The Logical Nexus Between The Decision To Deny Application of The Third Geneva Convention To The Taliban and al Qaeda, and the Mistreatment of Prisoners in Abu Ghraib

by

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Our values are non-negotiable for members of our profession. They are what a professional military force represents to the world.[2]

Those who do battle with monsters must take care that they do not thereby become a monster.

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> When Abu Ghraib opened, the first MP unit was the 72nd MP Company, based in Henderson, Nevada. Known as "the Nevada Company" it has been described by many involved in investigations concerning Abu Ghraib as a very strong unit that kept tight rein on operational procedures at the facility. The company called into question the interrogation practices of the MI Brigade regarding nakedness of detainees. The 72nd MP Company voiced and then filed written objections to these practices.

Id at 74.

To those citizen soldiers this article is also dedicated, with pride and respect.

The author also wishes to thank Charles Gittings for his excellent web site devoted to enforcement of the Geneva Conventions. http://pegc.no-ip.info/. His extensive efforts made this research much easier. The views here expressed represent those only of the author and not of any person with whom, or entity with which, he is affiliated.

[2]AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade, LTG Anthony R. Jones at Assessments as the Senior Military Officer (f) Training, p. 23.

Always remember that when you gaze into the abyss, the abyss gazes back into you.[3]

I

Introduction

Revelations of sexual indecencies committed by United States military personnel against Iraqi prisoners in Abu Ghraib prison,[4] and allegations of other misconduct, followed by repeated leaks of documents related to the decision making process regarding the status of captured enemy combatants, forced the release at least some addition documents relating to that issue [hereinafter the government memos]. Taken as a whole, those documents, as well as other known facts, and applicable law, demonstrate that 1) the legal, and perhaps, the factual basis for classification of many Afghan prisoners outside the Third Geneva Convention appears flawed; 2) treatment of persons entitled to the rights of prisoners of war in ways forbidden by the Third Geneva Convention appears to be neither inadvertent nor incidental; and 3) the application of those coercion methods to the Abu Ghraib prisoners appears to be related, to the sexual misconduct by prison guards.

This article examines the international law aspects of the determination by the United States government that Guantanamo detainees, and indeed all members of the Taliban[5], are unprotected by the Third Geneva Convention of 1949[6]. The government memos[7] demonstrate that the government based its decision on a finding that either the Taliban was not the *de facto* government of Afghanistan, and that as a result its military forces were unprotected by GC3, or on a finding that it was the *defacto* government, but that its forces were unprotected for failure to

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[3]Freidrich Nietzsche , *Jenseits von Gut and Böse*, IV 146.

[4]An Article 15-6 Report by MG Antonio Taguba characterized them as "...numerous incidents of sadistic, blatant, and wanton criminal abuses...inflicted on several detainees." between October and December, 2003. *Article 15-6 Investigation of the 800th Military Police Brigade*, http://www.globalsecurity.org/intell/library/reports/2004/800-mp-bde.htm [hereinafter Taguba Report]. Finding of Fact 5.He concluded that they constituted "grave breaches of international law." Id at Conclusion.

[5]That includes those held and questioned in Afghanistan without transportation to Guantanamo.

[6] As "The Third Geneva Convention of 1949 relative to the Treatment of Prisoners of War [hereinafter the Third Geneva Convention or GC3]. As a stylistic convention British spellings from the English language version of the conventions has been changed to the American.

[7]And other information released as a result, in, for example press reports and Red Cross reports. See discussion *infra.* at VI(A)(2).

meet certain purported "requirements" of Article 4 (2) of the Third Geneva Convention.. The article discusses the requirements of Article 5 of GC3 which provides that should "any doubt exist" as to the status of a captured person, a presumption of POW status continues until a decision to the contrary has been made by a "competent tribunal". The article examines the government memos and other recent information to demonstrate that reasonable doubt does exist as to at least Taliban[8] detainees' status, and that because they have not, to date, been screened by a competent tribunal, they continue to be entitled to treatment as POWs. The article also examines the interrogation methods used to question those detainees and concludes that 1) as to protected persons the methods constitute a breach, in some instances a grave one, of the Third Geneva Convention and 2) that the determination POW status did not apply appears to have been driven by a desire to use those interrogation techniques to obtain information from battlefield detainees in a manner unpermitted by the Convention, and to admit that information in trial proceedings using procedural and evidentiary rules forbidden by GC3.

Finally, the article analyzes the development of those interrogation methods, their migration to Iraq, and their application to prisoners at Abu Ghraib. It determines that the sexual misconduct by the Abu Ghraib prison guards, while not necessarily ordered or directed by higher authority, was an evolution reasonably foreseeable from the violations of GC3 already in place. Finally, the article concludes that many of the extraordinary interrogation methods, as applied, may constitute breaches of both domestic and international law, depending on the facts of each detainee's case.

II

Background

Following the 11 September, 2001, attacks on the World Trade center and the Pentagon the President of the United States immediately characterized those strikes as "an act of war."[9]

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[8]Al Qaeda detainees present a different question. Their only potential claim to protected status is if, they were in fact, acting as part of the Taliban when captured. The issue, depending on individualized facts such as the place, time and manner of capture, might or might not present an issue for resolution before a competent tribunal. This article does not examine other arguments which an al Qaeda detainee might assert regarding the legality of interrogation techniques, if that detainee is not a prisoner of war. See, e.g. the Convention Against Torture and Other Cruel, and Inhuman or Degrading Treatment of Punishment**,** *entry into force* 26 June 1987, in accordance with article 27 (1)**,** http://www.unhchr.ch/html/menu3/b/h_cat39.htm. [hereinafter the Torture Convention].

[9] BBC News Online, *Bush Calls Attacks "Acts of War"* (Sept. 12, 2001), *at* http://news.bbc.co.uk/hi/english/world/americas/newsid_1537000/1537534.stm.

The United States took swift military action against the perpetrators; members of al Qaeda, an international terrorist organization. President Bush, demanded that Afghanistan's ruling party, the Taliban, turn members of al Qaeda over to American custody.[10] On 18 September 2001, in a joint resolution, Congress, without declaring war, authorized military action against the Taliban.[11] By the end of September, the United Nations Security Council had also adopted two resolutions which (1) identified the attacks on the United States as a threat to international peace and security; and (2) mandated that states "[d]eny safe haven to those who finance, plan, support, or commit terrorist acts."[12]

On 7 October, with the consent of countries surrounding Afghanistan, the United States began extensive air attacks on the Taliban military infrastructures and the al Qaeda terrorist organization.[13] On October 17, the commander of CENTCOM issued an order instructing that the Geneva Conventions were to be applied to all captured individuals in accordance with their traditional interpretation.[14] By 21 December 2001, the allied coalition held in custody about seven thousand suspected al Qaeda and Taliban members in Afghanistan.[15] On 13 November, 2001, President Bush issued a Military Order providing for the trial before military tribunals of

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[10] *Id.*

[11] S.J. Res. 23, 107th Cong. (2001) (enacted as Pub. L. No. 1-7-40, 115 Stat. 224). In a further response to the attacks, on 26 October 2001, Congress adopted the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, which addresses domestic national security issues.

[12] S. Con. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

[13] *Bush Announces Opening of Attacks* (Oct. 7, 2001), available at http://www.cnn.com/2001/US/10/07/ret.attack.bush.

[14]Thus, "Belligerents would be screened to determine whether or not they were entitled to prisoner of war status. If an individual was entitled to [POW] status the protections of Geneva Convention III would apply. If armed forces personnel were in doubt as to a detained individual's status, [GC3] rights would be accorded to the detainee until a [GC3] Article 5 tribunal made a definitive status determination." Schlesinger Committee Report at p.80.

[15] *US Questions 7,000 Taliban and al-Qaeda Soldiers*, GUARDIAN (Dec. 21, 2001), *available at* http://www.guardian.co.uk/afghanistan/story/0,1284,623701,00.html.

non-U.S. citizens who were members or culpable supporters of al Qaeda.[16] In January, 2002, following a screening process a number of those prisoners identified by the United States as particularly interesting were transferred to a prison on the U.S. military base at Guantanamo Bay, Cuba. By mid 2004, approximately 640 such prisoners were held at that base.[17]

On April 27, 2004, CBS's Sixty Minutes broadcast the first photographs showing prisoner abuse by American personnel at Abu Ghraib prison.[18] In early May, 2004 the New Yorker Magazine published an article by Seymour Hersh[19] revealed the existence of an internal Army report authored by Major General Antonio M. Taguba.[20] According to Hersh:

> Taguba found that between October and December of 2003 there were numerous instances of "sadistic, blatant, and wanton criminal abuses" at Abu Ghraib. This systematic and illegal abuse of detainees, Taguba reported, was perpetrated by soldiers of the 372nd Military Police Company, and also by members of the American intelligence community. (The 372nd was attached to the 320th M.P. Battalion, which reported to [BG Janice] Karpinski's brigade headquarters.) Taguba's report listed some of the wrongdoing:
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> > 1. Breaking chemical lights and pouring the phosphoric liquid on detainees; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape; allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; sodomizing a detainee with a chemical light and perhaps a broom stick, and using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee.
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> There was stunning evidence to support the allegations, Taguba added—"detailed witness statements and the discovery of extremely graphic photographic evidence." Photographs

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[16] *See* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html.

[17] *Rasul v. Bush*, 124 S.Ct. 2686, 2690 (2004).

[18] http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml.

[19] Seymour Hersh, *Torture at Abu Ghraib*, New Yorker, May 10, 2004, http://www.newyorker.com/fact/content/?040510fa_fact.

[20] http://www.msnbc.msn.com/id/4894001/. Indexes to the Taguba Report were obtained by the media at a later date. http://www.usnews.com/usnews/issue/040719/usnews/19prison.b.htm

> and videos taken by the soldiers as the abuses were happening were not included in his report, Taguba said, because of their "extremely sensitive nature."

New Yorker, May 10, 2004. Follow-up articles on May 17[21] and May 24, 2004[22],

Following the first Hirsch article a stream of leaked photographs and memoranda became a torrent. The materials eventually included provision to Congress of disks containing thousands of sexually explicit photographs depicting sexual abuse of Iraqi prisoners[23], as well as memoranda drafted by personnel in the White House and the Departments of Justice and State[24]. The Bush administration, including the White House, specifically and repeatedly disavowed the use of sexual abuse as a means of interrogation, and claimed it had never authorized the use of torture to interrogate prisoners[25]. The leaked memoranda, combined with other known facts, tell a more convoluted, complicated and nuanced tale.

What follows is a progression of legal rationales which seem to have originated with the decision to try certain captured prisoners before military tribunals, then dealt with objections, based on the Third Geneva Convention, to those tribunals by a Presidential determination that captured members of al Qaeda and the Taliban were uncovered illegal combatants, and then determined that because those individuals were outside the Convention they could be interrogated through means prohibited by its terms. It appears that it was the application of those

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[21] Seymour Hersh, *Chain of Command*, New Yorker, May 17, 2004, http://www.newyorker.com/fact/content/?040517fa_fact2.

[22]Seymour Hersh, *The Gray Zone*, New Yorker, May 10, 2004, http://www.newyorker.com/fact/content/?040524fa_fact. Hirsch, citing the Taguba Report, wrote that Major General Geoffrey Miller, the commander of the detention and interrogation center at Guantanamo, "urged that the commanders in Baghdad change policy and place military intelligence in charge of the prison." The report quoted Miller as recommending that "detention operations must act as an enabler for interrogation." Hirsh said that Miller "...briefed military commanders in Iraq on the interrogation methods used in Cuba—methods that could, with special approval, include sleep deprivation, exposure to extremes of cold and heat, and placing prisoners in "stress positions" for agonizing lengths of time. (The Bush Administration had unilaterally declared Al Qaeda and other captured members of international terrorist networks to be illegal combatants, and not eligible for the protection of the Geneva Conventions.)."

[23]http://www.capitolhillblue.com/artman/publish/article_4521.shtml.

[24]See discussion, *infra.* Section III.

[25]http://www.washingtonpost.com/wp-dyn/articles/A60719-2004Jun22.html.

legal rationales, and the Geneva prohibited interrogation techniques they approved, which eventually resulted in the abuses of Abu Ghraib.

III

The Bush Administration's Path to Determination of POW Status

What follows is a chronological paper trail. For the ease of the reader, the two central analytical memoranda, the Yoo/ Delahunty Memorandum of 9 January, 2002, and the Bybee Memorandum of 22 January, 2002, are more fully discussed and analyzed at the end of this section.

On 13 November, 2001, President Bush issued his military tribunal Order.[26] That Order, and subsequent statements by the President[27], Vice President[28], Attorney General[29], Secretary of Defense[30], and the White House Counsel[31] made it clear that the tribunals were intended to

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[26]*See* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html. That Order provides, in part, that individuals subject to the order include current or past members of al Qaeda, individuals who "...engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor..." which adversely affected wide United States interests, or who "...has knowingly harbored one or more individuals" described above. Order at Section 2(A).

[27]On November 19, President Bush said that the nation was fighting "against the most evil kinds of people, and I need to have that extraordinary option at my fingertips." *New York Times*, 20 November, 2001, Section B, page 5.

[28]Vice President Dick Cheney, responding to question following a speech to the United States Chamber of Commerce on 14 November, 2001, "...spoke favorably of World War II saboteurs being 'executed in relatively rapid order' under military tribunals set up by President Franklin D. Roosevelt....A military tribunal, he said, 'guarantees that we'll have the kind of treatment of these individuals that we believe they deserve.'" *New York Times*, 15 November, 2001, Section B, page 6.

[29] According to the Attorney General, "Foreign terrorists who commit war crimes against the United States, in my judgment, are not entitled to and do not deserve the protections of the American Constitution, particularly when there could be very serious and important reasons related to not bringing them back to the United States for justice. I think it's important to understand that we are at war now." New York Times, 15 November, 2001, Section A, page 1.

[30]"[Secretary of Defense] Rumsfeld acknowledged that the rules for military tribunals would be decidedly differently [sic] from those for civilian trials. And Pentagon officials said today that they were devising regulations that were likely to include a more flexible standard for

follow procedural and evidentiary rules similar to those used to try spies and war criminals during and after the Second World War.[32] Those WW II rules included a rule of evidence first articulated in the 1942 military commission trial of eight German saboteurs, *United States v. Quirin,* 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3 (1942), see also, Louis Fisher, *Nazi Saboteurs On Trial*, 52-53, (University Press of Kansas, 2003), which provides that "Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man. " Section 4(c)(3) of the Bush Order provided for "admission of such evidence as would, in the opinion of the presiding officer of the military commission ...have probative value to a reasonable person." That rule, as applied in World War Two and in the post-war tribunals was repeatedly used to admit evidence of a quality or obtained in a manner which would make it inadmissible under the rules of evidence in both courts of the United States or courts martial conducted by the armed forces of the United States.[33]

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evidence than civilian trials would accept. They said the tribunals would probably allow a conviction of a suspected terrorist on a two-thirds vote of the officers on the panel." *New York Times*, 16 November, 2001, Section B, page 10. The *Military Order* itself, provided for "sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present..." *Military Order* at Sec.4(c)(7).

[31] At a meeting of the American Bar Association's Standing Committee on Law and National Security, White House Counsel Alberto Gonzales acknowledged nearly identical provisions in the two orders. Inter *Arma Silent Leges: In Times of Armed Conflict Should the Laws be Silent?*, *Committee on Military Affairs and Justice of the Association of the Bar of the City of New York* (2001) at FN 67 available at www.abcny.org.

[32]The *New York Times* quoted "A Bush administration official with knowledge of the planning said officials had been studying the world War II cases." *New York Times*, 15 November, 2001, Section B, page 6. "...as one White House official put it, 'it's a new reality.' The old rules, the old legal and ;law enforcement cultures, have to change officials argue..." *New York Times*, 18 November, 2001, Section A, page 1. According to the *Times*, "The incident that was uppermost on the minds of Bush administration officials in setting up tribunals took place in June 1942, when Nazi Germany dispatched eight saboteurs to this country to blow up war industries..." *New York Times*, 18 November 2001, Section A, page 1. That incident, of course resulted in the military commission procedures tested in *Ex Parte Quirin*. "'The commission itself is going to be unique,' said one military officer involved in the discussions. 'It will be separate and distinct from a civilian criminal trial. It will be separate and distinct from a court-martial.'" *New York Times*, 25 November, 2001, Section A, page 1.

[33]See, Wallach *The Procedural and Evidentiary Rules of the Post World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure*?, 37 Columbia Journal of Transnational Law 851 (1999); and Wallach, *Afghanistan, Quirin and Uchiyama: Does the Sauce Suit the Gander?*, The Army Lawyer, (November, 2003).

Eventually, the rules under which tribunals are to be conducted were substantially modified retaining only the World War II evidence rule and a limited appellate process. Ibid. To date, no memorandum has been released by the Bush administration detailing the reason for retaining those two rules. It is a not unreasonable conclusion that the rules were promulgated and retained with the specific intention of admitting evidence obtained through means which would require their exclusion under the Federal Rules of Evidence and applicable constitutional authority which prohibits or limits the use of illegally obtained evidence.[34]

On January 18, 2002, President Bush (the decision is referenced[35] in the Gonzales Memo

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[34]See, Wallach, *Afghanistan, Quirin and Uchiyama: id.* See, *Miranda v. Arizona*, 384 U.S. 436, 442, 86 S.Ct. 1602, 1611, (1966) and its progeny. "Over 70 years ago, our predecessors on this Court eloquently stated: 'The maxim '*Nemo tenetur seipsum accusare*,' had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which (have) long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, (were) not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.' *Brown v. Walker*, 161 U.S. 591, 596--597, 16 S.Ct. 644, 646, 40 L.Ed. 819 (1896). " See, *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations*, 4 April, 2004, at p.66. http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf. [hereinafter Working Group Report]. N.B. That Report differs to a very large degree from the initial draft report dated 6 March. 2004. http://www.ccr-ny.org/v2/reports/docs/PentagonReportMarch.pdf. Citations herein are to the Final Report.

[35]"On January 18, I advised you that the department of Justice had issued a formal legal opinion concluding that the Geneva Convention III on the Treatment of Prisoners of War

of 25 January, 2002) made a presidential decision that captured members of Al Quaeda and the Taliban were unprotected by the Geneva POW Convention. That decision was preceded by a Memorandum dated January 9, 2002, submitted to William J Haynes II, General Counsel to the Department of Defense, by the Department of Justice's Office of Legal Counsel (which provides legal counsel to the White House and other executive branch agencies) and written by Deputy Assistant Attorney General John Yoo and Special Counsel Robert J. Delahunty.

The Yoo Delahunty Memorandum of January 9, 2002

The Yoo/Delahunty Memorandum, along with the Bybee Memo, provided the analytical basis for all which followed regarding blanket rejection of applicability of the Third Geneva Convention to captured members of al Qaeda and the Taliban. Its validity is, accordingly, analyzed in some detail at the end of this discussion.

The Rumsfeld Order January 19, 2002

In a Memorandum dated 19 January, 2002[36], Secretary of Defense Donald Rumsfeld ordered the Chairman of the Joint Chiefs of Staff to inform combat commanders that "Al Quaeda and Taliban individuals...are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949." He ordered that "commanders should "...treat them humanely, and to the extent appropriate and consistent with military necessity, consistent with the Geneva Conventions of 1949." That order thus gives commanders permission to depart, where they deem it appropriate and a military necessity, from the provisions of the Geneva Conventions. The Memorandum was promulgated as an order by the Joint Chiefs of Staff on the same date.[37]

The Bybee Memorandum of 22 January, 2002

The Bybee Memo, Memorandum of 22 January, 2002 from Jay Bybee, Office of Legal Counsel for Alberto R. Gonzales, Counsel to the President and William J. Haynes II, General Counsel of the Department of Defense, *Re: Application of Treaties and Laws to al Qaeda and*

(GPWIII) does not apply to the conflict with al Qaeda. I also advised that the DOJ's opinion concludes that there are reasonable grounds for you to conclude that GPW does not apply with respect to the conflict with the Taliban. I understand that you decided that GPW does not apply and accordingly that al Qaeda and Taliban detainees are not prisoners of war under the GPW." Gonzaelz Memo, 25 January, 2002. http://msnbc.msn.com/id/4999148/site/newsweek/. See, *Bush Says No POW Status For Detainees*, CNN, January 28, 2002. http://www.cnn.com/2002/US/01/28/ret.wh.detainees/.

[36]http://www.defenselink.mil/news/Jun2004/d20040622doc1.pdf.

[37]http://www.defenselink.mil/news/Jun2004/d20040622doc2.pdf.

Taliban Detainees , follows the same structural pattern, and sometimes the exact phrasing, as the Yoo/Delahunty Memo, but with additional analysis of certain international law/ law of war issues. Parts of it are also discussed below.

The Alberto Gonzales Memo January 25, 2002

On January 25, 2002, White House Counsel Alberto Gonzales sent a Memorandum [hereinafter the Gonzales Memo] to President Bush regarding a presidential decision on January 18, 2002, (the White House had issued an Order to that effect, dated February 7, 2002, see below) that captured members of the Taliban were not protected under the Geneva POW Convention ("GPW"), to which the legal advisor to the Secretary of State had objected[38]. He advised that "there are reasonable grounds for you to conclude that GPW [the] does not apply ...to the conflict with the Taliban." Mr. Gonzales argued that grounds for the determination might include:

1) a determination that Afghanistan was a failed state "...because the Taliban did not exercise full control over the territory and people, was not recognized by the international community, and was not capable of fulfilling its international obligations" (see definition of statehood in Cpt. 1.3 and discussion in Kadic v. Karadzic, 70 F.3d 232, 244 to 245 (2nd Cir, 1995)) and/or

2) a "determination that the Taliban and its forces were, in fact, not a government but a militant, terrorist-like group."

Mr. Gonzales then identified what he believed were the ramifications of Mr. Bush's determination. On a positive note he felt they preserved flexibility stating that:

> The nature of [a "war" against terrorism] places a high premium on ...factors such as the ability to quickly obtain information from captured terrorists and their sponsors ... and the need to try terrorists for war crimes... [t]his new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners... [39]

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[38]http://msnbc.msn.com/id/4999363/. Secretary of State Powell argued vigorously that failure to apply the Geneva POW Convention to the Taliban as a group reversed long-standing U.S. policy and would adversely affect the nation's standing in the international arena. His projections of potential issues, including legal problems, proved to be substantially accurate.

[39]Here are some thoughts on the validity of the 1929 Geneva Convention by the Provost Marshal General of the United States Army, Maj. Gen. Archer Lerch in 1945. Although they address the 1929 Geneva convention, they seem relevant to arguments about obsolescence.

> The War Department has followed strictly the terms of this treaty in all the orders and directives that it has issued governing the treatment of prisoners of war. And I

He also believed the determination "...eliminates any argument regarding the need for case-by-case determinations of POW status." The determination, Mr. Gonzales said, also reduced the threat of domestic prosecution under the War Crimes Act (18 U.S.C. 2441). His expressed concern was that certain GPW language such as "outrages upon personal dignity" and "inhuman treatment" are "undefined' and that it is difficult to predict with confidence what action might constitute violations, and that it would be "...difficult to predict the needs and circumstances that could arise in the course of the war on terrorism." He believed that a determination of inapplicability of the GPW would insulate against prosecution by future "prosecutors and independent counsels."

Mr. Gonzales then identified the counter arguments from the Secretary of State (See, Colin Powell Memo of January 26, 2002) which included:[40]

> do not believe that any thoughtful person would have the War Department do otherwise.
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> The Geneva Convention, I might emphasize is *law*. Until that law is changed by competent authority, the War Department is bound to follow it.
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> That treaty, like other laws, can be changed but it cannot be changed by the War department's regarding it as a "scrap of paper." Such an attitude on the part of the War department would mean that our government is no more honest than others it severely condemned. It would mean that this government had sacrificed the place of honor and moral leadership that it has earned in the eyes of the world and had suck to the level of Japan whose emissaries talked peace while its army went to war.
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> I do not intend to indicate that I think the Convention should be changed. I do not think that any of us are now emotionally fitted to tackle the job of re-evaluating one of the few international laws that has withstood, with a considerable measure of success, the hatred and lawlessness that war breeds.

Lerch, The Army Reports on POWS, The American Mercury, May, 1945, pp. 536-547.

[40]See also, William H. Taft, IV, Memorandum to Counsel to the President, *Comments on Your Paper on the Geneva Convention*, February 2, 2002, "The President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years." http://www.fas.org/sgp/othergov/taft.pdf.

Past adherence by the United States to the GPW;
Possible limitations on invocation by the U.S. of the GPW in Afghanistan;
Likely widespread condemnation by allied nations;
Encouragement of potential enemies to find "loopholes" to not apply the GPW;
Discouraging turn-over of terrorists by other nations;
Undermining of U.S. military culture "which emphasizes maintaining the highest standards of conduct in combat..."

In response, Mr. Gonzales says, inter alia, "...even if the GPW is not applicable, we can still bring war crimes charges against anyone who mistreats U.S. personnel." He adds that, "...the argument based on military culture fails to recognize that our military remains bound to apply the principles of GPW because that is what you have directed them to do." (Emphasis added). In light of subsequent events, that last sentence is of particular interest.

The Ashcroft Letter of February 1, 2002

On February 1, 2002, Attorney General John Ashcroft sent President Bush a letter[41] which strongly indicates the administration's consideration of conduct which might violate the Third Geneva Convention. Mr. Ashcroft articulated two possible theories to support the conclusion that the protection of POWs under the Geneva Convention did not apply. The first was the failed state theory holding that Afghanistan was not a party to the treaty; the second an argument that although the Convention applied, the Taliban were not entitled to POW status because they acted as unlawful combatants. In arguing for the first option, made through a Presidential determination that Afghanistan was a failed state, Mr. Ashcroft stated:

> Thus, a Presidential determination against treaty applicability would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees. The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States.

(Emphasis added).

Attorney General Ashcroft's letter seems to make it clear that by the end of January, at least, consideration was being given to conduct which might violate GC3's strictures regarding the detention and interrogation of prisoners of war.

The Presidential Order of February 7, 2002

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[41] http://news.findlaw.com/wp/docs/torture/jash20102ltr.html.

On February 7, 2002[42], President Bush signed an Order[43], accepting the reasoning of the Yoo Bybee and Gonzales memos and the Attorney General's letter[44], and validating the order issued by Secretary Rumsfeld on January, 19, 2002.[45] That Presidential Order[46] was the basis for all

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[42]The Schlesinger Committee Report notes that before Mr. Bush signed that Order the Legal Advisor to the Chairman, Joint Chiefs of Staff, and "many of the military service attorneys" had agreed with the Department of State's position that "the Geneva Conventions in their traditional application provided a sufficiently robust legal construct under which the Global War on Terror could effectively be waged." Id at 7. At the February 4, 2002, National Security Council meeting called to decide this issue, the department of State, the department of Defense, and the Chairman of the Joint Chiefs of Staff were in agreement that all detainees would get the treatment they would be entitled to under the Geneva Conventions. Id 34.

[43]http://www.cnn.com/2004/images/06/22/bush.memo.pdf.

[44]The Presidential Memorandum was directed to Vice President Richard Cheney, Secretary of State Colin Powell, Secretary of Defense Donald Rumsfeld, Attorney John General Ashcroft, CIA Director George Tenet, Presidential Chief of Staff Andrew Card, National Security Advisor Condoleezza Rice, and Joint Chiefs Chair Richard Myers. It referred to "...our recent extensive discussions regarding the status of al Qaeda and Taliban detainees," and noted the discussions confirmed that application of the Third Geneva Convention to the detainees "involves complex legal questions."

[45]Discussing the announcement of the Presidential Order, Secretary Rumsfeld said that White House lawyers thought long and hard about the situation before making recommendations. The lawyers were worried about the precedent their decision could set about detainees in future conflicts, he added. "Prudence dictated that the U.S. government take care in determining the status of Taliban and Al Qaeda detainees...When the Geneva Convention was signed in 1949, it was crafted by sovereign states to deal with conflicts between sovereign states."

The current war on terrorism is not a conflict envisioned by the framers of the Geneva Convention, he said. Rumsfeld stressed that from the beginning, U.S. forces have treated all Taliban and Al Qaeda detainees humanely. He issued an order in January mandating all detainees be treated in a manner consistent with the Geneva Convention. "Notwithstanding the isolated pockets of international hyperventilation, we do not treat detainees in any other manner than a manner that is humane," Rumsfeld said.

Jim Garamone, *Rumsfeld Explains Detainee Status*, American Forces Information Service, 8 Feb. 2002, http://www.defenselink.mil/news/Feb2002/n02082002_200202086.html.

[46]The Presidential Order of 7 February was somewhat nuanced. In reliance on the Bybee Memo of 22 January, and the Ashcroft Letter of 1 February, it determined that al Qaeda was uncovered by the Geneva Conventions because it is not a party to them. As to the Taliban it

following actions which simply took as a given [47] that the Third Geneva Convention was

accepted that the President had constitutional authority to suspend applicability of the Geneva Conventions to Afghanistan but declined to do so "at this time." Instead, "...based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice" it determined that the Taliban detainees were "unlawful combatants and therefore do not qualify as prisoners of war under Article 4 of Geneva."Sic.

The Order did not clarify the basis for that unlawful combatant finding, but it could only have been made by the President on a finding that while Afghanistan was still a party to the Treaty, the Taliban were not the *de facto* government of Afghanistan. As to other claims of irregularity in uniforms, conduct, and leadership, they clearly do not apply to the regular armed forces of a signatory power, and accordingly could not be, as a matter of law, the basis for a Presidential determination of non applicability. See, Hays Parks: *Special Forces Wear of Non-Standard Uniforms*, 4 Chi. J. Int'l L. 493, See also, Evan Wallach, *Afghanistan, Quirin and Uchiyama: Does the Sauce Suit the Gander?*, The Army Lawyer, (November, 2003). But see, John Yoo and James Ho, *The Status of Terrorists*, 44 VA. J. Int'l L. 207 (Fall 2003) [hereinafter Yoo and Ho] which argues to the contrary based on a misreading of the intent of the drafters Third Geneva Convention regarding application of the four part test of Article 4 (2) to regular armed forces of a signatory power under Article 4 (2). That intent is unquestionably found in the *traveaux preparatoire* of GC3. See, Wallach, *Afghanistan, Quirin and Uchiyama*, *id.* at I (B) (1) (b).

A Fact Sheet issued by the White House on February 7, 2002, does contain a statement that:

> Although we never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Convention, and the President has determined that the Taliban are covered by the Convention. Under the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs.

White House Fact Sheet, February 7, 2002,
http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

How the United States intended that Fact Sheet to be interpreted is facially unclear. As noted above, apparently, it meant the Third Geneva Convention was applicable to Afghanistan, but not to the Taliban either because 1) they were the government of a failed state, or 2) they failed to meet the requirements of Article 4(2). In either case, it appears erroneous.

Interestingly, the Fact Sheet also states that "The detainees will not be subjected to physical or mental abuse or cruel treatment." *Id.* Eventually, that statement apparently became inoperative.

inapplicable to any Guantanamo detainee.[48]

Military Commission Order No. 1, 21 March, 2002

On 21 March, 2002, the Secretary of Defense issued *Military Commission Order No.1* [49] which prescribed procedures under the President's Military Order. While Commission Order 1 finessed the Presidential Order's two/third's sentencing requirement[50] it retained the World War II evidentiary rule and failed to provide a system of independent appeals.

From the sequence of events, and discussion by White House Counsel, it appears fairly clear that the decision by Mr. Bush, and the subsequent orders from Mssr.s Bush and Rumsfeld, were based on the Yoo/Delahunty Memorandum of 9 January, 2002 and the Bybee Memo of January 22., 2002. A close analysis of those documents is accordingly appropriate.

IV

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[47]As the process was explained by Lawrence Di Rita, a Department of Defense Spokesperson:

> ...we've been quite clear that the president had determined that the conflict with al Qaeda was not subject to the Geneva Conventions and that the conflict with the Taliban, while it was subject to the Geneva Conventions, people picked up as Taliban would be considered unlawful enemy combatants because we've had a character of how they fought....So this was the character of the people who were in Guantanamo, not prisoners of war, but unlawful enemy combatants and known al Qaeda terrorists. And it was on that basis that what ultimately became the procedures that General Miller has now talked to at some length were developed...

http://www.defenselink.mil/transcripts/2004/tr20040520-0788.html.

[48]The assumption persists unquestioned. Thus, for example, the Schlesinger Committee Report, discussing the laws of war and the Geneva Conventions simply accepts that "As a result of a Presidential determination, the Geneva Conventions did not apply to al Qaeda and Taliban combatants. Schlesinger Committee Report at 79.

[49] See, http://www.cdt.org/security/usapatriot/020321militaryregs.pdf.

[50] It provides that "An affirmative vote of two-thirds of the members is required to determine a sentence, except that a sentence of death requires a unanimous, affirmative vote of all the members."*Military Commission Order No.*1, Sec. 6(F).

The Yoo/Delahunty Memo January 9, 2002

This Memorandum is written in four parts. The first examines the 18 U.S.C. Section 2441, the War Crimes Act, and some of the treaties it implicates. The second part examines whether members al Qaeda can claim protection of the Geneva Conventions and concludes they can not. The third portion examines application of those treaties to members of the Taliban. It concludes nonapplicability because 1) it says "the Taliban was not a government and Afghanistan was not...a functioning State", 2) "the President has the constitutional authority to suspend our treaties with Afghanistan pending restoration of a legitimate government", and 3) "it appears...that the Taliban militia may have been ...intertwined with Al Qaeda" and thus on the same legal footing. Finally, the fourth part concludes that customary international law does not bind the President or restrict the actions of the United States military [under a constitutional analysis].

The Memorandum is questionable on many grounds. Its central operative flaw, however, from the viewpoint of international law, is that as long as there is a genuine issue of fact or law[51] regarding the status of captured individual combatants who are members of the Taliban or Al Qaeda, the Third Geneva Convention of 1949 must apply, until properly otherwise determined. Article 5 of that Convention provides, in part, that "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." (Emphasis added).

The key to whether there exists any genuine issue of fact or law resides in the Yoo/Delahunty Memo itself, which is the authoritative basis for all the actions which follows. Leaving aside the Memo's American constitutional arguments[52] which present no bar to a delict

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[51]The author suggests the fact or law standard of Fed. R. Civ. P. 56 because it is one with which American courts and lawyers have considerable experience. The any "doubt language" might constitute an even higher barrier to a non-determination of POW status, but the author is satisfied that existing facts and statements of opposition by officials of the United States Government are sufficient to meet test of the Rule 56. See, e.g. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-325 (1986).

[52]The Yoo/Delahunty and Bybee Memos argue at length that the President, as Commander in Chief of the armed forces, must, ipso facto, be endowed with all powers necessary to defend the nation in war time. Thus, they conclude, any action by Congress which derogates from that power would be inherently unconstitutional. As an example they cite the War Powers Act. The Memos raise an interesting question of domestic law. Might a military defendant in an action for breach of the War Crimes Act, raise as a defense, the superior orders of the President requiring a breach of a congressional mandate? The argument raises fundamental

in international law (see,e.g. the Dostler Case)[53], its argument for nonapplicability of Geneva III rests on the claim that as a matter of fact and law the Taliban did not constitute a *de facto* government. The short answer is that while the position is certainly arguable, it is also reasonably arguable that the Taliban were the *de facto* government. They controlled a substantial geographic territory and population, enacted and enforced laws and mandates, carried on relatively complex military operations, appointed persons to governmental posts and received diplomatic recognition from several nations. The core validity of that point is admitted, albeit inadvertently, in the following quote from the 22 January, 2002, Memorandum from Jay Bybee to Alberto Gonzales[54] and William Haynes:

> Whether the Geneva Conventions apply to the detention and trial of members of the Taliban presents a more difficult legal question. Afghanistan has been a party

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separation of powers issues which cut to the core of how American government functions. In its stated form it appears unanswered, but existing authority would seem to cut against it. See, e.g. New York Times Co. v. U.S. 403 U.S. 713, 91 S.Ct. 2140 (1971) ("The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to 'make' a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law."), 403 U.S. at 718; and *Rasul v. Bush*, 124 S.Ct. 2686 (2004) (United States courts have jurisdiction to consider challenges to the legality of detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay).

[53] *Trial of General Anton Dostler*, [hereinafter the Dostler Case]United States Military Commission, 8-12 October, 1945, Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume I, London, HMSO, 1949. Those arguments present a startling analogy to the arguments raised by defendants at the post World War II Nuremburg trials, and elsewhere, that, because they were required by national law to obey superior orders, they had an absolute defense against war crimes committed in carrying out those orders. That so called "superior orders" defense was, and has been since, roundly rejected, although that rejection represented a change from prior law(see discussion in Dostler, *supra*). The point is, of course, that whatever their validity under U.S. national law, they present no defense to an otherwise valid charge of a war crime under international law.

[54]Note also that in his Memorandum to the President, Mr. Gonzales states that there are "reasonable grounds ...to conclude that GPW does not apply with respect to the conflict with the Taliban." The existence of reasonable grounds is simply not the standard for a determination the Third Geneva Convention does not apply. Rather, as noted it is whether "any doubt exist[s]." See, the Gonzales Memo at text accompanying fn 38 *et seq*.

> to all four Geneva Conventions since September, 1956. Some might argue that this requires application of the Geneva Conventions to the present conflict with respect to the Taliban militia...Nevertheless, we conclude that the President has more than ample grounds to find that our treaty obligations under Geneva III toward Afghanistan were suspended during the period of the conflict... the weight of informed opinion indicates that, for the period in question, Afghanistan was a "failed state" whose territory had been held by a violent militia or faction rather than by a government....Second, there appears to be developing evidence that the Taliban leadership had become closely intertwined with, if not utterly dependent upon, al Qaeda. This would have rendered the Taliban more akin to a terrorist organization.

Memorandum of 22 January, 2002 from Jay Bybee, Office of legal Counsel for Alberto R. Gonzales, Counsel to the President and William J. Haynes II, General Counsel of the Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees at pp 10-11. (Emphasis added).

> We want to make clear that this Office does not have access to all of the facts related to the activities of the Taliban militia and al Qaeda in Afghanistan. Nevertheless, the available facts in the public record would support the conclusion that Afghanistan was a failed state...Indeed, there are good reasons to doubt whether any of the conditions were met.

Id. at 16.

What is of particular interest in this analysis is the emphasized language. It is that of argument, not fact, and what it seems to effectively admit is that there is indeed some doubt[55] as to the

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[55]The doubtful nature of the argument is emphasized by the enemy combatant trilogy of cases issued by the Supreme Court on June 28, 2004. In *Hamdi v. Rumsfeld*, 124 S. Ct. 2663 (2004); *Rasul v. Bush*, 124 S.Ct. 2686 (200), and *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), the Court decided various issues affecting the legal status of persons regarded by the administration as enemy combatants unprotected by the Third Geneva Convention. *Hamdi* is of particular importance here.

In the plurality opinion, Justice O'Connor twice refers to "the Taliban regime" and the "Taliban government." 124 S.Ct. At 2635 (emphasis added). That reference does not appear inadvertent. Not only does Justice O'Connor go on to say that, "...it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention", citing AR 190-8 §§ 1-6. Id at 2651, but Justice Souter in his concurrence, notes that:

status of the Taliban detainees.[56] That, of course, triggers the requirements of Geneva Convention Article 5 for a competent tribunal to determine status, and mandates treatment as a POW until the tribunal is held.[57] Judge Bybee later discusses Article 5:

> For now it is enough to recognize that the Government's stated legal position in its campaign against the Taliban...is apparently at odds with its claim here to be acting in accordance with customary law of war...In a statement of its legal position cited in its brief the Government says that "the Geneva Convention applies to the Taliban detainees...

Id at 2657 (citations omitted).

[56] Indeed, in a Notice of Motion and Respondents' Cross-Motion to Dismiss Consolidated Return to Petition and Memorandum of Law in Support of Cross-Motion to Dismiss,, filed on 6 August, 2004, in Swift v. Rumsfeld, No. CO4-0777 RSL, USDC (W.D. Wa), the government states that "United States and coalition forces have removed the Taliban from Power," at p.5 (emphasis added), and that "In the context of ...the removal of the Taliban from power...the United states...has seized and detained numerous persons fighting for and associated with the enemy during the course of the ongoing military campaign." Id.(Emphasis added),

[57]As Usual, Hays Parks makes the point most cogently:

> References to al Qaeda and the Taliban as separate entities constituted an incomplete and inaccurate picture. The enemy consisted of a loose amalgamation of at least three groups: the Taliban regime (until its December 2001 collapse, following which it reverted to its tribal origins), the al Qaeda terrorist group, used as the Praetorian Guard for the Taliban leadership (both for internal security prior to and following commencement of US/Coalition operations), and foreign Taliban. The picture was further complicated by the tendency of some to refer to the Taliban as the *de facto* government of Afghanistan, because it exercised rough control over 80 percent of Afghanistan. This was open to debate until the collapse of the Taliban, at which time it ceased to be an issue. Until the collapse of the Taliban regime in December 2001, a strong case could be made that this was an internal conflict between non-state actors in a failed state. By the time Army Civil Affairs entered Afghanistan, the case was absolute.

Hays Parks: *Special Forces Wear of Non-Standard Uniforms*, 4 Chi. J. Int'l L. 493, 505. Footnotes omitted, emphasis added.

Interestingly, John Yoo makes the same point at a later date.

> "Should any doubt arise as to whether persons, having committed a belligerent act, and having fallen into the hands of the enemy," article 5 of Geneva III requires that these individuals "enjoy the protections" of the Convention until a tribunal has determined their status. As we understand it, as a matter of practice prisoners are presumed to have article 4 POW status until a tribunal determines otherwise. Although these provisions seem to contemplate a case-by-case determination of an individual detainee's status the President could determine categorically that all Taliban prisoners fall outside article 4. Under Article II of the Constitution, the President posesses the power to interpret treaties[58] on behalf of the Nation.He could interpret Geneva III, in light of the known facts concerning the operation of the Taliban...to find that all of the Taliban forces do not fall within the legal definition of prisoners of war as defined by article 4. A presidential determination of this nature would eliminate any legal "doubt" as to the prisoners' status, as a matter of domestic law, and would therefore obviate the need for article 5 tribunals.

Id. at 30-31.[59]

> Unlike al Qaeda, the Taliban Militia arguably constituted the de facto government of Afghanistan. To be sure, there is a good case to be made that the Taliban militia was not even the legitimae government of Afghanistan. Afghanistan had all the characteristics of a failed state...On the other hand, the Taliban militia did effectively control a majority of the territory and population of Afghanistan, and Afghanistan is a party to the Geneva Conventions. [Followed by an argument that the Taliban failed to meet the four part test of Article 4(2).

See, Footnote 46 *supra*]. Yoo and Ho at p.218, fn 46 *supra,* (Emphasis added).

[58]After an effective concession that Articles 4 and 5 "seem to contemplate" status determination on an individualized basis, Judge Bybee's conclusion that presidential treaty interpretation power allows a categorical factual determination seems to be a logical *non sequitur*. Interpretations of law, no matter how phrased, are simply not determinations of factual status. While, perhaps an argument could rationally be constructed to claim that the President could constitutionally determine the interpretation of a treaty, this rationale veers off that path to state instead that the President, having the power to interpret the meaning of a treaty, can then alter the reality of existing facts, even if the treaty means what it "seems to contemplate." Any such approach is incompatible with the core concepts of rule of law, coequal branches of government and separation of powers. See, *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 1803 WL 893 (U.S.Dist.Col.), 2 L.Ed. 60 (1803).

[59]What the Memorandum does not discuss is what appears to be the author of this article to be a fundamental question. How could the Taliban have harbored members of al Qaeda

This argument presents an interesting question of domestic law as to whether a Commander in Chief can order a violation of international law by making a factual finding unsupported by independent evidence. Could one charged under the War Crimes Act (18 U.S.C. 2441) assert as a defense that as a matter of domestic law there was no grave breach, even though it was clearly a violation of international law? The answer to that proposition is beyond the scope of this discussion, although it appears questionable. What the argument does not do, however, for the same (Dostler Case)[60] reasons above discussed, is present any defense to charges by any other Geneva III signatory charged to prosecute perpetrators of grave breaches wherever they may be found.

In any case, because doubt as to the POW status of Taliban detainees appears with considerable force to exist, the language of Article 5 provides them with POW status until

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without controlling a defined territory and population?

In a speech to a joint session of Congress on 21 September, 2001, President Bush noted that "The leadership of al Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of that country." He demanded that, inter alia, the Taliban "Deliver to United States authorities all of the leaders of Al Qaeda who hide in your land," and that it "hand over every terrorist and every person and their support structure to appropriate authorities...The Taliban must act and act immediately. They will hand over the terrorists or... share in their fate." (Emphasis added). http://www.cnn.com/2001/US/09/20/gen.bush.transcript/

International law defines a state generally as "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." Kadic v. Karadzic, 70 F. 3rd 232 244-45 (2nd Cir. 1995). The Taliban did obtain formal recognition as the de jure government from three U.N. member states. Prior to September 11, 2001 the United Arab Emirates, Saudi Arabia and Pakistan had formally recognized them as the government and entered into diplomatic relations. See, http://www.cnn.com/2001/US/09/21/gen.america.under.attack/.

It would seem axiomatic that the other two requirements of statehood must have been met. That is, unless the Taliban controlled a defined territory and population the United States could not have demanded that they deliver all the al Qaeda terrorists "who hide in your land." President Bush's reference to the Taliban's control of "most of that country" only strengthens that position. See, also, Wallach, *Afghanistan, Quirin and Uchiyama:*, *supra* at fn 33.

[60]See The Dosteler Case supra at fn. 53.

determined otherwise by a proper tribunal.[61]

V

The Legal Effects of Applicability of the Third Geneva Convention

Article 5's requirement that prisoners "shall enjoy ... protection..." as prisoners of war until properly determined to be outside the Convention, creates a duel dilemma for the United States. Not only has it promulgated rules for military tribunals which constitute grave breaches of GC3, it has also treated detained individuals in a manner which clearly violates the Convention's strictures. To the extent that persons entitled to the "any doubt" standard of Article 5 have not properly had their status determined before a competent tribunal, that protection continues in force. It appears beyond doubt that such a tribunal was not provided, and that the decision to deny it was intentional.

A

No Captured Persons Held at Guantanamo Have Been Provided With Or Offered A Tribunal Which Satisfies Article 5 of GC III

None of the screening processes applied to the Guantanamo detainees, either pre-shipment from Afghanistan, during incarceration, or following the Supreme court's mandate in *Hamdi*[62], meets the requisites of Article 5. Those requirements are satisfied by the Army Regulation dealing with Prisoners of War[63], but its provisions have not been applied at

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[61]In an appearance with the author at the Federalist Society in New York on 27 September, 2004, John Yoo said to the audience that, in fact, his arguments regarding non-state status had been rejected by the White House, and that determination of non-combatant status was based on the four part test of Article 4 (2). That rationale does not appear from the Presidential order, fn 43, *supra*, but if it is correct, the concession that the Taliban were the army of a *de facto* state only makes the existence of a genuine doubt as to POW status more compelling. Not only is the four-part test inapplicable to state armed forces, fn 46, *supra*, but its factors as applied to irregular forces not part of the state's army, may arguably require an individualized determination varying from unit to unit. Thus, for example, the wearing of a recognizable sign, the bearing openly of arms, and obeying the laws of war may well vary from person to person and unit to unit.

[62]124 S. Ct. 2639. In her plurality opinion Justice O'Connor pointed out that "...the Government has never provided any court with the full criteria it uses in classifying individuals as [enemy combatants."

[63]AR 190-8.

Guantanamo.

1

No Article 5 Tribunal Has Been Convened or Held Regarding Any Captured Member of Al Qaeda[64] or the Taliban

The Army Regulation governing treatment of POWs directly incorporates Article 5. Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* [65] [hereinafter AR 190-8] provides that:

> In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belliegerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the ... Convention, until such time as their status is determined by a competent tribunal. ...A competent tribunal shall be composed of three commissioned officers, one of whom must be of field grade. ...Another officer, [preferably a JAG] shall serve as the recorder.

See, Army Regulation 190-8, Section 1-6.

AR 190-8 1-6(e) then establishes the procedures for a competent tribunal. It requires that, inter alia, tribunal members and the recorder be sworn, a written record be made of the proceedings, proceedings be open except for deliberation and voting "or other matters which would compromise security," that persons whose status is to be determined be advised of their rights, be allowed to attend all open hearings, be allowed to call reasonably available witnesses and to question witnesses called by the Tribunal, to testify or otherwise address the Tribunal, and that they may not be compelled to testify. "Preponderance of evidence shall be the standard used in reaching this determination."[66]

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[64]The status of an al Qaeda detainee is, of course, problematical and fact driven. Often, it appears most closely analogous to pirates or common criminals. The problem arises if captured persons functioned, as alleged in the Yoo/Delahunty Memo, as an intertwined part of al Qaeda. Given the amorphous nature of al Qaeda, on any given day the individual's status might be as a Taliban fighter, an irregular militia supporter, a Taliban agent, a terrorist or a common criminal.

[65]http://www.usapa.army.mil/pdffiles/r190_8.pdf.

[66]Of particular interest here, the Regulation requires that where a witness is not reasonably available "...written statements, preferably sworn, may be submitted and considered as evidence." Ibid at § (e) (6). Thus there appears to be a vital distinction between AR 190-8 screening, and the tribunal procedure. While the screening panel is permitted to admit affidavit

The Army's adoption of specific procedures to satisfy the 'competent tribunal" requirement is not, of course, definitive. While it demonstrates the Army's conclusion that the procedures set out in AR 190-8 meet the procedural requirements for such a tribunal, there might be any number of other processes designed by GC3 signatories, which result in a competent tribunal using differing national standards consistent with the underlying notions of fair play and substantial justice embodied in the Convention[67].

What adoption of those procedures does definitively establish, however, is 1) a set of self-binding administrative regulations which cannot be haphazardly abandoned under domestic law[68], and 2) more importantly in the international context, a concession that in order to meet the Convention's underlying requirement that national standards applicable to capturing powers' own soldiers be used in judging potential liability of enemies captured on the battlefield[69], standards at least consistent with national procedures, as well as the Third Geneva Convention must be applied.[70]

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evidence (which would be, unless it met an exception, hearsay), and indeed unsworn affidavit evidence where necessary, it is not permitted to use evidence obtained in violation of the protections provided to POWs by the Third Geneva Convention. That right against forced self-incrimination is clearly articulated... "Persons whose status is to be determined may not be compelled to testify before the tribunal." AR 190-8 (6)(e)(8).

[67] See, e.g. Article 99 "No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused."

[68]The United States Supreme Court has held that while an agency is free to change its policy based on either a change of circumstances or a changed view of the public interest, "an agency [that] changes its course must supply a reasoned analysis" for the change. *Motor Vehicle Mffs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57, 77 L. Ed. 2d. 443, 103 S. Ct. 2856 (1983).

[69]See, *inter alia*, GC3 Article 102.

[70]Thus, for example, the requirements of AR 190-8 1-6(e) that proceedings be open except for deliberation and voting "or other matters which would compromise security," comports with Article 105's provision that "„„representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held in camera in the interest of State security," and the provision that "they may not be compelled to testify," seems mandated by Article 99, "No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused," as well as U.S. national standards.

In any case, having established the national standard for determining who is a POW, the United States may not abandon it at will. To do so would fly in the face of every concept of rule of law and regulation of armed conflict developed over the past two hundred years. It would also be a direct and criminal violation of the standards for minimal conflict in war time developed at Nuremburg.[71] Unfortunately, however, the screening processes developed for those persons

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[71]Principles of International Law Recognized in the Charter of the Nuremburg Tribunal and in the Judgment of the Tribunal. Adopted by the International Law Commission of the United Nations, 1950.

Principle I
Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II
The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III
The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV
The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V
Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle Vl
The crimes hereinafter set out are punishable as crimes under; international law:

Crimes against peace:
Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

confined at Guantanamo have not met AR 190-8 standards.[72]

2

The Process Used For Screening Enemy Combatants Prior to Incarceration At Guantanamo Does Not Meet Article 5 Requirements

According to a Fact Sheet issued by the Department of Defense in February, 2004[73], the process for screening persons shipped to Guantanamo included an initial enemy combatant determination,[74] assessment in the field, centralized assessments in the area of operations,[75]

War crimes:
Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory, murder or illtreatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

Crimes against humanity:
Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII
Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principles VI is a crime under international law.

English Text published in Report of the International Law Commission Covering its Second Session, 5 June-29 Duly 1950, Document A/1316, pp. 11-14.

[72]Failure to meet those standards is not, of course, in itself a crime. What it may create, however, is a situation in which a prisoner continues to be entitled to POW status and GC3 protections because he has not been determined to be otherwise by a competent tribunal. That status, and its protections, may then constitute an element of a criminal violation, where other facts, such as improper interrogation techniques, or a trial in violation of Article 102, are present.

[73]http://usinfo.state.gov/dhr/Archive/2004/Mar/17-718401.html

[74]"At the time of capture and based on available information, combatant and field commanders determine whether a captured individual was part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United

a general officer review,[76] DOD review,[77] and a further assessment at Guantanamo.[78] None of those reviews comports with, or even resembles, the requirements of AR 190-8.[79] Although there is some procedural improvement, the Combatant Status Review Panels established in 2004 to screen all Guantanamo detainees, have similar failings.

3

Combatant Status Review Panels Do Not Meet Requirements of Article 5

On 7 July, 2004 Depurty Secretary of Defense Paul Wolfowitz, following the issuance of

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States. Such persons are enemy combatants." Id.

[75]"A military screening team at the central holding area reviews all available information, including interviews with detainees. With assistance from other U.S. government officials on the ground (including military lawyers, intelligence officers, and Federal law enforcement officials) and considering all relevant information (including the facts from capture and detention, threat posed by the individual, intelligence value, and law enforcement interest) the military screening team assesses whether the detainee should continue to be detained and whether transfer to Guantanamo is warranted."

[76]"When determining whether a detainee should be transferred, the combatant commander considers the threat posed by the detainee, his seniority within hostile forces, possible intelligence that may be gained from the detainee through questioning, and any other relevant factors." Id.

[77]"An internal DOD review panel, including legal advisors, reviews the recommendations of the combatant commander and advises the Secretary of Defense on proposed detainee movements to Guantanamo. All available information is considered, including information submitted by other governments or obtained from the detainees themselves." Id.

[78] "Reviews are based on all relevant information, including information derived from the field, detainee interviews, U.S. intelligence and law enforcement sources, and foreign governments. Id.

[79]Thus, for example, the military screening team at the central holding area which reviews all available information, including interviews with detainees and considers all relevant information to assesses whether further detainment and/or transfer to Guantanamo is warranted, see fn74, *supra*, provides none of the procedural safeguards such as a right against self-incrimination, found in AR 190-8 and GC3 Article 99.

the Supreme Court's enemy combatant trilogy[80] promulgated an Order establishing a Combatant Status Review Tribunal.[81] That procedure requires that detainees be notified of the opportunity to contest his designation as an enemy combatant and be assigned a military officer to assist in the review process and with the ability to review "reasonably available" DOD information relating the detainee's classification. Each Tribunal is to be composed of three neutral commissioned officers including a judge advocate, with another officer as a non-voting Recorder. Section g of the Order establishes the tribunal's procedures. Section (g)(9) is of particular interest:

> The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances. The Tribunal does not have the authority to declassify of change the classification of any national security information it reviews.

Order establishing a Combatant Status Review Tribunal at Section (g)(9).

Comparison of that procedure with AR 190-8, Section (6)(e)(8) is enlightening. The Army created screening panel allows hearsay affidavits as a specific exception. It does not provide the wholesale Querin exception to evidentiary procedure found in the Rules for Military Tribunals. That exception is apparently intended to vitiate the right against self-incrimination by allowing the admission of information obtained in a fashion which would make it excludable in a court of law.[82] Otherwise, the change in language from AR 190-8 to Section (g)(9) to make

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[80]See, footnote 55, *supra*. The Court found crucial the lack of "any legal proceeding to determine...status." *Rasul v. Bush*, *supra*, Justice Kennedy concurring at 2700. The majority opinion notes that:

> Petitioners' allegations–that although they have engaged in neither combat nor acts of terrorism against the United States, they have been held in Exceutive detention for more than two years...without access to counsel and without being charged with any wrongdoing–unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States."

Id at 2698,footnote 15 (citations omitted).

[81]Order Establishing Combatant Status Review Panels, 7 July, 2004. http://www.pentagon.mil/news/Jul2004/d20040707review.pdf

[82]James Risen. David Johnston and Neil Lewis, *Harsh C.I.A. Methods Cited in Top Qaeda Investigations*, New York Times, 13 May 2004:

hearsay exemplary rather than exclusive makes no sense. Essentially then, what the DOD has done in promulgating this Order is to reiterate its ability to obtain information in a manner in violation of the Third Geneva Convention[83] and to use that information in a manner adverse to the person from whom it was obtained. If that individual is someone who is, in fact, presumed to be a POW under GC3 Article 5, the implications are troubling.

B

Failure To Screen Under Article Five Leave Captured Enemy Combatants In A Presumed POW Status Which Is Not Retroactively Vitiated By A Later Proper Screening

The language of the Prisoner of War Convention is very clear. Article 5 of GC3 provides, in part, that:

> 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.

> The methods employed by the C.I.A. are so severe that senior officials of the Federal Bureau of Investigation have directed its agents to stay out of many of the interviews of the high-level detainees, counterterrorism officials said. The F.B.I. officials have advised the bureau's director, Robert S. Mueller III, that the interrogation techniques, which would be prohibited in criminal cases, could compromise their agents in future criminal cases, the counterterrorism officials said.

[83]In any case, the Combatant Status Review Panels are in violation of Article Five because they act in violation of the Article. That argument is not circular. In a recent filing in Al Ajmi v. United States, 02-CV-0828 (CKK) United States District Court for the District of Columbia, the government provided a copy of the record of proceedings before the Combatant Status Review Tribunal related to Al Ajmi attached to the Declaration of James R. Crisfield Jr. The conclusion of the Tribunal is telling. "The detainee is properly classified as an enemy combatant because he willingly affiliated himself with the Taliban." Id at Paragraph 7(b) (Emphasis added). Thus, the screening authorities are still taking as binding authority the Presidential Order of 7 February, 2002, and they are still failing to make an independent judgment about a detainee's status. Having failed to do so, as long as doubt continues to exist about an individual status, the presumption of Article Five persists, and violation of his rights under the Third Geneva Convention continue to violate the law.

(Emphasis added).

Accordingly, any such persons are protected by the Third Geneva Convention until a competent tribunal determines otherwise. The language of the Convention on determination of non-POW status determination is purely prospective, and it appears quite certain that such a determination if it did occur, would not operate retroactively to validate actions by captors which were otherwise violations of the rights of protected persons.

Thus, in *United States v. Uchiyama*[84], a United States military commission tried the Commanding General of the Japanese Fifteenth Area Army, his Chief of Staff, his Judicial Officer, the three members of the Japanese commission, the prosecutor and the executioner who carried out death sentences imposed by that body and confirmed by the convening authority. Defense counsel attempted to argue that the executed American airmen had, in fact been guilty of war crimes for the firebombing deaths of hundreds of thousands of Japanese civilians.

The prosecution argued, and the court accepted the argument, that the substantive guilt or innocence of the executed Americans was irrelevant to the case at hand. Rather, it argued, a capturing power was bound to apply certain minimum trial standards, even to crimes not committed as a POW,[85] and that the failure of the Japanese court martial to do so resulted in

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[84](Tried at Yokohama, 18 July, 1947), Case-35-46, War Crimes Branch Case Files, Records of the Judge Advocate General (Army), Record Group 153 (National Archieves, Suitland, MD).

[85]At the time, under the 1929 Geneva Convention, the United States took the position that fair trial requirements applied only to crimes committed while the accused was a prisoner of war, and not to war crimes before capture. See, *Yamashita v Styre,* 327 U.S. 1, 66 S.Ct. 340 *(1945)*. Accordingly, the defense moved for acquittal. Id. At pp. 22-23. The prosecution argued, based on other similar trials of Japanese convening authorities, that while the specific procedural protections of the 1929 Geneva Convention did not apply, the customary protections of the laws of war did. Id at pp. 24-26. The Motion was denied. Id. At p. 28.

The Yamashita position regarding applicability of Geneva procedural protections only to post capture crimes was specifically rejected and changed by the drafters of the 1949 Prisoner of War Convention. Article 85 of the 1949 Convention contains a provision not found in the 1929 Convention analyzed in Yamashita that:

> Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.

substantive liability of the convening authority, the members of the court and the prosecutor for the deaths of the American defendants caused by a unfair trial, even if the airmen had been guilty of illegally bombing civilians. [86]

The analogy here to the Uchiyama authority is straightforward. A capturing power may not treat a person protected by the laws of war or the Geneva Conventions in a manner which violates those laws or the Convention and then be heard to say that it later learned he should have

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In discussions of Article 74 of *the Stockholm Draft* (the precursor to GC3 Article 85) the representative of the Netherlands:

> ...pointed out that the 1929 Convention only dealt with crimes committed during captivity. That view had been adopted by the Supreme Court of the United States of America...The Conference of Government Experts of 1947 considered it reasonable, however, not to deprive a prisoner of war of the protection of the Convention on the mere allegation that he had violated the laws and customs of war, but to leave him under the protection of the Convention until such violation had been proven in a court of law, in other words until he had been sentenced by a court of such a crime or offense.

Committee II, 18th Meeting at p.318 (emphasis added).

[86]The prosecution's opening statement before that U.S. commission is telling:

> From a reading of the trial brief filed by the defense in this case prior to the arraignment,...it became apparent to the prosecution that by way of defense the accused would have the Commission conduct a posthumous trial of Lt. Nelson and Sergeant Augunas with the hope of having them adjudicated guilty of some offense ... Now the prosecution desires to emphasize and make abundantly clear this one fact: We are now charging the accused with having failed to have applied to these prisoners of war the type of procedure that they were entitled to. In other words they applied to them a special type of summary procedure which failed to afford them the minimum safeguards for the guarantee of their fundamental rights which were given them both by the written and customary laws of war. While we do not for a moment admit that Lt. Nelson or Sergeant Augunas were guilty of any offense, we none the less say that if they were guilty, under international law they were nevertheless entitled to the minimum standard of a fair, lawful and impartial trial. What they may have done cannot now be heard as a defense for failure of these accuded to afford them a proper trial as defined under international law.

United States v. Uchiyama, Trial Transcript at pp.20-21(emphasis added).

been unprotected[87].

C

The Effects of Denying Screening Are Not Merely Procedural

The protection provided to a captured person by the Article 5 presumption is not merely procedural. As long as the Convention protects an individual, grave breaches of its provisions constitute a breach of both U.S. and international law.

Article 130 of the Convention provides that grave breaches include "... any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention."

Similarly, 18 § 2441, "War Crimes" provides, in part, that any national of the United States who commits a war crime, "shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death." The term "war crime" as used in the statute means, inter alia, "any conduct defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party."

Thus, the status of individuals tried before military tribunals is not one of mere academic curiosity. If a detainee, classified by the United States as an enemy combatant unprotected by the Third Geneva Convention, is tried in a manner violative of that Convention, and if there is some doubt as to his status as a POW, the trial is itself a grave breach if it does not follow regular court martial procedures.[88]

D

Conclusion Regarding Legal Effects of Application of GC3

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[87] See also, Trial of General Tanaka Hisakasu and Five Others, United States Military Commission, Shanghai, 13 August-3rd September, 1945, Law Reports of Trials of War Criminals. Selected and Prepared by the United Nations War Crimes Commission. Volume VI, London: HMSO, 1948. http://www.ess.uwe.ac.uk/WCC/hisakasu.htm.

[88]For more detailed discussion of these rights and procedures see, Wallach, *Afghanistan, Quirin and Uchiyama: Does the Sauce Suit the Gander?*, The Army Lawyer, (November, 2003).

The Bush Orders of January and February, 2002, denying Geneva Convention protection to captured members of the Taliban and Al Qaeda appear inherently flawed. The international law analysis upon which they are based relies on a factual position, that the Taliban were not the *de facto* government of Afghanistan, which is subject to some doubt. Thus, acts carried out in furtherance of those orders, if themselves violations, might, accordingly, constitute war crimes. The determination that the Taliban and Al Qaeda were uncovered by the Third Geneva Convention seems logically to be the first of a two step process undertaken by the Bush Administration to legally justify the use of interrogation methods violative of that Convention. An examination of those methods, their rationale, and legality is thus appropriate, for as a DOD Working Group[89] determined in examining useful interrogation techniques:

> ...it became apparent that any decision whether to authorize a technique is essentially a risk benefit analysis that generally takes into account the expected utility of the technique, the likelihood that any technique will be in violation of domestic or international law, and various policy considerations. Generally the legal analysis that was applied is that understood to comport with the views of the Department of Justice. Although the United States, as a practical matter, may be the arbiter of international law in deciding its application to our national activities, the views of other nations are relevant in considering their reactions, potential effects on our captured personnel in future conflicts, and possible liability to prosecution in other countries and international forums for interrogators, supervisors and commanders involved in interrogation processes and decisions.

Working Group Report at p.66. Emphasis added.
http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf

[89]See, discussion of Working Group *infra* at Section VI (A) (1) (c).

VI

Interrogation Techniques Used Against Members of the Taliban and Al Qaeda Violated the Third Geneva Convention and, If Any Such Person Was Protected by the Convention, Constituted A Grave Breach

From the date the United States began capturing prisoners in Afghanistan[1] questions of their Geneva Convention status, and thus how they could be questioned, necessarily arose.[2] The Third Geneva Convention, of course, substantially limits methods for interrogating enemy POWs.

A

Interrogation Methods Against Members of the Taliban And Al Qaeda

The key to legal analysis of the position taken by the United States regarding interrogation of captured members of Al Qaeda and the Taliban, as it relates to any prisoner of war status they might possess, may be found in a *Memorandum For Alberto Gonzales Re; Standards of Conduct for Interrogation under 18 USC §§ 2340-2340A*, dated August 1, 2002

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[1]The first substantial U.S. ground operations against the Taliban commenced on 19 October, 2001. John Diamond, *First U.S. Ground Raid Hits Taliban*, Chicago Tribune, 21 October, 2001/ http://www.chicagotribune.com/news/specials/911/showcase/chi-warinafghanistanstrike,0,7664856.story. Much of the ground combat was conducted by allied Afghan forces supported by U.S. special operations troops and air power. Harold Kennedy, *Will Special ops Success "Change the Face of War?"* National Defense Magazine, February, 2002. http://www.nationaldefensemagazine.org/article.cfm?Id=721. Following initially desultory combat, the Taliban rapidly collapsed before the allied forces which captured Herat on 12 November, Kabul 0n 13 November, and Kunduz on 24 November. By 25 November, substantial U.S. conventional ground forces (Marines) were landing in Afghanistan for the first time, and enough prisoners were held from Kunduz alone, that a prison revolt in Mazar-i-Sharif by Taliban and al-Qaeda fighters resulted in the deaths, inter alia, of a CIA agent, about 30 Northern Alliance soldiers, and more than 500 Taliban prisoners. http://www.infoplease.com/spot/taliban-time.html.

[2]It is worth noting that President Bush issued his Military Order providing for trials before tribunals which permitted the admission of evidence which would, in the context of the Third Geneva Convention, be inadmissible, on 13 November, 2001, before the United States held substantial numbers of POWs, see, footnote, 16 *supra*, and well before he determined that GC3 was inapplicable to the Taliban and al Qaeda. See text accompanying footnote 38 *et seq*. The determination to use such evidence seems to indicate early consideration of the use of non-standard interrogation techniques, since ipso facto, evidence obtained through the interrogation techniques found in FM 34-52 is not dissimilar from that obtained using standard American police techniques, and would be admissible in courts martial or district courts.

from Jay S. Bybee of the Office of Legal Counsel.[3] The essence of that Memorandum is that the protections of the Third Geneva Convention for POWs need not be considered in interrogations because they are inapplicable to Al Qaeda and the Taliban.[4] Judge Bybee makes no attempt to justify the use of such violative conduct against POWs, he simply distinguishes it from torture. Thus the questions for discussion here become 1) what interrogation methods were used and against whom? 2) were they permissible under GC3? and 3) what is the relationship of their use to the legal analysis previously discussed?

There is considerable firsthand evidence of interrogation methods consisting of statements by the United States government, accusations by former detainees, and leaked or released information, documents and photographs; more may be inferred from what is known. Thus, for example, if it is a known fact that detainees were forcibly shaved[5] prior to their transportation to Guantanamo Bay, and that the maintenance of a full beard is considered a religious obligation by such individuals[6], it may be inferred that a possible object of that shaving was intimidation or psychological degradation of the prisoner.[7] This analysis will first discuss admitted interrogation techniques (including some which the United States government says were unauthorized). Then it will look at allegations of interrogation methods alleged by former detainees which have not been revealed, or which the administration says were not authorized for

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[3] http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf. See also, Letter of August 8, 2002, from Jay Bybee to Alberto Gonzales opining that no International Criminal Court jurisdiction would lie for acts discussed because under Article 8 of the Rome Statute to constitute a war crime torture must be committed against persons protected under the Geneva Conventions, and relying on President Bush's determination that neither members of the Taliban nor al Qaeda are so protected. (Citing the Yoo/Delahunty Memo, supra). http://news.findlaw.com/wp/docs/doj/bybee80102ltr6.html

[4]Similarly, the Working Group Report of 4 April, 2003, fn 88, *supra*, while recognizing the impropriety of application of many of the interrogation techniques to Prisoners of War, largely avoids the issue by accepting as valid the command determination that all captured persons at issue in the Report are unlawful combatants unprotected by GC3.

[5]The Fay report notes that at Abu Ghraib it was alleged a civilian analyst "...bragged and laughed about shaving a detainee and forcing him to wear women's red underwear."

[6]In 1998, the Taliban declared the maintenance of a full beard by men a religious compulsion and announced punishment of 45 days in jail for those who shaved, and seven lashes for those who trimmed their beard. http://www.rawa.org/beard.htm.

[7]The Schlesinger Committee Report references in its glossary a"Behavioral Science Coordination Team" which it defines as a "team comprised of medical and other specialized personnel that provides support to special operations forces." It might be a fruitful area of research to review those teams' analyses of cultural weaknesses of Moslem prisoners.

use against that detainee at the time or place alleged.[8]. The legal analysis articulated by the United States will then be briefly discussed. Finally, this section will examine what appears to be the relationship of the tribunals rules and procedures, and Department of Justice positions on applicability of the Third Geneva Convention and standards of conduct for interrogation.

1

Interrogation Techniques Revealed By the United States

A number of interrogation techniques have been discussed internally by the United States government as used or approved for use. They include standard Army methods in compliance with the Third Geneva Convention, as well as other approaches which are either questionable or clearly exceed the strictures protecting POWs. Several of the latter may also violate other limitations outside the scope of this article.[9] The best place to begin any analysis of interrogation techniques used by the United States in war time is with the standard interrogation approach found in the U.S. Army's field manual on Intelligence Interrogation.

a

The Army Intelligence Interrogation Field Manual

Army FM 34-52, *Intelligence Interrogation*[10] is the Army's standard for interrogation of captured enemy personnel. It was the basis for the initial interrogation techniques used at

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[8]Thus, for example, certain interrogation techniques authorized for use at Guantanamo during a relatively short time between December, 2002 and January, 2003, were allegedly used against prisoners at Abu Ghraib, Iraq, in 2004.

[9]Because this article deals with rights inherent to POWs, in an international conflict, it does not closely consider the protections more broadly applicable to other detained persons. Those might include, common article 3 of the 1949 Geneva Conventions, the Torture Convention, the Universal Declaration of Human Rights, http://www.hrweb.org/legal/udhr.html, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1)**,** Adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armned Conflicts**,** *entry into force* 7 December 1979, in accordance with Article 95, (The Protocols are unratified by the United States, however, The Geneva Conventions contain the Martens Clause requiring that in cases not covered by the Conventions, the Protocols or other international agreements, "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." Accordingly, the Additional Protocols might be considered customary law.).

[10]http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/toc.htm.

Guantanamo.[11] The DOD says that from January 11, 2002, when the first detainees arrived at Guantanamo "... doctrine contained in Field Manual 34-52 guided interrogations" until December 2002. It says that ...initial approaches governing interrogations at Guantanamo were in accordance with the standing doctrine outlined in FM 34-52. These procedures include 17 techniques such as direct questioning and providing incentives."[12]

That Field Manual requires in Chapter 1, under the heading Prohibition Against Use of Force, that:

> The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor. condoned by the US Government. Experience indicates that the use of force is not necessary to gain the cooperation of sources for interrogation. Therefore, 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. However, the use of force is not to be confused with psychological ploys, verbal trickery, or other nonviolent and noncoercive ruses used by the interrogator in questioning hesitant or uncooperative sources.
>
> The psychological techniques and principles outlined should neither be confused with, nor construed to be synonymous with, unauthorized techniques such as brainwashing, mental torture, or any other form of mental coercion to include drugs. These techniques and principles are intended to serve as guides in obtaining the willing cooperation of a source. The absence of threats in interrogation is intentional, as their enforcement and use normally constitute violations of international law and may result in prosecution under the UCMJ.
>
> Additionally, the inability to carry out a threat of violence or force renders an interrogator ineffective should the source challenge the threat. Consequently, from both legal and moral viewpoints, the restrictions established by international law, agreements, and customs render threats of force, violence, and deprivation useless as interrogation techniques.

In its discussion of proper interrogation techniques, FM 34-52 identifies two pertinent phases; approach and questioning. It notes that "...all approaches in interrogations have the following purposes in common: to establish and maintain control over the source and the interrogation; to establish and maintain rapport between the interrogator and the source; and to

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[11]Beaver Brief, *infra* at Section V (B) (3).

[12]Department of Defense News Release, *DOD Provides Details on Interrogation Process*, 22 June, 2004. http://www.defenselink.mil/releases/2004/nr20040622-0930.html. See Appendix 1.

manipulate the source's emotions and weaknesses to gain his willing cooperation.[13] It adds that "The number of approaches used is limited only by the interrogator's imagination and skill. Almost any ruse or deception is usable as long as the provisions of the Geneva Conventions are not violated. The Geneva Conventions do not permit an interrogator to pass himself off as a medic, chaplain, or as a member of the Red Cross (Red Crescent or Red Lion)."[14]

Interrogation then shifts to the questioning phase. "Although there is no fixed point at which the approach phase ends and the questioning phase begins, generally the questioning phase commences when the source begins to answer questions pertinent to the specific objectives of the interrogation."[15] The questioning techniques discussed are not dissimilar to those found in domestic police investigations: the use of non-pertinent questions, for example, to conceal objectives or strengthen rapport, and of repeated questions to assess the source.[16]

b

The Development of Additional "Counter Resistance Strategies"

Following the creation of the detention center at Guantanamo Bay, interrogators apparently used methods approved by FM 34-52 but with limited success.[17] By October, 2002,

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[13]*Id*. at Chapter 3.

[14]*Id.*

[15]*Id.*

[16]*Id.*

[17]The use of those methods, and their limitations is discussed in Request for Approval of Counter Resistance Strategies of 11 October, 02, http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf. The limitations of FM 34-52, and the Third Geneva Convention, however, were apparently not entirely observed even prior to this date. At least from the time prisoners were shipped to Guantanamo, their beards were forcibly shaved. U.S. Authorities justified the act as necessary for hygiene. http://www.ccr-ny.org/v2/reports/docs/ltr%20to%20Sentate%2012may04v2.pdf. Article 14 of GC3 provides in part,that "Prisoners of war are entitled in all circumstances to respect for their persons and their honour," and Article 16 provides for no adverse distinction based upon, inter alia, "religious belief." Article 34 provides that "Prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities." In 1945, Australian authorities prosecuted Japanese guards who shaved the beards of Sikh prisoners of war and forced them to smoke cigarettes in violation of their religious beliefs. U.N. war crimes series, *Trial of Tanaka Chuichi and Two Others*, Case No. 65, Australian Military Court at Rabaul, 12 July, 1946, Law Reports of Trials of War Criminals, Vol. XI, H.M.S.O. (London, 1949).

Joint Task Force authorities were seeking approval for the use of additional means.

i

The Request For Approval of Counter Resistance Strategies

In early October, 2002, Joint Task Force 170,[18] the SOUTHCOM entity charged with prisoner interrogation at Guantanamo Bay forwarded a Request for Approval of Counter Resistance Strategies[19] [hereinafter Request for Approval] of 11 October, 02[20]. That, in turn, was forwarded to the Joint Chiefs of Staff by Commander SouthCom on 25 October, 02.[21]

The Request noted[22] that "current" interrogation guidelines[23] "limit the ability of

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[18] United States Southern Command ("SOUTHCOM") established Joint Task Force 160/170, which was responsible for operating the detainee detention facility and conducting interrogations to collect intelligence in support of the War on Terrorism. Joint Task Force 160 was established in January 2002 and was tasked with taking care of captured enemy combatants from the war on terrorism. Joint Task Force 170 was stood up by Southern Command on 16 February 2002, and tasked with handling interrogation operations for the Department of Defense as well as ensuring coordination among government agencies involved in the interrogation of the suspected terrorists. http://www.globalsecurity.org/military/agency/dod/jtf-gtmo.htm.In August,2002, "based on difficulties with the command relationships," they merged into Joint Task Force Guantanamo. Final report of the Independent Panel to Review DoD Detention Operations, at 71, (Aug. 2004). http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf.

[19] *Supra* at fn. 105.

[20] The Request was accompanied by a Legal Brief on Proposed Counter-Resistance Strategies. *infra* at Section V (B) (3**)**. That Brief, by Diane E. Beaver, a USA Army JAG LTC, presumed the correctness of the proposition that detainees at Guantanamo were unprotected by the Geneva Conventions. Paragraph 2. It is discussed in more detail in Section VI(B) below.

[21] http://www.defenselink.mil/news/Jun2004/d20040622doc4.pdf.

[22] See, Appendix 2, supra.

[23] The Beaver Brief, *infra* at Section V (B) (3**),** identified "current techniques" as those outlined in FM 34-52.

The Field Manual discusses low intensity conflicts in chapter 9. It provides that:

interrogators to counter advanced resistance." It proposed three categories of interrogation techniques.[24]

> EPW interrogations are conducted in support of wartime military operations and are governed by the guidelines and limitations provided by the Geneva Conventions and FM 27-10. However, insurgent subversive underground elements who are seeking to overthrow an established government in an insurgency do not hold legal status as belligerents (see DA Pam 27-161-1). Since these subversive activities are clandestine or covert in nature, individuals operating in this context seek to avoid open involvement with host-government police and military security forces. Hence, any insurgent taken into custody by host-government security forces may not be protected by the Geneva Conventions beyond the basic protections in Article 3. The insurgent will be subject to the internal security laws of the country concerning subversion and lawlessness. Action of US forces, however, will be governed by existing agreements with the host country and by the provisions of Article 3 of the 1949 Geneva Conventions.

Id.

> Under the heading Handling of Insurgent Captives and Suspects FM 34-52 provides:
>
> Insurgency is identified as a condition resulting from a revolt or insurrection against a constituted government which falls short of civil war. It is not usually a conflict of international character, and it is not a recognized belligerency. Therefore, insurgent captives are not guaranteed full protection under the articles of the Geneva Conventions relative to the handling of EPWs. However, Article 3 of the Conventions requires that insurgent captives be humanely treated and forbids violence to life and person -- in particular murder, mutilation, cruel treatment, and torture. It further forbids commitment of outrages upon personal dignity, taking of hostages, passing of sentences, and execution without prior judgment by a regularly constituted court.
>
> Humane treatment of insurgent captives should extend far beyond compliance with Article 3, if for no other reason than to render them more suceptible to interrogation. The insurgent is trained to expect brutal treatment upon capture. If, contrary to what he has been led to believe, this mistreatment is not forthcoming, he is apt to become psychologically softened for interrogation. ...

Id. (Emphasis added).

[24]If from no other source, the Joint Task Force was aware of certain cultural issues involving the detainees through discussions with the International Committee of the Red Cross. In notes from a meeting between inter alia Judge Advocates from SOUTHCOM and JTF 160 and

Category I included an initial comfortable environment but if the detainee was determined by the interrogator to be uncooperative, could include 1) yelling (but not loudly enough to cause physical pain), and 2) techniques of deception including multiple interrogators and misidentification of the interrogator as a citizen of a foreign country "with a reputation for harsh treatment of detainees."

Category II, which required the permission of the General in Charge of the Interrogation Section, included "...the use of stress positions (like standing), for a maximum of four hours," the use of falsified documents or reports, solitary confinement for up to thirty days,[25] interrogation in other than the standard interrogation booth, sensory deprivation,[26] hooding with unrestricted breathing, "removal of all comfort items (including religious items)," feeding cold Army rations, removal of clothing, "forced grooming (shaving of facial hair etc.)," and "use of detainees individual phobias (such as fear of dogs) to induce stress."[27]

Category III techniques[28] include the use of "scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family," "exposure

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ICRC representatives on 21 January, 2002, the Red Cross raised the issues of privacy and beards. JAG notes from that meeting include "Islamic people are very private as concerns their bodies" and "Could closely trimmed beards be tolerated?" They also note regarding "red/orange colored clothing" that "In their culture, red clothing as a sign that someone is about to be put to death." The ICRC also articulated the detainees' desires for prayer caps, prayer beads, Korans, and prayer tapes. Two days later, in a Memo to File dated 24 January, 2002, the JTF 160 SJA noted initial responses to the issues raised including the placing of opaque plastic around the showers because "Showering in front of the guards is a great embarrassment to the detainees. Men of the Muslim culture are much more sensitive about their privacy than men in the Western culture." Regarding the issue that "Detainees wish to grow a short beard in accordance with their religion," it was noted the matter, along with return of prayer beads, was "under consideration." Korans were distributed. http://www.washingtonpost.com/wp-srv/nation/documents/gitmomemos.html.

[25] "Extensions beyond the initial 30 days must be approved by the Commanding General. For selected detainees, the OIC [Officer in Charge], Interrogation Section, will approve all contacts with the detainee, to include medical visits of a non-emergent [sic] nature." Request For Approval, *supra*, fn. 105, at paragraph (b)(3).

[26] Described as "Deprivation of light and auditory stimuli." Id at (b)(5).

[27]Id, items 1-12.

[28]Which could only be used after approval by the Commanding General following a request by the Director of the Joint Interrogation Group, with "appropriate legal review" and information to the SOUTHCOM Commander. Id at Paragraph (c). They "may be utilized in a carefully coordinated manner to help interrogate exceptionally resistant detainees. Any of these techniques that requoire light grabbing, poking or pushing will be administered only by individuals specifically trained in their safe application."

to cold weather or water (with appropriate medical monitoring),"[29] "use of a wet towel and dripping water to induce the misperception of suffocation,"[30] and use of "mild, non injurious physical contact such as grabbing, poking in the chest with the finger and light pushing."

ii

Approval of Additional Counter Resistance Techniques

On 2 December, 2002, Secreatry of Defense Rumsfeld,[31] approved Category I and II techniques and the fourth technique in Category III ("mild, non-injurious physical contact").[32] The use of death threats to family, exposure to cold weather and water, and simulated drowning was not approved although DOD General counsel advised they "may be legally available."[33] A number of those techniques were apparently used.[34] On 15 January, 2003, Secretary Rumsfeld

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[29] See Robert Lifton, Doctors and torture, 351 New England Journal of Medicine 415 (29 July, 2004) http://content.nejm.org/cgi/content/full/351/5/415.

[30] The technique is similar to the so-called "water cure" used by American troops against Philippine insurgents at the beginning of the last century. **"**Water cure is a form of interrogation In one variation, of which the subject is tied or held down in a chair and with his face covered with a cloth, water is poured over his face. The subject feels like he is drowning and this is done to encourage the subject to talk. Another variation is to pour water down the thoat of the subject being careful not to drown the subject but to make the subject feel the sensation of drowning." http://www.campusprogram.com/reference/en/wikipedia/w/wa/water_cure.html.

[31] Based on a recommendation from DOD General Counsel William J. Haynes II, Deputy General Counsel Douglas Feith and General Richard Myers, Chairman of the Joint Chiefs of Staff.

[32]See Appendix 3.

[33]http://www.defenselink.mil/news/Jun2004/d20040622doc5.pdf.

[34]On 22 June, 2004, the office of the DOD General Counsel released a document entitled GTMO Interrogation Techniques. http://www.washingtonpost.com/wp-srv/world/daily/graphics/interrogation_062304.htm. That document identifies Category I and II techniques used between December 2002, and 15 January, 2003. They include under Category I yelling (not directly into ear) and deception through introduction of a confederate detainee and "role playing by interrogator in next cell." Category II applied techniques include removal from social support, segregation, isolation, interrogation in a different location (still at Guantanamo), deprivation of light (using a red light), introducing strees through use of a female interrogator, up to 20 hour interrogations, removal of all comfort items including religious items, serving MREs instead of hot rations, forced grooming (to include shaving facial hair and head), and use of false documents.

rescinded[35] his approval of Category II and one Category III techniques pending a study by DOD General Counsel.[36] He noted that "Should you determine that particular techniques in either of these categories are warranted in an individual case, you should forward that request to me."[37] Approval of Category I techniques apparently remained in effect.

On 6 March the Working Group issued a Draft Report,[38] and on 4 April a final version of the document.[39]

c

The Working Group Report

The Working Group consisted of representatives from a broader spectrum than the government's prior analytical reports on interrogation.[40] They produced a document[41] which, except for one central flawed assumption, is sophisticated, well wrought and legally supportable.[42] That flawed assumption is the validity of the Presidential determination that the

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[35]As a result of concerns raised by the Navy General Counsel. Schlesinger Committee Report at p.7.

[36] Memorandum for Commander SOUTHCOM, from Secretary Rumsfeld, 15 Jan. 2003, http://www.defenselink.mil/news/Jun2004/d20040622doc7.pdf. Secretary Rumsfeld simultaneously directed the establishment of a working group within the DOD "to assess the legal, policy and operational issues relating to the interrogation of detainees.." http://www.defenselink.mil/news/Jun2004/d20040622doc6.pdf.

[37]Id.

[38] Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations, 6 March, 2003. http://www.ccr-ny.org/v2/reports/docs/PentagonReportMarch.pdf.

[39]Id at http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf.

[40]Those included representatives from the Offices of the Undersecretary of (Defense Policy), the Defense Intelligence Agency, the General Counsels of the Air Force, Army and Navy and Counsel to the Commandant of the Marine Corps, the Judge Advocates General of the Army, Navy, Air Force and Marines, and the Joint Staff Legal Counsel and J5. Id at Introduction, p.2.

[41]The Working Group Report constitutes both factual and legal analysis. It is discussed here, but also is compared and contrasted with the Bybee and Beaver Brief, *infra*, Section V (B) (3).

[42]The sea change reflected in the Working Group Report may indicate the shift to at least considering some input from military lawyers:

detainees were facially uncovered by the Third Geneva Convention.[43] Thus, the Report opines,[44] that:

> Due to the unique nature of the war on terrorism in which the enemy covertly attacks innocent civilian populations without warning, and further due to the critical nature of the information believed to be known by certain of the al-Qaida and Taliban detainees regarding future terrorist attacks, it may be appropriate for the appropriate approval authority to authorize as a military necessity the interrogation of such unlawful combatants in a manner beyond that which may be applied to a prisoner of war who is subject to the protections of the Geneva Conventions.

Id at 3, (Emphasis added).

> Lawyers from the military's Judge Advocate General's Corps, or JAG, had been urging Pentagon officials to ensure protection for prisoners for two years before the abuses at Iraq's Abu Ghraib prison came to light, current and former JAG officers told ABCNEWS. But, the JAG lawyers say, political appointees at the Pentagon ignored their warnings, setting the stage for the Abu Ghraib abuses, ... "If we — 'we' being the uniformed lawyers — had been listened to, and what we said put into practice, then these abuses would not have occurred," said Rear Admiral Don Guter (ret.), the Navy Judge Advocate General from 2000 to 2002. Specifically, JAG officers say they have been marginalized by Douglas Feith, undersecretary of defense for policy, and William Haynes II, the Pentagon's general counsel, whom President Bush has nominated for a judgeship on the United States Court of Appeals for the Fourth Circuit.

See, ABC News, JAG Lawyers Say Political Appointees Ignored Their Warnings on Prisoner Treatment, 16 May, 2004.
http://abcnews.go.com/sections/WNT/US/JAG_detainees_040515-1.html.

[43]Thus, the Report states that "The laws of war contain obligations relevant to the issue of interrogation techniques and methods. It should be noted, however, that it is to al Qaida detainees because, *inter alia*, al Qaida is not a High Contracting Party...As to the Taliban, the U.S. position is that the provisions of Geneva apply to our present conflict with the Taliban, but that Taliban detainees do not qualify as prisoners of war under Article 4 of the Geneva Convention," citing for both propositions the Presidential Determination of 7 Feb. 2002. That Presidential Determination is based on the Attorney General's and OLC's legal memoranda above discussed.

[44]Again, based on the Presidential Determination, id.

After extensive discussion[45] of domestic and international legal implications[46] the Working Group discusses considerations affecting policy.[47] That discussion noted the policies articulated by FM 34-52[48] and its predecessor, FM 30-15.[49]:

> The fundamental policy [of doctrine prior to FM 34-52] concerning intelligence operations...is that the commander may utilize all available resources and lawful means in the accomplishment of his mission and for the protection and security of his unit. However, a strong caveat to this principle noted "treaty commitments and policy of the United States, international agreements, international law and the UCMJ require the conduct of military to conform with the law of war." FM 30-15 also recognized that Army intelligence interrogations must conform to the "specific prohibitions, limitations and restrictions established by the Geneva Conventions...for the handling and treatment of personnel captured or detained by military forces."

Id at 51, emphasis added.[50]

The Working Group also noted that FM 30-15 "emphasized a prohibition on the use of force during interrogations", including "...actual use of force, mental torture, threats and exposure to inhumane treatment of any kind."[51] It pointed out that:

> FM 30-15 stated that experience revealed that the use of force was unnecessary...and was a poor interrogation technique, given that its use produced unreliable information, damages future interrogations, and induced those being interrogateed to offer [false] information... However, [it said] that the prohibition on the use of force must not be confused with the use of psychological tools and deception techniques...

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[45]Limited by the Presidential Declaration of inapplicability of GC3.

[46]Discussed *infra*, Section V (B) (3).

[47]Working Group Report, id at Section IV, page 51 *et seq*.

[48]Discussed *supra* at Section VI (A) (1) (a).

[49]Army Field Manual 30-15 was in effect from 1945 until its replacement in 1987 by FM 34-52. Its provisions were also applied by the other armed services of the United States. Working Group Report at p.51.

[50]FM 30-15 noted that violations of customary and treaty law would normally also violate the UCMJ and be prosecuted under it, as well as giving rise to potential command liability. Id at 51.

[51]Id at 51.

Id at 52.

In its discussion of FM 34-52, the Working Group pointed out that it had adopted the principles and framework for conducting interrogations of FM 30-15,[52] and that it, along with the curriculum at the U.S. Army Intelligence Center "continue to emphasize a prohibition on the use of force." It noted:

> The underlying basis for this prohibition is the proscriptions contained in international and domestic U.S. law. ...Army interrogation experts view the use of force as an inferior technique that yields intelligence of questionable value.

Id at 53. Emphasis added.

The Working Group also identified a number of policy considerations articulated by the Department of Defense.[53] The core of that policy is that:

> Choice of interrogation techniques involves a risk benefit analysis in each case bounded by the limits of DOD policy and U.S. law.

Id at 55.[54]

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[52]Id at 53.

[53]The policy statement was provided by the Office of the Assistant Secretary of Defense (Special Operations and Low-Intensity Conflict. Id at 54. The Assistant Secretary is Thomas O'Connell. See, http://www.results.gov/leadership/bio_540.html.

[54]The Assistant Secretary's policy guidance also includes what the author considers a wise and highly perceptive statement of a core policy reason for the importance of international law to the armed forces of the United States:

> When assessing whether to use exceptional interrogation techniques, consideration should be given to the possible adverse effects on U.S. Armed Forces culture and self-image, which at times in the past may have suffered due to perceived law of war violations. DOD policy, reflected in the DOD Law of War Program implemented in 1979 and in subsequent directives, greatly restored the culture and self-image of U.S. Armed Forces by establishing high benchmarks of compliance with the principles and spirit of the law of war and thereby humane treatment of all persons in U.S. Armed Forces' custody. In addition consideration should be given to whether implementation of such exceptional techniques is likely to result in adverse effects on DOD personnel who become POWs, including possible perceptions by other nations that the United States is lowering standards relating to the treatment of prisoners generally.

The DOD policy guidance confirmed that priority was being given to intelligence gathering but stated that there would be continued assessment of "the value of information for prosecution considerations."[55] In the event of a request to shift that priority, it noted, factors to be considered would include "...potential benefit from an effective interrogation compared to potential benefit from a better opportunity for effective prosecution."[56]

It provided that:

> For interrogations involving exceptional techniques approved by [Secretary Rumsfeld] standard doctrine may be used as well as specifically authorized exceptional techniques. However, such interrogations may only be applied in limited, designated settings approved by [Mr. Rumsfeld or designee] staffed by personnel specifically trained in their use and subject to a command/decision authority at a level [designated by Mr. Rumsfeld].

Id at 55.[57]

It is in its discussion of the potential effect of interrogation techniques on prosecutions that the Working Group Report is most directly relevant to the analysis here. It notes, "depending on the techniques employed, the admissibility of any information may depend on the forum considering the evidence." Id at 56.[58] It then considers two issues of direct relevance here; prosecution by the United States before a military commission, court martial or Article III court, and the effect of the Geneva Conventions if they are indeed applicable despite the Presidential Determination.

i

The Working Group's Analysis of Admissibility of Evidence Obtained By Extraordinary Interrogation Techniques Before A Commission, Court Martial or District Court

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Id at 55.

[55]Id at 54.

[56]It is at this point that the DOD seems to recognize on the record that the two might be mutually exclusive, a point which seemed lost on the Department of Justice. See, e.g. The Yoo/Delahunty Memorandum, *supra*, text accompanying fn. 51 *et seq*.

[57]The DOD policy also required all interrogations involving "exceptional" methods had to be applied in the context of a comprehensive plan which had to include at least appropriate approval authority

[58]The Report points out that admissibility is necessarily fact specific depending on the exact techniques used. Id.

The Working Group noted that although the standard of admissibility for military commissions is "fairly low"[59] "many of the [interrogation] techniques may place a burden on the prosecution's ability to convince commission members that the evidence meets even the lower standard."[60] Their analysis is encouraging, even if it is incongruent with the past history of the evidentiary standard:[61]

> As the interrogation methods increase in intensity, the likelihood that the information will be deemed coerced and involuntary and thus held inadmissible increases. Although voluntariness of the confession is not a specific threshold question on admissibility, it can reasonably be expected that the defense will raise voluntariness, challenging the probative value of the information and hence, its admissibility. If the statement is admitted, voluntariness will undoubtedly be a factor considered by the members in determining the weight given to the information.

Id at 56-57. Emphasis added.

The Working Group's speculation that a fair approximation of at least the policies underlying the exclusionary rule would be applied in a commission unbound by law and precedent is, unfortunately, contrary to past experience. As previously noted, examination of past applications of the Quirin evidence rule include substantial abuses, often offensive to basic notions of fair play. Their analysis of the admissibility of extraordinary interrogation results in a court martial or U.S. district court, is much more congruent with precedent.

Under those standards the Working Group noted:

> If the actions taken to secure a statement constitute torture the statement would be inadmissible.[62] It should be noted that conduct does not need to rise to the level of "torture" or "cruel, inhuman and degrading treatment or punishment" for it to cause a statment to be involuntary, and therefore inadmissible. As such, the more aggressive the interrogation technique used, the greater the likelihood it could adversely affect the admissibility of any acquired statements or confessions.

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[59]"Probative value to a reasonable person, see discussion, *supra*, text following fn. 32..

[60]Working Group Report at 56.

[61]See discussion *supra*, fn. 34. The analysis would be much more persuasive if the appellate process was through the courts rather than the executive branch.

[62]Citing *Brown v. Mississippi*, 297 U.S. 278 (1936) "(confessions procured by means 'revolting to the sense of justice' could not be used to secure a conviction."

Id at 57. Emphasis added.[63]

To the extent that court martial or district court standards apply, the emphasized language above is a direct refutation of Judge Bybee's torture analysis. It straightforwardly supports a core proposition of this article; that use of evidence obtained through violations of the Third Geneva Convention would violate a POWs rights under GC3 Article 102.[64]

Following its analysis of domestic legal issues, the Working group discusses its view of problems with the interrogation techniques under international law. It finesses the Presidential Declaration of inapplicability with a statement that the law "...although not binding on the United states, could be cited by other countries to support the proposition that the interrogation techniques used by the U.S. contravene international legal standards."Id at 58. While it says its purpose is to inform the DOD's policy considerations when deciding how to treat "unlawful" combatants, the discussion constitutes a clear and direct warning of the potential problems arising from violations of the Third Geneva Convention.

ii

The Working Group's Analysis of the Effects of Application of the Geneva Conventions

The Working Group notes that "to the extent that other nation states do not concede the U.S. position..."[65] Articles 13[66], 14[67], 17[68], 130[69] and 129[70] may be relevant to considerations of

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[63]The Working Group raises a number of other concerns including public reaction to methods of interrogation, and balancing the "stated objective of open proceedings with the need not to publicize interrogation techniques.' Id at 57.

[64]"A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed."

[65]*Id.*

[66]Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

Measures of reprisal against prisoners of war are prohibited.

interrogation techniques. It warns that:

> These articles of the Third Geneva Convention may provide an opportunity for other States Parties to allege that they consider the United States to be in violation of the Convention through its treatment of detainees. To the extent any such treatment could be considered by them to be torture or inhumane treatment, such acts could be considered "grave breaches" and punishable as war crimes.

Id. Emphasis added.[71]

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[67]Prisoners of war are entitled in all circumstances to respect for their persons and their honor. ...

[68]Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. ...No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.

[69]Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

[70]...Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts....

[71]The Working Group also notes that even if other States Party concur that POW status is inapplicable they may still claim coverage under Article 75 of the First Additional protocol to the Geneva Conventions. " ...persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons. [Prohibited acts include violence to the life, health, or physical or mental well-being of persons including murder, torture of all kinds, whether physical or mental;

Despite these warnings, the Working Group, operating on the assumption that the Presidential Directive of inapplicability of GC3 is mandatory, recommends an interrogation program containing many of the elements previously discussed. It is, however, substantially limited in their application.

iii

The Working Group's Recommended Interrogation Techniques

The Working Group recommends[72] limited use of many of the non-standard techniques[73] previously approved by Secretary Rumsfeld but hedged with numerous limitations, safeguards and caveats. Its core is the statement that:

> The purpose of all interviews and interrogations is to get the most information from a detainee with the least intrusive method, always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators.

Id at 62.

The steps it proposes to ensure compliance with that standard are enlightening, both because they circumscribe interrogator conduct, and because they explain in clear terms the psychological and emotional manipulation at the core of effective interrogation techniques.[74] The Report notes that interrogations must consider "often interlocking factors, such as ... a detainee's emotional and physical strengths and weaknesses...[and] an effort to gain the trust of the detainee..." They add:

> Interrogation approaches are designed to manipulate the detainee's emotions and weaknesses to gain his willing cooperation. Interrogation operations are never

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corporal punishment; and mutilation; outrages upon personal dignity, in particular humiliating and degrading treatment; taking of hostages; collective punishments; and threats to commit any of the foregoing acts]. '

[72]See Appendix 4.

[73]Many of the techniques discussed are standard interrogation methods found in FM 34-52.

[74]Thus the Working Group notes that interrogations "must always be planned, deliberate actions" with operating instructions "based on command policies to ensure uniform, careful and safe application of interrogations of detainees. id at 62. It adds this caveat emphasized in the original "*While techniques are considered individually within this analysis, it must be understood that in practice, techniques are usually used in combination; the cumulative effect of all techniques used must be considered before any decisions are made regarding approval for particular situations...*

> conducted in a vacuum; they are conducted in close cooperation with the units detaining the individuals. ...Detainee interrogation involves a plan tailored to an individual and approved by senior interrogators. Strict adherence to policies/standard operating procedures governing the administration techniques and oversight is essential.

Id at 62. Emphasis added.

The Working Group's Report was a carefully drafted document, which attempted to substantially limit and control potential abuses, and to recork, as much as possible, the bottle from which the evil genie of prisoner abuse had been released.[75] Unfortunately, even though Secretary Rumsfeld approved the Report, and implemented even further restrictions, the damage to the carefully restricted intelligence interrogation culture had already been inflicted,[76] in some case, damage which may prove to have had fatal consequences.

iv

Secretary Rumsfeld's Approval

On 16 April, 2002, after considering the Working Group's Report, Secretary Rumsfeld

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[75]It is most unfortunate that initial consideration of these matters gave short shrift to the concerns expressed about potential adverse affects on military culture. The Bybee Memo's rationale that the military will "do as it's told" reflects a substantial failure of civilian authorities to comprehend the complex interplay among rules, culture, honor and duty in the armed forces. Telling any human that a subset of his or her behavioral rules may be dismissed with a wink is inherently unsettling to societal norms. In a closed society like the military, the essential purpose of which is to provide closely regulated lethal force for national defense, adherence to a moral code is essential. See, Army FM 22-100, *Military Leadership*. See Fay Report, Finding 5 "Leaders must balance mission requirements with unit capabilities, soldier morale and effectiveness. Protecting soldiers from unnecessary pressure to enhance mission effectiveness is a leader's job."

[76]Thus for example, the Executive Summary of the Jones and Fay AR 15-6 Investigations of the Abu Ghraib Prison and 205th Military Intelligence Brigades notes that:

> Confusion about what interrogation techniques were authorized resulted from the proliferation of guidance and information from other theaters of operation; individual interrogator experience in other theaters; and the failure to distinguish between interrogation operations in the other theaters and Iraq. This confusion contributed to the occurrence of some of the non-violent and non-sexual abuses.

Executive Summary at p.3.

informed the Commander of SOUTHCOM that he had approved counter-resistance techniques[77] limited to interrogations of unlawful combatants held at Guantanamo Bay, Cuba.[78] He declined to approve some of the interrogation methods recommended by the Working Group including most of the methods in Categories I and II of the original request,[79] and noted that as to Incentive/Removal of Incentive, Pride and Ego Down, O. Mutt and Jeff, and Isolation "...you must specifically determine that military necessity requires its use and notify me in advance." Id.

The Department of Defense has verified that some of the techniques eventually approved by Secretary Rumsfeld were used, between 2 December, 2002 and 15 January, 2003.[80] From 16 January until 15 April, 2003, interrogators at Guantanamo used FM 34-52 techniques with three added Category I techniques: yelling, multiple interrogators and interrogator identity.[81] They were applied by the Joint Task Force 170[82] at Guantanamo under the Command of a Military Intelligence officer, Major General Geoffrey Miller.[83] Eventually they migrated[84] to Abu Ghraib

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[77]See Appendix 5.

[78]http://www.defenselink.mil/news/Jun2004/d20040622doc9.pdf,

[79] The methods eliminated from the Working Group recommendations included Hooding; Mild Physical Contact; Threat of Transfer; Use of Prolonged Interrogations; Forced Grooming; Prolonged Standing; Sleep deprivation; Physical Training; Face slap/Stomach slap; Removal of Clothing; and Increasing Anxiety by Use of Aversions. Secretary Rumsfeld noted, however, that if the SOUTHCOM commander determined that he required "...additional interrogation techniques for a particular detainee, you should provide me...a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee." Id at p.1.

[80] DOD Background Briefing, May 20, 2004. Sr. Defense Official: "I believe that there were some techniques that eventually were approved were used in the initial phase which began and then stopped." http://www.defenselink.mil/transcripts/2004/tr20040520-0788.html.

[81]Schlesinger Committee Report at Appendices D and E.

[82]Later the Joint Interrogation Task Force Guantanamo.

[83]General Miller assumed command at Guantanamo in November, 2002. http://www.globalsecurity.org/military/facility/guantanamo-bay_delta.htm. It is important to note that MG Fay, in his AR 15-6 Report, specifically notes that "There is no indication that the training provided by the JTF-GTMO Team led to any new violations of the Geneva Conventions and the law of land warfare. Training focused on screening, the use of pocket littler during interrogations, prioritization of detainees, planning and preparation, approaches, questioning, interpreter control, deception detection, reporting, automation, and interrogation booths. Fay Report at 18.

[84]Hersh claims in Chain of Command that the decision to use extraordinary interrogation techniques in Iraq was made by Undersecretary of Defense for Intelligence Stephen Cambone. He

Prison in Iraq,[85] in some instances based on intentional command decisions,[86] in some on

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quotes a source, "The White House subcontracted this to the Pentagon, and the Pentagon subcontracted it to Cambone. This is Cambone's deal, but Rumsfeld and Myers approved the program." *Chain of Command* at 60.

[85]In his AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade, LTG Anthony R. Jones determined that:

> Interrogation techniques, including counter-Resistance Techniques, were developed and approved for the detainees at Guantanamo and Afghanistan who were determined not to be EPWs or protected persons under the Geneva Conventions of 1949. The OSD Memo promulgatd in December, 2002 [the first Rumsfeld Order] approving techniques and safeguards for interrogation of unlawful combatants in GTMO included the use of dogs to induce stress and the removing of clothing as Counter-Resistance techniques. This memo was rescinded in January 2003. A General Counsel Interrogation Group was eventually formed and published a revised memo in April 2003...This memo...and the techniques outlined in FM 34-52 were referenced ...to develop the limits of authority memo for LTG Sanchez. The provisions of Geneva Convention IV, Relative to Protection of Civilian Persons in Time of War did apply to detainees in Iraq....[LTG Sanchez' memos on interrogation techniques] inadvertently left certain issues for interpretation: namely the responsibility for clothing detainees, the use of dogs in interrogation, and applicability of techniques to detainees who were not categorized as "security detainees."Furthermore, some military intelligence personnel executing their interrogation duties at Abu Ghraib had previously served as interrogators in ...Afghanistan and GTMO. These prior experiences complicated understanding at the interrogator level. The extent of "word of mouth" techniques that were passed to the interrogators in Abu Ghraib by assistance teams from Guantanamo, Fort Huachuca, or amongst themselves is unclear and likely impossible to determine.

http://www.globalsecurity.org/intell/library/reports/2004/intell-abu-ghraib_ar15-6.pdf

[86]According to the Schlesinger Committee Report:

> MG Miller had indicated his model was approved only for Guantanamo. However, CJTF-7 using reasoning from the President's Memorandum of February 7, 2002, which addressed "unlawful combatants," believed additional, tougher measures were warranted because there were "unlawful combatants" mixed in with Enemy Prisoners of War and civilian and criminal detainees. The CJTF-7 Commander [LTG Sanchez], on the advice of his Staff judge Advocate, believed he had the inherent authority of the Commander in a Theater of War to promulgate such a policy and make determinations as to the categorization of detainees under the Geneva Conventions. CENTCOM viewed the CJTF-7 as

cultural dispersion.[87] As the Schlesinger Committee Report Notes:

> [Extraordinary] interrogation techniques were authorized only [for use against al Qaeda and the Taliban]. More important, their authorization in Afghanistan and Guantanamo was possible only because the President had determined that individuals subjected to these interrogation techniques fell outside the strict protections of the Geneva Conventions."

Schlesinger Committee Report at 82 (Emphasis added).[88]

> unacceptably aggressive, and on October 12, 2003, [LTG Sanchez] rescinded his September directive and disseminated methods only slightly stronger than those in [FM 34-52]. The policy memos promulgated at the CJTF-7 level allowed for interpretation in several areas and did not adequately set forth the limits of interrogation techniques. The existence of confusing and inconsistent interrogation technique policies contributed to the belief that additional interrogation techniques were condoned.

Id. At 10 (emphasis added).

Note that CJTF-7 was Combined Joint Task Force 7, the forward deployed headquarters for Operation Iraqi Freedom, and commanded by LTG Ricardo Sanchez.

[87]"Interrogation techniques intended only for Guantanamo came to be used in Afghanistan and Iraq. Techniques employed at Guantanamo included the use of stress positions, isolation for up to 30 days and removal of clothing. In Afghanistan techniques included removal of clothing, isolating people for long periods of time, use of stress positions, exploiting fear of dogs, and sleep and light deprivation. Interrogators in Iraq, already familiar with some of these ideas, implemented them even prior to any policy guidance from CJTF-7." Schlessinger Committee Report at 68.

[88]The Schlesinger Committee's reference to Afghanistan is telling. The United States Army has charged MP SGT James P. Boland, with permitting the beating of one Afghan prisoner, and the shackling of another to the ceiling with his hands above his shoulders. Both prisoners at Bagram Air Base, according to the charge sheet, later died in December, 2002.

According to the New York Times, classified portions of an Army report [the Times story is unclear but the reference is apparently to either the Taguba or Fay Reports] on Abu Ghraib stated that "In Afghanistan, techniques included removal of clothing, isolating people for long periods of time, use of stress positions, exploiting fear of dogs, and sleep and light deprivation."

The classified portions of that report also identified as approved interrogation methods "shaving their heads and beards" and "20 hour interrogations."

Carlotta Gall, and David Rohde, *Afghan Abuse Charges Raise New Questions on Authority*, New

Thus, if the presidential determination was legally erroneous, the entire structure crumbled. The first shockwaves of that collapse began at Abu Ghraib.

d

The Taguba Report[89]

> "In September[2003], a team headed by General [Geoffrey] Miller assessed our intelligence interrogation activities and human detention operations. We reviewed the recommendations with the expressed understanding, reinforced in conversations between General Miller and me, that they might have to be modified for use in Iraq where the Geneva Convention was fully applicable.

Testimony by LTG Ricardo Sanchez before the United States Senate.[90]

After the revelation of sexual and physical abuse at Abu Ghraib, the CENTOM commander appointed MG Antonio Taguba to conduct an Article 15-6 investigation into the detention and internment operations of the 800th Military Police Brigade. The Taguba Report identified acts of intentional abuse of detainees by military police officers which included: punching, clapping and kicking detainees and jumping on their bare feet; videotaping and photographing naked male and female detainees; forcibly arranging detainees in sexually explicit positions for photographing; forcing detainees to disrobe and keeping them naked for several days at a time; forcing male detainees to wear women's underwear; forcing groups of male detainees to masturbate while being photographed; arranging naked male detainees in a pile and jumping on them; positioning a naked detainee on a box with a sandbag on his head and attaching wires to his fingers, toes and penis to simulate electric torture; writing "I am a rapist" on the leg of a detainee; placing a dog chain around a naked detainee's neck and having a female soldier pose for a picture with him; sexual intercourse with a female detainee; using unmuzzled military working dogs to intimidate and frighten detainees with at least one severe injury from a dog bite; and photographing dead Iraqi detainee. Taguba Report at Finding of Fact 6. The Report also accepted as credible detainees allegations of breaking chemical lights and pouring phosphoric liquid on detainees; threatening detainees with a pistol; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape; allowing non-medical personnel to stitch a wounded detainee; and sodomizing a detainee with a broom stick and possibly a chemical light. Id at Finding of Fact 8.

The Taguba Report, as well as some of the photographs which precipitated it, came into

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York Times, September 17, 2004 p.A10.

[89] *Id.* at fn. 4.

[90]General Ricardo Sanchez testimony before Senate Committee on Armed Services, 19 May, 2004, http://www.washingtonpost.com/wp-dyn/articles/A39851-2004May19.html.

the hands of American reporters and initiated the chain of events discussed above.[91]

Following the appointment of MG Taguba, a separate investigation was ordered by LTG Sanchez to investigate the role of military intelligence personnel[92] in abuses at Abu Ghraib. That investigation[93] conducted by MG George R. Fay, and later supplemented by appointment of LTG of LTG Anthony R. Jones, as an additional investigating officer, resulted in the disclosure of substantial additional information.

e

The Fay and Jones Reports

LTG Jones more closely examined the chain of command above the 205th M.I. Brigade. He determined that "the chain of command directly above" the Brigade "was not directly involved" in the Abu Ghraib abuses but that policy memoranda promulgated by LTG Ricardo Sanchez "led indirectly to some of the non-violent and non-sexual abuses,"[94] because they "allowed for interpretation in several areas, including use of dogs and removal of clothing."[95] He noted that:

> Particularly in light of the wide spectrum of interrogator qualifications, maturity, and experiences 0i.e. in GTMO and Afghanistan), the memos did not adequately set forth the limits on interrogation techniques."

Id at 16.

MG Fay's investigation which was principally directed at the Brigade level and below, was by its nature considerably more detailed. It identified forty-four alleged instances or events of detainee abuse committed by Military Police and Military Intelligence soldiers as well as civilian contractors employed by the Army. Military Intelligence solicitation of MP abuse included the use of isolation with sensory deprivation, removal of clothing and humiliation, the use of dogs as an interrogation tool and physical abuse.[96]

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[91]See Section II, *supra*.

[92]From the 205th Military Intelligence Brigade which included Abu Ghraib within its sphere of responsibility.

[93]Pursuant to Army Regulation 381-10, Procedure 15.

[94]Jones Report at p.4 para. d(1).

[95]*Id.* at 16.

[96]Fay Report, Executive Summary at p.7.

MG Fay extensively discussed how extraordinary interrogation techniques migrated from Guantanamo (GTMO) to Abu Ghraib:

> Non-doctrinal approaches, techniques and practices were developed and approved for use in Afghanistan and GTMO as part of the Global War on Terrorism (GWOT)[97]. These techniques, approaches and practices became confused at Abu Ghraib and were implemented without proper authorities or safeguards. Soldiers were not trained on non-doctrinal interrogation techniques such as sleep adjustment, isolation and the use of dogs. Many interrogators and personnel overseeing interrogation operations at Abu Ghraib had prior exposure to or experience in GTMO or Afghanistan. Concepts for the non-doctrinal, non field-manual approaches came from documents and personnel in GTMO and Afghanistan.

Id at p.8.

He then discussed those techniques in detail:

> Physical and sexual abuses of detainees...spanned from direct physical assault such as...head blows rendering detainees unconscious to sexual posing and forced participation in group masturbation. At the extremes were the death of a detainee in [CIA] custody, an alleged rape committed by a US translator, and the alleged sexual assault of a female detainee. These abuses are, without question, criminal....Such abuse can not be directly[98] tied to a systemic US approach to torture or approved treatment of detainees....The environment created at Abu

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[97] According to the New York Times, a classified section of the Fay Report:

> ...sheds new light on the role played by a secretive Special Operations Forces/Central Intelligence Agency task force that operated in Iraq and Afghanistan as a source of interrogation procedures that were put into effect at Abu Ghraib. It says that a July 15, 2003, "Battlefield Interrogation Team and Facility Policy," drafted for use by Joint Task Force 121, which was given the task of locating former government members in Iraq, was adopted "almost verbatim" by the 519th Military Intelligence Battalion, which played a leading role in interrogations at Abu Ghraib. That task force policy endorsed the use of stress positions during harsh interrogation procedures, the use of dogs, yelling, loud music, light control, isolation and other procedures used previously in Afghanistan and Iraq.

Douglas Jehl, *Report Faults Former Tom Commander in Iraq for Abuse*, New York Times, August 27, 2004.

[98]It is of interest to note that MG Fay specifically does not say they can not be indirectly tied to those policies.

> Ghriab contributed to the occurrence of such abuse and the fact that it remained undiscovered by higher authority for a long period of time. What started as nakedness and humiliation, stress and physical training (exercise), carried over into sexual and physical assaults by a small group of morally corrupt and unspervised Soldiers and civilians.

Id at 9-10, emphasis added.

In additional to the physical and sexual abuse, MG Fay identified three principal areas of detainee mistreatment. Those were the use of dogs, nudity and isolation:

> Abusing detainees with dogs started almost immediately after the dogs arrived at Abu Ghraib...Dog teams were brought to Abu Ghraib as a result of recommendations from MG G. Miller's assessment team from GTMO. MG G. Miller recommended dogs as beneficial for detainee custody and control issues. Interrogations at Abu Ghraib, however, were influenced by several documents that spoke of exploiting the Arab fear of dogs. The use of dogs in interrogations to "fear up" detainees was utilized without proper authorization. ... The use of nudity as an interrogation technique or incentive to maintain the cooperation of detainees was not a technique developed at Abu Ghraib, but rather a technique which was imported and can be traced through Afghanistan and GTMO. As interrogation operations in Iraq began...it was often the same personnel who had operated and deployed in other theaters in support of GWOT...The lines of authority and prior legal opinions blurred...The use of...(nudity) is significant in that it likely contributed to an escalating "de-humanization" of the detainees and set the stage for additional and more severe abuses to occur...LTG Sanchez approved the extended use of isolation on several occasions, intending for the detainee to be kept apart, without communication with their fellow detainees. The technique employed in several instances was not, however, segregation but rather isolation- the complete removal from outside contact other than required care and feeding by MP guards and interrogation by MI. ...Lack [of] proper training, clear guidance or experience...stretched the bounds into further abuse; sensory deprivation and unsafe or unhealthy living conditions. Detainees were sometimes placed in xcessively cold or hot cells with limited or poor ventilation or light.

Id at 10 (emphasis added).

The Fay Report summarizes detainee abuse in several categories including: 1) physical abuse including slapping, kicking, twisting hands, restricting breathing, poking an injury and "forcing an internee to stand while handcuffed in such a way as to dislocate his shoulder,"[99] 2)

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[99]The similarity to torture techniques used by the North Vietnamese against captured American pilots is disturbing. Although nothing as extreme as the odious nature of the North Vietnamese treatment is alleged, the difference seems to be one of degree rather than moral culpability. See, Stuart Rochester and Frederick Kiley, *Honor Bound*, Naval Institute Press

use of dogs to "threaten and terrify detainees"[100], 3) humiliating and degrading treatment including nakedness[101], photographs in undress and degrading positions, forcing detainees into simulated sexual positions[102], 4) improper use of isolation,[103] 5) failure to safeguard detainees, and 6) failure to report detainee abuse. Id. at 69.

2

Other Sources of Information About Alleged Abuses

In addition to official reports, allegations of and information about abuse has surfaced from several sources in the press. Those include claims by former prisoners, publicized reports by the International Committee of the Red Cross, and reports of continuing prosecutions of

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(Anapolis, 1998) pp 144-148.

[100]The Fay Report at p. 83, says that interrogations at Abu Ghraib were influenced by "several documents that spoke of exploiting the Arab fear of dogs." The document list includes the 11 October 2002 JTF 170 Counter Resistance Strategies memorandum."

[101]The Report notes that "removal of clothing was not a technique developed at Abu Ghraib but rather a technique which was imported and can be traced through Afghanistan and GTMO." Id. at 87. Id adds:

> At GTMO ...the SECDEF [Secretary Rumsfeld] granted this authority on 2 December, 2002, but it was rescinded six weeks later in January, 2003. ...As interrogation operations in Iraq began to take form, it was often the same personnel who had operated and deployed in other theaters and in support of GWOT, who were called upon to establish and conduct interrogation operations in Abu Ghraib. The lines of authority and the prior legal opinions blurred. Soldiers simply carried forward the use of nudity into the Iraqi theater of operations.

Id. at 88.

[102]The Fay Report draws a causal connection between extraordinary interrogation techniques and sexual abuse. The climate created at Abu Ghraib provided the opportunity for such abuse to occur and continue undiscovered...<u>What started as undressing and humiliation, stress and physical training, carried over into sexual and physical assaults</u> by a small group of morally corrupt and unsupervised Soldiers and civilians. Fay Report at 71 (emphasis added).

[103]Sen. MCCain says of his imprisonment in North Vietnam that "It's an awful thing, solitary. It crushes your spirit and weakens your resistance more effectively than any other form of mistreatment."John McCain, *Faith of my Fathers*, Random House (New York, 1999) at 206.

military personnel for abuse especially involving Afghanistan. [104] In addition, in September 2004, Seymour Hersh published Chain of Command[105] which contains a number of other specific allegations of mistreatment and misconduct.

According to the Fay Report:

> The ICRC found a high level of depression, helplessness, stress and frustration especially by those detainees in isolation. Detainees made the following allegations during interviews with the ICRC: threats during interrogation; insults and verbal insults during transfer in Tier 1A; sleep deprivation; walking in the corridors handcuffed and naked, except for female underwear over the head; handcuffing either to the upper bed bars or doors of the cell for 3-4 hours. Some detainees presented physical marks and psychological symptoms which were compatible with these allegations. Also noted were brutality upon capture, physical or psychological coercion during interrogation, prolonged isolation, and excessive and disproportionate use of force.

Fay Report at 64-65.

Of particular interest to the ICRC, was the status of a detainee kept "...in a totally darkened cell, measuring about 2 meters long, and less than a meter across, devoid of any

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[104]The Afghan claims are particularly enlightening because they deal with treatment of detainees classified as unlawful combatants under the same Presidential Order as those at Guantanamo. From the limited amount of information revealed in the Abu Ghraib related reports, it appears extraordinary interrogation techniques were applied to detainees in at least some instances. Some of those persons may have been captured after the capture of Kabul, and the installation of the Kharzai government. As long, however, as effective resistance continues in Afghanistan under the Taliban leadership, and as long as they maintain armed forces "in the field" the Third Geneva Convention should continue to apply. See, Hague Regulations, Art. 42. "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." C.f. Rev. *Mons. Sebastiao Francisco Xavier dos Remedios Monteiro v. The State of Goa*, Supreme Court of India, 26 March 1969, All India Reporter, 1970 SC 329. "There is however difference between true annexation on the one hand and premature annexation or "anticipated annexation" on the other. Annexation is premature so long as hostilities are continuing and there is an opposing army in the field even if the Occupied Power is wholly excluded from the territory. Anticipated annexation by unilateral action is not true annexation. True annexation is only so when the territory is conquered and subjugated."

[105]Harper Collins, New York (2004).

window, latrine or water tap, or bedding."[106] On the cell door was the inscription "the Gollum" with a picture of the character from the Tolkien film trilogy. Fay Report at 66.[107]

Press stories about Red Cross Reports also indicated the existence of abuses:

> On the military side, a key focus is Army Col. Thomas Pappas, commander of the 205th Military Intelligence Brigade. A controversial order last fall put Pappas in overall charge of Abu Ghraib on Nov. 19. The abuse of prisoners had already begun there, however, and Army Maj. Gen. Thomas Romig, Army judge advocate general, told a congressional hearing last week that the search for culpable officers may encompass others.
>
> Red Cross inspectors who visited Abu Ghraib in early October 2003 and found many of the abuses that have since come to light spoke to an unnamed military intelligence officer before Pappas took command of the prison. Romig told members of Congress last week, "Clearly ... we'd like to know who that was." Red Cross reports are kept confidential to prevent publicity-averse governments from denying the organization access to prisons around the world. Key witnesses are often not named.

John Diamond and Toni Locy, *Military intelligence, CIA Officers Under Scrutiny,* Army Times, 17 May, 2004

Some claims of abuse have been made in the press by former prisoners. For example, three Britons freed from Guantanamo Bay claimed they suffered systematic brutality and sexual humiliation during their detention at the U.S. military base.[108] A report released by their lawyers said prisoners at Guantanamo were stripped naked and forced to watch videotapes of other prisoners who had been ordered to sodomize each other. It also says one of the men was

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[106]The Fay Report also refers to an isolation "Hole," which subjected detainees to excessive cold in the winter and heat in the summer. "There was obviously poor air quality, no monitoring of time limits, no frequent checks on physical condition of the detainee, and no medical screeing, all of which added up to detainee abuse." Id at 93.

[107]The Fay Report says that the only response to ICRC complains about Abu Ghraib was a letter from BG Janice Karpinski dated 24 December, 2003. The letter, the Report noted "...tends to gloss over, close to the point of denying the inhumane treatment, humiliation and abuse identified by the ICRC.

[108]But see, [American] officials denied the specific allegations of mistreatment made by prisoners recently returned to Britain whose accounts appeared in British newspapers and from Afghans who spoke to The New York Times in Kabul. Their accounts detail enforced privation, petty cruelty, beatings and planned humiliations. Neil A. Lewis, *Guantanamo Detainees Deliver Intelligence Gains*, New York Times, March 20, 2004.

questioned with a gun to his head. Associated Press, Aug. 4, 2004. [109] Similar charges have been made by other prisoners.[110] See also, "Enduring Freedom:" Abuses by U.S. Forces in Afghanistan.[111]

In addition, reports of prosecutions arising from treatment of detainees in Afghanistan, especially by Special Operations forces, provide some potentially useful information. Thus, for example, charges against four Navy SEALs involving abuse of a prisoner who later dies, may result in testimony.[112] The same applies to the charges against a civilian contractor for the CIA, David Passaro, who was recently indicted in Raleigh, N.C. for the beating death of an Afghan prisoner.[113]

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[109] http://www.msnbc.msn.com/id/5602003/. See, also,letter to U,S, Senate Armed Services Committee, 13 May, 2004. http://www.ccr-ny.org/v2/reports/docs/ltr%20to%20Sentate%2012may04v2.pdf.

[110] A Pakistani on-line press report claims that:

> A Tunisian detainee testified other day before a U.S. military review hearing that he was abused while in captivity in Afghanistan before being brought to the prison camp at Guantanamo Bay, a military official said.
>
> The 35-year-old Tunisian told the review panel he was held in the dark and without sufficient drinking water for more than two months in Afghanistan, said a military officer who served as the tribunal recorder and whose identity was barred from being disclosed.
>
> Military officials said the detainee was captured by the Northern Alliance before being turned over to U.S. troops. The man didn't specify which force was holding him at the time of the alleged mistreatment, but he told the panel the experience led him to falsely confess to training with militants, the tribunal official said.
>
> The Tunisian told the panel he made the false confessions due to the "mistreatment he had received in Afghanistan, or as he phrased it, torture," the officer said.

Detainee Says He Was Abused in Afghanistan, PakTribune, 10 August, 2004. http://www.paktribune.com/news/index.php?id=73523.

[111] http://www.hrw.org/reports/2004/afghanistan0304/.

[112] Eric Schmitt, *4 Navy Commandos Are Charged in Abuse*, New York Times, 4 September, 2004, Section A, page 6.

[113] Terry Frieden, *U.S. Indicts CIA Contractor in Afghanistan Prison Death*, CNN, 22 June, 2004, http://www.cnn.com/2004/LAW/06/17/afghan.indictment/.

Finally, Seymour Hersh revealed additional facts in Chain of Command.[114] According to Hersh, in the late summer of 2002, a CIA analyst visited Guantanamo and interviewed at least thirty detainees. Hersh quotes one of the analyst's colleagues:

> "Based on his sample, more than half the people there didn't belong there. He found people lying in the own feces," including two captives, perhaps in their eighties, who were clearly suffering from dementia.

Chain of Command at p. 2.

Hersh claims that U.S. claims of providing a minimum of three hours of recreation a week to Guantanamo captives are, in some cases, not in compliance with the spirit of the Third Geneva Convention[115]:

> For the tough cases...in mid-2002, at recreation time some prisoners would be strapped into heavy jackets, similar to straitjackets, with their arms locked behind them and their legs straddled by straps. Goggles were placed over their eyes and their heads covered with a hood. The prisoner was then led at midday into what looked like a narrow fenced-in dog run...and given his hour of recreation. The restraints forced him to move, if he chose to move, on his knees, bent over at a forty-five degree angle. Most prisoners just sat and suffered in the heat.

Id at 12.[116]

In another example, Hersh quote a former Marine guard at Guantanamo who says he was encouraged by his squad leader to "visit" detainees one or two times a month:

> "We tried to fuck with them as much as we could–inflict a little bit of pain...you couldn't send them back with a broken leg or so. And if somebody died I'd get court-martialed." [Hooded prisoners were driven] around the camp in a Humvee making turns so they didn't know where they were. The prisoners would talk during the rides ... but "we didn't know what they were saying. I wasn't trying to

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[114] As is his practice, Mr. Hersh, a long-standing investigative journalist who first broke the My Lai story, did not reveal confidential sources. Given his history of accuracy, however, the author feels confident in at least adding them to the facts discussed, here, especially since they are consistent with the pattern of events revealed in official investigations to date.

[115]Hersh's discussion does not indicate whether a distinction was made among detainees based on their status as Taliban, al Qaeda, or otherwise. It is, accordingly, impossible to determine on these facts whether this "recreation" was provided to persons arguably covered by the Third Geneva Convention.

[116]Hersh says his informant claims photographs of the procedure exist.

get information. I was just having a little fun–playing mind control."

Id at 12-13.

Hersh also discussed the exhibition to the press of John Walker Lindh[117] who was stripped, gagged, strapped to a board and exhibited to the press. Id at 4. He quotes an affidavit by Lindh's attorney, James Brosnahan:

> a group of armed American soldiers 'blindfolded Mr. Lindh, and took several pictures of Mr. Lindh and themselves with Mr. Lindh. In one, the soldiers scrawled "shithead" across Mr. Lindh's forehead and posed with him...Another told Mr. Lindh that 'he was going to hang' for his actions and that after he was dead the soldiers would sell the photographs and give the money to a Christian organization."

Id at 37.[118]

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[117]One of the "American Talibans."

[118]Hersh claims that the photographing of prisoners both in Afghanistan and Iraq seems to have been "part of the dehumanizing interrogation process." Chain of Command at 38. He quotes Gary Myers the attorney for one of the Abu Ghraib MPs, "do you really think a group of kids from rural Virginia decided to do this on their own?" Hersh claims that "the notion that Arabs are particularly vulnerable to sexual humiliation had become a talking point among pro-war Washington conservatives." based on *The Arab Mind*, a 1973 book by Raphael Patai. "The Patai book, an academic told me, was "the bible of the neocons on Arab behavior." In their discussions, he said, two themes emerged–"one, that Arabs only understood force, and two, that the biggest weakness of Arabs is shame and humiliation." id. at 39.

Hersh's claim for the source of this interrogation approach is interesting, if speculative. It adds weight to the need for any full investigation to determine the bases upon which it was designed, if only because it indicates potential criminal liability for persons engaged in developing the process.

B

The Legal Analysis of Interrogation Techniques

Three principle defenses of the use of interrogation techniques outside FM 34-52 have been made public. They are the OLC Memorandum of 1 August, 2002 to Alberto Gonzales, the JAG Brief by LTC Beaver of 11 October, 2002, and the Working Group Report of 4 April, 2003 . They share what the author considers to be a similar analytical defect; each presumes that the Third Geneva Convention is inapplicable to all Guantanamo detainees.

1

The Bybee Memorandum of 1 August, 2002

On 1 August, 2002, Assistant Attorney General Jay Bybee provided a Memorandum[1] to White House Counsel Alberto Gonzales. The Memo examines the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and its implementation in 18 United States Code §§ 2340-2340A. It devotes considerable effort to distinguishing torture, which it agrees is usually[2] banned, from "cruel, inhuman, or degrading treatment or punishment.[3] It points out, for example, that "...both the European Court on Human Rights[4] and the Israeli

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[1]*Memorandum For Alberto Gonzales Re; Standards of Conduct for Interrogation under 18 USC §§ 2340-2340A*, dated August 1, 2002. http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

[2]Although it argues at length that Presidential powers as Commander-in-Chief authorize conduct which would be otherwise illegal if necessary to defense of the United States. See, id at Section V, commencing on p. 31, "The President's Commander-in-Chief Power."

[3] See, e.g. id at pp. 21 et seq and 27 et seq. The distinction is made for the purposes of domestic law to analyze both the reservations placed by the United States on its ratification of the Torture Convention, *supra,* at fn. 8, and the intention of the enabling legislation, See, 18 U.S.C. Chapter 113C, *Torture.*

[4]The Memo discusses *Ireland v. the United Kingdom* (1978) where the ECHR considered interrogation methods which included 1) wall standing where the prisoner leaned against a wall standing on his toes and with all his weight on his fingers, 2) continuous hooding except during interrogation, 3) subjection to loud and continuous noise, 4) sleep deprivation pending interrogation and 5) deprivation of food and drink through a reduced diet during and pending interrogation. The Memo notes that the ECHR concluded "that the techniques produce 'intense physical and mental suffering' and 'acute psychiatric disturbances,' [but] they were not [sic] sufficient intensity or cruelty to amount to torture." Id at 29.

Supreme Court[5] have recognized a wide array of acts that constitute cruel, inhuman, or degrading treatment or punishment, but do not amount to torture.[6]

Of particular note here, is that the Memo almost entirely ignores the Third Geneva Convention. While there is some discussion of Common Article 3 of the 1949 Geneva Conventions (which deals with conflicts not of an international character),[7] the Memorandum concludes that "...the standards of conduct established by common article 3 do not apply to "an armed conflict between a nation-state and a transnational terrorist organization."[8]

More importantly, for the concerns discussed in this article, the entire discussion the more general protections applied to POWs is found in a short footnote. That footnote states, in pertinent part:

> While Article 17[9] of [GC3] places restrictions on interrogation of enemy combatants, members of al Qaeda and the Taliban militia are not legally entitled to the status of prisoners of war as defined in the Convention..."[10]

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[5] The Memo also discusses Public Committee Against torture in Israel v. Israel, 38 ILM 1471 (1999) in which the Israeli Supreme Court considered five interrogation methods which included forceful shaking, stress positioning with an opaque hood and loud music, crouching stress positions, excessively tight handcuffs, and sleep deprivation. It notes that "While the Israeli Supreme Court concluded that these acts amounted to cruel and inhuman treatment, the court did not expressly find that they amounted to torture." id at 30.

[6] *Id.* at 31.

[7] *Id.* at fn. 8, and a reference to a to date unpublished Memorandum for John C. Yoo, Deputy Assistant Attorney General, Office of Legal counsel, from James C. Ho, Attorney-Advisor, Office of Legal Counsel, *Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War* (Feb. 1, 2002).

[8] *Id*. That statement is certainly correct within its limitations. The questions presented by the invasion of Afghanistan in pursuit of a terrorist organization, however, have other and more complex ramifications as discussed above.

[9] GC3, Article 17, states in part:

> No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind

[10] Citing the Memorandum of 22 January, 2002 from Jay Bybee, Office of Legal Counsel for Alberto R. Gonzales, Counsel to the President and William J. Haynes II, General Counsel of

Id at fn 22, p. 39.

The restrictions of Article 17, are, of course, much broader than torture alone. In effect, the Bybee Memo[11] makes the case that, whether they are torture, or merely "cruel, inhuman, or degrading treatment or punishment," certainly the interrogation techniques of Categories II and III,[12]constitute prohibited conduct when applied to POWs protected under the Article 17's prohibitions not just against physical and mental torture, but also against threats, insults, or "unpleasant or disadvantageous treatment of any kind." [13]

2

The Working Group Report

The Working Group's Report contains considerable analysis of the interplay of prisoner of war status with interrogation techniques[14]. As noted above, however, it operates from the central premise that it is bound by the Presidential Directive mandating the inapplicability of GCIII. Despite those ground rules, however, the participants managed to openly articulate their concerns that violations of the Third Geneva Convention could be found in the extraordinary interrogation techniques used at Guantanamo.[15]

It is the author's belief that those concerns were well-founded. If, as appears likely from the facts adduced above, persons protected by GCIII were questioned using Category II and III techniques, if they were subjected to intentional humiliation, denied their religious rights, placed in solitary confinement, or any number of the other techniques discussed above,[16] the Working

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the Department of Defense, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* .

[11]The Bybee Memo was, to some extent, repudiated by the administration as pure legal analysis for hypothetical purposes when it was leaked to the public. See,

[12]See, Section VI (A) (1) (b) (i) *supra*, and see the more extensive legal analysis *infra*, Section VI(C)(1).

[13]In addition to the separate restrictions on solitary confinement as punishment in Article 90.

[14]Operating under the rubric that other states might take the position the Third Geneva Convention applied, Working Group Report, *supra* at fn. 34, at pp**.** 4 and 68, as well as for purposes of determining potential legal problems. *Id.*

[15]*Id.*

[16]See discussion below in Section C.

Group was indeed well advised to express its doubts.

3

The Beaver Brief of 11 October, 2002

Another legal Memorandum of importance here is the a *Legal Brief on Proposed Counter-Resistance Strategies* [17] which accompanied the Request for Approval of Counter Resistance Strategies.[18] JTF Staff Judge Advocate LTC Diane Beaver stated as a factual predicate to her analysis that "The detainees currently held at Guantanamo Bay Cuba...are not protected by the Geneva Conventions."[19] She noted that:

> While the procedures outlined in Army FM 34-52...are utilized, they are constrained by and conform to the GC and applicable international law and therefore are not binding. Since the detainees are not EPWs, the Geneva Conventions limitations that ordinarily would govern captured enemy personnel interrogations are not binding on US personnel conducting detainee interrogations at GTMO.[20]

Consequently, LTC Beaver looked to other international law including the Convention Against Torture , as well as to US domestic law, to determine the legality of the proposed interrogation techniques. She concluded in part that, "An international law analysis is not required for the current proposal because the Geneva Conventions do not apply to these detainees since they are not EPWs." Id at 5. To the extent, of course, that any detainee was, in fact, entitled to protection under the Third Geneva Convention, her analysis is, of course, incomplete.

C

Analysis of The Legal Justification of the Techniques

To the extent the legal justification for application of extraordinary interrogation techniques ignores the requirements of Third Geneva Convention it is fatally flawed. Almost all the attorneys who dealt with this question, however, did exactly that. The Beaver Brief[21], the

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[17] LTC Diane Beaver, *Legal Brief on Proposed Counter-Resistance Strategies* , http://news.findlaw.com/hdocs/docs/dod/dunlavey101102mem.pdf.

[18] *Id.*

[19] *Id.* at page 1 of Legal Brief.

[20] *Id.*

[21] *Id.*

Working Group Report[22], and the Schlesinger Committee Report[23] all were premised on the assumption that the Third Geneva Convention was inapplicable to detainees from Afghanistan; they all based that assumption on President Bush's February, 2002 Order[24]. That Order, however, is legally flawed, and a battlefield detainee , at least from the Taliban, is, in fact, entitled to the presumption of POW status.[25]

In every case where the Article 5 presumption entitles a detainee to POW rights until his status is determined by a competent tribunal, the use of interrogation tactics which violate those rights is itself a war crime[26]. In some instances it may well constitute a grave breach.[27]

1

Under The Third Geneva Convention[28] Application of a Number of the Extraordinary Interrogation Techniques May Constitute War Crimes

As the Article 15-6 reports discussed above set out in detail, the extraordinary

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[22]*Supra* fn. 34.

[23]*Supra* fn. 1.

[24]*Supra* fn. 43.

[25]See discussion, *supra* at Section V A. The author finds it, quite literally, incredible that no consideration was given to the legal effects of failure to provide an AR 190-8(6) tribunal. Somewhere, he suspects a memo must exist.

[26] For example, acts of intimidation under Article 13, threats, failure to respect their person under Article 14, insults or exposure to any unpleasant or disadvantageous treatment of any kind under Article 17, failure to provide or allow retention of religious under Article 34, and denial of basic standards of treatment under Article 126.

[27] Article 130 includes as grave breaches wilful "torture or inhuman treatment ...[and] wilfully causing great suffering or serious injury to body or health." To the extent a reviewing court found that extraordinary interrogation techniques either constituted torture or inhuman treatment, or that separately, they caused great suffering or serious injury to body or health, even if they did not amount to torture or inhuman treatment per se, it would seem obligated to find a grave breach. The existence of defenses is a matter for separate analysis. See discussion below.

[28]This article deals solely with the status and rights of prisoners of war and is thus principally concerned with discussion of the Third Geneva Convention. Because of the much wider mix of prisoners at Abu Ghraib, the AR 15-6 reports and the Schlesinger Committee Report also dealt with the Fourth (Civilians) Convention. They are, in many respects, similar regarding fundamental rights.

interrogation techniques developed for use and applied against al Qaeda and the Taliban consist of general categories including physical and emotional abuse, environmental manipulation, and solitary confinement. Each of those categories included activities which violate the rights of POWs under the Third Geneva Convention.

a

Physical and Emotional Abuse Clearly Violates GC3

The POW Convention makes it clear that individuals and military units may not set their own standards for treatment of captured enemy soldiers.[29] "Any unlawful act or omission which causes death or seriously endangers the health of a POW is a grave breach,[30] and POWs are "entitled in all circumstances to respect for their persons and their honor."[31] Finally, prisoners of war may not be physically or mentally tortured, threatened, insulted or exposed to unpleasant treatment to obtain information.[32]

The extraordinary interrogation conduct revealed at Guantanamo and in Afghanistan against detained individuals is facially illegal as applied against prisoners of war.[33] While

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[29]GPW Article 12 provides that "Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them."

[30]GPW Article 13 says, in part, that "Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. ...Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity."

[31] GPW Article 14 requires that "Prisoners of war are entitled in all circumstances to respect for their persons and their honor. .."

[32]GPW Article 17, states in part that "Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information." and that ...No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind."

[33]Iraq requires no analysis to determine violations. The detainees are admittedly covered and the Article 15-6 reports discuss the violations in detail. The only exception is their failure to recognize that confinement of POWs with criminal populations (the reports repeatedly refer to the "mix" at Abu Ghraib) is a separate violation of GC 3. See, Article 22 "Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in

beatings and sexual assaults at Abu Ghraib were roundly condemned by investigators, it has become clear that physical abuse was a part of detainee interrogations, at least in Afghanistan, and that it exceeded mere shoving, light slapping and finger pointing.[34] The principal conduct violative of GC3, however, appears to be mental abuse and humiliation.[35] It includes, inter alia, forcing men into homosexual positions and simulated acts, into wearing women's clothing, exposing them unclothed to women, and photographing those acts.[36] That abuse appears designed to be particularly offensive to the cultural and sexual mores of conservative Moslem prisoners.[37]

It is quite clear that for that reason, the extraordinary interrogation techniques include indecent exposure in various forms, forced shaving, and the refusal to allow prisoners access to religious clothing, paraphenalia and literature.

During transit to Guantanamo, prisoners were shaved, stripped of their religious garb[38]

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penitentiaries."

[34]A number of military personnel have been charged with severe physical abuse from incidents in Afghanistan, *supra* at fn.s 200 and 201. In addition, prisoners released from Guantanamo allege beatings *supra* at fn.s 197 and 198. The latter are currently largely unsubstantiated.

[35]In its discussion of military intelligence interrogations of Iraqi police officers at Abu Ghraib, the Fay Report notes that , "The [Iraqi Police] were kept in various stages of dress, including nakedness, for prolonged periods as they were interrogated. <u>This constitutes humiliation which is detainee abuse</u>." Fay Report at 56 (emphasis added). Humiliating treatment is specifically banned by the Fourth Geneva Convention at article 27.

> Art. 27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity....Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

[36]Some of those acts, of course, were denounced by authorities as unauthorized perversions. Nevertheless, there is a comon element among all which is inescapable...the attempt to degrade a prisoner's resistance though manipulation of sexual taboos.

[37]Article 13 states, in part that "...prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity"

[38]GPW Article 34:

> Prisoners of war shall enjoy complete latitude in the exercise of their religious

and forced to wear orange coveralls.[39] POWs have an absolute right to retain personal items and a general right to customary clothing.[40]

b

Environmental Manipulation

Detainees in both Guantanamo/Afghanistan and Iraq were subjected to various forms of environmental manipulation which violated the Third Geneva Convention. Those include sleep

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duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities. Adequate premises shall be provided where religious services may be held.

[39]Article 46 governs transport of prisoners of war to different facilities:

> The Detaining Power, when deciding upon the transfer of prisoners of war, shall take into account the interests of the prisoners themselves, more especially so as not to increase the difficulty of their repatriation.
>
> The transfer of prisoners of war shall always be effected humanely and in conditions not less favorable than those under which the forces of the Detaining Power are transferred. Account shall always be taken of the climatic conditions to which the prisoners of war are accustomed and the conditions of transfer shall in no case be prejudicial to their health.
>
> The Detaining Power shall supply prisoners of war during transfer with sufficient food and drinking water to keep them in good health, likewise with the necessary clothing, shelter and medical attention. The Detaining Power shall take adequate precautions especially in case of transport by sea or by air, to ensure their safety during transfer, and shall draw up a complete list of all transferred prisoners before their departure.

(Emphasis added).

[40]All effects and articles of personal use, ...shall remain in the possession of prisoners of war, ... Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regulation military equipment. ...articles having above all a personal or sentimental value may not be taken from prisoners of war.

deprivation, light deprivation,[41] cell temperature adjustments, loud music and light adjustments.[42]

c

Solitary Confinement

A number of detainees were subjected to solitary confinement, not as punishment for rule infractions, but rather as a means of interrogation. That confinement is a direct violation of the Third Geneva Convention.[43] It was also, at least as reported by Generals Taguba and Fay, and as claimed by the ICRC,[44] anecdotally by reports from ex-prisoners[45], often done in conjunction with environmental manipulation in the confinement facilities.

In sum, to facilitate the breaking of a prisoner, he was, at least on occasion, left alone in a dark and dank or sweltering cell, for days or weeks at a time. The similarity to prior mistreatment of Americans held as POWs in three Asian wars, World War II in the Pacific[46],

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[41]Article 87 states, in part, that "...imprisonment in premises without daylight [is] forbidden."

[42]Article 25 provides that:

> Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. The said conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health.
>
> 1. The foregoing provisions shall apply in particular to the dormitories of prisoners of war as regards both total surface and minimum cubic space, and the general installations, bedding and blankets.
>
> The premises provided for the use of prisoners of war individually or collectively, shall be entirely protected from dampness and adequately heated and lighted...

[43]Article 21 provides, in part, that "...prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary." In a complementary fashion, Article 90 limits confinement for punishment to no more than thirty days with a further limitation that when further disciplinary punishment is imposed, a period of at least three days must elapse between the execution of any two of the punishments, if the duration of one of these is ten days or more.

[44]*Supra*, text accompanying fn.s 192-195.

[45]*Supra*, text accompanying fn.s 196-201.

[46]See, Huddle, *Japanese Treatment of American Prisoners of War and Civilian Internees*, VI Foreign Relations of the United States p. 316 (1945).

Korea[47] and Vietnam[48], mistreatment against which we violently protested[49], is despicable.

Finally, and in addition to those systematic breaches, required information about detainees was not provided[50], they were denied access to representatives of the ICRC[51], and in at

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[47]Lewis Carlson, *Remembered Prisoners of a Forgotten War*, St. Martin's Press, New York (1945).

[48]Rochester and Kiley, *supra* at fn. 187.

[49]See, e.g. Statement by William Sullivan, *Treatment of American Prisoners of War in North Viet-Nam*, Department of State Bulletin, December 22, 1969, pp. 596 *et. seq*.

[50]Article 70 requires that "immediately upon capture, or not more than one week after arrival at a camp, even if it is a transit camp, ...or transfer to hospital or another camp, every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency provided for in Article 123, on the other hand..." Article 122 requires that "Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall institute an official Information Bureau for prisoners of war who are in its power." ...Within the shortest possible period, each of the Parties to the conflict shall give its Bureau the information referred to in the fourth, fifth and sixth paragraphs of this Article regarding any enemy person belonging to one of the categories referred to in Article 4, who has fallen into its power..This information shall make it possible quickly to advise the next of kin concerned. Subject to the provisions of Article 17, the information shall include, in so far as available to the Information Bureau, in respect of each prisoner of war, his surname, first names, rank, army, regimental, personal or serial number, place and full date of birth, indication of the Power on which he depends, first name of the father and maiden name of the mother, name and address of the person to be informed and the address to which correspondence for the prisoner may be sent.

See, AR 190-8 Paragraph 1-7 articulating the information collection, storage and transmission requirements for the US National Prisoner of War Information Center. In addition to requiring the NPWIC to collect and store Geneva Convention required information on EPWs and retained persons, it requires, inter alia, that the NPWIC "obtain and store information concerning [civilian internees] and [other detainees] who are kept in the custody of U.S. Armed Forces...

[51]Article 126: "Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall also be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses, either personally or through an interpreter.

Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an

least some instances in Iraq, hidden from ICRC inspections.[52]

All of this conduct, to the extent that it was perpetrated upon prisoners of war, is a breach of the Third Geneva Convention; some constitutes grave breaches[53] punishable by all signatory powers.[54] Much of it is punishable under federal criminal law, [55] the Uniform Code of Military

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exceptional and temporary measure.

The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives. The appointment of such delegates shall be submitted to the approval of the Power detaining the prisoners of war to be visited.

(Emphasis added).

[52]The Fay Report notes, as an example of so called "ghost detainees:

> ...the CIA interned three Saudi national medical personnel working for the coalition in Iraq. CIA officers placed them in Abu Ghraib under false names. The Saudi General in charge of the men asked U.S. authorities to check the records for them. A search of all databases using their true names came back negative. Ambassador Bremer then requested a search, which likewise produced no information. Ultimately...Colin Powell, requested a search, and as with the other requestors, had to be told the three men were not known to be in U.S. custody. Shortly after the seqarch for the Secretary of State, a JDIC official recalled that CIA officers once brought three men together into the facility. A quick discussion with the detainees disclosed their true names, which matched the name search requests, and the men were eventually released.

Fay Report at 54.

[53]Article 130 of GC3 privides that:

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

[54]Article 129, provides in part:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the

Justice,[56] and international law.[57] In addition to the factual argument that detainees are not prisoners of war, the Yoo and Bybee Memos raised arguments relating to American constitutional law and other conventions.[58]While those discussions are not applicable in this analysis of GC3 protections, certain potential defense may be raised, and should at least, be examined.

2

Extraordinary Interrogation Techniques May Constitute Other Crimes

While extensive discussion is beyond the scope of this article it is worth mentioning that in addition to the direct criminality of breaching the Third Geneva Convention other domestic and international criminal violations may be implicated.

a

U.S. Domestic Law

Violations of U.S. domestic law may arise from these facts both under military law doctrines, and under criminal law applicable to all American citizens.

i

Military Law

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following Article.

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case

[55]See, discussion of the War Crimes Act (18 U.S.C. §2241) and federal conspiracy law at Section VI (C) (2) (a) *infra*.

[56]Section VI (C) (2) (a) (i) *infra*. See, *Yamashita*, *supra* at fn. 84.

[57]See, Nuremburg Principles, at fn. 70.

[58]See discussion at Section IV**,** *supra***,** The Yoo/Delahunty Memo January 9, 2002.

Within the ambit of military law the command responsibility doctrine and the Uniform Code of Military Justice would have application to uniformed service members involved in the development and application of any illegal interrogation or detention.[59]

The "principle of 'command responsibility' that holds a superior responsible for the actions of subordinates appears to be well accepted in U.S. and international law in connection with acts committed in wartime."[60] That is because "...a commander clearly must be held responsible for those matters which he knows to be of serious import and with respect to which he assumes personal charge. Any other conclusion would render essentially meaningless and unenforceable the concepts of great command responsibility accompanying senior positions of authority."[61]

The essence of that point in both military and international law was articulated by a U.S. military tribunal in the High Command Case:

> Under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. By doing nothing he cannot wash his hands of international responsibility....
>
> * * * * *
>
> The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means coextensive...There must be a personal dereliction that can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be personal negligence amounting to a wanton, immoral disregard of the actions of his subordinates amounting to acquiescence.

United States v. William Leeb et al, Vol. XI, Trials of Major War Criminals, 462, 512.[62]

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[59]The Working Group Report, *supra* fn. 34, presents this issue comprehensively *Id.* at pp. 45 *et. seq*. It list as potential charges under the Uniform Code of Military Justice, *inter alia*, Cruelty, Oppression or Maltreatment, Article 93, Reckless Endangerment, Article 134, Assault, Article 128., Involuntary Manslaughter, Article 119, Unpremeditated Murder, Article 118, Disobedience of Order, Article 92, Dereliction of Duty, Article 92, and Maiming, Article 124.

[60]*Hilao v. Estate of Marcos,* 103 F.3rd 767, 776 70 778 (9th Cir. 1996).

[61]*Kostler v. United States*, 31 Ct. Cl. 301 (1982).

[62]But see, *Yamashita*, *supra* at fn. 84, affirming command responsibility on a considerably lower standard.

A number of other charges or crimes more directly analogous to civilian criminal law are also possibilities,[63] as well, of course, as standard criminal charges under Title 18 of the United States Code and federal common law.

ii

Possible Criminal Liability Under Civilian Law

An agreement by officials, acting under color of law, to commit grave breaches of the Third Geneva Convention would seem to involve, at the least, violations of the War Crimes Act[64] and federal conspiracy law.

The Yoo/Delahumty and Gonzales Memos [65]devote considerable time to raising the specter of prosecution under the War Crimes Act. Their refutation of its applicability rests solely on the argument that the Third Geneva Convention does not protect members of the Taliban or al Qaeda.[66] If a grave breach does exist, then the language of the statute seems to create a *prima facie* case in the circumstances here discussed..[67] In addition, there also seems to be a separate possibility of a conspiracy charge.

Federal conspiracy law is premised on the concept that a conspiracy is a distinct evil, which because it provides a unique synergy to the crime unavailable from individuals acting alone, is separately punishable.[68] That enhanced criminality is especially true in the case of government officials,[69] and if that criminal enterprise constitutes an international delict in the

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[63]See e.g. the possibilities cited in the Working Group Report, *supra*, fn. 34, at pp.7 *et seq* (Torture), and 17 *et seq* (Assault, Maiming, Murder, Manslaughter, Interstate Stalking and Conspiracy).

[64]18 U.S.C. §2441 discussed in the Yoo/Delahunty Memo of January 9, 2002 and the Alberto Gonzales Memo January 25, 2002.

[65]See, Section IV**,** *supra***,** The Yoo/Delahunty Memo January 9, 2002.

[66]*Id.*

[67]Thus, §2441 says, in part that (a) "Whoever [is a U.S. national §2441(b) and] , ...commits a [grave breach of the Third Geneva Convention, see §2441(c)(1)]...shall be fined...or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death."

[68]*Callanan v. United States*, 364 U.S. 587, 594, 81 S.Ct. 321, 325, 5 L.Ed 2d 312 (1961). "[T]he essence of a conspiracy is an agreement to commit an unlawful act." *United States v. Jimenez Recio*, 537 U.S. 270, 123 S.Ct. 819 (2003). Cited In Working Group Report, *id*. at 19.

[69]See, e.g. *Salinas v. United States*, 522 U.S. 52, 118 S. Ct. 469, 139 L.Ed. 2d 352 (1997).

name of a national government the policy reasons for the theory's application seem even more enhanced. [70] In addition, once the conspiracy is joined, conduct arising from it, even if unforseen, may create liability for all the conspirators.[71]

Thus, to the extent that the OLC and White House counsel erred in their analysis of the applicability of the Third Geneva Convention to prisoners captured on Afghan battlefields, and those errors led to grave breaches, they may have created a snare of immense proportions.[72] They may also have implications in international realms.

b

Other International Law

This article is not a survey, but it bears mentioning that in addition to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment[73] to which the

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[70]See, e.g. the Indictment in the "Doctors" Case:

> The United States of America, by the undersigned Telford Taylor, Chief of Counsel for War Crimes, duly appointed to represent said Government in the prosecution of war criminals, charges that the defendants herein participated in a common design or conspiracy to commit and did commit war crimes and crimes against humanity, as defined in Control Council Law No. 10, duly enacted by the Allied Control Council on 20 December 1945.

Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10. Nuremberg, October 1946 - April 1949. Washington D.C.: U.S. G.P.O, 1949-1953.

[71]See, 18 U.S.C. §371. Conspiracy to Commit Offense or Defraud United States.

[72]The availability of an advice of counsel defense in a conspiracy action might defend on good faith reliance. C.f. *U.S. v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1195 (2nd Cir. 1989). "In order to convict a defendant of conspiracy or mail fraud, the government must prove that he had the specific intent to commit the crime charged." Here, good faith might be difficult to find where the JAGs, service counsel, and Department of State were in overt disagreement with Yoo/Delahunty and Gonzales, and where it appears the military lawyers were "cut out of the loop" because their advice was unwelcome. **Cite.** It was the author's experience as a civil litigator, that when "train wrecks" occurred because of counsel's advice, quite often counsel had been informed of the result sought before the advice was rendered.

[73]Supra at fn 8.

White House Memos devoted so much space[74] there are also possible violations of international law punishable in a number of arenas. Those include the classic common plan conspiracy of the post World War II trials at Nuremburg and Tokyo,[75] and the mandatory jurisdictional requirements of signatory states under the Third Geneva Convention itself. [76]

An additional interesting question is the possibility of International Criminal Court jurisdiction, a consummation devoutly opposed by two presidential generations.[77] To the extent that a state is unable or unwilling to prosecute its own war criminals ICC jurisdiction may attach where an appropriate complaint is filed by a signatory state.[78] If the OTC interpretation of

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[74]Section IV**,** *supra***,** The Yoo/Delahunty Memo January 9, 2002. The author tends to agree with the Government Memos' argument that the United States reservation on constitutional definitions of torture may limit applicability of the Torture Convention. It is questionable, however, whether the reservation limits action by other states signatory, or whether it stretches anywhere nearly as widely as the Memos claim. The severe and permanent harm standard argued for by Judge Bybee sounds more like a defense counsels brief on appeal than a neutral memorandum of law.

[75]Jordan Paust, *The Common Plan to Violate the Geneva Conventions*, JURIST, http://jurist.law.pitt.edu/forum/paust2.php

[76]Article 129 provides, in part:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

[77]See, e.g., Senate Hearing 105-724, *Is A U.N. International Criminal Court in the U.S. National Interest?*, July 23, 1998. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_senate_hearings&docid=f:50976.pdf.

[78]Article 8 of the Statute of the I.C.C. provides, in part, that "1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes," and 2. "For the purpose of this Statute, "war crimes" means [inter alia] (a) Grave breaches of the Geneva Conventions of 12 August 1949. Article 13, provides, in part: "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party..." and Article 17, that "...the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it,

Presidential powers is correct, and binding upon the courts of the United States, it may have the unintended consequence of creating international jurisdiction separate from that required by the Third Geneva Convention.[79]

None of this is to say that defenses or mitigating facts may not exist. At least some of the circumstances here were unique and the United States was clearly the victim of an unlawful attack by international criminals harbored, inter alia, in the Afghan hills. It is difficult to imagine though, their applicability in circumstances as widely, cavalierly, and improperly applied as the extraordinary interrogation techniques used on persons covered by the Geneva Conventions.

3

Possible Defenses or Circumstances in Mitigation

In the circumstances involving application of extraordinary interrogation techniques to the Taliban and al Qaeda, additional legal defenses or alleged mitigating factors may involve a necessity defense, a claim of superior orders, and some sort of ratification argument. All would, of course, be intensely fact driven, and each would require assertion on a case by case basis.

The Yoo/Delahunty and Bybee memoranda discussed the necessity defense at length. It is available under the law of war in certain limited circumstances, [80] and is probably not best

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unless the State is unwilling or unable genuinely to carry out the investigation or prosecution..." See, Anthony Dworkin, *International Criminal Court to be Launched in July*, Crimes of War, http://www.crimesofwar.org/onnews/news-icc.html.

[79]The situation is somewhat analogous to that which would exist if a President exercised constitutional pardon authority to block the ability of U.S. courts to prosecute a government official under the War Crimes Act. The binding nature of the pardon authority on the U.S. Courts is indisputable; the consequences might create ICC jurisdiction. See, *Schick v. Reed*, 419 U.S. 256, 95 S. Ct. 379, 42 L.Ed. 2d 430 (1974), and Todd Peterson, *The Congressional Power Over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 Wake Forest L. Rev. 1225 (Winter, 2003).

[80]See, e.g., the law governing siege (at least where Protocol I is inapplicable) which cleraly allowed conduct, otherwise illegal, under a necessity rubric. William J. Fenrick *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), S/1994/674/Add.2 (Vol. I) 28 December 1994, Part VIII, Siege Warfare, "Subject to article 17 of the Geneva Civilians Convention, which encourages the conclusion of local agreements for removal of some persons from besieged areas, and article 23 of the Civilians Convention, which provides for the free passage of medical and religious supplies for all persons and of essential food for children under fifteen, expectant mothers, and maternity cases, the commander of the investing force has the right to forbid all communications and access between

approached on the analytical basis in which necessity is considered in the standard problematical approach to law of war issues.[81] Rather, given the mandatory nature of the Third Geneva Convention, and the open invitation for abuses, it would seem any exception should be strictly limited, if permitted at all.

The claim of superior orders[82] was rejected as an absolute defense at Nuremburg[83]but may still have validity either as a defense in limited circumstances[84], or in mitigation.[85]

Finally, the Yoo/Delahunty Memorandum appears to contain some sort of theory of ratification.[86] That is, the authors seems to believe that by issuing an order under what they claim is his implied constitutional powers, President Bush has made the military actions of his subordinates, necessary to carry out those powers, inherently legal.[87]

These possible defense arguments notwithstanding, it appears to the author that certain conclusions may be drawn from the facts and law developed above.

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the besieged place and the outside. ...Simply put, under the law as it existed prior to Protocol I, the investing force was, generally speaking, entitled to starve, freeze, or dehydrate the inhabitants of a besieged area into submission."

[81]That is to say, as one of the guiding principles identified by the commentators. See, e.g. Lauterpacht, *British Manual of Military Law, Part III, Law of War on Land*, §3, p.2 .

[82]Charles Garraway,Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied, 836 International Review of the Red Cross, 785 (1998), http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList175/4F89CC080CE0E792C1256B66005DD767.

[83]See, Nuremburg Principles, supra at fn. 70.

[84]Rule 916 of the Manual for Courts Martial states that "[i]t is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."

[85]Article 8 of the Charter of the International Military Tribunal states that:
"The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

[86]See discussion at Section IV**,** *supra***,** The Yoo/Delahunty Memo January 9, 2002.

[87]*Id.*

VII

The Symbiotic Relationship of Tribunals, Applicability of the Geneva Convention and Improper Interrogation Techniques

To date, it appears beyond doubt that the United States has applied interrogation techniques illegal under the Third Geneva Convention to some captured persons who have at least a reasonable argument that they are within its protection. These facts, and the law discussed above, show a pattern of development with certain threads running through them.

First, well before any publicly revealed analytical memoranda established an argument that the Taliban were unlawful combatants, President Bush had signed an Order establishing military tribunals which applied an evidence rule which permitted the use of information obtained through means which would subject it to exclusion in a court martial or U.S. district court. The White House, the Department of Justice and civilian authority in the Department of Defense appear to have fiercely rejected any attempts by uniformed lawyers to delete that rule.

Second, a small group of OLC lawyers seems to have developed both the legal justifications for non-application of the Third Geneva Convention to the Taliban, and the legal analysis which permitted the use of interrogation techniques against Guantanamo detainees in violation of the Convention.

Third, some of the techniques developed for use against Taliban detainees, and applied to them at Guantanamo, were indeed in violation of the rights of a POW under GC3.

Fourth, a number of the extraordinary interrogation techniques developed, approved and applied were specifically designed to exploit cultural and religious susceptibilities of conservative Afghan Moslems. The use of nudity, dogs, shaving of beards, and denial of religious paraphernalia were all intended to intimidate and humiliate Moslems detainees.[88]

Fifth, at least some cross-fertilization between Guantanamo and Iraq occurred when Major General Geoffrey Miller advised in August and September 2003, when MG Miller led a team to assess Iraqi Theater ability to rapidly exploit internees for actionable intelligence using Guantanamo procedures and interrogation authorities as baselines, and when Guantanamo

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[88]Hersh posits that:

> Such dehumanization is unacceptable in any culture, but it is especially so in the Arab world. Homosexual acts are against Islamic law, and it is humiliating for men to be naked in front of other men. Bernard Haykel, a professor of Middl Eastern studies at New York University explained, "Being put on top of each other and forced to masturbate, being naked in front of each other–it's all a form of torture," Haykel said.

Chain of Command at 24.

interrogation procedures were promulgated by LTG Ricardo Sanchez. Additional military cultural degradation was caused by confusion among military police and military intelligence personnel with Guantanamo and/or Afghan connections, regarding the applicability and rules of the Geneva Conventions in Iraq.

Sixth, in the context of persons protected by the Third Geneva Convention the use of dogs and nudity at Abu Ghraib were an extension of the already illegal techniques developed for Guantanamo to soften Moslem detainees for interrogation. The use of sexual assault including indecent exposure and forced cross-dressing, was not necessarily such an extension, but it was reasonably foreseeable where prison guards were tasked to intimidate and humiliate detainees based upon their cultural and sexual taboos.

Seventh, under the circumstances the doctrine of command responsibility and the law of conspiracy must both be examined for their applicability. To the extent that a commander knew or should have known that his or her subordinates were engaged in unlawful conduct, or failed to adequately investigate and remedy abuses, command responsibility may create liability. In the civilian context, where government officials, operating under color of law, have entered into an agreement to violate a federal law[89] all persons who joined in that agreement are liable for all reasonably foreseeable violations of law which were done in its furtherance.[90] Thus, even if a superior authority had ordered only some violations, the commission of others by his subordinates might still create liability.[91]

Finally, with the benefit of hindsight it is possible to discern a logical nexus among these factors. The continued refusal to apply an exclusionary rule, even in the review panels created by Assistant Secretary Wolfowitz, which demonstrates a continuing desire to obtain information with the advance knowledge that it might be considered illegally extracted by a court acting under the rule of law, combined with the continuous and connected application of interrogation techniques in violation of the Third Geneva Convention, appears to be more than coincidence.

VIII

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[89]In this case the War Crimes Act.

[90]Thus, for example, a civilian order to apply extraordinary interrogation techniques at Guantanamo, if applied to a person who was, in fact, protected by the Third Geneva Convention, might result in a grave breach. A similar analysis could apply to use of a military commission to try a POW. If, as would be necessary, that decision was carried out by an official's subordinates, the predicate acts for a conspiracy charge could be present under applicable precedent.

[91]There should also, at some point, be a defense available. Where the command authority eventually issued orders rescinding prior interrogation techniques, and instituting safeguards, the decision to continue to apply those techniques and ignore the safeguards might be reasonably unforeseeable. That would, of course, be a determination for a trier of fact.

Conclusion

This article has dealt with a relatively narrow issue, but it has extraordinary implications for the future of the rule of law, both in the United States and internationally. On the one hand it concerns only the application of the sweeping protection, arising out of the global panoramas of the Second World War, to benighted tribal warriors who might, if they were aware of its existence, cheerfully deny its benefits to captured enemies. On the other, it threatens the hard won protection, such as it is, which remains the slim reed at which the captured soldier, airman or marine may grasp in his or her time of deepest despair.

More importantly, it deals with the commitment by states to interpret their solemn obligations in good faith, when military advantage, and perhaps the general welfare of the home front dictate otherwise. How convenient it would have been for the British to have tortured captured Luftwaffe air crew to determine the next target. How tempting for the United States to have threatened the Afrika Korps tanker to discern enemy plans. By and large, though, in times of the gravest national peril, the West stood fast against such misconduct.

Surely reciprocity counted. For much of the war, the Germans held our own as prisoners in at least equal numbers. But it was not reciprocity alone. National ideals, global public opinion, military culture and what are now termed "obsolete" concepts of chivalry all mattered.[92]

In its dry language the Fay Report is damning:

> [The Department of Defenses'] development of multiple policies on interrogation operations for use in different theaters of operations confused Army and civilian Interrogators at Abu Ghraib....National policy and DoD directives were not completely consistent with Army doctrine concerning detainee treatment or interrogation tactics, resulting in CJTF-7 [interrogation and counter-resistance policies and practices] that lacked basis in Army interrogation doctrine. <u>As a result</u>, interrogators at Abu Ghraib, employed non-doctrinal approaches that conflicted with other DoD and Army regulatory, doctrinal and procedural guidance.

Fay report at 112-113 (emphasis added).

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[92]The requirement of Article 5 that POW status be determined in cases of doubt " by a competent tribunal" rather than by, *inter alia*, executive fiat, is surely reflective of the drafters' belief that reciprocity and chivalry, as well as a certain empathy, would be present in the minds of military officers examining facts to determine the fate of a captured warrior. Certainly, the experience of Allied POWs in Nazi Germany sometimes bore that out. See, e.g. Henry Chancellor, *Colditz The Definitive History,* Perennial, New York (2003) at pp. 126-127. ("All the prisoners who encountered the military court were impressed by the fairness of the senior German officers who sat on it.").

Those who sow the wind should not be surprised at what they reap. The Third Geneva Convention was written in the light of the still glowing embers of Nazi death camps. Millions of POWs had perished there because of race, religion and ethnicity.[93] They had been subjected to that regime despite the strictures of the 1929 Geneva Convention, not merely because of Germany's disregard for the law, but also because of her perversion of its provisions.

At war's end the world resolved to do better. The Third 1949 Geneva Convention was the child of that resolution. Its presumptions and protections are not mere words, they are not charming relicts of a bygone era, and they are not obsolete. We disregard their strictures not merely at our peril, both legal and moral, but more importantly at the peril of our military personnel, in service and yet unborn[94].

Who sets such precedents bears a heavy responsibility to remember what happens when we do battle with monsters. After the Abu Ghraib story broke President Bush addressed the key issues in this article:

> America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction. American personnel are required to comply with all U.S. laws, including the United States Constitution, Federal statutes, including statutes prohibiting torture, and our treaty obligations with respect to the treatment of all detainees.
>
> The United States also remains steadfastly committed to upholding the Geneva Conventions, which have been the bedrock of protection in armed conflict for more than 50 years. These Conventions provide important protections designed to reduce human suffering in armed conflict. We expect other nations to treat our service members and civilians in accordance with the Geneva Conventions. Our Armed Forces are committed to complying with them and to holding accountable those in our military who do not.[95]

That commitment by the Armed Forces of the United States to holding accountable violators of the Geneva Conventions is consistent with our history and values. Does it extend beyond the military to hold responsible all who conceived, ordered and abetted such violations;

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[93] **Cite** Not to mention the abysmal treatment of the Japanese of all their prisoners, whatever their race or creed.

[94] As the Executive Summary of the AR 15-6 Investigations of the Abu Ghraib Prison and 205th Military Intelligence Brigades cogently notes, "Soldiers/Sailors/Airmen/Marines should never be put in a position that potentially puts them at risk for non-compliance with the Geneva Convention or Laws of Land Warfare." **[cite]**

[95] White House Statement on United Nations International Day in Support of Victims of Torture, 26 June, 2004, http://usinfo.state.gov/is/Archive/2004/Jun/28-403335.html.

no matter how high their office?

The abyss is gazing back at us.[96]

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[96]As we began this article, with a quotation about doing battle with monsters,, so let us end it. Winston Churchill, speaking as First Lord of the Admiralty in a radio broadcast on January 20, 1940:

> Very few wars have been won by mere numbers alone. Quality, willpower, geographical advantages, natural and financial resources, the command of the sea, and above all a cause which rouses the spontaneous surgings of the human spirit in millions of hearts–these have proved to be the decisive factors in the human story. If it was otherwise how would the race of men have risen above the apes; how otherwise would they have conquered and extinguished the dragons and monsters of the prime; how would they have evolved the moral theme; how would they have marched forward across the centuries to broad conceptions of compassion, of freedom, and of right?

Roy Jenkins, Churchill, McMillan, London (2001) p.568, citing *The Churchill War Papers*, Vol. I p.652.

Appendix 1

Interrogation Techniques Permitted In FM 34-52 (Appendix H)

1. Direct Approach
2. Incentive Approach
3. Emotional Love
4. Emotional Hate
5. Fear Up Harsh
6. Fear Up Mild
7. Decreased Fear Down
8. Pride and Ego Up
9. Pride and Ego Down
10. Futility Technique
11. We Know All
12. Establish Your Identity
13. Repetition
14. File and Dossier
15. Mutt and Jeff
16. Rapid Fire
17. Silence

For a complete description of these techniques see FM 34-52, Appendix H, at http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/app-h.htm.

Appendix 2

Interrogation Techniques Requested BY Joint Task Force 170
11 October, 2002[97]

Category I Techniques

1) Yelling at the detainee (Not directly in his ear or at the level it would cause physical pain or hearing problems)

2) Techniques of deception:

a) Multiple-interrogator techniques

b) Interrogator-identity. The interviewer may identify himself as a citizen of a foreign nation or as an Interrogator from a country with a reputation for harsh treatment of detainees.

Category II Techniques

1) The use of stress positions (like standing) for a maximum of four hours.

2) The use of falsified documents or reports.

3) Use of the isolation facility for up to 30 days. Request must be made to [sic] through the OIC, Isolation Section, to the Director, Joint Interrogation Group (JIG). Extensions beyond the initial 30 days must be approved by the Commanding General. For selected detainees[98], the OIC, Interrogation Section, will approve all contacts with the detainee, to include medical visits of a non-emergent [sic] nature.

4) Interrogating the detainee in an environment other than the standard interrogation booth.

5) Deprivation of light and auditory stimuli.

6) The detainee may have a hood placed over his head during transportation and questioning. The hood should not restrict breathing in any way and the detainee should be under direct observation when hooded.

7) The use of 20 hour interrogations.

8) Removal of all comfort items (including religious items).

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[97] http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf.

[98] Author's note: This statement seems to imply that isolation may be used for more than a limited category of selected detainees.

9) Switching the detainee from hot rations to MREs.

10) Removal of clothing.

11) Forced grooming (shaving of facial hair etc.).

12) Using detainees individual phobias (such as fear of dogs) to induce stress.

Category III Techniques

Techniques in this category may be used only by submitting a request through the Director, JIG, for approval by the Commanding General with appropriate legal review and information to Commander, USSOUTHCOM. These techniques are required for a very small percentage of the most uncooperative detainees (less than 3%).[99] The following techniques, and other aversive techniques, such as those used in U.S. military interrogation resistance training or by other U.S. government agencies, may be utilized in a carefully coordinated manner to help interrogate exceptionally resistant detainees. Any of these techniques that require more than light grabbing, poking or pushing, will be administered only by individuals specifically trained in their safe application.

1) The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family.

2) Exposure to cold weather or water (with appropriate medical monitoring).

3) Use of a wet towel and dripping water to induce the misperception of suffocation.

4) Use of mild non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.

[99]Author's note: This statement seems to imply that Category I and II techniques are required for more than 3 per cent of detainees.

Appendix 3

Interrogation Techniques Approved by the Secretary of Defense

The Interrogation Techniques Requested by Joint Task Force 170 on 11 October, 2002 were forwarded by General James T. Hill, Commanding General of the Southern Command to General Richard Myers, Chairman of the Joint Chiefs of Staff with a recommendation that he believed Categories I and II were "legal and humane." He noted, however, that:

> I am uncertain whether all the techniques in the third category are legal under U.S. law, given the absence of judicial interpretation of the US torture statute. I am particularly troubled by the use of implied or expressed threats of death of the detainee or his family. However, I desire to have as many option as possible at my disposal and therefore request that Department of defense and department of Justice lawyers review the third category of techniques.

http://www.defenselink.mil/news/Jun2004/d20040622doc4.pdf

On 2 December, 2002, Secretary Rumsfeld approved[100] an Action Memo from William J. Haynes II, General Counsel of the DOD.[101] His approval permitted the use of counter-resistance techniques at Guantanamo limited to categories I and II and the fourth technique in Category III.[102]

Accordingly, the interrogation techniques approved and implemented for Guantanamo on 2 December, 2002, were as follows:

Category I Techniques

1) Yelling at the detainee (Not directly in his ear or at the level it would cause physical pain or hearing problems)

2) Techniques of deception:

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[100]Secretary Rumsfeld added a note that "I stand for 8-10 hours a day. Why is standing limited to 4 hours?"

[101]http://www.defenselink.mil/news/Jun2004/d20040622doc5.pdf

[102] Mr. Haines noted that he had discussed the issue with his Deputy Douglas Feiith and General Myers and that they "...believe that, as a matter of policy, a blanket approval of category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint." Id.

a) Multiple-interrogator techniques

b) Interrogator-identity. The interviewer may identify himself as a citizen of a foreign nation or as an Interrogator from a country with a reputation for harsh treatment of detainees.

Category II Techniques

1) The use of stress positions (like standing) for a maximum of four hours.

2) The use of falsified documents or reports.

3) Use of the isolation facility for up to 30 days. Request must be made to [sic] through the OIC, Isolation Section, to the Director, Joint Interrogation Group (JIG). Extensions beyond the initial 30 days must be approved by the Commanding General. For selected detainees[103], the OIC, Interrogation Section, will approve all contacts with the detainee, to include medical visits of a non-emergent [sic] nature.

4) Interrogating the detainee in an environment other than the standard interrogation booth.

5) Deprivation of light and auditory stimuli.

6) The detainee may have a hood placed over his head during transportation and questioning. The hood should not restrict breathing in any way and the detainee should be under direct observation when hooded.

7) The use of 20 hour interrogations.

8) Removal of all comfort items (including religious items).
9) Switching the detainee from hot rations to MREs.

10) Removal of clothing.

11) Forced grooming (shaving of facial hair etc.).

12) Using detainees individual phobias (such as fear of dogs) to induce stress.

Category III Techniques

1) Use of mild non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.

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[103]Author's note: This statement seems to imply that isolation may be used for more than a limited category of selected detainees.

Appendix 4

Interrogation Techniques Recommended By the DOD Working Group Report, 4 April, 2003[104]

1. Direct: Asking straightforward questions.

2. Incentive/Removal of Incentive: Providing a reward or removing a privilege, above and beyond those required by the Geneva Convention, from detainees. (Privileges above and beyond POW-required privileges).

3. Emotional Love: Playing on the love a detainee has for an individual or group.

4. Emotional Hate: Playing on the hate a detainee has for an individual or group.

5. Fear Up Harsh: Significantly increasing the fear level in a detainee.

6. Fear Up Mild: Moderately increasing the fear level in a detainee.

7. Reduced Fear: Reducing the fear level in a detainee.

8. Pride and Ego Up: Boosting the ego of a detainee.

9. Pride and Ego Down: Attacking and insulting the ego of a detainee, not beyond the limits that would apply to a POW.

10. Futility: Invoking the feeling of futility of a detainee.

11. We Know All: Convincing the detainee that the interrogator knows the answer to questions he asks the detainee.

12. Establish Your Identity: Convincing the detainee that the interrogator has mistaken the detainee for someone else.

13. Repetition Approach: Continuously repeating the same question to the detainee within interrogation periods of normal duration.

14. File and Dossier: Convincing the detainee that the interrogator has a damning and inaccurate file, which must be fixed.

15. Mutt and Jeff: A team consisting of a friendly and a harsh interrogator. The harsh interrogator might employ the Pride and Ego Down technique.

16. Rapid Fire: Questioning in rapid succession without allowing detainee to answer.

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[104]Working Group Report at pp. 63 et seq.

17. Silence: Staring at the detainee to encourage discomfort.

18. Change of Scenery Up: Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse).

19: Change of Scenery Down: Removing the Detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality.

20: Hooding: This techniques is questioning the detainee with a blindfold in place. For interrogation purposes, the blindfold is not on other than during interrogation.

21: Mild Physical Contact: Lightly touching a detainee or lightly poking the detainee in a completely non-injurious manner. This also includes softly grabbing of shoulders to get the detainee's attention or to comfort the detainee.

22: Dietary Manipulation: Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water, e.g., hot rations to MREs.

23: Environmental Manipulation: Altering the environment to create moderate discomfort (e.g. adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times.

24: Sleep Adjustment: Adjusting the sleeping times of the detainee (e.g. reversing sleep cycles from night today.) This technique is NOT sleep deprivation.

25:False Flag: Convincing the detainee that individuals from a country other than the United states are interrogating him.

26: Threat of Transfer: Threatening to transfer the subject to a 3rd country that subject is likely to fear would subject him to torture or death. (The threat would not be acted upon nor would the threat include any information beyond the naming of the receiving country).

The following list includes additional techniques that are considered effective by interrogators, some of which have been requested by USCENTCOM and USSOUTHCOM. They are more aggressive counter-resistance techniques that may be appropriate for detainees who are extremely resistant to the above techniques, and who the interrogators strongly believe have vital information. All of the following techniques indicate the need for technique-specialized training and written procedures to insure the safety of all persons, along with appropriate, specified levels of approval and notification for each technique.

27: Isolation: Isolating the detainee from other detainees while still complying with basic standards of treatment.

28: Use of Prolonged Interrogations: The continued use of a series of approaches that extend over a long period of time (e.g., 20 hours per day per interrogation).

29: Forced Grooming: Forcing a detainee to shave hair or beard. (Force applied with intention to avoid injury. Would not use force that would cause serious injury.)

30: Prolonged Standing: Lengthy standing in a "normal" position (non-stress). This has been successful, but should never make the detainee exhausted to the point of weakness or collapse. Not enforced by physical restraints. Not to exceed four hours on a 24-hour period.

31: Sleep deprivation: Keeping the detainee awake for an extended period of time. (Allowing individual to rest briefly and then awakening hi, repeatedly.) Not to exceed 4 days in succession.

32: Physical Training: Requiring detainees to exercise (perform ordinary physical exercises actions) (e.g. running, jumping jacks); not to exceed 15 minutes in a two-hour period; not more than two cycles, per 24-hour periods), Assists in generating compliance and fatiguing the detainees. No enforced complaince.

33: Face slap/Stomach slap: A quick glancing slap to the fleshy part of the cheek or stomach. These techniques are used strictly as shock measures and do not cause pain or injury. They are only effective if used once or twice together. After the second time on a detainee, it will lose the shock effect. Limited to two slaps per application; no more than two applications per interrogation.

34: Removal of Clothing: Potential removal of all clothing; removal to be done by military police if not agree to by the subject. Creating a feeling of helplessness and dependence. This technique must be monitored to ensure the environmental conditions are such that this technique does not injure the detainee.

35: Increasing Anxiety by Use of Aversions: Introducing factors that of themselves create anxiety but do not create terror or mental trauma (e.g., simple presence of dog without directly threatening action). This technique requires the commander to develop specific and detailed safeguards to insure the detainee's safety.

Appendix 5

Interrogation Techniques Approved By Secretary Rumsfeld 16 April, 2003

A. Direct: Asking straightforward questions.

B. Incentive/Removal of Incentive: Providing a reward or removing a privilege, above and beyond those required by the Geneva Convention, from detainees. (Privileges above and beyond POW-required privileges). Caution: Other nations that believe that detainees are entitled to POW protections[105] may consider that provision and retention of religious items (e.g. the Koran) are protected under international law (See, Geneva III, Article 34). Although the provisions of the Geneva Convention are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of this technique.

C. Emotional Love: Playing on the love a detainee has for an individual or group.

D. Emotional Hate: Playing on the hate a detainee has for an individual or group.

E. Fear Up Harsh: Significantly increasing the fear level in a detainee.

F. Fear Up Mild: Moderately increasing the fear level in a detainee.

G. Reduced Fear: Reducing the fear level in a detainee.

H. Pride and Ego Up: Boosting the ego of a detainee.

I. Pride and Ego Down: Attacking and insulting the ego of a detainee, not beyond the limits that would apply to a POW. [Caution: Article 17 of Geneva III provides, "Prisoners of war who refuse to answer may not be threatened, insulted or exposed to any unpleasant or disadvantageous treatment of any kind." Other nations that believe that detainees are entitled to POW protections may consider this technique inconsistent with the provisions of Geneva. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of this technique.

J. Futility: Invoking the feeling of futility of a detainee.

K. We Know All: Convincing the detainee that the interrogator knows the answer to questions he asks the detainee.

L. Establish Your Identity: Convincing the detainee that the interrogator has mistaken the detainee for someone else.

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[105]Author's Note: As does the International Committee of the Red Cross. http://www.commondreams.org/headlines02/0208-04.htm.

M. Repetition Approach: Continuously repeating the same question to the detainee within interrogation periods of normal duration.

N. File and Dossier: Convincing the detainee that the interrogator has a damning and inaccurate file, which must be fixed.

O. Mutt and Jeff: A team consisting of a friendly and a harsh interrogator. The harsh interrogator might employ the Pride and Ego Down technique. [Caution: Other nations that believe that POW protections apply to may consider this technique as inconsistent with Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of this technique.]

P. Rapid Fire: Questioning in rapid succession without allowing detainee to answer.

Q. Silence: Staring at the detainee to encourage discomfort.

R. Change of Scenery Up: Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse).

S: Change of Scenery Down: Removing the Detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality.

T: Dietary Manipulation: Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water, e.g., hot rations to MREs.

U: Environmental Manipulation: Altering the environment to create moderate discomfort (e.g. adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times. [Caution: Based on court cases in other countries, some nations may view application of this technique in certain circumstances to be inhumane. Consideration of these views should be given prior to use of this technique.

V: Sleep Adjustment: Adjusting the sleeping times of the detainee (e.g. reversing sleep cycles from night today.) This technique is NOT sleep deprivation.

W: False Flag: Convincing the detainee that individuals from a country other than the United states are interrogating him.

The following list includes additional techniques that are considered effective by interrogators, some of which have been requested by USCENTCOM and USSOUTHCOM. They

are more aggressive counter-resistance techniques that may be appropriate for detainees who are extremely resistant to the above techniques, and who the interrogators strongly believe have vital information. All of the following techniques indicate the need for technique-specialized training and written procedures to insure the safety of all persons, along with appropriate, specified levels of approval and notification for each technique.

X: Isolation: Isolating the detainee from other detainees while still complying with basic standards of treatment. [Caution: The use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command. This technique is not known to have been generally used for interrogation purposes for longer than 30 days. Those nations that believe detainees are subject to POW protections may view use of this technique as inconsistent with the requirements of Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation; Article 14 which provides that POWs are entitled to respect for their person; Article 34 which prohibits coercion and article 126 which ensures access to basic standards of treatment. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of this technique.]

The Rumsfeld Memorandum also included a section entitled "General Safeguards." It provided that:

Application of these interrogation techniques is subject to the following general safeguards: (i) limited to use only at strategic interrogation facilities; (ii) there is a good basis to believe that the detainee possesses critical intelligence; (iii) the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination); (iv) interrogators are specifically trained for the techniques; (v) a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel) has been developed; (vi) there is appropriate supervision; and (vii) there is appropriate specified senior approval for use with any specific detainee (after conducting the foregoing and receiving legal advice).

The purpose of all interviews and interrogations is to get the most information from a detainee with the least intrusive method, always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators. Operating instructions must be developed based on command policies to insure uniform, careful and safe application of any interrogations of detainees.

Interrogations must always be planned, deliberate actions that take into account numerous, often interlocking factors such as a detainee's current and past performance in both detention and interrogation, a detainee's emotional and physical strengths and weaknesses, an assessment of possible approaches that may work on a certain detainee in an effort to gain the trust of the detainee, strengths and weaknesses of interrogators, and augmentation by other personnel for a certain detainee based on other factors.

Interrogation approaches are designed to manipulate the detainee's emotions and weaknesses to gain his willing cooperation. Interrogation operations are never conducted in a vacuum; they are conducted in close cooperation with the units detaining the individuals. The policies established by the detaining units that pertain to searching, silencing and segregating also play a role in interrogation of a detainee. Detainee interrogation involves developing a plan tailored to an individual and approved by senior interrogators. Strict adherence to policies/standard operating procedures governing the administration of interrogation techniques and oversight is essential.