The TORTURE DEBATE in America

Edited by
Karen J. Greenberg

CAMBRIDGE www.cambridge.org/9780521857925

This page intentionally left blank

THE TORTURE DEBATE IN AMERICA

As a result of the work assembling the documents, memoranda, and reports that constitute the material in *The Torture Papers* questions were raised about the rationale underlying the Bush administration's decision to condone the use of coercive interrogation techniques in the interrogation of detainees suspected of terrorist connections. The condoned use of torture in any society is questionable but its use by the United States, a liberal democracy that champions human rights and is a party to international conventions forbidding torture, has sparked an intense debate within America and across the world. *The Torture Debate in America* captures these arguments with essays from individuals in different disciplines. This volume contains essays covering all sides of the argument, from those who embrace the absolute prohibition of torture to those who see it as a viable option in the war on terror, and with relevant documents complementing the essays.

Karen J. Greenberg is the Executive Director of the Center on Law and Security at New York University School of Law. She is the co-editor of the recently published *The Torture Papers: The Road to Abu Ghraib*, editor of the forthcoming *Al Qaeda Now*, and editor of *The NYU Review of Law and Security*.

THE TORTURE DEBATE IN AMERICA

Edited by

KAREN J. GREENBERG

CENTER ON LAW AND SECURITY
NEW YORK UNIVERSITY SCHOOL OF LAW

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
The Edinburgh Building, Cambridge CB2 2RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521857925

First published in print format 2005

ISBN-13 978-0-511-13838-6 eBook (Adobe Reader)
ISBN-10 0-511-13838-5 eBook (Adobe Reader)

ISBN-13 978-0-521-85792-5 hardback
ISBN-10 0-521-85792-9 hardback

ISBN-13 978-0-521-67461-4 paperback
ISBN-10 0-521-67461-1 paperback

Contents

Section Four: Looking Forward

RELEVANT DOCUMENTS

AFTERTHOUGHT

Acknowledgments

This book could not have been done without the advice and guidance of many. Marty Lederman kept constant and generous vigil on the torture debate that occurred and the documents that appeared around us as we assembled the essays. Francesca Laguardia provided wise counsel on the documents that underlay the debate. Gayle Horn shared her expertise on interrogation manuals and their usage.

Kristin Henderson's and Jonathan Voegele's thoughtful editing made the book come to life. John Berger's patience, encouragement and colleagueship made the work pleasurable as well as viable. The staff at the Center on Law and Security offered editing and assembling help.

Last but by no means least, Stephen Holmes flooded me with ideas and materials, all the while keeping me steadily afloat.

To all of them, my thanks.

Contributors

M. Cherif Bassiouni is Distinguished Research Professor of Law at DePaul University College of Law and President of the International Human Rights Law Institute. He is also President of the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, as well as the Honorary President of the International Association of Penal Law, based in Paris, France, after having served as President and previously as Secretary-General for thirty years. Professor Bassiouni is the author of 24 and the editor of 44 books, and the author of 217 articles, mainly on international criminal law, comparative criminal law, and international human rights law.

Richard B. Bilder is the Foley & Lardner-Bascom Emeritus Professor of Law at the University of Wisconsin-Madison where he has taught particularly in the areas of international and foreign relations law. He served for some years as an attorney in the Office of Legal Adviser at the U.S. Department of State. Among other positions, Professor Bilder has served as Vice-President, Honorary Vice-President and Counselor of the American Society of International Law and as a member of the Board of Editors of the *American Journal of International Law*. He served as Chair of the International Courts Committee of the American Bar Association and Committee on Diplomatic Protection of the International Law Association. He was educated at Williams College and Harvard Law School, and was a Fulbright Scholar at England's Cambridge University.

David W. Bowker is a counsel in the international litigation group at Wilmer Cutler Pickering Hale and Dorr LLP in New York. Before joining the firm, Mr. Bowker was an attorney-adviser for the law of armed conflict in the Office of the Legal Adviser at the U.S. Department of State. Mr. Bowker previously worked in the field of counterterrorism as a graduate intern for the National Security Council staff. He is an adjunct professor at the Benjamin N. Cardozo School of Law, where he teaches a course on international humanitarian law and the war on terrorism.

David D. Caron is the C. William Maxeiner Distinguished Professor of Law at the Boalt Hall School of Law at the University of California, Berkeley. He served as a legal assistant to Judges Richard Mosk and Charles Brower at the Iran-United States Claims Tribunal in The Hague. He was a senior research fellow at the Max Planck Institute for Comparative Public and International Law from 1985 to 1986, and served as director of studies (1987) and director of research (1995) at the Hague Academy of International Law. He is a member of the board of editors of the *American Journal of International Law* and received the 1991 Deak Prize of the American Society of International Law for outstanding scholarship by a younger academic. He presently serves as a member of the precedent panel of the U.N. Compensation Commission for claims arising out of the Gulf War and is also a member of the Department of State Advisory Committee on Public International Law.

Lee A. Casey is a partner in the law firm of Baker & Hostetler LLP, and serves as an expert member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights. From 1986 to 1993, he served in various capacities in the federal government, including the Office of Legal Counsel from 1992–93 and the Office of Legal Policy from 1986–90 at the U.S. Department of Justice. He was Deputy Associate General Counsel of the U.S. Department of Energy from 1990 to 1992. Mr. Casey received his J.D. from the University of Michigan School of Law in 1982, and served as law clerk to the Hon. Alex Kozinski from 1984–85.

Michael C. Dorf is the Michael I. Sovern Professor of Law at Columbia University and the author of dozens of scholarly articles on constitutional law and related subjects. He is the editor of and wrote the introduction to the book, *Constitutional Law Stories* (Foundation Press, 2004). With Laurence H. Tribe, Professor Dorf is the co-author of the book *On Reading the Constitution*. His bi-weekly column appears on the website writ.FindLaw.com. Professor Dorf is a graduate of Harvard College and Harvard Law School. Following law school, he was a law clerk for Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit in Los Angeles and then for U.S. Supreme Court Justice Anthony Kennedy.

Joshua Dratel is a practicing attorney in New York City. He is President of the New York State Association of Criminal Defense Lawyers and serves on the Board of Directors of the National Association of Criminal Defense Lawyers. Along with Major Dan Mori, he is assisting in the defense of Australian detainee David Hicks. He also defended al Qaeda member Wadih el Hage after the bombings in Tanzania and Kenya. He has written articles on defending terrorism cases, including *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case and Ethical Issues in Defending a*

Terrorism Case: Stuck in the Middle. He is co-editor of *The Torture Papers: The Road to Abu Ghraib*. He received his B.A. from Columbia College and his law degree from Harvard Law School.

Joyce S. Dubensky is the Executive Director of the Tanenbaum Center for Interreligious Understanding. Before joining the Tanenbaum Center, Ms. Dubensky served as the national Director of Communications and, later, the Deputy Executive Director of a regional office of the National Conference for Community and Justice. An attorney, Ms. Dubensky founded the legal department at UJA-Federation of New York and served as its General Counsel for over a decade. Ms. Dubensky holds her J.D. from New York University School of Law, where she graduated with honors, and has her M.A. in American History (with an emphasis on Minority Studies) from Adelphi University. Currently, she serves on the Board of Advisors for the Center Against Violence in the Family.

Noah Feldman is professor of law at New York University School of Law. He served as senior advisor on constitutional law to the Coalition Provisional Authority in Iraq and as advisor to Iraqis involved in the constitutional process there. He is the author of *What We Owe Iraq: War and the Ethics of Nation Building* and *After Jihad: America and the Struggle for Islamic Democracy*. He received his A.B. summa cum laude from Harvard University. Selected as a Rhodes Scholar, he earned a doctorate in Islamic Thought from Oxford University and his J.D. from Yale Law School, after which he served as a law clerk to Justice David H. Souter of the U.S. Supreme Court.

Stephen Gillers is professor of law at New York University School of Law, where he served as Vice Dean from 1999–2004. He now holds the Emily Kempin chair. Professor Gillers has written widely on legal and judicial ethics, including in law reviews and the legal and popular press. He has taught legal ethics as a visitor at other law schools and has spoken on lawyer regulatory issues at federal and state judicial conferences, ABA conventions, state and local bar meetings nationwide, before Congress, at law firms and corporate law departments, and in law school lectureships. He is currently Chair (and since 2002 has been a member) of the American Bar Association's Joint Committee on Lawyer Regulation. Following a clerkship with Chief Judge Gus J. Solomon in Federal District Court in Portland, Oregon, Professor Gillers practiced law in New York City before joining the NYU faculty.

Stephen Holmes is currently Walter E. Meyer Professor of Law at NYU School of Law. From 1979 to 1985 he taught at the Department of Government at Harvard University. From 1985 to 1997, he was Professor of Politics and Law at the Law School and Political Science Department of the University of Chicago. From 1997 to 2000, he was Professor of Politics at Princeton. He was the

editor-in-chief of the *East European Constitutional Review* from 1993–2003. In 2003, he was selected as a Carnegie Scholar. His fields of specialization include the history of liberalism, the disappointments of democratization after communism, the Russian criminal justice system, the weaknesses of international criminal law, and the near-impossibility of combating terrorism within the limits of liberal constitutionalism.

Scott Horton is a partner of Patterson, Belknap, Webb and Tyler LLP. He is an Adjunct Professor at Columbia University School of Law and chairs the Committee on International Law of the Association of the Bar of the City of New York. He has served as an advisor for the Central Eurasia Project at the Open Society Institute, and Chair of the Advisory Board for the Eurasia Group. He is a Founding Trustee of the American University in Kyrgyzstan and President of the International League for Human Rights.

Christopher Kutz is Professor of Law in the Jurisprudence and Social Policy Program, Boalt Hall School of Law, U.C. Berkeley. He teaches moral, political, and legal philosophy, as well as criminal law, and is the author of Complicity: Ethics and Law for a Collective Age. His recent work includes articles on democratic theory, reparations, and non-uniformed combatancy.

Rachel Lavery is the Religious Affairs Researcher at the Tanenbaum Center for Interreligious Understanding. She is also a J.D. candidate at the Benjamin N. Cardozo School of Law of Yeshiva University, where she is a member of the Cardozo Law Review. Ms. Lavery holds a B.A. in Religious Studies from New York University, where she wrote her honors thesis on the Church of Jesus Christ of Latter-Day Saints and its relationship with American culture.

Anthony Lewis was a columnist for the New York Times from 1969 to December 2001. He has twice won the Pulitzer Prize and in 2001 he was awarded the Presidential Citizens Medal. From 1956–57 he was a Nieman Fellow and he spent the academic year studying at Harvard Law School. Mr. Lewis was for fifteen years a Lecturer on Law at Harvard Law School, teaching a course on the Constitution and the press. He has taught at a number of other universities as a visitor, among them the Universities of California, Illinois, Oregon, and Arizona. Since 1983 he has held the James Madison Visiting Professorship at Columbia University.

David Luban is the Frederick J. Haas Professor of Law and Philosophy at Georgetown Law School. Previous to his tenure at Georgetown, Professor Luban taught at Kent State University and the University of Maryland. His numerous articles and chapters have focused on a range of topics in legal ethics, the social responsibility of lawyers, law and philosophy, jurisprudence, and social justice. He

has been a Woodrow Wilson Graduate Fellow, a Guggenheim Fellow, a Danforth Fellow, a Keck Foundation Distinguished Senior Fellow in Legal Ethics and Professional Culture at Yale Law School, and a Fellow of the Woodrow Wilson International Center for Scholars. He was chosen by the American Bar Foundation for the 1998 Keck Foundation Lecturer Award in Legal Ethics and Professional Responsibility.

Heather MacDonald is a John M. Olin Fellow at the Manhattan Institute and a contributing editor to *City Journal*. Her writings have also appeared in *The Wall Street Journal, Washington Post, New York Times, The New Republic, Partisan Review, The New Criterion, Public Interest*, and *Academic Questions* and she is also a frequent guest on Fox News, CNN, and other television and radio programs. A non-practicing lawyer, Ms. MacDonald has clerked for the Honorable Stephen Reinhardt on the U.S. Court of Appeals for the Ninth Circuit and she was an attorney-advisor in the Office of the General Counsel of the U.S. Environmental Protection Agency. She has testified before the Subcommittee on Civil and Constitutional Rights of the Committee of the Judiciary of the U.S. House of Representatives.

Andrew C. McCarthy was an Assistant U.S. Attorney for the Southern District of New York for eighteen years. He led the 1995 terrorism prosecution against Sheik Omar Abdel Rahman and eleven others, and is currently a senior fellow at the Foundation for the Defense of Democracies. The recipient of numerous awards, including the Justice Department's highest honors: the Attorney General's Exceptional Service Award (1996) and Distinguished Service Award (1988). Mr. McCarthy has also served as an adjunct professor of law at Fordham Law School and New York Law School.

Major Michael (Dan) Mori, United States Marine Corps, currently serves as Military Defense Counsel for Mr. David Hicks, an Australian citizen, before a military commission at Naval Base Guantanamo Bay, Cuba. Major Mori has served as Judge Advocate in the U.S. Marine Corps since 1996 and has performed the duties of Defense Counsel, Prosecutor and Special Assistant U.S. Attorney.

Burt Neuborne is the John Norton Pomeroy Professor of Law at NYU School of Law and the Legal Director of the Brennan Center for Justice. For 30 years, he has been one of the nation's foremost civil liberties lawyers, serving as National Legal Director of the ACLU, Special Counsel to the NOW Legal Defense and Education Fund, and as a member of the New York City Human Rights Commission. He has argued many Supreme Court cases, and litigated literally hundreds of important constitutional cases. He challenged the constitutionality of the Vietnam War, pioneered the flag-burning cases, worked on the Pentagon Papers case, worked

with Justice Ruth Bader Ginsburg when she headed the ACLU Women's Rights Project, and anchored the ACLU's legal program during the Reagan years.

Deborah Pearlstein is the Director of the U.S. Law and Security Program at Human Rights First and a visiting lecturer in human rights and national security at Stanford Law School. Before embarking on a career in law, Pearlstein served in the White House as a senior editor and speechwriter for President Clinton. After her graduation from Harvard Law School in 1998, Pearlstein clerked for Judge Michael Boudin of the U.S. Court of Appeals for the First Circuit, and then for Justice John Paul Stevens of the U.S. Supreme Court. In 2002, Pearlstein shared the ACLU's Voting Rights Award for her work on election systems reform in California following the 2000 presidential election.

Dana Priest covers the intelligence community and national security issues for *The Washington Post* and is an analyst for NBC News. Her widely acclaimed 2003 book about the military expanding responsibility and influence won the prestigious New York Public Library Bernstein Book Award and was a finalist for the Pulitzer Prize. In 2004, she was a Pulitzer Prize finalist twice, for her reporting on clandestine intelligence, and for her contribution to the Post's reporting on the Abu Ghraib prison abuse scandal. In 2001, Priest was awarded a MacArthur Foundation Research and Writing grant and was a guest scholar in residence at the U.S. Institute of Peace. The same year, she won the Gerald R. Ford Prize for Distinguished Reporting on the National Defense and the State Department's Excellence in Journalism Award.

Michael Ratner is President of the Center for Constitutional Rights. He was co-counsel in representing the Guantanamo detainees in the Supreme Court, where a major victory was won in June 2004. He and his office have sued two of the private contractors in Iraq, alleging their employees were involved in the abuses and torture at Abu Ghraib. He recently filed a criminal complaint in the courts of Germany against Secretary of Defense Rumsfeld and other U.S. officials seeking the initiation of criminal prosecutions for the Abu Ghraib abuse and torture. Mr. Ratner serves as an Adjunct Professor at Columbia Law School, where he teaches international human rights litigation, and previously as a Lecturer at Yale Law School. He is a former President of the National Lawyers Guild, and has served as Special Counsel to Haitian President Jean-Bertrand Aristide to assist in the prosecution of human rights crimes.

David B. Rivkin, Jr., is a partner in the Washington, D.C., office of Baker & Hostetler LLP. Mr. Rivkin is a Visiting Fellow at the Nixon Center, Member of the UN Sub-Commission on the Promotion and Protection of Human Rights and a contributing editor at the *National Interest* and *National Review*. He served in the White House Counsel's Office and in the Departments of Justice and

Energy during the Reagan and Bush Sr. Administrations. He frequently writes on international and constitutional law matters, as well as foreign and defense policy issues, for a variety of newspapers and magazines including *The Washington Post, Wall Street Journal, New York Times, Financial Times, LA Times, Foreign Affairs*, and *Foreign Policy*, and appears regularly on a number of TV and radio shows.

Jeffrey K. Shapiro is a lawyer in private practice in Washington, D.C. His practice focuses primarily on helping medical device and diagnostic manufacturers comply with U.S. Food and Drug Administration (FDA) regulatory requirements. Mr. Shapiro is the co-author of a book published in April 2005, Combination Products: *How to Develop The Optimal Strategic Path for Approval*, which is a guide for manufacturers seeking FDA approval of groundbreaking new medical products and therapies that combine drug, device or biologic therapies. From 1991 to 1994, he served as an attorney-advisor in the Justice Department's Office of Legal Counsel. He is a graduate of Harvard Law School.

William H. Taft IV is of counsel resident at the Washington D.C. law firm of Fried Frank, Harris, Shriver & Jacobson LLP. In 2001, Mr. Taft was appointed as Legal Adviser to the Department of State, where he served for four years. From 1981 to 1984, Mr. Taft was General Counsel for the Department of Defense. He also served as the Deputy Secretary of Defense from January 1984 to April 1989 and as Acting Secretary of Defense from January to March 1989, as well as the U.S. Permanent Representative to NATO from 1989 to 1992. Prior to his initial appointment to the Department of Defense, Mr. Taft was in private law practice in Washington, D.C., from 1977 to 1981. Mr. Taft received his J.D. in 1969 from Harvard Law School and his B.A. in 1966 from Yale University.

Detlev F. Vagts is the Bemis Professor of International Law at the Harvard Law School and has taught there since 1959. Prior to his academic career, Professor Vagts was associated with Cahill, Gordon, Reindel & Ohl in New York City from 1951–53 and 1956–59, and a Judge Advocate in the United States Air Force from 1953 to 1956. He graduated from Harvard College and Law School, and was an Associate Reporter of the Restatement (Third) of Foreign Relations Law and Counselor on International Law at Department of State.

Peter Weiss is a leading human rights lawyer and Vice President of the Center for Constitutional Rights. He also serves as Vice President, former President, of the International Association of Lawyers Against Nuclear Arms. He litigated the seminal case establishing the right of victims of torture to sue their torturers in U.S. courts (*Filartiga v. Pena-Irala*). Since his retirement in 1996 from Weiss Dawid Fross Zelnick & Lehrman, a leading trademark firm, he has been Senior Intellectual Property Counsel to The Chanel Company Ltd. He is also a founder

and former President of the American Committee on Africa and former Chairman of the Board of the Institute for Policy Studies in Washington. He has also long been an activist for peace in the Middle East and is currently a member of the Arab-Jewish Peace Group in New York and of the Executive Committee of Americans for Peace Now, which supports the Peace Now movement in Israel.

INTRODUCTION

The Rule of Law Finds Its Golem: Judicial Torture Then and Now

Karen J. Greenberg

THE MATTER OF TORTURE AT THE HANDS OF AMERICANS HAS BEEN ON public display for more than a year now as this book of essays and documents goes to print. In this past year, 2004–2005, we have learned much. We have learned that, starting in 2002, the abuse of prisoners from Iraq, Afghanistan, and elsewhere took place at more than one American military prison; that ghost prisoners and ghost detention centers exist under American supervision; that the practice of rendition, sending prisoners to countries that torture, is practiced by the United States government; that the Bush administration supported a policy that narrowly defined torture and then declared abusive behavior permissible in the case of suspected terrorists, enemy combatants, and other detainees of the war on terror.

We have learned something else as well. We have learned that very few Americans are eager to engage in a debate about the revival of torture as an overt practice conducted in their name. Despite the appearance of pictures of abuse on television and in the print media, despite the publication of a wealth of documents and government reports attesting to the use of abusive, torturous methods, the public response has remained at best apathetic. It is not that Americans don't care about the introduction of torture into our language and our national identity, it is more that we are confused about how to address the issue. And in that respect, we have had very little guidance. Academic lawyers have conducted a policy debate among themselves, but the wider public has not been privy to the legal debate any more than it has been privy to some of the more thoughtful philosophical and ethical perspectives.

The essays in this volume present the debate that has belatedly but importantly taken place among intellectuals, policymakers, lawyers, journalists and others in the wake of the revelations of the "Torture Memos," previously published in *The Torture Papers: The Road to Abu Ghraib*.[1] Until now, this debate has taken place largely outside of the public view. Together, these pieces are meant to bring these arguments into the public consciousness, to open up to a wider audience learned considerations on what it means for a nation to know

that torture is being conducted in its name. Amidst the myriad forms of ethical, moral, political, and strategic considerations, the authors included here have all asked themselves the question, what does the introduction of the fact of torture mean to the United States? Does it make us safer? Was the policy of granting the president unprecedented broad powers important even though it opened the door to the practice of torture? Are there long-term consequences to the use of torture? And finally, where do we as a nation want to go from here?

For some, the mere introduction of torture as an issue to be contemplated and debated has changed the nature of the American experiment; it has taken perhaps the ultimate taboo and made it part of the landscape, both theoretically and in practice. For many, the use of torture threatens to alter the very identity of Americans and their systems of values. David Luban considers the use of torture akin to the "unraveling of liberal ideology." Stephen Holmes takes it one step further: we have, despite ourselves, become our enemies. For others, it is a practice that, ultimately, may save us as a nation. Andrew McCarthy laments the fact that this is the moment to which we have arrived, but nevertheless, we cannot run and hide from a distasteful and dangerous reality.

Many of the essays focus on the Torture Memos themselves. They are concerned with the legal dimensions of the argument as it positions the United States internationally and domestically. Whether or not the United States should be bound by the prisoner of war protections of the Geneva Conventions in the post 9/11 years, the nature and extent of the power that accrued to the president in the wake of 9/11, and how to assess and understand the Torture Memos are central legal questions in the growing debate over the Bush administration's policy towards detainees from Afghanistan and Iraq. On the matter of the Geneva Conventions, the Bush administration concluded that the Geneva Conventions applied neither to the Taliban nor to al Qaeda. The former functioned within a failed state, the latter was a nonstate actor. Not everyone agrees with this conclusion however. Some, like William Taft, IV, who was legal advisor to the secretary of state, and David Bowker who worked for the Office of Legal Counsel (OLC) at the time, disagreed then as they disagree now. Others who worked at the OLC at the time the Torture Memos were written concur with the Bush administration's decision. David Rivkin and Lee Casey point out that there needs to be a rethinking of honoring reciprocity over treaties even when one party is not or does not consider itself to be reciprocally bound, especially now that the United States is engaged in asymmetric warfare. Dana Priest and Major Michael Dan Mori raise an alternative possibility, namely, the use of court martials. Priest maintains that the military would have liked to try the detainees rather than lock them up in unlimited detention without charges.

For still other contributors, torture is an unpleasant means to a necessary end. The authors in this volume consider each one of these issues, and more, in order to try and give readers a broad perspective on the need for change in the wake

of 9/11. Heather MacDonald argues that coercive interrogation ultimately serves the nation well. Michael Dorf points out that the August 1, 2002 "Bybee Memo" – which defined torture as pain associated with "serious physical injury so severe that death, organ failure, or permanent damage" results – was revoked with the December 30, 2004 memo from Daniel Levin to James Comey, which declared that "torture is abhorrent both to American law and values" and leaves room for the authorization of torture when necessary. Deborah Pearlstein sums up the fundamental parameters of the debate surrounding torture. And Anthony Lewis points out that, bottom line, the decision to use torture is a decision that feeds power.

A final and more focused discussion that takes place in these pages is over questions of legal ethics and, in particular, how we as readers should assess the role which the lawyers in the Department of Justice played as advisors to the president and the secretary of state. The panel on "Torture: The Road to Abu Ghraib and Beyond"[2] that is printed here raises this question several times and from several different angles. Burt Neuborne defines the philosophical underpinnings of the legal context of torture. Joshua Dratel and Stephen Gillers point to the way in which the OLC lawyers behaved more as corporate lawyers than as public servants. Jeffrey Shapiro disagrees, arguing that in fact, the lawyer's job is to interpret the law with an eye towards wise policy and that in these circumstances, the lawyers behaved responsibly.

Many of the contributors to this volume have chosen to look back in time for answers, for guideposts, in an attempt to formulate a rational response to a situation that is overshadowed by the emotions of victimhood, anger, and the seeming loss of control in the post 9/11 era. The authors look in these pages to Vico, to Hobbes, to the Federalist Papers and to the basic theories of liberalism and war. Joyce Dubensky and Rachel Lavery point to the way in which religious canons – Christian, Jewish, Islamic, and others – have condoned torture. Scott Horton has described the crumbling of law under the National Socialist regime in Germany in the 1930s. Detlev Vagts and Richard Bilder consider the matter of accountability in Germany – as evidenced at Nuremberg, for example – as a backdrop for understanding the American policy of abuse. Michael Ratner turns from the past and explores the way forward through legal remedy and retrospective accountability. And Noah Feldman contributes a trenchant analysis of the philosophical, legal, political, and religious questions that underlie the essays in this volume.

The historical approach reminds us that torture has a subtle relationship to the rule of law; it is the unspoken realm of the forbidden, the unnamed that law represses. It is, in many ways, the ghost in the closet. And like the ghost's relative, the Golem, it always lies in wait to announce itself, unexpectedly, and with the express challenge to remove it before it spreads its destructive impulses too widely.

The numerous references to prior ages in which torture was utilized proves illuminating. Torture was used in Austria, Germany, Italy, Spain, England, and elsewhere, primarily during the 13th–17th centuries. It was used to elicit confessions and to punish those who had broken the law. Then as now, the definition of torture was broad-ranging. It included methods ranging from humiliation – as in the use of the public stocks – to death, which was the intended result of methods such as impalement, or the wheel to which one was tied until one died, or the saw on which one was placed upside down as a wide-toothed implement cut the body in half lengthwise starting between the legs. All of these methods ensured that the suspect would die a slow death. Sometimes, the intended result was merely to maim, as in the cutting out of one's tongue or the use of the "iron boot." Often, the intent was to instill the fear of death, as in the use of water torture. And sometimes, the purpose was merely to inflict intolerable pain, as in the use of thumbscrews, or the tying up of the body into different positions, actions which could result in maiming but which were not specifically intended to cause lasting physical damage.

However wide-ranging the types of torture, they shared a physicality. Torture was about harming the body and involved others to engage physically with the victim to cause that harm. As drawings from the time demonstrate, the medley of implements often required the attention of more than one attendant, particularly in the use of the rack or of other forms of tying a person up to inflict pain, or in flaying a body. The human contact itself conveyed an intimate bond between the tortured and the torturer, which the sounds of pain would have deepened.

A further extension of that physicality was the frequent involvement of a sexual dimension to the torture. Often, the charge itself involved a sexual crime, such as adultery. But the sexual nature of the punishment was present for charges of sexual as well as other criminal behavior. In medieval torture, bodies were often in a naked state. Given the prevalence of accused females, the female body parts were often the subject of the abuse, as in the use of pincers at her breasts, or the pear inside her vagina. For men, the pear was used to pierce through the body's anal openings.

Much of the rationale for medieval torture was religious. In addition to crimes of theft and murder, the accused was often considered guilty of heresy, or of violating the mores of the Christian religion, either by sexual or otherwise immoral behavior. The confession was important to the sanctity of one's soul, both that of the tortured and that of the torturer. The need for a confession was to serve justice, to complete the narrative that the accusation initiated, but justice was largely a reflection of religious doctrine. Before death, it was imperative to elicit the truth.

The imperative to fulfill the judicial narrative via torture attested to the tie between law and torture. Medieval torture was about eliciting information for convicting criminals; it was imperative to gain either two eyewitness accounts or a confession by the accused in order to convict a criminal. As a result, the

law was present as a standard bearer. The jurisprudence of torture began in the 13th century and extended until the 18th century and was tied inextricably to the notion of proof. In Europe, the law of torture was reserved for capital crimes. Torture warrants in England and elsewhere relied on legal documentation, beginning with the issuing of a torture warrant, specifying the crime and the nature of the torture. The end result of the specified torture was to serve justice.[3] The kinds of torture were often tied to legal proceedings. For example, evidence gained through water torture was then considered "torture lite" and as a result was valued particularly for not distorting the quality of the information introduced into court. Sometimes, not only the legal system but the authority of the state was given to justify the routine use of torture, as when sovereign authority decreed the need for torture as a customary practice of law.

The similarities across the ages are striking. Today, any American can open up his newspaper and find mention of similar methods of torture, from the infliction of pain to the causing of death. In fact, very little innovation has accompanied the newer methods of torture. Hooding, water torture, short-shackling, and anal and vaginal piercing are prevalent now as they were in the 15th century. Moreover, there is a strong emphasis now as then on sexual humiliation at the hands of interrogators. Today's interrogators smear menstrual blood on male Islamic prisoners and force detainees to wear women's underwear on their heads.

The general impetus to physicality is present today as well. As David Luban reminds us, it is a form of intimate human contact, the opposite of love and affection, but nonetheless an intense emotional entanglement. Beyond the intimacy, there is also the possibility that the appeal of physicality as an expression of anger may be a reaction to the excessively technological practice which modern warfare has become. Perhaps it is a form of longing for an aspect of war that disappeared with the first world war, the mano a mano, one on one, aspect of harm inflicted by one human being onto another. Perhaps the age of technology that we have in our midst has deprived our soldiers and others of the kind of physical release that anger and aggression, the basis of war, find necessary. Torture has without a doubt enabled the act of war to be personal again. Gone are the video game tactics, the explosions from afar, the need to find the satisfaction of conquest on a screen. Torture restores the screams of the victims, the faces of defeat and, albeit ironically and perversely, the human side of warfare. More than that, it tells us that human beings have the capacity for cruelty; it also may tell us that human beings on some very deep level reject the technology of our times and the degree to which it has, as the philosophers of the twentieth century warned, alienated humans from themselves. Torture, seen in this light, restores man to himself.

In thinking about the cycles in which torture appears and disappears, one is struck as much by its disappearance in the past as by its appearance today. Like the Golem, whom many would consign to the imaginations of superstitious times, so images of torture belong to an age before science and reason. Long considered a taboo for Western culture, the reintroduction of the word and the

practice of torture has an eerie quality, as if it is returning a spectre from the past. Like the dangerously mystical Golem that is said to haunt Eastern Europe, hidden but reappearing to cause damage from time to time, torture appeared in Roman times, in Medieval times and has reasserted itself today.

The first modern thinkers, the philosophers upon whose ideas the modern state and the age of rights have been fashioned, equated the need for a more enlightened philosophy of rights with the need for the disappearance of both superstition and injustice, most notably torture. The Rule of Reason, the birth of notions of equality and justice, put the passions of men into restraint if not shame and provided a forum for the rationale and impersonal disposition of justice.

With even more precision and impact perhaps, developments in the legal sphere brought the practice of torture to an end. The movement toward a system of law and conviction which no longer required certainty but which rested content with the ability of the judge and/or jury to weigh the evidence and come to a reasonable rather than a certain conclusion brought to an end the need for torture. On the Continent, the law of proof standardized the need for evidence – gathering as opposed to confession as a means of establishing the legal record. In England, the emergence of the prosecutor similarly established the nature of evidence-gathering as a skill to be practiced in lieu of eliciting a confession.

It was, then, the legal process itself that contributed to a way out of the torture policies of yore. And for today's debate on torture, this is a significant point of reference. It was not just that liberal ideology could not tolerate torture; it was that the practice of law could not tolerate torture. Evidence-gathering, judicial standards, and the role of the prosecutor and the jury had made torture unnecessary and in turn were compromised by the fact of torture today. There is the sense that the legal debate has distracted us from the more important policy issues embedded in a torture policy, that the lawyers are splitting hairs rather than addressing the morally abhorrent nature of torture. But this is far from the case. If the history of the eradication of torture offers any example, it is that the abolition of torture is not just about moral outrage or concerns about the diminishing power of liberalism; it is rather a shift in the thinking of an age that enabled law to trump torture. Similarly for religion, as Dubensky and Lavery demonstrate, the universally acknowledged religious assertion is that "common humanity precludes torture." In the religious paradigm, it was the recognition of the shared human experience that led to the atrophy of violence and torture in the name of religion.

To some extent the reappearance of torture as a policy suggests that judicial torture was repressed rather than eradicated, that law exists together with torture in a dance between good and evil. Torture lurks beneath the law, waiting to see the light of day, never destroyed. The trauma of 9/11 seems to have reawakened the power of torture in contradistinction to the law. Similarly, in the religious context, the rebirth of torture indicates a return to a time when the shared humanity of

mankind was not a determinative value – a return to a time when differences outweighed commonalities.

If history is our guide, then the dismissal of torture will rely on the discovery of a new way of thinking about our world, not one that is reactive but one that emerges over time, through thought, debate, and the adoption of new ways of understanding in an altered context. Because the Torture Memos were written in the fraternity-like secrecy of the OLC, the public and those professionals with the skills to think about such matters did not engage in a debate over the use of torture and its relationship to law and to the American national security agenda. The secrecy of these discussions led to a quick and violent form of behavior in the name of law. But it is not impossible that a sustained debate about law, values, and the efficacy of violence at the hands of the state would result not in a policy that condoned torture but in one that considered the nuance of current geopolitical circumstances and decided in favor of law, not torture.

In the establishment of the law of proof as a replacement for torture, there was in essence an intellectual paradigm shift that took place; individuals took uncertainty upon themselves. Instead of the "certainty" of confession, they came to value the ability of the judge and the jury to consider reasonable proof. They took it upon themselves to live with uncertainty, to trust their own judgment.

One of the more telling characteristics of the post 9/11 era is the lack of trust in the judgments of the courts and its officers. As the country has engaged in a war on terror, it has to a large extent emasculated and second-guessed its established judicial processes. To date, in the three and a half years following 9/11, there has been but one conviction on the charge of terrorism and insufficient cooperation between American government officials and foreign courts. Instead of civilian or military courts, the U.S. government has established secret military commissions. Along these lines, there has been no talk of bringing the leading terrorists that are in U.S. custody – Khalid Sheik Mohammed, Abu Zabaydeh, and Ramsi bin Al Shibh, for example – to trial. Torture is but one more sign of the possibility that we as a nation are forsaking the judicial system and its ability to effect justice though the trial system, which begins with the attempt to interrogate and find information.

Recent public discussions about the general dilemmas posed by the spectre of terrorism suggest what paradigmatic changes might have to occur to move to a more sophisticated argument for once again repressing torture. First, the judicial system and the American government and public will need to learn once again to trust itself even in the face of uncertainty. Caught off-guard on 9/11 and without the tools of knowing with certitude the players and practices of terrorists, the authorities understandably looked for ready, immediate means to their ends. But torture became the behavior of the flailing and inept. It was meant to find answers in a context where we had lost years of preparation. (By contrast, the European legal system, out of necessity, has been tracking and following terrorist cells for decades.)

A second paradigm shift that is required for a renewed dissociation from torture is a greater tolerance for long-term consequences. Again, the legal dilemma takes its cues from the larger context of the war on terror. Americans are stymied by the need to understand the war on terror as the effect of policies that may be remote in time. Rather than the immediacy of cause and effect, there is a distance between cause and effect. For example, if there has been a growth of new terrorist cells in Iraq and of terrorism worldwide in response to American policies in Iraq and its torture of innocent Muslims in Guantánamo and Abu Ghraib, then it is not an effect that will be felt immediately. Americans who opposed these policies often warn of long-term consequences, but this is a complicated way of thinking, one that, like the court process itself, defies certainty and calls instead for judgment.

Ultimately, what the practice of torture at American hands in the wake of 9/11 tells us is not that human beings are potentially evil, but that they are missing the trust in self, and the intellectual tools of analysis and understanding that lead easily to reason and the rule of law. Many of these essays struggle to find their way back to the law itself, and in so doing, they are a valuable contribution to the debate that must inevitably proceed a reengagement of law as nuanced rather than aggressive, healing rather than harmful, and aimed at peace not war.

In today's context, the use of torture may very well find some explanation in the past. Torture today is not used in an effort to achieve certainty; on the contrary, most experts agree that the information gained through torture is at best unreliable. But the use of torture may indeed reveal a lack of trust in the legal system itself. As medieval torture existed in a vacuum designed to replace the absolute knowledge of God, so contemporary torture looks for an arbiter that is larger than the abilities of human beings who sit in judgment. The war on terror and the prospect of an unknown enemy, viewed by public officials and the media as mythic and outside of known American experience, seems to call for a means of determining facts that supercedes the talents, skills, and professionalism of American lawyers, soldiers, and intelligence officers.

What is instructive here, then, is that the legal reasoning included in the essays in this volume, is important for reasons beyond the ethical responsibility of the OLC, beyond the powers of the executive, and beyond the role of military and covert intelligence agencies. Legal minds may very well be our way out of torture, but not due to moral arguments or to philosophical theorizing or to references to the Constitution. Rather, legal minds can move us forward to rediscovering a comfort with nuance, with uncertainty, and with the abilities of men to determine, without torture, the facts surrounding those who would endanger us as individuals and as a nation.

The documents included in this volume are of several types. They include those memos and pieces of discussion in Washington that occurred after the publication of *The Torture Papers*, among them the long awaited memos drafted in the spring of 2002 by William Taft, IV, one of the unsung heroes of this story.[4]

And last but not least, there is a document from the 1920s written by Roscoe Pound, Felix Frankfurter, and ten other legal minds of that era. In the "Report upon the Illegal Practices of the United States Department of Justice," these men consider what should be done when the Department of Justice overreacts in fear and, in their estimation, misreads the law.

All told, these essays and documents are intended to provide an essential piece of the picture of the United States today. As it confronts the age of terrorism in the years beyond the initial shock and anger of 9/11, the country is poised to consider what, if anything, it chooses to keep sacred as it goes forward. Though it is early yet to assess the full ramifications of the Bush administration's willingness to tinker with the law, it is not too early to begin at least to reflect upon ourselves and our behavior at this moment in time. One of the great lessons of history is that with whatever passion and sense of righteousness we may see ourselves and our choices today, we may at some future point in time, given new facts and subsequent events, see ourselves, our motives, and our judgments in a new light. This volume is intended to help us gain some insight into the nuances of today's public discourse and to provide us in the future with a window onto our time and ourselves.

NOTES

1. Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers* (New York: Cambridge University Press, 2005).
2. *See* p. 13.
3. John H. Langbein, *Torture and the Law of Proof* (University of Chicago Press, 1976), p. 7–17.
4. Taft – Haynes March 22, 2002 Memo Re: President's Decision about Applicability of Geneva Conventions to al Qaeda and Taliban, p. 283.

THE ISSUES

Torture: The Road to Abu Ghraib and Beyond

Burt Neuborne, Dana Priest, Anthony Lewis, Joshua Dratel,
Major Michael (Dan) Mori, and Stephen Gillers

ON SEPTEMBER 23, 2004, THE CENTER ON LAW AND SECURITY SPONSORED an open forum at New York University School of Law entitled "Torture: The Legal Road to Abu Ghraib and Beyond." This event brought together noted experts in the fields of law, academia, and journalism to discuss the implications of the recently released memos and reports on the Bush administration's torture policy. The panelists included defense attorney Joshua Dratel, NYU law professor Stephen Gillers, journalist Anthony Lewis, military lawyer Major Michael Dan Mori, journalist Dana Priest. NYU law professor Burt Neuborne served as moderator. Below are the proceedings from the event.

Burt Neuborne: Montesquieu observed that this is a society dominated by law and legalism. There is no stronger proof of Montesquieu's thesis than the enormous role that lawyers have played in the evolution of the policies on torture that have brought us to this place.

Historically, it is an unfortunate truth that there is no inherent relationship between legalism and decency. The sad fact is that law has been placed in the service of barbarity as often as it has been placed in the service of decency. One has only to look at the role of Nazi lawyers and Nazi judges, the finest trained legal minds in Europe. The German legal profession in the 1930s consisted of the most brilliant collection of lawyers that had ever been put together in any place at any one time. And yet, the profession collapsed during the Nazi years and prostituted its talents in ways that now look to us to be inconceivable.

Consider as well the legal profession of South Africa during the apartheid years, clearly the cream of the legal profession on the African continent. In South Africa, one of the great bars of the world allowed its talents to be used to defend apartheid and crush human rights. For every Richard Goldstone, who fought for decency from within the South African judiciary, and Arthur Chaskalson, who fought apartheid from within the South African bar, there were 100 judges and 1,000 lawyers who vigorously enforced manifestly unjust laws without questioning the ends to which law was being put. There, too, is the Indian judiciary

during the emergency under Gandhi, and its failure to uphold the principles of the Indian Constitution during that crisis.

The U.S. government lawyers that have brought us these policies on torture are among the best and the brightest; good lawyers doing intensive legal analysis. One of the questions that we need to answer, or begin to answer, is "To what end?" Does the work of the government lawyers who use their talents to build a legal façade for torture differ in any real way from the work of the Nazi lawyers who used their talents to build a legal façade for Nazi racism?

I believe that the American bar has allowed itself to drift into an ethical climate where lawyers believe that when they are called upon to advise a client – whether that client is the President of the United States or the President of Enron – their role is to construct the kind of adversary justification for questionable behavior they would make if their client had been indicted. Lawyers routinely construct arguments during the advice phase of a relationship that would be perfectly appropriate if they were being made in defense of a criminal charge, but which are unjustified as pre-action advice. Lawyers seem to forget that, instead of making arguments at the end of the process, they are making their arguments at the beginning of the process in order to justify the behavior. Is there something that we are doing in American law schools that is allowing the best and the brightest of our profession to drift into a situation where they think that all they have to do is find an argument that will justify their client's goal, that will keep their client out of jail? This question transcends any of the other things we are doing as teachers. It addresses the very soul of the legal profession.

In the matter of torture, if we focus on the future instead of the past, we ought to wise up and stop expressing mere outrage and start saying instead that the rule of law is a deck chair that we take out in sunny weather, and we sit on it, and we enjoy it. But when it starts to rain, we fold it up and we put it away, which is why it has lasted so long, because it has never gotten wet. When things get tough, the law disappears, and lawyers like me are shocked. We cannot believe it, but it is gone.

If you look into our history, it is an ugly history as far as that goes. President Adams suspended the Constitution with the Alien and Sedition Acts. The very first time that there was a serious political debate in this country, the dissenters got locked up. Abraham Lincoln suspended the Writ of Habeas Corpus during the Civil War. Oliver Wendell Holmes voted to put people in jail for opposing the First World War. The Supreme Court upheld the Japanese concentration camps during the Second World War. The Supreme Court never really stopped McCarthyism until long after the hysteria was over. How many times does it take for us as lawyers to realize that paper parchments are paper parchments? And that there is not some extraordinary set of laws, some *deus ex machina* that is going to drop down and save us in times of crisis?

This is just the most recent collapse of the rule of law. It is painful for us, because it was orchestrated by some of the smartest lawyers we know. Now, how

do we break out of this? Am I being too cynical? Do we do better than I give us credit for doing in times of crisis?

If we do not do better, how can we build for the future in ways that will stop us the next time there is a national crisis from having another meeting like this where we talk about how terrible it was that we collapsed and how we can do better in the future?

Dana Priest: It is hard to believe that we are sitting here talking about torture. There have been many times in the past year where, following conversations on the telephone, I got off the phone and gulped and said to myself, "Where am I?" I found myself trying to understand the difference between the water-boarding technique and the wash-boarding technique, and how one might be considered torture and the other not! It is a very strange, topsy-turvy time for me, as an American and as a journalist. However, it is also an exciting time because we have made inroads trying to understand what the government tried to keep secret.

Have our views on torture changed? I think they have. They did change after 9/11, and I think they are changing again. I want to go back to 9/11 because that is really where all this starts.

Right after 9/11 the government said, "We are doing things differently." They went to Congress, rather than acting by themselves. They went to the intelligence committees, which I cover, and said "You know, in order to prosecute the war on terror, we think that we need to do things we have not done in this country for a long time. We need to interrogate people in a different way." Eventually, they came to the discussion of having to assassinate people using predator drones.

There was nobody I could find in Congress who was talking both to members of Congress and to their staffs and the people who brief them who said, "Well, wait a minute. Maybe you should not do that." In fact, the context in which the intelligence world and the military, but mainly the intelligence world, came to them and said, "Well, if we can find terrorists, do we have the go-ahead – never, never using the word 'torture' – to use extraordinary interrogation techniques?" They not only got a free hand, but many members of Congress who were on those oversight committees said, "Yes, and make sure that you are pressing as hard as you can. And the gloves are off." So, that is truly the context in which all these things then evolve.

We are now in the situation where the government, having been embarrassed by the memos that came out, has put a hold on all of those interrogation techniques, as far as we can tell. The CIA has pulled back and told its field officers and their interrogators that they cannot do those things anymore. So, we are yet again in the situation where the views of torture are changing. I think the pendulum was swinging one way and right after 9/11 it swung back. I could not predict at all where it is going to end up. It depends upon who is elected and whether there is another terrorist strike.

The go-ahead that the government got to prosecute the war as it saw fit, that it got from your representatives, did quickly evolve into, "Let's bring the lawyers in so that when we get caught, so that if we need to know where our limits are, we need to do it in a legalistic way." And that is what they did. There were lawyers at the CIA, the National Security Council, and at the Department of Defense (DoD). None of the techniques that were okayed, and the techniques that were discussed, were the result of any kind of rogue operations. This was central to how the government agreed to proceed; it needed these techniques, it believed, to prosecute the War on Terrorism.

As we saw in the August 2002 memo from Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice (DOJ) to Alberto R. Gonzales, Counsel to the President],[1] it went all the way up to the White House into the Justice Department's Office of Legal Counsel. The Legal Counsel at DOJ wrote the over-arching legal framework that would be used later by DoD in Guantánamo. When the CIA discovered that it would have these terrorists to detain, they realized that, up until this point, they had not had these sorts of people in their custody. They did not want to put them into any courts, they wanted to keep them out of the courts. They wanted to keep them away from any type of scrutiny whatsoever.

My point is that it was all done, in the government's mind, in a legal way. It was vetted the way that it is supposed to be vetted, and lawyers looked at it. Many lawyers will say that that was a proper thing, and none of this is rogue activity. So, the most interesting debate did not happen in the CIA context because that was really close to 9/11 and everybody was saying, "Go." There were not many people saying, "Put the constraints on."

The interesting debate occurred, though, a year later when, faced with an insurgency they did not expect to be as strong, in a prison system they did not even anticipate having to work in, under conditions that were really awful, they found themselves pushed by their own desire to break the insurgency, yet trying to get intelligence out of people in the prison. The DoD and the Judge Advocate General's Corps (JAG) lawyers in particular have this fierce tussle with one another.

It was mainly the civilians who were running DoD at that time – Secretary of Defense Donald Rumsfeld and William Haynes, General Counsel at DoD. They stood against a lot of military uniformed JAG officers who, steeped in the Geneva Conventions, put the reigns on the government for the first time by saying, "Excuse me, but this will not hold up in terms of the Geneva Convention."

Finally, there is the question, where do you go from here? How do you think of our government's role in torture or interrogation, tough interrogations? One of the members of the intelligence committee, Jane Harmon, has said that everyone has to have a status. The Guantánamo detainees have a status. It was a new status, so it was confusing, and it caused a lot of debate. But, they had a status, and they have access to the International Red Cross, as do other military detainees.

The CIA detainees have no status that no one, except for a very small, covert operation within the CIA, knows of. We do not know where the detention centers are. We do not know what the permitted interrogation methods are or the chain of command that needs to be bought off on that. And we do not know how many people have been exported, or rendered through rendition process to foreign countries for the explicit purpose of interrogating in their facilities at an arm's length distance from the U.S. government.

And, I think that that is one thing that has gained momentum recently. So, where are these people? Let's account for them. The CIA's Inspector General is now trying to do an accounting of it. But, in my view, that has to be shared much more broadly. It has to be shared in Congress which, for the first time, may have the backbone to actually ask the questions that are more detailed than they did before. That is because now they realize the public has many questions about this.

My final point is that, *while there may be a lot of criticism of lawyers who wrote some of these memos, I think it is the legal profession that we have fallen back on and laws that we have fallen back on to say where are we now as a country and what we are doing in this regard*. And, if there is one way that the chain of command at DoD will ever be revealed, it is through, I believe, the discovery method, through the defense of the troops at Abu Ghraib, who have been charged with committing crimes.

So, it is the discovery in our own legal system. It is going back to the very basics that may actually reveal whether or not these people were carrying out orders from above. This is what gives me some hope and comfort that our legal system has actually come back and is working the way it should.

Burt Neuborne: Dana's narrative makes one remarkable point: the inversion here of what we usually believe. We are usually trained to say that it is the civilians that have to ride herd on the military, that civilian control of the military is the essence of maintaining the rule of law.

The narrative here is that the first time anybody really began to speak up and put a brake on this stuff was when the military lawyers tried to control their civilian bosses, who essentially had completely reneged upon the notion of the rule of law. One of the things we have to remember here is the ability of military professionals, both at the level of command and at the level of law, to be an important process. I will confess that, over the years, I have written them off as a group that one could not rely on. And, it turns out that in this crisis, they were one of the strongest forces calling for the return of the rule of law.

Anthony Lewis: I think the military has shown itself to be believers in process. And the people, at least at the top of government, have been believers in something else, which is their own power. That's my notion of it.

I want to begin by recalling an episode which will tell you how I feel about these matters. Many years ago, at least 20, maybe more, I was in Jerusalem

and had an interview with Jacobo Timmerman. Timmerman was a prisoner in Argentina who was tortured. Actually, his life was saved by the Carter Administration, which protested strongly enough to keep him from being killed. When Timmerman was finally released, he chose to go to Israel.

Timmerman and I were talking about a lot of things one day, and we got onto the subject of torture. He started asking me questions. Now, remember, this is long ago, ladies and gentlemen, before these matters were in all our minds. He said, "Now suppose you had a prisoner, and you knew that he knew that there was a bomb about to go off in a crowded city." This is the sort of thing we read about now, but I had not thought about it then. And, Timmerman continued, "Say you knew that it was going to happen within two or three hours. And that you thought that if you tortured this man, you could find out where the bomb was, and you could prevent the terrible loss of life. Would you do it?"

I tried to avoid his question. I said, "I am interviewing *you*, you know. Come on." And so on and so on. But, finally, he said, "Answer the question." I said, "Well, I am reluctant, but I guess I would." And he shouted, "***No*! You cannot start down that road!**" I have never forgotten that moment. ***You cannot start down that road.*** That is what I believe about torture.

There are a lot of reasons for my conviction, all of which you are familiar with, among them, these: facts or alleged facts obtained by such methods tend to be unreliable; the torturers are ruined, as are the tortured. We all know this. But I do not think I want to live in a country where torture is accepted or excused as it is excused in the administration's memoranda. The defenses outlined in these memoranda are over the edge, even by the standards of colorful lawyers. The idea that a torturer could argue self-defense, meaning self-defense of the country, is one of the more far-fetched arguments I have ever heard.

I think power is a very strong motivating factor, running through everything the Bush administration has done since 9/11. The starting point has been the sense that we, the administration, have to be in charge. We cannot have any courts, any judges in charge. We cannot have the Constitution waved at us. We have to keep everything secret. We must not let anything out. It is a matter of the power of the Executive Branch and those who run it. That has been evident from the start.

One of the very first things that happened after 9/11, legally speaking, was that President Bush's order for Military Commissions was designed to keep things under control without access to civilian courts. Although, there was a strange moment when the President's Counsel, the White House Counsel, Alberto Gonzales, wrote an op-ed piece for the *New York Times* in which he said, "We have carefully preserved the right of review in civilian courts."[2] It was an absolute falsehood written by him, or by someone at his direction, for the *New York Times*. I thought it was amazing. It occurred a short time after the publication of the text of the order which said explicitly, "This and any judgment of the Military Commission may not be taken to any court anywhere in any country." You could not be more explicit than that. Then, the handling of the prisoners at

Guantánamo I thought was maybe the most dramatic indication of the state of mind of the administration.

The Third Geneva Convention requires that people captured in conflict be given a hearing before a competent tribunal to discover and decide on their status, who they are, whether they are legitimate prisoners of war, spies, terrorists, or others. Hundreds of such hearings were held in the first Gulf War, and a very large percentage of the hearings resulted in findings in favor of the prisoner.

So, it is in our history, it is not unusual. It was Colin Powell, after a life in the military, who objected strongly – passionately really, for a memorandum – to the course that President Bush took. That course was simply to say, "We are not going to allow the Geneva Convention, even though we signed and ratified it. The Geneva Convention and its predecessors have been part of our military culture for many, many years. We are just not going to pay any attention to it."

"We are going to say – without a hearing, without any fact-finding process, simply on the orders of the President – that everybody who is in prison at Guantánamo Bay is an unlawful combatant." This is a phrase which is not found in the Geneva Conventions by the way.

And then of course, there was the refusal – that is the powerful, strong resistance – to any attempt to challenge that finding in the courts, an attempt which failed in the Supreme Court last June. The brief of the Solicitor General in the Supreme Court in that case said that the President has conclusively found that all these prisoners are unlawful combatants, and there can be no review of that. That is that. That is their position. We do not want a judge or anybody else messing around with our findings.

Now, I have not talked about torture. Dana Priest has said very effectively how odd it is to be discussing torture. I want to say just how grateful I am to her and to her colleagues at the *Washington Post* and elsewhere, but especially the *Post*, for unearthing the facts about these matters. A great editor of the *Manchester Guardian* said once, "Comment is cheap. Facts are dear." And it is the facts about torture and about the legal arguments that went into torture that have made an enormous difference. We all owe a debt of gratitude to those in the press who brought them out.

Those memoranda read like the advice of a lawyer for a mafia don on how to stay out of prison without actually changing what you do. I know I am naive about these things. I spent a lot of time covering the Justice Department, and I had an enormous respect for government lawyers. Maybe too much respect. But, to me, it was really unpleasant to read those memoranda and to think that people working for the U.S. government thought that was the way to present the issues.

One of them, John Yoo, who at the time was in the Office of Legal Counsel, was regularly and is again a Professor at Boalt Hall, University of California Law School at Berkeley, wrote a piece for the *Los Angeles Times* saying, "We did not take any policy position. All we did was give advice, as lawyers do, on what would be a defense if you got into trouble."[3]

Well, of course, you know it is easy to say, "We did not take a policy position." But, the purpose of a memoranda was to open the way for the government to do what it wanted to do. That was the point. And so it is hypocrisy of the worst kind for lawyers to say, "Oh, well you know, we are not for torture. We did not take any position on torture. We just told them that if they did torture somebody, well, here were seventeen ways they could not be prosecuted successfully."

One more example away from the torture field, which I think needs to be included as part of this picture, is the Bush administration's legal operation since 9/11. A very, very important issue has been the treatment of the two so-called enemy combatants, American citizens held in prison in this country. Yassir Hamdi has been in detention for nearly three years and in solitary confinement for most of that period without access to a lawyer and without access to the outside world in any way. He had no idea that anybody was acting on his behalf.

Fortunately, someone was. And, if we want to say a good word for the legal profession, we could say it for Frank Dunham, Jr., the U.S. Public Defender in Virginia who volunteered to take on the case of Hamdi when the government was desperate to keep lawyers out of it. With tremendous courage and persistence, he took the case from the beginning right through the Supreme Court of the United States and into the negotiating that led to a decision to release Hamdi. Lawyers can still make a great difference.

Anyway, for Hamdi, as for Jose Padilla, the government's every effort was to keep lawyers and courts away. "Let us do what we want." And, we do not actually know what was done to Hamdi and Padilla in prison. We do not know what kind of pressure was put on them. The only thing we do know is that when a trial judge in New York held that Padilla should be allowed to talk to a lawyer, the government strenuously objected. The government asked for a rehearing on the ground that the decision would interrupt the relationship between the prisoner and his questioners, that it would disrupt the sense of trust and confidence that had built up between them. You can see what that sense of trust and confidence was.

I will close by saying that nearly a year ago a member of the highest court in the United Kingdom, the House of Lords, Lord Steyn, made a speech. A very unusual speech for a sitting judge about Guantánamo in which he said, "Guantánamo was a black hole in the world of Justice."[4] He said he had been brought up to think that the United States was the acme of justice, and its ways of doing things were the right way.

None of us has yet spoken of what this episode, the torture episode, Abu Ghraib, has done to that reputation in the world. But this was a year ago, before Abu Ghraib. Lord Steyn said, "The United States maintains that if a prisoner from Guantánamo came forward and said, 'I am being tortured,' no court could hear his claim." He said that, and I read that and thought, "Well, that is a rather exaggerated way of putting it."

It actually had not occurred to me. That is how out of it I am, or how much I am distorted by my habit of thinking government lawyers do the right thing. It had not occurred to me that people were actually being tortured at Guantánamo

or in Iraq. Well, ladies and gentlemen, they were. A significant number were tortured to death. Let us not forget that. It was not just the water-board technique or the wash-board technique. Fortunately, I do not know the difference. They were tortured to death. And, that is what has been done in our name.

Burt Neuborne: I am going to ask you an unpleasant question, Tony. If they had found weapons of mass destruction as a result of this, would we be here now talking about a major change in interrogation technique as appropriate? Are we here now, so confidently speaking out against this, because it apparently failed? It did not generate any important intelligence.

Are you so sure that Timmerman was right? And, that you are right when you say, "I will never start down that road?" Even if I am pretty sure it is going to get me to a place where I would have information that would save enormous numbers of lives?

Anthony Lewis: It is not an easy question, Burt. I think it is not a fair question because most of the time when the government thinks it knows that people know something, it is wrong. They do not know anything. And that is why it has been a failure, because all of the suspicions have been exaggerated.

If I actually believed, if I had credible evidence and if I came to believe that somebody who was a prisoner under my control knew where there were weapons of mass destruction, nuclear weapons (that is what we are talking about) that were going to be used shortly, I might change my view. Yes, I might.

Joshua Dratel: In terms of going forward, what it means to me is: are there sanctions? Is there a penalty that is paid for that kind of conduct? What you have in a military commissions system and in Guantánamo Bay – with respect to the other detainees who are not necessarily in the commission system but have combatant status – is an entire system that is composed of evidence obtained by coercive, abusive interrogation methods.

Most of these people, if not all of them, were apprehended or captured by the Northern Alliance, not by U.S. troops. The circumstances of their capture are unknown. You will not have first hand evidence of that. What they were actually doing in Afghanistan before then or in Pakistan or wherever is unknown. It is all obtained from their statements and the statements of other detainees as a result of this type of treatment.

The concept of torture to me is limited because it does not include coercion. Coercion to me means that you do not have to be tortured very often to have your will overborne. Conditioning is the key. It only has to happen once. It does not even have to happen to you. It can happen to the guy in the cell next to you, and that is all you have to know.

I had a conversation with a CIA station agent who was a witness in a case I was involved in. It was around the time that the Abu Ghraib scandal broke in the news, and we said to him over a lunch break, "So what do you think?

How would you deal with torture?" He said, "They would never get that far. I would speak immediately because why bother? You are going to break. You might as well speak before the pain." This is a professional intelligence officer of many years standing. It was a perfectly reasonable response, and when you get further into the process in terms of dealing with actual persons who have actually been involved in this treatment on the receiving end, it is very clear what is going on. You cannot be isolated in the situation that these people were in and not capitulate.

Are we going to permit a system to continue that is based on this? To me the principle that we have to work on is sanctions. Otherwise it is a no-lose proposition for those who violate the law. Because what they say is, as soon as I am caught, I will stop. But I will enjoy all the fruits of all the illegality I have done up until now. I think the entire commission process is illegitimate as a result of this trove of evidence that is going to be used against each of them, that *is* used against each of them. There exists almost no independent evidence as to any detainee.

With respect to efficacy, torture makes people talk. The threat of torture makes people talk. All these things make people talk but the problem is that you do not know what they are saying. It is not possible to distinguish between the true and the false, or that which is parroted back to an interrogator in these incredibly unrestrained interrogation sessions.

I have sat through an extraordinary number of interrogation sessions in my experience as a criminal defense attorney for 25 years. I know the way a professional U.S. Attorney or District Attorney operates in an interview. Above all, you do not give to the person that you are interviewing the answer that you want.

If they know what you want to hear, that is all you are going to get. They will give you what you want, if they know what you want. In these interrogations that are done unprofessionally and abusively, what you get is a parroting back to the interrogator of what the detainee knows that the interrogator wants to hear, because that is what will relieve the abuse. That is what will get them back to the ordinary minimum standards of living as opposed to the punishment and the substandards of living that is imposed upon them if they resist.

There are jurisdictions where confessions are not allowed because they are assumed to have been obtained by torture, and are therefore assumed to be of questionable reliability. So torture makes people speak, but reliability is a totally separate issue which cannot be answered simply by saying it is okay and there is something out there that somebody knows that we have to find out, because in truth, you do not know.

In essence, this is the corporatization of government lawyering. It is a conversation that I assume has occurred in many board rooms, some of which have ended up in court and some of which have not. The meeting might go something like this: the chief executive, or the chief financial executive, says to a general counsel, "This is what we would like to do." The general counsel says: "Well,

you know there is a regulation that says that you cannot do that." So the chief executive officer or the chief financial officer says, "Maybe you did not hear me. This is what we would like to do, and I would like something in the morning from you on this." Now the lawyer has a choice of what to do.

It is a personal choice in that context. It is a professional choice in that context. But it is done. And it is done in the corporate context because the loyalties are very narrow there. The problem with doing it in a governmental context is that the loyalties are not so narrow. They are much broader.

One of the problems with law schools, to me, is that the concept that lawyers are not supposed to examine moral consequences of their actions is, I think, wrong. It does not mean that you always act in a way that you think is moral in a broader sense, because sometimes you have specific roles. But you have to be conscious of what you are doing in terms of what your role is.

As a criminal defense attorney, my obligation is zealous representation of my client regardless of what he has alleged to have done, regardless of what he has done, regardless of who he is or what he is, or what he believes. So I have to put a lot of that aside to fulfill my role in the system. Because if I do not, no one will. And then all his rights will go by the board. But government lawyers have a very different standard. It is a codified different standard.

They are supposed to do justice, they are supposed to uphold the Constitution. And when you get into these narrow areas where they are just assigned to a specific task to get a result, they are missing the boat. Because that is not their job as government lawyers.

So if I were to teach people in law school, I would teach them that you can make moral choices as you wish, but you have to understand that you are making moral choices. If you ignore them, you walk down this road. You walk down the road of Nazi lawyers and Nazi judges following orders. Look at the Hamdi case. The significance of his release is that the government has demonstrated its distrust, its fear, its lack of confidence, and its distaste for our system of justice.

The system of justice was created by the Constitution that they are sworn to uphold. The government does not like this. They have done everything they can to deprive a federal court, an independent judiciary, from exercising its authority. And this is the latest. In the case of Hamdi, the government caved because instead of giving him a day in court with due process, they would prefer to let him go.

There are people in custody who are alleged to have done less than Hamdi, who is alleged to be an American citizen fighting against the United States to the coalition forces under arms, captured on the battlefield, according to the government's allegation.

I am not saying he should not be released. But I am saying that he is being released while other people are languishing there who they cannot prove are guilty in a million years. In these cases, the government, to my mind, is just extraordinarily unAmerican. They are doing everything they can to avoid the American legal system and its core values. And they undermined it on a continual

basis with this conduct. It seems like they are only comfortable in a totalitarian context, and that is obviously very dangerous. It is born of panic. It is born of desperation. It is born of ignorance. But that does not make it any less dangerous. This is the practice and the attitude we have to fight.

This is where have to consider sanctions. It is up to the other two branches of government – to Congress and the Judiciary to impose sanctions. And obviously it is up to all of us as lawyers, students, other people – ordinary, good people.

Lawyers need to take it upon themselves to make this a priority, to make sure that those other two branches of government exercise their authority in a way that imposes sanctions to prevent this from occurring again.

Beyond lawyers are the law schools. The first thing I think I learned working was that the obsession in law school with legal precedent is wrong-headed. There is a legal precedent for every position you need to take. You will always find a case to support your side of the argument. You will have no difficulty doing that. What you have to do is find facts. Facts are where cases are won or lost. And you have to apply law to facts. What that requires, above all, is judgment. That is what judges do. That is what judges have to do. And that is what they have been deprived of doing in this context because the Executive has made decisions.

When you combine the corporatization of the law with the rectitude and arrogance of government lawyering, an arrogance and rectitude that is not warranted, and with power and the result-oriented context of the current situation, the result is that everybody is embarrassed and disgraced by this whole process.

Burt Neuborne: Let me ask you one question, Josh. You have used the word "capitulation." You said that the detainees will eventually capitulate. Let me play devil's advocate for a minute. There are people in custody that I think have important information. They have information on the structure of al Qaeda, important information on the operations of terrorism that could assist in making the country safe. So capitulation is exactly what I want. Tell me how I go about getting that capitulation and still stay inside notions of decency and human rights. Is it your position that we provide them all with lawyers, give them Miranda warnings, and then just sit there while they are absolutely silent and then let them go?

Joshua Dratel: Let me first challenge the premise of your question. When I say capitulation, I do not mean telling the truth, I mean responding to interrogation. I will give you a perfect example: the men who were released in England, the "Tipton Three." All admitted to being in a video they were not in. That is capitulation. That is not telling the truth. That is not the information we want. That is purely overbearing one's will.

It is also important to note that we need to distinguish between the battlefield and Guantánamo Bay. I am not saying that you need battlefield Miranda warnings, but once you decide to apprehend someone, capture them, and detain them,