Al Qaeda terrorists in Afghanistan and remove the Taliban regime which had provided support and sanctuary to Al Qaeda.¹⁴ By November of 2001, the United States forces began to capture a significant number of individuals on the battlefield in Afghanistan believed to be associated with terrorist activities.¹⁵ For the most part, those individuals captured were believed to be either members of Al Qaeda or the Taliban.¹⁶ On 17 October 2001, the Commander, U.S. Central Command (CENTCOM), ordered that the Geneva Conventions would apply to all captured personnel.¹⁷ Despite this CENTCOM directive, U.S. forces on the ground in Afghanistan indicated they did not receive sufficient guidance concerning the status of captured Taliban and Al Qaeda personnel and were uncertain concerning their proper treatment and handling.¹⁸ In the perceived absence of such guidance, military lawyers filled the void by advising their commanders that captured Taliban and Al Qaeda personnel would be treated in a manner “consistent with” the Geneva Conventions.¹⁹

On 13 November 2001, in order to provide guidance on the handling of captured personnel, President Bush issued a Military Order concerning the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.”²⁰ The Order targeted three categories of personnel for capture: (1) members of Al Qaeda; (2) international terrorists who “have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy;” and (3) any person who provides refuge to the personnel described in (1) or (2).²¹ Under the Order, the Secretary of Defense (SECDEF) was delegated the authority to detain captured personnel and to receive the support of other U.S. government agencies in the performance of this mission.²² Further, the Order required that detainees in the custody of other agencies of the United States Government were to be turned over to the custody of the Defense Department.²³ In addition, SECDEF was empowered to designate a location either inside or outside the United States

where the captured personnel were to be detained.²⁴ Detained personnel were to be treated “humanely” and tried by military commissions “for violations of the laws of war and other applicable laws by military tribunals.”²⁵ However, the Order was silent concerning the precise status of captured personnel and there was no reference to the Geneva Conventions.²⁶ The President determined, however, that “the principles of law and rules of evidence” mandated in criminal cases of the United States district courts would not be required for military commissions.²⁷

The President’s Military Order bolstered the SECDEF’s earlier efforts to significantly develop the Department’s capability to effectively collect and analyze human intelligence (HUMINT).²⁸ Once this Order was announced, there remained no doubt that the principal responsibility to capture, detain, interrogate and try detainees seized during the GWOT was housed within the Department of Defense. With Congress’ enactment of the Authorization for the Use of Military Force (AUMF), the President had received his “carte blanche” for waging the war against terror, and now SECDEF received similar broad authority from his Commander-in-Chief in order to accomplish the critical mission of capturing and trying international terrorists who were deemed to be a threat to the United States.

President’s Status Declaration

United States forces in Afghanistan would not receive any definitive guidance until 7 February 2002, when the President declared that the Geneva Conventions (GC) would not apply to Al Qaeda anywhere in the world, including the conflict in Afghanistan.²⁹ The President further indicated while the GC did apply to the Taliban in Afghanistan, they (the Taliban) were considered “unlawful combatants” and thus would not be entitled to Prisoner of War (POW) status under the GC. Additionally, Common Article 3 of the GC would not apply to either Al Qaeda or Taliban detainees.³⁰ The President’s memorandum indicated that this decision was based on legal opinions of the Department of Justice (DoJ) and the Attorney General (AG).³¹ The decision not to apply the GC was unprecedented, but the President explained that the actions of the terrorists had prompted a “new paradigm” that necessitated a “new thinking in the law of war.”³² While the protections of the GC would not be accorded to the Taliban and Al Qaeda detainees, the President did emphasize that “[a]s 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.”³³ The memorandum also referenced an earlier order issued by the SECDEF.³⁴ United States military

personnel, especially military attorneys advising commanders in Afghanistan, welcomed the guidance, although significant legal issues remained.³⁵

What was the decision-making process behind the President's 7 February 2002 declaration? As the paper trail from the 22 June 2004 release reveals, the months of January and February of 2002 proved to be a critical time in the formulation of the detainee interrogation policy for the United States Government.

The President Decides and SECDEF Launches

On 18 January 2002, the Counsel for the President, Alberto R. Gonzales, informed the Commander-in-Chief of a "formal legal opinion" prepared by DoJ that opined that Geneva Convention III regarding the treatment of POWs (GPW) would not apply to Al Qaeda.³⁶ Gonzales also indicated to the President that the DoJ opinion provided him "reasonable grounds" to find that GPW would not apply to the Taliban as well.³⁷ Based upon that advice from his legal counsel, the President determined that the GPW would not apply to Al Qaeda and the Taliban. Thus, neither group would be treated as POWs.³⁸

Armed with the decision by the President on 18 January, the SECDEF did not wait for an official declaration to the public to convey guidance to the military. One day later, on 19 January 2002, the SECDEF dispatched a memorandum to the Chairman of the Joint Chiefs of Staff (CJCS), directing him to inform the Combatant Commanders (COMs) that neither Al Qaeda nor Taliban detainees would be entitled to POW status under the Geneva Conventions.³⁹ The COMs were to pass on this order to their subordinate commands for execution.⁴⁰ Joint Task Force 160, the unit charged with handling the confinement of detainees located at Guantanamo Bay, Cuba (GTMO), was specifically mentioned as a subordinate command that should receive this order for "implementation."⁴¹ The language contained in the SECDEF order tracked that of the subsequent 7 February 2002 memo issued by the President, directing the COMs to "treat them [detainees] humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions of 1949."⁴² On 21 January 2002, the CJCS sent a message to all the COMs outlining the SECDEF's order.⁴³

OLC Flexes Its Legal Muscles

During the time when detainees captured in Afghanistan were being shipped to GTMO in beginning of 2002, the General Counsel for the Department of Defense (DoDGC), William J. Haynes II, and the Counsel to the President requested a legal opinion from the Office of the Legal Counsel (OLC), DoJ, asking "whether the laws of armed conflict apply to the conditions of detention and the procedures for trial of members of Al Qaeda and the Taliban militia."⁴⁴ On 22

January 2002, DoJ issued a legal opinion, advising the both the President's Counsel and the DoDGC that neither the Geneva Conventions nor the War Crimes Act⁴⁵ applied to the detention conditions of Al Qaeda personnel.⁴⁶ The opinion further advised that President Bush had constitutional authority to "suspend our treaty obligations toward Afghanistan" because it was a "failed state." The President could also determine that members of the Taliban militia in Afghanistan did not qualify as POWs under Geneva Convention III (GPW).⁴⁷ The opinion, however, was careful to indicate that it was not recommending a particular policy decision by the President.⁴⁸ The memo is significant because it formed the legal basis for the President's 7 February 2002 memo concerning the status of Al Qaeda and the Taliban in Afghanistan.

Because it was authored by the OLC, the matters addressed in the 22 January memo became binding on all the other U.S. government agencies, including DoD and the Department of State (DoS).⁴⁹ In a 25 January 2002 draft memorandum addressed to the President, White House Counsel explained the impact of an OLC opinion on the rest of the Executive branch: OLC's interpretation of this legal issue is definitive. The Attorney General is charged by statute with interpreting the law for the Executive Branch. This interpretive authority extends to both domestic and international law. He has, in turn, delegated this role to the OLC.⁵⁰ Describing its power in more colorful terms, a 2006 *Newsweek* article described the authority of the OLC as such:

The OLC is the most important government office you've never heard of. Among its bosses—before they went on the Supreme Court—were William Rehnquist and Antonin Scalia. Within the executive branch, including the Pentagon and CIA, the OLC acts as a kind of mini Supreme Court. Its carefully worded opinions are regarded as binding precedent—final say on what the president and all his agencies can and cannot legally do.⁵¹

Gaining the favorable opinion from the OLC was a deft move by the DoDGC and WHC, as it would help to compel the elements of the Executive Branch to accept a decision that the GC would not apply to the conflict in Afghanistan.

Powell's Prescience is Disregarded ⁵²

By 21 January 2002, the President had determined that Al Qaeda and the Taliban would not receive POW treatment and that determination was passed to the military establishment. However, Secretary of State (SECSTATE) Colin Powell, greatly concerned over the adverse impact such a decision would have for United States' interests, asked the President to reconsider the determination that Al Qaeda and the Taliban were not POWs under the GC.⁵³ In a draft memo, dated 25 January 2002, White House Counsel (WHC) Gonzales advised the

President that the OLC opinion would remain unchanged, because the Secretary's "arguments for reconsideration and reversal are unpersuasive."⁵⁴ According to the WHC, there were two main advantages in not applying the GC to the conflict in Afghanistan. First, the inapplicability of the Conventions would provide greater "flexibility" in the treatment of Al Qaeda and the Taliban, particularly in the area of interrogation.⁵⁵ Part of this "flexibility" would eliminate the need for Article 5 tribunals to make "case-by-case determinations of POW status."⁵⁶ The WHC went so far as to suggest that some of the POW protections were "quaint" in light of this "new kind of war."⁵⁷ The WHC also advised that the decision not to apply the GC would also lessen the possibility of criminal prosecution under the War Crimes Act for U.S. personnel.⁵⁸ With input from Secretary Powell, the WHC provided a laundry list of disadvantages flowing from the decision to not apply the GC to Afghanistan, including the negative reaction from the international community and the reversal of over 50 years of applying the GC to all conflicts, however characterized. A foreshadowing of the events at Abu Ghraib is a statement indicating that the decision not to apply the GC "could undermine the military culture which emphasizes maintaining the highest standards of conduct in combat, and could introduce an element of uncertainty in the status of adversaries."⁵⁹ Despite the significant disadvantages, the WHC, "[o]n balance," advised that the better decision was to not apply GC protections to detainees in Afghanistan.⁶⁰

In a memorandum dated 26 January 2002, Secretary of State Colin L. Powell provided his position concerning the WHC's views on the applicability of the GC to Al Qaeda and the Taliban.⁶¹ In the memo, the Secretary conveyed concerns that the WHC's opinion did not "squarely present to the President options available to him."⁶² According to Secretary Powell, the WHC draft memo did not adequately explain the advantages and disadvantages of each option.⁶³ SECSTATE believed that the President should have been presented with two options – either the GC did apply to the conflict in Afghanistan or it did not.⁶⁴ The SECSTATE noted that both options shared certain advantages, such as "flexibility" in the treatment of detainees, including interrogation, conditions of detention, and trials.⁶⁵ Powell also pointed out that both options allowed the United States not to grant POW status to Al Qaeda and the Taliban.⁶⁶ Lastly, Secretary Powell emphasized neither option provided any substantial risk of criminal prosecution of U.S. personnel in U.S. federal courts.⁶⁷

Secretary Powell, however, saw the potential for significant problems if the President decided that the GC did not apply to the conflict in Afghanistan. Although such finding would provide "maximum flexibility," the disadvantages of such an approach were numerous. Powell indicated that choosing not to apply the GC would "reverse over a century of U.S. policy and

practice in supporting the Geneva conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general.” A declaration that the GC would not apply would also prompt an adverse international response and undercut public support of key allies. Further, Powell cautioned that this determination might subject United States military personnel and other officials to criminal charges lodged by foreign prosecutors. Additionally, the United States would have increased exposure to legal challenges in the United States and internationally. Powell also foretold the negative impact such a determination would have on the successful defense against any habeas corpus challenges made by a detainee in U.S. federal court.⁶⁸

In contrast, a decision to apply the GC would sustain the United States’ “flexibility under both domestic and international law.”⁶⁹ Further, this decision would provide “the strongest legal foundation” for anticipated actions with the detainees.⁷⁰ But perhaps the most important factor of the decision to apply the GC would be more ready acceptance by the international community.⁷¹ The United States would be seen as maintaining the high moral ground in the war against terror.⁷² With this approach, Secretary Powell believed that the United States would be in a better position to request and accept support from the international community.⁷³ Further, by promoting the Conventions, the United States would also be in a stronger position to demand reciprocal treatment for its forces.⁷⁴ With the applicability of the GC would also come a lessening of the possibility of international criminal investigations being initiated against U.S. personnel.⁷⁵ As a disadvantage, Secretary Powell did note that with this approach some members of the Taliban may be accorded treatment as POWs.⁷⁶

Powell also took issue with a number of factual assertions made by the WHC in his draft memo.⁷⁷ The WHC had indicated that Afghanistan under the Taliban was a “failed state” and therefore could not be considered a party to the Geneva Conventions.⁷⁸ Secretary Powell took issue with that finding, stating that it would contradict the position of the United States Government, as well as that of the international community.⁷⁹ Secretary Powell also disagreed with the assertion of the WHC that United States had determined that the GC did not apply during Operation Just Cause in Panama.⁸⁰

The import of Powell’s advice to the President was that United States could have the “flexibility” in the treatment and trial of captured detainees by proclaiming that the GC did apply in Afghanistan, without the negative domestic and international reaction attendant with a determination that the GC was not applicable. Powell’s comments concerning the problems associated with not applying the GC to the conflict in Afghanistan proved prophetic in many respects.⁸¹ However, Powell’s advice was not followed and, on 7 February 2002, the President

announced that the GC would not apply to either the Al Qaeda or Taliban.⁸² Secretary Powell would now have the unenviable task of dealing with the fallout of this announcement, as the President directed him “to communicate my determinations in an appropriate manner to our allies, and other international organizations cooperating in a war against terrorism of global reach.”⁸³

A subsequent memorandum to the WHC by Secretary Powell’s Legal Advisor, William Taft IV, provided legal backing to many of the points raised by the Secretary.⁸⁴ In Taft’s opinion, whether or not the Conventions applied to the conflict in Afghanistan, the potential for criminal liability under the War Crimes Act was “negligible.”⁸⁵ Further, in the case of Afghanistan, Taft argued that there should not be a distinction made between the war against Al Qaeda and the war against the Taliban. According to Taft, the Geneva Conventions should be applied on a “conflict” basis, not on an individual or group basis:

The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in that conflict – al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc. If the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protections as a matter of law.⁸⁶

Taft flatly denied that Afghanistan was a “failed state,” as was claimed by the Justice Department.⁸⁷ He also asserted that if there was doubt about whether a particular detainee was not entitled to POW status, then an additional review could be conducted either under or consistent with the authority of the Conventions.⁸⁸

One unique characteristic of Taft’s memo is his reference to the “800 pound gorilla” that no one had chosen to directly mention up to this point – the Central Intelligence Agency (CIA).⁸⁹ Although not specifically mentioned, the efforts taken to protect CIA’s equities are revealed in the significant concern placed over potential liability of U.S. personnel for violations of the War Crimes Act. Taft’s opinion indicated that “[t]he lawyers involved all agree” that both the military and CIA work under the same standards concerning treatment of detainees.⁹⁰ Taft further highlighted that attorneys for the CIA wanted to carve out an exception for its personnel from complying with the Conventions in the event that the Conventions would apply as a matter of policy, but not law.⁹¹

In simple and succinct terms, Taft’s position can be summed up as follows:

- The consistent practice of the United States over the past 50 years is the application of the Geneva Conventions to all conflicts.
- To deviate from that practice in Afghanistan will have serious negative consequences now and in future conflicts.

- The concern over criminal liability for violations of the War Crimes Act if the Conventions apply to Afghanistan is exaggerated.
- Afghanistan is not a failed State and that is not a good reason to not apply the Conventions in Afghanistan.
- Everybody agrees that Al Qaeda and Taliban captured in Afghanistan are presumed to not be POWs.
- If there is doubt about the status of any person captured in Afghanistan, we can always provide additional screening on an individual basis.
- The CIA and the military are both working under the same restrictions.

Reconsideration, But No Change

As the National Security Council (NSC) was seized of the issue concerning the status of Al Qaeda and the Taliban, Attorney General John D. Ashcroft provided a letter to the President which summarized the DoJ's position on why the GC did not apply to the conflict in Afghanistan.⁹² Secretary Powell's efforts had prompted a reconsideration of the issue.⁹³ The letter was the Attorney General's (AG's) personal response to the State Department's opinion that the GC protected the Taliban in Afghanistan.⁹⁴ The main thrust of the AG's advice was that if the President adopted the view of the State Department, American personnel involved in the handling of detainees could be subject to criminal prosecution in U.S. courts for violations of the War Crimes Act.⁹⁵

At a 4 February NSC meeting, opposing camps on the issue formed, with DoS, DoD, and CJCS all agreeing that detainees in Afghanistan should receive treatment under the GC, while DoJ, backed by the definitive OLC legal opinion and the WHC, advised that the Conventions did not apply to the conflict in Afghanistan.⁹⁶ Immediately prior to the President's announcement to the public, the Justice Department's OLC launched one final legal foray to WHC Gonzales concerning the status of Taliban forces in Afghanistan under Article 4 of the GPW (GC III re POWs).⁹⁷ The opinion was authored by Assistant Attorney General Jay S. Bybee, who advised, based upon information provided by the Department of Defense, "that the President could reasonably interpret the GPW [GC III re POWs] in such a manner that none of the Taliban forces fall within the legal definition of POWs as defined by Article 4."⁹⁸ Thus, according to OLC, there was no need for Article 5 tribunals to determine status of detainees on a case-by-case basis.⁹⁹

“Torture Memo” Provides “Cover” for CIA

As the GWOT progressed, the Central Intelligence Agency (CIA) sought legal sanction for more aggressive methods in interrogating suspected Al Qaeda terrorists. The CIA contacted President’s Counsel, Alberto Gonzales, who, in turn, requested a legal opinion from OLC to determine what acts, under applicable domestic and international standards, would constitute torture.¹⁰⁰ Because it was requested by the CIA, the memo did not focus on interrogations conducted at the Department of Defense.¹⁰¹ What would result was a lengthy legal opinion that became known as the infamous “Torture Memo.” In the memo, OLC interpreted the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment and Punishment (CAT) and the U.S. statute that implemented the CAT (Torture Statute) and determined that 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.¹⁰²

OLC’s opinion was unprecedented in the radical way that it limited what acts constituted torture.¹⁰³ The CIA now had top cover issued by the definitive legal authority within the Executive Branch that provided nearly limitless flexibility in methods utilized in the interrogation of suspected terrorists. In addition to its narrow definition of torture, the Torture Memo is significant for two other findings. First, it suggested that any interrogation of Al Qaeda terrorists found to have violated the U.S. Torture Statute would be an “unconstitutional infringement” of the President’s Commander-in-Chief power.¹⁰⁴ Secondly, the opinion raised the possibility that interrogators may have the defenses of necessity and self-defense available to criminal charges under the Torture Statute.¹⁰⁵ Thus, even if a criminal prosecution was initiated, CIA personnel could counter it with constitutional and defense claims, according to OLC.

Other than the shocking photographs of abuse at Abu Ghraib, this opinion stands as the most damaging piece of detainee-related information to be disclosed by the United States’ in its critical war of ideas. When it was leaked to the media in June 2004, it created an uproar.¹⁰⁶ The timing of the leak could not have come at a worse time for the Bush Administration, given less than two months earlier the Abu Ghraib photographs were displayed on the television news show, *60 Minutes II*.¹⁰⁷ Critics claimed that memo was proof that the United States was engaging in practices that amounted to torture. Also, there was a nexus drawn to the memo and the events at Abu Ghraib. The leak of the memo generated such controversy that the White House, on 22 June 2004, disclosed to the public a number of documents related to the treatment of detainees, including the Torture Memo.¹⁰⁸ The White House announced the

release in order to clear up for the public what actions were discussed and what actions were actually implemented, but the public's concern was not assuaged.¹⁰⁹ Perhaps the clearest indication of the suspect nature of the findings of the Torture Memo was its withdrawal on 22 June 2004¹¹⁰ and replacement with a new legal opinion by the Office of Legal Counsel (OLC) on 30 December 2004.¹¹¹

GTMO "Goes South"

Prior to the release of the President's guidance concerning the status of the Taliban and Al Qaeda personnel captured in Afghanistan, certain detainees were being transferred to a permanent holding facility at the United States Naval Base located in Guantanamo Bay, Cuba (GTMO) based on classified screening criteria established by DoD.¹¹² The decision to use GTMO as a facility to hold detainees was based, in part, on a DoJ opinion that concluded that alien detainees could not challenge their detention in U.S. courts.¹¹³ U.S. officials running GTMO quickly became frustrated with the growing number of detainees who exhibited resistance to traditional interrogation techniques.¹¹⁴ Because of this development, the Director of Intelligence Operations (DIO) for Combined Joint Task Force (JTF) 170¹¹⁵ requested approval from the Commander of JTF 170 for the use of certain techniques and approaches not contained in Army Field Manual (FM) 34-52.¹¹⁶

The "counter-resistance strategies" requested by the DIO included:

- stress positions for a maximum of 4 hours;
- non-injurious physical touching, such as poking in the chest with a finger;
- deprivation of light and auditory stimuli;
- placing a hood on the detainee during interrogation;
- interrogations for up to 20 hours;
- removal of clothing;
- removal of religious items;
- using the phobia of a detainee against him, such as fear of dogs;
- convincing the detainee that death or severe pain was imminent for him or his family;
- exposure of the detainee to cold weather or water; and
- use of a wet towel and dripping water to induce the misperception of suffocation by the detainee, i.e., "water boarding."¹¹⁷

Before the DIO's request was forwarded to the JTF-170 Commander, the Staff Judge Advocate (SJA) conducted a legal review of the request and recommended that all of the proposed counter-resistance techniques be approved.¹¹⁸ The SJA's legal opinion, however, is

considered flawed in a number of respects.¹¹⁹ The SJA determined that because the GC did not apply to detainees held at GTMO, and since FM 34-52 was based on the GC, then the guidance in FM 34-52 was no longer binding.¹²⁰ In essence, existing guidance was thrown out, effectively eliminating any doctrinal foundation for the interrogators to fall back on. The opinion also contained a questionable interpretation of the applicability of the Convention Against Torture (CAT) and the United States' implementation of the CAT, the Torture Statute, finding that "no international body of law directly applies" and further, the proposed techniques "did not violate applicable federal law."¹²¹ In addition, the opinion failed to consider minimum requirement of "humane treatment" contained in Common Article 3 of the GC.¹²² The SJA's recommendation to provide immunity for interrogators "in advance" of actions that violated the Uniform Code of Military Justice (UCMJ) was legally unsupportable.¹²³ Despite its dubious nature, the legal opinion would make its way through SOUTHCOM and eventually to the Office of the DoDGC without any serious concerns noted about its legal soundness.

Upon receipt of the legal opinion, the Commander of JTF-170 forwarded the request for additional interrogation techniques to the Commander, U.S. Southern Command (SOUTHCOM), stating that "Based upon the analysis provided by the JTF-170 SJA, I have concluded that these techniques do not violate U.S. or international laws."¹²⁴ On 25 October 2002, the Commander, SOUTHCOM forwarded JTF-170's request for counter-resistance techniques to the Chairman of the Joint Chiefs of Staff (CJCS).¹²⁵ The SOUTHCOM Commander indicated that he wanted to provide the interrogators "with as many legally permissible tools as possible" to counter the resistance being offered by the detainees at GTMO.¹²⁶ The SOUTHCOM Commander had no problem with the first two categories of techniques (Categories I and II), declaring that they were "legal and humane."¹²⁷ He was, however, concerned over certain proposed techniques contained in Category III, particularly the use of implied or express death threats against the detainee or his family.¹²⁸ Because of this concern, he wanted DoD and DoJ to determine whether the proposed techniques listed in Category III were legal.¹²⁹

On 2 December 2002, the SECDEF approved the use of all of Category I and II techniques requested by JTF-170. Concerning the Category III techniques, SECDEF indicated that all of those 4 techniques were "legal," but as a "matter of policy" he was approving only "non-injurious contact."¹³⁰ Before reaching the SECDEF, the action memo was cleared by the DoDGC.¹³¹ In addition to the non-injurious contact, those techniques approved for use by GTMO interrogators now included:

- use of stress positions;

- deprivation of light and auditory stimuli;
- hooding of the detainee during interrogation;
- 20-hour interrogations;
- removal of religious items;
- removal of clothing;
- forced shaving; and
- use of individual phobias against detainees, for example, dogs.¹³²

SECDEF, however, could not resist a personal comment concerning the limitation of standing for a maximum of 4 hours. In a pen-and-ink comment accompanying his formal approval, SECDEF posed the following question: “However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?”¹³³ That gratuitous handwritten comment would send a not-so-subtle message to the requestors, and that was, “c’mon guys, is this the best that you can come up with?”¹³⁴

With the stroke of a pen, over 50 years of U.S. military policy concerning interrogation of detainees was changed to allow multiple aggressive measures never before officially sanctioned. For instance, the approval of non-injurious contact now authorized something that had never been permitted – the intentional touching of a detainee for the purpose of eliciting information from him.¹³⁵ The SECDEF’s approved techniques would have about two weeks’ time until they came to the attention of a determined Navy civilian attorney, Alberto J. Mora.

Mora to the Rescue

On 17 December of 2002, General Counsel for the Navy, Alberto J. Mora, met with Mr. David Brant, the head of the Navy’s Criminal Investigative Service (NCIS).¹³⁶ Brant was concerned over reports from law enforcement agents with the [Criminal Investigation Task Force \(CITF\)](#) working at Joint Task Force (JTF) 170 at GTMO.¹³⁷ The reports indicated that interrogators at GTMO were using abusive interrogation tactics and that such tactics were not the result of “rogue” interrogators, but instead, were rumored to be approved at the “highest levels.”¹³⁸ The following day, Mora, along with The Judge Advocate General of the Navy, met the NCIS Chief Psychologist, Dr. Michael Gelles, who basically confirmed the agents’ reports.¹³⁹ Disturbed with what he had learned, Mora looked to the Army General Counsel, as the Army was the designated executive agent for detainee operations within DoD.¹⁴⁰ The Army General Counsel provided Mora with a copy of the JTF-170 request packet containing SECDEF’s 2 December 02 approval and the JTF-170 legal brief prepared by the JTF-170 SJA.¹⁴¹ The packet showed that the SECDEF had approved such enhanced techniques as stress positions,

hooding, isolation, deprivation of stimuli, and use of phobias.¹⁴² Further, upon reading the supporting legal brief, Mora found it “as a wholly inadequate analysis of the law and a poor treatment of this difficult and highly sensitive issue.”¹⁴³ Mora viewed some of the techniques as contrary to applicable international and domestic law, as well as inconsistent with the President’s earlier guidance to treat detainees “humanely.”¹⁴⁴ In a series of meetings with DoD officials, Mora repeatedly challenged the wisdom and legality of the approved techniques and, similar to Secretary Powell, warned of the “severe” consequences that would flow from such a policy if it was made public.¹⁴⁵

On 9 January 2003, clearly frustrated by the lack of progress, Mora cautioned the DoDGC that the interrogation policies could threaten SECDEF’s tenure and even harm the Presidency.¹⁴⁶ Finally, on 15 January 2003, Mora detailed his position in writing and delivered a draft memo to the DoDGC.¹⁴⁷ Playing hardball, Mora informed the DoDGC that if the techniques approved by the SECDEF on 2 December were not suspended, he would sign and circulate his memo.¹⁴⁸ Later that same day, the DoDGC contacted Mora and informed him that the SECDEF was suspending the authority for JTF-170 to use the enhanced techniques.¹⁴⁹ Mora was relieved and heartened by this development, but such feelings would be short-lived.¹⁵⁰

Working Group Woes

Mora’s persistence prompted some initial action by OSD. On 15 January 2003, in a memorandum to the SOUTHCOM Commander, the SECDEF revoked his earlier approval of all Category II techniques and one Category III technique (non-injurious touching) for interrogations occurring at GTMO.¹⁵¹ SECDEF further directed SOUTHCOM that if GTMO wanted to employ any Category II or III technique, they would have to obtain SECDEF’s express approval.¹⁵² SECDEF emphasized that “humane treatment” of detainees should continue.¹⁵³ Attached to the SECDEF’s memo was a separate memo to the DoDGC, directing him to convene a “working group” within DoD to evaluate all interrogation techniques.¹⁵⁴ The Working Group’s stated goal was to recommend to the SECDEF what interrogation techniques should be used by military interrogators.¹⁵⁵

On 17 January 2003, the DoDGC chose the Air Force’s General Counsel, Mary Walker, to act as the chair for the Working Group.¹⁵⁶ The Working Group, however, was informed early in its process that it would be bound by the guidance provided by the Office of the Legal Counsel (OLC) of the Department of Justice (DoJ).¹⁵⁷ The “guidance” that would hamstring the Group was a legal memo from the Department of Justice [Office of Legal Counsel](#) written by [John Yoo](#)

and signed by [Jay S. Bybee](#), which would later become known as the infamous "Torture Memo."¹⁵⁸ Mora led a bloc within the Working Group in opposing the standards posited in the "Torture Memo," and even went so far as to personally confront the memo's author, John Yoo.¹⁵⁹ During the March-April 2003 timeframe, The Judge Advocate Generals (TJAGs) for the Army, Navy, Air Force and Marines joined Mora's efforts and sent letters to the DoD General Counsel, conveying their concerns to the policy that was being developed by the Working Group.¹⁶⁰ Pushed by the DoDGC and its Chairperson, the Working Group plowed forward with its report. After considering relevant "legal, policy, historical and operational considerations" of the interrogation of detainees, the Working Group provided its findings and recommendations to the SECDEF on 4 April 2003.¹⁶¹ The report included a recommendation to approve 26 interrogation techniques under general conditions and 9 other "exceptional" techniques that would be subject to general and specific limitations.¹⁶²

Based upon the findings and recommendations of the DoD Working Group, on 16 April 2003, the SECDEF issued his guidance to SOUTHCOM.¹⁶³ The final report of the Working Group was signed by SECDEF and dispatched to GTMO without the knowledge of Mora and the others who had opposed its content.¹⁶⁴ In his guidance to SOUTHCOM, SECDEF approved the use of 24 interrogation techniques.¹⁶⁵ Seventeen of the 24 techniques approved by the SECDEF had a solid doctrinal basis, as they were already contained in the Army Field Manual on intelligence interrogations (FM 34-52).¹⁶⁶ The techniques approved by SECDEF, however, only applied to the detainees being held at GTMO.¹⁶⁷ Further, the SECDEF required justification and prior notice before certain techniques could be employed.¹⁶⁸ With this action by the SECDEF, DoD guidance to GTMO was considered back on track, even by one of its staunchest critics in DoD, Alberto Mora.¹⁶⁹ While it was positive development that the GTMO "ship" was finally righted, the adjustment process took too long, in part because the failure to include the input from the Service Judge Advocates Generals (TJAGs).¹⁷⁰

The Working Group Report holds no true lasting value, as it was later disavowed by the Department of Defense on 17 March 2005 as "a historical document with no standing in policy, practice, or law to guide any activity of the Department of Defense."¹⁷¹

Confusion and Migration

Unfortunately, the counter-resistance strategies approved specifically for use at GTMO did not stay on the island of Cuba.¹⁷² In Afghanistan, the Combined Joint Task Force (CJTF)-180¹⁷³ developed its own interrogation rules in the absence of specific guidance from higher.¹⁷⁴ From the beginning of the conflict until December 2002, CJTF-180 interrogators used the guidance

contained in FM 34-52.¹⁷⁵ However, on 23 January 2003, CJTF-180 adopted as its policy many of the techniques similar to those approved by the SECDEF for use at GTMO on 2 December 2002.¹⁷⁶ Despite their similarity to the GTMO techniques, the CJTF-180 enhanced techniques appear to be locally developed.¹⁷⁷ In addition to those locally developed techniques, CJTF-180 interrogation policy indicates that some “migration” of techniques from GTMO occurred.¹⁷⁸ In fact, when SECDEF ordered the suspension of Category II and III techniques at GTMO on 15 January 2003, CJTF-180 followed suit with its own revocation.¹⁷⁹

On 24 January 2003, in response to an inquiry, CJTF-180, through Central Command (CENTCOM), informed the Joint Staff of the use of its enhanced techniques.¹⁸⁰ After receiving no comments from the Joint Staff, CJTF-180 assumed that the enhanced techniques were not objectionable and continued their use.¹⁸¹ After two detainee deaths at the Bagram Collection Point in December 2002, the CJTF Commander eliminated 5 interrogation tactics on 27 February 2003.¹⁸² This change was made even though interrogation tactics were not found to have contributed to the detainees’ deaths.¹⁸³

In March 2004, CJTF-180 again issued new interrogation guidance.¹⁸⁴ This guidance, however, was not carefully drafted.¹⁸⁵ The March 2004 policy again started using techniques that had been eliminated by the CJTF-180 Commander in February 2003.¹⁸⁶ Furthermore, the March 2004 guidance appears to be based on the SECDEF’s 16 April 2003 memorandum intended only to apply to GTMO interrogation operations.¹⁸⁷ The March 2004 policy remained in effect until the CENTCOM declared one single detainee interrogation for the entire Area of Responsibility (AOR).¹⁸⁸ The June 2004 CENTCOM policy comported with the guidance contained in FM 34-52.¹⁸⁹

In Iraq, detainee interrogation policy was supposed to be “easy,” because the United States had declared that the Geneva Conventions applied.¹⁹⁰ However, the detainee interrogation policy in Iraq would receive a dual migration of interrogation techniques – flowing from both Afghanistan and GTMO.¹⁹¹ At the inception of Operation Iraqi Freedom (OIF) on 19 March 2003, interrogators in Iraq fell back on the doctrine contained in FM 34-52.¹⁹² Two separate events occurring in the summer of 2003, however, would affect the interrogation policy in Iraq.

In August 2003, Captain (CPT) Carolyn Wood, a commander of a Military Intelligence Company working at Abu Ghraib, submitted a draft interrogation policy to the CJTF-7¹⁹³ staff.¹⁹⁴ Her draft was based upon techniques that she had used earlier in Afghanistan.¹⁹⁵ In addition, between 31 August and 9 September 2003, Major General (MG) Geoffrey Miller, the GTMO Commander, visited the Iraq detention facilities, and noted an absence of specific guidance

regarding interrogation policy.¹⁹⁶ Quickly acting on MG Miller's finding, the CJTF-7 Commander published his first interrogation policy on 14 September 2003.¹⁹⁷ This initial policy was influenced by both the GTMO policy passed to him by MG Miller and input from CPT Wood borrowed from her experience in Afghanistan.¹⁹⁸ This initial policy included the use of muzzled dogs during interrogations.¹⁹⁹ The migration of the GTMO policy to Iraq was especially problematic as, unlike Afghanistan and GTMO, the Geneva Conventions did apply.²⁰⁰ Further, the GTMO techniques were applied under conditions and numbers that were substantially different than those in Iraq.²⁰¹

This initial policy, however, was overturned by the CENTCOM Staff Judge Advocate as being "unacceptably aggressive."²⁰² His initial policy found objectionable, the CJTF-7 Commander revised his policy on 12 October 2003, removing several interrogation techniques from the September policy.²⁰³ The 12 October policy, however, was based a prior version of FM 34-52 from 1987, which allowed interrogators to direct all facets of the interrogation, including environmental conditions, food and clothing.²⁰⁴ The 12 October policy remained in effect until 13 May 2004, when the CJTF-7 Commander enacted a new policy with techniques identical to those contained in the October 2003 policy.²⁰⁵ As with Afghanistan, CJTF-7's interrogation policy changed when CENTCOM issued AOR-wide guidance in June 2004.²⁰⁶

As CJTF-7 had struggled in the development of its interrogation policy,²⁰⁷ abuses at Abu Ghraib would begin on the night shift at the prison's "hard site."²⁰⁸ On 13 January of 2004, Specialist Joseph Darby turned over a compact disc of photographs graphically depicting abuse of detainees at Abu Ghraib to investigators of the Army's Criminal Investigation Command (CID). This disclosure prompted criminal investigations, as well as the administrative investigation conducted by Major General Taguba.²⁰⁹ The photographs from Abu Ghraib went public on 28 April 2004.²¹⁰ Although subsequent reports would not find any definitive causal connection between the interrogation policy and abuse, the Schlesinger Report notes that "[w]e cannot be sure how much the number and severity of abuses would have been curtailed had there been early and consistent guidance from higher levels. Nonetheless, such guidance was needed and likely would have had a limiting effect."²¹¹

Until Abu Ghraib went public, the Department of Defense was able to pursue its interrogation policies with little outside scrutiny. The honeymoon period was officially over. As the bright media lights shone on the abuses of Abu Ghraib, the United States Courts and Congress would confront DoD about its treatment of detainees.

The Supreme Court Intervenes

In April of 2004, about the time Abu Ghraib became public, the United States Supreme Court agreed to hear three cases involving detainees, *Hamdi v. Rumsfeld*,²¹² *Rasul v. Bush*,²¹³ and *Rumsfeld v. Padilla*.²¹⁴ Within two months, the Court had issued their separate opinions. Two of the three cases would be decided against the Government.

Yaser Esam Hamdi, a United States citizen, was captured in Afghanistan in 2001 as an “enemy combatant” allegedly fighting with the Taliban.²¹⁵ He was transferred to GTMO, and when government officials learned that he was an American citizen, he was moved to the U.S. and eventually detained in a Navy brig in Charleston, South Carolina. His father initiated the case by filing a habeas corpus petition under 28 U.S.C. § 2241 in federal district court.²¹⁶ On 28 April 2004, the day the Abu Ghraib photographs went public, the United States Supreme Court heard arguments from counsel.

On 28 June 2004, the Court’s decision in the *Hamdi* case was announced in a plurality opinion²¹⁷ holding that the United States Government could not detain Hamdi indefinitely without bringing him to trial.²¹⁸ The plurality opinion of the Court, authored by Justice O’Connor, and joined in by the Chief Justice, Justice Kennedy, and Justice Breyer, found that detention of Hamdi by the Executive in this instance was authorized by Congress via the Authorization for the Use of Military Force (AUMF). However, the plurality concluded that “although Congress authorized the detention of combatants in the narrow circumstances alleged in this case, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for detention before a neutral decisionmaker.”²¹⁹ Balancing the competing private and governmental interests, the Court determined that Hamdi’s fundamental right of liberty outweighed the Government’s interest of ensuring that enemy combatants are not released to again take up arms against the United States.²²⁰ In dicta, the plurality took time to comment upon the Government’s assertion of power being “condensed” in the Executive Branch:

We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of its Nation’s citizens (citing *Youngstown Sheet and Tube*, 343 U.S., at 587). Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations and with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.²²¹

Important to note is that near the end of its opinion, the plurality in *Hamdi* suggests that an Article 5 military tribunal, convened per Army Regulation 190-8, para. 1-6, may be an adequate due process substitute, vitiating the need for such a process to be conducted by a court.²²²

Hamdi was never brought to trial.²²³ On 11 October 2004, Hamdi arrived in Saudi Arabia after the Department of Justice released him on the conditions that he renounce his U.S. citizenship and agree to certain travel restrictions.²²⁴

On 28 June 2004, the Court also announced its decision in the *Rasul* case.²²⁵ In *Rasul*, the Court found that U.S. courts have jurisdiction to hear such suits brought by aliens confined at GTMO.²²⁶ At issue before the Court in *Rasul* was whether foreign nationals captured as unlawful combatants and detained at GTMO could challenge their detention under the Habeas Corpus Statute²²⁷ in U.S. Federal court. The Court found that U.S. courts do have jurisdiction to hear such suits brought by aliens confined at GTMO. Relying on the case of *Johnson v. Eisentrager*,²²⁸ the U.S. District Court and Court of Appeals both found that they lacked jurisdiction to hear the habeas corpus claims brought by the alien detainees confined at GTMO. The Court distinguished the *Eisentrager* precedent, finding that the GTMO detainees were different from the *Eisentrager* detainees in several important respects, to include being incarcerated in a “territory over which the United States exercises exclusive jurisdiction and control” and never being tried by any tribunal.²²⁹ The Court also highlighted that *Eisentrager* was primarily concerning the constitutional right to habeas corpus review, while *Rasul* involved the statutory cause of action available via the Habeas Corpus Statute.²³⁰ Furthermore, the Court dispensed with the presumption against the extraterritorial application of the Habeas Corpus Statute, determining that this principle was inapplicable because the U.S. exercised “complete jurisdiction and control over the Guantanamo Base.”²³¹ The Court also emphasized that U.S. Federal courts have jurisdiction to hear causes of actions brought by the GTMO detainees under the federal question statute and the Alien Tort Statute.²³²

In a brief concurring opinion, Justice Kennedy found the Court’s interpretation of *Eisentrager* and *Braden*²³³ unreasonable. He specifically agreed with the portion of Justice Scalia’s dissent that challenged the Court’s reading and application of *Braden*.²³⁴ However, Justice Kennedy nonetheless cited two critical factors in allowing U.S. courts to exercise jurisdiction over the detainees’ habeas actions: first, the unique status of Guantanamo Bay, and second, indefinite detention of the detainees “without the benefit of any legal proceeding to determine their status.”²³⁵

Justice Scalia authored a lengthy dissenting opinion in *Rasul*.²³⁶ The import of his objections was that a fair reading of the Habeas Statute did not authorize the exercise of

jurisdiction in the case. Justice Scalia declared that if the Habeas Statute is to be changed, it should be Congress, not the Courts, that amends it to allow petitions by aliens located outside U.S. territory.²³⁷ Clearly upset over what he determined to be the “judicial adventurism of the worst sort,” Justice Scalia further claimed that:

Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction - - and thus making it a foolish place to have housed alien wartime detainees.²³⁸

From a review of all of the Court's opinions (including Justice Kennedy's concurrence and Justice Scalia's dissent) there appears to be two critical facts determinative of the outcome of *Rasul*: first, the unique status of Guantanamo Bay, creating what amounted to a U.S. territory; and second, the lack of detainees' access to a tribunal that could review their status.

Rasul was held at GTMO for two years by the United States until he was returned to the United Kingdom.²³⁹ He was released by British authorities in March 2004, more than three months before his case before the United States Supreme Court was decided.²⁴⁰ Once in the United Kingdom, *Rasul*, along with two other former detainees, published a report of their alleged abuse while in U.S. custody.²⁴¹ In a case of “Gitmo goes Hollywood,” *Rasul* and two former detainees known as the “Tipton Three”²⁴² contributed to and participated in a movie, *The Road to Guantanamo*.²⁴³ *Rasul* and other detainees also brought a multi-million dollar lawsuit against U.S. officials alleging numerous abuses suffered while in their confinement at GTMO.²⁴⁴

The third detainee case decided by the Court on 28 June 2004 was *Rumsfeld v. Padilla*.²⁴⁵ Jose Padilla, a U.S. citizen, was arrested at Chicago's O'Hare Airport on 8 May 2002 upon his return to the United States from Pakistan.²⁴⁶ He was detained by federal authorities as a material witness in the government's investigation into Al Qaeda terrorist activities.²⁴⁷ Later, on 9 June 2002, Padilla was designated an enemy combatant by President Bush.²⁴⁸ Upon being designated an enemy combatant, Padilla was transferred to a military brig in South Carolina.²⁴⁹ On 11 June, Padilla's attorney filed a habeas corpus petition in the Southern District of New York, alleging that Padilla's detention was prohibited by the Non-Detention Act.²⁵⁰ While the District Court agreed to hear the case, it ruled that the Department of Defense (DoD), on behalf of its Commander-in-Chief and pursuant to the statutory authority provided by Congress with the AUMF, had the power to hold Padilla as an enemy combatant.²⁵¹ The case was appealed to the Second Circuit Court of Appeals. The Court of Appeals reversed the decision of the District Court, finding that the AUMF did not provide DoD with the authority to hold U.S. citizens

captured outside a combat zone.²⁵² The Government petitioned the Supreme Court and certiorari was granted.

The substantive issue facing the Supreme Court in *Padilla* was whether Congress' AUMF authorized the President to detain *Padilla* as an enemy combatant.²⁵³ The Court, however, never reached the merits, deciding the case on technical grounds. It found that *Padilla*'s habeas petition was improperly filed in federal court in the New York, instead of South Carolina, where *Padilla* was actually confined.²⁵⁴ In addition, the Court found that *Padilla*'s habeas corpus petition improperly named Secretary of Defense Rumsfeld as the respondent.²⁵⁵ According to a majority of the Court, the petition should have named the commander of the brig where *Padilla* was actually being held.²⁵⁶ Based upon these defects, the Court indicated that *Padilla*'s habeas petition would have to be re-filed in a federal district court in South Carolina.²⁵⁷

Despite the Government's success on procedural grounds in *Padilla*, the Court's decisions, along with the decisions to free *Hamdi* and *Rasul* with no charges ever being lodged, were generally viewed as significant setbacks in the President's war against terror.²⁵⁸ One of the key underpinnings of the capture and detention of the terrorists was the Executive Branch's ability to operate free from the interference of U.S. courts.²⁵⁹ That had been one of the reasons why Guantanamo Bay, Cuba was chosen as the site of the permanent detention facility.²⁶⁰ The Supreme Court had determined that the Executive Branch could no longer hold U.S. citizens indefinitely without trial and alien detainees at GTMO could access the U.S. courts.

To address the deficiencies noted by the Supreme Court in the *Rasul* case, the Department of Defense, taking a cue from Justice O'Connor in *Hamdi*, quickly established the Combatant Status Review Tribunal (CSRT) in order to provide detainees with the opportunity to challenge their enemy combatant status and thus, the reason for their detention.²⁶¹ By promptly setting up this process, the Defense Department, at least for the time being, was able to prevent the U.S. courts from intervening into its detention operations at GTMO.

Congress Awakens

During the development and execution of the United States detainee interrogation policy, Congress maintained an essentially indifferent attitude concerning its oversight role of this Executive Branch activity.²⁶² The events that awakened Congress and prompted their involvement were the revelations of the abuses against detainees committed by U.S. military personnel at the Abu Ghraib and GTMO.

Troubled by the reports of abuse coming out of the military detention facilities in Iraq and GTMO, Senator John McCain, himself a victim of abuse while a POW during the Vietnam

conflict, initiated a legislative effort in Congress to provide clear guidance to U.S. Government personnel conducting interrogations and further, to ensure that U.S. personnel did not engage in techniques amounting to torture when interrogating detainees captured during the GWOT.²⁶³ Supporters also felt that passing such legislation would help the United States repair an image damaged by detainee abuse scandals.²⁶⁴ Senator McCain's proposed amendment to the 2006 Defense Appropriations Bill intended to prohibit "cruel, inhumane and degrading" treatment of detainees and establish techniques contained in U.S. Army Field Manual as the standard for interrogations conducted by all U.S. Government personnel, including those working for the Central Intelligence Agency (CIA).²⁶⁵ In a statement on the Senate floor, Senator McCain indicated that the proposed legislation had two purposes: one, to use Army Field Manual 34-52 as a standard for all interrogations conducted in Department of Defense facilities; and two, prohibit "cruel, inhumane, and degrading treatment" of detainees in the custody of the United States Government.²⁶⁶

President Bush responded to the proposed amendment by indicating that he would veto the bill if it was passed by Congress. He was concerned that the bill would hamstring CIA's ability to "question the world's most dangerous terrorists and to get their secrets."²⁶⁷ Despite the announced stance of the Bush Administration, Senator McCain pressed on with the proposed amendment.²⁶⁸ Eventually, however, Senator McCain compromised, and a statutory defense for accused CIA and military interrogators was added to the bill. The Senate passed McCain's proposed legislation by a 90-9 vote, thus eliminating the threat of a presidential veto.²⁶⁹ A later amendment sponsored by Senators Lindsey Graham and Carl Levin prospectively eliminated habeas corpus review for individuals detained at GTMO, thus limiting the effect of the 2004 Supreme Court decision of *Rasul v. Bush*.²⁷⁰ Instead of allowing the detainees full access to U.S. Federal courts, the amendment provided for limited judicial review of combatant status determinations and convictions by military commissions.²⁷¹ That amendment, along with the earlier McCain amendment, were combined into a single law. The new law is referred to as the "Detainee Treatment Act of 2005 (DTA)."²⁷²

On 30 December 2005, President Bush signed the DTA into law. His statement that accompanied the signing into law of the DTA generated the most controversy of any of his numerous signing statements.²⁷³ Using language present in a number of his signing statements, President Bush indicated that he would construe Title X, Division A of the Act "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on judicial power."²⁷⁴ Some critics viewed this statement by the President as a blatant attack of

the Constitutional separation of powers. During his first term, President Bush has issued signing statements affecting 500 bills and this trend has continued during his second term. The signing statements are intended to lay down a marker and prevent a further erosion of Presidential power.²⁷⁵ Critics of such signing statements claim that the Presentment Clause of the Constitution allows two options when a bill is forwarded to him for action; he may either sign it into law or veto it and return it to Congress with his objections.²⁷⁶ Furthermore, the President is not to make law, but is entrusted with seeing that laws are enforced.²⁷⁷ Certain language contained in some of President Bush's signing statement appear to indicate that he will refuse to comply with portions of a law that he believes infringe upon his executive power.²⁷⁸

The American Bar Association (ABA) convened a Task Force to address its growing concern over the increased use of Presidential signing statements the past 25 years.²⁷⁹ The Task Force concluded that the President was misusing signing statements by indicating his intent to disregard all or part of a law he had signed and that such a practice constituted a "serious assault on the constitutional system of checks and balances."²⁸⁰ The Task Force urged Congress to awaken and assert itself.²⁸¹

The DTA was a very unique law, in that it specifically relied upon Army FM 34-52 as its standard for interrogation techniques.²⁸² At the time the law passed, FM 34-52 was under revision. When the revision was completed in 2006, the new regulation, FM 2-22.3, had the effect of U.S. Federal law.²⁸³ In addition, impact of the DTA was diminished by the amendments and compromises occurring during the legislative process. The law provides for what amounts to immunity for military and CIA interrogators charged with a crime. Further, the law effectively cuts off access to U.S. courts by the detainees at GTMO.

Congress had acted with the passage of the DTA. In the ebb and flow that marks the checks and balances of the United States' democratic system of government, it was time again for the judicial branch to intervene into matters involving the war against terrorism.

Supreme Court Declares Commissions Unconstitutional

Salim Ahmed Hamdan, a Yemeni bodyguard and driver for Osama Bin Laden, was captured by U.S. forces in Afghanistan in November 2001. Hamdan was charged in July 2004 with conspiracy to attack civilians and commit acts of terrorism, and was held at Guantanamo Bay since 2002.²⁸⁴ Hamdan was to be the first detainee tried by the military commissions established by President Bush in 2002. Hamdan challenged his detention at GTMO in U.S. federal court and after an adverse decision by the Circuit Court of Appeals, the Supreme Court agreed to hear his case.²⁸⁵ The case was argued on 28 March 2006 and decided on 29 June

2006.²⁸⁶ Declaring the military commissions illegal, a majority of the Court concluded that the “structure and procedures” of the military commission convened to try Hamdan “violate both the UCMJ and the Geneva Conventions.”²⁸⁷ Additionally, four of the Justices agreed that the crime Hamdan was charged with could not be tried at a military commission.²⁸⁸ The Court also ruled that the “requirements” Common Article 3 of the Geneva Conventions applied in this instance and that the military commission established by the President in Military Order Number 1 failed to meet those “requirements.”²⁸⁹ The Supreme Court further indicated the President had established the military commission without proper Congressional authorization.²⁹⁰

As with the earlier cases of *Hamdi* and *Rasul*, the Court’s decision was viewed as a significant check on the powers of the President during wartime.²⁹¹ The future status of the 450 detainees at GTMO was thrown into uncertainty over the Court’s decision. Some commentators even suggested that the *Hamdan* decision might prompt the closure of the GTMO detention facility.²⁹² All of the trials would be put on hold, while a new procedure was established to try the detainees.²⁹³ Also important to note is that the Court’s determination that Hamdan would receive the protections of Common Article 3 of the GC would potentially have a limiting impact on the interrogation of detainees by CIA personnel.²⁹⁴ Feeling the impact of *Hamdan* decision, President Bush would need Congress’ help to keep two vital tools in the war against terror from being disrupted – that is, military commissions and flexible interrogation techniques.

Republican Congress Responds

On 6 September 2006, President Bush requested Congress to establish legislation to authorize a military commissions system, as dictated by the Supreme Court in *Hamdan v. Rumsfeld*.²⁹⁵ On 29 September 2006, a Republican-controlled Congress passed the Military Commissions Act of 2006 (MCA of 2006).²⁹⁶ On 17 October 2006, the President signed bill into law.²⁹⁷ While no formal, written signing statement was issued, President Bush did take time to emphasize the importance of allowing the CIA to continue their practices:

When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to continue? This bill meets that test. It allows for the clarity our intelligence professionals need to continue questioning terrorists and saving lives.²⁹⁸

Overall, the MCA was considered a very favorable piece of legislation for the support of the President’s war against terror. Key parts of the Military Commissions Act (MCA) include:

- Statements made as result of torture may not be admitted; however, coerced statements occurring before 30 December 2005 may be admitted provide the military judge makes certain findings;²⁹⁹
- Classified information is protected;³⁰⁰
- Hearsay evidence is admissible against a detainee;³⁰¹
- In response to the finding in *Hamdan*, conspiracy is made a crime that may be tried by the commission;³⁰²
- Provides a retroactive legal defense for U.S. personnel who may have engaged in enhanced interrogation techniques from 11 September 2001 and 30 December 2005;³⁰³
- The range of actions that may be considered a violation of Common Article 3 of the Geneva Conventions is narrowed;³⁰⁴
- It amended the Detainee Treatment Act (DTA) to provide that detainees will not have access to U.S. courts once their status as an enemy combatant is determined by the Combat Status Review Tribunal.³⁰⁵

The Bush Administration could have viewed the Supreme Court decision *Hamdan* to mean that detainees at GTMO cannot be tried by a military commission, but instead must be tried by a U.S. federal court, court-martial under the UCMJ, or court located in the detainee's home country. President Bush, enabled by a Republican Congress, decided to stick with the commissions. The MCA of 2006 withstood its first court challenge. On 20 February 2007, the Court of Appeals for the District of Columbia, in a split decision, upheld a key provision of the MCA of 2006.³⁰⁶ However, in June 2007, a panel of judges for the Court of Appeals for the 4th Circuit determined that President Bush may not indefinitely hold a U.S. citizen without bringing criminal charges.³⁰⁷

The commissions under the MCA of 2006 have seen mixed success. On 26 March 2007, the military commissions conducted their first trial of a detainee under the MCA.³⁰⁸ Later, two sets of charges brought to trial, however, were dismissed by military judges.³⁰⁹ While the MCA is functioning, it remains to be seen what its fate will be when a case eventually reaches the Supreme Court.³¹⁰ The decision by the Court to reverse itself and hear a detainee-related case does not bode well for the Bush Administration.³¹¹ This will be the Bush administration's fifth round with the United States Supreme Court, after already having suffered significant setbacks in three of the prior four cases concerning treatment of detainees. With this latest intervention by the Supreme Court, the potential exists for the possibility that the Supreme Court will render a decision that will effectively dismantle the military commissions.

Is the NSC Process Broken?

Does what happened during the development of the United States' detainee interrogation policy indicate a seam caused by an inadequate structure and processes of the National Security Council (NSC)? In reviewing the machinations that transpired, the circumstances did not necessarily lend themselves to the deliberative processes of the Policy Coordination Committees (PCCs), Deputies' Committee (DC) and Principals' Committee (PC).³¹² Key personnel were marginalized or simply cut out of the process at times.³¹³ An advantage of the NSC system is that it possesses sufficient flexibility to adapt to the inclinations of individual Presidents. What occurred in the development of the detainee interrogation policy is not necessarily indicative of a structure or process flaw in the NSC system, but the actions of certain dominant parties who were allowed to exercise their authority outside the channels of the formal system with either the tacit or express approval or direction of the President.³¹⁴ Rather focusing on the operation of the NSC, more concern should be devoted to the possible "chilling" effect the 22 June 2004 disclosure of detainee-related documents will have on senior officials' future willingness to engage discussions that "push the envelope" in developing options to address issues arising in the war on terror.

In a "Flat World," Bad Strategy Produces Catastrophic Effects

The tactical decision to engage in a policy of coercing information from detainees captured during the GWOT had grave domestic and global consequences for the United States. Perhaps even more disappointing is that the senior official expected to be able to exercise appropriate strategic vision and guidance were the ones who drove the policy equated with the torture of detainees. This is not a situation where a "strategic corporal" takes an action that unwittingly causes a strategic impact. In this instance, the exact inverse occurred – senior leaders charged with strategic responsibility succumbed to tactical pressures and pushed the flawed policy down to the operators.

In the age of a "flat world" and globalization,³¹⁵ actions taken at the tactical level can have almost instantaneous strategic impact. The cascade of effects of bad policy in a complex and modern world can be staggering. All forms of media – print,³¹⁶ internet,³¹⁷ and television³¹⁸ – embrace and churn the story in a 24/7 news cycle.³¹⁹ The formal media is not the only culprit in this process. Every service member has the potential to become a "reporter" of global impact, with the proliferation of blogs, digital cameras, video cameras, and postings on "MySpace.com" and "YouTube."³²⁰ Not only is the damage quick to spread, it is lasting and will likely take probably decades to repair.³²¹ The photographs of the abuse at Abu Ghraib immediately

became a virulent and persistent carrier of American hypocrisy, tailored-made for the promotion of the radical ideology of the terrorists:

A committee of devils scheming to thwart American intentions in Iraq could have done no worse than turning a group of loutish, leering U.S. soldiers loose with a camera on bound, hooded, naked Iraqi prisoners.³²²

Amplifying this observation and honing in on the Arab and Muslim preoccupation with humiliation and shame, are comments from Thomas L. Friedman, author of the popular book, *The World is Flat: A Brief History of the Twenty-first Century World*:

This humiliation is the key. It has always been my view that terrorism is not spawned by the poverty of money. It is pawned by the *poverty of dignity*. Humiliation is the most underestimated force in international relations and human relations. It is when people or nations are humiliated that they really lash out and engage in extreme violence.³²³

Later, Friedman ties this principle specifically to the situation of the detainees being held by the United States military:

It is no accident that the groups in Iraq who beheaded Americans dressed them first in the same orange jumpsuits that al-Qaeda prisoners in Guantanamo Bay are forced to wear. They had to learn about those jumpsuits either over the Internet or satellite TV. But it amazes me that in the middle of the Iraq war they were able to have the exact same jumpsuits made in Iraq to dress their prisoners in. You humiliate me, I humiliate you."³²⁴

Whether or not the United States' detainee interrogation policy was a cause of the abuse is irrelevant – the linkage was made and exploited. Part of the perverse beauty of the abuse photographs are their appeal to a universal audience, from intellectuals to illiterates. You do not have to even read to get the message. The photographs also tend to provoke a visceral and emotional revulsion. It doesn't matter that a Saudi in a coffee shop in Riyadh watching satellite television can't hear the news commentator. Something like the "Torture Memo" provoked a negative reaction, but many of its messages were buried in 50 pages of legalese and footnotes. It was just not something the man on the street could readily and fully understand.

"GTMO" and "Abu G" "Go Hollywood"

Given the raw and salacious nature of what occurred at Abu Ghraib, it is especially vulnerable to certain unique "vectors"³²⁵ that carry its message, such as art and movies.

For example, renowned Colombian artist Fernando Botero created a series of drawings and paintings devoted to the abuse of Iraqi prisoners by United States military personnel at Abu Ghraib. Botero has produced 87 drawings and paintings on the topic of Abu Ghraib. The depictions were first published in a small magazine in Colombia, but were soon being contacted

from interested parties in France, United States, China, Russia, and Arab countries. Botero related that “[t]hey all wanted to write about them. It’s just amazing how everybody knows about everything so quickly now.”³²⁶

Films based on a real life event can be especially damaging by their fostering of anti-American sentiments. For example, the *ArmyTimes* movie reviewer of the film, *The Road to Guantanamo*,³²⁷ posited that the film gave “one possible answer to the question of why many Muslims around the globe both hate and fear America.”³²⁸ The film, characterized as a “docu-drama,” tells the story of three young Muslims from the same town in the United Kingdom (“the Tipton Three”) who travel to Afghanistan, are captured by the Northern Alliance and eventually transported to GTMO, where they spend over two years in detention. The three men allege that they were abused during their stay with American military captors. All three were eventually released without ever being charged. Adding to its realism, the movie actually uses the former detainees as “actors” in the movie. Rare for a Western film, Iranian officials requested the movie’s distributor to release the film in Iran.³²⁹ Even more unusual, according to the film distributor’s president, was that Iranian officials ordered four prints of the movie instead of the usual one and offered three times the normal amount of money in payment.³³⁰ What these actions are indicative of is that anti-Americanism sells and is popular in the Muslim world.

Also, there is usually an unfortunate lag between the event and the movie based upon the event. Thus, when the film debuts, it extends or revitalizes memories of an incident that may have occurred years ago. Further, once the movie is created, there is a permanence attached to the event - another, albeit different, visual record. Take note that it is forty years later and the French are still dealing with implications of the film, *Battle of Algiers*.³³¹

Perhaps the most insidious effect flowing from these types of films is that they often do not reflect what actually happened – there will usually be “literary license” applied that enhances the sensationalism of the story. Take for example the film, *The Valley of Wolves- Iraq*.³³² At the time that it was made, it had the largest budget of any film made in Turkey.³³³ *Wolves* has just enough basis in fact to seduce a predisposed viewer into believing that the entire film must reflect reality. The film begins with a depiction of an event that actually occurred in 2003 in the town of northern Iraqi town of Salaymaniyah, where U.S. forces captured Turkish special forces and hooded them. The act of hooding was considered an act of severe humiliation. When *Valley of the Wolves-Iraq* contains scenes where a Jewish doctor, played by American actor Gary Busey, is harvesting organs from prisoners at Abu Ghraib for sale to wealthy clients in New York and Tel Aviv, the audience associates a whole new lurid detail to the event. The organ harvesting sounds too far-fetched to believe, until it is discovered that the U.S. State

Department has had to repeatedly dispel such rumors in a series of official message posted on one of their websites.³³⁴ When *Wolves* debuted in Germany, U.S. military personnel were requested to avoid civilian cinemas showing the film.³³⁵ Senior U.S. officials back in the States were pestered about *Wolves*, prompting a State Department spokesman, in response to a question about what the U.S. was doing to improve its image in the Muslim world, curtly remarked "I don't do movie reviews."³³⁶ The film's showing in Germany proved so provocative, that Germany's largest chain of cinemas pulled *Wolves* from its theaters.³³⁷ The film, however, was very popular with the large Turkish population in Germany.

Capitalizing on a recent trend of popular documentaries, filmmakers have found the treatment of detainees by the United States captured during the war on terror an attractive subject. In 2007 alone, there have been two documentaries created by high-profile directors, such as Alex Gibney, the director of a documentary on the Enron scandal that was nominated for an Oscar in 2005. His *Taxi to the Dark Side* tells the story of an Afghani taxi cab driver who died while in captivity at a U.S. detention center at Bagram Air Base.³³⁸ The film alleges that the cab driver was tortured to death by military interrogators.³³⁹ Its catchphrase is "Murder's the ultimate torture."³⁴⁰ In February of 2007, Home Box Office featured a documentary about Abu Ghraib, entitled *Ghosts of Abu Ghraib*.³⁴¹ Another documentary on Abu Ghraib, entitled *S.O.P: Standard Operating Procedure* is currently in production under the direction of Errol Morris, who has the Academy Award winning film *The Fog of War* to his credit.³⁴²

Abu Ghraib is Now a U.S. Symbol

That the abuse occurred at what had been a facility infamous for its atrocities committed under Saddam Hussein adds an aggravating dimension for the United States.³⁴³ The choice of Abu Ghraib as a facility to permanently house and conduct the sensitive activity of interrogation of detainees captured during OIF was questionable strategically and operationally.

The Iraqi citizenry had enduring memories of the notorious prison run by the regime of Saddam Hussein where thousands of Iraqis had been confined under horrific conditions that included torture and summary executions. Thus, the choice of Abu Ghraib certainly cannot be viewed as helpful in an effort to win the hearts and minds of the local populace. To the Iraqi people, Abu Ghraib was a place where prison officials would summarily execute a prisoner and then send a bill to the prisoner's surviving relatives for the cost of the bullet used in the execution. The mere affiliation of such a place to sensitive activities of the United States military simply sent completely the wrong message to the Iraqi population that the Coalition forces were so desperately attempting to win over and gain their support.

Abu Ghraib was a symbol of all that was bad and evil about Saddam's regime. With the revelations of the abuse committed by the United States personnel, that symbolism previously associated with Saddam was effectively transferred to the United States and its military. Soon after the release of the photographs depicting abuse committed by U.S. soldiers, the President appropriately described Abu Ghraib as "a symbol of disgraceful conduct by a few American troops who dishonored our country and disregarded our values."³⁴⁴ With its improvident selection followed by its own prisoner abuse scandal, the United States has created a monument in Iraq that stands for the antithesis of America's promotion of democratic values, such as the respect for human dignity. The President has called for the destruction of Abu Ghraib "as a fitting symbol of Iraq's new beginning," but ultimately the Iraqis themselves will decide the facility's fate.³⁴⁵

Another unfortunate consequence of the use of Abu Ghraib to house large numbers of detainees was that the facility became a "school for terrorists," or "Jihad University."³⁴⁶ In April 2007, it was reported that there were 18, 000 detainees being held in U.S. facilities in Iraq, with those number expected to increase to 20,000 detainees by the end of the year.³⁴⁷ Within a year, the number of detainees held by the U.S. in Iraq has nearly doubled.³⁴⁸ The average confinement time for a detainee is one year, although many are held for significantly longer periods of time.³⁴⁹ While confined, willingly and sometimes unwillingly, thousands of detainees have been exposed to extremist ideology and training. Those subjected to the "schooling" leave detention better able to fight the insurgency and advance extremist ideology. Even those detainees not succumbing to these influences do not leave detention as supporters of the coalition forces in Iraq, especially when one considers that many have been held for long periods of time under suspect circumstances. Did this activity cease when Abu Ghraib was closed and detainees were transferred to facilities such as Camp Cropper located near the Baghdad Airport? Apparently not.³⁵⁰ The likely outcome of the United States military decision to confine thousands of personnel under less than ideal conditions is that, at best, there are thousands of people in Iraq who possess a strong dislike or hatred of the United States and its military. The worst case scenario is that the United States has created a huge incubator for creating new terrorists and a graduate school for enhancing the skills of existing terrorists. The policy of mass detention associated with the surge in Iraq has actually fed the insurgency, rather than starve it.

Beyond the lingering issues associated with Abu Ghraib, the United States also continues to deal with the controversy surrounding the operation of the detainee facility at Guantanamo Bay, Cuba (GTMO).³⁵¹ The facility has always garnered its share of international condemnation,

but now its existence has become a divisive internal issue for the United States. The current Secretary of Defense, Robert M. Gates, has reportedly argued for its closure.³⁵² The catch is that even if the United States decided to close the facility, it will have significant problems in determining what to do with the remaining detainees.³⁵³

Missing Powell's Bus³⁵⁴

To know many of the effects flowing from the United States' detainee interrogation policy, one must just read former Secretary of State Powell's prophetic memo of 26 January 2003.³⁵⁵ To review his memo after the policy saga unfolded almost makes one think that he was a seer with a crystal ball. The laundry list of disadvantages cited by Powell that accompanied the President's decision not to apply the Geneva Conventions to the conflict in Afghanistan include:

- undercut Geneva Conventions protection for the U.S. military;
- "high cost in terms of negative international reaction";
- weaken public support among important allies, causing problems in maintaining military collaboration;
- prompt individual foreign prosecutors to bring charges against U.S. civilian and military personnel;
- makes the actions of the Executive Branch more prone to domestic and international legal challenges;
- eliminates an important legal basis for the military commissions;
- legal challenges from international organizations, such as the United Nations;
- eliminates the legal flexibility inherent with the Geneva Conventions;
- removes a "winning argument" to oppose habeas corpus actions by detainees.

A number of disadvantages noted by Secretary Powell involve legal implications. The legal decisions in the policy development were driven by the Office of Legal Counsel opinions aimed at not having the Geneva Conventions apply and providing legal cover for the CIA as they applied their aggressive interrogation techniques. Such legal decisions, while supportive of efforts at the tactical level, failed miserably in accounting for the strategic effects.

Losing at "Lawfare"³⁵⁶

The misguided efforts of primarily senior civilian lawyers in the development of detainee interrogation policy provided cover for a bad tactical decision, resulting in disastrous strategic effects. The senior civilian lawyers made the same mistake that the policy makers committed –

they succumbed to expediency at the price of long term strategic loss.³⁵⁷ The lack of “strategic lawyering”³⁵⁸ is disappointing, but even worse, some of the critical legal decisions were technically questionable, as evidenced by the separate withdrawals and disavowals of the “Torture Memo” and Report on the DoD’s Working Group.

Because of the interrogation policy, current and former United States senior officials face lawsuits at home and abroad. Although criminal prosecution here in the United States for violations of the Torture Statute is highly unlikely, officials may face domestic civil suits and criminal prosecutions in other countries. Whether the suits are ultimately successful for the complainants is largely immaterial. The suits have a certain harassment factor and also keep the “torture story” in the news.

Part of the fallout from the United States’ detainee interrogation policy is that former officials who participated in the development or execution of the policy may face criminal charges in foreign court based upon the principle of “universal jurisdiction”³⁵⁹ and the “Pinochet Precedent.”³⁶⁰ Augusto Pinochet Ugarte, former dictator of Chile, was receiving medical care in the United Kingdom when he was served with a criminal indictment issued from a court in Spain, alleging numerous human rights violations against the citizens of Chile. The magistrate in Spain invoked a Spanish law that authorized the exercise of universal jurisdiction in order to indict Pinochet and seek his extradition from the United Kingdom. The court in the United Kingdom rejected Pinochet’s immunity claims and was prepared to extradite him to Spain. British officials intervened and determined that Pinochet was too ill to be extradited. Upon his return to Chile, Pinochet was stripped of his immunity, but died before he could be tried. The outcome of Pinochet’s case or the “Pinochet Precedent” represents the principle that those individuals, whether current or former State officials, engaging in egregious violations of human rights may be subject to criminal charges in any State wishing to exercise universal jurisdiction.

Soon after Secretary Rumsfeld resigned from his duties as SECDEF, several international groups of attorneys filed a lawsuit Germany, demanding that federal prosecutors in Karlsruhe investigate former Secretary Rumsfeld for allegedly authorizing torture.³⁶¹ The suit is being brought on behalf of 11 former Iraqi detainees of the Abu Ghraib prison and one Saudi currently held at GTMO.³⁶² German law allows the prosecution of war crimes in Germany regardless of where they occurred in the world.³⁶³ Other senior U.S. Defense Department officials are also named in the lawsuit.³⁶⁴ A similar suit was filed in 2004, but rejected by German authorities because there was an ongoing investigation being conducted in the United States.³⁶⁵ A Pentagon spokesman dismissed the lawsuit as “frivolous.”³⁶⁶ Are these prosecutions seen as a credible threat to that will put a United States official in a foreign jail? Probably not, but that’s

not the point. The purpose of these suits is to keep former Secretary Rumsfeld on the run, to deny "safe haven" for him.³⁶⁷ The irony is that while United States is fighting to deny "safe havens" to international terrorists, groups opposed to American policy claim to share the same goal targeted at U.S. officials. As a representative of the one of the groups bringing the suit against former Secretary Rumsfeld in Germany proclaimed: "We have won a part of this case already."³⁶⁸

Human rights organizations have not limited their activities to publication of their views to the domestic and international audiences. In March of 2005, two prominent private organizations, the American Civil Liberties Union (ACLU) and Human Rights First initiated a civil lawsuit on behalf of nine former detainees confined in Iraq and Afghanistan.³⁶⁹ The persons being sued include former Secretary of Defense Rumsfeld, Lieutenant General Ricardo Sanchez, and Colonel Janis Karpinski, commander of the military unit that was responsible for running U.S. detention facilities in Iraq.³⁷⁰ The suit alleged that former Secretary Rumsfeld and the officers violated constitutional protections, international law, and the Geneva Conventions in the execution of the United States' interrogation policy.³⁷¹ The suit sought compensatory damages and a judicial declaration that the legal rights of the detainees were violated under the Constitution, the Geneva Conventions, and other international law.³⁷² The Department of Justice requested that the judge dismiss the case, asserting that Iraqi and Afghan citizens are not entitled to the protections of the Constitution, Geneva Conventions and other international law.³⁷³ Chief Judge Thomas A. Hogan of the Federal District Court for the District of Columbia, describing the case as "lamentable," dismissed the suit, "[d]espite the horrifying torture allegations."³⁷⁴ He determined that the plaintiffs did not have standing to assert rights under the Constitution or international law against former Secretary Rumsfeld and other military officers.³⁷⁵ Even though they had lost the case, the plaintiffs and private organizations assisting them had won the information war concerning this litigation.³⁷⁶

In addition to participating in the civil law suit against United States officials, the American Civil Liberties Union (ACLU) also filed a Freedom of Information Act (FOIA) request with the Department of Defense on 7 October 2003 seeking information concerning the treatment of detainees after 11 September 2001. For over a year, DoD basically ignored the request and the ACLU was forced to file a lawsuit in the Southern District of New York on July 2, 2004. The Court opened its opinion stating:

Ours is a government of laws, laws duly promulgated and laws duly observed. No one is above the law: not the executive, not the Congress, and not the judiciary.

Clearly, the Court was not pleased with the lack of responsiveness of DoD and thus, DoD was ordered by the Court to produce or identify all responsive documents just one month later, on 15 October 2004.³⁷⁷ Furthermore, the order made the ACLU's request "rolling," meaning as additional documents were uncovered, sanitized or declassified they were to be automatically provided to the ACLU. Later, on 29 September 2005, the Court also ordered DoD to release 74 photographs relating to abuse occurring at the Abu Ghraib Confinement Facility in Iraq.³⁷⁸ The release was ordered by the Court despite the Chairman of the Joint Chiefs of Staff submitting an affidavit to the Court asserting that the release of the photos to the public could possibly provoke acts of violence against military personnel. The Order was stayed 20 days so that the parties could appeal the ruling. DoD did initially appeal the decision of the District Court, but later withdrew its appeal and released the photographs and videos in question.³⁷⁹ The ACLU's FOIA action not only attracts media interest, but also all disclosed material is posted on the ACLU's website for public viewing.³⁸⁰

Given the limited number of prosecutions thus far, it may prove difficult to predict what effect the interrogation policy will have on criminal trials under the authority of the 2006 MCA. Will coerced statements jeopardize the successful prosecutions? The 2006 MCA has provisions that allow even coerced statements to be used as evidence upon certain findings by the military judge.³⁸¹ Statements that are a product of torture may not be admitted into evidence against the detainee.³⁸² In all likelihood what the commissions will see are detainees alleging coerced confessions, hoping that the military judge will be unable to make the appropriate findings for its admission into evidence. A similar case in U.S. federal court, that of U.S. citizen Jose Padilla, was filled with allegations that abuse suffered during his captivity so traumatized him that he was legally incompetent to stand trial for his suspected crimes.³⁸³ Thus far, a guilty plea by Australian citizen David Hicks in March 2007 is the only successful prosecution conducted under the 2006 MCA.³⁸⁴

Has the Military's Image Suffered?

There are indications events like Abu Ghraib and the military's participation in acts considered to be torture may be doing damage to the standing that the United States military has typically enjoyed with the American public. Recent polls have indicated that military officers are very trusted³⁸⁵ and that their profession is considered amongst the most prestigious.³⁸⁶ However, looking at a series of Harris Polls from the onset of the Global War on Terrorism (post-9/11) reveals a downward trend in the public's "confidence in the military as an institution."³⁸⁷ For the first time since 1989, the military was not tied for first or first in Harris'

“Confidence in Leaders of Major Institutions” poll. Although it declined only slightly, the military dropped to second place (46%), behind small business (54%). It was the military’s lowest level since 2001 (44%). The last time over half of U.S. adults expressed a great deal of confidence in leaders of the military was in 2004.³⁸⁸

As the wars in Iraq and Afghanistan drag on, the public’s opinion of the military is not the only thing that appears to be slipping. One of the effects of the prolonged participation in the counterinsurgency in Iraq appears to be an erosion of service member’s attitudes concerning ethical conduct during combat. In a poll conducted by the Army of Marine Corps and Army military personnel participating in Operation Iraqi Freedom (OIF) from 2005 to 2007 indicated that over 40 percent of those polled believed that torture of noncombatants was acceptable if it would save the life of a soldier or Marine.³⁸⁹ A significant portion of those polled also indicated that they believed that torture was acceptable if its aim was to gather important information.³⁹⁰ This polling data is particularly disturbing considering the enhanced emphasis placed by the United States military on the humane treatment of detainees following the discovery of abuses at Abu Ghraib in April of 2004. Could these attitudes be affected by what is seen on popular television shows, such as “24”?³⁹¹ Brigadier General Patrick Finnegan, the Dean of the U.S. Military Academy, was so concerned about the depictions of torture on show “24” that he visited the set of the show in November of 2006 to personally express to the show’s director that portrayals of torture were sending the wrong message to impressionable cadets, as well as hurting America’s image in the international community.³⁹²

Democracy, not Hypocrisy

Perhaps the most significant consequence the United States will pay for its spastic development of detainee interrogation policy is the loss ability to fight from the moral high ground.³⁹³ The most recent National Security Strategy (NSS) proclaims that the United States will “champion aspirations for human dignity” and speak out against human rights abuses as means to help to advance democracy across the globe.³⁹⁴ However, the effective promotion of basic democratic principles, such as respect for human dignity, cannot be empty statements contained in strategic documents – actions must reflect those ideals. If the United States is truly committed to the promotion of democratic values as its “long-term approach” for winning the war against terror, then it must avoid situations where its short-term tactical actions end up damaging strategic goals.

The United States has stated that it realizes the importance of the “war of ideas.” On 5 September 2006, the new National Strategy for Combating Terror (NSCT) was published.³⁹⁵ In

his strategic vision of the global war against terrorism, the President indicates that the United States is involved in “a different kind of war,” one not just of armed conflict, but a “battle of ideas.”³⁹⁶ To negate the ideology of terrorism, the strategy posits that the “long-term solution” for victory in the war on terror is “the advancement of freedom and human dignity through effective democracy.”³⁹⁷ Clearly the strategy views the promotion of democratic principles as the cure to the disease of terrorists’ radical ideology. Similarly, the most recent Quadrennial Defense Review (QDR) has emphasized the importance of strategic communications and the “battle of ideas” in defeating terrorist networks.³⁹⁸

Thus, as the United States, along with its allies and friends, wages this war against the terrorists, it is important that they do so from the moral high ground. This ability is undercut when the United States appears to embrace harsh interrogation methods tantamount to torture in order to gain information from certain High Value Detainees (HVDs).

The Way Ahead - Did Anyone Watch the Film?

On 27 August 2003, the Office of the Assistant Secretary of Defense for Special Operation and Low Intensity Conflict offered a screening of the film *The Battle of Algiers*³⁹⁹ for personnel working in the Pentagon. The flier advertising the presentation read:

How to win a battle against terrorism and lose the war of ideas. Children shoot soldiers at point-blank range. Women plant bombs in cafes. Soon the entire Arab population builds to a mad fervor. Sound familiar? The French have a plan. It succeeds tactically, but fails strategically. To understand why, come to a rare showing of this film.⁴⁰⁰

The primary lesson to be learned from the film for military personnel is the expediency of the use of torture tactics ended up coming at the expense of long-term strategic objectives. The superior French forces were eventually defeated by Algerian resistance fighters. The French won the battle for the city of Algiers with their brutal tactics, but such practices resulted in them losing the war for the whole of Algeria.

Looking back, the French caught a break in at least one respect in Algeria. In 1957, the world was still a “round” and possessed a more deliberate pace. At that time, there was no CNN (and therefore, no “CNN effect”), no internet, and no proliferation of satellite TV dishes on rooftops. The United States, the world’s only current superpower, does not have that luxury in today’s world. Because of its status and the nature of the world, the United States is scrutinized like no other country on Earth.

What should the United States do now to repair its image and re-establish its damaged credibility? The military, through doctrinal changes and accompanying training, has clearly

established that it is committed to the Rule of Law and humane treatment of all detainees.⁴⁰¹ Some of those changes may initially lead to less effective HUMINT gathering by military interrogators. With the publication of the new FM 2-22.3, there will be no surprises in the interrogation room regarding what measures may be employed. Even prior to the revised interrogation manual, terrorists had already developed fairly sophisticated counter-measures. With the full disclosure of interrogation techniques by the military, one can imagine instances where an interrogator is questioning a detainee and the detainee correctly identifies the precise interrogation technique being utilized. In terms of efficacy, the failed interrogation policy has forced the military to become too transparent. Thus, for the military, tactical questioning at the point of capture that exploits the shock of capture will become even more critical, while at the same time remain the primary source of abuse allegations.⁴⁰² While the military may suffer some tactical losses in implementing its policy, it is re-taking the moral high ground with its emphasis on and strict adherence to Common Article 3 of the Geneva Conventions.

But what about the CIA? On 20 July 2007, President Bush signed a long-awaited Executive Order that purported to align CIA detention and interrogation policy with the *Hamdan* decision and Common Article 3.⁴⁰³ With the Order's enactment, the Director of the CIA indicated that his organization had received "more than was asked for."⁴⁰⁴ The Order puts the military out of the business of the questioning of truly High Value Detainees (HVDs). While the Order makes some progress,⁴⁰⁵ it falls well short of quelling criticism that the CIA continues to engage in activities that amount to torture.⁴⁰⁶ In fact, the Order does not say that the CIA will comply with Common Article 3; instead, it states that the CIA will comply with the Administration's "interpretation" of Common Article 3.⁴⁰⁷ The Order effectively ignores international standards for what constitutes "cruel, inhuman, or degrading treatment or punishment" and substitutes a U.S. Constitutional standard of "cruel, unusual and inhumane treatment or punishment" prohibited by the 5th, 8th and 14th Amendments.⁴⁰⁸ What the use of that Constitutional standard means is that unless the CIA's treatment of the detainee during interrogation "shocks the conscience" under the test announced in *Rochin v. California*⁴⁰⁹ it will be "interpreted" to comply with the Common Article 3.⁴¹⁰ The "shock the conscience" test has built-in flexibility, allowing for the consideration of the scenario under which government actions occurred.⁴¹¹ While specific methods authorized for employment by the CIA are classified,⁴¹² the language of the Order will continue to allow the CIA to employ sleep deprivation, stress positions, and even water boarding as authorized techniques.

President Bush wasted an opportunity to have the United States unquestionably repudiate torture and acts tantamount to torture. Instead of joining the military on the moral high ground,

he chose, primarily through obfuscation, to allow the CIA to continue their enhanced interrogation program to work in the shadows under a separate set of rules. Therein lays the problem. As long as one part of the United States Government operates under a different set of rules, there will be an uneasy relationship existing between DoD and CIA. What will happen when the CIA requests the Army turn over an HVD to them and the military personnel have a reasonable belief that harsh treatment will result? Do DoD personnel have a responsibility not to turn over the HVD? Or, if they do, will they be considered an enabler or accessory to what may occur afterwards? The current status where “inter-governmental renditions” between executive branch agencies are possible is not acceptable.

In the year 2000, General Jacques Massu, the French officer depicted by the brutal character “Colonel Mathieu” in the movie, *Battle of Algiers*, admitted that “Torture is not indispensable in time of war, we could have gotten along without it very well.”⁴¹³ When asked about whether France should officially acknowledge its policy of torture in Algeria and renounce it, Massu answered “I think that would be a good thing. Morally torture is something ugly.”⁴¹⁴ Massu was over 90 years old at the time of these statements. It took him over 40 years to finally speak out.

The current perception of the world is that the United States has an official policy that endorses the use of torture. While there are arguments for both sides, pro⁴¹⁵ and con,⁴¹⁶ concerning torture, the United States cannot be seduced by the television show mentality of the “ticking time bomb” scenario.”⁴¹⁷ Instead of creating a clear standard for the entire U.S. Government repudiating the use of acts that amount to torture, our Commander in Chief decided to perpetuate the perception that part of the Executive Branch will operate outside the Rule of Law under certain circumstances. The United States had the opportunity to do the right thing, morally, legally and strategically and passed on the chance to rebuild its image. The likely result of this decision is that the United States, its military included, will continue to suffer from international and domestic criticism, thus undercutting its status as a sincere promoter of individual human rights and dignity.

Endnotes

¹ Transcript, “The Vice President appears on Meet the Press with Tim Russert,” Camp David, Maryland, 16 September 2001, *The White House*, available from <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010916.html>; accessed 31 May 2007. The question posed by Mr. Russert and the full response provided by Vice President Cheney is as follows:

MR. RUSSERT: When Osama bin Laden took responsibility for blowing up the embassies in Kenya and Tanzania, U.S. embassies, several hundred died, the United States launched 60 tomahawk missiles into his training sites in Afghanistan. It only emboldened him. It only inspired him and seemed even to increase his recruitment. Is it safe to say that that kind of response is not something we're considering, in that kind of minute magnitude?

VICE PRES. CHENEY: I'm going to be careful here, Tim, because I--clearly it would be inappropriate for me to talk about operational matters, specific options or the kinds of activities we might undertake going forward. We do, indeed, though, have, obviously, the world's finest military. They've got a broad range of capabilities. And they may well be given missions in connection with this overall task and strategy.

We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in 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.

² On 8 June 2004, the Senate Judiciary Committee conducted a hearing concerning the role played by the Department of Justice in the evolution of the United States' detainee interrogation policy. During the hearing, committee members queried Attorney General John Ashcroft concerning Department of Justice memoranda that had not been officially released. The Attorney General repeatedly refused to provide the memoranda to the committee, stating "The president has a right to receive advice from his attorney general in confidence, and so do other executive agencies of government. And this does not mean that there can't be debate on such topics. It just means that the private advice that the president gets from his attorney general doesn't have to be a part of the debate." Text: Ashcroft Comments on Anti-Terror Policy, FDCH E-Media, *The Washington Post*, 8 June 2004, available from <http://www.washingtonpost.com/wp-dyn/articles/A25211-2004Jun8.html>; accessed 13 March 2007. Later, on 17 June 2004, a congressional subpoena proposed by Senators Leahy and Feinstein was defeated by the Senate Judiciary Committee. Helen Dewar, "GOP Senators Block Subpoena on Memos but Prod White House," *The Washington Post*, 18 June 2004, A23, available from <http://www.washingtonpost.com/wp-dyn/articles/A50454-2004Jun17.html>; accessed 14 March 2007.

³ On 8 June 2004, *The Washington Post* published an article concerning a 2002 Department of Justice (DoJ) Memorandum regarding an exploration of the legal limits of interrogation techniques. The memo was written for the Central Intelligence Agency (CIA) and addressed to White House Counsel Alberto R. Gonzales. According to the article, the DoJ memo defined torture in a significantly narrower way, indicating that for acts to constitute torture, they "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Dana Priest and R. Jeffrey Smith, "Memo Offered Justification for Use of Torture: Justice Dept. Gave Advice in 2002," *The Washington Post*, 8 June 2004, A01, available from <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html>; accessed 14 March 2007. On 13 June 2004, *The Washington Post* posted a copy of the 1 August 2002 memo, "Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A" on its website. As indicated the 8 June 2004 article, the memo was from Department of Justice's Office of Legal Counsel to the Counsel to President Bush, Alberto R. Gonzales. Because of its controversial stance concerning the parameters of torture, the memo became known as the "Torture Memo." Dana Priest, "Justice Dept. Memo Says Torture 'May Be Justified'," *The Washington Post*, 13 June 2004, available from

<http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html>; accessed 14 March 2007.

⁴ On 28 April 2004, the U.S. television news-magazine show *60 Minutes II* aired a story about the abuse of Iraqi prisoners by United States soldiers at the Baghdad Correctional Facility. The story included graphic photographs depicting the abuse of prisoners. *60 Minutes II*, "Abuse Of Iraqi POWs By GIs Probed, 60 Minutes II Has Exclusive Report On Alleged Mistreatment," *CBS News*, 28 April 2004, available from <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>; accessed 14 March 2007. An article by Seymour M. Hersh in *The New Yorker* magazine also reported the story of the abuses committed by U.S. soldier at Abu Ghraib. Seymour Hersh, "Torture at Abu Ghraib: American soldiers brutalized Iraqis. How far up does the responsibility go?", *The New Yorker*, 10 May 2004, available from http://www.newyorker.com/fact/content/?040510fa_fact; accessed 17 March 2007. Hersh based part of his article on information leaked from the Ryder and Taguba Reports. The Ryder Report was requested by Lieutenant General (LTG) Ricardo S. Sanchez, the Combined Joint Task Force-7 (CJTF-7) Commander, and was used by Major General Taguba in his investigation, appearing as annex (Annex 019). Major General Ryder was the Provost Marshal General of the Army at the time he conducted his assessment. The assessment was conducted between 13 October and 5 November 2003. Its purpose was to evaluate and make recommendations concerning detention and correction operations in Iraq, with a view towards improving detainee operations to the point where the Iraqi government could eventually assume responsibility for its own penal operations. Perhaps the most notable observation made in the Report was that military police, contrary to doctrine contained in Army Regulation 190-8, were "actively setting" the conditions for interviews conducted by military intelligence personnel. Major General Ryder found that "[s]uch actions generally run counter to a smooth operation of a detention facility attempting to maintain its population in a compliant and docile state." Major General Donald J. Ryder, Office of the Provost Marshal of the Army, "Assessment of Detention and Correction Operations in Iraq," 5 November 2003, available from http://www.dod.mil/pubs/foi/detainees/taguba/ANNEX_019_MG_RYDER_REPORT.pdf; accessed 17 March 2007. The Taguba Report was also the result of a request for an investigation by LTG Sanchez. On 31 January 2004, the Commanding General of the Coalition Forces Land Component Command (CFLCC) appointed Major General Antonio M. Taguba, then Deputy Commanding for General Support, CFLCC, as an investigating officer to look into, among other matters, allegations of detainee abuse occurring at the Abu Ghraib Prison. The Report was completed in March 2004. Major General Anthony Taguba, Army Regulation 15-6 Informal Investigation of the 800th Military Police Brigade, available from <http://www.dod.mil/pubs/foi/detainees/taguba/>; accessed 17 March 2007; see also U.S. Department of Defense, Senior Army Official, "Background Briefing on the Investigations on Abu Ghraib, 25 August 2004, available from <http://www.defenselink.mil/transcripts/2004/tr20040825-1222.html>; accessed 17 March 2007.

⁵ Press Briefing by White House Counsel Judge Alberto Gonzales, DoD General Counsel William Haynes, DoD Deputy General Counsel Daniel Dell'Orto and Army Deputy Chief of Staff for Intelligence General Keith Alexander, The White House, 22 June 2004, available from <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>; accessed 10 March 2007. The documents included in the 22 June White House release were described by White House Counsel Alberto Gonzales as "two distinct sets of documents, those that were generated by government lawyers to explore the limits of the legal landscape as to what the Executive Branch can do within the law and the Constitution as an abstract matter; you also have

documents that reflect the actual decisions issued by the President and senior administration officials directing the policies that our military would actually be obliged to follow."

⁶ Ibid: United States domestic law provides for criminal penalties for acts or attempted acts of torture "outside the United States." *U.S. Torture Statute*, U.S. Code, vol.18, sec. 2340A (2000). The international treaty that defines and proscribes the use of torture is the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, commonly referred to as the "Convention Against Torture" or the "CAT." United Nations, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 26 June 1987, available from <http://hrweb.org/legal/cat.html>; accessed 17 March 2007. The United States ratified the CAT on 21 October 1984, with reservations. The reservations included what the United States considered to constitute "cruel, inhuman, or degrading treatment or punishment" and "torture" under Articles 16 and 1 of the CAT, respectively. United Nations, Office of the United Nations High Commissioner for Human Rights, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, New York, 10 December 1984, available from <http://www.ohchr.org/english/countries/ratification/9.htm>; accessed 17 March 2007.

⁷ U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), News Release No. 596-04, "DoD Provides Details on Interrogation Process," 22 June 2004, available from <http://www.defenselink.mil/releases/2004/nr20040622-0930.html>; accessed 10 March 2007. Five of the nine records released by the Defense Department on 22 June were also part of the release by the White House

⁸ Ibid.

⁹ Schlesinger Report, 33. The Report, commenting on the "policy promulgation process" for the handling and treatment of detainees, states: "Although there were a number of contributing causes for detainee abuses, policy processes were inadequate or deficient in certain respects at various levels: Department of Defense (DoD), CENTCOM, Coalition Land Forces Command (CFLCC), CJTF-7, and the individual holding facility or prison."

¹⁰ The 9/11 Commission Report: The Final Report of the National Commission on Terrorist Attacks Upon the United States (Executive Summary), available from <http://www.gpoaccess.gov/911/pdf/execsummary.pdf>; accessed 15 February 2007.

¹¹ Michael Kirk, producer and director, *The Torture Question*, approx. 90 mins., PBS Video (Frontline), 2005, DVD. Transcript of the DVD available from <http://www.pbs.org/wgbh/pages/frontline/torture/etc/script.html>; accessed 2 June 2007.

¹² *Authorization for Use of Military Force*, Public Law 107-40, 18 September 2001. The text of the Authorization for Use of Military Force (AUMF) reads as follows:

SECTION 1. SHORT TITLE. This joint resolution may be cited as the 'Authorization for Use of Military Force'. SECTION 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL- That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against

the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements-

(1) SPECIFIC STATUTORY AUTHORIZATION- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS- Nothing in this resolution supercedes any requirement of the War Powers Resolution.

¹³ President George W. Bush, Address to a Joint Session of Congress and the American People, 20 September 2001, available from <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>; accessed 26 March 2007. In this address, the President announced the beginning of the global war on terror, by stating:

Americans have many questions tonight. Americans are asking: Who attacked our country? The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al Qaeda. They are the same murderers indicted for bombing American embassies in Tanzania and Kenya, and responsible for bombing the USS Cole. The leadership of al Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of that country. In Afghanistan, we see al Qaeda's vision for the world. Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.

¹⁴ Presidential Address to the Nation, 7 October 2001, available from <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html>. The officially-stated purpose of the invasion was to destroy al-Qaeda and deny them sanctuary and freedom of movement within Afghanistan and to remove the Taliban regime which had provided support and haven to al-Qaeda. In this address, the President explained the circumstances that led to the invasion of Afghanistan: More than two weeks ago, I gave Taliban leaders a series of clear and specific demands: Close terrorist training camps; hand over leaders of the al Qaeda network; and return all foreign nationals, including American citizens, unjustly detained in your country. None of these demands were met. And now the Taliban will pay a price. By destroying camps and disrupting communications, we will make it more difficult for the terror network to train new recruits and coordinate their evil plans. On my orders, the United States military has begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. These carefully targeted actions are designed to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime. Important to note is that after signing of the AUMF into law (18 September 2001) and before initiation OEF (7 October 2001), the Deputy Counsel to the President sought a legal opinion from the Department of Justice (DoJ) concerning the "scope of the President's authority to take military action in response to the terrorist attacks on the United States on September 11, 2001." The responding DoJ opinion provided a legal "green-light" for President, stating that he had "broad constitutional power" to take preemptive or retaliatory military action against terrorists and those States that may support them. Further, this "plenary authority," unlike that spelled out in the AUMF by Congress, need not be "linked to the specific terrorist incidents of September 11." John Yoo, Deputy Assistant Attorney General, Office of the Legal Counsel, U.S. Department of Justice, Memorandum for Timothy Flanigan, The Deputy Counsel to the President, Re: "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them," 25 September 2001, reproduced in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 3-24.

¹⁵ James R. Schlesinger, et. al., "Final Report of the Independent Panel to Review Department of Defense Detention Operations," 24 August 2004, 6, 33 available from <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>; accessed 4 March 2007 [hereinafter Schlesinger Report]. The Report notes that the first detainees captured in Afghanistan were held at Mazar-e-Sharrif beginning in November of 2001.

¹⁶ Ibid.

¹⁷ Schlesinger Report, 80.

¹⁸ Legal Lessons Learned from Afghanistan and Iraq: Volume I, Major Combat Operations (11 September 2001 to 1 May 2003) 53, Center for Law and Military Operations (CLAMO), The Judge Advocate General's Legal Center and School, Charlottesville, Virginia [CLAMO Lessons Learned]. The apparent lack of guidance is reflected in a subheading to a section on "Detainee Operations in Afghanistan" that advises Judge Advocates to "Be Prepared to Address Issues Concerning Detainee Status and Treatment in the Absence of Guidance from Higher Authorities, and Adapt Local Procedures to Implement Guidance from the Highest Levels of the United States Government." CLAMO Lessons Learned, 51. In further discussing the beginning of detainee operations in Afghanistan, the report goes on to state that the "[l]egal issues associated with detainee operations in Afghanistan were initially unsettled." CLAMO Lesson Learned, 51.

¹⁹ CLAMO Lessons Learned, 53.

²⁰ President Issues Military Order, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," available from <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>; accessed 18 March 2007. The text of the President's Military Order reads as follows: By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Section 1. Findings.

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to

identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. Definition and Policy.

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. Detention Authority of the Secretary of Defense. Any individual subject to this order shall be --

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for --

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense.

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. Additional Authorities of the Secretary of Defense.

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. Relationship to Other Law and Forums.

(a) Nothing in this order shall be construed to --

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order –

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. Publication.

This order shall be published in the Federal Register. GEORGE W. BUSH THE WHITE HOUSE, November 13, 2001.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid. The term "the Geneva Conventions" refers to a collection of treaties (four Conventions and three Additional Protocols to the Conventions) that establish a body of international law related primarily to the protection of victims of war. The United States is a party to all four of the Geneva Conventions, but is not a party to any of the Additional Protocols. The first Geneva Convention provides protection for sick and wounded military personnel on the battlefield. Geneva Conventions, *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, available from <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3>; accessed 11 March 2007. The second Geneva Convention provides protection for military personnel wounded during warfare at sea. Geneva Conventions, *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, available from <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/44072487ec4c2131c125641e004a9977>; accessed 11 March 2007. The third Geneva Convention provides protections to individuals qualifying as prisoners of war (POWs). Geneva Conventions, *Geneva Convention (III) Relative to the*

Treatment of Prisoners of War, 12 August 1949, available from <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68>; accessed 11 March 2007. In addition to revising certain language contained in the first three Conventions, the fourth Convention, also ratified in 1949, provides for the protection of civilians during wartime. Geneva Conventions, *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, available from <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5>; accessed 11 March 2007. Three additional Protocols were later added to the Conventions; the first two in 1977 and the third (and last) in 2005. The first Additional Protocol expands the definition of “international armed conflict” to include conflicts against racist regimes, colonial domination and alien occupation. Geneva Conventions, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, available from <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079>; accessed 11 March 2007. The second Additional Protocol provides protections to victims of internal armed conflicts. Geneva Conventions, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, available from <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/d67c3971bcff1c10c125641e0052b545>; accessed 11 March 2007. The third and final Additional Protocol authorizes recognized relief societies to utilize the religion-neutral symbol of the Red Crystal. Geneva Conventions, *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*, 8 December 2005, available from <http://www.icrc.org/ihl.nsf/FULL/615?OpenDocument>; accessed 11 March 2007. Common Article 3 of the Geneva Conventions is named as such because it is “common” to all four of the aforementioned Geneva Conventions. It prohibits, “at any time and any place whatsoever,” specific acts against persons who are taking no active part in hostilities (protected persons). Those prohibited acts include murder, mutilation, torture, cruel treatment, hostage taking, and outrages on human dignity. Common Article 3 also directs that all protected persons be “treated humanely.” While the specific language of Common Article 3 indicates applicability only to internal conflicts, it has also been applied to international conflicts.

²⁷ Ibid.

²⁸ For example, one action taken by DoD to enhance its human intelligence gathering capability was the establishment of the Strategic Support Branch (SSB). Barbara Starr, “Pentagon runs clandestine intelligence-gathering infrastructure,” *CNN.com*, 24 January 2005, available from <http://www.cnn.com/2005/ALLPOLITICS/01/23/pentagon.intel/index.html>; accessed 22 February 2007. This new unit was first exposed to the public in a *Washington Post* article in January 2005. Barton Gellman, “Secret Unit Expands Rumsfeld's Domain: New Espionage Branch Delving Into CIA Territory,” *Washington Post*, 23 January 2005, p. A1, available from <http://www.washingtonpost.com/wp-dyn/articles/A29414-2005Jan22.html>; accessed 22 February 2007. Defense Department officials quickly responded the Post's report indicating that creation of the SSB “was to improve the level of tactical and operational intelligence available to assist combatant commanders for specific missions involving regular or special operations forces.” The DoD spokesman emphasized that “[i]t is accurate and should not be surprising that the Department of Defense is attempting to improve its long-standing human intelligence capability.” The spokesman further indicated that “[p]rior to the 9/11 commission issuing their conclusion that the nation's human intelligence capability must be improved, the Defense Human Intelligence Service has been taking steps to be more focused

and task-oriented for the global war on terror. One of the objectives of this effort is to make better human intelligence capability available to assist combatant commanders for specific missions involving regular or special operations forces. News Transcript, DoD Background Briefing on Strategic Support Teams, 24 January 2005, available from <http://www.defenselink.mil/transcripts/2005/tr20050124-2022.html>; accessed 22 February 2007. The new teams, made up of about 10 civilians and service members, are being deployed to support combatant commands' warfighting capabilities with improved human intelligence. The composition of these teams may include case officers, linguists, interrogators and other specialists from the Human Intelligence Service, the human intelligence component of the Defense Intelligence Agency (DIA). Ibid.

²⁹ Memorandum, President of the United States, to Vice President, et. al., subject: "Humane Treatment of al Qaeda and Taliban Detainees," 7 February 2002, available from <http://www2.gwu.edu/~narchiv/NSAEBB/NSAEBB127/02.02.07.pdf>; accessed 25 March 2007.

³⁰ Ibid.

³¹ Ibid.

³² Ibid. In his 7 February 2002 memo, the President explained why the traditional laws of war did not fit the GWOT: "However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm - - ushered in not by us, but by terrorists - - requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva."

³³ Ibid. Note that the Schlesinger Report viewed the guidance contained in the 7 February 2002 memo, as "vague and lacking," based primarily on the use of the ambiguous terms "humanely" and "in a manner consistent with the principles of Geneva." Schlesinger Report, 81

³⁴ Ibid.

³⁵ CLAMO Lessons Learned, 40 (*citing* Jennifer Elsea, Congressional Research Service, Publication Number RL31367, "Treatment of 'Battlefield Detainees' in the War on Terrorism" (Updated 13 January 2005) available from <http://www.fas.org/irp/crs/RL31367.pdf>; accessed 1 February 2007.

³⁶ Alberto Gonzales, Counsel for the President, Draft Memorandum for the President, subject: "Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban," 25 January 2002, available from *MSNBC, Newsweek*, <http://www.msnbc.msn.com/id/4999148/site/newsweek>, accessed 20 March 2007.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Secretary of Defense Memorandum for the Chairman, Joint Chiefs of Staff, subject: "Status of Taliban and Al Qaida, 19 January 2002, available from <http://news.findlaw.com/hdocs/docs/dod/11902mem.pdf>; accessed 18 March 2007

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Message from the Chairman, Joint Chiefs of Staff, subject: "Status of Taliban and al Qaeda," 21 January 2002, available from <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/1202mem.pdf>; accessed 15 March 2007.

⁴⁴ Memorandum, Jay S. Bybee, Assistant Attorney General, Office of the Legal Counsel, Department of Justice, to Alberto Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, subject: "Application of the Treaties and Laws to al Qaeda and Taliban Detainees," 22 January 2002, available from <http://washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>; accessed 18 March 2007. On 9 January 2002, OLC had prepared a draft memorandum concerning the same subject addressed to the DoDGC. John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of the Legal Counsel, Department of Justice, Draft Memorandum for William J. Haynes II, General Counsel, Department of Defense, Re: "Application of Treaties and Laws to al Qaeda and Taliban Detainees," 9 January 2002, available from <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>; accessed 18 March 2007.

⁴⁵ The War Crimes Act, as amended, 18 United States Code, Section 2441 (1996), available from http://assembler.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00002441---000-.html; accessed 2 June 2007. The War Crimes Act applies if either the perpetrator or victim is a member of the U.S. armed forces or a national of the United States. The law defines a "war crime" to include "grave breaches of the Geneva Conventions" and violations of "common Article 3." The potential punishments for a violation of the Act include a fine, imprisonment and, if the victim dies, the death penalty.

⁴⁶ Bybee 22 Jan 02 Memo.

⁴⁷ Ibid.

⁴⁸ Ibid. The opinion, in its opening paragraph, indicates that the "memorandum expresses no view as to whether the President should decide, as a matter of policy, that the U.S. Armed Forces should adhere to the standards of conduct in those treaties with respect to the treatment of prisoners."

⁴⁹ The primary bases for the authority of the Attorney General are codified at four succinct sections of the United States Code, Title 28, secs. 510-513. Section 510 allows the Attorney General to delegate his authority to any person or agency of the DoJ, such as the Office of Legal Counsel. Section 511 provides that "The Attorney General shall give his advice and opinion on questions of law when required by the President." Section 512 states that "The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department." Lastly, Section 513 provides that "When a question of law arises in the administration of the Department of the Army, the Department of the Navy, or the Department of the Air Force, the cognizance of which is not given by statute to some other officer from whom the Secretary of the military department concerned may require

advice, the Secretary of the military department shall send it to the Attorney General for disposition.” Generally tracking the language in these statutory sections, the Department of Justice website describes the functions of the Office of Legal Counsel as follows:

The Assistant Attorney General in charge of the Office of Legal Counsel assists the Attorney General in his function as legal advisor to the President and all the executive branch agencies. The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the executive branch, and offices within the Department. Such requests typically deal with legal issues of particular complexity and importance or about which two or more agencies are in disagreement. The Office also is responsible for providing legal advice to the executive branch on all constitutional questions and reviewing pending legislation for constitutionality. Available from <http://www.usdoj.gov/olc/>; accessed 18 March 2007.

⁵⁰ Alberto R. Gonzales, Counsel for the President, Draft Memorandum for the President, subject: “Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban,” 25 January 2002, available from *MSNBC, Newsweek*, <http://www.msnbc.msn.com/id/4999148/site/newsweek>, accessed 20 March 2007.

⁵¹ Daniel Klaidman, Stuart Taylor, Jr. and Evan Thomas. “Palace Revolt,” *Newsweek*, 6 February 2006, available from <http://www.msnbc.msn.com/id/11079547/site/newsweek/>; accessed 18 March 2007.

⁵² In commenting on the State Department's role in the development of the United States's detainee interrogation policy, former Navy General Counsel Alberto Mora, who himself opposed DoD's stance concerning the treatment of detainees during December 2002 and January 2003, claimed that “The State Department wasn't just on the back of the bus—it was left off the bus.” Jane Mayer, “The Memo,” *The New Yorker*, 20 February 2006, available from http://msl1.mit.edu/furdlog/docs/newyorker_articles/2006-02-27_newyorker_the_memo.pdf; accessed 24 March 2007.

⁵³ Gonzales 25 Jan 02 Draft Memo to the President.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Memorandum to the Counsel to the President and Assistant to the President for National Security Affairs from Colin L. Powell, United States Department of State, Washington, D.C., subject: Draft Decision Memorandum for the President on the Applicability of the Geneva Conventions to the Conflict in Afghanistan, 26 January 2002, reproduced in Karen J. Greenberg

and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 122-125.

⁶² Ibid., 122.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid., 123. Secretary of State Powell indicated a decision that the Geneva Convention does not apply to the conflict in Afghanistan “deprives us of a winning argument to oppose habeas corpus actions in U.S. courts.”

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid., 124.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid., 124-125. For instance, Secretary Powell noted that it was never the United States’ position that Afghanistan was a “failed state,” contrary to what was asserted by the DoJ in its memorandum.

⁷⁸ Ibid., 124.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Andrew Sullivan, “Atrocities in Plain Sight,” *The New York Times*, 13 January 2005, available from <http://www.nytimes.com/2005/01/13/books/review/books-sullivan.html?ei=5088&en=cbe680953658797e&ex=1265259600&partner=rssnyt&pagewanted=print&position=>; accessed 10 March 2007. The author, commenting on the issues raised by Secretary Powell in his 26 January 2002 memo, described his warnings as “almost heart-breaking prescient.”

⁸² President Bush's Memo, 7 Feb 2002.

⁸³ Ibid.

⁸⁴ William H. Taft , IV, Legal Advisor, Department of State, Memorandum to Counsel to the President, subject: "Comments on Your Paper on the Geneva Convention," 2 February 2002, reproduced in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 129-133.

⁸⁵ Ibid., 129.

⁸⁶ Ibid.

⁸⁷ Ibid, 131.

⁸⁸ Ibid, 133.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² John Ashcroft, Attorney General, Letter to the President, 1 February 2002, available from <http://news.findlaw.com/wp/docs/torture/jash20102ltr.html>; accessed 21 March 2007.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Schlesinger Report, 34. The Report states: "At the February 4, 2002 National Security Council meeting to decide this issue, the Department of State, the Department of Defense, and the Chairman of the Joint Chiefs of Staff were all in agreement that all detainees would get the treatment they are (or would be) entitled to under the Geneva Conventions."

⁹⁷ Jay S. Bybee, Assistant Attorney General, Office of the Legal Counsel, U.S. Department of Justice, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: "Status of the Taliban Forces Under Article 4 of the Third Geneva Convention," 7 February 2002, available from <http://news.findlaw.com/wp/docs/torture/bybee20702mem.html>; accessed 21 February 2007.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Jay S. Bybee, Assistant Attorney General, Office of the Legal Counsel, U.S. Department of Justice, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," 1 August 2002, available from <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf>; accessed 21

March 2007 [hereinafter Torture Memo]. Between the 7 February President's declaration of status of the Al Qaeda and Taliban and the OLC's Torture Memo of 1 August 2002, one other OLC opinion is of note. Requested by the DoDGC, the opinion, dated 26 February 2002, indicated that interrogators need not "Mirandize" detainees captured in Afghanistan before questioning them. Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, Memorandum for William J. Haynes, II, General Counsel, Department of Defense, Re: "Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan," 26 February 2002, reproduced in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 144-171.

¹⁰¹ Ibid. There is no mention in the Torture Memo of the Uniform Code of Military Justice (UCMJ), an indication that the focus was on CIA personnel, who are not subject to the UCMJ, rather than active duty military personnel, who remain subject to the UCMJ worldwide and at all times.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Dana Priest and R. Jeffrey Smith, "Memo Offered Justification for Use of Torture: Justice Dept. Gave Advice in 2002," *The Washington Post*, 8 June 2004, A01, available from <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html>; accessed 14 March 2007. On 13 June 2004, *The Washington Post* posted a copy of the 1 August 2002 memo, "Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A" on its website. See also Dana Priest, "Justice Dept. Memo Says Torture 'May Be Justified'," *The Washington Post*, 13 June 2004, available from <http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html>; accessed 14 March 2007.

¹⁰⁷ *60 Minutes II*, "Abuse Of Iraqi POWs By GIs Probed, 60 Minutes II Has Exclusive Report On Alleged Mistreatment," CBS News, 28 April 2004, available from <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>; accessed 14 March 2007.

¹⁰⁸ Press Briefing by White House Counsel Judge Alberto Gonzales, DoD General Counsel William Haynes, DoD Deputy General Counsel Daniel Dell'Orto and Army Deputy Chief of Staff for Intelligence General Keith Alexander, The White House, 22 June 2004, available from <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>; accessed 10 March 2007.

¹⁰⁹ Ibid.

¹¹⁰ U.S. Department of State, Update to Annex One of the Second Periodic Report of the United States to the United Nations Committee Against Torture, 21 October 2005, available from <http://www.state.gov/g/drl/rls/55712.htm>; accessed 25 March 2007.

¹¹¹ Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, Memorandum Opinion for the Deputy Attorney General, "Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A," 30 December 2004, available from <http://www.usdoj.gov/olc/18usc23402340a2.htm>; accessed 18 March 2007.

¹¹² CLAMO Lessons Learned, 55; see also Schlesinger Report, 33.

¹¹³ Patrick Philbin and John C. Yoo, Office of the Legal Counsel, U.S. Department of Justice, Memorandum for William J. Haynes, General Counsel, Department of Defense, Re: "Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba," 28 December 2001, reproduced in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 29-37. Before DoD started to hold detainees at GTMO, it wanted some assurance from DoJ that non-U.S. citizen detainees would not be able to challenge their incarceration in U.S. federal district court while they awaited trial by military commissions. With some reservations, DoJ concluded "that the great weight of legal authority indicates that a federal district court could not exercise habeas jurisdiction over an alien detained at GBC [Guantanamo Bay, Cuba]." *Torture Papers*, 29.

¹¹⁴ Jerrold M. Post, Editor, *Military Studies in the Jihad Against Tyrants: The Al-Qaeda Training Manual* (USAF Counterproliferation Center, Maxwell Air Force Base, Alabama, August 2004) 157-168. The "Seventeenth Lesson" involves actions that AQ members should take in the event of questioning, interrogation and torture. The chapter details potential methods of physical and psychological torture that AQ members may face at the hands of their captors. Ibid., 163-166. If brought to trial, members are urged to allege that torture has occurred. Ibid., 169

¹¹⁵ Joint Task Force (JTF)-170 was initially responsible for interrogation operations (but not detention operations) at GTMO, until both detention and interrogation operations merged under one command, Joint Task Force Guantanamo (JTF-G) on 4 November 2002. Schlesinger Report, Glossary, 101.

¹¹⁶ Memorandum, Lieutenant Colonel Jerald Phifer, J2, to Commander, JTF-170, subject: "Request for Approval of Counter-Resistance Strategies," 11 October 2002, available from <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf>; accessed 24 March 2007. Until a new, more comprehensive Field Manual (FM) was published in 2006, the doctrine that covered intelligence interrogations of detainees at GTMO and worldwide was Army Field Manual 34-52, dated 28 September 1992. At pages 3-14-3-20, FM 34-52 listed and described the authorized approaches of intelligence interrogators:

- Direct approach;
- Incentive approach;
- Emotional approach (emotional love or emotional hate);
- Fear-Up (up or down);
- Fear Down;
- Pride and Ego (up or down);
- Futility;
- We Know All;
- File and Dossier;
- Establish Your Identity;
- Repetition;

- Rapid Fire;
- Silent; and
- Change of Scenery.

U.S. Department of the Army Field Manual 34-52, Intelligence Interrogation, 28 September 1992, available from <http://www.fas.org/irp/doddir/army/fm34-52.pdf>; accessed 24 March 2007. On 6 September 2006, the U.S. Army Field Manual for intelligence interrogation (FM 2-22.3, Human Intelligence Collector Operations) was released with provisions prohibiting “cruel, inhumane and degrading” treatment of detainees while in Defense Department custody. It also specifically named Common Article 3 of the Geneva Conventions as the treatment standard for interrogation conduct. Headquarters, Department of the Army, FM 2-22.3 (FM 34-52), Human Intelligence Collector Operations, 6 September 2006, available from <http://www.fas.org/irp/doddir/army/fm2-22-3.pdf>; accessed 24 March 2007.

¹¹⁷ Phifer Memo. The requested techniques were divided into three categories. Category I techniques included yelling at an uncooperative detainee, deception, and use of several interrogators at once. Category II techniques included stress positions, deprivation of stimuli, hooding of the detainee during interrogation, removal of religious items, removal of clothing, forced shaving of facial hair, and use of phobias of individual detainees. Category III techniques were reserved “for the most uncooperative detainees,” and included use of situations designed to make the detainee believe that death or serious injury was imminent for himself or a family member, exposure to extreme cold or water, water boarding, and non-injurious contact. Ibid. “Water boarding” refers to an interrogation technique that involves immobilizing an individual and pouring water over his/her face to simulate drowning. This action produces a strong gag reflex, making the individual believe that he/she is going to die. Walter Pincus, “Waterboarding Historically Controversial,” *The Washington Post*, 5 October 2006, available from <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100402005.html>; accessed 24 March 2007; see also Senator John McCain, “Torture’s Terrible Toll,” *Newsweek*, 21 November 2005, available from <http://www.msnbc.msn.com/id/10019179/site/newsweek/page/2/>; accessed 24 March 2007; Brian Ross and Richard Esposito, “CIA’s Harsh Interrogation Techniques Described,” *ABC News*, 18 November 2005, available from <http://abcnews.go.com/WNT/Investigation/story?id=1322866>; accessed 24 March 2007.

¹¹⁸ Memorandum, Staff Judge Advocate, JTF-170, to Commander JTF-170, subject: “Legal Review of Aggressive Interrogation Techniques,” 11 October 2002, available from <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf>; accessed 17 March 2007; Memorandum, Staff Judge Advocate, JTF-170, to Commander JTF-170, subject: “Legal Brief on Proposed Counter-Resistance Strategies,” 11 October 2002, available from <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf>; accessed 17 March 2007.

¹¹⁹ For a discussion of the problems associated with the legal opinion prepared by the SJA for JTF-170, see Lieutenant Colonel Paul Kantwill, et.al., “Improving the Fighting Position: A Practitioner’s Practical Guide to Operational Law Support to the Interrogation Process,” *The Army Lawyer* (July 2005) 13-14.

¹²⁰ JTF-170 Legal Opinion.

¹²¹ Ibid.

¹²² This may explain, in part, why the opinion failed to mention Army Regulation 190-8, which requires the “humane treatment” of all detainees in the custody of the DoD. U.S. Department of the Army Regulation 190-8, “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,” 1 October 1997, para. 1-4.g.

¹²³ Ibid.

¹²⁴ Memorandum from Commander, Joint Task Force 170, to Commander, U.S. Southern Command, subject: “Counter-Resistance Techniques,” 11 October, reproduced in *Torture Papers*, 225.

¹²⁵ Memorandum from Commander, U.S. Southern Command, to Chairman of the Joint Chiefs of Staff, subject: “Counter-Resistance Techniques,” 25 October 2002, reproduced in *Torture Papers*, 223-224.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Action Memorandum from William J. Haynes, General Counsel to the Secretary of Defense, subject: “Counter-Resistance Techniques,” 27 November 2002 and 2 Dec 2002 (action by SECDEF), reproduced in *Torture Papers*, 236.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Then Navy General Counsel Alberto J. Mora confronted DoD General Counsel regarding the SECDEF’s handwritten comment, indicating concern that the comment might be used by defense counsel in any upcoming trials by military commissions. Alberto J. Mora, Memorandum for Inspector General, Department of the Navy, subject: “Statement for the Record: Office of General Counsel Involvement in Interrogation Issues,” 7 July 2004, available from “The Mora Memo,” *The New Yorker*, 27 February 2006, <http://images/pdfs/moramemo.pdf>; accessed 15 February 2007.

¹³⁵ See Major (Ret.) James F. Gebhardt, “The Road to Abu Ghraib: US Army Detainee Doctrine and Experience,” Global War on Terrorism, Occasional Paper 6 (Combat Studies Institute Press: Fort Leavenworth, Kansas, 2005) available from http://www.au.af.mil/au/awc/awcgate/army/csi_gebhardt_road.pdf; accessed 8 June 2007.

¹³⁶ Mora Memo, 8; see also Jane Mayer, “The Memo,” *The New Yorker*, 20 February 2006, available from http://msl1.mit.edu/furdlog/docs/newyorker_articles/2006-02-27_newyorker_the_memo.pdf; accessed 24 March 2007.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Memorandum from the Secretary of Defense to Commander, USSOUTHCOM, subject: "Counter-Resistance Techniques," 15 January 2003, available from <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.01.15.pdf>; accessed 25 March 2007.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Memorandum from Secretary of Defense Donald Rumsfeld for General Counsel of the Department of Defense, subject: "Detainee Interrogations," 15 January 2003, available from <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.01.15b.pdf>; accessed 25 March 2007.

¹⁵⁵ Ibid.

¹⁵⁶ Memorandum from General Counsel of the Department of Defense William J. Haynes II to the General Counsel of the Department of the Air Force, subject: "Working Group to Assess Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held by U.S. Armed Forces in the War on Terrorism," 17 January 2003, available from <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.01.17.pdf>; accessed 25 March 2007.

¹⁵⁷ Mora Memo, 15-17.

¹⁵⁸ Ibid., 16-17.

¹⁵⁹ Ibid., 19.

¹⁶⁰ Karen Greenberg, ed., *The Torture Debate in America* (Cambridge: Cambridge University Press, 2006) 377-391 (Reproducing the following memoranda: Department of the Air Force, Memorandum from AF/JA for SAF/GC, subject: "Final Report and Recommendations of the Working Group to Assess Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism," 5 February 2003; Memorandum from AF/JA for SAF/GC, subject: "Comments on Draft Report and Recommendations of the Working Group to Assess Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism," 6 February 2003; Memorandum from The Judge Advocate General of the Navy for the General Counsel of the Air Force, subject: "Working Group Relating to the Interrogation of Detainees," 6 February 2003; Memorandum from the Staff Judge Advocate to the Commandant of the Marine Corps for the General Counsel of the Air Force, subject: "Working Group Recommendations on Detainee Interrogations," 27 February 2003; Memorandum from The Judge Advocate General of the Army for the General Counsel of the Department of the Air Force, subject: "Draft Report and Recommendations of the Working Group to Assess Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism," 3 March 2003; and Memorandum from The Judge Advocate General of the Navy for the Air Force General Counsel, subject: "Comments on the 6 March 2003 Detainee Interrogation Working Group Report," 13 March 2003).

¹⁶¹ Department of Defense Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, 4 April 2003, available from <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf>; accessed 25 March 2007.

¹⁶² Ibid.

¹⁶³ Memorandum from the Secretary of Defense to the Commander, U.S. Southern Command, subject: "Counter-Resistance Techniques in the War on Terrorism," 16 April 2003, available from <http://www.washingtonpost.com/wp-srv/nation/documents/041603rumsfeld.pdf>; accessed 25 March 2007.

¹⁶⁴ Mayer, "The Memo."

¹⁶⁵ SECDEF Memo, 16 April 03.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid. Those techniques that required a demonstration of "military necessity" and prior notification to the SECDEF were: "Incentive/Removal of Incentive;" "Pride and Ego Down;" "Mutt and Jeff;" and "Isolation."

¹⁶⁹ Mayer, "The Memo." For his efforts, Alberto J. Mora was awarded a 2006 Profile in Courage Award. Award Announcement, John F. Kennedy Library Foundation, 22 May 2006, available from <http://www.jfklibrary.org/Education+and+Public+Programs/Profile+in+Courage+Award/Award+R>

[ecipients/Alberto+Mora/](#); accessed 25 March 2007. In his acceptance speech, Mora equated the actions of the United States in response to the attack on Pearl Harbor to those of 11 September 2001. Alberto J. Mora, Acceptance Speech for the 2006 Profiles in Courage Awards, <http://www.jfklibrary.org/Education+and+Public+Programs/Profile+in+Courage+Award/Award+Recipients/Alberto+Mora/Acceptance+Speech+by+Alberto+Mora.htm>; accessed 25 March 2007.

¹⁷⁰ The Schlesinger Report, 8, notes that:

In the initial development of these Secretary of Defense policies, the legal resources of the Services' Judge Advocate and General Counsels were not utilized to their full potential. Had the Secretary of Defense had a wider range of legal opinions and a more robust debate regarding detainee policies and operations, his policy of April 16, 2003 might well have been developed and issued in early December 2002. This would have avoided the policy changes which characterized the Dec. 02, 2002 to April 16, 2003 period.

See also Josh White, "Military Lawyers Fought Policy on Interrogations: JAGs Recount Objections To Definition of Torture," 15 July 2005, available from <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/14/AR2005071402187.html>; accessed 25 March 2007. Because the Service TJAGs were largely ignored in the development of this DoD policy, South Carolina Senator Lindsey Graham, himself a reserve component judge advocate, pushed legislation that would make the Service TJAGs three-star generals, presumably with an enhanced status accompanying that rank (instead of the current two-star status). Roxana Tiron, "Graham focuses on glimmer of TJAGs' 3rd star," *TheHill.com*, 4 October 2006, available from http://thehill.com/thehill/export/TheHill/Business/100406_graham.html; accessed 25 March 2007.

¹⁷¹ U.S. Department of State, Update to Annex One of the Second Periodic Report of the United States to the United Nations Committee Against Torture, 21 October 2005, available from <http://www.state.gov/g/drl/rls/55712.htm>; accessed 25 March 2007; see also Josh White, "Military Lawyers Fought Policy on Interrogations," *The Washington Post*, 15 July 2005, available from http://www.washingtonpost.com/wp-dyn/content/article/2005/07/14/AR2005071402187_pf.html; accessed 25 March 2007.

¹⁷² Schlesinger Report, 37, indicating that "[i]nterrogators and lists of techniques circulated from Guantanamo and Afghanistan to Iraq."

¹⁷³ Combined Joint Task Force 180 was CENTCOM's forward deployed headquarters for Afghanistan. Schlesinger Report, Glossary, 101.

¹⁷⁴ Department of Defense, Detainee Investigations, DoD Presents Findings of Church Report, Church Report Executive Summary (EXSUM) 6, 10 March 2005, available from <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf>; accessed 26 March 2007.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Schlesinger Report, 36; see also Church Report EXSUM, 6.

¹⁷⁹ Church Report EXSUM, 6.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Church Report EXSUM, 7.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ USINFO.STATE.GOV, "Pentagon's Feith Says U.S. Committed to Geneva Conventions," 24 May 2004, available from <http://usinfo.state.gov/mena/Archive/2004/May/24-425032.html>; accessed 25 March 2007 (reprinting a column titled "Conventional Warfare" by Douglas J. Feith, Under Secretary of Defense for Policy, that was published in *The Wall Street Journal* on 24 May 2004); see also Schlesinger Report, 82.

¹⁹¹ Schlesinger Report, 37.

¹⁹² Schlesinger Report, 36. The CENTCOM Operation Order (OPORD) indicated that interrogators would follow FM 34-52. For the announcement of the start of OIF, see The White House, "President Bush Addresses the Nation," 19 March 2003, available from <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html>; accessed 25 March 2007.

¹⁹³ Combined Joint Task Force 7 was the forward deployed headquarters for OIF until it was replaced by Multi-National Force-Iraq and Multi-National Corps-Iraq in May 2004. Schlesinger Report, Glossary, 101.

¹⁹⁴ Church Report EXSUM, 8; see also Schlesinger Report, 36.

¹⁹⁵ Schlesinger Report, 36. The techniques that migrated to Iraq from Afghanistan had been contained in a written Special Operations Forces (SOF) Standard Operating Procedures (SOP) published in February 2003.

¹⁹⁶ Church Report EXSUM, 8.

¹⁹⁷ Ibid.

¹⁹⁸ Schlesinger Report, 37.

¹⁹⁹ Ibid., 77.

²⁰⁰ Ibid., 82.

²⁰¹ Schlesinger Report, 10-11, noted “that techniques effective under carefully controlled conditions at Guantanamo became far more problematic when they migrated and were not adequately supervised.”

²⁰² Schlesinger Report, 10.

²⁰³ Ibid.

²⁰⁴ Schlesinger Report, 37-38.

²⁰⁵ Church Report EXSUM.

²⁰⁶ Ibid.

²⁰⁷ Schlesinger Report, 10, characterized the development of the interrogation policy of CJTF-7: “The existence of confusing and inconsistent interrogation technique policies contributed to the belief that additional techniques were condoned.”

²⁰⁸ Taguba Report, Part One. Finding 5, indicating that the misconduct was perpetrated by members of the military police guard force in Tier 1-A section of the Abu Ghraib Prison between October and December 2003.

²⁰⁹ Schlesinger Report, 39.

²¹⁰ On 28 April 2004, the [U.S.](http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml) television news-magazine show [60 Minutes II](http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml) aired a story about the abuse of Iraqi prisoners by United States soldiers at the Baghdad Correctional Facility. The story included graphic photographs depicting the abuse of prisoners. *60 Minutes II*, “Abuse Of Iraqi POWs By GIs Probed, 60 Minutes II Has Exclusive Report On Alleged Mistreatment,” CBS News, 28 April 2004, available from <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>; accessed 14 March 2007.

²¹¹ Schlesinger Report, 38; see *also* Church Report EXSUM, 3.

²¹² Supreme Court of the United States, *Hamdi, et. al., vs. Rumsfeld, et. al.*, No. 03-6696, 28 June 2004, available from <http://www.supremecourtus.gov/opinions/03pdf/03-6696.pdf>; accessed 27 March 2007.

²¹³ Supreme Court of the United States, *Rasul, et.al, v. Bush, et. al.*, No. 03-334, 28 June 2004, available from <http://www.supremecourtus.gov/opinions/03pdf/03-334.pdf>; accessed 27 March 2007. *Rasul v. Bush* began as three separate lawsuits that challenged the detention of foreign nationals at the U.S. Naval Base at Guantanamo, Cuba (GTMO). One lawsuit was filed on behalf of two British citizens (Rasul and Iqbal, two of the “Tipton Three”) and an Australian national captured in Afghanistan. Another lawsuit was filed on behalf of an Australian citizen who was captured in Pakistan. The third lawsuit was filed on behalf of twelve Kuwaiti nationals who were captured in Afghanistan and Pakistan. Each lawsuit challenged the detention and

requested the release of the detainees. The three cases were subsequently consolidated into a single case.

²¹⁴ Supreme Court of the United States, *Rumsfeld v. Padilla, et. al.*, No. 03-1027, 28 June 2004, available from <http://supremecourtus.gov/opinions/03pdf/03-1027.pdf>; accessed 15 June 2007.

²¹⁵ *Hamdi*, Opinion of O'Connor, J., 2.

²¹⁶ *Ibid.*

²¹⁷ The term "plurality opinion" is an opinion of the Supreme Court that announces the judgment of the Court, but that has been unable to obtain an agreement of a majority of the participating Justices. Kermit L. Hall, ed., *The Oxford Companion to the Supreme Court of the United States* (New York, New York: Oxford University Press, 1992) 638. In the *Hamdi* case, no individual opinion of the Court carried a majority of the justices, but eight of the nine justices of the Court concurred that the [Executive Branch](#) did not have the authority to indefinitely detain a U.S. citizen without fundamental [due process](#) rights enforceable through judicial review.

²¹⁸ *Hamdi*, Opinion of O'Connor, J., 1.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*, 25-26.

²²¹ *Ibid.*, 29.

²²² *Ibid.*, 31-32.

²²³ Phil Hirschhorn and Nic Robertson, contributors, "Hamdi voices innocence, joy about reunion," *CNN.com*, 14 October 2004, available from <http://www.cnn.com/2004/WORLD/meast/10/14/hamdi/>; accessed 27 March 2007.

²²⁴ U.S. Department of Defense News Release, "Transfer of Detainee Control Completed," 11 October 2004, available from <http://www.defenselink.mil/releases/release.aspx?releaseid=7827>; accessed 27 March 2007; see also USINFO.STATE.GOV, "U.S. Will Release Hamdi from Prison, Fly Him to Saudi Arabia," 23 September 2004, available from <http://usinfo.state.gov/dhr/Archive/2004/Sep/24-374430.html>; accessed 27 March 2007.

²²⁵ *Rasul*, 1-2.

²²⁶ *Ibid.*

²²⁷ 28 U.S.C. § 2241.

²²⁸ 339 U.S. 763 (1950). The Court in *Eisentrager* held that U.S. courts had no jurisdiction to hear habeas corpus petitions brought by German war criminals being held in a detention facility located in occupied Germany, but run by the U.S.

²²⁹ *Rasul*, 7-8.

²³⁰ Ibid., 12.

²³¹ Ibid.

²³² Ibid., 16-17 (federal question statute, 28 U.S.C. § 1331; Alien Tort Statute, 28 U.S.C. § 1350).

²³³ *Braden v. 30th Judicial Circuit of the Court of Kentucky*, 410 U.S. 484 (1973). In *Braden*, the Court held that “[t]he jurisdiction of a district court considering a habeas corpus petition requires only that the court issuing the writ have jurisdiction over the custodian of the prisoner.” Thus, the critical location for the exercise of federal habeas jurisdiction is the location of the custodian, not the location where the petitioner/person is being confined.

²³⁴ *Rasul*, Concurring Opinion, Kennedy, J., 1.

²³⁵ Ibid., 3-4.

²³⁶ *Rasul*, Dissenting Opinion, Scalia, J., 1-20.

²³⁷ Ibid., 1, 19.

²³⁸ Ibid., 11.

²³⁹ “Delight at the Release of Guantanamo Men,” *BBC News*, 11 March 2004, available from <http://news.bbc.co.uk/1/hi/uk/3500156.stm>; accessed 28 March 2007.

²⁴⁰ Ibid.

²⁴¹ Jonathan Wald, “British Men Report Abuse from Guantanamo,” *CNN.com*, 4 August 2004, available from <http://www.cnn.com/2004/LAW/08/04/guantanamo.abuse.accusations/index.html?eref=sitesearch>; accessed 28 March 2007.

²⁴² The “Tipton Three” is the moniker given to three young men from Tipton, United Kingdom, who were held in captivity for two years by the United States as unlawful combatants at GTMO. They returned to the United Kingdom in March 2004, and were released by British authorities without ever being charged with any crime.

²⁴³ Michael Winterbottom, dir., *The Road to Guantanamo*, 95 min., Roadside Attractions, 2006, DVD, available from <http://www.roadtoguantanamomovie.com>; accessed 27 March 2007. On 14 February 2006, the film debuted at the [Berlin Film Festival](#) in [Berlin, Germany](#). On 9 March 2006, it was broadcast to a television audience in the United Kingdom. The movie also has been released on DVD and the internet. The movie recounts the story of [Ruhul Ahmed](#), [Asif Iqbal](#) and [Shafiq Rasul](#) (known as the “[Tipton Three](#)” because they all came from the British town of Tipton). They allege that they were captured by the [Northern Alliance](#) in Afghanistan in [2001](#) and detained as “[enemy combatants](#)” at Guantánamo Bay for over two years. The movie contains a number of scenes portraying their alleged beatings, use of “stress positions,” and other coercive efforts to make them admit their association with Al Qaeda and the [Taliban](#).

²⁴⁴ *Rasul, et. al., v. Rumsfeld, et. al.*, civil complaint filed in the United States District Court for the District of Washington, 27 October 2004, available from <http://news.findlaw.com/hdocs/docs/terrorism/rasulrums102704cmp.html>; accessed 28 March 2007; see also Karla Crosswhite-Chigbue, "Four British Gitmo Detainees Sue," *CNN.com*, 27 October 2004, available from <http://www.cnn.com/2004/LAW/10/27/gitmo.lawsuit/index.html>; accessed 28 March 2007. Among the named defendants in this suit are former Secretary of Defense Rumsfeld, former Chairman of the Joint Chiefs of Staff General Richard Myers, and Major General Geoffrey Miller, former Commander Joint Task Force Guantanamo.

²⁴⁵ Supreme Court of the United States, *Rumsfeld v. Padilla, et. al.*, No. 03-1027, 28 June 2004, available from <http://supremecourtus.gov/opinions/03pdf/03-1027.pdf>; accessed 15 June 2007.

²⁴⁶ *Ibid.*, 1.

²⁴⁷ *Ibid.*, 1-2.

²⁴⁸ *Ibid.*, 2.

²⁴⁹ *Ibid.*, 2-3.

²⁵⁰ *Ibid.*, 3; see also the Non-Detention Act, 18 United States Code § 4001(a), which provides, in part, that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

²⁵¹ *Ibid.*, 3-4.

²⁵² *Ibid.*, 4-5.

²⁵³ *Ibid.*, 1. The Court indicated that it was faced with "two questions," one of a procedural nature, i.e., whether Padilla's habeas petition was properly filed, and the other of a substantive nature, i.e., whether the President had the power to hold Padilla "militarily." Since its answer to the first question was in the negative, the Court never reached the more important substantive issue of the President's authority to detain.

²⁵⁴ *Ibid.*, 13.

²⁵⁵ *Ibid.*, 13, 18-19.

²⁵⁶ *Ibid.*, 13.

²⁵⁷ *Ibid.*, 23.

²⁵⁸ Joanne Mariner, "The Supreme Court, the Detainees, and the 'War on Terror,'" *FindLaw*, 5 July 2004, available from http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/mariner/20040705.html; accessed 27 March 2007; see also Thomas E. Ricks and Jerry Markon, "U.S. Nears Deal to Free Enemy Combatant Hamdi," 12 August 2004, available from <http://www.washingtonpost.com/wp-dyn/articles/A58002-2004Aug11.html>; accessed 27 March 2007.

²⁵⁹ Patrick Philbin and John C. Yoo, Office of the Legal Counsel, U.S. Department of Justice, Memorandum for William J. Haynes, General Counsel, Department of Defense, Re: "Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba," 28 December 2001, reproduced in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 29-37. Before DoD started to hold detainees at GTMO, they wanted some assurance from DoJ that non-U.S. citizen detainees would not be able to challenge their incarceration in U.S. federal district court while they awaited trial by military commissions. With some reservations, DoJ concluded "that the great weight of legal authority indicates that a federal district court could not exercise habeas jurisdiction over an alien detained at GBC [Guantanamo Bay, Cuba]." *Torture Papers*, 29.

²⁶⁰ *Ibid.*

²⁶¹ Department of Defense Fact Sheet, "Combatant Status Review Tribunals," 17 October 2006, available from <http://www.defenselink.mil/news/Oct2006/d20061017CSRT.pdf>; accessed 29 March 2007.

²⁶² The Constitution provides Congress with multiple bases that can be used to legislate in the area of treatment of detainees captured during the GWOT. These enumerated powers are found the United States Constitution in Article I, § 8. See Linda R. Monk, *The Words We Live By: Your Annotated Guide to the Constitution* (New York, New York: Hyperion, 2003) 46-47. For instance, the Congress has the authority to "make Rules concerning Captures on Land and Water" and to "define and punish" violations of international law. United States Constitution, Article I, § 8, clause 10. Further, in regards to the creation of military commissions to try unlawful combatants, Congress is empowered to establish federal courts "inferior to" the United States Supreme Court. United States Constitution, Article I, § 8, clause 9. In crafting its legislation, Congress is provided great flexibility by the "necessary and proper clause" of the Constitution. Article I, § 8, clause 18. Funding of the military is influenced by Congress' "power of the purse." Article I, § 8, clause 12.

²⁶³ Evan Thomas and Michael Hirsh, "The Debate Over Torture," *Newsweek*, 21 November 2005, 32.

²⁶⁴ *Ibid.*

²⁶⁵ United States Senate, Department of Defense Appropriations Act, 2006, s11061, 5 October 2005, available from [http://thomas.loc.gov/cgi-bin/query/F?r109:1:/temp/~r109f7VkSs:e0](http://thomas.loc.gov/cgi-bin/query/F?r109:1:/temp/~r109f7VkSs:e0;); accessed 30 March 2007. The original language of the amendment no. 1977 proposed by Senator McCain reads as follows:

SEC. __. UNIFORM STANDARDS FOR THE INTERROGATION OF PERSONS UNDER THE DETENTION OF THE DEPARTMENT OF DEFENSE.

(a) **IN GENERAL.**--No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

(b) **APPLICABILITY.**--Subsection (a) shall not apply to with respect to any person in the custody or under the effective control of the Department of Defense pursuant to a criminal law or immigration law of the United States.

(c) **CONSTRUCTION.**--Nothing in this section shall be construed to affect the rights under the United States Constitution of any person in the custody or under the physical jurisdiction of the United States.

SEC. __. PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT OF PERSONS UNDER CUSTODY OR CONTROL OF THE UNITED STATES GOVERNMENT.

(a) *In General.*--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.

(b) *Construction.*--Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.

(c) *Limitation on Supersedure.*--The provisions of this section shall not be superseded, except by a provision of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.

(d) *Cruel, Inhuman, or Degrading Treatment or Punishment Defined.*--In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the 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 done at New York, December 10, 1984.

²⁶⁶ Ibid., s11062.

²⁶⁷ R. Jeffrey Smith and Charles Babington, "White House, Senators Near Pact on Interrogation Rules: President Would Have a Voice on How Detainees Are Questioned," *The Washington Post*, 22 September 2006, available from <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/21/AR2006092100298.html>; accessed 30 March 2007.

²⁶⁸ "Senate ignores veto threat in limiting detainee treatment," *CNN.com*, 6 October 2005, available from <http://www.cnn.com/2005/POLITICS/10/06/senate.detainees/index.html>; accessed 28 March 2007.

²⁶⁹ Senate Vote 249, H.R. 2863, S. Amdt. 1977, 5 October 2005, The U.S. Congress Votes Database, *washingtonpost.com*, available from <http://projects.washingtonpost.com/congress/109/senate/1/votes/249/>; accessed 30 March 2007. The Congress can override the President's veto power by a two-thirds (2/3) majority of the Senate and House of Representatives. United States Constitution, Article I, § 7.

²⁷⁰ Senate Amendment 2524 to Senate Amendment 2515 (Graham-Levin Amendment), National Defense Authorization Act for the Fiscal Year 2006, s12752, 14 November 2005, available from [http://thomas.loc.gov/cgi-bin/query/F?r109:1:/temp/~r109d6WOFu:e0](http://thomas.loc.gov/cgi-bin/query/F?r109:1:/temp/~r109d6WOFu:e0;); accessed 30 March 2007.

²⁷¹ Ibid. See also Senate Vote on the Graham-Levin Amendment, National Defense Authorization Act for Fiscal Year 2006, S. Amdt. 2524, 151 Cong. Rec. s12802-s12804, 15 November 2005, available from <http://thomas.loc.gov/cgi-bin/query/F?r109:1:/temp/~r109FeNamh:e257935>; accessed 30 March 2007.

²⁷² *Detainee Treatment Act of 2005*, Public Law 109-148, Title X, Sec. 1002 (2005); Public Law 109-63, Title XIV, Sec. 1402 (2006). The full text of the Act reads as follows: Detainee Treatment Act of 2005: in the Defense Appropriations Act for 2006 5/18/2006 signed by the President December 30, 2005 TITLE X--MATTERS RELATING TO DETAINEES
SEC. 1001. SHORT TITLE.

This title may be cited as the ``Detainee Treatment Act of 2005".

SEC. 1002. UNIFORM STANDARDS FOR THE INTERROGATION OF PERSONS UNDER THE DETENTION OF THE DEPARTMENT OF DEFENSE.

(a) In General.--No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

(b) Applicability.--Subsection (a) shall not apply with respect to any person in the custody or under the effective control of the Department of Defense pursuant to a criminal law or immigration law of the United States.

(c) Construction.--Nothing in this section shall be construed to affect the rights under the United States Constitution of any person in the custody or under the physical jurisdiction of the United States.

SEC. 1003. PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT OF PERSONS UNDER CUSTODY OR CONTROL OF THE UNITED STATES GOVERNMENT.

(a) In General.--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.

(b) Construction.--Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.

(c) Limitation on Supersedure.--The provisions of this section shall not be superseded, except by a provision of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.

(d) Cruel, Inhuman, or Degrading Treatment or Punishment Defined.-- In this section, the term ``cruel, inhuman, or degrading treatment or punishment" means the 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 done at New York, December 10, 1984.

SEC. 1004. PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL ENGAGED IN AUTHORIZED INTERROGATIONS.

(a) Protection of United States Government Personnel.--In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an

important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.

(b) Counsel.--The United States Government may provide or employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation of an officer, employee, member of the Armed Forces, or other agent described in subsection (a), with respect to any civil action or criminal prosecution arising out of practices described in that subsection, under the same conditions, and to the same extent, to which such services and payments are authorized under section 1037 of title 10, United States Code.

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

(a) Submittal of Procedures for Status Review of Detainees at Guantanamo Bay, Cuba, and in Afghanistan and Iraq.--

(1) In general.--Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services and the Committee on the Judiciary of the Senate and the Committee on Armed Services and the Committee on the Judiciary of the House of Representatives a report setting forth—

(A) the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay or to provide an annual review to determine the need to continue to detain an alien who is a detainee; and

(B) the procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in the custody or under the physical control of the Department of Defense in those countries.

(2) Designated civilian official.--The procedures submitted to Congress pursuant to paragraph (1)(A) shall ensure that the official of the Department of Defense who is designated by the President or Secretary of Defense to be the final review authority within the Department of Defense with respect to decisions of any such tribunal or board (referred to as the "Designated Civilian Official") shall be a civilian officer of the Department of Defense holding an office to which appointments are required by law to be made by the President, by and with the advice and consent of the Senate.

(3) Consideration of new evidence.--The procedures submitted under paragraph (1)(A) shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee.

(b) Consideration of Statements Derived With Coercion.--

(1) Assessment.--The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess—

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) Applicability.--Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

(c) Report on Modification of Procedures.--The Secretary of Defense shall submit to the committees specified in subsection (a)(1) a report on any modification of the procedures

submitted under subsection (a). Any such report shall be submitted not later than 60 days before the date on which such modification goes into effect.

(d) Annual Report.—

(1) Report required.--The Secretary of Defense shall submit to Congress an annual report on the annual review process for aliens in the custody of the Department of Defense outside the United States. Each such report shall be submitted in unclassified form, with a classified annex, if necessary. The report shall be submitted not later than December 31 each year.

(2) Elements of report.--Each such report shall include the following with respect to the year covered by the report:

(A) The number of detainees whose status was reviewed.

(B) The procedures used at each location.

(e) Judicial Review of Detention of Enemy Combatants.—

(1) In general.--Section 2241 of title 28, United States Code, is amended by adding at the end the following:

“(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

“(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

“(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

“(A) is currently in military custody; or

“(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.”.

(2) Review of decisions of combatant status review tribunals of propriety of detention.—

(A) In general.--Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) Limitation on claims.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien--

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) Scope of review.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of--

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) Termination on release from custody.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this

paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) Review of final decisions of military commissions.—

(A) In general.--Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) Grant of review.--Review under this paragraph—

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) Limitation on appeals.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien--

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) Scope of review.--The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of--

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) Respondent.--The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

(f) Construction.--Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.

(g) United States Defined.--For purposes of this section, the term "United States", when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba.

(h) Effective Date.--

(1) In general.--This section shall take effect on the date of the enactment of this Act.

(2) Review of combatant status tribunal and military commission decisions.--Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

SEC. 1006. TRAINING OF IRAQI FORCES REGARDING TREATMENT OF DETAINEES.

(a) Required Policies.--

(1) In general.--The Secretary of Defense shall ensure that policies are prescribed regarding procedures for military and civilian personnel of the Department of Defense and contractor personnel of the Department of Defense in Iraq that are intended to ensure that members of the Armed Forces, and all persons acting on behalf of the Armed Forces or within facilities of the Armed Forces, ensure that all personnel of Iraqi military forces who are trained by Department of Defense personnel and contractor personnel of the Department of Defense receive training regarding the international obligations and laws applicable to the humane detention of detainees, including protections afforded under the Geneva Conventions and the Convention Against Torture.

(2) Acknowledgment of training.--The Secretary shall ensure that, for all personnel of the Iraqi Security Forces who are provided training referred to in paragraph (1), there is documented acknowledgment of such training having been provided.

(3) Deadline for policies to be prescribed.--The policies required by paragraph (1) shall be prescribed not later than 180 days after the date of the enactment of this Act.

(b) Army Field Manual.--

(1) Translation.--The Secretary of Defense shall provide for the United States Army Field Manual on Intelligence Interrogation to be translated into arabic and any other language the Secretary determines appropriate for use by members of the Iraqi military forces.

(2) Distribution.--The Secretary of Defense shall provide for such manual, as translated, to be provided to each unit of the Iraqi military forces trained by Department of Defense personnel or contractor personnel of the Department of Defense.

(c) Transmittal of Regulations.--Not less than 30 days after the date on which regulations, policies, and orders are first prescribed under subsection (a), the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives copies of such regulations, policies, or orders, together with a report on steps taken to the date of the report to implement this section.

(d) Annual Report.--Not less than one year after the date of the enactment of this Act, and annually thereafter, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report on the implementation of this section.

²⁷³ President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006," 30 December 2005, available from <http://www.whitehouse.gov/news/releases/2005/12/print/20051230-8.html>; accessed 25 March 2007. The text of the signing statement reads as follows:

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks. Further, in light of the principles enunciated by the Supreme Court of the United States in 2001 in *Alexander v. Sandoval*, and noting that the text and structure of Title X do not create a private right of action to enforce Title X, the executive branch shall construe Title X not to create a private right of action. Finally, given the decision of the Congress reflected in subsections 1005(e) and 1005(h) that the amendments made to section 2241 of title 28, United States Code, shall apply to past, present, and future actions, including applications for writs of habeas corpus, described in that section, and noting that section 1005 does not confer any constitutional right upon an alien detained abroad as an enemy combatant, the executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005.

²⁷⁴ Ibid.

²⁷⁵ Office of the Vice President, Vice President's Remarks to the Traveling Press, Air Force Two, en route to Muscat, Oman, 20 December 2005, available from <http://www.whitehouse.gov/news/releases/2005/12/20051220-9.html>; accessed 22 March 2007.

²⁷⁶ United States Constitution, Article I, § 7.

²⁷⁷ Ibid., Article II, § 3.

²⁷⁸ See, e.g., Bush Signing Statement for the DTA, *supra*, note 284.

²⁷⁹ American Bar Association, “Task Force on Presidential Signing Statements and the Separation of Powers Doctrine,” August 2006, 3, available from http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf; accessed 30 March 2007

²⁸⁰ Ibid., 27.

²⁸¹ Ibid., 1.

²⁸² Michael John Garcia, “Interrogation of Detainees: Overview of the McCain Amendment,” CRS Report for Congress, 25 September 2006, 2 (citing at footnote 3 Department of the Army Field Manual 34-52 (1992)).

²⁸³ Ibid. (citing at footnote 3 the revised Army FM 2-22.3 (2006)). The report points out that nothing in the DTA prevents DoD from revising FM 2-22.3 in the future.

²⁸⁴ Military Commission Charge Sheet, *U.S. v. Hamdan*, available from <http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf>; accessed 30 March 2007.

²⁸⁵ The Supreme Court of the United States of America, *Hamdan v. Rumsfeld, Secretary of Defense, et. al.*, Case no. 05-184, 29 June 2006, 1-2, available from <http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>; accessed 30 March 2007.

²⁸⁶ Ibid., 1.

²⁸⁷ Ibid., 2.

²⁸⁸ Ibid., 36-37, 48-49.

²⁸⁹ Ibid., 69, 72.

²⁹⁰ Ibid., 29-30.

²⁹¹ Charles Lane, “High Court Rejects Detainee Tribunals,” *The Washington Post*, 30 June 2006, A01, available from <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/29/AR2006062900928.html>; accessed 30 March 2007; see also Lionel Beehner, “The Impact of Hamdan v. Rumsfeld,” Council on Foreign Relations, 15 September 2006, available from <http://www.cfr.org/publication/11025/>; accessed 30 March 2007.

²⁹² Beehner.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ President George W. Bush, "President Discusses Creation of Military Commissions to Try Suspected Terrorists," *The White House*, 6 September 2006, available from <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>; accessed 30 March 2007.

²⁹⁶ *Military Commissions Act of 2006*, Public Law 109-366 (17 October 2006).

²⁹⁷ President Bush Signs Military Commissions Act of 2006, *The White House*, 17 October 2006, available from <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html>; accessed 25 March 2007.

²⁹⁸ *Ibid.*

²⁹⁹ MCA, § 948r.

³⁰⁰ MCA, § 949a.

³⁰¹ *Ibid.*

³⁰² *Ibid.*, § 950v.

³⁰³ *Ibid.*, Section 8.

³⁰⁴ *Ibid.*, Section 6.

³⁰⁵ *Ibid.*, Section 7.

³⁰⁶ Laura Parker, "Guantanamo prisoners lose a round: No right of access to the federal courts appeals panel rules," *USA Today*, 21 February 2007, 3A.

³⁰⁷ Carol D. Leonnig, "Judges Rule Against the U.S. On Detained Combatant," *The Washington Post*, 12 June 2007, A01.

³⁰⁸ Mike Rosen-Molina, "Hicks pleads guilty to supporting terrorism after two lawyers disqualified," *Jurist*, 26 March 2007, available from <http://jurist.law.pitt.edu/paperchase/2007/03/hicks-pleads-guilty-to-supporting.php>; accessed 30 March 2007.

³⁰⁹ William Glaberson, "Military Judges Dismiss Charges for 2 Detainees: Setback for New System: All Potential Guantanamo War Crimes Cases Are Said to Have Flaw," *The New York Times*, 5 June 2007, A01, A21

³¹⁰ Kathleen Dunnigan, "The Military Commissions Act of 2006: 'Play It Again [Uncle] Sam'," *Jurist*, 12 December 2006, available from <http://jurist.law.pitt.edu/forumy/2006/12/military-commissions-act-of-2006-play.php>; accessed 30 March 2007; see also Geoffrey S. Corn and Victor Hansen, "Military Commissions: War Crimes Court or Tribunals of Convenience?," *Jurist*, 21 February 2007, available from <http://jurist.law.pitt.edu/forumy/2007/02/military-commissions-war-crimes-courts.php>; accessed 30 March 2007.

³¹¹ Robert Barnes, "Justices to Weigh Detainee Rights: In Reversal, Court Agrees to Hear Case," *The Washington Post*, 30 June 2007, A01.

³¹² The National Security Council (NSC) was established by the National Security Act of 1947 (P.L. 235 - 61 Stat. 496; 50 U.S.C. Sec. 402), amended by the National Security Act Amendments of 1949 (63 Stat. 579; 50 U.S.C. Sec. 401, *et seq.*). The implementing directive for the NSC is National Security Policy Directive (NSPD)-1, subject: "Organization of the National Security Council System," 13 February 2001 (approved for release 1 March 2001), available from <http://www.fas.org/irp/offdocs/nspd/nspd-1.htm>; accessed 22 March 2007.

³¹³ National Public Radio, "Ex-Powell Staffer Discusses Cheney Role in Iraq War," 13 November 2005, available from <http://www.npr.org/templates/story/story.php?storyId=4987598>; accessed 17 March 2007; see also CNN.com, "Powell aide: Torture 'guidance' from VP: Former staff chief says Cheney's 'flexibility' helped lead to abuse," 20 November 2005, available from <http://www.cnn.com/2005/US/11/20/torture/>; accessed 17 March 2007; Dana Priest and Robin Wright, "Cheney Fights for Detainee Policy: As Pressure Mounts to Limit Handling Of Terror Suspects, He Holds Hard Line," *The Washington Post*, 7 November 2005, A01, available from http://www.washingtonpost.com/wp-dyn/content/article/2005/11/06/AR2005110601281_pf.html; accessed 17 March 2007.

³¹⁴ Barton Gellman and Jo Becker, "Pushing the Envelope on Presidential Power," *washingtonpost.com*, 25 June 2007, available from http://blog.washingtonpost.com/cheney/chapters/pushing_the_envelope_on_presi/index.html; accessed 26 June 2007. The article suggests that Vice President Cheney played a central and sometimes dominant role in the development of United States' policy concerning the treatment of detainees captured during the Global War on Terror.

³¹⁵ Thomas L. Friedman, *The World is Flat: A Brief History of the 21st Century* (New York, New York: Farrar, Straus and Giroux, 2005).

³¹⁶ "Iraq Prisoner Abuse Draws International Media Outrage," *Worldpress.org*, 12 May 2004, available from <http://www.worldpress.org/mideast/1861.cfm#down>; accessed 30 March 2007 (Listing a series of articles immediately following the public release of the Abu Ghraib from print media in major cities in various countries, to include the United Kingdom, Egypt, France, Spain, Indonesia, Germany, India, Croatia, Turkey, Russia, Saudi Arabia, Australia, Lebanon, and South Africa).

³¹⁷ Gabriel Weiman, "www.terror.net: How Modern Terrorism Uses the Internet," United States Institute of Peace, March 2004, available from <http://www.usip.org/pubs/specialreports/sr116.html>; accessed 29 March 2007.

³¹⁸ United States Institute of Peace, "Arab Media: Tools of the Governments: Tools for the People?" released online in August 2005, available from <http://www.usip.org/virtualdiplomacy/publications/reports/18.html>; accessed 29 March 2007. The article addresses the proliferation of inexpensive satellite television with the availability of numerous channels, such as al-Jazeera, in the Middle East.

³¹⁹ Margaret Belknap, "The CNN Effect: Strategic Enabler or Operational Risk," *Parameters* (August 2002) 100.

³²⁰ An example of this phenomenon is a posting of a video on "YouTube" of an injured dog being taunted by U.S. soldiers, prompting a written "To All Concerned" response by the Chief of Army Public Affairs, Brigadier General Tony Cucolo, "Army Response to Abuse Video," 2

February 2007, available from http://www.defenselink.mil/pubs/word_docs/ArmyResponse.doc; accessed 13 August 2007.

³²¹ Transcript, "Hardball with Chris Matthews: Karl Rove Q & A," *MSNBC.com*, 21 June 2005, available from <http://www.msnbc.msn.com/id/8306049/page/2/>; accessed 28 March 2007.

³²² Mark Bowden, "The Lessons of Abu Ghraib," *The Atlantic Monthly*, July/August 2004, available from <http://www.theatlantic.com/doc/prem/200407/bowden>; accessed 9 March 2007.

³²³ Friedman, 488.

³²⁴ *Ibid.*, 489-490.

³²⁵ The term "vector" in this instance refers to an [organism](#) that does not cause [disease](#) itself, but which spreads [infection](#) by conveying disease from one [host](#) to another. Perhaps the best example is a [mosquito](#) serving as a vector for the spread of the disease of [malaria](#).

³²⁶ Kenneth Baker, "Abu Ghraib's horrific images drove artist Fernando Botero into action," *San Francisco Chronicle*, 29 January 2007, available from <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/01/29/DDGF2NPRO91.DTL>; accessed 9 March 2007.

³²⁷ Michael Winterbottom, dir., *The Road to Guantanamo*, 95 min., Roadside Attractions, DVD, available from <http://www.roadtoguantanamo.com>; accessed 30 March 2007.

³²⁸ Matt Hevezi, "Film Review: The Road to Guantanamo," *ArmyTimes*, 23 June 2006, available from <http://www.armytimes.com/story.php?f=1-213098-1891822.php>; accessed 30 March 2007. The reviewer goes on to add: "Documentaries are inherently designed to present a certain point of view, although some do so more forcefully than others. This film is told from the intensely singular perspective of the men who say they endured the harsh imprisonment and accusations of involvement with terrorist groups as it traces their path from Pakistan to the infamous prison camp at Naval Station Guantanamo Bay, Cuba."

³²⁹ Ali Jaafar, "'Guantanamo' OK for Iran," *Variety International*, 30 April 2006, available from <http://www.variety.com/article/VR1117942242.html?categoryid=1019&cs=1&query=Iran+The+Road+to+Guantanamo>; accessed 30 March 2007.

³³⁰ *Ibid.*

³³¹ Gillo Pontecorvo, dir., *Battle of Algiers*, 121 mins., Casbah Film, 1966, DVD, available from http://www.rialtopictures.com/eyes_xtras/battle_times.html; accessed 30 March 2007.

³³² Sedar Akar and Sadullah Senturk, dirs., *Valley of the Wolves-Iraq*, 122 min., Pan Film, 2006. The official website for the movie is available from <http://www.valleyofthewolvesiraq.com/web/indexb.htm>; accessed 30 March 2007.

³³³ Ed Meza, "Anti-Yank Fare all the rage," *Variety International*, 26 February 2006, available from <http://www.variety.com/article/VR1117938845.html?categoryid=19&cs=1&query=Valley+of+the+Wolves+Iraq>; accessed 30 March 2007.

³³⁴ Bureau of International Information Programs, U.S. Department of State, "U.S. is NOT Harvesting Organs from Iraqis," *USINFO.STATE.GOV*, 23 December 2004, available from <http://usinfo.state.gov/xarchives/display.html?p=pubs-english&y=2005&m=December&x=20050114132642atlahtnevel0.6107904>; accessed 30 March 2006.

³³⁵ [Ben Murray](#), "Troops are urged to avoid theaters with Turkish film, Army says 'Kurtlar Vadisi Irak' depicts GIs as indiscriminate killers," *Stars and Stripes* (European Edition), 7 February 2006, available from <http://www.estripes.com/article.asp?section=104&article=34008&archive=true>; accessed 30 March 2007.

³³⁶ [Jeff Schogol](#), "U.S. officials shrug off fictional Turkish movie about Iraq," *Stars and Stripes*, (European Edition), 23 February 2006, available from <http://www.estripes.com/article.asp?section=104&article=34392&archive=true>; accessed 30 March 2007. General Pace, Chairman of the Joint Chiefs of Staff, indicated he had no plans to protest the movie. Pace commented that "It clearly does not have any basis in fact, and there is no reason for us to comment on fiction." When asked about the movie, Secretary of Defense Rumsfeld stated that Turkey is a foreign country, and referred the matter to the State Department.

³³⁷ "German Movie Chain Pulls Anti-American Flick," *StudioBriefing*, [24 February 2006](#), available from <http://www.imdb.com/title/tt0493264/news>; accessed 30 March 2007.

³³⁸ Richard Leiby, "Down a Dark Road: Movie Uses Afghan's Death to Ask Tough Questions About U.S. and Torture," *The Washington Post*, 27 April 2007, C1.

³³⁹ Ibid.

³⁴⁰ Ibid.

³⁴¹ Rory Kennedy, dir., *Ghosts of Abu Ghraib*, Home Box Office, 2007, DVD. A synopsis of *Ghosts* may be found at <http://www.hbo.com/docs/programs/ghostsofabughraib/synopsis.html>; accessed 15 June 2007.

³⁴² Leiby, Note 353, *supra*.

³⁴³ Schlesinger Report, 59-60. The Report indicates that "[t]he decision to use Abu Ghraib as the primary operational level detention facility happened by default." The Report adds that "Abu Ghraib was also a questionable facility from a standpoint of conducting interrogations." The Report further indicates that "[t]he choice of Abu Ghraib as the facility for detention operations placed a strictly detention mission-driven unit – one designed to operate in a rear area – smack in the middle of a combat environment." Operationally, Abu Ghraib's location near Baghdad made it subject to constant mortar attacks that caused Coalition and prisoner casualties. In addition to suffering the casualties, the U.S. military was subject to criticism for failing to protect captured personnel from these attacks. Soon after OIF commenced, the White House issued a press release that publicized a list of summary executions that had occurred at Abu Ghraib Prison during Saddam's reign. Office of the Press Secretary, "Life Under Saddam Hussein: Past Repression and Atrocities by Saddam Hussein's Regime," 4 April 2003, available from <http://www.whitehouse.gov/news/releases/2003/04/20030404-1.html>, accessed 15

February 2007. The Press Release reported that Saddam Hussein's regime conducted "frequent summary executions" at various prison locations in Iraq, including 4,000 prisoners at Abu Ghraib prison in 1984; 122 political prisoners at Abu Ghraib prison in February/March 2000; and 23 political prisoners at Abu Ghraib prison in October 2001. In addition, from a review of recent the Country Reports on Human Rights Practices on Iraq, the United States was well aware of the miserable conditions and severe human rights abuses occurring at certain Iraqi prisons, most notably, Abu Ghraib. Country Reports on Human Rights Practices (2001), Released by the Bureau of Democracy, Human Rights, and Labor, 4 March 2002, available from <http://www.state.gov/g/drl/rls/hrrpt/2001/nea/8257.htm>; accessed 15 March 2007 ("Certain prisons are infamous for routine mistreatment of detainees and prisoners. Abu Ghurayb, Baladiat, Makasib, Rashidiya, Radwaniyah, and other prisons reportedly have torture chambers."); Country Reports on Human Rights Practices (2002), released by the Bureau of Democracy, Human Rights, and Labor, 31 March 2003, available from <http://www.state.gov/g/drl/rls/hrrpt/2002/18277.htm>; accessed 15 March 2007 ("Certain prisons were infamous for routine mistreatment of detainees and prisoners. Abu Ghurayb, Baladiat, Makasib, Rashidiya, Radwaniyah, and other prisons reportedly had torture chambers. Hundreds of Fayli (Shi'a) Kurds and other citizens of Iranian origin, who had disappeared in the early 1980s during the Iran-Iraq war, reportedly were being held incommunicado at the Abu Ghurayb prison. In the past, the regime had not permitted visits by human rights observers, but did allow the Special Rapporteur to inspect briefly several prisons during his February visit. The Special Rapporteur observed that sections of the Abu Ghurayb facility that he visited kept prisoners in 'conditions that were almost appalling.' The regime claimed that prisons were open to inspections from the ICRC in accordance with standard modalities, but the ICRC had stated that it had only been given intermittent access to facilities such as Abu Ghurayb prison, and that access was only to well-known, better-kept facilities for foreign nationals."); Country Reports on Human Rights Practices for Iraq (2003), released by the Bureau of Democracy, Human Rights, and Labor, 25 February 2004, available from <http://www.state.gov/g/drl/rls/hrrpt/2003/27928.htm>; accessed 15 March 2007 ("The regime did not permit international monitoring of prisons; however, in 2002 the Special Rapporteur visited prisons and noted that the Abu Ghurayb prison's conditions 'were appalling.'").

³⁴⁴ President George W. Bush, "Fact Sheet: The Transition to Iraqi Self-Government," 24 May 2004, available from <http://www.whitehouse.gov/news/releases/2004/05/20040524-4.html>; accessed 4 March 2007. In this message, the President announced that a key element in rebuilding Iraq's infrastructure was to modernize the Iraqi prison system. Specifically regarding Abu Ghraib, the President declared:

Under Saddam Hussein, prisons like Abu Ghraib were symbols of death and torture. That same prison became a symbol of disgraceful conduct by a few American troops who dishonored our country and disregarded our values. America will fund the construction of a modern, maximum security prison. When that prison is completed, detainees at Abu Ghraib will be relocated. Then, with the approval of the Iraqi government, we will demolish the Abu Ghraib prison, as a fitting symbol of Iraq's new beginning.

³⁴⁵ Ibid.

³⁴⁶ Thom Shanker, "Abu Ghraib: School for Terrorists," *International Herald Tribune*, 15 February 2006, available from http://www.iht.com/bin/print_ipub.php?file=/articles/2006/02/14/news/detain.php; accessed 15 June 2007.

³⁴⁷ Walter Pincus, "U.S. Holds 18,000 Detainees in Iraq: Recent Security Crackdown in Baghdad Nets Another 1,000," *The Washington Post*, 15 April 2007, A24.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Scott Horton, "Training Tomorrow's Terrorists," *Harper's Magazine*, 8 April 2007, available from <http://www.harpers.org/archive/2007/04/horton-training-tomorrows-terrorists>; accessed 15 June 2007.

³⁵¹ Josh White and Robin Wright, "Guantanamo Splits Administration: Arguments Center on How to Handle Remaining Detainees," *The Washington Post*, 22 June 2007, available from http://www.washingtonpost.com/wp-dyn/content/article/2007/06/21/AR2007062102341_pf.html; accessed 22 June 2007.

³⁵² Thom Shanker and David E. Sanger, "New to Pentagon, Gates Argued for Closing Guantanamo Prison," *The New York Times*, 23 March 2007, A1.

³⁵³ Josh White, "Libyan Detainee, Fearing Torture, Fights Transfer Home," *The Washington Post*, 15 June 2007, A3.

³⁵⁴ See Note 60, *supra*.

³⁵⁵ Memorandum to the Counsel to the President and Assistant to the President for National Security Affairs from Colin L. Powell, United States Department of State, Washington, D.C., subject: Draft Decision Memorandum for the President on the Applicability of the Geneva Conventions to the Conflict in Afghanistan, 26 January 2002, reproduced in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 122-125.

³⁵⁶ Colonel Charles J. Dunlap, Jr., "Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflict," prepared for the Humanitarian Challenges in Military Intervention Conference, Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University, Washington, D.C., 29 November 2001, available from <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>; accessed 29 March 2007. There is no generally accepted definition of the term "lawfare." For purposes of this paper, however, the use of term "lawfare" refers to use of law as a non-kinetic means of warfare that provides either legal justification to support one's own military actions or legal counter-measures to an adversary's actions. An example of lawfare provided by Colonel Dunlap is the enemy's use of human shields to alter the targeting decisions of the United States military. Dunlap, 5. In his article, Colonel Dunlap acknowledges that the first use of the term "lawfare" appears in an article first published in 1975 titled "Whither Goeth the Law – Humanity or Barbarity." John Carlson and Neville Yeomans, "Whither Goeth the Law – Humanity or Barbarity," posted September 2000, available from <http://www.lacweb.org.au/whi.htm>; accessed 29 March 2007. The authors, commenting on the operation of courts of law, proclaim that "[t]he search for truth is replaced by the clarification of issues and refinement of combat. Lawfare replaces warfare and the duel is with words rather than swords." Dunlap, 25, Note 5.

Lawfare is also discussed as an alternative means of warfare in a 1999 book authored by two Chinese military officers. Qiao Liang and Wang Xiangsui, *Unrestricted Warfare* (Beijing: PLA Literature and Arts Publishing House, February 1999) 55. The authors refer to “international law warfare” as “seizing the earliest opportunity to set up regulations.” The concept has also crept into the strategic guidance of the United States. Although not using the precise term “lawfare,” the 2005 National Defense Strategy indicates that the United States “will be continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes and terrorism.” Donald H. Rumsfeld, Secretary of Defense, *The National Defense Strategy of the United States of America* (March 2005) 5.

³⁵⁷ Richard B. Bilder and Detlev F. Vagts, “Speaking Law to Power: Lawyers and Torture,” in *The Torture Debate in America*, ed. Karen J. Greenberg (New York, New York: Cambridge University Press, 2006), 151-155; see also David W. Bowker, “Unwise Counsel,” in *Torture Debate*, 183-201; Christopher Kutz, “The Lawyers Know Sin: Complicity in Torture,” in *Torture Debate*, 241-246.

³⁵⁸ Colonel Kelly D. Wheaton, “Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level,” *The Army Lawyer* (September 2006) 7-9, 15.

³⁵⁹ “Universal jurisdiction” refers to a controversial principle generally recognized in international law that allows any State to try individuals who have committed crimes that pose a threat to international community as a whole, such as piracy, genocide, crimes against humanity, and torture. Restatement of the Law Third, The Foreign Relations Law of the United States, Vol. 1, § 423.

³⁶⁰ Chandra Lekha Sriram, “The ‘Pinochet Precedent’: A Mixed Legacy for Human Rights,” *JURIST*, 11 December 2006, available from

<http://jurist.law.pitt.edu/forumy/2006/12/pinochet-precedent-mixed-legacy-for.php>; accessed 15 February 2007.

³⁶¹ Adam Zagorin, “Exclusive: Charges Sought Against Rumsfeld Over Prison Abuse,” *Time*, 10 November 2006, available from <http://www.time.com/time/nation/article/0,8599,1557842,00.html>; accessed 29 March 2007.

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ Ibid.

³⁶⁵ Ibid.

³⁶⁶ Associated Press, “Rumsfeld target of war crimes-related lawsuit,” *MSNBC*, 14 November 2006, available from <http://www.msnbc.msn.com/id/15720228/>; accessed 29 March 2007.

³⁶⁷ “Rumsfeld Under Fire; War Crimes Suit Filed Against Former Defense Secretary,” *Spiegel Online International*, 14 November 2006, available from <http://www.spiegel.de/international/0,1518,448320,00.html>; accessed 29 March 2007.

³⁶⁸ Ibid.

³⁶⁹ Warren Richey, "Suit by Iraqis and Afghans claims Rumsfeld ordered torture," *The Christian Science Monitor*, 8 December 2006, available from <http://www.csmonitor.com/2006/1208/p02s01-usju.html>; accessed 29 March 2007.

³⁷⁰ United States District Court for the District of Columbia, Memorandum Opinion, In Re: Iraq and Afghanistan Detainees Litigation," Misc. No. 06-0145 (TFH), 27 March 2007 (copy on file with author; electronic copy provided by U.S. Army Litigation Division).

³⁷¹ Ibid., 7-8.

³⁷² Ibid., 7.

³⁷³ Ibid., 8-9.

³⁷⁴ Ibid., 1.

³⁷⁵ Ibid., 11-35 and 39-54. The Court addressed the Plaintiff's Constitutional arguments at pp. 11-35 and their assertions concerning international law, including the Geneva Conventions, at pp. 39-54.

³⁷⁶ American Civil Liberties Media Release, "ACLU and Human Rights First Express Disappointment at Dismissal of Rumsfeld Torture Case," 27 March 2007, available from <http://www.aclu.org/safefree/detention/29209prs20070327.html>; accessed 29 March 2007.

³⁷⁷ *ACLU v. Dept. of Defense*, 339 F. Supp.2d 501, 502 (S.D.N.Y. Sept. 15, 2004); Opinion and Order, United States District Court for the Southern District of New York, 15 September 2004. The ACLU's FOIA request to DoD sought information concerning "(1) the treatment of Detainees; (2) the deaths of Detainees while in United States custody; and (3) the rendition of Detainees and other individuals to countries known to employ torture or illegal interrogation methods" after 11 September 2001.

³⁷⁸ District Court Judge's Opinion and Order, 29 September 2005, available from <http://www.nysd.uscourts.gov/courtweb/pdf/D02NYSC/05-05912.PDF>; accessed 22 March 2007.

³⁷⁹ David de Sola, "U.S. agrees to issue Abu Ghraib images: Defense Department withdraws appeal challenging ACLU request," *CNN.com*, 29 March 2006, available from <http://www.cnn.com/2006/US/03/28/abu.ghraib/index.html>; accessed 19 February 2007.

³⁸⁰ The ACLU's web address concerning its FOIA suit may be found at <http://aclu.org/torturefoia>; accessed 29 March 2007. For a typical ACLU release concerning a receipt of Department of Defense documents, see ACLU Media Release, "Newly Discovered Investigative Files Provide Further Evidence Soldiers Not Held Accountable for Abuse, 24 January 2005, available from <http://www.aclu.org/safefree/general/18831prs20050124.html>; accessed 29 March 2007. The sub-title of this particular release states: "Special Forces, including TF 6-26, Implicated in Numerous Incidents; Abuse Not Confined to Abu Ghraib."

³⁸¹ 2006 MCA, § 948r.

³⁸² Ibid.

³⁸³ Laura Parker, "Terror suspect's claim: Too traumatized for trial," *USA Today*, 14 February 2007, A1-A2.

³⁸⁴ Mike Rosen-Molina, "Hicks pleads guilty to supporting terrorism after two lawyers disqualified," *Jurist*, 26 March 2007, available from <http://jurist.law.pitt.edu/paperchase/2007/03/hicks-pleads-guilty-to-supporting.php>; accessed 30 March 2007.

³⁸⁵ The Harris Poll Number 61, "Doctors and Teachers Most Trusted Among 22 Occupations and Professions: Fewer Adults Trust the President to Tell the Truth," 8 August 2006, available from http://www.harrisinteractive.com/harris_poll/index.asp?PID=688; accessed 28 February 2007.

³⁸⁶ The Harris Poll Number 58, "Firefighters, Doctors and Nurses Top List as 'Most Prestigious Occupations,'" 26 July 2006, available from http://www.harrisinteractive.com/harris_poll/index.asp?PID=685; accessed 28 February 2007.

³⁸⁷ The Harris Poll, "Degree of Confidence in Major Institutions," 6-12 February 2007, available from <http://www.pollingreport.com/institut.htm>; accessed 7 March 2007. The most recent Harris Poll concerning confidence in the leaders of major institutions indicates that 46% of those individuals polled expressed a "great deal of confidence" in those individuals running the military. This is a significant drop since the first Harris Poll of this type after 11 September 2001, where 71% of the public expressed a great deal of confidence in the military. The percentage has steadily dropped through the years 2002 through 2007, with the largest single year drop occurring between the February 2004 poll and the February 2005 poll (a drop of 15%). Important to note is that the photographs depicting the abuse at Abu Ghraib were released to the public in April of 2004.

³⁸⁸ Ibid.

³⁸⁹ Thomas E. Ricks and Ann Scott Tyson, "Troops at Odds With Ethics Standards: Army Also Finds More Deployment Means More Mental Illness," *The Washington Post*, 5 May 2007, A01; see also Kimberly Johnson and Kelly Kennedy, "Almost half of surveyed troops say some torture OK: Officials concerned with their feelings on treatment of noncombatants," *Army Times*, 14 May 2007, 28.

³⁹⁰ Ibid.

³⁹¹ Jane Mayer, "Whatever It Takes: The politics of the man behind '24,'" *The New Yorker*, 19 February 2007, available from http://www.newyorker.com/reporting/2007/02/19/070219fa_fact_mayer?currentPage=1; accessed 12 August 2007; see also Tom Regan, "Does '24' encourage US interrogators to 'torture' detainees?", *csmonitor.com*, 12 February 2007, available from <http://www.csmonitor.com/2007/0212/p99s01-duts.html>; accessed 12 August 2007.

³⁹² Ibid.

³⁹³ Thomas Fuller and Brian Knowlton, "U.S. Is Seen Losing Its Moral Authority," *The International Herald Tribune*, 5 July 2004, available from http://www.ihf.com/articles/2004/07/05/moral_ed3_.php; accessed 24 March 2007.

³⁹⁴ President George W. Bush, *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, March 2006), 1,6.

³⁹⁵ President George W. Bush, National Strategy for Combating Terrorism (NSCT), 5 September 2006; available from <http://www.whitehouse.gov/nsc/nsct/2006/nsct2006.pdf>; accessed 27 March 2007.

³⁹⁶ *Ibid.*, 8.

³⁹⁷ *Ibid.*

³⁹⁸ Donald Rumsfeld, Secretary of Defense, Quadrennial Defense Review Report, 6 February 2006, 22, 91-92.

³⁹⁹ Gillo Pontecorvo, dir., *Battle of Algiers*, 121 mins., Casbah Film, 1966, DVD, available from http://www.rialtopictures.com/eyes_xtras/battle_times.html; accessed 30 March 2007.

⁴⁰⁰ David Ignatious, "Think Strategy, Not Numbers," *The Washington Post*, 26 August 2003, available from <http://www.washingtonpost.com/wp-dyn/articles/A45136-2003Aug25.html>; accessed 15 March 2007.

⁴⁰¹ See Department of Defense Directive 3115.09, "DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning," 3 November 2005, available from <http://www.dtic.mil/whs/directives/corres/pdf/311509p.pdf>; accessed 13 August 2007; see also Office of the Secretary of Defense, Memorandum, subject: "Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense," 7 July 2006, available from <http://www.defenselink.mil/pubs/pdfs/DepSecDef%20memo%20on%20common%20article%203.pdf>; accessed 13 August 2007 (Informing the various agencies and organizations of the Department of Defense of the Supreme Court decision of *Hamdan v. Rumsfeld* and requiring that all DoD personnel comply with Common Article 3 concerning their treatment of detainees. In order to highlight the standard, the memorandum includes a verbatim text of the entirety of Common Article 3); Department of Defense Directive 2310.01E, "The Department of Defense Detainee Program," 5 September 2006, available from http://www.defenselink.mil/pubs/pdfs/Detainee_Prgm_Dir_2310_9-5-06.pdf; accessed 13 August 2007 (The proponent for this Directive is the Undersecretary of Defense for Policy. It includes the full text of Common Article 3 at Enclosure 3 and details "minimum standards of treatment for all detainees in the control of DoD personnel."). From a review of this series of DoD issuances, it is readily evident the effect of the *Hamdan* decision on DoD regulatory guidance. DoDD 3115.09, "DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning," a pre-*Hamdan* publication, contains no direct reference to Common Article 3, while OSD's 7 July 2006 Memorandum and DoDD 2310.01E, "The Department of Defense Detainee Program," both post-*Hamdan* publications, contain verbatim recitations of Common Article 3.

⁴⁰² Schlesinger Report, 5. Indicating that of the substantiated allegations of detainee abuse reviewed, approximately one-third of those occurred at or near the point of capture.

⁴⁰³ President George W. Bush, Executive Order: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, 20 July 2007, available from <http://whitehouse.gov/news/releases/2007/07/print/20070720-4.html>; accessed 21 July 2007. The text of the Order is as follows:

By the authority vested in me as President and Commander in Chief of the Armed Forces by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force (Public Law 107 40), the Military Commissions Act of 2006 (Public Law 109 366), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. General Determinations.

(a) The United States is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces. Members of al Qaeda were responsible for the attacks on the United States of September 11, 2001, and for many other terrorist attacks, including against the United States, its personnel, and its allies throughout the world. These forces continue to fight the United States and its allies in Afghanistan, Iraq, and elsewhere, and they continue to plan additional acts of terror throughout the world. On February 7, 2002, I determined for the United States that members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war. I hereby reaffirm that determination.

(b) The Military Commissions Act defines certain prohibitions of Common Article 3 for United States law, and it reaffirms and reinforces the authority of the President to interpret the meaning and application of the Geneva Conventions.

Section 2. Definitions. As used in this order:

(a) "Common Article 3" means Article 3 of the Geneva Conventions.

(b) "Geneva Conventions" means:

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3114);

(ii) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516).

(c) "Cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

Section 3. Compliance of a Central Intelligence Agency Detention and Interrogation Program with Common Article 3.

(a) Pursuant to the authority of the President under the Constitution and the laws of the United States, including the Military Commissions Act of 2006, this order interprets the meaning and application of the text of Common Article 3 with respect to certain detentions and interrogations, and shall be treated as authoritative for all purposes as a matter of United States law, including satisfaction of the international obligations of the United States. I hereby determine that Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency as set forth in this section. The requirements set forth in this section shall be applied with respect to detainees in such program without adverse distinction as to their race, color, religion or faith, sex, birth, or wealth.

(b) I hereby determine that a program of detention and interrogation approved by the Director of the Central Intelligence Agency fully complies with the obligations of the United States under Common Article 3, provided that:

(i) the conditions of confinement and interrogation practices of the program do not include:

(A) torture, as defined in section 2340 of title 18, United States Code;

(B) any of the acts prohibited by section 2441(d) of title 18, United States Code, including murder, torture, cruel or inhuman treatment, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, taking of hostages, or performing of biological experiments;

(C) other acts of violence serious enough to be considered comparable to murder, torture, mutilation, and cruel or inhuman treatment, as defined in section 2441(d) of title 18, United States Code;

(D) any other acts of cruel, inhuman, or degrading treatment or punishment prohibited by the Military Commissions Act (subsection 6(c) of Public Law 109 366) and the Detainee Treatment Act of 2005 (section 1003 of Public Law 109 148 and section 1403 of Public Law 109 163);

(E) willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield; or

(F) acts intended to denigrate the religion, religious practices, or religious objects of the individual;

(ii) the conditions of confinement and interrogation practices are to be used with an alien detainee who is determined by the Director of the Central Intelligence Agency:

(A) to be a member or part of or supporting al Qaeda, the Taliban, or associated organizations; and

(B) likely to be in possession of information that:

(1) could assist in detecting, mitigating, or preventing terrorist attacks, such as attacks within the United States or against its Armed Forces or other personnel, citizens, or facilities, or against allies or other countries cooperating in the war on terror with the United States, or their armed forces or other personnel, citizens, or facilities; or

(2) could assist in locating the senior leadership of al Qaeda, the Taliban, or associated forces;

(iii) the interrogation practices are determined by the Director of the Central Intelligence Agency, based upon professional advice, to be safe for use with each detainee with whom they are used; and

(iv) detainees in the program receive the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care.

(c) The Director of the Central Intelligence Agency shall issue written policies to govern the program, including guidelines for Central Intelligence Agency personnel that implement paragraphs (i)(C), (E), and (F) of subsection 3(b) of this order, and including requirements to ensure:

(i) safe and professional operation of the program;

(ii) the development of an approved plan of interrogation tailored for each detainee in the program to be interrogated, consistent with subsection 3(b)(iv) of this order;

(iii) appropriate training for interrogators and all personnel operating the program;

(iv) effective monitoring of the program, including with respect to medical matters, to ensure the safety of those in the program; and
(v) compliance with applicable law and this order.

Sec. 4. Assignment of Function.

With respect to the program addressed in this order, the function of the President under section 6(c)(3) of the Military Commissions Act of 2006 is assigned to the Director of National Intelligence.

Sec. 5. General Provisions.

(a) Subject to subsection (b) of this section, this order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(b) Nothing in this order shall be construed to prevent or limit reliance upon this order in a civil, criminal, or administrative proceeding, or otherwise, by the Central Intelligence Agency or by any individual acting on behalf of the Central Intelligence Agency in connection with the program addressed in this order. GEORGE W. BUSH, THE WHITE HOUSE, July 20, 2007.

⁴⁰⁴ Karen DeYoung, "Bush Approves New CIA Methods: Interrogations of Detainees to Resume," *The Washington Post*, 21 July 2007, A01.

⁴⁰⁵ For example, the Order addresses the Abu Ghraib-like misconduct by prohibiting acts such as "forcing the individual to perform sexual acts or to pose sexually." Section 3(b)(i)(E). In addition, the Order addresses the alleged Koran desecration occurring at GTMO by banning "acts intended to denigrate the religion, religious practices, or religious objects of the individual." Section 3(b)(i)(F).

⁴⁰⁶ David Cole, "Bush's torture ban is full of loopholes," *salon.com*, 23 July 2007, available from http://www.salon.com/opinion/feature/2007/07/23/torture/index_np.html; accessed 6 August 2007.

⁴⁰⁷ Order, Section 3(a).

⁴⁰⁸ Order, Section 2(c).

⁴⁰⁹ *Rochin v. California*, 342 U.S. 165 (1952), available from <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=342&page=165>; accessed 6 August 2007. In a unanimous decision, the U.S. Supreme Court in *Rochin* found that it was unconstitutional (in violation of the Due Process Clause of the 14th Amendment) for police to forcibly pump the stomach of a criminal suspect and then use at trial evidence of a crime obtained from that medical procedure. *Ibid*.

⁴¹⁰ Phillip Carter, "The Torture Two-Step: Bush's New Torture Order and Its Loopholes," *Slate*, 23 July 2007, available from <http://slate.com/id/2170983/>; accessed 6 August 2007.

⁴¹¹ *Rochin*, 172, the Court states: "The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, see *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355, 28 S.Ct. 529,

531, 52 L.Ed. 828, on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.”

⁴¹² “Bush bars torture of CIA detainees, but what’s allowed stays secret,” *CNN.com*, 20 July 2007, available from <http://www.cnn.com/2007/POLITICS/07/20/bush.terrorism.ap/index.html>; accessed 6 August 2007.

⁴¹³ Lessons From History, *Human Rights Watch* (citing at note 2, Florence Beauge, “La torture faisait partie d’une certaine ambiance. On aurait pu faire les choses différemment,” interview with Jacques Massu, *Le Monde*, 22 June 2000) available from <http://www.hrw.org/backgrounder/eca/uk1106/2.htm>; accessed 30 March 2007.

⁴¹⁴ *Ibid.*

⁴¹⁵ Charles Krauthammer, “The Truth about Torture: It’s time to be honest about doing terrible things,” *The Weekly Standard*, 5 December 2005, available from http://www.weeklystandard.com/Utilities/printer_preview.asp?idArticle=6400&R=C80E3672C; accessed 17 February 2007.

⁴¹⁶ David Luban, “Torture, American Style: This Debate Comes Down to Words vs. Deeds,” *The Washington Post*, 27 November 2005, available from http://www.washingtonpost.com/wp-dyn/content/article/2005/11/25/AR2005112501552_pf.html; accessed 17 February 2007; see also David Luban, “Liberalism, Torture, and the Ticking Time Bomb,” reprinted in *The Torture Debate in America*, edited by Karen J. Greenberg (Cambridge University Press, New York, New York 2006) 35-83.

⁴¹⁷ David Butler, “The Power of TV Torture,” *The Associated Press, Reading Eagle*, 18 February 2007, E8.

