Looking Forward, Not Backward:
Refining American Interrogation Law

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Introduction

The worldwide scandal spurred by the abuse of prisoners in Abu Ghraib, Guantánamo, Afghanistan and secret CIA prisons during the Bush Administration has been a stain on America's honor and a catastrophe for our national image. Understandably eager to save innocent lives by breaking the resistance of a few Al Qaeda leaders, Bush and his aides went way overboard. Instead of crafting special rules to allow for exceptionally tough interrogations of those few leaders and maintaining strict limits to ensure that those interrogations stopped short of torture, the Bush team chose to gut the laws, rules and customs restraining coercive interrogations. They did this with a public bravado and an ostentatious disregard for international law that both scandalized world opinion and sent dangerous signals down through the ranks. These signals contributed to lawlessness and to confusion about what the rules were supposed to be. They helped open the floodgates both to CIA excesses widely seen as torture and to brutal treatment by the military of hundreds of small-fry and mistakenly-arrested innocents in Iraq and Afghanistan and of an unknown number of prisoners at Guantánamo. All this inspired widespread international and domestic revulsion and gravely undermined America's political and moral standing and ability to work with some allied governments.

The policies that led to this scandal were long ago largely abandoned by the Bush Administration itself. Years before President Obama took power, the former president's lawyers stopped claiming for Bush the power in effect to nullify the federal law that makes torture a crime. While the administration did not concede that highly coercive methods including waterboarding, an infamous form of simulated drowning, are banned under current law, the CIA had discontinued that method after using it to help break three Al Qaeda figures in 2002 and 2003. And Congress adopted new restrictions on interrogation in the Detainee Treatment Act in 2005 and in the Military Commissions Act of 2006. The military, with sharp prods from Congress and the Supreme Court, got out of the coercive interrogation business entirely in 2006.

But Congress, the media, and other critics have continued to focus so intensely on the sins of the past, particularly in light of President Obama's release of the prior administration's formal legal opinions on coercive interrogation, as to neglect serious analysis of what is at this stage a far more important question: What rules should govern future interrogations? In particular, what should our government do the next time it captures known terrorist leaders who likely possess information that could save lives yet who are fiercely determined not to divulge that information? Should the law prohibit CIA interrogators from using any coercion at all, as the Democratic-led Congress voted to do in 2008, and thereby reclaim some international good will by disavowing what may prove an important safeguard against terrorist mass murders? If not, then exactly how much coercion should Congress allow, using what interrogation methods, on what kinds of prisoners, and with what high-level approvals and congressional oversight?

The new administration has so far offered answers to these questions that are at once bold and tentative. They are bold in the sense that they represent a virtually complete repudiation of what remained of the Bush Administration's policies. The prior administration still permitted the CIA to hold detainees in secret sites away from the

prying eyes of the International Committee of the Red Cross and subject them to interrogation tactics not authorized by the military and—in some cases—in violation of, or at least in grave tension with, extant law. The Obama Administration, by contrast, has revoked the CIA's standing detention authority and required that it comply with military interrogation policies, including an instruction not to "threaten or coerce" detainees. It has required ICRC access for all detainees. Whereas Bush spoke proudly and publicly of the "tough" interrogations he authorized, Obama emphasized in his inaugural address that "we reject as false the choice between our safety and our ideals" and stressed in his first address to Congress that "living our values doesn't make us weaker, it makes us safer and it makes us stronger. And that is why I can stand here tonight and say without exception or equivocation that the United States of America does not torture."[1] He also stressed in a press conference this April that he did not regard coercive interrogation as having netted the United States intelligence benefits. "I put an end to these practices," he said. "I am absolutely convinced that it was the right thing to do, not because there might not have been information that was yielded by these various detainees who were subjected to this treatment, but because we could have gotten this information in other ways, in ways that were consistent with our values, in ways that were consistent with who we are."[2]

On the other hand, Obama's new policies are tentative both in the sense that they are non-statutory—accomplished through an executive order, not changes in the law itself—and in the sense that they may prove temporary. While the executive order creates a hard-line anti-coercion default policy for now, it also establishes a task force to study whether the CIA needs more flexibility in interrogation rules for the longer term. And Obama is free secretly to make exceptions to his order if ever a crisis arises in which he, like Bush, may consider coercion necessary.

This essay deals fundamentally with the prospective question of how to amend American interrogation law to balance the need to avoid Bush-like excesses against the need to get intelligence from captured terrorists. It begins by examining some of the deceptions and evasions that frustrate candid discussion of coercive interrogation and torture. It then reviews the post-September 11 evolution of Bush administration policies on interrogation, the experiences of the CIA and the military, and the lessons to be learned from those experiences. It focuses, in particular, on two questions: Has coercive interrogation saved lives that could not have been saved through conventional questioning, either in the post-September 11 context or earlier in history? And is it inevitable that coercive methods, once allowed, will spin out of control? It then turns to a discussion of why, in our judgment, it is essential for Congress and the next president to craft decent, effective, democratically legitimate, internationally respectable interrogation laws for the future; of what those rules should forbid and authorize; and of how to handle exceptionally exigent circumstances that may call for violating the usual rules.

There is no one best legal regime. Each possible approach to these questions has real costs. But America should be able to improve on the legacy of Bush. It should also be able to improve on the approach of human rights groups such as the American Civil Liberties Union, Amnesty International, and Human Rights Watch—and of Congress and the Obama Administration to date. Congress has moved from what-me-worry passivity

about coercive practices, to passing in December 2005 a law imposing virtuous-sounding but vague restrictions on interrogators without clear guidance, to voting in 2008 for far more stringent restrictions (a bill which Bush vetoed) without serious discussion of the costs and benefits of any of these approaches. And while the Obama Administration has not embraced such legislation, the executive order the new president signed does effectively the same thing.

We, by contrast, favor a regime characterized by relatively stringent baseline rules but with flexibility built in for the most wrenching, highest-stakes cases. Without a firmer sense than the public record offers of the effectiveness of both mildly- and highly-coercive interrogation techniques, any responsible policy proposal will necessarily be somewhat tentative. And our proposal could shift in a more or less restrictive direction in response to changed understanding of what "works" in interrogation. That said, in our view, it is essential that American interrogation policy be anchored in law. And at least as the record currently stands, that law should have the following contours:

- The military should continue to ban all coercive interrogation, and the CIA should avoid it except in extraordinary circumstances, with vigorous congressional oversight to ensure compliance.
- The CIA should retain the option of using mildly coercive methods such as threats, isolation, and disrupting sleep patterns—for carefully limited periods of time—on high-value prisoners who defy standard interrogation methods.
- Highly coercive interrogation that falls short of torture should be off limits even for the CIA, with an important exception: Congress should reserve to the president and the attorney general the power to authorize the CIA to use highly coercive methods such as sleep deprivation and forced standing on a very small number[3] of high-value prisoners if and only if the president and attorney general comply with detailed procedures to ensure restraint and accountability.
- Torture should remain a crime in all circumstances, and the definition of torture should be tightened to reflect a more commonsense understanding of morally unacceptable coercion. If an emergency so dire should arise that the president or a subordinate feels compelled to cross (or arguably cross) the line into authorizing illegal torture, his only option should be to violate (or arguably violate) the law and chance the consequences.

Deceptions and Evasions

It's not easy to have an honest conversation about this subject. The main reason is that many of us are so conflicted, in part as a matter of morality and in part because we know very little about how likely it is that coercion, up to and including torture, could elicit otherwise unobtainable, potentially life-saving information.

The idea of torturing or brutalizing any fellow human being fills civilized people with visceral horror—even more horror, for many of us, than the idea of dropping bombs from on high that will bring torturous, agonizing deaths to countless innocents. Torture is condemned by the moral codes of all civilized societies. It degrades and can do severe

psychological damage to the torturers as well as those tortured. The natural human impulse is to say, "never." But many of us have also heard of, or can imagine, dire circumstances involving so urgent a need to extract life-saving information from bad people that we might say "in this case, anything goes." Indeed, when Americans were asked in an October 2005 Pew poll about whether "the use of torture against suspected terrorists in order to gain important information" could be justified, only 27 percent said "never."[4] And in an April 2009 CNN/Opinion Research Corporation poll of 2,019 Americans—at a time of vast and sometimes blood-curdling publicity about harsh interrogations by the Bush Administration—50 percent approved the Bush approach, with 46 percent disapproving, even though 60 percent said some of the Bush procedures were a "form of torture."[5] Moral absolutes tend to founder in the turbulent seas of real life. Many of us therefore try to have it both ways by resorting to various deceptions, including self-deceptions and evasions.

President Bush's deceptions were especially large. He insisted not only that "we do not torture" but also that his policies treated all prisoners "humanely,"[6] even as his top aides with his knowledge secretly approved such clearly inhumane, highly coercive interrogation methods as waterboarding to break suspected Al Qaeda operatives.[7] Vice President Cheney trivialized waterboarding, versions of which were known at least since the Spanish Inquisition as an agonizing and terrifying ordeal, as a mere "dunk in the water."[8]

Human rights activists and many in the media and elsewhere resort to various deceptions and evasions of their own to depict as virtually cost-free their position that American forces should never use coercive interrogation.[9] Many absolutists seek to preempt candid, fact-based analysis of costs and benefits by glibly declaring that even apart from moral scruples, coercive interrogation is never—or almost never—the most effective way to obtain life-saving information. Many label as "torture" even interrogation methods that inflict only mild discomfort, not severe pain, on high-level terrorists against whom the government has a mountain of evidence. Many who accuse Bush and his top aides of war crimes also gloss over the difficulty of the choices that they faced, while misleadingly pretending that highly coercive interrogations are virtually unprecedented in U.S. history and that they have long been clearly illegal under both domestic and international law.

Congress has also been less than forthright. Its leaders and members raised no serious complaints about coercive interrogation for years after September 11, despite CIA briefings of leading figures in both parties. When Senator John McCain and others then pushed through legislation in December 2005 banning the CIA from using "cruel, inhuman and degrading treatment" of prisoners under interrogation, they defined those terms far more narrowly than their colloquial meaning would suggest even as they tacitly reserved the right to trash the CIA if it failed to squeeze detained terrorists hard enough to prevent attacks. Worse, when the Democratic congressional leadership pushed through in February 2008, over McCain's objection, a provision that would effectively prohibit the CIA from using even mild forms of coercion, almost all supporters of the ban grossly misled the public by concealing its unprecedented sweep.[10]

The media have misled the public too. Almost without exception, the major news organs misrepresented this no-coercion-at-all provision as banning only the use of waterboarding, beatings, frigid cells, sexual humiliation, and other extremely coercive methods.[11] In fact the ban would also have extended even to interrogation methods such as angry yelling, denying or threatening to deny hot food rations, and any and all other methods that "threaten or coerce" prisoners in any way—no matter how dire and urgent the calamities that might be averted. Bush's veto of the bill drew widespread denunciations in the media, almost all of which again concealed the radical scope and novelty of the proposed ban.[12] When Obama effectively implemented this sweeping prohibition through his executive order, the press once again largely ignored the magnitude of the policy change, treating it as a rejection of extreme interrogation techniques, rather than a requirement that the CIA use the Army Field Manual, as revised in 2006 to make interrogations gentler than ever before.

Those of us who come down somewhere between the Bush Administration and the human rights activists are tempted to slip into evasions of our own. We abhor torture but want some latitude for the CIA to use highly coercive methods if necessary to squeeze timely, life-saving information out of those few prisoners most likely to have it. One temptation is to disavow "torture," which is a federal crime, while gravitating toward very narrow definitions of it so as to leave room for highly coercive interrogations in the most dire and urgent emergencies. (This was carried to extremes in the infamous August 1, 2002 Bush Justice Department "torture memo" that leaked in 2004.) A second temptation is to cling to the perhaps unrealistic hope that a limited dose of coercion might break the resistance of and extract life-saving information from hardened terrorists without crossing the line by inflicting pain so severe as to constitute torture. A third temptation is to gloss over the difficulty of drawing clear lines between the theoretically small number of prisoners who seem *most likely* to have life-saving information and the many who *just might* have it.

The hypothetical ticking time bomb scenario, in which a terrorist is known in advance to have information that could stop an imminent attack, is dismissed by many human rights activists and academics as an "intellectual fraud," as one put it.[13] In fact, coercive interrogation has sometimes prevented bombs from going off. But those occasions have been so rare as to be a dangerous paradigm for policymaking.[14]

To avoid any kind of deceptions or evasions in this paper, let us begin by defining our terms precisely. For purposes of this essay,

- "Torture" refers only to governmental use of interrogation methods that fit the narrow definition in a 1994 U.S. law criminalizing any "act . . . specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within [an agent's] custody or physical control." It is not torture under U.S. or international law to inflict pain that is not quite "severe." Also, in an important narrowing of both international and popular usage, the 1994 U.S. law narrowly defines "severe mental pain or suffering" as "the prolonged mental harm" caused by methods including "the threat of imminent death" and

"procedures calculated to disrupt profoundly the senses or personality."[15] (The definition in the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which governs the U.S. government's international law obligations, contains no such limitation on the meaning of "severe mental pain or suffering."[16] This means that some interrogation methods that amount to torture under international law and common usage are not criminally prosecutable as torture under American law.)

- "Cruel, inhuman, or degrading" treatment (often abbreviated to CID, and herein to "near-torture") refers to highly coercive methods that are not so painful as to be torture. CID is banned by the same U.N. convention that bans torture,[17] and also by the 1949 Geneva Conventions. But U.S. domestic law—although not the Obama executive order—allows the CIA sometimes to use methods that many would call cruel, inhuman or degrading.
- "Highly coercive" and "brutal" refer generally to methods that might reasonably be classified by some as torture and by others as CID.
- "Mildly coercive" refers to threats, isolation, mild sleep deprivation and other interrogation methods that do not amount to CID or torture.

There is much room for argument about which of these definitions best fits a particular interrogation method or combination of methods. Sleep deprivation, for example, might be mildly coercive, CID, or even torture depending upon how long the prisoner is kept awake and what else is being done to him at the same time. These definitions, however, are intended for purposes of discussion in this paper of different gradations of coercion that law and policy—if not always the public debate—treat differently.

A Brief History of Post-9/11 Prisoner Abuse

We don't intend here to reprise the entire history of the Bush Administration's approach to coercive interrogation. A brief overview, however, helps frame the contours of the current policy debate.

Five days after the September 11 attacks, Vice President Cheney said on NBC's "Meet the Press": "We also have to work the dark side, if you will, the shadows, in the intelligence world . . . . It is a mean, nasty, dangerous and dirty business, and we have to operate in that area."[18] Looking back a year later, Cofer Black, former chief of the CIA's counterterrorism center, said in testimony to the congressional intelligence committees, "After 9/11, the gloves came off."[19]

Neither man referred specifically to interrogation. But that was a big part of their war plan. And they were not the only ones. It was a climate of extreme fear—in the context of which many people, even prominent liberals, were openly contemplating the perceived need for coercive interrogation.[20]

In our judgment, the administration was quite right to think about what degree of coercion was appropriate under the circumstances. But there was a right way and a wrong way to go about it. The administration could have urged Congress to enact judicious

modifications of the criminal justice and military interrogation rules to allow for a period of incommunicado and, if necessary, aggressive interrogation of suspected terrorists held overseas. Instead, Cheney, Bush and others began laying the groundwork for circumventing all domestic and international restrictions on tough interrogations and overriding even the 1994 federal law that made it a crime to torture prisoners.

The path they took is now a familiar story. It started with the decision to deny the protections of the Geneva Conventions to Al Qaeda and Taliban detainees. This may well have been an accurate interpretation of the original understanding of the 1949 Geneva Conventions. But it was at odds with the views of human rights groups and many international law experts and drew strenuous objections from the State Department.[21] (As discussed below, it was also rejected by the Supreme Court in June 2006.) It also departed from prior American policy of complying with Geneva even when compliance was not legally required. This decision was the legal and rhetorical foundation stone for the Bush program of highly coercive interrogations. Common Article 3 of the Geneva Conventions requires that prisoners protected by it "shall in all circumstances by treated humanely" and bans "violence to life and person, in particular…cruel treatment and torture; [and] outrages upon personal dignity, in particular humiliating and degrading treatment," a ban that can be read as encompassing most or all coercive interrogation methods. All violations of Common Article 3 were then—and some are still—prosecutable under the federal War Crimes Act of 1996.[22] But Bush's decision, codified in an order of February 7, 2002, swept away these legal impediments for more than four years.[23]

By eviscerating the rules instead of recognizing the need for occasional deviations from them, the administration ended up with highly implausible definitions of both torture and inhumane treatment that left ample room for abuse of *all* detainees, not merely those few whose seniority and real-time operational importance may actually have justified a measure of coercion. The result was to brutalize some small-fry and innocent detainees mistakenly seized as terrorists while degrading all legal restraints on excess.

Events on the ground were also pushing in that direction—a combination of normal battlefield stress, post-September 11 desire for revenge and intense pressure to gather intelligence that might save American lives.

By late 2001, U.S. soldiers in Afghanistan had begun brutalizing substantial numbers of detained Afghans and others in prisons at Bagram and Kandahar air force bases. Much of this prisoner abuse was freelancing by troops in the field, not part of any official policy. But some of it probably reflected in part the signals sent by administration rhetoric such as Cheney's talk of "the dark side" and by the administration's apparent lack of interest in putting a stop to the prisoner abuse. Some prisoners appear to have been murdered in custody.[24]

There was, in short, a convergence going on between high-altitude policymakers keen to facilitate intelligence-gathering by relaxing the rules that restrain abuse, interrogators in the field who felt encumbered by those rules and some soldiers in the field as well with

sadistic impulses of precisely the type such rules are intended to restrain.

The CIA's Coercive Interrogation Program

The capture in late March 2002 of Abu Zubaydah, a senior Al Qaeda logistics man, focused high-level attention on specific interrogation methods. Abu Zubaydah had been shot three times and severely wounded during the battle that ended in his capture. After the U.S. flew in doctors to ensure his recovery, he was questioned gently by FBI and CIA agents at a secret detention facility in Thailand. This elicited some useful information, at least in the view of the FBI.[25] But the CIA officers thought that he was providing disinformation and hiding important secrets that could save many lives. They wanted to get rougher. They also wanted legal cover so that interrogators and their superiors would not end up getting prosecuted or hung out to dry for trying to protect their country, as had occurred to CIA officials in the 1970s.[26]

What the Bush team should have done in late 2001, when it was already anticipating a need for coercive interrogations, or in 2002, when that need became apparent, was to ask Congress to resolve legal uncertainty. It should have sought more detailed legislative rules specifying—among other things—what interrogation techniques should be allowed, with one set for the ordinary run of cases and a separate set of special rules for the highest-value prisoners. Congress might not have given Bush and Cheney everything they wanted. But the nation would have been better off had Bush and Congress come as close as possible to crystallizing a national consensus on whether and when to use coercive interrogation.

Instead, the administration exploited legal uncertainty. In a series of high level meetings, the president's top security aides discussed and approved tough interrogations methods proposed by the CIA, including waterboarding.

And the CIA got the legal cover it wanted in the form of two secret, August 1, 2002 Justice Department Office of Legal Counsel memos. Some called them "get out of jail free cards"[27] because they would provide a seemingly ironclad defense against any prosecution for torture: good-faith reliance on advice of the Justice Department office seen as the authoritative source of legal guidance for executive branch officials. The first "torture memo," as it has been called since it leaked in June 2004, went to astonishing extremes to tell the CIA that it could legally do just about anything, including torture, to get information out of suspected terrorists. That memo was signed by Assistant Attorney General Jay Bybee, but John Yoo, Bybee's deputy, was the principal draftsman, with the powerful vice presidential counsel David Addington very much involved.[28] Among other things, the Yoo-Bybee memo strained for a reading of the 1994 anti-torture statute so narrow as to attract widespread condemnation when made public, advising that only intentional infliction of pain so severe as to be "equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily functions, or death" amounted to torture. The memo also claimed that as commander-in-chief, the president could, if he chose, effectively nullify criminal statutes such as the anti-torture law and authorize interrogation methods that would amount to torture by any

definition. Not even burning prisoners' flesh, yanking out their fingernails, or cutting off their fingers one by one were ruled out. The memo's sweeping language sought to strip the law's protections not only from terror kingpins but also from Taliban foot soldiers, innocent bystanders, and anyone else in the world U.S. forces might choose to brutalize.

The second August 2002 memo was considerably more careful, although it strained to bless the legality of some repugnant practices. It approved ten specific interrogation methods that included an "attention grasp" with both hands of a detainee's collar; slamming detainees into a flexible wall to instill shock and fear (but with precautions to prevent injury); a "facial slap"; confinement in a dark box for up to 18 hours or in a smaller box for up to two hours; standing "about four to five feet from a wall" with the detainee's arms "stretched out" and "fingers resting on the wall" supporting "all of his body weight"; a variety of "stress positions," including "sitting on the floor with legs extended straight out" and with "arms raised above [the detainee's] head" and "kneeling on the floor while leaning back at a 45 degree angle"; extended sleep deprivation; exploiting detainee phobias by—in Zubaydah's case—putting a harmless insect with him in a confinement box while telling him falsely that it could sting him (a technique that the agency never ended up trying); and waterboarding.[29]

Later memos by Bybee's and Yoo's successors describe additional procedures: Dietary manipulations using "commercial liquid meal replacements [instead of] normal food;" forced nudity; abdominal slapping; and dousing detainees with cold water.[30] And they make clear that these techniques can be used in combination with one another. One memo, in fact, is specifically devoted to analyzing the "combined use of certain techniques."[31]

The general impression of the program the memos offer is one of highly-controlled and regulated brutality. The CIA clearly did not use its coercive techniques wantonly. They were, rather, "generally used in an escalating fashion, with milder techniques used first" and harsher ones used only when milder ones failed. They were subject to various limits and under constant medical monitoring.[32] Moreover, the number of detainees subjected to enhanced interrogation techniques of any kind was quite small. Of the 94 detainees who passed through the CIA's detention program, only 28 were interrogated with any of the enhanced techniques.[33] And only three detainees were waterboarded.

At the same time, there is no way to make these techniques seem humane, as some of the program's defenders have sought to do. The memos make clear that waterboarding, for example, constitutes a "threat of imminent death" and that it was used repeatedly on both Abu Zubaydah and Khalid Sheikh Mohammed. Exactly how many times remains unclear. One of the memos quotes a CIA inspector general's report to the effect that the CIA waterboarded Abu Zubaydah 83 times and Mohammed 183 times, but this appears to be the number of specific pours of water onto their faces, not the number of waterboarding sessions.[34] In any event, the memos make clear that "The CIA used the waterboard extensively" in those cases.[35] What's more, detainees were deprived of sleep for extraordinary periods of time: "more than a dozen detainees have been subjected to sleep deprivation of more than 48 hours, and three detainees have been subjected to sleep

deprivation of more than 96 hours; the longest period of time for which any detainee has been deprived of sleep by the CIA is 180 hours," one memo recounts.[36]

And both the memos and the leaked ICRC report on interrogation tactics in the program—which is based on interviews with the detainees after their transfer to Guantánamo and is broadly consistent with most of the facts recited in the Justice Department memos—describe the specific modalities of sleep deprivation as horrifying. "Ten of the fourteen [detainees interviewed] alleged that they were subjected to prolonged stress standing positions, during which their wrists were shackled to a bar or hook in the ceiling above the head for periods ranging from two or three days continuously, and for up to two or three months intermittently," the ICRC reports—a tactic the OLC memos describe as designed to prevent sleep. Both describe detainees subject to this technique being forced to wear diapers, and not being allowed to use the toilet.[37] It is hard to read this material without a deep sense of revulsion.

And yet critics of the program often elide too quickly the question of what the agency or the administration should have done instead. The March 2003 capture in Pakistan of Khalid Shaikh Mohammed (KSM, in official shorthand), in part based on Abu Zubaydah's disclosures, is as close to a ticking time bomb as American interrogators have come in the real world. KSM was the architect of the September 11 attacks and Al Qaeda's chief of operations. As such, he probably knew more than anyone else alive about any planned attacks and where to find other key terrorists. The CIA thus had good reason to believe that unlocking the secrets in his head might save dozens or hundreds of lives—perhaps many, many more, in the unlikely but then-entirely-conceivable event that Al Qaeda was preparing a nuclear or biological attack on a major American city.

The CIA also had reason to believe that the only chance of saving the many lives that might depend on learning KSM's secrets was to use highly coercive methods amounting to near-torture or worse. If interrogators stuck to the kid-glove interrogation rules that they routinely tried before resorting to coercion and were demanded by human rights groups, this tough, committed jihadist was not about to betray his cohorts to his hated enemies. Nor was there much chance that mildly coercive interrogation methods—such as yelling, threats of violence, or a slap on the face—would break his resistance.

So the choice facing the interrogators and their bosses—at least as they perceived it—was either to risk seeing preventable mass murders unfold and be blamed for failing to stop them, or to risk professional ruin by subjecting KSM to near-torture or torture. People disposed to criticize what the CIA did, or to assert that highly coercive interrogation should never be used, can claim to have a fully considered opinion only if they are prepared to say exactly what they would have done with KSM.

The CIA has contended that the interrogations in the program were dramatically effective, leading to a chain of captures of Al Qaeda leadership and thereby disrupting specific plots. This claim is disputed. FBI agents involved in the Abu Zubaydah case, for example, have given dramatically different accounts, describing him as a mentally troubled Al Qaeda hanger-on who provided CIA interrogators with increasingly dubious

information as his treatment became more and more coercive and gave up his important information before the rough stuff ever began.[38] The CIA made hundreds of hours of videotapes of the interrogation that could help resolve these disputes, as well as to provide evidence for investigations of the interrogators and their bosses. But the CIA destroyed the tapes in November 2005.[39] The public now knows a great deal about what the CIA did to get information. Without knowing more about what it obtained and how much of it was obtainable by other means, a rigorous cost-benefit analysis is impossible.

The Military: From al-Qahtani to Abu Ghraib

The same alarmed intelligence reports about major impending attacks in the summer and fall of 2002 that helped spur the brutalizing of Abu Zubaydah also focused attention on Mohammad al-Qahtani. Al-Qahtani became known as the "20th hijacker" after the government figured out in July 2002 that, shortly before September 11, he had been en route to meet Mohammed Atta, who was waiting for him at the Orlando airport when al-Qahtani was refused entry to the U.S.[40] This made al-Qahtani an obvious candidate for intensive interrogation.

But important as he was, al-Qahtani was no KSM. Seized in Afghanistan in November 2001 and sent to the military's Guantánamo prison camp in February 2002, he had already been in captivity for almost a year by the time the coercive phase of his interrogation began. His knowledge could no doubt be of some value to intelligence analysts assembling a mosaic of Al Qaeda's operations and in identifying other detainees at the base. But it was probably too stale to be a plausible bet to stop any particular attack, let alone an imminent attack.[41]

The Pentagon's most fundamental error was its decision that al-Qahtani was an appropriate candidate for the kind of highly coercive interrogation that can be justified—if at all—only for prisoners likely to have information that could prevent imminent or already-planned attacks. The rationale underlying this decision to use highly coercive methods on al-Qahtani could be stretched to justify the wholesale tormenting of dozens or even hundreds of other prisoners as well. A conceptual door had been swung open that would not easily be shut.

Al-Qahtani had received resistance training in an Al Qaeda camp and predictably stood fast through weeks of traditional, non-coercive military interrogation, concocting preposterous stories that his reason for trying to enter the U.S. had been to deal in used cars and that his reason for going to Afghanistan had been an interest in falconry.[42] With Defense Secretary Donald Rumsfeld impatiently demanding better intelligence from Guantánamo, al-Qahtani's handlers put him in strict isolation for many weeks and sought permission to get rougher to "enhance our efforts to extract additional information." The handlers proposed a list of 18 methods.[43]

Acting on the advice of Pentagon General Counsel William J. Haynes II, Rumsfeld approved most of these methods on December 2, 2002. The Rumsfeld-approved methods included isolation for up to 30 days; interrogations for 20 hours at a time, in unfamiliar

settings; forced nakedness; forced grooming and shaving of beards; depriving detainees of light and sound; hooding them; denying them hot rations and comfort items; "mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing"; using "individual phobias (such as fear of dogs) to induce stress"; and "the use of stress positions (like standing) for a maximum of four hours."[44] Haynes and Rumsfeld did not approve requests for permission to use the three harshest of the suggested techniques: exposure to cold weather or water; implied threats of severe pain or imminent death for the detainee or his family; and waterboarding, which by then the CIA had used on Abu Zubaydah with Justice Department approval. Haynes advised that these methods, too, "might be legally available" but that "as matter of policy, a blanket approval of [those] techniques is not warranted at this time. Our armed forces are trained to a standard of interrogation that reflects a tradition of restraint."[45] Rumsfeld and Haynes included no guidance on how long or in what combinations the methods that they approved could be used.

In contrast to the CIA's program, which was carefully regimented and seems to have generally stayed within the guidance it received, things in the military spun out of control. According to a subsequent 2005 Southern Command report and leaked, day-by-day logs of the interrogation that appeared in *Time* magazine, al-Qahtani's interrogators pushed the approved methods past the limit, often using several at once over long periods of time and adding others that were not on the list of approved methods. The prisoner was isolated from other detainees for 160 days; interrogated for 18-20 hours a day for 48 of 54 consecutive days; manacled in painful stress positions for hours; forced to wear a woman's bra and thong on his head during interrogation, to dance with a male interrogator, to stand naked in front of a female interrogator, to be straddled by a female interrogator and to perform dog tricks on a leash; pumped full of intravenous fluid until he had to urinate on himself; had water poured on his head; was menaced by a snarling, unmuzzled dog; was told that his mother and sister were whores, and more.[46]

An official military investigation found in 2005 that al-Qahtani's interrogation had been abusive, and that some actions had been unauthorized. But it stopped short of calling them torture.[47] Al-Qahtani's lawyers have claimed that the interrogation so ravaged him that he was still a broken man almost six years later, unable to communicate meaningfully even with those who would help him.[48] In any event, al-Qahtani did eventually begin cooperating and provided information interrogators have regarded as critical and that defense lawyers have derided as unreliably implicating numerous other detainees.

How many Guantánamo prisoners besides al-Qahtani were also subjected to highly coercive interrogation is in dispute. Many of those who have been released have alleged that they were tortured, but Al Qaeda operatives were trained to make such claims whether true or false.

The use of coercive methods at Guantánamo drew strenuous objections from FBI officials who were there and from some in the military, including the Pentagon's Criminal Investigative Task Force. These critics complained that the methods were

inhumane, possibly illegal and ineffective.[49] By the end of 2002 similar complaints at high levels of the Pentagon led to withdrawal of Rumsfeld's approval for some of the coercive methods.

The Bush Administration clearly helped unleash forces that it could or would not control in Afghanistan and Iraq as well as at Guantánamo, when it used the cases of al-Qahtani and others to jettison the restraints that had long been imposed by the Army Field Manual and the Geneva Conventions without putting any other clear rules in their place. The rules in the 1992 edition of the Army Field Manual theoretically remained in force. But those were vague and easily overridden by the need to obtain information to prevent planned attacks, by the president's disparagement of the Geneva Conventions and by other high-level pronouncements such as Cofer Black's "after 9/11 the gloves came off." These high-level signals to get tough combined with freelance brutalization by troops in the field to produce widespread abuse of prisoners.[50]

Indeed, at least to some extent, the tolerance of brutality in the few instances in which officials overtly countenanced it seems to have migrated to cases in which senior officials never intended to promote abuse. Several official investigations of abusive treatment of military prisoners concluded that the high-level approvals of the methods used to torment al-Qahtani had contributed to a culture of confusion about what the rules were that helped foster the abuse of prisoners in Afghanistan and Iraq. Rumsfeld, who was concerned about improving intelligence in a deteriorating Iraq theater, had sent his Guantánamo commander, Lt. Gen. Geoffrey Miller, to "Gitmo-ize" interrogations in Iraq.[51] And while the abuses at Abu Ghraib were never authorized by policy, military intelligence officials do appear to have encouraged guards to abuse detainees by way of softening them up. Many and perhaps most of the prisoners brutalized had little or no useful intelligence to impart. Indeed, in most instances, abuse bore little relation to intelligence gathering efforts; much of the disgusting conduct by MP's on the night shift at Abu Ghraib in the fall of 2003 was done for sport, not for any purpose related to interrogation.[52] Still, the Bush Administration forgave itself too much when it claimed that the abuses at Abu Ghraib were utterly unrelated to its policy choices. The "augmented techniques for Guantánamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded," concluded one official report on prisoner abuse.[53] Another report said: "Confusion about what interrogation techniques were authorized resulted from the proliferation of guidance and information from other theaters of operation; individual interrogator experiences in other theaters; and, the failure to distinguish between interrogation operations in other theaters and Iraq. This confusion contributed to the occurrence of some of the non-violent and non-sexual abuses."[54]

Some judgments have been harsher. The Senate Armed Services Committee, in a lengthy report, concluded, "Interrogation policies endorsed by senior military and civilian officials authorizing the use of harsh interrogation techniques were a major cause of the abuse of detainees in U.S. custody."[55] While this report is flawed in a number of respects and this conclusion significantly overstated, the notion that what happened at Guantánamo didn't stay at Guantánamo is clearly corroborated by other findings.[56]

The Bush Era Reforms

As noted above, Rumsfeld started yielding to internal dissent about coercive interrogations in December 2002, just a month after he had authorized the coercive methods that military interrogators used to torment al-Qahtani. After a forceful complaint by Alberto Mora, the Navy's general counsel, about the al-Qahtani interrogation, Rumsfeld withdrew his authorization for most of the coercive methods in January 2003. He said that other coercive methods could be used only with his personal approval. Rumsfeld also had Haynes convene a "working group" to study interrogation methods. It recommended a list of 35 methods, some of them mildly but not highly coercive,[57] 24 of which Rumsfeld approved in part in an April 2003 memo.

This list of 24 included the 17 methods already described in the Army Field Manual plus a sort of "good cop, bad cop" routine, denying detainees hot rations and limiting them to Meals Ready to Eat, isolation, changing detainees' sleep schedules, temperature adjustments and other environmental manipulations, and so-called "false-flag" interrogations. Rumsfeld disapproved the use of blindfolds, and even mild, non-injurious physical contact.[58]

But this partial Pentagon pullback from approving highly coercive interrogation methods did not immediately put an end to abuse of prisoners on the ground in Afghanistan and Iraq. General Miller's summer 2003 trip to Iraq and the infamous Abu Ghraib photos—mostly taken in October 2003—dramatized the extent of the abuse still to come.[59]

Additional cautionary notes were sounded throughout 2003 and into 2004. In December 2003, Jack Goldsmith, the new head of the Justice Department's OLC, advised top Pentagon officials that the Fourth Geneva Convention, pertaining to occupied territories, prohibited coercive interrogations of any Iraqis, even Iraqi terrorists.[60] Then, in March 2004, Goldsmith wrote to Haynes that the Pentagon could no longer rely on a March 2003 OLC memo by John Yoo, who had given the Pentagon much the same almost-anything-goes advice that the infamous August 2002 "torture memo" had given the CIA.[61] Then the Abu Ghraib scandal broke in April 2004. By mid-2004, the military's coercive interrogations were largely past.

What's more, in 2006 Congress and the Supreme Court helped slam the door shut on any future coercive interrogations by the military. First, in December 2005, the so-called McCain Amendment to the Detainee Treatment Act banned subjecting any person in the military's custody or control "to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation."[62] Second, in June 2006 the Supreme Court ruled in *Hamdan* v. *Rumsfeld* that Common Article 3 of the Geneva Conventions protects even Al Qaeda terrorists, contrary to the February 7, 2002 Bush order and underlying OLC memorandum.[63] While the decision did not immediately involve interrogation, and the justices did not even mention the subject, their decision had the effect of rendering all U.S. interrogations subject to Common Article 3's broad ban on inhumane, "cruel," or "humiliating and degrading" treatment of prisoners.

Given the fact that violations of Common Article 3 were then prosecutable under the federal War Crimes Act, the decision seemed to many experts to knock the legal props out from under the administration's interrogation program. Indeed, the *Hamdan* decision meant that notwithstanding the Justice Department's still-quite-narrow reading of the anti-torture statute, the highly coercive interrogations of Abu Zubaydah, KSM, al-Qahtani and some others could very plausibly be called war crimes. This came as an extremely unpleasant surprise to the officials at the highest level of the administration who had explicitly approved the methods used on those prisoners.

Finally, in September 2006, after detailed internal debates, the Pentagon adopted major revisions to the Army Field Manual, which had acquired the force of law as a consequence of the McCain Amendment.[64] The new rules allow some new non-coercive methods, including forms of trickery, but ban a list of eight specified harsh methods.[65] More remarkably, and in contrast to the 1992 edition of the Army Field Manual—which listed as a Geneva-compliant method "Fear Up (Harsh)," defined as exploiting a prisoner's fears by behaving in an overpowering manner with a loud and threatening voice—the September 2006 edition bans *all* coercion and threats.[66] The revised rules include enough detail to provide clear notice to military interrogators of what they can and cannot do. They comply with the Geneva Conventions. And since they were adopted, there have been few complaints about military interrogations.

The McCain Amendment had also given the CIA new legal guidance—albeit much vaguer guidance than it gave the military. It granted the agency more latitude to use coercive methods than it gave the military, imposing a high-altitude ban on "cruel, inhuman, or degrading" treatment of prisoners. Critically, it defined those terms with reference to federal case law that allows the use of coercive interrogation methods if the need for information is sufficiently dire and urgent.[67]

But the *Hamdan* decision subjected the CIA, as well as military interrogations, to the strict requirements of Common Article 3 of the Geneva Conventions and of the War Crimes Act. This prompted the CIA temporarily to suspend its "enhanced interrogation program" after the decision. Then, in October 2006, the administration and Congress blunted the impact of the *Hamdan* decision on CIA interrogators by rushing through a new interrogation law, enacted as part of the Military Commissions Act (MCA).

While the MCA's chief purpose was to reconstitute the military commissions the Court had struck down, Section 6 of the new law effectively immunized administration officials from any prosecutions under the War Crimes Act for most pre-MCA conduct violating Common Article 3 unless they had inflicted such severe pain as to violate the anti-torture law, too.[68] (Previously, the Detainee Treatment Act had immunized officials who relied reasonably and in good faith on Justice Department advice that specified interrogation methods were legal.[69]) Looking to future interrogations, the MCA also specified that only "grave breaches" of Common Article 3 could be prosecuted under the War Crimes Act, and it defined "grave breaches" narrowly enough to exclude much conduct that could be considered "humiliating or degrading." Only murder, maiming, sexual abuse, biological experiments, taking hostages, violations of the narrowly-drafted torture statute,

and "cruel or inhuman treatment" would qualify as prosecutable "grave breaches."

The MCA delegated to the president the authority to define the parameters of Common Article 3 short of the grave breaches the statute itself outlined. This President Bush did in an executive order in July 2007, which interpreted Common Article 3 and the MCA in ways that allow room for some highly coercive interrogation methods so long as the purpose is to gain intelligence rather than to humiliate or degrade the prisoner.[70] Justice Department officials opined that interrogation methods "undertaken to prevent a threatened terrorist attack" might be permitted even if the same methods would be illegal if done "for the purpose of humiliation or abuse."[71] This logic was attacked by some experts as at best strained when it became public in 2008. Still, any use of waterboarding (to pick one example) after the effective date of the MCA might violate the War Crimes Act, as "cruel or inhuman treatment," if the resulting "mental harm" is "serious and non-transitory;" it need not be "prolonged" enough to fall within the definition of "torture."[72] Indeed, while the Justice Department continued to maintain that the CIA's use of waterboarding with "strict limitations and safeguards" did not violate the anti-torture statute, it conceded that *Hamdan* and the MCA "would make it much more difficult to conclude that the practice was lawful" than it had been before.[73]

Whatever the precise limits placed on future interrogations by the MCA, it's clear that the McCain Amendment and the September 2006 revision of the Army Field Manual mean that if and when any president again wants suspected terrorists squeezed hard for information, the CIA will have to do the dirty work.

And unless one wishes to see coercive interrogation banned entirely, this division of labor makes a great deal of sense. It was a mistake, as many military lawyers argued at the time, for the Bush Administration to allow military interrogators to use highly coercive methods. The military has held tens of thousands of prisoners in occupied Iraq and in Afghanistan. Most are small-fry with little or no useful information. Most also qualify—as a matter of U.S. policy, if not strict legal right—for the kid-glove treatment required by the Fourth Geneva Convention for citizens of occupied countries. In addition, military interrogations are often conducted by thousands of low-ranking personnel with much less professional training and supervision than CIA interrogators, as illustrated by the catastrophic breakdown of discipline at Abu Ghraib. These are among the reasons the military has traditionally imposed strict restraints on its interrogators and why the Pentagon made these restraints more exacting than ever before in the September 2006 revision of the Army Field Manual.

The CIA, on the other hand, has since September 11 assembled a small cadre of highly trained professional interrogators operating far from combat zones and under close supervision and only in cases involving people they believe to be the highest-value detainees. These attributes provide some insurance against the grave danger that individual interrogators will get carried away in their efforts to break a prisoner's resistance and violate the law or the policy limits by which they should be bound.

The Obama Reforms to Date

Banning coercive interrogation entirely is exactly what the Obama Administration has sought to do so far. The new president's executive order concerning CIA interrogation and detention authorities came within 48 hours of his inaugural oath, and it made quite clear that, at least for the immediate term, Obama—unlike his predecessor—was not going to hide rough interrogations behind words like "humane." The order took strong policy stands on all of the key questions—and it marked a significant shift.[74]

For starters, the order revoked a great deal of the legal guidance the Bush Administration had given the CIA on the subject of interrogation and replaced that guidance with a requirement that CIA interrogations comply with the Army Field Manual. This step, long sought by human rights groups and other critics of the Bush Administration's harsh interrogation policies, effectively accomplished with a stroke of the presidential pen what Congress sought to do the previous year yet been stymied by President Bush's veto.

Obama's order contained one loophole of indeterminate significance. The passage allowing reliance on the Army Field Manual and forbidding reliance "upon any interpretation of the law governing interrogation issued by the Department of Justice between September 11, 2001, and January 20, 2009" begins with the following caveat: "unless the Attorney General with appropriate consultation provides further guidance…" This seems to permit, in the event of an exigent circumstance, the CIA to go to the attorney general for additional legal guidance. But it in no way guarantees a permissive result. For the time being, in other words, the agency cannot count on the availability of any technique other than the specific set of approved non-coercive procedures to which the military is already bound by law. It eliminated not merely the latitude to conduct highly-coercive interrogations, *but also the latitude to use indubitably legal techniques that don't happen to be approved by the Army for use by its interrogators*.

This was a tremendous change—albeit one that, with the CIA's secret prisons already depopulated and their occupants moved to Guantánamo Bay, had little capacity to impact many detainees in the short term.

Obama's order did contain another important nod to the possibility that the CIA may have legitimate needs for techniques the military does not authorize. This came in the form of a "special task force," to be led by the attorney general and composed of several cabinet members, intelligence leaders, and the chairman of the Joint Chiefs of Staff. It was charged with reporting to the president in 180 days. The executive order tasked the group with studying "whether the interrogation practices and techniques in [the Army Field Manual], when employed by departments or agencies outside the military, provide an appropriate means of acquiring the intelligence necessary to protect the Nation, and, if warranted, to recommend any additional or different guidance for other departments or agencies." It is possible, in other words, that the CIA will regain some measure of interrogation flexibility as a result of this study. But that's down the line if it happens at all, and given Obama's strong rhetoric on the subject, it seems unlikely.

The only other latitude the executive order leaves the CIA is that it does not prohibit the

continued use of renditions—which have sometimes in the past served to let ugly interrogations take place under the auspices of foreign governments. Again, the contours of the Obama rendition policy are still a work in progress, but it is possible that it too could serve as a back door through which the CIA could regain—though foreign government subcontractors—some interrogation flexibility.

With the CIA now subject to the same interrogation rules as the military, there was no longer any reason to retain its detention authority—other than perhaps the power to hold people in a transient fashion until turning them over to other agencies or countries.

Accordingly, Obama's order also revoked the CIA's detention power, requiring the agency to "close as expeditiously as possible any detention facilities that it currently operates" and clarifying that it "shall not operate any such detention facility in the future." (The document's definition of "detention facilities" excludes "facilities used only to hold people on a short-term, transitory basis.") In the future, it goes on, the International Committee of the Red Cross (ICRC) must be notified of and given "timely access to any individual detained in any armed conflict in the custody or under the effective control of . . .the United States Government, consistent with Department of Defense regulations and policies." In other words, no more secret prisons.

For as long as the current policy remains in effect, the human rights community has won virtually everything it asked for concerning interrogation—except durability. The new policy, after all, can vanish as quickly as it appeared.

Did Post-9/11 Coercive Interrogations Save Lives?

To many Americans, the new policy will seem like an unqualified good—unless and until we suffer another mass-casualty attack. But the question of whether coercive interrogation should continue under any circumstances depends, to a great degree, on the extent to which it may produce life-saving intelligence unobtainable by other means. The public record is littered with contradictory claims about this fundamental empirical question, on which the media have shed remarkably little light. In general, Bush Administration officials and CIA officers who have participated in coercive interrogations, with certain notable exceptions, have asserted that coercion has saved lives, as have some Pentagon reports on coercive interrogations in the military. By contrast, most FBI officials, military interrogators, non-CIA lawyers, and most journalists, contradict the CIA-Bush claims and assert that the rapport-building approach that they have long favored is not only more moral and more consistent with American values but also far more effective at eliciting accurate information.

Neither side in the dispute brings a lot of hard evidence to the table. Consider, for example, the weakness of the Bush Administration's public claims that coercion extracted valuable information from Mohammed al-Qahtani, the Guantánamo detainee alleged to have flown to the United States to meet Mohammed Atta. The military has argued that he "ultimately provided extremely valuable intelligence," in the words of a 2005 military report.[75] But its claims to that effect have been so vague as to inspire little

confidence. The 2005 report, for example, could have been a reference to al-Qahtani's less-than-reliable statements fingering about 30 of Osama bin-Laden's supposed bodyguards among his fellow detainees.[76] Southern Command's Gen. Bantz Craddock also testified in congressional hearings that the once-defiant prisoner had "provided insights" into Al Qaeda's planning for the September 11 attacks.[77] But that could mean only that al-Qahtani had confirmed that he had been en route to meet Atta when he flew to Orlando in August 2001. The Schlesinger report said that al-Qahtani and another coercively interrogated Guantánamo prisoner gave up "important and time-urgent information."[78] That stops short of saying that the information saved lives and does not make clear what it was. And al-Qahtani, for his part, said in 2006 that all of his statements under coercive interrogation had been falsehoods adopting "the story that the interrogators wanted to hear."[79]

The countervailing claims by FBI and military intelligence officials that the coercive interrogations of al-Qahtani and others at Guantánamo produced no useful intelligence have also been heavier on generalities than on specifics.[80] Some stress the fact that in May 2008, Susan Crawford, the Pentagon official in charge of trials of Guantánamo prisoners, dismissed war crimes charges against al-Qahtani. Crawford later stated that al-Qahtani had been tortured and the evidence against him was all tainted.[81] But that does not negate the possibility that al-Qahtani provided good information about Al Qaeda.

One of the more persuasive accounts of successful use of the kind of mildly coercive interrogation that we favor allowing the CIA to use came from a former Army interrogator in Afghanistan. Using the pseudonym Chris Mackey, he wrote with a co-author Greg Miller:

> The early story of the war in Afghanistan was one of frustration and failure for us. Many Al-Qaeda prisoners had been trained to resist, and our schoolhouse methods were woefully out-of-date. . . . [Later] our experience in Afghanistan showed that the harsher the method we used—though they never contravened the [Geneva] Conventions, let alone crossed over into torture—the better the information we got and the sooner we got it.

Mackey said that he and his colleagues "never touched anyone." Rather, their main methods were threats to hand over prisoners to their home countries' brutal intelligence services and sleep deprivation, limited by a rule that the interrogator had to stay awake as long as the prisoner.[82]

Another account of coercive interrogation that "worked," although it clearly violated both military law and policy, came in 2003, when Army Lt. Col. Allen B. West, a battalion commander in Iraq, threatened an unresponsive detainee with death by twice firing his pistol during an interrogation while demanding to know the whereabouts of his accomplices. The detainee, an Iraqi policeman who was allegedly part of a plot to kill West and his soldiers, revealed his cohorts' names and plans for a sniper attack the next day. This may well have saved the lives of U.S. soldiers.[83] It is far from clear that a non-coercive interrogation could have obtained the same information.

As noted above, CIA officials have argued that the waterboarding of Abu Zubaydah saved lives, perhaps many lives. But FBI officials involved in interrogating the same man minimized his importance. "The problem is they didn't realize he didn't know all that much," Daniel Coleman, a retired FBI agent who worked on the case, told reporters.[84] Again, different witnesses to the same interrogation came away with radically different perceptions of the value of coercion.

KSM, on the other hand, clearly knew a lot, and the evidence that coercion in his case netted valuable information is fairly compelling. Yet even concerning KSM no consensus exists. He confessed to a role in more than 30 criminal plots, including the videotaped beheading in Pakistan of *Wall Street Journal* reporter Daniel Pearl.[85] The reliability of some of his statements has been questioned, including his claimed role in Pearl's death.[86] "Some intelligence officers say that many of Mr. Mohammed's statements proved exaggerated or false," an October 4, 2007 *New York Times* article reported. It quoted a former senior agency official saying that "many C.I.A. professionals now believe patient, repeated questioning by well-informed experts is more effective than harsh physical pressure." Even a former CIA executive director, A.B. Krongard, told author Ron Suskind that KSM and other Al Qaeda captives "went through hell, and gave up very, very little."[87]

On the other hand, a subsequent *Times* article reported that after the waterboarding and other brutalization of KSM, he became "quite compliant" in the course of rapport-building efforts by a CIA interrogator. This article's description of the interrogation process leaves some doubt as to whether the reason the prisoner became compliant was the brutalization by the tough guys or the gentler questioning by the interrogators who followed up: A "paramilitary team put on the pressure…to force a prisoner to talk. When the prisoner signaled assent, the tormenters stepped aside. After a break that could be a day or longer, [an] interrogator took up the questioning."[88]

Whatever the reason, KSM discussed his "fellow extremists' goals, ideology and tradecraft" and "provided more and more detail on Al Qaeda's structure, its past plots and its aspirations."[89] As for the Pearl murder, KSM "pointed out to [an interrogator] details of the hand and arm of the masked killer in a videotape of the murder that appeared to show it was him."[90]

Former National Intelligence Director Mike McConnell, former President Bush, former CIA Directors George Tenet and Michael Hayden and former Attorney General Michael Mukasey have all claimed that the interrogations of KSM and others saved many lives. Tenet said: "I know that this program has saved lives. I know we've disrupted plots. I know that this program alone is worth more than [what] the FBI, the Central Intelligence Agency and the National Security Agency put together have been able to tell us,"[91] a view Jack Goldsmith said "permeated the executive branch during my time in office."[92] McConnell told *The New Yorker*: "Have we gotten meaningful information? You betcha. Tons! Does it save lives? Tons! We've gotten incredible information…We have people walking around in this country that are alive today because this process happened."[93]

President Bush himself provided the most detailed account claiming big successes for the CIA's "enhanced" interrogation program in September 2006. If Bush—whose information came from the CIA—was telling the truth, coercive interrogation has indeed saved many innocent lives since September 11. Bush said that the initially "defiant and evasive" Abu Zubaydah disclosed in 2002—after being subjected to tough methods that were later revealed to include waterboarding—information that helped lead to the capture of other accomplices in the September 11 attacks, including Ramzi Binalshibh; that those two provided information that helped lead to the capture of KSM; and that he in turn gave up "information that helped us stop another planned attack on the United States" and described "many details of other plots to kill innocent Americans." KSM's disclosures helped U.S. agents find other terrorist leaders including Hambali, the leader of Al Qaeda's Southeast Asian affiliate, Jemaah Islamiyah, and Hambali's brother in Pakistan, which in turn "led us to a cell of 17 Southeast Asian…operatives," who Hambali admitted "were being groomed at KSM's request for attacks inside the United States—probably using airplanes."[94]

Later Bush speeches and articles by his former speech writer Marc Thiessen added details: KSM was initially defiant but, after being tormented and waterboarded, gave up information leading to the capture of a terrorist named Zubair, and then to the capture of Hambali, and then to his brother "Gun Gun" in Pakistan, whose information led to a cell of 17 Southeast Asian terrorists. This chain of events, the CIA insists, unraveled the dangerous "Second Wave" plot, planned by KSM and Hambali, which called for the Southeast Asian terrorists to crash a hijacked airliner into the tallest building in Los Angeles, the Library Tower. Bush critics have claimed to find various holes in this account.[95]

Most chillingly, perhaps, Bush said that,

> KSM also provided vital information on Al Qaeda's efforts to obtain biological weapons. During questioning, KSM admitted that he had met three individuals involved in Al Qaeda's efforts to produce anthrax, a deadly biological agent—and he identified one of the individuals as a terrorist named Yazid. KSM apparently believed we already had this information, because Yazid had been captured and taken into foreign custody before KSM's arrest. In fact, we did not know about Yazid's role in Al Qaeda's anthrax program. Information from Yazid then helped lead to the capture of his two principal assistants in the anthrax program. Without the information provided by KSM and Yazid, we might not have uncovered this Al Qaeda biological weapons program, or stopped this Al Qaeda cell from developing anthrax for attacks against the United States.[96]

Of course, Bush does not have much credibility on intelligence matters; the CIA may have misled him; both Bush and the CIA had a big stake in justifying the brutal interrogations; President Obama, for his part, came to the conclusion after grilling CIA officials, including Hayden, that the information the CIA obtained could have been had by other means; and some FBI officials have scoffed at the CIA-Bush claims. It's also

true, however, that the FBI—locked in a perpetual turf war with the CIA and eager to recapture the lead in terrorism investigations—had a big stake in selling the notion that its own non-coercive interrogation methods work and the CIA's methods do not.

News reports of the September 2006 Bush speech focused on his contemporaneous announcement that KSM and 13 other "high-value terrorist detainees" had been moved from secret prisons abroad to Guantánamo to face military trials and his request for the legislation that would ultimately become the MCA.[97] Remarkably, not one major newspaper or magazine reported at the time the details of the president's claims about the output from the coercive interrogation program. This pattern of ignoring the best available evidence that coercive interrogation may have saved lives, combined with the vast media attention to the arguments by human rights activists and FBI officials that coercive interrogation does not work and can yield false or unreliable information, has provided the public with a misleading and unbalanced picture. And, of course, as many in the media tend to forget when seeking to dramatize the flaws of coercive interrogation, it is hardly the only type of intelligence gathering that can yield false and unreliable information. Consider how Ahmed Chalabi and other Iraqis with agendas of their own helped mislead the administration into believing that Saddam Hussein had weapons of mass destruction.

There is, of course countervailing evidence. FBI Director Robert Mueller, for example, told *Vanity Fair* in 2008 that he did not believe that any attacks had been disrupted because of intelligence obtained through the coercive methods.[98] A recent book by a military interrogator writing under the pseudonym Matthew Alexander describes the great successes the military had in breaking terrorists after abandoning coercion—and specifically how it managed to locate and kill Abu Musab al Zarqawi using smart, not brutal, interrogations.[99] Our point is not that it's clear that brutality works, much less that it clearly works better than non-brutal alternatives.

Our point is, rather, that the bottom-line lessons of the post-September 11 experience are that coercion is often useless or counterproductive, especially when used indiscriminately against people who have little or no information to divulge; that there is no conclusive proof that it has saved lives; but that the claims that it has saved lives are too numerous and plausible to dismiss. For that reason, no president who takes seriously his or her responsibility to protect the American people should want to be bound in all circumstances by a flat criminal-law ban denying him the option of authorizing even mild coercion.

Historical Evidence that Coercion Can Work

While the competing agendas of various participants complicate the debate about whether the administration's post-September 11 coercive interrogations have saved lives, a body of historical evidence shows fairly conclusively that such coercion has sometimes saved lives—though not that it is a good bet to save lives in any particular emergency. History does not support the confident claims by ideologically-driven opponents of coercion that "torture never works" because prisoners will give false confessions and make up false

stories to stop the pain.[100] Nor does it support corollary claims that milder forms of coercive interrogation don't work either.

Most experienced military and FBI interrogators emphatically agree that coercion is generally ineffective and vow that they would never try it. And it's probably true that, as most veteran interrogators, psychologists and other experts say, less coercive methods are equally or more effective most of the time. It's also true that there is little or no empirical evidence that coercive interrogation "works" —or that it does not. That's the main message of a 2006 report of the Intelligence Science Board, a collection of papers entitled *Educing Information: Interrogation: Science and Art.* The first paper baldly states: "We do not know what systems, methods, or processes of interrogation best protect the nation's security."[101] A second paper says that "virtually none" of the authorized techniques used by U.S. personnel over the past 50 years "are based on scientific research or have ever been subjected to scientific or systematic inquiry or evaluation." It adds: "There is little or no research to indicate whether [coercive] techniques succeed in the manner and contexts in which they are applied. Anecdotal accounts and opinions based on personal experiences are mixed, but the preponderance of reports seems to weigh against their effectiveness."[102]

But how many people really believe that coercive methods are *never* effective? How many of us doubt that we personally could be coerced or tortured into revealing secrets, especially if our tormentors had ways immediately to check the accuracy of what we told them? If you were arrested near a crowded train station in which you had hidden a bomb, and an interrogator brandished a red-hot poker an inch from your eyes while demanding, "Where's the bomb," would you refuse to answer? Concoct a lie likely to crumble under pressure? After your lie was exposed, and the interrogator began torturing you with that red-hot poker, would you hold fast? We suspect that we would blurt out the truth before it came to that. We also suspect, on the other hand, that we might hold our tongues if subjected only to mild coercion.

Of course, if you don't know of any hidden bomb but the interrogator thinks you do, no amount of torture will get its location out of you, and you will indeed concoct false stories to stop the pain. That's why there are countless examples of suspects confessing under pressure to crimes that they did not commit. Moreover, if the interrogator's goal is not to get the truth but to force a confession or simply to humiliate you, the results of the interrogation may be a great deal more noise than signal. Coercion is thus at best a crude and imperfect means of obtaining intelligence.

But in a case like KSM's, it may also be the only hope of learning what a terrorist mastermind knows in time to save the innocents whom he is conspiring to murder. Interrogators are not looking for a confession to use at trial but for information that could prevent mass murders. They also have strong incentives and, in many cases, opportunities to check the accuracy of the prisoner's statements: they can interview co-conspirators, use polygraph tests, find out whether people or things are where the prisoner said they would be, and more.

Indeed, a substantial body of recent and not-so-recent historical evidence supports the proposition that both mild coercion and harsher methods, including torture, have indeed extracted important information, probably saving lives. Examples, beginning in 1946, include:

- In 1946, British forces found and detained the wife of Rudolph Hoess, the commandant of Auschwitz. Through several days of interrogation, she claimed that Hoess was dead. Then the British told her that unless she wrote down her husband's whereabouts quickly, they were about to put her three sons on a train to the Soviet Union, where it was understood that the KGB would kill them. She gave the British the information they wanted. They caught Hoess that evening, disguised as a farm worker.[103]
- In 1978, in a decision finding coercive British interrogations of suspected Irish Republican Army terrorists to be unlawful (but not severe enough to constitute torture), the European Court of Human Rights nonetheless found that they had been effective in obtaining "a considerable amount of intelligence information, including the identification of 700 members of both IRA factions and the discovery of individual responsibility for about 85 previously unexplained criminal incidents."[104]
- A 1984 federal appeals court decision recited the following findings of fact: Two kidnappers seized a taxi driver and held him for ransom. One was caught while collecting the ransom. He refused to tell police where the cabbie was held. Several officers "threatened him and physically abused him by twisting his arm and choking him until he revealed where [the cab driver] was being held." The court found that the officers had acted "in a reasonable manner to obtain information they needed in order to protect another individual from bodily harm or death."[105]
- A Sri Lankan army officer told terrorism scholar Bruce Hoffman a personal story, apparently from sometime in the 1990s (and impossible to verify), as an example of the need for ruthlessness to defeat terrorists such as the Tamil Tigers. The officer's unit caught three hardened Tamil Tigers suspected of having recently planted in the city of Colombo "a bomb that was then ticking away, the minutes counting down to catastrophe." The officer asked the three where the bomb was. They were silent. He asked again, adding that if they did not answer, he would kill them. They remained silent. He pulled his pistol from his gun belt, pointed it at one man's forehead and shot him dead. The other two talked immediately. The bomb, hidden in a crowded railway station and set to explode during evening rush hour, was found and defused.[106]
- In 1995, Philippine intelligence agents caught an al-Qaeda member named Abdul Hakim Murad in a Manila bomb factory. Murad was defiant through 67 days of savage torture, including beatings that broke his ribs and lighted cigarettes crushed into his private parts. He finally broke when agents disguised as Mossad agents threatened to take him to Israel. He then revealed a plot to assassinate Pope John Paul II, crash 11 U.S. airliners carrying some 4,000 people into the Pacific Ocean and fly a private Cessna loaded with explosives into the CIA's headquarters. Philippine authorities finally turned him over to the United

States.[107]

- Israel's secret services have broken up terrorist cells while planned bombings were in the operational stage, as Israel's High Court of Justice detailed in the very same 1999 decision in which it declared unlawful, absent legislative authorization, the coercive methods that the security services called "a moderate degree of physical pressure." Indeed, it said that such coercion "has led to the thwarting of murderous attacks" and cited several cases in which interrogators had obtained lifesaving intelligence. For example, an applicant who complained of Israeli torture had admitted under interrogation "that he was involved in numerous terrorist activities in the course of which many Israeli citizens were killed," including "the bombing of the café 'Appropo' in Tel Aviv, in which three women were murdered and 30 people were injured…A powerful explosive device, identical to the one detonated at the Café 'Appropo' in Tel Aviv, was found in the applicant's village (Tzurif) subsequent to the dismantling and interrogation of the terrorist cell to which he belonged. Uncovering this explosive device thwarted an attack similar to the one at Café 'Appropo.'"[108]
- An Al Qaeda terrorist named Jamal Beghal was arrested in the Dubai airport in October 2001. His lawyer later charged that he had been "tossed into a darkened cell, handcuffed to a chair, blindfolded and beaten and that his family was threatened." After some weeks, he suddenly decided to cooperate and revealed secrets that thwarted a planned bombing of the U.S. embassy in Paris and that could possibly—had he been caught and interrogated sooner—have prevented the September 11 attacks.[109]

Some of these cases are disputed and none is by itself dispositive. Our point is not to defend the sometimes savage tactics described in these examples—or in the countless others that point in the same direction. It is, rather, to emphasize that it will not do to pretend that America can ban coercion without cost. While it remains very much an open question how often and under what circumstances coercion generates useful intelligence, the correct answer is clearly not "never." As Philip Bobbitt puts it, "There is a reason why, in the very teeth of explicit and pervasive law to the contrary—domestic and international—…the U.S., the UK, France, and Israel have repeatedly engaged in highly coercive techniques of interrogating terrorists. That reason has more to do with the moral imperatives of [protecting their people] than it does with the depravity of officials."[110]

The Arguments for Banning All Coercion and their Flaws

The fact that coercive interrogation has probably saved many lives, at least on rare occasions, does not disarm those who say that torture or less severe forms of coercion is always wrong. One of the more candid arguments for that proposition comes from Michael Ignatieff:

> Those of us who oppose torture should also be honest enough to admit that we may have to pay a price for our own convictions. *Ex ante*, of course, I cannot tell how high this price must be. *Ex post* following another terrorist attack that might have been prevented through the exercise of coercive interrogation—the price of

> my scruple might simply seem too high. This is a risk I am prepared to take, but frankly, a majority of fellow citizens is unlikely to concur.[111]

The following, in roughly ascending order of persuasiveness, are the nine principal arguments that torture and near-torture—some would say any kind of coercion—should *never* be used, and the reasons we regard "never" as an unpersuasive and indeed morally flawed stance.

First, absolutist opponents say that torture or near-torture is simply immoral in all circumstances, no matter how strong the evidence that the prisoner was involved in planning an imminent mass murder and no matter how many lives it might save.[112] This is a weak argument on its own terms. By choosing to allow the massacre of innocents in order to avoid inflicting pain on would-be mass murderers, it embraces the greater of two moral evils. Bobbitt takes the moral offensive against this kind of absolutism. Positing a hypothetical ticking bomb case, he asserts: "In such a situation, only a self-absorbed monster would say, sweetly, 'Oh no, I mustn't (even if I wish I could), sorry,' thus deliberately sentencing unnumbered innocents to death and dismemberment in order to protect the manifestly guilty."[113]

Second, one of the most common arguments against brutal interrogations is that if America abuses its prisoners, it will expose American prisoners to abuse as well. This makes sense in the context for which the Geneva Conventions were originally designed: wars between states in which the belligerents capture enemy soldiers and are willing to provide reciprocal assurances that these prisoners of war will be treated well, as honorable, lawful combatants. The reciprocity argument carries less weight when the prisoners being detained are stateless terrorists committed to torturing and murdering as many American soldiers and civilians alike as they can. Reciprocity presumes a degree of enemy commitment to the treaties—a commitment that is simply counter-factual in the context of global counterterrorism.

Third, one clear cost of the highly coercive CIA and military interrogations of Al Qaeda terrorists has been and will continue to be that it makes it far more difficult, if not impossible, to prosecute major terrorist suspects with any semblance of legitimacy unless none of the essential evidence derives from the coercive interrogations. The fruits of these interrogations will and should be inadmissible in civilian courts and in almost all cases, probably also in military commissions—should those even continue to exist. This helps account for why—seven years after Bush ordered creation of a system of military commissions to prosecute Al Qaeda terrorists for war crimes—so few prosecutions have proceeded before them and no defendant has been convicted of any role in the September 11 attacks or other murderous crimes. Indeed, the proceedings at Guantánamo have generated far more publicity about what was done by America to extract information from the defendants than about their alleged crimes.

This is a high price to pay for whatever intelligence was gained through coercive interrogations. But the price may have been worth paying if the intelligence gained has saved lives, because holding "enemy combatants" for the duration of the war either under

the laws of war or under some other administrative detention regime presents a plausible—if suboptimal—legal alternative to prosecuting them. While establishing the guilt of these mass murderers beyond a reasonable doubt at public trials represents an abiding policy objective, it is not the only policy objective. It may sometimes be more important to get intelligence that might thwart future attacks than to publicly prove the guilt of and punish those responsible for past attacks.

Fourth, opponents of any coercion argue that any use of interrogation methods that can reasonably be called "torture" either violates the 1994 law making torture a crime or invites disrespect for that law. Moreover, they argue that any use of near-torture, or even mildly coercive interrogation, violates international law, including the Geneva Conventions and the U.N. Convention Against Torture and Other Cruel, Humiliating, or Degrading Treatment or Punishment. It follows that even far more judicious use of coercive interrogation than that practiced by the Bush Administration opens the United States to charges of violating international law, including its treaty obligations.

The trouble with this argument is that while the use of torture and near-torture surely violates international law, the use of mildly coercive interrogation on stateless terrorists does not clearly violate Geneva or any other international agreement, at least not as ratified by the United States. In addition, not all use of near-torture violates U.S. law. Finally, while the U.S. should strive to comply with international law when possible, neither it nor any other nation has shrunk from violating international law when necessary to protect its vital interests.

Fifth, opponents of coercive interrogation argue that, even if it does sometimes "work," it so infrequently offers the most effective approach that it leads to a net loss in the amount of good intelligence obtained. This point is probably true in most circumstances. Our view, outlined above, that coercive interrogation *can* prove effective in obtaining life-saving information under certain circumstances does not negate the argument that this happens so rarely and unpredictably that the large costs of a coercive interrogation program to effective intelligence-collection outweigh any of its benefits. Indeed, apart from the fact that the Bush Administration could point to no conclusive public evidence that its coercive interrogations were effective, there are stacks of books and articles from the past few years reciting dozens or even hundreds of examples of coercive interrogations of small-fry and mistakenly-suspected innocents that yielded little or no useful information. There are also cases in which prisoners responded to torture or near-torture by misleading the Bush Administration into disastrous misjudgments and blunders. It might well also be true that because of rampant excesses, the Bush Administration's coercive-interrogation policy generated more costs than benefits—though this is impossible to assess rigorously without a firm sense of how many lives, if any, it saved. But even assuming that the costs to intelligence gathering of the Bush interrogation program vastly exceeded its benefits to intelligence gathering, the same would not necessarily be true if the current administration and Congress were to adopt interrogation laws and policies authorizing more judicious use of more limited coercion.

Sixth and seventh, opponents contend that coercive interrogation, once commenced,

tends to send its practitioners and advocates hurtling down two slippery slopes. The first leads to the use of ever more extreme methods on prisoners who are not easily broken, such as Abu Zubaydah and KSM, or who have no useful information. The first August 1, 2002 "torture memo" greased the path down this slope by effectively telling the interrogators, "Just about anything you might want to do is legal, and the president's word is the law." Perhaps the easily-broken sort of prisoner who can be forced to spill his guts by mild coercion isn't likely to know very much; perhaps the hardened terrorist leaders who are most likely to have life-saving information will not reveal it unless put through out-and-out torture. If we could be confident that these propositions were true, it would be proper to ban all coercive interrogation, since the law has long banned pushing the prisoner's pain to the point of torture.

The trouble is that we cannot be confident. Nobody knows the set of tactics that optimizes the ratio of valuable intelligence extracted in emergency situations to coercive force exerted—which seems, to us anyway, to be the morally essential ratio. The Israelis appear to have obtained a considerable amount of life-saving intelligence by highly coercive methods that stopped short of torture. Chris Mackey's book cites similar successes with milder coercion in Afghanistan. And a case can be made that the moral imperative to prevent terrorist mass murders may justify—as a matter of right and wrong, although not as a matter of law—the suffering of a few bad men such as Abu Zubaydah, KSM and al-Qahtani.

The other slippery slope leads toward brutalizing large numbers of small-fry and innocent detainees. Harsh methods initially designed for use against only the worst of the worst, who presumably have the most life-saving information, tend to spread to less important cell leaders, and then to individual foot soldiers, and their brothers and fathers and sons and neighbors, and many innocents who are wrongly suspected of being terrorists. This certainly occurred in the military (though not the CIA) under Bush.

A *Washington Post* editorial drew a broader lesson. Speaking of the dismissal of the war crimes charges against al-Qahtani, it asserted, "His case is testament to the fact that extreme tactics, even when used to prevent violence, almost always backfire."[114]

But "almost always"—with its implication of inevitability—probably overstates the matter. The brutal methods used on al-Qahtani migrated overseas because of avoidable Bush Administration blunders and arrogance. Bush did not have to toss the Geneva Conventions aside and throw the military into a state of confusion about what, if any, law interrogators had to obey. The Justice Department did not have to give the White House and CIA memos so drastically narrowing the anti-torture law and asserting presidential power to order wholesale torture. Rumsfeld did not have to give al-Qahtani's handlers such an open-ended authorization to work him over or take so little care to prevent the spread of techniques intended only for use at Guantánamo. General Miller did not have to advise that prisoners be treated like dogs. The military did not have to circulate a confusing succession of inconsistent rules at Abu Ghraib. Indeed, the administration did not have to permit coercive interrogation in the military—which holds the most and lowest level detainees—at all. Confining the use of such methods to the CIA's small

corps of highly-trained interrogators and to its particularly high-value group of detainees has greatly limited the number of prisoners subjected to them.

In other words, in the future, with better laws and better leaders, we might be able to save lives by using coercive—and in dire emergencies highly coercive—interrogation methods only on the few prisoners who seem especially likely to have life-saving information, and to do so without crossing the line into torture and without again brutalizing large numbers of small-fry and innocents.

Eighth, opponents argue that coercive interrogation represents a betrayal of American values and traditions. Since the Revolutionary War, the United States has taken pride in its renunciation of torture and abuse of helpless prisoners. While the British brutalized captured members of George Washington's army, Washington ordered that British prisoners of war be treated "with humanity," receive food and medical care, and be housed in conditions comparable to those of their American captors.[115] From the Civil War through World Wars I and II, the adoption of the Geneva Conventions and beyond, America took the lead in pushing for international rules to prevent mistreatment of prisoners of war. As Philip Zelikow, a former senior adviser to Condoleezza Rice, stressed in an April 2007 lecture, the high-level Bush Administration approval of methods involving prolonged physical torment was unprecedented in American history, even during World War II, which took hundreds of thousands of American lives. Nor did World War II-era leaders such as Henry Stimson, George Marshall and Winston Churchill "rely on lawyers to tell them what was right and wrong," Zelikow said.[116]

This point has a great deal of merit. Coercion is an ugly thing; torture raises that ugliness to a particularly high degree. But the high-minded ideals professed by American leaders and expounded in the Geneva Conventions have often coexisted with some space in practice for the use of fairly tough coercive interrogation methods. In a carefully researched paper contradicting the conventional wisdom that the post-September 11 prisoner abuse was almost unprecedented in U.S. history, a scholar named William Levi has written: "Almost without exception, the techniques approved after 9/11 for military interrogations of unlawful combatants would have been understood to fall within the legal constraints of the Geneva Conventions for protected prisoners of war at one point or another pre-9/11."[117]

In a review of declassified Defense Department and CIA interrogation manuals, Levi found that even after ratification of the 1949 Geneva Conventions, both military and CIA interrogation techniques long remained much rougher than a literal reading of Geneva would have led one to expect. The military authorized, and claimed as consistent with Geneva, techniques including drugs, slaps and other physical pressures short of torture to induce disorientation. And the CIA long maintained more permissive guidelines than the military. CIA manuals encouraged the use of sensory deprivation to soften up detainees for their interrogators. As the military's rules became tighter in the 1960s and early 1970s, the CIA began outsourcing some interrogations to foreign governments with much looser standards. American forces trained Latin American governments how to use tactics that U.S. policy forbade and shared the information obtained.[118] In other words, the real

history of American interrogation has not taken place entirely on the high road but stepped off on the shoulder in exigent (and sometimes less than exigent) circumstances.

Finally, opponents argue that coercive interrogation fans hatred of America and risks alienating allies. They are undoubtedly correct on this point. Perhaps the most powerful argument against coercive interrogation is that by abandoning the moral high ground, America forfeits international support, spurs anti-Americanism, and encourages more people to become terrorists than we can ever kill or catch. The evidence of this backlash against America is all around us, in the headlines and polls showing a deep drop in sympathy for America all over the world since 2001. The brutal interrogations in Guantánamo, Afghanistan and Iraq may also have done as much to alienate potential informants as to reap valuable intelligence; while this hypothesis is inherently untestable, it is sufficiently plausible to warrant firm repudiation of the Bush approach.

More broadly, the widespread view in Europe and elsewhere that the United States has systematically tortured prisoners has done incalculable damage to the international cooperation in fighting terrorists that is essential to success. In poll after poll, most people around the world say the United States plays a negative role in world affairs.

The risk that alienating foreign opinion can contribute to military defeat is illustrated by the aftermath of French forces torturing Algerian revolutionaries during the 1957 Battle of Algiers. The French squeezed enough information out of these revolutionaries to win the immediate battle, but lost the war, in part because the brutal French tactics had swelled the ranks of the revolutionaries and their sympathizers as well as outraging public opinion in France and elsewhere.[119] All this adds up to a serious case that perhaps the only way to recapture the high ground in world opinion and make a clean break with the Bush record would be to ban all coercive interrogation—even angry shouting—as Congress has voted to do and the Obama executive order does on an at-least temporary basis.

A serious case—but ultimately an unpersuasive one, in our view. Polls and anecdotal evidence alike suggest that America's image is not actually so bad in much of the world and that the anti-Americanism concentrated in the Muslim world and Western Europe would not be greatly dissipated by a ban on coercive interrogation[120]; this anti-Americanism is rooted in numerous causes, including hatred of America's alliance with Israel and the smugness and hypocrisy of Europeans who have taken the American security umbrella for granted for decades. This is not to deny that a flat ban on coercive interrogation might improve America's image abroad. But the same might be true if the new administration and Congress firmly repudiate the excesses and abuses of the Bush years while at the same time allowing limited, carefully controlled, coercive interrogation short of torture to meet dire emergencies and unlock the secrets of important terrorist captives such as KSM.

Fixing the Law

We have seen the terrible consequences of allowing coercive interrogation to spin out of

control. But the preceding discussion suggests that it would be an overreaction to ban *all* coercive interrogation—that is, to make permanent the current Obama policy, particularly by passing a statute of the type Congress would have enacted in February 2008 but for Bush's veto. A more clear-eyed consideration of long-term interrogation policy starts from a different, less comfortable premise—that the real question is not whether coercion is ever appropriate but how much coercion is appropriate, how rarely, and with what, if any, degree of legal sanction. We should also resist answering this question in simple terms, but acknowledge the need for different rules for different agencies that conduct interrogations. Threats and intimidation that are unacceptable in the military context and banned by the Army Field Manual may be routine and quite legal in, for example, the criminal justice context, where police officers and FBI agents regularly threaten suspects with lengthy prison terms—even the death penalty—to get them to cooperate. (Presumably for this reason, the Obama executive order specifically exempted the FBI from the requirement to follow the Army Field Manual.[121]) In the real world, there is no magic line between coercion and non-coercion. Nor even is the line between physical coercion and psychological pressure altogether sharp.

Humility is critical in this policymaking exercise. In the absence of more rigorous study of how coercion has worked in practice, we are as a society guessing as to questions of when coercion is appropriate and how much. Any policy proposal not predetermined by ideology, therefore, ought to be tentative—subject to revision in a more permissive direction if evidence develops that coercion saves lives and in a less permissive direction if evidence develops that it produced results either too confounded with noise or obtainable by less ugly means. While we await more empirical evidence of what works and what doesn't, we believe that our laws and policies should be guided by the following principal lessons of the post-September 11 experience:

- Rapport-building methods such as those used by military interrogators under the Army Field Manual should be the preferred approach for interrogating suspected terrorists. They not only present fewer legal and moral problems, they often offer the most effective means of obtaining the largest volume of useful information. What's more, they certainly facilitate eventual criminal prosecution more readily than do coercive methods. They do not alienate our allies—though the non-criminal detentions that enable them may still—nor do they rally world opinion against America's fight.
- When non-coercive methods seem unavailing, it will often—although not always—be because the prisoner has little or no information to give up. One cannot assume that every prisoner is going to tell all if interrogators only keep on him long and hard enough to "break" him. Sometimes, they don't tell all because they don't know much.
- Coercive methods may well spur such prisoners to mislead interrogators by fabricating stories to stop the pain. This fact is oft-repeated by those for whom it ineluctably counsels abstention from all coercive methods all the time. While it does not lead us to that conclusion, it should induce a great deal of caution about authorizing highly-coercive practices and a skepticism about the intelligence take from detainees subjected to those practices absent strong corroboration data.

- Any use of coercive methods also poses a grave danger that the interrogators will be tempted to ratchet up the pressure to the point of near-torture or torture if mild coercion does not produce results. Again, this point does not necessarily counsel abstention from all coercion, but it should induce especially clear and rigorous regulatory constraints on escalation.
- Vague definitions of what is and is not lawful are doubly dangerous. On the one hand, they may tempt some officials to twist the law to allow extreme methods, giving latitude to people like Yoo who wished to beat the law until it confessed. On the other hand, vagueness can also induce undue risk aversion. When the law does not offer clarity about what methods are legally safe, it can deter officials from using even perfectly defensible techniques that should be lawful and might save lives. The current reliance on the Army Field Manual, which stops far short of the legal lines—wherever they reside—is an example of this danger. Unsure of where the legal lines actually lay, the military set its regulatory limits extremely conservatively.
- High-level approval of coercive interrogation can ripple down through the ranks, leading to wholesale brutalization of small-fry detainees who know little or nothing of value, as well as of wrongly-suspected innocents. It is, therefore, critical not to have a *general policy* of authorizing harsh interrogations. To minimize the danger of the contagion's spreading and diffusing throughout the government, any coercive methods should be administered only by well-trained personnel in an isolated program. Those interrogators must be carefully screened to filter out people who might be tempted to abuse prisoners as a form of retribution or as a source of sadistic pleasure.

Most of the major elements of a policy based on these principles are already in place—the product of the reforms of the late Bush years and the early Obama days. The Bush administration already reduced the risks of brutalizing small-fry detainees and of using unfit or badly trained interrogators by ending the military's use of coercive interrogation methods. By late 2006, coercion was already segregated to the tiny CIA program, which had been emptied of subjects. The Obama order, while eliminating this program, keeps in place the principle that if anyone is permitted to exceed the Army Field Manual, it is only agency personnel with special authorization. This would presumably affect only a small number of the highest-value prisoners and would involve only a small number of carefully-chosen and specially-trained interrogators.

Meanwhile, the *Hamdan* decision and the MCA's revision of the War Crimes Act, both in 2006, have fortified the case that it is a war crime to use waterboarding and perhaps some other highly coercive methods that the CIA had previously employed based on Justice Department advice that they were lawful. In addition, waterboarding was already barred by the CIA's classified interrogation rules when Obama shut down the agency's program. And both Obama in a press conference and Attorney General Eric Holder in his confirmation hearings made clear that they regard waterboarding as torture.[122]

What's more, the McCain Amendment codified a series of important judgments that reflect a kind of consensus about military interrogation policy—a consensus that could

plausibly inform future policymaking about CIA interrogations, too. The first of these is that Congress is not well-suited to write the granular rules of interrogation policy. The McCain Amendment, after all, says nothing about the details of what military interrogators may and may not do. Rather, it delegates to the military itself the authority to write the rules and merely requires as a matter of law that the military then follow those rules. It therefore leaves the military with great policy latitude both to set the boundaries and, if circumstances change, to alter them. If the military tomorrow decided that it needed to use more coercion and could justify it under the high-altitude principles Congress has set, it could rewrite the Army Field Manual to ramp up the permissible pressure at least to some degree—all without going to Congress.

The second judgment reflected in the McCain Amendment is that the legal restraints on interrogation should not be enforced by adding new criminal laws to those banning torture (which we would tighten as detailed below) and war crimes. Even if a tactic violates the Army Field Manual or, more fundamentally, the ban on cruel, inhuman, or degrading treatment, it remains an administrative matter under the MCA unless it is sufficiently violent to constitute a "grave breach" of the Geneva Conventions. In other words, Congress has recognized that not every violation of the interrogation rules or of international law should be criminally prosecutable.

The result of these policy judgments and their wide acceptance is that the residual policy dispute is quite narrow. A near consensus has developed that military detainees should not be coercively interrogated at all and the CIA should rarely use coercion. The only real dispute is over that tiny handful of CIA detainees who are both high-value enough to have access to prospective terrorist planning information and who stubbornly resist non-coercive interrogation.

While President Obama's executive order makes a clean break with the Bush record, it actually does not answer the question of how best to handle this group. Were the Obama order to become the long-term policy of the administration, it would fail on both a substantive and a procedural level. First, it goes too far by banning all coercion all the time. Second, this rule is unstable because it can so easily be changed at the whim of the president, whether Obama or, perhaps, a successor more like Bush. An administration down the road that wanted to resume waterboarding could rescind the current order and adopt legal positions like those of the prior administration. Unless the Obama Administration and Congress hammer out rules that provide interrogators with clear guidance about what is and is not allowed and write those rules into statute, America risks vacillating under current law's vagaries between overly permissive and overly restrictive guidance.

The general goals of new legislation should be threefold:

- To make it a crime beyond cavil to use interrogation methods considered by reasonable people to be torture. The torture statute already does this to some degree, but the fact that it arguably permitted techniques as severe as waterboarding suggests that it may require some tightening. The key here is that

the statute should cover *all* techniques the use of which ought to prompt criminal prosecution;
- To subject CIA interrogators in almost all cases to rules that, without relaxing current law's ban on cruel, inhuman and degrading treatment, permit relatively mild forms of coercion that are properly off limits to military interrogators; and
- To allow the president, subject to strict safeguards, to authorize use of harsher methods short of torture (as defined in the revised criminal statute) in true emergencies or on extraordinarily high-value captives such as KSM.

Only Congress can provide the democratic legitimacy and the fine-tuning of criminal laws that can deliver such a regime. Only Congress, for example, can pass a new law making it clear that waterboarding—or any other technique of comparable severity—will henceforth be a federal crime. Only Congress as well can offer clear assurances to operatives in the field that there exist safe harbors against prosecution for conduct ordered by higher-ups in a crisis in the genuine belief that an attack may be around the corner. Only Congress, in other words, can create a regime that plausibly turns away from the past without giving up what America will need in the future.

Refining the Torture Statute

Congress could accomplish the first of these objectives most simply by adopting a definition of torture for purposes of the anti-torture statute that is more specific and detailed—and therefore less amenable to interpretative manipulation—than current law and that bans a somewhat wider range of brutality. The goal here should not be a narrow anti-waterboarding law, since it requires no particular creativity to imagine inflicting some equivalent suffering by means that would not fit the terms of such a statute. Rather, the legislature should aim to define and ban the *category of techniques* that induces discomfort of such enormity that any reasonable person would regard them as torture.

As described earlier, federal law currently defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering…upon another person within his custody or physical control." And it defines "severe mental pain and suffering" to include "the prolonged mental harm caused by or resulting from" any of four distinct behaviors: "the intentional infliction or threatened infliction of severe physical pain or suffering," "the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality," "the threat of imminent death," and "the threat that another person will imminently be subjected to" these other harms.[123]

There are two problems with this definition. First, "severe" is almost infinitely malleable. The statute does very little to tell an interrogator—or a president—how much pain will trigger criminal liability. Does it have to be "equivalent in intensity to the pain accompanying serious physical injury such as organ failure," as John Yoo suggested, or will discomfort beyond the scratches and bruises of day-to-day life suffice? What about techniques—such as waterboarding, for example—that leave no permanent mark or

damage yet cause excruciating suffering and panic?

Second, the requirement that "mental harm" be "prolonged" introduces an analytical circularity. How can the interrogator know before he performs a technique whether it will cause *prolonged* mental harm or just temporary mental harm? And how could a jury possibly ascertain his intent? Indeed, why would any interrogator other than a sadist *ever* intend to cause prolonged mental harm?

To correct these problems, Congress should both give texture to the word "severe" and remove the requirement that mental harm be "prolonged," replacing it with a definition based on intensity and that more textured understanding of severity. Congress might define "severe physical pain or suffering" as, for example, "physical discomfort of such intensity and duration as to be unendurable by an average person." And it might define "severe mental pain or suffering" as "the mental harm caused by or resulting from" the four currently-listed tortures as well as a more generalized fifth category: "the infliction of any other techniques of mental or psychological manipulation that are of sufficient intensity and duration as to be unendurable by an average person." Not every technique of coercion hurts enough to render a person willing to do anything to make it stop. Those that do are the ones that deserve the special mark of criminal-law opprobrium. Such a rule will not by any means make completely clear where along the spectrum of coercion pressure crosses the line into torture. It will, however, both offer more guidance than current law does and clarify that certain specific techniques that are now arguable cases fall clearly on the criminal side of the line.

To add additional clarity, Congress might follow the Army's lead and identify a specific set of off-limits tactics—not as a comprehensive list but as a representative sample. The Army Field Manual both identifies the techniques that it authorizes *and* specifically proscribes techniques to be avoided. The relevant language reads:

> If used in conjunction with intelligence interrogations, prohibited actions include, but are not limited to,
>
> - Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner.
> - Placing hoods or sacks over the head of a detainee; using duct tape over the eyes.
> - Applying beatings, electric shock, burns, or other forms of physical pain.
> - "Waterboarding."
> - Using military working dogs.
> - Inducing hypothermia or heat injury.
> - Conducting mock executions.
> - Depriving the detainee of necessary food, water, or medical care.[124]

A similar approach for CIA interrogations might well specify different techniques, but laying out examples in statute would offer executive branch lawyers guidance as to the sort of coercive intensity Congress means to ban.

CIA Flexibility under the McCain Amendment

Even if Congress were to tighten the torture statute to reflect a more intuitive understanding of torture, a considerable gap would remain between the prohibitions in this revised statute and those in the Army Field Manual, which forbids even mild coercion or intimidation. A smaller but still substantial gap also exists between methods that "shock the conscience" and are thus banned by the McCain Amendment and the Army Field Manual. Thus, a second key goal of legislative policy should be to both authorize and set strict limits on CIA interrogations in this legal space—that is, space forbidden to the military as a matter of policy but not precluded by any statute. Congress should, in other words, make clear that CIA interrogations need not follow the Army Field Manual but must by law follow a parallel code developed for the agency's own use.

Specifically, Congress should require the administration to adopt and to submit to the congressional intelligence committees a detailed CIA interrogation manual, subject to revision by legislation. Like the military interrogation rules in the Army Field Manual, the CIA manual should prohibit the use of any interrogation methods other than those it specifies, subject to the emergency exception described below. Also like the military rules, the CIA manual should carry the force of law for those whose behavior it governs. And like the Army Field Manual, it should be enforced though administrative discipline, not by criminal sanction, except to the extent that violations involve highly coercive methods that amount to either torture under the definition as revised above or a violation of the War Crimes Act.

Unlike the military rules, however, the CIA manual should permit the agency far greater latitude—subject to the existing legal prohibitions on cruel, degrading and inhuman treatment and the criminal prohibitions discussed above—both to put pressure on detainees to cooperate and to give them benefits in exchange for cooperation. The CIA manual should authorize a range of mildly coercive methods. For example, the CIA should retain the options of yelling, making threats, disrupting sleep patterns in a carefully limited manner, denying hot rations and comfort items, and perhaps forcing prisoners to stand for long enough to make them uncomfortable but not so long as to put them in agony. The rules should forbid any violent physical contact.

The basic principle is that for this limited group of detainees (the highest-value, most dangerous terrorist suspects in American custody) and this limited group of interrogators (the most highly-skilled and well-trained personnel in the government), the government should take advantage of every technique it can reasonably defend as lawful. Such interrogation might make it more difficult to prosecute these prisoners, whose coerced statements would be inadmissible in federal court. But this cost would be justified by the hope of obtaining potentially life-saving information. And any statements made before coercion was used would still be admissible.

The CIA manual should be made public to the maximum extent possible. The agency's interrogation rules have long been classified, on the theory that captured terrorists should not know the limits of what might be done to them in advance lest they be encouraged to hold out. Indeed, Al Qaeda trains its terrorists in what interrogation methods to expect

and how to resist. So it might be necessary to keep some details under wraps. But perhaps not: The emergency exception described below would have the benefit of signaling to high-value captured terrorists that they might be subjected to methods tougher than those listed in the public manual. While the emergency exception would also have the cost of signaling the same to the rest of the world, the world would know that the tougher methods were reserved for the direst emergencies. In any event, it is essential for the broad contours of the manual and its techniques to be public—and debated in public—so that it does not appear that the United States is secretly authorizing interrogation practices more brutal than it admits to its own people and the world at large.

An Emergency Exception

The combination of military interrogations under the Army Field Manual and CIA interrogations under a more permissive CIA manual should provide adequate flexibility for almost all interrogations United States personnel will have to conduct. There likely will be exceptions, however—those rare captives who seem especially likely to have life-saving information yet prove resistant to the usual interrogation methods. Both Congress and the executive branch must take account of this group. In these situations, the executive branch will face an excruciating dilemma: give up on obtaining information on which large numbers of innocent lives may depend or exceed the baseline rules for interrogations. In such crisis situations, it is reasonable to anticipate the executive branch's choice. Restraint will not appeal to officials who fear that it will sacrifice innocent lives. The question Congress must confront, therefore, is whether it wants to regulate this choice or to force executive branch officials to choose between obeying the law and saving lives. In our view, the widespread acknowledgement—often quite backhanded—that in such situations coercive tactics that are otherwise unacceptable may be justified warrants congressional recognition.

Congress should, therefore, create an emergency exception to the rule against using any interrogation method not specified in the CIA manual. This provision should authorize the CIA to deviate from its interrogation manual only on a personal order of the president, on a case-by-case basis, to use otherwise banned, highly-coercive methods short of torture. To prevent interrogators from going too far—and to protect those using authorized methods from subsequent accusations that they did go too far—any such order should detail in writing why extraordinary methods are needed, what methods can be used, for how long, and in what combinations. It should also be accompanied by a Justice Department opinion finding that the proposed interrogation plan violates neither the prohibition against torture nor the War Crimes Act. There should, however, be no requirement that such emergency orders comply with international law, which is thought by many experts to ban all highly coercive interrogation methods—a ban that no president would or should recognize as sacrosanct when innocent lives are at stake.

This law should immunize personnel acting within the four corners of such an order from any subsequent prosecution or civil liability. For these decisions, in other words, the president alone should be accountable, through the political process including impeachment.

To provide political accountability, these orders should be valid only if signed by the president personally and shared promptly with the intelligence committees, much as presidents have long shared "findings" authorizing covert actions. The president should also be required to disclose on a regular basis the number of such orders that have been issued. This would ensure that the president does not slough these decisions off on mid-level career officials who might either resort too readily to near-torture or then face years of investigations and insinuations of criminality—or both. It would also ensure that Congress is kept informed and has appropriate recourse if the president misuses this power.[125]

Congress should, in our judgment, retain the principle that there are no exceptions to the criminal prohibitions in the anti-torture statute or the War Crimes Act. This is not to deny the possibility that torture—and nothing less than torture—might save lives in some imaginable scenario. But so rarely if ever will it be knowable in advance that a prisoner has information that could avert imminent catastrophe and that could be elicited by torture, and only torture, and so high are the costs of authorizing it, that the law must regard anyone who resorts to torture, including the president, as a criminal. If such a law-breaker acts honorably, based on a good-faith conviction that his actions were necessary to avert imminent danger to innocent lives, his protection should lie in prosecutorial judgment, public opinion, a defense of necessity, the common sense of jurors, the president's pardon power, and the judgment of history.

Anything less than a no-legal-exceptions rule would amount to a formal endorsement of torture by the United States government, for the first time in history. And that would be an invitation to abuse and another disaster for America's image. Senator John McCain, a victim of torture and leading critic of waterboarding and other harsh practices, gave the right answer when presented in 2005 with a nuclear-bomb-hidden-in-New-York hypothetical. Citing President Lincoln's probably unconstitutional suspension of habeas corpus to save the union, McCain responded: "You do what you have to do, but you take responsibility for it."[126]

Conclusion

Amid the long, painful, and bruising political battle over interrogation policy, America has actually made enormous progress. We have solved the problem of military interrogations and narrowed the problem of the highest-stakes CIA interrogations. Given that American forces worldwide hold many thousands of people, it is notable that we have reached near-consensus on how to treat all of them excepting a tiny group that currently, in all probability, numbers zero.

That said, Congress's work is not done. As long as it leaves the definition of torture so narrow, and as long as such a wide gap persists between what is lawful in the highest-stakes interrogations and what the Army Field Manual permits, its guidance will remain at once overly permissive and overly restrictive—overly permissive in that the law will not criminalize conduct reasonable people will intuitively understand as torture and

overly restrictive in the sense that the rules will prohibit coercions that, under certain circumstances, are altogether reasonable. A better balance is possible—one that would protect America's security without staining its honor.

Notes

[1] Barack Obama, Inaugural Address (Washington, DC, January 20, 2009); Barack Obama, Address to Joint Session of Congress (Washington, DC, February 24, 2009).
[2] Barack Obama, News Conference by the President (The White House, Washington, DC, April 29, 2009).
[3] CIA Director Michael Hayden has said that since 2001, the agency used "enhanced techniques" on only about one-third of the fewer than 100 suspected Al Qaeda terrorists of whom it has had custody. U.S. Senate Select Committee on Intelligence, *Open Hearing: Current and Projected National Security Threats*, 110th Cong., 2nd sess., February 5, 2008. The exact numbers, as the subsequent releases made clear were that 94 detainees passed through the CIA's detention program, of whom 28 were interrogated with any of the enhanced techniques. See Steven G. Bradbury to John A Rizzo, memorandum, "Re: Application of United States Obligations under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value Al Qaeda Detainees," 30 May 2005, 29 (hereafter "Convention Against Torture" memo).
[4] Fifteen percent said "often," 30 percent "sometimes," 24 percent "rarely," and 4 percent "don't know/refused." See The Pew Research Center for the People & the Press, *Beyond Red vs. Blue*, http://people-press.org/report/?pageid=953/.
[5] See Paul Steinhauser, "Poll: Don't Investigate Torture Techniques," *CNN*, May 6, 2009, http://politicalticker.blogs.cnn.com/2009/05/06/poll-dont-investigate-torture-techniques/.
[6] See, e.g., Eric Schmitt and Tim Golden, "Pentagon Plans Tighter Control of Questioning," *New York Times*, November 8, 2005, A1.
[7] See Jan Crawford Greenburg et al., "Sources: Top Bush Advisors Approved 'Enhanced Interrogation,'" *ABC News*, April 9, 2008, http://abcnews.go.com/TheLaw/LawPolitics/story?id=4583256&page=1/; Dick Cheney, interview by Jonathan Karl, *ABC News*, ABC, December 15, 2008. Here, "humane" is used in the colloquial sense. The Senate, in reservations to treaties, and Congress and the president, in interpretations or modifications of treaties, have sometimes defined "inhuman" more narrowly than dictionary definitions of "inhumane."
[8] See Dan Eggen, "Cheney Defends 'Dunk in the Water' Remark," *Washington Post*, October 28, 2006.
[9] Some, when pressed, turn out not to be such moral absolutists at all. See Benjamin Wittes, *Law and the Long War* (New York: Penguin Press, 2008), 183-84 (discussing retreat from absolutism by retired *New York Times* columnist Anthony Lewis when pressed on "ticking time bomb" question).
[10] This provision, section 327 of the proposed *Intelligence Authorization Act for Fiscal Year 2008*, would have barred the CIA from using any interrogation method not authorized by the Army Field Manual's rules for military interrogators. Those rules had been revised in September 2006 to make them far more restrictive than before, and to ban *all* coercion and threats. Department of the Army, Field Manual 2-22.3, *Human Intelligence Collector Operations*, (Washington, Department of the Army, 2006), § 8-35. See Stuart Taylor, Jr., "Interrogation: Anti-Bush Overreaction," *National Journal*, December 15, 2007; Stuart Taylor, Jr., "What to Do About Waterboarding," *National Journal*, March 1, 2008.
[11] See, e.g., David Herszenhorn, "Bill Curbing Terror Interrogators Is Sent to Bush, Who Has Vowed to Veto It," *New York Times*, February 14, 2008, A24; Dan Eggen, "Bush Poised to Veto Waterboarding Ban," *Washington Post*, March 8, 2008, A2.
[12] See, e.g., Editorial, "Horrifying and Unnecessary," *New York Times*, March 2, 2008, A10 (anticipating veto); Editorial, "Moral Barrier: The President Stands in the Way of a Ban on Torture," *Washington Post*, February 15, 2008 (same).
[13] See David Luban et al. in Wittes, *Law and the Long War*, 185.
[14] Phillip Bobbitt lists the improbable circumstances that must coincide for interrogators to know that a bomb is ticking and that their prisoner has information that could prevent it from going off. See Phillip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* (New York: Alfred A. Knopf, 2008), 362.
[15] See 18 U.S.C. § 2340, which reads:

> (1) "Torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
> (2) "Severe mental pain or suffering" means the prolonged mental harm caused by or resulting

from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;
(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
(C) the threat of imminent death; or
(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Examples might include pulling off fingernails, cutting off fingers, applying scalding pokers or electric shock to genitals and other body parts, severe beatings, and (subject to the "prolonged mental harm" element) holding a gun to the prisoner's head while threatening to shoot him.

[16] "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," December 10, 1984, *United States Treaties and Other International Agreements.* See Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture (advance unedited version)*, 36th sess., CAT/C./U.S.A./CO/2, (Geneva, 2006), at 3 (acts that cause severe mental suffering are torture "irrespective of their prolongation or its duration"); Philippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York: Palgrave Macmillan, 2008), 169-70 and n. 6-7. The U.S. specified its narrower definition of "severe" mental suffering in understandings lodged when it ratified the Convention. *Ibid*; *Reservations, Understandings, and Declarations, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, S17486-92, Amendment No. 3200-3203, 101st Cong., 2nd sess., *Congressional Record* 136 (October 27, 1990).

[17] Examples might include prolonged sleep deprivation that stops short of torturous extremes, forcing prisoners into uncomfortable but less-than-torturous "stress positions," and not-very-painful slaps or pokes in the chest. Some experts suggest that some methods which would not be CID for people of Western cultures might amount to CID for some others; devout Muslims, for example, might feel degraded if straddled by naked women.

[18] Dick Cheney, interview by Tim Russert, *Meet the Press*, NBC, September 16, 2001.

[19] See Frank Davies, "'Americans Are Going to Die,' CIA Warned," *Miami Herald*, September 27, 2002.

[20] See, e.g., Sanford Levinson, "The Debate on Torture: War Against Virtual States," *Dissent* (Summer 2003): 79; Alan Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2003); Philip B. Heymann and Juliette N. Kayyem, *Protecting Liberty in an Age of Terror* (Cambridge: MIT Press, 2005), 31; Richard Posner, "The Best Offense," review of *Why Terrorism Works*, by Alan Dershowitz, *The New Republic* 28 (September 2002).

[21] See Stuart Taylor, Jr., "We Don't Need to Be Scofflaws to Attack Terror," *National Journal*, February 2, 2002; Mayer, *The Dark Side*, 122-25.

[22] 18 U.S.C. § 2441.

[23] President George W. Bush to the Vice President, et al., memorandum, "Humane Treatment of Al Qaeda and Taliban Detainees," 7 February 2002, in Karen J. Greenberg and Joshua L. Dratel, ed., *The Torture Papers* (New York: Cambridge University Press, 2005), 134-35.

[24] Tim Golden, "In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths," *New York Times*, May 20, 2005, A1; Human Rights Watch, *"Enduring Freedom:" Abuses by U.S. Forces in Afghanistan*, March 7, 2004, pt. III.

[25] Dan Eggen and Walter Pincus, "FBI, CIA Debate Significance of Terror Suspect," *Washington Post*, December 18, 2007, A1; see Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies since 9/11* (New York: Simon & Schuster, 2006), 99-101, 111, 115-18.

[26] Eggen and Pincus, note 25 above; Goldsmith, *The Terror Presidency*, 90-97.

[27] Goldsmith, *The Terror Presidency*, 97.

[28] This memo, formally titled "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," has been published in Greenberg and Dratel, ed., *The Torture Papers*, 172-217.

[29] Jay S. Bybee to John Rizzo, memorandum, "Interrogation of Al Qaeda Operative," 1 August 2002, 10-12.

[30] Steven G. Bradbury to John A. Rizzo, memorandum, "Re: Application of 18 U.S.C §§ 2340-2340A to Certain Techniques that May Be Used in the Interrogation of a High Value Al Qaeda Detainee," 10 May 2005, 7-10 (Hereafter "Application to Certain Techniques" memo).

[31] Steven G. Bradbury to John A. Rizzo, memorandum, "Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value Al Qaeda Detainees." 10 May 2005 (Hereafter "Combined Effects" memo).
[32] Steven G. Bradbury to John A. Rizzo, "Application to Certain Techniques" memo, 10 May 2005, 5.
[33] Steven. G. Bradbury to John A. Rizzo, "Convention Against Torture" memo.
[34] *Ibid*., 37.
[35] *Ibid*., 8.
[36] Steven G. Bradbury to John A. Rizzo, "Application of Certain Techniques" memo, 10 May 2005, 12.
[37] International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody*, February 2007. See also Steven G. Bradbury to John A. Rizzo, "Certain Techniques," 10 May 2005, 14.
[38] Suskind, *The One Percent Doctrine*, 114-15; Mayer, *The Dark Side*, 155-57. Ali Soufan, "My Tortured Decision," *New York Times*, April 23, 2009, A27.
[39] See Mark Mazzetti, "CIA Destroyed Tapes of Interrogations," *New York Times*, December 6, 2007.
[40] The National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, July 22, 2004, 248.
[41] See, e.g., Sands, *Torture Team*, 128, 144-48, 225.
[42] Adam Zagorin and Michael Duffy, "Inside the Interrogation of Detainee 063," *Time Magazine*, June 20, 2005, 26; Evan Thomas and Michael Hirsch, "The Debate over Torture," *Newsweek*, November 21, 2005; Lt. Gen. Mark Schmidt and Brig. Gen. John Furlow, U.S. Department of Defense, *Final Report, Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility*, June 9, 2005 (hereafter cited as *Schmidt Report*), 14.
[43] See Gen. James T. Hill to the Chairman of the Joint Chiefs of Staff, memorandum, "Counter-Resistance Techniques," 25 October 2002, in Greenberg and Dratel, ed., *The Torture Papers*, 223. The memo forwards a request from Major General Michael E. Dunleavey, commanding general of the Joint Task Force 170 at Guantánamo, also *ibid*, 225-35.
[44] William J. Haynes II to Secretary of Defense, memorandum, "Counter-Resistance Techniques," 27 November 2002, in Greenberg and Dratel, ed., *The Torture Papers*, 236-37. See also related memoranda of Gen. James T. Hill, Maj. Gen. Michael E. Dunleavy, Lt. Col. Diane E. Beaver, and Lt. Col. Jerald Phifer at *ibid.*, 223-35.
[45] *Ibid.*
[46] *Schmidt Report*, 20; Zagorin and Duffy, note 42 above.
[47] *Schmidt Report*, 20, 26.
[48] Editorial, "Torture's Blowback," *Washington Post*, May 16, 2008, A18; Sands, *Torture Team*, 206-08.
[49] See Human Rights First, *Tortured Justice: Using Coerced Evidence to Prosecute Terrorist Suspects*, May 2008 (hereafter cited as *Tortured Justice* Report), 29 and sources collected therein; Sands, *Torture Team*, 112-20.
[50] See Raymond Bonner, "Questioning Terror Suspects in a Dark and Surreal World," *New York Times*, March 9, 2003.
[51] See, e.g., Josh White, "Top Officer Ordered to Testify on Abuse: Use of Dogs to Scare Detainees at Issue," *Washington Post*, April 9, 2006, A14.
[52] See, e.g., *Schlesinger Report*, in Greenberg and Dratel, ed., *The Torture Papers*, 914.
[53] *Schlesinger Report*, in Greenberg and Dratel, ed., *The Torture Papers*, 908 at 914-15.
[54] *Investigation of Intelligence Activities at Abu Ghraib*, special report prepared at the request of the Department of Defense, August 2004, in Greenberg and Dratel, ed., *The Torture Papers*, 987-1131. The quoted language appears on 989.
[55] Carl Levin, Senate Armed Services Committee, *Report of an Inquiry into the Alternative Analysis of the Issue of an Iraq-Al Qaeda Relationship*, October 21, 2004, xxvi.
[56] For one reason to be skeptical of the Senate Armed Services Committee report on factual questions, see Stuart Taylor, Jr., "Inconvenient Facts and Detainee Abuse," *National Journal*, January 10, 2009.
[57] *Working Group Report on Detainee Interrogations in the Global War on Terrorism; Assessment of Legal, Historical, Policy, and Operational Considerations*, April 4, 2003, in Greenberg and Dratel, ed., *The Torture Papers*, 286-359, especially 340-47.
[58] Memorandum of Donald Rumsfeld for the commander, U.S. Southern Command, "Counter-Resistance Techniques in the War on Terrorism," 16 April 2003, in Greenberg and Dratel, ed., *The Torture Papers*,

360-63.
[59] See Sands, *Torture Team*, 150-54; Gen. Glen Fine, *A Review of the FBI's Involvement in an Observations of Detainee Interrogations in Guantanamo Bay*, special report prepared at the request of the Department of Justice, May 2008 (hereafter cited as *Fine Report*), viii-ix, xxii ("FBI observations confirm that prolonged short-shackling [continued] for at least a year after" the April 2003 Rumsfeld order barring this and some coercive practices took effect).
[60] Goldsmith, *The Terror Presidency*, 40-42.
[61] *Ibid*., 152-55.
[62] *Detainee Treatment Act of 2005*, Public Law 109-148, 109th Cong., 1st sess. (October 5, 2005), § 1002.
[63] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
[64] Department of the Army, Field Manual 2-22.3, *Human Intelligence Collector Operations*, (Washington, Department of the Army, 2006).
[65] These eight methods include waterboarding, beatings and other physical pain, induced hypothermia or heat injuries, forced nakedness, and deprivation of food, water, or medical care. *Ibid*., §§ 5-75, 8-18.
[66] Department of the Army, Field Manual 2-22.3, *Human Intelligence Collector Operations*, (Washington, Department of the Army, 2006), § 8-35: The interrogator "must be extremely careful that he does not threaten or coerce" a detainee or "act as if he is out of control or set himself up as the object or focal point of the [detainee's] fear;" see Taylor, "Interrogation: Anti-Bush Overrreaction."
[67] *Detainee Treatment Act*, §§ 1003, 1004. Section 1004(d) specifies that "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." The relevant federal case law under these constitutional amendments boils down to a balancing test in which the court decides whether the methods used to get information out of the prisoner were far harsher than can be justified by the importance and urgency of the information sought. Specifically, the Supreme Court has ruled that suspects have a substantive due process right to be free from police practices "so brutal and so offensive to human dignity" that they "shock the conscience." *Rochin* v. *California*, 342 U.S. 165, 174 (1952) (pumping a suspect's stomach merely to get evidence for drug prosecution shocks the conscience). The Court has suggested that this test calls for balancing the harshness of the methods used against the urgency of the need for information. See *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) ("conduct intended to injure in some way *unjustifiable by any government interest* [emphasis added] is the sort of official action most likely to rise to the conscience-shocking level"). If the information sought could avert an imminent killing, for example, this balancing test might allow use of very harsh methods indeed. See *Leon* v. *Wainwright*, 734 F. 2d 770, 772-73 (11th Cir. 1984). Indeed, Justice Antonin Scalia said in an interview broadcast by BBC in Britain that in the unlikely event of a "ticking time bomb" scenario, "It would be absurd to say that you couldn't, I don't know, stick something under the fingernail, smack him in the face." Ralph Satter, "Scalia Says 'So-Called Torture' Cannot Be Ruled Out as Interrogation Method," *Associated Press*, February 14, 2008.
[68] *Military Commissions Act of 2006*, Public Law 109-366, 109th Cong., 2nd sess. (October 10, 2006), § 6, (amending 18 U.S.C. 2441) (see especially provisions of 18 U.S.C. 2441(d)(2) retroactively and narrowly defining "severe" and "serious" physical and mental pain or suffering by reference to the torture statute, 18 U.S.C. 2340).
[69] *Detainee Treatment Act*, § 1004(A).
[70] Executive Order No. 13,440, "Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, July 20, 2007," Federal Register, title 72, no. 141, 40,705-09 (July 24, 2007). See Greg Miller, "Bush Signs New CIA Interrogation Rules," *Los Angeles Times*, July 21, 2007. See also Gen. Michael Hayden, "Director's Statement on Executive Order on Detentions, Interrogations: Statement to Employees by Director of the Central Intelligence Agency, General Michael V. Hayden on the Executive Order on Detentions and Interrogations," CIA press statement, July 20, 2007.
[71] See Mark Mazzetti, "Letters Outline Legal Rationale for C.I.A. Tactics," *New York Times*, April 27, 2008.
[72] See 18 U.S.C. § 2441(d)(2)(E)(2).
[73] See House Committee on the Judiciary, Subcommittee on Constitution, Civil Rights and Civil Liberties,

Oversight Hearing on the Justice Department's Office of Legal Counsel, 110th Cong., 2nd sess., 2008; Dan Eggen, "Justice Official Defends Rough CIA Interrogations," *Washington Post*, February 17, 2008.
[74] Executive Order, "Ensuring Lawful Interrogations" (January 22, 2009).
[75] *Schmidt Report*, 20.
[76] See Office of the Assistant Secretary of Defense (Public Affairs), "Guantánamo Provides Valuable Intelligence Information," U.S. Department of Defense news release, June 12, 2005; Daniel J. Dell'Orto, White House press briefing, June 22, 2004.
[77] Senate Armed Services Committee, *Hearing on Guantanamo Bay Detainee Treatment*, 109th Cong., 1st sess., July 13, 2005.
[78] *Schlesinger Report*, in Greenberg and Dratel, ed., *The Torture Papers*, 908-75. The quoted language appears *ibid*., 924.
[79] See Sands, *Torture Team*, 144-48, 159-60; Adam Zagorin, "'20th Hijacker' Claims that Torture Made Him Lie," *Time Magazine*, March 3, 2006; U.S. Armed Forces, Administrative Review Board, *Summary of Administrative Review Board Proceedings for ISN 063* [al-Qahtani], Enclosure (5), 8.
[80] See *Tortured Justice* Report, 29-30, and sources collected therein. Examples: Former FBI agent Jack Cloonan told Human Rights First that the coercive interrogations at Guantanamo were "a complete and unmitigated failure." *Ibid.*, 219. Dan Coleman, another former FBI agent, reportedly asserted: "Brutalization doesn't work; we know that. Besides, you lose your soul." Mayer, *The Dark* Side, 119. And at a September 6, 2006 news briefing announcing the new Army Field Manual, Lieutenant General John Kimmons, Deputy Chief of Staff for Intelligence, asserted: "No good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tells us that." Office of the Assistant Secretary of Defense (Public Affairs), "DoD News Briefing with Deputy Assistant Secretary Stimson and Lt. Gen. Kimmons from the Pentagon," U.S. Department of Defense news release, September 6, 2006.
[81] Bob Woodward, "Detainee Tortured, Says U.S. Official: Trial Overseer Cites 'Abusive' Methods Against 9/11 Suspect," *Washington Post*, January 14, 2009, A01.
[82] Chris Mackey and Greg Miller, *The Interrogators: Task Force 500 and America's Secret War against Al Qaeda* (New York: Back Bay Books, 2005), xxx, 285-89, 354-64, 468, 476, 477.
[83] West's actions apparently violated the Uniform Code of Military Justice and would qualify as torture under international law, if not U.S. law. He was threatened with a court-martial for attempted assault and up to eight years imprisonment and was eventually forced to retire. See Audrey Hudson, "West Would Make 'Sacrifice' Again," *Washington Times*, December 19, 2003, 1.
[84] Eggen and Pincus, note 25 above; see Suskind, *The One Percent Doctrine*, 94-96, 100.
[85] Scott Shane, "Inside the Interrogation of a 9/11 Mastermind," *New York Times*, June 22, 2008, A1.
[86] Eggen and Pincus, note 25 above; Suskind, *The One Percent Doctrine*, 229-230; Associated Press, "Khalid Sheikh Mohammed's Words Provide Glimpse into the Mind of a Terrorist," *USA Today*, March 16, 2007; see Elaine Shannon and Michael Weisskopf, "Khalid Sheikh Mohammed Names Names," *Time Magazine*, March 24, 2003 ("Some officials remain skeptical that at least some of [KSM's statements were] intentionally misleading," but some were corroborated, and a counter-terrorism official said it was "valuable, credible, specific information.")
[87] Suskind, *The One Percent Doctrine*, 228-30.
[88] Shane, note 85 above.
[89] *Ibid.*
[90] *Ibid*.
[91] George Tenet, interview by Scott Pelley, *60 Minutes*, CBS, April 29, 2007; Tenet, *At the Center of the Storm*, 256.
[92] Goldsmith, *The Terror Presidency*, 151-52.
[93] Lawrence Wright, "The Spymaster," 52.
[94] Speech of George W. Bush (The White House, Washington, DC, September 6, 2006).
[95] Timothy Noah, "More Library Tower Nonsense," *Slate*, April 27, 2009, contra Marc A. Thiessen, "The CIA's Questioning Worked," *Washington Post*, April 21, 2009 and Thiessen, "The West Coast Plot: An Inconvenient Truth," *National Review Online*, April 25, 2009, http://corner.nationalreview.com/post/?q=ZDE5YTNmZTg5OWUyOTlkMGUxOTk3OGMxY2I4ZDQ4YWQ=.
[96] Bush speech, note 96 above.

[97] See, e.g., Sheryl Gay Stolberg, "President Moves 16 Held in Secret to Guantanamo," *New York Times*, September 7, 2006, A1; R. Jeffrey Smith and Michael Fletcher, "Bush Says Detainees Will Be Tried," *Washington Post*, September 7, 2006, A1.
[98] David Rose, "Tortured Reasoning," *Vanity Fair*, December 16, 2008, 4, http://www.vanityfair.com/magazine/2008/12/torture200812?currentPage=1.
[99] Matthew Alexander and John Bruning, *How to Break a Terrorist: The U.S. Interrogators Who Used Brains, Not Brutality, to Take Down the Deadliest Man in Iraq* (New York: Free Press, 2008).
[100] See, e.g., American Civil Liberties Union, "Safe and Free: Restore Our Constitutional Rights," American Civil Liberties Union, http://www.aclu.org/safefree/torture/index.html; Human Rights Watch, "Torture Doesn't Work," Human Rights Watch, http://www.hrw.org/en/news/2006/04/26/torture-doesnt-work; Amnesty International, "Counter Terror with Justice: No Justification for Torture," Amnesty International, http://www.amnesty.org/en/campaigns/counter-terror-with-justice/issues/no-justification-for-torture. Darius Rejali at Wittes, *Law and the Long War*, 191-192; Darius Rejali, *Torture and Democracy* (Princeton, Princeton University Press, 2007). See also Thomas and Hirsch, "The Debate over Torture," 26: "Torture still works to extract the truth in the movies and on TV shows like the popular '24' but not in real life, say the experts. A prisoner who has his fingernails pulled out or his genitals shocked will say (and make up) anything to make the pain stop." The same article, however, also cites evidence that coercion *has* worked in real life: "In modern times, these tactics have been used by British intelligence to unravel the command structure of the IRA and by the Israelis to stop Palestinian suicide bombers."
[101] Robert Coulam, "Approaches to Interrogation in the Struggle Against Terrorism: Considerations of Cost and Benefit," in *Educing Information: Interrogation: Science and Art* (Washington: Center for Strategic Intelligence Research, 2006), 7-16. The quoted language appears at 8.
[102] Randy Borum, "Approaching Truth: Behavioral Science Lessons on Educing Information from Human Sources," in *Educing Information*, 17-43. The quoted language appears at 35. See generally *Tortured Justice* Report, 27-28; but see sources cited at *ibid.*, note 196 ("The scientific community is not universal in its condemnation of these practices").
[103] Laurence Rees, *Auschwitz, A New History* (New York: PublicAffairs, 2005), 288-89.
[104] *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) 1978, at 42. The court ruled that a combination of harsh methods had violated the European Convention on Human Rights and qualified as cruel, inhuman and degrading treatment. The methods, which the court stopped short of calling "torture," included forcing suspects to stand on their toes against the wall with fingers high above their heads; keeping dark hoods over their heads; assailing them with loud and hissing noises; and depriving them of sleep, food and drink.
[105] *Leon v. Wainwright*, 734 F. 2d 770 (11th Cir. 1984).
[106] Bruce Hoffman, "A Nasty Business," *Atlantic Monthly*, January 2002, 52.
[107] Matthew Brzezinski, "Bust and Boom," *Washington Post*, December 30, 2001, W9; Steven Chapman, "No Tortured Dilemma," *Washington Times*, November 5, 2001, A18.
[108] *Public Committee Against Torture in Israel v. State of Israel*, 38 I.L.M. 1471 (1st H.C.J. 1999).
[109] Jerome H. Skolnick, "American Interrogation: From Torture to Trickery," in Sanford Levinson, ed., *Torture: A Collection* (New York: Oxford University Press, 2004), 111.
[110] Bobbitt, *Terror and Consent*, 368.
[111] Excerpted in Kenneth Roth and Minky Worden, ed., *Torture: Does It Make Us Safer? Is It Ever OK?* (New York: The New Press, 2005).
[112] See, e.g., Ariel Dorfman, "The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond?" in *Torture: A Collection*, 3; Henry Shue, "Torture," in *ibid.*, 47.
[113] Bobbitt, *Terror and Consent*, 362. See also Michael Walzer, "Political Action: The Problem of Dirty Hands," in Levinson, ed., *Torture: A Collection*, 61-75.
[114] Editorial, "Torture's Blowback," note 48 above.
[115] David Hackett Fisher, *Washington's Crossing: Pivotal Moments in American History* (New York: Oxford University Press, 2004), 379; Mayer, *The Dark Side*, 84-85.
[116] Philip Zelikow, "Legal Policy for a Twilight War" (lecture, Houston Journal of International Law, Houston, TX, April 26, 2007).
[117] William Ranney Levi, "Interrogation's Law," *YALE L. J.* 118 (forthcoming Apr. 2009): manuscript at 105-106, on file with authors.
[118] *Ibid.*, 144-149.
[119] Hoffman, "A Nasty Business," 50-51.

[120] The Pew Global Attitudes Project, *Pew Global Attitudes Survey*, June 12, 2008, 2: "America's image has improved over the last year in many countries…In most countries surveyed, however, views of the United States remain either mixed or negative. Among America's traditional allies in Western Europe, the U.S. continues to receive largely negative reviews. And in predominantly Muslim countries, highly unfavorable opinions prevail."
[121] Executive Order, "Ensuring Lawful Interrogations," § 3(b).
[122] See Barack Obama, News Conference by the President (Washington, DC, April 29, 2009); Senate Committee on the Judiciary, *Executive Nomination*, 111th Cong., 1st sess., January 15, 2009, 19.
[123] 18 U.S.C. § 2340.
[124] Department of the Army, Field Manual 2-22.3, *Human Intelligence Collector Operations*, (Washington, Department of the Army, 2006) 5-21.
[125] This proposed approach elaborates on one detailed by one of the present authors in *Law and the Long War*, 209-18; and is somewhat similar to suggestions by scholars Philip Heymann and Juliette Kayyem in *Protecting Liberty in an Age of Terror* (Cambridge: The MIT Press, 2005), Chapter 1; and Phillip Bobbitt in *Terror and Consent*, 388-93. See also Eric A. Posner and Adrian Vermuele, *Terror in the Balance: Security, Liberty, and the Courts* (New York: Oxford University Press, 2007); Michael J. Glennon, "Terrorism and the Limits of the Law," *The Wilson Quarterly* 26, no. 2, (Spring 2002).
[126] Thomas and Hirsch, "The Debate over Torture," 26; John McCain, "Torture's Terrible Toll," *Newsweek*, November 21, 2005, 34.