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Detainment and Torture in Guantanamo Bay: Events, Legality and Effectiveness

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Detainment and Torture in Guantanamo Bay

Detainment and Torture in Guantanamo Bay:
Events, Legality, and Effectiveness

By

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ABSTRACT

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ADVISOR: Professor Clifford Brown

The first chapter found that following September 11th, the Bush Administration implemented policies allowing the indefinite detainment and torture of suspected terrorists. Many detainees held in Guantanamo Bay, as well as other detention facilities, were tortured, both physically and psychologically.

The second chapter concluded that the Bush Administration was incorrect in claiming that the detainees were not subject to any protections under international law. According to international law, detainees are protected by either IHL (international humanitarian law) or by international human rights law. It was found that whether or not the prisoners can be held indefinitely and tried by military courts depends on whether or not the conflict between the United States and al-Qaeda is considered an armed conflict according to IHL. This is unclear and up for interpretation. In an armed conflict, the US Military can hold the detainees until the end of the conflict and try them in military tribunals. It is unfair and puts the United States at risk if al-Qaeda can use military force but the US cannot use force back. Therefore, IHL must be adapted to include guidelines for new types of conflicts that include transnational terrorist organizations like al-Qaeda.

The third chapter found that persuasive methods of interrogation were found to generally be more effective than torture. Torture was found to sometimes cause the subject to build up a resistance to cooperation and sometimes result in false information. Considering the costs of torture, including the illegality, it did not make sense to torture prisoners.

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Introduction

On September 11, 2001 terrorists hijacked airplanes and flew them into the twin towers in New York City and the Pentagon just outside of Washington, D.C. Fortunately, they failed to strike the White House or the Capitol building thanks to the efforts of heroic passengers who took their own lives and flew the plane into the ground in order to save these American institutions. Almost three thousand American citizens lay dead in the first attack on American soil since Pearl Harbor in 1941. However, unlike Pearl Harbor, civilians were the targets of this attack, not military personnel. In response President George W. Bush declared the attacks an act of war and declared a global “War on Terror,” in which “Americans should not expect one battle but a lengthy campaign, unlike any other we have ever seen” (Bush, George W. “Transcript”). He said that we would pursue both the terrorists who committed these acts and the nations that provide a safe haven for them, stating, “Either you are with us, or you are with the terrorists” (Bush, George W. “Transcript”). The War on Terror was unlike any other war America has ever fought, because the enemy, al-Qaeda, was not a state with a standing military but was a group of dispersed and hidden people bonded by a shared ideology, acting across many different states. Al-Qaeda believes that they must rid Muslim world of its Western influence, overthrowing governments and replacing them with fundamentalist Islamic states, which are basically oppressive dictatorships governed by Islamic Sharia law. They believe that it is okay to kill any non-Muslim, whether civilian or not, who they view as an enemy of their cause.

This unprecedented attack led to extraordinary military response, which put the United States in a continuous state of global war that would forever change the American identity and forever change the role of America in the world. During President Bush’s address to Congress on September 20, 2001, he stated:

America will never forget the sounds of our national anthem playing at Buckingham Palace, on the streets of Paris, and at Berlin's Brandenburg Gate. We will not forget South Korean children gathering to pray outside our Embassy in Seoul, or the prayers of sympathy offered at a mosque in Cairo. We will not forget moments of silence and days of mourning in Australia and Africa and Latin America. (Bush, George W. "Transcript").

Unfortunately, it would soon be all too easy to forget this. The support for America throughout the world would soon be replaced by condemnation of its policies implemented in response to the September 11th attacks. The war in Iraq, and to less of an extent the war in Afghanistan were not very popular throughout the world, but perhaps the most appalling policies were the torture and indefinite detainment without trial of anyone suspected of being a terrorist. Suspected terrorists were detained and tortured in secret CIA "black sites" located throughout the world, various Military prisons located in the Middle East, and the Guantanamo Bay detention center in Guantanamo Bay, Cuba. At these sites prisoners, many who were innocent, were denied the rights given to prisoners under International Law. While continually facing an onslaught of international criticism, the United States government continued to assert the legality of these practices.

This paper will answer many important questions related to the detainment and torture of prisoners during the War on Terror. The three chapters examine what happened regarding the detainment and treatment of prisoners, the legal issues, and the effectiveness of torture. The first chapter will analyze what happened, including topics such as: the creation of the legal framework authorizing detainment and torture, details about the treatment of the detainees throughout their journey to Guantanamo and while at Guantanamo, details about the torture policies, the methods of torture and abuse that occurred, and the rights of the detainees relating to their detainment and trials. The second chapter will analyze the legal issues relating to the detainment and treatment of prisoners, including topics such as: whether the conflict with al-

Qaeda is legally an armed conflict or a law enforcement issue, whether or not al-Qaeda and the Taliban qualify as prisoners of war, whether or not they qualify as unlawful combatants, what rights and protections detainees have depending on the classification of their status, the legality of torture and abuse of detainees, and the legality of indefinite detainment of detainees. The third chapter will examine the effectiveness of torture, and will explore topics such as: whether or not torture is effective in obtaining accurate information, whether or not there are more effective methods of interrogation than torture, and whether or not there are any indirect costs to using torture. These questions are all important in understanding the controversial topic of the United State's actions in the War on Terror. This paper essentially answers the questions: What happened? Was it legal? Was it effective? These three questions are essential in determining whether the actions taken by the United States in response to 9/11 were justified and were worthwhile. This paper will aim to answer these questions, along with how the overall response to September 11th affects our identity as Americans.

The research in this paper came from a number of different sources. The first chapter on what happened included memos from within the Bush White House regarding issues such as the legality of torture, the legality of indefinite detainment, the legality of military tribunals, and authorized torture tactics. It also included many first-hand detainee accounts of torture and various reports on the torture. The second chapter on the legal issues relied mostly on international humanitarian law, for example the Geneva Conventions, and various sources analyzing international humanitarian law. The third chapter on the effectiveness of torture relied on accounts by a couple former FBI agents, some quotations of US military code, and relied heavily on a report focusing mainly on the psychological aspects of interrogation. It also relied on various other reports on effective interrogation techniques.

Chapter 1: What Happened

Legal Framework for Detainment and Torture

Directly following the attacks of September 11th, the nation was in shock. The American people united together and supported President Bush in his effort to retaliate against those responsible for the attacks and prevent any future attacks. Bush's approval ratings jumped 35 points in response to 9/11 (Pfiffner 2). An environment of fear, shock, and anger took over the nation and the American people began to accept something like torture, something they would otherwise consider unacceptable. In the days following September 11th, the Bush Administration quickly implemented policies to fight the War on Terror. On September 14th, 2001, President Bush declared the United States to be in a state of national emergency (Bush, George W. "Military"). Then three days later, on September 17, President Bush secretly authorized the CIA (Central Intelligence Agency) to "create paramilitary teams to hunt, capture, detain, or kill designated terrorists almost anywhere in the world" (Mayer). This secret directive also authorized the CIA to set up secret detention centers, called "black sites" located in other countries to imprison suspected terrorists, in which an "alternative set of interrogation procedures," a euphemism for torture, would be used (Fletcher and Stover 3). President Bush also authorized the CIA to transfer terror suspects to countries known to torture (McCoy 113). Officials working for the CIA did not deny it, as a CIA official was quoted as saying "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them" (Gushee 2010, 4). The public found out about this secret directive in October of 2001, when an article in the *Washington Post* uncovered it, quoting a US official stating that the Bush Administration authorized the CIA to "undertake its most sweeping and lethal covert action since the agency was founded in 1947" (Fletcher and Stover 3). The CIA was originally

unprepared to take on this initiative. According to a former CIA officer involved in the initiative, “They invented the program of interrogation with people who had no understanding of Al Qaeda or the Arab World” (Mayer). He also said a lot of pressure came from the White House, especially from Vice-President Dick Cheney, to get going with this program (Mayer). The capture, detainment, and torture of prisoners had some serious legal issues, and the Bush Administration knew this. While the CIA was torturing prisoners in secret black sites, the Bush Administration simultaneously had its lawyers busy interpreting international and domestic laws to legally justify the treatment of prisoners and to ensure that US officials could not be held legally accountable for anything that happened.

The Bush Administration soon began to decide on a more secure place where detainees would be kept outside the reach of civilian courts, and for that reason it was decided it had to be located outside the United States (Fletcher and Stover 4). A task force was created, made up of lawyers from the White House, Department of Defense, Department of State, and Department of Justice (Fletcher and Stover 4). John Yoo, a former Department of Justice lawyer who was a member of the task force and an integral part of President Bush’s legal team, wrote in his book:

We researched whether the courts would have jurisdiction over the facility, and concluded that if federal courts took jurisdiction over . . . camps, they might start to run them by their own lights, substituting familiar peacetime prison standards for military needs and standards. We were also strongly concerned about creating a target for another terrorist operation. . . . No location was perfect, but the U.S. Naval Station at Guantánamo Bay, Cuba, seemed to fit the bill. (qtd. Fletcher 5).

It was decided that the detention center would be located at Guantanamo Bay, which would allow the government to detain the prisoners and try them in military tribunals, while denying them access to challenge their detainment or charges in civilian courts. On November 13, 2001, President Bush issued a military order, which invoked the national state of emergency, giving the Department of Defense the authority to detain and put on trial suspected terrorists in the war on

terror, (Gushee 5). It defined which people would be subject to detention by the Department of Defense and stated, “Any individual subject to this order shall be detained at an appropriate location designated by the Secretary of Defense outside or within the United States” (Bush, George W. “Military”). It also stated that the detainees must be treated humanely and provided adequate living conditions, among other things (Bush, George W. “Military”). The qualifications for detention were:

Any individual who is not a United States citizen with respect to whom I [President Bush] determine from time to time in writing that: (1) there is reason to believe that such individual, at the relevant times, (i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and (2) it is in the interest of the United States that such individual be subject to this order. (Bush, George W. “Military”).

This definition gave the United States military a very broad scope of power in terms of whom it was able to detain. This definition essentially created the designation of an “enemy combatant,” a term that was later commonly used by the Bush Administration as justification for the detainment of suspected terrorists and the denial of their human rights (Pfiffner 16). The military order of November 13, 2001 provided the Department of Defense with the legal framework for its policies of detention, allowing it to designate locations to detain suspected terrorists, which led to the opening of a detention center in Guantanamo Bay run by the Department of Defense less than two months later.

The first prisoners arrived at Guantanamo Bay on January 11, 2002. During this time, the Bush Administration was very busy creating the legal justifications for the treatment of prisoners that would occur at Guantanamo. On December 28, 2001, Office of Legal Council members John Yoo and Patrick Philbin released a memo stating that since the detainees were located in

Cuba, out of U.S. jurisdiction, they were not entitled to rights provided to prisoners under U.S. Law (Gushee 2010, 6). Then, on February 7, 2002, President Bush released a memo stating that the detainees were not subject to the rights guaranteed by the Geneva Conventions because this was not a conflict between “‘High Contracting Parties,’ which can only be states,” it was a new “paradigm” which “requires new thinking in the law of war” (Bush, George W. “Presidential”). In the memo, President Bush wrote “I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva” (Bush, George W. “Presidential”). The Bush Administration now claimed that it had the legal authority to detain suspected terrorists without following international or domestic laws relating to the treatment of these prisoners. Then to further legitimize its practices under the law, in August of 2002, the Bush Administration redefined torture so that interrogation practices being used in the War on Terror would not be classified as torture. Attorney General Jay S. Bybee and Deputy Assistant Attorney General John Yoo co-wrote a memo to White House Counsel Alberto Gonzalez stating that under US law, abuse is not considered torture unless it inflicts pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death” (qtd. in Fletcher and Stover 9). The memo stated that for abuse to be considered mental torture, it required “suffering not just at the moment of infliction but . . . lasting psychological harm, such as seen in mental disorders like post- traumatic stress disorder” (qtd. in Fletcher and Stover 9). Also, to be considered torture, the “precise objective” of the abuse had to be to inflict pain as opposed to just a by-product of abuse (qtd. in Fletcher and Stover 9). It was said that even if the interrogator knew that what he was doing could cause pain, “if causing such harm is not the

objective, he lacks the requisite specific intent” necessary for it to be considered torture (qtd. in Fletcher and Stover 9). The Bush Administration re-interpreted the law relating to torture in a way in which there was a very narrow definition of torture and much broader scope of interrogation tactics could be argued to be legal. This justified the use of “torture,” now referred to as “enhanced interrogation,” and aimed to protect US officials and military personnel from prosecution by international courts. The memo also reiterated that members of al Qaeda are not considered POWs, “but rather are illegal combatants, who are not entitled to the protections of any of the Geneva Conventions” (“U.S.”) This memo was just another way for the Bush Administration to legally protect itself and all of the US officials and military personnel from legal ramifications from the highly questionable treatment of prisoners. In the upcoming years, the executive branch continued to release legal memos and statements claiming the legality of its practices. The next section will examine in detail what these practices were. It will explore important questions such as how the detainees were treated, who they were, and what types of rights they were given.

The Capture and Journey to Guantanamo

During the War on Terror anyone suspected of being involved in terrorism could be captured and detained, in which they were held indefinitely without being given any of the protections given to prisoners under the Geneva Conventions. Detainees were held in secretive CIA black sites, military prisons, and the Guantanamo Bay detention center, where many were reportedly tortured and physically abused. Torture came to the public’s attention with the media reports and pictures of torture in the Abu Ghraib prison in Iraq. The public soon heard of torture occurring throughout the many prisons holding suspected terrorists and public debate about the

rights of these prisoners became an issue too. President Bush made it so there was not any real proof needed of involvement in terrorism for someone to be captured and detained. In an effort to capture as many terrorists as possible, the United States rounded up many people, without much discretion as to their true status as terrorists. This meant that numerous innocent people were captured and detained. Many of the detainees suspected of having connections to al Qaeda and the Taliban were captured during the US war in Afghanistan. Shortly after September 11, the United States launched its war on Afghanistan, because its government, the Taliban, was harboring al Qaeda, the planners of the September 11th attacks. During the bombing of Taliban and al Qaeda strongholds, many people, both civilians and terrorists, fled their homes and many became trapped in the borderlands between Afghanistan and Pakistan (Fletcher and Stover 19). The United States dropped leaflets offering steep cash rewards for “al Qaeda and Taliban murderers” (Fletcher and Stover 19). With rewards reported to be as high as 5000 dollars per person, it created an obvious incentive for people to turn people in whether they were truly affiliated with al Qaeda or the Taliban or were just ordinary citizens fleeing the bombing (Fletcher and Stover 21). Local militia and village leaders captured many of these people and turned them over to the Pakistani army, which turned many of them over to the United States for money. According to Pakistani President Perez Musharraf, Pakistani troops captured 689 people suspected of being part of al-Qaeda after 9/11, and then sold 369 detainees to the CIA, charging “millions of dollars” in exchange (Fletcher and Stover 19). Of the 62 former Guantanamo Bay detainees interviewed in Laurel Fletcher and Eric Stover’s study, over a third said they were sold to the United States in circumstances such as this (20). Laurel Fletcher and Eric Stover, along with the Human Rights Center and the International Human Rights Law Clinic at UC Berkeley, and the Center for Constitutional Rights, conducted “a study of detainees previously held in U.S.

custody in Afghanistan and Guantánamo Bay, Cuba” and documented it in their book *The Guantánamo Effect* (12). They interviewed “62 former detainees living in nine countries,” interviewed “50 key informants, including U.S. government officials, representatives of nongovernmental organizations, attorneys representing detainees, and former U.S. military and civilian personnel who had been stationed in Guantánamo or Afghanistan,” and analyzed “1,215 coded media reports concerning Guantánamo” (Fletcher and Stover 13). One person who was sold to the United States reported that he was tricked by Pakistani villagers who offered him and others to stay and rest and then turned them all in to the Pakistani soldiers (Fletcher and Stover 20). Thirteen of the 62 former detainees who were interviewed said “they were arrested in raids by U.S. forces or were turned over to the Americans by Afghan soldiers” (Fletcher and Stover 21). Some people interviewed claimed to have been detained because their identities were mistaken, while some claimed to have been detained for owning a weapon, which they say is necessary for protection (Fletcher and Stover 21). One person claimed that he was detained because he owned a passport, which American soldiers found suspicious. He was detained even though the passport was legal (Fletcher and Stover 21). According to the study, “Other respondents said personal feuds or failure to pay bribes to local officials led to their arrests” (Fletcher and Stover 22). Respondents talked about how the money created an incentive to turn people in, with one person saying, “It was just a business. People were sold to the U.S. soldiers. In my case, I had personal feuds with people where I was living” (Fletcher and Stover 22). Other people were detained because they refused to turn over their property or possessed items such as binoculars (Fletcher and Stover 22). The process of capturing suspected terrorists was clearly highly disorganized and not very selective. People were captured for unreasonable suspicions and were turned in for monetary gains.

Procedures for capturing terrorists in Afghanistan and Pakistan were used in other countries too. “At the same time, security forces in other countries began detaining suspected militants at the request of the United States, some of whom were turned over to U.S. authorities” (Fletcher and Stover 20). However, some detainees were captured in different ways. Some were captured by the CIA or groups hired by the CIA and brought to black sites. All of the former detainees in Fletcher and Stover study were brought to detention centers in either Kandahar or Bagram, Afghanistan before they were brought to Guantanamo Bay. Yet whichever way the suspected terrorists were captured, they all received harsh treatment during their capture and temporary detainment before being brought to Guantanamo. Khalid Sheikh Mohammed, a high value detainee who is accused of being a major mastermind in the planning of the September 11th attacks, is an example of someone who went through the route of first being detained by the CIA in black sites and then being sent to Guantanamo Bay (Mayer). Mohammed was probably taken from Pakistan to the CIA black site in Afghanistan by a process known as the “takeout.” The takeout is a process described by a former member of the transport team as “a carefully choreographed twenty-minute routine, during which a suspect was hog-tied, stripped naked, photographed, hooded, sedated with anal suppositories, placed in diapers, and transported by plane to a secret location” (Mayer). This not only caused physical pain, but also caused extreme humiliation. Multiple prisoners in CIA black sites have described being “chained naked to a metal ring in his [their] cell wall for prolonged periods in a painful crouch” (Mayer). Multiple prisoners also reported being bombarded with “deafening sound twenty-four hours a day for weeks, and even months.” Binyam Mohamed, a prisoner who was later transferred to Guantanamo, told his lawyer that this psychological torture was worse than the torture he

received in Morocco, in which he was sliced with a razor blade (Mayer). The CIA black sites, as they were completely secret, were perhaps the most brutal of the prisons.

The prisoners who were transferred to military prisons in Kandahar and Bagram were treated similarly. Tens of thousands of detainees have been held in Kandahar and Bagram (Fletcher and Stover 23). Fewer than 800 of these detainees have been transferred to Guantanamo Bay (Fletcher and Stover 23). Although most detainees in Bagram and Kandahar never made it to Guantanamo, most if not all of the detainees in Guantanamo had previously spent time in Kandahar and Bagram. According to a Human Rights Watch report:

All of the former Guantanamo detainees who gave statements directly to Human Rights Watch, and many of the others whose accounts are cited in this briefing, have also described having been held, prior to their transfer to Guantanamo, either at the Bagram Airbase or at the now closed facility at Kandahar airport, or at both.” (*Guantanamo*).

The Bagram and Kandahar prisons have acted as facilities used to screen people to determine whether they should be transferred to Guantanamo. However, transfers to Guantanamo have mostly stopped since 2004 and the population of the Bagram prison has increased. At the time of Fletcher and Stover’s study, sometime during 2009, the population of Bagram prison was 630 prisoners (23). Beginning with their arrival at the Kandahar and Bagram prisons, prisoners were subjected to mistreatment and humiliation. U.S. Army interrogator at Kandahar and Bagram, Chris Mackey, described the arrival of detainees at Kandahar prison:

As always, it happened at night. A cargo plane touched down in darkness, its lights doused to avoid attack, and lumbered across the rutted runway toward what had once been the passenger terminal of the Kandahar airport. Its rear ramp lowered, revealing a ragged train of enemy fighters in bare feet and rags, emerging like aliens in the red-hued light of the cargo hold. Their heads were covered in burlap bags, but their breath was still visible in the frigid air. Some were wounded, others had relieved themselves, and all stank. They were bound together in long chains. As they were spirited down the ramp, if one were to stumble, he would pull the others down with him. (Fletcher and Stover 24).

Prisoners interviewed as part of Fletcher and Stover's study described similar situations at both Bagram and Kandahar, both describing being forced onto their stomachs and having their clothes cut off with scissors. They described these events as very humiliating, which they said was clearly the main purpose (Fletcher and Stover 24). At Kandahar, after having their clothes cut off, prisoners were given a medical examination and rectal search, which one prisoner described in detail:

It was like one of those pictures from Abu Ghraib. Most of us were naked, and they would pile us up one on top of the other. I still had my pants on, but the guys on top of the pile were completely naked. . . . [T]hey told us, "if you move we will shoot you." So we didn't move. We just stayed where we were. They kept sending people in and piling them on top of us. And nobody dared to move. (Fletcher and Stover 25).

Abdul Razaq, a former prisoner at Kandahar and at Guantanamo before being released in 2003, said "One thing I've learned about Americans... is that they are very harsh when they transport people around. They had tied up my hands so tight that for two months I couldn't use my right hand" (Worthington 85). Three Bahrainis who were prisoners at Kandahar said that they were beaten as they were led from the plane, while military police yelled insults at them. One detainee said a female even "grabbed and held his penis" during his anal probe (Worthington 86).

On a day-to-day basis, prisoners were treated very poorly at both Bagram and Kandahar. The meals served were ready to eat, and the detainees "had to eat the food right out of the envelopes, squeezing the sauces and processed meat products into their mouths" (Fletcher and Stover 26). Sometimes detainees were transferred to "a smaller facility made of corrugated sheet metal with an earthen floor," which was separate from the general population and contained single cells with a latrine bucket and a water bottle (Fletcher and Stover 26). As was reported in CIA black sites, detainees held in the smaller facility were forced to listen to loud music for prolonged periods of time (Fletcher and Stover 26). In Bagram, detainees in the separate facility

had to sleep with floodlights on and were not allowed to pull their blanket over their face (Fletcher and Stover 27). One of the most humiliating abuses was forced nudity, mainly in the form of strip searches, collective showers, and defecation in public. Female soldiers would see them naked and sometimes laugh. This may sound bad to us, but in the Muslim culture it is even worse because public nudity is considered un-pure and dehumanizing, and is even discouraged in the Quran (Fletcher and Stover 29). Moazzam Begg, a former detainee at Bagram, Kandahar, and Guantanamo explained in further detail why this treatment was so humiliating:

These were men who would never have appeared naked in front of anyone, except their wives; who had never removed their facial hair, except to clip their moustache or beard; who never used vulgarity, nor were likely to have had it used against them. I felt that every- thing I held sacred was being violated, and they must have felt the same (Fletcher and Stover 29).

One prisoner said, “The worst experience for me was being forced to take off my clothes and then having my picture taken. You know, we are Afghans and Muslims . . . I would rather be killed than to be treated in that way” (Fletcher and Stover 29). Some detainees were also subject to watching soldiers desecrate the Quran, even putting it in a latrine bucket (Fletcher and Stover 30). Physical abuse also took place in the prisons. In December of 2002, two detainees were beaten so hard that they died (Fletcher and Stover 30). Reported incidents of assault at Bagram included “striking shackled detainees, sleep deprivation, stress positions, prolonged hanging by the arms, beatings, use of dogs to terrorize detainees, and sexual abuse” (Fletcher and Stover 32). Six of thirty-one detainees interviewed in Fletcher and Stover’s study that were held at Bagram, said they were “chained to the ceiling in isolation cells or holding pens for prolonged periods” (32). A former Bagram detainee reported that he, along with others, were handcuffed to a wire attached to the ceiling for 8 to 9 days at a time. He described it, saying:

When they brought me food, they would untie my hands from the ceiling and hand me a plate. But it was difficult moving the food into my mouth because my hands were still

tied together. If some of the [guards] were treating me okay, they would tell me, “Sit on the floor and eat your meal.” . . . Sometimes I fell asleep, and I would think I was just dreaming about all these things. Some of the soldiers who were guarding us weren’t very nice. They would untie our hands from the ceiling, and make us do pushups while our hands were still tied to each other. Because we had handcuffs on, we were unable to do the pushups. And so they would beat us and yell, “Do the pushups!” (Fletcher and Stover 32).

Another prisoner in Bagram was chained upside down from the ceiling because guards said he was talking too much (Fletcher and Stover 33). Detainees in both Kandahar and Bagram were subject to this extreme treatment, and there are many more abuses reported at both prisons. The treatment varied person to person, but it is clear that there was systematic abuse of detainees in these prisons.

The interrogators in Bagram were in charge of deciding which detainees would be sent to Guantanamo. The criteria determined by the Pentagon for transfer to Guantanamo was very vague, so it was up to the interrogators to make the decision (Fletcher and Stover 35). There was limited time to screen the detainees, making it hard to determine who was “Al Qaeda, Taliban, non-Afghan foreign fighters,” and the most vague category, “any others who may pose a threat to U.S. interests, may have intelligence value, or may be of interest for U.S. prosecution” (Fletcher and Stover 35). Chris Mackey, a senior interrogator at Bagram and Kandahar prisons described the difficulties of the interrogation, saying that “the prisoners generally fell into one of two categories – ‘a small group of ideologically committed al Qaeda types,’ and a ‘second, far larger group’ of Taliban foot soldiers and others who claimed that they were not fighters at all” (Worthington 94). He said, “it was sometimes very difficult to tell the difference between the two” (Worthington 94). Interrogators were scared of making a mistake and releasing dangerous criminals, so they often played it on the safe side, choosing to send off detainees to Guantanamo who could have been innocent (Fletcher and Stover 35).

Detainees at Kandahar and Bagram would sometimes be interrogated two to three times a day, but were sometimes left for a few days without interrogation (Fletcher and Stover 35). Interrogator Chris Mackey claimed that even though the Bush Administration had removed the requirements that the detainees be treated as prisoners of war under the Geneva Conventions, it was “declared from the very beginning that the camp would be operated under the rules of the Geneva Convention (Worthington 91). This meant that interrogators could use 16 interrogation tactics authorized by the Army Fields Manual (FM 34-52), which “allowed for a good deal of shouting and verbal abuse, but absolutely no physical contact whatsoever” (Worthington 92). Evidence shows that for the most part, physical abuse was not used in interrogations (Worthington 92). Former Kandahar prisoner Mourad Benchellali acknowledged being abused in detention but said his interrogations did not contain abuse (Worthington 92). However, there is evidence that the line was crossed during interrogations at times. Under intense pressure “and the prevalent atmosphere of self-righteous vengeance throughout the base,” prohibited interrogation practices were sometimes used, such as “physical violence, death threats, stress positions and sleep deprivation” (Worthington 94). Former prisoner at Kandahar, Khaled bin Mustafa, described being beaten because he would not confess to being affiliated with al Qaeda, which he claims he is not. He said, “I got many beatings as a result of that. I was hit with wet towels, double-folded like a bag and containing small contusive objects such as toilet soaps. As a result of that I suffered dizziness and aches behind the ear” (Worthington 95). Some of the former detainees in Fletcher and Stover’s study said they were “physically abused or threatened during interrogation sessions” (35). One respondent stated he was interrogated while having surgery on his back. Other respondents described being threatened with death and his family’s safety (Fletcher and Stover 36). Many detainees described being beaten and physically abused during

interrogations (Worthington 96). One detainee was beaten so hard he said, “At that point, with all my suffering, if he had asked me if I was Osama bin Laden, I would have said yes” (Worthington 96). Evidence shows that the interrogations at the prisons in Kandahar and Bagram were probably much less brutal than the day-to-day treatment of detainees. It seems as though there was at least an effort by some interrogators to follow laws banning torture in the US army manuals and international law. However, when abuse was lacking in interrogations it was made up for outside of interrogations. Plus, there is evidence in both Fletcher and Stover’s study and in Worthington’s book *The Guantanamo Files*, that at times the CIA came to assist with interrogations and sometimes took detainees offsite, presumably to black sites. Descriptions of interrogations run by the CIA were much more brutal. One person described having boiling water poured on his head, cigarettes put out on his skin, interrogators urinating on his head, and gasoline being injected into his anus (Worthington 97).

Arrival at Guantanamo Bay

Most of the detainees held at the prisons in Kandahar and Bagram or at CIA black sites in various countries were not sent to Guantanamo. However, ones who were transferred to Guantanamo had to endure especially brutal treatment, even during their transport there. For the most part, the experience of being transported to Guantanamo was the same for all detainees, with the exception of a few minor details that varied from detainee to detainee. The transport process started with the detainees being stripped and shaved (Fletcher and Stover 37). One detainee described being taken to another room after two or three hours and being photographed naked (Fletcher and Stover 37). Detainees were then searched. Former prisoner Shafiq Rasul described being given a full body search, including a cavity search (*Guantanamo*). According to

Human Rights Watch, many of these procedures, such as “strip and cavity searches; shaving of head, facial and body hair; and being photographed naked,” were “reasonable from a security perspective,” however “were nonetheless humiliating for them” (*Guantanamo*). After these procedures, detainees were given orange clothes, hat and jacket. Then painful shackles were put on them (Fletcher and Stover 37). Detainees were given a “three-piece-suit,” which in the words of a former detainee “means shackling the hands to a chain at the waist, with another chain running from the waist to the feet shackles” (Fletcher and Stover 38). Detainees were also given black masks with goggles or blacked out goggles, so they couldn’t see and either earplugs or earmuffs, so they couldn’t hear (Fletcher and Stover 37). According to a Human Rights Watch report, “Former detainees describe their transfer to Guantanamo as taking place in conditions of significant physical discomfort and sensory deprivation through the use of painted-out goggles and earmuffs” (*Guantanamo*). Several former detainees described “the treatment they received prior to boarding the plane as the worst they experienced at Kandahar or Bagram” (Fletcher and Stover 38). One former detainee described a room they were sent to before boarding the plane, saying:

We were taken to a room and forced to sit cross legged . . . we were insulted so much in that room. We were beaten on the back and insulted with words like “fuck you, shut up, don’t talk.” And we sat in that position for about three or four hours. . . . Eventually we started to cry because of the pain and grief we were receiving. (Fletcher and Stover 38).

During the flight, the detainees stayed shackled. During some transports detainees were chained to the seats of the cargo plane, while during some they were chained to the floor (Fletcher and Stover 38). Detainee Shafiq Rasul described the process as extremely painful, saying:

I was given an orange jumpsuit to wear and I was tied by my arm with a rope in a line of other detainees. I was also chained with the three-piece suit [a belt with hand shackles attached to it and with a metal bar leading down to leg-irons] around my arms, legs and waist. I had goggles on my eyes and earmuffs but no gloves or hood. I couldn’t see or hear anything. The elastic on the goggles and the earmuffs was cutting into my ears and

eyes. On the plane we were sat on the floor and couldn't talk. The air was blowing on my head and my head was aching. (*Guantanamo*).

Rasul also complained that the shackles were painful, saying, "during the plane journey the shackles had been on so tight that they really cut into me. I still have scarring on my left arm from them and I lost the feeling in my right hand for a long time because they were on so tight" (*Guantanamo*). Detainees described the plane as very cold. They described the whole situation as extremely painful and uncomfortable. One detainee even said, "It was the worst pain ever. I just wanted to die" (Fletcher and Stover 39). The detainees were given food, sometimes apples and sometimes sandwiches. However, the shackles made it difficult to eat (Fletcher and Stover 39). Human Rights watch says the flight was 22 hours long and detainees were not given access to the bathroom (*Guantanamo*). A former detainee in Fletcher and Stover's study said the flight was 36 hours long (38). A respondent also said he was allowed to go to the bathroom but could not urinate because a woman was standing there watching him the whole time (Fletcher and Stover 36). Over one quarter of respondents in Fletcher and Stover's study said they were drugged (38). One detainee said, "I couldn't tell exactly what it was . . . I felt in a daze and very heavy. My nose was blocked, I could hardly breathe" (Fletcher and Stover 38). The flights to Guantanamo also included a stopover in which the detainees had to transfer planes. During the stopover, multiple detainees described being abused (*Guantanamo*). Tarek Dergoul described the stopover:

At some stage we changed planes, I don't know where. When this happened we were dragged to the airplane one by one by our cuffs. I could not walk due to the frostbite in my feet. I tried to complain but they just dragged me even harder. They were pulling me by my hand so the handcuffs cut into my hand. When I was not walking fast enough they were just dragging me. (*Guantanamo*).

When he arrived, Tarek Dergoul said he was stripped and underwent another full body cavity search (*Guantanamo*). Another detainee said he was stripped naked upon arrival, while yet

another detainee said he only had his blood checked and was weighed (*Guantanamo*). When the plane arrived at Guantanamo Bay, the detainees were put on a bus, which drove to a ferry, which landed at the detention facility (*Guantanamo*). Former prisoner Briton Asif Iqbal described abuse during the bus ride, “On the bus we sat cross legged on the floor (the seats had been removed) and were thrown about because of the movement of the bus, but soldiers would still punch or kick us if we moved” (*Guantanamo*). When the detainees arrived at the detention facility, their goggles, clothing, and earmuffs were finally removed (Fletcher and Stover 41). Then, “Detainees were taken to communal showers, the first in months for many, where soldiers scrubbed them with stiff brushes and gave them undergarments and orange jumpsuits” (Fletcher and Stover 41). Finally, they were allowed to write a letter home, although many said it was difficult to write with the shackles on (Fletcher and Stover 41). After a long journey filled with abuse, pain, and suffering, the detainees had finally arrived at their new home, Guantanamo Bay.

Who Was Detained in Guantanamo

Since process in which people were captured was not very selective, and the sorting process for those selected to go to Guantanamo Bay was not very thorough either, many innocent people were detained in Guantanamo Bay. According to a senior Pentagon official with “extensive knowledge of Guantanamo,” “At least two -thirds” of the 600 detainees held as of May 2004 could, he said, be released without hesitation” (Rose 3). According to David Rose, author of *Guantanamo: America’s War on Human Rights*, “The evidence suggests that large numbers of the Gitmo prisoners – citizens of over forty countries around the world – were absolutely innocent of the least involvement in anything that could reasonably be described as terrorist activity” (Rose 3). In 2004, a CIA agent “with experience at Gitmo,” said that only 10

percent of the prisoners held at Guantanamo Bay were dangerous (Forsythe 107). In 2006, an academic report “found that over half of the Gitmo detainees had committed no hostile act against US personnel or facilities, that most detainees were captured by other parties, and that perhaps 8 percent of those at Gitmo were associated with Al Qaeda” (Forsythe 107). Then, in 2009, a study commissioned by President Obama of the 240 remaining prisoners at Guantanamo found that “only about 10 percent were important for US security” (Forsythe 107). All of this evidence confirms the findings in Fletcher and Stover’s study that many of the people captured were people with little or no ties to al Qaeda or the Taliban. The detainees at Guantanamo came from a mix of Middle Eastern countries. Out of the 770 total detainees that were brought to Guantanamo (as of 2008): 221 were from Afghanistan, 140 from Saudi Arabia, 110 from Yemen, 70 from Pakistan, and the rest from various other countries (Fletcher and Stover 42).

Government Approved Torture

The evidence presented so far shows that torture was prevalent throughout United States detention facilities following 9/11. For some detainees, every day life was turned into torture. Some were tortured during interrogations. While some interrogators, guards, and other military personnel crossed the line in their treatment of prisoners, the government approved many of the torture tactics used. Earlier it was shown how the Bush Administration protected itself, claiming that detainees in the War on Terror were not subject to the Geneva Conventions and even redefined what torture meant. The Bush Administration authorized the use of specific torture techniques, authorizing different torture techniques to the CIA and the Department of Defense. The CIA, being a secretive organization, was allowed to use harsher interrogation techniques than the military (Pfiffner 67). The Department of Defense ran the Guantanamo Bay detention

facility, but the CIA and FBI were also involved in interrogations there (Fletcher and Stover 5; Priest and Higham).

Before 9/11, the only authorized interrogation techniques were the ones approved in the Army Field Manual, FM 34-52 (Pfiffner 58). As was explained earlier, these were the standard Army techniques that were made to comply with the Geneva Conventions. These limitations did not last for long. Since Bush stated that as illegal enemy combatants these detainees were not subject to the Geneva Convention, he determined that there was no reason why he could not authorize the use of torture. On October 11, 2002, Lieutenant Colonel James Phifer, who believed the authorized interrogation techniques were not yielding enough results, sent a memo to Major General Michael Dunlavey, Commander at Guantanamo, asking for approval of harsher interrogation techniques (*Interrogation*). The memo made its way up the ladder, with suggestions being made upon the way, eventually making its way to Department of Defense General Counsel William J. Haynes, who recommended all but three of the proposed interrogation techniques to Secretary of Defense Donald Rumsfeld. Rumsfeld approved Haynes recommendations on December 2, 2002. (Pfiffner 59; *Interrogation*). The authorized techniques were put into three categories of harshness: Category I, Category II, and Category III (Pfiffner 59). Category I included “yelling at detainee” and two forms of deception: “multiple interrogators” and a method known as “false flag,” when the detainee is told the “interrogator is from country with reputation for harsh treatment of detainees” (*Interrogation*). Category II consisted of:

1. ‘The use of stress positions (like standing) for a maximum of four hours.’
2. ‘The use of falsified documents or reports.’
3. ‘The use of isolation facility for up to 30 days. Extensions beyond the initial 30 days must be approved by commanding general.’
4. ‘Change of ‘environment’ for interrogation.’
5. ‘Deprivation of light and auditory stimuli.’
6. ‘The detainee may also have a hood placed over his head...(not to restrict breathing).’
7. ‘The use of 20 hour interrogations.’

8. 'The removal of all comfort items (including religion items).'
9. 'Switching the detainee from hot rations to MREs.' (meals ready to eat).
10. 'Removal of Clothing.'
11. 'Forced grooming (shaving of facial hair, etc).'
12. 'Using detainees (sic) individual phobias (such as fear of dogs) to induce stress.' (Pfiffner 59).

The only technique approved from Category III was the "Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing" (Pfiffner 59). On January 15, 2003, Donald Rumsfeld rescinded the approval of these tactics out of concern of the legality of many of the authorized techniques (Pfiffner 60; *Interrogation*). He ordered DOD General Council Haynes to create a working group to recommend legal interrogation techniques (Pfiffner 60; *Interrogation*). On April 16, 2003 authorized 24 interrogation techniques, rejecting eleven of thirty-five of the working group's recommended techniques, which were given to him a couple weeks before (Pfiffner 61; *Interrogation*). The authorized techniques included all seventeen of the techniques authorized in FM 34-52, along with seven more techniques. These seven extra techniques were:

- R. 'Change of Scenery Up'
 - S. 'Change of Scenery Down'
 - T. 'Dietary Manipulation' (with 'no intended deprivation of food or water')
 - U. 'Environmental Manipulation' ('e.g., adjusting temperature')
 - V. 'Sleep Adjustment' ('This technique is NOT sleep deprivation')
 - W. 'False Flag' (pretending that he will be interrogated by people from other countries)
 - X. 'Isolation' (not known to have been done for interrogation 'for more than 30 days')
- (Pfiffner 61).

Rumsfeld also noted that these techniques were only for "unlawful combatants held at Guantanamo Bay, Cuba," that "techniques 'are usually used' in combination" and that detainees be "treated humanely and, to the extent appropriate with military necessity, in a manner consistent with the principles of the Geneva Conventions" (Pfiffner 61). He also said that officials could send a written request to him to use additional techniques (Pfiffner 61). It is clear

that many of the interrogation tactics authorized by the US government were abusive. However, they actually do not seem that bad. They may be abusive and coercive, however most of them do not appear to cross the line to torture. However, officially allowing these relatively harmless abuses created the foundation for much more harmful abuses. For example, “dietary manipulation with no intended deprivation of food or water” can easily turn into dietary manipulation with deprivation of food or water that was officially “non-intended.” If that is mixed with environmental manipulation, for example locking a detainee in an extremely air-conditioned room air, it starts to seem a lot more like torture. Then on top of that maybe the detainee is shackled to the ground. Then it crosses the line into serious abuse and even torture. Stuff like these occurred at Guantanamo and will be described in detail later in the chapter. It is not very hard to see how the seemingly not so abusive authorized interrogation techniques can quickly turn into extremely harsh abuse. As was already explained, at the Bagram prison, the military went beyond what was officially allowed. Also, according to a former Guantanamo interrogator, interrogators knew that since the Geneva Conventions did not apply to them, they had a lot of flexibility in what they could do (Worthington 194). Some of the detainees in Guantanamo Bay were also interrogated in Guantanamo by the CIA, which was allowed to use much more abusive tactics (Fletcher and Stover 49; Priest and Higham).

Compared to the Military, the CIA was authorized to use much harsher interrogation techniques. In October of 2002, Jonathan Fredman, a CIA counterterrorism lawyer said to a group of officials at Guantanamo, “The CIA is not held to the same rules as the military. . . . [Torture] is basically subject to perception. If the detainee dies you’re doing it wrong” (Fletcher and Stover 7). The CIA did not have restrictions that the military had on how to treat prisoners. The CIA is a secretive organization and is separate from the military, which is why President

Bush authorized it to set up secret “black sites” and to use the most brutal types of torture. When the CIA asked the Bush Administration for legal consideration on what it can and cannot do during interrogations, the Bush Administration responded with the authorization of ten interrogation tactics. On August 1, 2002, Jay Bybee, Assistant Attorney General for the Office of Legal Counsel in the Department of Justice, released a memo to the CIA outlining these tactics. This memo was kept secret until it was made public by the Obama Administration in 2009

(Pfiffner 73). The ten techniques authorized in the memo were:

1. the attention grasp
2. walling (pushing the individual into a specially constructed wall)
3. facial hold
4. facial slap
5. cramped confinement
6. wall standing (standing 4-5 from the wall, the individual leans forward so that his weight is supported by his fingertips)
7. stress positions
8. sleep deprivation
9. cramped confinement in a box with an insect (not used)
10. waterboard (Pfiffner 67).

These tactics were authorized specifically for use on the detainee Abu Zubaydah, a prisoner who was held by the CIA in secret prisons and tortured and then eventually brought to Guantanamo. In May of 2005, Office of Legal Council Director, Steven Bradbury, issued another torture memo to the CIA. It said that torture is wrong and “abhorrent both to American law and values and to international norms” (Pfiffner 68). It listed thirteen authorized interrogation techniques, and justified why they were not torture. The thirteen techniques were:

1. dietary manipulation (liquid rather than solid food with caloric requirement)
2. nudity (to cause psychological discomfort, including presence of women)
3. attention grasp
4. walling
5. facial hold
6. facial slap (with fingers slightly spread)
7. abdominal slap

8. cramped confinement (for larger box, no more than eight hours at a time for a total of eighteen hours a day; for a smaller box, no more than two hours)
9. wall standing
10. stress positions (three types specified)
11. water dousing (ambient temperatures of 64 degrees; water temperature of 41 degrees for twenty minutes; higher temperatures for longer periods)
12. sleep deprivation (maximum of 180 hours, hands shackled above head [two hour limit], and feet shackled; danger of edema, which is 'not painful')
13. waterboard (forty-second duration; two-hour limit; two sessions per twenty-four hours) (Pfiffner 68).

The CIA used these torture tactics mostly in their black sites, however the CIA has also participated in interrogations at Guantanamo, and according to military officials and current and former intelligence officers, the CIA operated a detention center within the Guantanamo Bay detention center that was kept secret from the public (Fletcher and Stover 49; Priest and Higham). According to a military official, it was “off-limits to nearly everyone on the base (Priest and Higham). The official interrogation policies authorized by the US government for use by the CIA and Department of Defense show some of the tactics that were used in interrogations. However, it is important to hear evidence of what actually happened regarding the treatment of detainees in Guantanamo.

Treatment of Detainees in Guantanamo

Living conditions in the Guantanamo Bay detention center were very poor. When detainees first arrived, they were housed in a temporary camp, Camp X-Ray, which consisted “of small cages with chain-link sides, concrete floors and metal roofs, offering scant shelter from the elements, and with very basic sanitary facilities” (*Guantanamo*). Camp X-Ray was closed in April of 2002 and Camp Delta was opened, which was a permanent facility. At first, detainees were prohibited from talking to each other or praying, but these restrictions were eventually relaxed (*Guantanamo*). A Pakistani detainee named Abdul Razak described being allowed two

showers a week, but said “we could only use the toilet at the discretion of the guards and often they would not allow us to use the toilet when we needed to” (*Guantanamo*). Not all of the detainees were treated equally. There were six camps in Camp Delta, and the levels of comfort that detainees were allowed varied. Some detainees described very poor living conditions, while some detainees described high standards of living. For example:

One of a group of twenty-three Afghans released in March 2004, Haji Osman, told a New York Times journalist that he was well-treated, allowed to spend up to six hours a day outside his cell, allowed to play sports, and had eaten well enough to put on weight, albeit he had observed that not all prisoners were detained in the same level of comfort. (*Guantanamo*).

In general research has shown that prisoners at Guantanamo were not subject to good living conditions and were often physically and mentally abused. However, some people were given better conditions than others and were not abused at all.

By the time they got to the Guantanamo Bay detention center, most of the detainees had already undergone plenty of abuse either in CIA black sites, military prisons, or both. Whether subjected to brutal torture tactics or not, everyday life was often turned into torture. From the opening of Guantanamo Bay in January of 2002 to November of 2002, Brigadier General Rick Baccus was the commander of the Joint Task Force of Guantanamo. However, because he was believed to have been too soft on detainees, he was replaced by Major General Geoffrey Miller in November of 2002 (Worthington 191). Baccus was said to have distributed to prisoners copies of the Koran and adjusted meal times for Ramadan, something that the Pentagon was not too happy with (Worthington 191). Major General Miller, who was in charge until 2004, implemented much harsher conditions for the detainees. It should be noted that about the same time Miller was appointed commander, Rumsfeld approved the new interrogation techniques for use by the military at Guantanamo. Miller implemented a system in which guards were responsible for “setting the conditions” for interrogations (Worthington 192). “Every aspect of

the prisoners' physical existence – their conditions of detention, their food, their medical support, and every single 'comfort item,' which now included their solitary Styrofoam cup – would be geared to the interrogators requirements" (Worthington 192). The guards worked together with the interrogators, creating levels of compliance, giving more compliant detainees more "comfort items" (Fletcher and Stover 46). The most compliant level got prayer mats and personal toilet paper rolls, while the least compliant detainees received no sheet or mattress. There was also a separate level of detainees that were housed in a separate area for "intelligence gathering purposes (Fletcher and Stover 46). During Miller's time as commander, "incidents of abuse during interrogations became widespread, as did acts of violence from guards" (Worthington 192). With the guards working with the interrogators, for many detainees, torture was blurred between the actual interrogations and every day life. According to a former Guantanamo Bay interrogator, the new forms of abuse were used on about one-sixth of prisoners (Worthington 194). He also said, "when new interrogators arrived they were told they had great flexibility in extracting information from detainees because the Geneva Conventions did not apply at the base" (Worthington 194). Brutal beatings sometimes occurred. Sometimes this was in response to a detainee breaking a rule. For example, prisoner Asif Iqbal was once beaten because he refused to remove a towel that was wrapped around his waste while he was praying because the uniforms they were given were open at the side, which is not allowed in Islam while praying (*Guantanamo* 19). Asif Iqbal also overheard a military police officer saying that he had "beaten someone in isolation with a large metal rod used to turn on the water to the blocks" (Worthington 192). Another prisoner said that once after an interrogation, he was dragged back to his cell by his shackles so hard that his ankles bled and then his head was put in the toilet and the toilet was flushed. He also described a time when guards went into his cell in the middle of the night and

sprayed mace in his eyes (Worthington 192). A prisoner named David Hicks described being “repeatedly beaten, once for eight hours, and frequently while he was restrained and blindfolded” (Worthington 192).

At the Guantanamo Bay detention center, abusive treatment occurred both in every day life and during interrogations. According to Fletcher and Stover’s study, all former detainees reported being interrogated (56). “Some said they were interrogated daily or several times a week for weeks on end, others were questioned regularly and then the questioning would stop and months would pass before they were summoned back to the interrogation booth” (Fletcher and Stover 56). The report also said that out of the 55 respondents who talked about the interrogations they were subject to, 31 “characterized them as abusive” (Fletcher and Stover 62). During Miller’s implementation of new policies, multiple detainees explained being interrogated 150 or even 200 times a year, up from only five times before (Worthington 194). One prisoner, Abdel Rahman Noorani said that during the twenty months he spent at Guantanamo, he was “badly punished 107 times,” including being chained by his hands and feet while his legs and back were beaten with a metal rod (Worthington 194).

Prisoner abuse at Guantanamo Bay was very brutal, and occurred both during interrogations and outside of interrogations, sometimes as part of an effort to soften up the prisoners for interrogation. Many of the Department of Defense authorized interrogation techniques were used on detainees. However, the list of authorized techniques does not explain how bad the abuse that occurred really was. The interrogation techniques used went beyond the limits of the authorized techniques. Detainees were subject to abuses such as: “short shackling and stress positions,” “environmental manipulation,” “sexual humiliation,” sleep deprivation, isolation, along with reports of waterboarding and other methods of abuse. In Fletcher and

Stover's study, 12 of the 62 respondents "said they were subjected on one or more occasions to painful shackling and stress positions during questioning" (62). In Fletcher and Stover's research on media reports, they found that "nearly 15 percent of identified former detainees... reported that they had been shackled in painful positions for hours while at Guantánamo" (62). Even though shackling was only approved for interrogation for slightly more than a month, data suggests, "that short shackling and other stress positions were used both prior to and following that window" (Fletcher and Stover 62). According to a report by the Office of the Inspector General:

Over 30 FBI agents told investigators with the Department of Justice that they saw or heard about the use of prolonged shackling or stress positions on detainees at GTMO. . . . Several agents described detainees being short-shackled overnight or while being subjected to cold temperatures, loud music, and flashing lights. (Fletcher and Stover 63).

Short shackling was an especially abusive practice. According to Fletcher and Stover:

Many respondents said they were questioned by interrogators and then left sitting alone in a chair or on the floor for hours, hunched over with their hands and feet short shackled to a metal ring in the floor. Two respondents said this treatment occurred after they had repeatedly denied allegations by their interrogators that they were terrorists, which their interrogators deemed evidence that they were not 'cooperating.' (63).

One detainee said he was shackled in a room once for 24 hours while an interrogator came in every so often and asked, "Are you ready to confess yet?" (Fletcher and Stover 63). Prisoner Tarek Dergoul said for a month straight he was short-shackled every day for eight hours. He described the process saying, "After a while, it was agony. You could hear the guards behind the mirror, making jokes, eating and drinking, knocking on the walls" (*Guantanamo*). For Tarek Dergoul, short shackling was combined with "environmental manipulation," a process in which prisoners were subject to really cold or sometimes warm temperatures. According to Dergoul, "the air conditioning would really be blowing—it was freezing, which was incredibly painful on my amputation stumps [Dergoul's left arm and a big toe are amputated]" (*Guantanamo*). Former

detainees Shafiq Rasul and Asif Iqbal released a joint statement in 2004, describing in detail the brutality of the practice of short shackling mixed with environmental manipulation:

Our interrogations in Guantanamo... were conducted with us chained to the floor for hours on end in circumstances so prolonged that it was practice to have plastic chairs... that could be easily hosed off because prisoners would be forced to urinate during the course of them and were not allowed to go to the toilet. One practice... was ‘short shackling’ where we were forced to squat without a chair with our hands chained between our legs and chained to the floor. If we fell over, the chains would cut into our hands. We would be left in this position for hours before an interrogation, during the interrogations (which could last as long as twelve hours), and sometimes for hours while the interrogators left the room. The air conditioning was turned up so high that within minutes we would be freezing. There was strobe lighting and loud music played that was itself a form of torture. Sometimes dogs were brought in to frighten us... Sometimes detainees would be taken to the interrogation room day after day and kept short-shackled without interrogation ever happening, sometimes for weeks on end (*Guantanamo* 12).

The practice of environmental manipulation was used both with and without short shackling. Environmental manipulation was one of the interrogation techniques that were approved by Rumsfeld in both December of 2002 and April of 2003 (Pffner 59, 61).

Environmental manipulation was approved as an interrogation technique from April 2003 until September of 2006 (Fletcher and Stover 63). Prisoners were frequently isolated in rooms with air conditioning turned up for days, weeks, or even months (Worthington 194). 14 of the 62 respondents in in Fletcher and Stover’s study reported being subject to environmental manipulation during interrogations at Guantanamo Bay (64). Eight of these respondents described this as “the worst treatment they endured at Guantánamo” (Fletcher and Stover 64). Detainees were exposed to these cold temperatures for very long periods of time. One respondent described being shackled and being subjected to extremely low temperatures for nine hours. He said, “It was extremely cold, I wasn’t allowed to use the toilet, and I was very ill with the flu” (Fletcher and Stover 64). A former guard at Guantanamo Bay described the situation in which detainees were shackled and subject to cold temperatures, mentioning a:

room in which detainees are shackled to the floor for periods of time, I've discovered, more than 10 hours pretty frequently. And they're shackled by their hands and feet to the floor so that they are in a constant crouching position without being able to really put their ass on the floor, like sit down or anything. And the room is incredibly cold. (Fletcher and Stover 64).

One prisoner, Mehdi Ghezali, described the environmental manipulation treatment, saying, "They put me in the interrogation room and used it as a refrigerator. They set the temperature to minus degrees so it was terribly cold and one had to freeze there for many hours. 12-14 hours one had to sit there, chained" (Worthington 195). Prisoner Aryat Vakhitov described this treatment, saying:

During the interrogations they left you in a cold room for weeks... We weren't given anything to lie on – no carpet. All of us have problems with our kidneys because we slept on the iron [floor] with [the] air conditioning on. It was freezing cold. The ceilings began to be covered with condensation from the cold. We were held like that for months. I was in the isolation ward for five months. (Worthington 195).

Environmental manipulation and short shackling, often used together, were both forms of brutal treatment and extreme isolation. According to Fletcher and Stover, the Schmidt-Furlow Report said that "bright lights and/or loud music" were used as a form of environmental manipulation on "numerous occasions" between July 2002 and October 2004" (Fletcher and Stover 64).

Worthington's book also mentions the use of "loud music, sustained noise, and strobe lighting" (Worthington 195). Practices such as "environmental manipulation," which may seem relatively harmless, can actually be really brutal. It all depends on how much the temperature is changed, for how long it lasts, and whether or not other abusive actions such as short-shackling are done with it.

Sleep deprivation was also used on detainees. Rumsfeld did not specifically authorize sleep deprivation, however he did authorize "sleep adjustment." However, what is the difference between sleep adjustment and sleep deprivation? This is not clear. Where is the line drawn

between the two? This is open to interpretation, making it easy for sleep deprivation to become regular practice. Sleep deprivation was “achieved either by waking the prisoners whenever they fell asleep or, more commonly, by moving them repeatedly from cell to cell over a period of weeks or months.” According to a prisoner Mourad Benchellali, “We were treated differently depending on whether or not we responded to questions. Those who did not ‘cooperate’ were awakened every hour with the aim of preventing them from sleeping at all costs” (Worthington 197). Some prisoners reported being moved from cell to cell frequently. One prisoner, Fouad al-Rabia, said this left him “suffering from depression, losing weight in a substantial way, and very stressed.... deprived of his sleep and seriously worried about the consequences for his children” (Worthington 197). Mehdi Ghezali described being “deprived of sleep for about two weeks by the constant switching of cells and interrogation” (Worthington 197). Many prisoners reported situations like this. According to former prisoner Mohammed Khan Achakzai, “some prisoners had been deprived of sleep for up to 45 days at a time” (Worthington 197).

It is clear that many of the prisoners at Guantanamo Bay were subject to extremely harsh physical abuse. They were isolated in rooms for long periods of time with very cold temperatures, often times shackled to the ground, and sometimes while being forced to endure sustained loud music and/or bright lights. This also threw off their sleep schedules, eating schedules, and deeply affected their mental health. Detainees were also reportedly severely beaten and deprived of their sleep. Other interrogation techniques were also used on detainees. The FBI stated in a letter to the Pentagon that Al-Qahtani, a prisoner who was treated especially harshly because he was suspected of having important information, was “subjected to intense isolation for over three months” (Worthington 206). Another prisoner described cleaning agents being thrown in his face (Worthington 195). The most notorious form of interrogation that has

been reported about during the War on Terror is waterboarding. As was previously mentioned, only the CIA was authorized to waterboard detainees. There is no evidence that the military used this technique. However, it is possible that the CIA used this technique at Guantanamo Bay in their secret facility there.

Interrogation techniques that did not inflict physical harm, but instead inflicted psychological harm were also used. One of these methods was taking advantage of specific fears of prisoners, often times by using dogs (Worthington 197). Sexual humiliation was an ever more commonly used technique (Worthington 197). According to former prisoners Shafiq Rasul, Asif Iqbal, and Rihel Ahmed, sexual humiliation was used on “the people who’d been brought up most strictly as Muslims,” because Islam prohibits “any physical contact between unrelated men and women” (Worthington 197; Fletcher and Stover 65). As was described earlier in this paper, sexual humiliation was also used in the military prisons in Afghanistan and was a method of abuse that detainees found extremely humiliating because of their religious views. Sexual humiliation consisted of forced nudity and also of women interrogators making the men feel sexually uncomfortable, sometimes by showing them their private parts. One FBI agent who was at Guantanamo said that “agents told him that they observed female military interrogators straddling detainees, whispering in their ears, and generally invading the detainees’ personal space” (Fletcher and Stover 66). According to an OIG/DOG report, over 20 FBI agents reported “that they had seen or heard about female interrogators touching or acting toward a detainee in a sexual manner” (Fletcher and Stover 66). Two other FBI agents reported “that an FBI Intelligence Analyst told them a female military interrogator named ‘Sydney’ had exposed her breasts and performed sexual lap dances on detainees to make them uncomfortable and ashamed” (Fletcher and Stover 176). This may not seem so bad to Americans, as many American

men actually pay money for this type of treatment. However, for Muslims it is degrading and it was done for this reason, not for the purpose of entertainment. A prisoner named Juma al-Dossari said that two interrogators forced him to watch them have sex (Worthington 198). During one of Al-Qatani's interrogations, a female interrogator stuck her hand down her pants and wiped on her hand what looked like menstrual blood (it was actually ink), while also showing him her breasts and saying "Don't you like these big American breasts?" (Worthington 207). There were also reports of detainees being forced to get naked. Three British detainees said they saw this happen to other detainees, and said "This was done in full view of all those on the block and not only humiliated the prisoner involved but caused deep resentment in the others in sight" (*Guantanamo*). As was described earlier, in relation to similar treatment in the Kandahar and Bagram prisons, public nakedness is especially humiliating in the Muslim culture.

The psychological abuse that occurred also included threatening of death or violence, solitary confinement, and disrespect for the Quran. One prisoner claimed that interrogators threatened him and his family with death, and even pretended to beat someone in the room next to him in order to scare him (*Guantanamo* 11). Prisoner David Hicks said he had been "menaced and threatened, directly and indirectly, with firearms and other weapons before and during interrogations" (Worthington 192). One prisoner described being threatened with torture, saying:

I was there for eighteen months and was taken for interrogation plenty of times. Questions were the same and there was offering and intimidation during the interrogations. For instance, I was promised I would be released if I told all the truth and shared all my information. Or I was threatened to be given electricity shock if I did not tell the truth. The threats were verbal. (*Guantanamo* 11).

Solitary confinement was a practice that was used on some detainees. Some detainees in the Fletcher and Stover study responded that they were held in a room with the lights always on for long periods of time (72). As previously explained, solitary confinement also sometimes

accompanied physical pain when used with shackling, environmental manipulation, or often times both. Solitary confinement can cause profound psychological damage, both long and short term (Fletcher and Stover 73). According to a group of UN experts, “the conditions of their confinement have had profound effects on the mental health of many of them. . . . These conditions [including long periods of solitary confinement] have led in some instances to serious mental illness, over 350 acts of self-harm in 2003 alone, individual and mass suicide attempts and widespread, prolonged hunger strikes” (Fletcher and Stover 72). Interrogators and guards have also been reported to have disrespected the Quran or interfered with the practice of the religion of the detainees. The Quran is the holiest book in Islam and desecrating it is extremely intolerant and disrespectful, and for a devout Muslim, would cause serious psychological pain. According to the 2004 Guantanamo Bay Camp Delta guidelines, the military was supposed to treat the Quran with extra respect and respect detainees religious practices, however it is clear this rule was not always followed (Fletcher and Stover 53-54). Of the 33 respondents in Fletcher and Stover’s study who “discussed treatment of the Quran, 13 reported that they directly witnessed military personnel leave the Quran on the floor. In five of these instances, respondents claimed soldiers also stepped on or kicked the Quran” (54). One prisoner described an interrogator treating the Quran poorly, saying he put it on top of a coffee and then made jokes about it (*Guantanamo* 11). Many detainees also said they were intentionally interrupted while praying with things like guards mocking them, singing or playing loud music while they prayed, or guards conducting cell searches during prayer time (Fletcher and Stover 54). However, not everyone’s religious beliefs were treated with such disrespect. Many detainees reported that they were allowed to pray freely and one even said that a guard obeyed his request to wake him up for pre-dawn prayer (Fletcher and Stover 54).

The treatment of prisoners in Guantanamo was very poor, especially during interrogations and the abuse that was administered in order to soften up the prisoners for interrogation. However, as noted above, not every prisoner was abused. Some prisoners reported merely being asked questions. Of course, even for the ones who were just asked questions, detainment must have still been a traumatic experience, especially since many if not most of them were innocent. The detainment and abuse caused extreme psychological harm. Some of the psychological harm that occurred was explained above, however there was a lot of deeper psychological harm that occurred. According to Fletcher and Stover:

Psychological damage, as doctors who treat victims of torture and prisoner abuse have long recognized, can result not only from individual acts of extreme cruelty (such as waterboarding) but from the cumulative nature of seemingly less severe acts, such as sleep deprivation, stress positions, and sexual humiliation, especially when applied in sequence and in combination, with one technique intensifying the effects of the others, over long periods of time. The stress and suffering produced by these cumulative acts can be further compounded by the ongoing uncertainty of indefinite detention. (xvii).

The combination of all these factors led to psychological trauma for many detainees. Six of the respondents in the Fletcher and Stover study said they tried to commit suicide at least one time. This shows especially how much psychological damage was inflicted because suicide is prohibited in Islam (Fletcher and Stover 82). Fletcher and Stover also said that the “The operating assumption was that camp conditions should serve to weaken the defenses of detainees and enable interrogators to break them down psychologically” (Fletcher and Stover xvii). This started with General Miller taking charge of the camp. Many of his practices, especially ones in which the guards would set the conditions for interrogation, involved breaking the detainees down psychologically. Physical abuse was meant to not only cause physical pain, but also psychological pain, while many humiliating and fear-inducing techniques were meant to cause only psychological harm. Trying to break down someone psychologically is not inherently

abusive, however when it crosses a certain point it becomes abusive. In Guantanamo Bay and other military prisons, it is clear that it crossed this line numerous times. The trauma of being taken away from one's home and detained indefinitely in multiple prisons throughout the world without being able to challenge one's detention and not knowing how long it will last definitely adds to the psychological damage that affected these prisoners. It is

Rights of Detainees

The detainees at Guantanamo Bay lacked the legal rights that both prisoners of war would have and that prisoners within the United States would have. As was explained earlier, the Bush Administration re-interpreted the law in order to claim that the United States was not violating any laws and that the detainees did not have a legal right to have any protections that civilian prisoners or prisoners of war normally have. It was also decided that the status of Guantanamo Bay as an overseas property being leased by the United States, meant that the prisoners there were not subject to US laws. It was also decided that since the prisoners were not affiliated with a state army, they were not subject to the Geneva Conventions. Detainees were considered illegal enemy combatants, and thus could be held indefinitely without being charged. They did not have the right to a standard civilian trial that someone in the United States would receive. Detainees in Guantanamo instead were given the right to be tried by military commissions. Over the years the ways in which prisoners could challenge their detainment has expanded, through new laws and Supreme Court decisions.

When the Guantanamo Bay detention center opened in January of 2002, detainees were given the right to a trial by military commission. According to Human Rights Watch, the purpose was to "To prosecute non-U.S. citizens, who have allegedly participated in international

terrorism against the United States, for war crimes or other offenses” (*Making*). President Bush’s military order on November 13, 2001 established the authority for the Department of Defense to hold military commissions (*Making*). The first military commission trial did not occur until August 24, 2004 (“Guantanamo”). When this trial occurred, 15 detainees were declared eligible for a trial (*Making*). Since the detainees were considered illegal enemy combatants, they could be held indefinitely without trial. The structure and procedure of the military commissions was as follows:

Each military commission shall consist of from three to seven members, all of whom must be current or retired members of the U.S. armed forces. The defendant must be represented by an assigned military defense counsel but is also permitted to hire a civilian defense lawyer at his own expense. The normal rules of procedure in a court martial do not apply in the military commissions. Hearsay evidence can be admissible. Decisions are based on a majority of commission members, except in death penalty cases, where a unanimous verdict is required. Cases are reviewed by a military review panel, but there is no appeal to a civilian court as is the case with courts martial. Final review rests with either the Secretary of Defense or the President.

The Human Rights Watch report on military tribunals claims that these commissions “fall far short of international due process standards” (*Making*). They claim that they:

- Restrict the defendant’s right to choose his lawyer.
 - Deprive defense counsel of the means to prepare an effective defense.
 - Improperly subject criminal suspects to military justice.
 - Prosecute prisoners-of-war in a manner that violates the 1949 Geneva Conventions.
 - Place review of important interlocutory questions with the charging authority.
 - Fail to guarantee that evidence obtained via torture or ill-treatment shall not be used.
 - Allow wide latitude to close proceedings and impose a gag order on defense counsel.
 - Deprive military defense counsel of normal protections afforded military lawyers from improper command influence.
 - Provide lower due process standards for non-citizens than for U.S. citizens.
- (*Making*).

In 2006, in the case *Hamdan v. Rumsfeld*, Supreme Court ruled that military commissions violated international law and the US Constitution (“Guantanamo”). The Supreme Court said that the President does not have the right to create military commissions without Congressional

approval (Greenhouse). In response to this, President Bush worked with Congress to pass a new Military Commissions Act that would “withstand judicial scrutiny” (Greenhouse). On October 17, 2006, President Bush signed the Military Commissions Act into law. *Hamdan v. Rumsfeld* was a landmark decision, however it failed to do much to change the rights of the detainees. According to the ACLU (American Civil Liberties Union), the Military Commissions Act “eliminates the constitutional due process right of habeas corpus” and “allows our government to continue to hold hundreds of prisoners for more than five years without charges” (“Military Commissions”). The ACLU also stated, “It also gives any president the power to declare — on his or her own — who is an enemy combatant, decide who should be held indefinitely without being charged with a crime and define what is — and what is not — torture and abuse (“Military Commissions”). The military commissions changed very little. The biggest change was that Congress now authorized them.

Detainees at Guantanamo Bay also had the right to “contest their status as enemy combatants” (*Making*). This right did not exist until July 7, 2004 when Combatant Status Review Tribunals (CSRT) were created in response to a Supreme Court decision, *Rasul v. Bush*. In June of 2004, the Supreme Court decided that, “detainees can use federal court to challenge their captivity” (“Guantanamo”). This was a landmark decision, however it still was not easy to challenge one’s detainment in a federal court. As a result of the decision, Combatant Status Review Tribunals were created as a way for detainees “to contest their status as enemy combatants” (*Making*). The structure and process of these tribunals was as follows:

According to the DOD, each detainee will be notified of the review of his detention as an enemy combatant, of the opportunity to consult with a personal representative, and of the right to seek review in U.S. courts. Each detainee will be assigned a military officer as a personal representative, who is not a lawyer, to assist in the tribunal process. Detainees will be afforded an opportunity to appear before and present evidence to a tribunal composed of three military officers. The tribunal will decide whether a preponderance of

evidence supports the detainee's claim that he is not an enemy combatant; there will be a rebuttable presumption in favor of the government's evidence. If the tribunal determines that the detainee should no longer be classified as an enemy combatant, the Secretary of Defense will advise the Secretary of State, who will coordinate the transfer of the detainee for release to the detainee's country of citizenship or other disposition consistent with domestic and international obligations and U.S. foreign policy. (*Making*).

By the end of March 2005, the Combatant Status Review Tribunals were completed. Each detainee got one chance to challenge his captivity. 558 detainees challenged their status, and 38 were determined not to be enemy combatants, and were eligible for release ("Guantanamo"). The fact that only 38 of 558 detainees were released shows that there must have been a flaw in the process because evidence examined earlier showed that as at least half of the detainees were probably innocent. Human Rights Watch had many concerns with the CSRTs:

- Prejudge the detainees as enemy combatants, thereby keeping the tribunals from making determinations with full independence and impartiality.
- Place severe limits on detainees ability to make their claims, including denial of assistance of counsel.
- Erroneously adopt the U.S. government position that all enemy combatants at Guantanamo can still be held under the laws of war.
- Do not recognize any legal obligation on the part of the U.S. government to conduct reviews of their detention nor any legal right of the detainees to such a review process. (*Making*).

The last method in which detainees could be released was through the Administrative Review Board, which created by an order from the Department of Defense in May 2011 (*Making*).

According to Human Rights Watch, the structure and process of the Administrative Review

Boards were:

According to the DOD, each detainee will have a formal opportunity each year to appear before a board of three military officers and explain why he believes that he should be released. He will be provided a military officer who is not a lawyer to assist him in his appearance. In addition, the review board will accept written information from the family and national government of the detainee. Based on this information, as well as submissions by other U.S. government agencies, the board will assess the current threat posed by the detainee, then recommend to a designated civilian defense official whether he should remain in detention. This official will then decide whether the detainee should remain in detention. (*Making*).

Human Rights Watch also had some concerns, stating that these procedures:

- Reflect the U.S. government's assumption that all those detained at Guantanamo are enemy combatants and that none are entitled to prisoner-of-war status.
- Assume, erroneously, that all those held at Guantanamo can be detained under the laws of war; an unknown number of detainees were taken into custody where the laws of arm conflict did not apply.
- Provide for only an annual review when the laws of war require reviews for security detainees at least every six months.
- Place the burden of proof on the detainee to demonstrate why he is no longer a threat to the United States.
- Limit the detainee's access to relevant information.
- Require family members to provide information through their governments even in cases where doing so would place the family at risk.
- Allow the designated civilian official to override the panel's recommendation based on his consultations with other agencies, such as the CIA, that occur entirely outside the panel process and about which the detainee will not learn, much less have the opportunity to rebut. (*Making*).

There are clearly many legal issues surrounding the rights of detainees in Guantanamo Bay. The detainees have been given an alternative form of justice to the standard civilian courts. This form of justice is extremely controversial. All of the detainees have also been deemed "illegal enemy combatants" subject to indefinite detainment and lying outside the protection of the Geneva Conventions. These are all issues that will be addressed in the next chapter on the legal issues surrounding the treatment of prisoners in Guantanamo Bay.

The United State's response to 9/11 has involved many actions that have been highly criticized. The most criticized policy has been the creation of prisons to hold captured detainees, many who were innocent, and the abuse and torture of these detainees. Many of the detainees were subject to abuse and torture, policies that were authorized by the Bush Administration. From the CIA black sites, to the Bagram and Kandahar prisons, to the Guantanamo Bay detention center, the treatment of detainees was extremely harsh.

Chapter 2: Legal Issues

Introduction

As was explained in the previous chapter, after September 11th the Bush Administration launched the War on Terror, setting up a system of detainment and military trials for terrorists captured overseas. Suspected terrorists, which included members of al-Qaeda and the Taliban, were captured and detained in military prisons in Afghanistan, secret CIA prisons throughout the world, and the Guantanamo Bay detention center. Many of the detainees were subject to extremely harsh treatment and torture. The Bush Administration considered all members of al-Qaeda and the Taliban to be illegal combatants; a group it claimed was outside the protection of the Geneva Conventions. According to the Bush Administration, illegal enemy combatants could be held indefinitely without being charged and could be tried in military tribunals for committing war crimes.

This chapter will analyze whether or not the classification of members of al-Qaeda and the Taliban as illegal combatants was appropriate as well as what are the proper legal rights and protections of illegal combatants. These answers will be determined mainly through the analysis of international humanitarian law, the area of law governing armed conflict. This chapter will also examine the appropriateness of the American response to the 9/11 attacks and the rights and protections of those detained in Guantanamo Bay. The chapter will ultimately aim to answer three important questions: whether or not the United States military has the authority to detain suspected terrorists indefinitely, whether or not the military tribunals in Guantanamo ought to have jurisdiction over the detainees, and whether or not detainees in Guantanamo Bay are legally protected from torture and other abuse.

Law Enforcement and War Models

One of the most important questions to answer is: according to international law, should the United States retaliate against al-Qaeda using the law enforcement model or the war model? This is one of the important questions that the chapter will aim to answer, as it has implications affecting the legality of the United States' military response to the attacks, the legality of the detainment of prisoners, and the legality of the trial of detainees by military tribunal. The war model generally allows for the detainment of prisoners without trial until the end of the conflict, while also allowing for trials by military tribunals. The law enforcement model means detainees must either be tried for a crime or released and must be tried in a domestic court.

There is no obvious answer as to how a state should legally combat a transnational terrorist organization like al-Qaeda. Traditionally in the United States, terrorist attacks have been treated as criminal acts and those responsible have been charged in civilian courts. However, traditionally terrorist attacks have been executed by individuals, often US citizens, and these acts have never reached the level of violence of the 9/11 attacks in which almost 3000 people were killed. If a state had launched the attacks it would be clear act of war, however the fact that it was a terrorist organization makes things less clear. Should the fact that al-Qaeda is not a state change the nature of the conflict? An argument can be made that al-Qaeda should be treated as part of an armed conflict because it acts and operates like an army and has political motives. Al-Qaeda is a militant organization with various command structures and leadership roles, which trains combatants to fight what they view as a holy war. Al-Qaeda's ultimate goal is political: to create an Islamic Caliphate, or Empire, governed under strict Islamic Sharia law. They see the United States as their main enemy and a major obstacle to reaching their goal. They want to rid all Muslim lands of foreign influence, especially Western influence, and they believe that it is

okay to kill non-Muslim civilians in the name of Islam. Some say that a War on Terror fought against al-Qaeda should be treated as a law enforcement issue like the War on Drugs. However, unlike the War on Drugs, in the War on Terror the enemy, al-Qaeda, has political goals. The drugs cartels motivations are purely monetary. One of the major practical issues with treating September 11th attacks as a merely a criminal act is that the “law enforcement model is geared towards punitive, rather than preventive action” (*International* 17). The law enforcement model allows the state to try those responsible for committing terrorist acts but does not allow the state to use military force to prevent further attacks. According to John Yoo, a member of the Office of Legal Council in the Department of Justice during the Bush Administration, treating terrorists under the law enforcement model:

“Might mean, for example, that it is illegal under international law for the United States actually to use force against members of al Qaeda and the Taliban unless in self-defense, and that in general government authorities can only resort to arresting members of terrorist organizations when they have sufficient evidence of probable cause to believe they have violated a criminal law in the past. (Yoo and Ho 2).

This really limits the ability for the United States to protect itself. Al-Qaeda is able to continue plotting attacks on the United States while training combatants and the United States may only be able to retroactively respond by putting on trial those who have already committed a crime. Under the war model, al-Qaeda is treated as the enemy in a war and can be attacked as a way of preventing further attacks. There are also many issues with the logistics of finding and capturing those responsible for the terrorist attacks using the law enforcement model. According to a report prepared by the ICRC on “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts” in 2003, “international cooperation in criminal matters, as well as practical application of the ‘extradite or prosecute’ provisions in international treaties cannot be relied on, due to the political, bureaucratic and legal obstacles that often arise in inter-state relations”

(*International* 17). Al-Qaeda's attacks on the United States on September 11th were not the first, as it bombed the World Trade Centers in 1993 and bombed the USS Cole in 2000. If al-Qaeda is not stopped, then the 9/11 attacks will not be the last. Treating al-Qaeda as a party in a war makes fighting them much easier. If one fights them solely with a law enforcement approach, they have an advantage because they use military force. Although there are many reasons why it makes sense to treat September 11th as an act of war and to pursue a military response against al-Qaeda, the current legal definitions of armed conflict do not clearly address the status of transnational terrorist networks like al-Qaeda. Traditionally, international armed conflict exists only between two states, and non-international armed conflict generally only exists within one state ("The Relevance"). As was explained earlier, the legal definitions of war and the legal designation of the participants in a war have a direct impact on how these individuals are treated.

Combatants in Armed Conflict

Generally in a war, members of the armed forces for all parties involved in the conflict are considered combatants and when captured are given the status of Prisoners of War (POW). A combatant must follow certain guidelines and is considered a prisoner of war if captured by the enemy. According to the Inter-American Commission on Human Rights, "The combatant's privilege in turn is in essence a license to kill or wound enemy combatants and destroy other enemy military objectives" (*Report*). According to the ICRC conference on "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts," "If a person is a 'combatant', this implies that he or she, among other things, cannot be punished for having taken a direct part in hostilities and is entitled to prisoner of war status upon capture" (*International* 19). Combatants have the right to kill the enemy, and thus "cannot be tried or punished simply

for their participation in the armed conflict” (*Background 7*). Prisoners of War can still be prosecuted for “war crimes, crimes against humanity, and criminal acts unrelated to the armed conflict” (*Background 6*). POWs cannot be charged for “acts that do not violate international humanitarian law” (“Customary” Rule 106). POWs also have the right under the Third Geneva Conventions to certain standards of treatment, as they are guaranteed facilities “under conditions as favorable as those for the forces of the Detaining Power in the same area” (qtd. in *Background 7*). POWs can also be detained until the conflict is resolved.

In order to qualify as a privileged combatant and thus be considered a prisoner of war if captured, one must follow a number of rules. These qualifications are detailed in the Geneva Conventions III, Article 4:

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
- (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form

themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war. (Geneva Convention (III)).

The most important qualification is 2b, “that of having a fixed distinctive sign recognizable at a distance.” The ICRC commentary on customary international humanitarian law considers this the most relevant qualification, stating, “State practice establishes this rule as a norm of customary international law applicable in international armed conflicts” (“Customary” Rule 106). The ICRC states that “Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have the right to prisoner-of-war status” (“Customary” Rule 106). The ICRC also explains any confusion that may arise with qualifications 1 and 3 in the Geneva Conventions, which do not list distinguishing oneself from the civilian population with a “distinctive sign” as a qualification. It states that “Several military manuals remark that the obligation to distinguish oneself does not pose a problem for the regular armed forces because it is ‘customary’ or ‘usual’ for members of the regular armed forces to wear a uniform as a distinctive sign” (“Customary” Rule 106). For those who do not qualify as combatants and thus do not qualify for POW status if captured, they may be unlawful combatants. The designation of unlawful combatants will be talked about in much more detail further on in this chapter. In order to avoid any confusion over combatants who are entitled to POW status and unlawful combatants, in the future the former will be referred to as either combatants or privileged combatants (because they have the privilege of killing their enemies in battle) and the latter will always be referred to as unlawful combatants.

One of the major fronts in the War on Terror has taken place in Afghanistan. After September 11th, the United States went to war with Afghanistan with the goal of dismantling al-Qaeda and taking the Taliban out of power, as they provided a safe haven for al-Qaeda. As was

the case with al-Qaeda, the United States considered Taliban soldiers to be “illegal enemy combatants” and denied them prisoner of war status when captured. The classification of the Taliban as illegal combatants was incorrect, as members of the Taliban army legally should have been considered privileged combatants as they met all of the necessary qualifications to be considered a prisoner of war under the Geneva Conventions (*Background 6*). Captured combatants who are part of the Taliban army are often referred to as “Taliban foot soldiers.” The word “soldier” was used to describe them for a reason. These soldiers were part of a regular army. When the US invaded Afghanistan, Taliban soldiers probably most closely fit into the first category for POWs under the Geneva Conventions, “Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces” (Geneva Convention (III)). The Taliban army meets the main requirement of being considered a privileged combatant, that they distinguish themselves from the civilian population. The Bush Administration’s reasons for denying the Taliban POW status are outlined in a January 9, 2002 memo written by Deputy Assistant Attorney General John Yoo and Special Counsel Robert J. Delahunty. It says that Afghanistan is a failed state and which was highly intertwined with al-Qaeda “as to be functionally indistinguishable from it” (“Memorandum”). It says the “Taliban militia was more akin to a non-governmental organization that used military force to pursue its religious and political ideologies than a functioning government, its members would be on the same legal footing as al-Qaeda” (“Memorandum”). None of these claims are relevant and they are both highly exaggerated. Afghanistan was an oppressive state but was not a failed state as it could be argued that it is today. The Taliban was very oppressive and had similarities in ideology to al-Qaeda (both Islamic extremists), but it was still the government of Afghanistan. The Taliban army was the Afghanistan army. The Taliban also could possibly be classified as an

irregular group of armed forces, fitting in the second category of the Geneva Conventions qualifications for POW status. However, they still meet the conditions necessary to legally participate in hostilities and be considered POW when captured. Although the Taliban was not recognized by the US or the UN as the legitimate government of Afghanistan, this is not necessary under the Geneva Conventions in order for POW status. Because they were not recognized by the United States as the legitimate government of Afghanistan, the Taliban soldiers may fit best into the third group entitled to POW status in the Geneva Conventions. This group is: “Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power (Geneva Convention (III)). There is also precedent for the United States treating combatants of unrecognized governments as POWs. During the Korean War, captured combatants from the People’s Republic of China, which the US and the UN did not recognize to be the legitimate government of China, were treated as POWs (*Background 6*). Assuming they identified themselves in battle, Taliban soldiers should qualify for POW status under international humanitarian law. The Bush Administration gave another reason for denying the Taliban POW status. On February 7, 2002 the White House Press Secretary stated:

Under Article 4 of the Geneva Convention, ... Taliban detainees are not entitled to POW status.... The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. (*The Legal*”).

In some cases Taliban fighters may not have identified themselves with uniform, and would thus not be entitled to POW status. However, the organized Taliban army did identify itself and carry arms openly. Others who did not were most likely civilians taking up arms, and would be rightfully denied POW status, and be classified as “unlawful combatants,” a term that will be explained in detail later. The outright rejection of POW status for Taliban soldiers by the Bush

Administration violates international humanitarian law. Taliban soldiers can legally be detained during the conflict but must be released when the conflict is over. It may not be ideal to return a bunch of Taliban soldiers to Afghanistan when the war ends. However, once the war ends we do not have the right to hold them simply for the purpose of preventing attack if they haven't broken any laws. Some may not have viewed it ideal to return German soldiers fighting for the Nazis in WWII back to Germany after the war, but it was necessary under international humanitarian law.

Unlike the Taliban, al-Qaeda detainees do not qualify for POW status, and thus al-Qaeda operatives are not privileged combatants. This means that members of al-Qaeda do not legally have the right to participate in hostilities. Al-Qaeda violates multiple requirements necessary to have POW status. Most importantly, they do not distinguish themselves from the civilian population. In fact, as is evident by the September 11th attacks, they purposely try to disguise themselves as civilians. Al-Qaeda does not meet the qualifications for a regular armed forces or an irregular armed forces. It may seem as if members of al-Qaeda fit into the first category entitled to POW status in the Geneva Conventions, which includes "Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces" (Geneva Convention (III)). However, as was discussed earlier, customary international humanitarian law states that all combatants must distinguish themselves from civilians. Since this is normal for members of a regular armed forces, it is not specified in the Geneva Conventions. Besides the fact that they do not identify themselves, al-Qaeda also does not qualify as an irregular armed forces because they do not conduct "their operations in accordance with the laws and customs of war." This was made clear on September 11th when they purposely attacked and killed almost 3000 civilians. Rule 1 of the ICRC commentary on IHL states, "The parties to the conflict must at all times distinguish between civilians and

combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians” (“Customary” Rule 1). Al-Qaeda clearly violates this rule. Members of al-Qaeda do not qualify as privileged combatants, however they may be unlawful combatants. However this designation is highly disputed as it is not specifically mentioned in the Geneva Conventions but is part of customary IHL.

Unlawful Combatants in Armed Conflict

In international humanitarian law there exists a category of combatants called “unlawful combatants.” They are not considered combatants under IHL, and thus are not considered POWs upon capture, because they do not follow the necessary requirements, the main one being distinguishing oneself from the civilian population. The term “unlawful combatant” does not appear in the Geneva Conventions, however it is present in customary international humanitarian law. Although the term unlawful combatant is not specifically mentioned in the ICRC’s commentary on customary IHL, Rule 6 states that “Civilians are protected against attack, unless and for such time as they take a direct part in hostilities” (“Customary” Rule 6). The ICRC’s article on “The Relevance of IHL in the Context of Terrorism” states, “If civilians directly engage in hostilities, they are considered ‘unlawful’ or ‘unprivileged’ combatants or belligerents (the treaties of humanitarian law do not expressly contain these terms)” (“The Relevance”). Essentially, since an unlawful combatant is not a legal combatant, he is a civilian, but a civilian that has forfeited his immunity from attack by illegally engaging in hostilities. This does not mean that unlawful combatants cannot have any organized structure. As long as the group does not meet the qualifications for combatants, they are considered civilians who are illegally

engaging in hostilities. According to an article written by Knut Dormann, a legal advisor at the ICRC:

‘unlawful/unprivileged combatant/belligerent’ is understood as describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy. This seems to be the most commonly shared understanding. (46).

Like Prisoner’s of War, unlawful combatants can be detained until the end of the conflict.

According to an ICRC article titled the “The Relevance of IHL in the Context of Terrorism”

from January 2011, “Both lawful and unlawful combatants may be interned in wartime, may be interrogated and may be prosecuted for war crimes. Both are entitled to humane treatment in the hands of the enemy” (“The Relevance”). The article also states “They may be interned for as long as they pose a serious security threat” (“The Relevance”). As unlawful combatants are considered civilians and not combatants, upon capture they are not protected by the Third Geneva Convention “relative to the Treatment of Prisoners of War,” but are protected by the Fourth Geneva Convention, “relative to the Protection of Civilian Persons in Time of War” (“The Relevance”; *Background* 8; Dormann 48). According to the ICRC article on the “The Relevance of IHL in the Context of Terrorism,” “Their situation upon capture by the enemy is covered by the Fourth (Civilian) Geneva Convention if they fulfil [sic] the nationality criteria and by the relevant provisions of the Additional Protocol I, if ratified by the detaining power” (“The Relevance”). Those who do not fulfill the “nationality criteria” mentioned are not covered by the Fourth Convention. Article 4 of the Fourth Convention states:

1. Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
2. Nationals of a State which is not bound by the Convention are not protected by it.
3. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while

the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. (Geneva Convention (IV)).

It also states that persons protected by the Third Geneva Convention (meaning prisoner's of war) are not covered by the Fourth Convention (Geneva Convention (IV)). Since acceptance of the Geneva Conventions is basically universal, requirement two in Article 4 is irrelevant. The Geneva Conventions are also generally considered to apply to every state as part of customary international humanitarian law. The third requirement however is more relevant. However, those who do not meet this requirement, or any nationality requirement for that matter, would still be protected under Additional Protocol 1 to the Geneva Conventions. Article 45 (3) of Protocol 1 states, "Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol" (Protocol). Additional Protocol 1 was not ratified by the United States (however it was signed) however it is considered part of customary IHL. It is not completely clear whether customary IHL is binding; as the ICRC claims it is but the US claims it is not ("Customary International"). However, either way it provides an important set of principles to IHL. Article 75 of Protocol 1 provides numerous protections for detainees, among them are: prohibition of violence, torture of all kinds, and many provisions related to receiving a fair trial (Protocol). Human Rights Watch also states that detainees who are considered unlawful combatants are entitled to a "fair and regular trial" (*Background* 8). Rule 100 of the ICRC's commentary on customary IHL states, "No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees" ("Customary" Rule 100).

Under the laws of armed conflict (IHL), only combatants are allowed to take part in hostilities ("Customary" Rule 106). Unlawful combatants are not allowed to take part in

hostilities, and thus if captured “may be charged with criminal offenses arising out of their participation in the armed conflict” (*Background 8*). It is well established that unlawful combatants can be charged for crimes that make their status unlawful, however it is not completely clear whether these crimes would constitute violations of domestic civilian law or of international humanitarian law (*Background 8*; “Customary” Rule 5). This affects whether or not they should be tried by a civilian court or a military tribunal. There is conflicting evidence on the issue, with international humanitarian law stating that unlawful combatants can be tried under domestic law and the United States Supreme Court stating that they can be charged by military tribunal (“The Relevance”; “Customary” Rule 5; *Ex Parte*). According to Rule 5 of the ICRC’s commentary on customary IHL, “[unlawful combatants] upon capture, may be tried under national law for the mere participation in the conflict” (“Customary” Rule 5). According to the ICRC article titled “The Relevance of IHL in the Context of Terrorism,” unlawful combatants “may be prosecuted under the domestic law of the detaining state for such action [directly participating in hostilities]” (“The Relevance”). These statements on IHL, saying that unlawful combatants can be tried under domestic law, imply that they cannot be tried under international law for actions relating to their involvement in hostilities. This of course also implies that unlawful combatants should be tried in civilian courts for these crimes. In the case *Ex Parte Quirin*, the United States Supreme Court decided that “Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful” (*Ex Parte*). There is a clear conflict here between these two areas of law. According to the US Constitution, the Constitution is the “supreme law of the land,” therefore the Supreme Court’s decision would override international law, especially since this is not law based on a treaty, but customary international law. It would

seem that this would mean that unlawful combatants should be tried by military tribunals for “acts which render their belligerency unlawful,” however the *Ex Parte Quirin* decision did not state that unlawful combatants cannot be tried by domestic civilian courts for “acts which render their belligerency unlawful,” therefore the customary IHL still stands up. Although this may seem strange that it is not one or the other, it is what the law states. Unlawful combatants can be charged in either domestic or military courts for their participation in hostilities. If charged by a military tribunal, they could be charged with breaking international laws of war or US laws of war. The defendants in the trial surrounding the *Ex Parte Quirin* case were charged with violating laws within the US Military Code of Justice (*Ex Parte*). Aside from being charged for participating in hostilities, unlawful combatants can be charged with violating laws other than those that made them unlawful combatants. Like POWs, unlawful combatants can be charged with committing war crimes, in which case they could be tried by a military tribunal (*Background 8*; “The Relevance”; Von Heinegg and Epping 153). However, unlawful combatants can also be charged with crimes in violation of the domestic civilian law of the detaining state. According to a book written by a number of distinguished experts in the field of international humanitarian law, “Even when the act negating the status of a lawful combatant does not constitute a crime *per se* (under either domestic or international law, it can expose the perpetrator to ordinary penal sanctions (pursuant to the domestic legal system) for any other act committed by him amounting to an ordinary crime under the local legal system” (Von Heinegg and Epping 153). The ICRC reiterates this point in its article on “The Relevance of IHL in the Context of Terrorism,” stating “They [unlawful combatants] may also be prosecuted for war crimes and other crimes and sentenced to terms exceeding the length of the conflict, including the range of penalties provided for under domestic law (“The Relevance”). An example of a

crime that an unlawful combatant may be charged with is murder. If an unlawful combatant kills an American soldier, he can be charged with murder under US civilian law because since he is not a legal combatant, he is not legally allowed to kill American soldiers.

Bush's Automatic Designation as Illegal Enemy Combatant

Under International humanitarian law, people who engage in hostilities illegally are considered unlawful combatants. These people are considered unlawful combatants during the time they are “directly engaging in hostilities,” otherwise they are considered civilians. Unlawful combatants can be attacked by the opposing armed forces and can be captured and detained for “as long as they pose a serious security threat.” When detained, unlawful combatants must be treated humanely and given a fair trial when tried for crimes. They can be charged by the detaining power with both violations of the laws of war and violations of domestic criminal law, and can thus be tried in military tribunals and domestic courts. The Bush Administration used the terms “illegal enemy combatant,” “enemy combatant,” “illegal combatant,” “unlawful combatant,” and other variations of these terms. As was previously explained, the Bush Administration determined that all al-Qaeda and Taliban members were illegal combatants. As was previously explained, unlawful (or illegal) combatants can be detained until the end of the conflict without being charged (which in a conflict like the War on Terror with an undefined limit could be considered indefinite), but are entitled to protections under the Geneva Conventions. Therefore it was illegal for the Bush Administration to deny protections given to unlawful combatants under IHL. The Bush Administration also denied illegal enemy combatants any sort of protection against abuse or torture that are guaranteed to all detainees, not only in

International humanitarian law, but also under international human rights law (“The Relevance”).

The Bush Administration automatically declared anyone that was detained as part of the War on Terror an illegal enemy combatant. As we know from the first chapter, many of these people were actually innocent, and many others’ status as unlawful combatants is highly questionable. This automatic assumption that all detainees are illegal combatants is actually illegal (*Background 5*). Under the Geneva Conventions, if there is any doubt that a captured combatant is not a prisoner of war, he must be treated as a POW until it is determined otherwise by a competent tribunal. Article 5 of Convention III of the Geneva Conventions states:

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal. (Geneva Convention (III)).

It is important to note that Article 4 outlines the qualifications for Prisoners of War, and the “present Convention” that is mentioned is Convention III “relative to the treatment of Prisoners of War.” The United States military did not go through this process, but rather assumed every captured combatant to be an illegal enemy combatant, meaning that the Bush Administration did not give them protections under the Geneva Conventions. This is illegal, as the proper process would be to extend the rights of prisoners of war to all captured combatants until determined otherwise by a tribunal. In 2004 CRSTs (Combatant Status Review Tribunals) were created, which allowed the review of prisoners’ “enemy combatant” status. However, all detainees were still assumed to be illegal enemy combatants until further review instead of the legally mandated assumption of POW status until further review. The military essentially illegally assumed jurisdiction over all captured detainees no matter what their true status was instead of

determining their status on an individual basis as is legally required. Prisoners had no way of challenging their status; therefore they could be detained without charge or conviction indefinitely (Forsythe 171). If as a result of the Article 5 hearing, a detainee is determined to be a civilian (who has not taken up hostilities), he should be released. Evidence from the first chapter shows that many if not most of the detainees would probably be released in Article 5 hearings. Many of the detainees who are part of the Taliban would probably be determined to be prisoners of war as a result of Article 5 hearings. Of course some detainees would also be determined to be unlawful combatants.

The Determination Between Unlawful Combatants and Civilians

The determination of whether or not a detainee is a POW, unlawful combatant, or civilian is up to the Article 5 tribunal. This distinction is not only important for who can be detained and tried, but also for who can be attacked. Those who are unlawful combatants or POWs can be attacked, however those who are civilians cannot be attacked. It is hard to distinguish between unlawful combatants and civilians. Members of al-Qaeda seem to fit the definition of unlawful combatants because they engage in hostilities but do so illegally because among other things, they do not distinguish themselves from civilians. In fact, their main form of warfare is based on the premise that the combatant must disguise as a civilian. How does one decide who is truly an unlawful combatant for al-Qaeda and who is just a civilian? Someone training in an al-Qaeda training camp to fight, someone preparing to engage in a suicide-bombing mission, or someone planning an attack is clearly an unlawful combatant. Someone who lives in an area where al-Qaeda has a strong presence but takes no part in the organization is clearly a civilian. However, what about everyone in between? Most definitions of unlawful combatants say something along

the lines of people are unlawful combatants only “for such time as they take a direct part in hostilities” (“Customary” Rule 6). How does one define taking a “direct part in hostilities?” It is such a vague term open to interpretation. Even the ICRC states in its commentary on customary IHL that “A precise definition of the term “direct participation in hostilities” does not exist” (“Customary” Rule 6). According to the Inter-American Commission on Human Rights, “direct participation in hostilities” generally means “acts which, by their nature or purpose, are intended to cause actual harm to enemy personnel and matériel” (“Customary” Rule 6). Matériel is defined as “The equipment, apparatus, and supplies of a military force or other organization” (“Matériel.”). The Inter-American Commission on Human Rights, in a report on human rights in Columbia, states:

Civilians whose activities merely support the adverse party’s war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party. (“Customary” Rule 6).

In this statement, the word combatant is not meant to mean a legal combatant, but only a combatant in the sense of someone participating in hostilities, either illegal or legal. These descriptions of what it means to “directly participate in hostilities” imply that anyone actively involved in the al-Qaeda organization should probably be considered an unlawful combatant, while everyone else should be considered a civilian. Salim Ahmed Hamdan, a man detained in Guantanamo indefinitely as an illegal combatant, was considered an unlawful combatant because he was Osama bin Laden’s personal driver. Whether or not he should be considered an unlawful combatant depends on his level of involvement. He claims to be “little more than a low-level employee, a simple man who was just trying to support his wife and daughters” (“Salim”). If his

claim is true, then he should not be considered an unlawful combatant. However, if his claims turn out to be false and he had more of an involvement in al-Qaeda, then perhaps he should be considered an unlawful combatant. This determination is up for an Article 5 tribunal to determine. The purpose of the tribunal is to determine one's status in instances like this where it is hard to tell. As was explained by the Inter-American Commission on Human Rights, someone who merely expressing sympathies for al-Qaeda is not taking part in hostilities. Even someone who strongly believes in everything al-Qaeda does and was extremely happy to hear about the 9/11 attacks is a civilian as long as he does not actually have any involvement with al-Qaeda. One important question to answer is if a member of al-Qaeda sleeps at home but spends his days engaging in hostilities, is he still "directly engaging in hostilities" when he is sleeping at home? This may be relevant for whether or not he can be attacked, but if he were captured then he would most likely be an unlawful combatant based on his general involvement. A scenario like this is also pretty unlikely to occur, as the home of an al-Qaeda operative would probably not be stormed unless he were a high level official, as Osama bin Laden was. Again, instances like this are what the Article 5 hearings are for. An Article 5 tribunal determines the detainee's status in all cases where there is doubt that the detainee is not a POW.

The Designation of an Armed Conflict

There is one issue that calls al-Qaeda's status as unlawful combatants into question under international humanitarian law. This is the idea that an armed conflict, as defined by international humanitarian law, cannot legally exist between a transnational terrorist organization and a state. If this were true, international humanitarian law would not apply to the conflict and instead domestic and international criminal law would apply ("The Relevance"). The designation of

unlawful combatant would not apply because it only exists in armed conflict. In IHL there are both international armed conflicts and non-international armed conflicts. IHL governs under both types of armed conflict (“The Relevance”). There are many more laws related to international armed conflict, however in both international and non-international armed conflict those detained in conflict are entitled to humane treatment (Geneva Convention (III); Geneva Convention (IV))

The ICRC article titled “The Relevance of IHL in the Context of Terrorism” defines the two categories of armed conflict:

International humanitarian law (the law of armed conflict) recognizes two categories of armed conflict: international and non-international. International armed conflict involves the use of armed force by one State against another. Non-international armed conflict involves hostilities between government armed forces and organized armed groups or between such groups within a state. (“The Relevance”).

The conflict with al-Qaeda does not seem to clearly fit into the definition of international or non-international armed conflict. It is really a transnational armed conflict, which is not defined in international humanitarian law. When the definitions of armed conflict were created, states probably did not foresee the creation of the phenomena of transnational armed conflict. When the Geneva Conventions were ratified in 1949, one could not have imagined an armed conflict between a state and a transnational terrorist organization. Since al-Qaeda does not clearly fit into the current definitions of armed conflict should one still consider the conflict an armed conflict and determine which existing category best fits the conflict with al-Qaeda? Or since the conflict with al-Qaeda does not clearly fit into any category should one consider it not to be an armed conflict? Al-Qaeda acts like an army and uses force equal to that of an army, so fighting them without using force is a disadvantage. Maybe one has to re-interpret the definition of international armed conflict. These are tough answers to make, and in the future laws or treaties may need to be created to solve this major question in the field of IHL.

The armed conflict between the United States and al-Qaeda does not fit the previously stated definition of an international armed conflict because al-Qaeda is not a state. Based on the definition of “international,” it is logical that an international armed conflict could not exist between a non-state organization and a state. The word “international” is defined by the Merriam-Webster dictionary as, “of, relating to, or affecting two or more nations” (“International.”) However, the Merriam-Webster dictionary’s third definition of “international” is “active, known, or reaching beyond national boundaries (“International.”). This is actually very similar to the definition of “transnational,” which means “extending or going beyond national boundaries” (“Transnational.”). The problem is that international humanitarian law is not defined based on the dictionary. According to another article by the ICRC titled “International Humanitarian Law and Terrorism: Questions and Answers,” it states “The parties to an international armed conflict are two or more states (or states and national liberation movements)” (“International”). Al-Qaeda could be classified as a liberation movement since one of their goals is to do what they view as “liberate” the Middle East from foreign occupation. However, al-Qaeda does not really fit the definition of a “national” liberation movement since they are not really trying to liberate a nation. Then again, in a way al-Qaeda views the Islamic world as a nation of people that must be liberated from foreign control. Al-Qaeda wants to establish an Islamic Caliphate, which is basically a nation-state for Muslims. One could reasonably consider al-Qaeda a national liberation movement, so it would be reasonable to consider the conflict between the United States and al-Qaeda an international armed conflict.

One could also argue that the conflict with al-Qaeda may be best defined as a non-international armed conflict because it involves hostilities between a government armed forces and an organized armed group. One issue with this is that the word “non-international” seems to

imply that the conflict must take place between the government of a state and armed opposition groups within the state. Even if it is meant to include conflict between a foreign government and an armed group, the word “non-international” really does not apply to a conflict between a foreign government and armed opposition groups spread across multiple states. Non-international armed conflict was presumably separated from international armed conflict because it was felt a state should have a greater amount of sovereignty to govern conflicts within its own territory. That concept does not make sense for a conflict that is fought across many states. Although the meaning of the term “non-international armed conflict” is not clarified in the Geneva Conventions or by the ICRC, it is explained in detail in the Rome Statute of the International Criminal Court. Although the United States has not signed this statute, it still provides a useful clarification of the term “non-international armed conflict.” According to Article 8, Paragraph 2 (f) of the Rome Statute:

Paragraph 2 (e) applies to armed conflicts not of an international character... It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups. (Rome).

This definition of non-international armed conflict emphasizes that the conflict must take place within a state and implies that the conflict must be between a government of the state and armed groups within the state. It is evident that like the category of international armed conflict, non-international armed conflict does not fit the type of conflict between the United States and al-Qaeda. One could argue that either of the categories fit the conflict, however this argument would be a bit of a stretch. If the conflict were to be considered a non-international conflict, many of the laws of war would not apply. The designations of combatant and unlawful combatant would not exist (“The Relevance”). It is not completely clear what this would entail. It makes sense for a true non-international armed conflict within a state, where a state wants

sovereignty. However, it does not make sense for this conflict. This only provides greater evidence that the current conflict does not really fit the definition of a non-international armed conflict. The detainees would still be entitled to humane treatment, as they would qualify for the treatments in Common Article 3 of the Geneva Conventions.

If one considers a state of armed conflict to be impossible between al-Qaeda and the United States, as was previously stated the rules of international humanitarian law would not govern the conflict (“The Relevance”). This would mean that members of al-Qaeda would not be considered unlawful combatants, but would be civilians who could be prosecuted for breaking domestic or international crimes, but not for breaking laws of war. According to the ICRC article titled “The Relevance of IHL in the Context of Terrorism”:

When armed violence is used outside the context of an armed conflict in the legal sense or when a person suspected of terrorist activities is not detained in connection with any armed conflict, humanitarian law does not apply. Instead, domestic laws, as well as international criminal law and human rights govern. (“The Relevance”).

If the conflict between al-Qaeda and the United States were not an armed conflict, members of al-Qaeda could not be tried in military tribunals. Most importantly, it would mean that members of al-Qaeda could not be held until the end of the conflict, but must either be charged with a crime or released. There is one important exception to this rule. Even if an armed conflict cannot exist between a group of unlawful combatants and a state, unlawful combatants can still exist within an existing armed conflict. Since Afghanistan is an international armed conflict and members of al-Qaeda have participated in the conflict, they should be unlawful combatants. Unlawful combatants can be detained for “as long as they pose a serious security threat,” however if members of al-Qaeda were detained in relation to the War in Afghanistan, then they

most likely could only be detained for “as long as they pose a serious security threat” in Afghanistan. It is also unclear as to whether the United States could fight all al-Qaeda members throughout other countries or whether the US could only fight those “directly engaged in hostilities” in Afghanistan. Even if an armed conflict does not exist, detained members of al-Qaeda are still guaranteed certain protections under United States law and international human rights law. Whether or not there is an armed conflict or not, detained terrorists must be treated humanely and cannot be tortured (*Background 8*; “The Relevance”).

Conclusion

The War on Terror does not clearly fit into any existing category of armed conflict in the laws of war, known as international humanitarian law. According to the author John T. Parry, the War on Terror “takes place everywhere, has no logical culmination, and irrevocably blurs the distinction between civilian and combatant that are so important to the Geneva Conventions” (qtd. in Forsythe 168-9). Al-Qaeda is an organized (although loosely organized) militant group with political goals that acts much like an army. After all, they did launch the most violent foreign attack on American soil since the Revolutionary War. They differ from an army because they are not connected with a state and do not follow the rules of war. However, they still use military force against the United States and against all their enemies. They are extremely dangerous and it would be very limiting if one could not use military force against them. It does not seem fair that al-Qaeda could be immune to attack because they do not clearly fit into the classic definition of a party in IHL. Furthermore, members of al-Qaeda fit the definition of unlawful combatants. The fact that members of al-Qaeda can be considered unlawful combatants (and thus be treated within the laws of war) when engaging in hostilities within an armed conflict

deemed legitimate under IHL, but cannot be considered unlawful combatants when acting outside an already existing armed conflict, even when their actions would clearly be considered acts of war under any other circumstances, does not make sense. Eventually the legal status of conflicts involving transnational terrorist networks like al-Qaeda will have to be addressed in international humanitarian law. The existence of only the two categories of armed conflict is not consistent with nature of modern warfare. Whether the conflict between the United States and al-Qaeda is considered an international armed conflict, a non-international armed conflict, or merely a law enforcement issue, the detainees are entitled to humane treatment and can never be tortured. If an international armed conflict exists, as unlawful combatants al-Qaeda detainees can be held for the remainder of the conflict and can be charged for their participation in the conflict, violations of domestic law, and war crimes. They can be charged in military tribunals for crimes they commit. Upon capture, they have the right to a tribunal to determine their status. Until then, they must be treated as prisoners of war. If armed conflict does not exist, detainees must be either charged or released and cannot be tried with breaking war crimes, as it is not a war. They can only be charged with violating domestic or international criminal law. No one is outside the law as the Bush Administration claimed. The Bush Administration recognized that al-Qaeda did not perfectly fit into the definition of a party to an armed conflict. The Administration concluded that the Geneva Conventions did not apply to al-Qaeda. However, if the Geneva Conventions did not apply to al-Qaeda, then al-Qaeda detainees would not be outside of the law. They would be under a different set of laws: criminal law. They would still be subject to US laws and international human rights laws that regulate the treatment of prisoners. If this were the case, the detainees could not be held indefinitely and would have to be tried in civilian courts or released.

In conclusion, whether or not the military has the right to detain suspected terrorists in Guantanamo Bay and whether or not the military tribunals have jurisdiction over the detainees depends mostly on one's interpretation of international humanitarian law. If one interprets the conflict between al-Qaeda and the United States as an international armed conflict under international humanitarian law, then al-Qaeda should be treated as unlawful combatants. This means that the military would have the right to kill members of al-Qaeda in battle, detain them, and try them in military tribunals for violations of the laws of war. If one deems the conflict between the United States and al-Qaeda to not be an armed conflict, then al-Qaeda must be dealt with using law enforcement. Members of al-Qaeda could not be killed in battle, as armed force could not be used. They could not be detained indefinitely and would have to either be released or tried in civilian courts for crimes they committed. However, since al-Qaeda participated in hostilities in an already existent armed conflict, the War on Afghanistan, they can be treated as unlawful combatants without the need to be a "party" to the conflict. In this situation, it is not clear how far the United States' jurisdiction reaches over al-Qaeda. Plus, Taliban soldiers captured in the War in Afghanistan are entitled to prisoner of war status. Additionally, anyone captured in armed conflict is entitled to prisoner of war status until declared otherwise by a "competent tribunal," as declared in Article 5 of the Third Geneva Conventions. Everyone is also entitled to humane treatment, including fair trials and protection from torture.

The legal situation relating to the conflict with al-Qaeda is clearly very complicated. There are many unanswered questions and many laws up for interpretation. The current legal framework does not fit the type of conflict that exists between a state like the United States and a transnational terrorist organization like al-Qaeda. Al-Qaeda fits somewhere in between an organized crime group and an organized state sponsored army. Neither international nor

domestic criminal law is suited for dealing with an organization that has a trained militia and regularly uses armed force to achieve its political goals. However, al-Qaeda does not entirely fit into the scope of international humanitarian law either. In conclusion, the laws of war must be adapted to fit the modern nature of armed conflict, so that conflicts involving terrorist organizations like al-Qaeda are clearly defined. There must be rules and guidelines for conflicts of this kind. It has been over sixty years since the original Geneva Conventions were agreed upon and over thirty years since the additional protocols were signed. The Geneva Conventions address armed conflict as it existed following World War II. The world has changed a lot since then and so has the nature of armed conflict. Nations must meet and agree upon a set of guidelines for war that relate to the new nature of war. They may decide that al-Qaeda should be treated as a law enforcement issue, or even create a whole new area of international law. What is important is that the laws are clear, because as was proven by the United States response to the September 11th terrorist attacks, if the laws are not clear countries are able to manipulate them and interpret them in their own way. As was the case with the United States response to 9/11, victims of this false interpretation of the law may have to deal with illegal detention for extended periods of time, physical abuse, torture, and an overall violation of their human rights.

Chapter 3: Effectiveness

Introduction

On May 2, 2011 President Barack Obama announced that Osama bin Laden had been killed. This resulted in excitement and joy among the American people, as the leader of al-Qaeda and the man responsible for planning the September 11th attacks was now dead. Thousands of people headed to the White House to celebrate justice for the nearly 3000 American civilians who were killed almost ten years earlier. After the excitement died down, the killing of Osama bin Laden renewed a contentious political debate surrounding the War on Terror: whether or not the torture of terrorists is justified. Many claimed that without the intelligence gained from torture we would not have been able to hunt down and kill Osama bin Laden. Others claimed that intelligence gained from torture did not help us capture Osama bin Laden and even if it did we could have found him without using torture. Many also claimed that the discussion is irrelevant because no matter how useful torture may be, it is illegal, wrong, and we should never do it.

Although the Bush Administration argued that torture was legal, many knew it was illegal. Still many Americans felt that given the national security threat posed by al-Qaeda, the use of torture was justified. There are many potential problems with engaging in torture. The issues often talked about are related to morality, legality, or the safety of American troops from being tortured. It is often assumed that torture is an effective method of interrogation. People do not often question whether or not torture results in gaining useful information. Perhaps the reason that this issue is not discussed more is because it goes against what most would consider basic logic. If you inflict extreme physical and/or psychological pain on someone, most people assume that they will eventually admit their guilt and spill all the information they know. This is definitely the case sometimes; however, it does not mean that the same information could not

have been attained using more ethical interrogation methods. Plus, what happens when the subject does not have any useful information? Then not only may you be torturing an innocent person, but you might end up getting false information. When being tortured, some people may be willing to say anything to make the pain stop, including falsely admitting their guilt and giving false information. False information could end up hurting intelligence efforts, possibly even negating any of the positive information gained. This chapter will examine these issues with the intent of answering the question of what the outcome of torture really is. Is torture an effective method for intelligence gaining purposes? Are other methods of interrogation more effective than torture? How does worldwide knowledge of our use of torture effect the overall fight against terrorism? Are there any indirect costs to using torture? This chapter will aim to answer of these critical questions.

Summary of Torture and Abuse

The first chapter explained the abuse and torture that occurred not only in Guantanamo Bay, but also in military prisons in places such as and secret CIA prisons throughout the world. In Guantanamo Bay and during most detainees' journeys to Guantanamo Bay, which commonly involved a stay at the Kandahar or Bagram US military prisons in Afghanistan, detainees were abused and tortured. Many of the detainees were tortured during interrogations. Some were physically or psychologically abused at levels that some may not consider torture, however were nevertheless aimed at inflicting pain as a method to gain information. Many of the torture techniques authorized by the United States government were listed in the first chapter. Some of the approved tactics were: dietary manipulation, nudity, cramped confinement, sleep deprivation, stress positions, and waterboarding (Pfiffner 68). Torture and abuse was not confined to the

interrogation room, as the idea was to set the conditions for interrogation by abusing the prisoners in their everyday routine as prisoners (Worthington 192). This was a plan implemented at the Guantanamo Bay detention center, in which “every aspect of the prisoners’ physical existence – their conditions of detention, their food, their medical support, and every single ‘comfort item,’ which now included their solitary Styrofoam cup – would be geared to the interrogators requirements” (Worthington 192). Sometimes detainees were even beaten outside the interrogation room. During interrogations, some detainees, about 15% of those questioned in Fletcher and Stover’s report, were shackled to the floor for long hours in painful positions (Fletcher 2009, 62). Some detainees said they were shackled overnight, or “while being subjected to cold temperatures, loud music, and flashing lights” (Fletcher 2009, 63). The torture and abuse that occurred is explained in great detail in Chapter 1.

The torture and abuse of suspected terrorists was done in an effort to gain useful information to fight al-Qaeda in the War on Terror. It was also used to obtain confessions of guilt from some terrorists. Attempting to gather information through interrogations, often through the use of torture or other coercive tactics, was a major part of intelligence efforts during the War on Terror. Evidence shows that using torture may not be a very effective method of intelligence gathering. In many instances the tactic failed at extracting useful information and sometimes resulted in the extraction of false information. The costs of using torture most likely outweighed the benefits. Using other non-violent methods of interrogation would probably have been more effective, not only in retrieving useful information but also in our overall global fight against terrorism. Unfortunately, there was no noble or greater purpose for our engagement in these morally detestable acts. Hopefully we will learn from this.

Obtaining False Information

One of the greatest problems with the use of torture as a method of gaining intelligence is that the person being tortured sometimes gives false information just to get the torture to stop. This phenomenon may be more likely to occur with the torture of innocent civilians, however it can also occur with people with legitimate terrorist affiliations but who do not have any useful knowledge or even legitimate terrorists that are knowledgeable. Sometimes prolonged abuse will even cause those being tortured to accidentally give false information. Ali Soufan, a former FBI special agent who interrogated al-Qaeda operatives, explained this in 2009 to Time Magazine, saying, “When they are in pain, people will say anything to get the pain to stop. Most of the time, they will lie, make up anything to make you stop hurting them. That means the information you're getting is useless” (Ghosh). This actually makes a lot of sense. One would assume that most people, especially innocent civilians who have not prepared mentally or physically for torture, would have a very tough time enduring torture and would probably say anything to make it stop. If your assertion that you are innocent consistently fails to make the torture stop, you will probably say anything just to make it stop. Even the United States Army Training Manual stresses this point. In the section on interrogation, it states, “the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear” (qtd. in “Does”). There is also evidence that abuse and torture can lead to cognitive dysfunction causing the person to accidentally give up inaccurate information. According to a 2006 report by the National Defense Intelligence College titled “Educing Information: Interrogation: Science and Art – Foundations for the Future”:

The accuracy of educed information can be compromised by the manner in which it is obtained. The effects of many common stress and duress techniques are known to impair

various aspects of a person's cognitive functioning, including those functions necessary to retrieve and produce accurate, useful information. (*Educing* 35).

There are examples of people detained as part of the War on Terror giving false information as a result of abuse and coercive interrogation during interrogations. Some former Guantanamo detainees have spoken about the false information they gave interrogators as a result of being tortured:

In a document released to the public, Sahfiq Rasul, Asif Iqbal and Rhuheh Ahmed describe the combination of months of isolation, coercive interrogation techniques, and endless interrogations in which their stories were not believed that ultimately led each of them to confess to having been with Osama bin Laden in Afghanistan at the time a video was taken. The three confessions were false, as British intelligence subsequently established the veracity of their alibis. (*Guantanamo* 12).

Sahfiq Rasul said that the extremely abusive treatment made him lose his mind. He stated, "I was desperate for it to end and therefore eventually I just gave in and admitted to being in the video" (Rumney 494). A. Johnson, the executive director of the Center for Victims of Torture has dealt with many victims of torture who have spoken about their willingness to give up false information. At a hearing about the confirmation of Attorney General Alberto Gonzales, he stated:

Well trained interrogators, within the military, the FBI, and the police have testified that torture does not work, is unreliable and distracting from the hard work of interrogation. Nearly every client at the Center for Victims of Torture, when subjected to torture, confessed to a crime they did not commit, gave up extraneous information, or supplied names of innocent friends or colleagues to their torturers. It is a great source of shame for our clients, who tell us they would have said anything their tormentors wanted them to say in order to get the pain to stop. Such extraneous information distracts, rather than supports valid investigation. (Rumney 496).

It is impossible to know what information is true or false when the chances of obtaining false information are so high. Retired FBI agent Dan Coleman also confirmed the idea that torture often results in false information. Referring to false information on Iraq obtained from torture, Coleman stated, "It was ridiculous for interrogators to think Libi would have known anything

about Iraq... The reason they got bad information is that they beat it out of him. You never get good information from someone that way” (McCoy 119). Obviously never is slight exaggeration, but it confirms the point that a number of experienced US intelligence agents understand the risk of relying on information gathered through torture.

When one relies on intelligence extracted through the use of torture, any useful information gained can easily become diluted with false information. One cannot tell the difference between what is true and what is false, potentially tainting all the information gained from torture. Relying on false information can slow down efforts to combat terrorism as it can divert resources away from acting upon useful information. It can potentially lead to more serious consequences, especially when key intelligence decisions rely on false information. False evidence obtained from torture was actually used by the US government to argue in support of the invasion of Iraq. In February 2003 Secretary of State Colin Powell argued before the United Nations that Saddam Hussein had provided “chemical or biological weapons” training to al-Qaeda (McCoy 119, *Does*). This linkage between Iraq and al-Qaeda turned out to be false, and Colin Powell later retracted his comments (McCoy 119). In his speech Colin Powell cited a terrorist source, whom he said “was responsible for one of al-Qaeda’s training camps in Afghanistan” (McCoy 118). Later it came out that the detainee was named Ibn al-Sheikh al-Libi, and that he divulged this false information “only after he was subjected to the harshest interrogation techniques” (*Does*). The United States probably would have still gone to war against Iraq without these false claims; however, this really emphasizes how unknowingly false information can be used to make significant decisions that in this case had extremely significant consequences. The supposed link between Iraq and al-Qaeda was used as a way to convince the American people and the world that the United States should go to war with Iraq. Without this

false evidence “proving” the link, it is impossible to know whether or not the US government would have faced more opposition from the American public and the international community, which could have possibly prevented the war. The point is that it is dangerous to rely on intelligence that is unknowingly false. It is clear that extracting information from the use of torture can result in people giving up false information. Since many of the detainees in Guantanamo Bay were innocent (as was explained in the first chapter) and presumably had little or no relevant information, it is possible that many detainees who were tortured were willing to say anything just to make the torture stop. It is extremely questionable whether or not the use of torture actually had an overall positive outcome in relation to the information gained. Enough false information and the costs of the false information may outweigh any benefits. Also, besides the fact that torture is prone to result in false information, there is also evidence that torture is just not very effective at getting people who do have information to give it up. Evidence shows that other non-violent forms of interrogation have more favorable results.

Torture Versus Persuasive Interrogation Methods

Evidence shows that mistreatment, torture, and coercion are generally not as effective at getting people to provide information than other non-violent or non-coercive tactics. Coercion and physical pain can strengthen ones resistance to cooperate. According to the report by the National Defense Intelligence College:

Psychological theory and some (indirectly) related research suggest that coercion or pressure can actually increase a source’s resistance and determination not to comply. Although pain is commonly assumed to facilitate compliance, there is no available scientific or systematic research to suggest that coercion can, will, or has provided accurate useful information from otherwise uncooperative sources. (*Educing* 35).

The report by the National Defense Intelligence College cites various reports emphasizing the more positive effects of persuasion as opposed to coercion. The NDIC report cites a 2002 article by authors Tjosvold and Sun, stating:

Research both in North America and in Asia (China) has shown that using coercive influence strategies causes targets (or sources, in the context of educating information) to feel disrespected, whereas persuasion strategies communicate respect. Thus, importantly, coercion creates a competitive dynamic that facilitates rejection of the other party's position where persuasion creates a cooperative dynamic that facilitates greater openness to the other party's position and productive conflict resolution. (qtd. in *Educating* 25).

It also cites a 1996 article by authors Yukl, Kim, and Falbe, stating, “rational persuasion — and avoidance of ‘pressure’ — increases the likelihood of target commitment in influence interactions” (qtd. in *Educating* 25). The NDIC cites yet another article from 1960 by the author Biderman, stating that reports about the physical abuse of POWs and other foreign prisoners in China show that “Belief change and compliance was more likely when physical abuse was minimal or absent” (*Educating* 33). The ultimate conclusion that the NDIC report made was that “people who believe they are being coerced are likely to feel disrespected and become less likely to comply or cooperate” (*Educating* 36). The NDIC is not alone in its conclusion that persuasive interrogation tactics are more effective than coercive ones. Previously it was stated that former FBI agent Ali Soufan believes that torture is ineffective, however this is the general attitude of the whole FBI, as it was trained in non-coercive methods of interrogation and views them as not only the right thing to do, but also the most effective. When the CIA began using torture and other methods of abuse a rift was created between the FBI and the CIA (Ghosh). When the United States captured Ibn al-Sheikh al-Libi, the head of an al-Qaeda training camp, in November 2001, he was originally questioned by the FBI. According to veteran FBI agent Jack Cloonan, the FBI interrogations were successful, but then the CIA shackled him up and took him off to a secret prison to be tortured (McCoy 118). He said the FBI agents were building rapport, a

commonly used interrogation technique, “And he [al-Libi] starts talking about [shoe-bomber Richard] Reid and Moussaoui. They’re getting good stuff and everyone’s getting the raw 302s [interview summaries] – the agency, the military, the director” (McCoy 118). According to the FBI, they have been more successful in interrogation than organizations using torture and coercive methods of interrogation. In 2009, Senator Carl Levin (D-Michigan) provided an explanation for why harsh intelligence gathering methods are ineffective at a speech at the Foreign Policy Association. His explanation was based mostly on the specific ideology and training of al-Qaeda operatives. He stated:

When I visited Afghanistan last year a Senior Intelligence Officer told me that treating detainees harshly is actually a roadblock to getting intelligence from detainees. Here’s why... al-Qaeda, he said, and Taliban terrorists, are taught to expect Americans to abuse them. They are recruited based on false propaganda that says that the United States is out to destroy Islam. Treating detainees harshly only reinforces their distorted view and increases their resistance to cooperation. (*Does*).

Al-Qaeda members are taught that America is the enemy and when a member of al-Qaeda is captured and tortured, this only reinforces this view for him. This principle could also be applied to al-Qaeda in general. When al-Qaeda hears about the abuse of prisoners by the United States, it will only reinforce the idea that the United States is evil and will increase their hatred of the United States. It could potentially help recruitment by allowing al-Qaeda to rally around a common hatred of the United States that is sure to grow as the Islamic world hears of the abuse of Islamic prisoners. The CIA has actually confirmed the point that Senator Levin made about pain increasing resistance to cooperation among al-Qaeda in one of its two manuals examining interrogation methods. Both the “KUBARK Counterintelligence Interrogation” manual released in 1963 and the “Human Resource Exploitation Training Manual” released in 1983 are based on research and field trials in human behavior and psychology. The KUBARK manual states, “Persons of considerable moral or intellectual stature often find in pain inflicted by others a

confirmation of the belief that they are in the hands of inferiors, and their resolve not to submit is strengthened” (Rumney 493). Al-Qaeda definitely fits this description as they view fundamentally religious Muslims as superior and everyone else, especially the United States, as inferior. The KUBARK manual also maintains that physical force in general is not helpful for educating information from detainees. It states, “In fact, most people underestimate their capacity to withstand pain... In general, direct physical brutality creates only resentment hostility, and further defiance” (Rumney 492-3). There is further research that confirms the ineffectiveness of torture. A 2006 report by the Intelligence Science Board found that “there is little evidence that torture can produce truthful answers to questions and that torture might even inhibit gaining intelligence (Pfiffner 90). Much evidence points to the conclusion that pain, torture, and coercion are not as effective methods of interrogation as persuasive methods. There is also a lot of evidence on the probability of gaining false information from torture or abuse. However, according to the National Defense Intelligence College report, the use of fear can sometimes be an effective method of educating information from a subject. However, it also says that the use of fear can result in resistance. If fear crosses the line over to coercion, for example if threats or pain is used, it is more likely to not be effective. As was already discussed, coercion can increase resistance. According to the report, “Threats that are perceived to lack legitimacy (arbitrary), and are more blatant (rather than subtle), direct (rather than indirect), and demanding (rather than delicate) tend to evoke more resistance” (*Educing* 28). If an interrogator threatens something as serious as death, the subject may not cooperate because “the source may believe that an educator who is willing to kill him might be willing — even likely — to kill him whether he complies or not” (*Educing* 25). There is also some evidence that sensory and sleep deprivation can cause the subject to be more willing to share information (*Educing* 34-5). Sensory and sleep deprivation

were tactics used at Guantanamo Bay too. However, as has been explained already, one of the downsides to these “stress and duress” tactics is that it can also impair memory function and cause the subject to give inaccurate information. Plus, if these tactics are applied to the point that the detainee views it as torture and coercion, then it may only create more resistance. In Guantanamo Bay and the military prisons in Afghanistan, sleep deprivation was often so extreme that it would be surprising if the detainees did not view it as a form of torture.

Effective Interrogation Tactics

As has been established, non-coercive methods of interrogation are generally more successful than using violence, pain, or coercion. The United States military recognized this as early as 1940 when it released its first field manual on interrogation. The manual stated that interrogators should not use coercion. One of the only suggestions on the method of interrogation offered was that “a cigarette or a cup of coffee will frequently elicit more accurate and important information than threats” (*Educing* xix). One might try to argue that in 1940 the army did not realize the benefits of coercion, as the benefits were discovered much later. However, the tactics of torture and coercion have been in use for thousands of years if not more. It is only in more recent times that extensive research has been done on interrogation practices. As to research on coercion and torture:

There is little or no research to indicate whether such techniques [coercive techniques or torture] 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. (*Educing* 35).

However, unlike coercive methods, there has been a wealth of social science research on effective non-coercive methods of educing information (*Educing* 35). It does not make sense to ignore the extensive knowledge available today on how to educe information from unwilling

detainees and instead use the brutal and problematic forms of the past. Standard interrogation practices use psychological manipulation instead of coercion, threats, humiliation, or physical pain. Developing a rapport with the subject is one of the most important non-coercive strategies for getting someone to share important information. According to the National Defense Intelligence College's report, "Most training materials and guides on law enforcement interrogation emphasize the need for one or more interrogators to develop a rapport with the subject" (*Educing* 22). Rapport develops during conversation or small talk. According to the National Defense Intelligence College, building rapport has two main functions. "First, research studies say, it helps to 'induce' or facilitate compliance with subsequent requests — and gets the source talking. Second, it allows the educer to identify and assess potential motivations, interests, and vulnerabilities" (*Educing* 22). The report says that "the way the target perceives the agent" is especially important (*Educing* 22). It is obvious that any type of threats or pain is harmful to building rapport. The report also mentions the importance of persuasion. Torture could be considered a form of persuasion, however the report talks about the benefits of persuasion based on conversation (*Educing* 23). It is important to persuade the person being interrogated to share information. The report mentions six factors that affect the ability to persuade: "reciprocity, scarcity, liking, authority, commitment/consistency, and social validation" (*Educing* 36). Likeability is an important factor of persuasion, and obviously also important in developing rapport. Research has shown (although research has been conducted mainly on Westerners) that:

...we tend to like others who: are physically attractive, appear to like us (directly or indirectly communicated), behave in a friendly and positive manner, are similar to us, are familiar to us, cooperate with us or generally behave consistently with our own interests, and appear to possess positive traits such as intelligence, competence, kindness, honesty, etc. (*Educing* 23).

Pretty much all of these things can be conveyed through proper technique. Even considering the great differences in appearance and culture between Americans and Muslims, one can still convey similarity by studying the others culture. Positive traits in Islamic culture may be slightly different than in Western culture, however that can be learned too. Authority is another factor of persuasion. According to the report made by the National Defense Intelligence College, “Social science research suggests that people are more likely to be influenced by the arguments of a person whom they perceive as an authority or an expert, especially on the topic of the discussion” (*Educing* 23). Another key to successful persuasion is the idea of reciprocity. The report states that research shows that “people are more likely to respond positively (affirmatively) to suggestions or requests for compliance from someone who has first provided a benefit to them than from someone who has not” (*Educing* 24). The report mentions special rations or reading material as possible things to give the subject, however it could also be beneficial for “gifts” to include acknowledgment of the subject’s viewpoint or other less tangible things. The 1940 military manual that suggests offering the subject coffee and cigarettes is a perfect example of the use of reciprocity. Commitment/Consistency, the idea that “people want to see themselves — and be seen by others — as fulfilling their promises and commitments,” is another important part of persuasion (*Educing* 24). An interrogator could use this principle by, for example convincing the detainee to commit to doing something and then pushing the detainee to follow through on the commitment (*Educing* 24). Perhaps the interrogator could even relate the United States position on terrorism with a belief in Islam or a cultural value in the Muslim world. Social validation is another part of persuasion. Social validation is the principle that people are more likely to do something if they believe others have done it too (*Educing* 24). If a detainee believes other al-Qaeda members have given up information, especially ones he knows,

he may be more likely to do so too. Scarcity is the last major part of persuasion. Not only is something that is scarce is more appealing, but when there is limited time to accept something (such as a deal), it becomes more appealing (*Educing* 24). An interrogator could use this principle by offering an incentive for the detainee to share information, but making the deal only available for a limited amount of time, for example one hour (*Educing* 24). All of these principles are important to the idea of persuasion. Many of them are very similar and overlap, and the overriding theme seems to be the importance in developing a rapport with the subject. An interrogator can use these strategies of persuasion to develop rapport with the subject. Instead of using abuse, violence, humiliation, and physical pain to persuade detainees to give up information, an interrogator could use these non-coercive methods of persuasion. Some methods of coercion, in the form of threats can work, however one must be careful to not cross the line because coercive tactics can cause resistance. Also, the threat must seem legitimate and most importantly seem like something that will not be followed through with if the subject complies with demands. The strategy of “setting the conditions” at Guantanamo Bay, in which many “comfort items” were taken away from detainees with the possibility to earn them back through compliance, could be said to have been a utilization of the principles of scarcity and reciprocity. However, beatings and the extent to which important items were taken away may have brought the plan too far as to be effective. If one goes too far, it may violate the important principles of likeability and commitment/consistency, while also hurting the development of rapport. Causing violence or suffering often makes cooperation less likely.

It is also important to note one particular interrogation tactic that in experiments has performed extremely well. Indirect strategies, such as “acquiring information through interaction by means other than asking for it directly,” are considered by the National Defense Intelligence

College to possibly be more effective than direct methods of interrogation (*Educing* 26). Using an indirect strategy, a subject may give up important information without even realizing. Since the interrogator does not directly ask a question, a subject that does not want to cooperate may end up accidentally cooperating. The National Defense Intelligence College report explains an experiment on the effectiveness of indirect strategies:

In one of the few open-source studies on the effectiveness of military ‘resistance training,’ 58 cadets at the Royal Norwegian Naval Academy were subjected to a simulated prisoner-of-war exercise. Some had received a pre-training experiential exercise in resisting interrogation, others were given only a pre-training lecture. Perhaps of greatest interest is that the use of indirect interrogation techniques significantly reduced the amount of ‘prisoner’ communication confined to name, rank, military number, and date of birth (from 24% to 0% in the lecture group and from 61% to 5% in the experiential pre-training group). More importantly, the indirect strategy (as opposed to a direct one) also increased the percentage of compromising statements revealed by the ‘prisoners’ from 22% to 37% in the lecture group and from 0% to 15% in the experiential pre-training group. (*Educing* 26).

This experiment really emphasizes the effectiveness of this strategy. This strategy is one that does not work with torture. Tricking and deceiving a subject can be much more effective than simply using force on the subject because as was explained earlier, using physical force can actually increase resistance to cooperation.

The National Defense Intelligence College report titled “Educing Information: Interrogation: Science and Art – Foundations for the Future” also talks about a number of possible approaches for dealing with resistance to sharing information. One method mentioned is reframing the relationship between the interrogator and subject. (*Educing* 28). The interrogator could put the subject in the role of being an expert (*Educing* 29). Another method of overcoming resistance is “Rather than offering directives, suggestions, or persuasive arguments, an agent might talk about a parallel situation or may even develop a metaphor” (*Educing* 28). It also suggests directly addressing the resistance, creating a distraction from the resistance, or using

reverse psychology (*Educing* 29-30). Reverse psychology could be used by starting out a persuasive message with a phrase like “I know you’re determined not to listen to anything I say, but...” The subject may end up resisting that statement and listen to what the interrogator is saying (*Educing* 30). There are more strategies to overcome resistance that are mentioned in the report, however the main point is that there are many methods of obtaining information from detainees besides torture. This includes the many strategies of persuasion and developing rapport with the subject.

Conclusion

The use of torture is bad policy. It just does not make any sense for the United States government to authorize and support the use of torture. The costs far outweigh the benefits. Besides the fact that torture is illegal, it is generally not effective. There are far more effective methods of interrogation than torture. The FBI has been trained for years in the art of interrogation and it maintains that torture is not very effective. The CIA and US military have taken up the use of torture since the September 11th terrorist attacks, however many of their existing manuals specifically forbade the use of torture as it they deemed it not only illegal and immoral but also ineffective. Social science research also maintains that torture and coercive methods of interrogation are generally not effective and that using tactics of persuasion are far more effective. Numerous accounts also confirm one of the biggest problems with torture, the high risk of obtaining false or inaccurate information. When being tortured, victims are often willing to say anything the torturer wants to here just to make it stop. When John McCain was tortured during the Vietnam War, instead of giving up names of his squadron members, he gave names of the Green Bay Packers offensive line (Pffifner 90). The torture of al-Qaeda members most likely built up their resistance to giving up any information, and any information that they

did tell would have a high chance of being false. From the many of the detainees in Guantanamo Bay who were innocent civilians, the best information that one could get from them would be no information and the worse information would be false information. False information hurts US intelligence efforts and was even used by the US government as an argument to go to war with Iraq. All the evidence points to the fact that torture is for the most part ineffective. One might wonder how this could be true considering all of the “enormously valuable intelligence” that the Bush Administration claimed was coming from the detainees in Guantanamo Bay. However, according to Lieutenant Colonel Anthony Christino, who had looked over intelligence coming out of Guantanamo Bay for six months, the value of the intelligence coming from Guantanamo was “wildly exaggerated” and interrogation methods used in Guantanamo were “inherently unreliable” (Rumney 497). Often times when supporters of torture argue their case they bring up the ticking time bomb scenario. This is a scenario in which there is a timed bomb about to explode and kill thousands of people and we have detained someone who knows exactly where the bomb is. They say that obviously we must torture him to save lives; therefore torture is justified in certain scenarios. Besides the fact that it is highly improbable for this scenario to occur with an al-Qaeda detainee, torture may not even be the best method in this scenario. Matthew Alexander, a military officer who “conducted more than 300 investigations and supervised more than 1000” in Iraq, encountered the ticking time bomb situation in Iraq with suicide bombers, and he said that building a relationship with the suicide bomber was a superior method to torture even in this situation (Pfiffner 92). He has also argued not only that a rapport-building approach to interrogation is superior to torture, but also that torture “acts as a recruiter of terrorists and suicide bombers; it makes the United States look like hypocrites; and it makes it more likely that the enemy fighters will fight to the death because they expect that they will be

tortured if they are taken prisoner by Americans” (Piffner 92). All of these are part of the dangerous costs of torture. Of course these costs are in addition to the gathering of false intelligence and the loss of useful information that could have been obtained through using other methods of interrogation.

Some of the other possible costs of using torture are: lowering international support in the War on Terror, putting US troops who are captured in possible danger, undermining US human rights efforts, and fueling the creation of more enemies (*Educing* 13-14). The United States relies on international support in the War on Terror. Cooperation with other countries on sharing intelligence, on law enforcement, and political efforts to pressure countries to stop supporting terrorism are important in the fight against terrorism. Other nations are less likely to support the United States in its efforts if they do not view the US as having the upper hand on morality in the conflict (*Educing* 13). International support also adds legitimacy to the War on Terror. There is also the possibility that using torture could make it more likely that terrorists who capture US soldiers may use torture. It is unknown whether or not this is true, however it is certainly not something to take a risk on (*Educing* 13). “This concern over reciprocity has long been an important factor in international agreements on the treatment of detainees” (*Educing* 13). The use of torture also has the potential to undermine US human rights efforts. The United States prides itself on being a leader in following human rights practices and of being a leader in the international human rights movement. By using torture the US loses its ability to press others to improve human rights because doing so could bring charges of hypocrisy (*Educing* 14). This is exactly what happened when the US State Department criticized China’s human rights practices in its annual report. “China peremptorily dismissed the criticisms, taking the United States to task for using a ‘double standard’ in judging other countries’ behavior” (*Educing* 14). Fueling

the creation of more enemies is extremely costly. A major part of al-Qaeda's ideology is its hatred of the United States. Using torture, especially against al-Qaeda, only fuels that hatred. It also spreads hatred throughout the Muslim world, potentially making it easier for al-Qaeda to recruit people for its fight against the "evil" United States. The costs of torture are just too high. On top of all of these costs just mentioned are the costs of gaining false intelligence and of using an ineffective interrogation technique. It does not make any sense for the United States to involve itself in the use of torture.

Enough evidence does not yet exist to determine for sure whether or not torture used in Guantanamo Bay and throughout other prisons resulted in useful information. In the future, as classified documents begin to be released, we may know for sure. However, based on extensive research on interrogation practices it is probable that non-coercive interrogation techniques would have resulted obtaining more useful information. It is probable that using non-coercive interrogation techniques would have resulted in more cooperation among detainees and the gathering of less false information, which can damage intelligence efforts. Considering the fact that the use of torture had many indirect costs, even if torture resulted in obtaining an extremely important piece of information, it would still be difficult to justify its use. Especially considering the fact that it is likely that the important piece of information could have been obtained through other methods of interrogation.

Conclusion

Summary

The September 11th terrorist attacks threw the nation into a state of fear. After the first attack on American soil since Pearl Harbor and the first foreign attack on the continental United States since the War of 1812, we did everything we could to prevent another terrorist attack. Unfortunately, we may have done too much. We abandoned our laws and our values. Besides the moral implications, these acts likely had an adverse effect on our counterterrorism efforts. In response to 9/11, President Bush announced a global War on Terror, in which “Americans should not expect one battle but a lengthy campaign, unlike any other we have ever seen” (Bush, George W. “Transcript”). The War on Terror would target al-Qaeda, the organization responsible for the attacks, and countries that provided a safe haven for them, mainly the Taliban in Afghanistan. The War on Terror was unprecedented, as it was a war against a semi-organized militant group spread across multiple states. There was no clear answer as to how to respond to an attack like this. Should it be treated as an act of war or as a criminal act? Can we use military force to take out al-Qaeda or must we use our law enforcement? These were all tough questions to answer.

President Bush took charge and made the decision to treat the attack as an act of war and respond with military force. He announced a system for the detainment and trial of terrorists. Those who were members of al-Qaeda, and eventually the Taliban too, could be detained indefinitely by the Military as they were deemed to be illegal enemy combatants. Detainees could also be charged for committing war crimes by a military tribunal. The Bush Administration claimed that the Geneva Conventions did not apply to the conflict with al-Qaeda or the Taliban. It was determined that the Geneva Conventions did not apply to the conflict with

al-Qaeda because al-Qaeda is not a state and did not apply to the conflict with the Taliban for multiple reasons, including the claim that they do not distinguish themselves from civilians and that their ideology is very similar to that of al-Qaeda. The determination that the Geneva Conventions did not apply to the conflicts with al-Qaeda and the Taliban meant that al-Qaeda and Taliban detainees were not subject to protections given to those detained during a conflict. The Bush Administration continued to interpret international law in a way that aimed to justify the lack of rights and poor treatment of detainees in Guantanamo Bay (and other military prisons) and to ensure that US officials and military personnel could not be held legally accountable for any of their actions. The Bush Administration began to authorize the use of torture in interrogations. It did this while releasing memos interpreting the law in ways that redefined which practices were considered torture so that those practices just authorized were not considered torture. The Military was authorized to use one set of interrogation techniques while the CIA was authorized to use another much harsher set of interrogation techniques. Many of the interrogation methods authorized for use by the Military could have been interpreted as torture. However, a legitimate argument could also have been made that they were not torture. They seemed to straddle the line between the two, however the descriptions were vague enough that it was not hard for interrogators to cross the line over to torture. In fact, the Military often crossed that line, as many of the detainees in Guantanamo Bay, as well as in the Bagram and Kandahar prisons in Afghanistan, were tortured. The torture tactics used were both physical and psychological, and included practices such as: beatings, short-shackling for long periods of time sometimes in combination with being subject to extremely cold or warm temperatures, and forced nudity. The overall treatment of the prisoners inside and outside of their interrogations was often extremely poor. Detainees were often not given basic necessities, were constantly

humiliated, were sometimes physically abused by guards, sometimes forced to listen to loud non-stop loud music to deprive them of sleep, and were treated with extreme disrespect throughout their detainment. Not every detainee had the same experience, as some detainees experienced little or no abuse. However, it is well documented that abuse was widespread for many of the detainees.

President Bush's decision to treat the conflict with al-Qaeda as an armed conflict drew a lot of criticism. This criticism is understandable because it is not clear under international law how this conflict should really be treated. On one hand, al-Qaeda is an organization that trains militants and launches attacks on states. Like a state actor and unlike organized crime groups, al-Qaeda has political motivations, hoping to rid the Muslim world of Western influence and establish an Islamic Caliphate throughout the Muslim world (and ultimately the entire world) ruled by strict Islamic Sharia law. On the other hand, al-Qaeda does not clearly fit into any of the groups of parties to an armed conflict. Arguments could be made that the al-Qaeda is most like a national liberation group in an international armed conflict or an organized armed group in a non-international armed conflict, however arguments could easily be made against this too. Al-Qaeda could be considered an organized armed group, however non-international armed conflict generally applies to conflicts within the borders of one state. Al-Qaeda is really a transnational terrorist organization, a group that has been left out of international humanitarian law because it did not exist when the laws were created. The nature of armed conflict has changed and it is time for the international community to define the proper placement of an organization like al-Qaeda into international law. It needs to be codified into law whether or not an organization like al-Qaeda can be a party to an armed conflict. Until then, the legal status of the fight against al-Qaeda is open to interpretation and debate.

As there is no correct answer to the question of al-Qaeda's status as a party to an armed conflict, President Bush's decision to treat the conflict with al-Qaeda as an armed conflict was not incorrect. However, if treating the conflict as an armed conflict, President Bush was incorrect that the Geneva Conventions did not apply to al-Qaeda or the Taliban. Under international humanitarian law, which governs armed conflict, no one is outside the Geneva Conventions. If the Geneva Conventions do not apply to the conflict, the conflict is not an armed conflict under international humanitarian law and the detainees are instead protected under international human rights law. International human rights law protects prisoners from physical abuse and torture and the United States has also signed international treaties banning the use of torture. No one is outside the protections given to prisoners under international law. If an armed conflict does not exist, then the detainees also cannot be detained until the end of the conflict. They would have to be treated as criminals and either be charged and tried for violating domestic laws in a civilian court or released. The laws of the US civilian courts would apply to them. Only in an armed conflict can detainees be held until the end of the conflict or commit war crimes. The Bush Administration applied the laws of war when it was convenient, for example when it wanted to detain the prisoners indefinitely and try them in military tribunals, but did not apply the laws of war when it was not convenient, for example when it decided to torture prisoners to gain information. However, where the Bush Administration did not apply the laws of war, it failed to apply the laws of peace too, as prisoners are subject to protections from torture in times of peace under international humanitarian law.

Assuming that the conflict was an armed conflict, the Bush Administration violated international humanitarian law by capturing and detaining basically anyone suspected of being a terrorist. Everyone who was captured was automatically considered an illegal enemy combatant,

meaning they could be detained indefinitely and were not subject to any protections from mistreatment or torture. The process of capturing suspected terrorists, which involved foreign countries rounding up prisoners to sell to the United States and paying people for turning in terrorists, resulted in many innocent people with little or no connection to al-Qaeda or even the Taliban, being detained. The automatic assumption that every detainee was an illegal combatant was illegal, as under the Geneva Conventions, whenever there is doubt that someone is not a prisoner of war they must be treated as a POW until a competent tribunal determines otherwise. The detainees were not given these tribunals and were not treated as POWs either. In 2004, Combatant Status Review Tribunals were created, which reviewed each detainee's status as illegal enemy combatants, however these tribunals were flawed. They assumed each detainee to have the status of an illegal enemy combatant unless he could prove otherwise when the detainee is supposed to be considered a POW unless proven otherwise. It was also extremely hard to prove that one was not an illegal enemy combatant, as out of 558 detainees subject to the first round of the tribunals, only 38 were determined not to be illegal enemy combatants and were released. As evidence shows that a much higher percentage of the detainees have no connection with al-Qaeda or the Taliban, perhaps more than fifty percent, the system was unfair.

Assuming a state of armed conflict existed, the Bush Administration was correct to consider members of al-Qaeda illegal enemy combatants. However, it did not give the illegal enemy combatants all of the rights that they are guaranteed under international humanitarian law. Illegal enemy combatants, also known as unlawful combatants, can be detained until the end of the conflict, can be tried for actions arising out of their participation in hostilities, and can be tried in military tribunals for violating war crimes. However, they are not outside of the Geneva Conventions. They are covered by the Fourth Geneva Convention relating to the treatment of

civilians in armed conflict, which protects them from torture, physical abuse, and all sorts of mistreatment. The Bush Administration was also wrong in considering Taliban soldiers to be unlawful combatants. The Taliban was the government of Afghanistan and the Taliban soldiers were part of an organized army, and thus should have been considered prisoners of war. POWs are protected by Third Geneva Convention relating to the treatment of prisoners of war, which protects them from torture, physical abuse, and all sorts of mistreatment. The Bush Administration illegally authorized the mistreatment of detainees in Guantanamo Bay and illegally authorized the detainment of anyone considered to be a terrorist. The detainees were legally protected from mistreatment and torture under international law. Immediately following their capture they were legally entitled to a tribunal determining their legal status, and were entitled to treatment as prisoners of war until the tribunal.

Even while being aware of the abuse and torture of the detainees, the illegality of the treatment of the prisoners, and the indefinite detention of numerous innocent people, some Americans still argue that this was a necessary price to pay for our security. They say that in times when our national security is threatened so much, we must take extreme actions, even actions that are illegal and will compromise many people's rights. They say that the ends justify the means. However, these people are basing their opinion on the incorrect assumption that torture yields effective results. Research actually shows that the use of torture often results in false information, which can hurt intelligence efforts. Research also shows that torture is often ineffective because it often builds up resistance to cooperation. Other methods of interrogation are shown to generally be much more effective than torture and coercion. Research shows that it is usually much more effective in obtaining useful information to develop a rapport with the subject and use various persuasive techniques. Although there is little evidence on the

effectiveness of torture used on prisoners in the War on Terror, research shows that other methods of interrogation would most likely have been far more effective. The use of torture, along with other mistreatment of detainees, also has many indirect costs. Some of these costs are: damaging the view of the United States throughout the world, putting US troops who are captured in possible danger, undermining US human rights efforts, and fueling the creation of more enemies. Unfortunately, these costs really hurt the United States. With all the costs associated with torture, it really did not make sense to use it, especially since other methods of interrogation are generally more effective. Also, on top of all of these costs is the moral cost to the American people: the cost of knowing that as Americans, we abandoned our laws and values that we claim to be so important to us.

Effect on the American Identity

As Americans, we pride ourselves on our ideals of freedom, liberty, justice, and equality. The foundation of the American identity really revolves around these ideals. As our sense of nationalism does not come from a shared ethnicity or background, it comes from a shared set of values and ideals. Our identity was formed with our declaration of independence from the British. We declared independence from a government we professed to be an oppressive monarchy. “No taxation without representation” was our motto, a motto that emphasizes the right to participate in government, hence liberty. We declared that “all men are created equal” and are endowed with the unalienable rights of “Life, Liberty, and the Pursuit of Happiness”; hence our values of freedom, liberty, justice, and equality (equality of opportunity, not outcome). After the formation of our country, our bill of rights guaranteed certain freedoms, such as freedom of speech, freedom of press, and freedom of religion, and guaranteed certain ideals of

justice. Our values are also in our pledge of allegiance, which ends with the words “with liberty and justice for all.” The idea of the American Dream represents the freedom to succeed and the equality of opportunity. All of the celebrated historical events and celebrated parts of our national pride revolve around our values. Even wars are framed in this way: the American Revolution is viewed as a fight for freedom and liberty; the Civil War is viewed as a fight for freedom and equality, and World War II is viewed as a fight to defend freedom and justice.

By engaging in torture, ignoring laws relating to the treatment of prisoners, and assuming guilt of detainees unless they succeed at the extremely hard task of proving themselves innocent, we abandoned our values of freedom, justice, and equality. We violated the value of freedom because we unfairly took away many people’s freedom. We violated the value of justice because we detained these people and denied them their freedom under unfair judicial procedures, we automatically assumed all captured to be guilty, and we denied them the rights to humane treatment that they were entitled to under the law. We violated our value of equality because we treated those detained as unequal, both in the practice of denying them rights and torturing them, and in many of the specific practices of torture and abuse in which we mocked their religious beliefs and humiliating them based on their religious and cultural beliefs. Many of the things we did overlap and violate multiple values and ideals. These are just some of the main ways in which we abandoned our values. One can see the abandonment of our values in War on Terror by reading the message inscribed on door to the entrance to the Guantanamo Military Commission Building. As opposed to the message inscribed above the entrance to the Supreme Court, which says “Equal Justice Under the Law,” the message inscribed in Guantanamo says “Honor Bound to Defend Freedom” (Resnik 602). This represents an abandonment of any ideal of justice, being replaced with defending freedom. This does not mean giving freedom to the

detainees in Guantanamo Bay, but rather justifying their lack of freedom with the idea that we are doing this to defend freedom for ourselves.

How does abandoning our values affect our identity as Americans? In a time of fear and threat to our national security, we let go of our ideals. Our ideals and values could not stand the test of fear. It is in times like this that our laws and values are truly tested, and in this instance we failed. We have to question whether we really believe in these values if we were able to abandon them so quickly. This lapse in our morals is something that as Americans we are going to have to live with throughout our history. How will we deal with this? How will we confront this part of our history? Only time can answer this question. Usually we eventually confront times when we have abandoned our values in our history. For instance, we have confronted slavery and Jim Crow laws. We have not let these huge violations of our values hurt our identity. Instead we have emphasized the greatness of our system because we were able to overcome this clear violation of our values. From slavery and Jim Crow laws, we emphasize how great it is that we have freedom of speech and great people, such as Martin Luther King, we able to challenge the unjust policies of our government and eventually change them. We like to emphasize that our country is great because when a group of people is denied certain rights, there is room for freedom, liberty, equality, and justice to expand. We emphasize that we were able to overcome these issues and learn from them instead of the fact that for so long we ignored them. However, we do not always confront past injustices so well. For example, the internment of Japanese-Americans who were US citizens during World War II has not been completely ignored, but it also has not been confronted in the same way that slavery and racism have. We do not emphasize the positive side of this issue much, which is perhaps why it is not talked about much. It is hard to find a positive side to this issue, as was not ended by a political movement for equality, but was resolved when

the war ended. We probably view the Japanese internment camps as an anomaly; an injustice that happened that will not happen again. However, if we avoid confrontation with this issue then we may not learn from and it may happen again. “Societies that fail to confront their past transgressions may repeat them. Indeed, history will judge us by the actions we take-or neglect to take-to rectify the Guantanamo Effect” (Fletcher, p. 10). One could argue that we did not learn from the Japanese internment camps because Guantanamo Bay is so similar to this situation. Like the situation in Guantanamo Bay, the creation of Japanese internment camps was an abandonment of our values and ideals in a time of threat. In both instances we detained people we viewed as threats to our country and stripped them of their rights. The main difference is that the Japanese that were interned were American citizens, while only a couple detainees in Guantanamo Bay were American citizens.

Perhaps we will truly confront Guantanamo Bay in our future. Maybe we will learn from it and emphasize the fact that we should never do this again. Maybe we will find a positive to this. We might emphasize the fact that in times of abandoning our values there was still public debate about the issues and criticism of the government’s policies, something that would not occur in many of the Middle Eastern countries in which we were fighting or in any state governed by al-Qaeda. Perhaps being able to find the positive side of negative events in our history is an important quality of the American people. This has its pros and its cons. The con is that we may sometimes overlook the negative aspect, causing us to not learn from our mistakes. The pro is that we are able to acknowledge our failures while not letting these failures hurt our pride. These failures are failures in our values that are essential to our identity. Our identity is important for us to be united together as a nation because otherwise our society may collapse. As can be seen in European countries such as Norway, in which identity and nationalism is based

largely on ethnicity as opposed to shared values, when there is no uniting sense of nationalism among people from many different ethnicities and backgrounds, social unrest is more likely. People only look out for the interests of people in their own group instead of the greater good of the nation. They do not want their tax money to go to social programs for people that are not part of their group. This occurs in the United States to a certain extent with immigrants and between people of different race and socio-economic status, however in the end we are able to unite around our shared values and ideals as Americans. The fact that we just elected our first African-American President shows that although there may still be some tensions between different races and ethnicities within the United States, we all view each other as Americans.

How we remember Guantanamo Bay in the future may very well depend on when we actually resolve the issue. Although Guantanamo Bay's population has significantly decreased, a number of prisoners are still detained there. Barack Obama ran on the campaign promise that he would close Guantanamo Bay; however when he came to office it turned out his promise was much harder to go through with than he thought. He faced too much opposition. Maybe if he really fought for it he could have closed it, but that is irrelevant now. It is presumed that the practice of torture no longer occurs and detainees are not rounded up in the way they were before. The attacks on al-Qaeda, along with the capture of members of al-Qaeda, have been much more targeted. The detainees now have the right to annual reviews of their status as illegal combatants and they have more ways to challenge their detainment in courts. Detainees may have more rights than they did before, however the continued use of the Guantanamo Bay detainment center serves as a reminder that we still have not overcome the injustices that occurred during the Bush Administration. Guantanamo Bay will be forever tainted by what

happened there following September 11th. Until the Guantanamo Bay detention center is completely shut down, we may never truly overcome the injustices of the War on Terror.

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