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US Torture Policy and Command Responsibility

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Abstract:
Civilian control of the military and political control of the executive branch are important constitutional principles upon which the United States government is based. After the 9/11 atrocities, President Bush used his power as president very effectively to pursue policies that would allow and encourage U.S. personnel to use harsh interrogation techniques to obtain intelligence in the war on terror. In implementing these interrogation policies, the Bush administration used legal arguments and the chain of command to ensure that the harsh interrogation policies would be carried out. In this process, the administration failed to heed the warnings of both civilian and military career professionals, and this led to the abuse and torture of detainees in the war on terror. This chapter will examine U.S. policy making on interrogation in the war on terror in light of several important principles of American government and international law: the politics-administration dichotomy, civilian control of the military, and command responsibility.

President Bush used his power as president very effectively to pursue a policy direction that would allow and encourage U.S. personnel to use harsh interrogation methods to obtain intelligence in the war on terror. His aides marshaled legal arguments to support his position, despite serious objections from his Secretary of State, Colin Powell, and professional military lawyers in the Judge Advocate General Corps, among others. His policy direction was passed down the chain of command through Secretary of Defense Donald Rumsfeld who chose personnel who would implement the policy, and he issued memoranda on what techniques were to be used. Civilian control of the military and political control of the executive branch are important constitutional principles upon which this nation is based; this is the way it should remain. But the Bush administration failed to heed the warnings of both civilian and military career professionals, and this led to the abuse and torture of detainees in the war on terror. The principle of command responsibility will be used to analyze accountability for the policies.

During the war on terror U.S. personnel engaged in "enhanced interrogation techniques" that at times amounted to torture. Often interrogators complied with the broad limits of interrogation policy established in memoranda from the Office of Legal Counsel in the Department of Justice. Some of the policies justified techniques that amounted to torture, e.g. sleep deprivation, withholding food, extreme temperatures, stress positions, short shackling, and prolonged solitary confinement. Policies that were cruel, humiliating, and degrading treatment, though not amounting to torture, included hooding, forced nudity, slapping, religious humiliation, and sexual taunting by females. And at times the actions of U.S. personnel were clearly illegal and sometimes resulted in the deaths of detainees: severe beatings, induced

hypothermia, asphyxiation, sexual assault, and withholding medical care. The Geneva Conventions and U.N. Convention Against Torture prohibit all forms of torture, and Common Article 3 of Geneva prohibits "cruel treatment" and "outrages on the personal dignity, in particular humiliating and degrading treatment." All of these techniques went well beyond those authorized in the U.S. Army Field Manual on Interrogation (Army FM 34-52).[1]

This chapter will examine U.S. policy making on interrogation in the war on terror in light of several important principles of public administration: the politics-administration dichotomy (established in Public Administration literature), civilian control of the military (established in the Constitution), and command responsibility (established in the Nuremburg tribunals after World War II). The chapter will address the question: how can responsibility for U.S. torture policy be assessed? The chapter will argue that harsh interrogation policies were clearly established at the uppermost levels of the executive branch and carried out despite warnings from career professionals that the policies violated U.S. and international law and were not in the best national security interests of the United States.[2] The chapter concludes that the top levels of the Bush administration were responsible for the policies and that a full investigation of the policies and their implementation is necessary but that criminal prosecutions would be counterproductive.

Principles of Public Administration

In trying to understand how the policy of harsh interrogations that at times degenerated into torture, we have to ask how the normal inhibitions against torture were overcome and how military training in the Geneva Conventions was set aside.[3] The acts of humiliation and torture were carried out by lower level personnel (and some were prosecuted for their actions), but the major responsibility for the policies that led to the abuse and torture lies with the higher levels of the Bush administration. This section will examine the principle of civilian control of the military, the principle of political control of administration, and some social-psychological dimensions of torture.

Political Control of Administration

Political control of administration is established in Article II of the Constitution, which vests the executive authority in the president. That authority is not exclusive, but it is substantial and covers most administrative functions of the U.S. government. The authority of political appointees is similarly based in the Article II presidential authority to appoint officers of the United States. In addition, public laws that authorize agencies vest legal powers in cabinet secretaries who lead executive branch departments.

The public administration principles of the politics/administration dichotomy and neutral competence have shaped the relationship between career civil servants and their political superiors. Woodrow Wilson's founding article on politics and administration (1887) makes the argument that the business techniques of administration are to be used to implement the political decisions of the polity. Other public administration scholars who have contributed to our understanding of the relationship between politics and administration include Leonard White (1926) Frank Goodnow (1900), and Paul Appleby (1949).

Public administration scholarship has rejected a simplistic version of the politics/administration dichotomy as an accurate depiction of administrative reality. But Hugh Heclo, among others, has argued that the dichotomy is a normative principle that should be honored rather than an attempt to describe the reality of administrative policy making (1975; 1977). That is, political appointees represent the president, who has been elected to exercise political leadership of the government, and career civil servants have a duty to comply with the lawful decisions of their political superiors.

The principle of neutral competence that was implied in the merit system created by Pendleton Act of 1883, holds that it is the duty of career professionals to provide their best judgment and advice to their political superiors, but after authoritative decisions have been made, to use their expertise to implement those policies faithfully. Heclo argues that political control of administration is legitimate but that it should be limited. "There should be enough control to hold superiors responsible for what it being done, but not enough to destroy individual responsibility and judgment in subordinates" (1977, 4). He describes the responsibility of career subordinates as "giving one's cooperation and best independent judgment of the issues to partisan bosses" (1975, 132). Other scholars, such as Terry Cooper, have argued that the "responsible administrator," is obligated to carry out legitimate administrative directions (1996, 65-75).

In the war on terror, political superiors in the executive branch were able to prevail in having enhanced interrogation techniques used in attempts to obtain intelligence. But many civilian and military subordinates, as described below, exercised their individual responsibility to give their best professional advice in objecting to the harsh practices.

Civilian Control of the Military

The parallel to the politics/administration dichotomy in the civil service is the principle of civilian control of the military, which is based on the constitutional designation of the president as commander in chief of the armed forces of the United States. This designation of authority was based in part on the suspicion the Framers of the Constitution had toward standing armies and the fear that military power and ambition would threaten the values of the new republic they were establishing. During the debates over adoption of the Constitution, James Madison said "A sanding military force, with an overgrown Executive, will not long be safe companions to liberty. The means of defence agst. foreign danger, have been always the instruments of tyranny at home. . . . Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people" (Madison 1787, 465). Scholars have elaborated on the relations between civilian leadership and their military subordinates and argued that the principle is of major importance in preserving the republican nature of the U.S. government (Huntington 1981; Janowitz 1964; Desch 200; Fever 2005; Cohen 2002; Davidson 2012). The military chair of command runs from the president to the secretary of defense to military commanders. The principle was at work when President Truman fired General MacArthur, when President Bush decided on the "surge" in Iraq in 2007, and when President Obama decided to change generals in Afghanistan in 2009.

Most presidents see their role as making strategic decisions about the nature of military conflicts, theoretically subject to the congressional war powers specified in Article I of the Constitution (Pfiffner 2008). The president's authority, however, extends to the full range of operational military decision, if he or she chooses to exert personal control over military decisions, even at the tactical level. It may be wise for presidents to take into account the best judgments of military professionals, but there is no requirement that they accept that advice. In the case of interrogation policies, President Bush, Vice President Cheney, and political appointees chose to reject the advice of top military officers.

The Bush administration did not systematically elicit the advice of military officers about the wisdom of establishing military tribunals, abandoning the Geneva Conventions, or using harsh interrogation techniques. Occasionally, members of the military were made aware of the administration's proposed policies. As described below, military professionals objected to each of the above policies, but their warnings were ignored by their civilian superiors. When military leaders did not move quickly enough to implement aggressive interrogation at Guantanamo and Abu Ghraib, Secretary Rumsfeld replaced them with those who would (Pfiffner 2010, 25-32).

The context in which the initial decisions on interrogation took place was the immediate aftermath of the 9/11 atrocities. The president and top members of his administration were convinced that further terrorist attacks were imminent and were determined to use whatever means were necessary to stop them. Thus the initial impetus to authorize harsh interrogation techniques was understandable. But during the following years, as warnings about the dangers of such policies came from military officers, and later as reports of abuse and torture were sent up the chain of command and made public, the administration refused to reconsider its policies. Attempts to have the policies changed were rebuffed and marginalized until the end of the administration. Even after leaving office, former Vice President Cheney publicly criticized the Obama administration for moderating the regime of harsh interrogations.

This chapter will next lay out the key initial decisions that established the policy of harsh interrogation: President Bush's Military order of November 13, 2001, the suspension of the Geneva Conventions in February 2002, and the memoranda on interrogation techniques issued by Secretary Rumsfeld in 2002 and 2003. It will then document attempts by military and civilian professional public administrators to have the policies changed before they were issued, during their operation, and after the abuse and torture had become public. It will conclude that the doctrine of command responsibility applies to the administration of the policies of harsh interrogation and torture.

Key Policy Decisions

On November 13, 2001, President Bush issued a military order that declared that, in accord with his commander in chief authority and in light of the national emergency created by the terrorist attacks of 9/11, suspected terrorists could be detained and prosecuted in military tribunals for violations of the laws of war (Bush 2001). The order applied to non-U.S. citizens who were members of al Qaeda or "engaged in, aided or abetted" it or who "knowingly harbored" its members. The order called for the Secretary of Defense to detain such persons, treat them humanely, provide them with the necessities of life, honor their religious beliefs, and have them "detained in accordance with such other conditions as the Secretary of Defense may

prescribe" (Bush 2001). The Military Commissions order was important because it was framed to avoid the U.S. civilian court system and to deny the protections of the Geneva Conventions to "enemy combatants." People could be labeled enemy combatants at the president's discretion. Members of the Judge Advocate General Corps objected to the military order, as described below; their objections were ignored.

In January of 2002 President Bush decided to suspend the Geneva Conventions with respect to al Qaeda. Secretary of State Colin Powell objected that the United States should not abandon its adherence to Geneva and that its abandonment would endanger our own troops. Despite these objections, President Bush signed a memorandum on February 7, 2002 that stated: "Pursuant to my authority as Commander in Chief . . . . I . . determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world . . . ." (Bush 2002). One of the explicit reasons for setting aside the Geneva Agreements was that it would be more difficult to prosecute U.S. interrogators for war crimes. U.S. personnel would no longer be constrained by prohibitions against torture or cruel, inhuman, or degrading treatment of prisoners. Secretary of State Colin Powell and others objected to abandoning the Geneva Conventions, as described below, but they were overruled by President Bush.

The third major policy change affecting interrogations was Secretary Rumsfeld's approval of a list of interrogation techniques available to U.S. forces. That policy decision was based on the "Torture Memo" of August 1, 2002 that was signed by the head of the Office of Legal Counsel, Jay S. Bybee (2002).[4] The Bybee memo provided the legal basis for the development of harsh interrogation techniques that were developed in the Department of Defense and authorized by Secretary Rumsfeld in December 2002 and modified in April 2003. The techniques went well beyond those authorized in the Army Field Manual on interrogations (FM 34-52, 1992). They included stress positions, isolation of 30 days, hooding, 20 hour interrogations, nakedness, and use of phobias. In addition, other techniques were based on the military Survival Evasion, Resistance and Escape (SERE) training of U.S. personnel to prepare them to resist torture by enemies who do not respect the Geneva Agreements.[5] Evidence of the use of these techniques as well as other, unauthorized practices that involved the torture and death of some detainees is contained in a series of DOD investigations (Pfiffner 2008, 130-133; Pfiffner 2010, 45-82). Both civilian and military professionals objected to the use of these techniques and tried to convince the administration to abandon them, but their recommendations were rejected.

This chapter will now turn to the principle of command responsibility and how it applies to the interrogation policies of the Bush administration. It will then document the warnings conveyed up the chain of command and how those warnings were ignored.

Command Responsibility and Ignored Warnings

The principles of command responsibility have been set out most authoritatively in the International Military Tribunal at Nuremberg and the Military Tribunal of the Far East. The Nuremberg Tribunals established that a claim that one was carrying out orders does not constitute a defense for war crimes. Subordinates are obliged to obey only lawful orders. In addition, the Nuremberg trials established that a general in command of an occupied territory

was responsible for preventing war crimes in his area of responsibility regardless of whether he had tactical command of the forces in the immediate area of the crimes (Hendin 2003, par. 53-60).

The mistreatment and torture of detainees in the war on terror certainly does not compare with the vast atrocities committed by some in the military forces of Germany and Japan during World War II. The principles developed in response to the atrocities with American leadership do, however, provide guidance about how to judge the actions of superior leaders when their subordinates commit war crimes or merely allow abuse to occur. The doctrine of command responsibility was developed into a set of three principles that the doctrine embraces:

1. There must be a superior-subordinate relationship.
2. The superior must have known or had reason to know that the subordinate was about to commit a crime or had committed a crime
3. The superior failed to take necessary and reasonable measures to prevent the crime or to punish the perpetrator (Human Rights Watch 2005, Annex 88).

The principles of command responsibility have been widely accepted by the United States Army and by customary international law. The U.S. Army Field Manual 27-10, Section 501 lays out the criteria for holding superior officers responsible for war crimes committed by their subordinates: "The commander is also responsible if he has actual knowledge, *or should have knowledge*, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or *have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violations thereof"* (Eckhardt 1982, 31; emphasis added). The Military Commissions Act of 2006, section 950q provides that: "a person is punishable as a principal under this chapter who . . . knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who *failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof*" (Jaffer and Singh 2007, 43; emphasis added).

It could be argued that President Bush and his aides should have known that the consequences of their actions might involve harsh interrogation techniques that were tantamount to torture. But it is not necessary to establish that these government officials should have known the likely consequences of their initial decisions, because the highest officials did, in fact, know about, and indeed participated in making decisions about the specific techniques used on at least some of the detainees. The specific techniques that were to be used, for example by the CIA on Abu Zubaydah and Mohammed al Qahtani, were the explicit subject of meetings of the NSC principles chaired by Condoleezza Rice and attended by Vice President Cheney, Colin Powell, George Tenet, Donald Rumsfeld, and John Ashcroft. President Bush publicly acknowledged that he knew of and approved of their meetings. Thus there can be no doubt that the very top levels of the administration had explicit knowledge and participated in decisions about the techniques, including water boarding, that were to be used on detainees in order to force them to confess to crimes or reveal intelligence information (Eggen 2008).

The principles of civilian control of the military and political control of administration hold that subordinates have the duty to provide their best judgment and advice to civilian superiors (the president and political appointees), but when an authoritative decisions have been made, their duty is to implement those decisions. These principles prevailed in the Bush administration's interrogation policy, but the emphasis below is on those civilian and military professionals who advised against such policies, sometimes at the risk of their careers.

When the policies were implemented, incidents of abuse and torture were reported, but largely ignored by Bush administration leaders. After abuse, mistreatment, and torture were conducted by low level enlisted personnel, many instances were reported to various levels in the chain of command. If in fact such behavior was not the policy of the administration, then one would expect that when administration officials became aware that abuse was occurring, they would have changed policies and put a stop to it. But this did not happen; administration officials were warned mamy times about the potential for abuse and abuse that was actually occurring, but they refused to take actions to stop it.

Warnings about Future Consequences of Detainee Policy

This section will first cite warnings about the probable consequences of administration policies, warnings that were ignored or suppressed by Bush administration officials. It will then describe accounts of actual abuse and torture reported to the chain of command; the administration did not take actions to stop the abuse. It will then show that, even after the abuses at Abu Ghraib were made public, the administration resisted any change in policy that would have reduced the "flexibility" of U.S. interrogators by outlawing cruel, inhuman, and degrading techniques. If the Bush administration did not intend for the harsh interrogation techniques to be used, they would have listened to the warnings and taken action to stop them. That they did not, demonstrates that abusive interrogations were the implicit policy of the Bush administration and that the actions of administration leaders fell under the doctrine of command responsibility.

When military lawyers were allowed to read (but not copy) the draft of President Bush's military order of November 13, 2001, shortly before it was issued, they objected that it was not in accord with U.S. legal obligations under the Geneva Conventions, but their last minute efforts to change it were not successful. When John Yoo wrote a memo arguing that the Geneva Conventions should not apply to the Taliban or al Qaeda, State Department Counsel William Taft wrote a responding memo arguing that the Geneva rules could be followed by the United States without compromising national security. Nevertheless, Alberto Gonzales recommended that President Bush abandon Geneva, despite Colin Powell's warning that the Geneva Conventions were intended to cover situations such as the war on terror (Powell 2002).

On April 15, 2002 Amnesty International sent a memorandum to President Bush and Secretary Rumsfeld about terrible conditions in Guantanamo and the killing and poor treatment of detainees in Afghanistan (Human Rights Watch 2004, 46). When a draft of Rumsfeld's December 2, 2002 memo was seen by military lawyers in November, lawyers from the Air Force, Marine Corps, and the Army as well as the top legal adviser to the DOD Criminal Task Force at Guantanamo wrote pointed memos arguing that the recommendations to authorize exceptional interrogation techniques were ill-advised (Pfiffner 2010, 25-39). In addition to

warnings about the potential moral, legal, and policy problems with interrogation policy, there had been a number of warnings that the people who had been transferred to Guantanamo were not all guilty of supporting terrorism and that there were many who had no information of any intelligence value.

In the summer of 2002, a senior CIA analyst went to Guantanamo and interviewed a sample of about 24 detainees in their own languages, which he spoke (Mayer 2008, 183). He concluded that about a third of the detainees were not connected to terrorism, and that he thought the United States was committing war crimes by holding these people and treating them harshly. National Security Adviser Rice's counsel, John Bellinger, brought the report to a meeting in Alberto Gonzales's office in the White House, but David Addington insisted that the President had decided that all detainees at Guantanamo were enemy combatants, and that the decision could not be questioned. He saw it as an issue of presidential power (Mayer 2008, 184). The report was also rejected when it was delivered to the Pentagon.

In the summer of 2003 Jack Goldsmith was appointed to be Director of the Office of Legal Counsel. After he had examined the Bybee memo of August 2, 2002, he decided that the legal reasoning was so flawed that he had to withdraw the memo. His warnings, however, did not deter the administration from its policy of harsh interrogation techniques (Goldsmith 2007).

Warnings about Actual Abuse

In the late fall of 2002 FBI agents assigned to assist in interrogations at Guantanamo began to express concern about the harsh techniques being used. In their judgment, the techniques being used were possibly illegal and, in any case, were not effective interrogation techniques. Spike Bowman of the FBI made three calls to professional colleagues in the Office of Secretary of Defense to express concern about the harsh techniques being used at Guantanamo. His concerns were politely noted, but no changes in policy followed (Bowman 2009).

The FBI concerns were expressed to top levels of the Departments of Defense and Justice and the National Security Council. At one point the FBI agents at Guantanamo were so concerned that they opened a "war crimes" file, but they were later ordered to close the file (Lichtblau and Shane 2008). One agent reported this observation of a detainee when he was in Guantanamo: ". . . the room was stifling hot, there was a strong smell of urine and feces, and there was a small pile of hair next to the detainee's head. The MPs on duty told the agent that the detainee had been there since the day before and that the MPs were told by his interrogators to leave him there and not bring him aNy food or water until the interrogators came back" (Justice OIG 2008, 181). As a result of the planning and use of these techniques in the summer of 2002 the FBI decided not to participate in joint interrogation of detainees (Justice OIG 2008, 370).

Civilian members of DOD also expressed alarm and concern over the interrogation techniques. Dave Brant, head of the DOD Criminal Investigation Task Force, Mark Fallon, his deputy, and Mike Gelles, its chief psychologist were so upset at the conduct of interrogations at Guantanamo that Brant and Gelles went to see Alberto Mora, general counsel of the Navy. Mora

courageously confronted William J. Haynes, Rumsfeld's top legal aide, several times and finally convinced Haynes to get Rumsfeld to rescind his December 2, 2002 order. But Rumsfeld appointed a Working Group to examine interrogation policies that was led by a hard line appointee, and the group was ordered to use John Yoo's analysis as its basis. When the Working Group was deliberating over its recommendations to Rumsfeld, judge advocates of the Air Force, Army, and Marine Corps as well as Alberto Mora wrote serious objections to the direction the report was taking. The final report, however, was issued on April 4, 2003 without their knowledge, and it recommended a range of techniques to which they had objected (Pfiffner 2010, 37-39).

Shortly after the Iraq war began, in March of 2003, the International Committee of the Red Cross began to send observers to U.S. prison sites in Iraq, and over the next six months, made 29 inspections of 14 sites. It issued reports that were communicated to U.S. commanders about the poor conditions and abuse in U.S. detention centers. In July 2003, it reported 50 allegations of abuse of detainees, including stress positions, prolonged exposure to sun, isolation in dark cells, and beatings with fists and rifle buts (Human Rights Watch 2004, 44). Early in the war, Paul Bremer and Colin Powell each raised concerns about the treatment of detainees with Cheney, Rice, and Rumsfeld (Slevin and Wright 2004). Amnesty International also raised the issue of treatment of detainees in May 2003. Numerous articles appeared in the popular press in late 2003 and early 2004 reporting on the treatment of detainees. None of these warnings led the administration to change its approach to interrogation policies.

In addition to the objections to Bush administration policies, a number of individuals stepped forward to report abuses of detainees that they had witnessed or had direct knowledge of. Most importantly, on January 13, 2004 Army Specialist Joseph M. Darby disclosed to his superiors the CD containing the infamous photographs taken at Abu Ghraib. This led President Bush to denounce the abuses recorded in the photographs, and to the appointment of a number of DOD investigations. These investigations led to changes in military policy intended to reduce the incidence of abuse. It did not, however, lead to serious actions that would have eliminated the continued use of abusive techniques or the denial of their use by the CIA.

Reports of Abuse after Publication of the Abu Ghraib Photos

When the photographs of the abuse and torture at Abu Ghraib were made public in the spring of 2004, expressions of outrage poured out from throughout the world as well as in the United States. President Bush expressed his own disgust at the incidents portrayed in the photographs and said that these were isolated incidents that did not reflect American values or administration policy. The argument of the administration was that these were a few bad apples who broke the law and that the perpetrators would be punished. The revelation of the photographs and world-wide public outrage constituted a blatant warning to the administration that torture and abuse were in fact taking place. A number of internal, executive branch investigations were undertaken, and the military services took remedial actions intended to stop the abuse and torture.

One warning from a professional military perspective came in the form of an editorial of the *Army Times*, which is not published by the government, but which reflects views of many

Army professionals. A hard-hitting editorial took the administration to task for its policies. It argued that responsibility for the abuse

> extends all the way up the chain of command to the highest reaches of the military hierarchy and its civilian leadership. . . . The entire affair is a failure of leadership from start to finish. From the moment they are captured, prisoners are hooded, shackled and isolated. The message to the troops: ANything goes. . . . This was not just a failure of leadership at the local command level. This was a failure that ran straight to the top. Accountability here is essential – even if that means relieving top leaders from duty in a time of war.

The editorial concluded that, ". . . the damage done to the U.S. military and the nation as a whole by the horrifying photographs of U.S. soldiers abusing Iraqi detainees at the notorious prison is incalculable" (Army Times 2004). The difficulty with its recommendation of "relieving top leaders from duty" was that the highest officials in the chain of command were complicit in the policies that led to the abuses.

In September 2005 Captain Ian Fishback, a West Point graduate who served in both Afghanistan and Iraq, wrote a public letter to Senator John McCain to complain about the lack of responsiveness of his superiors to his reports of abuse of detainees. He wrote after the frustration of trying for 17 months (since about January 2004) to obtain guidance on how prisoners should have been handled.

> While I served in the Global War on Terror, the actions and statements of my leadership led me to believe that United States policy did not require application of the Geneva Conventions in Afghanistan or Iraq. . . . For 17 months, I tried to determine what specific standards governed the treatment of detainees by consulting my chain of command through battalion commander, multiple JAG lawyers. . . . (Fishback 2005).

Fishback argued that the inability of U.S. troops to get clear and consistent guidance from their leaders about the correct treatment of prisoners led to "a wide range of abuses including death threats, beatings, broken bones, murder, exposure to elements, extreme forced physical exertion, hostage-taking, stripping, sleep deprivation and degrading treatment" that he and his troops witnessed in both Afghanistan and Iraq (Fishback 2004). He concluded that, "prisoner abuse was systemic in the Army" (Schmitt 2005). Fishback's concern about the lack of clear leadership guidance is striking because Iraq was formally and explicitly covered by the Geneva Conventions (Gonzales 2004). When Fishback approached his immediate superiors, he was told to "remember the honor of the unit is at stake," and not to make public his experience (Schmitt 2005). Significantly, Captain Fishback's resort to going public with his concerns came a year and a half *after* the Abu Ghraib photos appeared. When Matthew Alexander served as an interrogator in Iraq in 2006 he found that U.S. Army personnel were still using the "deeply flawed, ineffective and un-American way" of conducting interrogations. It was using the "Guantanamo Bay model" of using fear and control (Alexander 2008).

Even after these warnings, the Bush administration continued to resist restrictions on its harsh interrogation policies. Several policy decisions in the spring and summer of 2005

demonstrate that the administration continued to protect its harsh interrogation policies from those in the administration who objected.

In June 2005, officials in the Pentagon, as well as military lawyers, felt uneasy about the legality (and the world-wide appearance) of U.S. interrogation policies, and decided to broach a change in policy. Three high level officials decided to try to persuade President Bush to shut down the CIA interrogation program. In order to do so, they thought that if they could get Secretaries Rumsfeld and Rice to agree, they could get past the vice president. Philip Zelikow had been executive director of the 9/11 Commission and was counselor to Secretary of State Rice. John Bellinger was counsel to Secretary Rice. Matthew Waxman was assistant secretary of defense for detainee issues and formerly a clerk to Justice David Souter. Gordan England was deputy secretary of defense and had been Secretary of the Navy and president of Lockheed Martin (Mayer 2008, 316-319). They met (without Bellinger) in June of 2005 to work out a strategy. They argued that the secret CIA programs would eventually be exposed and that the U.S. should return to international standards of treatment of detainees, and they proposed closing Guantanamo and the secret CIA prisons abroad. They wrote, "We are not doing this for them [the detainees], we are doing this for us. There is a risk that some intelligence may be lost. As in prior wars, this risk should be accepted as necessary to maintain the integrity of our common-found values" (Mayer 2008, 317-318).

Secretary Rice seemed to be sympathetic to the proposal, but Secretary Rumsfeld was angry that it had been sent to Rice without his clearance. Rice showed it to national security adviser Hadley who called a NSC Principals meeting to discuss the proposals. Rumsfeld, however, insisted that the draft not be considered in the discussions, and no positive recommendation for changing interrogation policies was issued from the meeting. President Bush did learn of the proposals and thus was aware that the senior members of his administration, including the deputy secretary of defense strongly advised that his detainee policies be changed and that the proposals had some support from his secretary of state. He decided against any change in his administration's policies (Mayer 2008, 318-319).

In the fall of 2005 President Bush threatened to veto the Detainee Treatment Act authored by John McCain, demonstrating that he did not want his administration to be hindered by a requirement that forbade torture. When he saw that his veto would probably be overridden, he signed the bill but issued a signing statement indicating that he did not consider himself bound by the law (Pfiffner 2009).

In late 2005 Deputy Secretary of Defense Gordon England made another attempt to change administration policy. He chaired a meeting in the Pentagon to consider making it mandatory for the military to treat all prisoners in accord with Common Article 3 of the Geneva Conventions. This would forbid torture, cruel, inhumane, and degrading treatment and outrages on the personal dignity of detainees. The civilian secretaries of each of the services were present as well as the top military officers in each service and their lawyers. Of course, the Geneva Conventions, including Common Article 3, had been the supreme law of the land (Constitution, Article VI) since they were ratified by the United States in 1955. Each of the military leaders of the services argued in favor of the principle, but William Haynes and Undersecretary of Defense for Intelligence Stephen Cambone argued that it would limit the "flexibility." of the United

States. Thus the proposal was not adopted as policy (Mayer 2006, 13). (In 2006 the Hamdan decision of the Supreme Court ruled that the United States *was* bound by the Geneva Conventions, and thus Common Article 3 did apply to U.S. treatment of detainees.)

Immediately after the Supreme Court *Hamdan* decision, which ruled that the Geneva Conventions do bind the United States, the Department of Defense issued an order that restored Common Article 3 of the Geneva Conventions as U.S. policy. Interestingly, the order was signed by Deputy Secretary of Defense, Gordon England, rather than Donald Rumsfeld (Sands 2008, 225). In September 2006 the Army issued a revised Field Manual, *Human Intelligence Collector Operations*, which reinstalled the Geneva Convention requirements, including Common Article 3, to official Army policy. The previous Field Manual (FM 34-52, 1992) had been overridden by Bush administration policies on interrogation. In the fall of 2007 Congress passed a bill that would have required the CIA to conform to the same rules on interrogation as the military. But on March 8, 2008, President Bush vetoed the bill, and Congress did not have the votes to override his veto.

From these consistent and continued refusals of the Bush administration to change its interrogation policies, it can be concluded that President Bush intended them to continue. The Detainee Treatment Act of 2005 did compel the Department of Defense to return to the pre-2001 policies of conforming to the Geneva Conventions. Of course, many military officers had been arguing since 2001 that the United States should comply with the Geneva Conventions. Even after the military returned to a policy of compliance with Geneva, President Bush continued to insist that the CIA be allowed to use harsh interrogation techniques. He used his authority from the Military Commissions Act to interpret Common Article 3 of the Geneva Conventions in a way inconsistent with the interpretation of other signatories to the Agreements.

The Chain of Command

President Bush used his political skill and formal powers to pursue a policy direction that allowed and encouraged U.S. personnel to use harsh and abusive techniques to obtain intelligence from detainees. His aides marshaled legal arguments to support his position, despite serious objections from his Secretary of State, Colin Powell, some general officers in the military, and professional military lawyers in the Judge Advocate General Corps. His leadership on the interrogation issues was reinforced by Vice President Cheney and his staff down through the chain of command. The principle of civilian, political control of the executive branch prevailed, and overcame numerous objections, but the result was the abrogation of the Geneva Conventions.

The point of this analysis is not to attempt to assign legal culpability but rather to demonstrate that some U.S. civilian and military officials neglected their duty to ensure that crimes were not committed or to take disciplinary action once these crimes were brought to their attention. Even though maNy individuals fell short of the high standards expected of them, it must also be kept in mind that at maNy points in the series of actions, courageous individuals objected to the policies that led to abuse and torture.

War Crimes?

The United States War Crimes Act (18 U.S.C. Sec. 2441) provided that "Whoever, whether inside or outside the United States, commits a war crime . . . shall be fined under this title or imprisoned for life or aNy term of years, or both, and if death results to the victim, shall also be subject to the penalty of death." The law defined a war crime as "a grave breach" of the Geneva Conventions or conduct "which constitutes a violation of common Article 3" of the Geneva Conventions. The Military Commissions Act of 2006, however, changed the definition to narrow the scope of war crimes.[6]

Both international and U.S. officials have concluded that the treatment of some detainees by the United States during the war on terror constituted war crimes. In an investigative report (not fully disclosed) the International Committee of the Red Cross concluded that the CIA had tortured Abu Zubayda and that its treatment of some detainees constituted war crimes. The report was given to the CIA and was given to President Bush in 2007 (Mayer 2008, 164-165).

General Antonio Taguba, who wrote the first Army report on Abu Ghraib has, since his retirement, concluded that the United States is guilty of war crimes. In the preface to the 2008 report by the Physicians for Human Rights, *Broken Laws, Broken Lives*, he stated:

> This report tells the largely untold human story of what happened to detainees in our custody when the Commander-in-Chief and those under him authorized a systematic regime of torture. This story is not only written in words: It is scrawled for the rest of these individual's lives on their bodies and minds.
> After years of disclosures by government investigations, media accounts, and reports from human rights organizations, there is no longer aNy doubt as to whether the current administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account (Physicians for Human Rights 2008).

General P.X. Kelley, Commandant of the Marine Corps from 1983 to 1987, criticized President Bush's interpretation of Common Article 3 in June 2007 via his memo authorized by the Military Commissions Act. He argued that the president's order "cannot even arguably be reconciled with America's clear duty under Common Article 3 to treat all detainees humanely and to avoid aNy acts of violence against their person." He argued that U.S. troops depend on the protections of the Geneva Conventions and that President Bush's reinterpretation of CA 3 undermined these protections. He concluded with a warning to the president: "Policymakers should also keep in mind that violations of Common Article 3 are 'war crimes' for which everyone involved – potentially up to and including the president of the United States – may be tried in aNy of the other 193 countries that are parties to the conventions" (Kelley and Turner 2007).

Consequences and Remedies

The abuses carried out by US personnel have done enormous harm to the reputation of the United States throughout the world and have probably added maNy to the ranks of terrorists who would do harm to the United States and its citizens. While some tactical intelligence may

have been gained from the harsh interrogation techniques, much inaccurate information was also forced from detainees who were willing to say aNything in order to stop the pain. In addition, aNy intelligence benefit achieved has been far outweighed by the opprobrium of the international community and the damage to the professionalism of the United States Army. As Col Steven M. Klineman said, "As a result [of torture], adversaries and allies alike have accused this nation of gross violations of the Geneva Conventions and of violating the basic human rights of detainees in our custody. The geostrategic consequences are likely to last decades" (Kleinman 2008).

Former General Counsel to the Navy Alberto Mora testified that: "there are serving U.S. flag-rank officers who maintain that the first and second identifiable causes of U.S. Combat deaths in Iraq – as judged by their effectiveness in recruiting insurgent fighters into combat – are, respectively the symbols of Abu Ghraib and Guantanamo" (Mora 2008). In early 2009, Admiral Mike Mullen, chairman of the Joint Chiefs of Staff, declared: ". . .trust is the coin of the realm. . . . That's why images of prisoner maltreatment at Abu Ghraib still serve as recruiting tools for al-Qaeda" (Mullen 2009).

These judgments were reinforced by Bush appointee Susan J. Crawford, the convening authority for the military commissions at Guantanamo who dismissed charges against Mohammed al-Qahtani, when she publicly concluded that: "We tortured al-Qahtani. His treatment met the legal definition of torture. . . . It did shock me. I was upset by it. I was embarrassed by it. If we tolerate this and allow it, then how can we object when our servicemen and women, or others in foreign service, are captured and subjected to the same techniques? How can we complain? Where is our moral authority to complain? Well, we may have lost it" (Woodward 2009).

The preceding analysis presents a plausible argument that U.S. officials violated the Geneva Conventions, and broke U.S. and international law. The principle of command responsibility can be used to assign accountability for these actions. The principles of civilian control of the military and political control of administration prevailed, but the political leadership of the Bush administration was responsible for the abuse and torture that has harmed the image of the United Stated in the world.

Prosecuting these officials for criminal conduct, however, would be difficult legally and probably counterproductive to confronting the failures of U.S. interrogation policy during the war on terror**.** What is most important for the United States is to uncover what has been done it its name, admit our mistakes, and get beyond this unfortunate episode in U.S. public policy. Putting the torture behind us, however, necessarily entails uncovering what has happened, putting it in the public record in an authoritative way, denouncing the worst transgressions, and ensuring that they do not happen again.

Such investigations and reports would allow the United States to understand how its policies led to the abuse and torture that did occur and to illuminate the path to ensure that it does not happen again. In addition, such a public display of honesty would help restore the reputation of the United States in the eyes of the rest of the civilized world and demonstrate that we once again will practice what we preach. Some will say that uncovering and publicizing the crimes that have been committed will only give more material for our enemies to use against us. But

there is already quite enough evidence that our enemies have been using to criticize us. The only way to deal with this malignancy is to excise it and cauterize the wound. It will be a painful process, but it will allow us to get this deplorable period of U.S. policy behind us.

With luck and determination, the United States can learn from this painful era of U.S. history and will in the future heed Nietzsche's admonition: "He who fights with monsters should be careful lest he thereby become a monster" (Nietzsche 1927, 466). As U.S. interrogator Matthew Alexander concluded, "Murders like Zarqawi can kill us, but they can't force us to change who we are. We can only do that to ourselves. . . . Americans, including officers like myself, must fight to protect our values not only from al-Qaeda but also from those within our own country who would erode them" (Alexander 2008).

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[1] Documentation of these techniques and their use can be found in (Taguba 2004; Fay 2004; Schlesinger 2004; Taguba 2003; Schlesinger 2004. A summary of these documents can be found in Pfiffner 2010.

[2] For an analysis of the legal issues of interrogation and torture, see Pfiffner 2010, Chapter Five.

[3] For analyses of the social and psychological dimensions of U.S. torture, see Adams and Belfour 2006, 2009; Milgram 1974; Zimbardo 2007; and Mestrovic 2007.

[4] A separate Bybee memo of the same date authorized the CIA to use additional enhanced interrogation techniques. Interrogation policy for the CIA followed a parallel track that was overseen by the Principals Committee of the National Security Council.

[5] The Biderman techniques were developed by Alfred D. Biderman who was working for the U.S. Air Force and trying to explain why U.S. prisoners held in North Korea during the Korean War confessed to atrocities that they clearly did not commit, such as using biological weapons against the North Koreans. In his interviews of the former POWs, he developed a table of a set of techniques that the Chinese interrogators used in order to get American airmen to confess to atrocities. The title of his compilation was "Communist Attempts to Elicit False Confessions from Air Force Prisoners of War." The SERE chart was copied from the Biderman's chart,

although the title was changed to "Coercive Management Techniques." See John Rankin, to Officer in Charge, Subject: After Action Report Joint Task Force Guantanamo Bay (15 January 2003). From Senate Armed Services Committee Hearing on "The origins of aggressive interrogation techniques," [Tab 19] Available at: http://Levin.Senate.gov/newsroom/supporting/2008/documents.sasc.061708.pdf. Accessed December 7, 2008.

[6] For a full analysis of the legal issues concerning U.S. law, the Geneva Conventions, and customary international law, see Pfiffner (2010), Chapter 5.]

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