
SUFFOLK UNIVERSITY LAW REVIEW

Volume XLII

2008

Number 1

Detention and Interrogation in the Post-9/11 World*

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I. EXECUTIVE ACTION: THE ROAD TO GUANTÁNAMO

On September 11, terrorists fly hijacked airliners into the World Trade Center and the Pentagon. Over 3,000 Americans are killed. The nation—indeed the world—is stunned. The French paper *Le Monde* runs the headline: “We are all Americans.”¹ There are candlelight vigils outside the United States Embassy in Tehran.²

The American government responds immediately. On September 18, Congress passes a joint resolution authorizing the President

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.³

* This article is based upon a speech Professor Roosevelt delivered on February 28, 2008 as part of the Donahue Lecture Series. The Donahue Lecture Series is a program instituted by the *Suffolk University Law Review* to commemorate the Honorable Frank J. Donahue, former faculty member, trustee, and treasurer of Suffolk University. The Lecture Series serves as a tribute to Judge Donahue’s accomplishments in encouraging academic excellence at Suffolk University Law School. Each lecture is designed to address contemporary legal issues and expose the legal community to outstanding authorities in various fields of law.

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1. See Hendrik Hertzberg, *Lost Love*, NEW YORKER, Sept. 11, 2006, at 29, available at http://www.newyorker.com/archive/2006/09/11/060911ta_talk_hertzberg.

2. See *id.*

3. S.J. Res. 23, 107th Cong. (2001).

The lawyers of the Executive branch are also at work. A September 25 memorandum from Deputy Assistant General John Yoo of the Office of Legal Counsel (OLC) asserts that the President can “deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11.”⁴ The Framing generation, the memo explains, “well understood that declarations of war were obsolete.”⁵ No statute, it concludes, “can place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response.”⁶

Pursuant to either the limited grant of power in the congressional authorization for the use of military force or the boundless one suggested by the OLC, the Executive begins military action. On October 7, 2001, American and British forces launch a bombing campaign against the Taliban and Al-Qaeda in Afghanistan. Land offensives follow. On November 13, President Bush issues an executive order authorizing the Secretary of Defense to detain any individual who is not a United States citizen and whom the President determines to be a terrorist. Prisoners come into the hands of U.S. forces by various means. Some are battlefield captures; some are turned over by the Northern Alliance or Pakistani authorities. To swell this number, the U.S. offers cash bounties for members of the Taliban and Al-Qaeda. In November 2001, Defense Secretary Donald Rumsfeld claims that the leaflets are “dropping like snowflakes in December in Chicago.”⁷ They promise “wealth and power beyond your dreams . . . enough money to take care of your family, your village, your tribe for the rest of your life.”⁸ Other prisoners are apprehended in places far removed from Afghanistan, including The Gambia and Bosnia.⁹

Executive lawyers have been considering the question of where to hold the detainees. On December 28, 2001, John Yoo and Patrick Philbin, a fellow Deputy Assistant Attorney General, complete a memo addressing the issue of “whether a federal district court would properly have jurisdiction to entertain a

4. Memorandum from John Yoo, Deputy Assistant Att’y Gen., to Timothy Flanigan, Deputy Counsel to the President (Sept. 25, 2001), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 3* (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *TORTURE PAPERS*] (providing text of Yoo’s memo to President’s deputy counsel).

5. *Id.* at 7.

6. *Id.* at 24 (discussing President’s exclusive role in determining terrorist threat and military response).

7. JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 69 (2006).

8. *Id.*; see DAVID ROSE, *GUANTÁNAMO: THE WAR ON HUMAN RIGHTS* 34-37 (2004) (describing case of non-terrorist Guantánamo prisoners turned over for bounty).

9. See MARK DENBEAUX & JOSHUA DENBEAUX, *REPORT ON GUANTÁNAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA* 28 (2006), available at <http://law.shu.edu/aaafinal.pdf>. See generally Seton Hall Law Center for Policy & Research, *Guantanamo Reports*, http://law.shu.edu/center_policyresearch/Guantanamo_Reports.htm (providing more information on the Denbeaux Guantánamo reports).

petition for a writ of habeas corpus filed on behalf of an alien detained at the U.S. naval base at Guantánamo Bay, Cuba.”¹⁰ The answer, the memo concludes, is no.¹¹ For this reason, the memo suggests, Guantánamo is superior to other locations considered as possible detention sites, such as Wake or Midway Island.¹²

Executive officials’ public statements at this time suggest the Guantánamo detainees are a select group, “among the most dangerous, best-trained, vicious killers on the face of the earth.”¹³ They are “the worst of a very bad lot . . . very dangerous people who would gnaw hydraulic lines in the back of a C-17 to bring it down.”¹⁴ Within the government, the information is more equivocal. In January 2002, then-White House Counsel Alberto Gonzales asks the military to provide him with a one-page form for each prisoner so that prosecutors can start selecting those who will be charged with war crimes.¹⁵ Intelligence officers respond that they do not have enough evidence on most prisoners to complete the forms. The fact that they cannot understand Afghan culture handicaps their intelligence gathering efforts; they cannot sort valuable tips from attempts to use Americans as retaliation in inter-clan feuds; they cannot even tell if their interpreters are loyal.¹⁶ Classified intelligence reports describe detainees as “farmers, cab drivers, cobblers, and laborers.”¹⁷ In February 2002, Major General Michael Dunlavey concludes that as many as half of the detainees have “little or no intelligence value.”¹⁸

The Executive has also been making plans about what to do with the detainees. As Guantánamo is intended to be outside the jurisdiction of courts, the detainees are intended to be outside the bounds of law. The Executive

10. See Memorandum from Patrick Philbin, Deputy Assistant Att’y Gen., & John Yoo, Deputy Assistant Att’y Gen., to William Haynes, II, Gen. Counsel, Dep’t of Def. (Dec. 28, 2001), *reprinted in* TORTURE PAPERS, *supra* note 4, at 29.

11. *Id.* at 37.

12. *Id.* at 33 (discussing explicit definition of Wake and Midway Islands as falling under District of Hawaii jurisdiction). David Rose quotes a “top-level official” at the Pentagon as explaining that the United States chose Guantánamo “[b]ecause the legal advice was we could do what we wanted to them there They were going to be outside any court’s jurisdiction.” ROSE, *supra* note 8, at 22. Interestingly, the memo also includes a section opining that if jurisdiction were found to exist, a detainee, or “enemy alien”, would be able to assert the same constitutional rights as an American citizen. See Memorandum from Patrick Philbin, Deputy Assistant Att’y Gen., & John Yoo, Deputy Assistant Att’y Gen., to William Haynes, II, Gen. Counsel, Dep’t of Def. (Dec. 28, 2001), *reprinted in* TORTURE PAPERS, *supra* note 4, at 36.

13. See Press Release, Gerry J. Gilmore, Am. Forces Press Serv., Rumsfeld Visits, Thanks U.S. Troops at Camp X-Ray in Cuba, American Forces Press Service (Jan. 27, 2002), *available at* http://www.defense.link.mil/news/Jan2002/n01272002_200201271.html.

14. See MARGULIES, *supra* note 7, at 65.

15. *Id.* at 66.

16. *Id.* at 69.

17. *Id.* at 66.

18. MARGULIES, *supra* note 7, at 65. Subsequent assessments reaffirm this determination. In August 2002, intelligence officials conclude there are “no big fish” among the 600 or so prisoners. *Id.* at 67. In April 2004, a former CIA worker who spent a year at Guantánamo tells *Frontline* that only ten percent of Guantánamo detainees belong there. *Id.* at 209.

Order of November 13, 2001, authorizes the creation of military tribunals to try terror suspects.¹⁹ It also provides that no individual subject to the order shall

be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.²⁰

A January 2002 memo from Yoo argues that neither Al-Qaeda nor Taliban members are protected by the Geneva Conventions or the War Crimes Act.²¹ A February 7 memo from the President endorses this, reasoning Al-Qaeda detainees are unprotected because Al-Qaeda is not party to the Geneva Convention.²² As for the Taliban, the President's memo summarily determines that all Taliban detainees are unlawful combatants and therefore disqualified from claiming prisoner of war status under the Third Geneva Convention.²³

On February 26, 2002, Jay Bybee submits a memo to William Haynes, the General Counsel of the Department of Defense. The subject of the memo is "potential legal constraints applicable to interrogations of persons captured by U.S. armed forces in Afghanistan."²⁴ The memo focuses on the effect that failure to provide *Miranda* warnings and legal representation might have on subsequent criminal prosecution in federal court; it concludes that the effects will be minor.²⁵

On August 1, Bybee, with Yoo's assistance, submits a memo posing some different questions, such as what interrogation techniques might violate the federal law prohibiting torture.²⁶ Not many, they conclude. To qualify as torture, a technique must inflict pain "equivalent in intensity to the pain accompanying serious physical injury such as organ failure."²⁷ Mental pain or suffering "must result in significant psychological harm of significant duration, e.g., lasting for months or even years."²⁸ The technique must be used with the

19. See Press Release, White House, President Issues Military Order (Nov. 13, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

20. *Id.*

21. Memorandum from John Yoo, Deputy Assistant Att'y Gen., & Robert Delanbunty, Deputy Assistant Att'y Gen., to William Haynes, II, Gen. Counsel, Dep't of Def. (Jan. 9, 2002), reprinted in TORTURE PAPERS, *supra* note 4, at 79.

22. Memorandum for the Vice President et al. (Feb. 7, 2002), reprinted in TORTURE PAPERS, *supra* note 4, at 134-35.

23. The President's memo does not mention the Fourth Geneva Convention, which is supposed to cover those who are not entitled to prisoner of war status. See Memorandum for the Vice President et al., *supra* note 22; see also Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

24. Memorandum from Jay S. Bybee, Assistant Att'y Gen., to William J. Haynes, II, Gen. Counsel, Dep't of Def. (Feb. 26, 2002), reprinted in TORTURE PAPERS, *supra* note 4, at 144.

25. *Id.* at 144-45.

26. Memorandum from Office of the Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), reprinted in TORTURE PAPERS, *supra* note 4, at 172.

27. *Id.* at 172.

28. See *id.*

specific intent to inflict such pain. Possibly, the memo suggests, an interrogation technique is not torture if it is being used to extract information rather than to inflict pain.

Even conduct meeting these requirements may be excused in some circumstances on the grounds of necessity or self-defense. Last, the Commander-in-Chief override offers a safe harbor. “Any effort to apply” the torture ban “in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants . . . would be unconstitutional.”²⁹ As Yoo later tells a *New Yorker* reporter, “torture as an interrogation technique” is “the core of the Commander-in-Chief function. [Congress] can’t prevent the President from ordering torture.”³⁰

This legal analysis of the range of possible techniques does not answer the policy question of which ones should be used. The Army Field Manual on Interrogations cautions,

Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.”³¹

In October 2002, however, General James Hill reports that “some detainees have tenaciously resisted our interrogation methods.”³² Hill asks for review of proposed “counter-resistant techniques.”

The proposed techniques are divided into three categories. Category I includes basic questioning, yelling, the use of multiple interrogators, and deception, including “false flag”: the representation that an interrogator is from “a country with a reputation for harsh treatment of detainees.”³³ Category II techniques require approval from the officer in charge. These techniques include the use of stress positions, falsified documents, isolation, sensory deprivation, hooding, forced shaving and nudity, and the use of twenty-hour interrogations. Standing is given as an example of a stress position.³⁴

29. *Id.* at 200.

30. Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, *NEW YORKER*, Feb. 14, 2005, at 106, available at http://www.newyorker.com/archive/2005/02/14/050214fa_fact6.

31. DEPARTMENT OF THE ARMY, FIELD MANUAL 34-52 INTELLIGENCE INTERROGATION, 1-8 (1992), available at <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/FM34-52IntelInterrogation.pdf> [hereinafter FIELD MANUAL].

32. Memorandum from Gen. James T. Hill, Dep’t of Def., U.S. S. Command, to Chairman of the Joint Chiefs of Staff (Oct. 25, 2002), reprinted in TORTURE PAPERS, *supra* note 4, at 223.

33. Memorandum from Lieutenant Colonel Jerald Phifer to Commander, Joint Task Force 170 (Oct. 11, 2002), reprinted in TORTURE PAPERS, *supra* note 4, at 227.

34. See PHYSICIANS FOR HUMAN RIGHTS & HUMAN RIGHTS FIRST, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY 9-12 (2007), available at <http://www.humanrightsfirst.info/pdf/07801-etn-leave-no-marks.pdf> (describing consequences of stress positions).

Category III techniques require approval from the commanding general at Guantánamo and legal review by the commander of the U.S. Southern command. They include mock executions, threatened killings of family members, exposure to cold weather or water, waterboarding,³⁵ and mild physical contact. An accompanying memo from military attorney Diane Beaver asserts that none of the proposed Category III techniques violates the U.S. Constitution or the federal torture statute as long as the intent in using such methods is to secure information.³⁶ Beaver's analysis relies heavily on the argument that an interrogator using these techniques would lack the specific intent to inflict suffering.³⁷ The Army Field Manual, by contrast, lists stress positions as an example of physical torture and mock executions as an example of mental torture.³⁸ Indeed, the federal torture statute lists mock executions as an example of torture by the infliction of severe mental pain or suffering.³⁹ Given the specificity of the statute, Beaver warns that "[c]aution should be used with this technique."

On November 27, 2002, Department of Defense general counsel William Haynes recommends that Secretary Rumsfeld approve all of Categories I and II and mild contact from Category III. Secretary Rumsfeld does so, adding a handwritten note: "I stand for 8-10 hours a day. Why is standing limited to 4?"⁴⁰

Between November 2002 and January 2003, suspected Al-Qaeda member Mohammed Al Qahtani is interrogated eighteen to twenty hours a day. He is woken with showers of water when he falls asleep. He is made to stand at attention or sit immobile for hours at a time and to stand naked in the presence of jeering female interrogators. He is led around on a leash, forced to bark like a dog, and made to come and stay in response to commands. He is threatened by military dogs, shaved, dressed in women's underwear, and forced to urinate in his pants. He is told that he is being sent to Egypt, flown around in a plane

35. Waterboarding typically involves strapping a subject down on an inclined board with his feet elevated and pouring water over his nose and mouth, sometimes with a cloth or plastic covering the mouth. The experience has been called "simulated drowning," but it is not clear what aspect is simulated rather than actual. As former SERE instructor Malcolm Nance put it, "It's not simulated anything. It's slow motion suffocation with enough time to contemplate the inevitability of blackout and expiration—usually the person goes into hysterics on the board." See JANE MAYER, *THE DARK SIDE* 173 (2008).

36. The Eighth Amendment of the U.S. Constitution prohibits the infliction of "cruel and unusual punishments." U.S. CONST. amend. VIII. The federal statute defines torture as an act "specifically intended to inflict severe physical or mental pain or suffering." 18 U.S.C. § 2340(1) (2006).

37. Memorandum from Diane Beaver, Staff Judge Advocate, Dep't of Def., to Commander, Joint Task Force 170 (Oct. 11, 2002), reprinted in *TORTURE PAPERS*, *supra* note 4, at 234.

38. See *FIELD MANUAL*, *supra* note 31, at 1-8.

39. See 18 U.S.C. § 2340(2)(c).

40. Memorandum from William J. Haynes, II, Gen. Counsel, Dep't of Def., to Donald Rumsfeld, Sec'y of Def. (Nov. 27, 2002), reprinted in *TORTURE PAPERS*, *supra* note 4, at 236-37. Secretary Rumsfeld was referring to his habit of working all day at his standing desk. See Richard Leiby, *Donald Rumsfeld, A Real Stand-Up Guy*, WASH. POST, June 24, 2004, at C03.

for several hours, and then questioned by interrogators who pose as Egyptians. During this time he confesses to being the twentieth September 11 hijacker. He implicates thirty other detainees as associates of Osama Bin Laden by identifying their photos.⁴¹ He also reports hearing voices and spends hours talking to himself or to invisible people, cowering under a sheet in the corner of his cell.⁴² When *Time Magazine* reveals the details of Al Qahtani's interrogation on June 12, 2005, the Pentagon responds that his handling is consistent with its "unequivocal standard of humane treatment for all detainees."⁴³

Neither the Hill memo nor the Beaver analysis mentions the existence of Category IV. But an FBI agent on the base sends a memo to his superiors describing the transport to foreign locales to circumvent domestic law: "[D]etainee will be sent off GTMO, either temporarily or permanently, to Jordan, Egypt, or another third country to allow those countries to employ interrogation techniques that will allow them to get the required information."⁴⁴ As former CIA agent Robert Baer puts it, "If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear—never to see them again—you send them to Egypt."⁴⁵

On September 26, 2002, Maher Arar, a Canadian born in Syria, is arrested at J.F.K. airport on his way back to Canada from Tunisia. He is questioned for thirteen days by Americans, then flown to Jordan and driven to Syria, where he is beaten with electrical cables. His interrogators ask him the same questions as the Americans and under their treatment he confesses to everything they suggest. In October 2003, he is released without charges. The Syrian ambassador to the United States says his country has found nothing linking Arar to terrorism.⁴⁶

41. See Adam Zagorin & Michael Duffy, *Inside the Interrogation of Detainee 063*, TIME MAG., June 12, 2005, at 26, available at <http://www.time.com/time/magazine/article/0,9171,1071284-1,00.html>.

42. *Id.*

43. Press Release, Dep't of Def., Guantánamo Provides Valuable Intelligence Information (June 15, 2005), <http://www.defenselink.mil/releases/release.aspx?releaseid=8583>. An internal investigation concludes that the treatment of Al Qahtani was "abusive and degrading" but still humane. See FINAL REPORT, INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTÁNAMO BAY, CUBA, DETENTION FACILITY 20 (2005), available at <http://balkin.blogspot.com/Schmid%20Furlow%20report.pdf>. In contrast, the judge advocates general testify to Congress that Al Qahtani's treatment violated the Army Field Manual's guidelines. See Josh White, *Military Lawyers Say Tactics Broke Rules*, WASH. POST, Mar. 16, 2006, at A13, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/15/AR2006031502299.html>.

44. See Memorandum to Marion Bourman, Legal Counsel, FBI Headquarters, Legal Analysis of Interrogation Techniques (Nov. 11, 2002), available at <http://balkin.blogspot.com/rendition.fbi.memo.pdf>. The FBI memo also concludes that several of the interrogation techniques in Categories II and III violate the Constitution and the Torture Statute. *Id.*; see also Michael Isikoff, *Secret Memo: Send To Be Tortured*, NEWSWEEK, Aug. 8, 2005, at 7.

45. Adrian Levy & Cathy Scott-Clark, 'One Huge U.S. Jail', GUARDIAN, Mar. 19, 2005, <http://www.guardian.co.uk/afghanistan/story/0,1284,1440836,00.html>.

46. See DAVID COLE & JULES LOBEL, LESS SAFE LESS FREE 23-25 (2007). Other examples of mistaken

Support for these approaches is not uniform within the Executive branch. In December 2002, Navy General Counsel Alberto Mora learns of the interrogation techniques being used. He believes they are “unlawful and unworthy of the military services” and that Beaver’s supporting memo is “wholly inadequate.”⁴⁷ Mora worries that “[b]ecause the American public would not tolerate such abuse . . . the political fallout [is] likely to be severe.”⁴⁸ In January 2003, Mora presents his concerns to the Department of Defense, arguing that the interrogation practices are “illegal and contrary to American values” and that the difficult policy and ethical issues raised by interrogation should not be decided within the Pentagon but rather through “national debate.”⁴⁹

On January 15, Secretary Rumsfeld rescinds the order approving the use of selected Category II and III techniques. He creates a Working Group consisting of experts from the Department of Defense and the Military Departments to review interrogation issues and report back to him in fifteen days. Mora, overseeing the Navy’s participation, asks naval intelligence officers to contribute memoranda reflecting the expert consensus that torture and coercive interrogation are ineffective techniques.⁵⁰ The Working Group also receives a memo from OLC that largely replicates the analysis of the Beaver memo and includes an expansive statement of the Commander-in-Chief override. Based on the OLC memo, the Working Group leadership rejects Mora’s attempts to insert an analysis of Eighth Amendment limitations on interrogation techniques.⁵¹ In February, Mora tells Department of Defense General Counsel William Haynes that the Working Group draft report is a deeply flawed document that should “never . . . see the light of day.”⁵² Neither he nor anyone else in the Department of the Navy ever sees a completed

extraordinary rendition include those of a German citizen, Khaled El-Masri, apparently because his name was similar to that of an associate of a 9/11 hijacker, and a college professor implicated by an Al-Qaeda operative during interrogation, apparently because the professor had given him a bad grade. *Id.* at 25-27. Both Arar and El-Masri filed civil suits based on their renditions, which the Executive defeated on the state secrets privilege, which bars the suits from proceeding because they might reveal information damaging to national security. *Id.* at 42-43.

47. See Memorandum from Alberto Mora, Gen. Counsel to United States Navy, to Inspector General, Dep’t of the Navy 5-6 (June 18, 2004), available at http://www.aclu.org/pdfs/safefree/mora_memo_july_2004.pdf. [hereinafter Mora Memo]; Jane Meyer, *The Memo: How an Internal Effort To Ban the Abuse and Torture of Detainees Was Thwarted*, NEW YORKER, Feb. 27, 2006, at 32, available at http://www.newyorker.com/archive/2006/02/27/060227fa_fact (detailing Mora’s opposition to interrogation techniques).

48. See Mora Memo, *supra* note 47, at 6 (noting concern for public disapproval of interrogation techniques).

49. See *id.* at 10-11 (questioning legality and support for interrogation techniques).

50. See *id.* at 16 (“Most behavioral experts working in the field . . . viewed torture and other less coercive interrogation tactics not only as illegal, but also as ineffective”).

51. See *id.* at 17.

52. See Mora Memo, *supra* note 47, at 19.

version, and Mora assumes that it has never been finalized.⁵³

Unbeknownst to Mora, the Working Group submits a final report to Haynes on April 4, 2003.⁵⁴ The report observes that Guantánamo is within the United States for the purposes of the Torture Statute and therefore outside the statute's coverage.⁵⁵ But, it is outside the "sovereign territory" of the United States and therefore the aliens detained there have no constitutional rights.⁵⁶ In its analysis of the statute, the Working Group agrees with Yoo and Bybee that interrogation techniques cannot constitute torture as long as the intent is to obtain information and suggests that self-defense and necessity may be available defenses for interrogators. It also agrees that "any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."⁵⁷ The report endorses, with proper safeguards, the use of thirty-five techniques, including isolation, sleep deprivation, protracted interrogations, environmental manipulation such as prolonged exposure to heat or cold, forced nudity, the use of dogs, threats to transfer prisoners to countries that engage in torture, and the impersonation of interrogators from such countries.

On April 16, 2003, Secretary Rumsfeld approves the use of twenty-four of these techniques at Guantánamo, including sleep adjustment, environmental manipulation, false flag, and isolation. Other techniques may be permitted, but require Secretary Rumsfeld's prior approval.

In late 2003 and early 2004, FBI agents repeatedly complain about the interrogation techniques being used at Guantánamo. FBI interrogators report finding detainees chained to the floor for eighteen or twenty-four hours at a time while lying in their own feces and urine. They are left in extreme heat or extreme cold; one detainee is found lying on the floor next to a pile of his own hair, which he has pulled out during the night.⁵⁸ Detainees are wrapped in Israeli flags, touched by female interrogators, and smeared with fake menstrual blood. The FBI memos complain that these techniques fail to produce reliable information.⁵⁹

The international reaction to the Guantánamo program of detention and interrogation is generally negative. English Law Lord Johan Steyn deplors the "monstrous failure of justice" that denies detainees judicial process.⁶⁰ Some

53. *See id.* at 20.

54. Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Apr. 4, 2003) [hereinafter Working Group Report], reprinted in TORTURE PAPERS, *supra* note 4, at 286.

55. Working Group Report, TORTURE PAPERS, *supra* note 4, at 291.

56. *See id.* at 316.

57. *See id.* at 306.

58. MARGULIES, *supra* note 7, at 132 (recounting interrogators' common abuse practices).

59. *See id.* at 134 (stating "futility of these techniques is a recurring theme of the FBI memos").

60. *See* Joshua Rozenberg, "Monstrous US Justice" Attacked by Law Lord, TELEGRAPH (United Kingdom), Nov. 26, 2003, available at <http://www.commondreams.org/headlines03/1126-06.htm>.

foreign political figures approve. In Liberia, Charles Taylor expresses strong support for the American war on terrorism. He announces that opposition to his rule is part of global terrorism; he designates an opposition journalist an enemy combatant and has him arrested and tortured. When the United States objects, Taylor responds that he is simply acting “in the same manner in which the US treats terrorists.”⁶¹ Zimbabwe’s President, Robert Mugabe, describes foreign journalists as terrorist sympathizers. “We agree with President Bush,” he says. “Anyone who in any way finances, harbors, or defends terrorists is himself a terrorist.”⁶² Eritrea arrests dissident politicians on the grounds that they are agents of Osama bin Laden.⁶³

In June 2004, under new head Jack Goldsmith, the Office of Legal Counsel withdraws the Yoo/Bybee torture memo. Goldsmith will later characterize the earlier memo as “deeply flawed: sloppily reasoned, overbroad, and incautious,” and marked by “an unusual lack of care and sobriety.”⁶⁴ On December 30, 2004, the OLC issues a new interpretation of the Torture Statute, abandoning the specific intent argument but retaining the commander-in-chief override theory. The new interpretation declares torture “abhorrent.” A footnote states that the memo’s authors have reviewed the prior OLC opinions and “do not believe that any of their conclusions would be different” under the standards of the new memo.⁶⁵ Daniel Levin, then the head of OLC, later explains that this footnote meant not that he endorsed the Yoo/Bybee analysis but rather that he believed *they* would have reached the same conclusions applying the new memo’s standards.⁶⁶ He begins work on a second memo that will impose stricter controls, but is forced to resign before he can complete it.⁶⁷

Following Levin’s resignation and the appointment of Alberto Gonzales as Attorney General in early 2005, the Justice Department issues another memo, this time in secret. The memo provides “explicit authorization to barrage terror suspects with a combination of painful physical and psychological tactics, including head-slapping, simulated drowning, and exposure to frigid temperatures.”⁶⁸ The Justice Department issues the memo over the protest of

61. See MARGULIES, *supra* note 7, at 143.

62. See *id.* at 143.

63. See *id.* at 143.

64. JACK GOLDSMITH, *THE TERROR PRESIDENCY* 10, 148 (2007). Jay Bybee is not available to review the new memo, as the Executive appointed him to a federal judgeship on the U.S. Court of Appeals for the Ninth Circuit. See Adam Liptak, *Author of '02 Memo on Torture: 'Gentle' Soul for a Harsh Topic*, N.Y. TIMES, June 24, 2001, at A1.

65. See Memorandum from Daniel Levin, Acting Assistant Att’y Gen., Office of Legal Counsel, to Deputy Att’y Gen. (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/18usc23402340a2.htm>.

66. See Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2008/06/by-contrast-heres-administration.html> (June 18, 2008, 20:54 EST).

67. See *id.*; see also Jan Crawford Greenburg & Ariane de Vogue, *Bush Administration Blocked Waterboarding Critic*, ABC NEWS, Nov. 2, 2007, <http://abcnews.go.com/WN/DOJ/story?id=3814076> (last visited June 15, 2008).

68. Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1,

Deputy Attorney General James Comey, who tells colleagues that they will all be ashamed when the memo becomes public.⁶⁹

II. JUDICIAL RESPONSE: *HAMDI, PADILLA, AND RASUL*

During this time, the federal courts have not been idle. For years, all of the skirmishing occurs in the lower courts and all of the decisions against the government are stayed pending appeal. Finally, in the summer of 2004, the Supreme Court decides three cases.

Yaser Hamdi is an American citizen born in Louisiana.⁷⁰ The Northern Alliance captures him in Afghanistan in late 2001 and transfers him to U.S. custody.⁷¹ In January 2002, he is brought to Guantánamo.⁷² When the government realizes Hamdi is a citizen, it sends him to a naval brig in Norfolk, Virginia.⁷³ In June 2002, his father files a habeas petition on Hamdi's behalf and requests that the government allow Hamdi to see a lawyer.⁷⁴ The government opposes on the grounds that enemy combatants have no right to counsel, and access to a lawyer will compromise national security.⁷⁵ It offers a declaration from Michael Mobbs, a special advisor to the undersecretary of defense for policy. The declaration states that Hamdi entered Afghanistan in the summer of 2001, joined the Taliban, and was captured by the Northern Alliance in late 2001 while carrying a Kalashnikov.⁷⁶ The information originates from an unknown person in the Northern Alliance; it is transmitted to someone in the U.S. military, who puts it in a record, which Mobbs reviews.⁷⁷

The Executive argues that this declaration by itself is conclusive justification for detention. Hamdi cannot challenge the declaration in court; in fact, he cannot even see it. The Court of Appeals for the Fourth Circuit pronounces it undisputed that Hamdi was arrested in a zone of combat operations and concludes that by itself this fact justifies detention.⁷⁸ The Supreme Court grants certiorari on January 9, 2004.⁷⁹

Jose Padilla is another American citizen, born in Brooklyn. On May 8,

available at <http://www.nytimes.com/2007/10/04/washington/04interrogate.html>.

69. *Id.*

70. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

71. *Id.*

72. *Id.*

73. *Id.* The government later transfers Hamdi to a different brig in South Carolina, which he shares with Jose Padilla and Ali al-Marri. See Brief for the Respondent at 5, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 724020.

74. *Hamdi*, 542 U.S. at 511.

75. See *Hamdi v. Rumsfeld*, 296 F.3d 278, 282 (4th Cir. 2002), *vacated*, 542 U.S. 507 (2004).

76. See Brief for Petitioners at 5, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 378715.

77. See *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 533-35 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003); Brief for Petitioners at 4-5, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 378715.

78. See *Hamdi*, 316 F.3d at 458, *vacated*, 542 U.S. 507 (2004). The facts surrounding Hamdi's arrest are undisputed in the sense that he has not been given an opportunity to dispute them. See *id.*

79. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

2002, federal agents arrest him in Chicago's O'Hare Airport on a material witness warrant.⁸⁰ Padilla's appointed lawyer, Donna Newman, files a motion challenging the warrant and seeking his release.⁸¹ Rather than attempt to defend the warrant, the President designates Padilla an enemy combatant, and the military takes him into custody.⁸² Newman files a habeas petition asking the government to justify Padilla's detention.⁸³ The government offers another declaration from Mobbs, which says that Padilla conspired with members of Al-Qaeda to detonate a dirty bomb in the United States.⁸⁴ The declaration, the government argues, is conclusive; Padilla cannot challenge it, or see it, or see his lawyer.⁸⁵ The district court decides that Padilla has the right to challenge the factual basis for his detention and orders that he be allowed to meet with his lawyers.⁸⁶ The government asks for reconsideration and in support submits a sworn declaration from Vice Admiral Lowell Jacoby, Director of the Defense Intelligence Agency, describing the harm inflicted by allowing detainees to meet with lawyers.⁸⁷

Successful interrogation, Jacoby declares, depends "upon creating an atmosphere of dependency and trust between the subject and the interrogator."⁸⁸ Allowing Padilla access to counsel would "create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process."⁸⁹ It would, as the district court puts it, delay the Executive's effort to make him "give[] up hope."⁹⁰ The district court rejects this argument, and the Supreme Court ultimately grants certiorari on February 20, 2004.⁹¹

Asif Iqbal is a British citizen who, he says, travels to Pakistan in September 2001 to get married. His friend Shafiq Rasul, another British citizen, accompanies him. Rasul intends to stay in Pakistan after the wedding to take computer classes, which are cheaper there than in England. In October 2001, anticipating an American attack, Iqbal and Rasul go to Afghanistan to provide humanitarian aid. When the shooting starts, they realize this is a foolish plan

80. *Rumsfeld v. Padilla*, 542 U.S. 426, 430-31 (2004).

81. *Id.* at 431.

82. *Id.*

83. *Id.* at 432.

84. *See Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 572-73 (S.D.N.Y. 2002), *reconsidered*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *aff'd in part, rev'd in part sub nom., remanded*, *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd & remanded*, 542 U.S. 426 (2004).

85. *See id.* at 573.

86. *See id.* at 604.

87. *See Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42, 46 (S.D.N.Y. 2002), *aff'd in part, rev'd in part sub nom, remanded*, *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004).

88. *Id.* at 49.

89. *Id.* at 50.

90. *Id.* at 52.

91. *See Padilla*, 243 F. Supp. 2d at 53. The Executive allows Padilla to meet with his lawyer just before the parties argue the case.

and try to flee. They are detained by an Afghan warlord and end up in his prison. In December, the warlord hands Iqbal and Rasul over to the Americans. In January 2002, the United States brings them to Guantánamo.⁹²

Iqbal and Rasul allege that they are interrogated at Guantánamo with temperature manipulation, sleep deprivation, stress positions, disorientation, and isolation. They are told that they could be killed at any time and that no one will know what has happened to them. The Executive denies these allegations.⁹³

Civil rights lawyers file habeas petitions on behalf of Iqbal and Rasul. In the Court of Appeals for the District of Columbia (D.C. Circuit), the Executive prevails on the theory that Guantánamo is outside the sovereign territory of the United States.⁹⁴ Aliens detained there, the court agrees, have no constitutional rights that a habeas petition could vindicate and therefore no right to file a habeas petition at all.⁹⁵ The Supreme Court grants certiorari on November 10, 2003.⁹⁶

All of these cases are argued in April 2004—*Rasul* on the 20th, and *Hamdi* and *Padilla* on the 28th.⁹⁷ The Executive's position is simple: "The United States is at war." This is the first sentence of Solicitor General Theodore Olsen's argument in *Rasul*.⁹⁸ Furthermore, alien enemies held outside the United States have no rights. As Executive lawyers assert in related litigation before the Court of Appeals for the Ninth Circuit, the Executive is free to imprison these people indefinitely and do with them what it wills.⁹⁹ Even if it tortures or summarily executes them, courts cannot interfere.¹⁰⁰

92. See MARGULIES, *supra* note 7, at 35-38.

93. *Id.*

94. *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003), *rev'd sub nom.*, *Rasul v. Bush*, 540 U.S. 1003 (2003).

95. See *id.*

96. *Rasul v. Bush*, 540 U.S. 1003, 1003 (2003).

97. In March 2004, just before arguments, the government releases Rasul and Iqbal. They fly home to England, where they are not charged with any wrongdoing. See MARGULIES, *supra* note 7, at 145. Their civil suit seeking damages for alleged beatings and other abuse was dismissed by the Court of Appeals for the D.C. Circuit on the grounds that the right of an alien not to be tortured while detained outside the United States was not sufficiently clear to overcome a defense of qualified immunity and that such detainees are not "persons" protected by the federal Religious Freedom Restoration Act. See *Rasul v. Myers*, 512 F.3d 644, 665-66, 671 (D.C. Cir. 2008). See generally Jaykumar A. Menon, *Guantanamo Torture Litigation*, 6 J. INT'L CRIM. JUST. 323 (2008) (describing cases).

98. See Transcript of Oral Argument at 21, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 943637. Like the order creating military commissions, this opening statement is borrowed from the World War II context, specifically from the oral argument in *Ex parte Quirin*, which likewise began with the simple statement, "The United States and the German Reich are at war." See Transcript of Oral Argument at 70, *Ex Parte Quirin*, 317 U.S. 1 (1942), reprinted in LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 39 (Philip Kurland & Gerhard Casper eds., 1975).

99. See *Gherebi v. Bush*, 352 F.3d 1278, 1299-1300 (9th Cir. 2003), *vacated by Bush v. Gherebi*, 542 U.S. 952 (2004).

100. See *id.* Again, support for this position does not appear to be unanimous within the Department of Justice. Later news reports will disclose that almost a quarter of Justice Department appellate attorneys have

With respect to citizens, the matter is a little more complicated. Citizens have constitutional rights, no matter where the government holds them.¹⁰¹ But citizens can still be enemies and the Executive has the power to detain and interrogate them. The only question is what sort of review courts may engage in. Here, utmost deference is demanded and courts can ask at most whether some evidence, such as the declaration of a government official, supports detention.¹⁰²

The justices appear concerned that this is a one-sided procedure. During the *Hamdi* argument, the Justices ask if detainees should not be entitled to some opportunity to show that their detention is a mistake.¹⁰³

Indeed they should, concedes Deputy Solicitor General Paul Clement: “it may not seem what you think of as traditional due process in an Article III sense, but the interrogation process itself provides an opportunity for an individual to explain that this has all been a mistake.”¹⁰⁴ Clement does not go on to adduce the example of Shafiq Rasul, who is shown a photograph of four people sitting together and asked to confirm that they include himself and Mohammed Atta, one of the 9/11 masterminds. The photograph is from a video taken in Afghanistan in 2000. Rasul explains to his interrogators that he was in England in 2000 and was working at an electronics store, and that this can be verified. Interrogation continues and after five or six weeks, he confesses that he is indeed the person in the photograph. He is not; British intelligence later confirms that, as Rasul said, he was in England at the time.¹⁰⁵

The Justices appear skeptical that interrogation provides an adequate opportunity to demonstrate innocence. Though they are not aware of the full range of interrogation techniques available at Guantánamo—the government will not declassify the memos on those techniques until June 2004—they seem concerned about the conditions of interrogation. In the *Padilla* argument, Justice Ginsburg puts it directly: “Suppose the [E]xecutive says, ‘Mild torture, we think, will help get this information.’ It’s not a soldier who does something against the Code of Military Justice, but it’s an Executive command. Some systems do that to get information.”¹⁰⁶ Paul Clement’s response is equally direct. “Well, our [E]xecutive doesn’t.”¹⁰⁷

opted out of Guantánamo litigation, something the Department allows them to do for reasons of conscience. See Emma Schwartz, *Justice Department Lawyers Refuse Detainee Cases*, U.S. NEWS & WORLD REPORT, Aug. 30, 2007, available at <http://www.usnews.com/articles/news/national/2007/08/30/justice-department-lawyers-refuse-detainee-cases.html>.

101. See *Reid v. Covert*, 354 U.S. 1, 5-6 (1957).

102. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 527-28 (2004).

103. Transcript of Oral Argument, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 1066082.

104. *Id.*

105. See MARGULIES, *supra* note 7, at 40-42.

106. Transcript of Oral Argument, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 1066129.

107. *Id.*

That evening, the first photos from Abu Ghraib appear on CBS. They show prisoners stripped naked and chained to the bars of their cells or stacked in piles, hooded or with women's underwear on their heads, threatened by dogs, and standing on blocks with wires attached to their hands.¹⁰⁸

Decisions in the three cases come down together on June 28, 2004. The Executive loses all three. The Court agrees that the Executive has the power to detain as enemy combatants anyone who "was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there."¹⁰⁹ But the Executive cannot detain citizens without more process than it has afforded them. Yaser Hamdi, the Court announces, is entitled to some kind of hearing before a neutral decision-maker, at which he can rebut the Executive's allegations.¹¹⁰ "[A] state of war," Justice O'Connor writes, "is not a blank check for the President when it comes to the rights of the Nation's citizens Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized."¹¹¹ The Court turns aside Padilla's challenge on jurisdictional grounds, but his rights have been established by the *Hamdi* decision—and perhaps more solidly, as Padilla does not fit the *Hamdi* definition of enemy combatant.

As for the aliens detained at Guantánamo, the Court says that they have the right to file a habeas petition.¹¹² *Rasul* is a decision about the scope of the habeas statute. It does not say that detainees have any constitutional rights to vindicate by means of habeas, but it seems unlikely that the Court intends to give them a vehicle to obtain relief if such relief is categorically unavailable. And indeed, a footnote in *Rasul* more or less explicitly says that Guantánamo detainees have the same rights as Hamdi: their allegations, the Court says, "unquestionably describe custody in violation of the Constitution or laws or treaties of the United States."¹¹³

III. EXECUTIVE REACTION: RETREAT AND CSRTS

The aftermath of these three cases is somewhat different from what most people anticipate. Hamdi, the Court says, is entitled to a day in court when the Executive will be required to show its hand and justify his detention, but this does not happen. Instead the Executive releases him to Saudi Arabia on the

108. See MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 217-24 (2004).

109. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 516-17 (2004) (agreeing with government's alternative position arguing federal statute authorized detention).

110. *Id.* at 536.

111. *Id.* at 521.

112. *Rasul v. Bush*, 542 U.S. 466, 484 (2003).

113. See *id.* at 483 n.15 (omitting quotation marks and citation).

condition that he renounce his citizenship and promise not to sue.¹¹⁴

Padilla, likewise, never gets a hearing on the grounds for his detention. Instead, he is transferred to the civil justice system. Talk of a dirty bomb is dropped and wrangling begins over whether he is fit to stand trial or has been rendered incompetent to assist in his own defense by the interrogation tactics. The creation of a relationship of trust and dependency, Padilla's lawyers allege, was accomplished, or attempted, through isolation, sleep deprivation, environmental manipulation, threats of execution or transfer to third countries, hooding, sensory deprivation, stress positions, and mind-altering drugs.¹¹⁵ The Executive denies the allegations. It reports that it has lost the videotape of Padilla's last interrogation.¹¹⁶

Psychologists testify that Padilla is mentally impaired.¹¹⁷ The court agrees, though it makes no ruling as to the cause and orders the trial to go forward.¹¹⁸ Padilla's lawyers argue that information implicating him was obtained through torture, notably during the interrogation of Abu Zubaydah. The Bush Administration responds that the claim is "meritless" on the grounds that no evidence exists suggesting Zubaydah was tortured. In fact, the CIA made videotapes of Zubaydah undergoing aggressive interrogation, but destroyed those tapes in November 2005.¹¹⁹ On August 16, 2007, Padilla is convicted.¹²⁰ A White House spokesman comments that Padilla "received a fair trial and a just verdict."¹²¹ Padilla's civil suit for abuse suffered during detention is pending.

In *Rasul*, the Executive continues to argue on remand that the detainees have no constitutional rights. But it does something else, too. On July 7, 2004, it announces that it has created Combatant Status Review Tribunals (CSRTs) to

114. See Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15.

115. See Motion to Dismiss, *United States v. Padilla*, No. 04-60001-CR (S.D. Fla. Apr. 9, 2007), 2007 WL 1079090.

116. See Michael Isikoff & Mark Hosenball, *Terror Watch: The Missing Padilla Video*, NEWSWEEK, Feb. 28, 2007, available at <http://www.msnbc.msn.com/id/17389175/site/newsweek/print/1/displaymode/1098/>.

117. See Warren Richey, *US Terror Interrogation Went Too Far, Experts Say*, CHRISTIAN SCIENCE MONITOR, Aug. 13, 2007, at 1, available at <http://www.csmonitor.com/2007/0813/p01s03-usju.htm>.

118. See *id.*

119. See Emily Bazelon & Dahlia Lithwick, *Ifs and Buts*, SLATE, Dec. 10, 2007, http://www.slate.com/id/2179607/pagenum/all/#page_start (last visited Sept. 1, 2008). During the trial of Zacarias Moussaoui in May 2003, Judge Leonie Brinkema orders prosecutors to determine whether any audio or video recordings of interrogations, specifically including that of Zubaydah, existed. According to Executive filings, the CIA reports at the time that it had no such tapes. Brinkema repeats the order in November 2005 and receives the same response. See Warren Richey, *Destroyed CIA Tapes Spur Probes*, CHRISTIAN SCIENCE MONITOR, Dec. 10, 2007, at 3, available at <http://www.csmonitor.com/2007/1210/p03s03-usju.html>. The Executive later characterizes the "errors" in the CIA declaration as "unfortunate." *Id.*

120. See Richard A. Serrano, *Padilla Guilty on All Counts in Terror Case*, L.A. TIMES, Aug. 17, 2007, at 1, available at <http://www.latimes.com/news/printedition/front/la-na-padilla17aug17,1,6197477.story?coll=la-headlines-frontpage>.

121. *Id.*

review the status of the detainees. The tribunals are designed to meet the hearing requirements of *Hamdi*.¹²²

A CSRT is a tribunal of three commissioned officers who review information presented by a reporter. The detainee, if he wishes, can testify. He is not allowed a lawyer. He may present evidence that the tribunal decides is reasonably available. There is a presumption in favor of the evidence supporting detention and the tribunal may consider that evidence even if obtained by torture or coercive interrogation.¹²³ Classified evidence need not be shown to the detainee. A superior officer reviews the tribunal's decision.¹²⁴

The question for the tribunal is whether the detainee is an enemy combatant, defined as "an individual who was part of or supporting Taliban or Al-Qaeda forces. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy forces."¹²⁵

In litigation in the U.S. District Court for the District of Columbia, the Executive says the category of enemy combatant includes the following people:

[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance activities for Al-Qaeda . . . a person who teaches English to the son of an Al-Qaeda member . . . and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.¹²⁶

The evidentiary rules under which the CSRTs operate create their own problems. Mustafa Ait Idir is one of six Bosnians arrested by local officials in Sarajevo in October 2001 on suspicion of planning to bomb the U.S. Embassy. After a three-month investigation turns up no supporting evidence, the Bosnian Supreme Court orders the suspects' release.¹²⁷ The Human Rights Chamber for Bosnia and Herzegovina issues an order prohibiting their removal from Bosnia.¹²⁸ Nonetheless, U.S. military personnel transport them to Guantánamo.¹²⁹ In his CSRT, Idir is told that he has been detained because he "associated with a known Al Qaida operative."

122. See David L. Franklin, *Enemy Combatants and the Jurisdictional Fact Doctrine*, 29 CARDOZO L. REV. 1001, 1006 (2008); Thomas R. Johnson, *Combatant Status Review Tribunals: An Ordeal Through the Eyes of One "Enemy Combatant,"* 11 LEWIS & CLARK L. REV. 943, 947-50, 962 (2007).

123. See *Government: Evidence Gained by Torture Allowed*, CNN, Dec. 2, 2004, <http://www.cnn.com/2004/LAW/12/02/guantanamo.detainees/index.html> (last visited Sept. 1, 2008).

124. See generally Johnson, *supra* note 122 (describing CSRTs).

125. See *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005); see also Thomas R. Johnson, *Combatant Status Review Tribunals: An Ordeal Through the Eyes of One "Enemy Combatant,"* 11 LEWIS & CLARK L. REV. 943, 948 (2007).

126. *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 474-75 (describing respondents' hypothetical detention argument).

127. See Brief for the Petitioners at 2, *Boumediene v. Bush*, No. 06-1195 (U.S. Aug. 24 2007), 2007 WL 2441590.

128. See *id.* at 2.

129. See *id.*

Idir: Give me his name.

Tribunal: I do not know.

Idir: How can I respond to this?

Tribunal: Did you know of anybody that was a member of Al Qaida?

Idir: No. No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person but not [known] if this person was a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian, or whatever. If you tell me the name, then I can respond and defend myself against this accusation.

Tribunal: We are asking the questions and we need you to respond to what is on the unclassified summary.

Idir: If I was in your place, and I apologize in advance for these words—but if a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that.¹³⁰

Everyone present laughs. Idir is determined to be an enemy combatant. He remains at Guantánamo.¹³¹

Another of the Bosnians detained with Idir asks the CSRT to consider as evidence the decision of the Bosnian Supreme Court ordering his release. The CSRT deems this decision not readily available, even though it has been filed with the U.S. District Court for the District of Columbia and served on Executive lawyers in the habeas litigation.¹³²

Murat Kurnaz is detained on the grounds that a friend of his, Selcuk Bilgin, committed a suicide bombing. Some evidence casts doubt on this theory, among it the fact that Bilgin is alive and well in Germany. The investigative arm of the American Southern Command reports that it is “not aware of evidence that Kurnaz was or is a member of Al-Qaeda.” German intelligence confirms that Kurnaz has no connection to any Al Qaeda cell. Kurnaz’s CSRT pronounces him an enemy combatant.¹³³

130. See CSRT Transcript at 12-14, <http://wid.ap.org/documents/detainees/idr.pdf> (last visited Sept. 2, 2008).

131. See Memorandum from J.M. McGarrah (Oct. 26, 2004), <http://wid.ap.org/documents/detainees/idr.pdf> (affirming CSRT enemy combatant determination) (last visited Sept. 2, 2008).

132. See Brief for the Petitioners, *Boumediene v. Bush*, *supra* note 127, at 5.

133. See Carol Leonnig, *Panel Ignored Evidence on Detainee*, WASH. POST, Mar. 27, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A3868-2005Mar26.html>. Kurnaz was released in 2006 after diplomatic intercession by the German government. The U.S. government still considers him an enemy combatant. See Shannon Smiley & Craig Whitlock, *Turk Was Abused at Guantánamo, Lawyers Say*, WASH. POST, Aug. 26, 2006, at A11, available at <http://www.washingtonpost.com/wp-dyn/content/>

In all, of the 558 CSRTs held, thirty-eight determine that detainees are “no longer” enemy combatants.¹³⁴ A Seton Hall professor and his son review the 516 written determinations prepared after the hearings that explain why individuals were determined to be enemy combatants. They find that only five percent of the detainees were captured by U.S. forces. Fifty-five percent are not alleged to have committed any hostile act against the U.S. or its allies. Fleeing U.S. bombing is considered a hostile act.¹³⁵

Another Denbeaux report analyzes the 393 available CSRT records and the 102 available full transcripts of hearings.¹³⁶ They find that detainees were never allowed to call witnesses not already detained at Guantánamo and that fifty percent of the requests for testimony by witnesses detained there were denied. The only documentary evidence detainees were allowed to submit came from their family and friends. Detainees were not allowed to see the evidence against them. Among the 102 full CSRT returns released by the Executive, three contain an initial finding that the detainee is no longer an enemy combatant. In each case, a second CSRT was conducted without the detainee’s participation or any notice to the detainee. Twice, the second CSRT determined that the detainee was an enemy combatant. Once, the second CSRT found the detainee no longer an enemy combatant. A third CSRT was convened, which made an enemy-combatant finding.¹³⁷

In the habeas cases filed in the U.S. District Court for the District of Columbia, the government continues to argue that the detainees have no constitutional rights, but also claims that if such rights exist, the CSRTs meet the requirements set out by *Hamdi*. One judge rejects both arguments.¹³⁸ Another accepts the claim that aliens detained at Guantánamo have no constitutional rights.¹³⁹ The decisions are appealed. It is now the fall of 2005. Mustafa Idir has been detained at Guantánamo for three and a half years.

article/2006/08/25/AR2006082501270_pf.html.

134. So the Executive reports. See Detainees Found To No Longer Meet the Definition of “Enemy Combatant” During Combatant Status Review Tribunals Held at Guantanamo, http://www.dod.mil/pubs/foi/detainees/NLEC_DetaineeList.pdf (last visited Sept. 2, 2008). None of the “no longer enemy combatant” determinations turn up among the CSRT returns made public. See MARK DENBEAUX & JOSHUA W. DENBEAUX, SETON HALL PUB. LAW AND LEGAL RESEARCH PAPER SERIES, NO-HEARING HEARINGS: CSRT: THE MODERN HABEUS CORPUS? 6 (2006), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf (last visited Sept. 2, 2008).

135. See DENBEAUX, *supra* note 9, at 2-12. A report by the Combating Terrorism Center (CTC) criticizes the Denbeaux study. See COMBATING TERRORISM CENTER, AN ASSESSMENT OF 516 COMBATANT STATUS REVIEW TRIBUNAL (CSRT) UNCLASSIFIED SUMMARIES 4 (2007), <http://www.ctc.usma.edu/csrt/CTC-CSRT-Report-072407.pdf> (last visited Sept. 2, 2008). The CTC study disputes some elements of the Denbeaux study not mentioned in the text and also one of its statistics: CTC’s review found that only forty-five percent of detainees were not alleged to have committed a hostile act. *Id.* at 33. I have not attempted to resolve this discrepancy as of the date of this article.

136. See DENBEAUX, *supra* note 134.

137. *Id.* at 3.

138. See *In re* Guantánamo Detainee Cases, 355 F. Supp. 2d 443, 443 (D.D.C. 2005).

139. See *Khalid v. Bush*, 355 F. Supp. 2d 311, 330 (D.D.C. 2005).

During this time, he alleges, guards have jumped on his head, causing a stroke that paralyzed half his face, have broken his fingers, and have held his head under water.¹⁴⁰ The only court to hear the charges against him, the Bosnian Supreme Court, has found no evidence to support his detention.

IV. CONGRESS ACTS: THE DETAINEE TREATMENT ACT OF 2005

In contrast to the courts, Congress is slow to take official action. Some members of Congress visit Guantánamo, where, according to a former interrogator, fake interrogations are staged for their benefit.¹⁴¹ In June 2005, Congress begins holding hearings on detention policy. Members express outrage at the *Time Magazine* report on the Al Qahtani interrogation and also at the Pentagon's insistence that his treatment was professional and humane. "Dangerous, and very dumb, and very shortsighted," says Nebraska Senator Chuck Hagel. "This is not how you win the people of the world over to our side, especially the Muslim world."¹⁴²

A public opinion poll conducted in June 2005 finds that twenty percent of Americans believe Guantánamo detainees have been treated unfairly. A thirty-six percent plurality thinks the treatment is "better than they deserve," and thirty-four percent think the treatment is "about right."¹⁴³

In July 2005, Arizona Senator John McCain offers two amendments to a defense appropriations bill.¹⁴⁴ The first protects individuals in the custody of the Department of Defense from interrogation techniques not listed in the Army Field Manual.¹⁴⁵ The second protects individuals in the custody of the United States government—this extending to the CIA—from "cruel, inhuman, or degrading treatment."¹⁴⁶ The President threatens to veto any bill that includes these amendments.¹⁴⁷ Congress takes no action before its summer recess.

140. See Charlie Savage, *Guantánamo Detainee Is Alleging He Was Brutalized*, BOSTON GLOBE, Apr. 13, 2005, at A12, available at http://www.boston.com/news/nation/washington/articles/2005/04/13/guantanamo_detainee_is_alleging_he_was_brutalized/. The government refuses to comment on specific allegations, but notes that Al-Qaeda "emphasizes the tactic of making false accusations if captured." *Id.* Idir's CSRT transcript reveals that his fingers were indeed broken. See CSRT Transcript, *supra* note 130, at 7.

141. See Carol D. Leonnig, *Detainee Questioning Was Faked, Book Says*, WASH. POST, Apr. 29, 2005, at A21, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/04/28/AR2005042801639_pf.html.

142. See *Time Report Fuels Guantánamo Criticism*, CNN, June 13, 2005, <http://www.cnn.com/2005/US/06/13/gitmo.time/index.html>.

143. Scott Rasmussen, *20%: Gitmo Prisoners Treated Unfairly*, RASMUSSEN REPORTS, June 22, 2005, <http://legacy.rasmussenreports.com/2005/Gitmo.htm> (last visited Sept. 1, 2008).

144. See 151 CONG. REC. S8789, S8798 (daily ed. July 25, 2005), available at http://www.fas.org/irp/congress/2005_cr/s072505.html.

145. *Id.*

146. *Id.*

147. See Josh White & R. Jeffrey Smith, *White House Aims To Block Legislation on Detainees*, WASH. POST, July 23, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/22/AR2005072201727.html>.

In October 2005, McCain revives the amendments and the White House responds by reiterating its veto threat. Senator Lindsay Graham of South Carolina introduces different amendments stripping federal courts of jurisdiction over habeas petitions filed by Guantánamo detainees.¹⁴⁸ The legislation that emerges, the Detainee Treatment Act of 2005 (DTA), includes the McCain amendments and provides for the D.C. Circuit to review the CSRTs. As suggested by Senator Graham, however, the Act eliminates review by any court of habeas corpus petitions or other actions “filed by or on behalf of” Guantánamo detainees.¹⁴⁹

There are two public Executive responses. First, faced with a prohibition on techniques not listed in the Army Field Manual, the Executive revises the manual to include new aggressive interrogation techniques. The precise nature of the newly approved techniques remains unknown, as they appear in a classified addendum.¹⁵⁰ Second, in signing the Act, the President includes a signing statement asserting that his administration will construe the DTA “in a manner consistent with the constitutional authority of the President . . . as Commander-in-Chief and consistent with the constitutional limitations on the judicial power.”¹⁵¹ According to the OLC memos, this means that the limitations do not apply to any interrogation authorized by the President in connection with anti-terrorism efforts.¹⁵²

There is also a non-public Executive response to the Act. The OLC issues a classified opinion asserting that the prohibition on cruel, inhuman, and degrading treatment does not bar waterboarding or any other of the techniques used by the CIA.¹⁵³

V. MILITARY COMMISSIONS: THE EXECUTIVE, THE COURT, AND CONGRESS

In addition to being interrogated, some Guantánamo detainees are intended to undergo trial. The President’s Military Order of November 13, 2001, authorizes the trial of non-citizen terrorism suspects before military

148. See 151 CONG. REC. S12771 (daily ed. Nov. 14, 2005), available at <http://www.thomas.gov/cgi-bin/query/D?r109:10:/temp/~r109nDnbUL>.

149. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1001, 119 Stat. 2680, 2742 (2005) (amending 28 U.S.C.A. § 2241 to eliminate judicial review of habeas petitions for detainees).

150. See Eric Schmitt, *New Army Rules May Snarl Talks with McCain on Detainee Issues*, N.Y. TIMES, Dec. 14, 2005, at A1, available at <http://www.nytimes.com/2005/12/14/politics/14detain.html?ex=1186891200&en=180f264c1fb2adcf&ei=5070>. The revised manual eventually issues in September 2006. Michelle Gordon, *Army, Marine Corps Unveil Counterinsurgency Field Manual*, Dec. 15, 2006, <http://www.army.mil/news/2006/12/15/1005-army-marine-corps-unveil-counterinsurgency-field-manual> (last visited Sept. 1, 2008).

151. George W. Bush, *Statement by the President*, 2005 WL 3562509 (White House) (Dec. 30, 2005) available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

152. See *supra* notes 35-38 and accompanying text.

153. Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1, available at <http://www.nytimes.com/2007/10/04/washington/04interrogate.html>.

commissions.¹⁵⁴ The commissions do not start immediately and prove controversial even within the prosecution. In March 2004, two Air Force prosecutors quit on the grounds that the process is “rigged.” They accuse other prosecutors of failing to preserve exculpatory evidence and ignoring allegations of torture and other conduct that might “constitute dereliction of duty, false official statements, or other criminal conduct.”¹⁵⁵

In July 2004, Salim Ahmed Hamdan, a Guantánamo detainee and former driver for Osama Bin Laden, is charged with one count of conspiracy to commit offenses triable by a military commission. Hamdan’s lawyers file a habeas action seeking to bar the trial, arguing that the Executive lacks the authority to create military commissions unilaterally. The case reaches the Supreme Court in 2006, and on June 29, the Court rules in Hamdan’s favor.¹⁵⁶ The Executive, the Court reasons, can create military commissions on its own authority only in compliance with the laws of war, including the Geneva Conventions.¹⁵⁷ The commissions created by the November 13 order fail to comply with the Geneva Conventions in several respects, most notably by preventing a defendant from seeing evidence against him and excluding him from the trial.¹⁵⁸ The Court bars Hamdan’s trial from going forward.¹⁵⁹

On September 6, 2006, the President announces the transfer of fourteen “high value” detainees, including Abu Zubaydah and Khalid Sheikh Mohammed, from CIA custody to Guantánamo.¹⁶⁰ Bush declares that these detainees have been subjected to questioning techniques that are “tough, . . . and safe, and lawful, and necessary. . . . I want to be absolutely clear with our people, and the world: the United States does not torture. It’s against our laws and against our values.”¹⁶¹ He asks Congress to authorize military commissions for their trials and also to “make it clear that captured terrorists

154. Press Release, The White House, President Issues Military Order (Nov. 13, 2001), <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (last visited Sept. 1, 2008).

155. Jess Bravin, *Two Prosecutors at Guantánamo Quit in Protest*, WALL ST. J., Aug. 1, 2005, at B1.

156. In its opinion, the Court ignores the portion of the order purporting to bar terror suspects from obtaining judicial relief, just as it did with the similar proclamation of President Franklin Roosevelt in *Ex Parte Quirin*. See *supra* note 98.

157. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]. Common Article 3 of the Geneva Conventions protects detainees from “humiliating and degrading treatment.” *Id.* The article also prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *Id.*

158. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2787-88, 2796-98 (2006) (noting commissions’ exclusion of rules of evidence typically applicable to criminal and court-martial hearings).

159. See *id.* at 2798.

160. See Gerry J. Gilmore, *High-Value Detainees Moved to Gitmo; Bush Proposes Detainee Legislation*, AMERICAN FORCES PRESS SERVICES, Sept. 6, 2006, <http://www.defenselink.mil/news/NewsArticle.aspx?ID=721> (last visited June 15, 2008).

161. Press Release, White House, President Discusses Creation of Military Commissions To Try Suspected Terrorists (Sept. 6, 2006), <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> (last visited Sept. 1, 2008).

cannot use the Geneva Conventions to sue our personnel The men and women who protect us should not have to fear lawsuits filed by terrorists because they're doing their jobs."¹⁶²

Upon its return in September, Congress swiftly passes the Military Commissions Act of 2006 and the President signs it on October 17.¹⁶³ The Act authorizes the President to establish military commissions for the trial of "any alien unlawful enemy combatant."¹⁶⁴ It prohibits courts from entertaining habeas petitions by aliens determined to be enemy combatants or awaiting such determination. In other words, the Act authorizes the Executive to seize individuals, including lawful residents of the United States, and to detain and interrogate them indefinitely without access to courts.¹⁶⁵ It provides that the Geneva Conventions shall not be a source of rights in any proceeding in U.S. courts to which the government is a party¹⁶⁶ and gives retroactive protection to interrogators against civil or criminal liability.¹⁶⁷ Additionally, it narrows the War Crimes Act, providing that only certain defined "grave breaches" of Common Article 3 of the Geneva Conventions constitute War Crimes Act violations.¹⁶⁸

Once again, the commission process begins. The first case is that of David Hicks, an Australian captured in Afghanistan by Northern Alliance forces. He pleads guilty to one count of providing material support for terrorism and is sentenced to seven years in prison. He is given credit for the time spent in Guantánamo and is released to Australia to serve the remaining nine months. He also agrees not to speak to the media for one year.

The high-value detainees receive CSRT review. All are determined to be enemy combatants. In their hearings, several of the detainees claim that they were tortured to induce false confessions. Their descriptions of alleged torture are redacted from the transcripts.¹⁶⁹ The Executive asserts that the detainees should not be allowed to meet with lawyers because they may have come into possession of classified information "including . . . conditions of detention and alternative interrogation techniques."¹⁷⁰

162. *Id.*

163. See The White House, President Bush Signs Military Commissions Act of 2006, http://www.whitehouse.gov/news/releases/2006/10/images/20061017-1_p101706pm-086-515h.html (last visited Sept. 1, 2008).

164. See Military Commissions Act of 2006 § 3, Pub. L. No. 109-366, 120 Stat. 2600 [hereinafter MCA], 10 U.S.C. § 948c (2006), available at http://www.loc.gov/rr/frd/Military_Law/pdf/S-3930_passed.pdf.

165. See MCA § 7, 28 U.S.C. § 2241(e)(1) (2006).

166. See MCA §§ 3, 5, 10 U.S.C. §§ 948(a), 948b(g) (2006).

167. See MCA § 6(b)(1)(A), 18 U.S.C. § 2441(c)(3) (2006).

168. See MCA § 6(a)(2), 18 U.S.C. § 2441(c)(3) (2006).

169. See Transcript of Record at 16, Abd al-Rashim al-Nashiri, ISN No. 10015 (CSRT Mar. 14, 2007), http://www.defenselink.mil/news/transcript_ISN10015.pdf; Transcript of Record at 22, Abu Zubaydeh, No. 10015 (CSRT Mar. 14, 2007), http://www.defenselink.mil/news/transcript_ISN10016.pdf; Transcript of Record at 14-16, Khalid Sheikh Muhammed, No. 10024 (CSRT Mar. 10, 2007), http://www.defenselink.mil/news/transcript_ISN10024.pdf.

170. Carol Leonning & Eric Rich, *U.S. Seeks Silence on CIA Prisons*, WASH. POST, Nov. 4, 2006, at A1,

Before any of the high-value detainees can be brought before a military commission, the commissions themselves bring the trials to a halt. Their statutory jurisdiction extends to the trial of people determined to be unlawful enemy combatants, but the CSRT rulings address only enemy combatant status, not lawfulness. In the summer of 2007, two military judges dismiss charges against detainees on the theory that the jurisdiction of the commissions has not been established.¹⁷¹ In October, Morris Davis, the chief prosecutor, resigns, having “concluded that full, fair and open trials were not possible under the current system.”¹⁷² Davis is scheduled to testify before a congressional committee examining the treatment of Guantánamo detainees, but is told that the Department of Defense will not permit him to do so.¹⁷³ He is the second military lawyer whose testimony the Executive has blocked.¹⁷⁴

VI. ALL OF THE ABOVE, MORE OF THE SAME

Events continue to unfold and this article cannot pursue them indefinitely. Recent events suggest that the three branches will continue to act more or less as they have over the past seven years.

The Executive will continue to attempt to run its interrogation programs more or less unilaterally. On July 20, 2007, in response to *Hamdan*'s ruling that Common Article 3 of the Geneva Conventions protects all detainees, the President issues an executive order construing Common Article 3 as it applies to CIA interrogation and detention programs.¹⁷⁵ The order provides that the

available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/03/AR2006110301793.html>.

171. See Sara Wood, *Charges Dismissed Against Canadian at Guantánamo*, AMERICAN FORCES PRESS SERVICE, June 4, 2007, <http://www.defenselink.mil/news/newsarticle.aspx?id=46281> (last visited Sept. 1, 2008) (reporting dismissal of charges against Omar Khadr); Sara Wood, *Judge Dismisses Charges Against Second Guantánamo Detainee*, AMERICAN FORCES PRESS SERVICE, June 4, 2007, <http://www.defenselink.mil/news/newsarticle.aspx?id=46288> (last visited Sept. 1, 2008).

172. See Morris D. Davis, *AWOL Military Justice*, L.A. TIMES, Dec. 10, 2007, available at <http://www.latimes.com/news/opinion/la-oe-davis10dec10,0,2446661.story?coll=la-opinion-righttrail>. The last straw for Davis is a reorganization that puts him under the authority of Defense Department General Counsel William Haynes, who apparently disagreed with Davis' refusal to introduce evidence obtained by waterboarding. See *id.*; see also Morris D. Davis, *Unforgivable Behavior, Inadmissible Evidence*, N.Y. TIMES, Feb. 17, 2008, at WK12, available at <http://www.nytimes.com/2008/02/17/opinion/17davis.html> (stating Davis resigns to call attention to issue of military commissions considering torture-derived evidence). He gives interviews in which he alleges that the prosecutions are timed for political gain and that Haynes told him, “We can't have acquittals.” Davis says he expects to testify for the defense in upcoming trials. See *Surprise Witness for Bin Laden Driver*, ASSOCIATED PRESS, <http://www.cbsnews.com/stories/2008/02/22/national/main3865269.shtml> (last visited Sept. 1, 2008). On February 25, 2008, Haynes resigns. A Department of Defense statement praises him for serving “with distinction” during “one of America's most trying periods.” See Press Release, U.S. Dept. of Defense, General Counsel Returns to Private Life, <http://www.defenselink.mil/releases/release.aspx?releaseid=11711> (last visited Sept. 1, 2008).

173. See Jess Bravin, *Guantánamo Testimony Is Blocked*, WALL ST. J., Dec. 8, 2007, at A4.

174. See Jess Bravin, *Pentagon Forbids Marine To Testify*, WALL ST. J., Nov. 8, 2007, at A9.

175. See Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, Exec. Order No. 13340, 72 Fed. Reg. 40707 (2007), available at <http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html>.

program will be in compliance with Common Article 3 as long as it does not employ torture as defined in the Torture Act, other “comparable” abuses, techniques prohibited by federal law, or “willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency.”¹⁷⁶ Detainees are to receive “the basic necessities of life,” including “adequate food and water, shelter from the elements, necessary clothing, protections from extremes of heat and cold, and essential medical care.”¹⁷⁷ A senior intelligence official refuses to comment when asked if the order permits waterboarding. Another official acknowledges that sleep is not among the protected necessities.¹⁷⁸

The judiciary will continue to push back against Executive overreaching. The Supreme Court hears argument on the habeas petitions of Mustafa Idir and others in December 2007 and in June 2008 it hands down a decision. *Boumediene v. Bush* strikes down the provisions of the MCA denying habeas rights to Guantánamo detainees.¹⁷⁹ The complete jurisdiction and control exercised by the United States over Guantánamo Bay means that the right to habeas applies there despite the formal reservation of Cuban sovereignty; as the Court puts it, “The Nation’s basic charter cannot be contracted away like this.”¹⁸⁰ Nor are CSRTs with D.C. Circuit review under the DTA an adequate habeas substitute, for the DTA contains no provisions allowing detainees to present to the D.C. Circuit exculpatory evidence rejected by the CSRT as not reasonably available or discovered after the CSRT has concluded.¹⁸¹ Lawyers for detainees awaiting trial before military commissions immediately seek to block the trials on the grounds that they violate detainees’ constitutional rights.¹⁸²

In its first decision of a DTA suit, the D.C. Circuit also rules against the Executive.¹⁸³ The evidence in support of the CSRT determination that Huzaifa Parhat is an enemy combatant, the court says, is “insufficient to support the

176. *Id.* at § 3(b)(i)(E).

177. *Id.* at § 3(b)(iv).

178. See Katherine Shrader, *Bush Alters Rules for CIA Interrogations*, WASH. POST, July 21, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/20/AR2007072001581.html>.

179. 128 S. Ct. 2229 (2008).

180. *Id.* at 2259.

181. *Id.* at 2272-73.

182. See, e.g., William Glaberson, *Two Subplots in Guantánamo’s Long Legal Story*, N.Y. TIMES, July 4, 2008, <http://www.nytimes.com/2008/07/04/washington/04gitmo.html> (last visited Sept. 1, 2008). Hamdan’s military commission trial does take place in July 2008. In August the military jury convicts him of providing material support to terrorism and sentences him to five and a half years in prison. As he receives credit for time served in Guantanamo pending trial, this amounts to something under six months. See William Glaberson, *War Crimes System Is Still on Trial*, N.Y. TIMES, Aug. 9, 2008, available at <http://www.nytimes.com/2008/08/10/washington/10gitmo.html>.

183. *Parhat v. Gates*, No. 06-1397, 2008 WL 2576977 (D.C. Cir. June 20, 2008).

Tribunal's determination because it does not permit the Tribunal or this court to assess its reliability."¹⁸⁴ The government documents assert that various facts or events "reportedly" occurred, or are "suspected." But the government provides no indication of who reported or suspected these things and therefore no way for the CSRT or the court to determine their reliability.¹⁸⁵ The Executive "insists that the statements made in the documents are reliable because the State and Defense Departments would not have put them in intelligence documents were that not the case," but the court remains unpersuaded.¹⁸⁶ It orders the government to release Parhat, to transfer him, or to convene a new CSRT consistent with the requirements of its opinion.¹⁸⁷

Congress will continue to do very little. During confirmation hearings for the nomination of Michael Mukasey as Attorney General, senators repeatedly ask him whether he considers waterboarding to be torture. Waterboarding has been described as torture by the Supreme Court of Mississippi as long ago as 1926¹⁸⁸ and by the U.S. State Department as recently as 1994.¹⁸⁹ The United States has prosecuted it as a war crime.¹⁹⁰

Mukasey refuses to answer what he calls "hypotheticals."¹⁹¹ The Senate confirms him by a vote of 53 to 40.¹⁹² In later testimony, Mukasey suggests that whether waterboarding is torture depends on the importance of the information sought.¹⁹³ He comments that he "can't contemplate any situation in which this President would assert Article II authority to do something the law forbids," despite a history of signing statements asserting just that. He also refuses to share with the Judiciary Committee, even in closed session, the Executive theory as to why CIA enhanced interrogation techniques are not illegal.¹⁹⁴

On December 13, 2007, the House passes a bill that would require the CIA to adhere to the interrogation standards set out in the Army Field Manual. The White House threatens a veto on the grounds that such a restriction would "prevent the President from taking lawful actions necessary to protect

184. *Id.* at *9.

185. *Id.* at *11.

186. *Id.* at *13.

187. *Parhat*, 2008 WL 2576977, at *15.

188. *See Fisher v. State*, 110 So. 361, 362 (Miss. 1926).

189. *See PHYSICIANS FOR HUMAN RIGHTS*, *supra* note 34, at 16-19.

190. *See id.* *See generally* Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468 (2007).

191. *See Mukasey Stays Vague on Waterboarding* (CNN television broadcast Oct. 30, 2007).

192. *See* U.S. Senate Roll Call Votes 110th Congress, 1st Session, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00407 (last visited Sept. 1, 2008).

193. *See* Scott Horton, 'Reasonable Minds Can Differ', HARPER'S MAG., Jan. 31, 2008, available at <http://www.harpers.org/archive/2008/01/hbc-90002285>.

194. *See id.*

Americans from attack in wartime.”¹⁹⁵ The Senate passes the bill in February 2008.¹⁹⁶ On March 8, Bush vetoes the bill, saying that “[t]his is no time for Congress to abandon practices that have a proven track record of keeping America safe.”¹⁹⁷

VII. ANALYSIS

In its most skeletal outline, this story is a fairly simple tale of action and reaction by the three branches. It is the sort of interplay that high school civics teaches us to expect: the Executive makes aggressive claims of authority; the Supreme Court pushes back in *Hamdi*, *Rasul*, and *Padilla*; and Congress offers a middle ground with the Detainee Treatment Act. The Executive moves forward with military commissions, the Court pushes back in *Hamdan*, and Congress generally supports the Executive in the Military Commissions Act. The Court has refused to back down and its extension of constitutional habeas to Guantánamo in *Boumediene* will probably result in the closure of that facility given that there are no longer legal advantages to keeping detainees there. Whether detainees will be brought within the United States or shipped to prisons farther away remains to be seen.

To get a full view of the interplay between the branches of government in recent years, we would have to look at many other areas, for instance, the battle over the Foreign Intelligence Surveillance Act and warrantless surveillance.¹⁹⁸ Still, examining the area of Executive detention alone provides enough material to support an evaluation of the performances of the different branches both on their own and in comparison to relevant historical precedents.

A. The Executive

Many commentators believe that the Bush administration operates on a radical theory of Executive authority.¹⁹⁹ Some of its assertions are indeed quite radical, like the claim that the Executive can detain an American inside the United States and hold him indefinitely without charges or access to the courts. The claim that the Executive violates no enforceable law if it tortures or

195. Scott Shane, *House Passes Restrictions on Interrogation Methods*, N.Y. TIMES, Dec. 14, 2007, at A18, available at <http://www.nytimes.com/2007/12/14/washington/14intel.html>.

196. David M. Herszenhorn, *Senate Passes Interrogation Ban*, N.Y. TIMES, Feb. 13, 2008, available at <http://www.nytimes.com/2008/02/13/washington/13cnd-cong.html>.

197. See Dan Eggen, *Bush Announces Veto of Waterboarding Ban*, WASH. POST, Mar. 8, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/08/AR2008030800304.html>.

198. This article does not examine the related aspects of Executive detention in places like Iraqi prisons, Bagram Airforce Base in Afghanistan, or the CIA black sites.

199. See Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 346 (2007) (describing Bush administration’s understanding of executive power). “The Bush administration has claimed a radical and seemingly unending commander-in-chief power to violate any inhibiting international law or congressional legislation . . .” *Id.*

arbitrarily executes aliens detained abroad is similarly extreme. A look at history, however, shows that these claims are not as unprecedented as they might seem.

One of the current signature moves of Executive lawyers is the theory I have called the commander-in-chief override: the claim that the President, when acting as commander-in-chief, is immune to congressional regulation. Here is one formulation of the theory, from argument before the Supreme Court.

Question: I understood you to say that if [the President] acted in conflict with the Acts of Congress it was still all right.

Answer: He must have some constitutional power that Congress cannot interfere with, as Commander-in-Chief.²⁰⁰

Another signature claim is the theory that the nature of this war makes the whole world a battlefield, so that commander-in-chief power can be exercised everywhere. As an Executive lawyer argued before the Supreme Court, the conditions of previous wars “do not today exist, and a bomber may drop a bomb tomorrow on Chicago. Can it be said that there is no area of warfare, no area of military operations, in Chicago under those circumstances? I think not.”²⁰¹

But neither of the above quotes is from a Bush administration lawyer. Attorney General Francis Biddle made both statements while arguing before the Supreme Court in *Ex parte Quirin*, a 1942 case about Nazi saboteurs tried before a military commission pursuant to the orders of President Franklin Delano Roosevelt (FDR). The Executive strategy with respect to military tribunals this time around clearly relied heavily on the *Quirin* precedent as even the section of Bush’s order announcing that persons subject to it had no right to seek relief in court tracked a similar proclamation by FDR.²⁰²

In FDR’s defense, that order was aimed narrowly at eight individuals whose guilt was not in doubt. Of course, the Roosevelt administration engaged in broader-based detention as well when it detained over 100,000 Americans of Japanese descent without any individualized hearings.

A few features of the current Executive, however, are distinctive. First, the commander-in-chief override is pushed to extremes well beyond what prior administrations have asserted. Most constitutional scholars agree that there is an area where the powers of Congress and the Executive overlap and that if powers within this zone are used in conflicting ways then sometimes Congress wins and sometimes the Executive does. This is what Attorney General Biddle

200. Transcript of Oral Argument in *Ex Parte Quirin*, at 35, reprinted in 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT 636 (Philip Kurland & Gerhard Casper eds., 1975).

201. *Id.* at 580.

202. See JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 109 (2007).

was arguing.²⁰³ The Bush OLC lawyers, however, seem to have taken the position that Executive power prevails whenever it exists. That stance is radical, quite implausible, and undesirable.²⁰⁴

Second, this Executive behaves strategically to avoid legal constraint. This is visible in the analysis of the OLC memos and most notably in the selection of Guantánamo as a detention site. OLC lawyers chose Guantánamo because they believed that it was beyond the jurisdiction of federal courts and that neither the federal torture statute nor the Constitution applied to actions taken there.

Such an approach treats the Constitution the way aggressive lawyers treat the tax code, as an annoyance to be evaded. Under this approach, the Constitution must be followed, if you cannot figure out how to get around it, but is not of any normative significance. Guantánamo is also in fact much like a tax shelter, something created solely to circumvent the law. But using clever constructs to avoid tax liability is one thing; using them to evade the Constitution is another. Constitutional prohibitions on brutal or shocking conduct reflect a moral judgment that there are some tactics our government must refrain from using on individuals. This moral judgment is not altered by the location of such acts and eluding the reach of the prohibition does nothing to make the conduct less offensive. Treating the Constitution like the tax code disrespects it and to the extent that the Constitution is a charter of American values, it disrespects those values.

Third, this Executive insists on secrecy. To a certain degree, that is understandable: covert operations cannot be publicly conducted. At some point, though, the Executive's persistent refusal to produce any evidence in support of its claims damages public confidence. Opting to release Yaser Hamdi, for instance, rather than defend his detention in court, creates the impression that the case against him was weak. So does Jose Padilla's transfer into the criminal justice system and the abandonment of the dirty bomb allegations. So does the fact that 405 of the people detained at Guantánamo—once described as hardened terrorists—have been released.²⁰⁵

At some point, the insistence on secrecy becomes simply grotesque. The

203. It is also basically the import of Justice Jackson's famous concurrence in *Youngstown*. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

204. See, e.g., David J. Barron & Martin S. Lederman, *The Commander-In-Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); Jack M. Balkin, *Youngstown and the President's Power To Torture*, <http://balkin.blogspot.com/2004/07/youngstown-and-presidents-power-to.html> (last visited Sept. 1, 2008); Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2005/12/inherent-authority-to-violate-federal.html> (Dec. 22, 2005, 11:15 EST).

205. Most of the detainees have been released to their home countries for what the Executive calls "continued detention." Reporters who follow up on the continued detention find that most of the detainees have been freed by their home countries and were either never charged or cleared of all charges. See Andrew O. Selsky, "Vicious Killers" From Guantánamo Bay Routinely Freed by Other Countries, USA TODAY, Dec. 15, 2006, available at http://www.usatoday.com/news/world/2006-12-15-gitmo-freed_x.htm.

administration, as previously noted, has argued that the fourteen high-value detainees transferred to Guantánamo should not be allowed to meet with lawyers. The detainees, the administration says, might possess classified information that they could disclose. What kind of classified information would these detainees have? “Information,” the administration says, “including . . . conditions of detention and alternative interrogation techniques.”²⁰⁶ It is left for the reader to deduce how the detainees “came into possession” of information about alternative interrogation techniques.²⁰⁷ Arguing that detainees who allege that they have been tortured should not be allowed to meet with lawyers because they might describe the techniques used to torture them does not show the Executive in a very democratic light.²⁰⁸ Further, the Executive’s reliance on the state-secrets doctrine to obtain dismissal of other suits alleging mistreatment is not much better.²⁰⁹ Lastly, of course, there is the use of alternative interrogation techniques itself, which is discussed below.

The Executive’s conduct deserves low marks. Such conduct is not unprecedented; the basic pattern in our history is that the Executive responds to crisis with measures that in retrospect seem unnecessary, unwise, and undesirable.²¹⁰ One might hope, however, that the country could learn from this history even as it is repeated.²¹¹

B. Congress

The most striking feature of Congress’s post-9/11 performance is its passivity. Congress has done little except to give the President power and restrict the possibility of judicial oversight. The only notable exception is the enactment of provisions restricting permissible interrogation methods to some degree.²¹²

This would have surprised James Madison, who believed that the separation

206. Carol D. Leoning & Eric Rich, *U.S. Seeks Silence on CIA Prisons; Court Is Asked To Bar Detainees from Talking About Interrogations*, WASH. POST, Nov. 4, 2006, at A1.

207. *Id.*

208. It also seems close to an admission that the allegations are true. The Executive argues that the techniques it uses must be kept secret to prevent terrorists from training to resist them. Based on this rationale, only truthful disclosures are a threat; false ones would mislead terrorists into pointless resistance training.

209. See COLE & LOBEL, *supra* note 46, at 42-43 (describing Executive response to suits by Maher Arar and Khaled el-Masri).

210. *But see* ERIC A. & ADRIAN VERMEULE, *TERROR IN THE BALANCE: LIBERTY, SECURITY, AND THE COURTS* (2007). See generally GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* (2004).

211. Geoffrey Stone demonstrates the historic pattern of executive excesses and has also contributed to the effort to prevent repetition; he filed an amicus brief on behalf of Fred Korematsu in *Hamdi*.

212. See MCA, 10 U.S.C. § 948r(d)(3) (2006) (outlining forbidden interrogation techniques). Congress listed conduct that would amount to a “grave breach” of Common Article 3 of the Geneva Conventions and a violation of the War Crimes Act. *Id.* (discussing prohibition of “grave breaches” as defined in 18 U.S.C. § 2441 (2006)). The MCA also prohibits “cruel, inhuman or degrading treatment” of any individual in the custody of the U.S. Government, “regardless of nationality or physical location.” *Id.*

of powers between executive, legislative, and judicial branches of government would protect liberty.²¹³ But it should not surprise us. Madison's belief that separated powers would prevent abuse rested on the premise that officeholders would feel loyalty to their offices.²¹⁴ Members of Congress, in this view, would seek to protect and expand the power of Congress and they would naturally resist power grabs by the Executive. As Madison put it, "ambition must be made to counteract ambition."²¹⁵

Madison never gave any reason why this institutional loyalty would exist, but it might have seemed plausible in the Framers' world, one without political parties. The pressures of modern political party affiliation dramatically change the picture. Members of Congress who are of the same political party as the President do not see him as a rival, but as the captain of their team. The high school civics model of the separation of powers is therefore false. If the President's party controls Congress, Congress is unlikely to provide much of a check on executive ambition.

That, of course, is what we have seen: one-party rule produces very little in the way of congressional oversight or resistance. Divided rule produces something more of a balance, though not, perhaps, as much as one might hope for. Even a minority of the President's party in the Senate can filibuster or prevent the override of a presidential veto. The short lesson is that a factionalized Congress is simply no match for the Executive.

Again, however, history shows that our times are not exceptional. The World War II internment, for example, was accomplished in a system of one-party rule and Congress showed no inclination to restrain Executive power. Justice Robert Jackson, in fact, warned of the effects of the party system in his celebrated *Youngstown* concurrence over fifty years ago.²¹⁶ Congress is not performing especially well, but a Congress controlled by the President's party cannot be expected to do much other than follow the Executive's lead. More can be demanded of the new Democratic Congress, which thus far has not produced.²¹⁷ The Senate's confirmation of an attorney general, for example,

213. See THE FEDERALIST No. 51 (James Madison) (emphasizing importance of separation of government branches).

214. See *id.*

215. *Id.*

216. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J. concurring) (addressing problems associated with lack of separation of powers in practice). Justice Jackson wrote that the party system "has made a significant extraconstitutional supplement to real Executive power Party loyalties and interests, sometimes more binding than law, extend his power into branches other than his own . . ." *Id.* at 654. Jackson's insight, surprisingly, went little-discussed in academic literature until recently, when Daryl Levinson and Richard Pildes made it the basis of an article. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006) ("recover[ing] and build[ing] upon Justice Jackson's insight"). See generally *id.* at 2311-86 (concluding political parties main source of political competition).

217. See Jack M. Balkin, *The Party of Fear, the Party Without a Spine, and the National Surveillance State*, <http://balkin.blogspot.com/2007/08/party-of-fear-party-without-spine-and.html> (Aug. 5, 2007, 9:57 EST)

who refused to state for the record whether waterboarding is torture is an embarrassment to the party and the nation.²¹⁸

C. The Judiciary

In the absence of congressional pushback, the responsibility for restraining Executive claims of authority has fallen almost entirely on the courts. The courts have done well for the most part. They have refused to accede to the most dramatic claims of Executive authority, like the unreviewable authority to arrest, detain, and psychologically break American citizens for the purpose of interrogation.²¹⁹ In *Boumediene* and *Parhat* they have reaffirmed that the Executive cannot evade the obligation to justify its actions through strategic maneuvers or *ipse dixit*.

The Court's performance is also commendable when compared against the historical record. In times of crisis, courts tend to defer.²²⁰ The World War II Court, for instance, was obviously uncomfortable with the internment of Japanese Americans. It did not want to endorse the race-based detention of citizens and, indeed, in the three internment decisions it never did. *Hirabayashi v. United States* upheld a curfew,²²¹ and *Korematsu v. United States* upheld exclusion orders.²²² The Court refused to consider detention in *Korematsu* and, when it did get to the detention issue in *Ex parte Endo*, it said that this exceeded the power granted to the War Relocation Authority.²²³

The World War II Court, however, never interfered with any Executive programs. Even when it pronounced the camps unauthorized, it did so the day after the Executive had declared that they would be closed.²²⁴ The current Court, in contrast, has rejected some Executive claims on constitutional grounds and ruled in other cases that the Executive cannot proceed without congressional authorization.²²⁵ It has slowed down the most aggressive Executive programs and for others required wider political backing in the form

(categorizing two political parties as "Party of Fear" and "Party Without a Spine").

218. See *supra* notes 190-194 and accompanying text (discussing Mukasey's stance on torture during and after confirmation process).

219. See Warren Richey, *US Gov't Broke Padilla Through Intense Isolation, Say Experts*, CHRISTIAN SCI. MONITOR, Aug. 14, 2007, at 11, available at <http://www.csmonitor.com/2007/0814/p11s01-usju.htm> (arguing Executive's declaration of U.S. citizen as enemy combatant negates constitutional right against forced self-incrimination). The defense psychiatrist who examined Padilla reported that "[i]t is clear that the intent of this isolation was to break Padilla for the interrogations that were to follow." *Id.*

220. Chief Justice Taney's issuance of the writ of habeas corpus that Lincoln defied is a notable counterexample. See *Ex Parte Merryman*, 17 F. Cas. 144 (Md. 1861).

221. *Hirabayashi v. United States*, 320 U.S. 81, 105 (1943) (upholding curfew regulations in military area).

222. *Korematsu v. United States*, 323 U.S. 214, 217 (1944) (allowing exclusion of persons of Japanese ancestry pursuant to war power).

223. *Ex Parte Endo*, 323 U.S. 283, 297 (1944) (determining detention of Japanese-American citizens exceeded scope of War Relocation Authority).

224. See Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1935 (2003).

225. See *supra* Section II (analyzing Court's decisions in *Hamdi*, *Padilla*, and *Rasul*).

of congressional support. That is probably the realistic limit of the Court's exercise of authority.

D. The People

The Executive is performing badly, Congress not much better, and the judiciary fairly well. But the evaluation is not over. The Executive's detention and interrogation program clearly does not represent the work of a few bad apples, as was once suggested.²²⁶ Rather, responsibility goes right to the top. That is, to us.

The great innovation of the Framers of our Constitution was to create a government that is not our master but our servant. We the people are the ultimate sovereign. The government acts for us; what it does, it does in our name and with the power we have given it. Its acts, as hornbook agency law states, are attributable to us, for good or for ill. If it spreads liberty and relieves suffering, we can take pride in those acts as our own. If it tortures, we are torturers.

Of course, we cannot control what we do not know. And certainly the Executive has done the best it could to prevent the American people from reaching an informed decision about these policies. It has gone to great lengths to prevent facts from coming out in court. It has released alleged terrorists rather than explain why it was holding them. It has tried in other ways to undermine or derail the legal process that could bring truth to light. It has put pressure on the detainees' military lawyers,²²⁷ harassed their civilian counsel,²²⁸ and invited economic sanctions against law firms providing pro bono representation.²²⁹ It has tried to keep lawyers from seeing detainees on the

226. See Note, *Government Counsel and Their Obligations*, 121 HARV. L. REV. 1409, 1424, n.100 (2008).

227. See Raymond Bonner, *Prosecutor Criticizes Guantánamo Bay Detainee's Lawyer*, INT'L HERALD TRIBUNE, Mar. 4, 2007, available at <http://www.ihl.com/articles/2007/03/04/news/hicks.php> (discussing pressure on detainees' lawyers). In March 2007, the chief military commission prosecutor, Colonel Morris Davis, suggested that the efforts of David Hicks' military defense lawyer, Major Michael Mori, to stir up political support for Hicks in Australia might subject him to prosecution for using "contemptuous words" about administration officials. *Id.*

228. See Scott Horton, *State of Exception: Bush's War on the Rule of Law*, HARPER'S MAG., July 2007, available at <http://www.harpers.org/archive/2007/07/0081595> (noting detainees told that their lawyers are Jews and homosexuals who cannot be trusted).

229. See Tony Mauro, *Top Law Firms Join Forces in Landmark Detainee Case*, LEGAL TIMES, Mar. 28, 2006, <http://www.law.com/jsp/article.jsp?id=1143207019627> (last visited Sept. 1, 2008). In March 2006, the chief military commission prosecutor, Colonel Morris Davis, said at a Guantánamo press conference that it was "ironic" that law firms who represented defense contractors would also represent detainees. *Id.* More notoriously, on January 11, 2007, Deputy Assistant Secretary of Defense for Detainee Affairs Cully Stimson recited the names of major law firms providing pro bono representation to detainees, pronounced their involvement "shocking," and predicted that "when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms And we want to watch that play out." Stimson also characterized Guantánamo as "the most transparent and open location in the world." *Unveiled Threats*, WASH. POST, Jan. 12, 2007, at A18, available at <http://www.washingtonpost.com/wp-dyn/content/>

grounds that subjection to enhanced interrogation makes their bodies, in effect, state secrets. It has ordered military lawyers not to testify before Congress about the effect of interrogation techniques on their ability to prosecute suspects.²³⁰ It has destroyed tapes that might have clarified the question of whether those interrogation techniques constitute torture, in defiance of at least one judicial order.²³¹ And it has perhaps been less than candid in court, as when Paul Clement answered Justice Ginsburg's question about "mild torture" with the flat statement, "our Executive doesn't."²³²

Clement, however, was right about one thing: it is our Executive. After a certain point, one can only conclude that we have ratified its actions. Everything I have discussed here is public; every example and anecdote comes from the pages of major newspapers. If we, the American people, let these programs continue, it is because, in some sense, we want them. Or at least, we are too frightened, too passive, or too preoccupied with Britney Spears to stop them.

Now I wish to explain why they should stop, why the policies we have been pursuing are not just shameful but disastrous. For those who are categorically opposed to torture, I probably need to say nothing more. What about those who think that in times of crisis it is appropriate to defer to the expertise and energy of the Executive?²³³ The Executive has certainly displayed energy. It has not, however, been an inspiring example of expertise. If we think about torture in terms of its costs and benefits, it is reasonably clear that torture is bad policy.

The benefit of torture is that it makes people talk. But this is not an unalloyed benefit because talking and providing truthful information are very different things. In the Korean War, captured American aviators gave lengthy confessions about their plans to bomb civilian targets with bacteriological weapons. These confessions, it turned out, were coerced by various interrogation tactics like sleep deprivation, stress positions, isolation, and extended questioning. In light of this experience, the armed forces began training individuals at risk of capture to resist these tactics in the Survival, Evasion, Resistance, and Escape (SERE) program. The regulations governing

article/2007/01/11/AR2007011101698.html. On January 12, 2007, the *Wall Street Journal* ran an editorial quoting an unnamed "senior U.S. official" who stated, "Corporate CEOs . . . should ask firms to choose between lucrative retainers and representing terrorists." Neil A. Lewis, *Official Attacks Top Law Firms over Detainees*, N.Y. TIMES, Jan. 13, 2007, at A1, available at <http://www.nytimes.com/2007/01/13/washington/13gitmo.html?ex=1326344400&en=119d62dae944d2ea&ei=5088>.

230. See Bravin, *supra* note 174, at A9 (discussing Bush administration prohibiting military lawyer from testifying).

231. See Bazelon & Lithwick, *supra* note 119 (noting order from Judge).

232. This is not to suggest that Clement deliberately misled the Court. It is uncertain how much he knew of the Executive's interrogation practices at the time and perhaps he thought his observation so obvious a truth that it needed no investigation.

233. See POSNER & VERMEULE, *supra* note 210. See generally JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006).

the SERE program explain that these techniques are illegal but that other nations have not adhered to the Geneva Conventions.²³⁴

When Guantánamo interrogators started looking for what General James Hill called “counter-resistant techniques,” they turned to the SERE instructors. The list of techniques approved by Secretary Rumsfeld in December 2002 “resulted from a close collaboration between experts from the Army SERE school at Fort Bragg, North Carolina, and interrogation teams at Guantánamo.”²³⁵ The fact that these techniques were originally used by the North Koreans not to extract truthful information but to generate false confessions for propaganda purposes seems not to have been considered. But we know beyond a doubt that these techniques have produced false confessions in our hands as well. Shafiq Rasul, for example, admitted to being in Afghanistan and meeting with Mohammed Atta when we know that he was in England.²³⁶

False confessions are a serious problem. They harm the innocents who confess when they are used to justify continued detention or punishment. They can cause harm even when the confessor is guilty, if he implicates innocent people. Mohammed Al Qatani, during the period of his enhanced interrogation at Guantánamo, was repeatedly shown photographs of other Guantánamo detainees. Eventually he implicated thirty of them.²³⁷ How trustworthy are those statements? Khalid Sheikh Mohammed, during a CSRT hearing at which he confessed to involvement in a number of plots substantially exceeding what most intelligence experts believe possible, stated that techniques used in prior interrogations had led him to implicate innocent detainees.²³⁸

The costs go beyond the detention of possible innocents. If the invasion of Iraq was triggered in part by faulty intelligence, it is worth considering the case of Ibn Shaykh al-Libi. Al-Libi admitted that he and other Al-Qaeda operatives traveled to Iraq and received training in the use of chemical and biological weapons also known as weapons of mass destruction.²³⁹ The confession was elicited through interrogation by CIA operatives, who took al-Libi out of the custody of the FBI, and then by Egyptian officials after al-Libi was rendered to Egypt.²⁴⁰ Secretary of State Colin Powell relied on al-Libi’s statements in making his case for war to the United Nations Security Council.²⁴¹ Once

234. See MARGULIES, *supra* note 7, at 121.

235. See *id.* at 123.

236. See *supra* note 105 and accompanying text.

237. See Adam Zagorin, “20th Hijacker” Claims that Torture Made Him Lie, TIME MAG., Mar. 3, 2006, available at <http://www.time.com/time/nation/article/0,8599,1169322,00.html>.

238. See Transcript of Record at 14-16, Khalid Sheikh Muhammed, No. 10024 (CSRT Mar. 10, 2007), http://www.defenselink.mil/news/transcript_ISN10024.pdf (last visited Sept. 2, 2008).

239. See Michael Isikoff & Mark Hosenball, *Al-Libi’s Tall Tales*, NEWSWEEK, Nov. 10, 2005.

240. See Michael Hirsch et al., *Interrogation: A Tortured Debate*, NEWSWEEK, June 21, 2004, at 50.

241. See Secretary Colin Powell, Address to the United Nations Security Council (Feb. 5, 2003), <http://www.whitehouse.gov/news/releases/2003/02/20030205-1.html> (last visited June 15, 2008). Secretary Powell stated,

removed from the interrogation context, al-Libi recanted, and intelligence experts now consider his confession untrue.²⁴²

Viewed simply from the perspective of getting the best intelligence, torture is bad policy, as the pre-revision Army Field Manual on Interrogations noted.²⁴³ But of course there are other costs. One is that it makes prosecution more difficult. The criminal charges against Jose Padilla made no mention of the dirty bomb plot, which was no doubt in part due to the fact that any evidence that existed would not have been admissible in federal court because of the means used to extract it. In fact, when a Marine lawyer was scheduled to testify before Congress about the extent to which enhanced interrogation techniques had interfered with his ability to prosecute terrorism suspects, the Executive ordered him not to appear.²⁴⁴

By far the most serious cost, however, is the damage that the use of torture does to our counterterrorism campaign. “By our efforts,” said President Bush in his second inaugural address, “we have lit a fire in the minds of men.” Indeed we have. We have taken the worldwide shock and horror at the events of September 11 and replaced it with shock and horror directed at the United States. There is almost nothing that would more effectively breed new enemies and squander goodwill than what we have done. Our treatment of those we accuse of terrorism betrays the values and principles of America. It makes us seem hypocrites; it gains us no friends. Worse, our specific methods of interrogation—sexual humiliation and religious denigration—suggest hostility

Al Qaida continues to have a deep interest in acquiring weapons of mass destruction . . . I can trace the story of a senior terrorist operative telling how Iraq provided training in these weapons to Al Qaida. Fortunately, this operative is now detained, and he has told his story. I will relate it to you now as he, himself, described it The support that (inaudible) describes included Iraq offering chemical or biological weapons training for two Al Qaida associates beginning in December 2000.

Id.

242. See Isikoff & Hosenball, *supra* note 239. The Executive claims that information obtained through enhanced interrogation has prevented attacks. Without further disclosure, this assertion is impossible to verify. What has been disclosed suggests that even the purported success stories undermine the argument for torture. Abu Zubaydah, for instance, apparently gave large amounts of false information under torture—basically agreeing with everything the interrogators suggested—and provided useful information only when the torture ended and an interrogator managed to establish a bond with him. See COLE & LOBEL, *supra* note 46, at 126-27; RONALD SUSKIND, THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA’S PURSUIT OF ITS ENEMIES SINCE 9/11 100 (2006).

243. See Federation of American Scientists Project on Government Secrecy, *Intelligence Science Board Views Interrogation*, SECRECY NEWS, Jan. 17, 2007, <http://www.fas.org/sgp/news/secrecy/2007/01/011607.html> (last visited Sept. 2, 2008). A more recent and comprehensive study undertaken by the Intelligence Science Board, an advisory panel for the U.S. Intelligence Community, agrees. A contributor summarized the findings of their multivolume report “Educing Information” as follows: “(1) pain does not elicit intelligence known to prevent greater harm; (2) the use of pain is counterproductive both in a tactical and strategic sense; (3) chemical and biological methods are unreliable; (4) research tends to indicate that ‘educing’ information without the use of harsh interrogation is more valuable.” *Id.*

244. See Bravin, *supra* note 174, at A9.

to the values and principles of Islam. That gains us enemies.²⁴⁵

This is a terrible mistake. As Secretary Rumsfeld said, we should measure our progress by asking whether we are “capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training, and deploying against us.”²⁴⁶ The answer to this question is no. Terrorist attacks are on the rise. The State Department’s annual survey was canceled in 2005, but a State Department terrorism expert says it would have shown 625 significant attacks in 2004, which is more than triple the number from 2002 and 2003.²⁴⁷

There are people we need to kill and people we need to capture. There are people we need to deter by demonstrating our resolve. But mostly we need to dissuade. One of the many ways in which the war on terror differs from a conventional war is that the enemy is not a conventional standing army that can be defeated once and for all. This enemy can reconstitute itself and it can do so indefinitely if we give it a strong enough rallying cry.

But it can also wither away. Terrorist groups cannot draft new members; every person who joins their ranks makes a choice to do so. The most important thing we can do is reduce the reasons to make that choice. The best way to fight terrorism is to stop people from becoming terrorists. In that venture, we need the support and cooperation of the rest of the world, particularly the Islamic world. Moderate Islam is the most powerful opponent of radical Islam and moderate Islam must be our ally.²⁴⁸

What we have been doing is counterproductive,²⁴⁹ and it has gone on far too long. In the period of time from September 11, 2001, to the present, earlier generations won independence from the British Empire, subdued the Confederate South, and defeated Imperial Japan and Nazi Germany. We have made little appreciable progress since September 11 and by many measures things have gotten worse. Deference to Executive expertise is no longer an appropriate response.

245. See Jessica Stern, *Al Qaeda, American Style*, N.Y. TIMES, July 15, 2006, at A15, available at http://www.nytimes.com/2006/07/15/opinion/15stern.html?_r=1&oref=slogin. Perhaps the most striking illustration of this point is the July 2006 Al-Qaeda recruitment video featuring an American convert, Adam Gadahn, who builds a case against the United States based in large part on Guantánamo detention and extraordinary rendition. See *id.*

246. *Rumsfeld’s War-On-Terror Memo* (Oct. 16, 2003), USA TODAY, May 20, 2005, <http://www.usatoday.com/news/washington/executive/rumsfeld-memo.htm> (last visited Sept. 3, 2008).

247. See MARGULIES, *supra* note 7, at 227.

248. Of course, it is not just potential Islamic allies we are alienating. Italy and Germany have issued warrants for the arrest of CIA agents who abducted suspects from their territory as part of the extraordinary rendition program. See COLE & LOBEL, *supra* note 46, at 15, 25. Cooperation between intelligence agencies is more difficult when our agents are wanted criminals under the law of allied nations.

249. See James Fallows, *Bush’s Lost Year*, ATLANTIC MONTHLY, Oct. 2004, at 68, 71. This appears to be the consensus among experts. As James Fallows wrote, “[a]mong national-security professionals there is surprisingly little controversy. Except for those in government and in the opinion industries whose job it is to defend the Administration’s record, they tend to see America’s response to 9/11 as a catastrophe.” See *id.*

There is nothing particularly revelatory about this observation. The hard question is not whether we are on the right path; it is how we have gone so far down the wrong one. How, people wonder, could Americans do these things? How could other Americans let them be done?

In that wonderment is the answer, and also the seed of these acts. What is behind the tales of abuse and the lack of outrage is a simple cycle of self-reinforcing beliefs.

First, the belief that our enemies are bad and there is little need to worry about how we treat them. As Vice President Cheney put it, “[t]he important thing to understand is that the people that are at Guantánamo are bad people. I mean, these are terrorists for the most part.”²⁵⁰ Or in the words of a guard at Bagram Air Force Base, “We were pretty much told that they were nobodies, that they were just enemy combatants We called them hajis, and that psychology was really important.”²⁵¹

Second, the belief that we are good and what we do is just. As Senator Jim Talent said, “I don’t need an investigation to tell me that there was no comprehensive or systematic use of inhumane tactics by the American military because those guys and gals just wouldn’t do it.”²⁵² “America does not torture” is a premise, not a conclusion. That is the only sensible interpretation that can be given to Bush’s repeated assertions. Our character is the measure of our actions and whatever we have done, it cannot have been torture.

Last, the circle closes. When the Guantánamo detainee lies next to the pile of hair he’s pulled out,²⁵³ when the Iraqi general wrapped in electrical cord inside a sleeping bag and jumped on emerges dead,²⁵⁴ when the Afghan detainee chained naked to the floor overnight is found frozen to death in the morning,²⁵⁵ when the taxi driver’s heart gives out after four days of being periodically chained to the ceiling of his cell and beaten,²⁵⁶ it is hard to deny that something inhumane has been done. A natural reaction follows. If we

250. See Interview with Vice President Cheney (June 14, 2005), <http://www.foxnews.com/story/0,293,159469,00.html> (last visited Sept. 2, 2008).

251. Douglas Jehl & Andrea Elliott, *Cuba Base Sent Its Interrogators to Iraqi Prison*, N.Y. TIMES, May 29, 2004, at A1, available at <http://www.nytimes.com/2004/05/29/international/middleeast/29ABUS.html?ex=1401163200&en=d3608ff1475dc4da&ei=5007&partner=USERLAND>; see also TARA MCKELVEY, *MONSTERING: INSIDE AMERICA’S POLICY OF SECRET INTERROGATIONS AND TORTURE IN THE TERROR WAR* (2007) (describing Abu Ghraib psychology); PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2007) (explaining operation of “us vs. them” psychology as applied to Abu Ghraib).

252. See David Sarasohn, *World’s View of U.S. Torture Less Innocent*, THE OREGONIAN, Mar. 16, 2005, at D9.

253. See MARGULIES, *supra* note 7, at 132.

254. See Josh White, *Documents Tell of Brutal Improvisation by GI’s*, WASH. POST, Aug. 3, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/02/AR2005080201941.html>.

255. See Dana Priest, *CIA Avoids Scrutiny of Detainee Treatment*, WASH. POST, Mar. 2, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A2576-2005Mar2.html>.

256. See Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths*, N.Y. TIMES, May 20, 2005, at A1, available at <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html?ex=1274241600&en=4579c146cb14cfd6&ei=5088>.

have treated people inhumanely and we are good, then they must be bad. Like a coerced confession used to justify further interrogation, like a counter-resistant technique in the possession of those subjected to it, the fact of mistreatment itself implies culpability. Guilt is written on the body, where we have placed it. The alternative is too terrible to contemplate.

What I say now is trite, but it is our misfortune to live in a time when trite things need saying. The cycle of these beliefs runs backwards. Actions are the measure of character. We are good because our actions are just and if we do not act justly, we are not good. The belief in our inherent innocence, our unalterable righteousness, is the most dangerous seduction of all.

What we need instead is, for lack of a better word, empathy. We need it not because we should care about terrorists or blame ourselves for being attacked. We need it because we cannot afford the blinding assumption that anything we do is right, that any person we detain is guilty, that any confession given is true, that anyone who questions any of the above is unpatriotic. We need to understand ourselves better than that, and we need to understand our enemies better, too. Only that understanding will allow us to fight them in ways that do not simultaneously increase their numbers; only that will allow us to stop people from becoming enemies in the first place.

Some people, surely, cannot be stopped. There are people who hate us for any number of reasons. There may even be some who hate our freedom. We cannot stop them from hating us, but we can control the reasons why. Let us be hated for what is best in us, not what is worst. Let us be hated for being good. If terrorists kill Americans because our government stands for democracy and religious toleration, that is sad, but it is a price we should not shrink to pay. But if terrorists kill Americans because our government has tortured their coreligionists with little regard for guilt or innocence, that is not just sad, it is sickening, and it is a cost this country should never bear.

There will come a time when we will have to ask ourselves, "When this was going on, what did I do? While my government pursued this disastrous and shameful course, while it made me complicit in torture, while it sought to uproot two centuries of law in the name of secrecy and fear, while it made me and those I love less safe and less free, what did I do?" There will be a time when we must face that question, particularly the legal community.

That time is now. That time is always. And "nothing" is not an answer. To say "I did nothing" is to say "I helped."